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

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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