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A REFLECTION ON THE JAPANESE ARTICLE 9
DEBATE**

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**GLOBALIZING CONSTITUTIONAL MOMENTS?
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Rosalind Dixon* & Guy Baldwin****

US scholars have developed a rich toolkit for analyzing informal, as well as formal, processes of constitutional change. A leading example is Bruce Ackerman's theory of "constitutional moments". Comparative constitutional scholars, in contrast, have given relatively little attention to the legitimacy of informal modes of constitutional change. This article contributes to filling this gap in our understanding of informal constitutional change outside the US, by analyzing recent attempts by Shinzo Abe's LDP government informally to amend or "reinterpret" Japan's pacifist Constitution. Attention to the Japanese experience in this context reveals superficial indications of an actual constitutional moment, but also a lack of true democratic support for such change. This, the article suggests, further helps reveal an important, though largely unstated, precondition for the application of Ackerman's theory – i.e. that there must be meaningful competition between political parties, in the legislature and at national elections, before informal constitutional change can legitimately occur.

Bruce Ackerman has famously suggested that the US Constitution can be amended by both formal and informal constitutional means.¹ Basing his analysis on US history, Ackerman argues that several transformative constitutional changes have occurred outside the text of the Constitution, and the formal requirements for amendment under Article V. These constitutional "moments" include the introduction of the 1787 Constitution outside the amendment process under the Articles of Confederation, the Reconstruction amendments that passed only by coercing the consent of southern states, and the transformative 20th century New Deal and Civil Rights era reforms that took place without formal constitutional change. In each instance, the subsequent support at the ballot box of the ruling party is said to have rescued a constitutional change from its informality.

The idea of "constitutional moments" of this kind has also gained increased interest among comparative constitutional scholars as a means of analyzing informal processes of constitutional change in other countries.² This article, however, considers the degree to which an Ackerman-style theory of informal constitutional change can in fact be readily transplanted to a wide range of other constitutional democracies, with political conditions quite different from the US. To do so, it focuses specifically on recent debates over informal constitutional change in Japan.

In recent years, Japan's Liberal Democratic Party ("LDP") government, led by Shinzo Abe, has sought to amend one of the most important provisions of the country's post-war 1947 Constitution, which stipulates that Japan will have no "land, sea, and air forces", and that it "renounce[s] war ... and the threat or use of force" (Article 9).³ In doing so, it sought to rely on both formal and informal constitutional mechanisms. It has recently proposed some formal processes of constitutional change, under Article 96, to recognize the existence of Japan's military, the Self-Defense Forces ("SDF"). However, the government has also informally revised its understanding of Article 9 to enable the SDF to engage in "collective self-defense", meaning the defense of allies rather than only of Japan itself. This change is highly significant as it breaks with decades of settled constitutional understanding of the meaning of the provision – all without complying with the

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¹ BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 1: FOUNDATIONS* (1991) ('WTP1'); BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS* (1998) ('WTP2'); BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014) ('WTP3').

² Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 *MARQUETTE L. REV.* 363 (2015).

³ Japanese Constitution, art. 9.

requirements of formal amendment. The article thus considers the degree to which the changes might nonetheless be justified as the kind of constitutional moment envisaged by Ackerman.⁴

The process of informal constitutional change in Japan, we suggest, has in fact involved quite broad-ranging debate and engagement on the part of civil society in a way that looks very similar to the heightened political activity of a constitutional moment – indeed a level of debate and contestation that is quite rare in the Japanese constitutional context.⁵ Moreover, the Abe government has earned electoral victories, in elections in 2014 and 2016, which seem at least superficially consistent with acquiring the kind of popular mandate that Ackerman cites as overcoming formal defects.

Yet despite this, there seems to be limited real evidence of change being the result of decisive “popular mobilization” in favor of change of the kind in each of the American constitutional moments. Instead, the image is of a governing party enjoying a dominance that has spanned several decades almost without interruption, resisted weakly by opposition parties with a history of minimal electoral success, pushing through a change that polls show is in fact opposed by the majority of the population. This contrasts significantly with American examples in which change is contested by two parties with at least some measure of electoral viability and a long history of governing, even if they might fall in and out of favor at a given time. In this way, the fact that the Abe government has managed to adopt such change also arguably helps to illuminate a key precondition implicit – but otherwise potentially hidden – in Ackerman’s own theory of constitutional change.

Reflecting on the Japanese experience, we contend that for informal constitutional change of the kind that has occurred in the US to exist elsewhere, there must be both broad societal debate *and* meaningful political competition between viable political parties around the relevant ideas. Without competitive contestation of this kind, informal constitutional change may be relatively easy for governments to achieve, but also quite weak in its claim to recognition as a legitimate mode of democratic constitutional change. This, in most cases, will also mean that Ackerman’s theory will have limited application to “dominant party” democracies.⁶

The remainder of the article is divided into three parts following this introduction. Part I sets out Ackerman’s theory of informal constitutional change, as it has previously been applied to the US. Part II explains the text and previous interpretation of Article 9, its history, and the Abe government’s reforms. Part III then analyses the Japanese experience through the lens of a US-style commitment to truly deliberative, democratic forms of constitutional change. Part IV concludes that, in Japan’s present circumstances, informal constitutional change of the Ackermanian kind lacks validity and, accordingly, formal change should be required if change to Article 9 is in fact to occur.

I Ackerman’s Theory of Constitutional Moments

American constitutional theorists have identified a range of ways in which constitutional change may occur in the US, outside the confines of Article V. David Strauss, for instance, has argued constitutional change can, and frequently does occur, in the US via a process of “common law-style” constitutional decision-making by the Supreme Court. In fact, Strauss argues, this kind of incremental, analogical approach to constitutional interpretation – which relies strongly on past decisions and practices, not simply constitutional or its original public meaning – is the dominant mode of

⁴ Ackerman has himself criticized the Abe government’s reinterpretation as an “illegal frontal assault on Japan’s constitution”, but not analyzed it through the lens of his theory of constitutional moments: Bruce Ackerman, *Cry “Havoc” and Let Slip the Constitution of War*, FOREIGN POLICY, Sep. 8, 2015, http://foreignpolicy.com/2015/09/28/japan_constitution_war_peace_article_self_defense_force_shinzo_abe_obama/.

⁵ There have, of course, also been limits on this process, associated with limits imposed by the government itself on the media treatment of the issue: *see infra* notes 118-21.

⁶ On dominant party democracy more generally, *see, e.g.*, Matthijs Bogaards, *Counting Parties and Identifying Dominant Party Systems in Africa*, 43 EUR. J. POL. RESEARCH 173 (2004); NICOLA DE JAGER & PIERRE DU TOIT (EDS.), FRIEND OR FOE? DOMINANT PARTY SYSTEMS IN SOUTHERN AFRICA (2012); Sujit Choudhry, “*He Had a Mandate*”: *The South African Constitutional Court and the African National Congress in Dominant Party Democracy*, 2 CONST. CT. REV. 1 (2009); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES (2007); Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, WI. L. REV. (forthcoming 2016)

amendment in the US.⁷ It also makes formal processes of constitutional amendment, under Art V, largely “irrelevant”: since the mid twentieth century, at least, incremental, common-law style processes of change have achieved almost all of the same changes that would have occurred, had proposals for formal constitutional change – such as the Equal Rights Amendment – been ratified.⁸

Similarly, Mark Tushnet has suggested that constitutional meaning may practically be altered by various forms of “constitutional workaround”, that involve political actors working around a particular (seemingly outmoded) textual requirement, by relying on *other*, parallel textual provisions.⁹ One example is the Saxbe Fix: it sidesteps the US Constitution’s Ineligibility Clause, which prohibits appointments of legislators to executive positions whose pay has been increased in a given term, by suspending the pay increase for that appointee.¹⁰ Tushnet argues that workarounds of this kind are “a method of *amending* the Constitution without altering its text, in the same family as other forms of informal constitutional change”.¹¹ Although no such process has actually occurred, Akhil Amar also suggests that constitutional change can occur through a national referendum process.¹²

Perhaps the most well-known theory of informal constitutional change, in the US, however, is Bruce Ackerman’s theory of “constitutional moments”.¹³ The theory describes occasions of significant constitutional change in American history that have taken place without complying with formal amendment requirements. In each case, the change has not been brazenly illegal and featured some “gesture toward legality”; yet it exhibited unmistakable formal flaws.¹⁴ According to Ackerman, what redeems the moment from its informality is the support of a “mobilized” public. Each attempted change is vigorously contested by its opponents.¹⁵ Consequential “popular mobilization ... g[ives] extraordinary constitutional meaning to the next regularly scheduled election”, in which the voters, by their choice between political parties or candidates, in fact endorse or reject the informal constitutional change that has been attempted.¹⁶

Ackerman argues that this pattern of irregular change has played out several times over US history. In the American founding, the Federalists triggered a process of ratification that they claimed only required a supermajority of popularly elected conventions, instead of complying with the requirements for formal amendment of the Articles of Confederation, which required unanimous approval by the states.¹⁷ Constitutional change over the Thirteenth Amendment was similarly improper – President Andrew Johnson coerced southern states in order to obtain their consent to the amendment – and the Fourteenth Amendment equally so due to the Congress-imposed reoccupation of the south by the Union military directed at the same result.¹⁸ In the 1930s, President Franklin Roosevelt sidestepped Article V altogether in pushing the New Deal, threatening to stack the Supreme Court until it reinterpreted the Commerce Clause to allow the greater government economic regulation that he believed necessary during the Great Depression.¹⁹ Most recently, the civil rights era saw transformative statutes enacted on disputed constitutional footing.²⁰ In spite of these deficiencies, Ackerman argues that the resounding electoral victories of supporters of constitutional change in the 1780s, 1860s, 1930s and 1960s meant that the American people had spoken and authorized each change, overcoming the formal legal objections.²¹

⁷ David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

⁸ David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

⁹ Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1504 (2009).

¹⁰ *Id.* at 1501.

¹¹ *Id.* at 1510.

¹² Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment outside Article V*, 94 COLUM. L. REV. 457 (1994).

¹³ Rosalind Dixon, *Updating Constitutional Rules*, 8 SUP. CT. REV. 343 (2009).

¹⁴ *See WTP2*, *supra* note 1, at 93-4.

¹⁵ *WTP1*, *supra* note 1, at 48.

¹⁶ *Id.*

¹⁷ *WTP2*, *supra* note 1, at 34-5, 49.

¹⁸ *Id.* at 141-150, 198-215. For further irregularities, *see* at 100-13.

¹⁹ *Id.* at 271-4.

²⁰ *WTP3*, *supra* note 1, at 66-8, 83-4.

²¹ *WTP2*, *supra* note 1, at 57-62, 178-82, 186-88, 207, 234-8, 306-11, 354-5; *WTP3*, *supra* note 1, at 72, 76.

In describing these “constitutional moments”, Ackerman sketches a series of stages over which they take place. A moment is said to begin when the public is put on notice about possible “sweeping reform” (*signaling*), a concrete suggested change is put forward (*proposal*), and an irregular “ratification procedure” is established to approve it (*triggering*). This is followed by actual approval of the change (*ratification*) and its entrenchment in the legal order (*consolidation*), prior to a return to normal politics. More recently, Ackerman has described an additional stage, *elaboration*, as taking place prior to ratification and involving the introduction of measures such as “landmark statutes, [and] judicial superprecedents” through which the informal change may take place.²²

These stages are a feature of each constitutional moment. In the 1780s, leading up to the passage of the US Constitution, the signaling step took place through a series of conferences, beginning with the gathering at Mount Vernon in 1785, in which a potential constitutional overhaul was contemplated; the result was to put the public on notice that major constitutional change might occur.²³ The next step was taken when, at the Philadelphia Convention in 1787, the Federalists both proposed a constitutional text and triggered an irregular ratification process by asserting (without formal legal basis) that a lowered threshold for approval would apply rather than the unanimity requirement under the Articles of Confederation.²⁴ Passage in that reduced number of states constituted ratification followed by consolidation through widespread acceptance of the Constitution.²⁵

Several decades later, the election of known abolitionist Abraham Lincoln again put the public on notice that constitutional change might be on the cards – this time by signaling the possibility of an anti-slavery reform.²⁶ The prospect of such a change became more concrete with President Lincoln’s Emancipation Proclamation (followed by congressional proposal of the Thirteenth Amendment), and, after Lincoln’s assassination, President Andrew Johnson’s triggering of an unconventional ratification process involving pressuring southern states to ratify the amendment in order to be readmitted to the Union.²⁷ Following successful passage, the change was consolidated by way of a federal proclamation from Secretary of State William Seward announcing it had been approved, and congressional acquiescence in the result.²⁸

Similarly, in 1865, the potential for constitutional change was signaled by the refusal to seat southerners in Congress, and clashes between the Republicans in Congress and President Johnson over civil rights legislation.²⁹ Over the objections of President Johnson, the ardently abolitionist Republican Congress proposed the Fourteenth Amendment and, after success in the 1866 election, triggered an informal process by again pressuring the south to accept it, a tactic that reached its height with the redeployment of Union troops to the conquered states.³⁰ Following these moves, ratification of the amendment took place once again with passage in the states and consolidation of what had taken place resulted from yet another resounding Republican victory in the election in 1868.³¹

Entering the 20th century, a major constitutional change is said to have begun with the signaling election of a reformist Franklin Roosevelt in 1932, and President Roosevelt’s New Deal proposals (refined in response to judicial critiques).³² The 1936 election amounted to a trigger of informal change, because Roosevelt proposed to enact a series of major economic reforms legislatively despite the continuing constitutional objections of the Supreme Court, rather than committing to taking the formal route as some called for him to do – amending the Constitution

²² *WTP3*, *supra* note 1, at 44-6; *WTP2*, *supra* note 1, at 49 (proposal and triggering), 127 (signaling), 238 (consolidation). *See also WTP1*, *supra* note 1, at chs. 9, 10 (on the theoretical foundations of such periods of higher lawmaking compared to normal politics).

²³ *WTP2*, *supra* note 1, at 41-9.

²⁴ *Id.* at 49-57.

²⁵ *Id.* at 57-65.

²⁶ *Id.* at 126-7.

²⁷ *Id.* at 130-4, 136-141.

²⁸ *Id.* at 124, 141-50, 150-7.

²⁹ *Id.* at 166-73.

³⁰ *Id.* at 173-4, 186-8, 198-205.

³¹ *Id.* at 234-8.

³² *Id.* at 281-4, 286-306.

through Article V to overcome these objections.³³ Following the decisive victory of the Democrats in this election, the change came to be ratified by the Court's "switch in time" in 1937, and consolidated by President Roosevelt's decisive re-election to a third term in 1940.³⁴

In his more recent work, Ackerman traces a 1960s civil rights constitutional moment from the signaling of reform by the decision of the Supreme Court in *Brown v. Board of Education* in 1955. This moment continues with the proposal and passage of transformative civil rights reforms championed by President Lyndon Johnson, and the triggering of an informal process in the 1964 elections by which the reforms would continue to be pursued legislatively despite their disputed constitutionality (with the Supreme Court's upholding of the *Civil Rights Act of 1964* after the election constituting an "elaboration").³⁵ In an interesting interpretive turn, Ackerman contends that ratification of these changes only occurred when a supportive member of the other party, Richard Nixon, was elected president in 1968, and consolidation occurred only as a result of policies (including some additional civil rights legislation) under the Nixon presidency.³⁶

Despite its cogency as a means of explaining how formally questionable constitutional amendments have been admitted to constitutional orthodoxy, Ackerman's theory is not without its critics. Michael McConnell has argued that the theory is under-inclusive – he has written that it ignores the end of Reconstruction and potentially other situations.³⁷ Further, the theory has applied only to "extremely infrequent" change, covering a limited number of moments in US constitutional history so far.³⁸ However, for the purposes of this article, we put aside objections to Ackerman's theory, and seek to consider whether – assuming that it can be shown to be persuasive for the US – the theory in fact has broader global relevance. In fact, not only is Ackerman's the leading theory of informal change in the US, it also has the most plausibility of the available options as a lens through which to analyze Japan's recent experience with Article 9. The Supreme Court of Japan to date has had limited involvement in interpreting the scope of Article 9, in ways that make Strauss's account of common law constitutionalism of limited relevance.³⁹ There has been no national referendum, or direct exercise of popular or "constituent" power, that would give plausibility to Amar's account.⁴⁰ There has also been no attempt by Abe to rely on ambiguities within Article 9(2), or other textual provisions, in a way that would allow for a successful workaround, rather than more direct form of change.

II ARTICLE 9 and Informal Constitutional Change?

Article 9 is perhaps the most famous provision of the 1947 Constitution, earning it the admiring moniker of "peace constitution" among its supporters, while attracting in equal measure the ire of generations of conservative reformers.⁴¹ To situate the discussion of the Abe government's reforms, it is necessary to explore the text and effect of the article, and its history. In this context, the Abe government's endorsement of collective self-defense arguably represents the most dramatic shift in the understood meaning of Article 9 since the creation of the SDF.

(a) *The Text and History of Article 9*

³³ *Id.* at 306-11.

³⁴ *Id.* at 350-9.

³⁵ *WTP3*, *supra* note 1, at 51, 64-6, 66-9, 73-6.

³⁶ *Id.* at 76-78, 218-23.

³⁷ Michael McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 115-16 (1994).

³⁸ Dixon, *supra* note 13, at 344.

³⁹ It might, of course, be possible to adapt the theory to apply to the working of the Cabinet Law Bureau, but that is a question we leave for others/for another day.

⁴⁰ Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89 (Sanford Levinson ed., 1995).

⁴¹ See, e.g., Yamauchi Toshihiro, *Gunning for Japan's Peace Constitution*, 39 JAPAN Q. 2 (1992); Hiroshi Kaihara, *Contemporary Conservative Thoughts in Japan: Conservative Views on Morality, History and Social Issues*, 9 INT'L RELATIONS OF THE ASIA-PACIFIC 339 (2009).

Article 9 of the Constitution contains two paragraphs. Article 9(1) renounces war: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.” Article 9(2) prohibits war potential: “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”⁴² Although vaguely worded, the article appears, on its face, to deny Japan any right to make recourse to military force or to possess military forces. In fact, however, Article 9(1) has long been read as not negating Japan’s *individual self-defense* – meaning that Japan remains able to defend itself in the event of a direct attack.

The history of Article 9 dates to the post-WWII period. In 1946, General MacArthur, Supreme Commander for the Allied Powers (“SCAP”) in Japan, grew dissatisfied with the Japanese government’s conservative proposals for democratic constitutional reform, and rather extraordinarily directed his military staff to draft a model constitution to provide to the Japanese.⁴³ The model was adopted by the Japanese Cabinet, reportedly with deep reluctance, and passed the Diet, being enacted on 3 May 1947.⁴⁴ The origins of Article 9 itself are vague: MacArthur was the assumed author, but he claimed later that the pacifistic Japanese Prime Minister at the time, Kijuro Shidehara, suggested it to him.⁴⁵ A more unequivocally Japanese addition to Article 9 came from the Diet, which passed the Ashida Amendment, adding a prefatory phrase to the prohibition of war potential in Article 9(2) that would later be relied upon to enable rearming that was said to be purely defensive.⁴⁶

In initial Diet debates over adoption of the Constitution, the Japanese government adopted the face value interpretation of Article 9 as prohibiting war in all circumstances, including self-defense.⁴⁷ However, this stance ultimately proved incompatible with the exigencies of the Cold War. With the outbreak of the Korean War in 1950, MacArthur redeployed most US troops that had been serving in the occupation of Japan. To protect Japan, he ordered the creation of a 75,000 person “National Police Reserve”, which was renamed the SDF in 1954.⁴⁸ Accordingly, the government reversed itself and began putting forward the view that Article 9 was compatible with arming for self-defense only.⁴⁹ Growing US-Japan security cooperation through treaties in 1952 and 1960 further entrenched this view, with the latter treaty stipulating, at America’s insistence (having moved a long way from insisting on Japanese pacifism), that Japan would contribute militarily to its own defense.⁵⁰

The textual basis for this reading is the silence of the provision on the issue of self-defense. In Article 9(2), the prefatory phrase “In order to accomplish the aim of the preceding paragraph” has been taken to mean that armament is only prohibited *in order to achieve the prohibition in the first paragraph* – namely the renunciation of war “as a sovereign right of the nation and the threat or use of force as a means of settling international disputes”. Consequently, armament limited to the “minimum necessary” for self-defense remains valid on this interpretation.⁵¹

⁴² Japanese Constitution, art. 9.

⁴³ Charles Kades, *The American Role in Revising Japan’s Imperial Constitution*, 104 POL. SCI. Q. 215, 222-8 (1989). For criticism of the process, see Robert Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980, 1008-10 (1956).

⁴⁴ Ward, *supra* note 43, 1002-5; JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 83-4 (1999).

⁴⁵ Klaus Schlichtmann, *The Ethics of Peace: Shidehara Kijuro and Article 9 of the Constitution*, 7 JAPAN FORUM 43, 49-53 (1995).

⁴⁶ Theodore McNelly, *The Renunciation of War in the Japanese Constitution*. 77 POL. SCI. Q. 350, 370-2 (1962). On the Japanese contribution to Article 9, see Koseki Shoichi, *Japanizing the Constitution*, 35(3) JAPAN Q. 235, 236-8 (1988).

⁴⁷ James Auer, *Article Nine of Japan’s Constitution: From Renunciation of Armed Force “Forever” to the Third Largest Defense Budget in the World*, 53 L. & CONTEMPORARY PROBLEMS 171, 175-6 (1990). See also RAY MOORE AND DONALD ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* 307-8 (2002).

⁴⁸ Auer, *supra* note 47, at 176-9.

⁴⁹ *Id.* at 178.

⁵⁰ *Id.* at 176, 179.

⁵¹ Auer, *supra* note 47, at 178; Theodore McNelly, *The Renunciation of War in the Japanese Constitution*, 13 ARMED FORCES & SOCIETY 81, 83-5 (1986).

Japanese courts have largely deferred to the government's interpretation of Article 9(2) in this context. In the 1959 *Sunagawa* case, the Supreme Court rejected a challenge to American bases in Japan under Article 9(2) on the basis that they were not Japanese but American "war potential". It also suggested that Article 9 questions were "political", such that the Court would be reluctant to intervene except in cases of "clear" unconstitutionality, and affirmed in dicta that Japan retained a right to self-defense under Article 9(1).⁵² More recently, courts have used procedural barriers to avoid ruling on the issue. The SDF was held unconstitutional by a Sapporo District Court judge in the 1973 *Naganuma* case, but the decision was overturned on appeal by the Sapporo High Court on both self-defense and standing grounds, and ultimately by the Supreme Court on the basis of standing.⁵³

The post-Cold War period saw a period of renewed controversy over Article 9. During the Gulf War, Japan cited Article 9 and did not send any troops; its financial contribution of US\$13 billion was ridiculed as "chequebook diplomacy".⁵⁴ This embarrassment led to a reconsideration of Japan's participation in multilateral missions, and resulted in the passage of a peacekeeping law in 1992 that sought to sidestep Article 9(1) by enabling deployment of the SDF abroad in non-combat roles,⁵⁵ and the broadening of Japan's regional security role under the 1997 US-Japan defense guidelines.⁵⁶ Since then, the SDF has participated in a number of peacekeeping missions, in tension with the existing understanding of Article 9(1).⁵⁷ The rise of international terrorism led to additional "non-combat missions", with Japan providing refueling support in Afghanistan and peacekeeping and reconstruction in Iraq in the 2000s.⁵⁸

In addition to the rising prominence of multilateral missions, Japan's defense planners now face problems closer to home. For a number of years, the People's Republic of China's military budget has been rapidly increasing, including a 10% rise for the 2015 budget.⁵⁹ The boosted military potential of Japan's giant neighbor has been matched by growing assertiveness, with China in disputes with most states in East Asia, including Japan, about its claims for vast swathes of maritime territory.⁶⁰ Alarming for Japan, China frequently adopts a posture critical to Japan and has whipped up anti-Japan sentiment among its population.⁶¹ An additional security challenge is North Korea,

⁵² Saiko Saibansho [Supreme Court] 16 December 1959, 13 *Saiko Saibansho Keiji Hanreishu* [Keishu] 3225 (grand bench) ('*Sunagawa Case*'). See also Alfred Oppler, *The Sunakawa Case: Its Legal and Political Implications*, 76 *POLITICAL SCIENCE QUARTERLY* 241, 247-50 (1961).

⁵³ Sapporo Koto Saibansho [Sapporo High Court] 5 August 1976, 27 *Gyosei Jiken Saiban Reishu* [Gyosai Reishu] 1175, affirmed by Saiko Saibansho [Supreme Court] 9 September 1982, 36 *Saiko Saibansho Minji Hanreishu* [Minshu] 1679 (1st petty bench) ('*Naganuma Case*'). See also Robert Seymour, *Japan's Self-Defense: The Naganuma Case and Its Implications*, 47 *PACIFIC AFFAIRS* 421, 428-30 (1975).

⁵⁴ Aurelia George, *Japan's Participation in UN Peacekeeping Operations: Radical Departure or Predictable Response?*, 33 *ASIAN SURVEY* 560, 564 (1993); Robert Funk, *Japan's Constitution and UN Obligations in the Persian Gulf War: A Case for Non-Military Participation in UN Enforcement Efforts*, 25 *CORNELL INT'L L. J.* 363, 367 (1992).

⁵⁵ Shotaro Hamura & Eric Shiu, *The Japanese Constitution and the Gulf War*, 44 *INT'L & COMP. L. Q.* 405, 427-8 (1995).

⁵⁶ Chris Ajemian, *The 1997 US-Japan Defense Guidelines under the Japanese Constitution and Their Implications for US Foreign Policy*, 7 *PACIFIC RIM L. & POL. J.* 323, 337-42 (1998); Edward Southgate, *From Japan to Afghanistan: The US-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, 151 *U. PA. L. REV.* 1599, 1616-19 (2003).

⁵⁷ See, e.g., Ronald Bruce St John, *Japan's Moment in Indochina: Washington Initiative ... Tokyo Success*, 35 *ASIAN SURVEY* 668 (1995); HUGH DOBSON, *JAPAN AND UNITED NATIONS PEACEKEEPING: NEW PRESSURES, NEW RESPONSES* chs. 5-7 (2003); Katsumi Ishizuka, *Japan's Policy towards UN Peacekeeping Operations*, 12 *INT'L PEACEKEEPING* 67 (2005).

⁵⁸ Southgate, *supra* note 56, at 1619-24; Leszek Buszynski, *Japan's Security Policy in the Koizumi Era*, 2(3) *SECURITY CHALLENGES* 93, 95-6 (2006).

⁵⁹ *China Military Budget "To Rise 10%"*, BBC NEWS, Mar. 4, 2015, <http://www.bbc.com/news/world-asia-china-31706989>.

⁶⁰ See, e.g., John Mearsheimer, *China's Unpeaceful Rise*, in *THE REALISM READER* (Colin Elman & Michael Jensen (eds), 2014) 464; DAVID KANG, *CHINA RISING: PEACE, POWER, AND ORDER IN EAST ASIA* (2007).

⁶¹ See, e.g., James Reilly, *China's History Activists and the War of Resistance against Japan*, 44 *ASIAN SURVEY* 276 (2004); Parks Coble, *China's "New Remembering" of the Anti-Japanese War of Resistance, 1937-1945*, 190 *CHINA QUARTERLY* 394 (2007).

which acquired nuclear weapons in 2006, and is viewed as directly threatening Japan with its missiles.⁶²

(b) *Abe Government Amendments (2013-2015)*

Despite the longstanding stability of the “self-defense” interpretation of Article 9(1), it has always been controversial on both sides of the political spectrum. Japanese conservatives believe that the article imposes excessive restrictions on Japan such that it cannot be a “normal” nation with appropriate security responsibilities, and have made sporadic, unsuccessful attempts to revise it; the Hatoyama government was notably unsuccessful in an attempt at formal revision in 1954.⁶³ In contrast, many on the left are critical of the self-defense interpretation, opposing rearmament and the presence of American military bases on Japanese soil.⁶⁴ The Japan Socialist Party has thus been one of the key forces that has historically blocked attempts to alter the terms of Article 9.⁶⁵

More recently, however, changes in the region have set the scene for a push by the LDP to revise the dominant interpretation of Article 9(1), to allow Japan to engage in forms of *collective* self-defense. This goal was supported by the government of Junichiro Koizumi in the early 2000s,⁶⁶ but the defeat in 2009 of the LDP by the center-left Democratic Party of Japan (“DPJ”) temporarily took the issue off the agenda. However, upon the return to power of the LDP in 2012, Prime Minister Shinzo Abe soon revived the question: as an ally of Koizumi, and grandson of former Prime Minister Nobusuke Kishi, who pushed for an expanded Japanese defense role in the 1950s – Abe has long been associated with the nationalist side of Japanese politics.⁶⁷ On commencing his term, Abe wasted little time pursuing his reform goals, instructing the LDP’s internal working group on draft revisions that “[n]ow is the time for possible revision”.⁶⁸

After an abortive attempt at formal amendment in 2013, the Abe government shifted its attention to an informal executive reinterpretation of Article 9. On 14 May 2014, the Abe government’s Advisory Panel on Reconstruction of the Legal Basis for Security submitted a report to the government supporting the reinterpretation of Article 9(1).⁶⁹ The Abe government declared its intentions to act on the basis of the report in a press conference the following day.⁷⁰ The move immediately triggered pro-pacifism protests, and heated criticism from public figures, the media and academics.⁷¹

⁶² Christopher Hughes, *North Korea’s Nuclear Weapons: Implications for the Nuclear Ambitions of Japan, South Korea, and Taiwan*, 3 ASIA POLICY 75, 86-91 (2007).

⁶³ Isao Sato, *Comment: Revisionism during the Forty Years of the Constitution of Japan*, (1990) 53 LAW AND CONTEMPORARY PROBLEMS 97, 98 (1990). See also Robert Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan*, 24 J. ASIAN STUD. 401, 405 (1965).

⁶⁴ Auer, *supra* note 47, at 183.

⁶⁵ Ward, *supra* note 43, at 420-1.

⁶⁶ Christopher W Hughes, *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy*, 50 ORBIS 725, 726-7 (2006).

⁶⁷ Yuka Hayashi, *For Japan’s Shinzo Abe, Unfinished Family Business*, WALL STREET JOURNAL, Dec. 11, 2014, <http://www.wsj.com/articles/for-japans-shinzo-abe-unfinished-family-business-1418354470>; Reiji Yoshida, *Formed in Childhood, Roots of Abe’s Conservatism Go Deep*, JAPAN TIMES, Dec. 26, 2012, <http://www.japantimes.co.jp/news/2012/12/26/national/formed-in-childhood-roots-of-abes-conservatism-go-deep/>. His grandfather was also detained by the Allies as a “Class A” war criminal.

⁶⁸ Ayako Mie, *Abe Vows Again to Amend Article 9*, JAPAN TIMES, Feb. 16, 2013, <http://www.japantimes.co.jp/news/2013/02/16/national/politics-diplomacy/abe-vows-again-to-amend-article-9/>. For a draft of proposed amendments in Japanese published by the LDP in 2012, see Jiyuuminshutou [Liberal Democratic Party], *Nihon Kokkenpou Kaisei Souan [Japanese National Constitution Draft Amendments]*, Apr. 27, 2012, https://jimin.ncss.nifty.com/pdf/news/policy/130250_1.pdf.

⁶⁹ *Abe Panel’s Report Says Collective Self-Defense Already Covered by Article 9*, ASAHI SHIMBUN, May 14, 2014, https://ajw.asahi.com/article/behind_news/politics/AJ201405140028.

⁷⁰ *Abe Pushes Collective Self-Defense, Vows to Defend Pacifist Ideals in Constitution*, ASAHI SHIMBUN, May 15, 2014, https://ajw.asahi.com/article/behind_news/politics/AJ201405150060.

⁷¹ *Protesters Oppose “Destroying” Constitution as Ruling Coalition Starts Defense Talks*, ASAHI SHIMBUN, May 21, 2014, https://ajw.asahi.com/article/behind_news/social_affairs/AJ201405210030.

Despite the opposition, on 1 July 2014, Abe's Cabinet approved this "reinterpretation" of Article 9(1).⁷² Under this new interpretation, self-defense is no longer limited to when "an armed attack against Japan occurs". It now extends to any situation where three requirements are met. First, "an armed attack against a foreign country that is in a close relationship with Japan occurs". Second, and "as a result", the attack "threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness". Third, there are "no other appropriate means available to repel the attack and ensure Japan's survival and protect its people" and the use of force must be "the minimum extent necessary".⁷³ Despite the seemingly strict wording, Abe has suggested that even securing oil could come within "collective self-defense".⁷⁴ There are also indications that collective self-defense will not be limited to the US alliance.⁷⁵

In 2015, the Diet further approved 11 new bills that enshrined the Cabinet's reinterpretation.⁷⁶ The bills passed the lower house on 16 July 2015, with the support of the LDP and its coalition partner, Komeito.⁷⁷ They passed the upper house, after significant delay by the opposition, on 19 September,⁷⁸ and were promulgated on 30 September.⁷⁹ The new legislation they create also allows the SDF to provide logistical support to allies abroad and armed support when incidents threaten "the lives and survival of the Japanese nation".⁸⁰

III Article 9 and Constitutional Moments

Can the Abe government's informal Article 9(1) reform be justified under this framework as a foreign or global "constitutional moment"?⁸¹ Although Ackerman developed his analysis to explain US

⁷² *Cabinet Opens Door for SDF to Use Force Abroad; Abe Says Risk of War Lessens*, ASAHI SHIMBUN, Jul. 1, 2014, https://ajw.asahi.com/article/behind_news/politics/AJ201407010053.

⁷³ MINISTRY OF FOREIGN AFFAIRS OF JAPAN, CABINET DECISION ON DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN'S SURVIVAL AND PROTECT ITS PEOPLE (2014), *available at* http://www.mofa.go.jp/fp/nsp/page23e_000273.html (English translation). For the Cabinet decision in Japanese, see CABINET SECRETARIAT OF JAPAN, KUNI NO SONRITSU WO MATTOUSHI, KOKUMIN WO MAMORU TAME NO KIREME NO NAI ANZEN HONSHOU HOUSEI NO SEIBI NI TSUITE [ON THE DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN'S EXISTENCE AND PROTECT ITS PEOPLE] (Jul. 1, 2014), *available at* <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei.pdf>.

⁷⁴ *Abe Tells Ruling Coalition to Consider SDF Minesweeps in Middle East*, ASAHI SHIMBUN, Jun. 15, 2014, http://ajw.asahi.com/article/behind_news/politics/AJ201406150024. Conversely, junior coalition party Komeito has rejected this possibility. For the Diet discussion in Japanese of this point, see *Wagakuni oyobi Kokuaisaikai no Heiwa Anzen Housei ni Kansuru Tokubetsu Inkaikai Kaigiroku Dai 3 Gou [Special Committee Minutes on the Security Bills of the House of Representatives, Volume 3]* (May 27, 2015), *available at* http://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/029818920150527003.htm; *Sangiin Wagakuni oyobi Kokuaisaikai no Heiwa Anzen Housei ni Kansuru Tokubetsu Inkaikai Kaigiroku Dai 20 Gou [Special Committee Minutes on the Security Bills of the Upper House, Vol 20]* (Sep. 14, 2015), *available at* <http://kokkai.ndl.go.jp/SENTAKU/sangiin/189/0192/18909140192020.pdf>.

⁷⁵ *Sources: Abe Has No Intention of Limiting Collective Self-Defense to US*, ASAHI SHIMBUN, May 9, 2014, https://ajw.asahi.com/article/behind_news/politics/AJ201405090046.

⁷⁶ *Passage of Security Bills Marks Start of Rebuilding Japan's Democracy*, ASAHI SHIMBUN, Sep. 21, 2015, <https://ajw.asahi.com/article/views/editorial/AJ201509210058>. For the legislation in Japanese, see CABINET SECRETARIAT OF JAPAN, HEIWA ANZEN HOUSEI NO SEIBI NI TSUITE [ON THE PASSAGE OF PEACE AND SECURITY LEGISLATION] (2015), *available at* http://www.cas.go.jp/jp/gaiyou/jimu/housei_seibi.html.

⁷⁷ *Japan Lower House OKs Security Bills*, WALL STREET JOURNAL, Jul. 16, 2015, <http://blogs.wsj.com/japanrealtime/2015/07/16/japan-lower-house-oks-security-bills-2/>.

⁷⁸ *The Showdown That Obscured Japan's National Security Debate*, NIKKEI, Sep. 19, 2015, <http://asia.nikkei.com/Politics-Economy/Policy-Politics/The-showdown-that-obscured-Japan-s-national-security-debate>.

⁷⁹ *Communists Ready to Back DPJ Prime Minister to Scrap Security Legislation*, ASAHI SHIMBUN, Oct. 20, 2015, http://ajw.asahi.com/article/behind_news/politics/AJ201509290036.

⁸⁰ Jonathan Soble, *Japan Moves to Allow Military Combat for First Time in 70 Years*, NEW YORK TIMES, Jul. 16, 2015, <http://www.nytimes.com/2015/07/17/world/asia/japans-lower-house-passes-bills-giving-military-freer-hand-to-fight.html>.

⁸¹ We use the term global here figuratively rather than literally, to denote the global reach of the theory rather than a patient to transnational rather than national setting.

history, there is no particular reason that, similarly to other constitutional theories developed in the American context, it cannot have broader global application. Of course, since Ackerman offers an account of *democratic* change, countries without democratic elections or public debate cannot experience constitutional moments. Ackerman also draws a distinction with the UK's parliamentary system, under which the legislature has plenary power,⁸² making the concept of constitutional law-making less meaningful. However, Japan meets these threshold requirements: it is both a democratic country with regular elections,⁸³ and one with an entrenched, written constitution that limits legislative action.⁸⁴

Ackerman has also stressed that “[h]igher lawmaking ... is never a matter of a single moment; it is an extended process”,⁸⁵ which must allow opponents of change “a fair opportunity to organize their own forces”.⁸⁶ In this sense, it may also be somewhat premature to address this question in the Japanese context: the debate over Article 9 change continues in Japan, and how it is resolved will in large part inform the answer to the question in the longer term. But Abe's subsequent electoral successes also make it plausible to think that there has in fact been a constitutional moment authorizing an informal change to Article 9.

Approaching the question in these terms is further complicated by the prior question of what constitutes a valid *interpretation*, versus informal change to authoritative understandings of Articles 9(1) and (2).⁸⁷ The more dominant view among Japanese scholars, put forward by academics such as Yasuo Hasebe, is that the new interpretation of Article 9(1) as encapsulated in the 2014 Cabinet decision and the 2015 laws represents a distinct break from prior interpretations, including the authoritative reading by the Cabinet Law Bureau, and impermissibly strains the text of the provision.⁸⁸ Criticism has also focused on the breadth of the terms specified by the Cabinet for the

⁸² *WTP1*, *supra* note 1, at 254-7, 277-8.

⁸³ *See* Japanese Constitution, art. 21.

⁸⁴ Japanese Constitution, art. 81. *See generally* Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 *LOYOLA OF LOS ANGELES L. REV.* 603 (2008).

The relevance of analyses of informal change may also be bolstered in the US and Japan by the fact that both countries have Constitutions that (for different reasons) are regarded as difficult to amend by formal means. In the US, formal change requires a proposal by two-thirds vote in both houses of the US Congress or a convention of states called for by two-thirds of the states, followed by ratification by three-quarters of the states or conventions in three-quarters of the states: *see* United States Constitution, art. V. In Japan, the requirement is two-thirds approval in both houses of the Diet and a majority popular vote: *see* Japanese Constitution, art. 96. These features have led Astrid Lorenz to rank the US Constitution as the world's second hardest to amend and the Japanese as the tied fourth hardest: *see* Astrid Lorenz, *How to Measure Constitutional Rigidity* (2005) 17 *J. THEORETICAL POL.* 339, 358-59. Similarly, Arend Lijphart ranked both Japan and the United States in the top five in terms of difficulty, noting in particular the two thirds legislative supermajority requirement that is a feature of both systems: AREND LIJPHART, *PATTERNS OF DEMOCRACY* 220 (1999). *Compare, e.g.*, Donald Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237 (Sanford Levison ed., 1995); John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *L. & SOCIAL INQ.* 501 (1997).

⁸⁵ *WTP3*, 51.

⁸⁶ *WTP1*, 6.

⁸⁷ *Compare, e.g.*, Yasuo Hasebe, *The End of Constitutional Pacifism?*, 26 *WASH. INT'L L.J.* 125 (2017) (suggesting that the new interpretation is clearly an informal change in the prevailing authoritative interpretation); Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 *PAC. RIM L. & POL'Y J.* 99 (2017) (suggesting that it is within the bounds of a legitimate evolving interpretation of Art 9); Hitoshi Nasu, *Japan's New Security Legislation and the Right of Collective Self-Defence*, 92 *INT'L L. STUD.* 249 (2016).

⁸⁸ Hasebe, *supra* note 87. For discussion in Japanese about the way in which the reinterpretation breaks sharply with existing understanding or is unconstitutional, *see, e.g.*, Masaki Fujii, *Heiwa Shugi (Kenpou 9-jou) no Houkaishakuron [Law Interpretation Theory about the Pacifism of Constitution Article 9]*, 21 *J. SOCIAL & INFORMATION STUD.* 13 (2014); Onji Atsushi, *Shudanteki Jieiken to Kenpou Kaishaku ni Tsuite [The Right of Collective Self-Defense and Interpretation of the Constitution]*, 38 *KURUME SHIN-AI WOMEN'S COLLEGE BULLETIN* 85 (2015); Kiyoshi Sakaguchi, *Ikeda Sato Seikenki no Shudanteki Jieiken Kaishaku to 1972-nen Kenkai [The Japanese Government's Interpretation of the Right of Collective Self-Defense in the Ikeda and Sato Administrations and the 1972 Official View]*, 3 *KOKUSAI KOUGYOU SEISAKU KENKYUU [INTERNATIONAL*

exercise of collective self-defense.⁸⁹ The practitioner community has backed the critics – the Japan Federation of Bar Associations released a statement in 2015 indicating its view that the security bills were “in clear violation” of the Constitution⁹⁰ – as have former leaders of the Cabinet Legislation Bureau who testified in opposition to the bills before the Diet.⁹¹ US scholars such as Craig Martin have also argued that they represent a break from prior commitments to interpreting Article 9(1) in light of public international law norms.⁹²

Some Japanese scholars, however, have argued that the new policy is a legitimate interpretation of Articles 9(1) and (2), pointing in part to the policy considerations posed by a changing global, regional and historical context. Hitoshi Nasu, for instance, has argued that the distinction between individual and collective self-defense is flawed, and that increasing regional threats favor a broad interpretation of Article 9(1), which permits the relevant changes to the SDF’s role.⁹³ Eisuke Suzuki has described the prior Cabinet Legislation Bureau interpretation as “rigid” in light of new international realities.⁹⁴ Hajime Yamamoto has likewise argued that there is sufficient scope within the language of Article 9(1) to allow the SDF to engage in limited forms of collective as well as individual self-defense.⁹⁵ However, there is little question that these views are in the minority:

PUBLIC POLICY STUDIES] 1 (2016); YASUO HASEBE, KENSHOU: ANPO HOUAN [EXAMINATION OF THE SECURITY BILLS] (2015); YASUO HASEBE, ANPO HOUSEI KARA KANGAERU KENPOU TO RIKKENSHUGI, MINSHUSHUGI [CONSIDERING THE CONSTITUTION, CONSTITUTIONALISM, AND DEMOCRACY IN VIEW OF THE SECURITY LAWS] (2016); Masaru Kaneko, *Nihonkokukenpou to Abe Shinzou Naikaku Souridaijin no Sekkyokuteki Heiwashugi to Shuudanteki Jieiken* [The Japanese Constitution and Abe Government’s Active Pacifism and Collective Self-Defense], 48 RISSHOU HOUGAKU RONSHUU [RISSHO LAW REVIEW] 33 (2014). For background in Japanese on prior understandings of the scope of self-defense, see, e.g., TOSHIHIRO YAMAUCHI, HEIWA KENPOU NO RIRON [THEORY OF THE PEACE CONSTITUTION] ch. 3 (1992); NAOKI KOBAYASHI, KENPOU DAI KYUU-JOU [CONSTITUTION ARTICLE 9] 55-60 (1996).

⁸⁹ See Toshihiro Yamauchi, *Shudanteki Jieiken Younin no Kakugi Kettei no Mondaiten* [Critical Remarks about Cabinet Decision on Collective Self-Defense], 47 RYUUKOKU DAIGAKU HOUGAKKAI [RYUKOKU LAW REVIEW] 647 (2015).

⁹⁰ Susumu Murakoshi, *Statement Opposing the Bills to Revise National Security Policy*, JAPAN FEDERATION OF BAR ASSOCIATIONS (May 14, 2015),

<http://www.nichibenren.or.jp/en/document/statements/year/2015/150514.html>. For the statement in Japanese, see *Anzen Hoshou Housei Kaitei Houan ni Hantai Suru Kaichou Seimei*, NIHON BENGOSHI RENGOUKAI (May 14, 2015), <https://www.nichibenren.or.jp/activity/document/statement/year/2015/150514.html>.

⁹¹ See *Wagakuni oyobi Kokusaishakai no Heiwa Anzen Housei ni Kansuru Tokubetsu Inkaikai Kaigiroku Dai 13 Gou* [Special Committee on the Security Bills of the House of Representatives, Vol 13] (Jun. 22, 2016), <http://kokkai.ndl.go.jp/SENTAKU/syugiin/189/0298/18906220298013.pdf>; (Masahiro Sakata & Reiichi Miyazaki); *Sangiin Wagakuni oyobi Kokusaishakai no Heiwaanzenhousei ni Kansuru Tokubetsu Inkaikai Kaigiroku Dai 17 Gou* [Special Committee on the Security Bills of the Upper House, Vol 17] (Sep. 8, 2016),

<http://kokkai.ndl.go.jp/SENTAKU/sangiin/189/0192/18909080192017.pdf> (Masasuke Omori).

⁹² Craig Martin, *The Legitimacy of Informal Amendment and the “Reinterpretation” of Japan’s Constitutional War Powers*, 40 FORDHAM INT’L L. J. 2 (2016). For background on the scope of collective self-defense in international law from a Japanese scholarly standpoint, see SHINYA MURASE, JIEIKEN NO GENDAITEKI TENKAI [THE RIGHT OF SELF-DEFENSE IN THE CONTEMPORARY CONTEXT] ch. 2 (2007).

⁹³ See, eg, Nasu, *supra* note 87. See also Akira Mayama, *Kenpoteki Yousei ni yoru Shudan Jieiken Genteiteki Koushi no Hatsugen Keitai – Gaikoku Ryosui Soukai Oyobi Gaikokugun Kouhou Shien* [The Appearance of a Restricted Exercise of the Right of Collective Self-Defense under the Constitutional Requirements: Minesweeping in the Territorial Waters of a Foreign State and Logistical Support for Foreign Troops], 648 KOKUSAI MONDAI [INTERNATIONAL AFFAIRS] 16 (2016) (discussing issues with distinguishing between types of use of force). *But compare* Martin, *supra* note 92.

⁹⁴ Eisuke Suzuki, *Naikakuhouseikyoku no “Shuudanteki Jieiken” ni Kansuru Kaishaku wo Koete – Nichibei Anzen Hoshou Taisei no Saikentou e* [Beyond the Cabinet Legislation Office’s Interpretation of the Right of Self-Defense: The Need for Review of the U.S.-Japan Security Arrangements], 46 J. POLICY STUD. 27 (2014).

⁹⁵ Yamamoto, *supra* note 87.

the *Asahi Shimbun* conducted a survey of constitutional scholars in Japan in 2015 which indicated that only two out of 122 respondents considered the reform constitutional.⁹⁶

How one answers the question of validity will ultimately depend in part on one's theory of constitutional interpretation, or the relative emphasis placed in the process of construction on the text, history, and institutional practice behind Article 9. It is beyond the scope of this article fully to resolve this controversy. Notably, Ackerman's theory has applied both to changes that were somewhat overtly informal, such as the militarily coerced Reconstruction Amendments, and others that were less clearly so, such as the US Supreme Court's constitutional decisions relating to the New Deal and civil rights movement. However, each moment involved a dramatic shift in accepted constitutional understanding that took place without following the formal amendment process, in which claims of formality were at best highly debatable.⁹⁷ Since the current more dominant view among experts in Japan is that the reinterpretation of Article 9 is not formally valid, and in particular that it departs radically from decades of settled understanding of Article 9 without following the formal amendment process, we consider that the reinterpretation does in fact constitute informal change in the relevant Ackermanian sense. Accordingly, we ask whether it is plausible to regard the government's new interpretation as supported by informal constitutional change of the kind implicit in a true "constitutional moment".

Superficially, we suggest, there is in fact quite strong evidence to support the existence of a constitutional "moment" of this kind. The plausibility of this view is particularly apparent when applying Ackerman's six stage process, described above, to the Article 9 reform. On this view, it is possible to say that as early as 2006, Abe signaled his "long-cherished objectives of constitutional revision, [and] embrac[ing] of collective defense" for Japan.⁹⁸ In April 2012, the LDP also released draft proposals for constitutional revision, suggesting, among other steps, acknowledgment of the SDF in Article 9 and renaming it the "national defense military".⁹⁹ Following this signaling of the possibility of change, in 2014, the government's Advisory Panel on Reconstruction of the Legal Basis for Security proposed the new doctrine of collective self-defense, which the Cabinet later adopted, and triggered the irregular process of Cabinet reinterpretation followed by Diet passage of SDF legislation.¹⁰⁰ The Abe government then elaborated this change, on 1 July 2014, by approving a "reinterpretation" of Article 9 in accordance with the suggestion of the panel.¹⁰¹

The change was ratified by the Diet legislation in May 2015, via the passage of 11 statutes collectively referred to as "Peace and Security Preservation Legislation",¹⁰² which enshrined the Cabinet's reinterpretation by allowing the SDF to provide logistical support to allies abroad and armed support when incidents threaten "the lives and survival of the Japanese nation".¹⁰³ The recent electoral successes of the Abe government could also arguably be seen as a form of consolidation of these earlier changes.

⁹⁶ *Anpo Houan Gakusha Ankeeto [Security Laws Survey of Scholars]*, ASAHI SHIMBUN, Jul. 11, 2015, <http://www.asahi.com/topics/word/%E5%AE%89%E4%BF%9D%E6%B3%95%E6%A1%88%E5%AD%A6%E8%80%85%E3%82%A2%E3%83%B3%E3%82%B1%E3%83%BC%E3%83%88.html>.

⁹⁷ See, e.g., *WTP2*, *supra* note 1, at 93-4 (on how Ackerman's examples have some claim, albeit contentious, to legality).

⁹⁸ Paul Shinkman, *Experts: Japan's New PM Could Follow through on Tough Talk*, US NEWS, Dec. 17, 2012, <http://www.usnews.com/news/articles/2012/12/17/experts-japans-new-pm-could-follow-through-on-tough-talk>.

⁹⁹ Kazuo Yamagishi, *LDP Releases Conservative Draft for Constitutional Amendments*, ASAHI SHIMBUN, Apr. 28, 2012, http://ajw.asahi.com/article/behind_news/politics/AJ201204280065.

¹⁰⁰ *Japan PM Abe Calls for New Defence Law Interpretation*, BBC NEWS, May 15, 2014, <http://www.bbc.com/news/world-asia-27420077>.

¹⁰¹ Norihiro Kato, *Japan's Break with Peace*, THE NEW YORK TIMES, Jul. 16, 2014, http://www.nytimes.com/2014/07/17/opinion/norihiro-kato-japans-break-with-peace.html?_r=0.

¹⁰² Soble, *supra* note 80; Jake Adelstein, *In Japan, a Plan to Expand Military's Powers Faces Growing Resistance*, LOS ANGELES TIMES, Jun. 30, 2015, <http://www.latimes.com/world/asia/la-fg-japan-military-20150630-story.html>.

¹⁰³ Soble, *supra* note 80. The bills passed the Lower House on 16 July 2015, with the support of the LDP and its coalition partner, Komeito. The bills were then debated for two months in Upper House, and passed on 19 September 2015 after further opposition delaying tactics.

Ackerman further suggests that for a constitutional moment to occur, the public must consider proposed changes “with a seriousness that they do not normally accord to politics”.¹⁰⁴ Consequently, in each of Ackerman’s examples, the constitutional moment takes place with a strong element of open debate or contestation in the public sphere. Such contestation often involves civil society, including the news media, popular movements and political parties, and opposition to the reform push by other government institutions, including the Supreme Court, state bodies or even the US presidency.

This pre-condition was also arguably met for the recent changes to Article 9: the process involved a degree of public debate that was quite unusual by Japanese standards. For instance, protests occurred throughout Japan between 2014 and 2016. They drew high numbers, with one protest on 30 August 2015 outside the National Diet Building in Tokyo attended by 120,000 people, according to the organizers, while approximately 200 other protests took place around the country.¹⁰⁵ A protest in May 2016 at the Rinkai Disaster Prevention Park in Tokyo reportedly drew 50,000 demonstrators,¹⁰⁶ and a protest in Okinawa in June 2016 was attended by more than 65,000 people.¹⁰⁷ Other demonstrations took place in cities across the country.¹⁰⁸ Protesters have expressed passionate opposition, worrying that “Japan is slipping back into its pre-World War II state”, or “becoming like America”.¹⁰⁹ Conversely, nationalists have protested in smaller numbers in support of the changes, with one such event taking place in front of the Diet on 24 July 2015.¹¹⁰ Significantly, such protests have been allowed to occur without state interference.

Complementing the protests has been the advocacy of civil society groups. Grassroots organizations like Mothers against War have appeared, bearing anti-war posters with a message for the government: “We won’t let you kill anyone’s child”.¹¹¹ The Save Article 9 movement was initiated in the first decade of the 21st century by nine Japanese intellectuals and scholars, including

¹⁰⁴ *WTP1*, *supra* note 1, at 6. See also the discussion of “mobilized deliberation” indicating this to be an express requirement of Ackerman’s theory: at 285-8.

¹⁰⁵ Tomohiro Osaki, *Thousands Protest Abe, Security Bills at Diet Rally*, JAPAN TIMES, Aug. 30, 2015, <http://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.V7Z40Jh9600>.

¹⁰⁶ *Mass Protests in Japan as Battle over Changes to Pacifist Constitution Looms*, RT, May 3, 2016, <https://www.rt.com/news/341719-japan-article-constitution-protest/>.

¹⁰⁷ Brian Padden, *Anti-American Protests in Japan Reflect Opposition to Abe’s Ruling Party*, VOICE OF AMERICA, Jun. 21, 2016, <http://www.voanews.com/content/anti-american-protests-in-japan/3385091.html>.

¹⁰⁸ For coverage in the Japanese language media of other protests in 2016, *see, e.g., Anpo Housei Demo 9-jou, Donararetemo Tatsu [Security Legislation Article 9 Protest, Shouted at but Standing]*, ASAHI SHIMBUN, May 1, 2016, <http://www.asahi.com/area/hokkaido/articles/MTW20160502011570001.html> (Sapporo); “*Kaketsuke Keigo, Zettai Hantai*” *Kyouto de Shiminra Demo [“A Bodyguard Hurrying Over, Absolutely Not”: Protest in Kyoto]*, KYOTO SHIMBUN, Nov. 19, 2016, <http://www.kyoto-np.co.jp/politics/article/20161119000167> (Kyoto); *Anpohou Seiritsu kara Hantoshi, Hantaiha ga Shuukai Zenkoku Kakuchi de Demo [Half a Year after Passage of Security Laws, Opposition Gathers in Protests throughout Country]*, ASAHI SHIMBUN, Mar. 19, 2016, <http://www.asahi.com/articles/ASJ3M5QBNJ3MUTIL024.html> (Nagoya); *Hyougo kara “9-jou Kowasu na!” [From Hyogo, “Don’t Break Article 9!”]*, MAINICHI SHIMBUN, May 4, 2016, <http://mainichi.jp/articles/20160504/dtl/k28/040/302000c> (Kobe); *Daremo Senjou ni Okuranai: Minami Suudan Hahei Hantai Aomori Shuukai [We Won’t Send Anyone to the Battlefield: Aomori Meeting Opposes South Sudan Deployment]*, SHIMBUN AKAHATA [RED FLAG NEWS], Oct. 31, 2016 http://www.jcp.or.jp/akahata/aik16/2016-10-31/2016103101_01_1.html (Aomori); *Anpohou Haishi Uttae Shiminra 1100-nin Demo Kyuujou no Kai [Calling for Repeal of Security Laws, 1100 People in Article 9 Demonstration]*, KAHOKU SHIMPOU, May 1, 2016, http://www.kahoku.co.jp/tohokunews/201605/20160501_13038.html (Osaki). Particularly colorfully, in Osaka, a yearly parade for peace took place in which participants sang the story of Article 9 to the melody of Beethoven’s 9th Symphony: *Daiku de 9-jou Piisu Pareedo [Article Nine Peace Parade with the Ninth]*, MAINICHI SHIMBUN, Dec. 21, 2016, <http://mainichi.jp/articles/20161221/dtl/k27/040/401000c>.

¹⁰⁹ Padden, *supra* note 108; Adelstein, *supra* note 103.

¹¹⁰ *Best of News*, GETTY IMAGES, Jul. 24, 2015, <http://www.gettyimages.com.au/detail/news-photo/people-hold-japanese-national-flags-during-a-pro-government-news-photo/481753820>.

¹¹¹ *Anpohanrenhou ni Hantai Suru Mama no Kai @ Chiba [Mothers Association Opposing the Security Laws in Chiba]*, CHRISTIANITY TODAY, Nov. 22, 2016, <http://www.christiantoday.co.jp/articles/17771/20151122/mothers-against-war-article-9.htm>; Adelstein, *supra* note 103.

Oda Mokato, a well-known author and scholar, and Oe Kenzaburo, a Japanese author and Nobel Prize recipient, and is now a nationwide civil society movement with over 7,000 groups of volunteer members which has organized protests in response to Abe's reforms. Save Article 9 groups have even been established in the US and Canada.¹¹² The Students Emergency Action for Liberal Democracy (SEALDs) has been active in organizing and engaging in protests against the revision of Article 9, and has widespread support across the country, with more than 60,000 Twitter followers and 34,000 likes on Facebook.¹¹³ Over 600,000 people signed a petition for the Nobel Peace Prize bid by the prominent anti-revision Article 9 Association (though it was ultimately unsuccessful).¹¹⁴

Public figures have spoken out, including Nobel Prize-winning novelist Kenzaburo Oe and a former Chief Justice of the Supreme Court.¹¹⁵ Japanese celebrities joined the fray, such as Takeshi Kitano, who called for "a peaceful Japan that protects its constitution".¹¹⁶ Legal academics have also expressed opposition, with the anti-reform testimony of constitutional scholars before the Diet on 4 June 2015 in particular sparking a media storm.¹¹⁷ All three of the scholars expressed the view that collective self-defense was "unconstitutional", frustrating the LDP and dealing a blow to the optics of the reform.¹¹⁸ Such features point towards an engaged citizenry, and support the view that a legitimate constitutional moment has occurred.

This degree of public contestation is also unusual for Japan. Indeed, it flies in the face of quite direct and overt attempts by the Abe government to limit public criticism of its policies in this context: in contrast with Ackerman's examples of open debate,¹¹⁹ the Abe government has threatened to revoke the broadcasting licenses of "overly critical networks", abusing a legal loophole,¹²⁰ and appointed an ally to run Japan's national broadcaster, who obligingly promised "that the network will not deviate too far from the government's views".¹²¹ In April 2015, a prominent political

¹¹² Millie Creighton, *Civil Society Volunteers Supporting Japan's Constitution, Article 9 and Associated Peace, Diversity, and Post-3.11 Environmental Issues*, 26 INT'L SOC. THIRD-SECTOR RESEARCH 121 (2015).

¹¹³ Justin McCurry, *New Generation of Japanese Anti-war Protesters Challenge Abe*, THE GUARDIAN, Sep. 16, 2015, <https://www.theguardian.com/world/2015/sep/16/japanese-anti-war-protesters-challenge-shinzo-abe>; Lisa Torio, *Japan Is Scrapping Its Pacifist Constitution, Despite Massive Public Opposition*, THE NATION, Dec. 16, 2015, <https://www.thenation.com/article/japan-is-scrapping-its-pacifist-constitution-despite-massive-public-opposition/>. For background in Japanese on the role played by SEALDs and other social movements, see Sanae Yamamoto, *Anzen Hoshou Kanren Houan to Shakai Undou – SEALDS wo Chuushin ni [Security Related Laws and Social Movements Focused on SEALDs]*, 62 BUKKYOU DAIGAKU SHAKAI GAKUBU RONSHUU [BUKKYOU UNIVERSITY JOURNAL OF SOCIOLOGY] 75 (2016).

¹¹⁴ *Article 9 Supporters Disappointed to Miss Nobel Peace Prize*, JAPAN TIMES, Oct. 9, 2015, <http://www.japantimes.co.jp/news/2015/10/09/national/article-9-supporters-disappointed-to-miss-nobel-peace-prize/>. See also in Japanese in relation to bids for Nobel recognition of Article 9 and its supporters, *Nooberu Heiwa Shou "Kyuujou wo Hoji Suru Nihon Kokumin" wa Fuka [Nobel Prize for "the Japanese People, Who Preserve Article 9" Is Wrong]*, TOKYO SHIMBUN, MAR. 4, 2017, <http://www.tokyo-np.co.jp/article/world/list/201703/CK2017030402000140.html> (on the possibility of "the Japanese people" being nominated for this prize).

¹¹⁵ Shuichi Yutaka, *Oe Vows to Continue Work of Late Article 9 Torchbearer Okudaira*, ASAHI SHIMBUN, Apr. 4, 2015, http://ajw.asahi.com/article/behind_news/social_affairs/AJ201504040036; *Ex-Chief Justice Blasts Abe's Lack of Respect for Constitutionalism*, ASAHI SHIMBUN, Sep. 3, 2015, http://ajw.asahi.com/article/behind_news/politics/AJ201509030023.

¹¹⁶ *Geinoujin ga "Kenpou 9-jou wo Mamore" to Shuchoushihajimeta! [Performers Start Advocating to "Protect Article 9"!]*, LITERA, May 3, 2016, http://lite-ra.com/2016/05/post-2211_2.html.

¹¹⁷ Martin, *supra* note 92.

¹¹⁸ For local press coverage of this moment, see *Shuudantekijieiken Koushi, Zensankounin ga "Iken" Shuwin Kenpoushin [On Exercise of Collective Self-Defense, All Witnesses Say "Unconstitutional" in Lower House Constitutional Hearing]*, NIHON NIKKEI SHIMBUN, Jun. 4, 2015, http://www.nikkei.com/article/DGXLASF04H3U_U5A600C1PP8000/; *"Kokumin wo Gurou" "Chinmyou na Inyou" Hasebe Kobayashi Ryoushi no Itou Hihan Shouhou [“A Mockery of the People” “A Bizarre Reference” – Hasebe and Kobayashi Both Criticize Governing Party]*, MAINICHI SHIMBUN, Jun. 15, 2015, <http://mainichi.jp/articles/20150615/mog/00m/010/012000c>.

¹¹⁹ See, e.g., WTP2, *supra* note 1, at 324-8.

¹²⁰ Martin Fackler, *Effort by Japan to Stifle News Media Is Working*, NEW YORK TIMES, Apr. 26, 2015, <http://www.nytimes.com/2015/04/27/world/asia/in-japan-bid-to-stifle-media-is-working.html>.

¹²¹ *Id.*

commentator announced live on television that he had been fired by network executives due to political pressure.¹²² Due to such trends, Japan has also fallen 50 places in a ranking of press freedom by Reporters without Borders.¹²³ Public protest and engagement on the issue, however, have nonetheless been both broad and significant.

Is this sufficient to establish the legitimacy of recent informal attempts at constitutional change in Japan? We suggest it is not. When applying the theory of constitutional moments internationally, it is important also to consider the substantive conditions, which may be taken for granted in the American context, that are present in Ackerman's examples and analysis – specifically, the existence of robust political competition over the outcome. In the case of Article 9, we suggest that there was inadequate political competition around the proposed changes to ensure the kind of meaningful public choice that defines an Ackerman-style constitutional moment.

In the US context, Ackerman emphasizes that in a constitutional moment, a “regular election [is turned into] into one of the greatest higher lawmaking events of American history” because the public will vote with an eye to approving or disapproving of the informal change.¹²⁴ Because of the level of emphasis placed on an ordinary vote in Ackerman's theory, the *meaningfulness* of the electoral choice is of major significance.

If there is robust electoral competition between political parties, the return of a particular government or representative to office will generally reflect an all things considered judgment about the wisdom and appropriateness of their actions in government, or the legislature – including in supporting a proposed informal change. Conversely, if a single political party dominates electoral politics, the return of that party to power will often simply reflect the absence of any credible alternative – or a fear among voters that if they vote for the political opposition, it will damage the access of their community (or constituency) to various social and economic resources, while having little impact on the overall electoral result. Equally, if all major parties on the electoral landscape support the change, it follows that the significance of public approval of the change cannot be attributed to the vote. To speak of a particular election as validating a prior informal change will thus clearly also be a pure fiction, which bypasses the true significance of democratic consent.¹²⁵

The importance of meaningful political competition is reflected in each of Ackerman's examples, in which a potential change has been vigorously contested by *credible* political forces. In the 1780s, it was the Anti-Federalists, who counted among their members such prominent political leaders as Patrick Henry, Richard Henry Lee, George Clinton and Melancton Smith, who opposed the new constitution.¹²⁶ In the 1860s, the Republicans faced the strong Democratic opposition in putting forward the Thirteenth Amendment.¹²⁷ Equally, in Reconstruction, no less a figure than President

¹²² *Id.* See also in Japanese on this event, “Hou Sute” *Fukisoku Hatsugen de Tere Asa Kaichou Chinsha* [“Hodo Station”: *Asahi Television President Apologizes for Irregular Statements*], SANKEI, Mar. 31, 2015, <http://www.sankei.com/entertainments/news/150331/ent1503310009-n1.html>.

¹²³ *Japan's Media Are Quailing under Government Pressure*, THE ECONOMIST, May 16, 2015, <http://www.economist.com/news/asia/21651295-japans-media-are-quailing-under-government-pressure-speak-no-evil>.

¹²⁴ WTP2, *supra* note 1, at 19.

¹²⁵ Political competition also has significance in ensuring that there is sufficient clarity at the *proposal* stage. For ratification of a proposed informal change by the legislature to be meaningful, there must be some minimum degree of clarity regarding the proposed scope of such change: ratification implies agreement to a defined prior proposal, not an at-large delegation of power to future decision-makers. This also means that proponents of change must articulate and define the proposed scope of change, with some degree of precision. This, however, will also be extremely unlikely without some degree of competition among political parties in the legislature: absent competition of this kind, there will be little incentive for proponents of change to engage in any real process of clarification or delimitation. Doing so will generally be unnecessary to ensuring support for the proposed change, but potentially limit the future freedom of action of the government. Thus, to ensure that informal change is adequately defined or delimited even at the ratification stage, there must be some real degree of contestation within the legislature.

¹²⁶ WTP2, *supra* note 1, 49-63. See also SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-828 (1999).

¹²⁷ WTP2, *supra* note 1, 132-5.

Johnson broke with the Congressional Republicans to oppose the amendment and campaign for his own slate of candidates to oppose it. (Following the resounding Republican victory and Johnson's impeachment, the President acquiesced.)¹²⁸

Viable political competition was equally evident in changes in the 1930s and 1960s, as in each case one of the two major American political parties, the Republican Party, stood against the proposed change. The Republicans opposed Roosevelt's New Deal changes in the 1936 election, with the party's presidential nominee Alf Landon critiquing them as an unacceptable break from constitutional tradition that "str[uck] at the heart of the American form of government".¹²⁹ Facing this clear choice, Americans "gave Roosevelt and the New Deal Congress the greatest victory in American history", validating the proposed change.¹³⁰ In the 1964 election, Republican presidential nominee Barry Goldwater denounced the *Civil Rights Act* as unconstitutional, clarifying the choice between him and the pro-civil rights Democrat, President Lyndon Johnson.¹³¹

Can this level of political competition be seen over the Article 9 reforms? On the one hand, all the major opposition parties are against the reform, and have taken actions ranging from critical questioning of the Prime Minister after the 2014 Cabinet decision, to enlisting "every trick in the book" to delay the 2015 SDF legislation.¹³² In the Upper House, the bills were debated for two months; at one point, opposition members "tried to prevent voting by piling on top of the committee chairman and wresting away his microphone".¹³³ However, crucially, the strength of the LDP's position in the Diet rendered opposition to the relevant bills almost entirely ineffective. In the Lower House, the LDP-Komeito coalition, with its comfortable majority, ushered the bills through with ease.¹³⁴ In the Upper House, the government won agreement from three small parties to secure passage, but had the option to use its supermajority in the Lower House to override it anyway.¹³⁵

Of course, all political parties have ups and downs – what distinguishes the current success of the LDP from, say, the preponderant position of the Democrats in the US in the 1930s? One difference is that in the US both major parties are viewed as credible and enjoy stretches in power. Over the last 100 years up to 2016, Republicans held the presidency for 48 years, and the Democrats for 52 years, indicating a genuinely contested two party system.¹³⁶ In contrast, the strength of the LDP is not a transient phenomenon. Since its formation in 1955, the LDP has governed Japan almost uninterruptedly, in what has been described by some as a dominant party democracy. Through the Cold War, Japan had a "one-and-a-half party system", in which the LDP won every election and was feebly opposed by a Socialist Party half its size.¹³⁷ The LDP's control has broken on only brief

¹²⁸ *Id.* at 179-82, 227-8.

¹²⁹ *Id.* at 306-9.

¹³⁰ *Id.* at 310-11.

¹³¹ *WTP3*, *supra* note 1, 68.

¹³² *Abe Offers 1st Explanation in Diet, but Many Not Buying It*, ASAHI SHIMBUN, Jul. 15, 2015, http://ajw.asahi.com/article/behind_news/politics/AJ201407150054; Rupakjyoti Borah, *Japan's Controversial Security Bills Pass in the Upper House. Now What?*, THE DIPLOMAT, Sep. 19, 2015, <http://thediplomat.com/2015/09/japans-controversial-security-bills-pass-in-the-upper-house-now-what/>. For a detailed outline in Japanese of existing DPJ views on Article 9, a survey of its candidates was undertaken in 2009, indicating widespread opposition to reform in that party: *Minshutou Rikkouhousha ni Kiita: "Kenpou no 9-jou" Anata no Kangae Wa? [We Asked DPJ Candidates: "Constitution Article 9", What Are Your Thoughts?]*, MAGAZINE 9, 2009, http://www.magazine9.jp/mqr_1/ans_7.html.

¹³³ Jonathan Soble, *Japan Military Bills Provoke Scuffling in Parliament*, NEW YORK TIMES, Sep. 17, 2015, <http://www.nytimes.com/2015/09/18/world/asia/japan-military-bills-provoke-scuffling-in-parliament.html>.

¹³⁴ Borah, *supra* note 132.

¹³⁵ *Id.* The LDP/Komeito coalition held 326 seats of 475 in the Lower House, just over the two-thirds majority required for an override: *see* DAI 47-KAI SHUUGIIN SENKYO – 12-GATSU 14-NICHI TOUHYOU [47TH LOWER HOUSE ELECTION – DECEMBER 14 VOTE], JIJI, 2014, <http://www.jiji.com/jc/2014syu?j9>.

¹³⁶ The current presidency of Republican Donald Trump, following his election in November 2016, means that by 2020, the Democrats and Republicans are likely to have each occupied the White House for 52 years of the last 104. On criticisms of the two-party system, *see, e.g.*, David A. Dulio & James A. Thurber, *America's Two-Party System: Friend or Foe?*, 52 ADMIN. L. REV. 769 (2000); Joel Rogers, *Two-Party System: Pull the Plug*, 52 ADMIN. L. REV. 743 (2000); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process*, 149 U. PA. L. REV. 815 (2001).

¹³⁷ Ward, *supra* note 43, at 420-1.

occasions – in the 1990s, with a two-year Socialist Party prime ministership, followed by the decline of that party; and in the late 2000s, with the rise of a briefly viable opposition in the DPJ, founded by defectors from the LDP.¹³⁸

In addition to its historical strength, the LDP now faces a particularly enfeebled opposition for reasons unrelated to its Article 9 reform push. After the DPJ formed the government for the first time in 2009, its three-year tenure and revolving cast of prime ministers were viewed so poorly that its representation in the Diet dropped from 230 to 57 seats in 2012.¹³⁹ With this failure aborting the two party system, no party is currently viewed as ready to govern in place of the LDP. New parties, such as the Japan Innovation Party, arose in the wake of the DPJ's decline, splintering the opposition.¹⁴⁰ There is also a lack of competition *within* the LDP and governing coalition. Although historically there have been divisions within the LDP over the desirability of change to Article 9,¹⁴¹ since the Koizumi government it has been firmly revisionist.¹⁴² Further, Komeito, the LDP's Buddhist and pacifistic coalition partner, initially opposed the 2014 Cabinet resolution, only to agree to a modified version after negotiations.¹⁴³ The potential for dissent in the executive disappeared when Komeito resolved not to exit the government over the issue.¹⁴⁴

The entrenched strength of the LDP complicates the legitimacy of the Article 9 reform because it raises the prospect that the LDP will win elections *regardless* of popular attitudes towards the reform itself. Indeed, there is evidence that the Abe government's reinterpretation of Article 9 enjoyed limited popular support over the relevant period.¹⁴⁵ In part, that may be because the policy of collective self-defense was itself of doubtful popularity: for instance, an *Asahi Shimbun* poll conducted in June 2014 (prior to the Cabinet decision) and presenting a binary choice on whether to exercise collective self-defense found 56 per cent opposed, with only 28 per cent in favor.¹⁴⁶

¹³⁸ See, e.g., Junko Kato, *When the Party Breaks Up: Exit and Voice among Japanese Legislators*, 92 AM. POL. SCI. REV. 857 (1998) (Socialist Party government); Michael Green, *Japan's Confused Revolution*, 33 WASHINGTON Q. 3 (2010) (DPJ government).

¹³⁹ *Japanese Nationalists Return to Power in a Landslide Victory*, NATIONAL POST, Dec. 16, 2012, [http://news.nationalpost.com/news/japan-election; Dai 46-kai Souseinkyō \[46th Lower House Election\], ASAHI SHIMBUN, 2014, http://www.asahi.com/senkyo/souseinkyō46/](http://news.nationalpost.com/news/japan-election; Dai 46-kai Souseinkyō [46th Lower House Election], ASAHI SHIMBUN, 2014, http://www.asahi.com/senkyo/souseinkyō46/).

¹⁴⁰ Mizuho Aoki, *New Opposition Party Launched as Ishin no To*, JAPAN TIMES, Sep. 21, 2014, <http://www.japantimes.co.jp/news/2014/09/21/national/politics-diplomacy/new-opposition-party-launched-ishin/>; *Shintou Na, Kekkyoku "Ishin no Tou" [New Party Name Is, After All, "Ishin no Tou"]*, MSN, Sep. 11, 2014, <https://web.archive.org/web/20140911002315/http://sankei.jp.msn.com/politics/news/140911/stt14091107510001-n1.htm>.

¹⁴¹ See, eg, Ward, *supra* note 43, at 422; TAKAO SEBATA, JAPAN'S DEFENSE POLICY AND BUREAUCRATIC POLITICS, 1976-2007, 63-4 (2010).

¹⁴² Hughes, *supra* note 66, at 730-1.

¹⁴³ Ayako Mie, *Komeito to LDP: Self-Defense Not Same as Collective Defense*, JAPAN TIMES, May 22, 2014, <http://www.japantimes.co.jp/news/2014/05/22/national/politics-diplomacy/key-differences-remain-ldp-new-komeito-self-defense-talks/>; *New Komeito Agrees to Revised Collective Self-Defense Proposal*, ASAHI SHIMBUN, JUN. 25, 2014, http://ajw.asahi.com/article/behind_news/politics/AJ201406250049.

¹⁴⁴ *Defense Policy Talks Test New Komeito's Political Integrity*, ASAHI SHIMBUN, JUN. 14, 2014, <http://ajw.asahi.com/article/views/editorial/AJ201406140020>. Komeito has since returned to more familiar territory, speaking out against further constitutional change during the 2016 election: "9-jou Kaisei no Hitsuyou Nai" *Koumeitou no Yamaguchi Natsuo Otoko Daihyou [Revision to Article 9 Unnecessary: Komeito's Representative Natsuo Yamaguchi]*, THE HUFFINGTON POST, Aug. 16, 2016, http://www.huffingtonpost.jp/2016/08/15/komei-constitutional-revision_n_11535862.html.

¹⁴⁵ There is, of course, the difficulty in interpreting these polls that the precise effect of the government's proposed reinterpretation is not clear, and public opinion may vary depending on the precise proposed scope of the change.

¹⁴⁶ *MAJOR SECURITY SHIFT: 9% satisfied with collective self-defense debate; Cabinet support falls to 43%*, ASAHI SHIMBUN, JUN. 23, 2014, https://web.archive.org/web/20140626033643/http://ajw.asahi.com/article/behind_news/politics/AJ201406230028. Other polls that sought a "yes/no" response to a policy of collective self-defense indicated consistent majority opposition. However, some polls conducted in early 2014 by the right leaning *Sankei Shimbun* and *Yomiuri Shimbun* posed three options: that a right to collective self-defense should be able to be exercised "in full scale", to the "minimum extent necessary", or not at all. Majorities of respondents chose the middle option:

However, particularly unpopular was the *method* of reform: in the same poll, 67 per cent opposed “changing the interpretation of rather than amending the Constitution”, with only 17 per cent in favor.¹⁴⁷

Surveys after the reinterpretation undertaken by the Abe government also showed opposition. Polling in the *Yomiuri Shimbun* immediately after the Cabinet decision in July 2014 showed that 51 per cent opposed it, and 81 per cent of respondents believed the government had not adequately explained the changes. Later in the same month, an *NHK* poll showed 56 per cent opposed and only 38 per cent supporting the Cabinet decision.¹⁴⁸ This trend continued in 2015 in respect of the government’s national security laws, with a poll in mid-2015 by *Kyodo News* showing 68 per cent were opposed to their passage.¹⁴⁹ A June 2015 survey reported that 56.7 per cent believed the security legislation was unconstitutional.¹⁵⁰ In 2016, well after the reform had been introduced and shortly before the potentially “consolidating” upper house elections, a poll in the *Asahi Shimbun* showed that 53 per cent remained opposed to the laws with 34 per cent in favor.¹⁵¹ A long running poll on constitutional revision in the *Yomiuri Shimbun* indicated support for “reinterpretation” of Article 9 hovered around 40 per cent throughout the relevant period from 2012 to 2016, with most respondents rejecting reinterpretation in favor of either formal revision or no change.¹⁵²

Evidence from recent elections further suggests that, due to its strong political position, the LDP won elections *despite* a lack of popular support for the Article 9 reform. The LDP won the Lower House election on 14 December 2014, but polls found that 65 per cent thought the party was re-elected because it was “less unsatisfactory” than other options.¹⁵³ Turnout was significantly lower than usual, at 52 per cent, suggesting a disengaged public – the opposite of what one expects from public endorsement of significant constitutional change.¹⁵⁴ As the *Japan Times* concluded, the “figures suggest the LDP won big this time largely thanks to voters’ disappointment with opposition parties”.¹⁵⁵ In the Upper House election on 10 July 2016, polls showed only 41 per cent supported the Abe Cabinet,¹⁵⁶ and turnout was low at 54.70 per cent, with turnout among voters under 20 a

see Mataka Kamiya, *Japanese Public Opinions about the Exercise of the Right of Collective Self-Defense*, DISCUSS JAPAN, Sep. 25, 2014, <http://www.japanpolicyforum.jp/archives/politics/pt20140925231907.html>. The specification of a vague middle choice raises methodological questions about these surveys. For present purposes, the polls were not directed to the relevant question, being the government’s specific reform, including the method of Cabinet reinterpretation of Article 9, as opposed to the general policy issue of collective self-defense.

¹⁴⁷ ASAHI SHIMBUN, *supra* note 146.

¹⁴⁸ Kamiya, *supra* note 146.

¹⁴⁹ *Poll Shows Big Drop in Support for Japan’s Abe*, NEWSWEEK, Jul. 18, 2015, <http://www.newsweek.com/poll-shows-support-drop-japan-abe-355176>.

¹⁵⁰ *Support for Abe Security Bills Slumps: Survey*, THE JAPAN TIMES, Jun. 22, 2015, <http://www.japantimes.co.jp/news/2015/06/22/national/politics-diplomacy/support-abe-security-bills-slumps-survey/>.

¹⁵¹ *Asahi Poll: Majority of Voters Feel No Need to Revise Constitution*, THE ASAHI SHIMBUN, May 3, 2016, <http://www.asahi.com/ajw/articles/AJ201605030043.html>. This is the most recent poll located on the reinterpretation in Japanese or English at the time of writing, with later polls focusing on potential formal revisions: *see, e.g., Majority against Constitutional Changes While Abe in Office: Poll*, THE JAPAN TIMES, Oct. 29, 2016, <http://www.japantimes.co.jp/news/2016/10/29/national/majority-constitutional-changes-abe-office-poll/>. Though it is of course unclear whether opposition to the reinterpretation will persist as the public’s attention moves to other issues, any future shifts would not provide support for the informal change under Ackerman’s theory, which sources legitimacy from the popular assent in the constitutional moment itself.

¹⁵² Within this period, support for reinterpretation reached a high of 43 per cent in 2014, and a low of 38 per cent in 2016: *see* Masatoshi Asaoka & Ayumi Teraoka, *Japanese Public Opinion on Constitutional Revision in 2016*, COUNCIL ON FOREIGN RELATIONS, Aug. 1, 2016, <http://blogs.cfr.org/asia/2016/08/01/japanese-public-opinion-on-constitutional-revision-in-2016/>.

¹⁵³ Reiji Yoshida, *Low Voter Turnout Mars Abe’s Claim of Election Triumph*, JAPAN TIMES, Dec. 17, 2014, <http://www.japantimes.co.jp/news/2014/12/17/national/politics-diplomacy/low-voter-turnout-mars-abes-claim-election-triumph/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Survey: 55% of Voters Call for Overhaul of “Abenomics”*, ASAHI SHIMBUN, Jul. 5, 2016, <http://www.asahi.com/ajw/articles/AJ201607040040.html>.

particularly poor 45.45 per cent.¹⁵⁷ While on the campaign trail, Abe studiously avoided discussing constitutional reform and focused on “Abenomics”.¹⁵⁸ Such a result in both recent elections makes plain that the public, lacking confidence in the opposition, did not vote according to their view of the Article 9 issue.

The dominant position of the LDP also arguably contrasts with earlier instances of potential informal change to Article 9, particularly the creation of the SDF in the early 1950s and post-Cold War shift to non-combat deployments, each of which departed from earlier understandings of Article 9(2) and 9(1) respectively. These changes remain controversial to this day.¹⁵⁹ However, notably, they both happened to coincide with periods in which Japan displayed a more fluid political environment than the mid-2010s. In 1950, when the National Police Reserve (“NPR”) was formed, the Liberal Democratic Party did not yet exist, and the Japan Socialist Party – which opposed the NPR – was not without political power: following the 1950 election, it held 36 seats out of 132 in a divided House of Councilors, second only to the largest party, the Liberal Party, at 52.¹⁶⁰ Peacekeeping changes in the 1990s also took place in a somewhat more volatile decade of Japanese politics, in which a coalition government led by the Socialist Party took power only a year after the passage of the 1992 peacekeeping laws.¹⁶¹

Of course, whether this constituted sufficient political competition for a true constitutional moment remains debatable. There were also other important factors influencing the process of change in these earlier cases, which complicate such an analysis: the initial creation of the NPR took place directly by decree of General MacArthur, and US demands were a key driver of subsequent moves to a fully-fledged military. To a lesser degree, the adoption of peacekeeping laws was also a reaction to global, and American, pressures following Japan’s purely financial contribution in the Gulf War.¹⁶² However, earlier instances were also to some extent marked by differences of degree in the background level of political competition. This, we suggest, is also critical to assessing the ultimate claim to legitimacy of these various attempts at informal constitutional change.

IV CONCLUSION

After nearly 70 years as the bedrock of Japan’s “Peace Constitution”, it is unsurprising that attempts to reform Article 9 of the 1947 Constitution have proved deeply controversial. Prime Minister Abe’s government has altered the understanding of Article 9, permitting Japan to engage in “collective self-defense”, only in the face of vehement protests. The shift has profound implications for Japan, which has enjoyed years of peace under the traditional reading of Article 9. Yet as noteworthy as the change itself is, equally significant is the irregular way it has been accomplished: through an executive and legislative “reinterpretation” of Article 9, without complying with formal amendment rules. The legality of such a change is at best doubtful, and concerns about process as much as substance have fueled the continued public opposition.

¹⁵⁷ ‘Turnout Rate among New Teen Voters Was a Meager 45%, Survey Shows’, JAPAN TIMES, Jul. 12, 2016, <http://www.japantimes.co.jp/news/2016/07/12/national/politics-diplomacy/turnout-rate-among-new-teen-voters-meager-45-survey-shows/#.V6cOaenVyUk>.

¹⁵⁸ Motoko Rich, *Japan Election, a Landslide for Abe, Could Allow a Bolder Military*, NEW YORK TIMES, Jul. 11, 2016, <http://www.nytimes.com/2016/07/12/world/asia/japan-election-shinzo-abe.html>.

¹⁵⁹ For debates over the validity of these changes from theoretical standpoints other than Ackerman, see generally Kendrick F Royer, *The Demise of the World’s First Pacifist Constitution: Japanese Constitutional Interpretation and the Growth of Executive Power to Make War*, 26 VAND. J. TRANSNAT’L L. 26 (1993); J. PATRICK BOYD & RICHARD J SAMUELS, NINE LIVES? THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN (2005); Craig Martin, *The Case against “Revising Interpretations” of the Japanese Constitution*, 5 ASIA-PACIFIC J. 1 (2007).

¹⁶⁰ See 27-13 *Persons Elected and Votes Polled by Political Parties – Ordinary Elections for the House of Councillors* (1947-2004), <http://www.stat.go.jp/data/chouki/zuhyou/27-13.xls>.

¹⁶¹ See Thomas J Pempel, *Regime Shift: Japanese Politics in a Changing World Economy*, 23 J. JAPAN. STUD. 333 (1997)

¹⁶² See *infra* Part II.A. In contrast, although the 2014–15 Article 9 changes were in part a reaction to Japan’s international security situation, they were not compelled by a foreign power.

The question the article thus explores, against this backdrop, is whether it is possible for such processes of irregular change to draw support from leading US theories of informal change – such as Ackerman’s theory of constitutional moments. We suggest, in this context, that it is possible for there to be global constitutional moments, and that in many ways the sequence of events leading to the “reinterpretation” of Article 9 in Japan satisfies these requirements. At the same time, we suggest that for any true constitutional moment, there must be an important additional pre-condition – i.e. meaningful political competition among political parties.

In the context of proposals to revise Article 9, we note that there has been quite active civil society engagement of the kind envisaged by Ackerman, despite pressure by the government on the media, and the limited recourse of civil society to the courts. But we also note that the Abe government has still been largely able to ignore the clear public position to its proposals – because the longstanding political dominance of the LDP and weak, fragmented state of the opposition parties have meant that it has faced limited prospect of meaningful sanction for acting contrary to public opinion in this context. This, we suggest, further means that the relevant form of change also falls short of having the kind of heightened democratic support necessary for a true constitutional moment.

For constitutional theorists, a focus on the Japanese experience thus helps clarify a key assumption implicit in one of the leading US theories of informal constitutional change. Constitutional theories are often developed with a single country case study in mind. When we change the focus, and adopt a different country as the basis for our analysis, many of the assumptions implicit in such an approach become far more apparent:¹⁶³ for Ackerman’s theory in particular, it becomes far clearer the degree to which the theory turns on US-style notions of meaningful party-political competition.¹⁶⁴

The degree of political competition in a particular country may vary significantly over time: in Japan itself, the power of the LDP has on occasion weakened, leading to brief stints outside government (in the 1990s, and again between 2009 and 2012). The degree to which political parties compete on an issue may also vary significantly, even within otherwise consolidated, competitive democracies.¹⁶⁵ When we speak of democracies as either “competitive” or “non-competitive” in nature, we are thus clearly speaking of questions of degree, or a distinction that requires close attention to questions of time and context. At the same time, there remains an important difference between the ebb and flow of normal electoral politics – which may lead to situations in which one party holds a strong, temporary upper hand – and a system in which one party is almost continuously dominant.

With these caveats in mind, the basic lessons of the Japanese Article 9 experience seem quite simple when it comes to the applicability of Ackerman’s theory to contexts outside the US: countries (or jurisdictions) experiencing a situation of true dominant party democracy can never meet the requirements for fully legitimate *informal* change, by way of a true constitutional moment. Informal change of this kind does not necessarily require bipartisan *agreement*: indeed, the constitutional moments in the US have been deeply contested among the major parties, and opposed by the leaders of one or other party. But this process of contestation has ensured that there has been extensive contestation around the actual scope and desirability of proposed change, or some actual relationship between the changes adopted and broader democratic understandings. At the consolidation phase, it has also ensured that change has ultimately been “informally” adopted without true national majority support, expressed by some meaningful form of electoral choice.

This further means that notions of informal constitutional change, which rely on Ackerman’s ideas, have little or no application to a range of democratic constitutional settings outside the US,

¹⁶³ Cf., e.g., Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 95 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

¹⁶⁴ Cf. Mark Tushnet & Rosalind Dixon, *Weak-form Review and Its Constitutional Relatives: An Asian Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 102 (Rosalind Dixon & Tom Ginsburg eds., 2014).

¹⁶⁵ See, e.g., Rosalind Dixon, *Weak-Form Review and Political Competition* (2016) (unpublished manuscript, on file with author).

where there is a long history of single party dominance – e.g. India, Mexico and South Africa.¹⁶⁶ Indeed, it suggests they may have little relevance to many US states, which have a long history of single party dominance.¹⁶⁷ Even more clearly, it also suggests that there can be no claim to legitimate Ackerman-style informal change in any non-democratic context, or context in which there is a trend toward anti-democratic politics or backsliding from basic commitments to competitive democracy.¹⁶⁸

Given this understanding, in Japan itself, it also becomes clear that the only truly legitimate means of *changing* Article 9 will be via formal rather than informal processes of constitutional change.¹⁶⁹ Supporters of the 2015 SDF amendment may argue that this new legislation is supported by the existing language of Article 9. But if they cannot persuade a majority of the Japanese constitutional culture of the legitimacy of this “interpretation”, the only hope of saving the validity of the legislation will be by way of *formal* constitutional amendment.

Formal constitutional amendment of this kind is not always a panacea to democratic deficits in informal processes of constitutional change: in some countries, formal constitutional amendment procedures are themselves sufficiently flexible that they allow dominant political elites to entrench their own preferred new interpretation, absent any real form of political contestation.¹⁷⁰ This is also one reason that one of us has argued elsewhere (with David Landau) that concern for political contestation will often favor courts imposing limits on, not just giving effect to, formal processes of constitutional change.

In Japan, however, Article 96 of the Constitution requires that formal amendments must be initiated by the Diet, through a concurring vote of two-thirds or more of all members of each House, and then submitted to the people for ratification, requiring an affirmative vote of a majority of all votes cast at a special referendum. Further, the Constitution has not been revised since it was first created in 1947, largely due to a failure of proposals to obtain the support of two-thirds of both houses of the National Diet. As Tom Ginsburg and James Melton have recently shown, this itself also poses clear informal, cultural obstacles to successful constitutional amendment.¹⁷¹ Article 96 also gives an important role to Japanese voters, who are generally reluctant to support changes perceived as wide-

¹⁶⁶ See *supra* note 6.

¹⁶⁷ See PIETRO S. NIVOLA & DAVID W. BRADY, *RED AND BLUE NATION?* (2006).

¹⁶⁸ On this trend generally, see, e.g., David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013). In this way, attention to recent Japanese constitutional experience reminds us of the benefits to “aversive” as well as positive forms of constitutional comparison: by seeing what is missing in the recent Japanese “constitutional moment”, we are better positioned as comparative scholars to understand what are in fact the necessary requirements for legitimate forms of informal constitutional change: see RUTI G TEITEL, *TRANSITIONAL JUSTICE* (2000); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 INT’L J. CONST. L. 296 (2003); David Erdos, *Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights (1990)*, 5 INT’L J. CONST. L. 343 (2007); David Erdos, *The Rudd Government’s Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?*, 65 PARLIAMENTARY AFFAIRS 359 (2012) (on aversive constitutionalism).

¹⁶⁹ In saying this, we recognize the possibility that some amendments passed by proper democratic procedures may nonetheless lack the status of legitimate amendment, as impermissibly altering the “basic structure” of a democratic constitution: see, e.g., Rosalind Dixon and David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015); Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism* (Unpublished manuscript, August 2010); Gary Jacobsohn, *Constitutional Identity*, 68 REVIEW OF POLITICS 361 (2006); Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in *JUDICIAL ACTIVISM IN INDIA: A Festschrift in Honour of Justice VR Krishna Iyer* (Malik Lokendra (ed.), 2012) 240; Yaniv Rozani, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea* 61 AMERICAN JOURNAL OF COMPARATIVE LAW 657 (2013). We also suggest, however, that an amendment to Article 9 likely does not implicate this form of “democratic minimum core” to the Japanese Constitution: cf. Dixon & Landau, *supra* note 169.

¹⁷⁰ See, e.g., the experience in Hungary in 2011, or Bangladesh under a two-thirds legislative majority rule: see Dixon & Landau, *supra* note 169; Shamsul M. Hoque, *The Changing Balance of Power between the Government and NGOs in Bangladesh*, 23 INT’L POL. SCI. REV. 411 (2002).

¹⁷¹ Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter At All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L J. CONST. L. 686 (2015).

ranging or radical in nature, so that formal processes of change are likely to be both quite strongly contested and *delimited* in nature.

Interestingly, the Abe government has itself also begun discussing a further, formal revision of Article 9, this time to explicitly acknowledge the status of the SDF under Article 9(2).¹⁷² The government's plans for formal reform were bolstered by its performance in the July 2016 elections. For the first time, the election gave the Liberal Democrats and its allies the two-thirds Diet majority required to initiate formal constitutional change.¹⁷³ If the government is able to use this new super-majority position to enshrine its preferred reinterpretation of both Article 9(1) and (2), this would also grant the reform the legitimacy it is currently lacking: it would not only comply with the formal, or positive legal requirements, for legitimate constitutional change. It would also ensure that the government was in some real way responsive to the views of both its coalition partner, Komeito, and the broader Japanese public about the limits of desirable change.¹⁷⁴

For informal attempts at constitutional change to count as democratically legitimate, outside the US, there must be some real evidence that such change is underpinned by engagement with civil society, and meaningful elite contestation around the issue. Absent such support, claims by dominant political actors to speak "in the name of the people" when initiating such change will ultimately ring hollow.

¹⁷² *Abe Explicit in Call for Amendment to Constitution's Article 9*, JAPAN TIMES, Feb. 3, 2016, <http://www.japantimes.co.jp/news/2016/02/03/national/politics-diplomacy/abe-explicit-call-amendment-constitutions-article-9>; Tomohiro Osaki & Daisuke Kikuchi, *Abe Declares 2020 as Goal for New Constitution*, JAPAN TIMES, May. 3, 2017, <http://www.japantimes.co.jp/news/2017/05/03/national/politics-diplomacy/abe-declares-2020-goal-new-constitution/>.

¹⁷³ Motoko Rich, *Japan Election, a Landslide for Abe, Could Allow a Bolder Military*, NEW YORK TIMES, Jul. 11, 2016, <http://www.nytimes.com/2016/07/12/world/asia/japan-election-shinzo-abe.html>; *Triumphant Abe Calls for Debate on Constitutional Revision*, ASAHI SHIMBUN, Jul. 11, 2016, <http://www.asahi.com/ajw/articles/AJ201607110004.html>.

¹⁷⁴ Robin Harding, *Abe's Constitution Dream Collides with Buddhist Allies*, FINANCIAL TIMES, Jul. 14, 2016, <http://www.ft.com/cms/s/0/ee27717a-48d2-11e6-b387-64ab0a67014c.html>.