
VIRGINIA JOURNAL OF INTERNATIONAL LAW

Volume 52 — Number 2 — Page 235



Article

The Perils of Judicial Independence: Constitutional Transition and the Turkish Example

Aslı Ü. Bâli

The Perils of Judicial Independence: Constitutional Transition and the Turkish Example

ASLI Ü. BÂLI*

The Turkish democratic experience is sometimes considered a potential model for transformations underway in the Arab world. In this context, it is worth considering how impediments to democratic consolidation took root in Turkey and analyzing possible mechanisms for resolving tensions that block reforms. This Article illustrates how institutions that might ordinarily be expected to secure democratic space, such as a strong and independent judiciary, may instead serve as a constraint on political liberalization. The role of the Turkish judiciary as the guardian of particular ideological precepts — a role that is, at times, in tension with democratic commitments — is grounded in the history of Turkey's transition from imperial collapse to republicanism. The constitutionalization of an illiberal conception of secularism insulated founding ideological precepts from reinterpretation through ordinary politics. The surprising outcome in Turkey has been pro-Islamic groups that serve as accidental liberalizers and secular elites that oppose democratization. The particulars of the Turkish case may be unique, but a study of elite strategies in Turkey to manage transition and institutionalize preferences yields broadly applicable lessons. While this study offers a cautionary note, it also identifies contemporary sources of optimism when the focus turns from conventional prescriptions for democratic transition to the relationships between democratic publics and state institutions in a particular context. By analyzing the constitutional amendments that were adopted in the 2010 Turkish referendum,

* Acting Professor of Law, UCLA School of Law; B.A., Williams College; J.D., Yale Law School; Ph.D., Princeton University. For discussion and helpful comments, I would like to thank Khaled Abou El Fadl, Ziad Abu-Rish, Murat Akan, Roxanna Altholz, Perry Anderson, Richard Buxbaum, Devon Carbado, Ann Carlson, David Caron, Sharon Dolovich, Hilal Elver, Richard Falk, Stavros Gadinis, Stephen Gardbaum, Cheryl Harris, Barbara Herman, Ayşe Kadioğlu, Nikki Keddie, Mirjam Kuenkler, Maximo Langer, Hanna Lerner, Darryl Li, Odette Lienau, Katerina Linos, Chris Littleton, Karuna Mantena, Saira Mohamed, Anne Joseph O'Connell, Jamie O'Connell, Soli Özel, Aziz Rana, Kal Raustiala, Russell Robinson, Seana Shiffrin, Richard Steinberg, Chantal Thomas, Steve Yeazell, Noah Zatz, and the members of the Religion, Law and Democracy workshop at the European University Institute's 10th Mediterranean Research Meeting; the UCLA Center for European and Eurasian Studies Colloquium; the UCLA Law School Faculty Colloquium; the Yale Law School Middle East Legal Studies Seminar; the Berkeley Law School Faculty Colloquium; and the Cornell Law School Clarke Initiative for Law and Development in the Middle East and North Africa.

the Article suggests that when judicial independence is combined with democratic checks, the risks of illiberal interventionism in defense of elite privilege may be mitigated in cases of transition.

Introduction.....	236
I. Pathologies of Judicial Independence: The 2007–2008 Constitutional Crises	250
II. The Centrality of Constitutional Culture.....	264
A. Kemalism’s Founding: Setting the Stage for Cultural Revolution.....	265
B. State Formation and Cycles of Repression.....	270
III. Judicial Guardianship and the Ideological Constitution	279
A. Past as Prologue: Kemalist Crises of the Republic, 2002– 2007.....	281
B. Constitutional Crisis and Initial Retreat	290
IV. Unpacking the Court: Democratizing the Judiciary By Referendum	295
Conclusion	309

INTRODUCTION

The beginning of 2011 may well be recorded in history books as the winter of Arab revolutions. What remains to be seen is whether the revolutionary moment will give way to the long-awaited Arab “democratic spring” or devolve into the reassertion of authoritarian practices.¹ The timeframe for determining whether democratization will take hold cannot be measured in a season, however promising the popular mobilizations of 2011. There is, of course, no doubt that the uprisings that began in Tunisia and spread to Egypt, Bahrain, Libya, Yemen, Syria, and across the Arab world have once again confirmed the democratic aspirations of local populations. By giving sustained and urgent voice to popular demands for political liberalization, social movements throughout the region have brought renewed attention to long-standing questions regarding the

1. An earlier declaration of an Arab “democratic spring” as part of a realignment of American policy toward the region in the second term of the Bush administration ended in disappointment in 2006. See, e.g., Fouad Ajami, Commentary, *We Have George W. Bush to Thank for the Arab Democratic Spring*, DAILY STAR (May 23, 2005, 12:00 AM), <http://tinyurl.com/3em9mnds>; Pierre Prier, *Face aux régimes autoritaires, le “printemps arabe” se fane* [Faced with Authoritarian Regimes, the “Arab Spring” Fades], LE FIGARO (last updated May 10, 2007, 5:36 PM), <http://tinyurl.com/27f7g9g> (Fr.). For the current iteration of democratic spring commentary, see Fouad Ajami, Op-Ed, *How the Arabs Turned Shame into Liberty*, N.Y. TIMES, Feb. 26, 2011, at WK; and Natasha Mozgovaya, *Mideast Unrest is a Change the World Should Believe in, Scholar Says*, HAARETZ.COM (last updated Feb. 25, 2011, 8:30 AM), <http://tinyurl.com/694f9yo> (interview with Professor Fouad Ajami).

mechanisms for a transition from authoritarianism to democracy, particularly in the Middle East.²

The literature that developed out of the experiences of Latin America in the 1980s and Eastern Europe in the 1990s has generated a set of standard recommendations regarding the prerequisites for transitions away from authoritarianism.³ One consistent focus has been the initiation of reforms toward establishing the rule of law.⁴ The priority placed on the rule of law, in turn, is connected to a set of institutional prescriptions. Core among those prescriptions is the establishment of a legitimate constitutional order centered on an independent judiciary.⁵

In keeping with these prescriptions drawn from the political science literature, respect for constitutional order was placed at the heart of Egypt's transition from the decades-long rule of Hosni Mubarak.⁶ In the last days of Mubarak's tenure, arguments focused on the necessary constitutional mechanisms to transfer executive power as the President

2. Early efforts to assess, interpret, analyze, and understand the implications of the revolutions of 2011 in the Arab world have been published as collections of essays by both *Foreign Policy* and *Foreign Affairs*. See COUNCIL ON FOREIGN RELATIONS, *THE NEW ARAB REVOLT: WHAT HAPPENED, WHAT IT MEANS, AND WHAT COMES NEXT* (Foreign Affairs ed., 2011); FOREIGN POLICY MAGAZINE, *REVOLUTION IN THE ARAB WORLD: TUNISIA, EGYPT, AND THE UNMAKING OF AN ERA* (Marc Lynch et al. eds., 2011).

3. See, e.g., DEMOCRACY AND THE RULE OF LAW (Adam Przeworski & José María Maravall eds., 2003); LARRY JAY DIAMOND, *CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES* (1997) (exploring the scope of progress in the third wave of democratization and the extent to which perceived democratization has been illusory); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); 3 TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES (Guillermo O'Donnell et al. eds., 1986); Guillermo O'Donnell, *Illusions About Consolidation*, J. DEMOCRACY, Apr. 2006, at 34, 35.

4. The relationship between constitutionalism and the rule of law is crucial. A classic statement of this relationship in democratic transition and consolidation is provided by Juan Linz and Alfred Stepan: "Constitutionally, a democratic regime is consolidated when governmental and nongovernmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process." JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 6 (1996). The rule of law, here, is anchored in a constitutional order that specifies the legal channels for conflict resolution and commands the consent (and adherence) of both social and state actors.

5. A typical formulation of the view is the following: "Any attempt to achieve a transition from authoritarianism to constitutional democracy requires the nurturing of the rule of law. Essential to the rule of law is the creation and maintenance of an independent judiciary." A.E. Dick Howard, *Judicial Independence in Post-Communist Central and Eastern Europe*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVE FROM AROUND THE WORLD 89, 89 (Peter H. Russell & David M. O'Brien eds., 2001).

6. Some commentators have even argued that the transition must respect constitutional terms that required Mubarak himself to oversee the transition. Hossam Bahgat & Soha Abdelaty, Editorial, *What Mubarak Must Do Before Stepping Down*, WASH. POST, Feb. 5, 2011, at A13 (explaining the Egyptian constitutional process of naming a successor to Mubarak requires that he oversee the transition).

prepared to step down.⁷ In the end, when the Egyptian military assumed executive power and suspended the constitution, a different set of preoccupations with constitutionalism emerged. Under the new configuration, the legitimacy of the military intervention was said to hinge on the approach taken to constitutional reform.⁸ Among the first military decrees was the appointment of a commission of relatively independent jurists to amend elements of the existing constitution related to the electoral system.⁹ Some observers have argued that once the transition to a civilian government is accomplished under new electoral rules, another constitutional commission should be convened to overhaul or replace the constitution in its entirety.¹⁰ Strengthening the judiciary and guaranteeing its independence through these constitutional exercises have been among the primary demands of domestic democracy advocates and their international supporters.¹¹

This Article will argue that there is reason to reconsider the role of judicial independence in democratic transitions. Transitions from authoritarianism to democratization are, among other things, transitions from the rule of the few to the rule of the many. Where political reforms are designed to correct for a period of minority rule, the counter-majoritarian difficulty presented by the institutional prescription of independent courts that exercise powers of constitutional review is more pronounced than democratic theory might suggest.¹² Developing an account of the definition and role of judicial independence under

7. See, e.g., *id.*; Nathan J. Brown, *The Egyptian Constitution's Rulebook for Change*, FOREIGN POL'Y (Feb. 3, 2011, 2:48 PM), <http://tinyurl.com/4bxuu2r>.

8. Nathan J. Brown, *Egypt's Constitutional Ghosts: Deciding the Terms of Cairo's Democratic Transition*, FOREIGN AFF. (Feb. 15, 2011), <http://tinyurl.com/3rplth>.

9. Noha El-Hennawy, *Commission Announces Proposed Changes to Egyptian Constitution*, ALMASRY ALYOM: ENG. EDITION (Feb. 26, 2011, 5:10 PM), <http://tinyurl.com/7tlmynp> (“[A] package of proposed constitutional amendments . . . eased restrictions on eligibility conditions for presidential elections, limited the number of presidential terms to two four-year periods and ensured full judicial monitoring of elections.”).

10. For example, Islam Lotfi, an Egyptian lawyer, argued that following the election of a new Parliament under fair electoral rules, “they should revisit the Constitution” and reopen the question of a broader overhaul. David D. Kirkpatrick & Kareem Fahim, *In Egypt, a Panel of Jurists is Given the Task of Revising the Country's Constitution*, N.Y. TIMES, Feb. 16, 2011, at A12.

11. Brown, *supra* note 8 (“The [Egyptian] opposition would like to see . . . firm institutional guarantees of judicial independence . . .”); see also Bruce Ackerman, *Parliament to the Rescue*, FOREIGN POL'Y (Mar. 1, 2011), <http://tinyurl.com/5rfd6gt> (arguing in favor of the importance of constitutional design to Egypt's transition).

12. Recent scholarship has presented some arguments concerning the potentially adverse implications of powerful courts insulated from political processes in periods of democratic transition that are consistent with the arguments developed herein. See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); see also TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 25 (2003) (arguing that judicial review provides a form of insurance to elites concerned that they will become prospective electoral losers following a liberalizing transition).

conditions of democratic transition demands greater attention to context than to process or to best practices in institutional design transplanted from elsewhere. For instance, a conception of judicial independence that entails isolating the judiciary from the other branches of government might be desirable where executives and legislatures are not themselves democratic. By contrast, transitions to democracy require a different definition of judicial independence, one that incorporates a measure of interdependence (or checks and balances) between the branches and introduces forms of judicial accountability that underpin the democratic legitimacy of the courts' powers of review. To illustrate both the concerns raised by conventional accounts of judicial independence and the salutary effects of democratic judicial reform in transitional processes, this Article will consider the case of a democratization process that may constitute a relevant precursor to the current Arab uprisings.

The sudden onset of this transitional moment in the Arab world left analysts and policymakers searching for a model well-suited to the specificities of the region. For those who viewed the accelerating dynamic of change in the region with alarm, echoes of the 1979 Islamic revolution in Iran were anxiously invoked.¹³ In response, other commentators have noted the important contextual differences that separate Egypt, and most of the Arab world, from the Iranian experience.¹⁴ As heated debates about Egypt's trajectory followed the exhilarating eighteen days of protests that brought down the Mubarak regime, frequent references to the "Turkish model" emerged as an alternative to the specter of Iran.¹⁵ In much of the Middle East, Turkey's recent political trajectory has been followed with interest and, eventually, enthusiasm. The election and re-election of the

13. See, e.g., Roya Hakakian, *Egypt Through the Lens of Iran's 1979 Revolution*, TIME WORLD (Feb. 13, 2011), <http://tinyurl.com/3ucxq47>; Abbas Milani, *A Note of Warning and Encouragement for Egyptians*, NEW REPUBLIC (Jan. 30, 2011, 1:04 PM), <http://tinyurl.com/4a5uqhc>.

14. For example, noted Middle East historian Juan Cole provided a systematic analysis of the core differences in "the social forces making the revolution in Egypt" as compared to Iran. Juan Cole, *Why Egypt 2011 Is Not Iran 1979*, INFORMED COMMENT (Feb. 2, 2011), <http://tinyurl.com/4lwf1s>. Similarly, commentator Fareed Zakaria addressed fears voiced by U.S. politicians that the Egyptian protests resembled those in Iran in 1979, arguing, "[T]here is little evidence so far to support the scare scenarios. The Egyptian protests have been secular . . . Egypt is not Iran in a dozen important ways." Fareed Zakaria, Editorial, *The Real Egypt-Iran Parallel*, WASH. POST, Feb. 7, 2011, at A17. Both Cole and Zakaria focus on differences such as the secular character of the protests, the absence of a hierarchical clergy in Sunni Islam (as compared to the Shia clerical hierarchy present in Iran), and the more central role of white collar and labor activists in Egypt than was the case in Iran.

15. See, e.g., Landon Thomas Jr., *In Turkey's Example, Some See a Map for Egypt*, N.Y. TIMES, Feb. 6, 2011, at A10; Mustafa Akyol, Op-Ed, *Egypt Needs the New Turkish Model*, HÜRRİYET DAILY NEWS (Feb. 8, 2011), <http://tinyurl.com/3mbkey8>; Soner Çağaptay, Op-Ed, *A Turkish Model for Egypt?*, JERUSALEM POST (Feb. 6, 2011, 10:47 PM), <http://tinyurl.com/4x5ahpz>; Tariq Ramadan, *Democratic Turkey is the Template for Egypt's Muslim Brotherhood*, HUFFINGTON POST (Feb. 8, 2011, 3:23 PM), <http://tinyurl.com/3uvrcmz>; Ibon Villedabeitia, *Analysis — Can the Arab Revolt Learn from Turkish Model*, REUTERS (Feb. 2, 2011, 1:28 PM), <http://tinyurl.com/6lcr78u>.

ruling party, the Justice and Development Party (the *Adalet ve Kalkınma Partisi*, or AKP), in 2002, 2007, and 2011, represented a break from what was perceived regionally as the staunch antireligious stance of previous Turkish governments.¹⁶ The Turkish conception of secularism — not the separation of religion and state, but the subordination of religion to state — grew out of a statist tradition that the country shares with much of the Middle East.¹⁷ Yet, this illiberal conception of secularism had long been a feature of the Turkish constitutional order that set it apart from — and rendered it unattractive to — much of the Muslim world. Against this backdrop, the emergence of the AKP as a pro-Islamic party able to compete effectively in democratic elections and govern successfully in a secular political system has transformed the perception of the Turkish case among Arab publics from marginal to seminal.

As a party that represents a more religious and socially conservative swath of Turkish society,¹⁸ the AKP was seen in the wider region as a

16. Both the perceived anti-religious tenor of Turkish secularism and the view that Turkish political institutions were transplantations from the West, incapable of accommodating Islam, rendered the Turkish model unattractive to Arab reformers in earlier periods, despite what many Western observers saw as the promise of Muslim secularism. *See, e.g.*, John L. Esposito, *Introduction: Islam and Secularism in the Twenty-First Century*, in ISLAM AND SECULARISM IN THE MIDDLE EAST 1, 9 (Azzam Tamimi & John L. Esposito eds., 2000) (arguing that the Turkish model of secularism was seen as “anti-religious and anticlerical belief” and ill-suited for democratization in religiously Muslim societies); *see also* ÖMER TAŞPINAR, AN UNEVEN FIT? THE “TURKISH MODEL” AND THE ARAB WORLD 7–9 (Brookings Project on U.S. Policy Towards the Islamic World, Analysis Paper No. 5, 2003) (arguing that in the Middle East Turkey was regarded as a case of “authoritarian secularism” and as a “former colonial master that turned its back on Islam”); Meliha Benli Altunisik, *The Turkish Model and Democratization in the Middle East*, ARAB STUD. Q., Winter/Spring 2005, at 45, 47 (noting, in the context of processes of political reform in the Arab world in 2005, that “[s]ome in the Arab world also considered Turkish secularism as anti-religion”).

17. For reasons discussed in detail below, the Turkish model had previously been seen as embracing a form of secularism antithetical to religion. The Turkish word that corresponds to secularism is *laiklik* (*laik* is the word that appears in the text of the Constitution). The word is an adaptation from the French (*laïcité*), and the Turkish doctrine of secularism is often denoted as “laicism” to mark the difference between the Anglo-American conception of separation of church and state and the Turkish concept, which subordinates religion to the state. The Turkish model is adapted from but certainly not identical to the French, and should be understood as a separate conception than either the American or the French. In the words of one authoritative study of Kemalist ideology, the form of secularism/laicism adopted by the Republic “is a partly anticlerical and even limited form of laicism that posits neither a thorough separation between religious institutions and the state nor the privatization of religion characteristic of liberalism.” TAHA PARLA & ANDREW DAVISON, CORPORATIST IDEOLOGY IN KEMALIST TURKEY: PROGRESS OR ORDER? 14 (2004). Accordingly, the secular/laic distinction does not adequately capture what is distinctive in the Turkish doctrine of secularism. I will use the term “secularism” to refer to the Turkish doctrine, because it is the more natural English-language term.

18. There have been numerous debates about the identity of the Justice and Development Party (the *Adalet ve Kalkınma Partisi*, or AKP) and its constituent base as pro-Islamic, conservative democratic, or even straightforwardly Islamist. *See, e.g.*, YILDIZ ATASOY, ISLAM’S MARRIAGE WITH NEOLIBERALISM: STATE TRANSFORMATION IN TURKEY 2–14 (2009) (describing the AKP as a “pro-Islamic” party that reflects the social views of religious Muslims but does not seek to Islamize the public sphere); BANU ELİGÜR, THE MOBILIZATION OF POLITICAL ISLAM IN TURKEY (2010) (describing the AKP as an “Islamist party”); ARDA CAN KUMBARACIBAŞI, TURKISH POLITICS AND

potentially fruitful model of a pro-Islamic party capable of undertaking meaningful reform.¹⁹ An expansion of Turkish foreign policy priorities under the AKP's stewardship also occasioned greater engagement with the Middle East, setting the stage for improved ties between Turkey and the Arab world.²⁰ Renewed regional interest coincided with a set of domestic crises that brought into the open long-simmering tensions in the Turkish political order. In particular, watching the Turkish public grapple with the relationship between Islam and democracy reinforced the emerging view in the Arab world that Turkey might represent a model capable of accommodating Islam in a pluralistic electoral system. The very fact that these debates were aired rather than repressed has been a source of optimism about Turkey among advocates of political liberalization in the region.²¹

In contrast to Turkey's Arab neighbors, however, external observers have been less sanguine about Turkey's constitutional path.²² Turkey's recent trajectory has occasioned alarm that the country is becoming more Islamist.²³ Perhaps surprisingly, however, despite these concerns, Western

THE RISE OF THE AKP: DILEMMAS OF INSTITUTIONALIZATION AND LEADERSHIP STRATEGY 187 (2009) (arguing that the AKP resembles the "Christian democratic parties in Western Europe" and is thus best characterized as a conservative democratic party). In my view, those scholars who treat the AKP as a conservative democratic party representing a more religious and socially conservative sector of the Turkish population than the traditional parties of the center-right and center-left are correct. For scholars who share that view, see generally WILLIAM HALE & ERGUN ÖZBUDUN, *ISLAMISM, DEMOCRACY AND LIBERALISM IN TURKEY: THE CASE OF THE AKP* (2010).

19. For instance, a political party in Morocco called the Justice and Development Party (JDP) (the party uses both the Arabic and French translations of the name: *Hizb al-'adala wal-tanmiya* in Arabic and *Parti de la Justice et du Développement* in French) specifically claims to have been inspired by the AKP in developing a moderate version of political Islam. For a discussion of the Moroccan JDP and its view of the Turkish AKP, see Ellen Knickmeyer, *Islamic Party Confident in Morocco: Moderate Muslims Predict Big Gains in Today's Vote, New Role in Government*, WASH. POST, Sept. 7, 2007, at A14.

20. For a discussion of Turkey's shifting foreign policy toward the Middle East, including the initiation of a free trade (and visa-free) zone with Jordan, Syria, and Lebanon, see James Traub, *Turkey's Rules*, N.Y. TIMES, Jan. 20, 2011, § MM (magazine), at 32. For a detailed discussion of changes in perspectives on Turkey in the Arab world and public opinion polling on views of Turkey in seven Arab countries, see MELIHA BENLI ALTUNIŞIK, *TURKISH ECON. & SOC. STUDIES FOUND., TURKEY: ARAB PERSPECTIVES* (2010), available at <http://tinyurl.com/6ae72ua>.

21. See, e.g., Yonca Poyraz Doğan, *Turkey is the Only Middle Eastern Country Pointing Toward the Future*, TODAY'S ZAMAN (May 24, 2010), <http://tinyurl.com/5st62gp> (interview with Paul Salem, director of the Carnegie Middle East Center in Lebanon); Rami G. Khoury, Commentary, *Turkey, the Middle East's Only Real Country*, DAILY STAR (Dec. 5, 2009, 12:00 AM), <http://tinyurl.com/6s97mpv>.

22. See, e.g., Niall Ferguson, *The Mideast's Next Dilemma: With Turkey Flexing its Muscles, We May Soon Face a Revived Ottoman Empire*, NEWSWEEK, June 27, 2011, at 6 (describing what he views as a "sustained campaign to alter the Turkish Constitution" to increase Prime Minister Erdoğan's power and arguing that the rise of the AKP represents a threat to the West and the beginnings of "a new Muslim empire"); Can Yeginsu, *Turkey Packs the Court*, N.Y. REV. BOOKS BLOG (Sept. 22, 2010, 3:30 PM), <http://tinyurl.com/3nezx2j> (arguing that the recent Turkish constitutional referendum exacerbated existing polarization and represented an AKP-led assault on the separation of powers in the Turkish political system).

23. See, e.g., Thomas L. Friedman, *Letter from Istanbul*, N.Y. TIMES, June 16, 2010, at A31; Soner Çağaptay, *Is Turkey Leaving the West?: An Islamist Foreign Policy Puts Ankara at Odds with Its Former Allies*,

analysts offering their prescriptions for Egypt and other regional cases of transition have also embraced Turkey as a potentially successful model for resolving (at least provisionally) the perceived tension between Islam and democracy.²⁴ While such analysts might have preferred Turkey's pre-AKP orientation, the current path has still generally been seen as potentially promising in the Arab context.²⁵

The convergence of views among some Arab and Western analysts that Turkey presents a desirable political model at a time of regional transition underpins both the pertinence and the value of an examination of the country's recent constitutional trajectory. Precisely because Turkey has been undergoing a constitutional transition of its own, it is particularly important to understand both *what* is attractive about the Turkish political order and *how* it has been changing. In keeping with the transitions literature, studies of the Turkish model have focused on the institutional

FOREIGN AFF. (Oct. 26, 2009), <http://tinyurl.com/44pkfbx>; Editorial Bd., Commentary, *Referendum in Turkey Raises Fears of Too Much Islam in Government*, CHRISTIAN SCI. MONITOR (Sept. 10, 2010), <http://tinyurl.com/36t4nyc>.

24. See, e.g., Frankie Martin, *Turkey Can Model Democracy for the Arab World*, CNN OPINION (Feb. 16, 2011), <http://tinyurl.com/3gx4f9w> (arguing that Turkey offers “a model of a modern, democratic and Islamic nation nurturing pluralist ideals”). Turkey was first identified as a potential model for the Middle East by American government officials in the George W. Bush administration. For instance, in an interview on German television, then-Secretary of State Colin Powell commented that Turkey might serve as an “Islamic” model for democratization in Iraq. See *Turkey is a Democratic and Secular Republic: Logoglu*, MSNBC-NTV (April 6, 2004), <http://tinyurl.com/6b7x6zv>. Later, President Bush made similar remarks at a NATO Summit in Istanbul in June 2004. For the full text of his remarks, see *George Bush Addressed the NATO Summit in Turkey*, GUARDIAN (Jun. 29, 2004, 8:42 AM), <http://tinyurl.com/3bvjjh>. But compare the views of former U.S. Ambassador to Turkey from July 2000 to September 2003 in W. Robert Pearson, Comment, *Democracy as the Cure of Terrorism*, 45 VA. J. INT'L L. 1017, 1024–25 (2005), cautioning against the overuse of the idea of Turkey as a model. These early references to a Turkish model focused primarily on the viability of democratic politics in a Muslim-majority state. Under the Obama administration, officials, analysts, and journalists alike have also invoked Turkey as a possible model for democracy in the Muslim world. For instance, President Obama chose Turkey as the site of his first presidential visit to a Muslim-majority country, and in a press conference with Turkey's president, Abdullah Gül, he stated that “[Turkey] represents a blend of . . . ancient traditions with a modern nation state that respects democracy, respects rule of law and is striving toward a modern economy.” *Obama Says U.S., Turkey Can Be Model for World*, CNN POL. (last updated Apr. 6, 2008, 4:36 PM GMT), <http://tinyurl.com/3sqs2m2>. In the context of the Arab revolts, invocations of Turkey as a model have abounded. In addition to the articles cited in note 15, *supra*, see Alper Y. Dede, *The Arab Uprisings: Debating the “Turkish Model”*, INSIGHT TUR., Apr.–June 2011, at 23; and Michael Sallhan, *Turkey Seeks to Inspire Arab Uprisings for Democracy*, MIDDLE E. ONLINE (Jun. 16, 2011), <http://tinyurl.com/659m9xs>.

25. This tension is exemplified by a recent article in *The Economist* that both laments the recent turn in Turkish democracy and suggests that the fact that “Turkey's vibrant, if imperfect, democracy has trumped the mullahs” makes it a good model for the Arab world. *A Flawed Example: Turkey Will Be a Better Model for Its Region If It Fixes Its Kurdish Problem*, ECONOMIST, Sept. 24, 2011, at 63; see also Mustafa Akyol, *Turkey's Maturing Foreign Policy: How the Arab Spring Changed the AKP*, FOREIGN AFF. (July 7, 2011), <http://tinyurl.com/3wgu64e> (arguing both that some in the West have been concerned about Turkey's new direction under the AKP and that Turkey offers an “attractive model” for the Arab Spring as a country that has steered a “third way” between secular authoritarianism and Islamic authoritarianism).

prerequisites for democratization,²⁶ particularly a well-established constitutional tradition and an independent judiciary with a strong constitutional court. These features are understood to support the political infrastructure that has enabled a Muslim-majority country to develop and entrench liberal democratic institutions. The alleged advantages of the Turkish model map easily on to the initial prescriptions for the Egyptian transition: constitutionalism coupled with the strengthening of a judiciary endowed with institutional guarantees of independence from the political branches of government.

Yet, a close examination of Turkey's recent constitutional crises might trouble some of the assumptions implicit in these prescriptions and suggest the importance of a more cautious and contextualized analysis of the role that courts and constitutions play, particularly in moments of change. Examination of the Turkish case illustrates how constitutions and courts both enable and undermine fundamental democratic reforms during periods of transition. At different points in the Turkish trajectory, invocations of constitutionalism and demands to preserve or strengthen the independence of the judiciary have paradoxically served to sustain the power of old-regime decisionmakers and block pathways to future political liberalization.

In the following pages, I will argue that recent Turkish crises — in the form of controversial constitutional court cases and efforts to reform the constitution²⁷ and the judiciary — are a consequence of tensions institutionalized within the Turkish Republic's constitutional order from the outset. To explicate the problematic role played by the judiciary, I will trace this history to the central role of state actors during the early formation of the modern Turkish Republic. This period was marked by top-down state-driven policies intended to secularize Turkish society and consolidate the loyalties of the population around a homogenous ethno-

26. Political liberalization and democratization are sometimes defined as distinct processes, but I will follow Miles Kahler in treating political liberalization as the introduction of greater competition in the political system, wider participation (with a reduction of obstacles to popular participation), and greater transparency in governance. While liberalization does not inevitably produce full democratization (that is, it may not be *sufficient* for democratic consolidation), it is necessary to any process of democratization. Miles Kahler, *Introduction: Liberalization and Foreign Policy*, in *LIBERALIZATION AND FOREIGN POLICY* 1, 10–18 (Miles Kahler ed., 1997).

27. See, for example, the discussion by Mehmet Fevzi Bilgin of the constitutional amendments introduced in Turkey after the transition away from military rule, from 1987–2004, which resulted in considerable liberalization, limitations on military prerogative, and revisions of as much as one-third of the constitution. Mehmet Fevzi Bilgin, *Constitution, Legitimacy and Democracy in Turkey*, in *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST* 123, 123–46 (Saïd Amir Arjomand ed., 2008). Nonetheless, the amended constitution as of 2004 remained quite illiberal, notably denying access to the Constitutional Court of Turkey (ICC) by individual petitioners. A set of amendments that were adopted in 2010, subsequent to Bilgin's analysis, discussed *infra* Part IV, went a considerable way toward further liberalization.

national identity.²⁸ These social engineering projects of secularization and Turkification left the emergent nation with deep cleavages.²⁹ At the same time, this period witnessed the emergence of particular governmental elites charged with preserving the ideological commitments of the state formation period — and receiving privileged access to state resources in return.³⁰ In recent Turkish history, the state institution that bore responsibility for preserving these elite commitments came to be the Turkish judiciary, especially the constitutional court.³¹

In Part I, I will begin the analysis of the Turkish case with the constitutional crisis that erupted in 2007. The account that I will present highlights the potentially paradoxical role of judicial independence: On the one hand, judicial independence is understood as a condition of democratization; on the other hand, it may become an obstacle to liberalization. A crisis over presidential candidacy set in motion a rapid succession of constitutional challenges that culminated in what was seen as

28. As will be discussed at greater length *infra* Part II, such policies included the introduction of top-down state-funded secular education, in place of the earlier, largely private educational system, which included both traditional religious medrese education and secular private schools. The official language of the country, modern Turkish, was the only one permitted in the compulsory public educational system. The official history in state-issued primary school texts traced the ethnic roots of the Republic to the Turkic tribes of Central Asia. Later, the introduction by the military (after 1980) of compulsory religion classes in the state educational curriculum (allegedly as a basis for social cohesion and resistance to leftist tendencies) presented only the Hanafi school of Sunni Islam. Through such policies, the citizens of Turkey were assimilated to a “Turk” whose ethnic (Turkic) and religious (Sunni Hanafi) identity forms the allegedly homogenous basis of national loyalty to the state. Of course, such a definition excludes the sizeable Kurdish-language-speaking communities and non-Sunni Muslim communities (particularly the Alevis), as well as other religious minorities. For a discussion of the definition of Turkish identity from the Ottoman period through the reforms of Atatürk, see ZEYNO BARAN, *TORN COUNTRY: TURKEY BETWEEN SECULARISM AND ISLAMISM* (2010) (see especially Chapter One, “Turkish Identity — from the Ottomans to Atatürk”).

29. In this Article, I will make reference to two categories of cleavage: social and institutional. The principal *social* cleavages that emerged out of the reforms of the state-formation period in Turkey correspond to the repressed identities that are the obverse of the ethno-national Turkish identity promoted by the founders of the Republic. These cleavages are along the axes of ethnicity (Turk/Kurd), sectarian identity (Sunni Hanafi/non-Sunni Alevi), and religiosity (secular/religious). In addition, the period following the introduction of electoral competition (the multi-party period after 1946) gave rise to important *institutional* cleavages concerning the balance between civilian and military authority as well as between the elected government (*hükümet*) and the unelected state bureaucracy (*devlet*), with the latter comprised especially of the military, the state security apparatus, the state civil service, and the judiciary. This latter institutional cleavage is discussed at greater length *infra* note 150 and accompanying text. For a discussion of social cleavages in Turkey, see Yasushi Hazama, *Social Cleavages and Electoral Support in Turkey: Toward Convergence?*, 41 *DEVELOPING ECON.* 362 (2003). See also Ahmet Evin, *Changing Patterns of Cleavages Before and After 1980*, in *STATE, DEMOCRACY AND THE MILITARY: TURKEY IN THE 1980S*, at 201, 201–14 (Metin Heper & Ahmet Evin eds., 1988) (discussing cleavages prior to and after military intervention of 1980).

30. On conceptions of ideological fealty and loyalty to the founding statesmen as a qualification to govern and have access to state resources, see PARLA & DAVISON, *supra* note 17, at 183–92.

31. On the role of the Constitutional Court of Turkey as a guardian of founding ideological commitments, often labeled “Kemalism” after the founding statesman of the Turkish Republic, Mustafa Kemal, see Dicle Kogacıoğlu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 *INT’L SOC.* 258 (2003).

a judicial attempt to block political channels for constitutional reform.³² In some ways, the Constitutional Court of the Republic of Turkey's (TCC) decisions in 2008 represented a *Marbury* moment gone awry.³³ The TCC asserted a power of judicial review not clearly rooted in the text of the constitution, and then immediately employed that power to overturn properly enacted constitutional amendments, setting the stage for confrontation with the political branches.

In Part II, I will argue that contemporary obstacles to democratic consolidation in Turkey cannot be understood in a historical vacuum. Conventional arguments concerning the causes of recent constitutional crises center on one of three explanations. Some scholars attribute defects in the Turkish constitutional system to the specific provisions of the current constitution, promulgated by the military in 1982.³⁴ Other scholars argue that the weakness of the Turkish political party system creates an opportunity for a single opportunistic party to dominate the center-right.³⁵ Finally, a third explanation focuses on the rise of political Islam in the 1990s as the source of increasing polarization in Turkish society,³⁶ which is reflected in political conflict over the constitutional principle of secularism.³⁷ There are also other arguments that look beyond domestic factors and examine international influences, such as the role of the EU accession process, the change of government in Iraq, or the broader rise of political Islam in the region. While international factors have certainly affected processes within Turkey, I will argue that the explanation for the particular impact of these considerations is best understood in terms of

32. In a decision discussed *infra* Part I, the TCC held that certain unamendable provisions of the Turkish constitution — especially those related to a particular conception of secularism — foreclosed the possibility of broad constitutional reform through the elected branches of government.

33. *Marbury v. Madison* is the iconic United States Supreme Court case in which the Court introduced the power of judicial review in announcing its own authority to declare federal statutes unconstitutional. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

34. This argument is the prevalent explanation for the constitutional crises in left-leaning circles in Turkey and in the Turkish-language press. For a representative example of this argument (published in English), see Fevzi Bilgin, *Turkey's 'Constitutional Moment'*, WASH. REV. TURKISH & EURASIAN AFF. (June 2010), <http://www.thewashingtonreview.org/articles/constitutional-moment.html>.

35. A leading commentator on Turkish constitutional politics has argued that factionalism and fragmentation in the Turkish political party system has meant that parties with organizational strength, like the AKP, are able to dominate the political spectrum and produce electoral victories. See ERGUN ÖZBUDUN, *CONTEMPORARY TURKISH POLITICS: CHALLENGES TO DEMOCRATIC CONSOLIDATION* 73–103 (2000).

36. The most prolific proponent of this view is Soner Çağaptay of the Washington Institute for Near East Policy. See, e.g., Soner Çağaptay, *Slippery Slope*, HÜRRIYET DAILY NEWS (Mar. 30, 2011), <http://tinyurl.com/3tp7yge>; Soner Çağaptay, *Sultan of the Muslim World: Why the AKP's Turkey Will Be the East's Next Leader*, FOREIGN AFF. (Nov. 15, 2010), <http://tinyurl.com/3wblggs>; Soner Çağaptay, *Turkey's Turn from the West*, WASH. POST (Feb. 2, 2009), <http://tinyurl.com/bj3xnc>.

37. One leading scholar on the modern Muslim world who explains the rise of Islamist politics in Turkey, and the democratic form it has taken, through a regional perspective is Sami Zubaida. See, e.g., Sami Zubaida, *Trajectories of Political Islam: Egypt, Iran and Turkey*, 71 POL. Q. 60, 60 (Supp. 2000).

how they were refracted by domestic political institutions.³⁸ Each of the alternative arguments offers important insights, but none of them address what I identify as the core explanation. I will argue that recent constitutional crises originate from dynamics that date back to the founding of the state and have become embedded in the country's constitutional culture. To contextualize latter-day constitutional crises, I will return to the original constitutive moment of state formation when institutions were put in place to safeguard the core commitments of founding elites, centered on a particular modernizing ideology.³⁹ In this period, the principal institutions of a tutelary model of the state,⁴⁰

38. The broader role of the international context is attributed explanatory significance for the emergence of recent Turkish crises in a number of ways. Such international factors include the influence of events in Iraq on Kurdish aspirations for autonomy, the role of the European Union as a (controversial) catalyst for reforms, and the shifting balance of power in the Middle East, creating new regional opportunities and challenges. While each of these factors has contributed to shifts in Turkey, they complement, rather than conflict with or override, the arguments focused on domestic factors. The impact of the international context may well have fueled renewed Kurdish separatism, produced fits and starts in EU-oriented reforms (as the enthusiasm of the European Union toward Turkish candidacy has waxed and waned), and affected Turkish foreign policy toward the Middle East. But any such international influences are necessarily refracted through Turkey's domestic political institutions. My argument here will focus on explaining why these institutions have responded to the domestic and international environment through the constitutional crises that have marked the period from 2007 to 2011. On the influence of events in Iraq on the Kurdish question in Turkey, see Joshua R. Itzkowitz Shifrinson, *The Kurds and Regional Security: An Evaluation of Developments Since the Iraq War*, MIDDLE E. BRIEF (Crown Ctr. for Middle E. Stud., Brandeis Univ., Waltham, Mass.), Dec. 2006, at 1; Michael Rubin, *A Comedy of Errors: American-Turkish Diplomacy and the Iraq War*, TURKISH POL'Y Q., Spring 2005, at 69; and *Turkey's Kurds: Dreams and Reality*, ECONOMIST, Nov. 3, 2007, at 62. The most prominent analyst of Turkish politics who argues that the EU accession process has served as the catalyst for AKP reforms and the recent constitutional crises is Ümit Cizre. Ümit Cizre, *Introduction: The Justice and Development Party: Making Choices, Revisions and Reversals Interactively*, in *SECULAR AND ISLAMIC POLITICS IN TURKEY: THE MAKING OF THE JUSTICE AND DEVELOPMENT PARTY 1* (Ümit Cizre ed., 2008). On the significance of the regional rise of political Islam on the course of events in Turkey resulting in the rise of the AKP, see Zubaida, *supra* note 37.

39. On this modernizing ideology and its role in the state formation project, see PARLA & DAVISON, *supra* note 17. "Kemalism" — the founding ideology of the state — treated Westernization, modernization, and secularization as top-down imperatives that the state must carry out from above to elevate Turkish society to the level of "contemporary civilization" (*çağdaş medeniyet*), a term frequently invoked by Mustafa Kemal and embedded in the preamble of every Turkish constitution (1921, 1924, 1961, and 1982). For more on the history, background, and ideology of the Turkish state formation era, see *infra* Part II.

40. On the "tutelary" ideology of Kemalism, see PARLA & DAVISON, *supra* note 17, at 147 ("Kemalism's was a tutelary democratic ideology — meaning that Kemal's intention to create the conditions for democracy through necessary authoritarian measures . . ."). The authoritarian measures in question took a particular institutional form with a lasting impact on the Republic. For instance, Parla and Davison cite documents and statements from the founding that view the army as "ideologically constituted as the servant and indeed the embodiment of Kemalist goals. It becomes not only a department of the Kemalist state but an arena that manifests the highest goals of Kemalism and serves as an exemplary vehicle through which Kemalist ideological ends are achieved." *Id.* at 235. The civilian bureaucracy of the state assumed similar ideological purposes: "The state was conceived as the assemblage of laws, codes, and other mechanisms of enforcement to create the order necessary to achieve [Kemalism's] high, civilized, modern ends." *Id.* at 258.

including the military and civilian bureaucracies, were put in place.⁴¹ These institutions were understood to represent the guardians both of the founding ideology of the state and of the privileges of the urban elites, who gained differential access to state resources in exchange for their fealty to that ideology.⁴² The persistent legacy of these early repressive strategies, which are embedded in Turkish constitutional culture, provides the context through which to understand the state's institutional defensiveness in the face of contemporary demands for liberalization. This

41. The judiciary was not a branch of the original tutelary model, but a later innovation that can be traced to the creation of the TCC under the 1961 Constitution. But the TCC was put in place precisely to enforce a Kemalist call to order. The military, which overthrew the civilian government in a coup in 1960, viewed the initial multiparty period (1950–1960) as a retreat from the core tenets of the founding ideology. For a brief history of the original conception of the TCC under the 1961 Constitution, see ERGUN ÖZBUDUN, *TÜRK ANAYASA HUKUKU* [TURKISH CONSTITUTIONAL LAW] 27–30 (8th ed. 2004). According to Eric Zürcher, one of the foremost historians of modern Turkey, the “monolithic political system established after 1925” was centered on the military and civilian bureaucracies put in place during the state formation period, which served as the institutional form of the tutelary ideology of Kemalism. ERIC J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 177 (3d ed. 2004).

42. The content of Kemalism has changed over the history of the Republic. Initially, Kemalism was identified with a specific set of six principles: republicanism, populism, secularism, revolutionism, nationalism, and statism. The “six arrows” of Kemalism were officially articulated in the 1935 platform of the Republican People's Party, headed by Mustafa Kemal. See PEOPLE'S REPUBLICAN PARTY, PROGRAM OF THE PEOPLE'S PARTY OF THE REPUBLIC (1935). For an excerpt of the party platform adopted in 1935 available online, see *The Six Arrows of Kemalism: The Principles of the Republican People's Party*, (RPP), LONGMAN WORLD HIST. (last visited Nov. 13, 2011), <http://tinyurl.com/3as9b2x>. Over time, Kemalism was transformed into a looser set of commitments to a corporatist and tutelary model of the state institutionally committed to a particular understanding of secularism, nationalism, and modernity identified with the West. See, e.g., ZÜRCHER, *supra* note 41, at 181 (arguing that Kemalism is best described as “a set of attitudes and opinions” committed to principles of republicanism, secularism, and nationalism). For a detailed discussion of the content and character of contemporary Kemalism, see PARLA & DAVISON, *supra* note 17 (especially Chapter 4, “Kemalism and Ideology”). References to “Kemalists” are not intended to suggest that those who identify with this ideology have been the same individuals, the same families, or even precisely the same social groups throughout the history of the Republic. Rather, “Kemalists” are those social groups at any particular moment who exhibit loyalty to the founding conception of the state and gain access in return to state resources, such as civil service positions, military office, university appointments, privileged recourse to state subsidies or contracts, and so on. Although these groups have shifted over time, a core contingent has always been drawn from the principal western urban centers of the country, namely Istanbul, Izmir, and Ankara. For instance, every president of the Republic from the 1980 military coup until the appointment of an AKP-selected president has been a graduate of one of the top educational institutions of the country, all located in the western cities: the Ankara military academy (Kenan Evren), Ankara University (Ahmet Necdet Sezer), or the Istanbul Technical University (Turgut Özal, Süleyman Demirel). The prime ministers who served in this period were also graduates of either Robert College (which later became Bosphorus University) (Bülent Ecevit, Tansu Çiller), Ankara University (Mesut Yılmaz, Erdal İnönü), or the Istanbul Technical University (Turgut Özal, Süleyman Demirel, Necmettin Erbakan). For biographies, including educational backgrounds, for each past president, see *Cumhurbaşkanlarımız* [Former Presidents], TÜRKİYE CUMHURİYETİ CUMHURBAŞKANLIĞI [PRESIDENCY OF THE REPUBLIC OF TURKEY] (last visited Nov. 28, 2011), <http://tinyurl.com/84c4bct> (Turk.), and for prime ministers, see TÜRKİYE CUMHURİYETİ BAŞBAKANLIK [PREMIERSHIP OF THE REPUBLIC OF TURKEY] (last visited Nov. 28, 2011), <http://tinyurl.com/6oz6j6y> (Turk.).

analysis has two important implications. First, how transitions are initially institutionalized will have lasting impact on the potential for democratic consolidation. Second, where constitutional obstacles constrain further democratization, a new social contract may be the only means of advancing a project of political liberalization.

Having grounded the contemporary crises in historical context, I will return, in Part III, to the constitutional battles of the last decade, particularly the intense period of contestation from 2007 to the present. I will describe how establishment elites systematically refer back to the commitments of the original republican statesmen. Although these elites — who have long controlled key institutions, including the military, the state bureaucracy, and the judiciary — have enjoyed unparalleled access to the levers of power, their lack of a popular constituency, or at least one comparable in size to supporters of reform, contributes to an ongoing sense of vulnerability.⁴³ Further, because the establishment elites view Turkish society as a potential repository of antimodernist backlash, even modest proposals to relax ideological orthodoxy or adopt liberalizing reforms are treated as systemic threats to the established order.⁴⁴ The confrontation between the governing AKP and the state establishment is a

43. What began as an urban distaste for the rural peasantry that made up a large proportion of Turkey's population at the founding later developed into a center-periphery dynamic of republican elites versus the "poor masses" (whether rural or urban, in light of the mass urbanization of the 1950s, 1960s, and 1970s). Yet, because the republican elite represented a relatively small proportion of the population, drawn primarily from Turkey's largest western cities, they were vulnerable to electoral reversal of their preferred political arrangements. In this Article, I will argue that the result of this vulnerability has been a reliance on the unelected branches of government — the judiciary, military, and state bureaucracy — in a manner that impedes democratic consolidation. For a discussion of the development of a center-periphery relationship between the republican, urban elites and the provincial masses, see the classic article by Şerif Mardin, *Center-Periphery Relations: A Key to Turkish Politics?* DÆDALUS, Winter 1973, at 169, 169–90. For a detailed discussion of the relationship between the "Kemalist establishment" in Turkey and the AKP, see Menderes Çinar, *The Justice and Development Party and the Kemalist Establishment*, in SECULAR AND ISLAMIC POLITICS IN TURKEY, *supra* note 38, at 109. On the general sense of vulnerability of Turkey's secular elites — including the Turkish Armed Forces — and their "polarizing secular campaign" against the electorally powerful AKP and its policies, see Cizre, *supra* note 38, at 1–2 ("[I]he insecurity and distrust of Turkey's secularists derive from . . . fears that the EU-inspired reforms would transfer political power to the elected civilians.").

44. For instance, since 1998, the Turkish Armed Forces have specifically defined two internal enemies as representing greater national security threats than outside powers: Kurdish separatism and religious reaction (*irtica*). HAKAN YAVUZ, ISLAMIC POLITICAL IDENTITY IN TURKEY 246 (2007). Widespread calls for Kurdish cultural autonomy are, seen through this prism, understood to endanger the unitary definition of Turkish identity, which, in turn, has the potential to threaten the territorial integrity of the country, according to the military leadership. As for "religious reaction," it raises the risk of backsliding on the Kemalist interpretation of secularism, which is essential — again, on the army's account — to the security of the Republic. For a detailed discussion of the Turkish military's conception of threat, see Ümit Cizre, *The Justice and Development Party and the Military: Recreating the Past After Reforming It?*, in SECULAR AND ISLAMIC POLITICS IN TURKEY, *supra* note 38, at 132, 145 (describing the Turkish army's self-understanding as the "guardian" of the republican principles of Kemalism, requiring intervention to prevent reforms that would entail a reinterpretation of those principles).

repetition of this basic dynamic, with attempts at liberalizing reforms resulting in judicial or military blockage. I will argue that democratic consolidation will only be possible in Turkey if this dynamic is disrupted.

Yet, despite these obstacles to liberalization, promising developments rooted in recent social transformation in Turkey have generated newfound resources of democratic resistance. In Part IV, I will examine the prospects for meaningful transition through a consideration of the 2010 Turkish constitutional referendum and its aftermath. If the TCC decision in 2008 was a *Marbury* moment, some observers have interpreted the constitutional amendments proposed by the AKP in 2010 as echoing President Franklin D. Roosevelt's court-packing scheme.⁴⁵ Again, the comparison is deceptive because the Turkish case diverged in important ways from the earlier American example. While the 2010 referendum did expand the TCC, its principal effect was to return the judiciary to its role in a scheme of institutional checks and balances rather than to one of ideological guardianship. By limiting the role of the military in ordinary governance and subjecting judicial appointments to mechanisms of democratic accountability, the referendum removed antidemocratic veto points from the political order.

As a result of these changes, I will conclude that the constitutional order that has emerged after a decade of crises may interrupt a cyclical pattern of liberalization and repression by including a greater plurality of social actors in the political system. The Turkish case is thus both a cautionary tale and a hopeful one. Paying close attention to ways that the conventional wisdom on independence of the judiciary produced paradoxical outcomes may yield constructive lessons for comparisons across the region. In particular, conformity to formal institutional prescriptions without careful attention to context may yield superficially "liberalizing" reforms that actually serve to entrench the privileges of discredited state actors. By contrast, a definition of judicial independence that includes independence from elite capture and ideological uniformity may be as important as the formal indices of separation of powers. As the Turkish case is invoked in reference to the Arab revolts of 2011, recognizing *which* Turkish model of the judiciary and constitutionalism is being advocated is crucial. Over the last decade, Turkey has exemplified both the mechanisms by which authoritarian regimes transition to liberal constitutionalism and the reasons they sometimes fail to do so.

45. U.S. President Franklin D. Roosevelt proposed an expansion of the Supreme Court to dilute opposition to New Deal legislation in 1937. The proposal failed, but President Roosevelt was ultimately able to obtain a majority on the Court that was more favorable to his legislative agenda. For a detailed examination of his proposal and its consequences, see MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002).

I. PATHOLOGIES OF JUDICIAL INDEPENDENCE: THE 2007–2008 CONSTITUTIONAL CRISES

In October 2008, the Constitutional Court of the Republic of Turkey (TCC) delivered its reasoning for two of the most momentous decisions in the constitutional history of the Republic.⁴⁶ The first of the cases challenged the legality of constitutional amendments passed by the Turkish Parliament that would permit religiously observant students to wear headscarves on university campuses.⁴⁷ The second, and related case, sought the closure of the ruling AKP party on the grounds that it had become a “focal point” for antiseccular political activities in Turkey.⁴⁸ The principal evidence offered by the chief prosecutor in support of his allegations against the AKP were speeches and statements made by party members concerning efforts to lift the headscarf ban.⁴⁹

The twin decisions by the TCC to review properly ratified constitutional amendments and to permit the indictment of the sitting government — both for alleged violations of the founding constitutional provision of secularism — represented startling innovations in the Turkish legal and political system. To be sure, the TCC had a record of prior party closures,⁵⁰ but this was the first time a *sitting* elected government was

46. These cases were initiated months after the AKP party won a significant electoral mandate in parliamentary elections in July 2007. Those elections, in turn, had been convened early in an attempt by the party to gauge its support in the face of an earlier challenge by the Turkish military and the TCC in the spring of 2007. This broader constitutional crisis that began in 2007 is discussed *infra* Part III.

47. See Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>. This measure required a constitutional amendment because previous attempts to pass legislation liberalizing strict dress restrictions on university campuses had been overturned by the TCC by reference to the Turkish constitution, though no specific constitutional provision referred to such dress codes. On the lack of any constitutional provision concerning the headscarf prohibition, see Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PENN ST. INT'L L. REV. 383, 485 (2010).

48. See Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/1 (SPK), Karar No. 2008/2 (Resmi Gazete, Oct. 24, 2008, No. 27034) (Turk.), available at <http://tinyurl.com/5rw57jw>. The formulation of the charges was derived from the rules concerning party dissolution set forth in Articles 68 and 69 of the 1982 Constitution. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, arts. 68, 69 (Turk.). According to Article 69(7), party dissolution requires a determination by the TCC that the party has become the “focal point” for proscribed activities; the list of proscribed activities, set forth in Article 68(4), includes activities in conflict with the secular character of the Republic. *Id.* arts. 68(4), 69(7). The full text of the 1982 Constitution (as amended in 2010) is available in Turkish at <http://tinyurl.com/3zrj7mv>.

49. For a discussion of the indictment, see Uzun, *supra* note 47, at 385–87.

50. The TCC has distinguished itself among peer institutions worldwide with its astonishing activism in the area of party closures. The TCC's extensive docket of party dissolution cases has resulted in twenty-five party closures in the court's history — generally against Kurdish and Islamist parties, along with some socialist, communist, and anarchist parties in an earlier period. For a list of the TCC's past party closure activity, see Edip Yüksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 CARDOZO J. INT'L & COMP. L. 423, 443–46 (1999). Nineteen of these party

threatened with ouster by judicial action. It was also the first time under the current constitution that judicial review would operate to overturn constitutional amendments.⁵¹ Though the two cases were brought independently and relied on different constitutional provisions, together they represented the continuation of an ongoing confrontation between the Kemalist secular establishment⁵² and the governing party over measures that would liberalize the Turkish political and constitutional order — including its relationship to expressions of religious and ethnic identity. The TCC’s decision to hear these cases was characterized by analysts within and outside of Turkey as a form of “judicial coup.”⁵³

closures have been decided since the adoption of the 1982 Constitution. But the AKP closure case was the first time that a prosecutor sought to dissolve the governing party, let alone one that had won a resounding electoral mandate with a large plurality of the vote less than a year earlier. For this reason, the AKP closure case received the lion’s share of attention in the media. It should also be noted that the Chief Public Prosecutor also initiated a case in November 2007 to dissolve the Democratic Society Party (*Demokratik Toplum Partisi*, or DTP), a Kurdish political party. The TCC ultimately ruled against the DTP more than two years after the initiation of the case, on December 11, 2009. *Anayasa Mahkemesi* [Constitutional Court], Esas No. 2007/1, Karar No. 2009/4 (Dec. 11, 2009) (Turk.). The eleven judges ruled unanimously in favor of closing the party and banned thirty-seven DTP members from politics for five years, including several elected members of Parliament and an elected regional mayor. *Id.* By cutting elected Kurdish officials off from access to the political institutions of government, the TCC undermined the nonviolent and political channels pursued by Kurds to advocate for minority rights and greater pluralism, arguably contributing to the ongoing militarization of the Kurdish question in Turkey. The DTP was the sixth iteration of a Kurdish political party subjected to closure by the TCC. For a concise discussion of the previous Kurdish party closures, see Bülent Keneş, *Turkey is Repeating Its Useless Patterns*, TODAY’S ZAMAN (Dec. 14, 2009), <http://tinyurl.com/3bdzmn5>. In anticipation of an adverse TCC decision that would lead to the closure of the DTP, Kurdish politicians formed the *Barış ve Demokrasi Partisi* (Peace and Democracy Party, or BDP) in 2008 as a “reserve” party.

51. The TCC was empowered to engage in such review under the previous constitution, but the 1982 Constitution had been written explicitly to cabin the court’s ability to engage in any form of substantive review of constitutional amendments. On three prior occasions, when a question raised to the TCC would have called for substantive review of a constitutional amendment under the current constitution, the TCC found that it lacked the authority to engage in such review. For instance, the TCC denied an application for review by Turkish parliamentarians in 1987 on the grounds that it did not have jurisdiction to accept an application for annulment based on grounds other than those enumerated in Article 148 related to procedural irregularities. *Anayasa Mahkemesi* [Constitutional Court], Esas No. 1987/9, Karar No. 1987/15 (*Anayasa Mahkemesi Kararlar Dergisi* [AMKD], June 19, 1987, sayı 23, sayfa 282) [Const. Ct. J., June 19, 1987, No. 23, p. 282] (Turk.).

52. On Kemalism and what constitutes the “Kemalist secular establishment” see note 42, *supra*, and PARLA & DAVISON, *supra* note 17 (providing a detailed discussion of Kemalism).

53. See, e.g., Morton Abramowitz & Henri J. Barkey, *Turkey’s Judicial Coup D’etat*, NEWSWEEK, Apr. 14, 2008, at 17; *The Secularists Fight Back*, ECONOMIST, Apr. 5, 2008, at 53; Hasan Cemal, *Anayasa Mahkemesi, ‘yargusal darbe’ye geçit verecek mi?..* [Will the Constitutional Court Commit a ‘Judicial Coup’?..], MILLİYET (Mar. 29, 2008), <http://tinyurl.com/3bnqqeo>; Riz Khan, *Turkey’s Judicial Coup*, AL JAZEERA (July 1, 2008), <http://tinyurl.com/42anv9g>; Hilmi Toros, *Turkey Wrestles with a ‘Judicial Coup’*, ASIA TIMES ONLINE (Apr. 18, 2008), <http://tinyurl.com/6dhkgh6>. Turkey has more than once innovated new forms of intervention in the normal workings of the civilian government. To avoid the obviously antidemocratic implications of direct military coups to topple elected governments — though in 1960 and in 1980, the military did engage in overt coups — other forms of intervention developed. For example, the “postmodern coup” of 1997, in which the military used a press

Both cases received widespread domestic and international press coverage, placing the TCC under internal pressure and external scrutiny in coming to its judgment. In order to facilitate the expeditious resolution of legal challenges, the TCC's practice allows it to announce its decision well before providing its written opinion. The outcomes of the two cases — announced in June and July 2008, respectively — were received with much fanfare. The constitutional amendments were invalidated, reinstating the headscarf ban in universities, while the AKP survived the constitutional challenge by the thinnest of possible margins.⁵⁴ Because of the time lag between the announcement and the publication of the reasoning in support of these decisions, the latter received far less coverage. Yet, the reasoning offered by the TCC had the potential to be far more damaging to political liberalization efforts than a decision to close the governing party might have been.⁵⁵

The fact that the TCC agreed to hear the headscarf case was already a source of some surprise to legal scholars. The ban on the headscarf is not

conference to issue an ultimatum to the governing coalition, forced the leading party to step down. See Haldun Gülalp, *Political Islam in Turkey: The Rise and Fall of the Refah Party*, 89 *MUSLIM WORLD* 22, 39–40 (1999). Another example is the “e-coup” of 2007, in which the military posted a warning to the government on its website, prompting early elections. Ömer Taşpınar, *The Old Turks’ Revolt*, *FOREIGN AFF.*, Nov.–Dec. 2007, at 114, 115 (2007). But these earlier forms of coup — all involving the Turkish armed forces — were precluded in 2008 since the army’s attempt to push the AKP out had been rebuffed at the polls the previous year in an election that returned the AKP to office with a strengthened mandate. Because of the party’s apparent popularity, the military ceded its role as Kemalist guardian to the judiciary.

54. A majority of judges — six out of eleven — voted in favor of closing the AKP, but the dissolution of a party requires the support of two-thirds of the TCC — in other words, seven judges. See *Anayasa Mahkemesi* [Constitutional Court], Esas No. 2008/1 (SPK), Karar No. 2008/2 (Resmi Gazete, Oct. 24, 2008, No. 27034) (Turk.), available at <http://tinyurl.com/5rw57jw>. Further, ten of the eleven judges (all but Chief Justice Haşim Kılıç) found the AKP guilty of involvement in anti-secular activities, but opted for the lesser penalty of reducing the party’s support from the Treasury, as provided for under Article 69(8). *Id.* The determination by ten judges that AKP activities threatened secularism was widely seen as a “yellow card” — that is, a very serious warning — to the AKP. Soli Özel put it starkly when he observed that the “AKP is on probation . . . [t]he court clearly said it sees the party as a focal institution for Islamizing the country.” Sabrina Tavernise & Sebnem Arsu, *Turkish Constitutional Court Calls Ruling Party Constitutional But Limits Its Financing*, *N.Y. TIMES*, July 31, 2008, at A6.

55. The TCC’s reasoning in the headscarf decision, *Anayasa Mahkemesi* [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>, is more important than the opinion published in the AKP closure case for two reasons. First, many of the judgments in the AKP closure case turned on whether advocacy for the amendments constituted anti-secular activity. See *Anayasa Mahkemesi* [Constitutional Court], Esas No. 2008/1 (SPK), Karar No. 2008/2 (Resmi Gazete, Oct. 24, 2008, No. 27034) (Turk.), available at <http://tinyurl.com/5rw57jw>. Thus, in some sense, the TCC *derived* its reasoning in the AKP closure decision from its decision concerning the headscarf amendments. Second, the headscarf decision announced an expanded doctrine of judicial review, the significance of which outstrips the importance of the underlying decision related to the particular amendments at issue. The AKP closure decision entailed no comparable doctrinal innovation. As a result, the analysis that follows will focus on the TCC’s reasoning in the headscarf decision.

actually provided for by the 1982 Constitution, but rather derives from the Turkish judiciary's strict interpretation that constitutional secularism requires such a ban in key institutions, including government offices and universities.⁵⁶ The constitutional amendments that sought to lift the headscarf ban did so indirectly, by disallowing discrimination in institutions of higher education on the basis of dress.⁵⁷ The AKP was careful to follow legislative procedures and constitutional requirements scrupulously in adopting the amendments, going so far as to seek the support of a right-wing party, the Nationalist Action Party (*Milliyetçi Hareket Partisi*, or MHP), which is usually stridently opposed to the AKP.⁵⁸ The amendments passed with the overwhelming support of over eighty percent of the Parliament and easily met the constitutional threshold for procedural validity.⁵⁹ The 1982 Constitution clearly restricts judicial review

56. The TCC ushered in this strict reading — requiring the banning of headscarved women from public institutions including government offices and universities — as part of its reasoning in its dissolution of the Welfare Party, an earlier Islamist party that had faced constitutional challenge and ultimately closure in 1998. See *Anayasa Mahkemesi* [Constitutional Court], Esas No. 2007/1 (SPK), Karar No. 1998/1 (AMKD, Jan 1, 1998, sayı 32, sayfa 762) [Const. Ct. J., June 19, 1987, No. 32, p. 762] (Jan. 1, 1998) (Turk.). Days after that judgment, a briefing by a retired military officer to judges and university presidents encouraged them to adopt a formal ban, leading to a declaration by an association of university presidents restricting certain forms of clothing in institutions of higher education. See Hilal Elver, *Lanfare and Wearfare in Turkey*, MIDDLE E. REP. ONLINE (Apr. 15, 2008), <http://www.merip.org/mero/mero041508> (providing an excellent overview of the recent history of the headscarf ban in Turkey).

57. Specifically, the Parliament passed two amendments, the first to Article 10 concerning equality, and the second to Article 42 concerning the right to education. The amendment to Article 10(4) expanded the prohibition on discrimination by state organs and administrative authorities to “all public services.” The amendment to Article 42(1) — which provides that “no one can be deprived of his/her right to higher education” — added a phrase stating that any deprivation of the right would have to be specified by law. In effect, the amendments required the passage of a law explicitly regulating permissible restrictions on the right to an education. The clear parliamentary majority in favor of the amendments indicated that the opposition and the secular establishment would be unable to pass a law that would formalize the ban on headscarves following the amendments. *Turkish Parliament Approves Constitutional Amendments to Lift Ban on Headscarf*, TURKISHPRESS.COM (Feb. 9, 2008), <http://www.turkishpress.com/news.asp?id=214516>.

58. The Nationalist Action Party (*Milliyetçi Hareket Partisi*, or MHP) is an ultranationalist party usually opposed to the AKP. See Özgehan Senyuva, *Opposition for the Sake of Opposition? Polarized Pluralism in Turkish Politics*, MIDDLE E. REV. INT'L AFF. J., Dec. 2009, at 51 (describing the habitual MHP opposition to the AKP). But because the MHP's political outlook includes support for traditional values, including religious values, its habitual opposition gave way in the case of the headscarf issue. Interestingly, while the AKP faced proceedings for its closure as a result of the headscarf amendments, the MHP was never accused of serving as a “focal point” for anti-secular activities despite its central role in advocating for the same amendments.

59. For a constitutional amendment to be approved, it has to secure either the support of two-thirds of the Parliament or it has to be put to a national referendum. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, arts. 104(a), 175 (Turk.). The amendments passed by a vote of 411 in favor and 103 opposed, well over the two-thirds required for parliamentary passage of amendments. *Turkish Parliament Approves Constitutional Amendments to Lift Ban on Headscarf*, *supra* note 57. The 1982 Constitution had been amended without challenge under these same procedural rules eight times prior to 2007, with amendments enacted in

of constitutional amendments to procedural grounds.⁶⁰ Yet, the TCC accepted the complaint in the headscarf case unanimously and ultimately reversed the properly ratified amendments on the substantive grounds that they violated constitutional provisions on secularism.⁶¹ On the question before it concerning headscarves, the TCC first held that the process for the adoption of the amendments had failed to include democratic conciliation between supporters of the amendment and its detractors.⁶² Second, the TCC held that the private observance of religious dress codes on university campuses might result in social pressure on third parties.⁶³ While many critics of the opinion have debated the validity of the reasoning with respect to the specific issue of the headscarf,⁶⁴ the long-term significance of the decision lay elsewhere. In its reasoning, the TCC

1987, 1993, 1995, twice in 1999, 2001, 2002, and 2004. See ERGUN ÖZBUDUN & SERAP YAZICI, DEMOCRATIZATION REFORMS IN TURKEY (1993–2004) (2004) (examining amendments to the 1982 Constitution, including recent reforms intended to fulfill the Copenhagen political criteria for EU membership).

60. The 1982 Constitution provides that the TCC may review regular laws enacted by the Parliament on both substantive and procedural grounds, but may only hear procedural challenges to constitutional amendments. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 148 (Turk.).

61. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>. The decision cited Articles 2, 4, and 148 of the 1982 Constitution as the basis for the ruling. *Id.* Article 2 sets forth the characteristics of the Republic, including secularism. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 2 (Turk.). Article 4 asserts that the first three articles of the constitution, including Article 2, may not be amended. *Id.* art. 4. Article 148 concerns the duties of the TCC and specifically limits the court's powers of judicial review in the case of constitutional amendments to procedural questions. *Id.* art. 148. The TCC's reinterpretation of Article 148 greatly expands its own powers and jurisdiction and institutionalizes its role as ultimate guarantor of the founding Kemalist principles of the state. See Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>.

62. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>. The ruling was issued on June 5, 2008, but the reasoned decision was not announced until Oct. 21, 2008. The decision was then published in the Official Gazette on Oct. 22, 2008. An official translation of the decision does not exist. Also, because the Turkish judicial system does not have a doctrine of *stare decisis* comparable to the American constitutional system of jurisprudence, less significance is attached to the precise wording of opinions. For a discussion of the absence of *stare decisis* from civil law countries generally, and the implications for the creation of a constitutional court in Turkey in particular, see Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1214–15 (1966). The core question is the reasoning behind the ruling, not the phrasing of that reasoning. As a result, in the following discussion I will summarize the TCC's argument rather than translate specific passages.

63. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>. This argument was particularly weak in light of the fact that the amendment specifically contemplated that restrictions on dress codes could be introduced through parliamentary legislation. Thus, if the TCC's prospective concern about potential social pressure were realized, contrary to the court's claim that the government's hands would be tied, new restrictions could in fact be introduced by law.

64. See, e.g., Uzun, *supra* note 47, at 418–24.

not only expanded its own authority to review constitutional amendments on substantive grounds, but also placed new limits on the government's ability to amend the constitution.⁶⁵

The TCC's reasoning in the headscarf case draws a distinction between the "primary" (or "founding" — *asli* in the Turkish opinion) and "secondary" (or "subsequent" — *tali* in the Turkish opinion) powers of the legislature in the constitutional arena. The TCC argues that the primary power to draft a constitution resides exclusively in the founding legislature, which is either the original constituent assembly or the first elected body to assume legislative functions following an extra-legal "interruption in the country's political regime." At all other times, Parliament cannot draft a new constitution based on its ordinary legislative powers.

Under this definition, the Turkish Republic would only be able to adopt a new constitution in the event of an extra-legal interruption, which in Turkish political experience has historically taken the form of a military coup. Yet, Turkey's own constitutional history is in tension with the TCC's claim — the Turkish constitution of 1924 was drafted not by the original constituent assembly, but by the Parliament elected in 1923 using its ordinary legislative powers.⁶⁶ By contrast, the constitution currently in effect in Turkey *was* promulgated by the military following a coup and contains draconian human rights restrictions that have been a persistent stumbling block to Turkey's EU candidacy. The need for a civilian constitution to replace the 1982 Constitution had been one of the few points of political consensus prior to the headscarf decision.⁶⁷ The TCC's reasoning, which prohibits the drafting of a new constitution outright and would subject all future constitutional amendments to judicial review — a review designed to ensure conformity to Kemalist ideology — brought to a standstill a much-needed civilian constitutional initiative.⁶⁸

The court's decision represented an attempt to close democratic channels for constitutional reform in Turkey. The comparison to *Marbury*

65. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmi Gazete, Oct. 22, 2008, No. 27032) (Turk.), available at <http://tinyurl.com/5tbwfs7>.

66. See Ergun Özbudun, *New Constitution is Now a Must*, TODAY'S ZAMAN (Oct. 26, 2008), <http://tinyurl.com/3tuvocu> (providing an incisive and critical analysis of the TCC's reasoning).

67. See Bülent Keneş, *Why Is a More Civilian Constitution Needed in Turkey?*, TODAY'S ZAMAN (Aug. 1, 2007), <http://tinyurl.com/7db7xmk> (detailing prior attempts to introduce a new constitution and arguing that after the 2007 election there was widespread support to try again for a civilian constitution to replace the 1982 Constitution written under military rule). A 2007 special report on Turkey from Freedom House Europe underscored the widespread support for constitutional reform that would consolidate civilian control over the military. Sarah Repucci, *Civilian Control over Military Overdue in Turkey*, FREEDOM HOUSE (Oct. 2, 2007), <http://tinyurl.com/7hhs272>.

68. Again, it is worth noting that eight prior constitutional amendment packages had been adopted without the assertion of such review powers by the court between 1987 and 2004. Indeed, these earlier reforms had collectively amended as much as one-third of the 1982 Constitution. See Ergun Özbudun, *Democratization Reforms in Turkey, 1993–2004*, 8 TURKISH STUD. 179, 195 (2007).

v. Madison is apt insofar as the TCC used this occasion to unilaterally establish an expansive power of constitutional review, but the comparison ends there. In *Marbury*, Chief Justice John Marshall argued that the function of the courts is to decide the rights of individuals.⁶⁹ Accordingly, it was the protection of individual rights that warranted the invalidation of the acts of coordinate branches should they abridge those rights. By contrast, individuals did not have standing to bring claims before the TCC in 2008.⁷⁰ Further, the decision of the TCC to annul properly enacted constitutional amendments was explicitly framed in terms of the protection of one interpretation of the constitutional value of secularism (a Kemalist and statist definition) from reinterpretation through the vicissitudes of electoral preferences. Under this doctrine of constitutional review, the court will only nullify the actions of the majoritarian branches when they are deemed to impermissibly interfere with the state's preferred definition of its founding ideological precepts.

An additional distinction between the U.S. Supreme Court in *Marbury* and the TCC in its constitutional amendments decision is located in the institutional structure of the two courts. Judicial independence in the American context is assured by insulating the Supreme Court from majoritarian pressures by awarding life tenure and salary protections to the Justices. The involvement of the elected branches in the initial appointments process is not understood to undermine this independence. By contrast, at the time of its 2008 decision, the judges of the TCC had term limits and there was no parliamentary role in the appointments process, yet the military did have a role both in constructing the pool of candidates for the court and in making appointments. This arrangement insulated the TCC not from majoritarianism, but from accountability to the elected branches of government. In other words, a clear separation of powers between the elected and unelected branches of government was maintained in the absence of checks and balances to afford democratic

69. "The very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws whenever he receives an injury" and "the province of the courts is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 170 (1803).

70. The most liberal constitution adopted in Turkey, the 1961 Constitution, had relatively generous standing rules, allowing a wide array of political forces to petition the court. But even under these liberal standing rules, individuals were not entitled to petition the court directly. The 1982 Constitution replaced the bicameral legislature with a unicameral parliament and further narrowed the standing rules, affording only four channels of referral to the TCC for constitutional review. Prior to the 2010 amendments, the power of referral under the 1982 Constitution was afforded exclusively to the President, the main party in government, the largest opposition party seated in Parliament, or a petition by one-fifth (or 110) of the members of Parliament. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 150 (Turk.). The constitutional amendments of 2010 introduced, for the first time, individual standing to request constitutional review by the TCC. For an official translation of the 2010 constitutional changes proposed by the government and approved by referendum (which also reflects the minor changes mandated by the TCC ruling), see <http://tinyurl.com/65372jl>.

legitimacy to the TCC (or to any of the other branches of the unelected civilian and military bureaucracy). Thus, despite the superficial resemblance between the two cases, the comparison fails when the doctrine of judicial review and the conception of judicial independence underlying the decisions are taken into account.

A comparison that better captures the enormous impact of the two TCC decisions of 2008 would be to describe the decisions as having the combined effect of *Marbury*, *Scott v. Sanford*⁷¹ (*Dred Scott*), and *Bush v. Gore*.⁷² The aspect of the TCC's position that led to comparisons with *Marbury* was the principal element seized on by most commentators. Yet, the resemblance to *Dred Scott* is unmistakable when that case is understood as an effort by the Court to entrench one interpretation of the Constitution — an interpretation favoring a particular elite that benefited from the status quo⁷³ — while foreclosing the ability of Congress to engage in reinterpretation through ordinary political channels.⁷⁴ Similarly, the TCC's decision to entertain the closure of the ruling party after it had won a national election by a significant margin recalls arguments in the United States concerning the alleged partisanship of the Supreme Court's effective certification of the outcome of the 2000 presidential election after halting a contested recount of ballots.⁷⁵ But only if *Marbury*, *Dred Scott*, and

71. 60 U.S. (19 Howard) 393 (1857). *Scott v. Sanford* (*Dred Scott*) was the first case after *Marbury* in which the U.S. Supreme Court held an act of Congress to be unconstitutional. The decision was a deeply controversial attempt by the Chief Justice of the Court, Roger Taney, to resolve the status of slavery under the Constitution. Instead, the attempt to remove this question from the ordinary political process and resolve it by judicial decision was widely seen as having been a contributing factor to the Civil War. See EARL M. MALTZ, *DRED SCOTT AND THE POLITICS OF SLAVERY* 2–3, 140–54 (2007).

72. 531 U.S. 98 (2000). In this case, the Supreme Court resolved a ballot-counting controversy in the 2000 presidential election in favor of the Republican candidate, George W. Bush. Some critics viewed the decision as an expression of partisanship by the Court. See, e.g., BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Peter Berkowitz & Benjamin Wittes, *The Professors and Bush v. Gore*, WILSON Q., Autumn 2011, at 76, 76–89 (2001).

73. “In so holding, the Court simultaneously appeared to manifest a proslavery bias, and crippled congressional moderates in their efforts to preserve any semblance of détente between pro- and anti-slavery forces, thereby driving the nation inexorably into war.” Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 179 (2003).

74. Of course, the Court did not go further than to hold that because the Constitution acknowledged and protected the right to own slaves as property, Congress lacked the power to legislate a prohibition on slavery in the territories. In order to be completely analogous to the TCC's position, the Court would also have had to hold that Congress could not amend the Constitution to alter its provisions on slavery.

75. Again, treating these cases as analogous understates the reach of the TCC's authority, since the Supreme Court's decision did not have the potential to overturn an uncontested electoral outcome, nor to bar one of the principal political parties (and its leadership, including the sitting prime minister and president) from participation in future electoral contests. On the other hand, since the TCC asserted the right to review the constitutionality of the sitting government's political party, but then narrowly avoided actually closing the party, perhaps the outcome in *Bush v. Gore* is more extreme. Though the TCC threatened to overturn the results of a democratic election, the

Bush v. Gore had been decided at once would the collective impact on perceptions of the Court and polarization of the electorate have been truly comparable. While there are frequent debates in other contexts concerning counter-majoritarian difficulty presented by judicial review, few cases exemplify the antidemocratic potential of constitutional review as clearly as the doctrine announced by the TCC.⁷⁶

Yet, the concerns raised by the TCC's doctrine do not stem from conventional democratic objections to judicial review, because such objections begin from the premise that the review is designed to enforce a substantive set of individual rights, something the TCC does not claim. The TCC's approach to constitutional review is neither concerned with the protection of individual rights nor the promotion of democratic values; rather, it is an expression of the view that electoral majorities may endanger state prerogatives or threaten founding ideological commitments. The best argument for judicial review — that it enables citizens to challenge their government's majoritarian encroachment on individual or minority rights — was not applicable in the Turkish case, where individuals had no direct access to the TCC. The actions of the TCC, insulated from democratic accountability, amount to an assertion of top-down authority that is more desirable than, but bears a resemblance to, earlier military forays into Turkish politics.⁷⁷ To the elites accustomed to

Supreme Court actually exercised its power to influence the result and foreclose further examination of the underlying preferences of the electorate as expressed through the ballot box. *See supra* note 72.

76. For instance, there has been a long-running debate between the constitutional and political theorists Jeremy Waldron and Ronald Dworkin concerning the democratic legitimacy (or lack thereof) of judicial review. But of course, this debate concerns judicial review of *legislation*, not constitutional amendment. For an example of Dworkin's defense of judicial review, see RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2002) (see especially Chapter 4, "Political Equality"). For an example of Waldron's critique of judicial review as antidemocratic, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006). In the Turkish case, the objection is less a critique of judicial review than of an interpretation of judicial independence that insulates the judiciary from any form of democratic accountability. Such insulation is particularly problematic because the TCC is not a constitutional court that defends a substantive set of individual rights; rather, it understands the function of constitutional review as a mechanism to defend a preferred interpretation of the 1982 Constitution. Given that the 1982 Constitution was promulgated under military rule and contained severe restrictions on individual rights and liberties, review that enforces constitutional orthodoxy against liberalizing constitutional reform raises legitimacy concerns that both Dworkin and Waldron would embrace. Indeed, Dworkin's defense of judicial review is predicated on a democratic and rights-based paradigm of constitutionalism. The role of the courts in his account is protecting fundamental individual rights against assault by the state. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). The 1982 Constitution — which reserved significant domains of power for the military, advocated a statist version of republicanism, and contained individual rights restrictions justified in terms of "public reasons" associated with the safeguarding of the state — bears little resemblance to a constitutional order in which judicial review would be democracy-enhancing in Dworkin's account. As a result, this Article does not advance a critique of judicial review as such, since the defenders of such review limit their defense to rights-based paradigms of constitutionalism.

77. Indeed, the Turkish judiciary and military have traditionally been drawn from the same social

governing Turkey, the headscarf — along with other symbols of religious or ethnic identity — represent an intolerable threat of backsliding on the redemptive mission to secularize and modernize the nation.⁷⁸ The latter-

classes and view themselves at once as the guardians and the beneficiaries of the nation's powerful founding ideology, Kemalism. On the Turkish officer corps as an elite body that views itself as a guardian of Kemalist orthodoxy, see Malcolm Cooper, *The Legacy of Atatürk: Turkish Political Structures and Policy-Making*, INT'L AFF., Jan. 2002, at 115, 119 (2002) (noting that the Turkish officer corps "perceives itself as the guardian of the republic and its Kemalist legacy" and is comprised of a "small and closed elite," in contrast to the more popular aspect of the military institution represented by the large force created through conscription). Cooper argues, "The Turkish army's identity and objectives remain specifically defined by the original Atatürk agenda. The same is also true to a certain extent of large parts of the judiciary and the government bureaucracy at large." *Id.* at 118; see also WILLIAM HALE, *TURKISH POLITICS AND THE MILITARY* (1994) (discussing the role of the military in modern politics); GARETH JENKINS, *CONTEXT AND CIRCUMSTANCE: THE TURKISH MILITARY AND POLITICS* (2001) (exploring the military's continuing influence). Another scholar specifically defines the "guardians" of Kemalism as "the military and the judiciary." Güneş Murat Tezcür, *Constitutionalism, Judiciary, and Democracy in Islamic Societies*, 39 *POLITY* 479, 483 (2007). On the composition of the Turkish judiciary, one scholar has noted that the TCC is "a remarkably homogenous court where not only most members are jurists but they also have had very similar educational backgrounds and life experiences." Hootan Shambayati, *The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective*, in *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST*, *supra* note 27, at 99, 106. Along similar lines, the European Union has held that the Turkish high judiciary (appellate courts) are not adequately representative, calling into question their impartiality. In this regard, the European Commission's 2010 report on Turkey congratulated the country on enacting judicial reform through the September 2010 constitutional amendment package that would make the judicial appointments and promotion system more representative. *Turkey 2010 Progress Report*, at 75, SEC (2010) 1327 final (Nov. 9, 2010) (noting that "[t]here has been progress on the judiciary" by virtue of increases in representation in the high courts and the High Council of Judges and Prosecutors, the body responsible for judicial appointments and promotions). For a scholar who notes the alignment in composition between the military and the judiciary, see Ahmet T. Kuru, *Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies Toward Religion*, 59 *WORLD POL.* 568, 583 (2007) (arguing that "assertive secularists' dominance in the military and the judiciary" is the principal safeguard of the Kemalist interpretation of secularism). See also Metin Heper, *Consolidating Turkish Democracy*, *J. DEMOCRACY*, Apr. 1992, at 105, 106 (defining the Turkish "state elite" as comprised of the military, an unelected corps of state bureaucrats, and the judiciary). A recent article analyzing the rise of neo-nationalism in Turkey after the Cold War notes that the Turkish military and judiciary have traditionally been united on the question of their respective roles in the "continuation of the tutelary role of the Turkish bureaucracy," whether military or civilian. Ioannis N. Grigoriadis & Irmak Özer, *Mutations of Turkish Nationalism: From Neo-Nationalism to the Ergenekon Affair*, *MIDDLE E. POL'Y*, Winter 2010, at 101, 102 (arguing that the Ergenekon prosecutions represent the first instance of fragmentation within the ranks of the Turkish military and judiciary concerning the need for a tutelary state); see also MEHMET ALI BIRAND, *SHIRTS OF STEEL: AN ANATOMY OF THE TURKISH ARMED FORCES* (1991) (discussing the historic role of the military as a core institution of the state in Turkey and its relationship to the civilian bureaucracy, including the judiciary).

78. There is an extensive literature debating the emblematic significance of the Turkish headscarf. For an introduction to the views of leading social scientists and political theorists, see generally several articles posted to the blog on secularism hosted by the Social Science Research Council, including Nilüfer Göle, *A Headscarf Affair, A Women's Affair?*, *IMMANENT FRAME* (Feb. 21, 2008), <http://tinyurl.com/6xbd4o5>; and Ayşe Kadioğlu, *The Headscarf and Citizenship in Turkey*, *IMMANENT FRAME* (Apr. 23, 2008); <http://tinyurl.com/64vqo4x>; as well as an article by Seyla Benhabib, *What is That on Your Head? Turkey's New Legislation Concerning the 'Headscarf'*, *RESET: DIALOGUES ON CIVILIZATION* (Mar. 5, 2008), <http://www.resetdoc.org/EN/Benhabib-Headscarf.php>.

day Kemalist conception of secularism as an unamendable element of the Turkish political system — to be immunized from democratic debate or alteration — has become the pretext whereby entrenched elites are prepared to resort to extra-political means to prevent democratic outcomes. Though it may seem jarring from a Western perspective, republican secularism in the Turkish context is fundamentally illiberal.

For this reason, the debate over secularism is not a conflict over secularization as such. Rather, it is a struggle between competing conceptions of secularism that differ as to the institutional form that secularism should take. Perhaps more to the point, it is a competition for access to state power and state resources between an entrenched elite — identifying itself as the guardian of secularism and engaging in a rearguard struggle to preserve its privileges — and emergent political actors that enjoy a democratic mandate and advocate an alternative conception of secularism.⁷⁹ Precisely because the struggle of Kemalist secularism against secularism-as-neutrality plays itself out against a backdrop of elites vying for state privileges, the conflict over secularism has become a synecdoche for broader obstacles to democratic consolidation. Against the threat of a modified interpretation of secularism that might empower new elites, an independent judiciary insulated from the elected branches and capable of stemming pressure for liberalization⁸⁰ may seem an attractive mechanism for entrenching traditional elite preferences against democratic reversal.⁸¹ But this is precisely the paradox of a conception of judicial independence that, under certain conditions, may serve as an obstacle to, rather than a

79. One scholar has characterized these competing interpretations of secularism as “assertive” and “passive.” Kuru, *supra* note 77, at 571. According to Kuru, “[a]ssertive secularism . . . means that the state excludes religion from the public sphere and plays an ‘assertive’ role as the agent of a social engineering project that confines religion to the private domain.” *Id.* By contrast, “[p]assive secularism” means “that the secular state play[s] a ‘passive’ role in avoiding the establishment of any religions,” while allowing “for the public visibility of religion.” *Id.* In the Turkish context, the Kemalist conception of secularism would correspond to “assertive secularism.” By contrast, the AKP advocates an interpretation of secularism that emphasizes the neutrality of the state and religious pluralism, a conception that corresponds to Kuru’s “passive secularism.” For instance, another author cites an AKP publication for the proposition that “the AKP sees ‘secularism’ as an institutional attitude and process that ensures that the state remains neutral and equidistant to all religions and worldviews.” Ioannis N. Grigoriadis, *The First “Democratic Islamic” Party? The AKP and the Reform of Political Islam in Turkey*, in *MODERATE ISLAMISTS AS REFORM ACTORS: CONDITIONS AND PROGRAMMATIC CHANGE* 22, 26 (Muriel Asseburg ed., Meredith Dale trans., 2007) (citing and translating Yalçın Akdoğan, *AK PARTI VE MUHAFAZAKÂR DEMOKRASI [AK PARTY AND CONSERVATIVE DEMOCRACY]* (2004)).

80. By “liberalization,” I refer to political liberalization, which I defined generically in note 26, *supra*. In the Turkish context, such liberalization would require relaxing ideological orthodoxy and allowing electoral competition to determine the dominant interpretation of foundational constitutional principles, such as secularism and nationalism, at any given moment.

81. The Turkish case exemplifies Hirschl’s definition of the judicialization of politics as a mechanism for the preservation of elite preferences in times of transition. HIRSCHL, *supra* note 12.

condition of, democratic consolidation.⁸² In particular, the Turkish case illustrates that “independence” of the judiciary in the course of a democratizing transition may serve as a veto-point against reforms, especially if the judicial appointments procedures have produced a relatively homogenous judiciary, committed to the status quo under the *ancien régime*.

Whether in earlier instances of military intervention or in the contemporary experience of judicial interventionism, reforms that would mildly relax Kemalist orthodoxy are routinely regarded with skepticism and met with coercion. The headscarf decision and the AKP closure case represent a fraction of the multiple contemporary crises of the Turkish system. These crises extend beyond questions of secularism to the resurgence of a low-level civil war in the country’s Kurdish provinces and revelations concerning ties between various state organs and a spate of ultranationalist violence and attempted coup plotting.⁸³ These developments cannot be understood in a historical vacuum. The challenges facing contemporary Turkey are only the most recent examples of cleavages that have existed since the founding of the Republic. The explanation for the recent resort to repression is rooted in the Turkish state formation period and the anxieties over particularism and difference that were constitutive of the nation-building project.

Conventional arguments about Turkey’s stalled democratization and attendant crises locate the causes in the specificities of the 1982

82. Democratic consolidation has been variously defined in the political science literature on democratic transitions. In one famous formulation, democratic consolidation was defined as a state of affairs:

in which none of the major political actors, parties, or organized interests, forces, or institutions consider that there is any alternative to democratic processes to gain power, and . . . no political institution or group has a claim to veto the action of democratically elected decision makers. . . . To put it simply, democracy must be seen as the “only game in town.”

Juan J. Linz, *Transitions to Democracy*, WASH. Q., Summer 1990, at 143, 158. Another approach has been taken by prominent comparative political scientist Guillermo O’Donnell, who argues that democratic consolidation should not be understood teleologically as a historical process in which some states have “arrived” at full institutionalization and others lag. Guillermo A. O’Donnell, *Illusions About Consolidation*, J. DEMOCRACY, Apr. 1996, at 34. Rather, O’Donnell argues, democratic consolidation should be measured not by reference to “a distillation of the historical trajectory and the present situation” of Western democracies, but in terms of core characteristics such as “fair and institutionalized elections,” an inclusive definition of the electorate, a legal system that enacts and backs political freedoms and fundamental rights, and the absence of “reserved domains” of power that are above the law. Guillermo A. O’Donnell, *Democracy, Law, and Comparative Politics*, STUD. COMP. INT’L DEV., Mar. 2001, at 7, 8–19. Against this standard, Turkey has not attained democratic consolidation because of restrictions on political freedoms, persistent discrimination (especially against the Kurdish and Alevi communities), and the continued presence of “reserved domains” of military authority.

83. For background on the ongoing court cases addressing these revelations, see generally H. Akin Ünver, *Turkey’s ‘Deep-State’ and the Ergenekon Conundrum*, MIDDLE E. INST. POL’Y BRIEF NO. 23 (Middle E. Inst., D.C.), Apr. 2009.

Constitution,⁸⁴ the weakness of the Turkish political party system,⁸⁵ or broader debates about the alleged tension between Islam and democracy.⁸⁶ There is, however, an alternative explanation. While it is certainly true that the political party system and the 1982 Constitution both exacerbate the current impasse, these institutional deficiencies are manifestations of dynamics underlying the recent crises rather than independent explanations of those crises. That is, the 1980 military coup and subsequent developments in the Turkish constitutional order are continuous with, rather than a departure from, the prior history of the Republic. As for explanations that depend on the claim that Muslim-majority societies face unique challenges, the Turkish case provides compelling evidence that there is no incompatibility between Islam and democracy. This is a particularly important reason that Turkey is cited as a model for democratization as the wider Middle East enters a transitional period. In contrast to these conventional explanations, the core debates and cleavages of the early republican period remain unresolved, and contradictions internal to the founding commitments of the state now impede democratic consolidation.

The twin projects of the first republican generation — nation-building and state formation — were pursued through attempts at cultural (ethnic, linguistic, and religious) homogenization and secularization from above.⁸⁷ Yet, simple forms of ordinary resistance — the persistence of traditional religious practices, and the ongoing use of separate dialects and minority languages — prevented this social engineering project from entirely eliminating difference and homogenizing the underlying society. Turkish republican history is in many ways a record of recurrent conflicts over the ethnic particularism and religious practices that were never fully subordinated to a state-imposed, unifying Turkish nationalism. These repressed identities — Kurdish and Muslim — constitute the obverse of the founding pillars of Kemalist ideology: republican nationalism and laicism.⁸⁸

84. See generally Levent Gönenç, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA L. REV. 89 (2004) (arguing that the 1982 Constitution is the principal source of illiberalism in the Turkish political system).

85. Ergun Özbudun, *Turkey: How Far from Consolidation?*, J. DEMOCRACY, July 1996, at 123, 127.

86. For classic statements on the incompatibility of Islam and democracy, see BERNARD LEWIS, *THE SHAPING OF THE MODERN MIDDLE EAST* 54–56 (1994); and Samuel P. Huntington, *Will More Countries Become Democratic?*, POL. SCI. Q., Summer 1984, at 193, 208.

87. These processes of attempted homogenization and secularization taken together constitute the Kemalist “cultural revolution.” For a more detailed discussion of these processes, see YAVUZ, *supra* note 44, at 46–54.

88. “Republican nationalism,” in the Turkish context, refers to the form of ethno-national identification with the state that was encouraged by the first generation of republican statesmen in order to unify a heterogeneous population around a single national identity category. On the construction of this identity, see Ayşe Kadooğlu, *The Paradox of Turkish Nationalism and the Construction*

At no time since the first two decades of the Republic has the incomplete status of Turkey's founding cultural revolution been more apparent than in the post-Cold War period. With the end of geopolitical bipolarity, the polarizing ideologies of left and right gave way once more to the sociopolitical conflicts that have marked the Turkish Republic from its inception. In a remarkable "back to the future" moment, Turkey in the last decade has once again become consumed by the preoccupations of its founding. To face these challenges, contemporary state elites have resorted to repressive strategies reminiscent of earlier periods, particularly by deploying the judiciary to check electoral mandates for fundamental reform.

To understand the defensiveness and repression with which religious and ethnic pluralism are met in contemporary Turkey, one must return to the Kemalist revolution's early relationship to political opposition.⁸⁹ Precisely because the founding principles and the early republican generation remain the most important source of legitimacy and referent in the discourse of latter-day Kemalists, understanding the original strategies for addressing religious and ethnic pluralism sheds important light on contemporary strategies.⁹⁰ As with several of the post-colonial states of the Middle East, the effort to forge a nation out of the diverse peoples on the territory of the nascent polity resulted in forms of authoritarianism and statism that continue to mark Turkey's political trajectory more than half a century later. Moreover, the division between the modernizing elite controlling the state and the society that it sought to transform — the preference for top-down reform rather than bottom-up democratic pedigree — deprived the state-formation project of a clear social constituency. This state-society cleavage was later transposed into a division between the civilian and military bureaucracy of the state (*devlet*) and the elected branches of the government (*hükümet*). The perceived vulnerability of the modernization agenda to potential popular reversal laid the groundwork for a persistent antidemocratic strain in Turkish political life. This antidemocratic orientation now takes the form of resistance from unelected institutions of the state — the civil bureaucracy, the military, and the judiciary — to reforms initiated through the elected branches. This is

of *Official Identity*, 32 MIDDLE E. STUD. 177 (1996). On laicism, see note 17, *supra*.

89. A revisionist historical trend has recently emerged in Turkey that critically engages with the origin stories of the Republic along the lines of the interpretive history offered in this Article. For a recent example, see SEVAN NIŞANYAN, YANLIŞ CUMHURİYET: ATATÜRK VE KEMALİZM ÜZERİNE 51 SORU [THE MISTAKEN REPUBLIC: 51 QUESTIONS ABOUT ATATURK AND KEMALISM] (2008).

90. On the frequency with which contemporary Kemalists invoke the first decades of the Republic, the founding statesmen, and the ideology of that period as the benchmark for legitimacy in subsequent periods, see ESRA ÖZYÜREK, NOSTALGIA FOR THE MODERN: STATE SECULARISM AND EVERYDAY POLITICS IN TURKEY (2006).

most recently evident in the judiciary's resistance to constitutional reform through Parliament.

The next Part of this Article will provide an overview of the first decade of the Turkish Republic's efforts to produce a secular national identity that would unify the diverse populations inherited from the empire. Minorities that posed a challenge to the state's preferred notion of national identity were seen as a threat. Similarly, those minority groups that resisted the anticlerical secularization strategy of subordinating church to state were deemed a lasting internal threat to the Republic's national project. To meet these perceived threats, the state engaged in two discrete strategies. First, core state institutions were mobilized to resist democratic pressures, either through the direct repressive machinery of the security apparatus or indirectly through legal obstacles. Second, where direct, public forms of repression were difficult to mobilize, the state created parastatal militias and guerilla groups to eliminate potential sources of future resistance. The persistent legacy of these repressive strategies is apparent in the crises of the contemporary Turkish constitutional order, to which I will return in Part III.

II. THE CENTRALITY OF CONSTITUTIONAL CULTURE

The constitutional culture of Turkey grew not from a constitutive text, but from the constitutive period of its founding.⁹¹ The Turkish state was formed out of the crucible of Ottoman collapse and a dramatic cultural revolution from above, and conceived and executed by the military vanguard that emerged victorious from the Turkish war of independence.⁹² What follows, first, is a summary of the remarkable transformation accomplished by the nation-building project of Turkey's founders. Conducted through a series of wide-ranging state-driven reforms, this project was designed to remake not only the political institutions inherited from the empire, but also the underlying society with a view to producing a new Turkish citizen to suit the new Turkish state. Second, this Part chronicles the escalating forms of repression required to impose state-driven reforms and the implications of that repression. From the relative ideological diversity of the early years of the republican national assembly

91. I consider the recent crises in Turkey as "constitutional" precisely in this sense. Rather than a focus on pure legality and formal constitutional text, I examine the constitutive processes that produce the Turkish politico-legal order. Thus, for our purposes, the Turkish constitution or constitutionalism encompasses the historical trajectory sketched in this Part.

92. This characterization is common to all histories of modern Turkey. For some of the most prominent histories and historians, see M. ŞÜKRÜ HANIOĞLU, *A BRIEF HISTORY OF THE LATE OTTOMAN EMPIRE 150–202* (2008); ZÜRCHER, *supra* note 41, at 133–64; and Reşat Kasaba, *Dreams of Empire, Dreams of Nations*, in *EMPIRE TO NATION: HISTORICAL PERSPECTIVES ON THE MAKING OF THE MODERN WORLD* 198 (Joseph W. Esherick et al. eds., 2006).

to the consolidation of single-party rule, the increasing intolerance of political opposition among the earliest Kemalist reformers had a lasting impact on their project. Similarly, the repression of ethnic and religious identities as part of the state's mission to forge an all-encompassing, unitary national identity had enduring implications for state-society relations in Turkey.⁹³

In appealing to the Turkish model for transitions taking place in the Middle East, it is important to understand how dynamics set in motion at the beginning of a transition produce lasting effects. In particular, understanding the role of the state bureaucracy, as opposed to the elected branches of government, in preserving ideological orthodoxy provides the necessary background for assessing the latter-day role of the Turkish judiciary and how it might be transformed.⁹⁴

A. *Kemalism's Founding: Setting the Stage for Cultural Revolution*

The late nineteenth century introduced the concept of *kulturkampf*, or cultural struggle, as a technology of nation-building. Specifically, *kulturkampf* was a form of social engineering designed to impose from above a unitary national identity as a predicate for the consolidation of the

93. The discussion in Part II draws on conventional histories of the republican period to offer an unconventional interpretation that highlights the tensions in that period and their relationship to lasting cleavages in Turkey's constitutional culture. While this historical overview does not provide a strictly causal explanation, it suggests that choices made at critical junctures in the state formation period may have path dependent legacies. In adopting this approach, I identify with the methodology of historical institutionalism exemplified by such works as STEPHEN HEYDEMANN, *AUTHORITARIANISM IN SYRIA: INSTITUTIONS AND SOCIAL CONFLICT, 1946–1970* (1999); USSAMA MAKDISI, *THE CULTURE OF SECTARIANISM: COMMUNITY, HISTORY, AND VIOLENCE IN NINETEENTH-CENTURY OTTOMAN LEBANON* (2000); CHARLES TILLY, *BIG STRUCTURES, LARGE PROCESSES, HUGE COMPARISONS* (1984); *WAR, INSTITUTIONS, AND SOCIAL CHANGE IN THE MIDDLE EAST* (Stephen Heydemann ed., 2000); and EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914* (1976). For more on the application of this approach in the social sciences, see *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* (Sven Steinmo et al. eds., 1992). The most significant conceptual application in this project drawn from this methodological tradition is the idea that institutional legacies and patterns play an important role in the construction of political culture and the production of outcomes. In my view, the origins of the tutelary model of the state provide an important interpretive context, or set of institutional legacies, through which to understand some of the contemporary strategies of Turkish elites resistant to democratizing demands out of fealty to early republican commitments. The lasting importance of the founding is illustrated by the fact that latter-day Kemalist elites systematically refer back to the period in their discourse about contemporary threats to the state. See ÖZYÜREK, *supra* note 90, at 151–77.

94. The risks of transition that preserves the ideological orthodoxy of the prior regime even as a new order is being formed is apparent in the context of the Arab uprisings. For instance, with respect to Egypt, analysts speak of “Mubarakism without Mubarak.” Ellis Goldberg, *Mubarakism Without Mubarak: Why Egypt's Military Will Not Embrace Democracy*, in *THE NEW ARAB REVOLT: WHAT HAPPANED, WHAT IT MEANS, AND WHAT COMES NEXT*, *supra* note 2; Ty McCormick, *Down with Mubarak, Long Live Mubarakism?*, *FOREIGN POL'Y* (Sept. 27, 2011) <http://tinyurl.com/5st68p2>.

political authority of the state.⁹⁵ In its original German context, the *kulturkampf* of the 1870s was designed to delimit the authority of the Catholic Church, subjecting it to political control. In the process, the cultural struggle also sought to promote the secularization and Germanification of the diverse populations in the territory of the German Empire, especially the Polish population of Prussia.⁹⁶ The twentieth century would witness many more such cultural revolutions, perhaps most famous among them the mid-century violence of the Maoist sociocultural engineering project of the People's Republic of China.⁹⁷ Yet, few accomplished the rapid and near total social transformation achieved in the first decade of the Kemalist project in Turkey.⁹⁸

The Turkish Republic was the product of two decades of deeply traumatizing massacres, ethnic cleansing, war, and genocide that wrenched the diverse, multiethnic, and multiconfessional populations of the Balkans, the Caucasus, and Anatolia out of the Ottoman Empire and into the brave new world of twentieth-century state formation.⁹⁹ In the final years of the Empire, its population witnessed the dramatic loss of European and Arab territories.¹⁰⁰ Perhaps even more critically, after the First World War,

95. Parla and Davison's work, *Corporatist Ideology in Kemalist Turkey*, in its entirety sets forth the precise mechanisms through which this project was accomplished. See PARLA & DAVISON, *supra* note 17. The clearest overview and evaluation that they provide of the goals and consequences of Kemalist state formation is provided toward the end of the book: "The Kemalist movement created one chief, one nation (society, people), one state, and one party to secure together the high public interest of the singularly conceptualized, unified nation. . . . The demand for unity and desire to homogenize culture in terms of an overarching, vitalist nationalist identity effectively derogated the status of all other identities. . . . The guiding administrative idea was that all important aspects and processes of life should be shaped from the top." *Id.* at 260–61.

96. For more on Bismarck's *kulturkampf*, see RONALD J. ROSS, *THE FAILURE OF BISMARCK'S KULTURKAMPF: CATHOLICISM AND STATE POWER IN IMPERIAL GERMANY, 1871–1887* (1998).

97. For the definitive study of the historical context of Mao Zedong's Cultural Revolution in China, see 1–3 RODERICK MACFARQUHAR, *THE ORIGINS OF THE CULTURAL REVOLUTION* (1974, 1983, 1999).

98. Of course, these reforms had important antecedents in the late Ottoman period. For an account of Ottoman attempts at educational and religious reforms in the guise of "modernization," see SELIM DERINGIL, *THE WELL-PROTECTED DOMAINS: IDEOLOGY AND THE LEGITIMATION OF POWER IN THE OTTOMAN EMPIRE 1876–1909* (1998).

99. Without question, the most significant of these traumas was the Armenian genocide, which eliminated the largest Christian community in the Turkish mainland. TANER AKÇAM, *FROM EMPIRE TO REPUBLIC: TURKISH NATIONALISM & THE ARMENIAN GENOCIDE* (2004). Less well-known traumas include the ethnic cleansing of hundreds of thousands of Muslims from the Balkans, with the surviving communities resettling in Anatolia. For a history of the traumatic experience during the waning years of the empire and the related ideological battles that gave rise to the first republican generation, see HANIOĞLU, *supra* note 92.

100. A large proportion of Ottoman territory, including almost all of its European territories, was lost in the first two decades of the twentieth century — Balkan losses and pogroms that drove the Muslim populations of Ottoman Europe out of Bosnia, Macedonia, Bulgaria, Albania, and Thrace were particularly traumatic to the founding generation of the Turkish Republic, many of whom were personally dispossessed and displaced in the process. On Ottoman losses of territory and displacement of populations in the Balkan wars of the turn of the twentieth century, see ZÜRCHER, *supra* note 41, at 103–10.

victorious Western powers imposed a treaty of surrender on the rump imperial authority, which partitioned Anatolian Turkey into zones of European control. The Treaty of Sèvres¹⁰¹ divided control over Anatolia into French, Italian, and Greek zones of influence and at the same time promised to allot further territory to the creation of independent Kurdish and Armenian republics. To this day, the Treaty of Sèvres remains a potent symbol in Turkish politics of Western ambitions to dismember Turkish lands and extinguish Turkish nationhood.¹⁰² Even as the treaty was being negotiated, the Turkish National Movement, under the military leadership of Mustafa Kemal, split with the Ottoman monarchy and established a separate republican government based in Ankara. This movement then launched a war of independence, successfully freeing Anatolian lands from European control. The military reversals of the war of independence eventually forced the Allies back to the negotiating table to sign a new treaty recognizing the liberated portions of Anatolia and Thrace as the territory of the newly formed Turkish Republic in the Treaty of Lausanne.¹⁰³

The role of the national military leadership in liberating the Turkish mainland from European occupation established the military's status as the founding institution of the Republic. The officers who led the war of independence emerged from the conflict as the first generation of republican statesmen. The complete destruction of the social and political institutions of the Ottoman Empire in the course of two decades of war provided the military with considerable autonomy to treat the territory as a *tabula rasa* on which to impose their vision of the prerequisites of modern statehood. But that vision was marked by earlier Turkish efforts to modernize and Westernize that predate the founding of the Republic by at

101. The Treaty of Peace Between the Allied and Associated Powers and Turkey, Aug. 10, 1920 (negotiated but not signed) [hereinafter Treaty of Sèvres], reprinted in *Treaty of Peace Between the Allied Powers and Turkey* 15 AM. J. INT'L L. 179 (Supp. 1921). The Treaty of Sèvres was concluded between the representatives of the defeated Ottoman Empire and the victorious European Allies of WWI on August 10, 1920. It was subsequently annulled as a result of the Turkish War of Independence and later superseded by the Treaty of Lausanne of 1923. For an authoritative history of the Treaty of Sèvres and its aftermath, see STANFORD J. SHAW & EZEL KURAL SHAW, 2 HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: REFORM, REVOLUTION, AND REPUBLIC: THE RISE OF MODERN TURKEY, 1808–1975, at 340–72 (1977).

102. Feroz Ahmed, *The Historical Background of Turkey's Foreign Policy*, in THE FUTURE OF TURKISH FOREIGN POLICY 9, 9 (Lenore G. Martin & Dimitris Keridis eds., 2004).

103. Treaty of Lusanne, July 24, 1923, reprinted in *Treaty with Turkey and Other Instruments Signed at Lusanne July 24, 1923*, 18 AM. J. INT'L L. 1 (Supp. 1924). With the exception of a further adjustment of Turkey's borders to account for the annexation of Iskenderun (Alexandretta) to its territory, the boundaries recognized at Lausanne correspond to Turkey's contemporary borders. Renée Hirschon, *Consequences of the Lausanne Convention: An Overview*, in CROSSING THE AEGEAN: AN APPRAISAL OF THE 1923 COMPULSORY POPULATION EXCHANGE BETWEEN GREECE AND TURKEY 13 (Renée Hirschon ed., 2003).

least a century.¹⁰⁴ The break that the republican military vanguard did initiate was in equating modernization with a brand of wholesale Westernization that far exceeded earlier Ottoman models. The top-down modernization-as-Westernization project was identified with the political theories of Turkey's founding statesman, Mustafa Kemal, also known as Atatürk. "Kemalism," as this ideological orientation came to be known, was the chief legitimizing framework of the republican elite and remains the ideological foundation of the contemporary republic.¹⁰⁵

For the Kemalist vanguard, the Ottoman collapse provided a series of formative lessons. In particular, it emphasized the importance of containing the pressures of internal ethnonationalism and external, great-power interventions by Western nations that might opportunistically exploit minority separatism. The wrenching experience of micronationalist partition was a key motivating source behind the Kemalist emphasis on a unitary national identity to cohere the territory's diverse populations. Likewise, the belief that Ottoman technological and bureaucratic weakness, as compared to European advances, had been a result of the retrograde sociocultural influence of the clerical establishment led to a

104. In the mid-nineteenth century, the Ottoman Empire undertook extensive reform efforts, which focused primarily on rationalizing the state bureaucracy and restructuring the economy. This period is generally referred to as the *Tanzimat* (or "reorganization") era of the Ottoman Empire, in which the modernization of the state was understood as a means of reversing the decline of the empire. For a history of the *tanzimat* reforms, see SHAW & SHAW, *supra* note 101, at 55–172. The Ottoman officer corps of the late nineteenth century were heavily influenced by French political ideas, and many members of the military elite had actually received some training in French academies. On the importance of the military elites' determination to "strengthen and modernize" at the end of the Ottoman Empire, and the role played by reforms to military education in secularizing and centralizing the state, see Nikki R. Keddie, *Secularism and the State: Towards Clarity and Global Comparison*, *NEW LEFT REV.*, Nov.–Dec. 1997, at 21, 29–32. On the broader influence of French conceptions of republicanism, secularism, and reformism, see DOROTHÉE SCHMID, *INSTITUT FRANCAIS DES RELATIONS INTERNATIONALES, FRANCO-TURKISH VISIONS OF A REPUBLIC: AN INTERVIEW WITH BASKIN ORAN* (Nicolas Sowels trans., 2011), *available at* <http://tinyurl.com/4269fvs>. On the specific influence of the French revolution, see ŞERİF MARDİN, *RELIGION, SOCIETY AND MODERNITY IN TURKEY 192–204* (2006); and ZÜRCHER, *supra* note 41, at 25–26. Unsurprisingly, then, Kemalism was a state-building nationalism fashioned after the French civic-republican model. The first goal of the project was to build a coherent nation out of the multiethnic population inherited by the rump territory of the dismembered empire. İBRAHİM KAYA, *SOCIAL THEORY AND LATER MODERNITIES: THE TURKISH EXPERIENCE* 79 (2004) ("A first priority of Kemalism was that of anti-imperialism which required the Anatolian masses to constitute the 'Turkish nation.'").

105. For instance, the preamble of the current Turkish constitution, the 1982 Constitution — enacted over a half-century after the founding of the Republic — defines the objective of the Republic as remaining "[i]n line with the concept of nationalism and the reforms and principles introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and unrivalled hero" and expressing the determination "to attain the standards of contemporary civilization." TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, pmbl. (Turk.).

form of militant laicism reminiscent of the early-nineteenth-century French Jacobins.¹⁰⁶

Despite these views, however, the first priority during the war of independence was the liberation of Anatolian territory.¹⁰⁷ To motivate the disparate peoples of Anatolia to fight together for independence, the proto-republican definition of the state during the war had to be broad enough to embrace the multicultural and multiconfessional demographic of the underlying population. It was in this context that Mustafa Kemal and other nationalist leaders successfully enlisted Kurds,¹⁰⁸ Alevis,¹⁰⁹ and others in the national struggle, acknowledging their legitimate identitarian claims, including the ethnic and cultural rights of the Kurdish community.¹¹⁰ Yet, once the urgency of the nationalist struggle for independence ended, a nation-building model premised on a homogenous civic republican identity — one that naturalized the majority ethnicity — was adopted at the expense of minority cultures.¹¹¹

The Kemalist post-independence project, at base, had a single overarching objective: to achieve rapid, secular modernization while consolidating the diverse peoples in its territory into a single coherent nation.¹¹² State formation and nation-building were intertwined for the

106. On the influence of French revolutionary political theory and Jacobinism on Ottoman reformers in the nineteenth century, see ZÜRCHER, *supra* note 41, at 24–27. Following the French Revolution, Jacobinism came to be associated with political programs centered on patriotism, republicanism, and centralized institutionalization of national identity through civic education, conscription, and national service. On the influence of Jacobinism in France and beyond, see TONY JUDT, *MARXISM AND THE FRENCH LEFT: STUDIES ON LABOUR AND POLITICS IN FRANCE, 1830–1981*, at 4–8 (2011). Beyond the French context, Partha Chatterjee, a leading scholar of secularization outside of the West, in a study on the politics of secularization in India, notes that “the Jacobin tradition of *laïcisme*” involves “putting external and forcible constraints on the public political presence of religion.” Partha Chatterjee, *Fasting for Bin Laden: The Politics of Secularization in Contemporary India*, in *POWERS OF THE SECULAR MODERN: TALAL ASAD AND HIS INTERLOCUTORS* 57, 60 (David Scott & Charles Hirschkind eds., 2006). Chatterjee notes that Kemalist Turkey followed precisely such a mode. *Id.*

107. For a standard history of this struggle, see ZÜRCHER, *supra* note 41, at 133–65.

108. For a comprehensive overview of the Kurdish community from the Ottoman period to the end of the twentieth century, see ABDUL RAHMAN GHASSEMLOU, *A PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN* (Gérard Chaliand ed., 1993).

109. For a brief overview of Alevi communities in Turkey and the contemporary resurgence in Alevi identity, see Martin van Bruinessen, *Kurds, Turks and Alevi Revival in Turkey*, 200 *MIDDLE E. REP.*, Summer 1996, at 7.

110. On the recruitment and then repression of minorities by the Kemalists during and after the war of independence, see SONER ÇAĞAPTAY, *ISLAM, SECULARISM, AND NATIONALISM IN MODERN TURKEY: WHO IS A TURK?* 7–39 (2006). For more general background on the treatment of the Kurdish community, see KEMAL KIRIŞCI & GARETH M. WINROW, *THE KURDISH QUESTION AND TURKEY: AN EXAMPLE OF A TRANS-STATE ETHNIC CONFLICT* (1997).

111. See ÇAĞAPTAY, *supra* note 110, at 11–39.

112. Recent scholarship on Kemalist ideology has noted that conventional characterizations of Kemalism that repeat the self-representation of the early republican reformists by using terms like “modern,” “secular,” and “Westernizing” are oversimplifications. Comprehensive and systematic interpretive analysis of Kemalism *qua* ideology yields a more nuanced picture. For this more complicated account of the development and content of Kemalist ideology, see PARLA & DAVISON,

Kemalist reformers because both state and society required radical modernization and consolidation in their eyes. To accomplish these reforms not only in the public sphere and political life of the Republic, but also in the private sphere of its social fabric, the Kemalist project of secularization and national assimilation required a cultural revolution.¹¹³ Interestingly, the belief that Westernization was the appropriate standard for modernization produced no apparent contradiction from the Kemalist perspective, despite the anticolonial fervor of the war of independence.¹¹⁴

B. State Formation and Cycles of Repression

One critical analyst has noted that the triumph of Kemalism represented a rare example in history of a revolution with no social base.¹¹⁵ Lacking a social base, the Kemalist revolution was accomplished through a top-down penetration of society by a set of powerful state institutions, an effort that employed force when necessary to command compliance with the demands of its cultural project. Part of what made such transformation from above plausible was a remarkably high degree of popular fragmentation and demobilization. Recent arrivals in Anatolia, much of the

supra note 17, at 1–15. This more nuanced account concedes the significance of Kemalism’s self-perception as modern, secular, and Westernizing while simultaneously tracking inconsistencies in these concepts and the deployment of particular nationalist and populist strategies to anchor the state’s corporatist politics. The analysis also underscores the illiberalism at the heart of the construction of this “hegemonic ideology,” including the mechanisms for preserving that hegemony over time. The authors note that:

[T]he hegemony of Kemalism is preserved in a variety of legal, constitutional, practical-political, and sociocultural ways, covering nearly the entire gamut of social and political life. Among the most notable cultural forms are the ways in which the personality of Mustafa Kemal Atatürk occupies a preeminent presence in all sites of human social relations in Turkey.

Id. at 37.

113. For a detailed discussion of the efforts to Westernize both public and private spheres of Turkish society, see FERAZ AHMAD, *THE MAKING OF MODERN TURKEY* (1993).

114. Because Turkey was never actually colonized by European powers, Westernization is not associated with collaboration with foreign intervention in the Turkish context the way it might be elsewhere in the Middle East. As a result, there may have been less resistance to these reforms in Turkey than might have been occasioned by comparable efforts elsewhere in the region. The clear resistance engendered by the Iranian Shah’s attempts to undertake reforms of a Kemalist variety is suggestive of this contrast. On resistance to the “white revolution” reforms undertaken by Shah Mohammad Reza Pahlavi in the 1960s, see SANDRA MACKAY, *THE IRANIANS: PERSIA, ISLAM AND THE SOUL OF A NATION* 211–68 (1996).

115. PERRY ANDERSON, *THE NEW OLD WORLD* 414–17 (2009). The absence of a “social base” here refers to the fact that the reforms of the Kemalist revolution did not emerge from popular demands, but rather from the ideological views of an elite vanguard. This Kemalist elite then set about producing a society that corresponded to their vision of a “modern” Turkish state. One social history of this period describes this dilemma as follows: “In 1927, the population of Turkey was recorded at around thirteen million. Only 18% of this population was living in cities. The Kemalists aimed to alter this predominantly agrarian country into a modern one in a very short period. How to make this ‘immature’ society side with the revolutionary project was the crucial question of the time.” KAYA, *supra* note 104, at 83.

territory's population had been victims of the ethnic cleansing of Muslims in the Balkans and the Caucasus, experiences that left them exhausted and traumatized.¹¹⁶ Most of the Turkish-speaking peoples of the territory accepted the new national ideology, centered on Turkic ethnicity, as did the non-Turkic Muslim minorities who had fled the more far-flung reaches of the empire to the Anatolian mainland to escape anti-Muslim pogroms. At the end of two decades of wrenching war, many people were eager to assimilate into the nascent culture of the young republic, offering little resistance to the coercive state ideology that would determine its content. There remained, however, stubborn pockets of resistance to assimilation and secularization, principally among the large Kurdish-speaking Anatolian minority and heterodox, observant religious communities, like the Alevi.¹¹⁷ These pockets of resistance would prove to be a persistent irritant to the Kemalist vanguard, eventually subjected to brutal repression though never fully pacified.

The litany of reforms that gave content to the founding cultural revolution is chronicled in every modern history of Turkey.¹¹⁸ The reforms began with the abolition of the Sultanate by the Ankara National Assembly, led by Mustafa Kemal, in 1922.¹¹⁹ Tellingly, the Caliphate was not abolished together with the Sultanate; rather, the Kemalist leadership retained the Caliphate during the war of independence in order to retain the support of a religiously observant population.¹²⁰ At first blush, the abolition of the Sultanate, adopted unanimously by the National Assembly, seems to have been attained with remarkable ease. In point of fact,

116. The significance of the transplanted Muslim population as a proportion of residents of Anatolia in this period was magnified as a consequence of the prior ethnic cleansing of the Christians of Anatolia through the Armenian genocide and the population exchanges with Greece. See ZÜRCHER, *supra* note 41, at 108, 163–65 (noting that mortality, migration, the destruction of the Armenian community, and the population exchanges led to a complete transformation of Anatolia between 1913 and 1923). The elimination of large communities of Christians and the resettlement of the Muslim Balkan refugees yielded an overwhelmingly Muslim population in Anatolia. See AKÇAM, *supra* note 99, at 196–200; ÇAĞAPTAY, *supra* note 110, at 11–39.

117. On the Alevi communities of Turkey and the government's failure to recognize these communities, see Elise Massicard, *Recasting Islamic Heterodoxy in Different Public Spheres: Alevism in Turkey and Germany* (Univ. of Cal. Berkeley Religious Norms in the Pub. Sphere Working Paper Grp., 2010), available at <http://tinyurl.com/3e8wa6m>.

118. See, e.g., SHAW & SHAW, *supra* note 101; ZÜRCHER, *supra* note 41.

119. *The New York Times* archives from 1922 carry a striking article on the abolition of the Sultanate by the Angora National Assembly, warning that this would likely lead to the "Sovietization of Turkey." Edwin L. James, *Sultanate Ended By Angora Decree; Assembly Supreme*, N.Y. TIMES, Nov. 3, 1922, at 1.

120. In fact, the reliance on religiously observant Turks would continue as the state produced its privileged definition of Turkish identity. Though the emphasis was on a secular nation, the ethno-national identity around which the state sought to consolidate the loyalties of the population included a religious component. On the centrality of Sunni-Hanafi identity to the definition of "Turkishness" adopted by the state, see RELIGION AND POLITICS IN TURKEY (Ali Çarkoğlu & Barry Rubin eds., 2006).

archival records of the debates reveal that the proposal was forced through the Assembly and underscored the coercive practices that would become commonplace throughout the Republican era.¹²¹

The Kemalist elite itself was divided between an inner circle, which came to be known as the “Kemalist First Group,” and an opposition bloc, called “the Second Group.” The latter favored more progressive reforms, which would retain various aspects of Turkey’s Ottoman-Islamic heritage. In the initial vote over the abolition of the Sultanate, the Second Group was resistant due to concerns about the inseparability of the Caliphate from the Sultanate. The Turkish archives of the debates in the Assembly reflect overt threats against those who advanced this objection, suggesting that heads would roll if opponents did not give way. When a vote was convened following days of debate, it was held as a public show of hands with opponents of the measure heckled and silenced in order to record unanimous support.¹²²

The relative ideological diversity of the republican Parliament of 1919–1922 was stamped out in 1923 as single-party rule was consolidated under Kemal’s supervision.¹²³ Elections were convened in advance of parliamentary consideration of the Lausanne peace treaty and supporters of the First Group — associated with the military victory of independence — won overwhelmingly. The First Group was officially transformed, following the election, into the *Halk Fırkası* (the People’s Party, which later became the Republican People’s Party, or the CHP). Those who had been aligned with the Second Group or expressed support for the religious establishment in Turkey during the pre-1923 parliamentary period were either blocked from running or later purged from the National Assembly under Mustafa Kemal’s personal direction.¹²⁴

While the Second Group was eliminated, disaffection with the revolutionary social engineering project persisted, leading to the formation of another opposition bloc, this time from among Kemal’s earlier colleagues, which became the *Terrakîperver Cumhuriyet Fırkası* (the Progressive Republican Party, or the TCP).¹²⁵ Like the Second Group, the TCP was in favor of a less state-driven and more democratic, gradualist

121. On the coercive practices in the first decade of legislative practice in the Turkish Grand National Assembly, see Hasan Kayali, *The Struggle for Independence*, in 4 THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD 112, 141–46 (Reşat Kasaba ed., 2008).

122. For a detailed account based on archival materials of these debates and the coercive repression of opposition voices in the National Assembly, see Tolga Köker, *The Establishment of Kemalist Secularism in Turkey*, 2 J. MIDDLE E. L. & GOVERNANCE 17 (2010).

123. See PARLA & DAVISON, *supra* note 17, at 46–50.

124. See *id.*

125. See *id.* The modern Turkish word for *fırka* is “*parti*,” so the *Terrakîperver Cumhuriyet Fırkası* came to be known by the acronym TCP. The complete modern Turkish of the party’s name would be *İlerici Cumhuriyet Partisi*.

reform project with a more liberal approach to religion. The TCP also shared the Second Group's fate, though it faced far greater coercion.

The conclusion of the Lausanne peace conference and the *de jure* recognition of the independent Turkish Republic brought the war of independence to an end. Kemal lost no time in consolidating his position. While key members of the Second Group were away from Ankara, Kemal seized the opportunity to establish the Republic and ensure his appointment as President in a single open ballot vote.¹²⁶ Kemal's next priority was the dissolution of all the religious institutions associated with the Ottoman state, beginning with the Caliphate. To minimize resistance, Kemal delegated drafting responsibility for the proposed abolition of the Caliphate to two religious deputies and conducted another open ballot vote to ensure the passage of the bill.¹²⁷

With the religious establishment decapitated by this act of abolition, the next agenda item was the subordination of the remaining religious institutions to state control. Secularizing reforms adopted in 1924 fundamentally transformed the cultural life of the young Republic, marking a decisive break from its Ottoman past. A new directorate of religious affairs was created to entrench the authority of the state over religious practices. In particular, the religious establishment lost its source of finance as its direct access to religious foundations was severed and all financing was placed in the control of the directorate. Under the new regime, the state would control the budgets, salaries, training, and appointment of all Muslim religious officials.¹²⁸ A parallel law unifying education and bringing all forms of instruction under state control spelled the end of the centuries-old Ottoman *medrese* system. The new state-controlled schools for the training of imams bore such a strong Kemalist stigma that few students were willing to enroll, leading to widespread closures that left only two such institutions open in the country by the early 1930s, creating a shortage of imams for the state-run mosques.¹²⁹

One early instance of resistance to these secularizing measures took the form of the Sheikh Said rebellion of 1925. The rebellion is largely remembered as a Kurdish revolt against the imposition of Turkish nationalism, which was certainly an important motivating factor.¹³⁰ But the

126. A prominent historian of modern Turkey characterized this move as follows: "By a masterly technique of timing, surprise tactics and veiled intimidation, Kemal had assumed paramount power over the country." LORD KINROSS, *ATATÜRK: THE REBIRTH OF A NATION* 381 (1964).

127. On the choice of religious deputies to draft the bill abolishing the caliphate, see Köker, *supra* note 122.

128. On the subordination of religious institutions to state control, see Şerif Mardin, *Turkey: Islam and Westernization*, in 22 *RELIGIONS AND SOCIETIES: ASIA AND THE MIDDLE EAST* 171 (Carlo Caldarola ed., 1982).

129. Köker, *supra* note 122, at 27–28.

130. On the role of the Sheikh Said rebellion in the construction of the Kurdish identity as a

rebellion brought together Zaza-speaking¹³¹ dervish orders — that is, leaders of the form of popular Islam prevalent in the provinces — and Kurdish militias, both of whom were disgruntled as a result of the secularizing and centralizing reforms being imposed from Ankara. The rebellion, eventually backed by the British, resulted, albeit indirectly, in the loss of the province of Mosul to British-mandate Iraq. As a result, the Sheikh Said rebellion came to symbolize, in the eyes of the Kemalist establishment, the direct threat posed by religious reaction and Kurdish cultural demands to the territorial integrity of the Republic.¹³²

The resources devoted by the Republic to the repression of the rebellion were staggering and initiated a period of revolutionary terror. Over fifty thousand Turkish armed forces were mobilized to crush the revolt, and a number of paramilitary units were also created and permanently stationed in the southeast to deter further unrest.¹³³ A new legal framework — the Restoration of Order Law — created the mechanism for the Kemalist leadership to censor the critical press. An alleged assassination plot against Kemal in 1926 provided the political context to use martial law not only against the ‘external’ Kurdish ‘enemy,’ but also against the ‘internal’ threat of political opposition. By aligning the TCP with the Kurdish rebellion — prosecuting TCP members for treason on charges that they had been complicit in the rebellion — those who were seriously opposed to the Kemalist program were depicted as being in league with secessionism and religious reaction. During this period, most of Kemal’s opponents in the National Assembly, particularly those who objected to the coercive nature of secularization, were purged from politics, exiled, or even executed.¹³⁴

threat, see Mesut Yeğen, *The Turkish State Discourse and the Exclusion of Kurdish Identity*, 32 MIDDLE E. STUD. 216 (1996). On the contemporary treatment of the “Kurdish question” through the prism of national security in Turkey, see Ersel Aydın, *Between Security and Liberalization: Decoding Turkey’s Struggle with the PKK*, 33 SECURITY DIALOGUE 209, 209–25 (2002).

131. Zaza is the language of an ethnic minority in Turkey that has significant overlap with the Kurdish and Alevi communities of the country. Many contemporary Zaza speakers are Kurdish due to intermingling between the regional ethnic groups of eastern Turkey.

132. For more on the significance of the rebellion, see ROBERT OLSON, *THE EMERGENCE OF KURDISH NATIONALISM AND THE SHEIKH SAID REBELLION, 1880–1925* (1989). On the latter-day resonance of the “threats” of Kurdish separatism and religious reaction, see YAVUZ, *supra* note 44, at 246.

133. Despite the attempt to decisively quell Kurdish nationalism through the permanent militarization of the Kurdish regions of the country, however, the Kurdish communities continued their revolt against the Turkification program of the Republic. Indeed, the Kurdish question occupied much of the attention of the Turkish military in the first decades of the Republic. Between 1924 and 1938, seventeen of the eighteen military engagements in which the Turkish armed forces were deployed occurred in the Kurdish provinces. For more on the extent of Turkish military engagements in Kurdistan, both internal and external, see YAVUZ, *supra* note 44.

134. For a concise history of this period of consolidation of one-party rule under Kemal, see ZÜRCHER, *supra* note 41, at 182–95.

Having crushed the Sheikh Said rebellion with regular and irregular forces, and generated the legal machinery to eliminate organized political opposition, Kemal had cleared the path for the most far-reaching and ambitious of his reforms. The period that followed witnessed reforms designed to transform Turkish society in its every particular — the religiosity of its popular culture, prevalent habits of life, from dress styles to the traditional calendar, the nature of the national language, and the legal structures governing private life.¹³⁵ Many of the laws that accomplished this transformation — the replacement of *shari'a* personal status laws with an adapted European civil code, the switch from the Arabic to the Latin alphabet, and the outlawing of traditional dress — would not have been possible without the introduction of the quasi-martial Restoration of Order Law, giving the government nearly dictatorial powers.¹³⁶

Institutional Islam had already been brought under the control of the state at this point, but that was not deemed sufficient to root religion out of the social and cultural life of Turkish society. With their greatly expanded powers, the Kemalists next outlawed and suppressed all dervish orders (*tarikats*) in a bid to accomplish social secularization by suppressing the symbols of popular religion and fostering cultural Westernization. Much more than the disestablishment of official religious institutions, it was this attempt at thorough social secularization that generated the first real popular resistance to Kemalist reforms.¹³⁷

Other reforms of the same period also targeted the symbols of religious culture and practice, banning traditional headgear (fez or turban) for men, discouraging veiling of women, restricting religious attire to prayer services, and replacing the Islamic calendar with the Western calendar. Of

135. Again, Zürcher offers a description of this litany of reforms that is consistent with the standard descriptions in all modern histories of Turkey. *See id.* at 186–95.

136. On the Restoration of Order Law and its role in facilitating the most radical of the Kemalist reforms, see SHAW & SHAW, *supra* note 101, at 381–83; *see also* METIN TOKER, ŞEYH SAİT VE İSYANI [SHEIKH SAID AND HIS REBELLION] (1968).

137. “The most significant step in the secularization of social life was the suppression of the dervish orders (*tarikats*) . . . The resentment these measures caused and the resistance put up against them was far greater than, for instance, in the case of the abolition of the caliphate . . .” ZÜRCHER, *supra* note 41, at 191–92. The full secularization of the constitutional and legal systems of the Republic was accomplished through the replacement of the *shari'a*-based personal status law with a civil code at the same moment, in February 1926. Such a reform would have been unthinkable a decade earlier, but with religious courts and institutions already dismantled, official capacity for resistance was neutralized. Though it did not create the same degree of public outcry as the outlawing of the *tarikats*, the rupture with Islamic legal systems probably had more far-reaching consequences for the secularization of the daily life of ordinary Turkish citizens. The *tarikats* and other religious orders survived underground, while the old order created by *shari'a* personal status laws was irrevocably transformed. For a detailed discussion of the impact of the secularization policies on institutional religion in Turkey, see AMIT BEIN, OTTOMAN ULEMA, TURKISH REPUBLIC: AGENTS OF CHANGE AND GUARDIANS OF TRADITION (2011).

all the reforms, perhaps the most (in)famous, drastic, and decisive one was introduced in 1928: the adoption of the Latin alphabet, which became compulsory for all public communications beginning on January 1, 1929. More than any other measure, the alphabet reform succeeded in cutting republican Turkey off from its Ottoman past.¹³⁸

With these reforms, Kemal believed his goal of establishing a modern nation-state out of the crucible of Ottoman collapse had been secured. In many respects, he was a visionary reformer and secularizer whose accomplishments, by any measure, were of epic proportions. But he was not a democrat in the contemporary sense. Rather, he believed in “tutelary democracy,” in which a benevolent vanguard of enlightened leaders would offer limited forms of participation, enfranchisement, and liberties to a society in need of modernization.¹³⁹ By the end of his life, he had overseen the consolidation of one-party rule around the CHP and its commitments to the founding ideology of the state, rather than a system of alternation of power through meaningfully competitive elections.

Kemal’s efforts at the abolition of all forms of religion in the life of the Republic enjoyed modest success during his life and significant backsliding after his death. His view that identity-based particularisms, especially the expression of Kurdish identity, represented an existential threat to the Republic has proven more enduring. While Kemal succeeded for a time in suppressing indigenous religious and ethnic identities through a totalizing national ideology, there was a brittle quality to the top-down project that left it vulnerable and insecure. The slightest suggestion that state interventionism and rigorous Kemalism should be relaxed came to be viewed as a treasonous assault on territorial integrity and the national project. In the end, as Ernest Gellner noted in his seminal study of Turkish secularization, the Kemalist establishment became as reactionary and dogmatic in its redemptive mission as any religious orthodoxy.¹⁴⁰

138. The consequence of this reform has been a peculiar kind of historical illiteracy among subsequent generations of Turks, who can no longer read texts written prior to 1929. Taken together, the alphabet and language reforms instituted at the founding of the Republic have so transformed the language of the country that historical research in the country’s own history now requires extensive and specialized language training, to which only a tiny proportion of Turkish academics have meaningful access. One prominent Turkish analyst has suggested that the forging of a new alphabet, new language, and new myths of origin were necessary to paper over the real legacies of the ethnic cleansing campaigns of the turn of the century (in Anatolia, the Balkans, and the Caucasus) with an invented history and culture providing the diverse populations now assembled in Anatolia with a unifying narrative of belonging. See ÇAĞLAR KEYDER, *STATE AND CLASS IN TURKEY* (1987). The inability of most well-educated Turks to undertake historical research may account in part for the persistence of official histories promulgated by the Turkish state about the late Ottoman period, including the denial of the Armenian genocide. On the alphabet and language reforms and their extreme nationalist motivations, see ZÜRCHER, *supra* note 41, at 189–90.

139. This conception of enlightened, benevolent leadership is discussed in PARLA & DAVISON, *supra* note 17, at 280–82.

140. See ERNEST GELLNER, *MUSLIM SOCIETY* 59–60 (1983).

While extreme nationalism might appear today to sit uneasily beside the Westernizing orientation of Kemalism, the two were highly compatible in the 1930s as various forms of extreme, fascist nationalism swept Europe. Indeed, most of the characteristics of the Kemalist modernization projects were highly reminiscent of European social movements of the same period — its illiberal and authoritarian privileging of the duties of citizens over their rights, its state-centric reform model, and its assimilationist imposition of a national identity that was to unify all citizens of the territory.¹⁴¹ The Turkish model of national identity was both ethnically-specific (all citizens of Turkey were deemed “Turks”) and, at times, described as an ethnicity-blind inclusive civic identity.¹⁴² In the end, however, the naturalization of Turkish language and ethnicity as the basis of republican citizenship entailed an exclusionary model of ethno-nationalism.

The legacy of the extreme nationalism of the Turkish modernization project is a contemporary ideology that deems any challenge to the unifying and homogenizing claims of Kemalism, particularly challenges rooted in ethnic differentiation and religious identity, as a threat not only to the territorial integrity of the nation, but also to the legitimacy of the state. To guard against such challenges, the state has relied upon its permanent bureaucratic cadres to counter the susceptibility of elected members of the political branches to democratic pressure for change from below. State institutions in the military and civilian bureaucracy — particularly the military itself, parts of the policing apparatus of the state, and the judiciary — came to guard the core commitments of the state, and were secured against democratic alteration. As discussed below, where challenges were deemed sufficiently serious, state elites were prepared to resort to the extreme of military intervention. At other times, judicial

141. It is also worth noting the more than passing resemblance between the Kemalist project and other state formation projects of the Middle East in this period. The Ba’athist state-formation projects in Iraq and Syria shared the challenge faced by Turkey’s modernizing founders: establishing a modern state with central authority, a monopoly on violence, and administrative power over the regulation of public life in a fragmented society that is multiethnic and multiconfessional. Like the Kemalists before them, the Ba’athists opted for top-down authoritarian modernization, the legacy of which is still apparent in the autocratic political system in Syria. These parallels suggest, once more, why the Turkish example offers potentially rich comparative lessons for the Middle East more generally. On lasting legacies of Ba’athism in Iraq, see generally Judith S. Yaphe, *Reclaiming Iraq from the Baathists*, 103 *CURRENT HIST.* 11 (2004). On the role of Ba’athism in Syrian state formation, see generally STEVEN HEYDEMANN, *AUTHORITARIANISM IN SYRIA: INSTITUTIONS AND SOCIAL CONFLICT 1946–1970* (1999).

142. Somer describes the identity category developed by the Kemalists to unify the population as based on “interchangeably ethnic-exclusive or civic-inclusive (but ethnicity-blind) beliefs and values.” Murat Somer, *Defensive and Liberal Nationalisms: The Kurdish Question and Modernization/Democratization*, in *REMAKING TURKEY: GLOBALIZATION, ALTERNATIVE MODERNITIES AND DEMOCRACY* 106 (E. Fuat Keyman ed., 2007).

resistance to, and reversal of, legislative initiatives for reform affecting core state commitments sufficed.¹⁴³

The suppression of both Kurdish nationalism and all forms of opposition to radical secularization contributed directly to the consolidation of the new Turkish Republic and the evolution of the Republican People's Party (CHP), which became the vehicle for Kemalist domination of the state.¹⁴⁴ The CHP went on to govern virtually unchallenged for twenty-five years, having definitively silenced its critics. But that silence came at a price. Habits of governance by decree and the lack of serious political debate within the government left the CHP with a limited popular constituency. The period of CHP rule continued until 1950 and might well have been extended further had the logic of the Cold War not exerted pressure to initiate multiparty elections to gain favor with the United States.¹⁴⁵ Once the political system was liberalized, the CHP leadership was astonished that an opposition party promising to reduce state interventionism posed a serious electoral threat to its rule.¹⁴⁶ Unaccustomed to being challenged, they had few resources to mobilize a constituent base of their own and the opposition party — which called itself the “Democratic Party” to underscore its rejection of authoritarian statism — won a landslide victory in the election of 1950, just four years after it had been formed.

The introduction of a multiparty system in 1946 and the peaceful alternation of power in 1950 created the possibility that the Turkish Republic might transition to a more democratic and liberal trajectory some thirty years after its founding. While the original ideological fervor of Kemalism was inevitably tempered by the gradual reemergence of traditional forms of cultural and religious practice across the country, the

143. Dicle Koğacıoğlu has argued that the TCC's role as the protector of the Kemalist ideological principles of secularism and ethno-nationalism has increased over time. See Koğacıoğlu, *supra* note 31, at 272–73.

144. On the role of the Republican People's Party (CHP) as the guardian of Kemalist ideological commitments in the Turkish political party system from the founding to the contemporary period, see generally SINAN CİDDİ, *KEMALISM IN TURKISH POLITICS: THE REPUBLICAN PEOPLE'S PARTY, SECULARISM AND NATIONALISM* (2009).

145. Under Cold War doctrine, the United States gave military and economic assistance to Turkey on the condition that it democratize the political system and align its policies with American and Western priorities. On the role of the Truman Doctrine and the Marshall Plan in causing the CHP to initiate a transition to a multi-party political system, see JOHN M. VANDERLIPPE, *THE POLITICS OF TURKISH DEMOCRACY: ISMET İNÖNÜ AND THE FORMATION OF THE MULTI-PARTY SYSTEM, 1938–1950*, at 161–202 (2005); ZÜRCHER, *supra* note 41, at 209.

146. On the rise of the rival that unseated the CHP, the *Demokrat Partisi* (DP), and its efforts to distinguish itself from the CHP, see generally YAVUZ, *supra* note 44, at 59–79. For a contemporaneous account of the rise of the DP and its electoral strategy of moderating Kemalist dogma, see Howard A. Reed, *Revival of Islam in Secular Turkey*, 8 MIDDLE E. J. 267, 281–82 (1954) (arguing that the elections that brought the DP to power showed that “[m]ost Turks appear wholeheartedly in favor of moderation in both religion and politics”).

statist tradition of the founding has proven more resilient. Since the end of single-party rule, Turkey has experienced three direct military interventions — 1960–61, 1971, and 1980–83 — and several additional indirect interventions to reassert Kemalist control over the country’s electoral system whenever it has seemed to drift too far from the founding ideological orthodoxy in the eyes of the state.¹⁴⁷

More than eighty years after the Kemalist cultural revolution, the elites who have inherited control of the state apparatus remain deeply committed to the state’s founding ideology. The twin specters of Islamism and Kurdish national identity continue to haunt these latter-day Kemalists, but neither military intervention to topple the elected government nor military attacks to strike against Kurdish targets within and without the country’s borders have sufficed to permanently secure the founding project. As the direct repression associated with military intervention has become more untenable in a post-Cold War context, these elites have turned to the judiciary as a backstop against democratic pressure for liberalization.¹⁴⁸

III. JUDICIAL GUARDIANSHIP AND THE IDEOLOGICAL CONSTITUTION

Every period of Turkish republican history since the introduction of the multiparty system can be described in terms of cycles of state-driven Kemalist social intervention followed by efforts to temper the coercive powers of the state by political opposition groups, in turn provoking renewed Kemalist backlash.¹⁴⁹ Over time, the state-society dynamic has become institutionally inscribed in a distinction unique to the Turkish context. The elected branches of government (*hükümet*) are understood to be distinct from the underlying permanent bureaucracy of the state (*devlet*).¹⁵⁰ The state is comprised of the senior judiciary and prosecutors, the military and certain parts of the intelligence, national security, and policing apparatus. The civilian and military bureaucracies of these institutions are the guardians of the founding ideological commitments of the state.¹⁵¹ These bureaucratic cadres — together with the social elites

147. For a concise history of the Turkish experience of military interventions, see ZÜRCHER, *supra* note 41, at 241–48 (on the 1960 coup), 258–62 (on the 1971 military ultimatum to the elected government), 278–83 (on the 1980 coup).

148. See Kogacıoğlu, *supra* note 31, at 272–73.

149. Heper, *supra* note 77, at 105 (“[S]evere tensions between the government and the opposition have repeatedly jeopardized the legitimacy of civilian rule” and “government-opposition conflicts played a major role in sparking the three military interventions (of 1960, 1971, and 1980) . . .”).

150. For a detailed discussion of this *devlet/hükümet* distinction, see Shambayati, *supra* note 77, at 101.

151. See Cooper, *supra* note 77, at 118 (“The Turkish army’s identity and objectives remain specifically defined by the original Atatürk agenda. The same is also true to a certain extent of large parts of the judiciary and the government bureaucracy.”).

who have benefited from the Kemalist project — act to check social preferences expressed through democratic processes. Wherever such preferences — that is, electoral mandates — depart from the core tenets of Kemalism, these groups are called on to come to the defense of the state.¹⁵²

In other words, the Kemalist establishment, experiencing itself as under continual threat, treats efforts to blunt the force of the original modernizing project as a direct assault on the state. The repressive machinery of the state is employed to force the political opponents of the day into retreat. While the historical circumstances and nature of the perceived threat change over time — from the threat of populist appeals to tradition and religion in the 1950s to the leftism of the 1960s and 1970s, to the Kurdish revolt of the 1980s and the resurgence of religious identity in the political sphere in the 1990s — the strategy of enforcing a return to Kemalist orthodoxy remains consistent.

Initially, this led to direct military interventions of increasing brutality. Eventually, however, as social transformations shifted the balance of power away from the coastal urban elite constituency for Kemalism to the rising provincial middle classes, the democratic mandate of the perceived opponents to Kemalism was strengthened.¹⁵³ The potentially destabilizing consequences of forcibly toppling elected governments with a strong and broad-based constituency reduced the army's appetite for direct intervention through military coup. Instead, more indirect strategies were adopted to achieve the Kemalist call to order, using various media to sound the alarm against the alleged threat of separatist activities or gradual Islamization.¹⁵⁴ The deployment of the judiciary as a final line of defense against democratic demands for liberalization represents the most recent

152. In one recent study, Sinan Ciddi noted that the CHP has come to be the institution through which such calls are issued. For instance, he observes that the party describes the challenges of increasing religiosity and Kurdish demands in terms of “concerns for ‘national unity’ and ‘national security’”. So much so, that in the lead up to the expected general elections in 2007, the CHP has called upon the citizen body to safeguard secularism in Turkey.” CIDDİ, *supra* note 144, at 149.

153. In successive national legislative elections, the AKP's vote share has grown from 34% (2002) to 46% (2007), to just under 50% (2011). See CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL 34039, TURKEY'S 2007 ELECTIONS: CRISIS OF IDENTITY AND POWER 9 (2007); Ali Çarkoğlu, *Turkey's November 2002 Elections: A New Beginning?*, 6 MIDDLE E. REV. INT'L AFF. J., Dec. 2002, at 30 (2002); Henri J. Barkey, Commentary, *Winners and Losers in Turkey's Election*, CARNEGIE MIDDLE E. CTR. (Jun. 13, 2011), <http://tinyurl.com/3msm6jr>.

154. Examples are too numerous to cite, with dozens if not hundreds of Turkish pundits writing daily columns sounding these alarms. Some of these columnists have also been implicated in the Ergenekon prosecutions by virtue of their alleged ties to retired or active military officers. On journalists caught up in the Ergenekon case, see Alison Bethel McKenzie & Steven M. Ellis, *Turkey: Journalism Behind Bars*, INDEP. WORLD REP. (May 19, 2011), <http://tinyurl.com/6chg4mz>. For an example of meta-commentary on these themes with a prominent Turkish journalist, see *Ruşen Çakar, ile İslamlaşma, Cemaatler, AKP, Kürt Sorunu ve Gazetecilik Üzerine [A Conversation with Ruşen Çakar About Islamization, the AKP, Religious Congregations, the Kurdish Question, and Journalism]*, TANYERİ (Turk.), Nov. 2010, available at <http://www.sosyalistarsiv.com/S-A/tanyeri-3.pdf>.

chapter in this process.¹⁵⁵ This strategy, too, may have reached its limits, following the presidential crisis of 2007 and its aftermath.

A. Past as Prologue: Kemalist Crises of the Republic, 2002–2007

The AKP is the most recent iteration of a pro-Islamic political party in the history of the Turkish Republic. The first such party was formed over thirty years before, during a previous period of relative liberalization in the Turkish political order.¹⁵⁶ Each of the four prior pro-Islamic parties was eventually subjected to dissolution by the TCC on the grounds of anti-secular activities.¹⁵⁷ The last dissolution prior to the formation of the AKP resulted in a deep split within the movement. The older generation of conservatives, wedded to a thoroughly Islamist vision, formed a party led by veteran politician Necmettin Erbakan.¹⁵⁸ The other party that emerged from this split brought a younger generation of reformists from the pro-Islamic camp into the political mainstream.¹⁵⁹ Within one year of its formation, the AKP won a resounding plurality in the 2002 legislative

155. “The courts have been at the forefront of the secular campaign to expose the [AKP]’s Islamic aspirations, warn the public about the possible consequences and adopt an exclusionary conception of ‘identity,’ sharpening up the existing political polarization.” Cizre, *supra* note 38 at 11. The president of Turkey during the AKP’s first term in office was also drawn from the judiciary. Ahmet Necdet Sezer, the former president of the TCC, routinely vetoed legislation proposed by the party. See MIGDALOVITZ, *supra* note 153, at 1 (“Sezer, a former head of the Constitutional Court, is an ardent secularist who often vetoed AKP-proposed laws and appointments on the grounds that they conflicted with the founding nationalist and secularist principles of the state.”).

156. Following the military intervention of 1960, a new constitution was introduced in 1961 that relaxed the strictest interpretation of Kemalist secularism, allowing for the reintroduction of some forms of religious identity in the public sphere. The softening of the state’s stance enabled the formation of the first pro-Islamic political party, the National Order Party (*Milli Nizam Partisi*, or NOP) in 1969. The NOP was dissolved following the 1971 military intervention. It was reformed as the National Salvation Party (*Milli Selamet Partisi*, or NSP) in 1972, and was a partner in three coalition governments in the 1970s. The NSP was dissolved together with all other political parties following the 1980 military coup, and was reconstituted as the Welfare Party (*Refah Partisi*) in 1981. After the closure of Welfare by the Turkish Constitutional Court (TCC) in 1998, it regrouped as the Virtue Party (*Fazilet Partisi*). When Virtue, too, was closed by the TCC, the movement splintered and formed two separate parties: one conservative (*Saadet*) and the other reformist (AKP). For a detailed discussion of the history of pro-Islamic parties in the Turkish political system, see YAVUZ, *supra* note 44, at 207–56.

157. For a discussion of this earlier history and particularly the circumstances that led to the closure of the Welfare Party, see Gülalp, *supra* note 53.

158. Erbakan had also been the leader of all of the prior parties, including the Virtue Party. The new party that he formed, initially headed by his deputy, Recai Kutan, was the Felicity (*Saadet*) party. On Erbakan’s role as the leader of the “National Outlook Movement” — the shared political platform of the Felicity Party and all prior pro-Islamic parties in Turkey — see Levent Baskurk, *Turkey’s Splintered Islamic Movement at Crossroads*, MEDIA MONITORS NETWORK (Oct. 24, 2001), <http://www.mediamonitors.net/leventbasturk1.html>.

159. This second party was the Justice and Development Party (*Adalet ve Kalkınma Partisi*), known universally by the acronym AKP. On the AKP’s identity as the party formed by the more “moderate leaders” of the Virtue Party, which redefined itself as “socially-conservative Muslim-Turkish” rather than pro-Islamic, see YAVUZ, *supra* note 44, at 250.

elections, giving it the majority of seats in the Parliament and putting the party leader, Recep Tayyip Erdoğan, in office as prime minister by 2003.

Under the AKP's stewardship and ambitious reform agenda, Turkish society experienced rapid socioeconomic and political transformation.¹⁶⁰ Urbanization, globalization, economic liberalization, the proliferation of civil society organizations, and progressive integration with the European Union all threw the previously stable balances of Turkish politics into question.¹⁶¹

The AKP represents a group of new social actors¹⁶² that emerged out of socioeconomic transformations that began in the 1980s.¹⁶³ In one sense,

160. This reform agenda has been driven, in part, by the priority given by the AKP government in its first term to meeting the accession requirements of the European Union. In the realm of security powers and civil rights, reforms undertaken by the AKP include reduction in the powers of the National Security Council and the role of the military in civilian governance; closure of the State Security Courts; lifting of the state of emergency in the southeast (which had been in place since 1987); abolition of the death penalty; and the release of Kurdish members of Parliament who had been imprisoned for using the Kurdish language in their official capacity. With regard to economic reform, the AKP not only continued with an International Monetary Fund stabilization package initiated following the 2000–2001 Turkish financial crisis, but also adopted new policies of fiscal discipline, privatization of state-owned assets, and inflation control, which stabilized Turkish markets and bolstered investor confidence. The result from 2002 to 2007 was an average growth rate of seven percent in the Turkish economy. Critics of the AKP's wholehearted embrace of neoliberal economic policies rightly note that real wages did not increase in this period for the average Turkish worker, while the government's avowed rejection of social redistribution left staggering wealth inequalities across the country unaddressed. Nonetheless, the AKP's electoral base draws heavily from the poorest sectors of the Turkish population, including provincial agricultural workers and the urban underclasses. The stabilization of the price of staple goods resulting from inflation reduction combined with increased employment across the board driven by economic growth may account for the party's persistent popularity in these sectors. In addition, the Turkish economy has continued to show impressive growth rates despite the worldwide recession. The ongoing success of the AKP's economic stewardship goes a long way toward explaining its popularity, despite the persistence of systematic inequalities. On the economic policies of the AKP, see generally Marcie J. Patton, *The Economic Policies of Turkey's AKP Government: Rabbits from a Hat?*, 60 MIDDLE E. J. 513 (2006). On Turkey's recent economic growth profile, see Steve Bryant, *Turkish Economic Growth Accelerates to 11.7%, Fastest Pace in Six Years*, BLOOMBERG NEWS (Jun. 30, 2010, 5:43 AM), <http://tinyurl.com/65v965y>.

161. On the social transformations and political crises of the 1990s in Turkey, see KEREM ÖKTEM, *ANGRY NATION: TURKEY SINCE 1989*, at 84–156 (2011) (arguing that the 1990s were a “lost decade” of weak coalition governments, Kurdish unrest, economic reform and crises, and social divisions, and that the subsequent decade under AKP leadership transformed much of the balances that were formed in that period). The European Union served an extremely important role in offering leverage to domestic reformers to push reform legislation through in the name of the accession requirements imposed by Europe. YAVUZ, *supra* note 44, at 254–56. The absence of a comparable source of external pressure (and reform credibility) elsewhere in the Middle East may be an important factor in explaining the development of a conservative-democratic movement in Turkey out of the erstwhile political Islamist factions, something that has not been successfully replicated elsewhere in the region to date.

162. Prior to the formation of the AKP and its electoral victory of 2002, every prime minister and president of post-1982 Turkey had come from roughly similar social backgrounds. For instance, see note 42, *supra*, for details on the overlapping educational backgrounds of such individuals from 1982–2002.

163. For a history (and critique) of some of the changes introduced in the 1980s, see MEHMET

the party represents a successor to some trends in prior pro-Islamic parties as well as to center-right parties with populist agendas, like the DP of the 1950s. In another sense, however, the AKP represents newly empowered middle classes that have emerged out of the Anatolian provinces of the country, previously excluded from privileged access to state institutions.¹⁶⁴ Pressing claims grounded in particular religious or ethnic identities, these new actors disrupted the incomplete but taken-for-granted achievements of the state formation period. The emergence of provincial middle classes seeking to claim their fair share of political power has far-reaching implications. This new constituency is not invested in the secularism and ethnonationalism of the urban Kemalist elites from which the governing classes of the country have traditionally been drawn. As these new actors entered the political life of the Republic, they occasioned a transformation of the Turkish public sphere that mirrored the shifting socioeconomic landscape from which they had emerged.¹⁶⁵ The resulting polarization

ODEKON, THE COSTS OF ECONOMIC LIBERALIZATION IN TURKEY (2005). For a discussion of the emergence of this Anatolian bourgeoisie and its association with a new pro-market, pro-Islam sector, see *Islamic Calvinists: Change and Conservatism in Central Anatolia*, ESI REP. (European Stabilization Initiative, Berlin–Istanbul), Sept. 19, 2005, available at <http://tinyurl.com/6jygvk3>.

164. On the constituencies that form the core of the AKP's base, see ÖKTEM, *supra* note 161, at 127–30. The disinterest of the traditional parties in the rural or provincial population of Anatolia created an important window of opportunity for political organizing for the AKP and its predecessors. In fact, the urban/rural, coastal/Anatolian divisions reflect a bifurcated political culture in Turkey, with the coastal urban elites accustomed to governing (since Ottoman times) without much reference to the Anatolian provincial population. Most recently, this cultural divide has been captured in the evocative framing of “*beyaz Türk–kara Türk*” (literally, “white Turk–black Turk”), with the governing urban elites cast as “white Turks” and the provincial population as “black” or “dark” Turks. Of course, this terminology is not intended to capture a racial differentiation, since color does not correspond to conceptions of race within Turkey. Rather, the framing is a pun that plays on the fact that the Mediterranean Sea is known as the “White Sea” (*Akdeniz*) in Turkish, in contrast to the Black Sea (*Kara Deniz*). Thus, the elites of the Mediterranean coastal cities of Turkey are identified as “white,” while the Anatolian population of the interior is identified as “black.” The framing does a good job of capturing the marginalization of the elites of Turkey's provincial cities from the political parties that draw their principal constituency from the western parts of the country. On the white Turk–black Turk debate, see Nuray Mert, ‘*Beyaz Türkler’ Tartışması [White Turks Debate]*, HÜRRİYET DAILY NEWS (Nov. 11, 2010), <http://tinyurl.com/3atwnty> (arguing that the “white Turk” sobriquet applies to Westernizing elites that emerged at the end of the Ottoman empire and benefited in the republican period from their adaptation to the Westernized, secularized, modern state, and that these groups are now comprised of the liberal, urban middle classes).

165. The emergence of religiously observant middle classes that became the AKP's principal constituency also coincided with a period of accelerated ethnic differentiation in Turkey. The repression of the left following the 1980 coup affected Kurdish activists — disproportionately represented in the left-leaning movements of the 1970s — with particular severity. Following the coup, all manifestations of Kurdish cultural identity were banned, provoking a Kurdish nationalist backlash centered on language rights. While a discussion of the resurgence of Kurdish ethnic identity and political mobilization is beyond the scope of this Article, it is important to acknowledge the seminal role of this development in creating pressure for liberalization as well as provoking Kemalist backlash. The economic liberalization of the late 1980s was accompanied by an easing of the ban on the use of Kurdish dialects by then-President Turgut Özal in 1991. On Özal's Kurdish language policy, see Mary Lou O'Neil, *Linguistic Human Rights and the Rights of Kurds*, in HUMAN RIGHTS IN TURKEY 72, 77 (Zehra Kabasakal Arat ed., 2007). It is also worth noting that one aspect of the

between the Kemalist establishment and newly empowered segments of civil society has reopened contestation over the long-settled givens of the Republic. While this contest is often described as a conflict between secularism and Islamism, it would be more accurate to say that it is the clash between a traditional elite, guarding its privileges, and an emerging middle class pursuing social, economic, and cultural liberalization at the expense of those privileges.¹⁶⁶

The Turkish elections of 2007 were widely seen as a “showdown” in a more than two-year long escalation of conflict between Turkey’s secular establishment and the AKP. In Kemalist and ultranationalist quarters, hostility to the government’s ambitious reform agenda gained momentum in 2005, as Turkey’s prospects of EU membership dimmed.¹⁶⁷ The simmering hostility to government-initiated reforms was coupled with ongoing suspicions that the governing party harbored an anti-secular agenda.¹⁶⁸ These tensions came to a head over the AKP’s nomination of its preferred candidate for the Turkish presidency, sparking a wave of protests, as well as forms of intervention by both the judiciary and the military that finally led the AKP government to call early elections as a form of national referendum on its mandate to govern.

AKP’s early electoral success was fueled by support in the Kurdish provinces, stemming in part from the AKP’s platform of brotherhood, which emphasizes the common Muslim heritage of ethnic Turkish and ethnic Kurdish citizens. On the fate of the AKP’s Kurdish policy in its second term, see Soner Çağaptay, “Kurdish Opening” Closed Shut, FOREIGN POL’Y (Oct. 28, 2009), <http://tinyurl.com/ylsauwa>; and Andy Hilton et al., “Road Maps” and Roadblocks in Turkey’s Southeast, MIDDLE E. REP. ONLINE (Oct. 30, 2009), <http://www.merip.org/mero/mero103009>.

166. See *supra* note 79 and accompanying text on two competing conceptions of secularism.

167. The year 2005 was widely seen as a turning point in Turkey’s accession prospects, after a series of positive developments from 2002 to 2005 under the stewardship of the governing AKP. In particular, debate in the European Union over Turkey’s accession was seen as a principal motivator of the French and Dutch “no” votes in referenda over the new EU Constitution. In the grips of widespread anti-immigrant sentiment in Europe, the question of Turkish accession triggered a backlash against EU enlargement. Following subsequent elections that brought Turkey skeptics to government in Germany and France — under Angela Merkel and Nicolas Sarkozy, respectively — Turkey’s membership negotiations with the European Union began to falter and stall. In her electoral campaign, Merkel openly criticized the German government’s earlier support for Turkish membership in the European Union, advancing the idea of a “privileged partnership” in lieu of full membership. Likewise, one of Sarkozy’s first diplomatic initiatives as French president was a tour of Europe in which he expressed his opposition to Turkey’s EU membership bid. See Tony Paterson, *Merkel Plans to Block Turkey’s Bid to Join EU*, INDEPENDENT (U.K.), Aug. 27, 2005, at 24; *Sarkozy Tackles Turkey Question During Diplomatic Tour*, DEUTSCHE WELLE (May 25, 2007), <http://tinyurl.com/3nqym8c>.

168. This claim has often taken the form of accusing the AKP of practicing a form of “neo-*takıye*.” The allegation of *takıye* (often transliterated from the Arabic in English as “*taqiyya*”) suggests that party officials’ numerous public statements of commitment to Atatürk’s legacy and state secularism were a form of dissimulation, in keeping with an Islamic doctrine permitting believers to conceal their faith. For a critical engagement with such claims, see Nuray Mert, *Neo-takıye* [Neo-Team], TÜRKCE BILGI (May 16, 2005), <http://tinyurl.com/3slvqt> (Turk.).

From 2005 to 2007, the tensions over the AKP's leadership sporadically boiled over into open confrontation between the government and an array of antiliberal forces, ranging from members of the security services to ultranationalist far-right groups and the civil society organizations that support them. The de facto emergence of an autonomous Kurdistan following the American invasion of Iraq together with rising anti-Turkish sentiment in Europe fanned the flames of retronationalism in Turkey. Across a variety of media — including television programs, movies, and books — a growing belief took hold in the popular imagination that Turkey was under threat from foreign forces acting in collaboration with the internal “enemies” of the republic — namely, Islamists and Kurds.¹⁶⁹

The insecure nationalism underlying these developments also found expression in a series of violent attacks across the country targeting Kurdish activists, religious minorities, and various and sundry alleged enemies of the state. One of the most shocking instances of this violence was the assassination of Turkish-Armenian journalist Hrant Dink in January 2007.¹⁷⁰ The strategy for targeting liberal intellectuals took a different form. The courts were instrumentalized by ultranationalist lawyers to bring a spate of politically-motivated prosecutions against academics and authors who dared to question official Turkish historiography.¹⁷¹

169. Examples of such conspiracy-theory cultural products include the popular novels of the *Metal Fırtına* series, the popular television series (and eventually movie), *Kurtlar Vadisi* (“Valley of the Wolves”), and a whole host of purportedly “non-fiction” books claiming that a variety of internal and external covert actors secretly control or plan to weaken the country, by authors like Soner Yalçın and Yalçın Küçük, to name just a few in the vast cottage industry spawned by the turn to xenophobic retro-nationalism. See, e.g., YALÇIN KÜÇÜK, *ISIMLERİN İBRANİLESTİRİLMESİ* [THE HEBREW-IFICATION OF NAMES] (2006) (Turk.); ORKUN UÇAR & MURAK TURNA, *METAL FIRTINA* [METAL STORM] (2004) (Turk.); SONER YALÇIN, EFENDİ: BEYAZ TÜRKLERİN BÜYÜK SIRRI [EFENDİ: THE GREAT SECRET OF THE WHITE TURKS] (2004) (Turk.).

170. Other prominent examples of such attacks include the assassination of a High Court judge, the murder of two Catholic priests, a bombing attack on the Istanbul offices of the newspaper *Cumhuriyet*, the murder of a German missionary and two Turkish Christians in Malatya, and a spate of violence and killings targeting Kurdish activists across southeastern Turkey. Many of these attacks now form the basis of the ongoing Ergenekon prosecution, in which it is alleged that ultra-nationalist forces, together with factions in the security services and military, were behind false-flag attacks. The murder of Mustafa Yücel Özbilgin, a judge sitting in the highest administrative court in Turkey, the Council of State, became a pretext to heighten tension between the AKP cabinet and other state institutions. The attack on *Cumhuriyet* was also seen, initially, as an instance of Islamist violence against the country's Kemalist establishment, intensifying anti-AKP sentiment among some urban elites. Such “false flag operations” now form one basis of the allegations that the provocateurs behind the attacks were engaging in these operations primarily to destabilize the government and prime public opinion in preparation for a military intervention. For more on the strategy of the ultranationalist groups behind this string of attacks, see Ünver, *supra* note 83; and Bill Park, *Ergenekon: Turkey's “Deep State” in the Light*, OPENDEMOCRACY (Aug. 7, 2008), <http://tinyurl.com/3aw8npq>.

171. The prosecutions of Turkish Nobel laureate Orhan Pamuk and the popular novelist Elif Şafak were given the lion's share of international coverage, but the prosecution of countless academics, publishers, journalists, and human rights activists writing on Kurdish and Armenian

Although religious and ethnic minority groups and liberals represented important targets of opportunity for these reactionary forces, their real sights were set on the traditional nemesis of the Kemalist establishment — the alleged threat posed by political Islam to the secular state. As early as 2004, rumors were circulating of a planned military intervention to remove the AKP from power and to restore the Kemalist social order.¹⁷² It would take several more years, however, for retronationalists to gain enough momentum to attempt to topple the government in earnest, with the support of the Turkish armed forces and judiciary.

That opportunity arose in 2007 with the nomination of the AKP's preferred candidate to accede to the presidency, Abdullah Gül, Turkey's then-foreign minister. Using the fact that Gül's wife wears a headscarf as their pretext, Kemalist civil society organizations, retired military officers, and ultranationalist groups joined forces to mobilize massive demonstrations against the "threat" posed by the AKP to Turkey's secular system.¹⁷³ With secularism as their rallying cry, ultranationalist organizers were able to draw large numbers of supporters who were genuinely alarmed by the perceived religiosity and social conservatism of the AKP leadership.¹⁷⁴

The outgoing president — Ahmet Necdet Sezer, an avowed secularist and former TCC judge — had used his second term in office to veto numerous AKP legislative proposals and to warn against the threat of Islamization.¹⁷⁵ He had also insisted that a TCC decision concerning the

issues — such as Baskın Oran, Ragıp Zarakolu, Temel Demirer, and Perihan Mağden — has had a quieter and more lasting legacy of inhibiting free speech in Turkey. For more on these and other prosecutions, see AMNESTY INT'L, TURKEY: ARTICLE 301: HOW THE LAW ON "DENIGRATING TURKISHNESS" IS AN INSULT TO FREE EXPRESSION (2006), available at <http://tinyurl.com/6bfl55x>.

172. The weekly newsmagazine *Nokta* reported in 2007 on a series of three aborted coup attempts dating back to 2004, based in part on excerpts from the diary of a retired naval commander, Admiral Ozden Ornek. Following these disclosures, pressure from the military led the publisher to close the magazine. The allegations of coup planning in 2004 — apparently, in response to dissatisfaction with the government's willingness to accept a compromise position on the future of Turkish Cyprus — were later taken up as part of the Ergenekon prosecution. See *Gen. Ernygur: Fervent Coup Enthusiast*, TODAY'S ZAMAN (July 4, 2008), <http://tinyurl.com/3s3wdxg> (including excerpts from the diary of Admiral Ornek); *Magazine that Revealed 'Coups' Ends Publication*, TODAY'S ZAMAN (Apr. 21, 2007), <http://tinyurl.com/6g9padg>; and *Nokta Magazine Raided By Police*, HÜRRİYET DAILY NEWS (Apr. 14, 2007), <http://tinyurl.com/696z0lb>.

173. On the role of Gül's wife's headscarf in the controversy over his candidacy, see, for example, *Abdullah Gül's Presidential Ambitions Have Long Alarmed Turkey's Secular Establishment*, BBC NEWS (Aug. 28, 2007, 5:11 PM GMT), <http://tinyurl.com/3frgfd6> ("[S]ecularists dislike the fact that Mr Gül's wife wears the Islamic headscarf."); and Annette Grossbongardt, *Turkey Considers Candidate Gül: First Lady in a Headscarf?*, SPIEGEL ONLINE INT'L (Apr. 25, 2007), <http://tinyurl.com/3ugvr8c>.

174. For coverage of the huge "pro-secular" rallies organized in this period see, for example, *Huge Rally for Turkish Secularism*, BBC NEWS (Apr. 29, 2007, 3:33 PM GMT), <http://tinyurl.com/4xr8w8g>.

175. See, e.g., Ercan Yavuz, *Former President Sezer's Vetoes Still Blocking Turkey*, TODAY'S ZAMAN (May 21, 2009), <http://tinyurl.com/65j4dlr> ("Sezer . . . was the president who issued the highest number of vetoes after the Sept. 12, 1980 military coup.").

scope of the public sphere to which Turkish state secularism applies included the presidential palace and other state buildings. On this interpretation, the headscarved wives of AKP officials would not be permitted to attend official ceremonies taking place in the halls of state, nor could the wife of Abdullah Gül take up residence in the presidential palace.¹⁷⁶

Once the AKP made Gül's candidacy official,¹⁷⁷ the opposition CHP party sprang into action to block the nomination.¹⁷⁸ In the 2002 election, the AKP, benefiting from the electorate's dissatisfaction with the political establishment, had gained a surprise victory, securing 353 seats in Parliament, or just under a two-thirds majority. The only other party to gain a large enough share of the vote to pass the ten percent national electoral threshold was the CHP, though their share of parliamentary seats was not sufficient to block the AKP from nominating its preferred candidate for the presidency.¹⁷⁹ Instead, the CHP's strategy was to boycott the first round of the vote, claiming that the balloting in Parliament was unconstitutional and that their absence would deny the AKP a necessary quorum of 367 (two-thirds).¹⁸⁰ No such "super quorum" rule had previously been recognized, and the 1982 Constitution stipulated only a requirement that the president be chosen by a two-thirds majority in the first two rounds of voting or a simple majority in a third and fourth round.

176. For more on Sezer's contribution to the 2007 presidential crisis, and for background on the crisis more generally, see Gamze Çavdar, *Behind Turkey's Presidential Battle*, MIDDLE E. REP. ONLINE (May 7, 2007), <http://tinyurl.com/6zpn94>.

177. Sarah Rainsford, *Analysis: Turkey's Tense Election*, BBC NEWS (Apr. 24, 2007, 5:36 PM GMT), <http://tinyurl.com/42r6zw6>.

178. In fact, the CHP had been organizing rallies against a possible presidential bid by members of the AKP in advance of the announcement of Gül's candidacy. Yesim Borg & Laura King, *Secular Turks Rally to Send a Message to Prime Minister*, L.A. TIMES, Apr. 15, 2007, at 4. After the announcement of the Gül candidacy, the opposition accelerated, with much larger protests and a constitutional court challenge to parliamentary voting rules. Paul de BERNARD, *One Million Turks Rally Against Government*, REUTERS (Apr. 29, 2007, 2:49 PM), <http://tinyurl.com/66k5y2n>.

179. On the outcome of the 2002 Turkish elections, see Soner Çağaptay, *The November 2002 Elections and Turkey's New Political Era*, MIDDLE E. REV. INT'L AFF. J., Dec. 2002, at 42. Under the constitutional provisions in effect in the spring of 2007, the president would be selected by Parliament based on multiple rounds of voting. This was the procedure that had been used for the election of previous presidents, whether under coalition governments or the control of a single party. Any candidate that wins the support of two-thirds of Parliament in either the first or second round of parliamentary voting is elected. If no candidate receives two-thirds of the vote, then in the third and fourth rounds of voting, any candidate that receives a simple majority of votes is elected. While the AKP did not control enough seats in Parliament to elect Gül in the first two rounds, they had more than a simple majority of seats in Parliament and therefore would be able to elect Gül without garnering votes from outside of the party in the third round. For more on the procedural requirements for appointment of the president under the 2007 rules, see ERGUN ÖZBUDUN & ÖMER FARUK GENÇKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* 97–103 (2009).

180. The normal legislative quorum necessary for a vote to be valid is 184. ÖZBUDUN & GENÇKAYA, *supra* note 179, at 97.

While the AKP had enough seats in Parliament to ensure that their candidate would be elected by a third round of voting, they could not ensure that two-thirds of members would attend the vote.

Within hours of the first round of balloting, on April 27, 2007, the Turkish armed forces also made their displeasure with the process known, posting a statement on the website of the general staff stating that the military was the guardian of Turkish secularism and would not permit the continuation of activities undermining the fundamental values of the Republic.¹⁸¹ This statement was dubbed an “e-coup” by the Turkish media — a blunt warning that the army would not permit the swearing in of a president that it deemed inadequately secular.¹⁸² Once the first round of Parliamentary voting concluded overwhelmingly in Gül’s favor, the CHP brought a challenge before the TCC. On May 1, 2007, the Court accepted the opposition’s quorum argument and annulled the first round of voting on Gül’s candidacy.¹⁸³ The TCC’s decision marked the first of a series of judicial interventions in defense of positions taken by the CHP and the military against the AKP.¹⁸⁴

181. Cengiz Çandar, “Post-modern darbe” [*Post-Modern Coup*], SABAH (June 27, 1997), <http://www.webcitation.org/5uRjkSIYI> (Turk.).

182. For an excellent analysis of the so-called “e-coup,” see Taşpınar, *supra* note 53.

183. For a detailed account of the role of the military and the judiciary in the run-up to the 2007 elections, see MIGDALOVITZ, *supra* note 153.

184. Numerous scholars have argued that the TCC’s self-perception over the last decade has been that of a guardian court. A concise definition of what is entailed by such a guardianship model is the emergence of a “negative or defensive constitutional politics, where the constitutional courts and other organs of constitutional review . . . engage in political activism in defense of the official ideology of the regime.” Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 INT’L SOC. 7, 22 (2003). With more detailed reference to the Turkish case, Shambayati has argued that “the civilizing mission of the state in Turkey has led to the creation of regime of guardians where elected and unelected institutions jointly exercise power. The presence of guardians requires the creation of institutions such as constitutional courts that serve to preserve the above-politics posture of the guardians by putting a distance between them and day-to-day politics.” Shambayati, *supra* note 77, at 99–100. Similarly, Tezcür argues that the courts in Turkey have come to see themselves as institutions entitled to supervise “elected organs to ensure that they do not deviate from the fundamental revolutionary principles.” Tezcür, *supra* note 77, at 482. Tezcür goes on to further explain this conception of “supervision”:

Democratic politics are by definition unpredictable and may bring to power groups of suspect loyalty in the eyes of the guardians. Majorities might be swayed by populist politicians who seek to aggrandize their power while disregarding the ideological goals of the regime. Guardians perceive themselves as the only force capable of containing and eliminating these ‘internal threats’ before they irreversibly erode the revolutionary legacy. The guardians’ fear of popular rule is also reinforced by the ideological convictions that inspire social transformation projects.

Id. The broader social science literature, drawing on earlier transitions, also notes the emergence of such “guardianship” arrangements wherever constitutions leave some institutions insulated from the electoral process. In the Turkish case, this would apply to both the military and the judiciary. Under such conditions, the emergence of institutional resistance “of privileged sectors opposing the extension of their rights to other, ‘undeserving’ or ‘untrustworthy’ sectors” is typical. O’Donnell, *Democracy, Law, and Comparative Politics*, *supra* note 82, at 13.

While the AKP Prime Minister, Recep Tayyip Erdoğan, decried the TCC's decision as antidemocratic, the combined military and judicial resistance to an AKP presidential candidate left the party vulnerable. Early elections were the only way to break the impasse by evidencing the AKP's democratic mandate to select a presidential candidate. Within two months of the Court's decision, the government convened early elections, and with over 80% voter turnout, the AKP won a landslide victory, increasing its share of the national vote from 34.3% in 2002 to a then-record high of 46.7%.¹⁸⁵ This time, three parties cleared the 10% electoral threshold — the AKP, the CHP, and the far-right nationalist *Milliyetçi Hareket Partisi* (the Nationalist Action Party, or MHP) — with 341 of the 550 seats in Parliament apportioned to the AKP, 112 to the CHP, and 71 to the MHP.¹⁸⁶

The AKP's electoral victory did not amount to a mandate for Islamization, but rather a continuation of the reform agenda of its first term, including careful management of the economy and progressive liberalization of the political sphere.¹⁸⁷ The AKP quickly reclaimed the mantle of reform,¹⁸⁸ pressing for a constitutional referendum on electoral issues — including a measure for direct presidential elections — which

185. Kerem Öktem, *Harbinger's of Turkey's Second Republic*, MIDDLE E. REP. ONLINE (Aug. 1, 2007), <http://www.merip.org/mero/mero080107>. The results were widely seen as a landslide victory for the AKP. See, e.g., Taşpınar, *supra* note 53, at 115.

186. In light of the militantly nationalist atmosphere in which the elections were conducted, the MHP had a relatively poor showing. The remaining seats in Parliament went to twenty-six independent candidates, the majority of whom were Kurdish members of the Kurdish *Demokratik Toplum Partisi* (the Democratic Society Party, or DTP). These candidates chose to run as independents, knowing the party as a whole would not be able to pass the ten percent electoral threshold nationwide. After the election they reconvened as a DTP parliamentary bloc with twenty seats in Parliament. For a detailed analysis of the results of the 2007 elections, including the DTP strategy, see Öktem, *supra* note 185.

187. In many ways, the crisis over Gül's candidacy was less about secularism and Islamism than about the anxiety among Kemalist elites and the state bureaucracy that the AKP might encroach on their prerogatives. In particular, they were determined to block AKP access to a core political institution that served as a check on the party's reform agenda (through Sezer's liberal recourse to presidential vetoes). The 1982 Constitution was written with the expectation that the military, the judiciary, and the office of the president would serve as guardians of state interest against the vagaries of electoral politics. In this sense, the presidential crisis was a crisis of the constitutional order imposed by the governing military authorities following the 1980 coup. For instance, one Turkish political commentator argued that the crisis was a contest “between an open and an introverted Turkey; between civilian, democratic rule and military tutelage; and between a globalising and a protectionist economy.” Soli Özel, *All Change for Turkey*, GUARDIAN (Aug. 28, 2007, 12:00 PM), <http://tinyurl.com/3wsy9d9>.

188. The AKP embraced a human rights agenda as part of its EU-accession-oriented reform strategy, but its constituency's commitments may be narrower. While they supported the AKP's reform platform, their real priorities were liberalization in the area of religious expression and for the Kurdish supporters of the party, in the area of minority rights. Still, the referendum of 2010 demonstrated that the AKP is able to mobilize a relatively broad spectrum of the Turkish electorate in favor of political liberalization that goes beyond religious expression and language rights.

passed by a wide margin on October 21, 2007.¹⁸⁹ Abdullah Gül's candidacy was also renewed and he acceded to the Turkish presidency on August 28, 2007.¹⁹⁰

The nationalist backlash, the political intimidation tactics of the security services, and the systematic opposition to AKP reforms of this period bear all the hallmarks of the founding Kemalist legacy. The contrast between the fate of the early republican political opposition — such as the Second Group or the TCP — and the AKP lies not in the tactics adopted by the Kemalist establishment across an eighty-year span, but rather in the capacity of the AKP to withstand the pressure by relying on a politically-mobilized social base. This constituency for the AKP's reforms is itself seen by traditional elites as a source of abiding threat to the legacy of the founding cultural revolution. But the Kemalist establishment's ability to mobilize tens of thousands of supporters for rallies in support of laicism suggests that in their alliance, the military-bureaucratic cadres and the urban elites have also prioritized the development of a social base of their own. Further, the initial aftermath of the 2007 elections showed that Kemalist intimidation tactics remained relatively effective. Subsequent rounds of judicial intervention stalled the AKP's reform agenda through three years of recurring constitutional challenge.

B. *Constitutional Crisis and Initial Retreat*

For all of the high drama and electoral resolution of 2007, the much-heralded “showdown” did not actually bring the escalating tensions between the putatively Islamist AKP and the secular establishment to a close. Rather, the 2007 election proved to be a prelude to the ongoing destabilization and polarization that the country would experience in the following years.

Despite the huge electoral mandate that it won in the 2007 election, the AKP was unnerved by the military's attempted “e-coup” and subsequent judicial interventionism that sought to preclude Gül from the presidency. While in the immediate aftermath of the election, President Gül attempted to advance the party's agenda to address the political dimensions of Kurdish minority rights, planning a high-profile visit to the Kurdish provinces as his first official state trip, those efforts were soon undermined

189. Susan Frazer, *Turks Vote 'Yes' in Referendum on Electing Presidents By Popular Vote*, ASSOCIATED PRESS WORLDSTREAM, Oct. 21, 2007.

190. Gül was renominated by the AKP following the election, and was ultimately elected in a third round of parliamentary voting by a simple majority of votes. In fact, Gül was only twenty-nine seats short of two-thirds support in the second round of balloting. Mavi Zambak, *Tomorrow President Abdullah Gül Will Be Elected, "Moderate" and "Islamic"*, ASIA NEWS.IT (Aug. 27, 2007, 2:02 PM) <http://tinyurl.com/3hlqeuq>.

by a climate of anti-Kurdish retronationalism.¹⁹¹ Reproducing the well-worn strategy of tarring opponents with the brush of separatism, the military ominously warned of the growing threat from PKK supporters both within Turkey and operating out of Iraq, poisoning public receptivity to strengthening protections for Kurdish minority rights. Soon, the government provided its own support to the military's strategy of reinitiating airstrikes against PKK targets, with the grudging cooperation of U.S.-led coalition forces in Iraq.¹⁹² As disgruntlement over the failure of the AKP to follow through on promised reforms grew among its Kurdish supporters, the government made another serious blunder, this time with respect to its constitutional reform agenda.

The unprecedented scale of the AKP's electoral victory in 2007 should have been seen as a decisive electoral rebuke of the military's interference in the party's reform agenda. This gave the party a unique opportunity to undertake much-needed democratic reforms, particularly to replace the military-imposed 1982 Constitution with a new civilian constitution.¹⁹³ Initial signs suggested that the AKP embraced its new mandate for constitutional reform with enthusiasm. A five-member committee of Turkey's leading constitutional law scholars, headed by Professor Ergun Özbudun, was appointed with the task of preparing an initial draft for a new civilian constitution.¹⁹⁴ The mandate of the committee was to prepare a draft that would expand individual freedoms, strengthen protections for

191. See, e.g., 'Kurd Attack' Kills 12 in Turkey, BBC NEWS (Sept. 30, 2007, 5:45 PM GMT), <http://tinyurl.com/34mter>; Jim Muir, *Is Turkey Planning Incursion or Invasion?*, BBC NEWS (Oct. 30, 2007, 4:00 AM GMT), <http://tinyurl.com/6dom4l5>; Clive Myrie, *Kurds Show Coded Support for PKK*, BBC NEWS (Oct. 26, 2007, 12:00 AM GMT), <http://tinyurl.com/3fosauh>; *Turkish MPs Back Attacks in Iraq*, BBC NEWS (Oct. 18, 2007, 12:00 AM GMT), <http://tinyurl.com/6yrnk2g>; *Turkish Soldiers Killed By Rebels*, BBC NEWS (Oct. 7, 2007, 11:18 PM GMT), <http://tinyurl.com/268ujx>.

192. Volkan Sarsakal Cizre, *Turkey Attacks Kurdish Rebels on Iraqi Border, Warplanes Seen Setting Off for Refuge in Mountains Campaign for Military Offensive Intensifies*, GUARDIAN (U.K.), Oct. 25, 2007, at 22.

193. The original 1982 constitution was extremely draconian, restricting the political rights of Turkish citizens and establishing a semi-authoritarian system. The first round of democratizing reforms to check the excesses of the constitution was undertaken by then-Prime Minister Turgut Ozal in 1987. Subsequent rounds further liberalized the constitution, but though the eight partial amendment packages from the mid-1990s to 2004 amended as much as one-third of the original 1982 text, they left the basic structure of the military constitution intact. For the text of the Constitution (in English) reflecting the amendments through 2004, see TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982 (Turk.) available at <http://tinyurl.com/436a3gl>. There was strong consensus across the political spectrum in Turkey by 2007 that this constitution should be replaced by a streamlined civilian constitution in line with EU accession requirements. On the illiberalism of the 1982 Constitution and the constitutional amendment packages from 1987 to 2005, see ÖZBUDUN & GENÇKAYA, *supra* note 179, at 31–96 (discussing the relationship between the reform packages and EU conditionality, among other things); Bilgin, *supra* note 27, at 134–45.

194. On Özbudun's appointment, see Zühtü Arslan, *Turkey's Bid for the New Constitution*, INSIGHT TURK., July 2007, at 7. The members of the committee were Ergun Özbudun, Yavuz Atar, Fazıl Hüsnü Erdem, Levent Köker, and Serap Yazıcı.

minority rights, remove all remnants of the tutelary prerogatives of the military bureaucracy, narrow the powers of the presidency and broaden those of the legislature, liberalize rules on party closure to bring them in line with the Council of Europe's "Venice Criteria," and generally conform to other important international human rights instruments.¹⁹⁵

The committee submitted a draft to the government in the fall of 2007, which was then vetted by a group of AKP ministers and party members.¹⁹⁶ The principal sources consulted by the committee in preparing the rights provisions of the draft were such standard international human rights instruments as the Universal Declaration of Human Rights and the European Convention on Human Rights.¹⁹⁷ By all accounts, the committee delivered on its assignment, providing a liberal and democratic constitution that retained the basic principles of Kemalism while eliminating the authoritarian and state-centric elements of the 1982 Constitution.¹⁹⁸ The four principal areas of liberalizing reform addressed by the draft were fundamental rights and liberties, strengthening the rights-protecting functions of judicial review, improving the representativeness of the high judiciary, and curbing excessive executive powers.¹⁹⁹ The draft was unofficially disseminated through the Internet, but the government never presented an official proposal to Parliament on the basis of the Özbudun draft. Instead, the civilian constitution initiative was put on hold as a result of a tactical error on the part of the AKP.

As it prepared to overhaul the Turkish constitutional order, the party anticipated that a serious stumbling block for any attempted reform would be the question of lifting the headscarf ban. A broad spectrum of the AKP's constituency was deeply committed to the lifting of the ban and had been badly disappointed by the party's failure to address this demand

195. The mandate for the drafting committee is discussed by the chair, Ergun Özbudun, in a co-authored monograph. ÖZBUDUN & GENÇKAYA, *supra* note 179, at 103. The "Venice Criteria" refer to guidelines prepared by the Venice Commission of the Council of Europe, an advisory body comprised of constitutional law experts, on the standards to be applied in the prohibition of political parties. For a statement of the Venice Commission Guidelines, see Venice Comm'n, *European Commission for Democracy Through Law (Venice Commission): Code of Good Practice in the Field of Political Parties*, Study No. 414/2006, Venice Comm'n Doc. CDL-AD(2009)002 (Jan. 28, 2009).

196. The complete text of the draft constitution prepared by the committee is available online in Turkish. *Yeni Anayasa Taslağı (Tam metin 1)* [New Constitution Draft (Complete Text 1)], NTV-MSNBC (Sept. 13, 2007, 11:57 AM GMT), <http://tinyurl.com/65ugmzu> (Turk.).

197. In his description of the mandate given to the constitutional commission charged with producing an initial draft, Özbudun has written that the constitution was to be written in keeping with the Universal Declaration of Human Rights and the European Convention on Human Rights. ÖZBUDUN & GENÇKAYA, *supra* note 179, at 103.

198. For a useful analysis of the 2007 draft civilian constitution written by a member of the drafting committee, see Zühtü Arslan, *Turkey's Bid for the New Constitution*, POL'Y BRIEF (SETA FOUND. FOR POLITICAL ECON. & SOC. RESEARCH, Ankara, Turk.), Nov. 2007, available at <http://tinyurl.com/cuthsko>.

199. *Id.*

in its first five-year term in office.²⁰⁰ Perhaps as a result of the political confidence of its strong electoral mandate, or perhaps due to the new opportunity to gain support from the right-wing MHP, which had only just entered Parliament as an opposition party following the 2007 elections, the AKP embarked on a risky path that backfired.

Breaking off the question of the headscarf ban from the broader package of constitutional reforms, the party entered a single-issue coalition with the MHP to pass a set of stand-alone reforms to indirectly lift the headscarf ban.²⁰¹ The headscarf was only one among several issues related to liberalization of rules governing religious practice. Other issues related to religious liberalization included greater protection for the rights of Muslim minorities, like the Alevi community, and for the religious foundations of non-Muslim minorities. By acting on the headscarf issue separately, the government created the appearance of privileging reforms catering exclusively to its religious base. The rationale for this strategy offered by the AKP was that acting on the headscarf in the fall of 2007 would take the most contentious issue off the table when it came time to consider a new draft civilian constitution later in 2008. Instead, the party was seen by the Kemalist opposition as engaging in a majoritarian constitutional project, forcing the most contentious issue through Parliament without offering the CHP any concessions or guarantees. Rather than facilitating the subsequent passage of broader constitutional reform, the headscarf amendments, despite passing with overwhelming support, derailed the entire reform project.

Although the constitutional committee convened by the AKP was composed of first-rate liberal and independent scholars, the decision to assign the drafting of the constitution to a committee of experts rather than a parliamentary commission cast suspicion on the AKP's intentions. Excluded from the initial stages of the drafting process, the CHP and other opposition groups saw the project of a new constitution — particularly one with a more liberal definition of secularism — as a stalking horse for a program of creeping Islamization. The failure to provide

200. According to a widely-cited 2006 report by the Turkish Economic and Social Studies Foundation (TESEV), sixty-two percent of Turkish women wear headscarves. *See, e.g.*, Janice Turner, *Islam and the Great Turkish Cover-Up*, *TIMES* (London), July 18, 2008, at 4; Sabrina Tavernise, *Turkey Moves to Lift Ban on Head Scarves in Universities*, *N.Y. TIMES* (Jan. 29, 2008), <http://tinyurl.com/3lsletb> (citing to the 2006 TESEV report).

201. As earlier noted, the headscarf issue is perhaps the only point of agreement between the ultranationalist MHP and the neoliberal AKP. Some analysts have subsequently suggested that the MHP initiative to introduce the two amendments dealing with the headscarf issue separately may have been a deliberate trap set to derail the broader AKP agenda of constitutional reform. *See, e.g.*, Andrew Arato, Editorial, *The Turkish Constitutional Crisis and the Road Beyond*, *INFORMED COMMENT* (June 30, 2008), <http://tinyurl.com/3haqlsm>; Hilal Elver, *The Headscarf as an Instrument of Political Suicide in Turkey*, *TODAY'S ZAMAN* (Nov. 19, 2008), <http://tinyurl.com/3ptdo9o>.

greater transparency and opportunities for participation in the drafting process generated resistance, despite protestation that the draft would be open to wide-ranging debate once submitted to Parliament and would be adopted by consensus rather than majority vote.²⁰²

The AKP certainly moved abruptly and even opportunistically in its attempt to lift the headscarf ban through a coalition with the MHP.²⁰³ Further, erstwhile liberal supporters of the AKP were disappointed by the much slower pace of reform in the government's second term.²⁰⁴ Yet, these legitimate grievances are not commensurate with the extraordinary measures taken to reverse properly ratified constitutional amendments and seek the closure of the governing party. As discussed in Part I, the TCC did not ultimately dissolve the AKP, but it did find the party guilty of anti-secular activities. While the party survived in power, this new confrontation left it weakened.²⁰⁵ Its constitutional reform agenda was placed on indefinite hold, AKP affiliates were indirectly implicated in corruption scandals, and its EU accession strategy was stalled if not ground to a halt.²⁰⁶ The constitutional challenge to the AKP also

202. On the intention to have a consensus-based adoption procedure, see Ergun Özbudun, *New Constitution Should Be Accepted Via Consensus*, TODAY'S ZAMAN (Mar. 5, 2008), <http://tinyurl.com/c252qju>.

203. A further troubling possibility is that in order to maintain this alliance, the AKP may have deliberately slowed its broader reform agenda of establishing greater protections of freedom of speech, particularly through an amendment of the notorious Article 301 of the Turkish Penal Code.

204. In addition to rumors of a tacit alliance with the MHP that led the AKP to slow or abandon its commitment to reforming Article 301, there were also widespread suspicions that the party may have struck a deal with the head of the Turkish armed forces to respect certain "red lines" of the Kemalist establishment in exchange for the military's forbearance from future coup attempts. Such a deal with the military might explain the AKP's apparent abandonment of its Kurdish reform agenda through much of 2008. See, e.g., Daniel Steinworth, *Erdogan Striking Nationalist Tones*, SPIEGEL ONLINE (Sept. 12, 2008), <http://tinyurl.com/3r9hjt> ("Erdogan . . . is . . . adopting a tougher stance on the Kurds and moving closer to the country's military leaders."). The subsequent revelation of multiple attempted coup plots, in turn, may explain the (ultimately abortive) return to a Kurdish initiative in 2009. See Ünver, *supra* note 83.

205. By contrast, the other party that faced dissolution by the TCC in 2007, the DTP, was actually banned in December 2009. *Turkey's Constitutional Court Closes DTP*, HÜRRİYET DAILY NEWS (Dec. 11, 2009), <http://tinyurl.com/ybq2xec>. Party members — many of them elected officials in the Turkish Parliament or in municipal government in the southeastern provinces — formed a new party, the Peace and Democracy Party (*Barış ve Demokrasi Partisi*, or BDP), to continue to represent their largely Kurdish constituency. *Turkey's Kurdish Deputies to Join BDP in Parliament*, HÜRRİYET DAILY NEWS (Dec. 18, 2009), <http://tinyurl.com/yz94m7l>. Within days of the formation of the BDP, a wave of arrests swept up thirty-six Kurdish political leaders, journalists, and activists, including nine democratically-elected mayors. Over one hundred party officials and members of the DTP, and its later incarnation, the BDP, were arrested during 2009 as part of an ongoing investigation by the Diyarbakır prosecutor's office. Though the investigation was under secrecy orders, the charges brought invariably alleged links to militants from the outlawed Kurdistan Workers' Party (the PKK). See generally Alexander Christie-Miller, *The PKK and the Closure of Turkey's Kurdish Opening*, MIDDLE E. REP. ONLINE (Aug. 4, 2010), <http://www.merip.org/mero/mero080410> (discussing the arrests associated with the PKK).

206. For details of the corruption allegations, including the "Deniz Feneri" affair, see *Turkish PM*

confirmed the emergence of the judiciary as a powerful guardian of the state's tutelary function.²⁰⁷ Particularly considered in light of the breadth of the TCC's decision overturning properly enacted amendments, severe barriers had been placed in the path of future constitutional amendments.²⁰⁸

The effort to block liberalization met with initial success, with the TCC imposing severe limits on any attempt to promulgate a new civilian constitution. Moreover, in the aftermath of the constitutional challenges of 2008, the AKP appeared to reduce its own reform agenda, either to accommodate Kemalist reaction or to appease its own core base by limiting itself to a narrower platform related to religious liberalization.²⁰⁹ Yet, the ambitious reform agenda that won the AKP a massive electoral victory in 2007 continued to enjoy strong support from the Turkish electorate. Moreover, the constitution-drafting exercise of the Özbudun committee charted a clear path forward. The draft civilian constitution placed the issues of limiting the role of the military in the civilian affairs of the state, protecting minority rights, and ensuring greater religious freedom squarely at the center of political reform initiatives. Further, the AKP's years in office enfranchised previously marginalized groups, giving them a stake in the state's institutions. With large segments of the population demanding access to state benefits and services without professing fealty to Kemalist ideology, the exclusive hold of the secular, nationalist establishment on the state bureaucracy came under pressure. The key pressure point was the judiciary and the next constitutional crisis centered on judicial reform.

IV. UNPACKING THE COURT: DEMOCRATIZING THE JUDICIARY BY REFERENDUM

The history of the founding of the Republic relates directly to Turkey's contemporary political crises. The repression during the state-formation period created deep and persistent cleavages, particularly along ethnic and religious lines, that continue to mark both state and society. The failure to fully democratize civilian-military relations remains a major obstacle to addressing the nation's longstanding denial of Kurdish language rights and cultural autonomy. The persistent primacy of state over society in Turkey's constitutional order undergirds the Kemalist belief that democratization

Under Pressure Over Recent Rise in AKP Related Scandals, TURKS.US (Sept. 8, 2008, 6:15 AM), <http://tinyurl.com/6bhoz9a>.

207. The guardianship model of judicial tutelage was discussed at note 184, *supra*.

208. For discussion of the TCC opinion in the headscarf case see *supra* notes 56–68 and accompanying text.

209. For a description of the AKP's disappointing reform record from 2007 to 2008, see Kerem Öktem, *Deep Trouble*, NEW HUMANIST, Nov.–Dec. 2008, at 12.

represents a threat to secularism, at least their preferred definition of “*laiklik*.” The most recent expression of this primacy of state over society was the judicial blockage placed in the path of an electoral mandate for reform.

Surmounting judicial and other obstacles to reform is the necessary first step to charting a path toward a new constitutional order capable of accommodating political pluralism. The AKP government may have initiated this process with the constitutional amendment package that it proposed in the spring of 2010.²¹⁰ The constitutional referendum of September 2010, which witnessed the passage of the amendments package with the support of fifty-eight percent of the Turkish electorate, was a watershed moment.²¹¹ The occasion was not nearly as dramatic as the Arab revolts of 2011, but it may prove to be just as consequential for the course of democratization in the region.

Many analysts interpreted the referendum as the final showdown between the country’s secular establishment and Islamist forces, with the result definitively displacing the former.²¹² Such accounts treated the referendum as a vote of confidence in the AKP with little attention to the substantive impact of the constitutional amendments that were the subject of the vote. In fact, that package of constitutional amendments reformed some of the most illiberal provisions of the 1982 Constitution. This is particularly true in the areas of individual rights and the judicial reforms, where the amendments specifically addressed those features that scholars have identified as central to an “ideological constitution.”²¹³

210. In many ways, this constitutional amendment initiative bookends the crises initiated in 2007 and exacerbated by the TCC’s twin decisions in 2008. I discussed the TCC’s reasoning in 2008 in Part I, *supra*. While that discussion was detailed, it reflected arguments that have been widely aired over the intervening three years. See, e.g., Uzun, *supra* note 47. By contrast, my analysis of the significance of the 2010 constitutional amendment package may be the first such comprehensive treatment. Accordingly, I offer a more detailed account of the arguments proffered by various parties in 2010 than I offered for the 2008 crisis.

211. For the complete official results of the referendum, see YÜKSEK SEÇİM KURULU [Supreme Election Board], REFERANDUM SEÇİM SONUÇLARI [Official Results of Constitutional Referendum Vote] (Turk.), available at <http://tinyurl.com/5rns6zk>.

212. Soner Çağaptay & David Pollock, *Turkey: The Scary European Model*, NEWSWEEK, Aug. 9, 2010, at 15.

213. The concept of an “ideological constitution” has been defined most recently by the comparative law scholar Said Arjomand. His definition views “ideological constitutions” as “instruments of social transformation according to total ideologies and their offspring . . . marked by the subservience of narrowly conceived rule of law and legality to the dominant ideology of the regime.” Arjomand, *supra* note 184, at 9. With respect to the Turkish case, Arjomand specifically notes that the country reached the stage of ideological constitution-making with the founding of the Republic and then became “stalled.” *Id.* Applying Arjomand’s definition to Turkey, Bilgin argues that the 1982 Constitution is an ideological constitution that emphasizes the protection of state from society while embracing a view of society as homogenous, without reference to values of pluralism or diversity. Bilgin, *supra* note 27, at 137. Perhaps the clearest expression of the constitutional theory underlying the 1982 Constitution can be found in the speech of General Kenan Evren, leader of the military regime, on the occasion of the opening of the 1981 Constituent Assembly (convened for the

The twenty-six constitutional amendments at issue in the referendum included provisions that empower civilian courts while reducing the jurisdiction of military courts; strengthen gender equality and protections for children, the elderly, veterans, and the disabled; improve privacy rights and access to government records; expand collective bargaining rights; afford individuals standing to bring constitutional challenges; and remove immunities long afforded to those responsible for the 1980 military coup.²¹⁴ The overwhelming effect of these provisions amounted to civilianizing the military coup-era constitution, strengthening individual freedoms and political rights, and undertaking much-needed judicial reform. The European Union consistently expressed support for the amendment package and welcomed its passage as another step toward convergence with European standards.²¹⁵ Once the results were released, President Obama called to congratulate Prime Minister Erdoğan on the outcome of the referendum.²¹⁶

Despite the overwhelmingly liberalizing effect of the amendments, they occasioned significant polarization in the Turkish electorate in the run-up to the referendum. Turkey's traditional urban elites viewed the amendments as deeply threatening.²¹⁷ The main substantive objections

adoption of the draft that would become the 1982 Constitution). In that speech, General Evren stated that the structure of the constitution would reflect lessons from the political instability that had led to the military coup. In particular, he argued that:

While trying to enhance and protect human rights and liberties, the state itself also has certain rights and obligations as far as its continuity and future is concerned. . . . There are, however, limits to [citizens freedoms]; there is also a state founded by individuals that together make up a collectivity. . . . Individual freedoms can be protected to the extent that the will and the sovereignty of the state are maintained.

METIN HEPER, *THE STATE TRADITION IN TURKEY* 131 (1985) (internal quotation mark omitted). The degree to which this kind of constitutional theory favors the state and society over the individual is readily apparent in Evren's speech, with its emphasis on the rights of the state and the concomitant restrictions on individuals.

214. The text of the constitutional amendments (not reflecting minor changes following the July 2010 TCC ruling) is available online in Turkish at <http://tinyurl.com/39j9l7z>. The official English translation of the amendments package (which reflects the minor changes mandated by the TCC ruling) is available at <http://tinyurl.com/65372jl>.

215. EU Enlargement Commissioner, Stefan Füle, stated that "the reforms are a step in the right direction as they address a number of long-standing priorities in Turkey's efforts toward fully complying with [EU] accession criteria." *Turkey's Erdogan Scores Reform Referendum Victory*, REUTERS (Sept. 12, 2010, 6:08 PM), <http://tinyurl.com/3r97bcq>.

216. Sebnem Arsu & Dan Bilefsky, *Turkish Constitutional Changes Pass By a Wide Margin*, N.Y. TIMES, Sept. 13, 2010, at A4.

217. Several Turkish commentators writing for an English-language audience gave voice to these fears in columns and blogs immediately preceding or following the referendum. See, e.g., Ceren Coskun, *Don't Sweeten the Bitter Pill of Illiberal Democracy*, OPENDEMOCRACY (Sept. 10, 2010), <http://tinyurl.com/6fmra87>; Melik Kaylan, *Why You Should Care About Turkey's Referendum*, FORBES (Sept. 16, 2010, 5:24 PM), <http://tinyurl.com/67e264o>; Yeginsu, *supra* note 22. Their Western counterparts in the blogosphere echoed similar concerns. See, e.g., J.E. Dyer, *Turkey: Worry*, COMMENTARY (Sept. 13, 2010, 2:23 PM), <http://tinyurl.com/65d8dzx>. For a stark example of Western news coverage depicting the referendum result as an Islamist victory, see Tom Bonnett,

centered on changes to the composition and selection process of the TCC and the appointment of a board overseeing judicial appointments, which were seen by opposition groups as an attempt at court-packing that would undermine judicial independence.²¹⁸ Behind these substantive objections lay anxieties that demographic changes in Turkish society would yield new distributions of political power if state institutions that had long resisted democratic pressure were subjected to forms of accountability entailed by the reforms.

One version of the court-packing objection held that the AKP opportunistically combined unrelated amendments in a single package in order to put what at least one commentator referred to as “democratic window-dressing” on core court-packing provisions.²¹⁹ Analysts pursuing this line of critique also argued that piecemeal amendments were, in any event, inadequate, given the need to introduce an entirely new, civilian constitution to replace the current coup-era document.²²⁰ In response, those who supported the constitutional amendment package acknowledged the critique that the reforms did not go far enough, but rejected an all-or-nothing approach that would have postponed, once again, much needed reforms in the areas the package did cover.²²¹ While these responses are valid, the limitations of the amendments package did represent a degree of opportunism on the part of the government. In particular, the failure to address the ten percent electoral threshold demonstrated that even as the AKP advocated these reforms, it also

Fears Vote Moves Turkey Nearer Islamic State, SKY NEWS ONLINE (Sept. 13, 2010, 10:12 AM), <http://tinyurl.com/44ehjne>.

218. There was also a procedural objection to the amendments being submitted as a single package rather than allowing the electorate to vote on each provision individually. The package included elements to attract a wide spectrum of the electorate, though each provision might singly have been more vulnerable to rejection. On the other hand, the amendments *were* voted on singly by Parliament before being put to the referendum, with some provisions, such as those that would have made it more difficult to ban political parties, being dropped. Göksel Bozkurt, *Turkish PM Erdoğan Sees ‘Democratic’ Lining in Cloudy Key Vote*, HÜRRİYET DAILY NEWS (May 4, 2010), <http://tinyurl.com/6eqqave>.

219. Haldun Gülalp, *The Battle for Turkey’s Constitution*, GUARDIAN (Sept. 4, 2010, 7:00 AM), <http://tinyurl.com/6y6bn5b> (arguing that the core purpose of the amendment package is court-packing, with other proposed changes “added for democratic window-dressing”).

220. In fact, a comparison of the 2010 constitutional amendment package to the 2007 draft civilian constitution undermines the argument that the 2010 package represented an opportunistic hodgepodge. To the contrary, the four key areas of reform advanced by the earlier effort to replace the constitution — individual freedoms, political rights, judicial reform, and civilianization — were all reflected in the 2010 amendment package. Indeed, the most contested provisions, related to the judiciary, were also part of a broader judicial reform strategy that was repeatedly applauded by the European Union. *See, e.g.*, Joost Lagendijk, *Maximalists and Orientalists*, HÜRRİYET DAILY NEWS (Apr. 4, 2010), <http://tinyurl.com/yargz69>.

221. *See id.*

maintained its focus on maintaining its own electoral advantage in the coming 2011 legislative elections.²²²

There is no question that the constitutional amendment package would have been improved had it been accompanied by measures lowering the electoral threshold.²²³ But legitimate criticism of the shortcomings of the package should be distinguished from substantive attacks on those provisions that *were* included. By reducing the role of the military in ordinary governance, undertaking judicial reform in the area of both military and civilian courts, and enhancing individual and political associational rights, the amendments should have been greeted as an important step toward liberalizing the Turkish political order. Instead, some commentators viewed the amendments as an assault on state institutions, particularly judicial autonomy. A threat to the guardianship model of the judiciary was mistaken for a threat to the judiciary.

The allegations of threats to the independence of the judiciary and control over the appointments procedure would be incoherent but for the skepticism about a democratic and participatory political order among the opponents of the reforms. Much of the concern stems from the fear of what might happen if the judiciary and the state prosecutors became more representative of Turkish society taken as a whole, and not of the particular elites from which these groups have heretofore been selected. Two sets of amendments were at the center of the controversy: one concerned the composition of the TCC, and the other the composition of the Supreme Board of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*, or HSYK). In other words, the controversy was about the composition of the highest appellate courts and the judicial promotions system.

With respect to the TCC, the amendments in question increased the size of the court from eleven permanent and four alternate justices to

222. The exceptionally high electoral threshold put in place following the 1980 coup benefits large national parties, like the AKP, while adversely impacting smaller and regional parties, such as pro-Kurdish parties like the BDP. Lifting the requirement that parties garner ten percent of the vote nationwide to be seated in Parliament, or replacing the threshold with one more in line with liberal standards (setting it, for instance, at a three to five percent level) would be an important step in liberalizing the political order. Such a change in the threshold would almost certainly have enabled more than a handful of parties to gain representation in Parliament in the 2011 elections, diluting the AKP's parliamentary majority.

223. Lowering the electoral threshold would require amendment to the Political Parties Law, rather than the constitution, as the current threshold is statutory, not constitutional. The Political Parties Law was also introduced under the military coup government, promulgated just after the 1982 Constitution, on April 22, 1983. For a critical discussion of the law and the need for its repeal, see Nuray Mert, *For a Liberal, Democratic and Participatory Constitution*, HÜRRIYET DAILY NEWS (Mar. 24, 2001), <http://tinyurl.com/3n5gcjh> (arguing that the ten percent national election threshold must be lifted as part of the next round of democratizing reforms).

seventeen permanent justices.²²⁴ Two related objections were raised to this expansion. The first objection regards the institutions from which the pool of candidates may be drawn. The second objection regards the role accorded to the political branches in appointing the candidates. Both objections are driven by an additional layer of concerns. As discussed above, in the Turkish political order, the elected branches of government (*hükümet*) are understood to be separate from the unelected branches, which are more commonly referred to as the “state” (*devlet*).²²⁵ The idea of separation of powers, in this context, is understood not as the separation of the three branches of government, as would be the common understanding in the United States, but as the separation of the elected and unelected branches of government.²²⁶ In particular, the subjection of the unelected branches of government to forms of democratic accountability is deemed to represent a direct threat to the autonomy of the state. Thus, the civilianization of the constitution — that is, the subjection of the military to civilian authority — and the reform of the judiciary — that is, greater democratic accountability in the appointments process — are both understood to undermine separation of powers by subjecting the state to majoritarian pressures.

On the question of the pool of candidates from which TCC members may now be drawn, the concerns reflect the view that the Constitutional Court should be composed exclusively of candidates drawn from the self-appointing ranks of the high judiciary.²²⁷ Prior to the amendment, the

224. The relevant amendment was to Article 146 of the 1982 Constitution. For the full list of amendments in the referendum package (translated into English), see REPUBLIC TURK. PRIME MINISTRY, LAW NO. 5982 AMENDING CERTAIN PROVISIONS OF THE CONSTITUTION, *available at* <http://tinyurl.com/3kjj4hd>.

225. This distinction is often mentioned in the Turkish-language media, but is not the subject of sustained analysis in the comparative law scholarship. For examples of typical articles from the Turkish press, see Şahin Alpay, *Devlet mi hükümet mi? [Is it State or Government?]*, ZAMAN ONLINE (Sept. 7, 2010), <http://tinyurl.com/6ht9mxc>; and Zülfü Livaneli, *Devlet-hükümet ayrımı [The State-Government Divide]*, VATAN (Dec. 12, 2003, 8:50 PM), <http://tinyurl.com/635o9jt>.

226. As Shambayati notes, “When sovereignty is divided between elected and non-elected institutions, conditions are ripe for the judicialization of politics, or the expansion of the judiciary’s role in the political arena.” Shambayati, *supra* note 77, at 102–03. The judicialization of politics is a process that has garnered considerable attention in the last decade, in part as a result of the expansion of the role of courts in the European Union. See ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000). In the context of the European Union, Stone Sweet argues that the impetus for judicialization of politics comes in part from opposition movements that fear being outvoted in the ordinary political process and so seek to insulate their preferences from day-to-day politics. *Id.* at 55 (“Oppositions judicialize legislative processes in order to win what they would otherwise lose in ‘normal’, unjudicialized processes.”).

227. Promotions to appellate courts and the higher judiciary were controlled, prior to the amendments, by the seven-member Board of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*, or HSYK), itself comprised entirely of judges from the Court of Cassation (*Yargıtay*) and Council of State (*Danıştay*) and two members of the Ministry of Justice. This composition was specified in Article 159 of the 1982 Constitution prior to the 2010 amendments. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 159

eleven-member court was drawn primarily from among the five highest courts in the country: the Court of Cassation (*Yargıtay*), the Council of State (*Danıştay*), the Military Court of Cassation (*Askeri Yargıtay*), the Military High Court of Administration (*Askeri Danıştay*), and the Court of Accounts (*Sayıstay*).²²⁸ Appointees from these courts accounted for seven of the eleven judges on the court, with the remaining four drawn from among senior administrative officers and lawyers and the Council of Higher Education (*Yükseköğretim Kurulu*, or YÖK). Following the amendment, the composition of the Court includes a broader representation from beyond the highest courts.²²⁹ In the seventeen-member TCC, nine of the judges are drawn from the five highest courts (one additional appointee from each of the Court of Cassation and the Court of Accounts, as compared to the preamendment composition).²³⁰ The remaining eight members of the court are drawn from among senior administrative officers and lawyers, judges and prosecutors from lower courts, and YÖK, with one candidate chosen from a pool nominated by Turkish bar association presidents. Thus, whereas the TCC's composition previously reflected a ratio of seven appellate court appointees to four appointees from other parts of the legal and judicial profession, after the amendment, that ratio is now nine appellate court appointees to eight appointees from other parts of the legal and judicial profession. This institutional change brings greater representation of the judicial and legal profession onto the TCC in line with EU-approved judicial appointments procedures.²³¹

Claims that the amendment package expanded executive power with respect to appointments were misplaced. Prior to the amendment, *all* appointments were made by the president from among nominees selected

(Turk.). The narrow composition of the Council facilitated the imposition of an ideological litmus test on judicial promotions, ensuring that the high judiciary was a relatively politically homogenous group. The selection procedure for the TCC was then much less important. So long as the pool of eligible candidates could be restricted primarily to the high courts, the promotion system producing the high judiciary would ensure the relative ideological conformity of TCC judges. See Abdullah Bozkurt, *Venice Commission Secretary Slams HSYK, Urges Judicial Reform*, SUNDAY'S ZAMAN (Jan. 28, 2010), <http://tinyurl.com/3gb6qwy>.

228. It is worth noting, again, the role that the military (through the military courts and its representation on the board of the Council of Higher Education (*Yükseköğretim Kurulu*, or YÖK)) played in judicial appointments under these arrangements, even as the elected civilian Parliament was excluded from the process of forming the candidate pool or choosing among the candidates.

229. For an excellent example of the critique of this expansion, see Ozan Varol, *Turkey's New Majoritarian Difficulty*, CONSTITUTIONMAKING.ORG BLOG (Sept. 29, 2010, 8:24 PM) <http://tinyurl.com/3hp784v>.

230. While none of the courts that previously played a role in the formation of the candidate pool have been excluded, the ratio of votes has shifted in favor of the civilian courts.

231. For more on the new composition of the TCC and the European Union's reaction to such changes see, Abdullah Bozkurt, *Venice Commission Lauds Broad Representation in Judiciary*, TODAY'S ZAMAN (Mar. 25, 2010), <http://tinyurl.com/3evc3ma>; and note 238, *infra*.

by the high judiciary and other unelected state organs.²³² Under the amendment, the president continues to make the majority of appointments in the same manner, from among a small set of nominees chosen primarily by the judiciary. As discussed, a larger proportion of eventual seats on the TCC will be drawn from a wider spectrum of the civilian judiciary than was previously the case, but the pool of candidates remain restricted primarily to those chosen by the judicial branch. While the role of the executive may be worryingly large in making appointments to the TCC, that is not a consequence of these amendments. In fact, the democratically-elected Parliament is now accorded a role in the appointments procedure for the first time, enabling them to appoint candidates for three of the seventeen seats on the expanded court. In other words, the amendment amounts to marginally reducing the president's sole authority to select justices.

With a reduction of the president's role in appointments and a parliamentary role in appointing fewer than twenty percent of the justices, the amendments hardly amount to court-packing, even were the AKP guaranteed a durable parliamentary majority. The Venice Commission — the European Union's Commission for Democracy Through Law, which advises the Council of Europe on constitutional matters — has noted that a parliamentary role in the selection of members of constitutional courts is the prevalent practice in Europe.²³³ Moreover, the initial transition to an expanded court occurred by awarding the four current alternate justices, chosen under the pre-amendment procedures favored by the opposition, permanent seats. That left only two new seats to be filled on the expanded court in the immediate aftermath of this referendum. The Turkish Parliament filled the two vacancies with one candidate from among three chosen by the Court of Accounts²³⁴ and one from three candidates nominated by the presidents of Turkish bar associations.²³⁵ If there was to be court-packing by the government, it was not in the immediate aftermath of the referendum. Further, rather than introducing a

232. The English document produced by the Office of the Prime Minister that lists the amendments contained in the package put to referendum, available at <http://tinyurl.com/3kjj4hd>, includes a comparison to the original language of each Article. The unamended text of Article 146 clearly sets forth the exclusive role of the President in appointments prior to 2010. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 146 (Turk.).

233. Bozkurt, *supra* note 231.

234. Hicabi Dursun was selected from among the candidates list produced by the Court of Accounts (Sayıştay). *Meclis'ten Yüksek Mahkeme'ye: Hicabi Dursun* [Parliament to the Supreme Court: Hicabi Dursun], NTV-MSNBC (last updated Oct. 6, 2010, 9:36 PM GMT), <http://www.ntvmsnbc.com/id/25138620/> (Turk.).

235. Celal Mümtaz Akıncı, the head of the Afyon bar association, was selected from among the TBA candidates list. *Anayasa Mahkemesi üyeliğine Celal Mümtaz Akıncı seçildi* [Celal Was Elected a Member of the Constitutional Court], STAR (Turk.) (Oct. 13, 2010), <http://tinyurl.com/6gupew4>.

separation-of-powers challenge, the real effect of the amendments was to insert checks and balances to mitigate the complete insulation of the judiciary from democratic accountability.

The second set of controversial amendments concerned the composition of the Supreme Board of Judges and Prosecutors (the HSYK).²³⁶ Here, the amendments significantly alter the makeup of the HSYK, but not in a way that enhances the role of either the Parliament or the President in the appointments procedure. Prior to amendment, the 1982 Constitution provided for the HSYK to be comprised of seven regular and five substitute members, with the minister of justice and the undersecretary to the ministry of justice both serving as regular members (the latter *ex officio*). The remaining five regular members were all drawn from the senior judiciary. Under the amendments, the HSYK was dramatically expanded to include twenty-one regular members and ten substitutes. While the minister of justice and the undersecretary continue to be members of the board, their authorities are reduced, addressing concerns of undue executive influence on the Board. In particular, whereas the undersecretary's presence was previously required to convene a meeting — giving the ministry an effective veto over HSYK activities if they chose to boycott — HSYK decisions may now be taken in the absence of the members from the ministry. More importantly, while the president, the Court of Cassation, and the Council of State continue to select a proportion of members of the Board, the majority of the expansion draws on a completely new pool of candidates to be selected by judges and prosecutors across the country at lower-level administrative and judicial institutions.²³⁷ In other words, the amendments make the HSYK more representative of the profession at all levels.

This reform was long sought after by European officials who found the HSYK too narrow and insulated to offer a democratic standard of accountability in judicial affairs.²³⁸ The narrow composition of the HSYK,

236. These changes were reflected in amendments to Article 159 of the 1982 Constitution. See *infra* note 237 for a discussion of the prior composition of the HSYK.

237. The composition of the HSYK was previously made up of five senior judges selected by the criminal, civil, and administrative courts of appeal and two members of the ministry of justice. Following the amendment, the HSYK is now made up of three members from the Court of Cassation, two from the Council of State, one from the Justice Academy, four appointed by the president from among academics and lawyers, and ten directly elected from among lower courts (seven from the first category of judges and three from the administrative judiciary). Those ten members are elected at large by 12,000 judges and prosecutors.

238. For instance, in the most recent European Commission report on Turkey's progress on reforms toward accession, the Commission Staff reported, "Concerns remain about the independence, impartiality and efficiency of the judiciary," *Turkey 2009 Progress Report*, at 11, SEC (2009) 1334 (Oct. 14, 2009), and noted, "The composition of the High Council [of Judges and Prosecutors] is not representative of the judiciary as a whole; only senior members of the Court of Cassation and of the Council of State are members of this Council." *Id.* at 69 n.46 The Commission

which decides almost all promotions to the courts of appeal in the country, had produced a self-perpetuating oligarchy of judges that applied ideological and other criteria to ensure that only likeminded members of the judiciary were promoted to senior positions.²³⁹ The expansion of the HSYK to allow junior judges and prosecutors to participate in the election process enables broader judicial self-regulation, reducing the cliquishness that has characterized the promotions process for three decades. In the words of one commentator, the effect of the expansion is to enable the judiciary to “wrest control of regulating its own affairs from a small, self-selecting clique of older judges.”²⁴⁰

Rather than facilitating AKP control, these reforms confer control over judicial appointments and promotions to the judicial branch as a whole. Claims that the AKP will necessarily benefit from such an expansion rest on the premise that a Board that better represents the demographic makeup of the judiciary will be more closely aligned with the AKP. On this account, HSYK expansion will inure to the benefit of the AKP because it enjoys broader popularity in the judicial branch as a whole than it did among the senior judges that previously dominated the Board.²⁴¹ This is either a result of its general electoral popularity — which is not a durable advantage, but one the party can only maintain by remaining accountable to the electorate — or a result of a prior partisan bias among the senior judges, which a more representative Board will correct. Either way, there is nothing about the expansion itself that introduces an illicit role for the political branches generally, or the AKP in particular, in the judicial appointments and promotions process.²⁴²

specifically notes that the HSYK was involved in what appeared to be politicized dismissals of prosecutors involved in high profile cases, raising questions about its independence. *Id.* at 11. The report goes on to comment that “[o]n occasions senior members of the judiciary, of the military and of an association of judges and prosecutors made statements which are likely to be perceived as pressure on individual courts and members of the judiciary, putting thus the *impartiality* of the judiciary at risk in important cases.” *Id.* at 69.

239. Turkish commentators have long noted that the creation of a self-appointing judicial caste enforcing ideological selection criteria was a deliberate design feature of the military’s post-1980 constitutional order. *See, e.g.,* Mustafa Akyol, *From Kemalist Oligarchy to Chaotic Polyarchy*, HÜRRİYET DAILY NEWS (Feb. 19, 2010), <http://tinyurl.com/68kf527>.

240. Grenville Byford, *Out With the Old in Turkey*, TIME MAG. WORLD (Sept. 27, 2010), <http://tinyurl.com/6ztonbg>.

241. The expansion of the HSYK must be read in conjunction with other amendments, such as those giving judges and prosecutors the right to judicial review of dismissal decisions (also provided for through revisions to Article 159). Indeed, the expansions of judicial review under the amendments have the effect of limiting the capacity of both the military and the judiciary to engage in politically-motivated purges. While this is generally an important step in strengthening individual rights and bureaucratic competence, it is also clear that these protections will (at least initially) disproportionately benefit a segment of the AKP’s constituency. There is no question that the primary target of judicial and military purges in the last decade have been those deemed by the state to be unacceptably Islamist, a category that often overlaps with the AKP’s electoral base.

242. The elections that were held following the referendum to fill the ten directly-elected slots on

A review of the overall effect of the judicial reform provisions, both regarding the TCC and the HSYK, yields a picture of political liberalization rather than court-packing. The fact that the provision of judicial reform may at first benefit AKP supporters should not detract from an appreciation of the broader implications of the reform. Indeed, were it not for a backdrop of targeted unfair practices, there would be no reason to expect these reforms to differentially impact the AKP constituency. The promulgation of judicially-monitored professional standards in appointments and promotions in the state bureaucracy, provision of judicial review to civil servants, and immunization of judicial processes from political intervention are all important and liberalizing accomplishments regardless of their initial, contingent beneficiaries.

Yet, it is also undeniable that deep fears pervaded the debate about the amendment package in the run-up to the referendum. The significant accomplishments of the amendments toward civilianization — eliminating military court jurisdiction over civilians, empowering civilian courts to try military officers, removing the immunity from prosecution of the 1980 military coup leaders — were overshadowed for many observers by what were seen as the dangers of judicial reform.²⁴³

At base, these concerns were grounded in the view that the elected branches of government must be kept in check by unelected guardians of the Turkish regime. The authority of the military to intervene in the country's political life was substantially curbed in the last decade by a combination of the electoral support enjoyed by the government, the strengthening of Turkish civil society, and the willingness of lower courts to entertain investigations and prosecutions of military coup planning. But the guardianship role since 1980 has been shared, under the military-era constitution, between the army and other parts of the state bureaucracy, including the high judiciary. Each of the unelected branches acts to ensure that the core ideological tenets of the state remain stable, and that the elites most committed to those tenets retain their privileged access to state resources, ranging from subsidies to high-ranking office. Any attempt to subject such guardians to democratic accountability has been met with

the HSYK were predictably decried by the opposition for creating a Board stacked with AKP-favored candidates. See *Supreme Court Prosecutor Demands Cancellation of Judge, Prosecutor Board Elections*, CUMHURİYET (Oct. 22, 2010), <http://tinyurl.com/6dmn9xm>. Critics of such accusations countered that there was no evidence that the AKP had influenced a secret ballot involving 12,000 judges and prosecutors and EU officials deemed the elections for the Board legitimate. *EU Official 'Pleased' with Turkey's HSYK Election*, HÜRRIYET DAILY NEWS (Oct. 27, 2010), <http://tinyurl.com/37pm2qg>; *New HSYK Has Poor Image, Turkish Experts Say*, HÜRRIYET DAILY NEWS (Oct. 22, 2010), <http://tinyurl.com/3chhhdg> (citing leading Turkish constitutional law expert Ergun Özbudun as viewing the allegations as baseless).

243. See, e.g., Yeginsu, *supra* note 22; see also Gareth H. Jenkins, *Turkey's Constitutional Amendments: One Step Forward, Two Steps Back?*, TURK. ANALYST, Mar. 29, 2010, available at <http://tinyurl.com/6ksohhf>.

genuine alarm by those elites in Turkey who fear the democratic reversal of their preferences.²⁴⁴

The judiciary was the locus for political contestation over the amendments precisely because of the guardianship role the TCC has played in recent years in support of the status quo. The TCC's record has displayed a willingness to intervene against democratic preferences, whether by checking constitutional reform efforts by parliamentary majorities or through the device of political party closures. The recent decisions by the TCC led some Turks, particularly among the urban elites of the western cities, to view the court as a guardian — together with the military and parts of the state's civilian bureaucracy — of their preferred understanding of secularism and nationalism.²⁴⁵ Ultimately, the 2010 constitutional amendments were polarizing because they brought an end to judicial guardianship.

The anxieties of Kemalist elites concerning their traditional privileges have been exacerbated by underlying demographic shifts in Turkish society favorable to the AKP's constituency. The urban elites of the country's western coastal cities have historically controlled a large proportion of the wealth of the nation. In addition, this class has also benefited from privileged access to state resources, including public sector employment, whether in the civil service or the military. The trends that have bolstered electoral support for the AKP also represent demographic changes that alter the balance of wealth and privilege to which such traditional elites had grown accustomed.²⁴⁶ The AKP's political fortunes in Turkey ride on the rise of a provincial middle class that is culturally more traditional and religiously more conservative than the elites that have historically governed the country. The neoliberal economic policies that have fueled Turkish growth, particularly in the last decade, have disproportionately benefited this relatively new bourgeoisie and increased its profile, even in the

244. This is not so much because these elites fear democracy as it is because they fear that the results of democratic elections will continue to favor groups that promote alternative interpretations of core republican principles, secularism being chief among them. Believing that they will not be able to compete with the AKP at the ballot box, the only remaining alternative is to block reform efforts by the AKP through the unelected branches of government.

245. It is worth reiterating, however, that what is at stake in the political struggle between the AKP and these traditional elites is not whether secularism and nationalism will remain constitutive elements of Turkey's political order, but whether the system can tolerate a reinterpretation of these values that is more accommodating of private religious expression, and ethnic and cultural pluralism.

246. See, e.g., World Bank, Eur. & Cent. Asia Region Human Dev. Dep't, *Turkey: Expanding Opportunities for the Next Generation — A Report on Life Chances*, Rep. No. 48627-TR (Feb. 2010) (detailing the state of equity and opportunity in Turkey); see also Maren Zeidler, *Islam and Politics in Turkey: A Divided Nation*, QANTARA.DE (Jun. 15, 2011), <http://tinyurl.com/63odc32> (“In the cities and on the Mediterranean coast, the Kemalist establishment and intellectuals . . . have the people's ears, defending secularism and voicing opposition to the AKP. In Anatolia and the rural areas of western Turkey — areas like Denizli Province — the AKP has the support of a kind of Islamic bourgeoisie, the new religious-minded middle class.”).

bastions of the traditional socioeconomic and cultural elites of the country's western cities.²⁴⁷

The cultural shift that has accompanied Turkey's economic growth does not bespeak creeping Islamization so much as it does a recalibration of the political and economic balance of power in the country between the traditional elites of the western coast and the new provincial Anatolian business communities. The discomfort this shift has caused first burst into open political confrontation in 2007 over Gül's nomination for the presidency.²⁴⁸ Those opposed to the constitutional amendments in 2010 were much the same forces that were aligned against Gül three years earlier. Results at the polling booth demonstrated that a solid majority of the country's electorate favored the amendments, even if it meant giving greater voice to a civil society increasingly inflected by the social and cultural conservatism of the Anatolian middle classes.²⁴⁹ As with the AKP's electoral showing in 2007, the 2010 referendum reinforced the democratic mandate for the party's reform agenda.

The cultural unease with the greater public visibility of social conservatism in Turkey's public spaces should not cloud analysis of its political implications. The inclusion of a broader swath of the Turkish public in political institutions and access to state resources has sustained a liberalizing reform agenda. The AKP has won significant pluralities in five national elections in the last decade — two municipal elections (2004 and 2009) and three parliamentary elections (2002, 2007, and 2011)²⁵⁰ — bringing a measure of political and economic stability to Turkey following the turbulence and polarization of the 1990s (marked by nine coalition governments from 1993–2002).²⁵¹ During its time in office, the AKP has ushered in several significant rounds of constitutional and legislative reforms, each chipping away at the authoritarian legacy of the constitution put in place by Turkey's military following the 1980 coup. The fact that a broadening of the public base of support for government initiatives has

247. On the economic transformation that produced this new pro-Islamic bourgeoisie and its eventual arrival in Turkey's western cities, see M. Hakan Yavuz, *The Transformation of a Turkish Islamic Movement: From Identity Politics to Policy*, 22 AM. J. ISLAMIC SOC. SCI. 105 (2005).

248. See ÖZBUDUN & GENÇKAYA, *supra* note 179, at 97–101.

249. The more religious and conservative constituency of the AKP in some ways resembles more closely the demographic makeup of neighboring Muslim-majority countries than the urban elites of Turkey's coastal cities. The recalibration of the political distribution of power in Turkey that may result from the referendum — particularly as a result of democratizing the civilian judiciary — might make the Turkish example more attractive for comparative purposes in the region.

250. For a discussion of the AKP's performance in the four elections between 2002 and 2009, see Ali Çarkoğlu, Commentary, *Turkey's Local Elections of 2009: Winners and Losers*, INSIGHT TURK., Apr.–June 2009, at 1, 3 (2009). For a discussion of the AKP's performance in the 2011 parliamentary elections, see Steve Bryant & Benjamin Harvey, *Erdogan Elected to Third Term with Pledge to Rewrite Turkey's Constitution*, BLOOMBERG (Jun. 13, 2011, 9:54 AM), <http://tinyurl.com/6gshow3>.

251. For an overview of this period of coalition politics in Turkey, see ZÜRCHER, *supra* note 41, at 294–306.

strengthened (rather than deterred) reform initiatives also has promising implications for the wider Middle East.

The results of the September 2010 constitutional referendum were a testimony to the commitment of Turkish civil society to continuing the recent trajectory of democratization and liberalization, despite pronounced elite polarization. In characterizing the referendum results immediately following the vote, Prime Minister Erdoğan said that the message from the electorate is “Yes to freedom. Yes to rule of law. No to the law of the rulers. The tutelage of the coup regime is over.”²⁵² The reference to the end of the guardianship or tutelage system was one that the Turkish audience understood readily. Further, the referendum results show that commitment to ending the “tutelage of the coup regime” was far broader than the AKP’s electoral base.²⁵³ The depth of support for the referendum reflects the generational shift and anti-military orientation of the electorate. Much of the Turkish commentary following the passage of the referendum confirmed that it was more a vote to end the military’s role in the ordinary politics of the country — and to relax the suffocating grip of the state bureaucracy — than an endorsement of any particular party or politician.²⁵⁴

A realistic assessment of the meaning of the constitutional referendum would endorse the slogan embraced by many who supported the amendments package: “*Yetmez! Ama Evet!*” (Not Enough! But Yes!).²⁵⁵ While the particular amendments were a clear improvement over the prior status quo and accomplished reforms required for EU accession, they did not go far enough in addressing the shortcomings of the 1982

252. Benjamin Birnbaum, *Islamic Party a Big Winner in Turkish Constitution Vote*, WASH. TIMES, Sept. 13, 2010, at A01 (internal quotation marks omitted).

253. While the AKP has commanded a plurality of the Turkish electorate in parliamentary elections, it has never mustered the near-sixty-percent majority that the constitutional amendments package enjoyed. The AKP’s strongest electoral performance was in the national parliamentary elections that took place nine months after the constitutional referendum, in June 2011, and though the AKP garnered a near majority of the vote, the amendments package had substantially greater support.

254. See, e.g., Nuh Yılmaz, *Turkey’s Referendum: Thwarting the Specter of a Coup d’Etat*, FOREIGN POL’Y (Sept. 15, 2010, 4:09 PM), <http://tinyurl.com/2dlh9u6h>. The coverage of the referendum results in Turkey and in the West initially told a story of a regionally divided country. One Turkish commentator memorably described the results for an American audience as Turkey’s “red-blue divide.” Ash Aydıntaşbaş, *In Turkey, a Red-Blue Divide*, WALL ST. J., Sept. 17, 2010, at A17. This misleading characterization soon gave way to more nuanced maps, showing remarkable consistency across the country. *Two-Colored Analysis of Turkish Referendum Turns Multicolored*, HÜRRİYET DAILY NEWS (Sept. 24, 2010), <http://tinyurl.com/6eyhkbq>. Despite highly distorted media coverage leading up to the referendum and the call for a boycott by the leading Kurdish party, nationwide results showed remarkable voter turnout (78% outside of the Kurdish provinces) and majorities in favor of the amendment package in most regions. The Turkish Supreme Board of Elections published the official results with provincial and municipal breakdowns. See *supra* note 211.

255. On this campaign, see *Yetmez ama evet’ kampanyası* [The ‘Not Enough but Yes’ Campaign], TARAF (July 2, 2010), <http://tinyurl.com/3kc3dcx> (Turk.).

Constitution.²⁵⁶ For the national parliamentary elections of 2011, the AKP campaign platform included a return to the project of a new civilian constitution.²⁵⁷ That is an important initiative that should be welcomed by those who criticized the piecemeal approach taken in the 2010 amendments package.²⁵⁸ In the meantime, the amendments endorsed in the 2010 referendum are an incremental step toward democratization. They do not eliminate the authoritarian and statist tenor of the constitution, but they ameliorate some of its excesses.

The constitutional reforms of 2010 represent an important step in the direction of improved fundamental rights, judicial accountability and civilian control over government. The amendments opened avenues of appointment and advancement to a broader cross-section of the Turkish judiciary. In this sense, the referendum succeeded in *unpacking* the appellate courts, which had previously been limited in their composition to a self-perpetuating clique. The democratization of the judicial appointments process may well represent the end of a judicial guardianship model. But the end of such guardianship need not represent a threat to constitutional commitments. Rather, a judiciary with a more pluralist composition may enable a wider set of interpretations of those commitments — including crucially the constitutional conception of secularism — to gain a hearing.

CONCLUSION

The recent Turkish constitutional crises may have accomplished through reform what is today being sought in the broader Middle East through revolution.²⁵⁹ In its own way, the Turkish case, too, represents a democratic revolution. This Article has argued that the sources of stalled democratic consolidation in the Turkish case originated in dynamics dating back to the founding of the Republic and manifested most recently in a

256. In this respect, the 2010 constitutional amendment package resembled the eight prior reform packages that had each modified the constitution since 1982.

257. Göksel Bozkurt, *Turkish Charter Poll Gives AKP Green Light for New Constitution*, HÜRRIYET DAILY NEWS (Sept. 12, 2010), <http://tinyurl.com/3la3fbx>; *Turkish President at Odds with AKP over Timing of New Constitution*, HÜRRIYET DAILY NEWS (Sept. 29, 2010), <http://tinyurl.com/6hf2etc>.

258. Following its strong electoral performance in the 2011 elections, the AKP reiterated its intention of introducing a new initiative for a civilian constitution. When the Parliament convened in September 2011, the first order of business was the question of the new constitution. On September 29, the AKP and the CHP agreed to a roadmap for work toward a new constitution, with the goal of having a new draft prepared in the first half of 2012. *See, e.g., Çiçek Announces Constitutional Commission's 15-Point Roadmap*, TODAY'S ZAMAN (Nov. 3, 2011), <http://tinyurl.com/cbjdnzw>; Fatma Dişli Zibak, *Parties Get to Work on New Constitution, PM Wants It Done By First Half of 2012*, TODAY'S ZAMAN (Sept. 29, 2011), <http://tinyurl.com/bud7spe>.

259. Though the Turkish trajectory, too, offers a note of caution in the privileging of reform over revolution. While reform processes sometimes result in meaningful transformation, they can also become a mechanism by which regimes stave off such transformation by deploying disabling forms of incrementalism and gradualism to drain momentum.

paralyzing model of judicial guardianship. The broader context for recent conflicts in Turkey is an underlying crisis over pluralism, and managing religious and ethnic identity, that has been working its way through the political system for nearly a century.²⁶⁰ Finding a path to resolve the attendant constitutional crisis has been a convulsive process. As Arab and Western analysts propose Turkey as an exemplar of democratic transition for the wider region, it is important to be careful of the lessons that are drawn from the Turkish case.

The story told in this Article traces an arc from Turkey's *Marbury* moment in 2008 to accusations of court-packing in 2010, locating these episodes in the context of a broader set of historical and institutional legacies. As we have seen, this trajectory is more complicated than a straightforward process of democratic transition. Institutions that we would ordinarily expect to secure democratic space—in particular, a strong and independent judiciary—have served as a constraint on democratization in the Turkish case.

The Turkish judiciary is embedded in patterned institutional interactions between state actors and social groups that reproduce, rather than resolve, recursive cycles of liberalization and repression. While the particular elite preferences entrenched in the constitution and guarded by the judiciary have been specific to the Turkish case, the strategy employed by elites to maintain their privileges through the judiciary is not uniquely Turkish.²⁶¹ Formal invocations of the importance of a strong judiciary resonate with conceptions of democratic checks and balances in American and other traditions. But fundamental differences in the understanding and operation of such concepts are obscured by such resonances. For instance, in the Turkish context, the judiciary has strong institutional ties to the military, constitutional principles are derived from an instrument originally promulgated under martial law, and prior to the referendum the constitutional court exclusively reviewed appeals brought by government officials rather than ordinary citizens. In other words, both the constitutional order and the role it assigned to the judiciary have historically served to protect state prerogatives rather than individual rights. Further, in the context of a Muslim-majority country, fears of

260. Similar crises over the relationship between religion and the state, the challenges of ethnic pluralism, and the legacies of authoritarianism dating to founding-era political institutions have marked much of the post-colonial history of the formerly Ottoman Middle East. The shared origin point of Ottoman collapse (and the dynamics it set in motion) serves as another compelling reason to think lessons from the Turkish case may have broader implications for the Arab world.

261. Indeed, the Turkish story exemplifies a strategic use of the judiciary identified by political scientist Ran Hirschl as “juristocracy.” In his study, Hirschl considers the use of constitutions and courts by elites for what he terms “hegemonic self-preservation.” HIRSCHL, *supra* note 12, at 11. The cases he considers are those of Canada, New Zealand, Israel, and South Africa, but the Turkish case is broadly consistent with the trends he observes. *See id.*

repression based on religious ideology are given disproportionate attention. The result is that other forms of repression — including those imposed in the name of a particularly illiberal conception of secularism — are deemed expedient in light of fears of Islam.²⁶² Each of these factors has complicated the analysis of recent Turkish constitutional crises and is likely to plague any prescriptions for the wider Middle East drawn from the Turkish example.

Perhaps the easiest way to conceptualize the problem of a common vocabulary that masks significant differences is through the metaphor of *faux amis*, or “false friends,” borrowed from linguistics. The concept of “false friends” denotes pairs of words or phrases in two languages that differ in meaning but are deceptively similar.²⁶³ This is one way to convey the conceptual confusion generated by the use of words or phrases like “secularism,” “constitution,” “judicial independence,” “judicial review,” and “separation of powers” across disparate contexts. In the United States, these concepts are related to particular political or constitutional theories, which, in turn, may introduce a set of unstated assumptions when the same concepts are applied elsewhere. The Turkish case offers an excellent illustration of the risks of misconception associated with such unstated assumptions. For instance, debates about judicial review in the American context depend on the assumption that constitutions limit state power and entrench individual rights, enabling constitutional review to serve the purpose of protecting individuals from assertions of state power that encroach on their rights. But if one begins from the premises embedded in the Turkish constitutional system, the meaning of judicial review is quite different and more likely to favor state prerogatives than individual rights. Similarly, the association of secularism with liberal commitments in the United States may serve to obscure the sometimes illiberal implications of Turkey’s statist and anticlerical secularism. The resulting confusion over depictions of contemporary Turkish constitutional crises — pitting pro-Islamic actors in favor of liberal reforms against secular elites wedded to illiberal commitments — is unsurprising. Yet, this confusion may produce a flawed account of the current Turkish constitutional “model” and with it

262. Additional concerns that are obscured by the overarching fear of Islamism include forms of repression that address other social cleavages such as ethnicity, language, sect, and nonreligious ideological commitments. Thus, the Turkish record of discrimination and human rights abuse against the Kurds (on the basis of ethnicity and language), the Alevis (on the basis of their sectarian identity), and leftist activists (for fear of the influence of communism as an ideology) is also frequently overlooked or excused. *See supra* Part II.B for a discussion of this history of discrimination and human rights abuse.

263. Classic “false friend” examples recall the observation attributed to George Bernard Shaw — that England and America are two countries separated by a common language. For instance, the verb “to table” may mean either to raise a matter for consideration (as it does in the United Kingdom) or to suspend a matter from consideration (as understood in the United States).

a set of troubling prescriptions that risk transplanting antidemocratic tendencies from the Turkish context to other regional transitions.

The broader lesson offered by the Turkish case is to be aware that elites may manage processes of institutional reform during periods of transition to retain power or entrench privilege.²⁶⁴ In this sense, the Turkish case counsels against over-investing in particular institutional strategies for democratization. The Turkish political order at the turn of the twenty-first century featured a strong and independent constitutional court that became an obstacle to democratization. A decade later, Turkey has produced a new institutional balance between the judiciary and the political branches that may unblock the path to democratic consolidation.

The Turkish constitutional experience provides compelling evidence that certain definitions of judicial independence may not serve the purposes of democratic consolidation.²⁶⁵ For instance, an emphasis on separation of powers without checks and balances may remove the only mechanism for democratic legitimacy in a system — like the Turkish one — comprised of elected and unelected branches of government. Further, judicial independence cannot be understood independent of conceptions of judicial accountability. Even under the U.S. Constitution, judicial independence is guaranteed insofar as the federal courts have a monopoly over judicial power and are insulated from threats to tenure and salary.²⁶⁶ But such judicial independence is also “counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability.”²⁶⁷ In other words, the language of “independence” may

264. Both authoritarian and democratic orders channel political authority through law and both systems frequently place constitutions at the center of their legal configurations. One important lesson of the Turkish case is that institutions that entrench and guard constitutional understandings may serve antidemocratic ends for this reason.

265. For instance, recent social science research suggests that constitutional courts modeled after Hans Kelsen’s conception of constitutional review may be more prone to politicization. Alec Stone Sweet’s study of the European Union, where the democratic legitimacy of constitutional review depends on Kelsenian constitutional theory, concludes that: “European policy-making has been *judicialized*” and that courts use *ex ante* judicial review to serve as a kind of supralegislature. STONE SWEET, *supra* note 226, at 1, 3–38. The TCC, a product of constitutional borrowings from European models, reflects elements of the Kelsenian model, as do the apex courts of those Arab countries with a system of constitutional review. Empirical studies suggest that Kelsenian constitutional courts in civil law jurisdictions are prone to politicization. *See, e.g.*, GINSBURG, *supra* note 12; Sofia Amaral-Garcia et al., *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, 6 J. EMPIRICAL LEGAL STUD. 381 (2009). This result underscores the potential relevance of the Turkish experience of judicialized politics in other settings.

266. Geyh, *supra* note 73, at 159–60.

267. *Id.* at 160. Indeed, Geyh argues that the U.S. Constitution provides for a system of interbranch interdependence rather than independence, precisely because the separation of powers is subject to a system of checks and balances. *Id.* at 163. In a similar vein, Ferejohn and Kramer have argued that while the relationship between judicial independence and accountability is complex, a balance must be struck in any properly functioning constitutional order. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 962–64 (2002); *see also* Frances K. Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S.

not properly capture the *interdependence* between branches in a government with a well-functioning system of checks and balances.

Beyond the added emphasis on judicial accountability, the very definition of judicial independence may need to be adapted for transitional situations. For instance, decisional independence from other branches of government is emphasized in the scholarly literature that has grown out of the American tradition.²⁶⁸ But alternative conceptions might emphasize independence from political capture, whether by another state institution or by particular elites. The judicial guardianship model long operative in Turkey is, at base, a model of elite capture of the judiciary. Moreover, the ideological uniformity that the judicial appointments procedures ensured prior to the 2010 constitutional amendments exacerbated the effects of such elite capture.²⁶⁹ The judicial selection criteria tended to produce appellate courts in which judges shared very similar social backgrounds.²⁷⁰ The socioeconomic background of appellate judges further contributed to the production of homogeneity²⁷¹ in higher courts populated by an elite less and less representative of the broader judiciary, let alone the democratic public that they served.²⁷² All of these features complicate any

CAL. L. REV. 625, 630 (1999) (arguing that authority is granted to courts in democracies on the basis that “decisional independence” is “accompanied by accountability”).

268. See, e.g., Stephen B. Burbank, *What Do We Mean by ‘Judicial Independence’?*, 64 OHIO ST. L.J. 323 (2003).

269. For instance, Peter Russell has argued that “[t]he greatest danger to judicial independence from political manipulation of the staffing or promotion process is ideological conformity.” Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 5, at 1, 17.

270. This is also a common characteristic in the region as a whole. Ran Hirschl has observed that the composition of constitutional courts in the Middle East generally reflect judges whose legal education includes familiarity “with some of Western law’s basic principles and methods of reasoning.” Ran Hirschl, *Juristocracy vs. Theocracy: Constitutional Courts and the Containment of Sacred Law*, 1 J. MIDDLE E. L. & GOVERNANCE 129, 138 (2009). He goes on to argue that this shared educational background also correlates to a shared social background, and a common outlook on matters of religion and state relations.

An “attitudinal” approach to judicial behavior is therefore likely to manifest itself with most or all apex court judges adhering to [particular] ideological preferences, worldviews, and values Most judges belong to the very same social stratum that is, by and large, set to lose by the spread of religious radicalism. Likewise, judges seem to care about their reputations within their immediate social milieu, court colleagues and the legal profession more generally, and will therefore likely seek to advance notions of collective identity that are popular among these communities of reference.

Id. at 139.

271. In the absence of checks on judicial discretion, judges can be expected to rule in ways that reflect the social background and dominant culture in which they were socialized. Selecting judges from the same background therefore magnifies the likelihood of ideological uniformity. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1982 (1990).

272. By “representative” here I do not mean that judges should be selected *in order* to be representative, but that so long as they are selected on the basis of a specifically *unrepresentative* social background and the requirement of uniformity of ideological preferences, the social composition of the judiciary will further undermine democratic justifications for judicial review. For instance, Melissa Williams notes that because members of privileged groups lack the experience of marginalization,

analysis of the requirements of “judicial independence” or “separation of powers” as conventionally understood. Indeed, the Turkish case suggests that an emphasis on judicial independence in contexts of democratic transition may need to be fundamentally rethought.

Insulated from democratic accountability and aligned with the interests of a particular elite, the TCC has often worked to sustain repressive patterns of rule and elite privilege. There is reason to fear similar long-run outcomes in neighboring states.²⁷³ Evidence from the Turkish case, however, also suggests that moments of transition present windows of opportunity to disrupt repressive patterns and provide more direct popular access to judicial and constitutional reform. If Turkey is taken as a more broadly relevant example, the model of a democratically accountable judiciary, produced following the constitutional referendum in late 2010, should be embraced over the previous paradigm of judicial guardianship.²⁷⁴

In the end, the recent political polarization in Turkey may prove to be a source of liberalizing hope rather than authoritarian despair. The constitutional conflict of the last decade was not a confrontation between secularists and Islamists or a modernizing elite and a backward-looking provincial bourgeoisie. Rather, it was a conflict over the apportionment of

they often lack an understanding of what marginalized groups' interests are. MELISSA S. WILLIAMS, VOICE, TRUST AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION 242 (1998). Accordingly, she argues that if judges are selected exclusively from a privileged elite, they may not be qualified to apply the law in certain instances, however competent or well-intentioned they may be. *Id.*

273. As will be discussed further below, critical to this dynamic in the Turkish context is the fact the definition of secularism at issue in the constitutional crises surveyed is not the liberal conception of the Anglo-American tradition. Rather, the Turkish conception of secularism is a statist conception of secularism that protects the state's prerogatives, including the power to impose an official state-controlled definition of religion. An independent judiciary with broad powers of judicial review defending an illiberal, statist constitutional value presents a more pronounced counter-majoritarian difficulty than the more familiar instances in the American context, where judicial review is exercised to protect individual rights from state encroachment. A review of the recent history of the Egyptian Supreme Constitutional Court suggests these issues may not be unique to Turkey when considered in regional context. *See, e.g.*, Tamir Moustafa's scholarship on the limits of the Supreme Constitutional Court's activism in the area of state security courts and “insulated liberalism.” TAMIR MOUSTAFA, POLITICAL ROLE OF THE SUPREME CONSTITUTIONAL COURT: BETWEEN PRINCIPLES AND PRACTICE (2006), available at <http://tinyurl.com/66h26su>; *see also* TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT (2007).

274. As discussed above, the judicial reforms undertaken by the 2010 referendum have met with approval from the European Union's Venice Commission. No official assessment of the reforms' conformity with the International Covenant on Civil and Political Rights (ICCPR) has been issued by the United Nations. For the provisions of the ICCPR, see International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171. The impending visit to Turkey by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, should yield conclusions concerning compliance with the ICCPR in advance of debates on a new draft constitution (expected to be introduced in 2012). Country Visits: Special Rapporteur on the Independence of Judges and Lawyers, UNITED NATIONS OFFICE HIGH COMMISSIONER FOR HUM. RTS. (last visited Oct. 31, 2011), <http://tinyurl.com/62xho4a> (noting a forthcoming visit by Special Rapporteur to Turkey in October 2011).

access to state resources between a defensive elite seeking to safeguard its traditional privileges and a new class of social actors seeking to transform state institutions to accommodate ethnic and religious particularism. Understood in this way, the resonance of these Turkish conflicts with broader contemporary trends in the Middle East is apparent.

Turkey presents a cautionary tale for the Arab uprisings, albeit one that ends in a note of optimism. The Turkish experience counsels against the transplantation of “best practices” prescriptions or insistence on institutional prerequisites for transition. The tendency to privilege process and overemphasize constitutional form without regard to contextual differences may obscure more than it explains. A focus on pure legality without attending to constitutive processes, institutional legacies, ideological commitments, historical patterns, and social stratification — none of which can be reduced to the written text of a constitutional instrument — will produce formulaic but misguided insistence on form over substance. This tendency was apparent in the reverence shown for the presidential succession terms of the Mubarak-era constitution even as a popular uprising had clearly rendered the apparatus of the Mubarak regime untenable.²⁷⁵ Further, constitutional borrowings and transplantations have inadvertent and lasting effects. Whether lessons from the Turkish case will be relevant in the transitions currently underway in the Arab world is an open question. At a minimum, however, the Turkish case suggests that conventional accounts of judicial independence sometimes yield strategies to insulate elite privileges from democratic reversal, blocking reforms.²⁷⁶ In

275. See *supra* notes 6–10 and accompanying text for a discussion of the early insistence on constitutionalism prior to the ouster of Mubarak in February 2011.

276. Nor is this phenomenon alien to the American context. For instance, Girardeau Spann has argued that “to the extent that [the electorate is] able to forgo Supreme Court guardianship over their interests in favor of the protections available through the pure political process, the political option has considerable appeal.” Spann, *supra* note 271, at 1991. He reasons that judicial review, even in the American context of checks and balances, amounts to a form of legitimation of the status quo through which “beneficiaries of the present distribution of societal resources seek to convince those who do not benefit that the social and legal systems responsible for the present distribution are basically fair and should not be replaced.” *Id.* at 2025. That elites who benefited from authoritarian or semi-democratic systems will resist reforms is not a novel insight:

Authoritarian elites . . . are typically interested in restraining some, if not all, politicians . . . [t]o the extent that they wield influence over the terms of the transition, outgoing governments can institutionalize such restraint through two mechanisms: by creating insulated decision-making structures that can be counted on to pursue [the elite’s] policy agenda; and by placing various limits on the composition and activities of the political opposition.

STEPHAN HAGGARD & ROBERT R. KAUFMAN, *THE POLITICAL ECONOMY OF DEMOCRATIC TRANSITIONS* 120–21 (1995). What is novel, however, is applying this insight in the Middle East where secular elites allied with the West adopt precisely these familiar strategies to entrench their privileges. In these instances, because the liberalizing or democratizing actors give rise to fears of political Islam, the analysis becomes clouded by the shared distrust of the would-be democratizers among internal elites and external actors. When the democratizing impulse comes from political Islamist quarters, recommendations begin to favor protecting secular elites from normal political competition by constitutionalizing their preferences and entrusting them to an insulated judiciary.

light of the role-reversals associated with transitions, political actors and political analysts alike would do well to remember that secularism is not always liberal, and liberalizing (or prodemocratic) forces may not always appear to be secular.²⁷⁷

In the Turkish case, where secularism has been at issue, conflict has been described in terms of creeping Islamism. In fact, I have argued that the constitutional crises would be better described as a clash between two conceptions of secularism, one based on laicist subordination of mosque to state, the other on a more accommodationist model of expressions of private religious identity in the public sphere.²⁷⁸ Likewise, the conflict over minority rights is not a fight over separatism or partitioning the country, but a clash between two conceptions of nationalism — one ethnic, the other civic. Both the AKP and Kurdish reformers may be accidental democrats in that they have come to pursue liberalization as the best avenue to address their constituencies' grievances. Though the democratizing and liberalizing posture of these actors may be contingent, it is also the predictable outcome of their shared experience of repression. The founding constitutional period was marked by the incomplete suppression of pluralism — particularly of religious and ethnic identity — setting the stage for recursive conflict. The democratic iterations of the last decade — the repeated back-and-forth between reform and retrenchment — have resulted in an interrogation of the founding commitments that set the repressive cycle in motion. Ultimately, the effort to transcend Turkey's founding cleavages requires the development of a new, more liberal conception of secular nationalism capable of embracing diverse ethno-cultural and religious identities.

Accordingly, the very hegemonic preservation strategies Haggard and Kaufman identify are redescribed through the vocabulary of Western constitutionalism as necessary checks on religious reaction. Ran Hirschl both identifies this tendency and argues that it may have salutary effects in his recent monograph, *Constitutional Theocracy*. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010) 162–206.

277. The role of the Egyptian Muslim Brotherhood as a potential source of support for liberalizing reforms is an example of a phenomenon somewhat reminiscent of the surprise with which the AKP's reformist initiatives have been met. On the role of the Muslim Brotherhood in Egypt, see Essam El-Erian, Op-Ed, *What the Muslim Brothers Want*, N.Y. TIMES, Feb. 9, 2011, at A25, in which El-Erian, a member of the Muslim Brotherhood's guidance council, argues that the organization is in favor of “reform and rights for all . . . not just for Muslims, but for all Egyptians.”; Brian Dabbs, *Egypt's Muslim Brotherhood, Eying Election, Joins Secular Coalition*, ATLANTIC INT'L (Jun. 17, 2011, 7:00 AM), <http://tinyurl.com/62y9h6m>; and Mohammed Zahid, *The Muslim Brotherhood in the Post-Mubarak Era*, FOREIGN POL'Y J. (Sept. 17, 2011), <http://tinyurl.com/6279co3>.

278. While the “laicist” model is frequently described as “French” and the accommodationist model is likened to the American separation of church and state, the comparisons to France and the United States are oversimplifications. For a more developed version of the argument that Turkey has experienced a clash of secularisms particular to its experience as a Muslim-majority country situated in the Middle East, see UMUT AZAK, *ISLAM AND SECULARISM IN TURKEY: KEMALISM, RELIGION AND THE NATION STATE* 1–20 (2010).

As in the past, a revitalized language of difference — the resurgence of religion in the public sphere and the reemergence of Kurdish identitarian claims on the state — is challenging the unifying discourse of Turkish modernization. The original model of nation-building and state formation on which the Republic was constructed — modernization from above, directed and imposed by a military-bureaucratic establishment, and defended by core state institutions, including the judiciary — has become self-undermining. The very developments that might be construed as the realization of the Kemalist vision — accession to the European Union, democratic consolidation, and a stable set of relationships with neighboring countries — have increasingly been met with suspicion and hostility by the latter-day Kemalist establishment. The question today vexing the Turkish Republic is whether it will be able to fashion a less defensive, less repressive response to these challenges more than seventy years after the death of its founding statesman. The answer to this question may depend on the capacity of the elected branches of the Turkish government to subject the bureaucratic institutions of the state to democratic checks. Contrary to conventional wisdom on democratization, charting such a new path for Turkey may require judicial accountability rather than prescriptions for judicial autonomy.

The path to a more pluralist and democratic Turkey will also require the construction of a new social contract, one that already exists in embryonic form as a result of the draft civilian constitution prepared by the Özbudun committee. At the time that the draft was produced, it did not gain support across the Turkish political spectrum despite its strong liberal credentials. While many agreed that democratic consolidation in Turkey required a new constitution, not piecemeal amendments to the military-era constitution, there was little substantive consensus to ground such a project. Some commentators in favor of a new constitutional initiative faulted the AKP government for commissioning a group of jurists to produce the draft, rather than adopting a more consensual approach. In particular, they argued in favor of reconstituting the mechanism that had been used in previous rounds of constitutional amendment, an All Party Accord Commission.²⁷⁹ But while social and political consensus are

279. The All Party Accord Commission (APAC) was established by the Turkish Parliament and was composed of representatives of all parties with seats in Parliament. A sub-commission that was equally representative was tasked with producing draft amendments, that were then submitted to the APAC for consideration. The negotiations on the APAC involved interparty bargaining as well as consultation with the president, TCC, and the military. For details on the operation of the APAC in the case of the adoption of constitutional amendments in 2001 (the last time the mechanism was used), see Gönenç, *supra* note 84, at 95–96. For the most prominent argument that the APAC device should have been employed by the AKP in 2007, see Andrew Arato, Op-Ed, *The Decision of the Turkish Constitutional Court: The Way Ahead*, INFORMED COMMENT (Sept. 12, 2008), <http://tinyurl.com/69wujj5>.

certainly essential to the eventual legitimacy of a constitution, such demands for consensual arrangements were misplaced in 2007, given the heightened parliamentary polarization that resulted from a smaller number of parties having been seated.

Whereas in the 1990s a wide number of political parties were represented in Parliament and included in negotiations over amendments, fewer parties made it past the electoral threshold in the 2000s. As a result, for much of the decade, only two (2002 to 2007) or three (2007 to 2011) parties were officially seated in Parliament.²⁸⁰ Further, the opposition parties formed a nationalist block that was largely unwilling to negotiate with the AKP on key constitutional questions.²⁸¹ While they lacked the requisite numbers to block AKP initiatives in Parliament, they were able to adopt this rejectionist stance because they sought to resolve core political questions by extra-political means, through resort to the courts.²⁸² As we have seen, reform initiatives undertaken by the AKP ended in constitutional challenges and ultimately reversals. The willingness of the judiciary to serve as guardian of Kemalist commitments placed the courts reliably in the camp of the opposition parties. As a result, the opposition was left with little incentive to enter into political negotiations with the AKP, let alone agree to compromises. By removing the ideological litmus test that previously governed the judicial promotion system, the constitutional referendum may have reduced the propensity of the appellate courts to serve as an enforcer of Kemalist ideological conformity. Without the extra-political trump card of judicial reversal of AKP initiatives, the opposition parties may now face real incentives to enter into the political fray and bargain for meaningful compromises.

In an important sense, then, judicial reform may not only unblock the possibility of constitutional reform, it may generate the conditions needed to create and sustain a stable constitutional settlement. In both

280. From 2002 to 2007, the only two parties seated in Parliament were the AKP and the CHP; following the 2007 elections, the ultranationalist MHP also gained a high enough proportion of the vote to be represented in Parliament. The Kurdish political parties, the DTP and its post-closure successor, the BDP, ran their candidates as independents and then formed a party caucus within the Parliament following the election. In this way, though the party was unable to garner enough votes to meet the ten percent electoral threshold currently in place in the Turkish political order, it was able to have representatives in Parliament, adding a fourth party.

281. While it is true that the CHP and AKP were able to come to an accommodation regarding a set of constitutional amendments that were necessary to clear the path to EU accession talks in 2004, those amendments did not entail a renegotiation of core Kemalist commitments, such as the role of the judiciary as an ideological guardian or the constitutional conception of secularism, and were therefore less polarizing. On the specific amendments adopted in 2004, see Fatih Baran, *Turkey Changes Its Constitution*, SOUTHEAST EUR. TIMES (May 25, 2004), <http://tinyurl.com/437qrd>.

282. Again, this is not alien to the American context, as was apparent in the attempt to take the question of slavery out of the political arena through constitutional intervention by the Supreme Court in *Dred Scott*. *Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); see also *supra* note 71 and accompanying text.

democracies and transitions from authoritarian rule, the most stable constitutions are grounded in negotiation and compromise across the political spectrum.²⁸³ But such a consensual process requires the possibility of elite convergence and compromise, something that had been forestalled by the expectation that the courts would vindicate opposition preferences that did not enjoy electoral support. Consensus and accommodation among competing elites, bargaining with each other through political processes, would place Turkish constitutionalism on a more democratic and legitimate footing. Without a reliable judicial veto on such processes, the political space for contestation and negotiation over core constitutional commitments has been reopened. For instance, the two principal parties contesting the 2011 parliamentary elections, the AKP and the CHP, both committed to constitutional reform as part of their election platforms.²⁸⁴ This was an early sign that the referendum may have succeeded in creating the prerequisites for democratic resolution of the constitutional impasse.²⁸⁵

One attractive model for thinking about the way forward in Turkey is to view the last decade through the prism of “democratic iterations.”²⁸⁶ The concept suggests that repeated public argument, deliberation, and negotiation over core commitments — whether legal, political, constitutional, or even religious — are learning processes through which new meanings and political possibilities may be created in democratic public spheres. The risk of such iterated processes is that they may

283. For a discussion of a broad range of democratic transitions and the role of consensus-based processes, see LINZ & STEPAN, *supra* note 4. The discussion of the Spanish case in Chapter 6 is especially pertinent.

284. Göksel Bozkurt, *New Constitution, New Tactics*, HÜRRIYET DAILY NEWS (Jan. 14, 2011), <http://tinyurl.com/3grob86> (noting that Prime Minister Erdoğan promised that “the Turkish public will draft a new constitution following this year’s elections”); *Kılıçdaroğlu: Yeni anayasayı hemen yapalım [Kılıçdaroğlu: Let’s Immediately Work on a New Constitution]*, RADİKAL (Sept. 25, 2010, 10:12 AM), <http://tinyurl.com/66hjf9> (Turk.).

285. Of course, to be truly democratic, the elections should be conducted either without an electoral threshold or with a significantly lowered threshold, allowing a broader spectrum of political parties to be represented. Since such a reform would reduce the share of seats available to the AKP and the CHP, neither party is likely to initiate a lowering of the threshold for parliamentary elections. Barring such reform, an alternative recently proposed by Andrew Arato would afford stronger democratic credentials to the constitution-drafting process. Arato has proposed using the electoral results of parliamentary elections without a (or with a lower) threshold as a basis to seat representatives on a national all-party convention that would deliberate over provisions of the new constitution and recommend a draft to the Parliament. Andrew Arato, *Democratic Constitution-Making and Unfreezing the Turkish Process*, 36 PHIL. & SOC. CRITICISM 473, 484–85 (2010).

286. Şeyla Benhabib developed the concept of “democratic iterations” to connote both the liberating and repressive potential of recursive renegotiations of the meaning of core commitments — religious, cultural, legal, and political — in democratic public spheres. ŞEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004). For a discussion of the concept of democratic iterations in the Turkish context, see Şeyla Benhabib, *The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey*, 36 PHIL. & SOC. CRITICISM 451, 466 (2010).

produce repeated conflict and polarization, with repressive potential. But they also have the potential to represent a jurisgenerative means of producing provisional equilibria around new constitutional meanings aligned with the underlying (and shifting) pluralism of the political and social order.²⁸⁷ Much of the previous decade in Turkey saw such iterations produce repressive outcomes. The recursive process by which the courts pushed back against reform initiatives and reasserted the founding ideological commitments of the state served as a constraint on democratic deliberation. The removal of that constraint may now enable constitutional politics to resemble a process of democratic iteration without extra-political disruption.

As the Arab world stands poised on the brink of a new wave of democratization from below, the democratic experiment underway in Turkey reflects both the promise of liberalization and the risks of reversal confronting the broader region. Of course, no constitutional model can be transplanted meaningfully from one context to another with the expectation of producing consistent outcomes. Processes that might have strong democratic credentials in one setting may produce antidemocratic outcomes on the ground in others. A focus on pure legality, as was evidenced in early debates about the significance of the constraints within Egypt's authoritarian constitution, may obscure much needed contextual analysis of how processes operate in practice. The Turkish case demonstrates that an emphasis on the independence of the judiciary, without attention to the role of judicial institutions in historical practice, might empower authoritarian tendencies at the expense of popular calls for democratization. By contrast, attending to the relationship between path dependent institutional trajectories and particular processes of liberalization may produce unexpected but effective strategies. As the Turkish example counsels, the promotion of liberalizing outcomes on the ground may require departures from conventional wisdom concerning the role of courts and constitutions in transition.

The Turkish model is a function of both historical legacies and contemporary dynamics. The enforced homogeneity project of Kemalism may have failed, but it left in its wake the foundations for a common political culture that may yet form a basis to bind the multi-ethnic, multi-confessional population of Turkey to a fully democratic order. Turkey's ability to fulfill this promise is the most important measure of whether it may serve as a source of optimism for the Middle East.

287. Benhabib borrows her concept of "jurisgenerativity" from Robert Cover. For a definition of the concept and her discussion of its relationship to Cover's *Nomos and Narrative*, see Şeyla Benhabib, *Democratic Exclusions and Democratic Iterations*, 6 EUR. J. POL. THEORY 445, 454–56 (2007).