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REINTERPRETING THE REINTERPRETATION: COLLECTIVE SELF-DEFENSE AS CONSTITUTIONAL FIDELITY

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ABSTRACT

As currently interpreted, Article 9 of the Japanese Constitution requires Japan's Self-Defense Forces (JSDF) to operate in a purely defensive capacity. Recently, however, the United States has increasingly asked Japan to participate in joint military operations, in which Japanese forces would defend not only themselves, but also their American allies. This raises an important legal question: does Article 9 permit the JSDF engage in this kind of collective self-defense?

Former Prime Minister Abe Shinzo believed so. After a government panel of legal experts found that collective self-defense was consistent with Article 9, the Abe administration adopted the panel's conclusion. However, this "Reinterpretation" of Article 9 has been highly controversial. Japanese scholars of constitutional law are deeply divided on the meaning of Article 9 and the legality of the Reinterpretation. While some maintain that Article 9 prohibits collective self-defense, others have argued that Article 9 either permits it, or is superseded by Japan's treaty obligations to the United States.

However, until now, these arguments have not been reflected in the non-Japanese literature. Accordingly, English-language scholarship has often assumed with little discussion that the

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Reinterpretation is inconsistent with Article 9, before proceeding to analyze the Reinterpretation as a failed attempt to informally amend the Article 9 without the requisite democratic support.

This essay re-frames the debate. The Reinterpretation is not an attempt to amend Article 9, but an attempt to understand it. Accordingly, its legitimacy is not derived from the magnitude of its popular support, but the strength of its legal justifications.

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INTRODUCTION

After unconditional surrender in World War II, Japan was occupied by a foreign power for the first time in her recorded history.[3] As a condition of the Instrument of Unconditional Surrender, Japan disarmed its military and adopted an amended Constitution that, in its ninth article, prohibited the maintenance of "land, sea, and air forces, as well as other war potential."[4]

Despite this commitment, Japan has long maintained armed forces.[5] In 1950, while Japan was still under American occupation, Army General Headquarters (GHQ) instructed leaders of the fledgling Japanese Diet to create a National Police Reserve (NPR) of 75,000 persons, so that the United States could redeploy her own ground forces to fight in the Korean War.[6] Over time, the NPR evolved into Japan's current armed forces, the JSDF (Japan Self-Defense Forces).[7] Although the occupation of Japan ended in 1952, Japanese legal commitments made during the occupation were incorporated into the Treaty of San Francisco, the instrument through which Japan regained full sovereignty.[8] Subsequently,

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[3] *See generally* MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN (2002).

[4] NIHONKOKU KENPŌ [KENPŌ], art. 9, para. 2, *translated in The Constitution of Japan*, PRIME MINISTER OF JAPAN AND HIS CABINET, http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (last visited Feb. 16, 2020).

[5] *See* Takei Tomohisa, *Japan Maritime Self Defense Force in the New Maritime Era*, 34 HATOU 4 (2008) ("Japan's naval build up began after the Meiji Restoration in 1868 . . . [F]leet battle doctrine . . . continued until the dismantlement of Imperial Navy in 1945 . . . At the onset of the Cold War, once the East-West confrontational posture had been clearly delineated, the JMSDF formally emerged from its predecessor of two years, the Coastal Safety Force or Kaijo Keibitai.")

[6] MASUDA HIROSHI, MACARTHUR IN ASIA: THE GENERAL AND HIS STAFF IN THE PHILIPPINES, JAPAN, AND KOREA 253 (2012).

[7] *See* Ayako Kusunoki, *The Early Years of the Ground Self-Defense Forces, 1945–1960 in* THE JAPANESE GROUND SELF-DEFENSE FORCE: SEARCH FOR LEGITIMACY 8 (Eldrige & Midford, eds. (2017) (providing a chronology of the SDF); *id.* at 60–62 (describing the evolution of the SDF from the NPR).

[8] Yoshida Shigeru, Prime Minister of Japan, Speech on Signing Treaty of San Francisco (Sept. 7, 1951)*; see also* STEVEN GOW CALABRESI ET AL., THE U. S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES AND MATERIALS (forthcoming 2021).

military cooperation has remained a core element of Japanese defense policy.[9] Recent developments, including the rise of military assertiveness in China and North Korea, have placed more emphasis on joint Japanese-American military operations.[10] On December 26th, 2019, Japan even agreed, for the first time, to dispatch independent naval forces to the Middle East.[11] These new deployments raise key questions about the legal status of the JSDF.[12] Should Japanese force deployments be treated as military expeditions? If so, do they violate Article 9 of Japan's Constitution?[13]

Japanese judges and constitutional scholars have long struggled to reconcile the Post-War Constitution's *prima facie* commitment to disarmament with the continued maintenance of armed forces.[14] Some scholars have argued that the prohibition in paragraph 2 of Article 9 is less all-encompassing than it appears, limited by the Article's preamble to the use of military force "as a means of settling international disputes."[15] Others have argued that the Treaty of San Francisco overrides the limitations of the Post-War Constitution, requiring the continued maintenance of military forces, as well as continued military cooperation with the United States.[16]

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[9] Nobukatsu Kanehara, Assistant Secretary to the Cabinet, Office of the Prime Minister of Japan, Speech on Japan's Grand Strategy and Universal Values at Columbia University (Apr. 11, 2017).

[10] Shinsuke J. Sugiyama, Ambassador of Japan to the United States, Ministry of Foreign Affairs of Japan, Speech on Japan's Strategy for the 21st Century at Columbia University (Nov. 16, 2018).

[11] Kiyoshi Takenaka, *Japan to Send Warship, Aircraft to Middle East to Protect Vessels*, REUTERS (Dec. 26, 2019, 7:24 PM), https://www.reuters.com/article/us-mideast-iran-japan/japan-to-send-warship-aircraft-to-middle-east-to-protect-vessels-idUSKBN1YV00W.

[12] Interview in person with Mizobuchi Masashi, Minister-Counsellor at the Embassy of Japan, D.C. (Jan. 17, 2021).

[13] *Id.*

[14] *See, e.g.,* Itazuke Air Force Base Dispute (*Japan v. Matsumoto et. al.*), Tokyo High Court 9–11 (Mar. 5, 1960) (translation on file with author).

[15] NIHONKOKU KENPŌ [KENPŌ], art. 9, para. 1 (Japan).

[16] *See* Treaty of Peace with Japan art. 19, Sept. 8, 1951, 3. U.S.T. 3169, 136 U.N.T.S. 45.

Japan's Supreme Court addressed this problem to some extent in the 1950s, holding in *Sakata v. Japan*[17] that Article 9 permits the maintenance of self-defense forces, at least so long as those forces lack the strength to wage a war of aggression. Yet recent developments have created renewed tension between the requirements of Article 9 and Japan's self-defense needs.[18] As the United States increasingly requests Japanese participation in joint military activities,[19] the JSDF has been ordered to conduct operations that do not fall cleanly into a narrow definition of self-defense. These developments test the limits of the Court's holding in *Sakata*, and accordingly the limits of Article 9 as well.

To resolve this tension, the Japanese government under Prime Minister Abe Shinzo made a series of administrative and legislative moves intended to clarify the scope of permissible military activity, as well as the status of Japan's military forces. Originally, the Abe administration proposed a constitutional amendment to Article 9.[20] However, after the proposed amendments failed to generate a broad parliamentary majority, the administration, working through the Cabinet, commissioned and then adopted by resolution and legislation a "reinterpretation" of Article 9, interpreting it to permit Japanese forces to engage in collective self-defense.[21]

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17 *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

18 Steve Herman, *Japan Mulls Constitutional Reform*, VOICE OF AMERICA (Feb. 15, 2006, 9:27 AM), https://www.voanews.com/archive/japan-mulls-constitutional-reform.

19 *Trump Expects Japan's Military to Reinforce United States in Asia and Beyond*, REUTERS (May 27, 2019, 8:30 PM), https://www.reuters.com/article/us-japan-usa/trump-expects-japans-military-to-reinforce-united-states-in-asia-and-beyond-idUSKCN1SY06Y.

20 *See generally* NIHON-KOKU KENPOU KAISEI SOUAN, POLICY PLATFORM OF THE LDP (2012), available at http://www.jimin.jp/policy/policy_topics/pdf/seisaku-109.pdf (Japanese language).

21 THE ADVISORY PANEL ON CONSTRUCTION OF THE LEGAL BASIS FOR SECURITY, REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY (2014), http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf [hereinafter REPORT OF THE ADVISORY PANEL].

This Reinterpretation quickly set off a heated legal debate in Japan.[22] Although many Japanese contend that Article 9 prohibits Japanese forces from engaging in collective self-defense,[23] others have read the Article differently,[24] or argued that Japan's international obligations supersede this domestic constitutional requirement.[25]

Outside of Japan, however, this legal debate has received relatively little attention. International constitutional analysis of the Reinterpretation has often assumed that the Abe administration's understanding of Article 9 is legally unfounded.[26] Instead, it has treated the Reinterpretation as an attempt to amend the Japanese constitution without going through the formal amendment process.[27] This scholarship has generally applied Professor Bruce Ackerman's five-step model[28] for informal constitutional change. This model views constitutional change as arising out of a groundswell of national popular support, rather than a formal legal process. Accordingly, scholars applying Ackerman's model have usually concluded that the Reinterpretation lacks the requisite popular approval to legitimize any attempt at informal constitutional amendment.[29]

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[22] Justin McCurry, *Japanese Pacifists Unnerved by Lifting of Ban on Military Intervention*, THE GUARDIAN (July 1, 2014, 9:01 AM) (quoting Takeshi Ishida, Professor Emeritus at Tokyo University).

[23] *See, e.g.,* James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force 'Forever' to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 183 (1990).

[24] *See* REPORT OF THE ADVISORY PANEL, *supra* note 21.

[25] Narushige Michishita, Vice-President, Nat'l Graduate Inst. for Pol'y Studies, Lecture at the Bos. Univ. Ctr. for the Study of Asia: The Rise of China and Japan's Response (Sept. 25, 2019).

[26] *See, e.g.*, Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMP. L. 145, 159–61 (2019).

[27] *See, e.g.*, Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 508–11 (2017).

[28] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[29] *See, e.g.*, Dixon & Baldwin, *supra* note 26, at 163–72; Martin, *supra* note 27, at 502–06.

This Essay, however, argues that the Reinterpretation should not be understood as an informal constitutional amendment, because it isn't trying to amend the Constitution in the first instance. International analysis of the Reinterpretation often takes as a premise the primary issue in dispute: whether the Reinterpretation is based on a legally justifiable understanding of the Post-War Constitution. If it is, as many Japanese scholars contend,[30] then the Reinterpretation is not an attempted circumvention of the Constitution's amendment process. It is instead an honest effort to resolve a genuine legal problem—specifically, the apparent contradiction between Article 9's prohibition on military activity and Japan's treaty obligation to maintain defense forces. Like any other interpretation of a constitutional provision, the Reinterpretation should therefore be judged according to its legal merits, not its popularity.

Part I of this Essay explains the historical developments that led to Japan's current legal predicament. It discusses Japan's initial adoption of Article 9 as part of the post-war Constitution, followed by the creation of defense forces pursuant to GHQ's guidance after the outbreak of the Korean War. Part I then recounts some of Japan's earlier failed attempts to amend Article 9 prior to the Reinterpretation, demonstrating that the uncertain constitutional status of the JSDF has posed legal problems since long before the Abe administration.

Part II of this Essay lays out the legal basis for the Reinterpretation, discussing the differing legal stances that scholars have taken with respect to Article 9 and the Treaty of San Francisco. Although the Reinterpretation is inconsistent with some of these legal understandings, it is potentially compatible with others. In particular, the Reinterpretation can be justified by a reading of Article

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[30] See, for example, extended discussions of varying views offered in NAKAJIMA TORU, CASEBOOK ON JAPANESE CONSTITUTIONAL LAW (2010) (Japanese language). Japanese scholars generally adopt a positivist approach to Constitutional reconstruction, as the Japanese legal tradition is somewhat removed from natural law influences more common in the European tradition. *Cf.* C. D. A. Evans, *Suarez: Law and Obligation*, PHIL. F. (Sept. 2, 2011). But even from a natural law perspective, all that is needed for our argument is that the issue is complex and the answer genuinely a subject of dispute.

9 that permits collective self-defense, or by an understanding that treats Japan's obligations under the Treaty of San Francisco as supreme over domestic Japanese law, including Japanese constitutional law.

Finally, Part III of this Essay responds to international constitutional scholarship analyzing the Reinterpretation as an attempt to informally amend the Japanese Constitution. It argues that the requirements of Article 9 have not been sufficiently established, either as a matter of original meaning or by any authoritative body, for the Reinterpretation to "amend" the Article. Instead, the Reinterpretation is better understood as a genuine legal position on the meaning of the Constitution, motivated by a desire to reconcile Japan's domestic and international obligations.

Constitutions cannot be written with the "prolixity of a legal code."[31] Their terms are often broad, subject to future exposition and clarification.[32] It can be tempting to accuse constitutional actors of politically motivated revisionism when disagreement arises over the interpretation of a constitutional provision. But unless these actors are openly or demonstrably operating in bad faith, such accusations diminish the scope of liberal discourse. Multiple interpretations of a constitutional provision are often reasonable—and if one interpretation is correct, then it is correct regardless of its political implications.

I. THE CONSTITUTION OF JAPAN

Following the terms of the Potsdam Declaration, the United States led an occupying force that took political control over Japan in 1945.[33] General Headquarters (GHQ) set up shop in Tokyo,[34] with a mandate to prevent Japan from returning to the fascist politics that

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[31] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

[32] This is certainly true of Japan's Constitution. *See* J. Mark Ramseyer, 17 J. JAPANESE STUD. 176, 176–78 (1991) (reviewing HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES (1990)).

[33] *See* JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 39–80 (1999).

[34] *Id.* at 45–48.

had caused immense global suffering from 1931 to 1945.[35] An integral part of this effort was GHQ's planned revision of the Meiji Constitution.[36]

Section 10 of the Potsdam Declaration required Japan to effect political change establishing democracy and protecting civil liberties. Section 12 stated that occupation would continue until the changes outlined in the Declaration were completed to allied satisfaction. GHQ made clear early on that amending the Constitution was necessary to satisfy Section 12.

At first, Japan was reluctant to entirely replace the Meiji Constitution. Matsumoto Joji (**松本烝治**), Japan's Minister for Constitutional Reform, led a committee of constitutional law experts that recommended only modest changes in February of 1946.[37] Supreme Allied Commander General Douglas MacArthur rejected this draft out of hand, instead directing GHQ to draft an entirely new Constitution.[38] The authors of this new document—principally Army lawyers Milo Rowell[39] and Courtney Whitney[40]—attempted to take into consideration historical influences on Japanese law, as well as

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[35] *See, e.g.,* MARK FELTON, SLAUGHTER AT SEA: THE STORY OF JAPAN'S NAVAL WAR CRIMES (2007); HARRIES, MEIRION HARRIES, SUSIE HARRIES, SOLDIERS OF THE SUN: THE RISE AND FALL OF THE IMPERIAL JAPANESE ARMY (1994); SHELDON HARRIS, FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE 1932–945 (2010); BRIAN MACARTHUR, GUESTS OF THE EMPEROR: THE SECRET HISTORY OF JAPAN'S MUKDEN POW CAMP (2005).

[36] The Meiji Constitution, formally the Constitution of the Empire of Japan, came into effect November 29, 1890. It was Japan's first modern Constitution. The main prior constitutional text was the ancient Seventeen-Article Constitution, first recorded in the 8th Century. For further information, see generally Calabresi, *supra* note 8. For background on the political ideas behind the Meiji Restoration and the subsequent constitution, see C. D. A. Evans & Ishikawa Hanako, *A New Translation of Yoshida Shoin's Taisaku Ichido,* 8 J. JAPANESE PHIL. (forthcoming 2021).

[37] JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 351–54 (1999).

[38] *Id.* at 360.

[39] *Id.* at 364.

[40] *Id.* at 373.

guidance from Japanese legal scholars.[41] The Army's draft was presented to Japanese officials on February 13th, 1946. An outline was released on March 6th, 1946. To preserve legal continuity, the new Constitution was formally adopted as an amendment to the Meiji Constitution, in accordance with Article 73.[42] The new Constitution was approved on October 6th, 1946.[43] It became law on November 3rd, 1946 and came into effect on May 3rd, 1947.[44]

The Post-War Constitution is approximately 5,000 words long, containing a preamble and 103 articles.[45] The new Constitution immediately gave rise to a number of interpretative controversies, but it has never been amended.[46] Some of the controversy over the Constitution arises because it was adopted on the instruction of an occupying power. This has led to a debate between the "external imposition" theory and the "internal consistency" theory.[47]

The external imposition theory emphasizes that the Constitution was imposed involuntarily on Japan by the occupying Allied Powers.[48] A famous meeting on February 13th, 1946 provides evidence to support this narrative. On that day, General Whitney met with then Foreign Minister Yoshida Shigeru (吉田 茂) to discuss constitutional reform.[49] Rather than making modifications to Minister Matsumoto's prior draft, Whitney handed out the draft written by GHQ.[50] All sides were aware that GHQ was considering prosecuting

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41 *Id.* at 364–74; *see also* J. Mark Ramseyer, *Together Duped: How Japanese and Americans Negotiated a Constitution without Communicating*, 23 L. JAPAN 123, 123-126 (1990) (reviewing KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991)).

42 *Id.* at 383–91.

43 *Id.* at 394–404.

44 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (JAPAN).

45 *See generally id.*

46 MATSUI SHIGENORI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS ch. 9, part I (2011).

47 *Id.*

48 *See, e.g.*, Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980 (1956).

49 DOWER, *supra* note 37, at 364.

50 *Id.* at 365.

the Emperor, which Matsumoto sought to avoid at all costs.[51] In that context, Whitney's demand that Japan adopt GHQ's draft seemed like a threat.[52] On this recounting of events, the Constitution was thrust upon the Japanese people by the United States.[53] Naturally, if the Constitution was imposed by external forces, an independent Japan might seek to amend or replace it. Indeed, some conservatives have deployed this argument since ratification,[54] with a particular focus on Article 9.[55]

The "internal consistency" account, on the other hand, emphasizes the degree to which GHQ's draft was shaped by Whitney's sense of Japanese history and comments from Japanese scholars. This theory stresses that GHQ's draft was substantively amended by Japanese parliamentarians, and notes that the language of the Post-War Constitution has been subsequently interpreted to reflect Japan's values.[56] The internal consistency theory also highlights the continuing public approval for the modern Constitution, expressed in part by a lack of amendments.[57] Proponents of the internal consistency account are more cautious about amending the Constitution. Similarly, they tend to focus less on amending Article 9.

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[51] *Id.* at 352, 366.

[52] *Id.* at 376–77.

[53] For a description of this meeting from the Japanese side, *see generally* SATO TATSUO, NIHONKOKU KENPO SEIRITSUSHI (1964) at Vol. 3, 47–57 [Japanese language]. From the American side, see NIHONKOKU KEMPŌ SEITEI NO KATEI (Takayanag et al. eds. 1987) at Vol. 1, 320–36 [Japanese language].

[54] *See e.g.* ETO JUN, 1946 NEN KENPO: SONO KOSOKU (THE CONSTITUTION OF 1946: ITS CONSTRAINT) (1980) [Japanese language].

[55] *See e.g.* ETO JUN, TOZASARETA GENGO KUKAN: SENRYOGUN NO KENNETSU TO SENGO NIHON (THE SEALED LINGUISTIC SPACE: THE CENSORSHIP OF THE OCCUPATION FORCES AND POSTWAR JAPAN) (1994) [Japanese language].

[56] *See, e.g.,* J. Mark Ramseyer, *Book Review*, 41 J. ASIAN STUD. 142 (1981) (reviewing JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT (JOHN M. MAKI ed. & trans., 1981)).

[57] Of course, the lack of amendments isn't entirely due to overwhelming approval—the Japanese Constitution is difficult to amend. *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

A. Article 9

GHQ's primary goal in drafting the new Constitution was to prevent Japan from threatening East Asia after the Occupation concluded. To that end, the Constitution includes extensive restrictions on Japan's future use of military force. The most important restrictions are codified in Article 9.[58] The full text of Article 9 reads:

> ARTICLE 9.
>
> (1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[59]

Paragraph (1) renounces war as a sovereign right. This could be interpreted to mean as little as renouncing the right to formally declare war, while maintaining the right to self-defense (sometimes

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[58] *See* 13 Keishū 13, 3225, 3232, Sup. Ct. Grand Bench, Dec. 16, 1959, http://www.courts.go.jp/app/hanrei_en/detail?id=13. For analysis of this case, see also Miyoko Tsujimura, Kenpō [Constitution] 59 (2000). (Additional restrictions on the use of armed force might be sourced to the Constitution's Preamble, which clearly states the document's pacifist aims. But Japan's Supreme Court has held that this language is too vague to meaningfully restrict military force, instead holding that the commitments in the Preamble are realized through specific provisions in the subsequent text.).

[59] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan). (In the original language, this section reads: "日本国憲法第九条 第1項　日本国民は、正義と秩序を基調とする国際平和を誠実に希求し、国権の発動たる戦争と、武力による威嚇又は武力の行使は、国際紛争を解決する手段としては、永久にこれを放棄する。//　第2項　前項の目的を達するため、陸海空軍その他の戦力は、これを保持しない。国の交戦権は、これを認めない。").

considered an inalienable sovereign right).[60] Or it could mean as much as requiring the complete renunciation of any belligerent activity whatsoever.

Paragraph (2) begins with a statement of purpose, which may or may not constrain the remaining text. It then forbids "land, sea and air forces"—whatever that means. Finally, it renounces the "right of belligerency"—whatever that means.

1. Article 9, Paragraph 1

Most constitutional law scholars in Japan interpret Paragraph 1 of Article 9 to forbid the invasion of another country using force or the threat of force.[61]

The Japanese text is clearer here. In English, it is logically possible that Article 9's setting aside of "war as a sovereign right of the nation" applies only "to the threat or use of force as a means of settling international disputes." In Japanese, it is clearer that the "renunciation of war" is more general.[62]

What is meant by "war . . . as a means of settling international disputes?" Context from other treaties during this period helps clarify. For example, the 1928 General Treaty for the Renunciation of War uses the phrase "war for the solution of international controversies."[63] In that Treaty, the term meant invasion of other countries.[64] Because of the similarity in language, the majority of

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[60] *See, e.g.*, U.N. Charter art. 51.

[61] *See* NOBUYOSHI ASHIBE, KENPŌGAKU I [CONSTITUTION STUDY] 529 (1992); *see also* Tsujimura, *supra* note 58, at 107–11.

[62] *See generally* Ward, *supra* note 48.

[63] General Treaty for the Renunciation of War, 46 Stat. 2343 (1928).

[64] *See Further Correspondence with Government of the United States Respecting the United States Proposal for the Renunciation of War* (June 23, 1928); B. J. C. MCKERCHER, THE SECOND BALDWIN GOVERNMENT AND THE UNITED STATES, 1924-1929, at 246 (1984).

scholars interpret Paragraph 1 to renounce only wars of invasion, not self-defense.[65]

While this is the majority view, some scholars disagree, arguing that Paragraph 1 truly renounces all wars (including wars of self-defense)[66]—perhaps because it is too difficult to distinguish a war of invasion from a war of self-defense.[67]

2. Article 9, Paragraph 2

There are two major interpretations of Paragraph 2. The first is that Paragraph 2 permits war for self-defense. The key, on this account, is the prefatory clause:[68] " . . . in order to accomplish the aim of the preceding paragraph." Because the aim of Paragraph 1 is to renounce war "as a means of settling international disputes," and the phrase "as a means of settling international disputes" means, in context, an invasion directed at foreign countries, the restriction on maintaining armed forces applies only to the aim of not invading foreign countries. Therefore, war in self-defense is permitted.[69] For clarity, we call this first interpretation the "self-defense interpretation."

The second major interpretation does not read the prefatory clause as limiting the scope of the operative clause. Under this interpretation, Paragraph 2 fully renounces self-defense.[70] In the immediate aftermath of the Second World War, particularly prior to

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[65] *See* NOBUYOSHI ASHIBE, *supra* note 61, at 257; KOKUSAI HŌ [INTERNATIONAL LAW] 310 (Kisaburo Yokota ed. 1966).)

[66] *See*, e.g., MIYAZAWA TOSHIYOSHI, KENPŌ [CONSTITUTION] (1962).

[67] *See*, e.g., TSUJIMURA, *supra* note 58, at 108 .

[68] The Second Amendment to the United States Constitution has a similar structure, containing both a prefatory clause ("A well-regulated Militia, being necessary to the security of a free State") and an operative clause ("the right of the people to keep and bear Arms, shall not be infringed."). U.S. CONST. amend. II. However, the United States Supreme Court has rejected a reading of the prefatory clause that would limit the Amendment's operative clause. *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) ("But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

[69] Ward, *supra* note 48.

[70] NOBUYOSHI, *supra* note 61, at 259–61.

the creation of the National Police Reserve (NPR) (**警察予備隊**), the government operated under this interpretation.[71] Japan's defense strategy consequently relied on diplomatic alliances.[72] Around half of constitutional law scholars in Japan now hold this perspective.[73] For clarity, we call this interpretation the "pacifist interpretation."

One strong argument in favor of the self-defense interpretation is that Article 66, Paragraph 2 requires the Prime Minister and other Ministers of State to be civilians. This restriction would not make sense if military forces were forbidden, because if that were the case, all Ministers would be civilians regardless.[74] The Abe Administration has generally adopted the self-defense interpretation, in part because of this argument.[75] Of course, the Abe Administration's interpretation still forbids invasion or other aggressive military actions.[76]

3. Constitutional Supremacy

Under the terms of Japan's surrender in 1945, Japan accepted fundamental limitations on her sovereignty. For the first time in Japan's history, Japan placed a foreign power legally above her own government, subject to the constraints of the terms of surrender[77] and background international legal rules governing occupations.[78] General MacArthur represented the highest authority in Japan from the beginning of the unconditional surrender until the Treaty of San

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[71] *See, e.g.,* Shigeru Yoshida, Prime Minister, plenary session, House of Representative, June 26, 1946 in Shimizu, *Shingiroku* 2: 82–83 [Japanese language].

[72] *See* NOBUYOSHI, *supra* note 61, at 266.

[73] *See id.* at 260 (surveying the field).

[74] *Id.* at 258–61.

[75] Interview with Dr. Tomohiko Taniguchi, Senior Adviser, Cabinet of Japan, Tokyo, Japan (Jul. 11, 2019).

[76] For the origin of this view, still in force, *see* Answer of Ichiro Yoshikuni before the Budget Committee of the House of Councilors, Nov. 13, 1972, *Sangiin yosan iin kaigiroku* [Budget Committee of House of Councilors Minutes], 70th Diet Session, No. 5, at 2 (Nov. 13, 1972).

[77] *See generally* ROBERT J. C. BUTOW, JAPAN'S DECISION TO SURRENDER (1954).

[78] Wladyslaw Czaplinski, *Jus Cogens and the Law of Treaties, in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 84-88 (2006).

Francisco took effect in 1952, ending the occupation.[79] But just how high does that highest authority go? Suppose that GHQ issued a command that conflicted with the Constitution. Which would be supreme?

This is a vexing question. On the one hand, we are used to thinking of constitutions as the supreme law of the land.[80] On the other hand, under the specific circumstances of an unconditional surrender, there is a strong legal argument that GHQ had not just *de facto* supremacy but also legal supremacy, at least during the occupation. Certainly, GHQ acted that way in redrafting the Japanese Constitution.[81] This question is particularly relevant to the JSDF because the JSDF's predecessor force was created by order of GHQ.

a. History of the National Police Reserve / JSDF

During the occupation, it was initially GHQ policy to disarm and demilitarize Japan.[82] However, as strategic circumstances changed, American policy evolved. Early on, diplomat John Foster Dulles[83] urged General MacArthur to support limited remilitarization. MacArthur demurred,[84] but, after the outbreak of the Korean War, was forced to redirect American troops to the Korean Peninsula.[85] This left Japan under-garrisoned. With Japan's economy rapidly recovering, MacArthur sent a letter to Prime Minister Yoshida on July 8th, 1950, ordering the creation of the National Police Reserve (NPR).[86]

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79 DOWER, *supra* note 37, at 80–87.

80 *See, e.g.*, U.S. CONST. art. VI, § 2.

81 *See* SATO, *supra* note 53.

82 *See* Kuzuhara Kazumi, *The Korean War and the National Police Reserve of Japan*, 7 NIDS SECURITY REP. 95, 95 (2006).

83 Dulles served as Chief Negotiator for the Treaty of San Francisco and later served as Secretary of State to President Eisenhower. *See* RICHARD H. IMMERMAN, JOHN FOSTER DULLES: PIETY, PRAGMATISM AND POWER IN U.S. FOREIGN POLICY xvii-xxvi (1988).

84 *See* Alan Millett, *Dwight D. Eisenhower and the Korean War: Cautionary Tale and Hopeful Precedent*, 10 J. AM.-E. ASIAN REL. 155, 174 (2001).

85 Hiroshi, *supra* note 6, at 254.

86 *Id.* at 253.

The NPR was duly created by Government Ordinance No. 260 (G.O.260) on August 10, 1950.[87] G.O.260 immediately raised legal questions as it seemed, *prima facie*, to conflict with Article 9, Paragraph 2 of the new Constitution.

Specifically, two questions arose: (1) does G.O.260 conflict with A9P2? (2) if so, which authority trumps?

b. Supreme Court Precedent: Sakata v. Japan

The Supreme Court considered the fundamental question of the constitutionality of the Japan Self-Defense Forces (JSDF) (自衛隊)—the NPR's successor—in *Sakata v. Japan*. In 1955, angered by plans to evict local residents in order to expand a nearby American military base, protesters stormed the base's airfield, in violation of posted restrictions.[88] The protestors were tried and convicted, but appealed, arguing that Article 9 forbade any military presence in Japan, invalidating their convictions.[89]

The Supreme Court concluded that Article 9 did not forbid the JSDF.[90] While acknowledging the pacifist intentions of the framers of Paragraph 2,[91] the Court held that nothing in the Article prevented Japan from exercising her sovereign right of self-defense.[92]

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87 *Id.* at 254.

88 *Sakata v. Japan*, 13 Keishu 3225, 3225-27 (Sup. Ct., G.B., Dec. 16, 1959).

89 *Id.* at 98-99.

90 *Id.* ("[I]t cannot be acknowledged that the stationing of the United States armed forces is immediately, clearly unconstitutional and void, contravening the purport of Article 9. . . . [O]n the contrary, it must be held that it is in accord with the intent and purpose of these constitutional provisions.").

91 *Id. ("*We, the people of Japan, do not maintain the so-called war potential provided in paragraph 2, Article 9 of the Constitution, but we have determined to supplement the shortcomings in our national defense resulting therefrom by trusting in the justice and faith of the peace loving people of the world, and thereby preserve our peace and existence.").

92 *Id.* ("[C]ertainly there is nothing in [Article 9] which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance".).

The Supreme Court concluded that self-defense is an inalienable right of all sovereign states and cannot be waived.[93]

A natural law approach might understand the right to self-defense as a fundamental property of sovereignty;[94] but the Japanese Supreme Court did not take this approach.[95] Instead, the Court grounded the inherent right of self-defense in general concepts of international law.[96] The Court considered three main ways the right of self-defense might be waived.[97] First, by international law, if Japan were to sign a broad global treaty foregoing the right of self-defense.[98] Second, by transnational law, if Japan were to sign a treaty with specific countries so forbidding the right.[99] Third, by domestic supremacy, on the assumption that the Constitution has supremacy over international commitments. In Japan's case, arguably, all three conditions apply. The San Francisco Peace Treaty, signed by Japan at the close of the occupation, seems to imply that Japan will forego self-defense.[100] Similarly, the U. S.—Japan Security Treaty of 1952 (日本国とアメリカ合衆国との間の相互協力及び安全保障条約) assumes a minimal role for Japan.[101] Third, Article 9 itself arguably alienates Japan's right to self-defense.[102]

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[93] *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959) (quoting supplemental opinion of Justice Kotaro Tanaka: "[t]he fact that a state possesses the right of self-defense for the sake of preserving its national existence is universally recognized").

[94] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[95] Japan's Supreme Court has steadfastly maintained a positivist approach to law common to East Asian jurisdictions that inherited the German approach to legal interpretation. For further analysis, *see generally* Bernd Martin & Peter Wetzler, *The German Role in the Modernization of Japan—The Pitfall of Blind Acculturation*, 33 ORIENS EXTREMUS 77 (1990).

[96] *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Treaty of Peace with Japan art. 19, Sept. 8, 1951, 3. U.S.T. 3169, 136 U.N.T.S. 45.

[101] Security Treaty Between the United States and Japan, Japan-U.S., art. I, Sept. 8, 1951, 3 U.S.T. 3329 ("Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such

However, the Court did not think that any of these events indicated an intention to forego self-defense.[103] Instead, the Court held that these provisions barred only offensive or aggressive military conduct.[104]

Because Article 9 did not preclude self-defense, the Court gave great deference to the Parliament and the Prime Minister in matters of defense policy.[105] Entering a security alliance is a political decision, the Court held, properly the province of the democratically selected branches of the state.[106] Therefore, the Court held that the

forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down largescale internal riots and disturbances in Japan, caused through instigation or intervention by an outside power or powers . . . ").

102 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 9 (Japan).

103 *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959) (" . . . we are free to choose whatever method or means deemed appropriate to accomplish our objectives in the light of the actual international situation, as long as such measures are for the purpose of preserving the peace and security of our country").

104 *Id.* ("This Article renounces . . . war and prohibits the maintenance of . . . war potential, but certainly there is nothing in it which would deny the right of self-defense. . . . [T]he pacifism advocated in our Constitution was never intended to mean defenselessness.")

105 *Id.* ("The Security Treaty, therefore . . . is featured with an extremely high degree of political consideration, having bearing upon the very existence of our country as a sovereign power"). This deference is echoed in other cases. *See*, *e.g.*, Itazuke, *supra* note 14.

106 *Id.* ("Accordingly, unless the said treaty is obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the court . . . [the wisdom of the Treaty] should be left primarily to the Cabinet which has the power to conclude treaties and [the Parliament] which has the power to ratify them.")

U.S.-Japan Security Treaty was constitutional[107]— any recourse for the protestors would have to come from the ballot box.[108]

At the time of *Sakata*, the JSDF was capable only of defensive action. The constitutionality of a more expanded force remains an open question.[109]

c. Incorporation by Treaty

Japan regained full sovereignty with the Treaty of San Francisco (サンフランシスコ講和条約), signed by 49 nations on September 8th, 1951.[110] The Treaty took effect on April 28, 1952, officially ending the Allied Occupation of Japan.[111] The US-Japan Security Treaty was signed the same day, as part of the same process.[112] One might think that, having resumed full sovereignty, Japan was no longer under any obligation to obey an order from the United States. But this is not entirely the case. Although Article 1 of the Treaty of San Francisco restores sovereignty to Japan, many of the Treaty's articles explicitly reaffirm and incorporate decisions made by the occupying Allied Powers.[113] Other parts of the Treaty reaffirm certain interpretations of Article 9, explicitly permitting collective self-defense.[114]

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[107] *Id.* ("It cannot be acknowledged that the stationing of the United States armed forces is immediately, clearly unconstitutional and void, contravening the purport of Article 9, paragraph 2 of Article 98, and the Preamble of the Constitution. On the contrary, it must be held that it is in accord with the intent and purpose of these constitutional provisions.").

[108] *Id.* ("[t]he wisdom of the Treaty] should be left . . . ultimately to the political consideration of the people with whom rests the sovereign power of the nation").

[109] *See generally Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

[110] Treaty of Peace with Japan, *supra* note 16.

[111] *Id.*

[112] Security Treaty Between the United States and Japan, *supra* note 101.

[113] For example, Article 4(b) affirms decisions regarding the disposition of property located in overseas territory. Treaty of Peace with Japan, *supra* note 16.

[114] For example, Article 5(iii)(c) retains the right to individual and collective self-defense. *Id.*

Clarifying the legality of orders issued during the occupation, Article 8 recognizes as binding law "the full force of all treaties now or hereafter concluded by the Allied Powers."[115] In addition, Article 19(d) reads:

> (d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time.

Article 19(d) applies to orders issued by the Supreme Allied Commander, including his letter on July 8, 1950 creating the NPR.[116] The JSDF evolved out of the NPR and General Order 260. G.O.260 (and its successor enabling acts) are incorporated by treaty into the Post-War Japanese legal and political system. The Treaty of San Francisco, including Article 19(d), remains in force to this day.[117] Despite this, of course, Japan's (unamended) 1946 Constitution remains the law of the land.

In the United States, we are used to thinking of the Constitution as the highest law—a supreme document that encompasses, as Hart puts it, our Rules of Recognition, Arbitration and Change.[118] In Japan, the situation is murkier. The Constitution clearly has priority over ordinary legislation.[119] It also (probably) has priority over international treaties.[120] But the Treaty of San Francisco

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115 *Id.* at art. 8.

116 Prime Minister Yoshida's speech at the signing and his personal reflections make it abundantly clear that continuing legal force was intended. *See generally* Treaty of Peace with Japan, *supra* note 16; Yoshida Shigeru, Prime Minister of Japan, Speech on Signing Treaty of San Francisco (Sept. 7, 1951); Yoshida Shigeru, *supra* note 71.

117 *See* Articles 4(b), 5(iii)(c), 6(a) and 8 all reference continuing legal authority of actions taken during the occupation. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 4(b), 5(iii), 6(a), 8 (Japan) (formally incorporating as legal various actions taken during the occupation).

118 *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

119 Satoh Junichi, *Judicial Review in Japan*, 41 LOY. L.A. L. REV. 603, 606–07 (2008).

120 *Id.* at 623–24.

is more complicated. The Constitution of Japan reifies the will of the Japanese people.[121] But Japan only has the sovereign authority to reify its peoples will because of its acceptance of the terms of unconditional surrender. In this sense, then, Japan's contract to uphold the terms of the Treaty of San Francisco could represent a higher legal authority even than the Constitution, for the latter could not exist without the former.[122]

Consequently, even if the JSDF possessed offensive capacity that could potentially violate Article 9, Paragraph 2 under the reasoning in *Sakata*, that capacity might still be legally permissible, because where Article 9, Paragraph 2 conflicts with the orders of GHQ (incorporated by the Treaty of San Francisco), arguably, the Treaty has priority. We tackle this thorny and complex issue at length in Part II.

B. Attempts to Amend the Constitution: A History of Controversy

Since 1952, several proposals to revise the Constitution have been advanced.[123] The Constitution requires that Amendments be approved first by a two-thirds supermajority in the Diet (Japan's Parliament), and then submitted to a popular referendum.[124] No amendment has ever made it past the Diet.

1. Background, History of Constitutional Reform

Efforts to amend the Japanese Constitution have focused on some of the more ambiguous parts of the text. These include the Constitution's anomalous and rather vague description of the Emperor,[125] the absence of environmental protection or special

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121 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] pmbl. (Japan).

122 This is a controversial position, of course, discussed at great length by scholars. *See* REPORT OF THE ADVISORY PANEL, *supra* note 21.

123 As a good overview of arguments in favor of amending the Constitution, see generally WATANABE OSAMU, NIHONKOKU KENPŌ KAISEI SHI [A HISTORY OF ATTEMPTS TO REVISE THE CONSTITUTION OF JAPAN] 231–33 (1987).

124 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 96 (Japan).

125 *Id.* at art. 1–8.

protections for persons with disabilities,[126] limitations on the funding of religion[127] and, of course, Article 9. While many of these changes are controversial, changes to Article 9 may be the most controversial of all.[128]

It is easy to see why many successive governments have desired to amend Article 9. First, as discussed above, the language is vague and open to many interpretations. Second, the way the language interacts with the Treaty of San Francisco creates significant unresolved legal questions. An Amendment could clarify matters and add legitimacy through a public referendum.[129]

Politically, however, revision of the Constitution has proven unpopular. Even Prime Minister Nakasone Yasuhiro, widely considered the strongest post-War Prime Minister until the present Abe administration,[130] downplayed constitutional revision between 1982 and 1987, fearing a lack of public support.[131] Indeed, despite decades of attempts, the Constitution has never been amended.[132] Nevertheless, the governing Liberal Democratic Party (LDP) has adopted several party platforms calling for revision of the constitution. The most serious recent efforts came in 2005 and 2012, when the LDP released two draft amendments.

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126 *Id.*

127 The Japanese Constitution, in effect, already incorporates amendment language proposed (and rejected) by Senator James Blaine in the 19th century. *See Kakunaga v. Sekiguchi* (Supreme Court of Japan, Grand Bench) 31 Minshū 4, 522, 533 (1977).

128 *Poll Shows 56% of Japanese Oppose Amending Constitution under Abe Government*, KYODO NEWS WIRE (July 24, 2019), https://www.japantimes.co.jp/news/2019/07/24/national/politics-diplomacy/56-japanese-oppose-amending-constitution-abe-government-poll-shows/#.XiXEGRdKh0s (noting the specific public opposition to proposals to amend Article 9).

129 Interview with Eiichi Hasegawa, Special Adviser, Prime Minister of Japan, Tokyo, Japan (Dec. 11, 2019).

130 Robert Angel, *Prime Ministerial Leadership in Japan: Recent Changes in Personal Style and Administrative Organization*, 61 PACIFIC AFF. 583, 583 (1988).

131 GERALD CURTIS, THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE 147 (1999).

132 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

2. 2005 Constitutional Reform Proposal

Prime Minister Koizumi proposed the first of these draft amendments on November 22nd, 2005.[133] The first part of this amendment was aimed at Article 9, clarifying the status of the JSDF.[134] The 2005 amendment also created a separate and well-defined system of military courts, clarifying the unresolved legal question of JSDF jurisdiction. Additional amendments focused on other areas of legal ambiguity, such as: (a) removing the strict bar on funding religious institutions (which, for example, bans public funding of military chaplains); (b) making technical modifications to the relationship between the central government and the prefectures, increasing federalism; and, (c) modifying the constitutional amendment process to make further amendments easier.

The 2005 draft was controversial and fiercely debated. Nearly all of the American coverage of the debate focused on the political dynamics of the proposed amendment, with the LDP and PM Koizumi roundly castigated for attempting to reverse "Japan's pacifist Constitution."[135] Little to no English-language writing pointed out that the Amendment was principally drafted to resolve unclear legal questions. Even English-language voices sympathetic to constitutional change focused on the geopolitical forces motivating the revision of Article 9, particularly rising Chinese ambitions.[136] The legal aspect of the debate was almost entirely ignored.

In the end, no formal amendment was proposed, because Prime Minister Koizumi retired after a then-unusually long nearly

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133 *See* Canon Pence, *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N. C. J. INTL'L. & COM. REG. 335 (2006) ("On November 22, 2005 the ruling coalition of Japan, the Liberal Democratic Party (LDP), released a draft proposal to reform the Constitution.").

134 *Id.* at 336 ("The most significant change proposed by the LDP, and arguably the chief purpose of the draft revision, is to remove the war renunciation language of Article 9 of the constitution.").

135 *See*, *e.g.*, *Id.* at 380 ("In a move that some say undermines the principle of pacifism and ignores the lessons of Japan's past, the new draft . . . ").

136 In this context, the 2004 incursion into Japanese territorial water of a submerged Chinese submarine was particularly significant. *See* Mizuho Aoki, *Chinese Submarine Intrusion Considered an Act of Provocation,* JAPAN TIMES (Nov. 13, 2004).

five-year term.[137] Prime Minister Abe took over from 2006-2007, but was unable to form a stable enough coalition to push the amendment proposal.[138] At the same time, the amendment package was underwater in the polls, in part because an influential panel of legal experts pointed out that several constitutional ambiguities (like the status of the Emperor) were actually not resolved by the 2005 Proposal.[139] In an effort to address these concerns, Abe proposed that the Parliament pass legislation allowing for a national referendum on constitutional revision, with the details to be hammered out later on in the process.[140] Amid protests and low approval ratings, the Government ultimately decided not to move forward.

The Democratic Party of Japan (DPJ) and allied parties took control of the Japanese Parliament in a historic election in 2008.[141] As constitutional reform had long been associated with the LDP, the DPJ did not push for it at all, though parts of the DPJ coalition actually favored many of the proposed reforms (for example, a constitutional amendment to prohibit disability discrimination).[142]

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137 Reiji Yoshida & Kazuaki Nagata, *Koizumi to exit political stage*, JAPAN TIMES (Sept. 26, 2008), https://www.japantimes.co.jp/news/2008/09/26/national/koizumi-to-exit-political-stage/.

138 *Japanese Prime Minister Resigns*, BBC NEWS (Sept. 12, 2007, 4:17 PM), http://news.bbc.co.uk/2/hi/asia-pacific/6990519.stm (" . . . but his poll ratings plummeted amid a row over pensions and a series of financial scandals involving some of his cabinet ministers").

139 *Japan approves constitution steps*, BBC NEWS (May 14, 2007, 8:45 AM), http://news.bbc.co.uk/2/hi/asia-pacific/6652809.stm ("Public opinion in Japan on the issue also appears to be mixed").")

140 Kyodo, *Response to Abe's Drive: Support Falls for Amending Constitution,* JAPAN TIMES (Apr. 17, 2007), cited in JAPAN'S POLITICS AND ECONOMY: PERSPECTIVES ON CHANGE 65 (Marie Söderberg & Patricia A. Nelson eds., 2010).

141 *'Major Win' for Japan Opposition*, BBC NEWS (Aug, 30, 2009, 4:37 PM), http://news.bbc.co.uk/2/hi/asia-pacific/8229368.stm ("The DPJ has won 300 seats in the 480-seat lower house, ending 50 years of almost unbroken rule by the Liberal Democratic Party (LDP) . . . DPJ leader Yukio Hatoyama hailed the win as a revolution.").

142 Interview with Takeuchi Norio, Member of Parliament, Constitutional Democratic Party, New York, N.Y. (Apr. 16, 2019).

The DPJ government collapsed in 2011-2012, in a landslide general election victory for the LDP and Prime Minister Abe.[143]

3. 2012 Constitutional Reform Proposal

As part of the parliamentary campaign in 2012, the LDP released a new proposal for constitutional reform.[144] The new reform proposal contained several changes and represents the most recent plan to formally amend the Constitution.

First, the proposal revised the Constitution's preamble, modifying some of its theoretical and normative language. Similarly, the language regarding human rights is somewhat revised.[145] Next, the new amendment formally defines the Emperor as the Head of State, as well as codifying Japan's national flag and anthem.[146] Controversially, the new draft permits the Government to restrict public expression for the public interest or to support public order.[147] The new draft also proposes a new system of patents and intellectual property rights,[148] makes it harder for public workers to unionize[149] and adds new rights, including protection of privacy,[150] accountability of the State,[151] environmental protections[152] and the rights of victims of crimes.[153] Discrimination against persons with disabilities is also prohibited.[154] The draft deletes a clause prohibiting the establishment

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143 *See generally* TOMOHITO SHINODA, CONTEMPORARY JAPANESE POLITICS: INSTITUTIONAL CHANGES AND POWER SHIFTS (2013).

144 *Id.*

145 For example, instances of the phrase "public welfare" are replaced by the phrase "public interest." Policy Platform of the LDP, *supra* note 20, at 19.

146 *Id.* at 22.

147 *Id. at* 19.

148 *Id.* at 11.

149 *Id.* at 10.

150 *Id.* at 3.

151 *Id.* at 3.

152 *Id.* at 28.

153 *Id.* at 3.

154 Policy Platform of the LDP, *supra* note 20, at 19. The amendment proposal would add this to the Constitution; Japan presently prohibits discrimination against persons with disability through legislation alone. *See generally* KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS 123–66 (2015); *see also*

of religion,[155] changes the way that Supreme Court judges are reviewed[156] and makes it easier to pass further amendments to the Constitution in the future.[157]

Many of these provisions were controversial in Japan and generated an enormous amount of public debate.[158] However, the bulk of the English-language commentary focused on the proposal's amendments to Article 9.[159] The proposed draft amends Article 9 to state that a formal national defense force is authorized, with the Prime Minister as commander in chief.[160] The proposed amendment still requires the self-defense forces to remain defensive.[161] Additionally, the amendment adds a procedure for the government to declare a national emergency, permitting expedited law-making during such crises.[162] It is important to understand the context of these proposals. They go beyond the 2005 draft amendment, aiming to address a broader range of legal issues. Although the substance of these reforms is very much legal, little to none of the English-language material discussed the legal dimensions of the constitutional amendment debate.[163]

Adam P. Liff & Ko Maeda, *Order from Chaos: Why Shinzo Abe Faces an Uphill Battle to Revise Japan's Constitution*, Brookings, https://www.brookings.edu/blog/order-from-chaos/2018/12/15/why-shinzo-abe-faces-an-uphill-battle-to-revise-japans-constitution/ (discussing the public debate back and forth over various different constitutional amendment proposals).

155 *Id.* at 22.

156 *Id.* at 12.

157 *Id.* at 29.

158 Masami Ito, *Constitution Again Faces Calls for Revision to Meet Reality*, JAPAN TIMES, (May 1, 2012), https://www.japantimes.co.jp/news/2012/05/01/reference/constitution-again-faces-calls-for-revision-to-meet-reality/ (discussing the divide between security experts who seek an amendment to the Constitution formalizing the legal structure of the JSDF and general public opinion against it).

159 Mizobuchi, *supra* note 12.

160 Policy Platform of the LDP, *supra* note 20, at 2.

161 *Id.* at 2.

162 *Id.* at 2.

163 Mizobuchi, *supra* note 12.

4. Current Status

Despite decades of debate, most opinion polls continue to show that the majority of Japanese citizens oppose amending the Constitution or changing Article 9.[164] Nevertheless, constitutional revision remains a priority for the LDP.[165] As recently as the last Parliamentary election, Prime Minister Abe spoke at length on the importance of amending the Constitution, although with less specificity than his previous proposals.[166] The continuing salience of the constitutional amendment issue is one of the major fault lines in Japanese politics, as evinced by the name of one of Japan's strongest opposition parties, the Constitutional Democratic Party (CDP).[167] There are also major strategic implications—the United States

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[164] Craig Mark, *Japan Debates Changing Its Pacifist Constitution*, THE DIPLOMAT (May 18, 2017), https://thediplomat.com/2017/05/japan-debates-changing-its-pacifist-constitution/ ("But the pacifist sentiments of a majority of the Japanese people could be the greatest obstacle to passing any referendum. A recent Kyodo News poll found 49 percent support for changing Article 9, with 47 percent against. But another NHK poll had only 25 percent for change, with 57 percent opposed.").

[165] *Id.* ("Prime Minister Shinzo Abe declared 'the time is ripe to begin a debate on possible change.'").

[166] *Id. ("*Abe said that since the war-renouncing clauses would be maintained, Japanese forces would not join wars abroad. He claimed many legal scholars consider the forces' very existence unconstitutional – hence his motive for proposing constitutional change was merely to resolve this ambiguity, and therefore improve Japan's overall security.")

[167] *2017 Lower House Election / Edano Announces Launch of New Party of Liberals*, THE YOMIURI SHIMBUN (Oct. 2, 2017, 8:34 PM), the-japan-news.com/news/article/0003978833 [https://web.archive.org/web/20171002215742/http:/the-japan-news.com/news/article/0003978833]; *see also* Liff, supra n. 154 (discussing the ambivalence of the LDP's coalition partner and disputes between the parties over the Constitution).

generally supports an Amendment of Article 9,[168] while China and North Korea both strongly oppose it.[169]

Politics continues to play a central role in shaping the constitutional amendment debate. However, in our view, there is no denying that legal ambiguity plays a major role as well, particularly with regard to Article 9. While English-language writing often covers the political debate at great length, very little of it addresses the legal issues. We aim to take a step toward filling that gap in Part II.

II. THE LEGAL BASIS FOR THE REINTERPRETATION

We now direct our attention toward the legal arguments surrounding Article 9 and the 2014 Reinterpretation permitting collective self-defense. We begin by recounting the historical and political background of the 2014 Reinterpretation. We then discuss the political and scholarly response, with a focus on English-language commentary. Finally, we delve into the many legal intricacies surrounding Article 9.

A. The Reinterpretation

In the summer of 2014, the Cabinet of Japan announced that it was adopting an interpretation of Article 9 that permitted collective self-defense.[170] Collective self-defense refers to the defense of allied units in military operations.[171] For example, suppose that two Japanese and American destroyers were sailing in joint formation. If the Japanese ship came under attack, the American ship could come

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168 Jeffrey P. Richter, *Japan's "Reinterpretation" of Article 9: A Pyrrhic Victory for American Foreign Policy?* 101 IOWA L. REV. 1223 (2016) (" . . . as it has for decades been pushing Japan to repeal Article 9 so that it could assist the United States and its allies during the Cold War").

169 *Id.* ("Japan's neighbors—particularly China—have responded to this [attempt to revise the Constitution to normalize the JSDF] . . . with widespread condemnation").

170 Richter, *supra* note 168.

171 *Id.* ("For international lawyers the phrase 'collective self-defense' refers primarily to the well-established UN Charter right of States to defend *other States*. This right pertains to the *jus ad bellum,* that is, the law that governs when a State may use force against or in the territory of another State.")

to its aid—collectively defending the group. The Japanese ship could, of course, also defend itself.[172] Prior to the summer of 2014, however, if the American ship came under attack first, it was legally unclear whether the Japanese ship could come to the American ship's aid. Such an action would constitute collective self-defense, which the law did not clearly permit.[173]

After reactivating a panel of scholars and reviewing their report,[174] the Cabinet adopted an official understanding that collective self-defense is lawful under Article 9.[175] This process and decision is referred to as the "Reinterpretation of 2014," the "2014 Reinterpretation" or just the "Reinterpretation."

For decades, Japanese military planners operated as if collective self-defense was prohibited.[176] But there was little practical need to act otherwise.[177] Since the end of World War II, Japan's principal security partner has been the United States,[178] and, until very recently, American naval supremacy made it difficult to imagine that Japanese naval assets would be called on to assist American vessels.[179]

The rise in the capacity and size of the Chinese armed forces has significantly changed this calculus.[180] Since 2000, while American

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172 *See generally* YOSHIKAZU WATANABE ET AL., THE U.S.-JAPAN ALLIANCE AND THE ROLE OF THE JAPANESE SELF-DEFENSE FORCES 13-24 (Sasakawa Peace Found. USA 2017).

173 Interview with Dr. Tomohiko Taniguchi, Senior Adviser, Cabinet of Japan, Tokyo, Japan (Jul. 11, 2019).

174 REPORT OF THE ADVISORY PANEL, *supra* note 21.

175 *Id.* at 2.

176 Takei Tomohisa, *Japan Maritime Self Defense Force in the New Maritime Era*, 34 HATOU 4, 5 (2008).

177 Interview with Kanehara Nobukatsu, Deputy Assistant, Chief Cabinet Secretary of Japan, in Tokyo, Japan (Dec. 14, 2015).

178 DOWER, *supra* note 37.

179 *See* David Lague & Benjamin Kang Lim, *Special Report: China's Vast Fleet is Tipping the Balance in the Pacific*, REUTERS (Apr. 30, 2019, 7:30 AM), https://www.reuters.com/investigates/special-report/china-army-navy/ ("Globally, the U.S. Navy remains the dominant maritime force, the power that keeps the peace and maintains freedom of navigation on the high seas.").

180 *Id.* ("In just over two decades, the People's Liberation Army (PLA), the Chinese military, has mustered one of the mightiest navies in the world. This

military expenditures have risen only modestly,[181] Chinese military expenditures have exploded.[182] China has also continued aggressive island-building in the Spartly Islands,[183] part of an area-denial tactical doctrine intended to neutralize American blue-water fleet superiority.[184] These technological and policy developments have significantly increased the threat level for the American Seventh Fleet and other naval units.[185]

Before these developments, Japan declined to engage in collective self-defense simply because it was not strategically necessary. The debate over collective self-defense is not about a settled matter of constitutional law, rather it is about a novel question arising from changing geo-strategic circumstances. As American strategists increasingly asked Japan to assist in collective self-defense,

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increased Chinese firepower at sea—complemented by a missile force that in some areas now outclasses America's—has changed the game in the Pacific . . . In raw numbers, the PLA navy now has the world's biggest fleet. It is also growing faster than any other major navy.").

181 *See* United States Department of Defense, Fiscal Year 2009 Budget Request (Feb. 4, 2008), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2009/FY2009_Budget_Request_Justification.pdf at 6 (reflecting a relatively constant expenditure in terms of GDP).

182 *See* Lague & Kang Lim, *supra* note 179 ("Under Xi, the Communist Party has also opened the funding tap. Between 2015 and 2021, total military outlays are projected to jump 55 percent from $167.9 billion to $260.8 billion. . . . Over the same period, the navy's share of this budget is expected to increase 82 percent, from $31.4 billion to $57.1 billion, the report said").

183 *See* Kurt M. Campbell & Ely Ratner, *The China Reckoning,* FOREIGN AFFAIRS, (Mar./Apr. 2018), https://www.foreignaffairs.com/articles/china/2018-02-13/china-reckoning.

184 *Id.* ("For Beijing, the United States' alliances and military presence in Asia posed unacceptable threats to China's interests in Taiwan, on the Korean Peninsula, and in the East China and South China Seas . . . So China started to chip away at the U.S.-led security order in Asia, developing the capabilities to deny the U.S. military access to the region and driving wedges between Washington and its allies.").

185 Kurt M. Campbell & Jake Sullivan, *Competition Without Catastrophe*, FOREIGN AFFAIRS, (Sept./Oct. 2019), https://www.foreignaffairs.com/articles/china/competition-with-china-without-catastrophe.

the issue of Japan's legal capacity to do so became particularly salient.[186]

After internal deliberations in 2012 and 2013, the Cabinet sought out external guidance on this complex legal question.[187] In 2014, the Prime Minister reactivated a special panel to advise the Cabinet on whether or not Article 9 permitted collective self-defense, drawing on the expertise of retired policymakers and legal scholars.[188] The panel released a report arguing that collective self-defense was lawful,[189] and the Cabinet accepted that conclusion.[190]

From the beginning, the Cabinet's examination was intended to resolve serious legal questions affecting Japan's security.[191] There is a significant strategic cost to the ambiguity of the current legal status of the Self-Defense Forces.[192] For example, in the summer of 2019, President Trump asked allied nations to assist the United States in a mission patrolling the Suez Canal.[193] Given the sophistication of Japan's Maritime Self-Defense Forces,[194] and the alliance between Japan and the United States,[195] it seemed natural for Japan to contribute.[196] Indeed, Japan would very much have liked to do so.[197]

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186 Interview with Dr. Tomohiko Taniguchi, *supra* note 75.

187 REPORT OF THE ADVISORY PANEL, *supra* note 21.

188 *Id.* at 54–55.

189 *Id.* at 32.

190 Linda Seig & Kiyoshi Takenaka, *Japan Takes Historic Step from Post-War Pacifism, OKs Fighting for Allies*, REUTERS (June 30, 2014), https://www.reuters.com/article/us-japan-defense/japan-takes-historic-step-from-post-war-pacifism-oks-fighting-for-allies-idUSKBN0F52S120140701.

191 *See* REPORT OF THE ADVISORY PANEL, *supra* note 21, at 1–4.

192 Interview with Dr. Tomohiko Taniguchi, *supra* note 75.

193 *Id.*

194 *See Japanese Aircraft Carrier*, GLOBALSECURITY.ORG (Aug. 3, 2012), https://www.globalsecurity.org/military/world/japan/ddh-x-aircraft-carrier.htm ("With the decline of Russian naval strength, the Self- Defense Forces' fighting vessels and aircraft rank second in the world, behind the United States.").

195 *See* Treaty of Mutual Cooperation and Security between the United States and Japan, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632; T.I.A.S. No. 4509.

196 Interview with Dr. Tomohiko Taniguchi, *supra* note 75.

197 Japanese strategists viewed a dispatch of force as helpful to Japan's strategic interest, since positively responding to American requests enhance security cooperation. *Id.*

But there were serious legal concern within the Abe Administration.[198] Armed forces operating officially, in uniform and fighting under a declared flag, enjoy special legal protections under the laws of war.[199] Of course, rouge nations might violate international law and disregard those protections.[200] But, as Louis Henken once observed, nearly all nations follow nearly all of international law nearly all of the time.[201] The protections extended to soldiers impacts their safety, and the safety of deployed personnel is (and ought to be) a significant concern for any state.[202]

Suppose that Japan dispatched Maritime Self-Defense Forces to join the American multi-lateral force.[203] And suppose that these forces were then captured and held as prisoners. Would they enjoy similar protections to American forces captured under similar circumstances? As the law stands, there is a good argument that they should; but there is also a real argument that they should not, that the Self-Defense Forces are unconstitutional, and that soldiers claiming to so-affiliate are enemy combatants—or something else entirely.[204]

This ambiguity weakens the deterrent and protective effect of international law, so well-established by Henken and others.[205] It was also a significant factor in persuading the Cabinet that it ultimately

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198 *Id.*

199 U.S. DEP'T OF DEF., LAW OF WAR MANUAL § XX (2016).

200 *See* Anna Holligan, *Radovan Karadzic Sentence Increased to Life at UN Tribunal*, BBC NEWS (Mar. 20, 2019), https://www.bbc.com/news/world-europe-47642327.

201 LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

202 One of the main reasons, no doubt, that the Conventions have been so widely signed. *See* Jean S. Pictet. *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462 (1951).

203 A proposal that was actually considered quite seriously. *See* Takenaka, *supra* note 11.

204 *See* Bruce Ackerman & Matsudaira Tokujin, *A militarized Japan?*, L.A. TIMES (Jan. 11, 2013, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2013-jan-11-la-oe-ackerman-japan-constitution-20130111-story.html (Here, Professor Ackerman argues that the current defense forces are unconstitutional and Japanese overseas deployment is unlawful—he does not, of course, say Japanese combatants should be treated poorly.).

205 *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599–2603 (1997).

could not join the United States' multi-lateral force.[206] The legal ambiguity had a profound effect on important decisions of Japanese foreign policy, causing Japan to instead dispatch naval forces under her own authority, with more limited rules of engagement.[207]

All of this goes to show that there is a real legal problem when it comes to the status of the Self-Defense Forces—one rooted in the documentary history of the Constitution. This legal ambiguity produces practical consequences for policy. And the Reinterpretation clarified some of this uncertainty.[208]

B. Response to the Reinterpretation

The conventional narrative in the English-language literature is that the Reinterpretation was solely, and shallowly, motivated by political pragmatism.[209] Variations of this account dominate English-language writing.[210] That narrative goes something like this: Prime Minister Abe very much wishes to amend Article 9.[211] He cannot, because the Japanese people oppose it.[212] So, for political reasons, he

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206 Taniguchi, *supra* note 173.

207 Takenaka*, supra* note 11 ("Japan, a U.S. ally that has maintained friendly ties with Iran, has opted to launch its own operation rather than join a U.S.-led mission to protect shipping in the region.").

208 REPORT OF THE ADVISORY PANEL, *supra* note 21.

209 *E.g.*, Craig Martin, *The danger in Abe's constitutional amendment proposal*, JAPAN TIMES (Aug. 5, 2019), https://www.japantimes.co.jp/opinion/2019/08/05/commentary/japan-commentary/danger-abes-constitutional-amendment-proposal/ ("But this amendment proposal was politically impossible to move forward, and so Abe then attempted to achieve many of the same results through a 'reinterpretation' of Article 9, through a Cabinet decision issued in 2014, followed by its implementation through the national security legislation enacted in 2015 . . . ").

210 *See, e.g.*, Michael A. Panton, *Japan's Article 9: Rule of Law v. Flexible Interpretation*, 24 TEMPLE INT'L & COMP L.J. 129 (2010).

211 This premise is true. *See Japan's Abe Hopes for Reform of Pacifist Charter by 2020*, REUTERS (May 3, 2017, 1:34 AM), https://www.reuters.com/article/us-japan-government-constitution-idUSKBN17Z0BH.

212 *Poll Shows 54% Oppose Revision of Japan's Pacifist Constitution under Abe's Watch*, JAPAN TIMES (Apr. 11, 2019), https://www.japantimes.co.jp/news/2019/04/11/national/politics-diplomacy/poll-shows-54-oppose-revision-japans-pacifist-constitution/#.Xi-TaBdKhR0.

has forced through a *de facto* amendment (the Reinterpretation) to achieve some of his desired constitutional changes.[213]

Approaching the Reinterpretation with an eye toward background social forces rather than object-level legal arguments has a certain appeal. It seems to provide a sense of what is *really* going on—a deeper insight into Japanese politics. There is, after all, no denying that political, policy and personal reasons played a large role in Prime Minister Abe's decision to pursue constitutional amendment. From a foreign policy perspective, Japan's principal security ally, the United States, has long urged Japan to adopt a more strident defense policy. In Japan's case, that means normalizing her defense policy and armed forces,[214] releasing American assets to spend more energy on deployment elsewhere.[215] Arguably, a more conventional defense policy would also enhance Japan's broader foreign policy influence.[216]

In addition, the Reinterpretation is popular within the LDP, particularly within the more hardline conservative factions.[217] Prime

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[213] The idea that broad democratic support is what makes Constitutional change legitimate is a hallmark of the "Constitutional Moments" model discussed at length in Part III, *infra*.

[214] Seig & Takenaka, *supra* note 190 ("The United States, which defeated Japan in World War Two then became its close ally with a security cooperation treaty, welcomed the Japanese move and said it would make the U.S.-Japan alliance more effective. 'This decision is an important step for Japan as it seeks to make a greater contribution to regional and global peace and security,' Defense Secretary Chuck Hagel said in a statement.").

[215] *Id.* ("Washington has long urged Tokyo to become a more equal alliance partner and Japan's move will also be welcomed by Southeast Asia nations that like Tokyo have territorial rows with an increasingly assertive China.")

[216] This belief is, at any rate, widely—and probably correctly—attributed to many members of the LDP. *Id.* ("Conservatives say the constitution's war-renouncing Article 9 has limited Japan's ability to defend itself and that a changing regional power balance, including a rising China, means policies must be more flexible.").

[217] *Id.* ("[Q]uoting Gerry Curtiss—'Conservative governments have pushed the envelope hard and often to get the public to agree to a more elastic interpretation of article 9 . . . '")

Minister Abe led a center-right faction within his Party.[218] To remain in power he needed to be mindful of the further-right factions.[219] Prime Minister Abe could build political support with these factions through the Reinterpretation,[220] so there were domestic political reasons to pursue it, even if the Reinterpretation is not broadly popular outside the Party. But, as many observers have noted, polling and other public policy information shows that while the LDP may strongly favor constitutional reform, the public largely does not.[221] Instead, the public is either unsure, or outright opposed, depending on the poll.[222] Article 9 seems to be beloved by the Japanese public,[223] and attempts to revise it are viewed with great skepticism.[224]

Because there is limited English-language writing on Japanese internal politics, and because the Reinterpretation is a highly controversial and sensitive topic within Japan,[225] it is easy for this conventional narrative to take hold. It is also abundantly clear, from

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218 *List of Members*, Seiwa POLITICAL-ANALYSIS COUNCIL [SEIWA SEISAKU KENKYŪKAI], http://www.seiwaken.jp/seiwaken/seiwaken.html#03 (last visited Aug. 18, 2020).

219 *See generally* Curtis, *supra* note 131.

220 Seig & Takenaka, *supra* note 190.

221 *Id.* ("Some voters worry about entanglement in foreign wars and others are angry at what they see as a gutting of Article 9 by ignoring formal amendment procedures.").

222 *See, e.g.*, *Poll Shows 54% Oppose Revision of Japan's Pacifist Constitution under Abe's Watch*, JAPAN TIMES, *supra* note 212.

223 This fact is conceded even by those who seek to remove Article 9. *See*, *e.g.*, Akira Murao, *Ishiba Attacks Abe for Shifting Stance on Constitutional Revision*, MAINICHI SHIMBUN (Sep. 7, 2018), https://mainichi.jp/english/articles/20180907/p2a/00m/0na/016000c016000c016000c7 ("At a meeting of Abe's intraparty faction in early August, a member argued that removing Article 9's second paragraph 'may be logically consistent, but has little likelihood of getting support from the opposition or the public, and this should be understood by a wider audience inside the party.'").

224 *Id.* ("[Removing Article 9] has little likelihood of getting support from the opposition or the public. . . .")

225 Martin, *supra* note 209 ("Most readers will recall that this reinterpretation effort was highly controversial. The vast majority of constitutional scholars in Japan, along with several former Supreme Court justices and former directors of the Cabinet Legislation Bureau, publicly claimed that the reinterpretation was illegitimate and unconstitutional, and tens of thousands of people protested against it on in the streets.").

either a living constitution perspective, or from the perspective of original public meaning, that this kind of political workaround is improper.[226] It denies the people their fundamental right to amend their government's fundamental rules. The Constitution binds the government.[227] The government should not be able to change it without asking the people.[228]

This conventional narrative misunderstands the importance of the substantive legal questions at the center of the Reinterpretation. Because the Reinterpretation is fundamentally an effort to answer a genuine legal question,[229] it deserves to be analyzed for its object-level legal merit. It addresses real, unsolved questions of constitutional interpretation. If the Reinterpretation answers these questions correctly—if it is right on the law—then it is as an exercise of constitutional fidelity, regardless of whatever other political factors might motivate the interpreters.

C. Legal Analysis

The problem with this narrative is not just that it places too small an emphasis on the legal dialogue; it is that it misunderstands its relevance. The law is not politics.[230] It may be shaped by political forces, but it does not reduce to those forces. If the Reinterpretation advances a view of the Constitution that is legally correct, then it

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226 *See generally* Ackerman, *supra* note 28; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997) ("It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change.").

227 *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2013).

228 Indeed, the ability of the chief executive to act beyond the authority of the Constitution is a component factor in the ranking of the political freedom within a country by the widely cited Freedom House Index. *See Freedom of the World 2019*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat (last visited Feb. 16, 2020).

229 REPORT OF THE ADVISORY PANEL, *supra* note 21, at 1, 4–8.

230 *See Baker v. Carr*, 369 U.S. 186, 208–217 (1962) (distinguishing between political and legal questions).

does not really matter (at least not legally) whether that view is popular.[231]

As mentioned briefly in Part I, there is a fundamental legal problem at the heart of Article 9 created by Japan's treaty obligations under international law. Conspiratorial accounts miss this critical point and therefore misunderstand the fundamental disagreement at the heart of the Reinterpretation. The Constitution was ratified in 1946[232] and was, at that time, in a certain sense, the highest law of the land. Yet in 1946 Japan was still under occupation.[233] Japan had surrendered unconditionally to the United States[234] and the United States followed international law and norms in carrying out that occupation.[235] Indeed, the occupation is now largely viewed rather positively in Japan.[236]

Could the United States have ordered changes to Japan's 1946 Constitution? Or even vetoed it entirely? This is a difficult question. On the one hand, the Constitution is Japan's highest law. On the other hand, an unconditional surrender is a surrender of sovereignty; the recognition that a state is no longer the sole master of its affairs.[237]

1. A Belligerent Hypothetical

Suppose that two states, A and B, go to war. To simplify the hypothetical, assume that they fight the war above-board—they

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231 *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.").

232 *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

233 *See generally* DOWER, *supra* note 37.

234 *Id.*

235 We need not arbitrate the legal dispute over whether compliance with international law is required for legal authority after an unconditional surrender. *A fortiori*, even if it is, the United States seems to have been operating within these constraints. *See generally id.*

236 *Id.* at 65.

237 Francis C. Balling, *Unconditional Surrender and a Unilateral Declaration of Peace*, 39 AM. POL. SCI. REV. 474 (1945).

declare in advance and they both commit no war crimes.[238] Eventually, B elects to conditionally surrender. A condition of the surrender is that B amend its Constitution to permit the payment of reparations to A for damages in the war equal to the harm B caused A, as determined by A or by a neutral third party. Suppose for the purposes of this example, that B's original constitution explicitly made reparations payments of this kind illegal. The Instrument of Surrender and Treaty of Peace name A as the legal occupying power of B until such changes are made.

Subsequent to the signature of this Instrument of Surrender, B amends its Constitution to permit the payment of reparations as determined solely by B to be reasonable and sufficient. A rejects this amendment and orders B to draw up a new constitution, Draft 3. B refuses to do so.

Who is in the right here legally? We have no idea.[239] A strong argument can be made for a kind of transnational law contractarianism, in which B has a duty to effect the changes in the Instrument of Surrender and, if B breaches that duty, A can demand specific performance.[240] After all, since the decision by B seems fundamentally inequitable, specific performance seems reasonable.[241] On the other hand, it seems like B has a fundamental right to set its basic law. And if that law is the Constitution, it seems wrong to place another law above it. As Professor James Stern declared "we have no concept of what it would mean for the Constitution to be

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[238] These conditions are added to avoid complexity caused by the War itself being unlawfully launched or conducted. For simplicity, the author assumes neither country is a signatory to the UN Charter or any other document that flatly forbids the use of offensive war. We want a good clean hypo.

[239] Even just by analogy to the United States, the answer is complex. Surely in the American context the Constitution is the highest law and should presumably trump any international obligations. Yet some international obligations may be so central that, some argue, they must always bind, nevertheless. *See generally* Richard Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990).

[240] A strong presentation of this argument is found in Makoto Iokibe, *50 Years of Japanese Diplomacy*, 500 INT'L ISSUES 4 (2001) [Japanese language].

[241] For this general approach to contract remedy, *see* CHARLES FRIED, CONTRACT AS PROMISE (1981).

unconstitutional."[242] But is there a way for the Constitution to be unlawful?

This is more than just an interesting theoretical question — these are precisely the factual circumstances of Japan's JSDF. Indeed, the conflict between GHQs instructions and Article 9 is a complex legal issue that Japanese legal scholars have struggled to answer. Their debates have produced a range of views.

2. Contours of the Legal Landscape

One approach, which we call Absolute Constitutionalism, maintains that the Constitution of 1946 is simply Japan's highest law.[243] Under this approach, any state action in conflict with that law is unconstitutional.[244] Therefore, Japan's 1950 enabling legislation would have no legal force, despite GHQ's orders. On this account, the modern JSDF is either unconstitutional (because it is prohibited by Article 9), or permitted (because Article 9, properly interpreted, allows it). And if the JSDF is unconstitutional, then it always has been ever since it was created.[245]

Another approach, which we call Limited Constitutionalism, holds that the order by GHQ *did* override the Constitution of 1946—

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[242] Interview with James Stern, Professor of Law, William and Mary Law School, in Annapolis, MD (Aug. 10, 2019).

[243] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 98, para. 1 (Japan) ("This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity").

[244] *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting that "Article VI of the Constituion makes the Constitution the 'supreme Law of the Land"). *See also* Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308 (2007).

[245] Rui Abiru, *Almost All Japanese Look Favorably at the JSDF, So Why Do We Keep the Forces in Limbo?*, JAPAN FORWARD (Mar. 13, 2018), https://japan-forward.com/almost-all-japanese-look-favorably-at-the-jsdf-so-why-do-we-keep-the-forces-in-limbo/ ("[D]espite the government having always interpreted the JSDF as constitutional, it would politically be irresponsible not to try to counter the view of more than 60% of constitutional scholars that the JSDF is unconstitutional. The Communist[sic] Party, too, according to chairman Kazuo Shii, is of the view that, 'the JSDF is incompatible with the Article 9 of the Constitution.'").

but only until Japan regained full sovereignty. Once that occurred in 1952, the Constitution again became the highest law. The trouble with this approach is that the Treaty of San Francisco, which restored full sovereignty to Japan, contained explicit language requiring Japan to recognize the lawfulness of commitments made during the occupation.[246] If these commitments were the condition on which Japan regained full sovereignty, Limited Constitutionalism must hold that they were vacuous (or, rather implausibly, that Japan has never regained full sovereignty). Regardless, on this account, as in Absolute Constitutionalism, the constitutionality of the present-day JSDF depends entirely on the interpretation of Article 9.

A third approach, which we call Sovereign Contractarianism, maintains that the orders of GHQ and the 1950 enabling legislation were completely legally binding at the time and, per the Treaty of San Francisco of 1952, remain completely legally binding. On this view, the JSDF is lawful and legitimate because, while it may or may not violate Article 9, the Japanese Constitution is not the highest relevant legal authority—treaty agreements enacted at the conclusion of the unconditional surrender are supreme and trump the 1946 Constitution.

A fourth and final approach, which we call Legal Internationalism, simply holds that all international legal treaties of Japan trump the 1946 Constitution. The idea here is that if Japan enters into a legally binding international agreement that conflicts with a provision of the Constitution, so much the worse for the Constitution. On this account, the JSDF is perfectly legitimate because it is required by the Treaty of San Francisco. International law is simply higher than national law.[247]

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[246] Treaty of Peace with Japan, *supra* note 16, at art. 19(d) ("Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.").

[247] To prove our thesis in this paper—that the Reinterpretation debate turns on genuine legal issues—we do not need to arbitrate between these four views or prove that any one of them is true. All we must show is that these four views are actually held, actually plausible, and that the 2014 Reinterpretation is

Defenders of the purely pragmatic narrative outlined in Section 2 seem to implicitly assume that only Absolute Constitutionalism or Limited Constitutionalism is plausible. In other words, they assume that perhaps Japan was obligated to follow GHQ's enabling instructions in 1952—but it certainly is not now. Coupled with the dubious assumption that there really is no legal dispute about the meaning of Article 9, it follows that there is nothing (legally) to fight about.

However, careful legal analysis does not unambiguously support these assumptions. Japanese scholars and legal policymakers take seriously the continuing authority of the Treaty of San Francisco.[248] In that treaty, Japan made a number of legally binding promises, among them that Japan would continue to be bound by lawful orders issued by the occupying powers. [249] In other words, by signing the Treaty of San Francisco, Japan explicitly affirmed the authority of many prior policies—including lawful commands by the allied Supreme Commander, General MacArthur. Japan therefore affirmed General MacArthur's order creating the Self-Defense Forces through its Treaty commitments. This was not an idle promise; it was a fundamental condition of regaining sovereignty. z

3. Further Contours

The Cabinet convened its reinterpretation panel principally because it was unsure of the legal status of Japan's present security situation.[250] The panel heard testimony from legal experts, seeking to answer two questions: (i) had Article 9 of the Constitution been interpreted previously to forbid collective self-defense; and (ii) was

about determining which one of them is accurate. This is sufficient to show that a genuine legal dispute exists.

248 REPORT OF THE ADVISORY PANEL, *supra* note 21, at 4–8.

249 Treaty of Peace with Japan, *supra* note 16 at art. 19(d) ("Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.").

250 REPORT OF THE ADVISORY PANEL, *supra* note 21, at 3.

collective self-defense a form of self-defense under international law?[251]

The panel first answered question (i), concluding that Article 9 had not been interpreted to forbid collective self-defense. Although there is little legal precedent, the panel did carefully consider S*akata,*[252] determining that it did not forbid collective self-defense.[253]

Next, the panel answered question (ii), concluding that international law views collective self-defense as a form of self-defense.[254] The panel drew heavily on the U.N. Charter, which explicitly reserves collective self-defense as a sovereign right (while at the same time forbidding other forms of military action).[255]

Based on this analysis, Article 9 can be interpreted in three ways:

> (1) Restricting only aggressive forms of military action; permitting self-defense and collective self-defense.[256]
>
> (2) Limiting Japan solely to pure self-defense; no collective self-defense.[257]
>
> (3) Forbidding any military forces of any kind, including the JSDF.[258]

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[251] *Id.* at 2.

[252] *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

[253] *Id.*; REPORT OF THE ADVISORY PANEL, *supra* note 21, at 5.

[254] REPORT OF THE ADVISORY PANEL, *supra* note 21, at 32.

[255] U. N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"); U. N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

[256] This is the position taken by the Reinterpretation. *See* REPORT OF THE ADVISORY PANEL, *supra* note 21.

[257] This is one of the more common positions taken by opponents of the Reinterpretation, including the CDP, Japan's largest opposition bloc in Parliament. *See* Norio, *supra* note 142.

Each of these views can be combined with the four views outlined above: (a) Absolute Constitutionalism, (b) Limited Constitutionalism, (c) Sovereign Contractarianism, (d) Legal Internationalism.

There are, in other words, twelve possible legal views here. According to one set of views—1(a), 1(b)—the Constitution is supreme, but permits collective self-defense. Accordingly, the JSDF can engage in collective self-defense as long as Parliament wishes. But there is no obligation—nor even any obligation to maintain the JSDF.

According to the largest second set of six views—1(c), 1(d), 2(c), 2(d), 3(c), 3(d)—Japan must maintain a reserve force of at least 75,000 persons pursuant to G.O. 260, incorporated into the Treaty of San Francisco. Therefore, both the JSDF and collective self-defense are lawful and legitimate. The constitutional questions are not relevant, because treaty law trumps.

Although these eight views differ, all conclude that the JSDF and collective self-defense are both lawful and legitimate.

Following a third set of views—2(a), 2(b)—the JSDF is lawful and legitimate but collective self-defense is forbidden by the Constitution.

Finally, a fourth set of views—3(a), 3(b)—concludes that the JSDF is flatly unconstitutional and (presumably) should legally be disbanded. On this account, Sakata was wrongly decided. The Constitution forbids any armed forces whatsoever, and, obviously, forbids collective self-defense as well.

The conventional English-language narrative seems to assume that only the third and fourth sets of views are legally plausible. But these views represent just a third of the real estate in the constitutional landscape. The assumption that only these views

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[258] Presumably, advocates of this position argue that *Sakata* was wrongly decided. *See, e.g.*, Panton, *supra* note 210.

are plausible seems dubious, and little is advanced in the English-language literature to defend it.[259]

Many of these views, require a careful scholarly analysis of applicable treaties. Accordingly, reinterpretation by an expert panel is perfectly sensible—and since an advisory opinion is not possible under Japanese law, probably the best way that the Prime Minister can try to be faithful to the law. [260]

This analysis does not all justify the most radical of English-language commentators, who assert not only that the Panel's position is incorrect, but that the Prime Minister and his advisors know that it is incorrect and are pretending otherwise as part of a plot to deceive the electorate.[261] This conclusion is simply not supported by the facts in evidence.

4. A Noncommittal Defense of the Reinterpretation

To emphasize the legal plausibility of the Cabinet's position, we here present a sketch of an argument in favor of collective self-defense. Our goal here is not to show that this argument is correct, but rather merely that it is a plausible good-faith legal stance. An argument to this effect might proceed as follows:

The Supreme Court, in its most significant decision on the matter, determined that Article 9 does not forbid the maintenance of some security forces and in any event was not intended to completely foreswear self-defense.[262] As it is emphatically the duty of the

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[259] An exception is Martin, who does present arguments in defense of his interpretative stance, although we disagree with his conclusions. See Martin, *supra* note 27.

[260] *See generally* Matsui Shigenori, *supra* note 46; *see also* Eric Rasmusen & J. Mark Ramseyer, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001).

[261] *See, e.g.*, Panton, *supra* note 210.

[262] *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959) ("Thus, [Article 9] renounces the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power.").

Japanese Supreme Court to say what Japanese law is,[263] this decision implies that the Self-Defense Forces are, simply put, legal. Of course, it is possible that the Court erred in its judgment, but even if the Prime Minister felt this way, is he not bound to the law as currently interpreted?[264]

Plausibly *Sakata's* approval of the JSDF could be understood as conditioned upon the idea that the JSDF have a purely defensive role.[265] But what of *collective* self-defense? If Japanese forces commit to defending allies when they are engaged, does that broader commitment contradict Article 9? And if so, does that make the new role unconstitutional?

Because no case challenging collective self-defense had yet arisen through the adversarial process, involving the judiciary would mean asking for an advisory opinion.[266] Advisory opinions are not permitted under Japanese law.[267] What then ought the Cabinet to do? To get a final answer the government has to take a position, presumably in consultation with its own legal counsel.[268] Once the government has set a policy, it could then be challenged and that challenge can be arbitrated by the Supreme Court.[269] The analogue to

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263 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan); *see also*, *e.g.*, *Kurokawa v. Chiba Prefecture Election Comm'n*, 30 Minsh 223, 248-50 (Sup. Ct., G.B., Apr. 14, 1976); Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 223; *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

264 *Kurokawa v. Chiba Prefecture Election Comm'n*, 30 Minsh 223 (Sup. Ct., G.B., Apr. 14, 1976); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

265 *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

266 *Cf.* Letter by John Jay, Chief Justice, United States, to George Washington, President, United States (Aug. 8, 1793) (available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html).

267 *See generally* Masahito Tadano, *The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan, in* CONTEMPORARY ISSUES IN HUMAN RIGHTS LAW (Yukimo Nakanishi ed., 2017); *see also* Rasmusen, *supra* note 260.

268 *Id*; *see also* Matsui Shigenori, *supra* note 46.

269 Critics of this argument would likely respond that the Japanese Supreme Court is too passive to be entrusted with this role. *See, e.g.*, David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011). Even if

the American system would be to ask White House Counsel or the Justice Department to submit an internal memorandum opining on the correct interpretation of a constitutional restriction.[270] Nor are there separation of powers concerns: if the Prime Minister comes to an incorrect conclusion there is both a judicial remedy (the courts can strike down the interpretation) and a political one (through the election of a new Prime Minister).

Of course, this is precisely what the Prime Minister and the Cabinet have done through the Reinterpretation. The Cabinet took a complex question and submitted it for expert analysis.[271] The Cabinet then adopted a working position they take to represent those expert's conclusions. If they have erred, the Supreme Court stands ready to clarify. The Reinterpretation is not an attempt to go around the Constitution — it is an attempt to work within it.

D. Conclusion

The 2014 Reinterpretation is often portrayed as an end-run around the restrictions of Article 9. But the evidence does not support this narrative. First, Article 9 has not been interpreted to restrict collective self-defense.[272] Second, the Reinterpretation was throughout squarely focused on legal questions.[273]

Japan adopted Article 9 under unusual circumstances that pose novel legal questions. Unique legal facts and history affected the creation of the Self-Defense Forces. Path-dependence and the specifics of past legal cases shaped a history of debates over interpretation.

There are real legal questions at play here because the documents that form the basis of the law are genuinely unclear. The

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this criticism were sound, the error is the Supreme Courts. The Prime Minister must follow the Constitution—if the Court is too lackadaisical in its approach that does not change the PM's lawful duties.

270 Tadano, *supra* note 267.

271 REPORT OF THE ADVISORY PANEL, *supra* note 21.

272 *Sakata v. Japan*, 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959).

273 REPORT OF THE ADVISORY PANEL, *supra* note 21.

Reinterpretation is an attempt to answer these thorny questions. Similarly, a constitutional amendment would help further clarify the status of the armed forces and their treatment under international law by bringing the Constitution more clearly into harmony with international obligations. Like the Restatements, or clarifying rules promulgated by an agency after notice and comment, efforts to bring harmony to confusing and conflicting laws have real merit. Like any legal project, these efforts may fail. But that doesn't make it a conspiracy—just a work in progress.

III. IS THE REINTERPRETATION CONSTITUTIONAL CHANGE?

The debate over the Reinterpretation reflects a common trope in constitutional discourse: the other side is accused of not merely misunderstanding the Constitution, but ignoring its meaning entirely.[274] Rather, the other side is engaged, not in an act of constitutional interpretation, but of "constitutional revision."[275] This line of attack views the opposing position as either so obviously unsupported by the Constitution, or so openly based on extra-constitutional considerations, that it does not qualify even as an attempt to faithfully interpret the meaning of the text. Instead, it is a naked exercise of political power, brazenly ignoring the constitutional constraints on that power.[276]

As Part II of this Essay explains, this argument unreasonably sidelines the serious legal justifications for the current Constitutional Reinterpretation in Japan. The continuing authority of General

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[274] *See, e.g.*, Letter from Donald J. Trump, President, United States, to Nancy Pelosi, Speaker, United States House of Representatives (Dec. 17, 2019) ("By proceeding with your invalid impeachment, you are violating your oaths of office, you are breaking your allegiance to the Constitution, and you are declaring open war on American democracy.").

[275] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) (accusing the majority of revising, rather than interpreting, the Constitution, by protecting the unenumerated right of same-sex couples to marry).

[276] *See e.g., id.*; *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2678 (2015) (Roberts, C.J., dissenting) (accusing the majority of "ignor[ing]" the "text, structure, [and] history of the Constitution" in favor of "naked appeals to public policy").

MacArthur's order combined with the international treaty obligations codified by the Treaty of San Francisco and other documents, raise serious, real and open legal questions with regard to their supremacy over the Post-War Constitution. While modern political and foreign policy considerations surely motivated the Abe administration's stance on the necessity of collective self-defense, the Reinterpretation is more than simply an attempt to address a political problem. It is necessitated by the decades-long tension between Japan's domestic and international legal obligations, and between those obligations and the country's historical practice.

Because critics of the Reinterpretation take as a premise that it is legally unfounded, they instead tend to analyze it as an attempt at informal constitutional change. Several scholars, most notably Professor Bruce Ackerman at Yale Law School, have proposed mechanisms by which constitutions can be effectively amended without going through a formal amendment process.[277] Indeed, Professor Ackerman understands constitutional change as occurring primarily through these informal mechanisms. Viewed through this lens, the Reinterpretation is often seen as an illegitimate form of constitutional change, lacking the necessary popular support to qualify as an informal amendment.[278]

The problem with this view, however, comes in the first instance from its premise that the Reinterpretation is a form of constitutional change. Rather than amending the Constitution, the Reinterpretation contends that its *current* meaning supports an expansion of Japanese military doctrine to encompass collective self-defense. Ackerman's theory of constitutional change rejects the possibility that reinterpretation can restore the original understanding of a constitutional provision.[279] But that is precisely what the Reinterpretation seeks to do. Accordingly, the interpretation should not be viewed as an attempt at an informal constitutional amendment. Instead, it should be assessed on its own merits as a legal interpretation of the constraints Article 9 actually imposes.

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277 See Ackerman, supra note 28, at ch. 10.

278 *See e.g.*, Dixon & Baldwin, *supra* note 26.

279 *See* Ackerman, *supra* note 28, at 835 (discussing the "myth of rediscovery").

A. The Reinterpretation as Informal Constitutional Amendment

Non-Japanese scholars analyzing the Reinterpretation as a form of constitutional change are often sharply critical. Professor Craig Martin, for example, has argued that the Reinterpretation is a transparent end-run around the Japanese Constitution's formal amendment process.[280] And Professors Rosalind Dixon and Guy Baldwin have argued that a single-party system like Japan's may lack the necessary kind of democratic competition necessary to legitimize informal constitutional amendments.[281] These analyses often employ Professor Bruce Ackerman's model of "constitutional moments"[282]—likely the leading model of constitutional change outside of the formal amendment process,[283] and one that places heavy emphasis on democratic approval of constitutional change.[284] Accordingly, scholarly criticism of the Reinterpretation has often focused on its lack of democratic foundation.[285]

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[280] Martin, *supra* note 27, at 508–11.

[281] Dixon & Baldwin, *supra* note 26, at 158–72. This view of the triumph of the LDP is controversial and, in our view, ignores the diversity of policy opinions expressed within Japan's factions. *See, e.g.*, Matthew D. McCubbins & Michael F. Thies, *As a Matter of Factions: The Budgetary Implications of Shifting Factional Control in Japan's LDP*, 22 LEGIS. STUD. Q. 293 (1997).

[282] *Id.* at 148–52.

[283] *See id.* at 148 ("Perhaps the best-known theory of informal constitutional change in the United States . . . is Bruce Ackerman's theory of 'constitutional moments.'") But *see also* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (describing most constitutional change as occurring outside the amendment process); Mark Tushnet, *Constitutional Change: Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1510 (2009) (describing "constitutional workarounds"—i.e., governmental actions designed to circumvent constitutional prohibitions by relying on alternate provisions of the constitution—as "a method of amendment the Constitution without altering its text, in the same family as judicial interpretation and 'constitutional moments.'").

[284] See Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990, 2001 (2013) ("Ackerman insists that the mechanism that legitimizes reformers' claims to popular sovereignty is the expression of political will manifested in these elections.").

[285] *See* Dixon & Baldwin, *supra* note 26, at 169–71; Martin, *supra* note 23, at 508 ("To begin with, I would suggest that the absence of any expression of popular will in favor of the change, is a factor that counts against its legitimacy.").

Professor Ackerman himself, for example, has been a vocal critic of the Reinterpretation for its apparent disregard of the democratic process.[286] In one article, Ackerman briefly asserts that the Abe administration's interpretation of Article 9 is "illegal," before quickly proceeding to exhaustively list the ways in which Prime Minister Abe failed (or did not try) to gather popular approval for the Reinterpretation.[287] For example, Abe is accused of failing to gather the legislative support to initiate a referendum to amend Article 9; failing to enact a constitutional amendment that would have made a referendum easier to pass; failing to push military legislation through parliament; and failing to make his case to the public, a majority of whom continued to believe the Prime Minister's initiative was unconstitutional.[288] Ackerman argues that, instead of going through a democratic process, Prime Minister Abe achieved his policy goals through an administrative process, "pressur[ing]" the government into adopting an understanding of Article 9 that would permit a more expansive use of military force.[289]

On their face, these criticisms would seem to have minimal legal relevance. If the Reinterpretation's understanding of Article 9 were correct, an end-run around the Constitution's formal amendment process would be unnecessary. The Constitution would not need to be amended, because it would already say what the administration asserted that it said. Additionally, public support would be irrelevant, at least with respect to the meaning of the text, because regardless, the law would be on the administration's side. Alternatively, if the Reinterpretation's understanding of the Constitution were incorrect, the above measures would be insufficient to remedy the legal error. Neither public support, nor ordinary legislation, can overcome a clear constitutional command. A Constitution's guarantees "may not be submitted to vote; they depend on the outcome of no elections."[290] If the Constitution does

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286 Bruce Ackerman & Tokujin Matsudaira, *Cry 'Havoc' and Let Slip the Constitution of War*, FOREIGN POLICY (Sept. 28, 2015, 8:00 AM).

287 *Id.*

288 *Id.*

289 *Id.*

290 *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

not mean what the Prime Minister thinks, the only way to ratify his interpretation is through amendment.

But, for Professor Ackerman, these democratic considerations have legal significance as well.[291] Ackerman has advanced an understanding of constitutional changes that depends relatively little on textual formality.[292] Instead, constitutional change occurs through a series of "constitutional moments"—outpourings of popular support that disrupt traditional practice and establish a new set of constitutional norms.[293] Under this model of constitutional change, the concern with the Reinterpretation has less to do with its alleged lack of formal legal justification. Instead, the problem is that it changes the country's constitutional understanding without the necessary super-majoritarian support.[294]

Professor Ackerman conceives of constitutional change as occurring through a series of "constitutional moments."[295] These moments generally involve multiple branches of government, as well as the people themselves.[296] They need not, however, involve a formal constitutional amendment.[297] Instead, substantive constitutional change occurs when effectively ratified by the general public, usually in an election where the relevant change is a particularly salient issue.[298] From this perspective, constitutional norms do not live in the constitutional text, or even in the history or

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[291] *See* Bruce Ackerman, *The Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1751 (2007) (suggesting that a rigorous understanding of formal constitutional change can give rise to an "official constitutional canon that is adequate for use by lawyers and judges.").

[292] *See* Young, *supra* note 284, at 1997–98.

[293] *Id.* at 1998.

[294] *See, e.g.*, Martin, *supra* note 27, at 447.

[295] Ackerman, *supra* note 291, a 1763. *See also id.* at 1757–92.

[296] *Id.* at 1777–1785 (describing how national elections, the judiciary, Congress, and the President all participated in bringing about the constitutional changes that defined the civil rights era).

[297] *See id.*; Young, *supra* note 284, at 1997–98.

[298] Young, *supra* note 284, at 2004 ("Ackerman attributes enormous significance to the supposedly heightened salience of constitutional issues during the elections.").

intent behind constitutional provisions.[299] Instead, these norms arise from the evolving consensus of the general public as demonstrated by a series of ratifying events.[300] Amendments therefore have little role to play in the understanding of the constitutional change itself.[301] They primarily exist to codify and formalize law that has already been put into practice.[302] The actual change in the law occurs through extraconstitutional, and often political processes.[303]

The 'constitutional moments' model of constitutional change arises from the observation that a constitution's implementation can change dramatically, even without an amendment.[304] Ackerman developed this model in the context of developments in American constitutional law that occurred without a formal amendment process.[305] The Supreme Court's reinterpretation of the Interstate Commerce Clause in the wake of the New Deal, for example, significantly increased the federal government's power to enact economic legislation, even if that legislation touched primarily on intrastate activities.[306] But the only amendment from that period relevant to federal regulatory power—the 21st Amendment—limited the federal government's ability to regulate the sale and production of alcohol.[307] Similarly, the reinterpretation of various constitutional provisions to prohibit state-sanctioned racial discrimination, and to allow Congress to prohibit private racial discrimination, occurred

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299 *See* Ackerman, *supra* note 291, at 1750–51.

300 *Id.*

301 *Id.*

302 *See* Strauss, *supra* note 283, at 1459 ("[When] amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment.").

303 Ackerman, *supra* note 291, at 1748.

304 *Id.* at 1750 ("[E]very American intuitively recognizes that the modern amendments tell a very, very small part of the big constitutional story of the twentieth century.").

305 *Id.* at 1750–51.

306 *Compare Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that the power to regulate interstate commerce does not extend to the power to prohibit the interstate sale of goods made by child labor) *and United States v. Darby Lumber Co.*, 312 U.S. 100, 115–16 (1941) (overruling *Hammer*) *with Wickard v. Fillburn*, 317 U.S. 11 (1942) (permitting regulation under the Commerce Clause to reach even the entirely intrastate production and consumption of wheat).

307 U.S. Const. amend. XXI.

through a series of Supreme Court decisions and legislative acts.[308] Constitutional amendments have little if anything to do with this change.[309]

Nor, according to Ackerman, does the Constitution's original meaning. Many originalist constitutional scholars have argued that the Supreme Court's New Deal and desegregation decisions helped to align the Court's doctrine with the original meaning of the Constitution.[310] From this perspective, the Court's decisions in these areas did not cause constitutional change—they simply reversed a departure from the Constitution's original understanding. Ackerman, however, rejects this notion, which he calls the "myth of rediscovery."[311] According to Ackerman, the originalist narrative both overstates the similarity between the modern era and the founding era, and understates the transformational nature of modern constitutional change.[312] Ackerman instead argues that modern constitutional change diverges from the founders' vision both substantively and procedurally.[313] Substantively, modern

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[308] *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (prohibiting school segregation); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[309] Arguably, the 24th Amendment (prohibiting poll taxes in federal elections) was targeted at a discriminatory practice designed to disenfranchise black voters; but the Supreme Court at the time understood poll taxes as an issue of wealth discrimination rather than racial discrimination. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). (invalidating a poll tax because "[v]oter qualifications have no relation to wealth"). Additionally, the 24th Amendment addressed only a minute portion of overall system of segregation. The integration of schools, workplaces, and public accommodations, as well as the enfranchisement of black voters in the South took place almost entirely through judicial and legislative acts, not amendments. *See, e.g.*, *Brown*, 347 U.S. at 483; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[310] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005) (advocating a broad reading of the commerce clause according to its original meaning); *Gonzales v. Raich*, 545 U.S. 1, 35–38 (2005) (Scalia, J., concurring in the judgment) (defending the Supreme Court's post-New Deal commerce clause precedents); ROBERT BORK, THE TEMPTING OF AMERICA 83 (1990) (defending *Brown v. Board of Education* on originalist grounds).

[311] ACKERMAN, *supra* note 28, at 835.

[312] *Id.*

[313] *Id.*

constitutional doctrine reflects principles and results in applications that Ackerman believes the founders would not have envisioned. And procedurally, modern constitutional change takes place outside of the state-centric amendment process laid out in Article V of the U.S. Constitution. Instead, change occurs through the development of a national consensus, mediated through national institutions.[314]

To provide scholars and judges with a test through which they can identify legitimate (but informal) constitutional change, Ackerman breaks the process into roughly five steps.[315] First, in the *signaling* step, an institutional actor signals that constitutional change could soon occur. Second, in the *proposing* step, the actor lays out its specific plan for constitutional reform. Third, in the *triggering* step, the people express support for this plan, usually through an election in which constitutional issues are particularly salient. Fourth, in the *ratifying* step, the people confirm their commitment to the constitutional change. And finally, in the *consolidating* step, the previous understanding of the Constitution is sidelined, and any resistance to it fades away. If these steps have been followed, Ackerman argues that we should grant the resulting change at least as much legitimacy as we would a formal constitutional amendment.[316]

B. The Reinterpretation is Not a Constitutional Moment

If one thinks that, for informal constitutional change to have democratic legitimacy, it must occur within the context of a constitutional moment, then the Reinterpretation may appear to be a failed attempt to force a constitutional moment.[317] Although the LDP may have attempted to signal and propose constitutional change, the argument goes, they never garnered the popular support necessary to properly legitimize it.[318] We argue, however, that Ackerman's model of constitutional moments is a poor fit by which to understand the Reinterpretation. Ackerman's model seeks to explain changes in

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314 *See* Ackerman, *supra* note 291, at 1754.

315 *Id.* at 1762. Dixon and Baldwin also provide a helpful summary of this process, *supra* note 26, at 149–51, as does Young, *supra* note 284, at 1999.

316 Ackerman, *supra* note 291, at 1754–56.

317 *See* Dixon & Baldwin, *supra* note 26.

318 *Id.* at 169–72.

constitutional understanding that deviate from the Constitution's original meaning. But the Reinterpretation is an attempt to implement, not change, the meaning of Article 9.

Professor Rosalind Dixon has argued that the Reinterpretation is an attempt at informal constitutional change, but an illegitimate one under Ackerman's model of constitutional moments.[319] Dixon explain thats, while "[s]uperficially, at least, there is . . . evidence to support the existence of a constitutional 'moment' in the context of the Article 9 reform,"[320] Japan ultimately lacks "sufficient political competition for a true constitutional moment."[321] Dixon acknowledges that Prime Minister Abe may have "signaled" his intention to adopt a policy of collective self-defense "as early as 2006."[322] And the LDP released specific proposals for a planned constitutional amendment in 2012. Accordingly, the "signaling" and "proposing" components of a constitutional moment appear to be present. However, according to the authors, these proposals never resulted in a triggering election that demonstrated democratic support for the change.[323] Abe's proposed amendment was never approved by the legislature. And although military legislation ultimately was adopted, Dixon argues that the LDP was able to pass legislation over popular protest because the party has had effectively unchallenged rule since shortly after the adoption of the post-war Constitution.[324] Ultimately, Dixon concludes that informal

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319 *Id.*

320 *Id.* at 161.

321 *Id.* at 171.

322 *Id.* at 161.

323 The LDP's landslide victory in the 2012 Japanese general election does not apparently count, even though the LDP won an outright majority and, with its long-time coalition partner, controlled a supermajority capable of overruling the House of Councillors. Yuriko Nagano, *Japanese Conservatives Win Landslide Election Victory*, L.A. TIMES (Dec. 16, 2012), https://www.latimes.com/world/la-xpm-2012-dec-16-la-fg-wn-japan-conservatives-landslide-election-20121216-story.html. Perhaps that is because even Prime Minister Abe acknowledged that the victory mostly reflected disgust with opposition rule rather than roaring support for the LDP. Yoshida Reiji, *LDP Aware Voters Just Punished DPJ*, JAPAN TIMES (Dec. 17, 2012), https://www.japantimes.co.jp/news/2012/12/17/national/ldp-aware-voters-just-punished-dpj/.

324 *See* Dixon & Baldwin*, supra* note 26, at 161–72.

constitutional amendment may not be possible in a single-party system, where the absence of real political competition deprives the voting population of an effective channel by which they can express their approval or disapproval for a proposed constitutional change.[325]

Professor Craig Martin has argued even more forcefully that the Reinterpretation cannot be understood as *any* legitimate form of informal constitutional amendment.[326] Rejecting the notion that the Reinterpretation proposes a legitimate or plausible reading of Article 9,[327] Martin criticizes the government for pressing forward with its proposal despite the paucity of popular support.[328] Because Abe cannot gather the necessary political support for a constitutional amendment, Martin accuses the Abe administration of a "deliberate" and "duplicitous" attempt to circumvent the formal amendment process,[329] and suggests that even a formal amendment of the Japanese Constitution would be unable to legitimately "dismember[]" the Constitution's "fundamental constitutional commitment to pacificism."[330]

As discussed in Part II, such accusations of "duplicit[y]" are unnecessary and unfounded. Even if the Abe administration might have preferred a formal amendment to more persuasively pacify critics, this does not imply that a formal amendment is required. If the Prime Minister either believed that Article 9 could be read as consistent with an exercise of collective self-defense, or that, regardless, it is overridden by international law requirements to maintain an active military force, then the parliament's adoption of military legislation, and the government's adoption of a stance

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325 *Id.* at 173. It is not necessary, for our thesis, to dispute this characterization, since we do not view the Reinterpretation as a Constitutional moment. Nevertheless, our view is that Dixon in this comment mischaracterizes the real competition that exists in the Japanese political system, albeit mostly (at the parliamentary level) between intra-party factions rather than between parties. Our view here represents one side in a much larger debate. For a good general overview, see Curtis, *supra* note 131.

326 Martin, *supra* note 27.

327 *Id.* at 489–502.

328 *Id.* at 506–08.

329 *Id.* at 508–10.

330 *Id.* at 512–13.

consistent with the Reinterpretation, is precisely what an administration should do in order to operate according to the law. Indeed, Abe's proposed legislation significantly pared back the reform he had hoped to accomplish through constitutional amendment. The 2012 Amendment—in contrast with the Reinterpretation—expressly constitutionalizes the Self-Defense Forces, giving them the legal status of a conventional national military. There are real policy differences between these proposals. For example, a preemptive strike against a military threat is flatly inconsistent with the 2014 Reinterpretation, but arguably would be permitted if the 2012 LDP Amendment were to have become law. The Prime Minister's restraint in declining to push for these broader policy changes suggests that Prime Minister Abe does not intend the Reinterpretation to circumvent the amendment process, but is instead attempting to enact only policy already consistent with the Constitution.

If the Supreme Court had invalidated the Reinterpretation and Abe persisted in his stance, then Martin's accusations would have more force. But Martin concedes that the Supreme Court is unlikely to issue a substantive ruling on the issue, and that if it does, that ruling may be highly deferential to the government.[331] This point undermines Martin's accusation of illegitimacy, demonstrating that the Reinterpretation's position is consistent with existing doctrine (if not the Constitution itself).[332] Official judicial interpretations of Article 9 have been relatively rare, and have clarified relatively little. The government's adoption of a specific interpretative stance is therefore not a contravention of any established legal principle.[333] Moreover, since the Supreme Court ought to have a controversy before it rules on a question, the Reinterpretation may be a necessary prerequisite to the creation of such a ruling in the first instance.

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331 *Id.* at 488–89.

332 Interview with Keisuke Suzuki, State Minister for Foreign Affairs, Parliament of Japan, New York (Jan. 18, 2020). Members of Parliament seem confident that Prime Minister Abe would follow a ruling of Japan's Supreme Court, even if he disagreed with it.

333 Hasegawa, *supra* note 129. Nor is it viewed as such.

This absence of authoritative judicial precedent undermines one of the fundamental premises of these arguments: that the Reinterpretation is an attempt at constitutional *change*. In Ackerman's examples of informal constitutional amendment, the enacted change always upends not only existing practice, but also a settled constitutional understanding. The Civil Rights Era did not just end the legislative practice of government-enforced segregation; it also overturned an existing constitutional principle of "separate but equal."[334] The New Deal did not just change a legislative policy of economic nonintervention; it also overturned existing constitutional doctrine holding that the federal government had limited power to engage in such broad economic reforms.[335] Indeed, Ackerman stresses the pre-moment constitutional doctrine may have been justified at the time, but the constitutional moment required a reevaluation of the country's constitutional understanding.[336] Constitutional moments therefore represent more than just the clarification of unresolved legal questions. They represent historical changes in constitutional law, justified by historical changes in national life.

By contrast, Japanese institutional practice has never reflected a consensus around the lawfulness of collective self-defense. Japanese courts, for example, have never authoritatively held that Japanese forces may not engage in collective self-defense.[337] And while many (although not all) Japanese scholars may interpret Article 9 restrictively, this should not be conflated with settled law. Before the Reinterpretation, the question of collective self-defense was simply less strategically pressing. However, increasing military expenditure by China, and corresponding increases in American requests for Japanese military expenditure and activity, have placed unprecedented pressure on Article 9's constraints.[338] Rather than attempting to overturn an existing doctrine, the Reinterpretation is a response to a

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334 *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954).

335 *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 116, 124 (1941) (overturning or limiting prior cases).

336 *See* ACKERMAN, *supra* note 28, at 1185–1261.

337 *See generally* Peter Durfee, *The Article 9 Debate at a Glance*, NIPPON.COM (Aug. 10, 2016), https://www.nippon.com/ja/features/h00146/.

338 Takenaka, *supra* note 11.

novel political situation that existing doctrine has never had the opportunity to address.

Attempts to characterize the Reinterpretation as informal constitutional change presume the primary issue in dispute: whether the Abe administration's understanding of Japan's obligations under Article 9, in light of the Treaty of San Francisco, is a reasonable and legitimate legal stance.

C. The Reinterpretation as Constitutional Fidelity

Supporters of the Reinterpretation do not see it as an attempt to informally amend the Japanese Constitution.[339] Rather than revising the Constitution, the Reinterpretation sets out to solve a specific legal question: what, precisely, does Article 9 prohibit, and how do those prohibitions square with Japanese obligations under the Treaty of San Francisco?[340] Professors Dixon and Martin assume that Article 9 is inconsistent with Abe's preferred military policy, and therefore understand the Reinterpretation as an attempt to amend the Constitution. But this assumption sets aside the primary point of dispute. The Reinterpretation's fundamental premise is that Article 9 does *not* prohibit the administration's military policy.[341]

If this premise is correct—or even if one merely grants that the Abe administration is operating on the good faith belief that it is—then the Reinterpretation should not be understood as an attempt at constitutional change. From its own internal perspective, it is not trying to change the Constitution, but rather to more closely adhere to it. Because the Reinterpretation is not an attempt at constitutional revision, it does not need to derive its legitimacy from an overwhelming groundswell of popular support, as the constitutional moments model requires. Instead, if the legal justifications for the Reinterpretation are correct, it derives its legitimacy directly from Japan's governing documents.

339 Interview with Nobukatsu Kanehara, *supra* note 9.

340 REPORT OF THE ADVISORY PANEL, *supra* note 21, at 25.

341 *Id.* at 25.

It thus makes little sense to evaluate the Reinterpretation under a constitutional framework that assumes that it is impossible to rediscover a constitution's original meaning. Instead, we suggest analyzing the Reinterpretation from a documentarian perspective.

1. Documentarianism

Professor Akhil Amar has advanced a philosophy of constitutional interpretation, which he calls "documetarianism",[342] that emphasizes the truest interpretation of the Constitution over subsequent doctrinal developments. Documentarianism recognizes that constitutional change sometimes produces results inconsistent or in tension with the actual meaning of the constitution; but it treats such change as illegitimate.[343] From a documentarian perspective, the job of constitutional actors is not necessarily to align their behavior with public consensus (unless, of course, that consensus is expressed through a properly ratified amendment), but to elaborate and clarify the meaning of constitutional guarantees when a new situation arises in which that meaning might not be clear.[344] If constitutional change occurs outside of the formal amendment process, it should occur only to make the implementation of constitutional norms more faithful to the document itself.[345]

The Civil Rights Era in the United States provides an example that helps to illustrate the difference. Ackerman considers the Civil Rights Era an important constitutional moment.[346] According to Ackerman, the era "radically transform[ed] the Constitution *as it was then understood*."[347] But for Amar, no kind of "formal constitutional amendment or informal amendment-equivalent" was necessary to bring about this transformation.[348] From

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342 Akhil Reed Amar, *The Supreme Court, 1999 Term-Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

343 See *id.* at 78–84 (arguing that judicial doctrines conflicting with the actual meaning of the Constitution should generally be rejected, notwithstanding *stare decisis*).

344 *Id.* at 79–80.

345 *Id.* at 78–84.

346 *See* Ackerman, *supra* note 291, at 1762–785.

347 *Id.* at 1769 (emphasis added).

348 Amar, *supra* note 342, at 83.

a documentarian perspective, the Civil Rights Era did not represent a constitutional transformation so much as a constitutional "restoration," finally implementing the guarantees of the Reconstruction Amendments that had been disregarded for nearly a century before.[349] Documentarianism does not require an amendment to restore the Constitution's original meaning; just a "confession or error" from those who have distorted it.[350]

Documentarianism should not be conflated with originalism or "pure textualism."[351] Documentarianism points the constitutional interpreter's attention to what the constitution actually says; but it does not require the interpreter to focus narrowly on only certain kinds of textual evidence.[352] Constitutional meaning can be evaluated according to the text of the constitution as originally understood,[353] or according to the original intention behind the constitution,[354] or according to the purpose behind the provision in light of its history,[355] or any combination of the above considerations.[356] Whatever the interpretative focus, however, the aim should be to arrive at "the reading that best fits the entire document's text, enactment history, and general structure."[357]

Despite its focus on a largely static text, documentarianism does not preclude a constitutional interpreter from considering longstanding traditions or constitutional understandings.[358]

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[349] *Id.*

[350] *Id.*

[351] *Id.* at 28.

[352] *Id.* at 28–31.

[353] *See, e.g.*, SCALIA, *supra* note 226.

[354] *See, e.g.*, ROBERT BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984).

[355] *See, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246–47 (2002) (advocating "an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes.").

[356] *See* Amar, *supra* note 342, at 31 (advocating interpretation derived from the "text, history, and structure" of the Constitution).

[357] *Id.* at 54.

[358] Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L. J. 1734 (2011). [hereinafter Amar, *America's Lived Constitution*].

Occasionally, a Constitution may permit the interpreter to take such factors into account. Additionally a Constitution can be interpreted in a manner designed to accommodate existing practices.[359] A documentarian interpretive approach can acknowledge that constitutional text may be susceptible to multiple interpretations.[360] And when selecting between those interpretations, a documentarian approach may prefer the construction that best accommodates historical practice.[361] Such a choice not only reduces potential conflict between different branches of government, but also respects each branch's ability to independently interpret the constitution.

2. Documentarian Analysis of the Reinterpretation

Arguments in favor of the Reinterpretation consistently sound in documentarian terms. Consider some of the arguments discussed in Part II. First, the text of Article 9 accommodates an interpretation that is at least consistent with collective self-defense. Though Article 9 renounces the maintenance of "land, sea, and air forces," this renunciation comes with a prefatory clause.[362] And this clause (at least arguably) limits the Article's scope only to the use of military forces to wage wars of aggression. But documentarianism considers more than just grammatical analysis.[363] Structural arguments also bolster this reading—if Article 9 intended to completely eliminate the maintenance of any military forces, then Article 66's requirement that government ministers be "civilians"

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[359] *See, e.g., NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (acknowledging the multiple potential interpretations of the recess appointments clause and choosing the interpretation most consistent with the historical practice of Presidents making appointments in recesses other than Congress' primary summer recess).

[360] *See* Amar, *supra* note 342, at 79 ("But even after judges have derived as much meaning as possible from the document, they will be faced with a broad outline leaving a vast number of details unspecified.").

[361] *See* Amar, *America's Lived Constitution*, *supra* note 358, at 1752 ("In choosing between these two plausible readings . . . faithful interpreters should embrace the [one] which helps the written Constitution cohere with settled contemporary practice. . . .").

[362] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 9, para. 2 (Japan).

[363] *See* Amar, *America's Lived Constitution*, *supra* note 342, at 28 (distinguishing documentarianism from "pure textualism").

would be redundant. These kinds of textual and intertextual arguments are the bread and butter of documentarian interpretation.[364]

Or consider arguments looking outside the Constitution's four corners. Almost immediately after the post-war Constitution was implemented, Japan was ordered to create national reserve forces. And this order was issued by General MacArthur, the same person who first called for the creation of a new Constitution for Japan. Documentarian analysis often considers the way in which a provision was interpreted shortly after its enactment.[365] And as early as the 1950s, Japan had adopted an interpretation of Article 9 that was consistent with the maintenance of armed forces for self-defense, if not collective self-defense. The Supreme Court's decision in *Sakata* confirms this interpretation. *Sakata* interpreted Article 9 to permit the use of force in self-defense. And the decision deferred to the government's judgment about how to accomplish Japan's defense goals. Documentarian analysis places less emphasis on precedent than other modes of constitutional interpretation.[366] But documentarian arguments can nevertheless rely on precedent when that precedent represents a permissible interpretation of the Constitution.[367]

Finally, consider the argument that Japan's constitutional obligations are inferior to its international ones. At first glance, such an argument might seem *anti*-documentarian if anything, denigrating the authority of the Constitution it is supposed to interpret. But not every Constitution purports to be the "supreme Law of the Land."[368] Indeed, Japan's Constitution suggests just the opposite, affirming the supremacy of Japan's obligations under international law. The third

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[364] *See generally* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY ch. 1 (2012) [hereinafter Amar, AMERICA'S UNWRITTEN CONSTITUTION].

[365] *Id.* at ch. 8 (interpreting the U.S. Constitution by looking to the Washington administration's actions).

[366] Amar, *America's Lived Constitution*, *supra* note 342, at 83 (contrasting documentarianism with Ackerman and Strauss's "Maximalist Model of precedent").

[367] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 364, at ch. 4, ch. 5 (discussing the role of precedent).

[368] U.S. CONST. art. VI, cl. 2.

clause of the preamble declares "that no nation is responsible to itself alone," that "laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations."[369] These affirmations justify the post-war Constitution in light of the history of its enactment—another essential tool of documentarian interpretation.[370] Though the Constitution of Japan was ultimately ratified by both the Emperor and the Diet, it was drafted at the order of the United States after Japan's unconditional surrender. A documentarian could therefore appreciate that the Constitution of Japan derives its authority not just from the people of Japan, but from Japan's relationship with other nations as well.

None of this is to say that this interpretation of Article 9 is correct. But it is an interpretation. The Reinterpretation draws on conventional tools of constitutional analysis, used to understand a legal text, not to amend it. The legal underpinnings of the Reinterpretation therefore do not depend upon an informal amendment process.[371] Instead, the Reinterpretation contends that Article 9 either permits Japan to engage in collective self-defense, or that Article 9 is overridden by American instructions pursuant to the Treaty of San Francisco. If this premise is correct, then the documentarian argument is dispositive. The prevailing popular understanding of the Constitution cannot be made subservient to what Japan's governing documents actually instruct. The adoption of an interpretation that the government believes more faithfully reflects the actual meaning of Article 9 should therefore not be characterized as "informal constitutional change,"[372] but an attempt at constitutional "restoration."[373]

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369 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] pmbl. (Japan).

370 AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 364, at ch. 2 (interpreting the U.S. Constitution by looking to the history behind its enactment).

371 Interview with Eiichi Hasegawa, *supra* note 129 (differentiating between the changes sought through Reinterpretation and broader Amendment proposals).

372 Dixon & Baldwin, *supra* note 26, at 148.

373 *See* Amar, *America's Lived Constiution*, *supra* note 342, at 83.

CONCLUSION

Since the adoption of Japan's post-war Constitution, Japanese defense has operated in a legal gray zone: armed forces are arguably required by Japan's treaty obligations but are arguably forbidden by Japan's Constitution. Despite decades of subsequent legal debate, this conflict has never been fully resolved, and whether Japan may lawfully engage in collective self-defense remains an open question.

The Reinterpretation contends that Article 9 poses no barrier to collective self-defense. This view is supported by serious legal arguments about the actual meaning of the Article, and the scope of its intended prohibitions. These arguments may be incorrect, and Japan's Supreme Court may ultimately so order. Until then, the Reinterpretation should not be characterized as a rejection of law, but an attempt to harmonize it. If Article 9 is too strict, then Japan must either violate its obligations under the Treaty of San Francisco or violate a provision of its Constitution. Depending on how the Court rules, Japan may have to face that choice. For now, the Reinterpretation avoids the conflict, and it does so on the basis of a legal interpretation that seems, to us, manifestly reasonable.

Because the Reinterpretation addresses a live legal question, it is not rightly viewed as an attempt at informal constitutional amendment. If its legal premises are correct, the Reinterpretation is not an amendment—it is simply the proper interpretation. Models of informal constitutional change may provide an alternative justification for the Reinterpretation—and if the legal foundation of the Reinterpretation is rejected by the courts, then those models are plausibly proper for determining the Reinterpretation's legitimacy. For now, though, the Reinterpretation presents a legal question, resolvable by legal means. Until that question is resolved, it is no more legally necessary to assess the political reaction to the Reinterpretation than it is legally necessary to assess the political response to any other legal argument.

Critics of the Reinterpretation need not worry that viewing the issue through a legal lens concedes it. Domestic opponents of the Reinterpretation have had no problem framing their argument in

documentarian terms. While we believe that there are serious arguments that Article 9 permits deference to the political branches when they act for Japan's self-defense, and that the supremacy of international and treaty law in Japan remains an unsolved question, we readily acknowledge that this view is not the consensus. Some Japanese scholars have insisted that the Reinterpretation is unconstitutional, arguments we take to be serious and made in good faith. Our claim is simply that insufficient attention outside of Japan has been dedicated to the substance of this legal, documentarian debate—at least, relative to the focus on the Reinterpretation's political implications.

This may all be of limited political relevance to the ruling administration's intentions. The current Japanese government is surely motivated less by academic legal arguments than by the grave and growing threats of Chinese and North Korean military activity. But political branches are supposed to be motivated by political considerations. While their actions must have legal justification, Japanese democracy provides a legal venue—the judiciary—through which these justifications can be definitively tested.

A skeptic of the administration's motives needs not give it the benefit of the doubt—just the benefit of the law.