Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective

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1 Which stems from the Latin term *promovendus*, meaning the one moving forward, advancing, growing.

I could never have written this dissertation, nor could I have been so happy in general without my intellectual companion, friend and dear wife Karolina Pill. I draw to a great extent on her wisdom, skills and love.

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1 General introduction

> 'A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve.'
>
> Edmund Burke[1]

> 'In every constitutional democracy, interpretation and practice have been far more common means to effect constitutional change [than formal constitutional amendment].'
>
> Walter F. Murphy[2]

1.1 The challenge of constitutional change

Once a country has decided to adopt a written constitution and has defined it as its fundamental law, the country must then ask how the fundamental status of the constitution can be protected and maintained. Constitutional change is one of the most difficult challenges of constitutional design and practice, especially in contemporary times when the legal, socio-political, technological and environmental contexts in which constitutional documents are supposed to operate are transforming more rapidly than ever.[3]

The issue of constitutional change can be understood as a dilemma.[4] Written constitutions are designed to provide a stable and permanent framework for government.[5] They are often seen as legal instruments that compre-

1 Burke (2003), 19.
2 Murphy (2007), 498.
3 Ginsburg and Melton (2015), 688. See on constitutions in the 'age of speed': Scheuerman (2002).
4 Hesse (1995), 15 *et seq*. Murphy (2007), 497 *et seq*. Voermans (2009), 84.
5 As Bush explains, constitutions are designed for longevity: '…they are an institutional answer to the demand of stability. Constitutional provisions should not be at the disposition of the government or the parliamentary majority of the day.' Bush (1999), 8. Elkins, Ginsburg and Melton argue on the basis of empirical data that the endurance of constitutions is positively associated with GDP per capita, democracy and political stability and negatively associated with crisis propensity: 'On average, countries are richer, more democratic, more politically stable, and experience fewer crisis, as their constitution ages'. See: Elkins, Ginsburg and Melton (2009), 31–32.

hensively regulate the establishment and exercise of public power, protect minorities and the opposition against chance majorities,[6] and guarantee a distinction between the constituent power of the sovereign people and the constituted power of state organs.[7] It may therefore seem desirable to make a master constitutional text unchangeable or at least extremely difficult to change.[8] This would give the constitution an ultimate supreme status in law, making it impossible for any branch of government to legally evade the control that constitutional provisions seek to have. Even the rights of the smallest minorities would be legally protected (assuming the minorities concerned were parties to the original constitutional bargain). The people would, once and for all, fix a just system of government for all time to come, or so some early constitutionalists believed.[9]

However, contrary to what the first drafters of written constitutions hoped for, it has proven impossible for a constitutional charter to fully carve the government of a nation into stone.[10] Constitutions have appeared, like any legal code, to be 'by inescapable necessity placed in the flow of historic events', as Jellinek put it.[11] Presumably, an unamendable constitution would not last long.[12] Even the wisest drafters cannot look too far into the future.[13] Unforeseen technological, cultural and physical developments may require fresh solutions,[14] and even the most confident men and women who form a constitutional assembly might admit that they cannot create a perfect document (if such a thing could even exist at all).[15]

Moreover, it may be questioned whether an 'eternal' or extremely rigid constitution would be truly democratic at all, even if it provided for democratic law-making procedures. In a letter to James Madison on the issue of constitutional amendment, Thomas Jefferson made a case for a relatively flexible

6 Sajó (1999), 39.
7 See: Grimm (2012), 104, 109–111.
8 Madison, for example, famously believed that a constitutional law-making track should be kept open only for 'certain great and extraordinary occasions', fearing that 'every appeal to the people would carry an implication of some defect in the government' and that too frequent appeals would undermine the stability of the government depriving it of 'that veneration which time bestows on everything'. See: Madison (1987b), 313 (Federalist Nr. 49).
9 The idea of an unchangeable constitution is not only theoretical. In 1669, John Locke drafted 'The Fundamental Constitution of the colony of Carolina'. Article 120 stipulated that it was to 'remain the sacred and unalterable form and rule of government of Carolina forever'. http://avalon.law.yale.edu/17th_century/nc05.asp (accessed 30-3-2017).
10 Loughlin (2009), 297.
11 Jellinek (1906), 2.
12 Elster (2000), 95.
13 Llewellyn (1934), 11.
14 Murphy (2007), 497.
15 Levinson (2012), 331.

constitution. He asserted that 'the earth belongs to the living and not to the dead'.[16] According to Jefferson's democratic principle,

> '"the living" may govern themselves as they please, but they may not bind future generations. Therefore, Jefferson found that every constitution should 'naturally expire at the end of thirty-four years'.[17]

Noah Webster believed that it should not be overly difficult to change a constitution. During the debates on the ratification of the US Constitution, he asserted that

> 'the very attempt to make perpetual constitutions is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia'.[18]

More recently, Delinger said that 'an unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed'.[19]

Therefore, along with a stable framework, constitutions also need adaptive capacity in order to be able to endure as circumstances and demands change.[20] In the words of Elkins, Ginsburg and Melton:

> 'given the existence of exogenous shocks that change the costs and benefits to the parties to a constitutional bargain, constitutions require mechanisms for adjustment over time'.[21]

How can this paradox be solved? How can a balance be achieved between stability and flexibility? How can fixity be connected to progress and constitutionalism (limited government) to democracy (popular sovereignty)? One could argue that these questions lie at the heart of constitutional theory

16 Letter from Thomas Jefferson – 'The Earth belongs to the Living' – to James Madison, Paris, September 6, 1789. http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html (accessed 30-3-2017).
17 Ibid.
18 Webster quoted in Murphy (2007), 497.
19 Dellinger (1983), 387. See also: Albert (2010) and Jackson (2015).
20 Jacobsohn (2010), 214 and 252. Not only constitutions need adaptive capacity. Fukuyama makes the more general point that all political institutions need to be able to adapt in order to survive; see: Fukuyama (2011), 452.
21 Elkins, Ginsburg and Melton (2009), 81.

and practice[22] and are among the most influential constituent choices.[23] The task for constitutional designers is not easy. As Levinson explained,

> '[too much] [r]igidity is fatal to the constitutional enterprise because it will prevent constitutions from changing as times change. But one might argue with equal confidence that too much flexibility destroys what is thought to be the strongest promise of constitutionalism'.[24]

1.2 Amendment procedures as a solution

A solution that many countries have opted for is to include a special amendment procedure in their written constitution. This idea was invented during the American Revolution[25] and was, as Wood put it, 'a totally new contribution to politics'.[26] Since it was first introduced in the 1787 US Constitution,[27] the amendment procedure has become an almost universal feature of national constitutions; 95 percent of the constitutions that have been drafted in the past 225 years have specified one or more special constitutional law-making tracks that formally differentiate constitutional law-making from making other rules

22 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, 3–4. See also: Jacobsohn (2010), 37–39.

23 Fusaro and Oliver (2011), 425.

24 Levinson (2012), 364. Or, as formulated by Masing: 'Wenn und weil die Regelungen zur Verfassungsanderung die Verfassung als Grundlage der staatslichen Ordmung stabliseren wollen, hindern sie notwendig auch deren reform.' See: Masing (2008), 145.

25 As Wood explained, the early constitutional documents of American states had a fundamental status, but lacked a special amendment procedure. They were created by state legislatures so it was presumed that such legislatures could also change them. In those circumstances, it was hard to make a distinction between the constitution and ordinary legislation. The concept of the rigid amendment procedure was introduced to make this distinction effective; see: Wood (2011), 177. Indeed, Wright concluded that 'important advances have been made in the techniques of preparing the fundamental law of the states, in the process of adopting such constitutions, and in providing special processes for their amendment' (Wright (1936), 370 quoted by Loughlin (2009), 281).

26 As Wood understood it, the amending clause of the 1787 US Constitution 'institutionalized and legitimized revolution'; see: Wood (1969), 613.

27 Article V of the US Constitution provides that:
'The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.'

of law.[28] Today, almost every country in the world has a written constitution (embodied by one or a set of closely related documents[29]) that includes one or more special procedural requirements for constitutional change, such as super-majorities, a referendum, and/or the consent of states in a federal system.[30] Only New Zealand, Israel, and the United Kingdom have no solemn constitutional document that provides qualified terms for amending the constitutional text.[31]

Constitutional amendment procedures purport to solve the dilemma of constitutional change by making it difficult (at least relative to making ordinary legislation), but not impossible, to change the master-constitutional text. That is to say, constitutional amendment procedures are commonly included to perform two, potentially conflicting, functions in parallel. In the first place, the amendment procedure may have the function to entrench a written constitution.[32] Entrenching a written constitution would, among other things, render its content stable;[33] effectuate and protect its higher or supreme status in law;[34] elevate the constitution above the sphere of ordinary politics;[35] mark a distinction between ordinary rule-making and constitutional law-making;[36] guarantee that no informal sub-constitutions can emerge;[37] safeguard the rights of minorities and individuals;[38] protect regions;[39] protect institutions in the constitution,[40] and guard against 'moral panic'.[41] Furthermore, constitutional amendment procedures supposedly have an affirmative function: to make formal constitutional change possible by providing one or more institutionalized constitutional law-making tracks by which people can legitimately and effectively alter[42] or update the constitution's commitments as circum-

28 Elkins, Ginsburg and Melton (2009), 74.
29 Sweden, for example, has four documents that make up its written constitution.
30 For an overview of the structure of amendment procedures, see: Albert (2014a).
31 Which of course does not mean that these countries have no constitution in the material sense of the term. See: Kelsen (2007), 125.
32 Barber (2016).
33 Kelsen (2007), 259.
34 Wheare (1966), 7. Badura (1993), 59.
35 Loughlin (2009), 298.
36 Kelsen (2007), 125 and 263.
37 Möllers (2007), 210.
38 Barber (2016), 339. Wheare (1966), 83.
39 Barber (2016), 341.
40 Ibid.
41 Ibid.
42 It is sometimes considered that a constitutional amendment procedure may not be used to fundamentally alter the existing constitutional framework. In *Raven v. Deukmejian* (1990), the Californian Supreme Court invalidated a constitutional amendment for the reason that 'it substantially alters the pre-existing constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections'. See: *Raven v. Deukmejian*, 801 P. 2d 1077 (S. Ct., Cal, 1990). In the 1971 Keshavananda case, the Indian Supreme Court held that the Indian constitution provides certain 'basic features' that cannot by altered by way of formal amendment. The Court asserted

stances and demands change.[43] The availability of an amendment procedure would ensure the enduring relevancy of the constitutional document, as well as its enduring legitimacy of popular consent.[44] Confidence in law 'springs from a conviction that the law can be changed if it does not adequately represent popular will', as Siedentop put it.[45] Moreover, amendment procedures would promote orderly change (that is, change within the existing constitutional framework, rather than by way of replacement or overthrow),[46] systematic change (rather than ad hoc amendments),[47] deliberation[48] at the highest levels, sufficient amounts of societal support[49] before constitutional change is brought about, as well as a commitment to such principles as transparency, legal certainty, and the rule of law.[50]

It is interesting to note that an increasing number of countries have supplemented procedural requirements of constitutional amendability with substantive limitations – so-called 'eternity clauses' – that make certain types of amendments illegal.[51,52] In other words, substantive requirements may deem certain constitutional amendments unconstitutional, giving rise to the conundrum

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the right to annul any amendment that seeks to alter the basic structure or the basic framework of the constitution on the ground of 'ultra vires'. That is, it held that the word 'amend' in Article 368 only provides the possibility of bringing about changes that fit into the existing structure of the constitution. *See: Kesavananda v. State of Kerala*, 1973 (4) SCC 225. Murphy asserted that a similar argument could be used in any system that considers itself a constitutional democracy. He explained that the verb 'to amend' stems from the Latin word 'emendere', which means 'to correct' or 'to modify'. Therefore, an amendment that would de facto abolish the existing constitutional order or fundamentally change its nature would not be an amendment at all, but a replacement. And that is, by definition, not the power an amendment procedure grants, according to Murphy. See: Murphy (2007), 506.

43 'A constitution provides a protected space for institutional transformation', as Jacobsohn put it. See: Jacobsohn (2010), 214.

44 Dellinger (1983).

45 Siedentop (2001), 16.

46 Dixon (2011), 97. Indeed, when doubts were raised regarding the need to include an amendment provision, George Mason replied that amendment 'will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence'. See: The Founders' Constitution, Volume 4, Article 5, Document 2. http://press-pubs.uchicago.edu/founders/documents/a5s2.html (accessed 1-4-2017).

47 Möllers (2007), 210.

48 Griffin (1998). Wheare (1966), 83.

49 Fukuyama (2011), 273.

50 Bryde (2003), 205.

51 As Roznai argued, 'the global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power'. See: Roznai (2013), 660.

52 Seventy-five out of 194 contemporary constitutions specify one or more unamendable provisions.https://www.constituteproject.org/search?lang=en&key=unamend(accessed 30-3-2017).

of 'unconstitutional constitutional amendments'.[53] Eternity clauses clearly aim to strengthen the entrenchment function of amendment requirements.[54]

In order to be able to perform both the constraining and affirmative tasks at the same time, amendment procedures must perform a balancing act. A properly calibrated (at least from a functional perspective) amendment procedure, regardless of whether it is supplemented by eternity clauses, carefully balances and connects the potentially conflicting objectives of stability and flexibility, fixity and progress, and constitutionalism and democracy. In Madison's words, it guards

> 'equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults'.[55]

Alternatively, as Cooter put it in terms of game theory, it 'minimizes the harm when the worst political possibilities materialize'.[56] Or as Loewenstein observed,

> 'the process of constitutional amendment everywhere is kept sensibly elastic, neither too rigid to invite, with changing conditions, revolutionary rapture, nor too flexible to allow basic modifications without the consent of qualified majorities'.[57]

However, the ideal combination of requirements of alterability and the degree of rigidity depends on the intricacies and peculiarities of a country's social and political culture, as Andenas explained.[58] There is no one-size-fits-all solution; some countries need a relatively 'rigid', difficult-to-amend constitution, whereas others are better off with a more passable ('flexible') constitutional law-making route. Nevertheless, a variety of options[59] with regard to procedural and substantive requirement of amendability should allow framers to design a formal constitutional law-making track that is made to measure.

Formal constitutional amendment procedures are often considered to be a very important, if not essential, element of a modern constitutional democratic system. Sheips saw this concept as 'one of America's principal contributions to political science'.[60] Amar wrote that amendment procedures are of

53 Jacobsohn (2010), 34 *et seq*. Roznai (2017).
54 While eternity clauses could, of course, never prevent an illiberal revolution, they can perhaps prevent revolutionaries from claiming legality. See: Levinson (2012), 334.
55 Madison (1987a), 284 (Federalist Nr. 43).
56 This is what Cooter labels the 'Minimax Constitution'. See: Cooter (2000), 10–11.
57 Loewenstein (1951), 215.
58 Andenas (2000), xii–xiii. See also: Masing (2008), 142. The fact that these intricacies and peculiarities also change would arguably imply that also amendment mechanisms themselves need to be recalibrated over time.
59 For an overview see: Albert (2014a) and Barber (2016).
60 Sheips (1950), 48.

'unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced'.[61] Burgess held that the articles concerning formal change are 'the most important part of a constitution'.[62] The Venice Commission of the Council of Europe considers constitutional amendment procedures to be of great significance; 'The amending power is not a legal technicality', it asserts, 'but a norm-set the details of which may heavily influence or determine fundamental political processes.'[63] A forthcoming volume on constitutional change will define comparative constitutional amendment as a distinct field of study in public law.[64]

However, as some of the above mentioned sources by the way recognize,[65] one may question the extent to which formal constitutional amendment procedures truly regulate the course of constitutional development.

1.3 The issue of informal constitutional change

According to some people, in countries that live under a written constitution, formal constitutional amendment is the only way to change formal constitutional norms. For example, the United States Supreme Court once stated that 'nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.'[66] Cooley noted that '[t]he meaning of the Constitution is fixed when adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'[67] And Dow argued that the Article V amendment procedure of the US Constitution sets out an exclusive mode of constitutional change.[68] A commonly stated fact is that the US Constitution has been changed 27 times, the Dutch Constitution about 23 times, the Indian Constitution about 99 times, and that the Spanish Constitution changed never.

However, while it is true that formal constitutional amendment is indeed an important way in which constitutional change has taken place in some constitutional democracies,[69] it does not generally appear to be the only one.

61 Amar (1994), 461.
62 Burgess (1890), 137. Cited by Albert (2014a), 914.
63 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 3.
64 Albert, Contiades and Fotiadou (2017, forthcoming).
65 Albert (2017, forthcoming).
66 *Ullman v United States* (350 U.S. 422, 428 [1955]).
67 Cooley (1868), 55.
68 Dow (1995), 117 *et seq*.
69 The German Basic Law, for example, has been amended 63 times in the past 68 years. Some of these amendments have facilitated major constitutional developments such as rearmament, emergency regulations, budgetary and financial policy reorganisations, reunification and European integration. See: Heun (2011), 21. Bryde (2003), 206-207.

A brief tour through some national and comparative constitutional literatures suggests that, in most constitutional democracies, alternative routes for constitutional change have actually been at least as important as the formal constitutional amendment procedure.

American constitutional literature provides particular support for this claim. Griffin, for example, argued that:

> '[t]he most significant source of constitutional change in the twentieth century has not been amendments under Article V [(the amendment procedure of the US Constitution)] or Court Decisions, but changes initiated and carried out by the President and Congress.'[70]

Griffin recently explored 20th and 21st century constitutional transformations that were effected by rise of the National Security State during the Cold War and the ongoing War on Terror. Griffin contended that, in the fields of foreign affairs and war powers, 'amendment-level' constitutional developments have taken place outside of the formal amendment procedure and beyond the scope of the judiciary.[71] According to Ackerman's celebrated reinterpretation of American constitutional history, sweeping constitutional transformations associated with the 1930s New Deal and the Civil Rights Revolution of the 1950s and 1960s took place without formal constitutional amendment and largely outside of court rooms.[72] Whittington listed no fewer than 87 examples of constitutional developments that occurred outside the formal constitutional law-making tracks of the US Constitution and outside federal or state courtrooms.[73] His examples include the president's cabinet, independent regulatory commissions, congressional subpoena and contempt power, the military draft, the Louisiana Purchase, the establishment of the Federal Reserve System, the development of the welfare state, and the entrance of the United States into the United Nations. Moreover, Posner and Vermeule argued that, in the welfare and security state the US has become

> 'the central mechanism of constitutional change is not amendments, higher lawmaking, or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority.'[74]

In more general terms, Harris contended that the American amendment procedure 'has fallen into disuse'.[75] Consequently, formal amendment and alternative forms of interpretation, 'to a significant degree, stand on the same

70 Griffin (1996), 28.
71 Griffin (2013).
72 Ackerman (1993), (1996) and (2014).
73 Whittington (1999), 12.
74 Posner and Vermeule (2010), 67.
75 Posner and Vermeule (2010), 67.

conceptual space within the constitutional order.'[76] Strauss went as far as to assert that:

> 'Formal amendments, adopted according to Article V, are actually not a very important way of changing the Constitution. The mechanisms of constitutional change that make up the living constitution – the evolution of precedents and traditions – are much more important. The living Constitution is the primary – I will go as far as to say the all-but-exclusive-way in which the Constitution, in practice, changes.'[77]

In other countries, written constitutional norms also appear to change outside the formal constitutional amendment procedure. For example, in a 2009 report, the Venice Commission of the Council of Europe stated that:

> '[In European countries,] [f]ormal amendment is not the only form of constitutional change, and in some systems not even the most important. Leaving aside revolutionary or unlawful acts, the two most important alternative ways of legitimate constitutional change are through judicial interpretation and through the evolvement of unwritten political conventions supplementing or contradicting the written text.'[78]

For instance, the Dutch constitution has not been fundamentally amended since 1917. According to Peters, important 20th century constitutional developments regarding the role of the courts, the voting system, and ministerial responsibility have taken place without formal amendment.[79] I have argued elsewhere that the rise of political parties, the changing authority, and the influence of the king, the rise of the welfare-state and the Europeanization and internationalization of national (constitutional) law hardly show, if at all, on the face of the text of the written constitution of the Kingdom of the Netherlands, despite the fact that these developments have arguably had substantial consequences for the meaning of a number of constitutional provisions.[80] In Germany, constitutional developments have taken place by constitutional amendment or 'quiet constitutional change'.[81] As Heun explains, 'the Basic Law [that is, the German written constitution] has experienced both to a great extent making it a living constitution'.[82] In the Indian context, Sen explained that '[a]lternative and informal patterns of governance and political change seem

76 Harris (1993), 205.
77 Strauss (2010), 116.
78 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 109.
79 Peters (2003), 31.
80 Passchier (2015) and Passchier (2018, forthcoming).
81 Heun (2011), 21.
82 Ibid.

to have replaced constitutional norms' during the past 50 years.'[83] Significant constitutional developments under a static constitutional document have also been reported in Japan.[84] Murphy even asserted that, in every master-text constitutional democracy, alternative forms of change have been far more common than formal constitutional amendment.[85]

Where the meaning of formal constitutional norms changes without (foregoing) formal constitutional amendment – that is, without explicit changes to the written constitution's text – the written constitution changes informally. This phenomenon, which I will refer to as 'informal constitutional change', is the central focus of this study.[86]

1.4 Research questions

The phenomenon of informal constitutional change raises at least three important questions.

1.4.1 Processes of informal constitutional change

The first question concerns the mechanisms of informal constitutional change: how does informal constitutional change occur? Constitutional literature suggests that there are multiple routes for informal constitutional change, including interpretation,[87] ordinary legislation,[88] evolving unwritten conventions,[89] customs,[90] policies,[91] political and societal practices,[92] changing political theories,[93] shifting understandings,[94] and the evolution of European[95] and/or international law.[96] It appears that the meaning of formal

83 Sen (2007), 1.
84 Matsui (2011).
85 Murphy (2007), 497.
86 Note that this study will not address 'constitutional change outside the written constitution', that is, change that can be regarded 'constitutional', but which has no real relation to the constitution text. On this topic see: Young (2005). This thesis will also not address the theme of constitutional change in systems that have no master constitutional text, on which see e.g. Oliver (2003). Loughlin (2013).
87 Harris (1993). Murphy (2007), 397. Jellinek (1906), 8 *et seq*.
88 Albert (2016). Ackerman (2014). Zippelius and Würtenberger (2005), 65.
89 Albert (2015a). Wheare (1966), 121 *et seq*. Vermeule (2004).
90 Kelsen (2007), 259.
91 Posner and Vermeule (2010), 67.
92 Strauss (1996), 905. Jellinek (1906), 10. Llewellyn (1934).
93 Murphy (1993), 12. Zippelius and Würtenberger (2005), 64.
94 Jellinek (2000), 55.
95 Pernice (2009), 373.
96 Ackerman and Golove (1995). Jacobsohn (2010), 337.

constitutional provisions may change just because the context in which the constitutional document operates changes. As Fusaro and Oliver contended,

> '[a]ny written legal text and any set of constitutional provisions, however introduced, at the end of the day produces different normative outcomes when the context in which they are embedded and to which they are to be applied significantly changes.'[97]

How can we understand these accounts? Furthermore, when we ask ourselves how informal constitutional change take place, can we explore whether such change takes place at 'moments', as maintained by Ackerman, for example?[98] Or does informal constitutional change occur gradually and incrementally? What is the (average) time span of an informal constitutional development? And is informal constitutional change something that typically takes place silently – that is, without the recognition of constitutional actors that they intend to bring about constitutional reform without resorting to new constitutional writing – as the German concept of *Stiller Verfassungswandel* suggest?[99] Or can informal constitutional changes also take place more explicitly; when constitutional actors recognize that they are indeed seeking to change the written constitution by the use of alternative means of change?

1.4.2 Explanations for textual unresponsiveness

The second question that the phenomenon of informal constitutional change raises is: what explains why, in countries that live under a written constitution, significant constitutional change sometimes takes place outside of the formal constitutional amendment procedure? Why do constitutional actors sometimes choose to use alternative means of constitutional change rather than a designated constitutional amendment procedure? Why does the constitutional legislator not always update the constitutional text when it has acquired a different meaning? In short, what explains what I call 'the absence of textual responsiveness' that written constitutions apparently sometimes show?

In most master-text constitutional democracies, the most obvious explanation for textual unresponsiveness of the written constitution is probably the difficulty of formal constitutional amendment. Indeed, many constitutional writers have suggested that stringent requirements of amendability may force necessary constitutional change to assume alternative forms.[100] Especially

97 Oliver and Fusaro (2011), 406.
98 Ackerman (1991), (1996) and (2014).
99 See, amongst others: Badura (1993), 63; Zippelius/Würtenberger (2005), 52 et seq.; Bryde (2003), 206–207; Heun (2011), 21; Wolff (2000), 79 et seq.
100 Elkins, Ginsburg and Melton (2009), 74. Voermans (2009). Lutz (1995). Lutz (2006). 156, Elster (2000), 95. Masing (2008), 131. Griffin (1996), 30.

where the difficulty of formal constitutional amendment is further enhanced by processes of constitutional 'veneration'[101] (that is, processes in which written constitution acquire an almost sacrosanct status) or by so-called 'amendment cultures'[102] (that is, extra-institutional political and societal attitudes toward amendment which make formal constitutional amendment an ever more cumbersome process), constitutional change may be driven 'of the books'.[103] As Elster argued, '[a]ttempts to bind society very tightly could have the opposite effect'.[104] He also went on to say:

> 'The Norwegian constitution of 1814 prohibited the entry of Jews and Jesuits into the Kingdom. (The former provision was abolished in 1851, the latter in 1956.) If that ban had been unamendable, it would eventually either have been disregarded (that is, rendered inoperative by a tacit constitutional convention) or changed by extraconstitutional means. Similarly, entrenched restrictions on suffrage could not have survived the irresistible progress of equality in modern, Western societies. Ulysses would have found the strength to break the ropes that tied him to the mast.'[105]

According to some observers, amendment difficulty would be an even more important explanation for textual unresponsiveness in the contemporary context of globalisation of politics and economy, technological innovation, the increasing life-span of human beings, terrorist threats, religious extremism, and changing citizens' demands regarding constitutional, democratic and welfare state[106] arrangements.[107] Especially in times of emergency and (perceived) crisis, a formal constitutional law-making route will presumably be hardly (if at all) able to supply for necessary reforms. As Elster put it, '[t]ight constitutional self-binding may be incompatible with the flexibility of action required in a crisis'.[108]

This study will explore the significance of amendment difficulty in explaining why constitutional change sometimes takes place without new writing. It will also examine whether there may be other explanations for the absence

101 Levinson (2012), 337.
102 Ginsburg and Melton (2015). See also: Dixon (2011), 107.
103 I derive this expression from Griffin (1998).
104 Elster (2000), 95.
105 Ibid.
106 Posner and Vermeule argued that it is impossible to bind the modern administrative state to (constitutional) law. 'We [Americans] live in a regime of executive centered government', they contended, 'in an age after the separation of powers, and the legally constrained executive is now a historical curiosity'. After what they call the 'Madisonian republic' (let's say, the pre-New Deal laissez faire government), 'the central mechanism of constitutional change is not amendments, higher lawmaking, or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority'. See: Posner and Vermeule (2010), 4 and 67.
107 See, generally: Oliver and Fusaro (2011), 5. Ginsburg and Melton (2015), 688.
108 Elster (2000), 163.

of the textual responsiveness that written constitutions sometimes show. After all, complex and multifarious phenomena such as informal constitutional change can seldom be explained by a single factor.

1.4.3 Alternative means as functional substitutes

The third question I will address in this study is whether and, if so, to what extent alternative mechanisms of constitutional change can functionally substitute a formal constitutional amendment procedure? As indicated above, a constitutional amendment procedure is considered an extremely important element of a modern constitutional democratic system. The instrument is supposedly able to guarantee stability and flexibility, fixity and progress, and constitutionalism and democracy. Amendment requirements are commonly attributed the task of promoting orderly change, transparency, deliberation and sufficient amounts of support for constitutional change. However, what happens when constitutional change is effected by other mechanisms than a formal constitutional amendment procedure? Can alternative mechanisms of constitutional change be (perfect) functional equivalents of a formal constitutional amendment procedure?

There is hot debate in the constitutional literature surrounding these questions. Some people believe that alternative mechanisms of change cannot substitute the constraining function of a formal constitutional amendment procedure. Voermans, for example, asserted that written constitutions are only effective if political and legal actors use the formal amendment procedure to bring about constitutional change:

> '[i]f a constitutional issue is regulated in another way, via lower ranked legislative authority (e.g. the parliamentary legislator), the constitutional restrictions on amendability become idle.'[109]

According to Voermans, constitutional engineering outside the formal constitutional amendment procedure may 'ultimately undermine or erode the value of a [written] constitution'.[110] Therefore, Voermans believed that regulating constitutional issues should be the 'prerogative (or reserve)' of the constitutional legislator as defined by the constitution's amendment provisions.[111] Along similar lines, Grimm contended that a written constitution can only fulfil its promise of comprehensively regulating the establishment and exercise of public power if it enjoys a supreme status above other rules of law. According to Grimm, this means that 'all acts of public authority have to conform

109 Voermans (2009), 84.
110 Ibid, 84–85.
111 Ibid.

the provisions of the constitution'.[112] If the constitution is not higher or supreme law, its functioning will be severely hampered: state institutions would then be able to legally evade the constitution's control. Grimm observed an indispensable relation between the essential higher rank of constitutional law and the rules for constitutional amendment:

> '[i]f a constitution allows for amendments by way of ordinary legislation, that is, without requiring a super-majority, its quality as higher law is seriously hampered.'[113]

Grimm also considered the typical requirement of a supermajority to be an essential means of furnishing a consensus basis for political adversaries and 'a framework in which the political competition can take an orderly and peaceful route'.[114] This framework needs to be protected against chance majorities; otherwise, the function of the constitution will be put at risk: '[i]t becomes a tool in the hands of the majority and ceases effectively to protect the minority or the opposition.'[115]

Other scholars have expressed concerns regarding the substitutability of the affirmative function of amendment procedures. For example, it has been questioned whether alternative means of change are able to generate sufficient amounts of support as constitutional change takes place. For this reason, the Venice Commission clearly prefers the use of formal constitutional law making tracks when constitutional changes are being brought about:

> '[p]roperly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time.'[116]

As Murphy explained, democratic theorists have denounced the use of alternative means of constitutional change, such as interpretation, as 'potentially both creative and enormous in effect'.[117] Vile, for example, believed that 'there must be a procedure at the heart of every political process'.[118] Möllers made a similar contention, stating that:

112 Grimm (2012), 109.
113 Ibid.
114 Ibid.
115 Ibid, 110. See also: Sajó (1999), 31.
116 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 199.
117 Murphy (1993), 13.
118 Vile (1998), 378.

> 'democratic will is formed through procedures, there is no strictly democratic legitimate decision outside the legal order, because only formal procedures can actually guarantee the change of the kind of equal participation that we may call democratic.'[119]

Murphy himself suggested that 'democratic governance would seem to require that establishing or amending a constitutional text be done openly, not by stealth.'[120] Furthermore, we may note that alternative means of change may lack the effectiveness that formal amendments expectedly have as instruments to bring about necessary constitutional reforms. As Dixon observed, the transformative effects of potential amendment substitutes may be less rapid than the effect of formal constitutional amendments.[121] Moreover, constitutional change that takes alternative forms may be less enduring than formal amendments.[122] Indeed, the constitutional status of fundamental reforms may remain contested for generations if they are not casted in written constitutional form. As Livingston suggested:

> '[t]he formal procedure of amendment is of greater importance than the informal processes because it constitutes a higher authority to which appeal lies on any questions that may arise. It provides the ultimate authority and is the final arbiter of all disputes.'[123]

Other writers have seen alternative mechanisms of change as valuable – and sometimes even necessary – substitutes for (overly laborious) formal amendment procedures. Wheare pragmatically suggested that 'one reason why the process of formal amendment has proved adequate in most constitutions is that it does not operate alone'.[124] According to Loughlin, a process of constitutional change 'often appears to be puzzling and somewhat mysterious', but this is only because maintaining the constitution's utility 'requires that it be capable of silently adjusting itself to change.'[125] Loughlin presented Walter Lippmann's sobering argument that 'only by violating the very spirit of the constitution have we been able to preserve the letter of it' as a general insight regarding informal constitutional change.[126] And Gerken suggests that in-

119 Möllers (2013), 76.
120 Murphy (2007), 485.
121 Dixon (2011), 100.
122 Vermeule (2004), 2–3.
123 Livingston (1956), 14.
124 Wheare (1966), 99.
125 Loughlin (2009), 305.
126 Ibid.

formal channels of constitutional change can be more productive than formal constitutional amendment procedures.[127]

Strauss put forward a more principled defense of the capabilities of alternative means of change, arguing that, 'in a fledging society' – that is, one that 'lacks well-established understandings, traditions and patterns of mutual trust and accommodation' – the formal constitutional amendment procedure may indeed be regarded as the only usable institution to bring about legitimate constitutional change.[128] By contrast, in what Strauss calls a 'mature constitutional regime', formal amendment procedures and actual formal amendments to a written constitution are more or less irrelevant.[129] Such a regime has developed mechanisms other than formal amendment supported by supermajority to bring about legitimate change; those alternative mechanisms exist because 'over time people have developed institutions that they trust.'[130] Moreover, in Strauss's view, alternative forms of change are not, by definition, undemocratic. Contrary to old and static written constitutional provisions, constitutional developments that have taken place through what Strauss calls 'the common law method' are 'not likely to stay out of line for long with view that are widely and durably held in society.'[131] Moreover, the 'common law approach' would provide more effective constitutional constrains than textualist or originalist approaches. It would restrain judges more effectively, it would be more justifiable, and it would provide a better account of a nation's actual constitutional practices.[132] The German constitutionalists Zippelius and Würtenberger seemed to more or less share Strauss' view when they argued that informal constitutional developments can be legitimized through legal discourse and the 'consensus readiness' (*Konsensbereitschaft*) of society.[133]

127 Gerken (2007), 927.

128 Strauss (2001), 1460. See also: Strauss (2010).

129 Strauss contended that the American constitutional system would look the same today if the US constitutional document had not contained any special provision for formal constitutional amendment. In an attempt to prove this thesis, Strauss established four propositions. First, he asserted that constitutional matters sometimes change while the text of the written constitution remains unaltered. Second, he contended that constitutional changes occur even though formal amendments that would have facilitated these changes are explicitly rejected by the constitutional legislator. Third, he claimed that when constitutional changes are brought about by way of formal amendment, they often do nothing more than ratify changes that have already taken place in a different form, without the help of a formal amendment. Fourth, Strauss argued that formal amendments are sometimes systematically evaded: '[t]hey end up having little effect until society catches up with the ambitions of the amendment'. See: Strauss (2001), 1461.

130 Ibid, 1462.

131 Strauss (1996), 929.

132 Ibid, 879.

133 Zippelius and Würtenberger (2005), 65.

The present study tests some of the arguments made in this debate. Is one of these camps right? Can we regard alternative mechanisms of constitutional change the functional equivalent of formal constitutional amendment procedures? Or does the substitutability of formal constitutional amendment procedures depend on certain circumstances? Alternatively, we may conclude that there are some important tasks that only an amendment procedure can perform.

1.5 The design of this study

In an attempt to shed light on these questions, I will conduct and compare three detailed case-studies of major constitutional developments in three different countries. In particular, where this study takes a 'functionalist turn' – that is, where I seek to identify institutions (such as formal constitutional amendment procedures and alternative mechanisms of change) and doctrines that exist in multiple constitutional systems and explore the functions they perform – the case-study method has important advantages.[134] As Jackson argued,

> '[a] benefit of the case study method in the comparative setting is the ability to explore how different features of the system may interact with and affect the operation of seemingly similar institutions or doctrines, that is, to see particular institutions or doctrines "in action" in their own legal contexts'.[135]

More specifically, the method of 'structured comparative case studies' that this study largely resembles should enable me to provide 'a set of comparative perspectives on how seemingly similar issues are (or are not) addressed in different constitutional systems.'[136]

1.5.1 Three case studies

The first case study (chapter 3) will explore the Japanese national defense and pacifism issue. Article 9 of the 1947 Constitution of Japan renounces war 'as a sovereign right of the nation' and 'threat or use of force as means of settling international disputes'. It also stipulates that, in order to accomplish this aim, 'land, sea and air forces, as well as other war potential, will never be maintained.' This so-called 'pacifism clause' was originally drafted to prohibit Japan from maintaining armed forces for all purposes, even self-defense. However,

134 Jackson (2012), 62.
135 Ibid, 64.
136 Ibid, 65.

in 1952, without formal constitutional amendment, the Japanese government established 'Self-Defence Forces' (SDF). Ever since, the size and capability of the SDF has been significantly extended to the point where the SDF is currently counted among the five most powerful militaries in the world. Along the way, the Japanese government reinterpreted Article 9 twice: in 1952 to allow the government to use military force in 'individual self-defence', and in 2014 to allow the government to use military force in 'collective self-defence'. Meanwhile, while Japan refrained from sending troops abroad, since the early 1990s, the country has conducted an ever-more assertive defence policy, also without formally amending the Article 9 constitutional commitment to pacifism. The case study will examine how these developments have taken place, the extent to which they can be understood as informal constitutional change, why Article 9 has never been amended, and to what extent (if any) the alternative mechanisms of constitutional change that have modified the content of Article 9 have substituted some of the most important functions that may be attributed to the formal amendment procedure of the Japanese Constitution.

The second case study (chapter 4) will explore the relationship between real-world shifts that haven taken place since the Second World War in terms of how American constitutional war powers have been divided between the President and Congress, on one hand, and the War Clauses of the US Constitution on the other. The War Clauses vest in Congress the power to 'Declare War', 'To raise and support Armies', and 'To provide and maintain a Navy.'[137] Furthermore, they make the president the 'Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.'[138] In the period between the adoption of the US Constitution (in 1789) and the Second World War, these clauses facilitated a system in which the *de facto* and *de jure* ability of presidents to use military force depended to a great extent on congressional approval. However, during the Cold War and the War on Terror, a development occurred whereby the president, as commander-in-chief, acquired an increasingly independent and powerful position in the field of national security. Although this development has a strained relationship with the pre-WWII constitutional plan, the judiciary has hardly interfered, because it has consistently refused to hear the merits in war power cases. The result is that a contemporary American president, as commander-in-chief, is hardly bound by checks and balances anymore. As an empirical matter, at least, the president has a broad preclusive and unilateral authority to deploy conventional weapons, intelligence units, and use nuclear arms. The case study will explore whether the extent to which the increased scope of presidential capacity to use military force can be understood as informal constitutional change. I will argue that, as a consequence of post-WWII developments in the allocation

137 Article 1(8) US Constitution.
138 Article 2(2) US Constitution.

of constitutional war powers, the pre-WWII meaning of the US Constitution's War Clauses no longer holds true, even though these clauses have not been formally amended. I then ask why, despite significant constitutional change in the area the War Clauses of the US Constitution address, these clauses have never been the subject of formal constitutional amendment. Moreover, I will seek to provide a sense of the extent to which alternative mechanisms of change that have affected the shifts in the allocation of constitutional war powers have been functional equivalents of US Constitution's Article V formal amendment procedure.

The third case study (chapter 5) will explore the relationship between the evolution of European integration and the German Basic Law. Some of the constitutional implications of this evolution show on the text of the Basic Law. However, even after several formal amendments to the Basic Law in connection to the development of the EU have been brought about, the contemporary text of the Basic Law does not seem to reflect all – and perhaps not even the most important – constitutional implications of almost seven decades of European integration. In fact, it has been widely recognized in German constitutionalism that the evolution of European integration has effected substantial 'material' modifications of the contents of the German Basic Law; that is, changes in the meaning of Basic Law provisions outside of the Article 79(2) amendment procedure of the Basic Law. The case study will explore some important examples of informal constitutional developments that have taken place in connection with the evolution of European integration; these include changes pertaining to the principle of federalism, human rights, and the powers of certain state institutions. I will then ask why it is that some constitutional developments connected with European integration have been channeled through the formal constitutional amendment procedure, while other important changes have come about solely through alternative routes of constitutional change. I will also explore whether and, if so, to what extent alternative mechanisms of constitutional change have been able to substitute some of the most important functions that are being attributed to the formal constitutional amendment procedure of the Basic Law.

1.5.2 Selection of the cases

The selection of cases for this study has been constrained by the languages with which I am familiar (namely, Dutch, German, and English) and the availability of materials in these languages. However, even within these constraints, the cases for this study have not been selected randomly.[139] In the first place, the countries that form the context for the cases in this study

139 On case selection in comparative constitutional studies, see: Hirschl (2014), ch. 6. Jackson (2012), 65. Saunders (2006).

may be regarded as stable constitutional democracies.[140] That is to say, they seemingly share some basic ideas and deeply rooted traditions about the tenets of just government, ideas, and traditions that can briefly be summarized constitutionalism (limited government), the rule of law, human rights, and democracy (popular rule).[141] While, on a concrete level, the constitutional systems of Japan, the US, and Germany differ significantly from each other, they share the assumption that, in Murphy's words, 'although the people's freely chosen representatives should govern, those officials must respect certain substantive limitations on their authority.'[142] In making these potentially conflicting ideas work, constitutional democracies encounter comparable problems.[143] For example, the phenomenon of informal constitutional change raises similar questions in countries that take constitutional norms seriously; that is, in countries in which the branches of government at least pretend to let themselves govern by constitutional precepts. Conversely, in countries that live under authoritarian rule, questions regarding the way constitutional change takes place, regarding explanations for the absence of textual responsiveness of written constitutions, or regarding whether the form of change matters would get a totally different dimension – if such questions would be relevant at all.

A second and related observation that may be made about the countries that form the contexts of the cases in this study is that, in each of these countries, the idea that the written constitution is a source and measure of legitimacy figures prominently.[144] In Japanese, American, and German constitutionalism we encounter the (modern) idea that the written constitution provides the foundation of legal order, establishing itself as 'the pivot on which the legitimacy of legality turns,' as Loughlin put it.[145] One important explanation for this common characteristic is that the Americans exported this tradition of written constitutionalism to Japan and Germany after the Second World War. Indeed, in both Germany and Japan, the Americans were deeply involved in the post-war constitution-making processes.[146] The Japanese charter was

140 I.e. countries that have been constitutional democracies for more than 20 years. See: Lijphart (2012), 47. In listing stable constitutional democracies, Lijphart relies on the rankings of Freedom House and Dahl's classical criteria: (1) the right to vote, (2) the right to be elected, (3) the right of political leaders to compete for support and votes, (4) free and fair elections, (5) freedom of association, (6) freedom of expression, (7) alternative resources of information, (8) and institutions for making public policies depend on votes and other expressions of preference.

141 Koopmans (2003), 6.

142 Murphy (2007), 10.

143 Koopmans (2003), 7.

144 The cases of the United Kingdom, Israel, and New Zealand suggest that a country does not necessarily need to have a written constitution in order to be a successful constitutional democracy.

145 Loughlin (2012), 276.

146 Murphy (2007), 200.

even drafted by Americans before it was handed over to the Japanese government.[147] It may be true that both the German Basic Law of 1949 and the Constitution of Japan of 1947 utilized many existing institutions. It may also be true that, as we will see, Japanese and German constitutionalism have treated their post-war constitutional systems in their own ways in the decades to follow. Yet, in both Japan and Germany, the idea that the written constitution is supposed to 'plate political power with the gold of authority'[148] seems to have made a lasting impression.

For now, it is important to consider that the similar ways in which written constitutions are perceived in the countries that form the contexts for the cases selected for this study may allow us to better appreciate the significance of the differences between the way informal constitutional change is appraised in Japan, the US, and Germany.[149] Indeed, the selection of these countries resembles, in a way, what Hirschl called the 'most different cases approach', which involves comparing cases that are 'different for all variables that are not central to the study but similar for those that are'.[150] Doing so, Hirschl explained, 'emphasizes the significance of the independent variables that are similar in both cases to the similar readings on the dependent variable.'[151]

Another observation that support the selection of case studies made for this study is that both the Japanese, US and German constitutions are highly resistant to change. As we shall see, the Japanese and US constitution provide a particularly rigid constitutional amendment procedure. The German Basic Law's formal amendment procedure does not provide too high hurdles. On the other hand, it does include several eternity clauses which make parts of the text formally unamendable. In each of the countries selected for the study, a cultural persistence against constitutional change makes formal amendment even harder than it already is as a purely formal matter. The relatively high resistance to constitutional change we can observe in each country selected for this study may allow for the argument that if informal constitutional change is possible in such systems, it is possible everywhere.

Furthermore, consider the difference in age between the constitutions of the countries selected for this study. The US Constitution (of 1789) is oldest surviving constitution in the world. Both the Japanese (1947) and German (1949) constitutions are relatively young and modern. This selection may therefore allow to test whether 'old' constitutions rely more on informal constitutional change than relatively young ones.

If we then focus on the cases themselves, we may also make several observations that indicate that they have been selected with due care. In the first

147 See, generally: Koseki (1998) and Moore and Robinson (2002).
148 Murphy (2007), 199.
149 See: Jacobsohn (2010), 29.
150 Hirschl (2014), 253. Also quoted by Jacobsohn (2010), 29.
151 Ibid.

place, the cases selected for this study may be regarded as 'prototypical'[152] cases of informal constitutional change in the sense that they take the typical form of a mounting tension between developments taking multiple – legal and non-legal forms – and original intention of written constitutional norms. Indeed, the idea here is that the lessons learned from studying these major cases of informal constitutional change may apply to – or at least be relevant for – other cases of informal constitutional change as well.[153] Moreover, the cases selected for this study have sparked a lot of scholarly and societal debate about what indeed appear to be similar questions. More in particular, in the Japanese, American and German case, constitutional actors have extensively debated the status, validity, and legitimacy of developments that have taken place in areas the written constitution addresses, but have not resulted in new writing – indeed, developments that could be informal constitutional change. These debates will be helpful, if not vital, in exploring some of the questions I have raised above. Lastly, consider the fact that all three cases touch upon issues of vital foundational importance, such as war and sovereignty. If informal change in such areas is accepted as 'constitutional', informal constitutional change could be possible in other areas as well.

Obviously, selecting cases for a comparative study always remains a rather intuitive enterprise. Furthermore, most writers should presumably admit that their personal preferences and interests play a role in the selections they make.[154] On the other hand, anyone who would carefully read some of the recent comparative volumes about constitutional systems in general and constitutional change in particular would have to agree that the Japanese, American, and German cases selected for this study appear to be amongst the most fascinating cases of constitutional change in the world's constitutional democratic systems.[155]

152 Hirschl (2014), 256.

153 Ibid.

154 As Tushnet also seems to admit. See: Tushnet (2014), 11.

155 Prior to this study I conducted a 'quick scan'. That is to say, I scanned the literature about Lijphart's 36 stable constitutional democracies for the existence of a scholarly, political, or societal debate about the issue of informal constitutional change in general or about developments that might be classified as informal constitutional change in particular. For this preliminary exploration, the comparative volumes of Contiades, Oliver and Fusaro about constitutional were very helpful (see: Contiades (2013) and Fusaro and Oliver (2011)). Also, the series on the constitutional law of the EU Member States were of great help (see: Prakke and Kortmann (2006) and Kortmann, Fleuren and Voermans (2006)). I also used *Google Scholar* and the digital catalog of the Leiden University library (catchwords 'constitution [constitutional democracy]' and 'constitutional change [constitutional democracy]'. These search engines provided an indication of the amount of available material on the topic per country.

1.5.3 Explaining similarities and differences

Each of the cases selected for this study is interesting on its own, may shed new light on existing and highly topical debates, and may provide valuable insights regarding the phenomenon of informal constitutional change. However, comparative constitutional law is not only about presenting descriptions of a number of cases side by side.[156] Comparative research should also explain the different and similar manifestations of phenomena it finds.[157] As Dannemann argued,

> 'generally speaking, the [comparative] analysis should seek to explain differences and similarities as they arise from the description of the legal systems under consideration, so that whoever has predominantly found similarity, will predominantly have to explain similarity, whereas those who have predominantly found difference, will predominantly have to explain differences.'[158]

Therefore, in the present study I also seek to make some more general comparative observations (chapter 6). I am to point to some recurring features, striking similarities, and differences between the cases of informal constitutional change in this study, and purport to confront the cases in this study with one another and suggest, where feasible, ideas that might explain the comparative observations I have made.

The conclusion to this study (chapter 7) will draw on this comparative analysis to suggest some general comparative lessons regarding the phenomenon of informal constitutional change. I am fully aware that generalizing from case studies is problematic[159] and that I have examined a limited number of cases. On the other hand, the case study method can be particularly helpful for testing candidate theories.[160] Moreover, this study does not seek to provide definitive answers regarding the issue of informal constitutional change; my ambition is merely to shed some light upon the questions raised. My objective in this study is to show the importance of the issue, provide some insights into it and, above all, lay the groundwork for further explorations of the theme.

1.5.4 Understanding informal constitutional change

However, before I can start reviewing and comparing actual case studies, it is necessary to evaluate the different perspectives on informal constitutional

156 Adams (2011), 189 following Shapiro (1981), vii.
157 Cf. Adams (2011). See also Hirschl (2014), 227.
158 Danneman (2006), 416 cited by Adams (2011), 192.
159 Murphy (2007), 23.
160 Eckstein (1992), 119.

change that have been taken in constitutional literature and see which one provides us with the most comprehensive and accurate understanding of the phenomenon (chapter 2).

2 Taking a perspective

> 'Identifying structural political changes as constitutional in the absence of formal amendments can make people uneasy'.
>
> Stephen M. Griffin[1]

2.1 INTRODUCTION

As I indicated in the previous chapter, in recent decades, national and comparative constitutional literatures have paid considerable attention to the phenomenon of informal constitutional change. It is apparent that in most constitutional democracies that live under a written constitution, formal constitutional amendments do not account for all – and perhaps not even for the most important – constitutional changes. It seems that alternative forms of change are at least just as important as formal constitutional amendments. However, it is still far from obvious how we should understand constitutional change that takes without new constitutional writing. This chapter seeks to find a perspective that will allow us to gain a deeper comprehension of how informal constitutional change may take place and how it can be identified.

I will start by explaining and evaluating two common perspectives on informal constitutional change, namely the 'legal-positivist' and 'common-law' perspectives. I will argue that taking either one of these perspectives may have certain advantages, but that both are ultimately incapable of providing an adequate comprehension of the phenomenon of informal constitutional change. My proposed solution is to connect the legal-positivist and common-law perspectives. This 'historical institutionalism' view, which focuses on the evolution of the relationship between the formal constitution and the institutional reality in which this constitution is embedded, arguably provides us with the most accurate understanding of informal constitutional change. On one hand, it enables us to account for a constitutional text's potential firmness of authority. On the other hand, it enables us to describe and explain how the import of formal constitutional rules may be shaped and reshaped by

1 Griffin (2006), 13.

multiple legal and non-legal forces without (foregoing) formal constitutional amendment.

The main content of this chapter is summarized and reproduced in Table 1, at the end of this chapter.

2.2 Legal-positivist perspectives

A common way in which legal scholars understand how formal (or written) constitutions change is by taking what we may call a 'legal-positivist view'.[2] The legal-positivist perspective draws from the idea that a formal constitution is a set of discrete provisions, which derive their authority from having been formally adopted or enacted by a constitutional assembly of some sort, a constitutional legislator, or by way of some other solemn procedure.[3] This perspective presupposes that formal constitutional norms, as supreme law, have an autonomous normative meaning – that is, a meaning that can be described and explained independent from the constitution's legal and socio-political context[4] – and that constitutional change can only be brought about through a limited number of designated legal procedures.[5] Hence, in understanding how constitutions change, those who take this view focus exclusively on what we may call 'authoritative' or 'canonical' sources of changing the constitution. Legal-positivists do not necessarily believe that legal or socio-political developments that do not show on the face of authoritative sources of changing the formal constitution are completely irrelevant for the study constitutional law. In fact, most of them would presumably accept that such developments might trigger the use of authoritative instruments of constitutional change (in that sense they recognize a 'dynamic' between constitutional and non-constitutional sources).[6] They would uphold a strict conceptual and methodological separation between hearkening the normative/dogmatic 'ought' of constitutional law – as or as not changed by authoritative legal instruments – and describing and explaining the empirical 'is' of socio-political development.[7] As one Dutch professor put it, constitutional law is 'the study that investigates the legal framework', while political science is 'the other discipline that looks at the flesh around it'.[8]

2 Alternatively, we could refer to this perspective as the 'legal-dogmatic' view. See: Becker and Kersten (2016), 2.
3 Goldsworthy (2012), 690.
4 As Becker and Kersten put it, 'from the "is" does not follow an "ought"!' ('Aus dem Sein folgt kein sollen!') See: Becker and Kersten (2016), 2.
5 Möllers (2007), 187–188.
6 Ibid.
7 E.g., Böckenförde (1993), 6. Voßkuhle (2008), 201–210. Schauer (1995), 146–147.
8 Barents (1948), 11 quoted by Van der Hoeven (1958), 3.

2.2.1 Classic, conventional and innovative legal-positivist views

We can distinguish between three different legal-positivist views, each of which recognizes only a limited number of sources of changing the formal constitution, but which differ over the question of which sources should belong to the constitutional canon.

According to what we may call the 'classical' legal-positivist view, the formal constitution can only change by way of formal constitutional amendment.[9] Those who take this view advocate a maximum degree of 'positivism' and 'originalism'; that is, fidelity to the meanings of formal constitutional provisions as determined by the formal constitution's founders – or the understandings of the founding generation – outside the formal amendment procedure.[10] Hence, in principle, they do not accept that constitutional change can validly take place without formal constitutional amendment. The United States Supreme Court once took a classical legal-positivist view when it stated that 'nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.'[11] However, when people say that the US Constitution has been changed 27 times, the Constitution of the Netherlands 23 times, the German Basic Law 63 times or that the Japanese Constitution has never been changed at all, they give – either deliberately or otherwise – a classical legal-positivist account of constitutional change, because they consider the special amendment procedure of the formal constitution in question to be the exclusive route for changing the content of this document.

A second version of the legal-positivist view may be called the '*conventional view*'. Those who take the conventional view may still have a positivist and originalist turn of mind, but then accept on pragmatic grounds – and possibly with some regret[12] – that judicial discretion in (re-)interpretation is sometimes inevitable, because written constitutions include ambiguities, vagueness, and inconsistencies.[13] Also on pragmatic grounds, conventionalists might consider that no constitutional document can interpret itself.[14] As Barak put it, '[a]ll understanding comes from interpretation. Pre-interpretative understanding does not exist.'[15] In the same pragmatic vein, they may say that interpretation is, by definition, no neutral operation to discover the pre-established meaning

9 See e.g. Vile (1990), 271–308.
10 Goldsworthy (2012), 691.
11 *Ullman v United States* (350 U.S. 422, 428 [1955]).
12 As Goldsworthy explains, because they 'would prefer law to be objective, determinate, and comprehensive, so that it can provide answers to every dispute, which judges can reliably ascertain and apply'. See: Goldsworthy (2012), 691. As Dow put it, ´From the need to interpret there can be no escape´. See: Dow (1995), 143.
13 Goldsworthy (2012), 690–691.
14 Barak (2005), 218.
15 Ibid, xv.

of a constitutional norm, even if the constitutional text includes instructions for interpretation.[16] As Grimm explains,

> '[i]interpretation of the general law with regard to a concrete problem always contains an element of constituting the meaning, and this the more so the older and more abstract the text is, and the more the context has changed since its enactment'.[17]

Others who also take the conventional view might endorse judicial discretion in interpreting a constitutional text on more principled grounds. What we may loosely call 'non-originalist' positivists license the judiciary to interpret formal constitutional provisions according to the supposed meaning, values, and understanding of contemporary society.[18]

Indeed, the 'conventional' view on constitutional change appears to be the most common one in global constitutional literature. In Germany, for example, as Becker and Kersten reported, most contemporary legal scholars have a 'juristic' or 'dogmatic' conception of informal constitutional change. This means that, in accounting for constitutional change, they focus on developments in the German Federal Constitutional Court's jurisprudence.[19] Similarly, in the US, the dominant view appears to be that informal constitutional change comes about mainly or solely through judicial interpretation. According to Ackerman, the 'dominant professional narrative' of American constitutional development is court-centered.[20] As he explained,

> '[t]he young lawyer is taught from casebooks that focus almost exclusively on judicial opinions stretching from Marbury v. Madison to Brown v. Board, Roe v. Wade, and beyond'.[21]

16 In written constitutions around the world, explicit textual instructions with regard to interpretation are rare. Murphy provides a couple of examples. The Ninth and Tenth Amendments to the US Constitution give instructions as how to not interpreted them. The Ninth Amendment says that 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. The Tenth Amendment stipulates that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'. Article 27 of the Canadian Constitutional Charter gives a positivist instruction stating that 'This Charter shall be interpret in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada'. See: Murphy (2007), 471.

17 Grimm (2010), 40.

18 Goldsworthy (2012), 691.

19 Becker & Kersten (2016), 2 and 9.

20 Ackerman (2014), 2.

21 Ibid, 2.

Similarly, Griffin reported with regard to the US that:

> '[l]awyers differ over which cases exemplify constitutional change, but all would agree that it has occurred primarily through doctrinal interpretation by the Supreme Court'.[22]

A final variation on the legal-positivist view may be labeled the '*innovative*' or '*broad*' view. Scholars who take this perspective believe that the classical and conventional legal-positivist perspectives provide an incomplete account of (informal) constitutional change.[23] They argue that, under certain circumstances, important ordinary statutes may also change the body of fundamental rules that govern the government.[24] Hence, those who take an innovative view believe that a comprehensive canon of possible sources of constitutional change should also include what they call 'organic laws'[25] 'landmark'[26] or 'super-'[27] statutes or 'quasi-constitutional amendments'.[28]

Theories that criticize the classical or conventional legal-positivist view on grounds of incompleteness are often presented as revolutionary or innovative theories of constitutional change. However helpful and provocative these theories may be, they are usually not fundamentally different from the conventional and classical legal-positivist views. Ultimately, innovate views merely seek to add a legal source to the existing authoritative canon of sources of constitutional change. They remain 'legal' and 'positivist' in the sense that, like other legal-positivist views, they presuppose that the constitution is a closed system of legal rules that can only validly change through a limited number of authorized procedures.

22 Griffin (2006), 3.
23 E.g. Ackerman (2014), 83 *et seq*.
24 See e.g. Ackerman (2014). Albert (2016).
25 Wheare (1966), 3.
26 Ackerman (2014), 92.
27 Eskridge and Ferejohn (2001), 1216. 'A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.'
28 'A quasi-constitutional amendment is a sub-constitutional alteration to the operation of a set of existing norms in the constitution – a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function, though not the formal status, of constitutional law over time as a result of its subject-matter and importance, making it just as durable as a constitutional amendment'. Albert (2016), 2.

2.2.2 Advantages of legal-positivist views

Taking one of these legal-positivist views on informal constitutional change may have at least two important advantages.

Firstly, legal-positivist views may allow us to describe and explain the evolution of the 'constitutional plan' as intended by the constitutional legislator and authoritative interpreters, such as the constitutional legislator, the judiciary, and perhaps the ordinary legislator. The conventional view enables us to recognize, for example, that the plan of the US Constitution for citizenship has been profoundly changed by way of constitutional amendment, judicial decisions, and ordinary statutes. Taking a classical view, we can observe that, in 1868, the Fourteenth Amendment added to the US Constitution that:

> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'[29]

If we then adjust our lens, and include judicial decisions in our list of sources of changing the constitution, we see that the Fourteenth Amendment plan was modified twice by the Supreme Court: in 1896, the US Supreme Court held that 'equal but separate accommodations for the white and colored races' was constitutional;[30] 60 years later, in the 1954 school segregation case Brown vs. Board of Education, the Supreme Court changed its mind and ruled that separate educational facilities were 'inherently unequal' and thus unconstitutional.[31] If we then switch to the innovative view, we can also recognize that the meaning of the US Constitution's citizenship clauses has also been changed by a series of 'landmark' statutes, namely the Civil Rights Act of 1964,[32] the Voting Rights Act of 1965,[33] and the Fair Housing Act of 1968.[34,35]

Moreover, taking a legal-positivist perspective may enable us to draw a clear distinction between what kind of developments should be considered 'constitutional' and what kind of developments should just be considered 'ordinary' legal or socio-political change; that is, change without implications for the meaning of the formal constitution. With regard to the classical view, this advantage is obvious: if we would only recognize formal constitutional

29 Section 1.
30 *Plessy v Ferguson* 163 US 537, 540 (1896).
31 *Brown v Board of Education* 347 US 483, 495 (1954).
32 Public Law 88–352, 78 Stat. 241.
33 Public Law 89-110, 79 Stat. 437.
34 42 U.S.C. 3601-3619.
35 See: Ackerman (2014).

amendment as constitutional change, the constitutional document itself supposedly gives a comprehensive account of the constitutional developments that have taken place in a given constitutional order. In the conventional view, it is somewhat harder to distinguish constitutional change from non-constitutional change because it may be difficult to distinguish – supposedly legitimate – ordinary development by interpretation from – supposedly illegitimate – extraordinary change.[36] However, theories that view the (highest) court as the only authoritative interpreter of the constitutional text (that is, theories of judicial supremacy[37]) still provide a much more demarcated understanding of constitutional change than theories that recognize multiple interpreters.[38] Of all three legal-positivist perspectives, the innovative perspective seems to present the most difficult challenges. This is because, in addition to debates about the meaning of case law, it may well provoke difficult discussions about which statutes should be included in the constitutional canon.[39] At the same time, if one reaches agreement upon an analytical framework or some kind of universal doctrine capable of answering these questions, the innovative perspective would still enable us to provide a reasonably delimited account of informal constitutional change. Indeed, as Ackerman's work shows, it would still allow us to depict constitutional change as something that takes place at particular identifiable 'moments' at which legal instruments are being used by designated actors to consciously reformulate a nation's fundamental commitments.[40]

2.2.3 Disadvantages of legal-positivist views

On the other hand, taking a legal-positivist perspective also seems to incur at least three important drawbacks.

Firstly, we may object to taking a legal-positivist view based on the argument that such a view hardly allows us to account for discontinuities in the meaning of formal constitutional norms. As we have seen, legal-positivist theories presuppose that formal constitutional provisions have an independent meaning that can only be changed by the use of designated methods of consti-

36 Goldsworthy (2012), 689. Levinson (1995), 14 *et seq.*

37 As Chief Justice Hughes once asserted: 'We are under a Constitution, but the Constitution is what the judges say it is ....'. Hughes (1908), 139. Quoted by Alexander and Schauer (1996), 1387.

38 Some scholars even claim that viewing the judiciary as the final arbiter is a matter of necessity because any other idea about authoritative interpretation would threaten the constitutional order. See, e.g., Alexander and Schauer (1997), 1359–1387.

39 Indeed, a scholar like Ackerman may be criticized for having a progressive bias because he only recognizes the special status of statutes that fit in a progressive agenda. See: Loughlin (2009), 304. See also section 4.4.1. below.

40 See Ackerman (1993), Ackerman (1996) and Ackerman (2014).

tutional reform. However, we may doubt whether such a conception does justice to reality. Indeed, it appears that an adequate perspective on informal constitutional change should enable us to anticipate that the meaning of written norms may also change gradually, incrementally and even ongoing.[41]

An example of incremental informal constitutional change can be found in Canada.[42] Under the Constitution Act of 1867, the British government has the power to 'disallow' or repeal a law passed by the Canadian legislator.[43] Within two years after a bill has been approved by the House of Commons, the Senate and been signed into law by the Governor General, the British government formally has two years to annul it. However, the British power of disallowance has not been used since 1873. It was rejected as Canada gradually achieved independence in the 1920s and 1930s. A 1930 report[44] that confirmed Canada's growing independence led to an agreement that the power of disallowance would no longer be exercised in Canada. The Statute of Westminster finally removed the power of the UK Parliament to legislate for Canada.[45] In that way, as Albert explained, it effectively abolished the British power of disallowance.[46] Ever since, the British power of disallowance has been implicitly repealed, yet it remains unaltered in the text of the Constitution Act of 1867. According to Albert,

> 'Canadian constitutional law now operates pursuant to a new rule of recognition: the British power […] of disallowance [is] no longer binding as [a] primary rule of obligation.'[47]

From Albert we can learn that the formal constitutional provision in the Canadian Constitution establishing the power to disallow gradually fell into 'desuetude'.[48]

A second objection against taking a legal-positivist perspective on constitutional change is that such a perspective may easily lead to overestimations of the consequence of a constitutional text and authoritative sources of changing the constitution. Again, legal-positivist theories often explain constitutional change in terms of moments, as something that is being engineered by the use of legal instruments of constitutional change. However, even the most ostensible great moment of constitutional change may turn out not to be so

41 Oliver and Fusaro (2011), 424.
42 Albert (2014b), 641–686.
43 Constitution Act, 1867, pt. IV, s.56.
44 Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929, at 16 (1930); id. At 19. Cited by Albert (2014b), 660.
45 Statute of Westminster, 1931, 22 Geo.5,ch. 4, ss. 2, 4. Cited by Albert (2014b), 660.
46 Albert (2014b), 660.
47 Albert (2014b), 660.
48 Which takes place, according to Albert, when 'an entrenched constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors'. See: Albert (2014b), 4.

momentous after all; it may just have codified or ratified developments that had already taken place in some other form.[49] Formal constitutional amendments that just codify informal constitutional change are what Murphy referred to as 'housekeeping chores'.[50]

One example of a constitutional housekeeping chore is a recent proposal of the Dutch government that purports to introduce a 'general provision' declaring that the Netherlands is a constitutional democratic state that respects human rights.[51] Such an addition to the constitution may have some significance, because it confirms that also the constitutional legislator recognizes the principles of constitutional democracy as the fundamental principles of the Dutch political order. Meanwhile, it should be noted that the doctrine of constitutional democracy – '*democratische rechtsstaat*', as it is called in Dutch – has been fairly well established and universally recognized by Dutch constitutional actors for at least the past 60 years or so, despite of the fact that, as of yet, this doctrine has hardly shown explicitly on the face of the constitutional text. True, the written constitution of the Netherlands addresses such topics as parliamentary elections,[52] the judiciary,[53] the legislative process[54] and it provides some fundamental rights.[55] However, nowhere does it explicitly mention the concepts of '*rechtsstaat*' or 'democracy', nor does it explicitly embody the principle of legality, the separation of powers or the independence of the judiciary – principles that are commonly considered basic tenets of Dutch constitutional democracy. If the proposed 'general provision' concerning the doctrine of constitutional democracy would be adopted, it would just codify a range of interrelated developments that have already taken place in such forms as ordinary legislation, constitutional conventions and treaties.

Landmark judicial interpretations of the constitution can sometimes also be considered housekeeping chores.[56] In this case, the real innovations come from the political branches; the courts merely ratify the innovation.[57] One example of 'political-judicial updating' is the history of US Constitution's Commerce Clause.[58] As Tushnet noted, most American constitutionalists would agree that the US government, under the Commerce Clause, regulates a wide range of activities within the states that would not have been regarded part of interstate commerce by the Founding Fathers of the US Constitution.

49 Strauss (2001), 1459.
50 Murphy (2007), 301.
51 In the proposal of the Cabinet: 'This Constitution shall ensure democracy, a state based on the rule of law and human rights.' Kamerstukken II, 2013-2014, 31570, NR. 24. https://zoek.officielebekendmakingen.nl/kst-31570-24.html (accessed 14-4-2017).
52 See: Article 54 and 55.
53 See: Article 112-122.
54 See: Article 81-89.
55 See: Article 1-23.
56 Loughlin (2009), 301. Tushnet (2009), 242.
57 Tushnet (2009), 242.
58 Ibid.

However, according to Tushnet, this is not merely because the conception of 'commerce among the several change changed', but rather because 'Congress adopted, and the courts endorsed a definition of 'commerce' that was significantly broader than the definition of the founding generation'.[59]

A third drawback of legal-positivist perspectives is that they cannot be taken to account for constitutional change that has been effected solely by non-authoritative sources of changing the constitution. Non-authoritative sources are sources which legal-positivists do not consider part of the constitutional cannon. Recent literature has especially attacked the legal-positivist idea that only judicial interpretations can have implications for the content of constitutional law. Indeed, authors with a more sociological turn of mind have suggested that, even when legal-doctrine vests judicial review exclusively in a Supreme or Constitutional Court,[60] other institutions such as the legislature, the government, and the electorate may bring about transformative interpretations as well. As Balkin noted with regard to the US:

> '[m]uch of the most important constitutional work does not come from the courts. It comes from acts of constitutional construction by executive officials and legislatures, both at national and local levels, building institutions, programs and practices that flesh out and implement constitutional text and principles that courts cannot.'[61]

For example, some parliaments have special constitutional committees that issue influential interpretations of the constitutional text.[62] Furthermore, it is arguable that ordinary citizens may also act as relevant constitutional interpreters; for example, when they express themselves in the voting booth.[63] As Murphy explained,

> '[a]lthough differently prescribed delegations of authority can significantly affect the substantive results of constitutional interpretation, in no constitutional democracy does any single institution have either a monopoly on constitutional interpretation or a guarantee of interpretative supremacy.'[64]

Comparative constitutional literature has also indicated that the import formal constitutional rules has also been shaped and reshaped by ordinary legislation,[65] evolving unwritten conventions,[66] customs,[67] policies,[68] political

59 Tushnet (2009), 242.
60 E.g. Article 93 *et seq* of the German Basic Law.
61 Balkin (2011), 17. See also Murphy (2007), 463–468 for a theory of 'departementalism'.
62 Murphy (2007), 464.
63 Ibid.
64 Ibid, 469.
65 Albert (2016). Zippelius and Würtenberger (2005), 65.
66 Albert (2015). Barber (2012), 82–83. Wheare (1966), 121 *et seq*. Vermeule (2004).
67 Kelsen (2007), 259.

and societal practices,[69] changing political theories,[70] shifting understandings,[71] and the evolution of European-[72] and/or international law,[73] among other mechanisms. It appears that the meaning of formal constitutional provisions may change just because the context in which the constitutional document operates changes. As Fusaro and Oliver contended,

> '[a]ny written legal text and any set of constitutional provisions, however introduced, at the end of the day produces different normative outcomes when the context in which they are embedded and to which they are to be applied significantly changes'.[74]

In sum, on the one hand legal-positivist perspectives may enable us describe and explain the evolution of the 'constitutional plan' as the constitutional legislator and authoritative interpreters intended. Moreover, an advantage of legal-positivist approaches is that they may allow us to relatively clearly distinguish between constitutional and non-constitutional developments. On the other hand, legal-positivist perspectives may tempt us to overestimate consequence of formal constitutional rules and authoritative sources of changing the constitution. They hardly – if at all – enable us to account for forces of shaping the constitution outside of authoritative ones.

2.3 The common-law perspective

Partly as a response to what some have regarded overly formalistic legal-positivist accounts of constitutional development, some scholars have opted for – or actually fallen back to[75] – what we may call a 'common-law' perspective.[76] The common-law perspective rejects the legal-positivist notion that formal constitutional precepts have an independent or autonomous meaning that can only be changed by actors who consciously follow a limited number

68 Posner and Vermeule (2010), 67.
69 Strauss (1996), 905. Jellinek (1906), 10.
70 Murphy (1993), 12. Zippelius and Würtenberger (2005), 64.
71 As Jellinek argued, 'jurisprudence is everywhere based on people's changing views and needs …. [w]hat seems to be unconstitutional in one period appears constitutional in the following'. Jellinek (2000), 55.
72 Pernice (2009), 373.
73 Ackerman and Golove (1995). Jacobsohn (2010), 337.
74 Oliver and Fusaro (2011), 406.
75 As McIlwain reminded us, the common-law view is actually the older traditional view in which the word 'constitution' was applied only to 'the substantive principles to be deduced from a nation's actual institutions and their development'. See: McIlwain (2009), 2
76 Strauss used this term explicitly. See: Strauss (1996). Similar views, though under different designations, can be found with Lewellyn (1934), Jellinek (1906) and Strauss (2001). Also the Dutch constitutionalist Van der Hoeven may arguably be understood as a common-law constitutionalist. See: Van der Hoeven (1958).

of designated constitutional law-making routes.[77] Instead, it presupposes that the meaning of constitutional norms fully depends on practice and, hence, that these norms change 'whenever the basic ways of government change,' as Llewellyn put it.[78] Therefore, in describing and explaining constitutional change, the common-law perspective focuses exclusively on the evolution of what has been called the small-'c' constitution[79] or 'constitutional reality,'[80] 'the constitution in practice,'[81] 'the working constitution'[82] or, perhaps most commonly, the 'living constitution';[83] in essence, a nation's actual institutional understandings and practices. Those who take a common-law perspective may indeed accept that a master constitutional text can have *some* firmness of authority, particularly in case of systems that live under a relatively young constitutional document.[84] Ultimately, however, common-law constitutionalists believe that 'it is only the practice which can legitimize the words as being still part of [..] [a] going Constitution.'[85]

2.3.1 Advantages of the common-law perspective

Taking a common-law perspective has at least two important advantages.

In the first place, the common-law perspective may enable us to trace constitutional developments that do not show on the face of the constitutional text and authoritative sources of changing the constitution. Other than the legal-positivist perspective, the common-law perspective does not focus exclusively on a limited number of canonical sources of constitutional change. Therefore, it can yield a much broader view and reveal changes that might be considered constitutional or of a constitutional equivalence, even though they occurred outside of the designated channels for change. Indeed, by taking a common-law view, Llewellyn enabled himself, as one of the first in American constitutional literature, to challenge the customary view of his time that American constitutional change was exclusively channeled by the formal

77 Strauss (1996), 879.
78 Llewellyn (1934), 22 (emphasis in the original).
79 Strauss (2001), 1459.
80 'The real relations between state organs and the actual behavior of a people in the area addressed by a constitution.' Maurer (2007), 26. See also Zippelius and Würtenberger (2005), 65.
81 '[T]he fundamental political institutions of a society.' Strauss (2001), 1459.
82 '[A] set of ways of living and doing.' Llewellyn (1934), 17.
83 Strauss (2010).
84 Llewellyn (1934), 39. However, according to Llewellyn's estimation 'any Text of fifty years of age is an Old Man of the Sea'. See also Strauss (1996), 879–891,
85 Llewellyn (1934), 12 (emphasis in the original).

constitutional law-making track of Article V of the US Constitution.[86] A common-law lens allowed him to reveal several constitutional developments that had taken place outside the formal amendment procedure, such as senate filibusters and congressional conference committee powers.[87]

The German constitutionalist Jellinek took what was essentially a common-law view at a very early stage (in 1906) of modern constitutional scholarship. By defining constitutional change as

> 'change that allows the text [of the written constitution] to remain formally unchanged and is caused by facts that need not to be accompanied by an intention or awareness of the change'[88]

he was able to reveal several legal and non-legal mechanisms of changing the constitution, such as interpretations (on the part of the judiciary, the executive or the legislator), the force of facts, conventions, rules of law becoming obsolete, customary law that fills constitutional gaps, and shifting power relations.[89]

More contemporary authors have also taken a common-law view. A prominent example is the American constitutionalist Strauss.[90] Taking a common-law view, he identified several important developments in the American constitutional order that have not been the subject of formal constitutional amendment, but which have nevertheless implications for the meaning of formal constitutional norms. Strauss' examples include developments regarding the allocation of power between the US government and the states, the allocation of power among the three branches of the US government, the scope of individual rights against government action and changes in the basic rules of representative democracy.[91]

Secondly, contrary to legal-positivist perspectives, the common-law perspective may have the advantage of enabling us to describe and explain constitutional discontinuities. Consider, for example, changes in the scope of power of the US Congress.[92] The powers of the US Congress are defined by the US Constitution in great detail and Congress' powers were discussed extensively during the Philadelphia Convention. In the past 225 years, the scope of Congress' power has expanded substantially, largely outside the US

86 In fact, Llewellyn was one of the first to critique what he called the 'orthodox constitutional theory' that contends that formal amendment is the only way in which the (American) constitution changes. 'Surely there are few superstitions with less substance,' he wrote, somewhat dramatically, 'than the belief that the sole, or even the chief process of amending our Constitution consists of the machinery of Amendment.' Llewellyn (1934), 21.
87 Llewellyn (1934), 15.
88 Jellinek (2000), 54.
89 Jellinek (1906).
90 E.g. Strauss (1996), Strauss (2001) and Strauss (2010).
91 Strauss (2011), 1469–1470.
92 Ibid, 1470.

Constitution's formal amendment procedure and other authoritative sources of changing the constitution. Some of these expansions have arguably occurred at great 'moments', such as the New Deal, and can be traced in landmark statutes.[93] However, the common-law perspective may allow us to not only recognize that the broadening of the range of subjects about which Congress' may legislate has been engineered by the use of designated instruments of constitutional change, but also that it has been the result of gradual and incremental shifts in the allocation of real power that have not (immediately) appeared on the face of authoritative sources of changing the constitution.

2.3.2 Disadvantages of the common-law perspective

Taking a common-law perspective on constitutional change arguably also comes with at least three important drawbacks.

In the first place, we may consider that while the common-law perspective enables us to reveal constitutional narratives of discontinuity, in its turn, it does not allow us to adequately account for constitutional continuities. As we have seen, in presupposing that the meaning of formal constitutional norms depend completely on practices, those who take a common-law view tend to depict constitutional change as something that goes along with the ebb and flow of political and societal events as something that takes place all the time – as Llewellyn put it, 'whenever the basic ways of government change'.[94] However, although Llewellyn helpfully pointed to the possibility of constantly *changing* aspects of a formal constitution, we should also be aware, both in the US and other contexts, of the importance of what Levinson called 'Narrative[s] of Stasis'; that is, *unchanging* aspects of constitutions.[95] As Levinson suggested, we may agree with those who take a common-law view that, in the American constitutional order, important constitutional change has taken place outside canonical sources of changing the constitution, but then also observe that there has been minimal change to such institutional practices as the formalities of passing legislation in a bicameral system and the existence of a presidential veto.[96]

Secondly, although, as we have seen, legal-positivist views tend to overestimate the importance of a constitutional text, those who take a common-law perspective tend to *underestimate* the importance and firmness of written constitutional norms. What's more, the premise that the meaning of constitutional law fully depends on the evolution of institutional practice ultimately leads to the conclusion that it does not matter for a country whether it lives

93 Ackerman (1996).
94 Llewellyn (1934), 22 (emphasis in the original).
95 Levinson (2012), 342.
96 Ibid.

under a written constitution or not. Indeed, as we have seen, common-law constitutionalists may agree that a solemn constitutional text could have some autonomous consequence in establishing a constitutional system – for a 'generation or two', as Strauss estimated.[97] Ultimately, however, those same constitutionalists refute that 'written' and 'unwritten' constitutions are different in their fundamental nature.[98] As Llewellyn argued, 'a "written constitution" is a system of unwritten practices in which the Document in question, by virtue of men's attitudes, has a little influence.'[99] Likewise Jellinek concluded in his book *Constitutional Amendment and Constitutional Transformation* that:

> '[t]he development of the constitution provides us with the great doctrine – the great significance of which has not yet been sufficiently appreciated – that legal precepts are incapable of actually controlling the distribution of power in a state. Real political forces move according to their own law, which act independently of any legal forms…'[100]

Both Llewellyn and Jellinek might have been correct to some extent about the significance of written constitutional norms in the constitutional order they lived in. Llewellyn's claims with regard to the 'written' constitutional system of the US have been supported by some prominent commentators.[101] Jellinek lived in the notoriously unstable Weimar Republic. However, comparative constitutional literature indicates that, as a general matter, we should not prematurely disregard the potential difference that a constitution's written form may make for its firmness of authority. Even if one does not believe that a formal constitution has an independent meaning, one may appreciate the fact that a written constitution may make a difference in the real world. For example, Hesse observed, with regard to modern Germany, that constitutional norms casted in a written constitution may shape, rationalize, and stabilize real-world practices, understanding, and conditions on the ground.[102] Levinson's work indicates that it is possible that, in any given constitutional demo-

97 Strauss 2001, 1461.

98 See Llewellyn (1934), p. 2 and 4. Strauss (1996), 890.

99 Llewellyn (1934), 39.

100 Jellinek (2000), 57.

101 For example, the prominent American constitutional historian Gordon Wood argued that 'many scholars, especially historians [….] say [that constitutional changes] have been ongoing, incremental and often indeliberate. Indeed, ultimately they have made our Constitution as unwritten as that of Great Britain'. Wood (2005), 32. Likewise, Tushnet contended that '[t]ypically offered as a paradigm of a nation with a written constitution, the United States actually operates with a constitution that is more similar to than different from the paradigmatic unwritten constitution of the United Kingdom'. Tushnet (2009), 1. And Gerken argued that 'despite the existence of a constitutional text, a surprising amount of American constitutionalism bears a close resemblance to Great Britain's textless constitutionalism. Gerken (2007), 928.

102 Hesse (1999), 14 'Die stabilisierende und rationalisierende Wirkung der Verfassung wird verstärkt, wenn die Verfassung geschriebene Verfassung ist'.

cracy, some 'hard-wired' constitutional issues can change only through formal constitutional amendment.[103] With regard to the contemporary US, Levinson reported that formal constitutional frames may be an 'unsurpassed guide' and 'determinant' of institutional behavior.[104] Voermans' comparative enquiry suggested that formal constitutional rules may even generate so much stability that they create what he calls 'constitutional reserves'; that is, issues that can only be changed by way of formal constitutional amendment.[105] In the Netherlands, for example, the procedure for appointing mayors cannot be reformed before it is taken out the formal constitution – or 'de-constitutionalized', as commentators have referred to the operation.[106] It is true that 'the force of law' is hard to measure,[107] but presumably we should anticipate that the supremacy and autonomy of a formal constitution may be favored through its written form.[108] Without necessarily assuming that 'plain text is the Man of Steel',[109] we probably cannot accurately understand how informal constitutional change takes place if we ignore the fact that the special status and written form of a master constitutional text might make a difference.

A closely related objection against taking a common-law perspective is that it does not enable us to (fully) account for the significance of authoritative sources of changing the constitution. Indeed, in the common-law view, the question of whether changes can be traced back to an authoritative or canonical source of constitutional change is inconsequential. The only changes it recognizes as constitutional change are those that can be traced in the actual evolution of institutional practices. Indeed, relying on a common-law view on constitutional change, Strauss has argued that formal constitutional amendments are 'irrelevant'.[110] He observed that, in the American context, formal constitutional amendments have often achieved nothing more than ratifying changes that had already taken place without the help of an amendment and that, when formal amendments were adopted even though society had not changed, they were often systematically evaded and had little effect until society had caught up with the aspirations of the amendment.[111] With regard to the American constitutional order, Strauss provocatively asserted that it

103 Levinson (2006), 29.
104 Levinson (2012), 6.
105 Voermans (2009). See also Levinson (2012), 342.
106 See: Parlement & Politiek, Deconstitutionalisering Kroonbenoeming, at: https://www.parlement.com/id/vhnnmt7jxosh/deconstitutionalisering_kroonbenoeming (accessed 19-4-2017).
107 Although Elkins, Ginsburg and Melton provide some suggestive empirical evidence for the potential force of formal constitutional norms. See: Elkins, Ginsburg and Melton 2009, p. 53–54.
108 Möllers (2007), 187.
109 Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 (1996) (Souter J., dissenting). Quoted by Griffin (2016), 13.
110 Strauss (2000).
111 Ibid, 1459.

'would look little different if the formal amendment process did not exist'.[112] Taking a common-law view, Posner and Vermeule made a similar point about the relevance of authoritative sources of constitutional change in general. They argued that the central mechanisms of constitutional change are not formal amendments, judicial interpretations, or important ordinary statutes, but are instead what they called 'constitutional showdowns'; that is, 'episodes of conflict between institutions over the distribution of policymaking authority'.[113]

Authors such as Strauss and Posner and Vermeule may be praised for putting the importance of authoritative sources of constitutional change into perspective. However, we may criticize them for pushing their practice-based argument too far. Even if they are correct in claiming that informal mechanisms of change may do much of the transformative work, this does not necessarily mean that the form constitutional change takes does not matter.[114] Instead, a representative understanding of constitutional change should appreciate that authoritative sources of changing the constitution may be essential elements of a particular narrative of constitutional change.[115] As Möllers reminded us, formalizing informal constitutional change may favor – and entrench, I would add – a change's supreme and autonomous status.[116] Indeed, even a well-established and widely recognized unwritten constitutional rule could not restrain President Roosevelt from assuming a third term in 1940: it ultimately took a formal constitutional amendment to raise the two-term limit for election and overall time of service for the office of President of the United States beyond all doubt. In the Dutch context, to give another example, it is pretty clear that the Parliamentary legislator cannot introduce a binding referendum without foregoing constitutional revision.[117] Moreover, it is widely recognized that the authoritative interpretations of the Court of Justice of the European Union (CJEU) played an essential part in the constitutionalization of the European Union.[118] For example, it is unlikely that, in establishing the principles of supremacy[119] and direct effect[120] non-authoritative processes of change could have done all the work. Besides that, even when a particular formal constitutional amendment or other authoritative source of

112 Ibid, 1505.
113 Posner and Vermeule (2010), 67.
114 Denning and Vile (2002), 247.
115 Ibid, 247 et seq.
116 Möllers (2007), 186.
117 Voermans (2009), 96. See also Zippelius & Würtenberger (2007), 101.
118 Claiming to preserve the rule of law, the CJEU has developed principles of a constitutional nature as part of EU law, such as direct effect, supremacy, and state liability in damages. When they act in the sphere of EU law, EU institutions and Member States are bound by these principles. See: Craig and de Burca (2011), 63.
119 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
120 Case C-26/62 *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

changing the constitution has had no immediate transformative effect, it may still have been of significance. At the very least, such an amendment may have changed the normative framework against which reality can be reviewed.[121] Furthermore, as Jacobsohn suggested, the 'disharmony' it may have created between the ideal embodied by the (new) text and the actual may also be a provocation for real-world change in the longer run.[122]

A final objection to taking a common-law perspective on constitutional change is that it does not enable us to distinguish with sufficient precision between constitutional change – that is, change that has implications for the meaning of the constitutional text – and non-constitutional change – that is, change that should be considered part of the ordinary ebb and flow of legal and socio-political developments. By understanding constitutional change as an exclusively empirical phenomenon, authors like Llewellyn, Jellinek, and Strauss have provided us with a way to reveal the evolution of practices and understandings beyond the constitutional text and authoritative sources of changing the constitution. However, by relying too heavily on practice, they have left us with no adequate basis for distinguishing between ordinary changes in governance or unjustifiable change, on the one hand, and informal change that has a more fundamental nature, on the other.[123] Indeed, their practice-based conception of constitutional change does not allow us to distinguish between fact and norm.[124] Jellinek in particular gives no concrete clues for how to identify informal constitutional change. He seems to have been stranded in the empirical domain when he found that, when constitutional change takes place, 'law and fact, otherwise kept strictly separate, merge into one another.'[125] Llewellyn suggested that a practice may be designated constitutional if it (1) exists, which includes 'highly probable continuance' and felt importance; and (2) has constitutional function.[126] However, Llewellyn did not specify what a 'constitutional function' exactly entails. Strauss, in his turn, acknowledged the difficulty of distinguishing between changes of an ordinary kind and 'constitutional' change.[127] However, his suggestion that we should draw this distinction by identifying 'the kinds of developments that an untutored reader of the Constitution would expect to be accompanied by a change in the text' hardly provides an adequate solution because in most cases it is simply impossible to determine with sufficient precision what an 'untutored reader' of the Constitution would think – if *the* untutored reader would be identifiable at all.[128] The fact of the matter is that, in the common-

121 Möllers (2007), 194.
122 Jacobsohn (2010), 351.
123 Griffin (2016), 11.
124 Loughlin (2009), 220.
125 Quoted in Jacobson and Schlink (2000), 46.
126 Llewellyn 1934, 28.
127 Strauss (2001), 1469.
128 Ibid, 1469.

law view, In the historical institutionalism view, then, informal constitutional change has occurred where, within a particular constitutional order, the evolution of institutional practices and understandings has modified the normative content of one or more formal constitutional norms, without the wording of the formal constitution having been amended before these modifications took effect.any social or political change could potentially be regarded constitutional change. It ultimately leaves us with an 'undifferentiated soup', as Griffin puts it, of constantly evolving practices that have no real relationship with the more permanent formal constitutional norms under which they exist.[129]

Thus, although a common-law perspective can be very helpful in accounting for constitutional developments that have occurred outside the constitutional text or authoritative sources of changing the constitution, it ultimately does not enable us to adequately describe and explain how and when political and legal developments outside the formal amendment procedure change the meaning of written constitutional norms.

2.4 The historical institutionalism perspective

As should now be clear, the problem is that both the legal-positivist perspective and the common-law perspective enable us to comprehend only part of the phenomenon of informal constitutional change. In short, while the legal-positivist approach can be helpful in describing and explaining the evolution of the 'constitutional plan', as intended by the constitutional legislator and authoritative interpreters of the formal constitution, it does not enable us to account for constitutional change that has not shown up on the face of authoritative sources of changing the constitution. On the other hand, taking a common-law perspective would allow us to reveal how the evolution of institutional practices and understandings – 'constitutional reality' – can change the meaning of formal constitutional norms, but this perspective tends to ignore the relative firmness of authority such norms may have. So how can we acquire a full understanding?

2.4.1 Understanding how constitutions change

One possible solution is to connect both perspectives by taking what we may call a 'historical institutionalism'[130] view.[131] The historical institutionalism view does not accept the (legal-positivist) idea that a formal constitution can only change through designated routes, and does not acknowledge (as com-

129 Griffin (2016), 11.
130 I have derived this term from Hirschl (2014), 158.
131 See e.g., Becker and Kersten (2016), Dau-Lin (1932), Griffin (2006) and Griffin (2016).

mon-law constitutionalism does) that the meaning of formal constitutional norms change whenever institutional practices change. Instead, it draws upon the proposition that in generating meaning, the master constitutional text and the institutional context in which this text is embedded are interconnected (and indeed interdependent[132]) through time.[133] The historical institutionalism view presupposes, in other words, that a nation's written constitution and its actual institutional practices and understandings form a single system – a 'constitution order', if you will – that is composed of a dynamic interplay between the 'ought' of formal constitutional precepts and the 'is' of legal and socio-political realities.[134]

On one hand, the historical institutionalism view relies on the claim that the normative meaning of formal constitutional norms may have a certain firmness of authority. It recognizes that if constitutional reality no longer coincides with the precepts of the formal constitution, this does not necessarily imply that the normative content of these precepts (immediately) changes. To the contrary, in the historical institutionalism view, the tension[135] (or 'conflict'[136] or 'disharmony'[137]) between formal constitutional norms and a constitutional reality that has become incongruent with these norms may even impel constitutional actors to launch an effort to force reality in line with the constitutional plan (again). At the same time, on the other hand, the historical institutionalism view presupposes that evolving institutional understandings and practices – whatever legal or non-legal form they take – may also call into question the meaning of formal constitutional norms without new constitutional writing.

Therefore, in describing and explaining how constitutions change informally, the historical institutionalism perspective focuses on the evolution of what we may call the 'institutional constitution':[138] that is, the formal constitution in relation to the institutional context in which it is embedded. In the historical institutionalism view, then, informal constitutional change has

132 Maurer (2007), 27. 'Das Verfassungsrecht ist auf Verwirklichung, auf Anwendung und Umsetzung in der Praxis, angewiesen, wenn seine Regelungen nicht ein wertloses stuck Papier bleiben sollen. Andererseits wird das politische Leben und damit die Verfassungswirklichkeit (auch) durch das Verfassungsrecht bestimmt und geprägt.' See also: Zippelius and Würtenberger (2005), 66–67 and Dau-Lin (1932), 18.

133 Harris illustrated these proposition in terms of 'interplay' between the 'Constitution' with a large 'C' and the 'constitution' with a small 'c'; the constitutional text and the substantive understandings of the polity: 'Both have ordered form, and they are both capable of generating meaning through rigorous explanation. Their relationship can be summarized by the metaphor of a capital printed 'C' and a small script 'c' juxtaposed.' See: Harris (1993), xiii.

134 Loughlin (2009), 310–311.

135 Dau-Lin (1932), 18. Loughlin (2009), 232.

136 Griffin (2016), 19.

137 Jacobsohn (2010), ch. 1.

138 I have derived this term from Amar (2012), 333 *et seq*.

occurred where, within a particular constitutional order, the evolution of institutional practices and understandings has modified the normative content of one or more formal constitutional norms, without the wording of the formal constitution having been amended before these modifications took effect.

2.4.2 Understanding when constitutions change

The question then remains how we can identify informal constitutional change. How to determine, in the absence of formal constitutional amendment, when institutional developments have consequences for the meaning of formal constitutional norms? The pioneering work of the Chinese constitutionalist Dau-lin arguably exemplifies that taking a historical institutionalism view does not automatically allow us to distinguish with sufficient accuracy between institutional developments that have implications for the meaning of formal constitutional norms and institutional developments that do not affect the written constitution.[139] True, other than common-law constitutionalists, in understanding constitutional change, Dau-Lin seems to have recognized the significance a written constitution may have. But by only stating *that* the evolution of constitutional reality may call into question the meaning of formal constitutional norms – but not *when* this happens – he also ultimately had no methodology to distinguish between constitutional and non-constitutional change. How to fill this void?

A possible way to tackle the problem of identification is to incorporate the concepts of 'interpretation' and 'constitutional convention' in our historical institutionalism perspective on informal constitutional change.[140] We should anticipate that not every institutional development that may have implications for the normative meaning of formal constitutional norms unequivocally takes one of these forms. However, using the lenses of interpretation and constitutional convention may allow us to better illuminate when the dynamic between the formal constitution and the institutional context in which this constitution is embedded has consequences for how we must describe and explain the meaning of formal constitutional norms – without neglecting the firmness of authority these norms may have.

2.4.2.1 Constitutional change by interpretation

Let us first consider the idea of informal constitutional change by way of interpretation. In the historical institutionalism view, a (mounting) tension between institutional reality and the precepts of the formal constitution may induce constitutional actors to reinterpret the constitutional text. Indeed, interpretation is, in Harris words:

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139 See: Dau-Lin (1932).
140 Wolff (2000), 99.

> 'the continual process in which the words of the document and the activity of the polity are aligned with one another through methods that reconfirm the conditions of popular authorship and readability which give the constitutional order its validity.'[141]

As Jellinek recognized, in understanding the interaction between formal constitutional norms and constitutional reality, the concept of interpretation is indispensable:

> 'Constitutional precepts are often unclear and elastic, and only the legislature gives them firm meaning through implementing laws, just as only the judge creates clear awareness of the content of the statutes he is to apply. Just as, given the same legal texts, jurisprudence is everywhere based on people's changing views and needs, the same is true of the legislature when it interprets the constitution through specific laws. What seems to be unconstitutional in one period appears constitutional in the following; thus through transformation of its interpretation, the constitution itself experiences transformation. And it is not just the legislature that can produce such transformation; the practice of parliaments, as well as government and judicial authorities, can also do this and in fact does.'[142]

Indeed, Interpretation leaves the text of the constitution unaltered, but it may have profound implications for its meaning. As Grimm confirmed,

> '[t]he interpretation does not give the interpreter any power over the text itself but only over the meaning of the text. However, quite often a change in the meaning is just as important as an amendment to the text itself.'[143]

In some cases, reinterpretation might be inevitable, as no constitutional or political actor can read the constitution without interpreting it. Indeed, if times and circumstances change, the perspective of constitutional actors will inevitably change as well, regardless of how hard they try to be good originalists or textualists. As Barack reminded us, 'Pre-interpretative understanding does not exist'.[144] On the other hand, changing the meaning of a formal constitutional provision by interpretation could also be a more conscious effort to bridge a gap between the constitutional text as originally read and new realities and understandings.

Cypriot constitutionalism provides a good example of informal constitutional change by interpretation.[145] The formal constitution of Cyprus was adopted in 1960 and it envisioned a united Cyprus, governed by Cypriot Turks and Greeks together, and it carefully divided the essential powers of the

141 Harris (1993), 13.
142 Jellinek (2000), 54–55.
143 Grimm (2010), 41.
144 Barak (2005), xv.
145 Markides (2006), I-6 and I-10 *et seq.*

Cypriot state between these ethnic groups. By 1963, however, a major incongruence had already come into being as a result of the secession of the Turks. In order to be able to continue to govern, the Greeks now needed to bring about some significant modifications to the formal constitution. The problem was that any alterations to the constitutional text formally required the consent of the Turks. According to Article 182(3) of the Constitution of Cyprus an amendment can

> '[…] be made by a law passed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.'

Instead, the Greeks decided to adopt the doctrine of 'the law of necessity', also called 'justice of need'. This doctrine, which continues to govern the implementation of the written constitution of Cyprus in practice, authorizes a 'temporary' departure from the letter of the constitutional document as long as Turkish separation exists.

Another good example of informal constitutional change by reinterpretation is the US Supreme Court's effort to change the meaning of the Fourteenth Amendment. As discussed earlier, in 1896, the US Supreme Court confirmed that the practice of having 'equal but separate' accommodations for the 'white and colored races' in American society was constitutional.[146] However, in the 1954 school segregation case Brown vs. Board of Education, the Supreme Court changed its mind and ruled that separate educational facilities were 'inherently unequal' and thus unconstitutional.[147]

Again, we should perhaps bear in mind that differently prescribed delegations of authority can have significant implications for the results of constitutional interpretations. The interpretation of an average German citizen will usually not have the same consequences for the normative content of the German Basic Law as the interpretations of the German Constitutional Court. But as Murphy reminded us, 'in no constitutional democracy does any single institution have either a monopoly on constitutional interpretation or a guarantee of interpretative supremacy'.[148] For example, the ordinary legislator may change the content of formal constitutional rules by interpretation when it concretizes constitutional provisions. Also, understandings in society regarding the content of formal constitutional provisions may change, without new constitutional writing, what these provisions actually mean.

146 *Plessy v Ferguson* 163 US 537, 540 (1896).
147 *Brown v Board of Education* 347 US 483, 495 (1954).
148 Murphy (2007), 469. See also Wolff (2000), 100.

2.4.2.2 Constitutional change through the formation of conventions

Furthermore, in the historical institutional view, informal constitutional change may take place by way of what have been called 'customs',[149] 'usage,'[150] 'understandings,'[151] 'habits,'[152] 'practices,'[153] 'common-law,'[154] or 'the construction of constitutional norms within the realm of political practice,'[155] which most constitutional scholars now commonly refer to as 'constitutional conventions'.[156] On the one hand, where institutional practices evolve in such a way that they no longer coincide with the formal precepts of the written constitution, constitutional actors may deem such practices 'unconstitutional'. They may even make an effort to force institutional practice in line with the constitutional plan. In any case, in the historical institutionalism view, where institutional practices that deviate from the formal constitution's plan are considered invalid, the normative content of the formal constitution remains unaffected.

On the other hand, institutional practices that do not coincide with the plan of the master constitutional text may become widely followed and generally accepted standards of conduct, and thus fall into the pattern of a constitutional convention. Indeed, in Wheare's definition, constitutional conventions are binding rules of behavior 'accepted as obligatory by those concerned in the working of the constitution'[157] or, in Philips' words, 'rules of political practice which are regarded as binding by those to whom they concern'.[158] Where these constitutional conventions concern the subject matter of the formal constitution, they may have important consequences for its normative content, even where constitutional conventions do not show on the face of its text. As Kelsen noted,

> 'there is no legal possibility of preventing a constitution from being modified by way of custom [i.e. convention], even if the constitution has the character of statutory law, if it is a so-called "written" constitution'.[159]

If we flesh out the classic accounts of constitutional conventions, we may consider that constitutional conventions operate where: (1) in general people act in conformity with the standard of behavior these practices reflect; (2) this

149 Philips (1966), 143. Cited by Barber (2012), 82.
150 Ibid. Cited by Barber (2012), 82.
151 Dicey (1959), 24. Cited by Barber (2012), 82.
152 Ibid. Cited by Barber (2012), 82.
153 Ibid. Cited by Barber (2012), 82.
154 Wolff (2000), 99.
155 Whittington (1999), ch.1.
156 Barber (2012), 82.
157 Wheare (1966), 122.
158 Barber (2012), 83.
159 Kelsen (2007), 260.

standard of behavior is regarded obligatory by those to whom they concern; (3) this standard of behavior is accepted as a valid rule of conduct by a portion, at least, of the community of constitutional actors; and (4) where this standard of conduct is constitutional in nature.[160]

In addition to these four criteria, some constitutionalists who are devoted to the 'critical morality approach' to conventions insist that a rule can only become a (transformative) constitutional convention where there is (5) an adequate reason for constitutional actors to respect the rule.[161] Following Jennings, Albert argued that in order to become a convention, 'a practice must also be rooted in normativity'.[162] Jennings believed that a convention must 'enable the machinery of the state to run more smoothly' and that it must be 'desirable in the circumstances of the constitution'.[163] Also Marshall belonged to the 'critical group' arguing that '[…] conventions are the rules of that the political actors *ought* to feel obligated by, if they have considered the precedents and reasons correctly'.[164]

Should we subscribe to this (fifth) criterion as well? Marshall advocated it because it allows:

> 'critics and commentators to say that although a rule may appear to be widely or even universally accepted as a convention, the conclusions generally drawn from earlier precedents, or the reasons advanced in justification, are mistaken.'[165]

But, like Barber, we could ask whether this really is a benefit.[166] I agree with Barber that it would be odd if constitutional scholars refused to acknowledge that a rule has been widely followed and accepted by constitutional actors is in fact a convention.[167] As Barber warned, if constitutional scholars refused to accept rules that constitutional actors treat as conventions, there would ultimately 'be one set of rules governing the functioning of the constitution, and another set in the writings of constitutional scholars.'[168]

At the same time, Barber encouraged us to not hastily jettison the adequate reason requirement, but to instead think further about what a 'reason' might imply in this context.[169] He helpfully suggested that the adequate reason requirement might induce us to explore three sorts of reasons behind a constitutional convention, which he believed are an indispensable part of a complete

160 Ibid, 83.
161 Barber (2012), 83.
162 Albert (2015), 390.
163 Jennings (1967), 136.
164 Marshall (1984), 10–12.
165 Marshall (1984), 12.
166 Barber (2012), 83.
167 Ibid.
168 Ibid, 84.
169 Ibid.

and satisfying account of this phenomenon. First, the adequate reason requirement might induce a student to provide historical reasons for the existence of a convention and explain how it came to be as it is. Second, it might impel a writer to give a physiological reason for the convention and explain why people follow to the convention. Finally, it might prompt a commentator to give justificatory reasons for the convention, explain why people should adhere to the convention. As Barber suggested,

> 'every operative constitutional convention possesses a "reason" in senses one and two, but need not possess a "reason" in sense three: some conventions may be pointless, or wrong.'[170]

Note in addition that dismissing the normative justification requirement for the formation of constitutional conventions opens the possibility to appreciate that informal constitutional change may not necessarily be 'progress'. That is to say, dismissing the normative justification requirement enables us to recognize that also practices some of us would deem 'illiberal' may assume the form of constitutional conventions and, hence, modify the meaning of formal constitutional norms. Furthermore, dropping the normative justification requirement enables us to reveal – contrary to for example Louglin's lens of 'reflexive constitutionalism'[171] – constitutional dynamics (between texts and contexts) whereby the constitutional text comes to play an increasingly *less* important role in the regulation of the political sphere or whereby such dynamics undermine the stability of the constitutional order. Indeed, commentators may deem such change illegitimate for all kinds of (good) reasons. But where constitutional actors change their behavior in such a way that a new standard of conduct emerges, broadly act in conformity with this standard of conduct and generally accept it as valid, we may recognize that informal constitutional change has occurred, whether we like it or not.

Moreover, Griffin, a prominent researcher of constitutional change, stressed that informal constitutional change is necessarily a 'self-conscious' process.[172] Therefore, Griffin argued, in identifying non-legal informal constitutional change, we 'should take into consideration whether the participants thought constitutional change was going on.'[173] However, there is an argument that this requirement should be dismissed.[174] In the first place, the evolution of constitutional reality is not always 'engineered' and may be a product of the contingency of history. As Fusaro and Oliver reminded us, constitutional changes are not necessarily 'the product of the legitimate authorities in the

170 Barber (2012), 84.
171 Loughlin (2009), 311.
172 Griffin (2006), 20. See also Albert (2016, forthcoming).
173 Ibid.
174 See more elaborately Passchier (2017, forthcoming).

pursuit of relatively transparent institutional strategy.'[175] Rather, constitutional change may also be 'evolutionary' or 'contextual'; that is, the effect of social and economic developments that are outside the (direct) control of constitutional actors.[176] Also, when constitutional actors decide to follow and accept certain precedents, they might not always be (immediately) aware that they are doing something that has implications for the normative content of formal constitutional rules. Even when constitutional actors do consciously try to bring about a constitutional convention, this effort might have different implications for the meaning of the formal constitution than these actors actually intended.

So, constitutional conventions can modify the meaning – though not the text – of formal constitutions in a number of ways. Albert helpfully hypothesized two major methods.[177] First, the formation of constitutional conventions can change the content of a formal constitution by *incorporating* something new into the formal constitution's text, without new writing. Second, a convention can informally *repudiate*, but not formally repeal, something that has been embodied by the text of the constitution. According to Albert, these methods may each manifest themselves in two ways. Where constitutional conventions incorporate something new in the formal constitution, they may either *fill a void* in the constitutional text – in case the subject matter of the constitutional convention is not currently addressed by the text of the constitution – or they may refine and indeed supplement[178] the text of the constitution where the subject matter of the convention was in some way already addressed by the text. Repudiation, then, may occur where a convention creates a void in the constitutional text by effectively disabling a formal constitutional provision,[179] or by substitution,[180] where a convention flatly contradicts the original meaning of formal constitutional rules.

We might refine Albert's scheme by adding that void-creation may occur either where it becomes impossible for state organs to apply and implement certain formal constitutional rules[181] or where formal constitutional norms have lost their validity as a result of long-lasting disuse.[182] This latter subcategory is sometimes also referred to as constitutional change by 'the atrophy of constitutional powers',[183] 'the obsolescence of constitutional norms,'[184] 'disuse,'[185] 'desuetudo,'[186] or 'constitutional desuetude'.[187]

175 Oliver and Fusaro (2012), 407.
176 Zippelius and Würtenberger (2005), 64.
177 Albert (2015a), 391. Dau-Linn (1932).
178 Wheare (1966), 130.
179 See also: Ibid, 123.
180 See also: Dau-Lin (1932), 29
181 Dau-Lin (1932), 25.
182 Wolff (2000), 103.
183 Vermeule (2012).
184 'ein Obsolet-Werden von Verfassungsnormen'. Wolff (2000), 104.

We may add to Albert's scheme that constitutional conventions may transfer powers granted in a constitution from one person or institution to another.[188] Moreover, we may recall the Chinese constitutionalist Dau-Lin's point that, where constitutional conventions regulate something that was not originally addressed by the original constitutional plan, they do not necessarily modify one specific provision, but they can also reshape the meaning of several formal constitution provisions or the entire formal constitution read in conjunction.[189]

As Albert stressed, making categories of informal constitutional change by convention – void-filling and refinement, void-creation and substitution – does not necessarily provide a comprehensive reflection of how constitutional conventions can modify the meaning of formal constitutional norms.[190] They may help us to better explain this phenomenon, not give a definitive account.

2.4.3 Advantages of the historical institutionalism perspective

Taking a historical institutionalism perspective on informal constitutional change has at least three important advantages over a legal-positivist or common-law perspective.

Firstly, a historical institutionalism perspective allows us to recognize that formal constitutional norms may have a certain firmness of authority, while also acknowledging that multiple mechanisms of change – legal and non-legal, authoritative and non-authoritative – are capable of becoming a mechanism of changing the normative content of the written constitution. On one hand, this perspective makes it possible to recognize situations in which constitutional reality deviates from the formal constitution, but the formal constitutions still retains its original meaning (or meaning at time X in the past before constitutional reality changed) because constitutional actors generally retain their original understanding and do not, at least not in large numbers, accept the validity of the deviating practice or understanding. Indeed, this situation occurs, for example, each time constitutional actors decide to accept and comply with a court decision that has declared certain pieces of legislation or government practices unconstitutional. It also occurs when constitutional actors at some point figure that a certain practice cannot endure before the written constitution is being amended. In the Netherlands, for example, the possibility for municipalities to hold referenda about the appointment of

185 'Wandlung der Verfassung durch Nichtausübung staatlicher Machtbefugnisse'. Jellinek (1906), 34 et seq.
186 Kelsen (2007), 119.
187 Albert (2015a).
188 Wheare (1966), 127.
189 Dau-Linn (1932), 20.
190 Albert (2015a), 391.

mayors – which are in effect a kind of informal mayoral elections – can only be reinstated after the text of the Dutch constitution has been amended.[191]

On the other hand, the historical institutionalism view enables us to appreciate that multiple mechanisms may take the form of interpretations or effect changes in the institutional context of the formal constitution, which may in turn be accepted by the community of constitutional actors as valid and binding standards for conduct and thus have implications for the normative content of formal constitutional norms. Take for example the implications of the introduction of the Euro for The Netherlands' written constitution. Article 106 of the Dutch Constitution provides that 'The monetary system shall be regulated by Act of Parliament'. This provision was originally included by the constitutional legislator to put up a barrier against rashly swapping the Dutch Guilder for a European currency.[192] However, taking a historical institutionalism approach, we may recognize that Article 106 became largely irrelevant and lost most of its meaning after the introduction of the Euro, even though the Euro was introduced without formal constitutional amendment. Indeed, as Janse de Jonge points out, Article 106 does not protect the Guilder anymore nor has it blocked the introduction of the Euro.[193]

Moreover, taking a historical institutionalism view, we can for instance recognize that the multifarious dynamics of modern democratic politics have in some countries led to reinterpretations – or indeed 'iterations'[194] – of formal constitutional norms.[195] Take again an example from the Netherlands. Since 1848 the Dutch Constitution has provided that the government can prematurely – that is, before the next regular election are scheduled – dissolve each one of the Houses of Parliament and trigger new parliamentary elections.[196] Originally, this rule functioned as a means for the government to refer a political conflict between the government and Parliament to the electorate.[197] However, while during the late 19th and 20th centuries the relation between the government and Parliament changed, the governmental power to dissolve Parliament changed as well. In the modern context, in which the government can, both as a legal and practical matter, not function without the confidence of Parliament, Parliament acquired the primary say over its own premature dissolution.[198] As Van der Hoeven commented,

191 See: Parlement & Politiek, Benoemde/gekozen burgemeester, at: https://www.parlement.com/id/vhnnmt7jydzb/benoemde_gekozen_burgemeester (accessed 19-4-2017).
192 Fleuren (2015), 202-203.
193 Janse de Jonge (2017).
194 Hirsch Ballin and Van Vugt following Benhabib (2006), p. 48. See: Hirsch Ballin and Van Vugt (2014), 128.
195 Hirsch Ballin and Van Vugt (2014), 128
196 Article 64 Constitution of the Netherlands.
197 Hirsch Ballin and Van Vugt (2014), 121.
198 Ibid, 117.

> 'although the constitutional text regarding the dissolution of Parliament has remained unaltered textually, the meaning of dissolution has actually changed legally'.[199]

A second good reason for taking a cross-disciplinary perspective is that it lets us anticipate the existence of constitutional continuities and discontinuities over time. It allows us to acknowledge, first of all, that formal constitutional rules may have stabilized constitutional development, even to such an extent that constitutional actors would generally only accept the validity of certain changes if these changes where brought about by way of a formal constitutional amendment. For example, by taking a historical institutionalism view we can observe that although the Dutch formal constitution has not stood in the way of significant informal constitutional change, such as changes associated with Europeanization and the rise of the welfare state, it has also ensured that the Netherlands still has a bicameral system and no practice of constitutional review by the judiciary.[200] Especially with regard to the latter issue, it can hardly be denied that this has a lot to do with Article 120 of the Constitution of the Netherlands, which quite clearly stipulates that '[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. In a recent discussion, it also became clear that it would presumably be impossible to introduce the possibility to hold a referendum about issues addressed by the Dutch constitutional text – even a non-binding advisory one – without formally amending the amendment procedure of the formal constitution.[201]

At the same time, the historical institutionalism perspective allows us to understand that formal constitutional norms may also gradually change. Interpretations may incrementally change, and practices that do not coincide with the formal constitution's plan may gradually attain persuasive and then obligatory force.[202] As Heller notes:

> 'A power that, while for a time existing merely as a matter of brute fact and though experienced as unjust, [may] succeed […] in winning for itself, bit by bit, the belief in its justification.'[203]

Consider the following example from Ukraine. Article 2 of the Ukrainian Constitution declares that the 'territory of Ukraine within its present border is indivisible and inviolable'. Article 133 states that

199 Van der Hoeven (1958), 155.
200 Cf. Passchier (2015).
201 Passchier and Voermans (2016).
202 Wheare (1966), 122.
203 Heller (1996), 1180.

> '[t]he system of the administrative and territorial structure of Ukraine is composed of the Autonomous Republic of Crimea, oblasts, districts, cities, city districts, settlements and villages'.

Article 134 provides that the

> 'Autonomous Republic of Crimea is an inseparable constituent part of Ukraine and decides on the issues ascribed to its competence within the limits of authority determined by the Constitution of Ukraine'.

Finally, Article 158 holds that the

> 'Constitution of Ukraine shall not be amended, if the amendments […] are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine'.

These articles designate the territorial integrity of Ukraine as an eternal, unamendable, constitutional principle.

However, on March 6, 2014, Russian special forces backed by pro-Russian separatists took over major governmental institutions and military bases on the Crimean peninsula. On March 11, 2014, the parliament of the 'Autonomous Republic of Crimea' and the Sevastopol City Council adopted a 'Declaration of Independence', which stated that Crimea would announce an independent and sovereign state with a republican order '[i]f a decision to become part of Russia is made at the referendum of the March 16, 2014'.[204] The declaration also said that

> '[i]f the referendum brings the respective results, Republic of Crimea as an independent and sovereign state will turn to the Russian Federation with the proposition to accept the Republic of Crimea on the basis of a respective interstate treaty into the Russian Federation as a new constituent entity of the Russian Federation'.[205]

According to the declaration's plan, on March 16 Crimea's local authorities held a referendum asking the local population whether they wanted to join Russia as a federal subject, or whether they wanted to restore the 1992 Crimean constitution and Crimea's status as a part of Ukraine. A day later, the Crimean authorities announced that 97 per cent of the voters had opted for the former option. Following the referendum, Russia recognized the Republic of Crimea as a sovereign state and accepted Crimea into the Russian federation.

These real-world developments – or 'brute facts', to use Heller's term – are obviously at odds with the unamendable commitment to territorial integrity

204 'Resolution On the Independence of Crimea', March 17, 2014. https://www.rt.com/news/crimea-resolution-independence-ukraine-346/ (accessed 21-4-2017).

205 Ibid.

in Ukraine's written constitution.[206] Accordingly, Ukrainian constitutional actors have refused to recognize the constitutionality of the new situation.[207] The government has declared the Crimean referendum a violation of the laws and the Constitution. The Parliament issued a statement demanding that the Crimean Parliament immediately revise its resolution to comply with the national law. The Ukrainian Constitutional Court has ruled that the Crimean referendum was against the Constitution. Ukraine's minister of justice, ombudsman and chair of the Council of Judges all publicly condemned the Crimean referendum as unconstitutional.

Although it seems unlikely that these key constitutional actors will change their view on the situation any time soon, we may appreciate that, in the future, the *de facto* independence of Crimea may win for itself, bit by bit – to paraphrase Heller – the belief in its justification. At least within the current constitutional order, the Ukrainian constitutional legislator cannot adapt the constitutional text to new circumstances. Nevertheless, in a not entirely unrealistic scenario, an increasing number of Ukrainian constitutional actors might gradually reconcile to the fact that Ukraine has 'lost' the Crimea and stop maintaining that this situation is unjustifiable or even accept the validity of the Crimean declaration of independence and the outcome of the referendum. Moreover, at the same time, the situation may induce constitutional actors to align the constitutional text and the new situation with one another by reinterpreting Ukraine's constitutional commitment to territorial integrity. Taking a historical institutionalism view, we may recognize that if such scenarios would unfold, the meaning of the provisions of the Ukrainian Constitution that embody the county's constitutional commitment to territorial integrity have changed, even though these changes will not show on the face of the constitutional text.

Moreover, chapters 3 and 4 of this study explore examples of gradual informal constitutional change. Chapter 3 will show that most Japanese constitutional actors initially considered the government policy to establish and maintain the Self Defense Forces to be unconstitutional, in light of Japan's pacifist constitution. Many believed that Japan must formally amend Article 9 of its constitution before re-armament would be legally valid.[208] However, over time, without new constitutional writing, an increasingly large proportion of constitutional actors accepted Japan's right to have a military for the purpose of self-defense. Taking a historical institutionalism approach we may recognize that these developments have affected, bit by bit, the meaning of Article 9.

206 Roznai and Suteu (2015), 545.

207 Bilych et al. (2014), 'The Crisis in Ukraine: Its legal Dimensions', Razom, 21. http://www.usukraine.org/pdf/The-Crisis-in-Ukraine-Its-Legal-Dimensions.pdf (accessed 22-4-2017).

208 Which stipulates: 'Land, sea and air forces, as well as other war potential, will never be maintained."

Chapter 4 provides an example of gradual informal constitutional change. As this chapter will explain, the US Constitution originally divided the war powers between the president and Congress. However, during the Cold War and the War on Terror, the President acquired an increasingly independent, powerful position in the field of national security. Until recently, Congress explicitly contested the validity of the modern allocation of war powers. It held that the US Constitution's Declaration of War Clause[209] required the President to obtain Congressional authorization before using military force. However, recent events have indicated that Congress reconciled itself to the fact that it has become a junior partner in the field of national security. What's more, it now even seems to expect the president to take lead in dealing with matter of war and peace. Also in this case, we may, taking a historical institutionalism perspective, acknowledge that developments outside the formal constitutional amendment procedure have little by little altered the meaning of the US Constitution's War Clauses.

A last advantage of the historical institutionalism perspective is that it lets us adequately distinguish between constitutional change and non-constitutional change. By focusing on the interplay between the normative content of the formal constitution and the evolution of constitutional reality, it evades difficult discussion about the question of which changes are of a constitutional or fundamental 'nature' or 'magnitude' and which changes are to be considered ordinary, or in any case not part of the 'constitution'. As Griffin cautioned us, we should anticipate that it may be hard in some countries to draw a clear dividing line between constitutional rules that are 'in' the formal constitution and rules that are 'outside' the formal constitution, especially in places (such as the US) that do not have an established understanding of what counts as an extra-constitutional rule or practice.[210] However, by focusing on changes that may have implications for the constitutional text – and indeed adopt a 'narrow' understanding of informal constitutional change[211] – we do not have to worry that every legal and socio-political practice immediately becomes constitutional. Moreover, by incorporating the concepts of interpretation and constitutional convention we have enabled ourselves to indicate when the evolution of the (empirical) 'is' affects the (normative) 'ought' without blurring the important distinction between the two.

2.5 Conclusion

The historical institutionalism perspective provides the most comprehensive understanding of the phenomenon of informal constitutional change (see

209 Article 1(8) US Constitution.
210 Griffin (2006), 9.
211 Wolff (2000), 98. For a 'broad understanding' see: Young (2005).

Figure 1 below). By focusing on the dynamic relationship between formal constitutional rules and constitutional reality, we can appreciate the relative firmness of a master constitutional text, at the same time as recognizing that the import of formal constitutional precepts can only be meaningfully described and explained by connecting these precepts to the legal and socio-political forces that have shaped them over time.

In the historical institutionalism view, then, informal constitutional change has occurred where, within a particular constitutional order, the evolution of institutional practices and understandings has modified the normative content of one or more formal constitutional norms, without the wording of the formal constitution having been amended before these modifications took effect. Such change may occur in two main ways: by interpretation and by the formation of constitutional conventions. Informal constitutional change by interpretation takes place when constitutional actors (the judiciary and others) change the way they apply the constitutional text to real-world situations; that is, when they consider something that did not seem to coincide with the constitutional precepts in one period coincides with these precepts in the following, constitutional, and political actors change the substantive content of the formal constitution through interpretation. Informal constitutional change by the formation of constitutional conventions occurs when practices that are not fully congruent with the original plan of the formal constitution become widely followed and accepted standards of conduct for constitutional actors.

Taking a historical institutional perspective has at least three advantages compared to taking legal-positivist or common-law perspectives. Firstly, it enables us to recognize that formal constitutional rules may have an independent meaning to a certain level, while at the same time revealing that multiple mechanisms of change – legal and non-legal, authoritative and non-authoritative – are capable of becoming a mechanism of changing the constitution. Secondly, it allows us to anticipate the existence of constitutional continuities and discontinuities over time. Thirdly, it enables us to adequately distinguish between constitutional change and non-constitutional change.

However, this does not mean that taking a historical institutionalism perspective does not come without any challenges. In the first place, it is presumably not always easy to identify changing interpretations and the formation of constitutional conventions. The question remains as to whether enough constitutional actors of note have accepted a certain reinterpretation or a practice that does not coincide with the original meaning of the formal constitution as a valid standard of conduct. The constitutional consequences of authoritative actors, such as constitutional courts, changing their constitutional views are, predictably, quite readily recognized by most other constitutional actors.[212] However, we should anticipate that the constitutional con-

212 Zippelius and Würtenberger (2005), 65.

sequence of informal changes that occur outside court rooms may remain contested for quite some time.[213]

Another difficulty that we should anticipate in identifying informal constitutional change is that (re-)interpretation or the formation of constitutional conventions does not always take place explicitly. Rather, informal constitutional change appears something that commonly occurs silently; that is, without constitutional actors explicitly referencing to their earlier understandings.[214] As Wolff explained, informal constitutional change does not necessarily bear the character of open renewal in the sense that it typically comes about with a clear separation being made between what has hitherto been said, and what now applies. Instead, it appears that the results of reinterpretations and constitutional conventions are often claimed to be timelessly correct.[215]

Finally, it may be helpful to expect that informal constitutional change does not presuppose a certain period of time.[216] Indeed, in hearkening whether, how, and to what extent real-world institutional developments in the area the constitutional text addresses have had implications for the normative content of this text, it may be wise to remember that the '[t]he owl of Minerva spreads its wings only with the falling of the dusk', as the philosopher G.W.F. Hegel put it.[217]

213 Gerken (2007), 937.
214 Wolff (2000), 99.
215 Ibid.
216 Ibid.
217 The full quote is: 'Wenn die Philospohie ihr Grau in Grau malt, dann ist eine Gestalt des Lebens alt geworden, und mit Grau in Grau läßt sie sich nicht verjüngen, sondern nur erkennen; die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug'. Hegel (1995), 28.

Table 1: Summary of chapter 2

Perspective	*Focus*	*Presuppositions*	*Method*	*Advantages*	*Disadvantages*
Legal-positivist	Formal constitution and limited number of authoritative sources of changing the constitution (the 'constitutional plan')	· Formal constitutional rules have independent meaning · Formal constitutional rules can only change in a limited number of ways	Legal-positivist	· Makes it possible to describe and explain the evolution of the 'constitutional plan' as intended by the constitutional legislator and authoritative interpreters · Makes it possible to make clear distinction between constitutional/non-constitutional change	· Does not allow accounting for constitutional discontinuities · May lead to overestimations of a formal constitution's firmness of authority and consequences of the constitutional text and authoritative sources of changing the constitution · Does not enable accounting for constitutional change outside authoritative sources
Common-law	Evolution of institutional practices (the 'constitutional reality')	· Meaning of formal constitutional rules fully depends on practices · Whenever constitutional reality changes, meaning of formal constitutional rules changes as well	Common-law	· Makes it possible to describe and explain the evolution of the institutional reality 'behind' the formal constitution · Allows accounting for constitutional discontinuities	· Does not allow accounting for constitutional continuities · May lead to underestimations of a constitution's firmness of authority and consequences of a constitutional text · Ultimately provides no adequate basis for distinguishing between constitutional non-constitutional change
Historical-institutionalism	The evolution of the relation between the formal constitution and the institutional reality in which this constitution is embedded (the 'institutional constitution')	· Formal constitutional rules and constitutional reality are interconnected through time	Historical-institutional	· Makes it possible to account for multiple mechanisms of changing the constitution (legal and non-legal, authoritative and non-authoritative) · Allows accounting for constitutional continuities and discontinuities over time · Allows distinction between constitutional and non-constitutional change	· Only permits identification of informal constitutional change in retrospect

3 Japan's pacifist constitution and national defense

> 'The pacifism and national defense issue is the most controversial issue created by the Japanese Constitution.'
>
> Shigenori Matsui[1]

3.1 Introduction

As one of the few written constitutions in the world,[2] the Constitution of Japan (1947) includes a pacifism clause. Article 9 of the Japanese constitution states that the Japanese people 'forever renounce war as a sovereign right of the nation' and also renounce the right to 'use force as means of settling international disputes.' Section 2 adds that, in order to accomplish these aims, 'land, sea and air forces, as well as other war potential, will never be maintained.' It ends by saying that 'the right of belligerency of the state will not be recognized.' In the past seventy years, political actors have tried to revise Article 9 a number of times, yet its text has remained unaltered. Among the people of Japan, Article 9 has enjoyed significant support from the moment of its adoption until today.[3]

Meanwhile, in reality, Japan has developed an advanced defense policy. Already in the early 1950s, Japan established the Self-Defense Forces (SDF). Referring to the SDF, The Japanese government has always carefully evaded the words 'military' or 'Armed Forces', but international observers have counted the SDF among the five most powerful militaries in the world for at least three decades.[4] Furthermore, since the early 1990s, the SDF have participated in international military operations. A recent policy shift should allow Japan to play an (even more) pro-active role on the international military stage.[5]

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1 Matsui (2011), 254.
2 Moore and Robinson (2002), 307.
3 Kyodo, 'Japanese sharply divided over revising Article 9 amid regional security threats, poll finds', *The Japan Times*, 30 April 2017.
4 Stockholm International Peace Research Institute, 'SIPRI Fact Sheet April 2013'. http://books.sipri.org/files/FS/SIPRIFS1304.pdf
5 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014. http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf

The tension that has mounted between the constitutional plan of Article 9 and the real-world institutional developments that have taken place is hard to overlook: the so-called 'pacifism and defense issue' is known as the most controversial issue of Japanese constitutionalism.[6] But how exactly should we understand this strained connection? How can the relationship between a constitutional precept like Article 9 of the Japanese constitution and the actual evolution of the Japanese defense policy best be understood?

3.1.1 Perspectives on pacifism and defense

Scholars from around the world have tried to answer this question by taking legal-positivist views.[7] They have presupposed that Article 9 – as formal constitutional norm – has an autonomous meaning, which can only change through formal constitutional amendment and judicial interpretation: as long as the Japanese constitutional legislator and the judiciary remain silent, Article 9 retains its original meaning; every real-world development that deviates from this meaning violates Japanese constitutional law. Indeed, attempts to amend Article 9 have failed. And in the (few) court-cases in which the constitutionality of the SDF and their activities were challenged, the courts refused to hear the merits, arguing that questions surrounding the national defense and pacifism are better dealt with by the political process.[8] Therefore, the ultimate consequence of this thinking is that Japan, due to Article 9 and the absence of formal constitutional amendment and permissive judicial decisions, should disband the SDF.[9]

Taking a legal-doctrinal perspective has advantages and disadvantages. On the one hand, taking a legal-doctrinal perspective can be very helpful in making a normative case, for example before a court. On the other hand, it hardly enables us to adequately appreciate what import Article 9 has really had in the real world or what the implications of defense shifts have been as to how we should describe and explain the material meaning of Japan's constitutional commitment to pacifism. It seems unlikely that Japan will indeed disband the SDF anytime soon. And whoever maintains, awaiting a formal constitutional amendment or judicial reinterpretation, that the meaning of Article 9 has remained unaltered, seems to run the risk of providing an overly formalistic account of the meaning of Japanese constitutional pacifism across time.

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6 Matsui (2011), 254.

7 E.g. Martin (2007). Jeff Kingston, 'Abe hijacks democracy, undermines the constitution', *The Japan Times*, 21 June 2014. Craig Martin, ''Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014.

8 Matsui (2011), 243.

9 E.g. Port (2005).

Alternatively, observers of Japanese politics have studied the development pacifism and national defense from a common-law perspective. In describing and explaining constitutional development, the common-law perspective focusses on the evolution of real-world institutional practices and understandings. While this perspective is indispensable in revealing the real mechanisms by which defense shifts have come about, it tends to ignore the fact that, even though a large gap has come into existence between Article 9 and institutional practices and understandings on the ground, Article 9 may have some firmness of authority and determined and marked the evolution of real-world practices and understandings to a significant extent. Indeed, commentators who have taken a common-law perspective have commonly reached the sweeping (and possibly wrong) conclusion that, as a consequence of defense shifts, Article 9 has become irrelevant or even 'died'.[10]

Instead of taking a legal-positivist or common-law perspective, this chapter seeks to understand the evolution of Japanese national defense and pacifism by taking an historical institutionalism view. This cross-disciplinary view focuses on the historical interplay between formal constitutional rules and institutional practices and understanding (see chapter 2). It will enable us, first, to describe the evolution of Japanese national defense policy and then explore what implications this evolution has had for the material meaning of Article 9.

3.1.2 Explanations and implications of textual unresponsiveness

The two remaining sections of this chapter have two aims. The first is to suggest some possible factors that might explain why, despite significant change in the area Article 9 seeks to regulate, this provision has never been subject of formal constitutional amendment. The second is to explore whether and to what extent the alternative processes of change by which defense shifts in Japan have come about have functionally substituted the formal constitutional amendment procedure of the Japanese Constitution.

Understanding the Japanese defense and pacifism issue through the historical institutional lens may shed new light upon the mechanisms that have brought this situation about. It may be particularly relevant at a time when the Japanese government is bringing about another set of sweeping defense reforms without amending Article 9 of the constitution. Moreover, the Japanese pacifism and national defense issue can teach us a great deal about the more general theme of informal constitutional development, including the ways in

10 See e.g. Repeta (2015). Kato, 'Japan's Break With Peace', *New York Times* July 16, 2014. Feffer, 'Is Japan's Peace Constitution Dead'?, *Inter Press Service*, July 2014. Snow, 'The Tragic Death of Japan's Pacifist Brand', *Foreign Policy Focus*, September 29, 2015. Leupp, 'The Death of the 'Pacifist' Constitution: Japan's Return to Its Martial Roots', *Counterpunch*, September 29, 2015.

which law and politics intersect, the significance of rigid constitutional norms, and the consequences that informal constitutional change can have for a constitutional democracy that (supposedly) lives under a written constitution.

3.2 From constitutional pacifism to becoming a 'normal' country again

This section[11] will start by exploring the origins of Japan's constitutional commitments to pacifism. It will then examine how, in the decades after the Second World War, Japan has rearmed by establishing the Self-Defense Force and has grown into one of the largest and most active military powers in the world – without formally amending its written constitution. In conclusion, the section will consider the relationship between this development and the war-renouncing Article 9 of Japan's written constitution.

3.2.1 The birth of Japan's pacifist constitution

In order to trace the origins of Japan's constitutional commitment to pacifism, we must go back to 1945 – the year in which the Second World War in the Pacific ended and in which Japan was placed under the authority of the Allied Powers headed by the Supreme Commander of the Allied Powers (SCAP), the American General Douglas MacArthur. The occupying powers sought to democratize Japan and purported to ensure that Japan would never become a threat to the world as a military power again.[12] To this end, the SCAP, among other things, dismantled the imperial armed forces (in November 1945) and purged all ultra-militarists from governmental positions (in January 1946). Meanwhile, MacArthur gave orders to start major legal reforms, most notably constitutional ones.

It was initially the Japanese government itself that was asked to prepare amendments that would democratize the old Meiji Constitution, but the proposals the government came up with were far too conservative from the viewpoint of the SCAP.[13] On February 3, 1946, MacArthur stated three 'musts' that had to be embodied by the new constitution in response to the government's proposals: popular sovereignty; the dismantling of the feudal system;

11 I published an earlier version (in Dutch) of this section in the Dutch *Journal of Constitutional Law* under the title 'De ontwikkeling van het Japanse pacifisme en defensiebeleid als informele constitutionele verandering' (The development of Japanese pacifism and self-defense as informal constitutional change). See: Passchier 2017a.

12 Matsui (2011), 13.

13 Moore and Robinson (2002), 77.

and – most notable – the renunciation of war.[14] The general expected that if Japan would constitutionally renounce war, other Asian countries might not object to the preservation of the Emperor.[15] The war-renouncing principle was defined as follows:[16]

> 'War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.
> No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.'[17]

MacArthur gave the Japanese government until February 13 to come up with a new draft constitution that would reflect, among the other two 'musts', this war-renouncing principle. Meanwhile, however, the general had secretly decided to come up with a draft himself. On 4 February 1946, he ordered his staff members to make a completely new constitution for Japan. The job was finished in no less than eight days.

On 13 February, the day the government was to present its proposals for amending the old Meiji Constitution, the SCAP instead presented MacArthur's new constitution to the Japanese government.[18] As the story goes, the Japanese government was surprised to see the document.[19] Cabinet members were especially shocked by the war-renouncing provision it included, although the words 'even for preserving its own security' were deleted.[20] Initially, some

14 See: State-War-Navy Coordinating Committee, Reform of Japan (SWNCC-228). http://www.ndl.go.jp/constitution/shiryo/03/059/059_001l.html (accessed 8-2-2017). For the SCAP's three original basic 'musts' in constitutional revision: 'Three basic points stated by the Supreme Commander to be 'musts' in constitutional revision'. www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html (accessed 8-2-2017).

15 MacArthur believed that saving the emperor was essential for a successful implementation of occupation policy. He presumed this measure would sharply reduce the period of Allied control over Japan. See: Koseki (1998), 107.

16 MacArthur later told reporters that this idea was suggested to him by Kijurou Shidehara, the Japanese prime minister at the time. This explanation is contested, however. See: Auer (1990), 173 and Koseki (1998), 82.

17 Quoted in Matsui (2011), 15. See also Koseki (1998), 79.

18 See for an elaborate overview of the events: Moore and Robinson (2002), 7 et seq.

19 Koseki (1998), 99.

20 See, for the 13 February 1946 SCAP draft: Alfred Hussey Papers, Constitution File No. 1, Doc. No. 12
http://www.ndl.go.jp/constitution/e/shiryo/03/076shoshi.html

ministers found the proposal unacceptable.[21] Nevertheless, the Japanese government soon decided to accept the SCAP draft.[22]

In the months thereafter, the Japanese government vigorously defended the new constitution, including the war-renouncing provision, in the Diet.[23] That provision did not meet serious opposition in the Diet.[24] It was only slightly modified: the phrase '[a]spiring sincerely to an international peace based on justice and order' was added to the first paragraph, and the phrase '[i]n order to accomplish the aim of the preceding paragraph'[25] was added to the second paragraph.

After the deliberations in the Diet, the proposal passed the House of Representatives, the House of Peers and the emperor, pursuant to the formal amendment procedure of the old Meiji Constitution.[26] 'The Constitution of Japan' came into force on 3 May 1947.[27] The final version of the war-renouncing provision, now Article 9, stipulates that:

> '(1) 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.
> (2) 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.'[28]

Students of Japanese constitutional law generally agree upon the original meaning of Article 9: it was designed and adopted with the intention of prohibiting Japan from maintaining armed forces for all purposes, including self-defense.[29] Indeed, during the deliberation in the House of Peers, the minister of Constitutional Amendment argued that even though the phrase

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21 Matsui (2011), 236.

22 Between the day of presenting the draft and the day of acceptance, the SCAP attempted to persuade the Japanese government to accept the draft, mainly by using the save-the-emperor argument. However, Koseki noted that it was only later that the Japanese government came to understand the political significance of the SCAP draft. Although the government expressed unanimous approval from the outset, it is unclear to what extent the cabinet members actually understood the SCAP draft when it was accepted. Koseki (1998), 107–108.

23 Matsui (2011), 236.

24 Ibid and Koseki (1998), 193.

25 This amendment is also called the 'Ashida' amendment, after the member of the Diet who proposed it. It was later argued that the Ashida amendment meant to recognize war and war-potential for self-defense. However, according to Koseki, there is no basis for this argument, partly because the records of the discussion of the argument do not show such an intention. Koseki (1998), 207.

26 Article 73 Meiji Constitution.

27 Matsui, *The Constitution of Japan*, p. 13–16.

28 In addition to Article 9, the preamble of the Japanese constitution also emphasizes the commitment never to go to war.

29 Matsui (2011) 237. Koseki (1998), 192 *et seq*. Moore and Robinson (2002), 247–250. See also Port (2005), 142–145.

'even for preserving its own security' was scrapped from section 1, section 2 made it impossible to exercise a right to self-defense. Another minister held that section 1 prohibited self-defense since most of the recent wars had been fought in the name of 'self-defense'.[30]

After the constitutional document was adopted, it became the official interpretation of the government of Japan that 'Japan retained a right of national self-defense in international law but, by virtue of the second paragraph, could not wither wage or maintain an armed force – even for the purpose of national self-defense.'[31] The government's interpretation became generally acknowledged. It was taught at university law schools and other educational institutions throughout Japan.[32] The general public embraced the new constitution, including Article 9. Totally exhausted by the war effort, the people of Japan accepted the Pacifist Clause with open arms.[33]

3.2.2 Rearming Japan

In the first years after adopting its pacifist constitution, Japan did refrain from establishing new armed forces or any organization that could be classified as a military organization. However, from the 1950s on, things gradually started to change. We can distinguish three policy shifts that resulted into to the *de facto* rearmament of Japan: the establishment of the National Police Reserves, the establishment of the National Safety Forces, and the establishment of the SDF.

3.2.2.1 The National Police Reserves

In 1950, when the larger part of the occupying US military force had to leave Japan in order to fight in in the Korean War, General MacArthur, concerned with the defense capability of the island, directed the Japanese government to form a 75,000-man 'National Police Reserves' (NPR).[34] Contrary to what this designation might suggest, the NPR was clearly an armed force from the beginning.[35] The NPR had tanks (called 'special vehicles') and the ranks were filled by former Imperial Japanese Army servicemen, even though they were called 'reserve policemen'.[36]

30 Matsui (2011), 237.
31 Auer (1990), 176.
32 Ibid.
33 Matsui (2011), 238.
34 Japan regained its sovereignty in 1952.
35 The establishment of the NPR is recognized as the beginning of the post-WW2 rearmament of Japan. Matsui (2011), 238.
36 Auer (1990), 177.

The tension between the pacifist precepts of the formal constitution and the newly evolved situation on the ground was immediately apparent. In 1952, a Diet member representing the Japanese Socialist Party (JSP) challenged the constitutionality of the establishment of the NPR directly before the Supreme Court.[37] However, the Court refused to review the challenge. The Japanese government did not address the question of constitutionality. It just continued to stand by its opinion that 'to maintain war potential, even for the purpose of self-defense, would mean rearmament' – and that rearmament 'would necessitate [formal] revision of the constitution.'[38]

3.2.2.2 The National Safety Forces

In 1952, the NPR was reorganized and expanded, following the Mutual Security Treaty[39] Japan had concluded with the United States in 1951.[40] What were now called the 'National Safety Forces' (NSF) had a ground and maritime element (but no air power). Like the NPR, the NSF were highly controversial in light of Japan's constitutional commitment to pacifism from the beginning. This time, however, the government did respond to those who argued that the NSF were unconstitutional. It innovatively asserted that Article 9 only prohibited the maintenance of 'offensive' war potential, to be differentiated from 'defense' potential.[41] More specifically, the government held that the NSF were in accordance with the constitution because they were not capable of waging modern wars and did not form an offensive threat.[42] A few months later, in reply to accusations by the JSP that the NSF were unconstitutional, the Cabinet Legislation Bureau (CLB)[43] – an authoritative interpreter of the Japan-

37 Supreme Court, grand bench, 8 October 1952, 6 *Minshu* 783. Explained by Matsui (2011), 142 and 241.

38 Prime Minister Yoshida quoted by Auer. Auer (1990), 177.

39 Japan–United States Mutual Security Treaty, 8 September 1951.

40 The Treaty was renewed in 1960. Contrary to what its title suggests, the treaty is not a *mutual* security arrangement like the NATO Treaty, for example. Article V of the document states that '[e]ach Party recognizes that an armed attack against either Party in the territories *under the administration of Japan* would be dangerous to its own peace and safety and declares that it would act to meet the common danger in *accordance with its constitutional provisions and processes*' (emphasis added). Since it has been held that the Japanese constitution does not allow for 'collective self-defense', it has been the government's position that the Mutual Security Treaty was based on 'individual self-defense'. The result is that if Japan is attacked, the United States is obliged to come to the aid of Japan, but, in the understanding of the Japanese government, the treaty does not commit Japan to come to the aid of the United States if the opposite scenario would occur. See: Matsui (2011), 248–249.

41 Auer (1990), 177.

42 Ibid.

43 According to the CLB's website, 'the Cabinet Legislation Bureau directly assists the Cabinet on legislative matters. It examines legislative bills, draft Cabinet orders and draft treaties that are to be brought before the Cabinet. It also undertakes the interpretation of laws.' http://www.clb.go.jp/english/index.html (accessed 9-2-2017).

ese Constitution – also changed its stance on the normative content of Article 9, declaring that:

> '[war potential] refers to a force with the equipment and organization capable of conducting modern warfare … Determining what constitutes war potential requires a concrete judgment taking into account the temporal and spatial environment of the country in question … It is neither unconstitutional to maintain capabilities that fall short of war potential nor to utilize these capabilities to defend the nation from direct invasion.'[44]

Two things in this (re)interpretation stand out. First, the CLB held that Article 9 contains a 'modern warfare' standard. This idea was highly controversial and soon to be revised. However, the mere assertion that such a standard existed at all was indeed 'a significant innovation', as Boyd and Samuels put it.[45] Second, the CLB opined that the constitution does not prohibit such a force from being utilized to defend the country 'from direct invasion'. Thus, for the first time, one of the most, if not the single most, authoritative interpreters of the Japanese constitution had asserted that, under the pacifist constitution, even though it is not formally amended, Japan has the possibility to use force as an act of self-defense.

Interestingly, throughout 1952, Prime Minister Yoshida maintained that Japan would not rearm. He continued to insist that 'to rearm we must ask the consent of the people and revise the Constitution.'[46]

3.2.2.3 The Self-Defense Forces and the first 'official' reinterpretation

Finally, in 1954, the Japanese legislator adopted the Self-Defense Forces Act.[47] This Act converted the NSF into the SDF: it established Ground-Self-Defense Force (GSDF), a Maritime-Self-Defense Force (MSDF) and an Air-Self-Defense Force (ASDF).[48] After these measures were brought about, the CLB persuaded the government to render the interpretation of Article 9 more flexible in order to justify the sweeping security shifts under the pacifist constitution. The government agreed, and in December 1954 the CLB, with the consent of the government, changed its 'official' interpretation of Article 9. The CLB held that the maintenance of 'war potential' forbidden by Article 9 Section 2 was any capability that exceeded the 'minimum necessary level' required to protect

44 Nakamura (2001), 99. Quoted by Boyd and Samuels (2005), 7.
45 Boyd and Samuels (2005), 7.
46 Auer (1990), 178.
47 Self-Defense Forces Act (Act No. 165 of 1954).
48 The SDF law was accompanied by a Diet resolution banning the deployment of SDF troops abroad. See: Boyd and Samuels (2005), 23.

Japan from direct attacks.[49] That is, according to the CLB, Japan could exercise force in self-defense under three conditions:

> '[1] when it is facing an imminent and illegitimate act of aggression; [2] when there is no other means of countering this act; and [3] when the use of force in self-defense is limited to the minimum necessary level.'[50]

In a June 1955 statement, the government confirmed this interpretation, declaring that:

> 'The Constitution, while denouncing war, has not denounced war for self-defense… To check armed attack in event of such an attack from outside is self-defense itself, and is entirely different from settling international disputes. Hence, the case of military power as a means of defending the nation when the nation has been attacked by military power is not counter to the constitution.'[51]

These major defense shifts, including the very explicit reinterpretations of Article 9 by some of the most prominent constitutional actors, clearly deviated substantially from the original plan of the pacifist constitution. In time, and with sufficient recognition, these shifts could have profound constitutional consequences, even if they did not show on the face of the formal constitution.

3.2.3 Expanding the SDF's capabilities and activities

The SDF increased in size in the following decades and the scope of organizations' activities gradually expanded. From the 1990s, the government started to deploy the SDF abroad. At the same time, with each policy shift, the government sought to bridge the gap between Article 9 of the written constitution and the evolving reality on the ground that was gradually widened by interpretation.

3.2.3.1 Defense Build-Up Programs

Between 1954 and 1976, Japan ran four Defense Build-Up Programs with the aim of building a force that could deal with small-scale aggression. In case of a larger attack, Japan would rely upon the cooperation with the United States. In nominal terms, the budget of the SDF grew gradually. In real terms, however, as a percentage of GNP, the budget fell from 1.8 percent of GNP in 1952 to 0.7 percent in 1971, mainly because of the unprecedented growth of

49 Boyd and Samuels (2005), 8.
50 Ibid.
51 Auer (1990), 178.

the Japanese economy in the 1960s and 1970s.[52] In 1976, the Miki Cabinet introduced the so-called '1 percent rule' limiting the defense budget to 1 percent of the GNP 'for the time being.'[53]

However, it became apparent in the early 1980s that it was going to be difficult for the successive Japanese government to limit the defense budget to 1 percent of the GNP. The growth of the Japanese economy slowed down while the country's defense policy became more ambitious. In 1981, Prime Minister Suzuki and United States President Reagan agreed to a US–Japan division of military responsibilities in the Western Pacific.[54] According to the new strategy, Japan would protect its territory, air and sea-lanes of communication to 1000 miles outside of the homeland. In order to be capable of doing this, the country required high-quality forces, which would necessitate further upscaling of its defense capabilities.[55]

In the second half of the 1980s, Premier Nakasone directed a plan to develop a high-tech anti-invasion, air defense, and anti-submarine network. In order to keep this plan on track, the Cabinet replaced the 1 percent limit with a new non-quantitative guideline. In the government's view, as Auer explained,

> 'future defense programs would be limited by the international situation of the time, economic and fiscal requirements, Japan's peace-loving nature, and, of course, the spirit of the Constitution.'[56]

A white paper approved the much more flexible limit, stating that the defense policy could be modified if the international situation required it.[57]

In the first four decades of its existence, the capabilities of the SDF were therefore substantially expanded. However, in line with the government's interpretation of Article 9 and the strict definition of the notion of 'self-defense', the SDF were not sent abroad until the early 1990s.

3.2.3.2 Deploying SDF troops abroad

The 1990 Gulf War marked a turning point. Japan supported this war with substantial financial sums, but the country was criticized by the international community for not supporting international peace and stability by delivering a military contribution.[58] As a world economic leader, Japan was humiliated

52 Ibid, p. 180.
53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Japan Defense Agency, 'Defense of Japan 1989'. Cited by ibid.
58 Hamura and Shiu (1995), 427.

by this criticism.[59] The Japanese people came to realize that their country could not be a full member of the international community through financial contributions alone.[60] Before the 1990 Gulf War, no Japanese politician had ever proposed sending SDF troops abroad, in accordance with a 1954 Diet Resolution.[61] But things changed after 1990.

In 1992, backed by growing popular support, the government submitted a bill designed to allow the SDF to participate in international peacekeeping operations, breaching the decades old Diet-ban on deploying armed forces abroad.[62] What would become the International Peace Cooperation Act passed the Diet in the same year.[63] The Act provides a legal basis for Japanese participation in United Nations peace keeping operations, international humanitarian relief operations, international election observation operations and the transfer of goods for these operations below market value.[64] Moreover, the Act puts forward five principles that aim to ensure that SDF participation in UN operations does not violate Article 9 of the constitution.[65] The Act allows for the commitment of SDF troops on certain pre-conditions; namely: (1) that the mission can be conducted without partiality to any of the parties to the armed conflict – that is, Japan can remain neutral; (2) that the parties to the armed conflict have agreed to cease fire; and (3) that the consent for the conduct of the operation has been obtained from the parties to the armed conflict as well as from the countries in which the operations are to be conducted.[66] During operations, moreover, (4), the SDF will withdraw if any of the pre-conditions for participation are undermined;[67] and, finally, (5) the Act stresses that the SDF can only use its weapons to defend its own personnel.[68]

Initially, these principles were strictly observed. Throughout the 1990s, Japan did not join in operations that might have required the exercise of force

59 Matsui (2011), 250.
60 Shibata (1994), 310.
61 Royer (1993), 790.
62 Moore and Robinson (2002), 325.
63 Act on Cooperation with International Peacekeeping Operations of the United Nations and Other Operations (Act No. 79 of June 19, 1992). Translation available at: http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=39&y=15&co=01&ia=03&ky=act+on+cooperation+with+international+peacekeeping+operations+of+the+united+nations&page=1. For a detailed analysis, see Shibata (1994), 318 et seq.
64 Article 1 International Peace Cooperation Act.
65 Shibata (1994), 325. Matsui (2011), 250.
66 Article 3 International Peace Cooperation Act.
67 Article 6(13)(1) and 8(1)(6) International Peace Cooperation Act.
68 Article 24(3) International Peace Cooperation Act states that SDF officials may only use their weapons 'within reasonable limits under the circumstances when unavoidably necessary to protect the lives of others or prevent bodily harm to themselves, other Self-Defense Force personnel, Corps Personnel who are with them, or individuals who have come under their control during the performance of their duties'.

such as the supervision of cease fires.[69] However, in 2001 the government more or less abandoned the fifth and most limiting condition, which held that Japanese troops could only use force to defend their own personnel. In that way, the government sought to make it legally possible for the SDF to play a more active role in peace-keeping operations and to also join peace-*enforcing* missions.[70] Moreover, in 2007, the SDF Act of 1954 was amended. In addition to the principal purpose of defending Japan, international peace cooperation was listed as one of the objectives of the SDF.[71] Under the International Peace Cooperation Act, Japan has deployed troops to places such as Cambodia, Mozambique, Rwanda, the Golan Heights, and East Timor. Japan currently contributes to operations of the United Nations in the Republic of South Sudan and Mali, among other places.[72]

In the new millennium, Japan also started to display international military activities outside a United Nations or peace-keeping context. Shortly after the 9/11 terrorist attacks in the United States, Japan enacted the Anti-terrorism Special Measures Act.[73] This Act purports to enable Japan

> 'to contribute actively and on its own initiative to the efforts of the international community for the prevention and eradication of international terrorism, thereby ensuring the peace and security of the international community including Japan.'[74]

Under the Act, Japan contributed to the War in Afghanistan by sending the MSDF to the Indian Ocean to supply the Allied Forces with fuel. Boyd and Samuels noted that the deployment was authorized in a situation when 'Japan's security was not directly threatened.'[75] The government justified the operation by stressing that it could be accomplished without using force. Furthermore, the government held that the mission did not violate the ban on collective

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69 The Japanese government distinguished between cease fire observation groups, which have to observe cease fires and report breaches to the Security Council, and peacekeeping forces, which have the task of preventing conflict and maintaining internal security. Shibata explained that the distinction was used by the Japanese government to emphasize that activities of UN observation groups do not involve the use of force and are therefore allowed by Article 9 of the constitution. Shibata (1994), 313.

70 Matsui (2011), 250.

71 Ibid, p. 250. See also Self-Defense Forces Act (Act No. 165 of 1954) (the SDF Act is not translated). See also the website of the Ministry of Justice, 'Fundamental Concepts of National Defense'. http://www.mod.go.jp/e/d_act/d_policy/dp02.html (9-2-2017).

72 See for a comprehensive list: http://www.mofa.go.jp/policy/un/pko/ (9-2-2017).

73 Special Measures Act Concerning Measures to be Adopted by our Country Regarding Activities of Foreign Countries in Order to Accomplish the Aims of the United Nations Charter in Response to the Terrorist Attack in the United States of America on September 11, 2001, and Related Humanitarian Measures to be Adopted Based on Resolution of the United Nations (11 October 2001). http://japan.kantei.go.jp/policy/2001/anti-terrorism/1029terohougaiyou_e.html

74 Ibid, Article 2(2).

75 Boyd and Samuels (2005), 43.

self-defense – associated with Article 9 – since the deployment was a collective non-combat security operation, allowed by the preamble of the constitution that states that Japan should 'strive for the preservation of peace.'[76] In 2007, the Special Measures Act was succeeded by the New Anti-terrorism Special Measures Act.[77] This Act was extended in 2008. The mission in the Indian Ocean was ended in 2010.[78]

From 2003 to 2008, Japan was also involved in the Iraq War. The Iraq Special Measures Act allowed the SDF to provide humanitarian and reconstruction assistance as well as assistance to ensure security in Iraq.[79] Under the Act, Japan deployed GSDF troops in the province of Samawah, mainly for humanitarian and reconstruction purposes. The ASDF was also sent to transport coalition troops. The government argued that the operations were consistent with Article 9 because the rules of engagement did not allow the Japanese troops to use force to accomplish their mission.[80] It was held that, by 2003, Iraq was no longer a 'combat zone' (an argument that became increasingly controversial after the security situation deteriorated in the second half of that year).[81]

Furthermore, in 2009, the Japanese government sent the MSDF to the coast of Somalia under the Act to Punish and Prevent Piracy.[82] The Act provides legal basis for MSDF officials to 'use their weapons' if perpetrators disobey warnings to deter and continue acts of piracy.[83] Note that the use of force was not limited to the protection of Japanese ships only, which could reasonably have been explained as national self-defense. Under the Act, the Japanese government could also send warships and maritime aircraft to protect vessels from other nations, regardless of their flag country.[84]

By 2011, Japan was ranked as the fifth-largest military spender in the world.[85] At the same time, it was involved in multiple sorts of military activities, notably within and outside UN contexts.[86] Although the security shifts

76 Boyd and Samuels (2005), 43.
77 Special Measures Act Concerning the Implementation of Fuel Supply to Anti-terrorism Maritime Activities.
78 Matsui (2011), 252.
79 Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).
80 Hayashi (2004), 582.
81 Boyd and Samuels (2005), 46.
82 Law on Punishment of and Measures against Acts of Piracy (2009). Unofficial translations found at: https://www.sof.or.jp/en/topics/pdf/09_01.pdf (accessed 9-2-2017)
83 Ibid, Article 6 and 8(3).
84 Matsui (2011), 252. See also Ministry of Defense, 'Defense of Japan 2013 (Annual White Paper)', 244. http://www.mod.go.jp/e/publ/w_paper/pdf/2013/39_Part3_Chapter2_Sec3.pdf
85 Stockholm International Peace Research Institute, 'SIPRI Fact Sheet April 2013'. http://books.sipri.org/files/FS/SIPRIFS1304.pdf
86 For a comprehensive list see: http://www.mod.go.jp/e/d_act/index.html (accessed 9-2-2017)

that had taken place during the past 65 years had not shown on the face of the constitution, their constitutional significance had become hard to deny.

3.2.4 Recent developments: asserting a right to collective self-defense

A new chapter in the story of Japanese national defense and pacifism began in early 2013. In February of that year, the Abe government instructed a special panel[87] to re-examine the legal basis for Japanese security and explore what reforms Japan should make in order to maintain the peace and security of the country.

3.2.4.1 Advisory Panel on Reconstruction of the Legal Basis for Security

On 15 May 2014, the panel issued its report.[88] The report starts by setting out the government's and CLB's interpretation of Article 9 that has been applicable since 1954, namely that it does not exclude a right to use of force for the purpose of self-defense and that Article 9 only prohibits the Japanese government from maintaining a military capability that exceeds the 'minimum necessary level' required to protect Japan from direct attacks. Subsequently, the report considers that, ever since this interpretation had been adopted, the security environment of Japan had changed dramatically. According to the report, among the most notable changes are technological progress, a changing inter-state power balance, the deepened and expanded Japan–US relationship, the development of regional frameworks, the increasing number of 'serious incidents' that 'the whole international community ought to address', and the SDF's operations in the international community. The report points to the 'remarkable scale and speed of these changes' and suggests that 'Japan is now facing a situation where adequate responses can no longer be taken under the constitutional interpretation to date in order to maintain the peace and security of Japan and realize peace and stability in the region and in the international community.'[89] Finally, the report advises the government to adopt a new interpretation of Article 9. The panel argued that the Japanese government should assert a right to 'collective self-defense' under the pacifist

87 The panel was composed of seven university professors, a (former) head of industry, a former military officer, and a retired minister who is now president of the International Tribunal for the Law of the Sea and a few directors of authoritative research institutes. 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', May 15, 2014, 54-55. http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf

88 Ibid.

89 Ibid, 16.

constitution, in addition to a right to self-defense.[90] Concretely, this would mean that:

> '[…] when a foreign country that is in a close relationship with Japan comes under an armed attack and if such a situation has the potential to significantly affect the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent of the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and security even if Japan itself is not directly attacked.'[91]

The report the explains how this change should be engineered. Interestingly, it starts by dismissing the view that asserting a right to collective self-defense would require a formal constitutional amendment.[92] Instead, in the view of the panel, it would be sufficient to make the necessary policy shifts by reforming the existing body of security legislation.[93] More specifically, the report argues that the proposed transformations would be permissible under the text of the constitution as it is; as the report puts it: 'the method of this Panel has been derived from a literal interpretation of the provisions of the Constitution'.[94] Furthermore, the report appeals to the power of precedent. It emphasizes that, just as the constitution does not expressly provide the right to individual self-defense, neither does it provide the right to collective self-defense. Nonetheless, the report points out that the right to individual self-defense has been recognized in the past.[95] The report concludes that:

> 'In view of these facts, it should also be possible, by the Government setting out a new interpretation in an appropriate manner, to make a decision recognizing that the exercise of the right of self-defense to the minimum extent necessary encompasses the right of collective self-defense in addition to the right of individual self-defense. The observation that the amendment of the Constitution is necessary therefore does not apply.'[96]

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90 Ibid, 27.
91 Ibid, 29–30.
92 Ibid, 48.
93 Ibid, 45.
94 Ibid, 48. Regarding section 1, the panel advised that it should be read as only prohibiting the use of force as means of settling international disputes *to which Japan is a party*. According to the panel, it should be interpreted 'as not prohibiting the use of force for the purpose of self-defense, nor imposing any constitutional restrictions on activities that are consistent with international law'. The panel also proposed changing the interpretation of section 2. This section states that 'in order to accomplish the aim of the preceding paragraph' war potential will never be maintained. According to the panel, this rule should be interpreted as 'not prohibiting the maintenance of force *for other purposes*' such as self-defense or 'contributions to international efforts'. Ibid, 22 et seq.
95 Ibid, 50.
96 Ibid.

3.2.4.2 Cabinet Decision on Development of Seamless Security Legislation

On July 1, 2014, the advisory panel published its report. Soon thereafter, the Japanese government issued the 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People.' The Decision takes up most of the recommendations of the advisory panel.

The Decision's preamble starts by recalling that Japan has consistently 'followed the path of a peace-loving nation under the Constitution'[97] and adhered to 'a basic policy of maintaining an exclusively national defense-orientated policy.'[98] However, it then asserts that, since the Constitution of Japan came into effect 67 years ago, 'the security environment surrounding Japan has fundamentally transformed.'[99] According to the Decision, the result of this transformation is that

> '[n]o country can secure its own peace only by itself, and the international community also expects Japan to play a more proactive role for peace and stability in the world, in a way commensurate with its national capability.'[100]

The Japanese government announced that it would 'promptly' develop domestic legislation 'necessary for securing the lives and peaceful livelihood of its people.'[101] This legislation was supposed to bring about three new basic security policies. The first new policy concerns possible responses to infringements that do not amount to an armed attack.[102] Under this policy, the government will enhance the security agencies capabilities, including those of the SDF, in order to ensure sufficient responses to 'any unlawful acts' that do not amount to an armed attack. Among other things, this policy will enable the SDF to more actively cooperate with the United States in a situation where an attack occurs against American armed forces stationed in Japan. The second new basic policy makes it possible for Japan to provide further contributions to international peace and stability operations. Among other things, it elevates certain restrictions on logistical support to armed forces of other countries carrying out 'legitimate use of force' – that is, in accordance with a UN Security

97 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People', July 1, 2014, p. 1. http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf

98 Ibid.

99 Ibid.

100 Ibid.

101 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014. http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf. See also: Martin Fackler and David E. Sanger, 'Japan Announces a Military shift to Thwart China', *New York Times*, 1 July 2014.

102 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014, 2.

Council resolution. It also creates restrictions with regard to the use of weapons by SDF officers that are deployed abroad more flexible. In this way, Japan should become able to deliver a more 'proactive contribution to peace' and to rescue Japanese nationals abroad by the use of weapons. The third new basic policy aims to broaden the scope of measures for self-defense that are permitted under Article 9. In this part of the decision, the government indeed asserts that 'in light of the current security environment', the 1954 official interpretation of Article 9 that only allowed for armed response in case of self-defense is no longer appropriate.[103] As a result:

> '[…] the Government has reached a conclusion that not only when an armed attack against Japan occurs *but also when an armed attack against a foreign country that is in a close relationship with Japan occurs* and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date.'[104]

Thus, in addition to a right to self-defense, the Japanese government will also assert a right to 'collective self-defense' under the Japanese constitution. That is to say, according to the Japanese government, Japan can henceforth come to the aid of friendly nations under attack if: (1) the attack on that country presents a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to 'life, liberty, and the pursuit of happiness'; (2) there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people; and (3) the use of force is limited to the minimum necessary.

In the remainder of the Decision, the government announced that it would soon submit draft legislation to the Diet that would (further) implement these changes.

103 In 1981 the CLB issued a formal interpretation in which it explicitly stated that Japan has the right to collective self-defense under international law, but that Article 9 of the constitution forbids to exercise it. Moreover, in 2004, the Japanese government informed other participants to military operations in Iraq that, because of Article 9, it could not come to the aid of other nation's forces if they were attacked. See: Boyd and Samuels (2005), 9-10.

104 Cabinet Decision of July 1, 2014, 7 (emphasis added).

3.2.4.3 Two new security Acts

On May 15, 2015, the Japanese government submitted two security bills to the Diet: the 'Bill for the Development of Legislation for Peace and Security'[105] and the 'International Peace Support Bill.'[106]

The former brings about a number of changes with regard to the existing body of national security law.[107] First, it revises the Self-Defense Forces Law; among other things, it introduces provisions concerning defense operations, provisions that allow for measures to rescue Japanese nationals overseas, and provisions that allow SDF forces to protect equipment of military units of other countries' forces. Second, it revises the 'Law Concerning Measures to Ensure Peace and Security of Japan in Situations in Areas Surrounding Japan.' It replaces the phrase 'in areas surrounding Japan' with the phrase 'in situations that will have an important influence on Japan's peace and security.' In its new form, this law makes it possible for Japan to extend the Japanese support activities to military forces of other countries. Third, it revises the 'Ship Inspection Operations Law.' Fourth, it amends the International Peace Cooperation Act. Among other things, it adds tasks that can be implemented during SDF UN peace-keeping operations and other international operations. Fifth, it reforms the 'Armed Attack Situation Response Act' and the Self-Defense Forces Law. These laws now include provisions for actions that amount to collective self-defense and, more specifically, provide a legal basis for the SDF to respond to situations in which an armed attack against a foreign country threatens the existence of Japan and the lives and liberties of the Japanese people.[108] Finally, the bill revises the Act for Establishment of the National Security Council

105 Bill for Partial Amendments to the Self-Defense Forces Law and Other Existing Laws for Ensuring Peace and Security of Japan and the International Community (no translation available). See 'Defense of Japan 2015 (Annual White Paper)' for an outline in English. http://www.mod.go.jp/e/publ/w_paper/2015.html

106 Bill Concerning Cooperation and Support Activities to Armed Forces of Foreign Countries, etc. in Situations where the International Community is Collectively Addressing for Peace and Security. See 'Defense of Japan 2015 (Annual White Paper)' for an outline in English.

107 Defense of Japan 2015 (Annual white paper), 141.

108 See Article 76 of the SDF Act. Section 1 of this Article provides the Japanese government to exercise a right to individual self-defense. Section 2, added as part of the latest policy shifts, provides the government the power to exercise a right to collective self-defense. The Article reads as follows (Translation: Defense of Japan 2015, 145.):
'The Prime Minister may, in responses to the situations listed below, give the whole or part of the Self-Defense Forces the Defense Operations Order when necessary to defend Japan. In this case, the approval of the Diet must be obtained pursuant to the provisions of Article 9 of the Act on the Peace and Independence of Japan and Maintenance of the Nation and the People's Security in Armed Attack Situations etc. and Situations where an armed attack against a foreign country results in threatening Japan's Survival (Act No. 79 of 2003).
1. A situation where an armed attack against Japan from the outside occurs, or a situation where imminent danger of an armed attack against Japan from the outside occurring is clearly perceived

in such a way that expanded the number of issues about which this council can deliberate.

The purpose of the latter bill is to enable Japan to contribute to 'securing the peace and security of the international community' by implementing cooperation activities to armed forces of other countries and by joining collective security operations under the auspices of the UN Security Council.[109] The Act should allow Japan, 'as a member of the international community', to 'independently' and 'proactively' contribute to international operations.[110] The Diet passed the two Bills on September 19, 2015.

3.2.5 Conclusion: Has Article 9 'died'?

Proponents of a more assertive Japanese defense policy have suggested that they want Japan to become a 'normal country' again with the capacity to defend its interests and citizens wherever they are threatened.[111] One thing Japan must do in order to reach this goal, or so it seems, is to get rid of the Article 9 and Article 9-associated limitations to the maintenance and deployment of its military – indeed, limitations that many other countries are not subject to. Has Japan (already) come this far, even though it has not formally amended its constitution?

Some observers have argued that the 70-year-evolution of national defense policy has effectively 'beaten [Article 9] down into irrelevance', even though this irrelevance does not show on the face of the formal constitution.[112] Others contend that Article 9 effectively 'died' as a consequence of the defense shifts that have taken place in recent decades.[113] However, even if we agree that the hollowing out of Article 9 is plain, this does not mean that this provision has entirely lost its significance.[114] On the contrary, Article 9 seems to have had a substantial shaping force over the years. First of all, Article 9 has been an important source of inspiration for those who have sought to realize the 'peace state'[115] and form a Japanese pacifist identity.[116] Furthermore, even

2. A situation where an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness.'

109 Defense of Japan 2015 (Annual White Paper), 147.

110 Ibid.

111 Cortzazzi, 'Is Japan a 'normal' country simply trying to stick out?', *Japan Times* 21 April 2014. Metzl, 'Japan's military normalization', *Japan Times* 6 March 2015.

112 Repeta (2015). Kato, 'Japan's Break With Peace', *New York Times* July 16, 2014.

113 Feffer, 'Is Japan's Peace Constitution Dead'?, *Inter Press Service*, July 2014. Snow, 'The Tragic Death of Japan's Pacifist Brand', *Foreign Policy Focus*, September 29, 2015. Leupp, 'The Death of the 'Pacifist' Constitution: Japan's Return to Its Martial Roots', *Counterpunch*, September 29, 2015.

114 Hook and McCormack (2001), 21.

115 Ibid.

though the Supreme Court has consistently refused to enforce Article 9, deeming issues surrounding it as 'political questions', the provision has not entirely been ineffective as a legal norm either. Most notably, the CLB has used its institutional power quite effectively to enforce its reasonably consistent interpretations.[117] For example, Article 9 has contributed to the development of a number of additional pacifist norms, such as the 1 percent rule, the non-nuclear principles, the ban on the export of weapons, and the ban on conscription for military service.[118] Furthermore, Article 9 has arguably prevented Japan from direct involvement in Cold War conflicts, such as the Korean War and the War in Vietnam. During the Gulf War, the government was quite willing to respond to international pressures to participate, but Article 9 and the associated pacifist norms operated pretty effectively to constrain its ability to act.[119] The Japanese contribution to the Iraq War was very limited as a consequence of what still appeared to be an efficacious pacifism principle.[120] Also in the post-9/11 era, as Martin noted,

> 'the fact remains that Japan has not used force, been directly involved in any armed conflict, or deployed armed forces as combatants in a theatre of armed conflict since the promulgation of its constitution'.[121]

Even after the 2014–2015 redefining measures, there is room to argue that Article 9 functions effectively as a constraint.[122] The recent defense shifts arguably show that Article 9 still significantly constrains policy-makers who seek to restore the military as a legitimate instrument of state policy. The instruments that have brought these shifts carefully specify the conditions under which Japanese forces may and may not engage in actions pertaining individual and collective self-defense:[123] apparently, the further departure from the principle of pacifism demanded elaborate justification on behalf of those who sought to engineer defense shifts. Besides that, while the 2014–2015 redefining measures are sometimes perceived as another major departure from pacifism, the new powers the Japanese government asserts still seem to be relatively measured compared to the powers claimed by governments of truly

116 One thing that illustrates that the pacifist identity is still very much alive in Japan is the 2014 nomination of Article 9 for the Nobel Peace Prize. Notably, a group of Diet members explicitly supported this nomination, probably not accidently while Abe was pushing through major security shifts. See: 'Japanese lawmakers say war-renouncing Constitution deserves Nobel Peace Prize', *The Japan Times*, 22 July 2014.
117 Martin (2008), 340.
118 Ibid. Hook and McCormack (2001), 21.
119 Martin (2008), 342.
120 Hayashi (2004).
121 Martin (2008), 356.
122 Ibid, 327. See also Martin (2012), 54 *et seq*.
123 See, e.g., 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People', July 1, 2014.

'normal' countries.[124] Add to this the fact that even when Japan increases its defense spending to 'record high budgets' in the years to come,[125] the relative amount of money the country spends (as a percentage of GDP) on defense is still below the amount its neighbors spend, below the NATO average, and far below the relative amount of money the United Stated spends.[126] In sum, even after 70 years of defense reforms, Article 9 still makes a significant difference for anyone who seeks to expand the capacity and scope of activity of Japan's Armed Forces.

On the other hand, the evolution of national defense has had consequences for a meaningful description and explanation of the import Article 9 has had over time. Taking a historical institutional view, we can observe that developments in the field of national defense have seriously called into question the original (and, perhaps, textual) meaning of this provision. The evolution of constitutional practice has deviated substantially from the original pacifist precept of the formal constitution. It seems unlikely that the establishment of the SDF and the expansion of its activities will be reversed any time soon. In fact, the opposite seems more likely, especially at a time when the (perceived) security environment surrounding Japan is deteriorating and when an American president is suggesting that he will not automatically come to the aid of Japan in case of an armed attack;[127] and the larger part of the community of constitutional actors have accepted the legal validity (or constitutionality) of the defense shifts.

Even in those circumstances, it is of course theoretically possible to hold on to a strictly legal-doctrinal understanding of the development of Article 9 and argue that, despite profound real-world change in the area this provision seeks to regulate, as a normative matter, its meaning has not changed, since it has not been subject to formal constitutional amendments or judicial decisions. However, especially in the case of Japanese pacifism and self-defense, it is clear that such a depiction does not adequately reflect how the normative content of Article 9 has changed. Instead, recognizing that Article 9 has not operated in a vacuum enables us to see that defense shifts taking the form of government and CLB interpretations, treaties, ordinary legislation, or other legal and non-legal mechanisms outside the formal constitutional amendment procedure have shaped and reshaped the import Article 9 has had in the real world.

That is not to say that the new material meaning of Article 9 has entirely crystalized. Especially with regard to the latest developments, the relationship

124 Joseph Nye, 'Japan's Self Defense', Blog Entry, 7 August 2014. http://joenye.com/post/94090601526/japans-self-defense-defense

125 'Defense Ministry eyes record-high budget request of over ¥5 trillion', *The Japan Times*, 24 August 2014.

126 Stockholm International Peace Research Institute, SIPRI Fact sheet April 2013.

127 Editorial Board, 'Editorial: Mattis' Japan visit welcome, but Trump policy worries remain', *The Mainichi*, February 4, 2017.

between Article 9 and real-world developments in the field of national defense remains unclear. True, the larger part of the community of constitutional actors have accepted and indeed endorsed the validity of the latest security shifts. However, consensus over the new meaning has not been achieved.[128] Moreover, it is arguably too early to say whether these shifts will be persistent. Especially with respect to the latest security shifts, counter-forces may not yet entirely be written off.[129] Even if it seems unlikely that the government will give up its claim to a right to collective self-defense anytime soon, we cannot predict what will happen in the (near) future.

3.3 Why did Japan never amend Article 9?

From the moment Japan rearmed, commentators have argued that Japan should amend its constitution to (explicitly) allow the country to have a military to defend itself.[130] Nevertheless, Article 9 has never been subject to formal constitutional amendment. It is not the case that governments have not attempted to amend the pacifist provision. Between 1955 and 1960, successive Japanese governments, led by the Japan Democratic Party and the Liberal Democratic Party (LDP), have aimed to amend article 9, but opposition from the JSP prevented the coalitions from obtaining the necessary two-thirds majority in the Diet.[131] Furthermore, since the beginning of the 1990s, multiple proposals have been made to amend Article 9. However, even during the period of office of Prime Minister Koizumi (2001–2006), who has been described as Japan's 'most pro-revisionist Prime Minister' and who met an unprecedented pro-revisionist Diet (according to one poll, no less than 80 percent of the house of commons was in favor of formal constitutional revision of Article 9[132]), the text of Article 9 has not been changed.[133] This section seeks to explore why this is the case. What reasons or factors may explain why Japanese defense shifts have solely been effected by alternative mechanisms of change, despite the fact that these shifts have substantially deviated from the text and original meaning of Japan's written constitution?

Without purporting to be comprehensive, this section will put forward six possible explanations of what we may call 'textual stickiness.' These are: amendment difficulty, polarization, judicial deference, the role of the CLB, the

128 Fisher (1999), 414–415.
129 Jiji, 'Democratic Party, other opposition forces to continue working to scrap security laws', *The Japan Times*, 19 September 2016.Jiji, 'Lawsuit challenging controversial security laws filed by group at Hiroshima Prefecture Court', Japan Times, 17 September 2016.
130 Matsui (2011), 262.
131 Ibid, p. 262–263.
132 A March 2004 poll cited by Boyd and Samuels (2005), 48.
133 Ibid, 27 et seq. and 48 et seq.

rejection of 'American-style' constitutionalism, and the rejection of an 'imposed' constitution.

3.3.1 Amendment difficulty

A first factor that might explain why Article 9 has never been amended – despite the fact that the evolution of Japanese national defense policy has substantially deviated from pacifism and despite the fact that many governments have sought amend this article to formally allow Japan to have a military – is that of all the constitutions, the Japanese Constitution is one of the most difficult ones to amend.[134]

One important source of amendment difficulty is the Constitution of Japan itself. According to Article 96 of this document, formal constitutional amendments have to be initiated by the Diet through a concurring vote of at least two-thirds of all the member of each House. Subsequently, the proposal has to be submitted to the people by holding a nationwide referendum. If the proposal is then approved by a majority of voters, the emperor will promulgate the amendment and it will become an integral part of the constitution. Compared to formal amendment procedures of other constitutions in the world, this procedure is extremely rigid. On Lijphart's index of formal amendment difficulty in liberal democracies, the Japanese procedure receives the highest possible value.[135] Further proof is the Japanese Constitution's extremely low formal amendment rate: despite the fact that several proposals have been passed in review, in 70 years no proposal has ever been adopted.

A second, more informal source of the difficulty of amending Article 9 is an unwritten doctrine that deems the principle of pacifism unamendable.[136] That is, some Japanese constitutionalists believe that even though the Japanese constitution does not provide any explicit eternity clauses – as, for instance, the German Basic Law[137] does – the constitutional legislator cannot alter the three fundamental principles of the Japanese constitution: the popular sovereignty principle, the protection of fundamental human rights, and the pacifism principle.[138] With regard to Article 9, a number of varieties on this unwritten doctrine of unamendability exist. Some argue that Article 9 cannot be altered or abolished, because it is the most fundamental provision of the Constitution of Japan. Others are of the opinion that the renunciation of (aggressive) war

134 Berger (2012), 14. Boyd and Samuels (2005), 10. Matsui (2011), 264–265.
135 Lijphart (2012), 208.
136 Matsui (2011), 260.
137 See Article 79(3) German Basic Law.
138 The idea of an 'unconstitutional constitutional amendment' is not typically Japanese. The existence of substantive limitations – explicit or implicit – on amendment power is being recognized in more and more constitutional systems around the world. See Passchier and Stremler (2017). Roznai (2013).

is key, but that the ban on armed forces could be amended by allowing for the maintenance of armed forces for the purpose of self-defense.[139] Both of these doctrines make it harder to actually amend Article 9, even if only a small part of the community of constitutional actors recognize its existence. The mere suggestion that an amendment of Article 9 would be an 'unconstitutional constitutional amendment' may delegitimize the revisionist effort and enhance the rigidity of this provision.

3.3.2 Polarization

However, even if it would have been easier to amend Article 9, the polarization of the debate surrounding the formal revision of Article 9 would still make it especially hard to change the text of this provision because there is hardly consensus in politics or society about the question what a new Article 9 should look like.[140] Since the early 1950s, the Japanese have been extremely divided on the issue of constitutional revision of Article 9.[141] There have been roughly three different camps.[142] Camp one, the 'nationalists', have advocated for the abolition of Article 9 and have sought to restore a strong and independent 'big Japan' that was capable of taking care of its own security and concluding conventional military alliances. Camp two, the 'progressives', viewed Japan as a 'peace nation' and have bitterly opposed any attempt to amend Article 9. Camp three has been the 'centrists' or the 'pragmatists', who have been open to limited reforms, such as recognition of Japan's right to individual self-defense, but have opposed *sweeping* amendments. The centrists have viewed Article 9 as an ideal instrument to deflect pressure from the United States to upscale defense capabilities and participate in international military operations and have held that the provision protected Japan's interests in the unequal security relationship with the US. During the past 70 years, these strong and contradictory forces have made it virtually impossible for a coalition to formally amend or abolish the pacifism clause, even if they agreed on the general point that Article 9 had to be amended.[143] Polarization has also divided major political parties internally. Within the LDP, for instance, pragmatists have restrained the revisionists for decades. According to Boyd and Samuels, it is this 'deep internal division' within the dominant conservative party 'that most protected Article 9 from formal change.'[144] Furthermore, public opinion has been divided. While revision of Article 9 has never been

139 Matsui (2011), 260.
140 Berger (2012), 15.
141 Moore and Robinson (2002), 321.
142 Berger (2012), 15.
143 Ibid.
144 Boyd and Samuels (2005), 26.

supported by more than 40 percent of the people, principle of pacifism has always been supported by substantial majorities of the Japanese public.[145] Today, approximately two-thirds of the people are opposed to any formal change at all. Of those who favor revision, only 38 percent believe that the SDF should have a 'normal' military status. Fifty-six percent of the revisionists take the view that the status of the SDF as force for the purpose of individual self-defense should be written into the constitution.[146] Also, this polarization in society makes it more difficult to amend Article 9, if only because ultimately a proposed amendment has to be approved by the people in a referendum.

3.3.3 Judicial deference

Another factor that may explain why Article 9 has never been amended – despite the awkward tension that has mounted between the text of the provision and the reality on the ground – is judicial deference: as the Japanese judiciary has never stood in the way of the government's defense plans, it has never been really necessary for the government, at least not from a legal point of view, to amend Article 9. If the judiciary had univocally declared the SDF or its activities unconstitutional, the government could probably have not continued to develop a more assertive defense policy without first overturning this declaration by way of formal constitutional amendment. However, while the lower courts were occasionally willing to declare the SDF unconstitutional,[147] a final Supreme Court judicial denunciation of the SDF and its activities remains forthcoming. In each of the (few) cases that have addressed the pacifism and national defense issue, the courts have ultimately refused to answer the principled questions, ruling that the question of the SDF's constitutionality is better dealt with by the political branches.[148]

3.3.4 The role of the CLB

The fact that the Japanese judiciary has not made it legally necessary for the Japanese government to amend Article 9 before establishing or expanding the activities of the SDF should perhaps not be a surprise. Although the Japanese courts have the formal power to review the constitutionality of government

145 Berger (2012), 16.
146 See for an overview of public opinion surveys Nishikawa (2009), 70–75.
147 See, for example, the *Naganuma case,* Supreme Court, 1st petty bench, 9 September 1982, 36 Minshu 1679. Explained in Matsui (2011), 241 and in Hamura and Shiu (1995), 436. Hamura and Shiu, 'Renunciation of war as a universal principle of mankind', p. 437. See also the *Sunagawa Case,* Supreme Court, grand bench, 16 December 1959, 13 Keishu 3225. Explained by Matsui (2011), 241 + 246 and by Hamura and Shiu (1995), 433.
148 Matsui (2011), 243.

action and legislation, they have never been a major constraint on the legislative and executive branches. In fact, the judiciary of the country is known as the most conservative in the world.[149] In scrutinizing the constitutionality of governmental and legislative action, the Cabinet Legislation Bureau (CLB) seems to have played a much more prominent role.[150] While the CLB is formally part of the executive, students of Japanese constitutionalism have recognized that 'no administrative agency of the Japanese state enjoys higher prestige or greater independence than the CLB.'[151] They even see the institution as a 'quasi-constitutional court'.[152] Indeed, 'in practice, the CLB has been a far more influential arbiter of the law than the Supreme Court', as Samuels put it.[153]

In the field of national defense and pacifism, however, the CLB has played different roles. In the early 1950s, as we have seen, the CLB made it possible for the government to sweepingly change the meaning of Article 9 of the constitution without formal amendment.[154] In later decades, however, the institution has been an important constraint on governmental ambition.[155] Most remarkably, the CLB upheld the 1954 proscription of collective self-defense until 2014, even though the Japanese government clearly wished to contribute more actively to international military operations and wanted a more equal security relationship with the US, certainly after 1990. Furthermore, the CLB actively blocked Japanese participation in the Gulf War in 1991, and in 2004 it forced the Japanese government to inform other participants in peace-keeping operations that Japan could not come to their aid in case they were attacked.[156]

Also, when the Abe government unfolded its plan to assert a right to collective self-defense under Article 9 of the constitution in 2013, the CLB initially stood in its way. The CLB Director-General Yamamoto believed that in order to realize the right to collective self-defense of the type the prime minister wished for, 'it would be more appropriate to amend the Constitution.'[157] However, the CLB would ultimately not make it legally necessary for the government to amend Article 9 before bringing about new defense reforms. In order to neutralize the opposition from the CLB, Prime Minister Abe promoted Yamamoto, somewhat ironically, to the less powerful Supreme Court and replaced him with Ichiro Komatsu, who was known to be a supporter of a broader interpretation of Article 9 allowing for collective self-

149 Law (2008). See also: Sakaguchi (2014).
150 Samuels (2004).
151 Ibid.
152 Ibid.
153 Ibid.
154 Ibid.
155 Ibid.
156 Ibid.
157 Ibid.

defense.[158] As we have seen, it was then possible for the government to bring about new defense reforms outside the formal constitutional amendment procedure, without being hampered by the CLB.

3.3.5 The rejection of 'American-style' constitutionalism

Another explanation for the fact that Article 9 has not been amended, despite major changes in the field this provision seeks to regulate, may be found by showing how the Japanese government treated the constitutional system that was largely designed by the Americans during the post-WWII occupation. As Murphy explained, in the years after the adoption of the 1947 written constitution, not many sophisticated Japanese believed that the document would long survive the American occupation.[159] However, as we have seen, the 1947 written constitution still operates today. Murphy believes that this longevity

> 'is largely due to the government's policy of treating the system as more a representative than a constitutional democracy and the Supreme Court's acquiescence in that piece of constitutional interpretation'.[160]

In other words, Japan did not follow the American model of constitutional democracy, but has arguably developed its own version. Japan has, at least partly, rejected the idea that the constitutional charter is both a source and measure of legitimacy.[161] Instead, Japan has developed its constitutional system in the direction of 'Westminster' representative democracy in which the (elected) government and the parliament have the primary say. Assuming that this characterization makes sense, the 'informal' way in which Japanese self-defense developed may not be that odd after all. It is probably considered less problematic to bring about constitutional transformations by using alternative methods of constitutional change if the constitutional text does not (always) play a central role in the broader constitutional context.

3.3.6 The rejection of an 'imposed' constitution

A final factor that may explain why Article 9 has never been amended, despite major change and despite an often recurring debate about constitutional revision, is the fact that many Japanese see their written constitution as an 'imposed' constitution. Nishikawa suggested that persistence to formal change

158 'For 'no war' Article 9, any reinterpretation will do', *The Japan Times*, 20 November 2013.
159 Murphy (2007), 208.
160 Ibid.
161 See: Ibid, 199.

is triggered by attitudes toward modern constitutionalism itself.[162] He reported that a group of conservative revisionists has always maintained that the post-war constitution was imposed or even forced upon Japan by the Allied occupiers. Article 9 in particular has annoyed those who do not see why Japan could not be a 'normal' nation (again). The same group has also tried to downgrade the significance of popular sovereignty – which is, besides pacifism, a central principle of the modern Japanese constitution – by arguing that the sovereignty of Japan belongs to the emperor.[163] Therefore, it is perhaps no surprise that the members of this group are happy to pursue a defense policy under a supposedly pacifist constitutional document that they deem illegitimate.

3.4 Alternative means of constitutional change as functional substitutes?

Section 1 of this chapter has revealed that constitutional shifts in the field of national defense and pacifism have come about outside the formal constitutional law-making of the Constitution of Japan. Instead, they have been effected by executive interpretations, treaties, and ordinary legislation, among other mechanisms. This section aims to give a sense of the extent to which these alternative mechanisms of constitutional change have been able to functionally substitute the formal amendment procedure of the Constitution of Japan.

Without purporting to give a comprehensive overview of all the functions of the formal amendment procedure of the Japanese Constitution that have or have not been substituted by the alternative mechanisms of change that have effected change in the field of national defense and pacifism, this section will explore four main questions. First, whether and to what extent alternative means of change have been able to substitute the constitutional amendment procedure in generating support for reform in the field of national defense. Second, whether and to what extent alternative mechanisms of change have been effective in bringing about structural change in the field of national defense. Third, whether informal constitutional change in one field has also had implications for the way constitutional change has taken place in other fields. Fourth, whether and to what extent informal constitutional change in the field of national defense and pacifism has had wider implications for the basic tenets of constitutional democracy.

162 Nishikawa (2009), 63.
163 Ibid.

3.4.1 Support for change

As we have seen, the most important Japanese constitutional actors have, either explicitly or implicitly, supported change in the interrelated fields of national defense and pacifism, even though this change has come about without any amendment to Article 9 explicitly allowing this change. Nevertheless, 'the national defense and pacifism issue' is known as the most controversial issue created by the Japanese constitution.[164]

The lack of support for informal constitutional change that has come about in the related fields of national defense and pacifism is striking. Particularly the lack of support for these change among scholars stands out. During the first decades of the SDF's existence, most constitutional scholars held that Article 9 prohibited the Japanese government from maintaining any military forces.[165] The recent 2014–2015 security shifts have even been more contested. Martin argued that 'this [the 2014 government Decision] so-called reinterpretation is entirely illegitimate and poses dangers to Japan's democracy.'[166] His main concern was that the Decision circumvents the amendment procedure, which he deems a 'crucial element … [of the] constraining characteristic of constitutions.'[167] Martin held that the fact that Prime Minister Abe used a Cabinet Decision to change the meaning of Article 9 is 'by its very nature' invalid:

> '[i]t not only stands in direct violation of the explicit constitutionality mandated amendment procedures, but it also violates democratic principles, given that the Diet and the public are cut out of the process.'[168]

On Friday June 19th, 2015, no fewer than 225 Japanese constitutional scholars signed a joint statement condemning the government reinterpretation of Article 9 and the new security legislation – at that time bills – as unconstitutional.[169] In an interview in the Kochi Shimbun, Yasuo Hasabe, professor of constitutional studies at Waseda University and one of the leading figures in the national debate, was asked whether the constitution could be revised in such a way that it would become possible to exercise a right to collective

164 Matsui (2011), 254.
165 Yoshida, 'Japan security bills reveal irreconcilable divide between scholars, politicians', *The Japan Times*, June 12, 2015.
166 Martin, ''Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014.
167 Ibid.
168 Ibid. See also Martin (2017).
169 Yoshida, 'Japan security bills reveal irreconcilable divide between scholars, politicians', *The Japan Times*, June 12, 2015.

self-defense.[170] His answer was that that kind of revision would indeed be possible:

> 'After all, the US, UK, and France all exercise a right to collective self-defense. Some might even say that so long as it remains very limited, a right to collective self-defense is compatible with the basic principle of pacifism. If they want to obtain consent through a national referendum, then they should try their utmost to explain matters in a way that reflects the history of past wars. If, after that, we end up exercising a right to collective self-defense, then there's nothing for constitutional scholars to say against it.'[171]

But what about 'trying to skip this next step, and *de facto* revise the constitution by re-interpreting it [?]', the interviewer asked. Yasuo Hasabe said:

> 'A constitution should not be altered willy-nilly according to the thoughts of whoever happens to be the Prime Minister at the time. That's precisely why it's a constitution. It's designed to be rather difficult to change.'[172]

Ginsburg agreed, arguing that a statute cannot substitute constitutional amendment if the statute is

> 'understood as an effort to achieve what cannot for the moment be accomplished by a formal constitutional amendment. […] Simply because constitutions must change with the times does not mean that every proposed change is acceptable.'[173]

Ginsburg also argued that Japan's constitutional commitment to pacifism can only be adjusted with broad public support, or at least elite consensus with popular acquiescence. However, given that neither seem to be present, 'this suggests that a true change in the Japanese Constitution will require more than simply a passing a statute.'[174]

The overwhelming majority – 99 percent, according to Hasebe Yasuo – of constitutional scholars in Japan seem to be of the opinion that the government's assertion a right to collective self-defense is unconstitutional.[175]

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170 'Hasebe Yasuo Interview with the Kochi Shimbun', *International Journal for Constitutional Law Blog*, June 30, 2015. At: http://www.iconnectblog.com/2015/06/hasebe-yasuo-interview-with-the-kochi-shimbun/

171 Ibid.

172 Ibid.

173 Tom Ginsburg, 'Rearmament and the Rule of Law in Japan: When Is it OK to Change the Constitution With a Statute?', *Huffington Post* 23 July 2015.

174 Ibid.

175 As Yasuo Hasabe put it in an interview with the Kochi Shimbun: 'The overwhelming majority – about 99% of scholars – are of the opinion that it [the reinterpretation of Article 9] is unconstitutional. Or, at least, they think that a right to collective self-defense is unconstitutional. Who comprise the remaining 1%? I can't say. I don't have any personal relations with anyone who holds that opinion, and I haven't met any at academic conferences. The

'Scholars don't understand security issues at all', one government official found.[176] Indeed, in conservative circles, constitutional scholars acquired a bad reputation for rigid adherence to theory during the Cold War. 'Sixty years ago, when the SDF was established, most constitutional scholars said the SDF was unconstitutional', LDP Vice President Masahiko Komura told *The Japan Times*.

> 'If we had followed what they said, we wouldn't now have neither the SDF nor the Japan-U.S. security treaty. […] It is highly doubtful that the peace and stability of Japan would have been maintained.'[177]

Security reforms have always met fierce opposition in society too. Some polls have indicated that as many as 60 percent of the Japanese people are opposed to the latest shifts.[178] Even conservative newspapers register clear majorities in opposition to asserting a right to collective self-defense under Article 9 of the constitution.[179] At the same time, enough people seem to have supported Abe's moves. As Kato argued,

> 'in each case [of security reform], the media focused on popular opposition to these actions, emphasizing dips in Mr. Abe's popularity. But the crucial point is that even with these dips, the Prime Minister has consistently drawn more support than opposition. If this had not been the case, he would almost certainly have decided not to rush ahead with his overbearing plan to alter the interpretation of Article 9.'[180]

Thus, mechanisms of change outside the formal constitutional amendment procedure seem to have been able to generate sufficient support for constitutional change in the fields of national defense and pacifism – sufficient in the sense that changes have been supported by the most prominent constitutional actors and the larger part of public – but they have not generated the amount of support for constitutional reform a permissive constitutional amendment of Article 9 presumably would have. Indeed, it appears that, in the absence of a universal 'objective' doctrine of informal constitutional change, only a formal constitutional amendment would be able to convincingly answer the most pressing constitutional issues the evolution of national defense policy

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opinion of the scholarly community leans pretty heavily to one side on this.' See: 'Hasebe Yasuo Interview with the Kochi Shimbun', *International Journal of Constitutional Law Blog*, June 30, 2015. At: http://www.iconnectblog.com/2015/06/hasebe-yasuo-interview-with-the-kochi-shimbun/ (accessed 13-4-2017).

176 Yoshida, 'Japan security bills reveal irreconcilable divide between scholars, politicians', *The Japan Times*, June 12, 2015.

177 Ibid.

178 Craig and Wakefield (2014).

179 Ibid.

180 Kato, 'Japan's Break With Peace', *The New York Times*, 16 July 2014.

has raised (although, in the case of Article 9, even a formal amendment may not suffice to end the debate over the permissibility of change, because, as we have seen, some students of Japanese constitutional law hold that Japan's constitutional commitment to pacifism is so fundamental that it substantively limits the amendment power of the Japanese constitutional legislator[181]).

3.4.2 The effectiveness of reform: a 50 dollar bottle of water

By reforming the country's national security policy, the Japanese government, among other things, intended to make it possible for Japan to defend itself in case of an armed attack by another country or foreign organization and deliver a more 'pro-active' contribution to international military operations. According to some, including the current Prime Minister Abe, the defense reforms have sought to 'normalize' Japan's defense policy and legal framework for national security. Have alternative means of constitutional change, such as executive interpretations and ordinary legislation, produced the desired or intended result, or would truly effective change have required a formal constitutional amendment?

It could be that, in the Japanese case of pacifism and national defense, alternative mechanisms of change have indeed functionally substituted the formal amendment procedure in bringing about the desired structural policy shifts. Without formally amending the pacifist precepts of the formal constitution of Japan, successive Japanese governments have been able to establish and maintain what is now one of the largest and most modern militaries in the world. Moreover, security shifts outside the formal amendment procedure have enabled Japan to play an increasingly prominent role in international development and security operations since the early 1990s. There have been suggestions that, in absence of a formal amendment to Article 9, Japan should disband its SDF.[182] However, the larger part of the defense shifts that have come about during the past 70 years seem to have the kind of staying power that may be associated with a formal constitutional amendment. As Martin noted, '[i]t is entirely unrealistic for proponents of Article 9 to think that the clock can be turned back with some radical disbandment of the SDF.'[183]

While this answer is true, it ignores the fact that the way in which the Japanese have reformed their defense policy – namely, without amending Article 9 of their constitution – has caused some very specific problems and difficulties in governance.

For example, the dual – and often conflicting – commitments to pacifism and national defense have made it very difficult for Japanese rule-makers to

181 See par. 3.3.1.
182 See e.g. Port (2005).
183 Martin (2012), 55.

bring about an effective framework for taking decisions regarding the use of military force. More specifically, it has been unclear who exactly can order the SDF to commence hostilities and when. For example, a 1968 CLB statement reaffirmed that the SDF can only act 'when there is a sudden unprovoked attack on Japan and there are no other means available to protect the lives and safety of the people.'[184] At the same time, it has been clear that any use of force by SDF personal needs to be approved by the prime minister himself. In his turn, the prime minister needs unanimous cabinet approval before he can authorize an officer to fire. However, the Japanese cabinet meets only twice a week, which meant, as Boyd and Samuels showed, that 'it was hard to imagine a timely authorization for a Japanese soldier who finds himself under fire.'[185]

Contradictions in the Japanese legal security framework have also made it harder – relative to other countries – to pursue an effective foreign security policy. An especially complicated issue was the ban on collective self-defense that existed until 2014.[186] In the late 1940s and 1950s, it was doubted whether Article 9 allowed Japan to join the United Nations.[187] It has also been impossible for Japan to conclude mutual security arrangements, such as NATO. Furthermore, until the 1980s, the CLB interpretation of Article 9 was so strict that it prohibited the SDF from reacting in case US forces came under attack while defending Japan.[188] As a result, mutual security negotiations with the US have been ponderous. It was not until 2014 that the Japanese government expressly asserted the right to collective self-defense, still, albeit with a lot of accompanying reservations that will continue to make it significantly harder for Japan to define a foreign policy and negotiate beneficial mutual security arrangements.

Sending the Japanese SDF abroad has been a particularly complicated enterprise in the ambiguous legal framework that has evolved during the past 70 years. As we have seen, sending troops abroad was considered impossible until the 1990s. When the Japanese government wanted to participate in the efforts to liberate Kuwait from Iraqi occupation in 1990, it was effectively obstructed by the CLB, which insisted upon compliance with a strict interpretation of Article 9. In response, the government issued the International Peace Cooperation Act that provides a legal basis for participating in United Nations peacekeeping missions. Shibata has described this Act as 'a clearly opportunistic piece of legislation, more concerned with domestic political problems than with Japan's effective participation in U.N. operations.'[189]

184 Samuels (2004).
185 Boyd and Samuels (2005), 6. See also Samuels (2004).
186 Boyd and Samuels (2005), 9.
187 More and Robinson (2002), 169.
188 Ibid.
189 Shibata (1994), 345.

Shibata was especially critical of the five[190] preconditions and requirements the Peace Cooperation Act stipulates that have to ensure that SDF participation in UN operations does not violate Article 9 of the constitution.[191] One of the principles entails that Japan may only participate in peace-keeping operations in which the parties to the armed conflict have agreed to cease fire.[192] Shibata explains that such a norm may make sense legally, but from a policy perspective it is far from sound:

> '[p]eacekeepers are generally sent to areas where it is impossible to predict whether a cease-fire will be maintained. Should sporadic cease-fire violations occur, as they often do, and SDF and Corps personnel are not able to participate, Japan will come to be known as a very limited player in the international community. After all, if there were a complete and permanent cease-fire with no possible violations, peacekeepers would be unnecessary.'[193]

Shibata has severely criticized the cease-fire requirement, the consent of the hosting state principle, and the suspension and termination rule.[194] However, the most striking problem he addressed is the Japanese sensitivity to the use of weapons by SDF personnel conducting a military operation. According to Shibata, the Peace Cooperation Act restricts the use of arms by Japanese servicemen to such an extent that Japanese participation is 'at best rendered ineffective, and at worse, damaging to U.N. operations.'[195] Article 24(3) provides that SDF officials may only use their weapons

> 'within reasonable limits under the circumstances when unavoidably necessary to protect the lives of others or prevent bodily harm to themselves, other Self-Defense Force personnel, Corps Personnel who are with them, or individuals who have come under their control during the performance of their duties.'

As a result, the SDF may be unable to come to the aid of peace-keepers from other states when they are under attack. In reality, however, peace-keeping contingents are seldom completely separated when operating; they usually help one another in case of danger. As Shibata commented,

> '[t]he Peacekeeping Law's use of the domestic law concept of legitimate individual defense to legitimize the use of arms by U.N. peacekeepers is fundamentally flawed given the international character of the peacekeepers and the inherently collective nature of their actions.'[196]

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190 See par. 2.2.3.
191 Shibata (1994), 325.
192 See: Article 3 International Peace Cooperation Act.
193 Shibata (1994), 327. Hayashi agreed and made a similar comment. See: Hayashi (2004), 581.
194 Shibata (1994), 325 et seq.
195 Ibid, 330.
196 Shibata (1994), 332.

Lummis wrote, perhaps with a slight exaggeration, that, as a consequence of the organizations' limited right to use force, 'nothing is more dangerous than to send the SDF.'[197] However, Lummis has a point when he holds that it may be dangerous to send into a warzone people who 'look like soldiers, act like soldiers, dress like soldiers and are equipped like soldiers', but have no right to fight under their country's law.[198]

Indeed, the fact that the Japanese legal framework for sending troops abroad is in two minds has had repercussions for the effectiveness of operations overseas. An example is the first (1992) SDF deployment abroad in Cambodia. Lummis wrote that Japanese troops

> 'were in Cambodia for political reasons, made no contribution to actual peacekeeping, which sometimes requires military action [i.e. the active use of force], and were in fact a major headache for the commanders.'[199]

As the story goes, the Australian general who commanded the Cambodia operation said that he had to 'wrap' the participating SDF troops 'in Cotton wool.'[200]

SDF deployments outside of a UN context that were executed after 9/11 were arguably even more problematic. The Peace Cooperation Act did not provide a legal basis for such operations and it proved to be impossible to achieve a comprehensive and permanent law that could. Therefore, the government had to resort to *ad hoc* legislation for each deployment and was forced to defend the constitutionality of each operation separately.[201] The Iraq Special Measures Act of 2003,[202] for instance, provides a legal basis for the dispatch of SDF troops to Iraq for humanitarian and reconstruction purposes. Hayashi characterized the Act as 'highly specific and strictly limited in purposes and duties.'[203] Like other Japanese defense laws, the Act provides that 'the implementation of the activities based on this Law shall not be tantamount to the threat or use of force.'[204] Therefore, it would even have prohibited the SDF, among other things, from carrying out rescue missions of Japanese citizens taken hostage in Iraq.[205] Boyd and Samuels consider the awkward situation that Prime Minister Koizumi was in when he had to inform the

197 Lummis (2013), 5.
198 Ibid.
199 Ibid.
200 Ibid.
201 Hayashi (2004), 581.
202 Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).
203 Hayashi (2004), 581.
204 See: Article 2(2). Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).
205 Hayashi (2004), 583.

'coalition of the willing' that Japanese troops could not come the aid of fellow participant's forces if they were attacked.[206] Also during the operation, countries that occupied neighboring provinces have reportedly complained about having to defend the Ground-SDF troops that were deployed in Samawah.[207] Since the operation, the overall effectiveness of the Japanese activities in Iraq has been seriously questioned. McCormack pointed out that Japan sent a 'numerically insignificant' force of 550 servicemen, of which only one-third was devoted to humanitarian reconstruction support activities.[208] It did not help that the SDF troops were housed in what has been described as 'one of the most formidable military camps planet earth has ever seen.'[209] According to the *Asian Times*, the Japanese camp, which was located about 10 kilometers outside of the city of Samawah, was an isolated, heavily fortified, and luxurious compound (it reportedly had its own karaoke bar, massage parlor, and gymnasium). Furthermore, the humanitarian operation was considered to be very cost-inefficient compared to other ways of providing aid. The Japanese troops provided 80 tons of water for 16,000 people daily and gave assistance to local schools and hospitals for approximately half a year at the expense of around US$360 million (this amounts to $50 per half-liter bottle). By comparison, the Japan-financed French NGO Agency for Technical Cooperation and Development (ACTED) provided services in gas, health, sanitation, and 550 tons of water daily to 100,000 people in the Iraqi province of Al-Muthanna at the expense of less than half a million US dollars a year. Therefore, Japan spent almost 1000 times as much on the military mission as it spends on aid to ACTED, while the latter was at least five times more effective in terms of aid provided.[210] McCormack commented that

> 'where the NGO operation was low cost, low profile and high impact, the money going mostly on rental for tanker and virtually all the labor being provided by local Iraqi's, the SDF operation was high cost, high profile and low impact.'[211]

He added that the operation 'was certainly not a model that could be expended or reproduced anywhere else but one in which political purpose trumped economic sense or humanitarianism.'[212]

Thus, the fact that the evolution of Japanese defense policy has come about through ordinary legal and socio-political processes, but not by way of formal

206 Boyd and Samuels (2005), 10.
207 Ibid.
208 McCormack (2004), 2.
209 J. Sean Curtin, 'Japan's 'Fortress of Solitude' in Iraq – plus karaoke', *Asia Times Online*, 19 February, 2004. Quoted by Ibid.
210 McCormack (2004), 2. Nao Shimoyachi, 'SDF vs. NGO – an Iraqi tale of cost-effectiveness', *The Japan Times*, 16 May, 2004.
211 McCormack (2014), 2.
212 Mc Cormack (2014), 2.

amendment, has sometimes resulted in quite bizarre, ineffective, and unsound policy outcomes. The tension between Article 9 and the evolution of national defense appears to have translated itself into dysfunctional government and ineffective policies on the ground. If Japan had amended Article 9, it would probably have been able to bring about a much more functional and less complicated policy framework for national defense, not a breeding ground for 'continuous hairsplitting' that 'makes for contested politics and messy policy', as Boyd and Samuels put it.[213]

3.4.3 The provocative effect of using alternative means of constitutional change

Students of Japanese constitutional law have also claimed that the use of alternative means of change in the related fields of national defense and pacifism has provoked the use of such means in other fields as well. Ackerman and Matsudaira warned that

> 'if [Prime Minister] Abe unilaterally modifies the constitution, and threats the referendum procedure with contempt, it would create a terrible precedent for further constitutional coups.'[214]

Jeff Kingston, director of Asian Studies at the Temple University Japan, has similar thoughts. In his view, Prime Minister Abe has been 'ramming through a reinterpretation of the constitution, cynically undermining the rule of law and the constitution by sneaking in the back door like a thief in the night.' Kingston believes that this 'is undemocratic, setting a dangerous precedent in bypassing and making of constitutional procedures.'[215]

Let us ignore for the moment the unease of these authors with the way Japanese security policy has evolved. Our concern is not the normative content of their claims, but the empirical one; namely that the use of alternative means of change in one field has furnished a precedent that influences modes of change in other fields as well. At least one example confirms that informal constitutional change in the field of national defense and pacifism has indeed had such an effect. According to Jones, the recently enacted State Secret Act will likely be used to restrict a number of constitutional liberties – without foregoing constitutional amendment.[216] Matsui explained that the government has recently reinterpreted Article 89 in such a way that it allows for public

213 Boyd and Samuels (2005), 8.
214 Ackerman and Matsudaira (2014).
215 Jeff Kingston, 'Abe hijacks democracy, undermines the Constitution', *The Japan Times*, 21 June 2014.
216 Colin P.A. Jones, 'Japan's Constitution: never amended but all too often undermined', *The Japan Times*, 26 March 2014.

funding of private universities, despite the fact that the provision quite plainly prohibits the expenditure of public money for the benefit of educational enterprises that are not under the control of public authority.[217] Matsui wryly reported that 'not many people felt the compelling necessity to amend the constitution.'[218]

Furthermore, the power of precedent has presumably been reinforced by the stalemate debate about formal constitutional revision of Article 9. Constitutional actors have deeply entrenched themselves in this fight, which also seems to make it harder to adapt the constitutional text of other provisions. Indeed, those who oppose the transformations and formal constitutional revision of Article 9 are often opposed to any formal amendment of the constitution.[219] This is not because they believe as a doctrinal matter that the constitution is untouchable in its entirety, but because they are afraid that any amendment will pave the way for formal constitutional revision of Article 9. In that way, the national defense and pacifism issue also makes it hard to settle other constitutional issues or bring the constitutional document up-to-date. In turn, the polarizing effect on politics and the subsequent constitutional paralysis may also cause informal constitutional transformations in other fields, even ones that are not particularly controversial. Prime Minister Abe has pointed to the difficulty of constitutional amendment in Japan and the fact that the constitutional document has not been amended for seven decades as evidence of a 'constitutional defect.'[220] Abe allegedly employs this defect as a justification for a more general use of alternative means of constitutional change.[221] Martin reports a more general belief that 'the formal amendment procedure is simply too difficult, and that other means of revision are thus justified.'[222]

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217 Matsui (2011), 265. Article 89 provides that '[n]o public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.'

218 Matsui (2011), 265.

219 Nishikawa (2009), 66 and Matsui (2011), 264.

220 Colin P.A. Jones, 'Japan's Constitution: never amended but all too often undermined', *The Japan Times*, 22 July 2014.

221 According to Jones, the fact that the 1947 Japanese constitutional document has never been amended is actually a sign of 'how successful the process of unwritten amendments has been'. See: Ibid.

222 Craig Martin, ''Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014.
Martin deems this belief a 'myth' that is 'untrue' because 'recent comparative analysis of the relative difficulty of constitutional amendment in many democracies has found that at least eight countries, including that of the United Sates, are more difficult to amend than that of Japan, and yet they have been amended many times'. Here, Martin probably (correctly) refers to Donald Lutz' research (….), but he forgets that also in the US and in other countries, with a rigid constitution most formal amendments have been relatively unimportant and that also in these countries fundamental changes have often taken place without formal constitutional amendment. See chapter 1.

Again, the stalemate revision process of Article 89 may serve as an example. Despite the fact that Article 89 (which is about education) has nothing to do with security issues, Matsui links complications in the revision of this Article directly to the controversies surrounding the pacifism and national defense.[223]

3.4.4 A general irony for constitutionalism and democracy?

Finally, it has been noted that alleged undermining effects of informal constitutional change in the fields of national defense and pacifism may affect the functioning of the whole constitutional document. Martin, for example, held that 'a constitutional provision [Article 9] that is in a constant state of violation erodes the credibility and normative power of the entire constitutional framework.'[224] Boyd and Samuels observed that failed attempts to bring about changes to Article 9 according to the formal constitutional amendment procedure of Article 96 led to 'an encouraging irony for democracy in Japan.'[225] Matsui noted that

> 'the existence of the SDF, despite the relatively clear provision prohibiting armed forces even for the purpose of self-defense, may undermine the rule of law and the basic assumptions of constitutionalism.'[226]

To what extent do these claims make sense? It is presumably true that the pacifism and national defense issue does not do the rule of law and democracy any good: it erodes the normative force of Article 9; it has created the most controversial issue of Japanese constitutional law; it undermines effective government in the field of foreign policy; and it triggers the use of alternative means of constitutional change in other fields. On the other hand, according to the 2016 country report of Freedom House, Japan should still be counted among the freest countries in the world, receiving a 1 out of 7 (1=best, 7=worst) for both civil liberties and political rights.[227] The report mentions the controversies over the 2014 and 2015 policy shifts. It notes that '[t]he measure prompted significant opposition in the parliament and inspired mass protests' and that '[t]he parliamentary and public confrontation over the legislation unleashed an unexpected vibrancy in Japanese politics and civil society.' However, the report does not suggest in any way that the issue of defense and pacifism undermine the rule of law or constitutional democracy. Rather,

223 Matsui (2011), 264.
224 Martin(2012), 55. Martin has also written very critically about earlier attempts of Abe to revise Article 9 by using alternative means of constitutional change. See: Martin (2007).
225 Boyd and Samuels (2005), 60.
226 Matsui (2011), 255.
227 Freedom House (2016), 'Freedom in the World – Country Report – Japan'. https://freedomhouse.org/report/freedom-world/2016/japan (accessed 14-2-2017).

the electoral process in Japan scored 40 points out of 40 in the 2016 Freedom House report and gained one point compared with the previous year. Japan scored 15 out of 16 points in 'political pluralism and participation', 12 out of 12 in 'the functioning of government', 16 out of 16 in 'freedom of expression and belief', and 11 out of 12 in 'associational and organizational rights'. In 'the rule of law' category, Japan scored 15 out of 16 points, with the report noting that 'Japan's judiciary is independent and fair, and the rule of law prevails'.[228] Finally, Japan scored 14 out of 16 points in the 'personal autonomy and individual rights' category. Considering these records, perhaps we should not be too dramatic about the general effects of informal constitutional developments in the field of national defense and pacifism.

3.5 Concluding observations

Article 9 of the Constitution of Japan (1947) stipulates that 'land, sea, and air forces, as well as other war potential, will never be maintained.' The original intention of this provision was to prohibit Japan from establishing or maintaining armed forces for any purpose, even self-defense. In the first years, constitutional practice more or less remained congruent with this plan. However, since the early 1950s, the Japanese government has established and built up a modern military, called the Self-Defense Forces (SDF). Since the 1990s, the government has also gradually broadened the scope of the SDF's activities. In more recent times, the SDF has participated in multiple international military operations both within and outside a UN context. Some recent legislative moves and assertions on behalf of the government have laid the basis for the Japanese government to deploy the SDF to come to the aid of friendly nations under attack in the (nearby) future.

Some have argued that 70 years of national defense shifts have made Article 9 irrelevant. However, as we have seen, such a claim seems hardly accurate. Even if we agree that the evolution of constitutional practice in the field of national defense substantially deviates from the original meaning of Article 9, the article itself and norms derived from it have significantly influenced the development of Japanese defense policy. Even today, Japan is not (yet) a 'normal' country in this sense because the unique constitutional Pacifist Clause still makes a significant difference for anyone wishing to expand the size and scope of activity of the SDF.

At the same time, the evolution of national defense has clearly had important implications for the import of Article 9 in the real world. If we accept that constitutional law and constitutional practice ultimately have an interdependent relationship (or that formal constitutional provisions to do not operate in a vacuum), we can appreciate that the original meaning of Article 9

228 Ibid.

has seriously been called into question: it seems that the evolution of constitutional practice has substantially and persistently departed from the idea that Japan cannot have a military, even for the purpose of self-defense; and some of the most prominent constitutional actors, such as the government, the CLB and the legislator, have quite explicitly accepted, if not endorsed, the constitutional validity of this evolution. The judiciary, for its part, has not had not much to say about what is sometimes called the 'pacifism and national defense issue.'

All of this is not to say that the contemporary meaning of Article 9 is entirely clear or even crystalized. The battle for the Japanese government's right to maintain a military for the purpose of self-defense seems to have been fought. In other words, it seems unlikely that the executive, the legislature, or the judiciary will plead for a disbandment of the SDF any time soon. On the other hand, it is probably too early to tell the extent to which Article 9 will ultimately also allow for practices that amount to collective self-defense. This right has been asserted by the government and was endorsed by the legislature in 2014–2015. It has arguably been exercised in measured forms since around the early 1990s, when Japan started to send the SDF abroad. However, only the future will tell what kind of activities amounting to collective self-defense will be persistent and durably accepted.

Why has Article 9 only changed informally – and not by way of formal constitutional amendment? In this chapter I have pointed to six possible factors that might explain Article 9's 'textual stickiness': amendment difficulty, polarization, judicial deference, the role of the CLB, the rejection of 'American-style' constitutionalism, and the rejection of an 'imposed' constitution.

This chapter has also explored whether and to what extent alternative mechanisms of constitutional change have functionally substituted the formal constitutional amendment procedure. As I have discussed, the 'official' interpretations, ordinary laws, treaties and other policy instruments that have been used in the fields of national defense and pacifism, seem to have been unable to generate the amounts of support for change as a formal constitutional amendment would presumably have had, because defense shifts have been extra-ordinary controversial in Japan. The use of alternative means of change seems to have also had repercussions for the effectiveness of constitutional change in the field of national defense. Although it seems unlikely that the SDF will be disbanded or that Japan will scale down its defense capacity and activities any time soon, a constitutional commitment to pacifism and an ambitious defense policy appear to have been hard to combine in practice.

Finally, this chapter has also noted that, other than a formal constitutional amendment probably would have had, the use of alternative means of change in the field of national defense seems to have triggered the use of such means in other field as well. It also appears to have generated a more general irony for constitutional democracy, although this general irony should not be exaggerated, or so this chapter has argued. Even though the national defense

and pacifism issue raises the eyebrows of many constitutionalists, Japan has been – and still is – widely recognized as one of the best functioning constitutional democracies in the world.

Would it be a good idea for constitutional legislators to amend Article 9 and answer at least some of the most pressing constitutional questions the evolution of national defense has raised? There is much room to argue that it would, even – or perhaps especially – if one wants to preserve Japan's constitutional commitment to pacifism. It seems that only a formal amendment would be able to ease the tension that has mounted between Japan's national defense policy and its constitutional commitment to pacifism, even though this commitment has proven to be extraordinarily flexible. Indeed, it appears that only a formal amendment would be able to convincingly answer the constitutional questions that have arisen during 70 years of national defense shifts in the direction of 'becoming a normal country again'. Moreover, it appears that only after a formal constitutional amendment would Japan be able to develop a truly effective policy framework for sending its military abroad. And, more generally, it would be a good idea for Japan to adapt the text of its constitution to changing circumstances and demands in order to make sure that, in the longer run, Article 9 – and the entire document for that matter – do not become dead empty letters with no shaping force at all.

These are probably some of the considerations that recently inspired Prime Minister Abe to launch another effort to formally amend Article 9.[229] However, although Abe seems to have sufficient support for constitutional amendment in the Diet, his chances of success again seem quite small.[230] Again, it has appeared to be much more difficult to agree upon a specific constitutional text than to agree upon the general idea that Article 9 should be amended.[231] Moreover, if the Diet would approve, the amendment proposal still has to be approved by in a referendum by a people who still seem to widely support Japan's constitutional commitment to pacifism.[232] And then the Emperor suddenly made a bold move by announcing his wishes to abdicate – thereby ensuring that, at least in the coming few years, the constitutional actors have to give an entirely different constitutional matter priority.[233]

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229 See: Kyodo, 'Abe explicit in call for amendment to Constitution's Article 9', *The Japan Times*, 3 February 2016. Tomohiro Osaki, 'As Diet opens, emboldened Abe sets sights on constitutional revision', *The Japan Times*, 25 September 2016.

230 Jiji, 'LDP vice chief negative about revising Article 9, *The Japan Times*, 26 July 2016.

231 Kyodo, 'Diet Panel reopens talks on constitutional revisions for the first time since February', *The Japan Times*, 16 November 2016.

232 http://www.japantimes.co.jp/news/2017/04/30/national/japanese-divided-revising-article-9-amid-north-korea-threats-poll/

233 Ilaria Maria Sala, 'The real reason Japan's emperor wants to abdicate', *SCMP*, 14 Aug 2016. http://www.scmp.com/week-asia/article/2003034/real-reason-japans-emperor-wants-abdicate (accessed 14-2-2017).

4 The US Constitution and shifting constitutional war powers

> '[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.'
>
> Justice Robert H. Jackson[1]

4.1 INTRODUCTION

During his election campaign, United States President Donald Trump was notoriously vague about his exact foreign policy plans[2] – especially with regard to his 'secret plan' to destroy ISIS – but it still became quite clear that he is a proponent of a harsher American security policy. Amongst other things, he said that if he became president, he would 'destroy' ISIS, possibly by deploying ground troops in the Middle-East.[3] He said that he would kill the families of terrorists in order to win the fight against ISIS.[4] He argued that the American military should reinstate the use of 'enhanced interrogation techniques' such as waterboarding, not only because 'it works', but also because 'if it doesn't work, they [the terrorists] deserve it anyway for what they do to us.'[5] Trump has suggested that he wants to continue detaining suspects of terrorism at

1 Concurring in *Youngstown & Tube CO v Sawyer* (1952), 343 US 579, 1952, 653.
2 Cf. Max Fisher, 'What is Donald Trump's Foreign Policy?', *The New York Times*, 11 November 2016.
3 Sopan Deb, 'Donald Trump: Massive ground force may be needed to fight ISIS', *CBSNEWS*, 11 March 2016.
4 Tom Lobianco, 'Donald Trump on terrorists: "Take out their families"', *CNN*, 3 December 2015.
5 Ben Jacobs, 'Donald Trump on waterboarding: "Even if it doesn't work they deserve it"', *The Guardian*, 24 November 2015.

Guantánamo Bay.[6] In an interview with MSNBC, he rhetorically asked: 'Somebody hits us within ISIS; you wouldn't fight back with a nuke?'[7]

Some commentators have attempted to set minds at rest by pointing out that an American president cannot make such decisions unilaterally.[8] The American presidency, they explain, is embedded in an advanced system of checks and balances, entrenched by one of the most difficult-to-change constitutions in the world. These commentators argue that, under the US Constitution, an American president can do little without the approval of Congress and his decisions can be reviewed against the constitution by the Supreme Court.

With respect to the president's authority in internal affairs, there might be an element of truth in such claims.[9] Indeed, in order to introduce a new health care system, President Obama required the consent of Congress. Moreover, the statute[10] that provides the legal foundation for 'Obama Care' was reviewed by the Supreme Court.[11]

However, when it comes to the powers of the president as commander-in-chief, the situation is substantially different. It is true that, up and until the Second World War, the president required the approval of Congress, both *de facto* and *de jure*, to deploy American troops and agents abroad.[12] In the common pre-1945 understanding, the Declare War Clause of the US Constitution (Article II) vested a prerogative in Congress to authorize and regulate the use of military force by the executive; the Commander-in-Chief Clause merely reserved the superintendence over the military to the president. However, during the Cold War and the War on Terror, a development occurred whereby the president, as commander-in-chief, acquired an ever more independent and powerful position in the field of national security.[13] Although this development has a strained relationship with the original – or least, traditional – constitutional plan, the judiciary has hardly interfered because it has consistently refused to hear the merits in war power cases.[14] The result is that a contemporary American president, as commander-in-chief, is hardly

6 The Associated Press, 'Never Mind Closing Guantanamo, Trump Might Make It Bigger', *New York Times*, 15 November 2016.

7 MSNBC Info, 'FULL TRANSCRIPT: MSNBC Town Hall with Donald Trump Moderated by Chris Matthews', MSNBC, 30 March 2016.

8 E.g., Daniel W. Drezner, 'Now, we test America's constitutional democracy', *The Washington Post*, 9 November 2016. Charles Groenhuijsen, 'Donald Trump als president is geen ramp', *NRC*, 7 Mei 2016. Stacy Hilliard, 'Don't panic about President Trump – the real power in U.S. politics lies elsewhere: how Congress, the cabinet and the vice-president will keep Trump in line', *Newsweek*, 10 November 2016.

9 For a different view, see Posner and Vermeule (2010).

10 The Patient Protection and Affordable Care Act of 2010, Public Law 111-148, 124 Stat. 119.

11 *National Federation of Independent Business v. Sebelius*, 567 U.S.. ___ (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566.

12 Griffin (2015), 353.

13 Barron and Lederman (2008). Griffin (2013).

14 See for an overview: Fisher (2013), 302.

bound by checks and balances. As an empirical matter at least, he has a broad preclusive and unilateral authority to deploy conventional weapons, intelligence units, and use nuclear arms.

The increased scope of presidential capacity to use military force has often been reviewed from a legal-doctrinal perspective.[15] Commentators who take this perspective recognize a limited set of authoritative sources of changing the constitution; these are commonly only formal constitutional amendments and judicial decisions. Since such sources are not available in the area of national security, they retain (their version of) the original meaning of the US Constitution's War Clauses. These commentators argue that any practice that deviates from this meaning is 'unconstitutional'. Moreover, the war powers issue has been studied from socio-political perspectives, which focus on real-world behavior and power relations.[16] These perspectives are taken to describe and explain the evolution of practice in the field of national security, without paying too much attention to the import of the legal or constitutional framework.

Both perspectives can be helpful. The legal-doctrinal perspective may reveal the original intent of the US Constitution's War Clauses. The political scientists, in turn, have very helpfully described and explained the much greater independence that modern presidents (compared to their pre-1945 predecessors) have acquired in shaping and implementing national security policy.[17] However, neither perspective really enables us to reveal the US Constitution's War Clauses' significance in the real world or, conversely, appreciate the implications that ordinary legal and socio-political developments may have had for how we should explain and describe the import of these clauses.

Therefore, this chapter takes an alternative approach. I will explore the American war powers issue by taking a historical institutionalism perspective. This cross-disciplinary approach, which focuses on the interplay between formal constitutional rules and real-world practices (see chapter 2), should enable us to explore the meaning that the US Constitution's War Clauses originally (or traditionally) had, reveal how the evolution of constitutional practices in the field of national security has changed during the Cold War and the War on Terror, and then see how both this evolution and the War Clauses of the US Constitution have related to one another. The historical institutional perspective will enable us to appreciate the consequences the War Clauses of the US Constitution have had for the way in which constitutional practice in the field of national security evolved, but also to recognize that this evolution has implications for how we must describe or explain the meaning of these War Clauses.

15 E.g. Fisher (2013). Ackerman (2010). Paulsen (2010).
16 E.g. Jones (2007), 118-120.
17 E.g. Perret (2007) and Skowronek (1993).

The two remaining sections of this chapter have two aims. The first is to suggest some possible factors that might explain why, despite significant change in the area the US Constitution's War Clauses seek to regulate, these clauses have never been subject of formal constitutional amendment. The second is to explore whether and to what extent alternative mechanisms that have effected structural change in the field of national security have functionally substituted the Article V amendment procedure of the US Constitution.

The US war powers issue is extremely relevant and interesting, especially at a time when an unpredictable president commands the American Armed Forces. Furthermore, the American war powers issue can teach us a great deal about the more general theme of informal constitutional development, including the ways in which law and politics intersect, the significance of rigid constitutional norms, and the implications of informal constitutional change for a constitutional democracy that (supposedly) lives under a written constitution.

4.2 War powers: from shared powers to presidential powers

This section[18] will start by explaining how the constitutional war powers of the US were allocated traditionally prior to 1945. I will then explore how, during the Cold War and the War on Terror, presidents acquired an ever broader, preclusive, and more independent authority to command the military. In conclusion, I will look at the consequences this development has had for the meaning of the US Constitution's War Clauses.

4.2.1 The constitutional plan for war in the early republic

A good starting point for exploring constitutional development in a particular field is to determine the original meaning of the constitutional provisions that supposedly establish and regulate this field. However, establishing the original meaning of the US Constitution's War Clauses is problematic, to say the least. Consider first of all the constitutional text. The US Constitution's War Clauses vest in Congress the power to 'Declare War', 'To raise and support Armies', and 'To provide and maintain a Navy'.[19] They also make the president the 'Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United

18 I published an earlier version (in Dutch) of this section in *Nederlands Juristenblad* (Netherlands Law Journal) under the title 'Als Commander in Chief kan President Trump straks bijna alles' (As Commander in Chief President Trump can do almost anything). See: Passchier (2017b).

19 Article 1(8) US Constitution.

States'.[20] These phrases are notorious for their 'vagueness and generality', as Justice Jackson put it.[21] Indeed, while these clauses clearly divide the war powers between the president and Congress, they are ambiguous in terms of how this division is exactly supposed to fall.[22]

Does the Declare War Clause imply that the US cannot wage war or use military force without a declaration of war by Congress? Does such a declaration need to be formal and explicit? Is a formal declaration of war the only way in which Congress can authorize a war? Can presidents wage smaller wars without a declaration of war or explicit congressional authorization? Or does the declare War Clause imply that all use of force by the US military needs prior congressional authorization of some kind? Also, the Commander-in-Chief Clause leaves a lot of room for interpretation. Can a president, as commander-in-chief, unilaterally initiate war? Does the commander-in-chief have a prerogative to direct how troops are to be deployed once Congress has authorized war? Or does Congress have the right to also intervene in tactical matters? Does the president, as commander-in-chief, have a prerogative of superintendence? Is the president, as commander-in-chief, obliged to wage wars that Congress has declared? Who can end a war? And what about emergencies? These are just a few examples of important legal questions that the text of US Constitution does not (directly) answer.

Moreover, while the War Clauses of the US Constitution hardly give clues with regard to their original meaning, the debates at the Philadelphia Convention, at which these Clauses were drafted, do not provide any univocal answers either.[23] On the one hand, it seems that the US Founding Fathers intended to establish a strict separation of war powers between the president and Congress, and therefore created a reduced role for the executive (relative to the British Monarch).[24] Indeed, during the debates at the Philadelphia Convention, some delegates explicitly rejected the British model in which the executive – the monarch – had the exclusive control over foreign affairs and decisions of war and peace. James Wilson

> 'did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace'.[25]

20 Article 2(2) US Constitution.
21 Justice Robert H. Jackson concurring in *Youngstown & Tube CO v Sawyer*, 343 US 579, 1952, p. 653.
22 Zeisberg (2013), 5 and Hasabe (2012), 469.
23 Which probably explains why scholars continue to debate until today whether the framers made their intentions fully evident in the US Constitution's War Clauses. Griffin (2015), 353.
24 E.g. Ginsburg (2008), 497. Paulsen (2010).
25 Fisher (2013), 5.

Edmund Randolph called the executive 'the foetus of monarchy', claiming that the delegates to the Philadelphia convention had 'no motive to be governed by the British Governmt. as our prototype'.[26] Charles Pinckney said he would prefer a 'vigorous executive', but was afraid that giving the executive the power of war and peace would 'render the Executive a Monarchy'.[27] John Rutledge was in favor of giving executive power to a single person, 'tho' he was not for giving him the power of war and peace'.[28] Roger Sherman argued that the executive was to be an institution that should merely carry 'the will of the legislature into effect'.[29] Finally, Alexander Hamilton proposed that the Senate would have 'the sole power of declaring war', and the president would have the competence to have 'the direction of war when authorized or begun'.[30]

On the other hand, the debates of the Philadelphia Convention indicate that the founders considered the president, as commander-in-chief, to have the power to 'repeal sudden attacks'.[31] Indeed, an early draft of the US Constitution provided Congress with the power to 'make war'. However, Charles Pinckney cautioned that legislative proceedings would be 'too slow' in the case of an emergency (the framers expected Congress to meet only once a year). Therefore, James Madison and Elbridge Gerry proposed the word 'declare' instead of 'make', intending to leave the president with 'the power to repel sudden attacks'.[32]

However, even without exactly knowing the original meaning of the US Constitution's War Clauses, we may acknowledge that in the period between the founding and the end of the Second World War, the ability of presidents to use military force depended to a great extent on congressional approval.[33] It is true that the 19th century had seen a few quite assertive presidents who had seriously challenged the position of Congress.[34] It is also true that presidents had asserted – and, on occasion, exercised – a unilateral power to 'safe American lives' by using military force abroad from the early 20th century on.[35] In general, however, it can be said that presidents who held office during the period between 1789 and 1945 were generally able to do relatively little in the field of war without the consent of congress. It was generally acknow-

26 Fisher (2013), 5.
27 Ibid, p. 4.
28 Ibid.
29 Ibid.
30 Ibid.
31 Hasabe (2012), 469.
32 Fisher (2013), 8-9.
33 Griffin (2015), 353.
34 Fisher (2013), 17 et seq. Polk's role in the Mexican War and Lincoln's role in the Civil War are notable and were, at least at the time, controversial in light of the division of war powers that was supposedly provided by the US Constitution. See: Fisher (2013), 38 et seq. (about Polk) and Fisher (2013), 47 et seq. (about Lincoln).
35 Fisher (2013), 56 et seq.

ledged, even by the presidents themselves,[36] that the commander-in-chief could only commence hostilities against foreign nations – both in the context of limited and total war – after explicit congressional authorization.[37] Indeed, major wars that were fought between 1789 and 1945 (the War of 1812, the Mexican War of 1846, the Spanish-American War, World War I and World War II) were formally declared. Countless less familiar wars and hostilities were, with only a few exceptions, preceded by an express congressional authorization in some alternative form.[38] Moreover, during the first 150 years or so of the American republic, it was generally acknowledged that Congress could regulate the war powers of the commander-in-chief. In the traditional understanding, the Commander-in-Chief Clause only protected the presidential prerogative of superintendence (and, with that, civilian control over the military[39]).[40] Other than that, the president had to operate in accordance with the wishes of Congress. Also consider that the ability of most pre-1945 presidents to wage war was also significantly limited as a practical matter. Until 1941, with the exception of the periods during the Civil War and the First World War, the United States maintained, in accordance with the doctrine of 'isolationism', a relatively small army that was only capable of conducting conventional – that is, overt – operations.[41] This concretely meant that, without Congressional approval (and funding), presidents hardly had the practical capacity to unilaterally send troops into harm's way, even if they wanted to.

The following anecdote illustrates the interdependent relationship between the president and Congress in the US Constitutional order before 1945.[42] As is well-known, the British were already fighting Nazi Germany in 1939. The British Prime Minister Winston Churchill repeatedly tried to convince the American President Franklin Roosevelt to involve the US in the struggle against Nazism. The US supported England with supplies, but the country officially remained neutral and did not send troops. When, after the German defeat of France, Churchill tried to persuade Roosevelt to deliver a more serious – military – commitment and declare war against Germany, Roosevelt tellingly replied that 'he could not commit the United States to military intervention in the war'. He told the British Prime Minister that 'only Congress can make such commitments'. Indeed, although we know that Roosevelt had probably wanted to join the fight against Nazi Germany much sooner, the full-scale

36 No pre-1945 president has asserted a unilateral authority to initiate major military operations (in sharp contrast to post-1945 presidents, as we will see later). See: Lederman and Barron (2008), 948-950. Zeisberg (2013), 18 and 92.

37 Lederman and Barron (2008), 948-950. Griffin (2013), 17. Adler (1988), 2.

38 Griffin (2013), 46-47.

39 Levinson 2012, p. 193.

40 Lederman and Barron (2008), 767-800.

41 In 1939 and 1940, the US military ranked only 20th in the world in terms of ground forces. Griffin (2013), 55.

42 See: Griffin (2013), 56.

war effort of the United States in the Second World War would only begin after the congressional declarations of war against Japan (on 7 December 1941) and Germany and Italy (both on 11 December 1941).

4.2.2 Developments at the outset of the Cold War

By 1945, after four years of intense fighting in four continents, the United States had the most powerful military in the world, capable of conducting overt, covert, and nuclear operations around the globe. After the First World War, the US had largely decommissioned its armed forces, but this time many political actors believed that the circumstances required a different approach. The perceived security environment surrounding the country and its new self-understanding as a leading 'superpower' with major responsibilities towards the 'free' world compelled the US to maintain the larger part of its armed forces and sweepingly reform its national security policy. In particular, the Soviet Union and the ideology of communism were considered major threats to American national security and international stability. In an influential document known as the 'Long Telegram' (a 5000-word piece) sent from Moscow on 22 February 1946, the diplomat George Kennan famously characterized the Soviet Union as a

> 'political force committed fanatically to the belief that with US there can be no permanent modus vivendi, that it is desirable and necessary that the internal harmony of our society be disrupted, our traditional way of life be destroyed, the international authority of our state be broken, if Soviet power is to be secure.'[43]

Suggesting that the Soviet leadership was '[i]mpervious to logic of reason, and […] highly sensitive to logic of force,' Kennan recommended a (further) militarization of the emerging conflict with the Soviet Union.[44]

In this context, a couple of policy reforms took place that significantly enhanced the president's capacity to use military force.

The two most important manifestations of these policy reforms are the National Security Act of 1947[45] and a top-secret document called NSC-68, which was drafted in 1950.[46] The National Security Act marks the establishment of what came to be known as the 'National Security State'. It formally

43 'George Kennan to George Marshall ["Long Telegram"]', February 22, 1946. Harry S. Truman Administration File, Elsey Papers. https://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/6-6.pdf

44 Ibid, p. 15.

45 Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758.

46 'A Report to the National Security Council – NSC-68' was drafted in 1950, and declassified in 1975. It can be retrieved from the Truman Library: http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf

purports to enhance the efficiency of the US security apparatus, including the armed forces, by centralizing its coordination and placing its direction under unified control.[47] To that end, the Act established three institutions. The first is the 'National Security Council', which is presided by the president. This council is attributed the function to advise the president in matters of national security and to coordinate armed forces and the other departments and agencies of the US Government to cooperate more effectively in matters involving national security.[48] The second is the National Security Act, which established the 'Central Intelligence Agency' (CIA), which is attributed several functions related to the coordination and execution of intelligence activities under the direction of the National Security Council.[49] The third institution is the National Security Act, which establishes the 'National Security Resources Board', attributed the function of advising the president concerning the coordination of military, industrial, and civilian mobilization to meet the demands of the American security apparatus in times of war.[50]

While the National Security Act outlines the organigram of the (much more centralized) Cold War security apparatus, the strategy for how this apparatus was to be used was crystalized in (NSC-68). NSC-68 largely adopts the suggestions Kennan had contemplated in his Long Telegram. It defines the position of the US as 'the center of power in the free world' and assumes that such a position 'place[s] a heavy responsibility upon the United States for leadership'. It formalizes the strategy 'containment' of global communist expansion, famously contending that 'the assault on free institutions is worldwide now' and that 'a defeat of free institutions anywhere is a defeat everywhere', and it endorses the use of force where necessary to oppose the Soviet Union.[51]

From the outset, observers noticed that the new US security policy would make it much harder for Congress to control and regulate the president as commander-in-chief. The National Security Act substantially expanded the potential scope of presidential activity, especially in the area of covert operations. The newly formed Central Intelligence Agency (CIA), for example, became responsible for clandestine intelligence gathering operations in war as well as in peace time. The organization did not have a detailed charter and it would fall directly under the authority of the president. Hence, it would provide the president with the new option to solve foreign policy problems by using force covertly, without direct legislative oversight.[52] NSC-68, in its turn, by striking nothing short of an apocalyptic tone – 'The issues that face us are momentous,

47 Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758, sec. 2.
48 Ibid, sec. 101.
49 Ibid, sec. 102.
50 Ibid, sec. 103.
51 'A Report to the National Security Council – NSC-68'.
52 Griffin (2013), 112.

involving the fulfillment or destruction not only of the Republic but of civilization itself'[53] – seems to implicitly call for a much stronger executive in the field of national defense. Indeed, the policies contemplated by NSC-68 would require a vast military buildup; in particular, the strategy of containment required a much more assertive commander-in-chief.[54] Moreover, in a framework in which a president would constantly have a vast standing military at his disposal (and would therefore not require separate funding for every action), and in which policy required swift military action, it would be much harder for the legislature to control presidential conduct.

The tension between the new security strategy and the meaning of the US Constitution's text embodied by the traditional, pre-1945, constitutional order was obvious, even for contemporaries.[55] Furthermore, historians and scholars of war power have observed that NSC-68 was crafted deliberately as what Griffin calls a 'white paper for a new constitutional order', because it embraced the idea that the old (pre-1945) constitutional order was no longer adequate.[56] However, there is no evidence that constitutional actors who brought about NSC-68 considered amending the War Clauses of the US Constitution.[57]

4.2.3 Korea and Truman's precedent

The consequence of the new American security policy for constitutional practice would soon become apparent. On June 25, 1950, communist North Korean forces, backed by the Soviet Union, crossed the 38th parallel invading South Korea. Only five days later, President Truman responded with a major counter-attack, in accordance with the doctrine of 'containment' stipulated by NSC-68. Under the terms of the constitutional plan for war, as it was generally understood before the Second World War, Truman would have need explicit congressional approval before going to war. However, following his Secretary of State Dean Acheson's advice to try to create a constitutional precedent for a broad unilateral presidential prerogative in the field of national security, Truman strikingly did not seek congressional authorization before commencing a large-scale military intervention abroad.[58]

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53 'A Report to the National Security Council – NSC-68', 9.

54 Finally, on the basis of the presumptions and strategies set out in NSC-68, the US defense budget was more than tripled, the development of tactual and strategic nuclear weapons was approved, and an extensive chain of overseas bases set up that would be used to legitimate a number of military interventions abroad. See: Hixson (1993), 508.

55 Kennan had already noted the constitutional challenge of dealing with the threat of Soviet Communism: 'the greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping'. See: 'Long Telegram'.

56 Griffin (2013), 61.

57 Griffin (2013), p. 67.

58 Lederman and Barron (2008), 1057.

Initially, there was little opposition in Congress against Truman's unilateral action.[59] A debate in the legislature only occurred the following winter, when the initial optimism about the possibility of success in Korea was fading and when Truman announced that he was going to send four army divisions to Europe – without congressional authorization – to reinforce NATO forces opposing the (perceived) Soviet threat.[60] Faced with a critical Congress, Truman asserted that, under 'the President's constitutional powers as commander-in-chief of the Armed Forces, he has the authority to send troops anywhere in the world' without consulting with Congress.[61] This unprecedented assumption of unilateral war powers reportedly set off an extended debate in the Senate that lasted more than three months.[62] During this debate the Truman administration further extended its claim about presidential unilateral deployment powers: a January 1951 Department of State memorandum asserted that such authority was not only implied by the constitution's Commander-in-Chief Clause, but was also preclusive of congressional control.[63] As the memorandum states,

> '[n]ot only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.'[64]

A memorandum about the 'powers of the president to send the armed forces outside the United States' submitted one month later put it even more avowedly, arguing that 'since the direction of the armed forces is the basic characteristic of the office of the Commander-in-Chief, the Congress cannot constitutionally impose limitations upon it.'[65]

Scholars of war power have recognized the transformative nature of Truman's claim and unilateral presidential use of military power. Griffin called Truman's 1950 intervention in Korea 'a sharp break in our [American] constitutional tradition' because such a major commitment of US military forces to combat without congressional authorization had 'no parallel in any previous

59 Ibid, 1059. See also Fisher (2013), 99.
60 Lederman and Barron (2008), 1059.
61 Harry S. Truman: 'The President's News Conference,' January 11, 1951. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=14050.
62 Lederman and Barron (2008), 1059.
63 Memorandum (Jan. 6, 1951), in Assignment of Ground Forces of the United States to Duty in the European Area: Hearings on S. Con. Res. 8 Before the S. Comm. on Foreign Relations and the S. Comm. on Armed Services, 82d Cong. 88 (1951), cited by Lederman and Barron (2008), 1060.
64 Ibid.
65 'Powers of the President to send armed the armed forces outside the United States', 16 (Comm. Print 1951). Cited by Lederman and Barron (2008), 1060.

military intervention.'[66] Also, Lederman and Barron noted that, in committing troops to assist South Korean forces against attack from the North without seeking Congress' approval before or after taking these steps, Truman took 'a dramatic step forward in the history of unilateral presidential use of military power.'[67] Indeed, while it is likely that presidents before Truman had occasionally sought to broaden the scope of the independent presidential war power, Truman was the first president to ever claim the power to initiate large-scale hostilities without congressional authorization.[68] Moreover, before 1945, the US constitutional war powers had been more or less divided between president and Congress: the capacity of the president to take independent action in matters of national security was significantly limited by both institutional and practical factors. But institutional reforms at the outset of the Cold War, the 'militarization of the Cold War',[69] the direct availability of troops, the (perceived) security environment surrounding the US and the (perceived) responsibilities of the US as international 'superpower' had apparently created a context in which the president could assert and exercise a broad unilateral prerogative to use military force against another nation.

4.2.4 Vietnam and the War Powers Resolution

The course of events surrounding the next major conflict the US became involved in, the Vietnam War, would highlight the enduring character of Truman's break with the pre-1945 constitutional tradition.[70] Indeed, the history of this war would confirm, in at least two ways, that it had become extremely hard for Congress to regulate and limit the constitutional powers of the president as commander-in-chief.

In the first place, the Vietnam War has showed that, in the second half of the 20th century, Congress was no longer able to control the beginning of war. Already in the early 1950s, President Eisenhower sent a first contingent of military personnel to what was then the French colony of Indochina to aid the French in their fight against communist freedom fighters from the North. For the first couple of years, the US commitment remained limited to only a few hundred serviceman. The French tried to persuade the US to deliver a larger commitment and intervene with bombing missions and naval operations, but Eisenhower refused. It was only after the French surrendered at Dien Bien Phu in 1954 and the subsequent division of Vietnam along the 17th parallel that the US position changed. Between 1954 and 1960, the number of US service-

66 Griffin (2013), 32.
67 Lederman and Barron (2008), 1055.
68 Lederman and Barron (2008), 1055 and Zeisberg (2013), 18 and 92.
69 On this broader context, see also Zeisberg (2013), 125.
70 Lederman and Barron (2008), 1055.

men stationed in Vietnam to assist the South in its struggle against the communist North increased rapidly. By 1960, around 16,000 US military 'advisors' were deployed in Vietnam. American aid also included the delivery of armed helicopters, piloted by Americans, which were used to by the South to conduct raids against the North.[71] From the late 1950s, various types of US covert operations had been conducted.[72] However, even by mid-1964 – when the Johnson administration was seriously contemplating the possibility of starting large-scale overt military action[73] – the executive had not yet asked Congress for approval. It was only on August 2, 1964, when a US destroyer was (allegedly[74]) attacked by the North Vietnamese navy that President Johnson asked Congress for a resolution 'expressing the support for all necessary action to protect our armed forces'.[75] This request revealed that modern presidents could place Congress for a difficult dilemma: once confronted with the presidential request for authorization – or, in the president's words, 'support' – Congress was effectively forced to choose between endorsing a military operation that it might actually oppose and declining to fund further military actions, cutting supplies, and thereby possibly endangering troops already deployed in the field.[76]

In the second place, the course of events surrounding the War in Vietnam made it clear that Congress had lost its ability to control the course of war. When Congress debated Johnson's request to support the military intervention in Vietnam, Johnson publicly highlighted that the American response to the incident in the Tonkin Gulf would be 'limited and fitting'[77] and that the US intended 'no rash-ness' and sought 'no wider war'.[78] On August 10, Congress nearly unanimously adopted 'The Tonkin Gulf Resolution', which states that

> 'Congress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repeal any armed attack against the forces of the United States and to prevent any further aggression'.[79]

71 Fisher (2013), 127-128.
72 Moïse (1996), 2.
73 Ibid.
74 Historians have later concluded that there was in fact no North Vietnamese attack. See Moïse (1996).
75 Lyndon B. Johnson: 'Special Message to the Congress on U.S. Policy in Southeast Asia,' August 5, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26422.
76 Hasabe (2012), 470.
77 Lyndon B. Johnson: 'Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,' August 4, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26418.
78 Lyndon B. Johnson: 'Special Message to the Congress on U.S. Policy in Southeast Asia,' August 5, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project.
79 Tonkin Gulf Resolution, Public Law 88-408, 78 Stat. 384.

Interestingly, when signing the resolution, Johnson said that the responsibility of the military intervention in Vietnam was 'mine – and mine alone'.[80] In this way, he made two important things clear.[81] The first was that he did not regard the authorization of congress as a necessary legal condition; following Truman's precedent, he asserted that congressional approval for waging was not constitutionally required. The second was that he would not acknowledge the constitutionality of congressional meddling with operational decisions. From the Johnson administration's perspective, the purpose of the resolution was to express the political *support* of Congress; it was not seen as the legal justification.

Although the Tonkin Gulf Resolution of August 10, 1964, merely authorized the President to 'take all necessary measures to repeal any armed attack against the forces of the United States and to prevent any further aggression',[82] US involvement in Vietnam would gradually deepen in the next four years.[83] In February 1965, large bombing runs began. From the spring of 1965, the number of combat forces deployed in Vietnam increased steadily. By July 1965, 125,000 servicemen were deployed in Vietnam and by the end of 1965, this number had already risen to 184,000 servicemen. Eventually, by the end of 1968, more than 500,000 US servicemen were fighting in Vietnam.

The purpose of the 'escalation' of the war was to bring a swift victory over the North Vietnamese. However, during 1968 it became clear that the war had reached a bloody stalemate. Many thousands of American casualties, a much higher Vietnamese death toll, horrifying journalistic reports of the situation, and the lack of concrete results and an appealing war aim made the war effort increasingly controversial. A powerful nation-wide anti-war movement led Johnson to announce that he would not run for a second tenure as president. Nevertheless, the war would not end soon. Johnson's successor, Richard Nixon, who had run a campaign that promised to end the war in Vietnam, actually extended it into Cambodia and Laos in 1970. These actions made the war effort in South-East Asia even more controversial.

In reaction, Congress enacted a series of legislative amendments designed to constrain the ability of the president to continue to use military force in South-East Asia. In 1971, Congress prohibited the use of public funds for introducing US ground combat troops and military advisors in Cambodia.[84] Around the same time, Congress repealed the Tonkin Gulf Resolution.[85]

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80 See: Lyndon B. Johnson: 'Remarks Upon Signing Joint Resolution of the Maintenance of Peace and Security in Southeast Asia,' August 10, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26429

81 Griffin (2013), 123-125.

82 Tonkin Gulf Resolution, Public Law 88-408, 78 Stat. 384.

83 Fisher (2013), 134.

84 Public Law 91-653-JAN. 5, 1971 (84 stat. 1943, sec. 7(a) (1971)).

85 Public Law 91-672-JAN. 12, 1971 (84 Stat. 2053, sec 12 (1971)).

Finally, in 1973, Congress cut funding for all combat activities in South-East Asia.[86] This measure finally ended the Vietnam War.

In an effort to restore its pre-1945 constitutional position, or at least strengthen its constitutional position, Congress enacted the War Powers Resolution (WPR) shortly after the end of the Vietnam War.[87] The formal purpose of this resolution was

> 'to insure that the collective judgement of both the Congress and the president will apply to the introduction of United Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations'.[88]

Section 3 then provides that, 'in every possible instance', the president has to consult with Congress before introducing US armed forces into hostilities and that, after each introduction, the president must regularly consult with Congress until the armed forces have been withdrawn. Section 4 stipulates that in any case in which the US armed forces are introduced into hostilities without a declaration of war, the president is required to submit a report to Congress explaining: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement. Section 5 provides for a 60-to-90-day 'clock'. It says that within 60 days after submitting the report about commenced hostilities to Congress, the president must terminate the use of US armed forces, unless Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. The 60-day period may be extended for not more than an additional 30 days

> 'if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces'.

86 Public Law 93-53-JULY 1, 1973 (87 Stat. 130, sec. 108 (1973)). 'Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.'

87 The War Power Act of 1973, Public Law 93-148.

88 Sec. 2.

In addition, section 5 states that, at any time US armed forces are engaged in hostilities outside the territory of the US, its possessions and territories without a declaration of war or specific statutory authorization, 'such forces must be removed by the President if so directed by a concurrent congressional resolution.'[89]

The WPR was immediately vetoed by President Nixon. He argued that the 60-days clock was 'CLEARLY UNCONSTITUTIONAL' [*sic*], because it was an 'attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years'.[90] Interestingly, Nixon found that the

> 'only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution – and any attempt to make such alterations by legislation alone is clearly without force'.[91]

However, Congress did not share Nixon's view and passed the WPR over his veto.

Despite this, the WPR changed little. The WPR is generally regarded a failure because it did not place effective limits on the war powers of the executive or strengthen the hand of Congress in decisions pertaining the use of military force by the US.[92] Rather, by recognizing that the president has a 60-90-day window to use military force without seeking congressional approval, it appears to have had the effect of promoting independent presidential moves.[93] Moreover, presidents after Nixon have also refused to acknowledge the constitutionality of the WPR.[94] Only twice have they reported to Congress under section 4,[95] and the 60-90-day clock was never formally started.[96]

89 This provision is generally regarded unconstitutional in light of *INS v Chada*, which the Supreme Court stipulates that actions by Congress having the purpose or effect of altering the rights, duties and relations of executive branch officials must be subjected to the possibility of a presidential veto. See: 462 U.S. 919 (1983) cited by Hasabe (2012), 471.

90 Richard Nixon: 'Veto of the War Powers Resolution,' October 24, 1973. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=4021.

91 Ibid.

92 Hasabe (2012), 470. Hassabe follows Ely (1993), 48-54, Bobbit (1994), 1397, Tribe (2000), 667-669. Dorf (2006), 172.

93 Fisher (2013), 144. For an example of how presidents interpret the 60-day clock, see: Office of Legal Council, 'Authority to Use Military Force in Libya', April 1, 2011, p. 1. Explaining the 60-day clock, the office claims that this provision only makes sense if makes sense 'if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.'

94 Hasabe (2012), 471.

95 Fisher (2013), 149.

96 Ibid.

Also, since the enactment of the WPR, presidents have commonly continued to assert a unilateral and preclusive power to deploy US armed forces abroad.[97] Presidents from Ford to Reagan have a fairly uniform record. As Fisher explains, when conducting short-term military operations in relatively isolated areas of the world, modern presidents generally acted unilaterally; for the use of force on a larger scale or for the use of force that carried the risk of involving other nations, they commonly sought congressional authorization (or 'support'), but they would not typically admit that they needed such an authorization legally.[98]

4.2.5 After the Cold War: no congressional come-back

The original – that is, pre-1945 – allocation of the American constitutional war powers, which had significantly changed during the Cold War, was not restored when the Cold War was over. Indeed, the course of events surrounding the Gulf War would indicate that the Cold War plan for war would outlive the Cold War itself.

Like his modern predecessors, when President Bush sent several thousands of troops to Saudi Arabia in early 1990, he did not seek congressional approval, claiming that the operations had a purely defensive nature.[99] When it became clear that the operations in the Middle East would probably take a more offensive posture, Secretary of Defense Dick Cheney testified before the Senate Armed Services Committee that he did 'not believe that the President requires any additional authorization from the Congress before committing US forces to achieve our objectives in the Gulf'.[100] (Interestingly, by using the phrase 'additional authorization', Cheney innovatively suggested that the UN Security Council approval was constitutionally sufficient for the US Executive to take military action.[101]) Moreover, when 53 members of Congress challenged the authority of the president to initiate an offensive attack against Iraq without fist securing congressional authorization, the Justice Department suggested[102] that it was up to the executive to determine whether an offensive action taken by US armed forces constitutes an act of war and whether such an act requires

97 Ibid, 144-145. Lederman and Barron (2008), 1069 et seq.

98 Fisher (2013), 154.

99 Ibid, 168.

100 'Crisis in the Persian Gulf Region: U.S. Policy Options and Implications', hearings before the Senate Committee on Armed Services, 101st Cong., 2d Sess. 701 (1990).

101 In this innovative assertion, the administration was backed by a New York University law professor, Thomas M. Frank, who argued in the *New York Times* that Congress had 'neither a constitutional obligation nor a right to declare war before the U.S. joins in a U.N.-sponsored police action in the Persian Gulf'. See: Thomas M. Franck, 'Declare war? Congress can't', *The New York Times*, 11 December 1990.

102 Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) par. 1145 and footnote 11.

the explicit consent of Congress in the form of a declaration of war or alternative statutory approval.[103] Despite these assertions, in a letter dated January 8, 1991 to congressional leaders regarding the Persian Gulf Crisis, President Bush requested that Congress adopt a resolution stating that Congress supports the use of all necessary means to implement the UN Security Council Resolution 678.[104] Interestingly, he added that he was 'determined to do whatever is necessary to protect America's security' and asked Congress to 'join with me in this task'.[105] The following day, when reporters asked him whether he believed that he needed congressional resolution for the use of military force in Iraq, Bush replied that he did not feel it was necessary: 'I feel that I have the authority to fully implement the United Nations resolutions.'[106] On January 12, 1991, Congress passed a joint resolution to 'authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678.'[107] Two days later, however, on signing the resolution into legislation, Bush stated:

> 'As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's

103 In *Dellums v. Bush*, which is one of the few cases in American history in which a Federal Court considered the justifiability of the US Constitution's Declare War Clause, 53 members of Congress, who believed that the initiation of offensive United States military action in Iraq was imminent, requested an injunction directed to President Bush to prevent him from initiating such action without first securing a declaration of war or another explicit congressional authorization for such action. The congressional plaintiffs argued that offensive US action in the Persian Gulf would be unlawful in the absence of a declaration of war by Congress of a statutory authorization, as 'a war without concurrence by the Congress would deprive the congressional plaintiffs of the voice to which they are entitled under the Constitution'. The court rejected the implicit argument of the Justice Department that it is up to the executive to determine whether certain types of military action require a declaration war (see par. 1145 and footnote 11). As Justice Greene noted: 'This claim on behalf of the Executive is far too sweeping to be accepted by the courts. If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand' (at 1145). Ultimately, however, the court decided not to grant the plaintiffs' request for a preliminary injunction because it found that the controversy was not ripe for judicial decision.

104 George Bush: 'Letter to Congressional Leaders on the Persian Gulf Crisis,' January 8, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19196.

105 Ibid.

106 George Bush: 'The President's News Conference on the Persian Gulf Crisis,' January 9, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19202

107 Public Law 102-1—JAN. 14, 1991. 105 STAT. 3.

> constitutional authority to use the Armed Forces to defend vital US interests or the constitutionality of the War Powers Resolution.'[108]

Also after the war against Iraq, Bush repeatedly made it clear that, in his view, he could have legally started the war without congressional authorization. In a speech given at Princeton University, in which he explained how he had understood his role of the president as commander-in-chief in the Persian Gulf crisis, Bush said:

> 'Though I felt after studying the question [of the allocation of war powers] that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf War.'[109]

During the 1992 presidential campaign, Bush said that some people had asked him why he had not been able to bring the same kind of purpose and success to the domestic scene as he had done to the war in Iraq. 'The answer is', as the president told his Texan audience, that 'I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait. That's the reason.'[110]

The second post-Cold War president, Bill Clinton, followed the line of his post-1945 predecessors in asserting that Congress had no authority to restrict the war powers of the Executive.[111] In fact, in places such as Bosnia and Haiti, Clinton initiated military interventions without consulting with Congress at all.[112] In each case, members of Congress (unsuccessfully) proposed legislation directing the president to obtain congressional consent prior to using troops. When Clinton was asked in a radio interview whether he would veto such legislation, he replied:

> 'All I can tell you is that I think I have a big responsibility to try to appropriately consult with Members of Congress in both parties – whenever we are in the process of making a decision which might lead to the use of force. I believe that. But I think

108 George Bush: 'Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,' January 14, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19217

109 George Bush: 'Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey,' May 10, 1991. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=19573.

110 George Bush: 'Remarks at the Texas State Republican Convention in Dallas, Texas,' June 20, 1992. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=21125.

111 See: Hendrickson (2002), 163.

112 Fisher (2013), 178-184.

> that, clearly, the Constitution leaves the President, for good and sufficient reasons, the ultimate decision-making authority.'[113]

In the same interview, Clinton agreed that a president should be careful and circumspect in committing the lives of Americans. 'But', he emphasized, 'still the President must make the ultimate decision, and I think it's a mistake to cut those decisions off in advance' by issuing constraining legislation.[114] At an October 19, 1995, news conference, Clinton was asked whether he would send ground troops to Bosnia, even if Congress did not approve. He responded:

> 'I am not going to lay down any of my constitutional prerogatives here today. I have said before and I will say again, I would welcome and I hope I get an expression of congressional support. I think it's important for the United States to be united in doing this. […] But I believe in the end, the Congress will support this operation.'[115]

In December 1995, Clinton did send 20,000 ground troops to Bosnia without first seeking or obtaining congressional authority.[116]

However, Clinton's most striking action was arguably his 1999 decision to use military force in Yugoslavia.[117] As we have seen, presidents since Truman have asserted a unilateral and preclusive power to deploy troops abroad. Moreover, most modern presidents have indeed ordered the use of military force without obtaining congressional approval in one or more instances. But, except for the Korean War, interventions without congressional approval had commonly been relatively minor in scope. Major interventions after the Korean War, such as the Vietnam War and the Gulf War, had – despite unilateral presidential claims and moves – ultimately been (more or less[118]) authorized by Congress. Also, prior to the beginning of the US intervention in Yugoslavia, the Clinton administration consulted with Congress to win its 'support'.[119] Several resolutions – some of which supported Clinton and some of which did not – were voted on, but no joint resolution was presented to the president to be vetoed or signed into law. On March 24, 1999,

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113 William J. Clinton: 'Interview With Radio Reporters,' October 18, 1993. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=47217.

114 Ibid.

115 William J. Clinton: 'The President's News Conference,' October 19, 1995. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=50666.

116 Fisher (2013), 190.

117 Fisher (2013), 197.

118 It is debated, of course, whether the Tonkin Gulf Resolution actually provided authorization for the large-scale conflict that the Vietnam War would become. See par. 4.2.4.

119 Fisher (2013), 197 et seq.

the US military intervention started without any statutory authorization. Indeed, the use of military force in Yugoslavia may be regarded as the second clear example of a major US military intervention undertaken by a president without any congressional authorization.[120] Controversies about Clinton's unilateral move arose immediately. On June 8, 1999, 25 members of the US House of Representatives went to court to seek a declaration that the president had violated the Declare War Clause of the US Constitution and the War Powers Resolution of 1973 by involving the US in the air offensive against Yugoslavia without congressional authorization.[121] However, both the District Court and the Court of Appeals dismissed the case for a lack of standing because 'plaintiffs had failed to demonstrate an actual confrontation or constitutional impasse between the legislative and executive branches.'[122]

Interestingly, during the bombing of Kosovo, Clinton's Undersecretary Thomas R. Pickering claimed that 'Congress had no authority to exercise its war powers since the beginning of World War II.'[123] According to Hendrickson, 'such statements illustrate how expansively the White House viewed its powers and how grossly it distorted Congress's constitutional powers'.[124] Hendrickson concluded his book on the use of war powers by the Clinton administration that 'institutionally and constitutionally, Clinton left office as commander-in-chief who was nearly omnipotent in military affairs'.[125] Even if this characterization is somewhat exaggerated, it seems to suggests correctly that the Cold War practice of unilateral presidential use of military force has been persistent, even beyond the Cold War itself.

4.2.6 Developments at the outset of the War on Terror

The terrorist attacks of September 11, 2001 arguably mark the beginning of a new chapter in the transformation of the constitutional relation between Congress and the president as commander-in-chief, and the powers of this latter office. The (perceived) failure to protect the US against a major terrorist attack and the strong call for presidential leadership after the attacks produced a strong incentive to further expand the war powers of the executive.[126] With

120 Ibid, 197.
121 Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999). Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).
122 Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), at 45.
123 Hendrickson (2002), 163.
124 Ibid.
125 Ibid.
126 Reportedly, President Bush explicitly ordered his attorney-general: 'Don't ever let this happen again'. Goldsmith (2007), 75. Goldsmith comments: 'Bush was not telling Ashcroft to do his best to prevent another attack. He was telling him to stop the next attack, period – whatever it takes.'

banner of the 'Global War on Terror', the people and public officials were told that permanent wartime had returned and that the capacities of the executive needed to be extended accordingly.[127] As former Assistant Attorney General Goldsmith reported,

> 'everyone in the administration with access to highly classified intelligence on threats to the homeland was scared of another deadly attack, and of not knowing how to prevent it. This fear created enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11.'[128]

In this context, at least two striking developments took place that would seem to have been of constitutional consequence.

In the first place, it appears that, since 9/11, Congress has reconciled itself to its role as junior partner in the field of national defense. Furthermore, on occasion, Congress appears to have even endorsed the shift towards an (even) stronger commander-in-chief. In the immediate aftermath of 9/11, the Bush administration requested Congress to pass an Act authorizing the use of force against terrorists. Within a week, Congress voted almost unanimously for, and the president had signed the 'Authorization for Use of Military Force' (AUMF) of, a statute that authorizes the president to

> 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons'.[129]

Commentators note the unprecedented broad scope of the AUMF. Among other striking things, it authorizes the unlimited use of force against state and non-state entities responsible for 9/11 or entities that aided those responsible; it approves military action in multiple jurisdictions;[130] and it does not provide a time limit or expiration date.[131] Paulsen argued that, by adopting this resolution, 'Congress embraces the presidential view'.[132] He deems the AUMF extraordinary as it 'marks a stunning, landmark paradigm shift in the constitutional practice of powers, light years distant in tone and attitude from the War

127 Griffin (2013), 219.
128 Goldsmith (2007), 11.
129 Public Law 107-40-Sept. 18, 2001.
130 Griffin (2013), 252.
131 Paulsen (2010), 7.
132 Ibid.

Powers Resolution of 1973'.[133] Paulsen even went as far as to argue that, with this resolution, 'Congress has added its powers to those of the President.'[134]

President Bush himself, for that matter, clearly believed that he would not have needed the AUMF to wage the War against Terror and that he was not bound even by the broad terms of it.[135] Two days after military operations started in Afghanistan, Bush sent a letter to congressional leaders reporting that he had given orders to commence military action in Afghanistan 'pursuant to my constitutional authority to conduct US foreign relations and as Commander-in-Chief and Chief Executive.'[136] Bush cited the AUMF (Public Law No. 107-40), writing that

> 'I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution and Public Law 107-40. Officials of my Administration and I have been communicating regularly with the leadership and other members of Congress, and we will continue to do so. I appreciate the continuing support of the Congress, including its enactment of Public Law 107-40, in these actions to protect the security of the United States of America and its citizens, civilian and military, here and abroad.'

Indeed, Bush regarded the AUMF as a source of 'support', but he did not recognize it as a source of authority.[137]

Also with regard to the decision-making process surrounding the War in Iraq, commentators have noted the accommodating stance of Congress in the context of the War on Terror. The War in Iraq would ultimately indeed be authorized by a separate congressional AUMF,[138] but commentators questioned whether Congress had sufficiently scrutinized the allegation on behalf of the executive that Iraq had weapons of mass destruction and that it supported Al Qaida. Fisher critically noted that, in the midst of confusing and contradictory claims about weapons of mass destruction and an Iraqi link to Al Qaida, Congress was not in a position to make an informed choice. 'Instead, they [Congress] voted under partisan pressures, with inadequate information, and thereby abdicated is constitutional duties to the President.'[139] Also, Griffin denounced the 'pathetic lack of inquiry by Congress' that did not 'push Bush to estimate casualties, the costs of the war or the likely consequence of

133 Ibid.
134 Ibid, 9.
135 Griffin (2013), 220. Balkin and Levinson (2010), 1820.
136 George W. Bush: 'Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters,' October 9, 2001. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=64785.
137 Fisher (2013), 209.
138 'Authorization for Use of Military Force Against in Iraq Resolution of October 2002', Public Law 107-243, Oct. 16, 2002, sec. 3.
139 Fisher (2013), 228.

victory.'[140] 'Even if we imagine that Congress would have favored the war no matter what', Griffin argued, 'it did not fulfill its role as a check on the executive.'[141]

Again, Bush himself made it clear that, in his view, he would not have required congressional approval to commence hostilities in Iraq. In his signing statement to the AUMF on Iraq, Bush referred to it as an 'additional resolution of support'.[142] Moreover, he declared:

> 'While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution.'[143]

When Bush reported to Congress on March 21, 2002 that military operations in Iraq had commenced, he declared:

> 'I now inform you that pursuant to my authority as Commander-in-Chief and consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) and the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107-243), I directed U.S. Armed Forces, operating with other coalition forces, to commence combat operations on March 19, 2003, against Iraq.'[144]

By using the phrase 'consistent with [the AUMF]', he highlighted that he had not based his actions on any statutory authority conferred by Congress, but on his (supposedly) independent presidential war powers under the US Constitution.

A second post-9/11 development that seems to have had constitutional implications is that the president, as commander-in-chief, has also asserted broad unilateral and preclusive war powers outside of the context involving the actual conduct of hostilities. After 9/11, the Bush Administration, among other things, instructed the military and intelligence agencies to establish

140 Griffin (2013), 234.
141 Ibid.
142 George W. Bush: 'Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002,' October 16, 2002. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=64386.
143 Ibid.
144 George W. Bush: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Iraq,' March 21, 2003. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=62688.

military tribunals,[145] to bring suspects of terrorism to foreign prisons ('extra-ordinary rendition'), the use of 'enhanced' interrogation techniques such as waterboarding in these foreign prisons,[146] to detain 'enemy combatants' indefinitely without trial (at Guantanamo Bay, Cuba),[147] and to monitor international communications of people inside the US, including US citizens, without a court-approved warrant.[148] These practices arguably have a strained relationship with statutes such as the Habeas Act of 1867,[149] the War Crimes Act of 1996,[150] the Torture Victim Protection Act of 1991,[151] the Foreign Electronic Surveillance Act of 1978,[152] and the Non-Detention Act of 1971.[153,154] However, Bush claimed that these statutes could not thwart his method of dealing with the fight against Al Qaida.[155] In the (in) famous 'Torture Memo', for example, the Office of Legal Council (OLC) denied that the interrogation techniques used by the CIA amounted to torture: 'Torture is not the mere infliction of pain or suffering on another', the OLC argued,

> 'but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.'[156]

Moreover, the OLC argued that

> 'even if an interrogation method arguably were to violate Section 2340 A [the statutory torture prohibition], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign'.[157]

145 George W. Bush: 'Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,' November 13, 2001. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=63124.
146 Fisher (2013), 247.
147 Ibid, 233.
148 Risen and Lichtblau (2005).
149 Sess. ii, chap. 28, 14 Stat. 385.
150 Public Law 104-192, 110 Stat. 2104.
151 Public Law 102-256, 106 Stat. 73.
152 Public Law 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36.
153 Public Law 92-128, 85 Stat. 347.
154 Lederman and Barron (2008), 1096.
155 Ibid.
156 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002, 13.
157 Ibid, p. 31.

After all, the president enjoys 'complete discretion' as commander-in-chief of the armed forces.[158] Any effort by Congress to regulate the interrogation of battlefield combatants would be unconstitutional, because these laws would prevent the president, or so the memo argued. It is true that, to a certain extent, the disregard of certain statutes by the Bush administration represented nothing fundamentally new, as other post-WWII presidents had also sometimes claimed a preclusive war power outside the context involving the actual conduct of hostilities.[159] However, there was probably no sustained practice of actually disregarding statutes similar to what the Bush administration had showed since 9/11. As Barron and Lederman explained,

> 'some of the statutes that the current Bush Administration claims a constitutional authority to disregard are measures that modern administrations helped to craft and that modern presidents signed without objection.'[160]

Commentators have noted that Bush's claims regarding presidential war powers were strikingly more broad and aggressive than those of his modern predecessors since Truman. Barron and Lederman, for example, observed that Bush pushed the preclusive presidential claims 'to their logical extremes'.[161] Similarly, Griffin argued that 'Bush arguably set a new standard for the exercise of executive power, even in wartime'.[162] Levinson felt that 'there is no doubt that President Bush is making claims substantially more far-reaching than any of his predecessors in office.'[163]

At the same time, after 9/11 Congress seems to have largely resigned to the modern practice of the executive branch making the main decisions with regard to war and national security; since those terrorist attacks, Congress has barely made any attempts to limit the military capability of presidents and, on a number of occasions, has even endorsed extensive presidential power

158 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002, p. 33.

159 Lederman and Barron (2008), 1096.

160 Ibid, 1098.

161 '… the Administration has gone beyond merely asserting the preclusive power in signing statements, veto messages, or memoranda to Congress. It appears to have relied upon such claims to engage in outright defiance of statutory restrictions in exercising coercive governmental authority. With the exception of the actions of President Ford in the extraordinary chaos of the last days of the Vietnam War, we are not aware of a similarly consequential act of executive disregard, premised on executive war powers, undertaken in the presence of a sitting Congress. The Bush Administration has exercised this claimed power, moreover, for prolonged periods of time and on multiple fronts.' See: Lederman and Barron (2008), 1094.

162 Griffin (2013), 216.

163 He added: 'There is more than a touch of "*L'etat c'est moi*" in Bush's conception of his role.' See: Levinson (2006), 81.

assertions.[164] The federal courts, for that matter, hardly encroached upon the Bush administration's methods to wage the War on Terror. In *Hamdan v. Rumsfeld*[165] and *Boumediene v. Bush*[166] the Supreme Court condemned the administration's use of military commissions. However, with regard to practices such as those associated with the extra-ordinary rendition program, the use of enhanced interrogation techniques, the warrantless-wiretapping[167] and the detention of 'enemy combatants' indefinitely without trial,[168] the administration either successfully blocked litigation by invoking the 'state secret privilege' or, if litigation commenced, the higher federal courts refused to reach the merits of the cases that were presented, mainly because they thought the plaintiffs lacked standing.

4.2.7 The Obama administration and beyond

During his first presidential campaign, Barack Obama criticized the aggressive security policies of the Bush administration. Moreover, in a comprehensive December 2007 Q&A with reporter Charlie Savage, then-presidential candidate Obama highlighted that he believed that the 'President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.'[169]

However, although President Obama (as far as we know) did not order his agencies to use 'enhanced' interrogation techniques in foreign prisons,[170] and although he attempted several times to close the prison facility on Guantanamo Bay, no attempts were made under his administration to structurally (re)circumscribe the powers of the president as commander-in-chief. Obama did not launch a fundamental critique on the foregoing practices of his predecessor,[171] and made every effort to preclude the judiciary from declaring

164 As Balkin and Levinson note, '[e]very time the President asked for broad new authorities from Congress, he received them'. Balkin and Levinson (2010), 1820.

165 *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006).

166 *Boumediene v. Bush*, 553 U.S. 723 (2008).

167 Clapper v. Amnesty International USA, 569 U.S. __(2013).

168 Rumsfeld v. Padilla, 542 U.S. 426 (2004). Hamdi v. Rumsfeld, 542 U.S. 507 (2004). In *Hamdi*, the Supreme Court recognized the authority of the government to detain enemy combatants, including US citizens under certain (narrow) circumstances. It also found that a citizen held in the US as an enemy combatant is entitled to rebut the factual basis for that detention before a neutral decision maker. In this way, the Supreme Court rebutted some of the most striking claims of the administration, but it did little more than round the sharp edges. Indeed, in later years the president asserted and exercised authority to detain enemy combatants 'for the duration of the armed conflict'. See: Fisher (2013), 255.

169 Charlie Savage, 'Barack Obama's Q&A', *Boston Globe*, December 20, 2007.

170 Scott Shane, Mark Mazetti, Helene Cooper, 'Obama Reverses Key Bush Security Policies', *The New York Times*, Jan 22, 2009.

171 Ackerman (2010), 121.

the practices of President George W. Bush illegal.[172] Indeed, the fact that a sweeping condemnation of Bush's practices remains forthcoming could make it a lot easier for lawyers in the Trump administration to revitalize Bush's harsh defense policies.[173]

While Obama repudiated some of Bush's most sweeping assertions to the war powers, he continued others. For one thing, evidence suggests that extraordinary rendition continued under Obama's administration.[174] Also, NSA surveillance was maintained under Obama. In 2013, *The Washington Post*, among other newspapers, revealed that the NSA and the FBI had been gathering the data of nine leading US internet companies and collecting Americans' phone records since 2006.[175] Obama defended these activities, amongst other times, in a June 19, 2013, speech in Berlin, arguing that NSA's data-gathering practices constitute 'a circumscribed, narrow system directed at us being able to protect our people.'[176] While the surveillance programs were indeed commonly considered lawful under the revised FISA Act of 2008, their constitutionality was questioned, particularly in light of the Fourth Amendment.[177] However, when the issue reached the Supreme Court, the court held that it could not address the principle question because the plaintiffs lacked standing.[178] Moreover, Obama maintained the Bush administration's claim that it can legitimately detain persons classified as 'enemy combatants' indefinitely without trail.[179]

In a sense, President Obama's claims to the war powers have even gone a step further than those of President George W. Bush. Most strikingly, Obama started major military operations against Libya and against ISIS without congressional authorization. When Obama notified Congress about the military intervention in Libya on March 21, 2011, he declared:

172 Charlie Savage, 'Hasher Security Tactics? Obama Left Door Ajar, and Donald Trump is Knocking', *The New York Times,* 13 November 2016.

173 Ackerman (2010), 121.

174 Craig Whitlock, 'Renditions continue under Obama, despite due-process concerns', *The Washington Post*, January 1, 2013.

175 Glenn Greenwald and Ewen MacAskill, 'NSA Prism program taps in to user data of Apple, Google and others', *The Guardian*, 6 June, 2013.

176 Barack Obama: 'The President's News Conference With Chancellor Angela Merkel of Germany in Berlin, Germany,' June 19, 2013. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=103833.

177 Laura K. Donoheu, 'NSA surveillance may be legal – but it's unconstitutional, *The Washington Post*, June 21, 2013.

178 *Clapper v. Amnesty International USA* (568 U.S. ___2013).

179 See, e.g., Barack Obama: 'Statement on Signing the National Defense Authorization Act for Fiscal Year 2012,' December 31, 2011. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=98513.

> 'I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive'[180]

and that he had provided the report as 'part of my efforts to keep the Congress fully informed, *consistent with* the War Powers Resolution' [*emphasis added*].[181] When Obama commenced military action ISIS, in August 2014, he informed Congress that he had 'authorized' the US Armed Forces to conduct targeted air strikes to support operations by Iraqi forces to recapture the Mosul Dam.[182] Again, the president argued that he did not need Congressional approval for these actions. As he wrote to Congress:

> 'I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive'.[183]

Also in the field of covert combat operations, the Obama administration again pushed the authority of the president as commander-in-chief a step further than the Bush administration, most notably by dramatically extending the program of the so-called 'targeted killings' with unmanned drones. As Klaidman wrote, Obama's 'most notable strategic shift is his fight against al Qaeda was the unrelenting use of hard lethal power in the form of the CIA's covert drone program'.[184] CIA director Leon Penetta reportedly commented that

> 'we [the CIA] are conducting the most aggressive operations in our history as an agency. That largely flows from this president and how he views the role of the CIA.'[185]

Klaidman estimated that

> 'by the time Obama accepted the Nobel Peace Prize in December 2009, he had authorized more drone strikes, including strikes against American citizens, than George W. Bush had approved during his entire presidency'.[186]

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180 Barack Obama: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya,' March 21, 2011.Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=90174.

181 Ibid.

182 Barack Obama: 'Letter to Congressional Leaders Reporting on the Commencement of Military Operations in Iraq,' August 17, 2014. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=106813.

183 Ibid.

184 Klaidman (2012), 117.

185 Ibid, p. 121.

186 Ibid.

Also, in the years thereafter, it is likely that hundreds, if not thousands of strikes have been executed in places such as Afghanistan, Pakistan, Iraq, Syria, Sudan, and Yemen.[187] A few US citizens were reportedly killed as well.[188] While the Justice Department memos that provide the executive's legal justification for the drone program have been kept secret until to date, *The New York Times* revealed in 2011 that the secret legal memo that justified the killing of Anwar Al-Aulaqi, an American citizen, asserted that strikes against US citizens suspected of terrorism are lawful if it is not feasible to capture them alive.[189] Furthermore, in 2013, a classified, unsigned and undated Justice Department 'white paper' was leaked.[190] In this document, the Justice Department claimed that a US citizen who is a senior operational leader of Al Qaida can lawfully be killed if:

> '(1) an informed high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles'.[191]

The same document argued that the constitutional Due Process Clause does not immunize a citizen from lethal operation because the interest in a person's live must be balanced against the United States' interest in forestalling the threat that 'senior operational leader' of Al Qaida may pose.[192] Multiple law suits were filed against the Obama administration challenging its use of the war powers. In 2010, for example, a case about the constitutionality of drone strikes against US citizens surfaced in court.[193] However, the court ruled that the plaintiff, a father of a US citizens who was supposedly on the government's kill list, lacked standing. Indeed, in this and other cases, Obama successfully sought to retain the war powers that have been acquired by himself and his predecessors since Truman.[194]

Under Obama's term, Congress further retreated from the field of national security. Most strikingly, it refused to vote on a possible AUMF for ISIS. As the

187 The Bureau of Investigative Journalism, 'Get the data: Drone Wars'. https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/ (16-1-2017)
188 Mark Mazzetti, 'Killing of Americans Deepens Debate over Use of Drone Strikes', *The New York Times*, April 23, 2015.
189 Charlie Savage, 'Secret U.S. Memo Made Legal Case to Kill a Citizen', *New York Times,* October 8, 2011.
190 Charlie Savage and Scott Shane, 'Memo Cites Legal Basis for Killing U.S. Citizens in Al Qaeda, *New York Times*, February 5, 2013.
191 'Department of Justice white paper', p.1. see: http://www.nytimes.com/interactive/2014/06/24/us/killingcitizenswhitepaper.html?_r=0
192 Ibid, p. 2.
193 *Al-Aulaki v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010).
194 Ackerman (2010), 121.

editorial board of *The New York Times* commented, by refusing to vote on this AUMF, 'Congress appears perfectly willing to abdicate one of its most consequential powers: the authority to declare war'.[195] Reportedly, some lawmakers would rather not face a war authorization vote shortly before a midterm election, claiming that 'they'd rather sit on a fence for a while to see whether an expanded military campaign starts looking like a success story or a debacle'.[196] Interestingly, the board realizes that the reservations of members of Congress about becoming involved in matters of war and peace may have long-term constitutional implications: 'by avoiding responsibility, they allow President Obama free reign to set a dangerous precedent that will last well past this particular military campaign.'[197]

At the time of writing this study, we do not know whether President Trump will try to realize the security plans he suggested during his campaign. The only thing we know is that, as commander-in-chief, Trump will have a sufficiently broad scope of substantive war powers to do so. We also know that it will be very difficult, if not impossible, for Congress to control these powers. It is true that Congress still has the power of the purse, but cutting funds for the military is an extreme measure[198] that hardly provides a means to hold the executive in check, especially in a country in which militarization is politically, economically, socially and culturally entrenched to such a significant extent as it is in the United States.[199]

4.2.8 Conclusion: have the War Clauses changed?

In the traditional – that is, pre-WWII – understanding, the US Constitution's Declare War Clause constituted a prerogative for Congress to authorize the use of military force by the president and regulate the ways in which the president could use such force. The Commander-in-Chief Clause, in turn, guaranteed the president's right to superintendence over the military.

However, as we have seen above, a range of developments during the Cold War and the War on Terror, taking such forms as executive claims, policies, ordinary legislation and changing understandings – but not formal constitutional amendments – have made the president, as commander-in-chief, ever more powerful and independent in the field of national security. A contemporary president has the ability to initiate large-scale hostilities and assert a broad set of war powers outside the context involving the actual conduct of hostil-

195 The Editorial Board, 'Legal Authority for Fighting ISIS', *New York Times*, Sept. 11, 2014.
196 Ibid.
197 Ibid.
198 Levinson (2012), 194.
199 See on this topic: Sherry (1997).

ities. At the same time, Congress has *de facto* lost its ability to limit and regulate these powers. They are by and large preclusive of congressional control.

How have these developments related to the US Constitutions War Clauses and vice versa? A legal-doctrinal perspective would enable us to argue that the traditional (or original) meaning of the Declare War Clauses has not been affected by the Cold War and War on Terror security shifts, because these shifts have taken place outside authoritative sources of changing the constitution. Conversely, taking such a perspective could lead to the conclusion that the Declare War Clauses have had profound meaning for real-world practices in the field of national security. Insofar as these practices have deviated from the War Clauses as originally understood, such practices could be considered legally invalid – that is, 'unconstitutional' – deviations from the formal precepts of the constitution, at least in a legal-doctrinal view.[200]

However, although it could provide helpful arguments for a case in court, for example, a legal-doctrinal perspective tends to provide an overly formalistic account of the significance of the Declare War Clauses and the consequences of legal and socio-political developments that take place in the context of these clauses. In other words, a strictly legal-doctrinal account does not seem to adequately represent the real-life impact the Declare War Clauses have had, and it also fails to appreciate the forces and actors involved in bringing about fundamental change in the area of national security. If we accept that, ultimately, the import of formal norms cannot be meaningfully explained and described without taking into account the legal and socio-political context in which these norms are embedded (see chapter 2), we may observe that the traditional meaning of the US Constitution's War Clauses has been seriously called into question, even though these Clauses have not been subject of a formal constitutional amendment or judicial re-reinterpretation. Indeed, the evolution of constitutional practice during the Cold War and the War on Terror in the area the War Clauses purport to regulate have deviated substantially from the traditional constitutional plan. Most of these changes seem to be persistent and have been recognized as legally valid – or 'constitutional' – by most constitutional actors. It is true that some constitutional actors have resisted the development towards an ever more powerful and independent executive in the field of foreign affairs. In particular, Congress has made serious efforts to revitalize the traditional constitutional plan, most notably by adopting the War Powers Resolution. Over time, however, more and more constitutional actors, including the president and – eventually – also Congress, have largely accepted the validity of the modern allocation and use of the constitutional war powers under the US Constitution. In those circumstances, we could – at least in theory – hold on to a strictly legal-doctrinal account of constitutional development. But such an account would not enable us to appreciate the fact

200 E.g., Ackerman (2010). Fisher (2013).

that, in the context of the Cold War and the War on Terror, actors such as the president, Congress and other policymakers – but not the constitutional legislator – have reshaped the material meaning of several provisions of the US Constitution.

That is not to say that the implications of the evolution of constitutional practice in the field of national security for the meaning of the War Clauses of the US Constitution are (already) entirely clear. Some practices that deviate from the traditional meaning of these clauses seem persistent and largely accepted by the community of constitutional actors as legally valid under the formal constitution. The consequences of other deviating practices for the normative content of the formal constitution, particular some of the most extreme practices outside the context involving the actual conduct of hostilities (such as torture), remain unclear. The relation between some of these practices and the formal precepts of the constitution is still the subject of intense debate, and institutional history has not (yet) revealed whether they have staying power or whether they are just part of the ordinary ebb and flow of political development. Moreover, we may observe that even though the larger part of the community of constitutional actors has acknowledged that the traditional meaning of the US Constitution's War Clauses no longer holds true, this meaning might still have some force of attraction. As we have seen, some commentators continue to question the legality of presidential activity in the field of national security by using the traditional interpretation of the War Clauses of the US Constitution as a normative framework. Indeed, this effort seems to have had some real-world effects because even contemporary presidents still seem to use military force with rather than without congressional approval, even though they possess the capacity to act unilaterally.

At the same time, taking an historical institutional view, we also have to be prudent and acknowledge that the direction in which future developments will go is not pre-determined. The developments that have expanded the capacity of American presidents to unilaterally use military force seem to have been accepted and persistent for now, but we cannot exclude that future events will trigger shifts in an entirely different direction. Another large-scale terrorist attack, for example, may provoke new and even broader claims to the war power on behalf of the presidency and further reduce the ability of Congress to regulate and limit this power. On the other hand, new (perceived) 'policy disasters' may aggravate new attempts by Congress and others to re-circumscribe the president and restore its traditional (that is, pre-1945) legislative prerogatives that apparently still have at least some normative appeal.[201] Indeed, although it has been challenged to a significant extent by post-WWII developments, the traditional meaning of the US Constitution's War Clauses

201 As the UK Parliament currently attempts to do. See: Reuters, 'Corbyn: MPs could take action against Blair for misleading Common over Iraq – video', *The Guardian*, 6 July 2016.

may turn out to be stickier than it seems and to have not yet entirely lost its relevance and force of attraction.

4.3 Why have the US Constitution's War Clauses never been amended?

As we have seen, in the traditional pre-1945 American constitutional plan, the war powers were divided between the president and the Congress. Pursuant to the Commander-in-Chief Clause, the president had the prerogative of superintendence of the armed forces, but could only use military force in accordance with the will of Congress, both as a practical and as a legal matter. After 1945, however, a range of developments have taken place that have made the US president increasingly powerful and independent in the field of national defense. During the Cold War and the War on Terror, presidents, as commanders-in-chief, have acquired substantive unilateral and preclusive powers both inside and outside the context involving the actual conduct of hostilities. Meanwhile, Congress has gradually become the commander-in-chief's junior partner.

The evolution of constitutional practice since 1945 has clearly had a strained relationship with the traditional constitutional regime. Despite this, the War Clauses of the US Constitution have never been amended. This section seeks to explore why this is the case. What reasons or factors may explain why shifts with regard to the allocation of US constitutional war powers have taken place solely through alternative processes of constitutional change, despite the fact that these shifts have been at loggerheads with formal precepts of the constitution, at least as they were traditionally understood?

Without purporting to be comprehensive, this section will put forward four important explanations of what we may call 'textual stickiness': amendment difficulty, controversiality of formal amendment, (perceived) unnecessariness of formal amendment, and judicial deference.

4.3.1 Amendment difficulty

A first possible reason why substantial shifts with regard to the allocation of US constitutional war powers have never crystalized in the US Constitution is that it has simply been too difficult for constitutional actors, at least as a practical matter, to amend the US Constitution. In fact, one could doubt whether constitutional actors who favored constitutional reform in the field of national defense have had a realistic amendment option at all. Indeed, the US Constitution is generally considered one of the most difficult-to-amend constitutions in the world.[202] The document has been deeply entrenched,

202 E.g., Lijphart (2012), 208 and Lutz (1995), 244.

both formally[203] and culturally,[204] which has meant it has an extraordinary low amendment rate.[205] In its 225 years of existence, roughly 10,000 amendments have been proposed, but only 27 of these proposals have been adopted. If one considers that the first ten amendments – known as the 'Bill of Rights' – were ratified three years after the original document was adopted, the real amendment rate is even lower. Furthermore, if one agrees that not all of the 17 remaining amendments are truly fundamental[206] and that several of the textual additions in fact added nothing to the body of fundamental rules that regulate the American government,[207] then the substantive constitutional amendment rate may reasonably be considered lower still. According to Levinson, Article V even makes it 'functionally impossible to amend the Constitution with regard to anything truly important'.[208] Indeed, taking the factor of amendment difficulty into account, it is perhaps not surprising that the US Constitution has mainly adapted to changing circumstances and demands through alternative processes of change rather than by way of formal constitutional amendment.[209]

4.3.2 Controversy

A second, and related, reason for the fact that the US Constitution has never been amended with regard to the allocation of war powers is that, even if a realistic amendment option were available, the issue would probably be too controversial to be subject of a formal constitutional amendment. Still, many so-called 'congressionalists' have challenged the legitimacy of the broad unilateral and preclusive presidential claims to the war power.[210] If they endorsed any amendments to the US Constitution's War Clauses at all, congressionalists would presumably only endorse those amendments that aim to reverse de shifts in the *de facto* allocation of war powers that have occurred

203 According to Article V, the US Constitution can be amended in two ways. First, an amendment may be proposed by a two-thirds majority in both houses of Congress and ratified by the legislatures of three-fourths of the several states. Second, it can be amended following the procedure of a national convention.

204 Levinson (2012), 336.

205 Lutz (1995), 244.

206 The 18th amendment, prohibiting the sale, manufacture and transportation of alcohol for beverage purposes and the 21st, repealing the 18th, provide examples of formal constitutional amendment that are not truly fundamental to the system of government. See: Kelsen (2007), 125.

207 Because they declared or recognized what was already there and did not truly change the preexisting legal reality. See: Levinson (1995), 26.

208 Levinson (2012), 338. For a different opinion see: Jackson (2015) – Jackson deems the (perceived) unamendability of the US Constitution a myth. I personally do not agree with this view; see: Passchier (2015).

209 E.g., Levinson (2006), 164 and Lutz (1995), 266.

210 E.g., Ackerman (2010).

in the past 70 years. At the same time, it is likely that most presidentialists would not object to formal constitutional amendments that reflect the expanded capacity of the president to use military force (apart from their cultural or ideological hesitation to employ formal constitutional amendment as a means of fundamental change[211]). However, presidentialists might still disagree about how such amendments should be formulated and how far they should go in terms of broadening the power of the executive. Indeed, some presidentialists favor a regime in which the president has exclusive control over military affairs.[212] They might want to totally diminish the formal role of Congress by, for example, erasing the Declare War Clause entirely. Other presidentialists might only be willing to support a more moderate revision of the formal allocation of war powers, claiming that Congress should still have *some* authority to limit and regulate the power of the president. Thus, even if a realistic amendment option were available, and even if some consensus with regard to the desirability of codifying amendments did arise, the controversial nature of the war powers issue would probably still make it too difficult to agree on a specific text to bring about such amendments.

4.3.3 Formal amendment considered unnecessary

A third reason why the US Constitution's War Clauses have never been formally amended may be that a significant part of constitutional actors have not yet considered formal amendment to be necessary. Some presidentialists have argued that developments in the field of national security after 1950 have not actually changed anything, contending that presidents have had a preclusive and unilateral power to use military force since the US was founded.[213] In this view, the modern allocation of war powers still completely coincides with the traditional constitutional plan. Other presidentialists have acknowledged that (substantial) security shifts have indeed taken place in the past 70 years, but they have expressed the belief that these changes perfectly fit within the 'flexible' framework the US Constitution supposedly establishes.[214]

Furthermore, amending the US Constitutional War Clauses also seems to have been considered unnecessary for an entirely different reason. Remember

211 See, e.g., Sullivan (2001).

212 Cf. Zeisberg (2013), 14.

213 Yoo, for example, claimed that, following the English tradition, the framers´ constitutional system ´encouraged presidential initiative in war´. See, e.g., Yoo (1996). According to Fisher, Yoo´s views, ´contradict not only statements made at the Philadelphia convention and the state ratification debates but also the text of the Constitution´. Fisher (2013), 16. Griffin pointed out that Yoo ´has no direct evidence in support of his general position´. Griffin (2013), 43.

214 E.g., Posner and Vermeule (2010).

that the shifts in the allocation of US constitutional war powers have taken place in a relatively recent stage of US constitutional history. Indeed, by the second half of the 20th century, several other significant constitutional developments had already taken place in the American constitutional order, without formal constitutional amendment.[215] As an example, consider the constitutional developments that are associated with the 1930s New Deal. These developments, outside the formal amendment procedure, fundamentally changed the power and prestige of the presidency, the nature of American federalism, and the ability of Congress and federal agencies to intervene in the economy and deal with social problems.[216] The course of events in the New Deal might have taught constitutional actors that effective and legitimate change could be brought about without investing the amount of political capital required to bring about a formal constitutional amendment.[217]

4.3.4 Judicial deference

A fourth reason for the fact that the constitutional developments in the field of national security have not been crystalized in the US Constitution by way of formal constitutional amendment could be that the judiciary has never really stood in the way of these developments. As we have seen, the American judiciary has consistently refused to address the principle questions that the war powers issue has raised over time. This has presumably made it less urgent – if not unnecessary – for American constitutional actors to consider whether the issue should be settled by changing the text of the Constitution. As Llewellyn reminds us, unless the judges have vetoed it, or unless political and constitutional actors expect that the judges will veto it if called upon, a formal constitutional amendment is 'in the main unnecessary and rarely resorted to'.[218] However, it should be noted that, in the American context, the absence of judicial vetoes only has *some* explanatory force. On the hand, it could be argued that, as a consequence of the infamous *Dred Scott* case, constitutional actors could indeed only decisively abolish slavery by way of formal constitutional amendment.[219] On the other hand, reforms associated with the New Deal were also vetoed by the judiciary, although it ultimately

215 See, e.g., Ackerman (1993), Ackerman (1996), Ackerman (2014), and Strauss (2001).
216 Griffin (1996), 36-40. See also Ackerman (1996).
217 Griffin (1996), 67.
218 Llewellyn (1934), 23.
219 In the *Dred Scott* case, the Court held that 'a negro, whose ancestors were imported into [the U.S.], and sold as slaves', whether enslaved or free, could not be an American citizen and therefore had no standing to sue in federal court. It also held that the federal government had no power to regulate slavery in the federal territories acquired after the founding of the United States. See: *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

proved unnecessary for Roosevelt and his followers to use the formal amendment procedure to overturn judicial decisions and reform the constitution.[220]

4.4 Implications of informal constitutional change

According to some, formal constitutional amendment is the only proper route for constitutional change. Yet, at least as an institutional matter, shifts in the allocation of American constitutional war powers have come about through a range of alternative processes of change.

What implications has informal constitutional change in the field of war had for a constitutional order that is supposedly established and regulated by a written constitution? Have alternative processes of change been able to generate the amounts of legitimacy a formal amendment process would supposedly generate? Have such processes proven to be effective means of bringing about constitutional change? And what implications have informal constitutional developments had for the shaping force of the constitutional text? In short, to what extent have alternative processes of change that we have seen at work in the area of war powers functionally substituted the formal amendment procedure of the US Constitution? These questions will be explored below.

4.4.1 Perceived legitimacy of change

American constitutional jurisprudence does not seem to have one general (legal) doctrine by which the legitimacy of informal constitutional change can be evaluated.[221] So-called 'originalists' believe that the US Constitution has a fixed meaning that can only be changed through the amendment procedures set out in Article V. Instead, proponents of 'living constitutionalism' contend that the US Constitution has a dynamic meaning that must be interpreted in the light of present-day views and circumstances.

Conservatives commonly present themselves as originalists, while the doctrine of living constitutionalism is popular among liberals. However, with respect to the debate about informal constitutional change that has taken place in the field of national security, the roles seem to be reversed. In this debate, conservatives, who typically seem to favor a broad and preclusive prerogative for the executive in the field of national security, have necessarily rested on a strong form of living constitutionalism.[222] A conservative thinker like Yoo, for example, uses a living constitutionalist perspective to argue that the numer-

220 Because they decided to instead threaten to 'pack' the Supreme Court. See Ackerman (1996).
221 Balkin (2011), 3 et seq.
222 Lederman and Barron (2008), 697.

ous military conflicts that were started without congressional authorization, the refusal of presidents to acknowledge the WPR, and the established practice ignoring the terms of the WPR all suggest that 'the branches of government have established a stable, working system of war powers'.[223] Especially post-9/11, it would be unworkable to require the president to seek explicit authorization for each individual conflict.[224] According to Yoo, therefore, it is a good thing that a system has emerged in which '[t]he President has taken the primary role in deciding when and how to initiate hostilities', in which

> 'Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and by appropriations'

and in which, '[t]he courts have invoked the political question doctrine to avoid interfering in war powers questions.'[225] Liberals like Fisher and Ackerman, on the other hand, have contested the legitimacy of the contemporary allocation of war powers in the American system. Fisher claimed that the modern allocation is 'not the framers' model'.[226] Quoting Casper, Fisher argued that 'unconstitutional practices cannot become legitimate by the mere laps of time' and, quoting Justice Frankfurter, that 'illegality cannot attain legitimacy through practice'.[227] Ackerman deems the pre-1945 constitutional shifts in the division of war powers illegitimate, claiming that they have led to a 'culture of lawlessness'.[228]

Especially Ackerman's work reveals that, in the American context, views regarding the legitimacy of informal constitutional change are commonly grounded in political or ideological preferences, rather than in some kind of 'neutral' legal doctrine that is consistently applied. In his three-volume We The People, Ackerman argued that the US Constitution can be changed legitimately outside the US Constitution's formal amendment procedure.[229] He essentially suggested that constitutional change has taken place legitimately when it has been endorsed by all three branches of government as well the electorate in 'several cycles of popular sovereignty'.[230] Taking this perspective,

223 Yoo (2006), 12-13.
224 Ibid, x.
225 Ibid, 13. See also Posner and Vermeule (2010).
226 Fisher (2013), 291.
227 Ibid, 297.
228 Ackerman (2010), 152.
229 Ackerman (1993), Ackerman (1996) and Ackerman (2014).
230 In Ackerman's account, the constitutional developments that are associated with the Civil Rights revolution were set in motion by the Supreme Court issuing *Brown vs. Board of Education* in 1954. Subsequently, Congress, backed by mobilized popular support, adopted the Civil Rights Act in 1964, the Voting Rights Act in 1965, and the Fair Housing Act in 1968. Finally, the new legislation was vigorously executed by committed presidents who had gained large popular mandates in landslide victories in successive national elections.

Ackerman vigorously defended the legitimacy of the New Deal and the Civil Rights Revolution, among other progressive developments in American history. However, Ackerman's enthusiasm for informal constitutional development tends to wane when it comes to shifts in the allocation of war powers after WWII and 9/11.[231] Even though many of these changes seem to have been approved, either implicitly or explicitly, by all branches of government as well as the electorate – just like the New Deal and the Civil Rights Revolution – Ackerman does not acknowledge that they have become part of the American constitutional 'canon'.

Thus, in appreciating the legitimacy of a certain informal constitutional development, American commentators seem to ultimately base their choice for a certain perspective – either originalism or living constitutionalism – on their ideological preferences with respect to the concrete topic at hand. American constitutionalism has no 'objective' legal doctrine that may settle disputes about the legitimacy of constitutional change that has taken place outside the Article V formal constitutional amendment procedure (as German constitutionalism knows, see chapter 5). In the absence of such a doctrine, informal mechanisms of constitutional change have not been able, at least not in the case under review here, to generate the amounts of legitimacy that a formal constitutional amendment process would supposedly produce.

4.4.2 Effectiveness of change

According to the Oxford English Dictionary, something is effective if it is 'successful in producing a desired or intended result'.[232] What was the desired or intended result of the alternative mechanism of constitutional change that has been employed in the field of national security? We do not always know, and most of the time we do not even know whether constitutional change was effected consciously.

What we can observe, however, is that after the Second World War, and again after 9/11, constitutional actors were able to quickly bring about the reforms they thought necessary in order to prevail against what they regarded an enemy threat. As early as 1950, President Truman was able to use force against Korea unilaterally and create a precedent that could be followed by his successors. Shortly after 9/11, President Bush was able to significantly expand his capacity to use the American security apparatus, even outside of the context involving the actual conduct of hostilities. Insofar as 'constitutional'

After several cycles of popular sovereignty, it was clear that We the People had ordained a new constitutional regime, or so Ackerman's argument goes. See Ackerman (2014).

231 See, for example, Ackerman (2010), 110.

232 https://en.oxforddictionaries.com/definition/effective (18-1-2017)

change was intended by these presidents, the informal means they used have proven to be highly effective means to bring about constitutional reform.

On the other hand, after 70 years of informal constitutional development, the allocation of US constitutional war powers is ever more ambiguous. This may make executive officials uncertain with regard to the risk they take following presidential orders.[233] For example, during the early years of the War on Terror, CIA officials doubted whether they could follow presidential orders to use 'enhanced interrogation techniques', such as waterboarding, because these orders seem to be against a 1994 criminal code that implemented the Convention against Torture.[234] (Ultimately, the issue was 'settled' by the 2002 'Torture Memo',[235] discussed above,[236] which functioned, in the words of one CIA official, as a 'golden shield' that provided enormous comfort.[237])

Moreover, while shifts in allocation of war powers have clearly had much staying power, alternative forms of change, such as executive interpretation and ordinary statutes seem unable to guarantee the same amount of stability as a formal constitutional amendment could supposedly provide. As we have seen, once amendments to the US Constitution have been brought about, they are deeply entrenched, both formally and culturally. However, alternative forms of constitutional change have no special formal status. Therefore, it is not unthinkable that significant shifts in the allocation of war powers will take place again. If new (perceived) security threats arise, presidents may seek to further broaden their capacity to use military force.[238] Conversely, after new (perceived) policy disasters – or violations of human rights for that matter – Congress, the courts, or presidents themselves may (again) make attempts to re-circumscribe the executive.

Thus, while the post-1945 and post-9/11 division of powers seems persistent, the new order is presumably not as stable as one that would have been established or codified by way of formal constitutional amendment.

4.4.3 The shaping force of the constitutional text

Shifts in the allocation of war powers seem to have made the Commander-in-Chief Clause more relevant than ever. The prerogative of superintendence has probably never been so exalted. Moreover, in the past seven decades more (substantive) meaning has been added to the Clause, which now attributes

233 Goldsmith (2007), 143.
234 Ibid.
235 US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales Counsel to the President, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', August 1, 2002.
236 Par. 4.2.6.
237 Ibid.
238 E.g., Ackerman (2006).

– at least in the reading of many constitutional actors – a capacity to initiate armed conflict unilaterally, and various broad preclusive powers inside and outside the context involving the actual conduct of hostilities.

On the other hand, the relevancy and normative force of the Declare War Clause seem to have diminished significantly during 70 years of national security shifts. Prior to the Second World War, the Declare War Clause effectively gave Congress the prerogative to authorize and regulate the use of both large- and small-scale military force. Major wars that were fought between 1789 and 1945 were formally declared, as were countless relatively minor conflicts, with only a few exceptions, preceded by an express congressional authorization in some alternative form.[239] It is telling that no pre-1945 president has claimed the unilateral authority to initiate major military operations.[240] In the post-1945 context, however, the congressional prerogative would become vulnerable for presidential claims to war powers. Many observers believed that the threat of communism and, later, terrorism required the president to assume a much more dominant role. As Posner and Vermeule put it, this is

> 'because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is natural, inevitable, and desirable for power to flow to this branch of government. Congress rationally acquiesces, courts rationally defer.'[241]

Meanwhile, the availability of a large standing security apparatus after WWII allowed presidents to actually materialize their unilateral and preclusive claims; it made them less dependent on Congress for funding, and the availability of overt, covert, nuclear and intelligence capabilities allowed the president to move quickly and confront Congress with *faits accompli*, accomplished facts, as we have seen in the decision-making process surrounding the Vietnam War.[242] Moreover, after 1945, the relevancy of the Declare War Clause diminished because formal declarations of war had become outmoded in international law and practice.[243] The UN Charter, which uses the concept of justified use of armed force,[244] arguably had the effect of making 'war' and 'formal declarations of war' legally obsolete.[245] With the decline in declarations of war, the text of the Declare War Clause had become harder to explain. In any case, it appears to have become much more difficult for congressionalists to convincingly argue that the phrase 'to declare war' still

239 Griffin (2013), 46-47.
240 Lederman and Barron (2008), 948-950.
241 Posner and Vermeule (2007), 4.
242 See par. 4.2.4. above.
243 Ginsburg (2014), 498.
244 See: Articles 39-51.
245 Griffin (2015), 351.

included a congressional prerogative to authorize and regulate the use of military force, because the phrase had become vulnerable to semantic language.[246] The WPR of 1973 can be understood as the centerpiece of an effort to revitalize the Declare War Clause and restore the traditional role of Congress.[247] However, even if the WPR can be attributed some shaping force,[248] it largely failed to bridge the gap between the antiquated language of the Declare War Clause and post-1945 circumstances.

It would presumably be incorrect to conclude that the Declare War Clause has been completely undermined by alternative processes of constitutional change. Still, many constitutional actors believe that the Declare War Clause stipulates that the president needs legislative authorization before using military force,[249] and even presidents themselves seem to prefer to use military force with the support of Congress than without it. Nevertheless, it is arguably fair to say that, after 70 years of deviating interpretation and practice, the impact of the Declare War has significantly declined and that, in the absence of textual addition or clarification, the phrase 'to declare war' has lost much of its substance and normative force.

4.5 Concluding observations

In this chapter, I have explored and evaluated the relationship between the US Constitution's War Clauses and Cold War and War on Terror developments that have taken place in the area these Clauses seek to regulate. I will now summarize my findings and make some closing remarks.

The first section found that the traditional – that is, pre-1945 – meaning of the US Constitutional War Clauses have seriously been called into question by the evolution of constitutional practice in the Cold War and the War on Terror. I posited that, if we acknowledge that the import of formal norms cannot be meaningfully explained and described without taking into account the evolution of the legal and socio-political context in which these norms have been embedded, we must recognize that, as a consequence of Cold War and War on Terror developments, the material meaning of the US Constitution's War Clauses has changed, even though these changes do not show on the face of the list of amendments to the US Constitution.

246 Ambiguities surrounding the meaning of the word 'war' in the post-1945 context seem to have made it possible for modern executives to claim that certain uses of force, because of their anticipated 'nature, scope and duration', do not amount to 'war' in the constitutional sense and therefore do not require congressional authorization. See, for example, Walter Dellinger, 'Deployment of United States Armed Forces into Haiti', 27 September 1994.

247 Ginsburg (2014), 498-499.

248 Ibid, 499.

249 Griffin (2016), 351.

The second section listed some factors that might explain why, despite the fact that substantial shifts in the allocation of US constitutional war powers have taken place, the War Clauses of the US Constitution have never been subject of formal constitutional amendment. I found that what we may call 'textual stickiness' can be explained by pointing to the difficulty of formal constitutional amendment in the US context, the controversiality of the war powers issue, the perceived unnecessariness of bringing about constitutional change in the field of national security by way of formal constitutional amendment and the fact that the American judiciary has never really made amending the constitutional War Clauses necessary, because it has not intervened in the matter.

Finally, in the third section I sought to explain the extent to which informal processes of constitutional change in the field of national security have substituted for the functions that are commonly attributed to the formal constitutional amendment procedure. That section revealed that, insofar alternative mechanisms were consciously used by constitutional actors to bring about fundamental reform, they have proven to be pretty effective means of change because they seem to have produced the desired outcome and ensured that this outcome has had staying power. On the other hand, in absence of a more or less 'objective' (legal) doctrine of informal constitutional change in American constitutionalism, alternative processes of change have not generated the amount of support for reform a formal constitutional amendment would have been expected to generate. Moreover, while alternative processes have made the Commander-in-Chief Clause more important – after all, it previously only guaranteed a presidential prerogative of superintendence and it now awards a broad set of substantive war powers to the presidency – they have undermined the shaping force of the Declare War Clause. While this Clause previously awarded central power to Congress in terms of making decisions regarding war and peace, it currently only reminds presidents that it is perhaps better to use force with rather congressional support than without it.

Perhaps a future Congress, judiciary, or president will manage to change the direction of the development we have explored above. However, the history of the Cold War and the War on Terror shows that it is quite unlikely that the war powers of the American Executive will be re-circumscribed anytime soon. This is not only because the branches of government do not seem to support such an effort (especially not the recently elected and appointed ones), but also – paradoxically – because it is so difficult to amendment the US Constitution with regard to anything truly important.

5 The German Basic Law and the evolution of European integration

> 'The incremental evolution of European integration in quantitative and qualitative terms has raised the problem of "silent constitutional revision"'.
>
> Jens Woelk[1]

5.1 INTRODUCTION

In Germany, one of the most significant and hotly debated constitutional developments over the past decades has been what is commonly called the 'Europeanization' of the Basic Law (*Grundgesetz*); that is, the overlapping, limitation, displacement and supplementation of national constitutional law by European Union[2] (EU) law.[3]

Some traces of Europeanization actually show on the face of the Basic Law. Since 1992, the Basic Law has been amended a number of times in connection with the evolution of European integration.[4] Article 23 was adopted in connection with the ratification of the Treaty of Maastricht in 1992. This Article provides, among other things, special constitutional authorization for Germany's participation in the development of the EU and codifies some of the limits of this authorization that had been developed earlier by the German Constitutional Court. Since 2009, Article 45 has provided that the Bundestag 'shall appoint a Committee on the Affairs of the European Union'. Article 50, which was added to the Basic Law in 1992, says that the *Länder* 'shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union'. Since 1992, Article 88 has provided a constitutional basis for the transfer of powers of the Federal

1 Woelk (2011), 161.
2 In this chapter, I use the term 'European Union' to refer to the current Union as well as the various Communities that have preceded this organization. This approach is consistent with Article 1(3) of the Treaty of the European Union, which states that 'The Union shall replace and succeed the European EU.' See also Schütze (2016), lxvi.
3 Maurer (2007), 127.
4 Streinz (2011), 137.

Bank to the European Central bank.[5] In 2000, the German constitutional legislator adapted the Basic Law to European developments in the field of equal treatment for men and women by removing a sentence from Article 12a(1) of the Basic Law that stipulated that '[women] may on no account render service involving the use of arms.'[6] Further formal amendment amendments that have been prompted by European integration concern the right to asylum (Article 16a BL), which was amended in 1993, and the ban on extradition of German citizens (Article 16 BL), which had to be (partly) lifted in 2000 to allow the German legislator to implement the European Arrest Warrant.[7]

However, it appears that the contemporary text of the Basic Law gives an incomplete account of the constitutional implications the evolution of European integration has had in the German constitutional order. In the first place, it may be noted that some of the constitutional amendments being associated with Europeanization have arguably been brought about (long) after the actual constitutional development had taken place. For example, consider Article 23 of the Basic Law (1992), which is probably the most prominent amendment to the Basic Law brought about in connection with Europeanization. Among other things, it provides limits to this process. However, for the large part, these limits were not new. Most of them had already been established by the German Constitutional Court prior to the moment this amendment was being engineered.[8]

Moreover, even after several formal amendments to the Basic Law have been brought about, the contemporary text of the Basic Law does not seem to reflect all – and perhaps not even the most important – constitutional implications of almost seven decades of European integration. Indeed, it has been widely recognized in German constitutionalism that the evolution of European integration has effected substantial 'material' modifications of the contents of the German Basic Law; that is, constitutional changes outside of the Article 79(2) amendment procedure of the Basic Law.[9]

This chapter starts by providing a few examples of informal constitutional developments that have taken place in connection with the evolution of European integration. All of these examples are derived from German constitutional literature and are recognized by authoritative authors in this field. My aim is to gain a sense of what kind of mechanisms of change, apart from the Basic Law's formal amendment procedure, have Europeanized the Basic Law.

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5 Kämmerer (2003), 453.

6 In 2000, the CJEU ruled that Council Directive 76/207 precludes the application of national legislation that imposes a general exclusion of women from the armed forces. See: Case C-285/98 Tanja *Kreil v. Bundesrepublik Deutschland* [2000] I-69.

7 Streinz (2011), 139.

8 See e.g. BVerfG 37, 271 – *Solange I*.

9 Cf. BVerfG 58, 1, 36 – *Eurocontrol*, Pernice (1998), 42. Maurer (2007), 128. Woelk (2011), 161. Hufeld (2011), 29 et seq.

The second section of the chapter will explore why some important constitutional implications of the evolution of European integration have not shown on the face of the Basic Law. This question is especially interesting because Germany is known for its commitment to bringing about constitutional change through formal constitutional amendment and for its lively amendment culture.[10] So why is it that some of the most notable constitutional changes induced by European integration have come about solely through alternative routes of constitutional change?

Lastly, this chapter will ask whether and to what extent alternative mechanisms of constitutional change have been able to substitute some of the most important functions that are being attributed to the formal constitutional amendment procedure of the Basic Law. Have alternative mechanisms of change produced amounts of support for change equivalent to those a formal constitutional amendment procedure would presumably have generated? Have such mechanisms been effective means of constitutional change? And what implications has informal constitutional change had for the relevancy of the Basic Law's text, which the Article 79(2) formal amendment procedure aims to protect?

The case study conducted in this chapter is interesting in its own right. The process of Europeanization has taken place in all the 28 EU Member States and the German debate about this process provides insights that might be helpful for understanding Europeanization in other Member States as well. Furthermore, studying the Europeanization of the Basic Law can teach us a great deal about the more general theme of informal constitutional development, including the mechanisms by which informal constitutional change comes about, the significance of formal constitutional norms, and the consequences that informal constitutional change can have for a constitutional democracy that lives under a written constitution.

5.2 EUROPEANIZATION AS INFORMAL CONSTITUTIONAL CHANGE

In this section, I will explore the mechanisms, apart from formal constitutional amendment, by which the Basic Law has Europeanized. To that end, I will search for concrete examples of where, due to the evolution of EU law, the meaning of one or more constitutional provisions has changed substantially without (foregoing) explicit change of the constitutional text. As I will suggest, these examples indicate that the Basic Law has been Europeanized significantly through such mechanisms as treaty-making and judicial interpretation, both by the CJEU and the German Constitutional Court.

10 See e.g. Benz (2011), 35. Murphy (2007), 487.

5.2.1 The relationship between EU law and domestic law

Probably the most important example of informal constitutional change being effected by the evolution of European integration concerns the relationship between EU law and German domestic law.

When the EU was founded, the formal legal quality of EU law was not fundamentally different than the quality of other international rules; from the EU law perspective, it only formally bound states and did not directly create rights and duties at the national level.[11] Each Member States could decide what position EU law would have in its national jurisdiction and in what way it would comply with EU obligations.[12] In Germany, the relationship between EU and domestic law was regulated by Article 25 of the Basic Law, which provides that:

> 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

Hence, as with international law, the general rules of EU law were considered an integral part of federal law (albeit not independently, but on the basis of Article 25 of the Basic Law). Moreover, pursuant to Article 25 they enjoyed primacy over domestic ordinary legislation, but not over national constitutional law.[13]

In the early 1960s, however, the Court of Justice of the European Union (CJEU) ruled that EU law takes precedence over national law – including national constitutional law – and that it directly creates rights and duties for citizens of the Member States, independent of the Member States' legal arrangements. In the 1963 *Van Gend & Loos* case, the CJEU considered that the EEC Treaty is more than just an agreement that creates mutual obligation between the contracting parties.[14] Instead, according to the CJEU,

> '… the Community [EU] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law

11 Although it should be noted that the case law of the CJEU works backward, the arguments used in Costa v. E.N.E.L. mean that, as far as EU legal doctrine is concerned, EU law was always supreme, even if the Member States or even other EU actors did not realize it.

12 Streinz (2011), 135.

13 According to German legal doctrine, general rules of 'ordinary' international law have a higher status in law than ordinary statutes, but they are subordinate to the provisions of the Basic Law. Zippelius and Würtenberger (2005), 509. See also Pernice (1998), 59 and Rojahn (2003), 269.

14 Case C-26/62 *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

> therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'[15]

In the 1964 *Costa/ENEL* case, the CJEU clarified that, according the doctrine of direct effect, natural and legal persons can invoke EU law before the national courts of the Member States.[16] It also stated that:

> 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'[17]

Furthermore, in the *Costa/ENEL* case the CJEU considered that the doctrine of direct effect established in *Van Gend & Loos* would be 'quite meaningless' if a Member State could unilaterally nullify its effects by means of a legislative measure that could prevail over EU law.[18] Therefore, the Court found that:

> '[t]he transfer by the States from their domestic legal system to the EU legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the EU cannot prevail.'[19]

In subsequent case-law, the Court vigorously maintained and further developed these doctrines of direct effect and supremacy of EU law. It confirmed, among other important things, that EU law takes precedence over national constitutional law,[20] including fundamental rights provisions.[21] It also specified that both primary and secondary EU law have direct effect and enjoy primacy over national law.[22] The Court also ruled that the doctrine of supremacy of EU Law precludes the valid adoption of new national legislative measures 'to the extent to which they would be incompatible with EU provisions.'[23] Although the doctrines of direct effect were never crystalized in the Treaties – and may therefore themselves perhaps be regarded as examples of informal constitu-

15 Ibid.
16 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
17 Ibid.
18 In the words of the court: 'law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as EU law and without the legal basis of the EU itself being called into question'. See: Ibid.
19 Ibid.
20 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
21 Case 11/70 Internationale *Handelsgesellschaft mbh v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
22 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
23 Ibid.

tional change, albeit at a European level[24] –, they have become an integral and undisputed part of EU law.[25]

The doctrines of direct effect and supremacy of EU law, as introduced and maintained by the CJEU, were at odds with the original constitutional plan for the relationship between EU Law and German domestic law. In particular, the claim that EU law takes precedence over national constitutional law implied a striking deviation from the original constitutional plan as embodied by Article 25 of the Basic Law. Nevertheless, German constitutional actors would – with some reserves – largely stomach the consequences, even though the Basic Law was not being amended. In 1967, the German Constitutional Court accepted that the EU is a Union 'of its own kind' to which the Member States transferred certain sovereign rights:

> 'Thereby a new public authority has come into being, which is autonomous and independent from the authorities of the Member States; its acts therefore neither need to be confirmed ('ratified') nor can they be repealed by them.'[26]

In 1971, the German Constitutional Court accepted that, by ratifying the EEC Treaty, the Member States had created an autonomous legal order that has direct effect in the domestic legal order and can be invoked in the German courts.[27] Furthermore, in subsequent case law, the German Constitutional Court in principle also accepted the supremacy of EU law, albeit in a modified and non-absolute form.[28] In short, referring to the German Basic Law, the Constitutional Court has acknowledged that EU law enjoys primacy over national constitutional law in so far as the German constitutional 'identity' as embodied by Articles 1, 20 and 79(3) of the Basic Law is not violated.[29]

24 Voermans (2009), 98.

25 Craig and De Búrca (2008), 256 et seq.

26 '[Die Gemeinschaft] ... ist eine im Prozeß fortschreitender Integration stehende Gemeinschaft eigener Art, eine "zwischenstaatliche Einrichtung" im Sinne des Art. 24 Abs. 1 GG, auf die die Bundesrepublik Deutschland – wie die übrigen Mitgliedstaaten – bestimmte Hoheitsrechte "übertragen" hat. Damit ist eine neue öffentliche Gewalt entstanden, die gegenüber der Staatsgewalt der einzelnen Mitgliedstaaten selbständig und unabhängig ist; ihre Akte brauchen daher von den Mitgliedstaaten weder bestätigt ("ratifiziert") zu werden noch können sie von ihnen aufgehoben werden.' See: BverfGE 22, 293, 296 – *EG-Verordnung*.

27 '….durch die Ratifizierung des EWG-Vertrages (vgl. Art. 1 des Gesetzes vom 27. Juli 1957 – BGBl. II S. 753 -) ist in Übereinstimmung mit Art. 24 Abs. 1 GG eine eigenständige Rechtsordnung der Europäischen Wirtschaftsgemeinschaft entstanden, die in die innerstaatliche Rechtsordnung hineinwirkt und von den deutschen Gerichten anzuwenden ist.' BVerfGE 31, 145, 173 – *Milchpulver*.

28 Streinz (2011), 135. Heun (2011), 186. Zippelius and Würtenberger (2005), 542. Pernice (1998), 60.

29 Streinz (2011), 136.

Moreover, since 1974,[30] the Constitutional Court, has reserved for itself the authority to review whether EU law developments are (still) in conformity with the core identity of the German constitution.[31] The German legislator has not univocally accepted the doctrines of direct effect and supremacy of EU law either, though the Treaty of Lisbon – which the German legislator ratified – includes a nonbinding declaration (Declaration NR. 17), which states that:

> 'in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.

Contemporary German constitutional handbooks generally adopt the view of the German Constitutional Court, recognizing the doctrines of direct effect and supremacy of EU law within the limits that have been developed by the Constitutional Court since 1974. As these limits are broad and quite abstract, this means that an average German handbook may explain that, as a consequence of the doctrine of supremacy of EU law, provisions of German law are not applicable if they conflict with EU law; that, in case of doubt, German law must be interpreted in light of EU law; that the competences of German public authorities in the field of legislation are limited or modified by the competences of EU and EU authorities; and that the compatibility of national law with EU or EU law can be reviewed by the Court of Justice of the European Union (CJEU).[32]

To date, neither the doctrines of direct effect and supremacy of EU law as they have been developed by the CJEU, nor these doctrines as they have been recognized by German constitutional actors, have shown on the face of the German Basic Law. Nevertheless, from a historical institutionalistic perspective, they have profoundly changed the material meaning of Article 25 BL law in particular and the entire Basic Law in general. Before the doctrines of direct effect and supremacy were introduced, the Basic Law operated as the highest law within the German legal order. After this introduction, however, the Basic Law largely lost this status and function. With the exception of the Basic Law's fundamental core, as embodied by Article 1, 20 and 79(3)), the document has become subordinate to EU rules, both as a practical matter and largely as a legal matter. As we have seen, despite their constitutional significance, these

30 In the 1974 *Solange* judgment, for example, the German Constitutional Court reserved for itself the competence to declare a rule of Community law inapplicable in Germany if it would consider such a rule incompatible with one or more fundamental rights provided by the German Basic Law, 'as long as' the Community itself would not provide an equivalent protection of fundamental rights. BVerfGE 37, 271, 279 *et seq* – Solange 1.

31 73 BVerfGE 339, 387 – *Solange II*, BVerfGE 89, 155 – *Maastricht* – 1993, 2 BVerGE 2/08 – *Lisbon* – 2009, 2 BVerfGE 2728/13 – OMT – 2014.

32 Maurer (2007), 128.

changes have not been effected by a formal constitutional amendment, but instead by alternative means of change such as judicial decisions (both at an EU and national level) and ordinary legislation ratifying EU Treaties.

5.2.2 The powers of individual state institutions

Moreover, European integration has had substantial implications for all German authorities constituted by the Basic Law, even when the concerned provisions have not been subject to formal constitutional amendment. Especially since the introduction of the doctrines of direct effect and supremacy of EU law, these authorities have been placed under the conditions of EU law, whether their powers are transferred to the European level or whether they have retained their powers in modified form.[33]

For example, European integration has had substantial consequences for the powers of the German Constitutional Court. Under Article 100(1) of the Basic Law, the Constitutional Court originally had the sole authority on determining the validity of domestic legislation.[34] This so-called *Verwerfungs monopol,* as originally interpreted, provided that the Constitutional Court has the exclusive power to reject acts and norms; no ordinary court or administrative agency is entitled to refuse the application of domestic legislation on the grounds that it is constitutionally doubtful.[35] The drafters of the Basic Law had included the *Verwerfungsmonopol* for the Constitutional Court to exclude the possibility of different institutions having different opinions about the validity of the same legislation.[36] It is also believed that the power to determine the validity of domestic law was monopolized and concentrated in order to protect the parliamentary legislator: these measures aimed to prevent every single court from ignoring the will of the legislator and refusing the application of a law because it would be unconstitutional and void.[37] Moreover, the *Verwerfungsmonopol* was included to promote uniformity of constitutional jurisprudence.[38] However, as we have seen, in *Costa/ENEL* and subsequent case law, the CJEU has made it mandatory for national courts to review whether domestic acts and laws are compatible with EU law and, in case of conflict,

33 Maurer (2007), 128.

34 Article 100(1) of the Basic Law provides that: 'If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.'

35 Grimm (2012), 45. Meyer (2003), 704.

36 Grimm (2012), 107.

37 Maurer (2007), 667. Meyer (2003), 705.

38 Meyer (2003), 705.

to disregard national legislation.[39] Especially in *Simmenthal*, the CJEU was very clear about the duty of national courts:

> '…every national court must, in a case within its jurisdiction, apply EU law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the EU rule.'[40]

Again, since as early as 1971, also the Constitutional Court itself recognized that the primacy of EU law can, in principle, be invoked in the German courts.[41] Although there is no jurisprudence, German constitutional actors have also held that the administration has the competence to reject the application of national legislation that is not compatible with EU law.[42] As Grimm argued, since these developments the *Verwerfungsmonopol* of Article 100(1) of the Basic Law no longer holds true:

> 'every judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law'.[43]

A related example concerns the function and tasks of the judiciary in general (Article 92-104 BL). The classic task of the German judiciary is to interpret and apply German law[44] and 'general rules' of international law pursuant to Article 25 of the Basic Law. However, in the process of European integration, national courts have effectively become increasingly EU courts as well, even though the Basic Law has not been amended to this end.[45] As we have already seen, since *Costa/ENEL*, national courts are 'bound to apply' EU law.[46] Furthermore, since the founding of the European Communities, national courts have had an institutionalized dialogue with the European courts. According to the contemporary TFEU, national courts have the power to request the CJEU to give a preliminary ruling on issues concerning the interpretation of the EU Treaties.[47] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter

39 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585. Case C-26/62 *Algemene Transporten Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
40 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
41 BVerfGE 31, 145, 173 – Lütticke.
42 Pernice (1998), 62.
43 Grimm (2012), 45. See also Streinz (2007), 46.
44 See in particular Art 93(1) BL.
45 Streinz (2011), 148.
46 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
47 Now Article 267 TFEU.

before the European Courts.[48] On the one hand, it should be noted that the German Constitutional Court has referred explicitly to the CJEU only once, namely in the OMT case.[49] Moreover, it clearly still considers itself the sole and ultimate guarantor of the German Constitution. On the other hand, at the same time, the 'interdependence of the judiciary within the multilevel system,'[50] as Streinz aptly labeled the new situation that has emerged in the course of European integration, has been recognized by the judiciary itself: the Constitutional Court has acknowledged that the CJEU is a 'legal judge' in the sense of Article 101(1) of the Basic Law, that the CJEU has been admitted to the German legal protection system,[51] and that the German Constitutional Court exercises its jurisdiction regarding the applicability of derivative EU law in Germany in a 'co-operative relationship'[52] with the CJEU.[53]

The evolution of European integration has also – without formal constitutional amendment – significantly changed the powers and role of the German parliament (the *Bundestag*), compared to the way parliament was originally established by the Basic Law (Article 38-48).[54] Most importantly, the processes of European integration increasingly reduced the ability of the national parliament to make legislation unilaterally. The wider the scope of EU law would become, the less room there would remain for the national parliament to take its decisions regarding legislation independently.[55] This effect has been particularly visible in the economic area, but also more recently in other areas such as the area of security and justice, the area of foreign affairs and, since the start of the implementation of the Economic and Monetary Union in the early 1990s, also the monetary and financial area. In recent years, even the budget debate – which has traditionally been considered a key activity of parliament[56] – has significantly been circumscribed by among other regulations the European Growth and Stability Pact.[57] Recent developments in the

48 Now Article 267(2) TFEU.
49 2 BVerfGE 2728/13 – OMT – 2014.
50 Streinz (2011), 148.
51 BVerfGE 75, 223, 240f – *Kloppenburg-Beschluss*.
52 BVerfGE 89, 155, 7 – *Maastricht*.
53 Streinz (2007), 46.
54 Grimm (2012), 107. See also Nettesheim (2002), 81 et seq.
55 Grimm (2012), 117.
56 See also Article 110 Basic Law.
57 Indeed, these developments have substantially changed the meaning of the Basic Law provisions with regard to finance (Article 104a-115 BL). These provisions fix the distribution of tax income within the Federal Republic and attribute equal financial autonomy to the Federal Government and the *Länder*. However, this autonomy has been substantially limited at both levels by the evolution of the European Monetary Union; this is because, since the ratification of the Treaty of Maastricht, the Commission has had the power to monitor the development of the budgetary situation and of the stock of government debt in the Member States (Now Article 126 TFEU). Moreover, Article 104a BL, which provides that 'the Federation and the Länder shall separately finance the expenditures resulting from the discharge

area of budgetary control associated with the 'European Semester' go much further still.[58] Today, approximately 20 percent of the federal legislation is in fact a transformation of EU Law.[59] A much larger percentage of legislation is influenced by EU obligations, depending on the level of integration in the area concerned.[60] Federal ministries spend roughly 30 percent of their time transposing EU regulations. According to Heun, these developments have

> 'reduced the autonomy of the Bundestag [the German Parliament] as a legislator including the fact that some substantial matters are regulated by European law and have a major impact on national legislation, even displacing national law completely in some areas'.[61]

Pernice even argued that, as far as the transposition of EU directives is concerned, it is has become the role of the parliament to be 'rubber-stamping the ideas from Brussels and acting as an administrative agency rather than a political body'.[62]

A classic example of an EU law development that has significantly circumscribed the powers of national legislators is the 1978 decision of the CJEU in *Cassis de Dijon.*[63] In this case, the CJEU significantly expanded the freedom of goods, ruling that measures applying to both imported and domestic goods that have an effect equivalent to a quantitative restriction on imports are prohibited under the ECC Treaty. In other words, if a product has been lawfully produced and marketed in one Member State of the Union, the sale of this product may not be subject to restriction in another Member State. After *Cassis de Dijon* Member States may still impose their own standards, but they must justify them. Hence, it has become much harder for Member States' legislatures to decide upon their own standards of protection.[64] Meanwhile, the function of the national parliament changed as a consequence of European integration. Over the years, large parts of the national parliament's traditional legislative functions have been taken over by the Council of Ministers and the European Parliament, which have increasingly acted as European legislators.[65] Instead of making legislation, it has become the national parliaments' task to control

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of their respective responsibilities', is arguably losing its grip on reality at a time when more and more decisions are made at a European level. See: Pernice (1998), 59.

58 Hinarejos (2015).

59 Töller cited by Heun (2011), 117.

60 Ibid.

61 Ibid.

62 Pernice (1998), 59.

63 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.[1978] ECR 649.

64 Grimm (2012), 107.

65 Pernice (2009), 373.

the ministers in the Council (or the Head of Government in the European Council).[66]

5.2.3 The principle of federalism

The evolution of European integration has effected substantial transformations outside the formal amendment procedure of the Basic Law with respect to the federal system in general (Articles 20(1) and 79(3) BL) and the distribution of legislative and executive powers between the federal and the state level in particular (Articles 70-75, 87f BL). German legal theory has traditionally defined federalism as a system in which the state as whole, as well as the *Länder*, have sovereignty.[67] In this understanding, independent sovereignty implies, among other things, that the *Länder* have a constitutional autonomy, a certain core of competences and minimum financial means that cannot be taken away, as well as a fundamental right to participate in the federal legislative process (which is protected, even against formal constitutional amendment, by Article 79(3) of the Basic Law).[68] However, European integration has actually triggered substantial shifts of power from the *Länder* to the federal state, and from the federal state to EU institutions.[69] As Heun explained, European integration has affected the position of the *Länder* in particular, because the European Union perceives the individual Member States as single identities.[70] Moreover, while EU law is often implemented at the level of the *Länder*, the *Länder* have only had a limited capacity to influence the European decision-making process.[71] Before Article 23 BL was introduced in 1992, the Federal legislator could, pursuant to Article 24(1) BL, transfer sovereign powers to the European level just by simple law, without involving the Federal Council (*Bundesrat*).[72] As foreign affairs, including European affairs, was a matter under exclusive power of the federation, the *Länder* could not use its legislative powers to block the transfer of sovereignty by the federal legislator.[73]

In 1986, new rights of participation in the decision-making processes regarding European matters were attributed to the *Länder* in an attempt to compensate for their increasing losses of competences due to European integration.[74] In 1992 and 1993, the most important of these rights were codified in Article 23 of the Basic Law and in a statute regarding the cooperation of

66 Pernice (2009), 373.
67 Heun (2011), 50.
68 Ibid, 54.
69 Streinz (2012), 141. Hufeld (1997), 148 et seq. Nettesheim (2002), 91 et seq.
70 Heun (2011), 81.
71 Ibid.
72 Ibid.
73 See: Article 70 BL and Article 73(1) BL.
74 Heun (2011), 81.

the Federation and Lander in matters regarding the EU.[75] Article 23(1) of the Basic Law, for instance, explicitly provides that the Federation may only transfer sovereign powers to the EU through a law with the consent of the Federal Council. Moreover, Article 23(2) states that, through the Federal Council, the *Länder* 'shall participate in matters concerning the European Union' and that the Federal Government has the obligation to keep the Federal Council 'informed, comprehensively and at the earliest possible time'. This means, among other things, that before it participates in the legislative process of the EU, the Federal Government must provide the Federal Council with an opportunity to state its position (Article 23(3)). It also means that, insofar as the legislative powers of the *Länder*, the structure of the Land authorities, or *Land* administrative procedures are primarily affected, the position of the Federal Council must 'be given the greatest possible respect in determining the Federation's position' (Article 23(5)). However, the constitutional amendments did not restore the division of powers between the federal state and the *Länder* as it was originally 'eternalized' by Article 79(3) of the Basic Law, among other provisions. As Heun pointed out, the amendments 'will only slightly delay, and not hinder, the competences from migrating to the federal government and the European Union'.[76]

5.2.4 The content of fundamental rights

Other important examples of informal constitutional change that has been effected by the evolution of European integration can be found in the field of human rights. In the first place, European integration has had implications for the scope of human rights. In particular, the interpretation of Articles 8(1), 9(1), and 12(1) of the Basic Law – the so-called 'German fundamental rights' – has changed in the process of European integration.[77] These three articles grant 'all Germans' the freedom of assembly, the freedom of association, and occupational freedom, respectively. However, since the introduction of EU Citizenship by the Treaty of Maastricht, German jurisprudence has held that these articles also apply to non-German citizens on German soil.[78] Also, Article 19(3) of the Basic Law, which provides that the fundamental rights of the Basic Law also apply to 'domestic artificial persons', has been extended to apply to non-German artificial persons from inside the EU as well.[79] In the course of European integration, EU law should also be counted among the

75 Article 2 Gesetz zur Einheitlichen Europäischen Akte Vom 28 Februar 1986 BGB1 II 1102.
76 Heun (2011), 82.
77 Maurer (2007), 128.
78 Ibid.
79 Streinz (2011), 141.

system of legal protection guaranteed by Article 19(4) of the Basic Law.[80] Moreover, European integration has had consequences for the interpretation of Article 2(1) of the Basic Law, which provides that

> '[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law'.

Since EU law has been considered part of the German constitutional order since 1971,[81] EU law also co-determines the limits of this general right to freedom.[82] These developments substantially and persistently change the meaning of the Basic Law provisions concerned, but they have not (yet) crystalized in the text of the Basic Law.

European integration has also changed the meaning of Basic Law fundamental rights provisions on a more abstract level. Article 1(3) of the Basic Law stipulates that the fundamental rights listed in Article 2-19 of the Basic Law bind the legislature, the executive, and the judiciary as directly applicable law. However, in *Internationale Handelsgesellschaft* the CJEU ruled that

> 'the validity of a EU measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.'[83]

This means that wherever German authorities implement EU acts, they must respect EU fundamental rights as developed by the CJEU and codified by the 2009 Charter of Human Rights: they cannot set aside EU rules simply because their application would violate a fundamental right of the German Basic Law.[84] Consequently, the rule of Article 1(3) that all German authorities are

80 Maurer (2007), 128.
81 See: BVerfGE 31, 145, 173.
82 Maurer (2007), 128. Pernice (1998), 56.
83 Case 11/70 Internationale *Handelsgesellschaft mbh v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, par. 3.
84 Pernice (1998), 55. This effect is also recognized by the German constitutional Court. In the 1981 *Eurocontrol* judgment, it stated that:
'Acts of the particular public power of a supranational organization which is separate from the State power of the Member States may also affect those persons protected by fundamental rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law and the duties of the Federal Constitutional Court, which include the protection of fundamental rights in Germany, and not only in respect of German governmental institutions (notwithstanding BVerfGE 58, 1).'
However, the court added that it will continue to assert the right to review EU Acts in case they evidently depart from the from the inalienable standards of protection provided by the Basic Law in order to be able to guarantee the mandatory standard of fundamental rights under the Basic Law. See: BVerfG 89, 155 – *Maastricht*.

bound by the fundamental rights stipulated by the German Basic Law does not apply to an increasing number of actions that result from EU obligations. As Pernice explained,

> 'German authorities are, insofar, under European "command", they act as European authorities and are with regard to the German legislation and constitution almost *de legibus soluti* [released from the law].'[85]

Grimm noted that these developments have had substantial implications for the interpretation of fundamental rights in Germany because, in interpreting fundamental rights, Germany and the EU have not entirely been guided by the same principles and values.[86] Article 1 of the Basic Law regards human dignity as an inviolable right and in German jurisprudence, personal communicative, and cultural rights traditionally prevail over economic interests. In general, the German constitution grants the federal legislature much leeway in regulating the economy in such a way that non-economic values are also respected.[87] For the EU, however, the four economic freedoms of the internal market have enjoyed the highest priority. It is true that the German Constitutional Court has held since *Solange II* that German rights still apply, but that EU law protects them as long as the level of protection is sufficient, that is, comparable to that of the Basic Law was achieved.[88] Yet, as Grimm reports, the CJEU may require that human dignity be balanced against entrepreneurial freedom:

> '[s]ince there is hardly any legal matter that does not have an economic aspect, the EU has a tool to extend its powers into fields that, according to national constitutional law, should not be guided by economic rationality.'[89]

5.2.5 Résumé

This section has listed some examples of constitutional norms, principles, and institutions whose material meaning has changed substantially and persistently – without formal constitutional amendment – as a consequence of European integration. This list is certainly far from comprehensive, as the evolution of European integration has presumably changed the material content of every single Basic Law provision in some important or less important way. As Pernice put it,

85 Pernice (1998), 55.
86 Grimm (2010), 46.
87 Ibid, 45.
88 73 BVerfGE 339, 387 – *Solange II*.
89 Ibid.

> 'whenever the Treaties on the European Union are changed, national constitutions undergo significant changes as well. Both constitutional levels are in permanent interdependency. Nearly all parts of the national legal orders – from constitutional law to private and criminal law – are affected by the Treaties and EU secondary law and are thereby Europeanized.'[90]

In addition, it should be considered that the progress of European integration is still ongoing and effects new constitutional developments virtually every day.[91] Therefore, it is probably impossible to give a comprehensive and perfectly systematic account of how the Basic Law has been Europeanized, but the list of examples presented above at least gives a sense of what kind of mechanisms have effected some of the most important informal constitutional changes in connection with European integration. Indeed, the Europeanization of the Basic Law has not only come about through formal constitutional amendments, but also through such mechanisms as treaty-making, court decisions – both at a European and at a national level – and by the national executive and legislature implementing EU policies.

5.3 Explanations for informal constitutional change

The fact that such important implications of the evolution of European integration for the material content of the Basic Law have not been subject to formal constitutional amendment may well be considered surprising. Post-WWII German constitutionalism is known for its 'positivism' – that is, its attachment to formal constitutional amendment – and its lively amendment culture.[92] Article 79(1) of the Basic Law[93] is commonly understood as a 'textual change commandment' (*Gebot der Textänderung*): 'no constitutional change without textual change'.[94] According to the mainstream view,[95] this does not mean either that the Basic Law categorically prohibits taking place outside the formal amendment procedure[96] or that the limits of informal constitutional change

90 Pernice (2009), 373.
91 Maurer (2007), 126.
92 Fusaro and Oliver (2011), 421. Murphy (2007), 487. Woelk (2011), 145.
93 The first sentence of Article 79(1) of the Basic Law provides that '[t]his Basic Law may be amended only by a law expressly amending or supplementing its text.'
94 Bryde (2003), 205.
95 See for the mainstream view: Bryde (2003), 205. Nettesheim seems to disagree, arguing that, pursuant to Article 79(1), the Basic Law does not allow its provisions to change implicitly. See: Nettesheim (2002), 79.
96 As Voâkuhle explained, when a new concretization is no longer compatible with the normative contend of a certain constitutional provision, the Basic Law must be amended in order to prevent violating Article 79(1). Voâkuhle (2008), 209.

be determined with precision.[97] However, Article 79(1) does demand a certain degree of fidelity to the words of the Basic Law and it reserves the right to bring about constitutional changes from a certain point for the constitutional legislator. In any case, Article 79(1) of the Basic Law does not allow for 'breaches of the constitution' (*Verfassungsdurchbrechungen)* by an ordinary statute without explicitly changing the text of the constitution, even if this statute is supported by a three-thirds majority.[98] As a more general matter, Article 79(1) reflects the aspiration of the Basic Law to render constitutional change and textual change fully analogous.[99]

The textual change commandment of Article 79(1) of the Basic Law seems to have had some influence on how constitutional change has taken place in German practice. Unlike the US and Japan, for example, German constitutional actors have occasionally used the constitutional amendment procedure to bring about or codify constitutional change. Major reforms associated with re-armament, emergency regulations, budgetary and financial policy reorganizations, reunification, and European integration were indeed accompanied by formal constitutional amendments.[100] More generally, the Basic Law has quite a high amendment rate relative to other national constitutions. Using a method that allows for comparison, Busch counted 193 amendments in the period between 1947 and 2007.[101] This makes the Basic Law the fifth most flexible constitution out of the constitutions of 20 OECD countries.[102] Benz indicated that, in Germany, informal constitutional change is relatively unconventional and that if certain constitutional transformation take place without foregoing formal amendment, the constitutional actors involved tend to adapt the constitutional text as soon as possible after the actual transformations have taken place.[103] Also, Kommers suggested that formal amendment rather than

97 As Badura explained, the limits of informal constitutional change are flexible. Badura (1992), 63.

98 This rule is a direct rejection of the Weimar practice. Under the Weimar constitution (1919-1945), the use of alternative means of change was not exceptional. For instance, it was acceptable for the legislator to deviate from the constitutional text – without explicitly amending it – by way of an ordinary statute if this statute was adopted by a qualified majority required to amend the constitution. However, the Weimar constitution's 'informal turnover' prompted the framers of the post-war Basic Law to take precautionary measures. It was mainly considered that, in a constitutional democracy that operates according to the rule of law, a more strict distinction had to be drawn between the *pouvoir constitutuant* and the ordinary legislator. See: Bryde (2003), 205 and Kotzur (2013), 126-127.

99 Bryde (2003), 206.

100 Heun (2011), 22.

101 Busch (2007). Most commentators count between 50-63 amendments, but the 'national' count does not allow for comparison as every country has its own methods of counting textual additions.

102 Ibid.

103 Benz (2011), 35.

alternative methods of constitutional change have been foremost in modern Germany.[104]

This raises the question of why, in apparent sharp contrast to the experience of constitutional change in other fields, so many important constitutional changes associated with Europeanization have taken place outside the Basic Law amendment procedure of Article 79(2). I present three possible answers below.

5.3.1 The German 'amendment culture' is a myth

One explanation for the fact that the Basic Law has Europeanized for a significant part without formal amendment is that, contrary to what some authors have indicated, Germany does not actually have such a thing as an 'amendment culture'. German constitutional actors certainly seem to prefer constitutional change to take the front door of the Basic Law's formal amendment procedure. However, although the German Basic Law has been amended many times, the extent to which these amendments truly reflect substantial constitutional change may be questioned. As Heun pointed out, the Basic Law has been amended many times (Heun counted more than 50 amendments), but only about five of these amendments have gained major importance.[105]

Furthermore, the extent to which the Article 79(2) formal amendment procedure of the Basic Law has actually rendered (material) constitutional change and (formal) textual change analogous may also be questioned. German constitutional actors, including the Constitutional Court,[106] have acknowledged that the meaning of constitutional provisions has sometimes changed outside the Basic Law's formal amendment procedure.[107] For example, the decisions of the Constitutional Court are being acknowledged as an important source of informal constitutional change.[108] It is noted that the ordinary legislature has modified the meaning of certain constitutional provisions, especially as it concretizes and implements formal constitutional provisions.[109] Also, constitutional authors have considered evolving unwritten constitutional norms,

104 Kommers cited in Murhpy (2007), 487.

105 Heun mentioned amendments concerning rearmament, emergency regulations, budgetary and financial policy reorganizations, reunification, and European integration. See Heun (2011), 22.

106 BVerfGE 34,269, 288 – *Soraya*. ‚[Eine] Norm steht ständig im Kontext der sozialen Verhältnisse und der gesellschaftlich-politischen Anschauungen, auf die sie wirken soll; ihr Inhalt kann und muss sich unter Umständen mit ihnen wandeln'. Cited by Zippelius & Würtenberg (2005), 67.

107 Heun (2011), 21. Bryde (2003), 206-207.

108 Petersohn and Schultze (2011), 47. Kneip (2011), 228 *et seq*. Zippelius and Würtenberger (2005), 64. Kotzur (2013), 140.

109 Zippelius and Würtenberger (2005), 65. Schulze-Fielitz (2008), 222.

conventions, and practices in order to effect implicit constitutional transformations.[110]

A 'perfect example', as Heun put it, of informal constitutional change is the transformation of Article 68 BL.[111] This article provides the federal chancellor with the power to ask for a 'confidence vote' in times of political crisis. If the vote is not supported by a majority of the parliament, the federal president may dissolve the parliament. The framers of the Basic Law included this article with the intention of providing stability and avoiding elections before the regular end of the legislative term. However, Chancellors Helmut Kohl and Gerhard Schröder have both used this instrument (in 1982 and 2005, respectively) while they enjoyed the support of a majority. They actually purported to lose the vote, thereby triggering the dissolution of the parliament and consequent election. In both cases, the Constitutional Court deferred the question about the constitutionality of the actions to the political actors involved. Legal scholars now distinguish a 'true' vote of confidence from a 'non-authentic' one.[112]

In sum, the high amendment rate of the Basic Law should not obscure the fact that the German constitution also changed many times outside the formal amendment procedure of Article 79(2) and, therefore, that the phenomenon of informal constitutional change is not so exceptional in Germany as some might expect.

5.3.2 Formal amendment is too difficult or impossible

Another factor that might explain why important constitutional developments associated with Europeanization do not show on the face of the Basic Law is the difficulty of formal constitutional amendment. Article 79(2) stipulates that amending the Basic Law requires the support of two-thirds of the Members of the *Bundestag* and the *Bundesrat*. For Woelk, the high amendment rate of the Basic Law is an indicator that the Basic Law's procedural requirement of amendability is 'definitely not an obstacle for change.'[113] As noted above, however, most amendments to the Basic Law appear to be relatively minor. The two-thirds majority may still prove to be impermeable if an amendment proposal would bring about change with regard to truly fundamental matters, such as the role and powers of one of the institutions that are necessary for amending the constitution.[114]

110 Zippelius and Würtenberger (2005), 65. Badura (1992), 64.
111 Heun (2011), 103. See also Woelk (2011), 146.
112 Ibid.
113 Woelk (2011), 145.
114 Grimm (2010), 40.

As in the US and Japan, a certain degree of cultural persistence against formal amendment seems to exist in Germany. This fact, combined with the qualified procedural requirements of Article 79(2), constitutes an important source of amendment difficulty. For example, in the 1970s the *Bundestag* established a commission to work out recommendations for a total revision of the Basic Law. However, when this commission presented its suggestions six years later, the Basic Law was already deeply venerated in West German society and the need for total revision was no longer felt.[115] Also, when East and West Germany reunified, the West was unwilling to draft a new constitution, although Article 146 had originally promised a new constitutional document for this historic event.[116]

Moreover, many informal constitutional changes that have been effected by European integration concern issues that are addressed by the eternity clauses of the Basic Law. These include fundamental rights, the allocation of powers in the federal system, and the way the principle of democracy is implemented in the organization of public powers. Article 79(3) of the Basic Law prohibits the textual alteration of certain Basic Law provisions and designates a few 'core' norms that are untouchable by formal constitutional amendment. It provides that

> 'Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [basic institutional principles] shall be inadmissible.'

Article 1 declares that 'Human dignity shall be inviolable' and that '[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world'. Moreover, Article 20(1) states that '[t]he Federal Republic of Germany is a democratic and social federal state'. According to German legal doctrine, constitutional amendments that would appear to contravene Article 79(3) could be tested, and in cases where an amendment is seen to violate the eternity clause, it could be ruled impermissible.[117] Consequently, the provisions and subjects addresses by the Basic Law's eternity clauses can only change implicitly.

5.3.3 Formal amendment has been considered unnecessary

Another important reason why a significant part of the constitutional changes effected by European integration took place without formal constitutional

115 Grimm (2010), 36.
116 Ibid.
117 Maurer (2007), 745.

amendment is the fact that, with regard to these changes, formal amendments have often been considered legally unnecessary. While Article 79(1) of the Basic Law embodies relatively strict doctrinal limits for informal constitutional change as a general matter, these limits do not apply to informal constitutional changes that have been effected by the evolution of international and European law.[118] Since the enactment of the Basic Law in 1949, the Preamble[119] and Article 24 of the Basic Law have embodied the concept of 'international openness', allowing for the transfer of sovereign powers by legislative act. Pursuant to Article 24, Ratification Acts (Article 59(2) BL) may 'breach the constitution' in case German authorities have to renounce (some of) their powers. According to German legal doctrine, such acts are exempted from the textual change commandment of Article 79(1) and are only circumscribed by the much broader limits of Article 73(3), which in any case provide the lower limits of informal constitutional change.[120] Moreover, Article 25 of the Basic Law has made 'general rules' of international law an integral part of federal law. Therefore, their development has been able to effect implicit constitutional changes in cases were German constitutional actors have recognized that certain international rules have constitutional or supra-constitutional status.[121]

Indeed, German legal doctrine has especially been permissive to informal constitutional changes that have occurred in connection with European integration.[122] German constitutional actors, including the Constitutional Court,[123] have explicitly recognized, almost from the beginning, that the evolution of European integration may imply substantial 'material' modifications to the content of Basic Law provisions, on the grounds that Article 24 allows for the transfer of sovereign powers to international organizations by an ordinary law and also based on general acknowledgement of the supremacy of EU law, even over the Basic Law.[124] In addition, since 1992, Article 23(1) of the Basic

118 Bryde (2003), 203.

119 The first sentence of the Preamble of the Basic Law provides that: 'Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law'.

120 The 'window in sovereignty' provided by Article 24 of the Basic Law is ultimately circumscribed by the core identity of the Basic Law (Article 73(3) BL), which provides, according to most authors, in any case the lower limit of informal constitutional change. Bryde (2003), 208. Woelk (2011), 163. Taking an historical institutional approach (chapter 2), we may add of course that also the 'core identity' of the Basic Law, though formally unamendable, has itself an interdependent relationship with the legal and socio-political context in which it is embedded.

121 Bryde (2003), 208.

122 Bryde (2003), 208. See also Kokott (2010), Pernice (1998) and Hufeld (1997), 132 *et seq*.

123 BVerfG 58, 1, 36 – *Eurocontrol*. 'Die Übertragung von Hoheitsrechten bewirkt einen Eingriff in und eine Veränderung der verfassungsrechtlich festgelegten Zuständigkeitsordnung und damit materiell eine Verfassungsänderung'. And: '[…] eine förmliche Verfassungsänderung nach Art. 79 GG [ist] nicht gefordert […]'.

124 Pernice (1998), 43. Hufeld (2011), 30.

Law has provided a special constitutional basis[125] for Germany's participation in the European Union: it explicitly provides that Germany shall participate in the development of the European Union and that, to this end, sovereign powers may be transferred by a legislative act.

In addition to being permissive, German legal doctrine has also provided limits to informal constitutional change connected with European integration. The most important of these limits have been embodied by Article 23(1) of the Basic Law since 1992. However, Article 23(1) seems to hardly (if at all) provide stricter limits to informal constitutional change by European integration compared to those that were already in place: the restriction and conditions set by Article 23(1) largely follow the formulation of the fundamental principles laid down in Articles 1, 20, 28 and 79(3) of the Basic Law, and therefore largely resemble the limits that had already been read, by most authors, into Article 24.[126] Moreover, Article 23(1) confirms that the Basic Law allows for the transfer of sovereign power by way of an ordinary statute: it subjects such a statute to the requirements stipulated by Article 79(2) (two-thirds majority) and Article 79(3) (fundamental core), but not to the textual change commandment of Article 79(1).

Only in the past two decades, the room for European integration to effect informal constitutional change seems to have been narrowed down somewhat by the German Constitutional Court.[127] This court has increasingly emphasized the protection of sovereignty – which the court has deduced from the principle of democracy – at the expanse of the principle open statehood.[128] It has also developed the procedure of 'identity review', which has made it, in the words of the Constitutional Court itself,

> 'possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated'.[129]

However, at the same time, the Constitutional Court has continued to emphasize that the Basic Law lays down 'a binding structure for Germany's participation in the development of the European Union' and that, pursuant to Article 23(1) 'the Basic Law can be adapted to the development of the European Union.'[130] Moreover, the limits to informal constitutional change effected by European integration, as provided by the Basic Law and clarified and developed by the Constitutional Court, remain mostly of theoretical significance, because the Constitutional Court has never actually found a violation

125 Rojahn (2003), 125 et seq.
126 Bryde (2003), 208. Woelk (2011), 162.
127 See especially BVerfGE 89, 155 – *Maastricht* – 1993, 2 BVerGE 2/08 – *Lisbon* – 2009.
128 Kokott (2010).
129 2 BVerGE 2/08 – *Lisbon* – 2009, par. 240. See also 2 BVerfGE 2728/13 – OMT.
130 Lisbon case par. 230.

of these limits and has never really stood in the way of further European integration or made it legally necessary to amendment the constitution before European integration could move on. It is true that the review powers asserted by the German Constitutional Court have forced the CJEU to take the German constitutional reservations seriously.[131] However, so far the Constitutional Court has continued to live up to its reputation as the 'Dog that Barks but does not Bite', as Weiler once noted.[132] Indeed, in *Honeywell*, the *Bundesverfassungsgericht* ruled that it would consider a violation of the EU Treaties to be *ultra vires*, only if this violation would be 'manifest' and of 'structural significance'.[133] And in the follow-up judgement to the OMT case it seems to have accepted the ruling of the CJ[134]EU that a program such as the Outright Monetary Transactions program would not be *ultra vires*, that is, would not 'manifestly' exceed the competences attributed to the European Central Bank and, hence, would not present a constitutionally relevant threat to the German Bundestag's right to decide on the budget.[135]

So why is it that some constitutional changes induced by European integration have been brought about or codified by using the formal amendment procedure of Article 79(2), while other changes have only taken alternative routes? Nettesheim argued that formal amendment such as Article 23 (which, as already noted, confirms the participation of Germany in the EU and provides limits to European integration), Article 28(1) (which confirms the right for EU citizens to vote in country and municipal elections), and Article 88(2) (which provides for the possibility to transfer powers and responsibilities of the Federal Bank to the European Central Bank) have not been brought about on legal-doctrinal grounds, but on grounds of 'constitutional aesthetics' ('*Verfassungsästhetik*'), which recommend bringing the provision of the Basic Law in line with EU law.[136] As Nettesheim pointed out, in case the text of the Basic

131 See: Heun (2011), 188.

132 Weiler (2009), 505 (caps in original).

133 2 BVerfGE 2728/13 – Honeywell.

134 Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, Judgement of the Court (Grand Chamber) of June 16 2015.

135 2 BvR 2728/13.

136 Nettesheim (2002), 78. At least with regard to the amendment of Article 88 and Article 28(1) BL, Pernice agreed that there was no legal need for constitutional amendment. Regarding Article 88, he argued that '[t]he fact that the federal government establishes a federal bank acting as bank of issue does not exclude that this Bank is integrated into a European System of Central Banks – in contrary: the system is based on its existence as much as on the existence of an (independent) Central bank in each other Member State.' Regarding the adaption of Article 28(1), Pernice argued that a modified construction of the word 'people' (*Volk)* would 'easily have allowed to accommodate voting rights for foreigners with the text of Article 28(1) GG, without an explicit amendment'. See: Pernice (1998), 54. Against this last point, one could argue that in the case of Article 28(1) BL, amendment was perhaps not strictly necessary, but was made because the Constitutional Court had declared any attempt to give foreign citizens a right to vote for municipal elections unconstitutional (see: BVerfGE 83, 37). When this right was introduced at a European level, this jurisprudence

Law is amended in connection to EU developments, such 'retrospective' constitutional amendments merely confirm that the German constitutional legislator has accepted these developments.[137] Similarly, Streinz pointed out that although it has not been necessary to facilitate European integration from a constitutional or European law perspective, some of these amendments were nevertheless helpful in view of constitutional politics.[138] In fact, a textual modification of the Basic Law is only legally necessary, as Pernice explained, in all cases where individual rights granted by EU law provisions are not fully clear and effective without formal amendment of the Basic Law. Pernice wrote:

> 'in other area fields, the normative unity of the European constitutional order may suffice to produce adequate results, and it is rather a question of clarity and simplicity for each [national] constitution to adapt its text from time to time to the changes it has undergone as a consequence of the development of the Treaties constituting the European Union.'[139]

5.4 Alternative mechanisms as perfect substitutes?

In German constitutionalism, the formal constitutional amendment procedure of the Basic Law (Article 79(2)) is considered to be of great importance for at least three reasons. First, the textual change commandment of Article 79(1) reflects the idea that the formal constitutional amendment procedure is a particular legitimate route for constitutional change. Article 79(1) aims to safeguard the content of the Basic Law and precludes it from changing by accident, unconsciously, or secretly.[140] Therefore, it demands a certain degree of fidelity to the constitutional text and it limits the possibility of legitimate informal constitutional change. At the same time, it embodies the rule that if constitutional change has taken place by alternative processes, such dynamics may later require a textual clarification.[141] Second, because of the textual change commandment of Article 79(1) of the Basic Law, the Article 79(2) formal amendment procedure is seen as one of the most effective, if not the only truly effective, means of constitutional change. Although Article 79(1) does not categorically prohibit informal constitutional change, it embodies the idea that the text of the Basic Law is to remain the basis, guideline, and limit of constitu-

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may have been overridden as a strictly doctrinal matter, but it is at least understandable that the constitutional legislator wanted to make it clear that constitutional rules with regard to the participation of European citizens in municipal elections had changed.

137 Nettesheim (2002), 78.
138 Streinz (2006), 39.
139 Pernice (1998), 59.
140 Bryde (2003), 208.
141 Kotzur (2013), 136.

tional evolution.[142] This means that certain reforms would indeed require the form of a formal constitutional amendment in order to be valid.[143] Third, formal constitutional amendment has sometimes been regarded the preferable route of constitutional change (e.g. Article 79(1)), because German constitutionalism values the continuing relevancy of the Basic law's *text*. By at least promoting that informal constitutional change and formal constitutional change remain aligned with one another, German constitutionalism seeks to guarantee that the Basic Law remains a comprehensive charter (*'Urkunde'*) of German constitutional law.[144]

However, as we have seen, the Europeanization of the German Basic Law has taken place for an important part outside of the Basic Law's formal constitutional procedure. This raises the question about the extent to which alternative mechanisms of change have been able to functionally substitute the Article 79(2) formal amendment procedure of the German Basic Law. This section aims to explore the following questions: To what extent have informal constitutional changes effected by the evolution of European integration been considered legitimate? To what extent have alternative processes of change that have Europeanized the Basic Law been effective in adapting the Basic Law to new circumstances and demands? And, in the view of constitutional actors, to what extent have alternative processes of change been able to preserve the relevancy of the Basic Law's text?

5.4.1 Legitimacy

In the early years of European integration, the legitimacy of informal constitutional change that occurred in connection with European integration seems to have hardly been questioned by German constitutional actors. On the contrary, the Herrenchiemsee Convention, which had a strong influence on the workings of the Constitutional Convention that drafted the Basic Law, embraced a very open and integration friendly interpretation of the Basic Law.[145] During the Herrenchiemsee Convention of 1948, Carlo Schmid, one of the most prominent founding fathers of the German Basic Law, said that the provision pursuant to which:

> 'the general rules of public international law are directly enforceable …, expresses very lively that the German People … are resolved to step out of the phase of the nation state and move beyond to a supranational phase. … We should … open the doors into a politically restructured supranational world

142 Badura (1992), 64.
143 Bryde (2003), 205.
144 Bryde (2003), 206. Hufeld (1997), 98.
145 Kokott (2010), 101.

> order widely. … Our Basic Law forswears stabilising state sovereignty like a "Rocher de bronze" (solid rock), on the contrary, it makes the surrender of sovereign powers to international organisations easier than any other constitution in the world.'[146]

Carlo Schmid also wrote that '[y]ou have to want Europe as a federal state, if you want an effective Europe'.[147] Schmid also believed that the Basic Law should leave to politics a wide margin of appreciation as to the modalities of the transition to 'a politically newly structured supranational world order'.[148]

During the first few decades of European integration, constitutional implications of the evolution of European integration appear to have been accepted virtually without reservations. In the common understanding, the Basic Law was based on the concept of 'open statehood', as Vogel put it.[149] Constitutional actors recognized that the evolution of European integration would go hand in hand with substantial material modifications, even when the text of the constitution was not explicitly changed.[150] As Pernice explained, this was considered the implication of Article 24 of the Basic Law and the fact that constitutional actors, including the Constitutional Court,[151] had recognized the autonomy and supremacy of EU Law even over constitutional law.[152]

However, the increasing intensity of European integration – both in qualitative and quantitative terms – raised what has been referred to as the problem of 'silent constitution revision'.[153] As Kokott explained, when the Herrenchiemsee Convention drafted Article 24, it presumably had in mind intergovernmental organizations with a limited capability to act, but the supra-

146 *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 443 (R. Oldenbourg 1996), translated and quoted by Kokott (2010), 101.

147 Carlo Schmid, *Deutschland und der Europäische Rat, Shriftenreihe des Deutschen Rates der Europäischen Bewegung*, Vol. 1 (1949), translated and quoted by Kokott (2010), 104.

148 *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 40 (R. Oldenbourg 1996), translated and quoted by Kokott (2010), 104.

149 Vogel (1964), cited by Kokott (2010), 112.

150 In 1972, Hans Peter Ipsen labeled the phenomenon of informal constitutional change by European integration 'constitutional mutation'. See: Ipsen (1966) cited by Pernice (1998), 42.

151 As we have seen, in 1967 the Constitutional Court had said that, with the ratification of the Treaty of Rome, a new public authority had come into being that is autonomous and independent from the authorities of the Member States; and that this public authorities' acts neither need to be confirmed nor confirmed and that they cannot be repealed by the Member States. See: BverfGE 22, 293, 296 – *EG-Verordnung*. In 1971, the Constitutional Court confirmed this judgment and more or less accepted the supremacy of EU law by saying that if national law and EU law conflict, the national courts should not apply national law, and thus give priority to EU Law. BVerfGE 31, 145, 173 – *Milchpulver*.

152 Pernice (1998), 42.

153 Woelk (2011), 161.

national European integration soon went much further: it became apparent that it could profoundly interfere with domestic constitutional structures.[154] Meanwhile, the *Zeitgeist* and the world order had also arguably changed. Immediately after WWII, Germany was eager to win back its international recognition and membership of the international community. In this context, there was no room for reservations. However, once Germany was fully readmitted to the international community and had won back (part of) its self-confidence, German constitutional actors also started to consider the limits and conditions of international integration.[155]

In 1974, the German Constitutional Court broke with the clear conception of the supremacy of EU Law that had prevailed until then in German constitutionalism.[156] The Constitutional Court started to gradually develop 'counter-limits' to European integration, instruments to defend German sovereignty and the core identity of the constitution, such as substantive equivalence of fundamental rights, the rule of law and democratic participation.[157] The (ominous) legitimacy deficit of European integration by 'silent constitutional revision' was subsequently addressed by the constitutional legislator at the time of the ratification of the 1992 Treaty of Maastricht. In connection with this Treaty, the German constitutional legislator inserted a new Article 23 into the Basic Law, also known as the 'European Clause', which provides a specific legal basis for EU integration and codifies the limits and conditions to European integration that had earlier been developed by the German Constitutional Court.[158] In addition, Article 23 emphasizes the protection of the federal principle. Paragraphs 2-6 seek to provide compensation for the loss of *Länder* and Federal Council competences as a consequence of European integration, by strengthening their participation in the European decision making process.[159] Also, in order to safeguard the participation of the *Länder* further, Article 23(1) subjects the establishment of the European Union, as well as changes in its Treaty foundations and comparable regulations that amendment or supplement the Basic Law (that is, those that produce informal constitutional change), to the procedural and substantive requirements of Article 79(2) and 79(3) that also apply to formal constitutional amendment. The only thing that Article 23(1) does not require still is a textual amendment to the Basic Law, because the 'textual change commandment' embodied by Article 79(1) is not included.[160]

In the years after the adoption of Article 23, the Constitutional Court has further articulated the doctrinal limits of (informal) Europeanization of the

154 Kokott (2010), 104.
155 Ibid, 102.
156 BVerfG 37, 271 – Solange I.
157 Woelk (2011), 161.
158 38th amendment to the Basic Law, 21 December 1992 (*BGBL*, I, 2086).
159 Heun (2011), 81.
160 Woelk (2011), 163.

Basic Law. In both in the 2009 *Lisbon* judgment, the Court stressed that acts ratifying new EU Treaties must remain within the boundaries of the core identity of the Basic Law and that German state organs may not apply EU legal instruments that transgress the limits of the integration program laid down in the Treaties (so-called *ultra-vires* exercises) as ratified by the German legislature.[161] The main rationale for the latter instrument was the protection of democratic participation and legitimacy, which according to the Court could only be realized and guaranteed through the national parliaments of the Member States.[162] The Constitutional Court explains its nation-state-based model of legitimation as follows:

> 'Article 23.1 of the Basic Law like Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.'[163]

Thus, the Court famously found that the Member States must remain the 'masters of the Treaties'.[164]

The German Constitutional Court's views regarding the relationship between EU law and German constitutional law and the limits of legitimate informal constitutional change by European integration have been criticized. In the first place, it has been argued that the Constitutional Court has misinterpreted the Basic Law, over-emphasizing the defense of national sovereignty at the expense of Germany's constitutional commitment towards European integration.[165] Another line of attack has focused on the Constitutional Court's model of legitimacy, which, as we have seen, is based on the thesis that the European integration process derives its legitimacy mainly from the national parliament and that the European parliament cannot provide more legitimacy than it already does. Pernice, for example, argued that the EU is not (anymore) a 'compound of states', as the Constitutional Court holds, but a 'compound of constitutions' (*Verfassungsverbund*).[166] This means that rules of EU primary law and national constitutional law have each become elements of a

161 2 BVerGE 2/08 – *Lisbon* – 2009.
162 Woelk (2011), 165.
163 2 BVerGE 2/08 – *Lisbon* – 2009, par. 229.
164 Ibid, par. 231.
165 Kokott (2010), 103.
166 Pernice (1998), 43.

> 'single constitutional system, obtaining their respective legitimacy from the same (European) citizens and giving the authority for legislation and public action applicable to the same people.'[167]

Despite this criticism, and partly as a result of the German Constitutional Court's rulings and the amendment (Article 23(1) BL) that has been brought about by the German constitutional legislator, Germany has a more or less universal legal doctrine that seems to have guided the choice of constitutional actors as to whether particular consequences of the evolution of Europeanization are acceptable. Insofar as the evolution of European integration – in whatever form – has been covered by a Ratification Act and has remained within the boundaries of the core identity of the Basic Law, its consequences for the Basic Law have commonly been accepted by the German Community of constitutional actors. But to the extent that the evolution of European integration has (supposedly) transgressed these limits, it has raised difficult constitutional questions.[168] Hence, within the boundaries of the German doctrine of (informal) Europeanization, alternative means of constitutional change have been able to substitute the legitimation function of the Basic Law's constitutional amendment procedure. Outside of this doctrine, they have not been able to prevent the rise of controversialities that would presumably not have arisen if the text of the Basic Law and the evolution of European integration had remained perfectly aligned with one another.

At the same time, it should be noted that the Constitutional Court has never actually deemed concrete constitutional implications of European integration illegitimate. Nor has it actually made the ratification of a European Treaty impossible or even difficult.[169] Only in the OMT case it actually reviewed

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167 Ibid.

168 The *Mangold* case of the CJEU (Case C-144/04, *Mangold* [2005] ECR I-9981), for instance, was criticized by a group of German law professors because it supposedly invented a European prohibition against age discrimination (See: Kokkott (2010), 110). Ultimately, however, the German Constitutional Court did not agree – arguably easing its ultra vires test somewhat. E.g. Woelk (2011), 165. The Constitutional Court ruled that: 'Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.' See: 2 BVerfG 2661/06.

169 In the Lisbon case, the Court also specified that the national legislative bodies have a special 'responsibility for integration' (par. 236), which means that the national parliament must have sufficient means to participate in the EU decision-making process. The Court declared the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in (*Bundestag* printed paper 16/8489) unconstitutional because it did not reserve sufficient participatory rights for the national Parliaments. The ratification of the 2009 Lisbon Treaty therefore required a new constitutional amendment, Article 23(1a), which guarantees the right of the Parliament and the Federal Council to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity.

whether concrete EU acts transgressed the integration plan of the Treaties, but, as noted, it accepted the decision of the CJEU[170] that a program such as the Outright Monetary Transactions program would not be ultra vires.[171] Thus far, the Constitutional Court has indeed more or less accepted 'de-facto monism', as Woelk puts it, with regard to the relation between German and EU legal system.[172] Of course, it is possible that the Constitutional Court will consider the evolution of European integration to transgress the limits it has formulated together with the German constitutional legislator; for example, if the EU transforms into a (fully-fledged) federal state.[173] Also the ECB's policy of Quantitative Easing may prove to be a transgression of these limits.[174] Only after these developments have come to a conclusion may it become apparent whether and to what extent alternative mechanisms of constitutional change can function as the equivalents the formal constitutional amendment procedure outside of the limits of Europeanization set out by German legal doctrine.

5.4.2 Effectivity

Although the Europeanization of the Basic Law has been facilitated by a formal constitutional amendment (e.g., Art. 23(1) BL), this process has largely taken place through alternative processes of constitutional change, such as Ratification Acts, treaty-making, and judicial decisions. Have these processes been able to bring about rules and structures for government that are clear, stable and enduring? Or have alternative mechanisms of change instead produced ambiguities, uncertainties, or an unstable constitutional regime?

Looking back, it may be observed that alternative processes of change have been very effective at Europeanizing the German constitutional law.[175] Article 24 of the Basic Law and the permissive interpretations of the Constitutional

170 Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, Judgement of the Court (Grand Chamber) of June 16 2015.

171 2 BvR 2728/13.

172 Woelk (2011), 165.

173 In the Lisbon judgment, the Constitutional Court ruled that: 'The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.' See: 2 BVerGE 2/08 – *Lisbon* – 2009, par. 228. Thus, in the view of the Constitutional Court, Germany cannot legitimately become part of a European Federation through alternative processes of constitutional change (or even formal constitutional amendment). Making this step is only possible through the constitution-making route of Article 146 of the Basic Law. See: Schorkopf (2010), 1237.

174 2 BverfG 859/15.

175 E.g. Streinz (2007), 55 et seq.

Court – particularly its general acceptance of the supremacy and autonomy of European law – would probably have remained a sufficiently stable basis for European integration, independent from any of the 'Europe friendly' formal amendments to the Basic Law.[176] However, Article 23(1) seems to have raised Germany's constitutional commitment to the development of European Union beyond all doubt: while it provides limits to European integration, it also makes it clear that policies hostile to European integration would be unconstitutional.[177] Moreover, with reference to the text and history of the Basic Law, the constitutional implications of European integration have commonly been recognized by constitutional actors. In particular, most actors would seem to agree that EU law has become an integral part of German constitutional law.[178]

However, it is not at all certain whether the scheme for Europeanization (de jure dualism, de facto monism) that has been followed so far will remain an effective scheme for constitutional change in the future. The main question appears to be whether the German Constitutional Court will continue to be able to find a workable balance between 'Europe friendliness' and the protection of national sovereignty. In the past two decades, the court has continued to underline the Basic Law's fundamental commitment to European integration. On the other hand, as we have seen, it has increasingly emphasized the defense of national sovereignty and democracy.[179] To date, ambiguity may have been a way to influence the behavior of European institutions[180] and avoid a frontal clash with the integration-oriented CJEU.[181] However, by questioning the doctrines of supremacy and autonomy of EU law, the German Constitutional Court has made the future of European integration more unpredictable: it has neither served 'the principles of legal certainty nor legal clarity', as Kokott put it.[182] Both with regard to the exercise of competences by EU institutions, as well as possible future Ratification acts, it is not at all clear what kind of constitutional implications of further European integration the German Constitutional Court will recognize and what kind of developments it will deem incompatible with the core identity of the Basic Law. How far can the progress of European integration go, as far as Germany is con-

176 Nettesheim (2002), 78.
177 Kokott (2010), 105.
178 Pernice (1998), 42.
179 'It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility.' Lisbon case, par. 226.
180 Cf. Heun (2011), 188.
181 Cf. Woelk (2011), 165.
182 Cf. Kokott (2010), 113.

cerned? Even the Constitutional Court's explicit ban on federalization of the EU under the present Basic Law[183] does not provide particularly clear guidance. At what point exactly will the EU become a federation? When the Treaties say so? Or does the court have a 'material' concept of 'federation' in mind? And how will it define this concept? Many questions remain.

In addition to these ambiguities and uncertainties, it is also still the question whether the German Constitutional Court will have the last say in matters of European integration. In German jurisprudence, the Constitutional Court is very authoritative and although its claim to supremacy of its interpretations is subject to debate, it commonly has a very dominant role in constitutional matters.[184] At the same time, some constitutional actors, including the Constitutional Court itself,[185] have acknowledged the exclusive competence of the CJEU to give a final view on the validity of Union acts (pursuant to Article 267 of the TFEU).[186]

5.4.3 The relevance of the constitutional text

Formal constitutional amendment procedures are often seen as instruments by which constitutional text can be adapted to new circumstances and demands. It has been hypothesized that alternative processes of change cannot perfectly substitute this function. If (too many and too far-reaching) constitutional developments take place outside of the formal constitutional amendment procedure, the importance of the constitutional text may be diminished or specific constitutional provisions may even lose their shaping force – and practical relevance.[187]

In analyzing the American and Japanese case, we have observed that this hypothesis hardly holds true. These cases reveal that if the meaning of certain constitutional provisions has changed through mechanisms that have a lower status in law than the formal amendment procedure of the constitution (such as judicial decisions or ordinary status) or social–political developments, tension may mount between the original or textual meaning of the constitutional provision and the new circumstances in which it has to operate. The original or textual meaning may then preserve at least some of its normative

183 In the words of the Court, 'due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.' 2 BVerGE 2/08 – *Lisbon* – 2009, par. 228.

184 Heun (2011), 178-179.

185 BVerfGE 75, 223, 234 – *Kloppenburg-Beschluss*. 'Art. 177 EWGV spricht dem Gerichtshof im Verhältnis zu den Gerichten der Mitgliedstaaten die abschließende Entscheidungsbefugnis über die Auslegung des Vertrages sowie über die Gültigkeit und die Auslegung der dort genannten abgeleiteten gemeinschaftlichen Akte zu;…'.

186 Pernice (1998), 61.

187 See Chapter 1.

force, even when interpretations and practices have significantly deviated from its original or textual meaning.[188] In the German case, we may observe the same effect with regard to the impact and relevancy of the provisions that are considered the core identity of the Basic Law (Article 1, 20, and 79(3): although the meaning of these provisions has changed as a consequence of European integration, they have remained relevant because, doctrinally, they still provide the highest authority on any legal question about European integration that may arise.

With regard to the rest of the Basic Law, however, it may be said to have lost at least part of its impact and relevance during the process of Europeanization. In principle, there is no tension with Basic Law provisions outside this document's core identity, and the evolution of European integration. As a consequence of the general acceptance of the autonomy and supremacy of European law, even above national constitutional law, the Basic Law must be interpreted in light of EU law; in case of conflict, EU law takes precedence over the Basic Law.[189] This means that the Basic Law remains supreme (and relevant) with regard to issues that are solely regulated at a national level, but once powers are transferred to the European level, the Basic Law provisions that regulate or establish these powers lose (part of) their impact and relevance.[190] Indeed, the process of Europeanization has moved the Basic Law (further) away from the ideal of what the Germans call '*Urkundlichkeit*'; that is, the idea of a comprehensive constitutional text that codifies the entire body of fundamental rules that govern the government.[191]

5.5 Concluding observations

The German Basic Law has been amended several times in connection with the evolution of European integration. At the same time, this evolution has effected some important constitutional changes outside of the Article 79(2) formal amendment procedure of the Basic Law. In this chapter, I have listed several examples of what we may call 'informal Europeanization' of the Basic Law, including changes concerning the relationship between EU law and German domestic law, the powers of several state organs, the principle of federalism and human rights. In German constitutionalism, it has been widely recognized that the material meaning of the provisions regulating these subjects has changed substantially as a consequence of the evolution of European

188 See: Chapter 3 and 4.
189 Maurer (2007), 127.
190 Grimm (2010), 45.
191 'Die integrationsoffenheit der Bundesrepublik last offenbar die kodifikatorische Geschlossenheit ihrer Verfassungsurkunde nicht mehr zu.' Hufeld (1997), 138.

integration, even though these changes do not explicitly show on the face of the Basic Law.

Subsequently, the chapter explored some factors that might explain why these significant constitutional developments have not come about in the form of formal amendments to the Basic Law. In a sense, it is surprising that changes regarding such an important issues as the issue of the relationship between EU law and German domestic law have taken place outside the Article 79(2) amendment procedure of the Basic Law. After all, post-WWII German constitutionalism is known for its 'positivism' – that is, its commitment to bringing about constitutional change by way of formal constitutional amendment as embodied by Article 79(2) of the Basic Law – and its lively 'amendment culture'. In Germany, a well-developed doctrine indicates what kind of informal constitutional changes are and are not allowed under the Basic Law. In short, this doctrine does not categorically prohibit informal constitutional change, but it does suggest that statutes cannot 'breach' the Basic Law without explicitly changing the text of the constitution through the Basic Law's formal constitutional law-making track (cf. Article 79(1) BL). However, since 1947, post-WWII German constitutional doctrine has made an exception for Ratification Acts. In accordance with the principles of 'international openness' and 'Europe friendliness', as embodied by the Preamble, Article 24 and, from 1992, Article 23(1) of the Basic Law, such acts are exempted from the textual change commandment of Article 79(1). This means that informal constitutional changes that occur in connection with the evolution of European integration are only circumscribed by the much broader limits of Article 73(3) and, in principle, do not necessarily require a formal constitutional amendment. As a consequence of this doctrine, it has not always been considered necessary to explicitly amend the Basic Law with regard to every single constitutional change that has occurred in connection with European integration.

Another important factor may explain why some significant constitutional changes that have occurred in connection with the Basic Law have not been subject of formal constitutional amendment. That is, even though the formal constitutional amendment procedure of the Basic Law does not seem to provide an insurmountable hurdle for textual change, changing the German Basic Law with regard to anything truly important may still prove to be a formidable undertaking. Furthermore, the German Basic Law makes certain types of amendments formally impossible, including amendments affecting the principle of federalism and human rights.[192] As the formal amendment route is blocked for these changes, they can only adapt to changing circumstances and demands through alternative mechanisms of change.

Indeed, the question to what extent the Basic Law's eternity clauses can change informally appears to be a vital one for the EU, in particular for the

192 Articles 1, 20 and 79(3).

EMU. From the EU perspective, this question would be a good candidate for future research.

Lastly, this chapter has explored whether and to what extent the alternative mechanisms of constitutional change that have Europeanized the Basic Law have functionally substituted the Basic Law's formal constitutional amendment procedure. In accordance with Article 23(1) of the Basic Law and the jurisprudence of the Constitutional Court, to the extent the informal Europeanization of the Basic Law has been covered by Ratification Acts and has stayed within the boundaries of the core identity of the Basic Law, alternative mechanisms of change have produced equivalent amounts of legitimacy in the same way as a formal constitutional amendment would have. On the other hand, to the extent the informal Europeanization has (allegedly) transgressed the limits of the integration program as originally laid down by the Treaties or the fundamental core of the Basic Law, difficult constitutional questions have been asked about the permissibility of (further) European integration under the present Basic Law. However, the German Constitutional Court has not yet actually deemed any concrete constitutional implications of European integration illegitimate: it has not made the ratification of a European Treaty impossible or even difficult, nor has it reviewed whether concrete EU acts transgressed the integration plan of the Treaties. Moreover, this chapter has considered that the alternative mechanisms of change that have Europeanized the Basic Law have substituted the Basic Law's formal amendment procedure in the sense that they have been particularly effective means of constitutional change. At the same time, alternative mechanisms of constitutional change have obviously not precluded the fact that, as a consequence of Europeanization, the text of the Basic Law no longer provides a comprehensive account of German constitutional law.

Until now, the larger part of the German Community of constitutional actors, including the Constitutional Court seem to have largely accepted the implications of the evolution of European integration, even though these implications have not always showed up on the face of the Basic Law. The question many ask is: how long will this be the case? Perhaps new formal constitutional amendments will be necessary before German constitutional actors can accept new phases in the development of the European Union. At the same time, tension is clearly mounting between the unamendable core identity of the Basic Law and the evolution of European integration. At least for the moment, this core identity seems to have substantial normative force; it might even halt the progress of European integration as the German Constitutional Court seems to interpret this core ever more extensively and makes it more easy for German citizens to challenge EU act before German courts. In the long run, however, the material meaning of Article 1, 20 and 79(3) may further be adapted by interpretation in order to permit further progress in the evolution of European integration. Much will depend on the German Constitutional Court, or so it seems, and on the question of whether the EU

will develop in a way that is perceived as consistent with the core identity of the Basic Law.

6 Comparative observations

'A person who knows only one country knows no countries.'
Seymour Martin Lipset[1]

The previous three chapters provided three main findings: (1) how, without formal constitutional amendment, the meaning of the war-renouncing Article 9 of the Japanese Constitution profoundly changed as Japan developed a national defense policy; (2) how, without amendments to the War Clauses of the US Constitution, the US presidency acquired broad de facto unilateral and preclusive powers to use military force, partly at the expanse of the war powers of Congress; and (3) how the normative content of several important provisions of the German Basic Law changed as a consequence of EU law developments, without resulting in new constitutional writing. Moreover, each of these chapters explored in some detail the processes through which these informal constitutional developments came about; sought important explanations as to why these significant constitutional changes have not been channeled through the special formal amendment procedures the written constitution of these countries provide; and tried to indicate the extent to which the alternative mechanisms of change by which these changes came about have functionally substituted the formal amendment procedures of the written constitutions under which they have operated.

The present chapter has two aims. The first is to point to some recurring features, striking similarities and differences between the cases of informal constitutional change in this study. However, as already discussed in chapter 1, comparative research should not just set cases side by side; it should also seek to explain the difference and similarities as they arise from the different case-descriptions.[2] As Hirschl encouraged us, 'there is no a priori analytical reason why the study of comparative constitutional law could not engage in a more explanation-oriented mode of scholarship.'[3] Therefore, the second aim of this chapter is to confront the cases in this study with one another and suggest, wherever feasible, ideas that might explain my comparative observations. I

1 Cited by Fukuyama (2007).
2 Cf. Adams (2011). Danneman (2006). Shapiro (1981).
3 Hirschl (2014), 227.

will draw on this analysis to suggest some more general, albeit tentative, comparative lessons about the phenomenon of informal constitutional change in conclusion (chapter 7).

As explained in chapter 1, I acknowledge that generalizing from case studies is problematic[4] and that the present study has conducted a limited number of case studies. On the other hand, the case study method can be particularly helpful when testing theories and developing hypotheses.[5] Moreover, this study has not sought to provide definitive answers regarding the issue of informal constitutional change; its ambition is merely to shed some light upon the questions it raises and lay the groundwork for further research.

6.1 Processes of informal constitutional change

The cases in this study have examined in some detail how informal constitutional change takes place in practice. Setting these studies side by side and confronting them with one another, I can make the following observations.

6.1.1 Multiple interpreters

In all three cases in this study, the normative content of formal constitutional provisions has been modified through interpretation. In each case, multiple interpreters can be identified. In the American and Japanese cases, the executive played a principal role in reinterpreting the War Clauses of the US Constitution and Article 9 of the Constitution of Japan, respectively. In these countries, the legislator also played an important role in determining what new circumstances and demands would mean for the normative content of the formal constitution. In the German case, the principal re-interpreter of the formal constitution appears to be the Federal Constitutional Court, although the ordinary legislator has also played a prominent role in aligning the German Basic Law with new realities, namely when it ratified new EU Treaties and implemented EU obligations in the German constitutional order.

Accordingly, the form in which re-interpretations take place varies. In the American case, constitutional interpretations have mainly taken the form of presidential statements, policy documents, and OLC memoranda. Also, congressional resolutions have re-interpreted the US Constitution's War Clauses. In Japan, the formal constitution has been re-interpreted by government decisions, 'white papers', governmental expert-panels, CLB opinions, Diet resolutions, and ordinary legislation. In the German case, constitutional interpretation seems to have taken a more classical form, namely that of judicial

4 Murphy (2007), 23.
5 Eckstein (1992), 118 *et seq.*

decisions or ordinary statutes concretizing the import of formal constitutional norms.

It appears that in none of the cases in this study did one authoritative institution have a monopoly or final say in interpreting the meaning of formal constitutional provisions. In the US case, the battle for the meaning of the constitutional War Clauses has been fought between the executive and the legislature; the judiciary has not intervened, consistently refusing to reach the merits in war powers cases. In Japan, the dialogue about the meaning of Article 9 has been conducted mainly between the government, the CLB, the Diet, constitutional scholars, and the public. Also in the Japanese case, the judiciary has virtually been absent; judicial decisions have only played a marginal role in giving meaning to Article 9 because they have had not much to say about constitutional questions surrounding the principle of pacifism and national defense. In the German case, the implications of the evolution of European integration for the meaning of the Basic Law have crystalized in a debate mainly between the ordinary legislator, the constitutional legislator, the Federal Constitutional Court and, notably, the CJEU. Some would say that the Federal Constitutional Court has the last say in any constitutional question the evolution of European integration may raise. From a doctrinal perspective, this assertion may perhaps be true. However, taking a more empirical perspective, we may observe that the dialogue between, for example, the Federal Constitutional Court and the CJEU about the limits of European integration has not come to closure yet and it is far from certain whose perspective will ultimately prevail, if one ever will.

This is not to say that all interpretations are equally important, influential, and powerful in the cases of this study. In the Japanese, American, and German cases, at least two factors seem to determine the influence of a particular interpreter. The first is the interpreter's ability to actually deal with the developments at hand; that is, its capacity to control the unfolding of real-world developments. For example, the American and Japanese cases indicate that the executive is far better positioned to deal with military issues and matters of national security than other institutions of government. In the field of security issues, the executive has major advantages in terms of capability to actually act, and, hence to take the initiative and have the first say about constitutional questions that may arise. The legislature, by contrast, can – at least as a practical matter – often only respond after the fact. Moreover, it is commonly much harder for the legislature to take a univocal position on short notice. Due to its long response time and its need for concrete cases, the judiciary is in an even worse position to answer any constitutional questions that may arise as national security developments take place. Therefore, it is unsurprising that the judiciary hardly plays a role in the Japanese and American cases in this study. By contrast, the German case in this study concerns a development that is predominantly legal. Indeed, the European Union is what Germans call a '*Rechtsgemeinschaft*': a community of law that binds

member states solely through the medium of law.[6] Here, the judiciary is arguably the branch that is best suited to re-align the constitutional text with the new Europeanized realities. Unsurprisingly in this respect, the Federal Constitutional Court has taken a leading role in determining what the evolution of European integration means for the content of the Basic Law.

A second factor that seems to determine the influence of a particular interpreter is authority, which means the extent to which other constitutional actors tend to accept and follow the view of this interpreter. The German Federal Constitutional Court, for example, appears to be one of, if not the most authoritative interpreter of the German Basic Law. The Basic Law itself recognizes the Court's power to review the constitutionality of new developments. The Court traditionally plays a very active role in explaining and determining the meaning of the Basic Law and German constitutional actors widely recognize the authority of the Federal Constitutional Court's decisions. From this perspective, it seems only natural that the Constitutional Court also plays a leading role in adjusting the Basic Law to the development of the EU. By contrast, the Japanese Supreme Court is known as the most 'conservative' court in the world.[7] The Constitution of Japan recognizes its right to review the constitutionality of legislation, but it has hardly used these powers in the past seven decades. If it would intervene in such a delicate and fundamental issue as the issue of national defense and pacifism, this would be a major break with tradition in itself. Instead, in Japan, it is the executive-related Cabinet Legislation Bureau (CLB) that is seen as the most authoritative interpreter of the Constitution of Japan. From this perspective, it not surprising that CLB interpretations of Article 9 have significantly influenced the way constitutional actors in general have understood the meaning of Japan's constitutional commitment to pacifism. In the US case, we have seen that presidents have often asked the Office of Legal Counsel (OLC) to confirm the constitutionality of their actions, presumably because the opinions of the OLC are – because of its relative independence – being held in higher esteem than the (partisan) opinions of the presidency itself.

6.1.2 Two sorts of conventions

In none of the countries that form the context of the cases in this study is the term 'constitutional convention' part of common constitutional parlance. However, we may observe that in all three cases, the actual formation and acceptance of standards of conduct that do not coincide with the normative content of the formal constitution – indeed, the phenomenon the term constitutional conventions refers to when used in the context of constitutional change

6 Loughlin (2013), 79.
7 Law (2008).

(see chapter 2) – have had profound implications for the meaning of formal constitutional provisions.

The cases in this study suggest that constitutional conventions may form in two ways. In the American and Japanese cases, governmental practices may gradually become concrete standards of conduct – usually when they crystalize in some decision, policy document, or memorandum – and, bit by bit, these standards of conduct are being accepted as valid and obligatory by other constitutional actors as well. In the US, for example, the presidency first asserted a unilateral and preclusive power to initiate war in the early 1950s. However, it is only since around the time of the 9/11 terrorist attacks that Congress has also to some extent accepted the validity of this claim and expected the president to move unilaterally if national security is (allegedly) at stake. In Germany, by contrast, the evolution of European integration is for the most part accepted and perceived as obligatory on the basis of an agreement, namely the principle of 'open statehood' as *inter alia* embodied by the Preamble, Article 24 and Article 23(1) of the Basic Law and the ratification of the EU Treaties.

In all three cases in this study, no single constitutional actor seems to have a monopoly in determining whether or not a certain practice ought to be treated as a constitutional convention. In the American and Japanese cases, it is has predominantly been the executive that has driven the evolution of constitutional practice. In both cases, the validity and binding nature of new practices have been subject to difficult debates amongst constitutional actors. The community of constitutional actors has only gradually come to treat them as constitutional conventions. In the German case, changes in the constitutional practice that have been effected by the evolution of European integration have, at least so far, been accepted by virtually the entire community of constitutional actors. The theory of 'open statehood', which is the basis upon which these practices are recognized, was originally established by the constitutional legislator, but the exact understanding of this theory – and the limits of open statehood – has been shaped and reshaped by multiple constitutional actors.

6.1.3 Silent *vs.* explicit informal constitutional change

Furthermore, the cases in this study suggest that informal constitutional change can take place both explicitly and silently. 'Explicit informal constitutional change' takes place when constitutional actors explicitly recognize that what they are doing is at odds with the constitutional plan. 'Silent informal constitutional change' takes place when constitutional actors – deliberately or otherwise – do not explicitly recognize or actually deny that their moves have called

into question the meaning of formal constitutional norms.[8] In the Japanese case in this study informal constitutional change has mostly taken place explicitly, in the sense that, in reinterpreting Article 9 or in following and accepting standards of conduct incongruent with the meaning of Article 9, Japanese constitutional actors have explicitly acknowledged that these provisions once had a different normative content and were therefore bringing about constitutional change. In the German case, change has sometimes taken place explicitly – when constitutional actors recognized that EU developments may effect 'material' modifications to the constitution – and sometimes silently. Especially in cases that concern the core identity of the Basic Law or in cases where the development of the EU has transgressed the plan of Treaties as ratified by the German legislator, constitutional actors favoring these developments have acted as if change had not taken place.[9] In the American case, informal constitutional change has largely taken place silently. While asserting broad unilateral and preclusive war powers, modern presidents have often claimed that such assertions were nothing new and that the presidency has had such powers since the founding of the United States. Recall Nixon's veto of the 1973 War Powers Act. He argued that the 60-day clock was 'CLEARLY UNCONSTITUTIONAL', because it was an 'attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.'[10] Interestingly, Nixon found that the

> 'only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution – and any attempt to make such alterations by legislation alone is clearly without force.'[11]

8 Drawing on the German concept of '*stiller verfassungswandel*'. See, e.g.: Heun (2011), 21. Wolff (2000), 79 et seq.

9 As Voermans noted, European institutions occasionally adopted further rules concerning subjects included in the TEU or TFEU, without an explicit Treaty mandate to make such rules. They also created rules and procedures that concern subjects that have not been governed by the Treaties at all. For example, the *trilogues* system in the legislative process has arguably emerged without a Treaty mandate. The comitology procedure, which played a prominent role in the legislative process prior to the 2009 Lisbon Treaty, was arguably even inconsistent with Article 202 of the TEC. Landmark CJEU judgements, such as *Van Gend & Loos*, *Costa/Enel* and *Handelsgesellschaft*, may be perceived as transgressions of the limits of the integration program as laid down by the treaties (see: Voermans (2009), 100-102). Also, in less major cases, the CJEU has allegedly broadened the scope of the Treaties beyond the limits of European competences. For instance, the *Mangold* case (Case C-144/04, *Mangold* [2005] ECR I-9981) of the CJEU was criticised by a group of German law professors because it supposedly invented a European prohibition against age discrimination (see: Kokott (2010), 110). Ultimately, the German Constitutional Court did not agree (see: 2 BVerfG 2661/06) – arguably easing its ultra vires test somewhat (Woelk (2011), 165) – but this does not necessarily mean that informal constitutional did not take in fact take place.

10 Richard Nixon: 'Veto of the War Powers Resolution,' October 24, 1973. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=4021. [caps in original]

11 Ibid.

The present study contains no better illustration of what ultimately amounted to 'silent informal constitutional change.'

Why do some informal constitutional changes take place silently, while others come about much more explicitly? In the first place, the clarity of the constitutional text and its original intent may be important factors. In the Japanese case, the explicit way in which the meaning of Article 9 has been modified appears to have had a lot to do with the clarity of the constitutional text and the straightforwardness of its original intent. It was simply impossible for the government to convincingly maintain that the SDF was in accordance with the original constitutional plan; therefore, the content of this plan had to be modified explicitly. In the US, by contrast, the text of the constitutional War Clauses is hardly specific and its original intent is ambiguous. Therefore, it was not necessary for constitutional actors to explicitly claim that in the new circumstances of the Cold War and later the War on Terror, the constitutional plan for war had changed. What's more, it seems that the constitutional text and the ambiguity of its original plan made it possible for presidents to maintain that, even after their extended claims to the war power, in essence nothing had changed and that they were just exercising powers that had been attributed to the presidency for more than 200 years. Moreover, the existence of doctrines with regard to the permissibility of informal constitutional change seems capable of influencing whether such change takes place explicitly or silently. The informal Europeanization of the Basic Law seems to have generally proceeded explicitly where this development was covered by a Ratification Act. However, as soon as developments transgressed the plan of the Treaties as ratified by the German legislator, constitutional actors willing to accept the constitutional implications of these developments deny that such a transgression has taken place. In that case, developments in European Law have still affected the material meaning of the Basic Law because constitutional actors have generally followed and accepted the validity and binding nature of EU standards of conduct. However, the actors have not explicitly admitted, or indeed denied, that these developments have actually gone beyond the doctrinal limits of informal constitutional change.

6.1.4 Change on 'moments' *vs.* gradual change

The cases in this study also suggest a distinction between informal constitutional change that takes place at certain identifiable 'moments' and change that takes place more gradually. For example, the Japanese government has issued two 'official' reinterpretations of Article 9 of the Constitution of Japan (in 1952 and in 2014) that have significantly changed what a meaningful description and explanation of the meaning of Article 9 looks like. On the other hand, in this case, the meaning of Article 9 also changed gradually; for example, when the Japanese government gradually expanded the capacity

of the SDF between the 1950s and the 1990s and when it deployed the SDF abroad in an increasingly assertive manner from the 1990s on. Also, moments can be identified in the German case at which constitutional actors use designated instruments of constitutional change; for example, when they ratify new EU Treaties or when the judiciary changes its views. At the same time, the evolution of European integration has been incremental, such as when powers originally reserved for the states gradually migrated to the federal government and then to the EU. It is only in the American case that it is difficult to identify moments of informal constitutional change. The ever-broader unilateral and preclusive war powers the presidency has acquired have hardly showed up on the face of judicial decisions or landmark statutes. On the contrary, one important statute – the 1973 War Powers Resolution – purported to restore the original division of war powers between the president and Congress by re-circumscribing the powers of the president. It is true that by starting a war in Korea, President Truman created a precedent that constituted a decisive break with American constitutional tradition. However, the validity and binding nature of this precedent have only been accepted over time by other constitutional actors.

6.1.5 Time span

The time span of the constitutional developments reviewed in this study varies greatly. In two of the cases in this study, we see that informal constitutional change takes place over a relatively long period of time. In the Japanese case, it has taken more than four decades to prepare the constitutional road for sending troops abroad and another 20 years before the Japanese government could assert the right to deploy the SDF in collective self-defense. Even after 60 years of defense reforms that ultimately sought to make Japan a 'normal' country again, the Japanese government can still, as a legal matter, not maintain a military and use military force without being subject to a number of limitations that do not apply to the governments of most other countries. In the American case, it has taken more than five decades before the larger part of the constitutional actors acknowledged that a president, as commander-in-chief, can launch major military operations abroad without explicit congressional approval. In the German case, by contrast, constitutional implications of the evolution of European integration have readily been accepted by constitutional actors. Again, this has arguably something to do with the doctrine of open statehood the Basic Law embodies, which quite clearly allows for significant material modifications to the content of the Basic Law without formal constitutional amendment. As a more general matter, however, the process of Europeanization is open-ended and may, at least in theory, continue indefinitely.

6.1.6 The significance of a constitutional text

In all three cases in this study, constitutional change has taken place without formal constitutional amendment. As we have seen, re-interpretations and the formation of constitutional conventions have had significant implications for the normative content of formal constitutional provisions. However, in none of the three cases in this study does this imply that the special form in which the rules embodied by the constitutional text were cast has not mattered. All three cases confirm that writing rules down adds to their firmness of authority. In other words, it gives them a quality of stickiness: even if their meaning has changed significantly, their original intent may retain normative appeal and any proposal for their removal may still invite significant opposition or even open up old wounds. Indeed, over the past 60 years or so, German constitutional law Europeanized significantly, but its content can still not be understood without reading the Basic Law. In recent years, some constitutional actors have utilized the Basic Law to defend German national sovereignty. Although the Declare War Clause of the US Constitution lost most of its meaning during the Cold War and the War on Terror, it still leads some people to believe that modern presidential claims to the war power are unconstitutional. Moreover, it is apparent that the Declare War Clause could provide authority to any future attempts to restore the prerogatives that Congress once had in decision-making processes surrounding matters of war and peace. Even in the Japanese case, in which interpretations and constitutional conventions have plainly contradicted the text and original intent of Article 9 of the formal constitution, the constitutional text still makes a significant difference for anyone who seeks to expand the capacity and scope of activity of Japan's Armed Forces.

6.2 Explanations for textual unresponsiveness

Subsequently, all three case studies in this thesis have examined why, in these cases, most (Germany) if not all (US and Japan) of the constitutional developments that have taken place have not left an imprint of the face of the constitutional text. In other words, the case studies have explored what might explain 'the absence of textual responsiveness', as I have referred to the situations in which the constitutional text remains unaltered, while the meaning of this text has significantly transformed (chapter 1). The cases in this study suggest the existence of some general factors, and some that are specific to each case.

6.2.1 The difficulty of amendment

One explanation for the absence of textual responsiveness in all three cases is amendment difficulty. In the Japanese, American, and German cases, the difficulty of formal constitutional amendment seems to be an important hurdle preventing constitutional actors from bringing about constitutional change by way of formal constitutional amendment or preventing the constitutional legislator from updating the text of the formal constitution to the new meaning it has acquired.

In the cases of this study, we may observe that amendment difficulty may stem from at least three different sources. The first is the constitutional text itself. The Japanese and American constitutional documents contain very difficult formal amendment procedures; the American document demands large majorities in both houses of congress and the support of a large majority of the state's legislatures, while the Japanese document demands a large majority in the Diet and a national referendum. The larger part of the German constitution is formally somewhat easier to amend than the American or Japanese constitutional documents. Amending the Basic Law requires a two-thirds majority in both houses of the German parliament. However, the Basic Law also contains so-called 'Eternity Clauses', which make it legally impossible for the constitutional legislator to bring about any textual changes in the Basic Law that tamper with the values and provisions that are considered part of the Basic Law's core identity (Article 1, 20 and 79(3) BL).

The second source of amendment difficulty we have encountered in all three cases is a cultural persistence against formal constitutional amendment. In the US and Germany, a deep veneration of the constitutional document and a culture of constitutional patriotism makes it hard to sell proposals for constitutional amendment in politics and society. In Japan, we have seen a related form of entrenchment: particularly the principle of pacifism has become deeply rooted in Japanese society. On the other hand, we have seen that forces in society are opposed to formal constitutional amendment because that would (further) legitimate what they view as, the 'imposed' constitution.

In the Japanese case, we also encountered a third source of amendment difficulty that could partly explain why Article 9 has never been amended despite significant defense shifts, namely an unwritten – or implicit[12] – doctrine that deems the principle of pacifism unamendable. Some Japanese constitutionalists believe that even though the formal constitution of Japan does not provide any explicit eternity clauses, the constitutional legislator cannot alter the principle of pacifism, because this principle is part of the fundamental core of the post-war Constitution of Japan. It appears that only a small proportion of the Japanese community of constitutional actors recognize

12 For a distinction between implicit and explicit doctrines of constitutional unamendability, see: Passchier and Stemler (2016).

the existence of this doctrine, but the mere suggestion that any amendment to Article 9 would be unconstitutional may delegitimize any effort to textually revise Japan's constitutional commitment to pacifism.

In the American and Japanese cases, the difficulty of formal constitutional amendment is indicated by the extraordinarily low amendment rates of these countries' written constitutions: the US Constitution has only been amended 17 times in 225 years, and only a few times in connection with something truly fundamental, while the 1947 Constitution of Japan has never been amended. The German Basic Law, by contrast, has been amended more than 60 times – one author even counted 193 amendments. However, some writers put this amendment rate into perspective by pointing to the fact that, in German constitutional history, the number of truly fundamental amendments that have been brought about has been relatively limited.

In all three cases, it seems possible to establish a relationship between the absence of textual unresponsiveness we have encountered to amendment difficulty. It appears that, at least partly as a result of the difficulty of constitutional amendment, American constitutional actors have never seriously considered updating the War Clauses of the US Constitution. Japanese actors have tried to amend Article 9 of the Constitution of Japan many times, but all attempts have failed before they could even be submitted to the people in a referendum. In Germany, the difficulty or impossibility of constitutional amendment seems to ensure that the rules, values, and principles associated with the Basic Law's core identity can, at least as a practical matter, by definition only transform outside the Basic Law's formal amendment procedure.

At the same time, the German case indicates that amendment difficulty does not always explain why countries sometimes do not update the text of their constitution, even if the meaning of this text has changed significantly. In the German case, some changes associated with Europeanization have taken place informally, although it would presumably not be too hard to codify these change in the text of the Basic Law. For instance, it would probably not be very difficult to adapt the texts of the so-called 'German fundamental rights' – which grant 'all Germans' the freedom of assembly, the freedom of association and occupational freedom (Articles 8(1), 9(1) and 12(1) BL) – to the new situation under EU law in which these rights also apply to non-German citizens on German soil. However, these constitutional implications of European integration – which seem to have been widely accepted – have not shown on the face of the Basic Law's text.

6.2.2 Formal amendment perceived unnecessary

In two cases in this study, the American and German one, we have seen that constitutional actors have not (entirely) aligned the constitutional text with

its new meaning, because they believed that amending their constitution was unnecessary.

In each case, however, actors have different reasons for believing that the formal constitution does not have to be updated. In the American case, we have seen that a proportion of the constitutional actors denied that change had been going on. They believed that the president, as commander-in-chief, has had unilateral and preclusive constitutional war powers ever since the founding of the United States. Others had learned from experience with the New Deal that alternative methods of engineering constitutional change were far more effective than the laborious formal amendment procedure of the US Constitution. A third group of Americans relied on a strong form of living constitutionalism, arguing that the allocation of war powers could change outside the US constitution's amendment procedure. In Germany, on the other hand, constitutional actors have considered it unnecessary to channel all constitutional change effected by European integration through the Basic Law's formal amendment procedure, because German legal doctrine quite unequivocally accepts that European integration may imply 'material' modifications to the content of the Basic Law and that such modifications do not legally require formal constitutional amendment. Indeed, some prominent writers have argued that the formal constitutional amendments that have been made in connection with the development of the EU have not been brought about on legal-doctrinal grounds, but on political grounds or grounds of constitutional 'aesthetics'. The doctrine of 'open statehood' or 'European friendliness' of the Basic Law would entirely waive constitutional change connected with European integration from any obligation (cf. Article 79(1) BL) to reflect constitutional change in the constitutional text.

It is only in Japan that constitutional actors have generally recognized the necessity of amending Article 9 to (fully) legitimize the defense shifts that have taken place. Indeed, successive governments have launched efforts to textually revise Japan's constitutional commitment to pacifism. At the same time, faced with the (near) practical impossibility of formal constitutional amendment and the (alleged) necessity of constitutional change in light of the (perceived) changing security environment surrounding Japan, a significant proportion of the Japanese constitutional actors have accepted that, at least for the moment, the content of Article 9 can be modified without new writing.

In the cases of this study, at least five factors seem to have influenced whether or not a country's constitutional actors deem it necessary to bring about constitutional change by way of formal constitutional amendment: (1) the clarity of the constitutional text and its original intent; (2) the perceived urgency of change; (3) the extent to which a realistic amendment option is available; (4) the extent to which alternative means of constitutional change are available; and (5) the presence of a permissive legal doctrine of informal constitutional change.

6.2.3 Judicial deference or acquiescence *vs.* judicial involvement

In two of the case studies, the absence of formal constitutional amendments in the face of significant constitutional change may be explained by pointing to the fact that the judiciary has not legally forced constitutional actors to settle constitutional questions by way of formal constitutional amendment before they could continue to pursue their effort to revise the constitution. In both Japan and the US, the judiciary has refused to address the tensions between formal constitutional norms and the institutional reality on the ground, declaring the questions that are being raised as being 'political' in nature. It is true that, in Japan, the CLB has occasionally stood in the way of governments that sought to conduct a more assertive defense policy, but seemingly not to the extent that formal amendment became necessary to amend the constitution. With regard to the most recent security shifts, we may observe that it was apparently easier for the government to 'pack' the CLB by transferring and replacing some of its personnel than to bring about constitutional change through the formal constitutional law-making route of the Constitution of Japan. The exception in this study is perhaps the case in Germany. After the German Constitutional Court started to develop 'counter-limits' to European integration from 1974 on, the constitutional legislator apparently not only found it necessary to codify some of these limits in the Basic Law, but to also confirm and highlight Germany's commitment to the development of the European Union (see Article 23(1) BL) at the time the Treaty of Maastricht was signed. While it may be true that these amendments were legally unnecessary – also after the more European-critical decisions of the German Constitutional Court – Article 23(1) can still be understood as a response to the more critical stance towards Europeanization the Constitutional Court had taken from 1974 on.

6.2.4 Polarization vs. consensus

In the American and Japanese cases, polarization may explain why constitutional changes in the field of the war powers and pacifism and national defense, respectively, have never been subject of formal constitutional amendment. In Japan, for example, there is hardly any consensus about the question of what a new Article 9 should look like. So, even if sufficient constitutional actors would agree that Article 9 has to be amended, it would be very hard to agree upon a specific constitutional text. Likewise, in the American case in this study, the debate about the war powers issue is so deeply divided between 'presidentialists' (those who favor a strong presidency in the field of national security) and 'congressionalists' (those who favor a strong(er) Congress in the field of national security) that even if a realistic amendment

option would be available, the issue of the war powers would probably be too controversial to be the subject of a formal constitutional amendment.

The German case, by contrast, indicates that polarization does not provide a universal explanation for the lack of textual responsiveness. As we have seen in the German case, there seems to be such a high degree of consensus about the validity and desirability of constitutional change connected with European integration that formal constitutional amendment is generally not considered necessary at all.

6.2.5 Constitutional cultures

A final comparative observation about absence of formal amendment in the face of significant informal constitutional transformation in the cases of this study is that such textual unresponsiveness may have something to do with political and societal attitudes toward the written constitution. Constitutional patriotism may be a reason for arguing both for and against amending the constitutional text. In the American case, forms of constitutional patriotism are common reasons for people to argue that the constitutional text should not be 'tampered' with. In the German case, on the other hand, constitutional patriotism may be a reason for arguing exactly the opposite. Many German constitutional actors seem to prefer that constitutional change (eventually) takes the formal amendment route. Also in Japan, the arguments for or against amending Article 9 are sometimes based on how the written constitution is perceived. However, unlike in the American and German cases, in Japan it is the idea of an 'imposed' constitution that seems to sometimes influence how people think about formal constitutional amendment. For some, the idea of an imposed constitution is sufficient reason to argue that Japan should rewrite or even replace its 'American' written constitution. For others, this idea is reason to contend that amending the constitutional text does not make any sense, because it is not theirs anyway.

6.3 Alternative mechanisms of change as functional substitutes?

All three countries in this study live under a written constitution that includes a special amendment procedure making it harder to change the constitutional text than to make or change other types of legislation. In all three countries, a number of functions have been attributed to this procedure. Generally, a constitutional amendment procedure should guarantee that the constitution is not tampered with easily and that constitutional change cannot take place without extraordinary support. The procedure should also provide a means for bringing about constitutional change effectively and provide a means to update the constitutional text. Each case study in this thesis has sought to give

a sense of the extent to which alternative mechanisms of constitutional change can substitute these functions.

6.3.1 Perceived legitimacy of change

As we have seen, in all three cases in this study, developments effected by alternative mechanisms of change – outside of a formal constitutional amendment procedure – have taken place that have nevertheless been accepted as valid by a significant proportion of the community of constitutional actors. However, does this also mean that, in these cases, alternative means of change were able to generate amounts of legitimacy for constitutional change commonly associated with formal constitutional amendment?

The extent to which the informal constitutional developments studied in this thesis have been viewed as legitimate varies significantly from case to case. The Japanese pacifism and national defense issue has been recognized as the most controversial issue created by the Japanese constitution. While a large proportion of the constitutional actors seems to have accepted the validity of the defense and pacifism shifts that have taken place, the mechanisms through which these shifts have come about seem to not have generated the amount of support for constitutional reform a permissive constitutional amendment of Article 9 presumably would have. For example, one commentator held that the fact that Prime Minister Abe used a cabinet decision to change the meaning of Article 9 is 'by its very nature' invalid:

> '[i]t not only stands in direct violation of the explicit constitutionality mandated amendment procedures, but it also violates democratic principles, given that the Diet and the public are cut out of the process.'[13]

Also, in the American case, the legitimacy of informal constitutional change has been contested because it has taken place outside the formal constitutional amendment procedure. In both cases, we can observe that even if most constitutional actors have accepted a certain reinterpretation or threat certain practices that are incongruent with the constitutional plan as constitutional conventions, the (perceived) lack of formal constitutional amendment provides a strong point of departure for anyone who seeks to contest the legitimacy of these informal constitutional amendments. Obviously we cannot be certain, but it appears that both in the Japanese and American cases, only a formal constitutional amendment could settle the most important controversies that the informal constitutional developments have raised.

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13 Martin, ''Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014. See also: Martin (2017).

In Germany, by contrast, the legitimacy of informal constitutional change connected to the evolution of European integration has hardly been contested at all. Constitutional actors, including most notably the German constitutional court, have virtually universally recognized that the Basic Law embraced the concepts of 'open statehood' and 'Europe-friendliness'. Drawing on these concepts, German constitutional actors have accepted that European integration may incur substantial 'material' constitutional modifications outside the formal amendment procedure of the Basic Law. In the first few decades of European integration, the legitimacy of these modifications was accepted virtually without question. It was only from the 1970s, as the process of European integration intensified, that some began to take a more critical stance toward the legitimacy of European integration under the Basic Law, and the doctrine of supremacy of EU law in particular. Notably, in 1974, the German Constitutional Court broke with the clear concept of supremacy of Community Law and started to develop 'counter-limits' to European integration, instruments to defend German sovereignty and the core identity of the constitution. Today the Court accepts that European integration may incur substantial informal constitutional change, but only on the condition that EU acts comply with the plan of the Treaties and European integration remains within the boundaries set by the unchangeable core of the German Basic Law. Some commentators have criticized the Court for placing too much emphasis on the defense of national sovereignty, and too little on Germany's constitutional commitment toward European integration. The review powers asserted by the German Constitutional Court have certainly forced the CJEU to take the German constitutional reservations seriously.[14] At the same time, it should be noted that the Constitutional Court has set limits and conditions that have so far remained theoretical: until now, it has accepted 'de facto-monism', as one author put it,[15] with regard to the relation between the German and EU legal systems, and thus accepted that the development of the European Union may have consequences for the meaning of the Basic Law, even outside the formal constitutional amendment procedure.

What explains this difference between the (perceived) legitimacy of informal constitutional change in the Japanese and the American cases on the one hand, and the German case on the other? One possible answer may be provided by pointing to the fact that, in Germany, European integration was endorsed by the Basic Law from the beginning, and further endorsed by the constitutional legislator in 1992 when it included a special EU Clause in the Basic Law (Article 23). As a consequence, German constitutional actors and commentators have virtually universally recognized that European integration may effect informal constitutional change. Any controversies about Europeanization outside the formal amendment procedure surround the questions how far

14 See: Heun (2011), 188.
15 Woelk (2011), 165.

Europeanization may go. In the US and Japan, on the other hand, the constitutional legislator and the courts have never really developed a legal doctrine of informal constitutional change. Therefore, in these cases, there has remained ample room for constitutional actors and commentators to base their choice for a certain perspective on their ideological preferences with respect to the concrete topic at hand.

6.3.2 Effectiveness of change

In all three cases in this study, we have seen that constitutional actors have used instruments other than the formal constitutional amendment procedure to bring about constitutional reform. Have these instruments been successful in producing the desired or intended result? If so, to what extent?

The simple answer for all three cases is that alternative means have indeed been successful in bringing about enduring constitutional reforms. On closer examination, however, the answer is more complicated. In all three cases, constitutional actors have managed to bring about significant constitutional reform without altering the text of the constitution. That is not to say that alternative means seem to be as effective in bringing about change as a formal constitutional amendment would have been. In the US, presidents have significantly extended their powers as commanders-in-chief by asserting and exercising a preclusive and unilateral power to use military force. Re-circumscribing their powers or restoring Congress' powers would presumably be extremely difficult, as the experience with the 1973 War Powers Resolution has shown. However, as long as the new allocation of war powers has not been entrenched by the text of the US Constitution, it remains ambiguous. Moreover, while shifts in allocation of war powers have clearly had a great degree of staying power, alternative forms of change, such as executive interpretation and ordinary statutes, seem unable to guarantee the same amount of stability as a formal constitutional amendment could supposedly provide. Significant shifts in the allocation of War Powers – either favoring the presidency or Congress – can probably take place again, also without requiring formal constitutional amendment. In the Japanese context, it is unlikely that the government will disband the SDF and restore the principle of pacifism as originally understood. In fact, it seems that the larger part of the defense shifts that have come about during the past 70 years have the kind of staying power that may be associated with a formal constitutional amendment. On the other hand, Japan could probably have reformed its national defense policy much more quickly if it had been able to amend Article 9 of the Japanese constitution. Furthermore, as long as Article 9 is in place, it will make it harder for the government to conduct an assertive and effective defense policy. Indeed, the Japanese case indicates that engineering constitutional change without formal constitutional amendment may involve some very specific problems and

difficulties in governance. Also in the German case, we have to give a twofold answer to the question of effective of alternative means of constitutional change. On the one hand, we may see that alternative means of constitutional change have been effective in adapting the Basic Law to the evolution of European integration. On the other hand, we may observe that it is not at all certain whether the scheme for Europeanization (de jure dualism, de facto monism) that has been followed by German constitutionalism so far will remain an effective scheme for constitutional change in the future. In particular, it can be doubted whether German constitutional actors will continue to be able to find a workable balance between 'Europe-friendliness' and the protection of national sovereignty without new constitutional writing.

When are alternative means of change relatively effective and when are they not? The three cases in this study suggest that the effectiveness of alternative means of change depends on myriad case-specific factors. However, one factor that seems to stand out is the sheer persistence of the factual situation that has been created. In the security situation that has surrounded Japan for the past 60 years or so, it would be almost unthinkable that the Japanese government would return to pacifism. Once the SDF was established, there was simply no way back. In the US, post-WWII institutional reforms have greatly favored the position of the presidency, partly at the expanse of the powers of Congress. It would be a herculean operation to reorganize this apparatus to restore the war powers of Congress. One thing it would probably require is a major defense cut – so the president cannot launch major military operations again without first obtaining congressional funding. However, in a country in which militarization is politically, economically, socially, and culturally entrenched to such a significant extent as it is in the US, cutting funds for the military is an extreme measure indeed. Also in the German case we see the (normative) power of facts at work. New EU developments raise often raise difficult constitutional questions, which are occasionally brought before the Federal Constitutional Court.[16] Where EU institutions have quite clearly transgressed the plan of the Treaties, the Court has sometimes 'barked', although it has so far continued to live up to its reputation as the 'Dog that Barks but does not Bite', as Weiler once noted.[17] Apparently, the evolution of European integration is a moving train that can hardly be stopped, let alone reversed. As Bryde noted, no constitution can preclude that its provisions become substantively incorrect by evolutions that lay beyond the control of its state organs.[18]

16 E.g., 2 BVerfGE 2728/13 – OMT. ECB, Press Release of 6 September 2012 on 'Technical features of Outright Monetary Transactions'. http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (accessed 5-4-2017).

17 Weiler (2009), 505 (caps in original).

18 Bryde (2003), 208.

6.3.3 Informal constitutional change and the constitutional text

Informal constitutional change takes place where the meaning of formal constitutional precepts change, though not the constitutional text itself. Some have hypothesized that informal constitutional change might ultimately render the constitutional text irrelevant.[19] However, the cases in this study suggest that this might only be the case when informal constitutional change takes place by way of constitutional conventions that substitute or repudiate the text. Other methods, like void-filling, refinement, or power transfers (see chapter 2) seem to have less rigid consequences for the relevancy of the constitutional text.

Consider the American case in this study. Shifts in the allocation of constitutional war powers have nearly repudiated the congressional prerogative to authorize and regulate the use of military force by the executive embodied by the Declare War Clause. At least the part of Article II of the US Constitution that vests in Congress the power 'to Declare War' lost much of its relevance, although it continues to be a source of inspiration for those who seek to restore the power congress originally had under the US Constitution. On the other hand, the interpretations and constitutional conventions that have refined the prerogative of superintendence embodied by the Commander-in-Chief Clause have made this clause more relevant than ever. In the Japanese case, constitutional conventions have partly substituted and repudiated the text of Article 9, and interpretations have given it a meaning that can hardly be traced in Article 9's text. At the same time, Article 9 has not yet fallen into disuse and it still provides a significant normative barrier for anyone who seeks to reform the Japanese national defense policy. In the German case, we see that where informal constitutional change connected with the evolution of European integration refines the Basic Law, as was the case with regard to several provisions that constitute the core identity of the Basic Law, the text of these provisions remains very relevant indeed. The evolution of European integration has modified the meaning of federalism, for example. However, the federalism clause of Article 20 still has a central meaning in German constitutionalism. On the other hand, where Basic Law provisions have been substituted or repudiated, they lost at least part of their relevance. Indeed, as a consequence of the general acceptance of the autonomy and supremacy of European law, even above national constitutional law, the Basic Law must be interpreted in light of EU law; in case of conflict, EU law takes precedence over the Basic Law. This implies that the Basic Law remains supreme (and relevant) with regard to issues that are solely regulated at a national level, but once powers are transferred to the European level, the Basic Law provisions that regulate or establish these powers lose (part of) their impact and relevance.

19 E.g. Griffin (1996), 32.

More generally, alternative means of constitutional change cannot preclude that, in the process of informal constitutional change, a written constitution will move away from the ideal that a constitutional text should be a comprehensive codification of the body of rules that governs the government.

6.4 Remaining observations

6.4.1 Informal constitutional change as precedent

From the cases in this study, we can also learn that if alternative methods of constitutional change are being used in one area the written constitution addresses, this could induce constitutional actors to use the same techniques of engineering constitutional change in other constitutional areas as well. In Japan, for example, we have seen that the strategy of reforming national defense outside the formal amendment procedure has also been employed in the field of education. In the US, some who have sought to reform the constitutional war powers regime have drawn inspiration from the way the constitutional reforms associated with the New Deal were brought about.

Only in the German case did I find no evidence to suggest that informal constitutional reform associated with Europeanization triggered informal reform elsewhere. This difference should probably be explained by pointing to the specific mandate the German Basic Law and German doctrine has provided for informal constitutional change by Europeanization. By specifically exempting constitutional change connected with European integration from the textual change commandment of Article 79(1) of the Basic Law – and thus making it clear that the European developments could legitimately alter the meaning of Basic Law provisions without formal constitutional amendment – the German legal doctrine has perhaps prevented alternative reform strategies from being employed elsewhere.

6.4.2 A general irony for constitutionalism?

In all three cases in this study, developments that question the meaning of one or more formal constitutional norms without formal constitutional amendment may give rise to a more general irony for constitutional democracy. In the Japanese case, this phenomenon is very apparent and explicitly noted by scholars on the pacifist and national defense issue. In the American case, while some have endorsed the development towards a stronger executive in the field of national defense, prominent authors have used the term 'imperial' president to address their concerns about the extent to which the expansion of presidential war powers can be reconciled with the principles of constitutional democracy. In Germany it was mainly the German Constitutional Court has warned

that informal constitutional change effected by the development if the EU may undermine the constitutional democratic state. Indeed, informal constitutional change taking place at the European level has been connected to the 'democratic deficit' the EU is supposedly facing. As Voermans observed, substantial informal constitutional change in the EU constitutional order 'contributes to the feeling of a bureaucratic, undemocratic, uncontrollable Union with an agenda of its own.'[20]

6.4.3 Limits to informal constitutional change

Finally, we may observe that in only one case in this study does legal doctrine provide some guidelines regarding the permissibility and limits of informal constitutional change. In short, pursuant to Article 79(1) of the Basic Law,[21] German legal doctrine demands a certain degree of fidelity to the words of the Basic Law and reserves the right to bring about constitutional changes from a certain point for the constitutional legislator. However, EU Ratification Acts are exempted from this so-called 'textual change commandment'.[22] German legal doctrine quite explicitly recognizes that, as long as the evolution of European integration does not transgress the integration plan of the Treaties as ratified by the German legislator, it may validly change the normative content of the Basic Law outside the Basic Law's formal amendment procedure. Informal constitutional change that is connected with European integration is only subject to the much broader limits of Article 73(3) of the Basic Law,[23] which in any case provide the lower limits of any constitutional change.

Although the limits of informal constitutional change by European integration appear to be flexible, they also seem to have an impact on the way the constitution develops. For example, the doctrine that addresses the permissibility of informal constitutional change by the evolution of European integration is occasionally used to review the constitutionality of European developments by the German Constitutional Court.

By contrast, Japanese and American constitutionalism hardly provides 'objective' legal handles that may guide whether a certain development that is incongruent with the content of the formal constitution should be regarded

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20 Voermans (2009), 103. See in connection to this theme also Albert (2015b) on the concept of 'Constitutional amendment by Stealth.

21 The first sentence of Article 79(1) of the Basic Law provides that '[t]his Basic Law may be amended only by a law expressly amending or supplementing its text.'

22 See Article 23(1) Basic Law.

23 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 [Human dignity – Human rights – Legally binding force of basic rights] and 20 [constitutional principles] shall be inadmissible.'

valid or not. Here, different philosophical theories – generally drawing on forms of originalism and living constitutionalism – compete with one another and actors seem to *ad hoc* select the one theory when reviewing the case at hand that best fits their existing political and ideological preferences. In the US, for example, conservatives commonly present themselves as originalists, while the theory of living constitutionalism is popular among liberals. However, with respect to the debate about the constitutionality of change that has taken place in the field of national security, the roles seem to be reversed. In this debate, conservatives, who typically seem to favor a broad and preclusive prerogative for the executive in the field of national security, have necessarily rested on a strong form of living constitutionalism. Liberals, on the other hand, have contested the constitutionality of shifts in the allocation of war powers in the American system by using originalist-like arguments.

One important (partial) explanation for why German constitutionalism has a legal doctrine that indicates the permissibility and limits of informal constitutional change, while Japanese and American constitutionalism do not, may be found in constitutional history. Germany has apparently had some bad experiences with having unclear restrictions on informal constitutional change. Indeed, the rule of Article 79(1), which prohibits 'breaching the constitution' (*Verfassungsdurchbrechungen)* by an ordinary statute without explicitly changing the text of the constitution, even if this statute is supported by a two-thirds majority, can be understood as a direct rejection of the Weimar practice.[24] Under the previous constitution of the Germany, the Weimar Constitution (1919-1945), the use of alternative means of change was not exceptional. For instance, it was acceptable for the legislator to deviate from the constitutional text – without explicitly amending it – by way of an ordinary statute if this statute was adopted by a qualified majority required to amend the constitution. However, the Weimar Constitution's 'informal turnover' prompted the framers of the post-war Basic Law to take precautionary measures. It was mainly considered that, in a constitutional democracy that operates according to the rule of law, a more strict distinction had to be drawn between the *pouvoir constituant* and the ordinary legislator.

24 Bryde (2003), 205 and Kotzur (2013), 126-127.

7 Concluding comments and findings

'One cannot enduringly deem the entire world unconstitutional.'
M. Steinbeiß[1]

This study explores the phenomenon of informal constitutional change. Such change takes place when the meaning of norms embodied by the written constitution changes without a (foregoing) formal constitutional amendment. This study takes a historical institutionalism view, which focuses on the interplay between formal constitutional norms and the institutional context in which these norms are embedded over time. It examines cases of informal constitutional change in Japan, the US and Germany. It asks how constitutions informally change; why significant constitutional change sometimes occurs without a formal constitutional amendment; and if, and to what extent, alternative mechanisms of constitutional change can functionally substitute for a formal constitutional amendment procedure. Regarding these themes, this study makes some comparative observations and suggests theories that might explain the differences and similarities among the case descriptions.

This study suggests at least seven important insights. First, it suggests that the historical institutionalism perspective provides an accurate understanding of how the meaning of formal constitutional norms may change without formal constitutional amendment by connecting legal-positivist and common-law perspectives on informal constitutional change. By focusing on the historical interplay between formal constitutional norms – the 'constitutional plan' – and the real-world institutional context in which these norms are embedded – the 'constitutional reality' -, the historical institutionalism perspective recognizes the multiple legal and non-legal forces that may shape the normative content of formal constitutional precepts. At the same time, the historical institutionalism perspective accounts for a written constitution's firmness of authority. It lets us appreciate that not every change in the area the written constitution addresses necessarily has implications for how we must describe the meaning of formal constitutional norms.

1 'Man kann nicht dauernd die ganze Welt für verfassungswidrig erklären'. Quoted by Goldmann 2015, 12.

Second, this study shows that the concepts of *interpretation* and *constitutional convention* are indispensable tools for identifying informal constitutional change. In the absence of formal constitutional amendments, these concepts highlight when the dynamic between the written constitution and its institutional context may have consequences for the meaning of formal constitutional norms, without blurring such important distinctions as those between ought and is; norm and fact; rule and practice; and plan and reality. The cases in this study also show that possible informal constitutional developments do not usually unequivocally take the form of interpretations and constitutional conventions. The mechanisms of constitutional change, which re-interpret the constitution or modify it by forming constitutional conventions, may go under different designations. However, in this study, the analytical framework that the concepts of interpretations and constitutional convention offer has been very helpful in giving a sense of the extent to which institutional development has affected the meaning of formal constitutional norms.

Third, the cases and comparative observations in this study confirm that, without new constitutional writing, legal or non-legal institutional developments in the context of a written constitution may have profound implications for the meaning of written constitutional norms. Contrary to that of Jellinek,[2] this study also confirms that written rules maintain some control over what happens in the real world, even in extreme cases of informal constitutional change (the Japanese case in this study). On the one hand, this study demonstrates that interpretation and the formation of constitutional conventions may significantly transform the meaning of a formal constitutional norm, even in such a way that it contradicts its former meaning or original intent. At the same time, it substantiates the idea that writing rules down in a master constitutional text may solidify them. Even if processes of informal constitutional change have significantly altered the meaning of a written constitutional rule, its original intent, or the literal meaning of the constitutional text by which this rule is embodied, may retain some shaping force. As long as the text is in place, any proposal for textual updating may still invite significant opposition. Even when contradicting constitutional conventions and interpretations have almost completely substituted the original text, its original or former meaning may remain a powerful source of authority for those seeking to challenge the validity of informal constitutional developments.

Fourth, this study verifies previous research that the most important reason why constitutional legislators do not always update the constitutional text in the face of significant constitutional change, or use the formal constitutional amendment procedure as a means of bringing about constitutional reform, is the difficulty of formal constitutional amendment. Highly formal amendment hurdles may induce constitutional actors to resort to alternative, less laborious

2 Jellinek (2000), 57.

methods of constitutional change, especially in this current fast-paced world. By pointing to the absence of a realistic amendment option, and the necessity of constitutional change, this study shows that constitutional actors may seek to legitimize the use of alternative routes for constitutional change. However, we have also seen that if constitutional actors do not adapt the constitutional text to changing circumstances and demands, it may lose some (or, perhaps, ultimately all) of its relevance and shaping force. In that way, rigid amendment procedures may undermine exactly what they aim to achieve: a balance between stability and flexibility, constitutionalism, and democracy. Therefore, acknowledging that a written constitution does not operate in a vacuum, constitutional designers may consider making it not too hard for constitutional actors to amend the document they are drafting.

A fifth, related insight of this study is that amendment difficulty may not be the only important explanation for informal constitutional change in a given constitutional order. For example formal constitutional amendments may be perceived as unnecessary, even if the meaning of formal constitutional norms have changed significantly.

Sixth, this study shows that alternative mechanisms of constitutional change can sometimes serve as functional substitutes for a formal amendment procedure. Many constitutional actors may perceive constitutional changes initiated by mechanisms other than a formal constitutional amendment procedure as valid. Moreover, alternative mechanisms of constitutional change can be effective, in the sense that they produce relatively stable, enduring outcomes. However, contrary to what some studies have asserted, this one suggests that alternative mechanisms of change are typically not functional equivalents or 'perfect substitutes' of formal constitutional amendment procedures.[3] It is important to appreciate that alternative mechanisms of change can alter the meaning of a written constitution, but not its text. This implies that certain constitutional questions or controversies that institutional change may raise can sometimes only be settled by new constitutional writing. Moreover, as long as constitutional change has not been explicitly crystalized in the constitutional text, it may not have the authority associated with a change that results from a formal constitutional amendment. In bringing about constitutional reform, constitutional actors may come a long way by using alternative means of change, but rewriting (parts of) the constitutional text may be a necessary (final) step to bring a particular reform to a conclusion.

Lastly, this study reveals that a legal doctrine of informal constitutional change, which specifies when constitutional provisions can change without a formal constitutional amendment, may have a powerful mitigating effect on debates surrounding the legitimacy and validity of such change. In this study, only Germany has such a doctrine. This doctrine can answer many constitutional questions that arise when institutional practices and understand-

3 See Griffin (2016) and Griffin (2006).

ings no longer coincide with the constitutional text. Of course, ambiguities remain, if only because the doctrinal limits of informal constitutional change are, by their very nature, flexible. However, the German case shows that a legal doctrine of informal constitutional change can prevent, to a significant extent, that informal constitutional change undermines the clarity of constitutional norms; debates about the permissibility of change outside the amendment procedure become polarized and politicized; and the status of informal change remains ambiguous. Constitutional democracies facing problems similar to those addressed in this study may want to consider developing their own legal doctrine of informal constitutional change.

Since this study has only explored three cases, these considerations are necessarily tentative. Nevertheless, they may function as valuable starting points for further, more comprehensive studies. Additionally, this study has many unexplored questions regarding the phenomenon of informal constitutional change. Perhaps most importantly, future studies may seek to answer more precisely what 'change' and 'amendment'[4] exactly entail. More precise definitions and categorizations of these basic yet undertheorized concepts are essential if the emerging field of comparative constitutional change is to fully mature. Furthermore, future studies may examine in more detail the dynamic between written constitutions and their institutional context through the analytical framework which the concepts of interpretation and constitutional conventions provide. One question is: which constitutional actors should precisely follow and accept a particular institutional understanding or practice before we can, in the absence of new writing, recognize it as informal constitutional change? A future study may also examine in closer detail drivers of informal constitutional change, specifically if informal constitutional change has different drivers than formal constitutional amendment. Future studies may look into the question of how we can improve the design of formal constitutional amendment procedures so they can actually function as a means to engineer constitutional change and maintain the constitutional text. Future research may want to further investigate what a legal doctrine of informal constitutional change could be in contexts other than Germany. A related question is: who can develop such a doctrine for it to become universally accepted by the community of constitutional actors?

Finally, future research could explore the more normative questions that the phenomenon of informal constitutional change raises. How should we appraise the fact that significant constitutional developments take place outside the formal constitutional amendment procedure in constitutional democracies that supposedly live under a written constitution? How should we evaluate the legitimacy of informal constitutional change in such countries?[5] How can we preclude that we, while answering these normative questions, let our

4 See on this concept Albert (2018, forthcoming).
5 See Albert (2014b) and Martin (2017).

analytical frameworks be shaped by (personal) political or ideological preferences?

Samenvatting
(Summary in Dutch)

Informele constitutionele verandering
Grondwettelijke veranderingen zonder grondwettelijke herziening in vergelijkend perspectief

Introductie

Tegenwoordig heeft bijna elk land ter wereld een grondwet. Een grondwet is een centrale wet waarin belangrijke constitutionele normen, dat wil zeggen normen met betrekking tot het overheidsbestuur zijn opgenomen. Iedere grondwet bevat een speciale herzieningsprocedure. Deze procedures maken het meestal relatief moeilijk om grondwettelijke normen te veranderen, maar niet onmogelijk. Het idee hierachter is dat grondwetten het evenwicht moeten vinden tussen stabiliteit en flexibiliteit. Zij moeten enerzijds constitutionele normen beschermen tegen de waan van de dag. Anderzijds moeten zij het mogelijk maken voor constitutionele actoren om deze normen op ordelijke en legitieme wijze aan te passen aan veranderende eisen en omstandigheden.

Vanwege hun belangrijke functie worden grondwettelijke herzieningsprocedures vaak gezien als een essentieel element van een rechtsstatelijk democratisch systeem. Volgens sommige constitutionalisten is grondwettelijke herziening zelfs de enige wijze waarop een grondwet kan en mag veranderen. Recent vergelijkend onderzoek wijst echter uit dat in veel constitutionele democratieën grondwettelijke herziening niet de enige manier is waarop grondwettelijke normen veranderen, en in sommige gevallen zelfs niet de belangrijkste. Het lijkt erop dat veranderingen in grondwettelijke normen veel vaker dan gedacht geëffectueerd worden door alternatieve, ínformele processen. Deze processen kunnen zowel van juridische aard zijn, bijvoorbeeld 'gewone' wetgevingsprocedures en rechterlijke procedures, als van niet juridische aard, zoals veranderingen in politieke praktijken.

Als de betekenis van grondwettelijke normen verandert zonder dat de tekst van de grondwet waarin deze normen zijn opgenomen formeel wordt herzien, dan spreekt de rechtsvergelijkende literatuur vaak van 'informele constitutionele verandering'.

Het fenomeen van informele constitutionele verandering roept een aantal belangrijke vragen op die centraal staan in het proefschrift zelf. Hoe moeten

wij verandering van constitutionele normen die plaatsvinden zonder grondwettelijke herziening begrijpen? Hoe kunnen wij zulke veranderingen, bij afwezigheid van sporen in de tekst van de grondwet, identificeren? Wat verklaart waarom in constitutionele democratieën die leven onder een centrale constitutionele tekst – een grondwet – constitutionele veranderingen soms plaatsvinden buiten de eisen van de formele herzieningsregels die deze tekst bevat om? Kunnen informele processen van constitutionele verandering de functies van grondwettelijke herzieningsprocedures vervangen? En zo ja, in hoeverre en onder welke voorwaarden?

Een historisch-institutioneel perspectief

Veel onderzoekers van constitutionele ontwikkelingen passen een 'juridisch-positivistisch' of een 'common-law' perspectief toe. Onderzoekers die een juridisch-positivistisch perspectief toepassen kijken bij het in kaart brengen van constitutionele verandering naar gezaghebbende juridische bronnen die de intentie of het 'plan' van constitutionele actoren uitdrukken. Onderzoekers die een common-law perspectief gebruiken kijken met name naar de evolutie van daadwerkelijke constitutionele opvattingen en praktijken. Beide perspectieven zijn echter ontoereikend om het fenomeen van informele constitutionele verandering goed te begrijpen. Onderzoeker die het juridisch-positivistische perspectief toepassen geven met hun focus op formele grondwettelijke herzieningen en rechterlijke (her)interpretaties vaak een veel te formele beschrijving van constitutionele ontwikkeling. Zij missen ontwikkelingen die buiten deze bronnen plaatsvinden. Onderzoekers met een common-law benadering richten zich vooral op daadwerkelijke constitutionele opvattingen en praktijken. Zij hebben daardoor , op hun beurt, weer onvoldoende oog voor het potentiële gewicht van grondwettelijke normen.

Door een 'historisch-institutioneel' perspectief te gebruiken kan men beter begrijpen hoe constitutionele ontwikkelingen plaatsvinden dan door het gebruik van een juridisch-positivistisch of common-law perspectief. De historisch-institutionele benadering neemt als uitgangspunt dat, in het generen van betekenis, een grondwettelijke bepaling en de institutionele context waarin deze bepaling werkzaam is uiteindelijk onderling verbonden zijn. Onderzoekers die voor deze benadering kiezen gaan er van uit dat een grondwet van een land en de structurele praktijken en opvattingen van de constitutionele actoren die in dat land leven één systeem vormen dat is samengesteld uit een dynamische interactie tussen het 'zou moeten' van normatieve voorschriften van formele grondwettelijke regels en het 'zijn' van feitelijke institutionele opvattingen en praktijken. Wij kunnen dit systeem een 'constitutionele orde' noemen.

Het historisch-institutionele perspectief stelt ons enerzijds in staat om te erkennen dat grondwettelijke bepalingen best eens een zekere mate van autonoom gezag kunnen hebben en van betekenis kunnen zijn voor sociologische,

politieke en juridische ontwikkelingen. Anderzijds stelt dit perspectief ons in staat om te waarderen dat verandering van institutionele opvattingen en praktijken implicaties kan hebben voor de manier waarop grondwettelijke bepalingen moeten worden beschreven en uitgelegd, ongeacht de vorm waarin zulke veranderingen plaatsvinden.

De keuze voor de historisch-institutionele benaderingswijze van constitutionele veranderingen roept de (methodologische) vraag op: hoe kunnen wij zulke veranderingen herkennen en onderscheiden van niet-constitutionele ontwikkelingen? Dit proefschrift stelt voor om dit te doen door te kijken naar:

1 de historische ontwikkeling van constitutionele interpretaties van leidende constitutionele actoren en
2 het ontstaan van constitutionele conventies in relatie tot de oorspronkelijke betekenis van grondwettelijke bepalingen. Informele constitutionele verandering doet zich vervolgens voor als institutionele opvattingen en praktijken
   a. grondwettelijke onderwerpen betreffen,
   b. van oorspronkelijke grondwettelijke normen afwijken,
   c. deze afwijking een blijvend, structureel karakter heeft en
   d. de geldigheid van deze afwijking impliciet of expliciet wordt geaccepteerd door leidende constitutionele actoren.

Case studies

Interessante en vergelijkbare informele constitutionele ontwikkelingen doen zich voor in Japan, de Verenigde Staten en Duitsland.[1]

In Japan hebben beleidsontwikkelingen op defensiegebied de betekenis van het pacifisme beginsel van de Japanse grondwet significant veranderd zonder dat de grondwet formeel werd herzien.[2] Artikel 9 van de Japanse grondwet verbiedt het Japan om een gewapende lucht-, land- of zeemacht te onderhouden. Vandaag de dag staat deze bepaling Japan echter niet in de weg om de vijfde krijgsmacht ter wereld aan te houden en deze in te zetten voor internationale militaire operaties. De case studie wijst uit dat de benodigde constitutionele veranderingen om de ontwikkeling van dit defensiebeleid

1 Om redenen van vergelijkbaarheid bevat dit proefschrift geen Nederlandse case studie. Wie toch meer wilt weten over constitutionele ontwikkeling in Nederland kan dit artikel raadplegen: Reijer Passchier, 'Formal and Informal Constitutional Change in the Netherlands', in: Ferrari, Passchier and Voermans (eds.), The Dutch Constitution beyond 200: tradition and innovation in a Multilevel Legal Order (The Hague: Eleven International Publishers, 2018 Forthcoming) beschikbaar op SSRN: https://ssrn.com/abstract=2975751.

2 Zie voor een verkorte versie van deze case studie in het Nederlands: Reijer Passchier, 'De ontwikkeling van het Japanse pacifisme en defensiebeleid als informele constitutionele verandering', *Tijdschrift voor Constitutioneel Recht* 2017(3) beschikbaar op SSRN https://ssrn.com/abstract=2998587.

mogelijk te maken met name werden doorgevoerd door middel van 'gewone' wetten en regeringsbesluiten. Ook speelden veranderende praktijken en verdragsrecht een rol.

Wij kunnen op ten minste zes factoren wijzen die verklaren waarom Japan, ondanks significante constitutionele ontwikkelingen, Artikel 9 nooit formeel heeft herzien: (1) de moeilijkheid van grondwettelijke herziening; (2) de mate van polarisatie in het pacifisme- en defensiedebat; (3) het uitblijven van rechterlijke uitspraken die de constitutionele wetgever dwingen om zich uit te spreken; (4) de rol van het Japanse *Cabinet Legislation Bureau*, een gezaghebbende constitutionele interpretator die defensiehervormingen faciliteert; (5) de verwerping van 'Amerikaans' constitutionalisme, d.w.z. constitutionalisme dat de geschreven grondwet centraal stelt; en (6) de verwerping, althans door sommigen, van de Japanse grondwet die als door de naoorlogse bezettingsmacht 'opgelegd' ervaren wordt.

In het geval van de Japanse pacifisme en defensiecasus hebben alternatieve processen van constitutionele verandering, zoals gewone wetten en veranderende praktijken, de herzieningsprocedure van de Japanse Grondwet slechts deels kunnen vervangen. Deze processen hebben niet de hoeveelheid steun voor constitutionele verandering gegenereerd die doorgaans geassocieerd wordt met formele grondwettelijke herzieningen. Bovendien lijken alternatieve processen niet zo effectief te zijn geweest als formele grondwettelijke herzieningen naar verwachting geweest zouden zijn in het doorvoeren van constitutionele hervormingen. De spanning die bestaat tussen de tekst van de grondwet en de institutionele praktijk zorgt er bovendien voor dat de effectiviteit van het Japanse defensiebeleid onder druk staat: constitutioneel pacifisme en defensieambities zijn in de praktijk niet altijd eenvoudig te combineren.

In de VS hebben ontwikkelingen die zich voordeden buiten de formele herzieningsprocedure van de Amerikaanse grondwet ervoor gezorgd dat de President, als Commander in Chief, tijdens de Koude Oorlog en de Oorlog tegen Terreur brede unilaterale en exclusieve bevoegdheden verkreeg om de Amerikaanse krijgsmacht in te zetten.[3] Deze verandering deed zich voor deels ten koste van de bevoegdheden die de Amerikaanse grondwet tot aan de Tweede Wereldoorlog aan het Congres toebedeelde. Oorspronkelijk reguleerde het Congres het gebruik van de bevoegdheden die de President als Commander in Chief heeft. Daarnaast kon de President, als gevolg van de oorlogsverklaringsclause van de Amerikaanse grondwet, geen oorlog beginnen zonder expliciete toestemming van het Congres. Vandaag de dag echter is de President *de facto* nog nauwelijks gebonden aan deze *checks and balances*. Anno 2017 kan de President, als Commander in Chief, feitelijk zelfstandig beslissen over de inzet van conventionele wapens, nucleaire wapens en inlichtingendiensten.

3 Zie voor een verkorte, Nederlandstalige versie van deze case studie: Reijer Passchier, 'Als Commander in Chief kan President Trump straks bijna alles', *NJB* 2017(1) beschikbaar op SSRN: https://ssrn.com/abstract=2973763.

Deze case studie wijst uit dat de processen die de ontwikkeling naar een machtiger presidentschap op het gebied van constitutionele *war powers* hebben geëffectueerd vooral de vorm aannamen van claims op deze bevoegdheden van presidenten zelf, de vorming van precedenten en, met name na 11 September, ook van gewone wetgeving.

Op zijn minst vier factoren verklaren waarom veranderingen in de verdeling van constitutionele oorlogsbevoegdheden nooit de vorm kregen van formele grondwettelijke amendementen: (1) de zeer zware amendementprocedure van de Amerikaanse grondwet en de culturele weerstand die in de Amerikaanse politiek en samenleving bestaat tegen amenderen van de grondwet in het algemeen; (2) de politieke en maatschappelijke controverse rondom de *war powers* kwestie; (3) het feit dat amenderen van de oorlogsclausules van de Amerikaanse grondwet door velen als onnodig wordt ervaren omdat zij niet erkennen dat er veranderingen hebben plaatsgevonden; en (4) de terughoudendheid die de Amerikaanse rechterlijke macht in acht neemt bij het oordelen over het gebruik van de *war powers* door de Amerikaanse President.

De informele processen van constitutionele verandering die zich hebben voorgedaan in de sfeer van de Amerikaanse nationale veiligheid zijn enerzijds effectief geweest als het gaat om het effectueren van blijvende constitutionele veranderingen. Anderzijds hebben deze processen nooit de hoeveelheid steun voor verandering weten te generen die het succesvol doorlopen van de formele amendement procedure van de Amerikaanse grondwet vermoedelijk wel zou hebben opgeleverd.

In Duitsland heeft de evolutie van de Europese integratie belangrijke informele constitutionele verandering geeffectueerd. Voorbeelden hiervan zijn veranderingen op het gebied van de relatie tussen nationaal en Europees recht, de bevoegdheden van individuele publieke organen, het beginsel van federalisme en de inhoud van mensenrechtenbepalingen. In al deze gebieden hebben zich belangrijke veranderingen voorgedaan, zonder dat voorafgaand aan deze veranderingen de tekst van de Duitse grondwet is aangepast via de formele herzieningsprocedure die deze grondwet bevat.

Het feit dat de Europeanisering van de Duitse grondwet zich voor een groot deel in informele vorm heeft voorgedaan kan worden verklaart door te wijzen op het bestaan van een doctrine in het Duitse staatsrecht die voorschrijft dat de Duitse grondwet 'doorgebroken' mag worden door de ontwikkeling van de Europese Unie. Normaal gesproken hecht het Duitse constitutionalisme aan het volgen van de formele herzieningsprocedure van Artikel 79(1) van de Duitse grondwet voor constitutionele veranderingen. Maar de doctrine van 'Europavriendelijkheid' of 'internationale openheid' bepaalt dat, onder voorwaarden, uitzonderingen bestaan voor veranderingen die plaatsvinden als gevolg van de voortschrijdende Europese integratie. In het licht van deze doctrine zijn formele grondwettelijke herzieningen op het gebied van Europeanisering juridisch gezien onnodig. En als gevolg daarvan is het vaak overbodig geacht om de tekst van de Duitse grondwet (volledig) aan te passen

aan de nieuwe, geëuropeaniseerde institutionele realiteit. Dat veel constitutionele veranderingen die zijn geëffectueerd door ontwikkelingen in het recht van de Europese Unie geen onderwerp zijn geweest van formele grondwettelijke herziening kan verder verklaard worden door erop te wijzen dat een deel van deze veranderingen onderwerpen betreft die vallen onder het bereik van de eeuwigheidsclausules die deze grondwet bevat. Deze clausules (Artikelen 1, 20 en 79(3) van de Duitse Grondwet) maken bepaalde tekstuele constitutionele verandering op het gebied van bijvoorbeeld mensenrechten en federalisme formeel onmogelijk.

Voor zover informele constitutionele veranderingen als gevolg van Europese integratie zijn gedekt door ratificatiewetten, hebben zij een hoeveelheid steun voor Europeanisering gegenereerd die het equivalent lijkt te zijn van de hoeveelheid steun die formele grondwettelijke herzieningen hadden kunnen opleveren. Voor zover informele constitutionele veranderingen buiten de reikwijdte van ratificatiewetten vallen – en dus eigenlijk zijn geëffectueerd door informele constitutionele veranderingen in het Europees constitutioneel recht – zijn deze controversieel en hebben informele mechanismen de formele herzieningsprocedure van de Duitse grondwet niet geheel functioneel gesubstitueerd.

Vergelijkende observaties

Op basis van de hierboven besproken case studies kunnen enkele vergelijkende waarnemingen worden gedaan. Het doel hiervan is om een aantal opvallende overeenkomsten en verschillen tussen de studies aan te wijzen, en vervolgens om ideeën aan te dragen die deze overeenkomsten en verschillen zouden kunnen verklaren. Op basis van deze ideeën kunnen wij dan weer enkele meer algemene, concluderende hypothesen over informele constitutionele ontwikkeling in constitutionele democratieën formuleren.

In alle drie de cases studies, herinterpreteren verschillende constitutionele actoren grondwettelijke normen. Dat wil niet zeggen dat alle interpretaties even belangrijk en gewichtig zijn, maar wel dat interpretaties van buiten de rechterlijke macht significante constitutionele consequenties kunnen hebben. In alle drie de landen speelt het ontstaan van constitutionele conventies een belangrijke rol bij constitutionele ontwikkeling. In de Japanse en Amerikaanse case studies zijn de praktijken die aan deze conventies ten grondslag liggen geleidelijk geaccepteerd. In de Duitse case studie zijn deze direct geaccepteerd als uitvloeisel van de doctrine van Europavriendelijkheid. Voorts wordt opgemerkt dat informele constitutionele veranderingen zich zowel 'stil' voordoen, met name in Amerika, als 'expliciet'. 'Stil' betekent hier dat constitutionele actoren – bewust of anderszins – niet expliciet erkennen, of zelfs ontkennen, dat hun acties consequenties hebben gehad voor de betekenis van constitutionele bepalingen. Bij 'expliciete' informele constitutionele verandering geven

actoren wél toe dat hun opvattingen of praktijken afwijken van hun eerdere gedachten en gedrag.

Wat bepaalt of veranderingen zich stil of expliciet voordoen? Dat heeft onder andere te maken met de hoeveelheid controle die actoren hebben over de verandering en met de duidelijkheid van de grondwettelijke tekst en de oorspronkelijke betekenis daarvan.

Verder vindt informele constitutionele verandering soms plaats op 'momenten' en soms laat zulke verandering een meer gradueel verloop laat zien. De tijdspanne waarop informele constitutionele verandering plaatsvindt varieert enorm tussen de cases van deze studie.

Tot slot merkt het proefschrift op dat institutionele veranderingen weliswaar de betekenis van de tekst van een grondwet ingrijpend kunnen veranderen, maar dat dit in geen van de cases betekent dat de betreffende tekst irrelevant is geworden. Alle drie de cases bevestigen de hypothese dat het opschrijven van constitutionele normen in een grondwet de robuustheid en duurzaamheid van hun gezag versterkt.

Wat zijn verklaringen voor de afwezigheid van 'tekstuele responsiviteit', dat wil zeggen, de afwezigheid van formele grondwettelijke herzieningen in de aanwezigheid van significante veranderingen in de betekenis van grondwettelijke normen? Eén verklaring hiervoor is de moeilijkheid van formele grondwettelijke herziening in de onderzochte landen, maar deze verklaring moet wel genuanceerd worden. Grote delen van de Duitse grondwet kunnen namelijk relatief eenvoudig worden aangepast, maar zelfs met betrekking tot deze delen vindt Europeanisering hoofdzakelijk plaats langs informele wegen. Verder laten twee van de drie cases in dit proefschrift zien dat zelfs in de aanwezigheid van significante veranderingen, grondwettelijke herziening niet altijd nodig wordt geacht. In de Amerikaanse case studie wordt grondwettelijk herziening overbodig geacht omdat niet altijd wordt erkent dat er überhaupt verandering heeft plaatsgevonden; en in de Duitse case wordt grondwettelijke herziening niet noodzakelijk gevonden omdat de doctrine van 'Europavriendelijkheid' formele grondwettelijke herziening ter facilitering van de Europeanisering van de Duitse grondwet juridisch overbodig maakt.

In de cases van deze studie lijken vijf factoren te bepalen of actoren formele herziening noodzakelijk achten: (1) de duidelijkheid van de grondwettelijke tekst en zijn oorspronkelijke bedoeling; (2) de gevoelde urgentie van verandering; (3) de mate waarin een realistische mogelijkheid beschikbaar is om de grondwet formeel te herzien, d.w.z. een niet al te moeilijke procedure; (4) de mate waarin effectieve en geaccepteerde alternatieve methoden van constitutionele verandering beschikbaar zijn; en (5) de aanwezigheid van een toegefelijke doctrine over informele constitutionele verandering.

Verdere vergelijkende observaties met betrekking tot verklaringen voor de afwezigheid van tekstuele responsiviteit die op basis van de Japanse, Amerikaanse en Duitse case studies kunnen worden gedaan betreffen: (1) de rol die de rechter speelt in de betreffende zaak (actief of juist passief), (2) de

vraag of het debat betreffende de verandering in kwestie is gepolariseerd en (3) de vraag wat voor opvattingen er zijn over de grondwet in het algemeen in de betreffende jurisdictie, de zogenaamde 'constitutionele herzieningscultuur'. In Duitsland bijvoorbeeld, lijkt men het in het algemeen belangrijker te vinden dat constitutionele ontwikkelingen worden weerspiegeld door de tekst van de grondwet dan in de VS of Japan.

Tot slot kijkt deze studie naar overeenkomsten en verschillen met betrekking tot de vraag in hoeverre, in de cases van deze studie, alternatieve mechanismen van constitutionele verandering formele herzieningsprocedures functioneel hebben gesubstitueerd. Een eerste observatie is dat de mate waarin informele constitutionele veranderingen in deze studie als legitiem worden gezien enorm verschilt van case tot case. Over de legitimiteit van veranderingen in de Japanse en Amerikaanse case wordt heftig gedebatteerd. Veranderingen in de Duitse grondwet die zich voordoen als gevolg van ontwikkelingen in het recht van de Europese Unie worden gezien als legitiem zolang deze gedekt worden door een ratificatie wet (en dus gelegitimeerd worden door de doctrine van Europavriendelijkheid). Een verklaring voor deze verschillen is dat in Duitsland de grondwetgever vanaf het begin ruimte heeft gelaten voor informele constitutionele veranderingen door Europeanisering terwijl in Japan en de VS de grondwetgever en de hoogste rechter tot nu toe hebben gezwegen over de geldigheid van de veranderingen die zich hebben voorgedaan. In deze laatste twee landen is er dus veel ruimte voor commentatoren om hun eigen visie te onderbouwen en te laten bepalen door meer ideologische voorkeuren. Verder kunnen wij constateren dat in alle drie de cases informele mechanismen van constitutionele verandering effectief zijn geweest als het gaat om het bewerkstelligen van veranderingen. Echter, dat betekent niet dat deze veranderingen net zo robuust zijn als deze vermoedelijk zouden zijn geweest ware zij vastgelegd in formele grondwettelijke herzieningen. In alle drie de cases zorgt de spanning tussen de grondwettelijke tekst en de institutionele realiteit die de informele verandering kenmerkt voor ingewikkelde discussies over de betekenis van grondwettelijke normen. En, op zijn beurt, kan onduidelijkheid over de inhoud van grondwettelijke normen weer leiden tot problemen in regeerbaarheid. Bijvoorbeeld de effectiviteit van het Japanse buitenlandbeleid staat onder druk doordat niet helemaal duidelijk is in hoeverre Artikel 9 van de Japanse Grondwet het gebruik van de krijgsmacht aan banden legt.

Wat bepaalt nu uiteindelijk wanneer alternatieve mechanismen van constitutionele verandering effectief zijn en wanneer niet? De belangrijkste factor lijkt de 'normatieve kracht' van feiten te zijn; dat wil zeggen, de vraag of een bepaalde institutionele situatie feitelijk omkeerbaar is of niet. Daarbij kan worden aangetekend dat veranderingen die in vorm niet grondwettelijk zijn weliswaar ingrijpende gevolgen voor de normatieve betekenis van een grondwettelijke tekst kunnen hebben, maar dat zij de grondwettelijke tekst niet zomaar irrelevant maken. Zelfs in de Japanse zaak in dit proefschrift, waarin

de institutionele realiteit een koers van 180 graden vaart ten opzichte van de oorspronkelijke betekenis van Artikel 9 van de Japanse grondwet, is de tekst van deze bepaling nog een belangrijke factor van betekenis. Overigens hebben in geen van de cases van deze studie mechanismen van informele constitutionele verandering kunnen voorkomen dat de grondwettelijke tekst en het geldende constitutionele recht elkaar minder weerspiegelen dan in de oorspronkelijke situatie het geval was.

Concluderende beschouwingen

De beschrijving en vergelijking van Japanse, Amerikaanse en Duitse case studies levert ten minste zeven waardevolle inzichten op. (1) Het toepassen van een historisch-institutioneel perspectief, door een juridisch-positivistisch en common-law perspectief te verbinden, levert een accuraat begrip op van hoe de normatieve betekenis van grondwettelijke normen kan veranderen zonder formele grondwettelijke herziening. (2) De concepten 'interpretatie' en 'constitutionele conventie' zijn onmisbare tools bij het identificeren van informele constitutionele veranderingen. (3) Zonder formele grondwettelijke herziening kunnen veranderingen in institutionele opvattingen en praktijken inderdaad ingrijpende en blijvende gevolgen hebben voor de normatieve betekenis van grondwettelijke normen. (4) De belangrijkste reden waarom constitutionele actoren de grondwettelijke herzieningsprocedure niet altijd gebruiken om constitutionele veranderingen te bewerkstelligen, of de tekst aan zich voorgedane veranderingen aan te passen, is de moeilijkheid van formele grondwettelijke herziening. (5) Tegelijkertijd is, in tegenstelling tot wat sommige auteurs denken, de moeilijkheid van formele herziening niet altijd de enige, en soms niet eens de belangrijkste oorzaak van het uitblijven van formele grondwettelijke herziening in de aanwezigheid van significante constitutionele ontwikkelingen. Voorts kan op basis van de hierboven besproken case studies en vergelijking worden geconcludeerd dat (6) alternatieve mechanismen inderdaad tot op zeker hoogte belangrijke functies die worden toegedicht aan formele grondwettelijke herzieningsprocedure kunnen substitueren. Echter, zij kunnen dit in principe niet geheel en al perfect. Sommige veranderingen kunnen alleen op legitieme en effectieve wijze worden bewerkstelligd door de tekst van de betreffende grondwet te veranderen. En tot slot (7) wijst deze studie uit dat een juridische doctrine die specificeert wanneer grondwettelijke bepalingen kunnen veranderen zonder formele grondwettelijke herziening een krachtig mitigerend effect kan hebben op debatten over de legitimiteit en legaliteit van zulke veranderingen. In de landen die zijn geselecteerd voor deze studie heeft alleen Duitsland een dergelijke doctrine. Constitutionele democratieën waarin problemen spelen die in dit proefschrift aan de orde zijn gekomen zouden kunnen overwegen om een eigen doctrine over informele constitutionele verandering te ontwikkelen.

Deze studie beperkt zich tot 3 case studies; de conclusies kunnen daarom slechts voorlopig zijn. Desalniettemin kunnen de bevindingen van deze studie dienen als een waardevol startpunt voor verder, uitgebreider onderzoek naar informele constitutionele verandering. Daarbij laat deze studie belangrijke vragen over informele constitutionele verandering onbeantwoord. Toekomstig onderzoek zou in meer detail de dynamiek tussen grondwetten en hun institutionele context kunnen onderzoeken. Een belangrijke vraag is bijvoorbeeld: welke constitutionele actoren moeten precies van de grondwet afwijkende institutionele opvattingen en praktijken overnemen en accepteren voordat deze afwijkingen informele constitutionele verandering bewerkstelligen? Een toekomstige studie zou ook in meer detail de drijvende krachten achter informele constitutionele verandering kunnen onderzoeken. Ook zou het relevant zijn om te bekijken of informele constitutionele verandering kan worden tegengaan door het ontwerp van grondwetten aan te passen. Een toekomstige studie zou voorts kunnen onderzoeken hoe een juridische doctrine over informele constitutionele verandering eruit zou moeten zien buiten de Duitse context. Een gerelateerde vraag is: wie zou zo'n doctrine kunnen en moeten invoeren? Tot slot zou een toekomstig onderzoek naar informele constitutionele verandering de meer normatieve vragen die dit fenomeen oproept kunnen adresseren. Hoe zouden wij significante constitutionele ontwikkelingen die buiten formele herzieningsprocedures van grondwetten om plaatsvinden moeten waarderen in het licht van democratische en rechtsstatelijke beginselen? Hoe zouden we de legitimiteit van informele constitutionele veranderingen moeten evalueren? En hoe kunnen we voorkomen dat we het analytische raamwerk dat we gebruiken om deze normatieve vragen te beantwoorden laten beïnvloeden door onze persoonlijk politieke en ideologische voorkeuren?

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