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The Origins and Limits of Originalism: A Comparative Study

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ARTICLES

The Origins and Limits of Originalism: A Comparative Study

Ozan O. Varol*

ABSTRACT

In the debate about originalism in the United States, scholars have devoted scant attention to the question whether the United States stands alone in its fascination with originalism. According to the prevailing view, originalism is distinctively American and the study of comparative originalism is an oxymoron. This Article challenges that conventional view. Drawing on neglected Turkish-language sources, the Article analyzes, as a comparative case study, the use of originalism by the Turkish Constitutional Court (Anayasa Mahkemesi) to interpret the secularism provisions in the Turkish Constitution. Comparing the Turkish version of originalism to American originalism, the Article sheds light on broader debates in the United States about the origins, functioning, and limits of originalism.

* Visiting Assistant Professor of Law, Chicago-Kent College of Law. This Article is dedicated to the memory of the author's grandfather, Şakir Kan, who passed away during its writing. For helpful discussions and feedback, I thank William Birdthistle, David Fontana, Jill Goldenziel, Sarah Harding, Steven Harris, Richard Kay, Jeremy Kidd, Harold Krent, David Law, Sheldon Nahmod, Bertil Emrah Oder, Hank Perritt, Todd Pettys, Christopher Schmidt, Tacettin Varol, Yurdanur Varol, and participants at workshops at the Chicago-Kent College of Law and the Law & Society Association Annual Meeting in June 2011. All Turkish translations in the Article, including translations of the Turkish Constitutional Court decisions, are mine.

This comparative study calls into question the existing theories in the American legal literature about why originalism thrives in certain nations. This Article suggests a new hypothesis that views support for originalism as a cultural, not legal, phenomenon: originalism blossoms in a nation when a political leader associated with the creation or revision of the nation's Constitution develops a cult of personality. The cult-of-personality hypothesis explains why originalism has thrived in nations such as Turkey and the United States, where the nation's founders have developed a strong cult of personality, but has failed to find a strong and sustained following in nations such as Australia, where the founders are held in no special reverence.

The Turkish case study is also instructive on the limits of originalism. Critics of originalism in the United States argue that originalism allows the dead hand of the past to rule an evolving society. In response to the critics, originalists note that the legislature has the option of amending the Constitution if its original meaning no longer comports with societal norms. But what if constitutional amendment were not an available option? The Turkish case study suggests that when the legislature lacks a plausible method—however difficult it may be—for amending the Constitution in times evolving societal norms, the continued use of originalism by the judiciary may motivate the legislature to place political constraints on the courts. In Turkey, the Constitutional Court's embrace of originalism but rejection of legislative attempts to amend the Constitution led to the adoption of a court-packing plan in September 2010.

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I. INTRODUCTION

A debate about originalism has swept the United States. The intricacies of originalism are discussed, not only in academic circles,¹ but also in popular discourse and popular media.² Most recently, a Saturday Night Live skit featured a news anchor speculating about the originalist understanding of the Second Amendment.³ According

1. See, e.g., GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION (1992); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875 (2008); Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009); Thomas B. Colby, *The Sacrifice of New Originalism*, 99 GEO. L.J. 713 (2011); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009) [hereinafter Greene, *Origins*]; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009) [hereinafter Greene, *Selling Originalism*]; Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods*]; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008) [hereinafter McGinnis & Rappaport, *Pragmatic Defense*]; Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707 (2011); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

2. Greene, *Origins*, *supra* note 1, at 17 (“[Originalism] is discussed on talk radio and in best-selling books; in blogs and in newspaper columns; in presidential campaigns and at water coolers.”).

3. *Saturday Night Live* (NBC television broadcast Jan. 15, 2011), available at <http://www.hulu.com/watch/207598/saturday-night-live-update-constitutional-corner>. In the skit, a news anchor questioned how the Founding Fathers would have applied

to a recent poll, nearly half of Americans favor originalism.⁴ It is astonishing that nearly half of Americans support a technical legal methodology for interpreting the Constitution.⁵

Does any other nation share this American fascination with originalism? The prevailing view is no: originalism is primarily an American obsession and the term comparative originalism is an oxymoron. For example, Jamal Greene has written about “the global rejection of American-style originalism” and argued that originalism is “an exceedingly unpopular view around the world.”⁶ Likewise, according to Michel Rosenfeld, “recourse to originalism is virtually nonexistent” in Europe.⁷ Jill Lepore has echoed the same view by arguing that “originalism . . . has no purchase anywhere but here” in the United States.⁸

This Article challenges these conventional views. Contrary to the popular belief that originalism is distinctively American, I argue that

the Second Amendment to contemporary society. *Id.* The anchor posited that, were the Founding Fathers here today, they would respond: “How can you speak of militias when you have steel dragons fly through the sky?” *Id.* Originalism was also prominently featured in Eliot Spitzer’s recent interview with Fareed Zakaria and Simon Schama about the interpretation of the U.S. Constitution. *See* Amar Bakshi, *U.S. Constitution: A Flexible Document*, GLOBAL PUB. SQUARE (July 7, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/07/07/u-s-constitution-a-flexible-document> (“So, let me jump then to a question which is at the heart of so much of this debate—the word originalism. People say we must interpret the Constitution as it was understood by those who drafted it. Does that make sense?” (statement of Eliot Spitzer)).

4. *See* Greene, *Selling Originalism*, *supra* note 1, at 659 (“Polls report that nearly half of Americans claim to believe that the original intentions of the Constitution’s authors should be the sole consideration in Supreme Court constitutional interpretation, and about seven in ten believe it is ‘very important’ for a good Supreme Court Justice to ‘uphold the values of those who wrote our Constitution two hundred years ago.’” (citations omitted)); Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER, Jan. 17, 2011, at 70 (noting that four in ten Americans support originalism); *see also* Greene, *Selling Originalism*, *supra* note 1, at 691 (noting that the terms “originalism” or “originalist” appeared in the *Washington Post*, the *New York Times*, and the *Wall Street Journal* “a total of eighty-five times in the three-year period from 2005 to 2007”).

5. *See* Greene, *Selling Originalism*, *supra* note 1, at 696 (“The public does not seem to understand the Court or its business with nearly the sophistication of legal professionals and academics, but it is nonetheless willing to offer an opinion on constitutional methodology.”); Eric A. Posner, *Why Originalism Is So Popular*, NEW REPUBLIC (Jan. 14, 2011), <http://www.tnr.com/article/politics/81480/republicans-constitution-originalism-popular> (noting “the rapid political rise of the once-obscure, ivory-tower theory of originalism”).

6. Greene, *Origins*, *supra* note 1, at 19.

7. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT’L J. CONST. L. 633, 656 (2004).

8. Lepore, *supra* note 4; *see also* Grant Huscroft & Bradley W. Miller, *The Challenge of Originalism: Theories of Constitutional Interpretation* 16 (forthcoming 2011) (“Originalist theory has little purchase outside of the United States . . .”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875052.

originalism has a foreign story. Analyzing the use of originalism by the Turkish Constitutional Court (*Anayasa Mahkemesi*) as a comparative case study, this Article contributes to a nascent academic debate on comparative originalism.⁹

Amidst the ongoing turmoil in the Arab world, the Republic of Turkey has gained newfound importance. As violent revolts unfold across nations such as Tunisia, Egypt, Libya, Syria, and Yemen, repressive leaders who have clung to power for decades are losing their grip, and autocracy is gradually giving way to democracy. Commentators have touted the Republic of Turkey as a role model for Arab nations that are craving a new democratic constitution.¹⁰

Though located in a region of the world with rising Islamic fundamentalism, Turkey remains a democratic and secular state.¹¹ Muslims make up 99.8 percent of Turkey's population, yet its strictly secular legal regime has rejected the implementation and application of Islamic laws.¹² Until the Republic's formation in 1923, Turkey was home to an Islamic fundamentalist regime under the Ottoman Empire, which relegated women to second-class status.¹³ Only ten years after the downfall of the Empire, Turkish women obtained the right to vote—before women in Canada, France, and Italy—and two years thereafter, eighteen women were elected to the Turkish Parliament.¹⁴ The once-fundamentalist and now-majority-Muslim Turkey gave the world its first female Supreme Court Justice and its first female fighter pilot, and Turkish voters elected a female Prime Minister, Tansu Ciller, in 1993.¹⁵

9. See generally David Fontana, *Comparative Originalism*, 88 TEX. L. REV. SEE ALSO 189 (2010).

10. See, e.g., *A Muslim Democracy in Action; Turkey's Election*, ECONOMIST, Feb. 19, 2011, at 59 (“[S]o many pundits have taken to talking up a ‘Turkish model’ as a way forward for Egypt.”); Marc Champion, *Turkey Navigates Path Through Unrest in Mideast, North Africa*, WALL ST. J., Feb. 22, 2011, at A10 (discussing Turkey’s “dramatically increased economic and political role” in the Middle East and North Africa); Joe Parkinson, *For Turkey, Egypt Crisis Holds Risk and Promise*, WALL ST. J. (Jan. 31, 2011), <http://online.wsj.com/article/SB10001424052748703439504576115900415938250.html> (“The anti-regime protests in Tunisia, Egypt and Yemen have drawn attention to Turkey’s relative success at wedding democratic freedoms with religion. It could emerge as the alternative model for countries that might soon have to choose between a democratic or Islamic administration.”); Landon Thomas, Jr., *In Turkey’s Example, Some See a Map for Egypt*, N.Y. TIMES, Feb. 6, 2011, at A10 (“As Egypt struggles to reinvent itself, many experts in the region say that it might look to Turkey for some valuable lessons.”).

11. See generally Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT’L L.J. 1 (2007) (discussing the past, present, and future of secularism in Turkey).

12. *Id.* at 3.

13. *Id.* at 10.

14. *Id.* at 17.

15. *Id.* at 17–18.

Recently, Turkey's economy has also been a resounding success story. Only ten years ago, the Turkish economy was in shambles, the unemployment rate was skyrocketing, and the inflation rate was "dizzily high."¹⁶ Yet in 2010 and 2011, when the economies of surrounding European nations foundered, Turkey's economy flourished. In 2010, Turkey's economic growth was the fastest in Europe.¹⁷ Likewise, in the first quarter of 2011, the Turkish economy grew by 11 percent, outstripping China and Argentina to become the fastest growing economy in the world.¹⁸ The magnitude of Turkey's economic growth led commentators to label Turkey "Eurasia's rising tiger"¹⁹ and "the China of Europe."²⁰

Despite its political, legal, and economic importance in the Middle East, the Republic of Turkey and its Constitution have received little attention in the academic legal literature in the United States.²¹ As David Fontana recently observed, leading law review articles on comparative law focus primarily on the same countries—Canada, New Zealand, Australia, the United Kingdom, South Africa, France, Germany, and India—and largely neglect others.²² With the increasing globalization of constitutional law and attendant academic debates on constitutional convergence and divergence,²³ the little-studied constitutions of the world cannot remain ignored.

Drawing on neglected Turkish-language sources, this Article fills part of that academic void by presenting the first comparative analysis of the Turkish Constitutional Court's (*Anayasa Mahkemesi*)

16. *Anchors Aweigh*, *ECONOMIST*, Oct. 23, 2010, at 3.

17. *Turkey Has Done It!*, SABAH (Jan. 4, 2011), <http://english.sabah.com.tr/Economy/2011/04/01/turkey-has-done-it>.

18. Marc Champion & Joe Parkinson, *Turkey's Economy Expands 11%*, *WALL ST. J.*, July 1, 2011, at A11.

19. *Id.*

20. *Is Turkey Turning Its Back on the West? A Country's Welcome Rise*, *ECONOMIST*, Oct. 23, 2010, at 14.

21. See, e.g., Hootan Shambayati, *The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective*, in *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST* 99, 103 n.13 (Saïd Amir Arjomand ed., 2007) ("There are very few scholarly studies devoted to the Turkish Constitutional Court.").

22. See Fontana, *supra* note 9, at 194.

23. See, e.g., VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 39–69 (2010); Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 *CHI. J. INT'L L.* 399, 400–01 (2010); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *HARV. L. REV.* 109 (2005); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 *NW. U. L. REV.* 1277 (2008); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 *CALIF. L. REV.* 1163 (2011); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 *VA. J. INT'L L.* 985 (2009); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999); see also Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 *STAN. L. REV.* 1583, 1620–23 (2010) (discussing constitutional convergence in the constitutions of substates).

use of originalism to interpret the secularism provisions in the Turkish Constitution. To my knowledge, no scholar—in the United States or in Turkey—has analyzed the Turkish Constitution through an originalism lens. The Turkish case study sheds light on broader debates in the United States on the origins, functioning, and limits of originalism.

The scant literature on the Turkish Constitutional Court largely criticizes the Court as an activist institution that has wrongfully injected itself into the Turkish political process through unprincipled opinions.²⁴ The criticism focuses primarily on decisions by the Turkish Constitutional Court that struck down legislative attempts to allow students to wear Islamic headscarves in higher-education institutions.²⁵ These attempts, the Court held, violated provisions in the Turkish Constitution protecting the Republic's secular regime.²⁶

In this Article, I analyze the Turkish Constitutional Court's controversial pro-secularism rulings as an American-style originalist interpretation of the secularism provisions in the Turkish Constitution. I argue that the Court has employed a combination of what American legal scholars call original intent, original meaning, and original expected application to interpret the Turkish Constitution. I further argue that the originalist methodology employed by the Court is not a mere interpretive preference of the Justices. Rather, unlike the U.S. Constitution, the Turkish Constitution expressly prescribes originalism by adopting, in a number of provisions, a specific form of secularism—that espoused by Mustafa Kemal Atatürk, the founder of the Turkish Republic.²⁷ An

24. See, e.g., Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 LAW & SOC'Y REV. 653 (2006) (discussing the selective nature of the court's activism); Ran Hirschl, *Constitutional Courts v. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1849 (2004) (noting the emergence of the court as "an important venue for excluding political Islam and its policy preferences from the purview of legitimate political discourse"); Shambayati, *supra* note 21, at 117 ("The Turkish Constitutional Court is an activist court that has not shied away from engaging in political controversies."); Gunes Murat Tezcur, *Judicial Activism in Perilous Times: The Turkish Case*, 43 LAW & SOC'Y REV. 305, 306 (2009) (arguing that a political alliance exists between the higher courts and the military in Turkey).

25. See Wing & Varol, *supra* note 11, at 36–41.

26. *Id.*

27. See, e.g., TÜRKİYE CUMHURİYETİ ANAYASASI [ANA.] [CONSTITUTION] pmbl. (Turk.), available in English at http://www.servat.unibe.ch/icl/tu00000_.html ("In 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 the unrivalled hero . . ."); *id.* ("[N]o protection shall be accorded to an activity contrary to . . . the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics . . ."); *id.* art. 2 ("The Republic of Turkey is a democratic, secular and social state governed by the rule of law . . . loyal to the

analogous Establishment Clause in the U.S. Constitution might state: "Congress shall make no law respecting an establishment of religion, as defined by the Jeffersonian view of a wall of separation between religion and state." In Turkey, as in the United States, the application of originalism has largely resulted in the rejection of transnational legal sources to interpret the national Constitution. Finally, the Turkish case study also shows that originalism does not inevitably produce substantively conservative results. Unlike in the United States, where originalism is generally associated with the American right, in Turkey, it is primarily progressives who support originalist interpretations of the Constitution.²⁸

The comparative study of Turkish and American originalism calls into question the existing theories in the American legal literature about why originalism thrives in certain nations. The primary theory draws a distinction between revolutionary and reorganizational constitutions and argues that originalism thrives in revolutionary constitutions, which create a nation, but not in reorganizational constitutions, which merely reorganize an already existing political and legal structure. But the revolutionary–reorganizational constitution distinction fails to explain why originalism has found a following under the reorganizational Turkish Constitution.

In this Article, I offer an alternative hypothesis for why originalism thrives under certain constitutions—one that envisions originalism as a cultural phenomenon that may become popular regardless whether the underlying constitution is characterized as reorganizational or revolutionary. Under this hypothesis, originalism blossoms when a political leader associated with the creation or revision of the nation's constitution develops a cult of personality within that nation. The cult-of-personality hypothesis explains why originalism has thrived in nations such as Turkey and the United States, where the nation's founders have developed a strong cult of personality, and has failed to find a strong and sustained following in nations such as Australia, where the founders are held in no special reverence.

The Turkish case study is also instructive on the limits of originalism. Critics of originalism in the United States argue that originalism allows the dead hand of the past to rule an evolving

nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble."); *id.* art. 42 ("Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state.").

28. See *infra* Part III.D (explaining that originalism in the United States historically is applied to limit the powers of the legal elite, whereas in Turkey, originalism has its strongest following among secular elites).

society. In response to the critics, originalists note that the legislature has the option of amending the Constitution if its original meaning no longer comports with societal norms.²⁹ What if constitutional amendment were not an available option? The Turkish case study suggests that when the legislature lacks a plausible method—however difficult it may be—for amending the Constitution in times of evolving societal norms, the continued use of originalism by the judiciary may motivate the legislature to place political constraints on the courts. In other words, the availability of constitutional amendment as a safety valve for altering the original meaning of the Constitution may be one of the foundations necessary to sustain originalism. In Turkey, the Constitutional Court's embrace of originalism but rejection of legislative attempts to amend the Constitution led to the adoption of a court-packing plan in September 2010.³⁰

This Article proceeds as follows. In Part II, I examine the origins and evolution of originalism in the United States. In Part III, using Turkish originalism as a comparative case study, I challenge the conventional view that originalism is a distinctively American fascination. Part III traces the roots of originalism in Turkey, summarizes select originalist decisions of the Turkish Constitutional Court, and examines the origins and functioning of originalism by comparing the Turkish and American versions of originalism. In Part IV, the Article explores the limits of originalism and discusses how the Turkish Constitutional Court eroded the foundation necessary to sustain originalism by thwarting a legislative attempt to amend the Constitution to alter its original meaning.

II. ORIGINALISM: THE AMERICAN VERSION

Before analyzing the Turkish version of originalism, I begin with a brief discussion of American originalism to lay the preliminary groundwork for comparing how originalism functions in each nation. As I discuss in further detail below, the Turkish Constitutional Court

29. See Scalia, *supra* note 1, at 862; see also Barnett, *supra* note 1, at 620 (“Originalists never denied the possibility of a constitutional amendment that would itself, in turn, be interpreted according to its original intent. Therefore, so long as it could be argued that the Constitution has been legitimately amended, a commitment to originalism is no insurmountable barrier to a progressive political agenda.”).

30. See Ozan O. Varol, *Turkey's New Majoritarian Difficulty*, CONSTITUTIONMAKING.ORG (Sept. 29, 2010), <http://www.comparativeconstitutions.org/2010/09/turkeys-new-majoritarian-difficulty.html> (“The [plan] convert[s] what used to be a 6–5 balance on the Constitutional Court in favor of Justices selected by counter-majoritarian institutions into an 11–6 balance in favor of Justices selected by majoritarian or majoritarian-influenced institutions.”).

has employed a convoluted combination of most of the versions of originalism that have found a following in the United States.

In simple terms, originalism is a method for interpreting a constitutional provision by seeking to uncover its meaning at the time of its adoption.³¹ Originalism envisions a constitution that adopts permanent, not evolving, values.³² According to originalists, evolution of constitutional principles takes place via amendment, not interpretation.³³ Originalists interpret the Constitution by reference to its original meaning because the purpose of the Constitution “is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”³⁴

Although evolution is antithetical to the traditional understanding of originalism,³⁵ originalism itself has evolved over the past few decades. At its inception, originalism focused on original intention.³⁶ Prominent from the 1960s to the mid-1980s, intentionalism sought to interpret the Constitution by determining the subjective intentions and expectations of its drafters.³⁷ Intentionalism focuses on what the framers “intended—or expected or hoped—would be the *consequence*” of the language they used in a specific constitutional provision.³⁸ Intentionalism, according to scholars such as Raoul Berger, was one of the interpretive presuppositions of the Constitution; the framers expected that their

31. See Primus, *supra* note 1, at 186–87 (“Originalism is a family of ideas and practices that locate the authoritative content of legal provisions in meanings that prevailed, actually or constructively, at the time when the provisions were enacted.” (footnote omitted)); Whittington, *supra* note 1, at 599 (“Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”).

32. Scalia, *supra* note 1, at 862.

33. Barnett, *supra* note 1, at 619.

34. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40 (Amy Gutmann ed., 1997).

35. Note, however, that recent modifications to originalism advocated by some scholars leave plenty of room for evolution. In a recent article, Peter Smith has noted that several prominent originalists view many constitutional provisions at a high level of generality or engage in constitutional construction—i.e., the crafting of legal rules to apply the constitutional provision to modern circumstances even where the legal rule is not mandated by original understanding. Smith, *supra* note 1, at 709–10. Professor Smith argues that these modifications to originalism by scholars whom Smith calls “new new originalists” collapse the practical and possibly the theoretical distinction between originalism and non-originalism. *Id.*

36. Barnett, *supra* note 1, at 620.

37. Whittington, *supra* note 1, at 599; see also BERGER, *supra* note 1, at 363–66; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (“[O]riginal intent’ refers to the goals, objectives, or purposes of those who wrote or ratified the text.”); Barnett, *supra* note 1, at 620; Powell, *supra* note 1, at 885–86 (noting that originalists initially believed “historically demonstrable intentions of the framers should be binding on contemporary interpreters of the Constitution.”).

38. SCALIA, *supra* note 34, at 115–16.

intent would govern how their posterity interpreted the Constitution.³⁹

Intentionalism eventually fell out of favor for reasons political and intellectual. Four primary intellectual objections led to the demise of original-intent originalism. First, the identification of a “single coherent shared or representative intent” where the drafters are multiple in number presented methodological problems (the “summing problem”).⁴⁰ Second, the ascertainment of subjective original intent was difficult also because the intention of the founders on a given constitutional provision is often ambiguous.⁴¹ Third, critics of intentionalism argued that the founders did not intend their personal intentions to bind future generations.⁴² And fourth, critics also pointed to the undesired consequences of being ruled by the dead hand of the past in a modern, evolving society.⁴³

With these objections gaining widespread acceptance, the focus of originalism gradually shifted in the early 1990s from original intent to original meaning—or what some scholars have called “Originalism 2.0” or “new originalism.”⁴⁴ New originalism seeks to discern, not the subjective original intentions or expectations of the founders, but the objective meaning that a reasonable observer would have assigned to the constitutional provision when it was enacted.⁴⁵ As Keith Whittington has observed, the primary goal of new originalism is not to “open up the head of the author and see what is inside” or to determine what Madison or Hamilton would do if he were a Justice on the Supreme Court.⁴⁶ Rather, the goal is to ascertain the objective meaning of the text, which is the medium

39. BERGER, *supra* note 1, at 403–04.

40. Whittington, *supra* note 1, at 605 (quoting BASSHAM, *supra* note 1, at 83); *see also* Barnett, *supra* note 37, at 105 (noting that the framers’ intentions “could and indeed were likely to be in conflict”).

41. Whittington, *supra* note 1, at 605; *see also* Barnett, *supra* note 37, at 105 (“[The framers’] intentions could have been publicly known—or hidden behind a veil of secrecy.”).

42. Powell, *supra* note 1, at 948; Whittington, *supra* note 1, at 605.

43. Whittington, *supra* note 1, at 605–06.

44. SCALIA, *supra* note 34, at 38 (“What I look for in the Constitution is . . . the original meaning of the text, not what the original draftsmen intended.”); Barnett, *supra* note 1, at 620–21; Greene, *Origins*, *supra* note 1, at 9 (“There has been a gradual but dramatic shift in preference among academic originalists in favor of original meaning rather than original intent.”); Whittington, *supra* note 1, at 599, 607. *But see generally* Kay, *supra* note 1 (criticizing the shift from original intent to original meaning).

45. Barnett, *supra* note 1, at 621; *see also* Whittington, *supra* note 1, at 609 (explaining that new originalism focuses more on meaning of the text at the time of adoption and less on the framers’ concrete intentions).

46. Whittington, *supra* note 1, at 610–11.

through which the drafters conveyed their intentions to their audience.⁴⁷

In ascertaining original meaning, a variety of sources may be consulted. The starting point is the text of the Constitution itself, both the provision at issue and any other provisions that might provide insight on what the provision in question means.⁴⁸ The text, after all, is the most reliable source of meaning.⁴⁹ But often the Constitution contains ambiguous and undefined terms whose meaning is unclear from the context the Constitution provides. In that case, original-meaning originalists refer to extrinsic sources to determine objective meaning—e.g., contemporary dictionaries, evidence of usage in the Constitutional Convention and the state ratification conventions, *The Federalist Papers*, etc.⁵⁰ The drafters' intentions may still be relevant in determining objective meaning, but at best as circumstantial evidence of what a constitutional provision may have meant to a reasonable observer.⁵¹

Jack Balkin has argued that what traditional originalists such as Justice Scalia have labeled original meaning is actually “original expected application.”⁵² Original expected application, according to Professor Balkin, asks “how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).”⁵³ Professor Balkin rejects original expected application as “unrealistic and impractical” because that interpretive method would undermine many extant federal laws and constitutional guarantees recognized by the Supreme Court—including federal environmental laws, social security, independent federal agencies, the constitutional protection

47. Barnett, *supra* note 37, at 105; Whittington, *supra* note 1, at 610.

48. Barnett, *supra* note 37, at 112.

49. *Id.* at 107.

50. *Id.* at 107–08.

51. SCALIA, *supra* note 34, at 38 (“I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”); Barnett, *supra* note 1, at 622; *see also* Barnett, *supra* note 37, at 106 (“If publicly known and widely accepted, these original intentions could have shaped the original meaning of terms and, for this reason, they are not completely immaterial to an originalist analysis.”).

52. Balkin, *supra* note 1, at 295–96; *see also* RONALD DWORKIN, *JUSTICE IN ROBES* 119–20 (2006) (arguing that Justice Scalia espouses a form of “expectation” originalism, “which holds that [constitutional provisions] should be understood to have the consequences that those who made them expected them to have”).

53. Balkin, *supra* note 1, at 296.

of gender equality, and the constitutional right to use contraceptives.⁵⁴

Most recently, John McGinnis and Michael Rappaport advocated an interpretive approach called “original methods originalism.”⁵⁵ Under that approach, the Constitution is interpreted using the “interpretative rules that the enactors expected would be employed to understand their words.”⁵⁶ According to Professors McGinnis and Rappaport, some of the founders’ interpretive rules and methods support the use of original intent and others support the application of original meaning.⁵⁷

Although originalists may disagree on the sources of originalism—intent, meaning, expected application, or methods—they agree, for the most part, on the rejection of living constitutionalism as a method for interpreting the Constitution. Unlike originalism, living constitutionalism envisions a constitution that evolves over time to meet the changing norms and needs of a modern society.⁵⁸ As Professor Balkin put it, living constitutionalists “fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation’s future.”⁵⁹ Thus, living constitutionalists (or non-originalists) advocate an evolutionary approach to constitutional interpretation and recognize the permissibility of constitutional change via judicial interpretation, not solely by constitutional amendment.⁶⁰

With these competing interpretive tools in an American judge’s toolbox, how does the judge decide which tool to use? After all, the

54. *Id.* at 297–98.

55. McGinnis & Rappaport, *Original Methods*, *supra* note 1, at 751.

56. *Id.* at 752. Professors McGinnis and Rappaport argue that the “original methods” approach is supported both by original intent and original meaning. “The original intent approach requires the application of the original interpretive rules, because the enactors likely intended the meaning those rules would generate, and applying those rules is the most accurate way of discerning a single meaning.” *Id.* at 758. Likewise, “[o]riginal public meaning also leads to original methods because an informed and reasonable speaker of the language would have understood the Constitution as subject to the interpretive rules applicable to such a document.” *Id.*

57. *Id.* at 753.

58. SCALIA, *supra* note 34, at 38; see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1985) (arguing that justices must interpret the Constitution’s meaning in light of the current time and needs); Primus, *supra* note 1, at 198 (“The subject of democratic assent to the Constitution is not an aggregation of individuals but rather the American People, conceived as a corporate and temporally extended entity.”).

59. Balkin, *supra* note 1, at 293.

60. See, e.g., Primus, *supra* note 1, at 211; SCALIA, *supra* note 34, at 40–41; see also *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (internal quotation marks omitted)).

U.S. Constitution prescribes no express interpretive methodology. The words originalism, living constitutionalism, or textualism appear nowhere in the Constitution. Although several scholars have argued that originalism may be a part of the “background of interpretive presuppositions” in the Constitution or may be implicit in the design of the Constitution,⁶¹ no express constitutional mandate exists in favor of originalism. In the absence of an express constitutional mandate,⁶² one judge may favor originalism, and the other might reject it and adopt living constitutionalism. Indeed, the same judge may employ different methodologies in different cases, applying an originalist approach in one case and living constitutionalism in the other. As discussed below in Part III.B, however, not all constitutions exhibit this interpretive ambiguity. Rather, the Turkish Constitution expressly prescribes the use of originalism to interpret certain constitutional provisions.

In summary, American originalism emerged as an antidote to living constitutionalism and has evolved, and continues to evolve, from its inception in the 1960s until today, assuming many forms (intent, meaning, expected application, methods) and names (old originalism, Originalism 2.0, new originalism, new new originalism). Does American-style originalism exist elsewhere in the world? If so, how does it function and what can we learn from it? The next Part tackles these questions by using Turkish originalism as a comparative case study.

III. ORIGINALISM: THE TURKISH VERSION

At first glance, Turkey seems like an unlikely candidate for a case study on comparative originalism. After all, its political and legal system differs significantly from the United States. Unlike the United States, Turkey is a parliamentary republic. Turkey’s legal regime is based on civil law, not common law. Turkey and the United States diverge significantly in their socio-cultural makeup as well. Turkey is a fairly homogenous country in terms of religion and ethnicity. Muslims comprise 99.8 percent of Turkey’s population, and ethnic Turks make up 50–55 million of its approximately 70 million

61. BERGER, *supra* note 1, at 404; McGinnis & Rappaport, *Pragmatic Defense*, *supra* note 1, at 920; Powell, *supra* note 1, at 948.

62. Randy Barnett has advocated the adoption of a constitutional amendment that would mandate the use of originalism in interpreting the U.S. Constitution. See Randy Barnett, *The Case for a Federalism Amendment*, WALL ST. J., Apr. 23, 2009, at A19. Professor Barnett’s proposed amendment states: “The words of this article, and any other provision of this Constitution, shall be interpreted according to their public meaning at the time of their enactment.” *Id.*

population.⁶³ In stark contrast, the United States is a bastion of ethnic and religious diversity, comprised of many different ethnicities and numerous religious and nonreligious beliefs. Finally, the United States and Turkey differ in terms of their constitutional stability as well. The same Constitution has governed the United States for more than two hundred years with only twenty-seven amendments. In contrast, the Turkish Constitution has been scrapped and completely re-drafted twice following military coups in 1960 and 1980.⁶⁴

These differences render the two countries ideal cases for a comparative study on originalism. Under the “most different cases” methodology for comparative constitutional law scholarship, the comparison focuses on cases that are different from each other in most pertinent respects.⁶⁵ Comparing the “most different cases” allows one to isolate the key independent variables that are similar in each case and offer explanations for the similar outcome on the dependent variable—which, in this case, is the use of originalism to interpret the Constitution of each nation.⁶⁶

The remaining sections of this Part explore Turkish originalism. Section A provides a brief overview of the history of Turkey’s founding and the reforms of its founder, Mustafa Kemal Atatürk, whose intentions and principles form the basis for the originalist principles in the Turkish Constitution. The overview of the Turkish revolution and Atatürk’s accomplishments also explain why Atatürk has developed a strong cult of personality, which, as detailed below, supports the use of originalism in Turkey. Section B explores the originalist interpretive tools in the Turkish Constitution and analyzes how, unlike the U.S. Constitution, the Turkish Constitution prescribes the use of originalism for certain constitutional provisions. Section C analyzes a set of originalist decisions by the Turkish Constitutional Court. Section D offers a number of observations and conclusions based on a comparison between the American and Turkish versions of originalism.

63. Wing & Varol, *supra* note 11, at 3; *Türkiye'deki Kürtlerin Sayısı* [*The Number of Kurds in Turkey*], *MİLLİYET* (June 6, 2008), <http://www.milliyet.com.tr/default.aspx?aType=SonDakika&Kategori=yasam&ArticleID=873452&Date=07.06.2008> (Turk.).

64. Belge, *supra* note 24, at 656–57, 659, 667.

65. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *AM. J. COMP. L.* 125, 139 (2005).

66. *Id.*

A. *A Brief Overview of the Turkish Independence War
and Mustafa Kemal Atatürk's Reforms*

The reflection upon my situation and that of this army produces many an uneasy hour when all around me are wrapped in sleep. Few people know the predicament we are in.

—General George Washington, January 14, 1776.

Her name was *SS Bandirma*. Born in 1878 in Scotland, the forty-seven-meter cargo ship first sailed the seas as a freighter and then served as a mail ship in the Ottoman Empire.⁶⁷ During the course of her life, she experienced two serious injuries—first in an accident with a private ship in 1891 and second in a torpedo attack by a British submarine during World War I.⁶⁸ As if to presage the fate of the national revolution she would later come to represent, the *SS Bandirma* sank in both accidents but floated again. She was one tough ship—exactly what a thirty-seven-year-old commander in the Ottoman Empire by the name of Mustafa Kemal needed to start a national revolution.

On May 16, 1919, when Mustafa Kemal boarded the *SS Bandirma* to leave the Ottoman Empire and start the Turkish Independence War, the Empire was in dire straits. At the apogee of its power, the Ottoman Empire had spanned three continents.⁶⁹ But by 1919, the Empire had been demoted to the rank of “the sick man of Europe.”⁷⁰ It had just been crushed alongside Germany by the Allied Powers in World War I. A year after Mustafa Kemal boarded the *SS Bandirma*, on August 10, 1920, the Empire would sign the Treaty of Sèvres, surrendering most of its landmass to the Allied Powers. Great Britain would take the Arabian Peninsula and Mesopotamia, France would take Syria and Southeastern Anatolia,⁷¹ Greece would take Izmir and Eastern Thrace, and Italy would occupy Western Anatolia.⁷² An independent Armenian state would be formed in

67. Ali Bozoglu, *S/S Bandirma 1878–1924*, DENİZ HABER (May 5, 2008), http://www.denizhaber.com/index.php?sayfa=yazar&id=28&yazi_id=100283 (Turk.); *SS Bandirma*, MIDDLE E. EXPLORER, <http://www.middleeastexplorer.com/Turkey/SS-Bandirma> (last visited Nov. 1, 2011) (Turk.).

68. *SS Bandirma*, *supra* note 67.

69. Tod Leaven & Christopher Dodge, *The United States Cyber Command: International Restrictions vs. Manifest Destiny*, 12 N.C. J.L. & TECH. ONLINE 1, 23 n.132 (2010).

70. Wing & Varol, *supra* note 11, at 11.

71. Anatolia (*Anadolu* in Turkish) is the name of the region in Asian Turkey.

72. Hakan Yilmaz, *The Kemalist Revolution and the Foundation of the One-Party Regime in Turkey: A Political Analysis*, in *ESSAYS IN HONOR OF ERGUN OZBUDUN* 535, 541 (Serap Yazici et al. eds., 2008).

Northeastern Anatolia and an autonomous Kurdistan would be established in Southeastern Anatolia.⁷³ The Treaty would also prohibit the Empire from maintaining armed forces, except for a gendarmerie to preserve internal security.⁷⁴ Finally, the Treaty would authorize a permanent Allied commission to regulate the Empire's finances and would require the Empire to reserve part of its revenues to pay reparations to the Allies.⁷⁵

To Mustafa Kemal, the terms of the Treaty of Sèvres were unacceptable. Determined to rescue a nation he had bravely served for nearly fifteen years, Mustafa Kemal started a revolution against the occupying Allied Forces as well as the Ottoman Empire, which had blissfully accepted the terms of the Treaty of Sèvres. Starting in Samsun in Northern Anatolia, where the *SS Bandirma* had dropped him off after a perilous voyage from Istanbul, Mustafa Kemal started touring the battered nation and organizing a national resistance movement.⁷⁶

But this was no easy feat. To many, the Turkish Independence War that Mustafa Kemal hoped to ignite was an exercise in futility.⁷⁷ Before Mustafa Kemal assumed command, the resistance movement was composed of irregular guerilla forces.⁷⁸ Ammunition, uniforms, and other battle supplies were woefully lacking, soldiers were difficult to recruit among the impoverished and skeptical peasants of Anatolia, and the irregular militias were unwilling to accept the discipline of a regular army.⁷⁹ These fledgling militias bore a striking resemblance to the men George Washington had been asked to command in 1776 against Great Britain. And it would take a commander of Washington's caliber to transform them into an organized army.

Mustafa Kemal was no stranger to difficulty. He had fought in the Ottoman Empire Army in the First and Second Balkan Wars and the First World War.⁸⁰ He had been wounded in the Battle of Gallipoli during World War I by shrapnel, but had cheated death when the shrapnel hit a pocket watch his father had given him, barely missing his heart.⁸¹ But even for the bravest of commanders, the task Mustafa Kemal faced seemed insurmountable. He had

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 542.

78. *Id.*

79. *Id.*

80. *Kemal Atatürk (1881-1938)*, BBC HIST., http://www.bbc.co.uk/history/historic_figures/ataturk_kemal.shtml (last visited Nov. 1, 2011).

81. Burak Sansal, *Ataturk's Life*, ALL ABOUT TURK., http://www.allaboutturkey.com/ata_life.htm (last visited Nov. 1, 2011).

managed to create a central army (*Kuvayi Milliye*), but the newly formed army paled in number, equipment, and experience to the veteran armies of the occupying Allied Powers. Worse yet, Mustafa Kemal's novice army had to confront the Allies on three different fronts—Armenia on the eastern front, Great Britain and Greece on the western front, and France on the southern front.⁸² To top it off, Mustafa Kemal was fighting not just the Allied Forces, but also the Ottoman Empire, which sided with the Allies throughout the Independence War.⁸³

But after a series of miraculous victories over the course of three years of battle, Mustafa Kemal's army managed to defeat the Allied Forces and the Ottoman Empire.⁸⁴ The Treaty of Lausanne that was signed with the Allied Forces marked the end of the Turkish Independence War and the beginning of the modern Republic of Turkey.⁸⁵ Mustafa Kemal was elected Turkey's first President.⁸⁶

With the Independence War over, the process of nation building commenced. Above all things, Mustafa Kemal wanted the new nation to be secular, which he called the cornerstone of the Turkish revolution.⁸⁷ He believed that fundamentalism was the primary reason behind the Ottoman Empire's collapse: "Look at our history. Those who hid their real beliefs under the disguise of religion deceived our innocent nation with big words like Sharia. You will see that what destroyed this nation, what caused its collapse, was always the deception hidden under the curtain of religion."⁸⁸ The Empire's primary mission was *jihad*, which required endless and costly battle with neighboring nations to spread Islam.⁸⁹ The Empire's legal system was based strictly on Islamic *Sharia* law, which, like a modern-day Constitution, reigned supreme over all other laws.⁹⁰ The Empire interpreted *Sharia* law to reject many modern developments as Western intrusions.⁹¹ For example, the newspaper press machine was not permitted in the Empire for nearly two hundred years.⁹² Under the Empire's reign, women also had become second-class citizens, because the Empire, under the strictures of *Sharia* law,

82. Yilmaz, *supra* note 72, at 542–43.

83. Wing & Varol, *supra* note 11, at 18.

84. *Id.* at 11.

85. See Ilhan Yildiz, *Minority Rights in Turkey*, 2007 BYU L. REV. 791, 793 & n.13 (2007).

86. Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, 2003 BYU L. REV. 475, 485 (2003).

87. Wing & Varol, *supra* note 11, at 11–12.

88. *Id.* at 12 (internal quotation marks omitted).

89. *Id.* at 10.

90. *Id.*

91. *Id.* at 10–11.

92. *Id.* at 10.

forced women to become servants to their husbands, gave them minimal inheritance rights, and required them to wear Islamic veils.⁹³

To replace the existing fundamentalist regime with a secular one, Mustafa Kemal and his supporters implemented a series of sweeping reforms between 1924 and 1935. I have previously discussed these reforms at length in a previous publication,⁹⁴ but a brief recount is necessary here because these reforms lie at the heart of the originalist decisions of the Turkish Constitutional Court discussed below.

Under Mustafa Kemal's leadership, the Turkish Parliament abolished the position of the caliph, who, under the Ottoman Empire's rule, served as the religious authority over three-hundred million Muslims all around the world.⁹⁵ The Parliament abolished *Sharia* courts and *Sharia* law, replacing them with a civil-law system based on the Swiss civil code⁹⁶ and a criminal-law system based on the Italian penal code.⁹⁷ The Parliament closed religious schools (*medrese*), which served as breeding grounds for fundamentalism and brought all educational institutions under government control.⁹⁸ The Parliament also replaced the Islamic calendar with the Gregorian calendar and changed the weekly holiday from Friday (the Muslim holy day) to Sunday.⁹⁹

Another drastic reform was the changing of the alphabet from Arabic to Latin script.¹⁰⁰ Implemented at lightning speed—five months—the alphabet reform was aimed at breaking the link with the Empire's religious traditions and improving the literacy rate, which was at approximately ten percent among men and less than five percent among women before the alphabet reform.¹⁰¹ In the ten years after the easier-to-learn Latin script was adopted, the literacy rate more than doubled.¹⁰²

Several reform laws were aimed at the abolishment of religious clothing from the public sphere. The Parliament passed the law on "the Wearing of the Hat" and prohibited the wearing of the fez, which Mustafa Kemal believed was "a symbol of illiteracy and

93. *Id.*

94. *See id.* at 11–19.

95. *Id.* at 14.

96. *Id.* at 15.

97. Talip Kucukcan, *Sacralization of the State and Secular Nationalism: Foundations of Civil Religion in Turkey*, 41 GEO. WASH. INT'L L. REV. 963, 965 (2010).

98. Wing & Varol, *supra* note 11, at 14.

99. Kucukcan, *supra* note 97, at 965.

100. Wing & Varol, *supra* note 11, at 16.

101. *Id.*

102. *Id.* at 16 n.138.

backwardness.”¹⁰³ With the Act on the Prohibition of the Wearing of Certain Garments, the Parliament also prohibited certain religious officials from wearing religious garments outside of official religious ceremonies.¹⁰⁴ And after living under decades of oppressive clothing mandates under the Ottoman Empire, Turkish women gained the freedom to wear modern clothing.¹⁰⁵

Turkish women benefited from other reform laws as well. In 1933, before countries such as Italy, France, and Canada, Turkey recognized women’s suffrage.¹⁰⁶ And just two years thereafter, eighteen women were elected to the Turkish Parliament.¹⁰⁷

These secular and democratic reform laws were entrenched into the Turkish Constitution. The Constitution was first drafted in 1921 as a short and temporary governance document before the Republic was officially established.¹⁰⁸ The 1921 Constitution (*Teskilat-i Esasiye Kanunu*) recognized, for the first time, that “sovereignty is fully and unconditionally vest[ed] in the people.”¹⁰⁹ This recognition marked a fundamental change from the Ottoman Empire’s theocratic regime, where sovereignty was vested in Allah and delegated to the Sultan.¹¹⁰

After the Republic was officially formed, a new constitution was adopted in 1924. The 1924 Constitution established a republican system of government and recognized certain fundamental rights and liberties.¹¹¹ Although the 1924 Constitution initially recognized Islam as the official religion of the Republic, the Constitution was amended in 1928 to remove the official state religion.¹¹² And in 1937, the Constitution was amended to officially recognize Turkey as a “secular” republic.¹¹³ The Parliament adopted the Turkish phrase for secularism (*laik*) from the French principle of secularism (*laïcité*).¹¹⁴

103. *Id.* at 15 (internal quotation marks omitted).

104. *Id.*

105. *Id.*

106. *Id.* at 17.

107. *Id.*

108. TULIN CAGDAS, 1921-1924-1961-1982 ANAYASALARININ OZELLIKLERI [THE CHARACTERISTICS OF THE 1921-1924-1961-1982 CONSTITUTIONS] 1-2 (2009) (Turk.).

109. Wing & Varol, *supra* note 11, at 13.

110. *Id.*

111. CAGDAS, *supra* note 108, at 4-8.

112. *Id.* at 5.

113. See Wing & Varol, *supra* note 11, at 18.

114. 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, 392 (2010) (“[T]he Turkish perspective, similar to its French origins, concentrates on the withdrawal of the religious spheres [sic] influence from political and public life; and its foremost exclusion from the educational and instructional spheres.”); Wing & Varol, *supra* note 11, at 6.

The 1924 Constitution also created an independent judiciary and recognized the supremacy of the Constitution by declaring that “no law shall be in contradiction to the Constitution.”¹¹⁵ But the Constitution did not expressly authorize any court to examine the constitutionality of laws passed by the Parliament.¹¹⁶ It would take a coup d’état in 1960 to establish a constitutional court with the power of judicial review.¹¹⁷

The reforms that transformed a fundamentalist empire into a secular and democratic republic happened in less than twenty years. That is a dizzying speed, especially because the reforms sought to permanently abolish religious and moral traditions deeply ingrained within the Turkish society over centuries of Ottoman rule. In 1934, the Turkish Parliament gave the architect of these reforms, Mustafa Kemal, the surname Atatürk—meaning “the father of all Turks.”¹¹⁸

But the Turkish nation honored Atatürk in yet another way. As the next section demonstrates, Atatürk’s reforms and principles have been entrenched in several provisions of the Turkish Constitution.

B. Originalist Provisions in the Current Turkish Constitution

As noted above, the U.S. Constitution contains no express preferred methodology for interpreting its provisions. In contrast, several provisions in the Turkish Constitution come equipped with a set of specific interpretive tools. These provisions prescribe their interpretation in accordance with the original meaning ascribed to those phrases and the original intent and expectations of Atatürk. In fact, the Turkish Constitution contains a grand total of sixteen express references to Atatürk’s name. Contrast this to the U.S. Constitution, which is devoid of any specific reference to the nation’s Founding Fathers.

Consider, for example, the Preamble to the Turkish Constitution. The Preamble’s first sentence states that the Constitution is “[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 the unrivalled hero.”¹¹⁹ The Preamble, which,

115. TÜRKİYE CUMHURİYETİ ANAYASASI 1924 [ANA. 1924] [CONSTITUTION OF 1924] art. 103 (Turk.), *translated in* Edward Mead Earle, *The New Constitution of Turkey*, 40 POL. SCI. Q. 73,100 (1925).

116. ENGIN SAHİN, SİYASET VE HUKUK ARASINDA: ANAYASA MAHKEMESİ [BETWEEN POLITICS AND LAW: THE TURKISH CONSTITUTIONAL COURT] 67 (2010) (Turk.).

117. See TÜRKİYE CUMHURİYETİ ANAYASASI 1961 [ANA. 1961] [CONSTITUTION OF 1961] art. 147 (Turk.), *translation available at* <http://www.anayasa.gen.tr/1961constitution-text.pdf> (“The Constitutional Court shall review the constitutionality of laws and the By-laws of the Turkish Grand National Assembly.”).

118. Wing & Varol, *supra* note 11, at 4 n.15.

119. ANA. pmb1. (Turk.).

according to Article 176, is an “integral part of the Constitution,”¹²⁰ also recognizes that “no protection shall be accorded to an activity contrary to . . . the nationalism, principles, reforms and modernism of Atatürk”¹²¹

These are profound statements with profound implications. The very first line of the Constitution invokes the nation’s founder by name and ascribes to him and to his “reforms and principles” the divine quality of immortality. At bottom, this is what originalism is all about. Originalism fixes in one point in time—in other words, immortalizes—a set of beliefs and principles until the Constitution is amended to alter them. In the case of Turkey, the immortal beliefs and principles are those espoused by the nation’s founder, Atatürk.¹²² Not only are Atatürk and his principles immortal, but, according to the Preamble, his “nationalism, principles, reforms, and modernism” trump all constitutional protections.¹²³

Atatürk’s principles and reforms are mentioned in other constitutional provisions as well. For example, Article 2, which sets forth the characteristics of the Republic, declares that “[t]he Republic of Turkey is a democratic, secular and social state governed by the rule of law” and is “loyal to the nationalism of Atatürk.”¹²⁴ Article 2 further notes that the nation is “based on the fundamental tenets set forth in the Preamble,” thus incorporating into the characteristics of the Republic the Preamble’s numerous references to Atatürk’s reforms and principles.¹²⁵

Likewise, Article 42 on the right to education states that “[t]raining and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state.”¹²⁶ These references to Atatürk’s principles and reforms, which include secularism, and the use of “contemporary” educational methods imply the rejection of educational methods based on religious dogma. Article 42 also prohibits the establishment of educational institutions that contravene Atatürk’s reforms.¹²⁷

When members of the Turkish Parliament assume office, the Constitution requires that they recite an oath that invokes Atatürk by name. Article 81 declares that parliamentarians must swear on their honor and integrity “to remain loyal to the supremacy of law, to

120. *Id.* art. 176.

121. *Id.* pmb1.

122. *See id.*

123. *Id.*

124. *Id.* art. 2.

125. *See id.*

126. *Id.* art. 42.

127. *Id.*

the democratic and secular Republic, and to Atatürk's principles and reforms."¹²⁸

Article 174 of the Constitution, titled "Preservation of Reform Laws," creates super statutes out of the various reform laws passed during Atatürk's presidency and prohibits their annulment as unconstitutional.¹²⁹ As William Eskridge and John Ferejohn explain, a super statute is a law that "(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law."¹³⁰ The reform laws in Article 174, ranging from clothing reforms to the adoption of the Latin alphabet, were all aimed at establishing a "new normative or institutional framework" for state policy—i.e., the nation's transformation from a fundamentalist regime to a secular one. As agents of that transformation, these reform laws are so entrenched in Turkish society that they have been promoted to a "quasi-constitutional status."¹³¹ Although the Parliament may theoretically amend or repeal the reform laws, the Constitution recognizes their preferred status by shielding them from constitutional challenges.

The Turkish Constitution thus embraces the use of originalism in a number of its provisions. The Constitution immortalizes Atatürk's reforms and principles, and rejects constitutional protection for any activity contrary to those reforms. To determine whether a certain activity enjoys constitutional protection, a court must therefore necessarily examine, at least as a preliminary inquiry, whether that activity is consistent with the meaning of reforms adopted nearly a century ago and the principles and beliefs of a founder long gone. In that sense, the use of originalism in Turkey is more akin to legal positivism, which Ronald Dworkin defines as the thesis "that a community's law consists only of the explicit commands of legislative bodies."¹³² In other words, by using originalism at least as a starting point, Turkish courts are following the explicit prescriptions of the constitutional drafters.

I now turn to examining how the Turkish Constitutional Court has employed the originalist interpretive tools in the Turkish

128. *Id.* art. 81.

129. *Id.* art. 174.

130. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

131. *Id.* at 1217 (suggesting super-statutes may be "quasi-constitutional" in that they are "fundamental and trumping like constitutional law, but more tentative and susceptible to override or alteration by the legislature or determined judges and administrators").

132. DWORKIN, *supra* note 52, at 212.

Constitution. I focus on two decisions that interpreted the constitutional provisions on secularism.

C. *Originalist Decisions by the Turkish Constitutional Court*

In both Turkey and the United States, the Turkish Constitutional Court has received stinging criticisms as an activist court that has wrongfully injected itself into the Turkish political process through unprincipled opinions.¹³³ These criticisms focus in large part on two decisions that applied the secularism provisions in the Constitution to strike down legislative attempts to permit students to wear Islamic headscarves on public university campuses. These decisions ignited a drawn-out confrontation between the Turkish Constitutional Court and the political branches and ultimately led to the adoption of a court-packing plan in September 2010.

In this section, I respond to the criticisms against the Court and argue that the Court applied an established methodology (originalism), which, as discussed above, is prescribed by the Turkish Constitution. One can disagree whether the outcome of these cases was normatively desirable or whether the Court used originalism as a convenient tool to achieve desired outcomes. I do not address those issues here. Rather, I argue that, in both decisions, the Court's methodology was solidly grounded in originalism.

1. The First Constitutional Court Decision on the Islamic Headscarf

On December 27, 1988, the Turkish Parliament passed the following law concerning the wearing of Islamic clothing in higher-education institutions: "Modern dress or appearance shall be compulsory in the rooms and corridors of higher-education institutions, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction."¹³⁴ The law was intended to overrule a circular adopted by the Higher Education Council in 1982 prohibiting students who wear the Islamic headscarf from attending university classes.¹³⁵ The motives behind that circular were summarized in a Council of State decision: "Beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of

133. See *supra* note 24.

134. Wing & Varol, *supra* note 11, at 36.

135. *Id.*

women and the fundamental principles of the Republic.”¹³⁶ University officials were concerned that allowing students to wear the Islamic headscarf would put pressure on other female students who chose not to wear the Islamic headscarf and would open the door to the injection of religion into the public sphere.¹³⁷ The 1988 legislation reversed the Higher Education Council’s circular and permitted the wearing of Islamic headscarves on university campuses.

Then-President of the Republic, Kenan Evren, who was also the leader of a 1980 coup d’état, immediately applied to the Turkish Constitutional Court for the annulment of the legislation.¹³⁸ Invoking the Court’s jurisdiction for abstract review of parliamentary legislation, Mr. Evren argued that the law violated the Preamble, Article 2 (secularism), Article 10 (equality before the law), Article 24 (freedom of religion), and Article 174 (protection of Atatürk’s reforms) of the Constitution.¹³⁹ In a ten to one decision, the Turkish Constitutional Court accepted the President’s arguments and struck down the law as unconstitutional.¹⁴⁰

Although the challenge invoked a number of constitutional provisions, the crux of the arguments focused on secularism. Does a law permitting the wearing of headscarves “out of religious conviction” run contrary to constitutional provisions protecting secularism? The answer to that question depended on the meaning of “secularism.” That phrase was added to the Turkish Constitution in 1937 as a fundamental characteristic of the Republic, but the Constitution did not expressly define it.¹⁴¹ Nor did the Constitution otherwise dictate what students may or may not wear in higher-education institutions.

The Court was thus confronted with a familiar dilemma: when the Constitution does not expressly define a phrase, how should the Court interpret it? For the Turkish Constitutional Court, the answer lied with originalism. In its opinion, the Court never expressly mentioned the phrase originalism or discussed which of the many competing interpretive methodologies it should employ. Rather, almost as an unconscious reaction, the Court turned immediately to a search for original intent and original meaning.

136. *Id.*

137. *See* Uzun, *supra* note 114, at 407 (discussing the perception of the Islamic veil movement as “the manifestation of political Islam and a direct threat to the laic Republic”).

138. Anayasa Mahkemesi [Constitutional Court], Esas No. 1989/1, Karar No. 1989/12 (Turk.). The Turkish Constitutional Court cases are available through T.C. ANAYASA MAHKEMESİ, <http://www.anayasa.gov.tr> (last visited Nov. 1, 2011) (Turk.).

139. *Id.*

140. *Id.*

141. *See* Wing & Varol, *supra* note 11, at 18.

The Court's originalist methodology was narrow, strictly tethered to text and history, and thus produced a rule-like result. According to the majority, the original understanding of the secularism provisions prohibited, in a rule-like fashion, the wearing of Islamic headscarves in universities—even though no such clear dictate existed in the text of the Constitution. The secularism provisions in the Constitution require adherence to the reforms and principles of Atatürk and are therefore more specific than, for example, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.¹⁴² But the secularism provisions are broader than, for example, the provision in Article II of the U.S. Constitution that mandates a minimum age of thirty-five for the President.¹⁴³ The secularism provisions adopt the vision of Atatürk as a guidepost, but do not delineate what that vision entails. That, in turn, generates multiple plausible interpretations of secularism depending on the level of generality at which one views the secularism provisions. The more specific the lens, the more rule-like the result, and the broader the lens, the more room for interpretive flexibility.

For example, one may adopt a specific lens and conclude, based on Atatürk's clothing reform laws and statements detailed below, that Atatürk's intent was to prohibit religious clothing in the public sphere. Under that vision, a law allowing the wearing of Islamic headscarves in universities would be unconstitutional. Alternatively, one may adopt a more general lens and conclude that Atatürk's intent was broadly to transition a fundamentalist society into a secular one. Under that view, strict restrictions on Islamic clothing may no longer be necessary because the society has completed its transformation to a secular Republic. In fact, one might argue that a restriction on the wearing of the Islamic headscarf might run contrary to Atatürk's original intentions on secularism, as viewed through a more general lens. If women who wear the Islamic headscarf cannot enroll in universities and cannot obtain a higher education, the Islamic headscarf restriction might undermine Atatürk's reforms on gender equality—which were part and parcel of Atatürk's vision of a secular society.¹⁴⁴

142. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

143. See *id.* art. II, § 1, cl. 4 (“[N]either shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years . . .”).

144. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 109–10 (2d ed. 1986) (“When we find in history, immanent or expressed, principles that we can adopt or adapt, or ideals and aspirations that speak with contemporary relevance, we find at the same time evidence of inconsistent conduct. But we reason from the former, not from the frailties of men who, like ourselves, did not always live up to all they

The majority adopted a more specific approach to the original understanding of secularism, which generated a rule-like result. The Court reached that result by employing a convoluted combination of three originalist methodologies accepted at one point or another in the United States: original meaning, original intent, and original expected application. I analyze each in turn below.

a. Original Meaning

To determine the original meaning of secularism, the Court first turned to the reform laws passed following the Turkish Independence War and before the phrase “secularism” was added to the Turkish Constitution. According to the Court, the war had been fought to banish the sultanate, abolish *Sharia* law and fundamentalism, and to create a secular Republic.¹⁴⁵ The reform laws passed following the war all had a unifying theme: to secularize what was once a fundamentalist Empire.¹⁴⁶

The Court also examined the clothing reforms passed by the Parliament, which especially pertained to the Islamic headscarf question at issue in the case. In 1925, the Parliament passed the law on “the Wearing of the Hat,” which prohibited the wearing of the fez, an item of clothing associated with the Ottoman Empire and Islam, and instead encouraged the use of the modern hat.¹⁴⁷ Although the modern hat was only one item of clothing, the law on the wearing of the modern hat symbolized the transformation of all clothing in Turkey as the nation transitioned from fundamentalism to secularism.¹⁴⁸ Citing a 1925 Judiciary Committee report on the law, the Court noted that the law separated the link between religion and clothing and paved the way for the implementation of modern clothing in Turkey.¹⁴⁹ The law, thus informed the original understanding of secular clothing for all Turkish people—men and women—even though the reform law by its terms applied only to the fez, which was worn by men. Finally, the Court also noted that in 1934, the Parliament prohibited religious officials from wearing religious garments outside of religious ceremonies, which was

professed or aspired to.”); Greene, *Selling Originalism*, *supra* note 1, at 679 (“Alexander Bickel . . . insisted that the level of generality at which we view constitutional principles may be so broad as to prove the ratifying generation incorrect about specific applications.”).

145. E. 1989/1, K. 1989/12 (Turk.).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

intended to confine conspicuous religious clothing to the private sphere, outside of the public's view.¹⁵⁰

These reform laws implemented Atatürk's vision of secularism and thus shed light on the original meaning of that term.¹⁵¹ Viewing the laws as a whole, the Court concluded that "secularism," at the time of its addition to the Turkish Constitution as a characteristic of the state, required the strict separation of religion and state, precluded religion from becoming a source of lawmaking or administrative authority, and relegated religion to what the Court labeled "its true, respectful position"—within the private conscience of each individual believer.¹⁵² Secularism paved the way for the once-fundamentalist Turkey to become a modern, democratic nation and to establish the rule of law.¹⁵³ Secularism, according to the Court, thus became the "life philosophy" of the Turkish Republic.¹⁵⁴

While employing an originalist methodology to interpret the Turkish Constitution, the Court denounced the original-meaning interpretation of the Quran. In discussing how the Turkish Revolution banished religious fundamentalism, the Court noted—in what can only be described as pure dictum—that under its proper understanding, the Islam religion also had condemned fundamentalism and dogma.¹⁵⁵ To stay true to that proper understanding, the Quran, according to the Court, should be interpreted to take into account modern societal norms.¹⁵⁶

At first blush, the Court's rejection of the originalist interpretation of the Quran seems hypocritical. After all, the Court advocated an interpretation of the Quran akin to living constitutionalism, but rejected that same interpretive methodology for the Constitution. But there is an important difference between the Constitution and the Quran that may explain the Court's stance: although the Turkish Constitution may be amended, the Quran may not.¹⁵⁷ If the original understanding of the Turkish Constitution no longer comports with prevailing norms, the people may amend the Constitution. Not so with the Quran. Absent an interpretative mode that takes into account evolving societal conditions, an originalist

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. L. Ali Khan, *The Qur'an and the Constitution*, 85 TUL. L. REV. 161, 177 (2010) ("The Qur'an prescribes no procedures for its textual amendments. In fact, the Qur'an prohibits any alteration to the Word of God. Over the past 1400 years, the Arabic text of the Qur'an has remained intact. The inability to amend the Qur'an assures the permanence of its values." (footnote omitted)).

interpretation of the Quran would permanently freeze the conditions that existed in the seventh century. And as I discuss in detail *infra* Part IV, precisely because the Turkish Constitutional Court treated the secularism provisions in the Turkish Constitution like the Quran by thwarting legislative attempts to amend them, the Court's originalist methodology has failed to survive and led to the adoption of a court-packing plan in September 2010.

b. Original Intent

Next, the Court examined the original intentions of Atatürk as to the meaning of secularism. The Court noted that Atatürk's intentions carried particular weight because "the Turkish Revolution was also the Atatürk Revolution."¹⁵⁸ To ascertain his intent, the Court reviewed his statements on religion and secularism.

According to the Court, the "most important" of Atatürk's reforms and principles was secularism.¹⁵⁹ Atatürk believed that *Sharia* law was antithetical to democracy and women's rights.¹⁶⁰ He thus advocated for the establishment of a secular regime to achieve equality, democracy, and national unity.¹⁶¹ Quoting Atatürk's statements, the Court underscored that secularism was the force that drove the nation away from *ummet* (a country defined by religion) and towards *ulus* (a country defined by nationality).¹⁶² In other words, the new nation's identity focused, not on a common religion, but on a common nationality.¹⁶³ With the implementation of secularism, the rule of law was established, secessionist movements were curbed, and intra-state peace was secured.¹⁶⁴ Secularism was therefore at the forefront of the "Atatürk Revolution."¹⁶⁵

And the Constitution, according to the Court, had expressly embraced Atatürk's intentions on secularism, specifically in the context of education.¹⁶⁶ The Court underscored that Article 42 required education and training to be conducted "along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state."¹⁶⁷ Laws based on religion thus had no place in higher-

158. E. 1989/1, K. 1989/12 (Turk.).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. ANA. art. 42.

education institutions.¹⁶⁸ Even religious education in Turkey, according to the Court, had to conform to Atatürk's secularist principles.¹⁶⁹

c. Original Expected Application

The original expected application of the secularism provisions also factored into the Court's analysis. Here, the Court shifted from determining what Atatürk intended secularism to mean when his reforms were adopted (original intent) to determining what Atatürk expected modern Turkey to look like long after his death (original expected application). On this point, the Court noted that allowing the wearing of Islamic headscarves and veils in universities "out of religious conviction" was inconsistent with the "requirements of contemporary civilization."¹⁷⁰ At first glance, this analysis implies the use of living constitutionalism and the rejection of originalism. After all, under originalist methodology, the "requirements of contemporary civilization" should have no bearing on the original meaning of a constitutional provision.¹⁷¹

But the Court's reference to the "requirements of contemporary civilization" was actually the use of original expected application. That phrase refers to Atatürk's well-known address to the Turkish nation on the tenth anniversary of the Republic, where he underscored that the Turkish Revolution was intended to "raise our national culture above the contemporary level of civilization."¹⁷² According to the Court, any legislation that permitted the wearing of certain clothing in government institutions "out of religious conviction" was inconsistent with modern clothing, the requirements of modern civilization, and Atatürk's vision for modern Turkey.¹⁷³

In summary, the Court held that the legislation at issue contravened the original meaning and expected application of secularism, as well as the original intentions of Atatürk with respect to secularism.¹⁷⁴ The legislation introduced an overtly religious rule into a secular education system by allowing the wearing of headscarves in a government institution "out of religious conviction."¹⁷⁵ The legislation also re-introduced the link between

168. E. 1989/1, K. 1989/12 (Turk.).

169. *Id.*

170. *Id.*

171. *See supra* notes 31–34 and accompanying text.

172. Mustafa Kemal Atatürk, Speech at the 10th Anniversary of the Republic of Turkey (Oct. 29, 1933), available at http://www.theturkishtimes.com/archive/02/11_01/f_speech.html.

173. E. 1989/1, K. 1989/12 (Turk.).

174. *Id.*

175. *Id.*

clothing and religion, which had been broken by Atatürk's reforms.¹⁷⁶ The Court further held that allowing the wearing of Islamic headscarves would destroy the religious neutrality of university campuses and allow the harassment of women who do not wear the headscarf as irreligious or anti-religious.¹⁷⁷ The Court brushed aside any concerns its holding may raise for freedom of religion, holding that secularism, as originally understood, reigned superior over the rights and liberties in the Turkish Constitution.¹⁷⁸

d. Rejection of Foreign Law to Interpret the Constitution

Much like their originalist American counterparts, the Justices on the Turkish Constitutional Court declined, in their quest for original meaning and intent, to incorporate transnational legal sources into Turkish constitutional law. In its discussion of secularism, the Court noted that other Western nations implemented different versions of secularism, some more tolerant of religion than the Turkish concept of secularism (*laiklik*).¹⁷⁹ But the interpretation of secularism in those nations would have no influence on how the Court interpreted the Turkish Constitution.¹⁸⁰

The Court reasoned that foreign legal norms could not penetrate the Turkish constitutional shield over secularism, because those norms were generated in nations whose demographics, context, and history were quite different from the Turkish Republic.¹⁸¹ For example, Western nations were majority-Christian and were not struggling, as was Turkey, with the vestiges of Islamic fundamentalism.¹⁸² Secularism thus assumed a preferred constitutional status in Turkey in light of Turkey's recent fundamentalist history.¹⁸³

The Court also underscored the difficulty of ascertaining the meaning of secularism by reference to foreign legal systems.¹⁸⁴ Secularism was not interpreted uniformly across Western nations.¹⁸⁵ Some were more accommodating of religion than others.¹⁸⁶ Even within the same nation, the meaning of secularism evolved over time,

176. *Id.*

177. *Id.*

178. *Id.* In other words, secularism acted as a "super provision" in the Turkish Constitution, reigning supreme over all other constitutional provisions. *See id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

and secularism was interpreted differently by competing political factions.¹⁸⁷ Given these differences of opinion, the Court had no reliable, consistent definition of secularism to consult and incorporate.¹⁸⁸ Chief Justice John Roberts apparently shared the Turkish Constitutional Court's views on this issue when he testified during his confirmation hearings: "[L]ooking at foreign law for support is like looking over a crowd and picking out your friends [Y]ou can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia" ¹⁸⁹

Like the Turkish Constitutional Court, most originalists in the United States disavow reliance on foreign law to interpret the U.S. Constitution.¹⁹⁰ If one accepts the originalist methodology, that position makes sense. In general, foreign law has no relevance to an analysis of the original understanding of a constitutional provision within a certain nation or the original intentions of that nation's founders.

There is one exception to the originalists' refusal to consider foreign law in interpreting the U.S. Constitution. Originalists such as Justice Scalia acknowledge that foreign law may be relied upon in devising a constitution.¹⁹¹ And where constitutional drafters actually use foreign law in crafting a constitutional provision, originalists acknowledge that judges may consult foreign sources contemporary to constitutional ratification to determine the original meaning of the provision. Originalists in America thus consult old English law in interpreting phrases such as "due process" and "right to confrontation" in the U.S. Constitution because these terms were

187. *Id.*

188. *Id.*

189. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005). Chief Justice Roberts's criticism of citations to foreign law followed in the footsteps of an earlier statement by Judge Harold Leventhal, who argued that citing legislative history is "akin to 'looking over a crowd and picking out your friends.'" Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

190. See Greene, *Origins*, *supra* note 1, at 11 (noting that originalism "is hostile to transnational sources of law"); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007); Antonin Scalia & Stephen Breyer, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 524-25 (2005).

191. Scalia & Breyer, *supra* note 190, at 525 ("If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution.").

adopted from English law and had the same meaning in the United States as in England.¹⁹²

When it comes to secularism, France is to Turkey as England is to the United States. The Turkish version of secularism (*laiklik*) is based on the French principle of *laïcité*.¹⁹³ The Court thus could have consulted French legal sources to interpret the secularism provisions in the Turkish Constitution without undermining its originalist methodology. But the Court's opinion has no mention of France or of *laïcité*. At least two reasons may exist for that omission. First, the Court may have been concerned about creating a dangerous precedent of entrusting Turkey's secularism to the vagaries of foreign courts' interpretations and understandings of secularism. Second, French legal sources would have been of no help to the majority, because, at the time of the opinion, France did not ban the wearing of Islamic headscarves in higher-education institutions.

e. The Dissent's Analysis

Faced with such robust use of originalism by the majority, the dissent might have taken issue with the majority's originalist methodology, employed a living constitutionalist analysis, or perhaps looked to foreign law to interpret the Constitution. This the dissent did not do. Rather, the dissent chose to confront the majority on its own originalist turf.

The debate between the majority and the dissent was remarkably similar to the recent exchange between Justice Scalia and Justice Stevens who respectively wrote the majority and the dissenting opinions in *District of Columbia v. Heller*.¹⁹⁴ In his majority opinion, Justice Scalia employed originalism to hold that the Second Amendment protected an individual right to bear arms.¹⁹⁵ Justice Scalia's application of originalism was, of course, no surprise. But Justice Stevens, instead of employing a living-constitutionalism analysis, chose to meet Justice Scalia on Scalia's own battlefield. In his dissent, Justice Stevens painstakingly parsed original sources to argue that the Second Amendment protected a right to bear arms only as part of a well-regulated militia.¹⁹⁶

192. *Id.*

193. Wing & Varol, *supra* note 11, at 6.

194. *District of Columbia v. Heller*, 554 U.S. 570, 572, 636 (2008).

195. *Id.* at 636.

196. *See id.* at 636–80 (Stevens, J., dissenting); Greene, *Origins*, *supra* note 1, at 35 (“Justice Stevens’s dissenting opinion in *Heller* sought to counter Justice Scalia not through an appeal to the living Constitution but through relentless emphasis on the intent of the drafters of the Second Amendment.”).

And just as Justices Scalia and Stevens disagreed on the original understanding of the Second Amendment, the majority and the dissent in the Islamic headscarf case disagreed on the original understanding of secularism and its application to the legislation at issue. The dissent agreed with the majority that “the best method for understanding Atatürk’s reforms and principles is to analyze his statements and actions.”¹⁹⁷ But the dissent disagreed with the majority on what those statements and actions showed.

To establish that the challenged legislation passed the Atatürk test, the dissent quoted a number of statements that Atatürk had made in 1923 regarding the Islamic headscarf. In that year, Atatürk stated that “the religious headscarf should not lead to isolation of women from society” and that “if worn in a simple fashion, the headscarf is not inconsistent with societal norms.”¹⁹⁸ These statements, according to the dissent, evinced Atatürk’s belief that the wearing of the Islamic headscarf is a religious requirement and that women should be permitted to wear the headscarf so long as the headscarf did not dissociate women from society.¹⁹⁹

Further, the dissent argued that Atatürk’s actions regarding the Islamic headscarf were consistent with his statements. According to the dissent, Atatürk did not attempt to regulate women’s clothing and even “permitted” his spouse, Latife Hanım, to wear the headscarf.²⁰⁰ The dissent also noted that Atatürk and his supporters did not pass any reform laws specifically aimed at modernizing women’s clothing.²⁰¹ Rather, all clothing reform laws targeted men.²⁰²

The dissent’s recount of Atatürk’s statements and actions on the Islamic headscarf question was quite selective. The dissent focused on two statements from 1923, the year in which the Turkish Republic was established. At that time, however, Atatürk remained cautious about revealing his intent to form a secular nation.²⁰³ During the first few years following the Turkish Independence War, Atatürk carefully avoided advocating for sweeping secularist reforms in order to prevent a backlash from Islamists. For example, Atatürk reluctantly acquiesced in a provision in the 1924 Constitution that listed Islam as the official religion of the Turkish Republic.²⁰⁴ This provision was

197. Anayasa Mahkemesi [Constitutional Court], Esas No. 1989/1, Karar No. 1989/12 (Turk.).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Wing & Varol, *supra* note 11, at 12–13 (“Thus, Atatürk and his supporters had to make some compromises and avoid, at least initially, overly sweeping reforms in order to establish a secular regime.”).

204. *Id.* at 13.

later removed from the Constitution, but at the time, Atatürk believed that its exclusion from the Constitution could have been too drastic of a change and may have derailed his plans to form a secular Republic.²⁰⁵ As one commentator observed, at the time the Republic was formed, the “idea of a secular Republic was Atatürk’s best-kept secret. When the time was right, he would make it a reality.”²⁰⁶

A selective focus on Atatürk’s statements and actions in the immediate aftermath of the Turkish Independence War therefore reflects a distorted representation of his views on secularism. In later years, as the Turkish society adjusted to the ongoing secularist reforms, Atatürk was less hesitant to reveal his once-concealed views. For example, in a statement disregarded by the dissent, Atatürk argued:

In some places I have seen women who put a piece of cloth or a towel or something like it over their heads to hide their faces, and who turn their backs or huddle themselves on the ground when a man passes by. What is the meaning and sense of this behavior? Gentlemen, can the mothers and daughters of a civilized nation adopt this strange manner, this barbarous posture? It is a spectacle that makes the nation an object of ridicule. It must be remedied at once.²⁰⁷

In another statement, Atatürk continued to advocate for the abolishment of clothing remnant of the Ottoman Empire—in this context, the fez:

This grotesque mixture of styles is neither national nor international . . . My friends, international dress is worthy and appropriate for our nation, and we will wear it. Boots or shoes on our feet, trousers on our legs, shirt and tie, jacket and waistcoat—and, of course, to complete these, a cover with a brim on our heads. I want to make this clear. This head-covering is called [the] ‘hat.’²⁰⁸

The dissent’s argument that Atatürk’s actions evinced a support for the Islamic headscarf also fails to persuade. To support that argument, the dissent noted that Atatürk had “permitted” his spouse to wear the Islamic headscarf during their marriage. Although Atatürk’s spouse, Latife Hanim, initially donned the Islamic headscarf, she later shunned the headscarf after she married Atatürk

205. See *id.* (“[T]o prevent those who thought of a secular Republic as anti-religious and those who wanted to use religion as a tool from taking advantage of the situation, we had to allow this meaningless part of Article 2 to stay in the Constitution.” (quoting Mustafa Kemal Atatürk)).

206. M. Iskender Ozturanli, *Birkac Soz [A Few Words]*, in *ATATURK VE DIN [ATATURK AND RELIGION]* 15 (2004) (Turk.).

207. Wing & Varol, *supra* note 11, at 15.

208. MEYDA YEGENOGLU, *COLONIAL FANTASIES: TOWARDS A FEMINIST READING OF ORIENTALISM* 133 (1998).

and embraced Western clothing.²⁰⁹ Atatürk and the newly unveiled Latife Hanım then went on a tour of Anatolia, where Latife Hanım, Turkey's first First Lady, displayed her modern clothing as a model of reform for Turkish women.²¹⁰

Given that history was not on the dissent's side, the dissent may have been better off with a living-constitutionalism approach. The dissent could have argued, for example, that the wearing of Islamic headscarves had become more acceptable in Turkish society since the nation's founding. Yet, the dissent did not even entertain the living-constitutionalism methodology and focused exclusively on the original meaning of secularism and the original intentions of Atatürk. The dissent was perhaps concerned that an interpretive methodology that gave little attention to Atatürk's intentions would have stripped the opinion of all legitimacy.

Debates about originalism in Turkey, on full display between the dissent and the majority in this case, are not confined to the judicial sphere. Even the Turkish politicians' criticisms of the judiciary feature heated debates over originalism. For example, in 2008, when the Parliament passed a constitutional amendment, discussed in detail *infra* Part IV, to permit the wearing of Islamic headscarves on university campuses, the law expressly invoked Atatürk in its purposes section: "For our nation to attain the 'level of contemporary civilization' aspired by Atatürk, no one should be denied the right to a higher-education."²¹¹ Likewise, in January 2011, politicians invoked Atatürk to criticize a decision of the Council of State striking down a regulation that allowed higher-education students who wear the Islamic headscarf to take university exams.²¹² In a sharp criticism of the decision, Huseyin Celik, the Vice President of the governing Justice and Development Party (*Adalet ve Kalkinma Partisi*), argued: "Atatürk's principles and reforms do not mandate one type of clothing. It is unacceptable to use Atatürk as a tool for taking an ideological stance on this issue."²¹³

In the next section, I discuss the second opinion in which the Turkish Constitutional Court deployed originalism to sink another legislative attempt to allow the wearing of Islamic headscarves in higher-education institutions.

209. Pelin Turgut, *The Legacy of Mrs. Ataturk: Turkey in the 21st Century*, INDEPENDENT (London) (July 1, 2006), <http://www.independent.co.uk/news/world/europe/turkey-in-the-21st-century-the-legacy-of-mrs-ataturk-406219.html>.

210. *Id.*

211. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Turk.).

212. *Danistay, ALES'te Turbana 'Dur' Dedi*, HURRIYET (Jan. 19, 2011), <http://www.hurriyet.com.tr/gundem/16799756.asp?gid=373> (Turk.).

213. *Id.*

2. The Second Constitutional Court Decision on the Islamic Headscarf

Approximately one year after the first Constitutional Court decision on the Islamic headscarf, on October 25, 1990, the Parliament took another shot at passing a law to allow the wearing of Islamic headscarves in higher-education institutions.²¹⁴ The law provided: "Choice of dress shall be free in higher-education institutions, provided that it does not contravene the laws in force."²¹⁵ The second legislation attempted to cure at least some of the deficiencies that the Constitutional Court had identified in striking down the first legislation.²¹⁶ The second legislation was neutral on its face as to religion.²¹⁷ It did not mention religion, unlike the first legislation, which had allowed the wearing of Islamic headscarves or veils "out of religious conviction."²¹⁸ Rather, the new law guaranteed the freedom to wear any type of dress in higher-education institutions and did not single out the Islamic headscarf or the veil for protection.²¹⁹

This time around, in a seven to four decision, the Turkish Constitutional Court upheld the legislation as constitutional.²²⁰ But this decision did not represent a dramatic shift of opinion on the court. To the contrary, the majority made it clear that under its 1989 decision on the first Islamic headscarf law, the wearing of Islamic headscarves and veils in higher-education institutions was still prohibited.

The Court arrived at this result through a textualist interpretation of the law. The new legislation protected the students' choice of dress in higher-education institutions "provided that it does not contravene the laws in force."²²¹ The Court concluded that the Turkish Constitution, as the supreme law of the land, was a "law" within the meaning of the legislation.²²² And because the Court's 1989 decision striking the first legislative attempt to allow the wearing of Islamic headscarves was an interpretation of the Constitution, that decision too was a "law" under the legislation.²²³ Under that interpretation, the new legislation thus permitted

214. Wing & Varol, *supra* note 11, at 39.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Anayasa Mahkemesi [Constitutional Court], Esas No. 1990/36, Karar No. 1991/8 (Turk.).

221. *Id.*

222. *Id.*

223. *Id.*

freedom of dress in universities provided that such freedom did not conflict, among other things, with the Court's 1989 decision.²²⁴ After praising the originalist underpinnings of the 1989 decision, the Court held that the legislation, by its express terms, did not override that decision and thus did not permit the wearing of Islamic headscarves in educational institutions.²²⁵ Therefore, the legislation was constitutional.²²⁶

Justice Hasim Kilic—who, at the time of this writing, is the President of the Turkish Constitutional Court—authored a concurring opinion.²²⁷ He would have dismissed the challenge because the Court lacked the authority to review the case, which did not raise a justiciable constitutional question.²²⁸ In Justice Kilic's view, the legislation at issue was clearly neutral on its face as to religion and thus obviated any concerns that the Court had expressed in its 1989 opinion as to the impermissible link between religion and clothing.²²⁹ He accosted the majority of abandoning all limits to judicial review and invoking its authority to impermissibly challenge the reasonableness of the Parliament's policy determinations.²³⁰ Justice Kilic's criticism of the majority smacks of the charge levied on judges in the United States for substituting their policy preferences for that of the legislature—i.e., *Lochnerizing*.²³¹

Justice Mustafa Sahin dissented, and relying primarily on legislative history, argued that the law is unconstitutional.²³² Although the legislation was neutral on its face as to religion, the dissent pointed to various statements by members of the Parliament evincing that the legislation's purpose was to provide a workaround for the Court's 1989 decision on the Islamic headscarf.²³³ Underscoring the originalist reasoning in the Court's 1989 decision, Justice Sahin argued that the legislation was inconsistent with Atatürk's reforms and principles, which formed the "spine" of the Turkish Constitution.²³⁴ After recounting the various clothing reform laws passed after the Revolution, Justice Sahin noted that although

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* (Kilic, J., concurring).

228. *Id.*

229. *Id.*

230. *Id.*

231. See WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 124–25 (1988) ("We speak of '*Lochnerizing*' when we wish to imply that judges substitute their policy preferences for those of the legislature.")

232. E. 1990/36, K. 1991/8 (Sahin, J., dissenting) (Turk.).

233. *Id.*

234. *Id.*

the laws did not expressly apply to women, in practice, women's clothing had been modernized in tandem with men's clothing.²³⁵

The other three dissenting Justices joined in a separate, short dissenting opinion, which closely tracked Justice Sahin's dissent.²³⁶ The remaining dissenters argued that the legislative intent was to undermine the 1989 decision of the Constitutional Court, which was inconsistent with various constitutional provisions guaranteeing the supremacy of the Constitution and the binding effect of Constitutional Court decisions.²³⁷

D. *Conclusions on Comparative Originalism*

At least six observations and conclusions can be drawn from the use of originalism in Turkey. *First*, and most obviously, the study of comparative originalism is not an oxymoron. Contrary to popular belief, originalism is not only an American fascination and exists elsewhere in the world. Thus far, originalism in Turkey and the United States evolved as two distinct organisms without awareness of each other's existence. I am aware of no reference by the Turkish Constitutional Court or Turkish academics to the originalism discussions in the United States, and likewise, in the United States, the originalism debate has thus far remained largely intra-national.

Second, in Turkey, as in the United States, originalism implies the rejection of foreign law to interpret the Constitution. The search for original meaning and original intent in both nations trumps the incorporation of evolving standards into the Constitution based on transnational legal sources or otherwise.

Third, in Turkey, as in the United States, originalism has assumed at least three different forms: original intent, original meaning, and original expected application. But in Turkey, these carefully delineated distinctions between originalist methods are without a difference. All three originalist modes yield the same result, primarily because original meaning, intent, and expected application all focus on ascertaining the meaning of Atatürk's reforms and principles. And even in the United States, as Jamal Greene has noted, it is difficult to find a case "in which any self-proclaimed originalist judge has perceived daylight between original meaning, original expected application, and original intent, notwithstanding the fierce academic debate over these distinctions."²³⁸

235. *Id.*

236. *Id.* (Tuzun, Sezer & Dincer, JJ., dissenting).

237. *Id.*

238. Greene, *Origins*, *supra* note 1, at 10; see also Kay, *supra* note 1, at 704 ("[O]riginal intention and original public meaning interpretation should usually yield the same result.").

Fourth, although new originalists in the United States have eschewed original intent and focus on original meaning, original intent continues to form a part of the Turkish Constitutional Court's originalist methodology. The Turkish Constitutional Court, unlike its American counterpart, may be willing to rely on original intent because the three primary objections levied against original-intent originalism in the United States do not apply in Turkey.²³⁹ First, the summing problem—the identification of a single intent from multiple founders—does not exist in Turkey. Because the Turks look only to the views of a single founder in interpreting the Constitution, the “Whose intent?” question is much easier to answer. Second, the difficulty of ascertaining original intent is not as pronounced in Turkey as it is in the United States. Because the Turkish Revolution and Atatürk's reforms took place within the past ninety years, unearthing records that delineate Atatürk's statements and actions is less challenging than determining the intentions of the drafters of the U.S. Constitution more than 200 years ago. In addition to Atatürk's writings, video and audio recordings of his speeches, as well as second-hand accounts of his statements, are readily available. Third, although academics in the United States spar over whether the founders intended their personal intentions to control their prosperity, the Turkish Constitution expressly prescribes that Atatürk's reforms and principles will continue to bind future generations.

Fifth, in the United States, originalism has its following primarily with the American right and is deployed in part to constrain “grants of discretion to legal elites.”²⁴⁰ But the opposite dynamic exists in Turkey. Originalism has its following primarily with secular elites in Turkey, who form a part of the social democrats—i.e., the Turkish left. The Turkish case study thus shows that originalism can be a preferred interpretive methodology for progressives where the founding principles of the nation are progressive and the law has since retreated from those progressive founding principles.

Sixth, the use of originalism in Turkey has important implications on current academic theories in the United States on the origins of originalism. These theories seek to explain why originalism thrives in certain nations, but not in others. The explanation certainly is not the existence of a written constitution. Many nations with written constitutions do not employ originalist approaches to

239. See *supra* notes 40–43 and accompanying text (explaining why original-intent originalism fell out of favor in the United States).

240. Greene, *Origins*, *supra* note 1, at 11.

constitutional interpretation.²⁴¹ Something different must therefore be at work. I begin by summarizing the current hypotheses in the legal literature, set forth by Jamal Greene and David Fontana, on why originalism thrives under certain constitutions. I then explain why these theories do not work in Turkey and offer a different hypothesis for the origins of originalism.

In a seminal article, Jamal Greene proffered six hypotheses for why originalism has thrived in the United States.²⁴² First, the passage of time since America's founding has resulted in deep national reverence for the founding generation, whose intent originalism seeks to preserve.²⁴³ America's confidence in the opinions of its founders is also bolstered by the fact that the Constitution they drafted has withstood the test of time for over 220 years.²⁴⁴ Second, the American Constitution is revolutionary, not evolutionary, and thus is not easily modified in light of evolving norms.²⁴⁵ The nation's political identity was formed "quickly, painfully, and without sympathy to its former colonizers" in the course of the American Revolution and crystallized in the American Constitution.²⁴⁶ Third, originalism served as a doctrine with which the conservatives in America lambasted the individual-rights decisions of the Warren Court.²⁴⁷ Fourth, in the United States, the nomination process of a Supreme Court Justice is unusually public and confirmation hearings serve as a public forum for introducing originalism into the American mainstream.²⁴⁸ Fifth, the prevailing desire for cultural and political assimilation and homogeneity in the United States favors a unitary method of constitutional interpretation and rejects competing methods.²⁴⁹ And finally, the United States is a religious nation and views the Constitution much like a religious text—literal, sacred, and permanent.²⁵⁰

These hypotheses fail in Turkey. Unlike the United States, Turkey is a relatively young Republic, formed less than ninety years

241. For example, living constitutionalism is the prevailing interpretive methodology in Canada, even though Canada has a written constitution. See A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 33 (2009).

242. Greene, *Origins*, *supra* note 1, at 6–8. Professor Greene is careful to note that the hypotheses in his article are just hypotheses; they do not imply causation, but merely suggest influence and association. See *id.* at 62.

243. *Id.* at 62.

244. *Id.* at 6.

245. *Id.*

246. *Id.* at 6, 66–69.

247. *Id.* at 6–7, 69–71.

248. *Id.* at 7, 72–74.

249. *Id.* at 7, 74–78.

250. *Id.* at 7–8, 78–82.

ago.²⁵¹ And unlike its American counterpart, the Turkish Constitution has been completely scrapped and re-drafted twice following military coups in 1960 and 1980.²⁵² In contrast to originalism in the United States—which gained a popular following as a tool to attack the individual-rights decisions in the Warren Court era—originalism in Turkey originated within the Turkish judiciary, not as a doctrine with which to criticize the judiciary’s decisions.²⁵³ Further, unlike in the United States, there are no confirmation hearings for judges in Turkey and until the September 2010 court-packing plan, the appointment of Justices to the Constitutional Court aroused little public clamor. Finally, unlike the originalists in the United States who view the Constitution much like a religious text, the originalists in Turkey are the bastions of strict secularism. Far from being associated with religion, originalism in Turkey has been used to preserve Atatürk’s view of secularism, which relegates religion and religious exercise to the private sphere.²⁵⁴ Finally, although a desire for cultural and political homogeneity is also arguably prevalent in Turkey, that desire does not explain why originalism—as opposed to another interpretive method—has found a following in Turkey.

In a response to Professor Greene’s article, David Fontana offers a different tack on the origins of originalism. Professor Fontana argues that originalism thrives where a constitution is revolutionary, as opposed to reorganizational.²⁵⁵ A revolutionary constitution, according to Professor Fontana’s definition of that term, is a constitution that creates the nation.²⁵⁶ In a revolutionary constitution, the nation focuses on the founding moment and the role of the constitution in that founding moment.²⁵⁷ Constitutional founders assume a quasi-divine quality and the intentions of the founders as reflected in the founding document assume a permanent value.²⁵⁸ Revolutionary constitutions, Professor Fontana argues, thus promote originalism.²⁵⁹ The U.S. Constitution, according to Professor Fontana, is a nation-creating revolutionary constitution and thus has “always featured an element of originalism.”²⁶⁰

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251. Wing & Varol, *supra* note 11, at 14.
252. See Belge, *supra* note 24, at 656–57, 659, 667.
253. See *supra* Part III.C.
254. See *supra* Part III.A–C.
255. Fontana, *supra* note 9, at 196.
256. *Id.* at 190, 196.
257. *Id.* at 196.
258. *Id.* at 197.
259. *Id.*
260. *Id.* at 190.

In contrast to revolutionary constitutions, reorganizational constitutions do not create the nation.²⁶¹ Rather, they post-date the nation's creation and merely reorganize the existing political and legal system through a constitutional process.²⁶² Reorganizational constitutions are therefore not as focused on the founding moment as revolutionary constitutions and are less prone to an originalist interpretation.²⁶³

Like Professor Greene's six hypotheses, the revolutionary-constitution hypothesis also fails in Turkey.²⁶⁴ The constitution that established Turkey—the revolutionary constitution—was scrapped and replaced with reorganizational constitutions following military coups in 1960 and 1980. These two post-coup constitutions are reorganizational because they post-date the nation's creation and reorganize the extant political and legal institutions. Under the revolutionary-reorganizational constitution dichotomy, the current Turkish Constitution that houses the originalist provisions I discussed above thus falls on the reorganizational side.

In fact, the revolutionary 1924 Turkish Constitution did not contain any provisions that prescribe originalism, nor did it mention Atatürk by name. The first originalist provision was added to the Constitution following the 1960 coup. The Preamble in the 1961 Constitution declared its "full dedication . . . to the reforms of Atatürk."²⁶⁵ The remaining originalist provisions were added to the Constitution following a military coup in 1980.²⁶⁶ The enactors of the reorganizational constitutions drafted after the 1960 and 1980 coups thus adopted—not their own intent—but the intentions of a founder long gone as the guidepost for interpreting constitutional provisions.²⁶⁷ The Turkish case study therefore shows that a

261. *Id.* at 197.

262. *Id.* at 196–98.

263. *Id.* at 196–97.

264. It is also arguable whether the revolutionary-constitution hypothesis explains why originalism has found a following in the United States. The U.S. Constitution is not necessarily "revolutionary" under Professor Fontana's definition of that term. The Articles of Confederation, and not the U.S. Constitution that exists today, was America's first formal, nation-creating constitution. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 456 (1989). The U.S. Constitution that was ratified after the Articles of Confederation may be better characterized as reorganizational because it re-organized an already existing political and legal structure.

265. ANA, 1961 pmb. (Turk.).

266. See *supra* Part III.B.

267. This raises an interesting theoretical question as to whether Atatürk's intentions or the constitutional enactors' interpretation of Atatürk's intentions should guide the originalist inquiry. Even if such a theoretical distinction existed, however, in practice, Atatürk's intentions and the enactors' interpretation of those intentions are likely to be aligned in many cases. See *infra* text accompanying notes 284–87.

revolutionary constitution is not the *sine qua non* of originalism. Originalism may blossom even under a reorganizational constitution.

What then explains why originalism has found a following in Turkey and the United States? I suggest an alternative hypothesis—one that envisions originalism as a cultural phenomenon that may become popular regardless whether the underlying constitution is characterized as reorganizational or revolutionary. Under that hypothesis, originalism thrives where a leader associated with the creation or revision of the nation's constitution develops a cult of personality. A cult of personality usually develops post-mortem in response to what later generations view as a series of miraculous accomplishments by political leaders. Often, these leaders assume a superhuman quality and are viewed as blessed with intellect, virtue, and foresight—to an extent unseen in the leaders that later generations produce.

In his seminal work *Economy and Society*, Max Weber referred to this quality as charismatic authority, which he defines as follows:

[Charisma is] a certain quality of an individual personality by virtue of which he is considered extraordinary and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities. These are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a "leader."²⁶⁸

As Thomas Jefferson also wrote in 1816, future generations "ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."²⁶⁹ Out of enthusiasm, despair, or hope, later generations recognize the charismatic authority of certain earlier political leaders,²⁷⁰ and the posterity of these leaders thus continues to look to their principles and ideals for guidance. If the principles and ideals of these quasi-divine leaders are crystallized in a written constitution, those principles tend to guide the constitutional inquiry and trump the legislation produced by what the society views as the inferior political leaders of later generations.

Before I move on to explain how the cult-of-personality hypothesis works in the United States and Turkey, I offer a word of caution. I do not mean to suggest that a cult of personality for a leader guarantees the use of originalism. Other countervailing considerations may undermine the use of originalism even where a

268. MAX WEBER, 1 *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 241 (Guenther Roth & Claus Wittich eds., 1968).

269. Greene, *Origins*, *supra* note 1, at 63 n.438 (citing Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 *THE WRITINGS OF THOMAS JEFFERSON 1816-1826*, at 37, 42 (Paul Leicester Ford ed., 1899)).

270. WEBER, *supra* note 268, at 242.

leader associated with the creation or revision of the constitution develops a cult of personality. My hypothesis simply is that a comparison between the Turkish and American versions of originalism suggests that where originalism thrives in a certain nation, it tends to do so because the ideals that originalism seeks to perpetuate belongs to a leader with a cult of personality.

The founders of both the United States and Turkey have developed a cult of personality, which promotes the use of originalism in each nation. Both the United States and Turkey were founded after national revolutions in which underequipped, undertrained, and outnumbered revolutionaries defeated their occupiers against all odds. In the United States, the revolution was against an oppressive British Empire. In Turkey, the national revolution was against the Ottoman Empire, which had lost World War I alongside Germany, and the Allied Powers that occupied the country following World War I.²⁷¹ The Turkish nation experienced its David-and-Goliath moment when Atatürk's fledgling army defeated the far superior Allied Forces during the Turkish Independence War. The nation then underwent a series of swift reforms that fundamentally upended religious norms deeply entrenched within the Turkish society during the Ottoman Empire's rule and established a modern republic from the ruins of the "sick man of Europe."²⁷² The result, for many, was nothing less than a miracle. Atatürk had achieved in less than twenty years what ordinarily might have taken centuries to accomplish.²⁷³

To the Turkish nation, Mustafa Kemal Atatürk is not a mere statesman or a decorated commander whom students study in history books or whose photographs and personal artifacts tourists observe in crowded museums. Rather, the Turkish nation views Atatürk as a quasi-divine figure, a God-like war hero, and a foresightful President who led a battered nation from despair to glory. Even though more than 70 years have passed since his death, his photographs and statues decorate offices and homes, coffee shops and restaurants, and village squares and soccer stadiums.²⁷⁴ Schools create Atatürk corners in classrooms, dedicated to displaying his photographs and

271. Wing & Varol, *supra* note 11, at 11.

272. *Id.* (citing Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 65 (2002)).

273. *Id.* at 19.

274. Kucukcan, *supra* note 97, at 969; see Andrew Mango, *Atatürk*, in 4 THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD 147 (Resat Kasaba ed., 2008) ("[Atatürk] is the Republic's symbol, pictured on stamps, coins and banknotes, portrayed on the walls of offices and homes, quoted in and out of season to buttress arguments, presented as a guiding star, an ideal to inspire and follow.").

posters.²⁷⁵ The name Atatürk is reserved by law for the founder only and its adoption by anyone in any form is unlawful.²⁷⁶

Following Atatürk's death, "Atatürkism" or "Kemalism" became a dogma.²⁷⁷ Atatürk's immediate political replacements "mobilized the limited resources of the new state to create and disseminate the Atatürk cult as the new symbol to unify the nation."²⁷⁸ The ideology of Kemalism remains a political and societal cult in Turkey.²⁷⁹ The production and sale of Atatürk posters and figures is a major industry in Turkey, "akin to the production and sale of religious icons and materials in areas where there are sizeable Catholic and Orthodox populations and shrines."²⁸⁰ Atatürk's memorial tomb (*Anıtkabir*) in the capital Ankara draws millions of visitors every year.²⁸¹ It is a criminal act in Turkey to insult or curse Atatürk or to damage or defile his statues, busts, or monuments.²⁸² Given his ubiquity in everyday Turkey and the strong reverence associated with him, Atatürk and his reforms thus continue to bind future generations. And since the Turkish version of originalism focuses solely on Atatürk's ideals, rejecting the utility of originalism implies questioning the value of Atatürk's reforms—a strong social anathema.

Although the revolutionary Turkish Constitution drafted under Atatürk's supervision has gone through significant reorganizational changes, those changes have bolstered, not weakened, the Constitution's commitment to Atatürk's founding ideals and principles. The Turkish military, which supervised the drafting of the two reorganizational constitutions, strongly supports the founding principles of the nation.²⁸³ Those founding principles, according to the military and other secularists in Turkey, have preserved stability and democracy in the face of threats to revert to theocratic governance structures.²⁸⁴ In times of national struggle, Atatürk and his ideology emerged as the "Turkish equivalent of Enlightenment," the "guiding philosophy which brought Turks out of their dark age onto the road to

275. Kucukcan, *supra* note 97, at 969.

276. *Id.* at 967.

277. *Id.*

278. ESRA ÖZYÜREK, NOSTALGIA FOR THE MODERN: STATE SECULARISM AND EVERYDAY POLITICS IN TURKEY 95 (2006).

279. Kucukcan, *supra* note 97, at 967.

280. *Id.*

281. *Id.* at 968.

282. *Id.* at 969 (citing Kanun No.: 5816 R.G. 31.7.1951 Sayı: 7872, Kabul Tarihi: 25.7.1951 [Turkish Civil Code, Law No.: 5816, R.G. July 31, 1951 No. 7872, enacted July 25, 1951] (Turk.)).

283. Belge, *supra* note 24, at 661–62; Shambayati, *supra* note 21, at 100–01.

284. Belge, *supra* note 24, at 661–62; Shambayati, *supra* note 21, at 100–01.

modernity.”²⁸⁵ And the reorganizational constitutions drafted under the military’s supervision reflect that support for the founding principles by reinforcing the Constitution’s commitment to Atatürk’s reforms and ideals.²⁸⁶

A similar reverence for the founders also exists, albeit to a lesser extent, in the United States.²⁸⁷ The U.S. Constitution was drafted in the aftermath of a successful revolutionary war against the all-powerful British Empire, and the principles that led to that revolutionary miracle were crystallized in the U.S. Constitution.²⁸⁸ The founders of the United States were also the founders of the Constitution, which has led to a national reverence for them.²⁸⁹ American children are taught to admire their forefathers from the very early stages of their education and literary works about the founders consistently top national bestseller lists.²⁹⁰ Over the years, values espoused by the founders have “acquired a presumption of rightness in our political culture.”²⁹¹ For example, at the investiture of Chief Justice Rehnquist and Justice Scalia, President Reagan ended his speech by underscoring the reverence for the Founding Fathers and the ideals they entrenched in the “miracle” that is the U.S. Constitution:

The warning, more than a century ago, attributed to Daniel Webster, remains as timeless as the document he revered. “Miracles do not cluster,” he said, “Hold on to the Constitution of the United States of America and to the Republic for which it stands—what has happened

285. SINAN CIDI, *KEMALISM IN TURKISH POLITICS: THE REPUBLICAN PEOPLE’S PARTY, SECULARISM AND NATIONALISM* 6 (2009).

286. See *supra* Part III.B.

287. H. W. Brands, *Founders Chic: Our Reverence for the Founders Has Gotten out of Hand*, *ATLANTIC*, Sept. 2003, at 101, 101–10 available at <http://www.theatlantic.com/magazine/archive/2003/09/founders-chic/2773>.

288. See Fontana, *supra* note 9, at 196–97 (“[Under revolutionary constitutions] the constitutional founders take on a certain status beyond just the words they wrote into the Constitution. They become quasi-religious figures, bringing a nation from isolation into a separate, juridical, autonomous existence.”).

289. See *id.* at 197 (“Revolutionary constitutions, then, promote originalism because of the particular reverence associated with the individual figures associated with the creation of the Constitution—because they are also the individual figures associated with the creation of the nation.”).

290. See Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 *CLEV. ST. L. REV.* 115, 117 (2010) (listing works about the founding generation that have been on national bestsellers lists); Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 *HARV. J.L. & PUB. POL’Y* 335, 337 (1996) (“The constitutional Founders still seem to enjoy a regard, if not reverence, that has not significantly diminished over time, an attitude evidenced in popular culture, as well as in Supreme Court opinions.”); see also Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 *MELB. U. L. REV.* 1, 2 (2000) (characterizing the American fascination with “original intent” of the Constitution as a form of legal “ancestor worship”).

291. Greene, *Selling Originalism*, *supra* note 1, at 713.

once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world.”²⁹²

This reverence for the founders elevates the focus on the founders’ principles as immortalized in the founding document, which, in turn, promotes originalism.²⁹³

Assuming that the U.S. Constitution is revolutionary, as Professor Fontana has defined that term,²⁹⁴ the United States is an example of a nation where the founders have developed a cult of personality primarily because the founders are associated with the creation of a revolutionary constitution. But the existence of a revolutionary constitution does not guarantee that originalism will be popular. Nor does the replacement of a revolutionary constitution with a reorganizational constitution rule out the use of originalism, as the Turkish case study shows. The distinction between reorganizational and revolutionary constitutions thus obscures the real driving force behind the use of originalism in a given nation—i.e., cult of personality.

The cult-of-personality hypothesis also may explain why originalism has failed to find a strong and sustained following in Australia. Although Australians have experimented with originalism, the Australian High Court “has, for a long time, turned its back upon originalism” and has refused to adopt American-style originalism.²⁹⁵ Australians may be skeptical towards originalism because, unlike Americans and Turks, “Australians hold their Founding Fathers of the 1890s, for all their achievement, in no special reverence or affection.”²⁹⁶ In fact, “many of them are already forgotten; few are quoted . . . they tend to be regarded as just another generation of run-

292. *Id.* (quoting President Ronald Reagan, Address at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 56 (1986)).

293. *See supra* note 289.

294. *But see supra* note 264.

295. Kirby, *supra* note 290, at 7; *see also* Adam A. Perlin, Comment, *What Makes Originalism Original? A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia*, 23 *UCLA PAC. BASIN L.J.* 94, 98 (2005) (“In Australia, the country as a whole has approached originalism with a certain skepticism.”); *id.* at 127 (noting that the Australian High Court “has limited [originalism] to very particular circumstances and it has merely been used to uphold existing legislation”).

296. John Andrew La Nauze, *Who Are the Fathers?*, 13 *HIST. STUD.* 333, 333 (1968) (Austl.); *see also* JOHN ANDREW LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 275–76 (1972) (“The men who were responsible for the making of the Constitution are now mostly forgotten. Ten, perhaps twenty, of them may be more or less vaguely associated in the minds of a small minority of Australians . . .”).

of-the-mill politicians.”²⁹⁷ With no special reverence for the founders in Australia, the use originalism to perpetuate the founders’ ideals and principles has failed to find a strong and persistent following. After all, if the founders are viewed as “run-of-the-mill politicians,” there is little reason to use their ideals and principles to trump the legislation passed by modern-day run-of-the-mill politicians.

In summary, originalism has a foreign story in Turkey. That foreign story calls into doubt some of our basic assumptions about originalism and illuminates current academic debates about the origins of originalism. Even though originalism has thrived in Turkey, are there any limits to its use? The next Part tackles that question.

IV. THE LIMITS OF ORIGINALISM

The critics of originalism in the United States argue that originalism commits the nation to being ruled by the dead hand of the past in an evolving society. In response to the critics, originalists such as Justice Antonin Scalia note that the legislature has the option of amending the Constitution if its original meaning no longer comports with societal norms.²⁹⁸ The very purpose of a constitution, according to Justice Scalia, is “to prevent the law from reflecting certain changes in original values” or to require the society to endure the often-tough process of amending the constitution before original values may be abandoned.²⁹⁹

But what if there was no option for amending the Constitution to alter its original understanding? Can originalism still endure as an interpretive method? The case study of Turkey suggests that for originalism to survive, the legislature must have a workable avenue for amending the Constitution when the original understanding of that document no longer comports with prevailing norms. If constitutional amendment is not an available option, the Turkish case study suggests that the legislature may place political constraints on the judiciary and undermine judicial independence to implement its political agenda. In other words, the availability of a constitutional-amendment mechanism—however difficult it may be—as a safety valve for altering the original meaning of the Constitution may be a prerequisite for originalism to serve as a legitimate interpretive method. The Turkish Constitutional Court’s embrace of originalism but rejection of legislative attempts to amend the

297. LA NAUZE, *supra* note 296, at 86.

298. See Scalia, *supra* note 1, at 862; see also Barnett, *supra* note 1, at 619.

299. Scalia, *supra* note 1, at 862.

Constitution led to the adoption of a court-packing plan in September 2010.

The descriptive theory in this Part is not unique to originalism. One can envision a scenario in which the use of non-originalism may also motivate the legislature to place political constraints on the courts. For example, a court, through a progressive interpretation of the Constitution, may recognize a previously unrecognized liberty; the legislature may attempt to amend the Constitution to withdraw that newly recognized right; and in response the court may strike down that legislative attempt to amend the Constitution. In that case, the legislature might have the same motives as the Turkish legislature to place political constraints on the judiciary.³⁰⁰

Nevertheless, for originalists, the desirability of a viable constitutional-amendment mechanism may be more pronounced than non-originalists. Originalists view originalism as a discretion-constraining, neutral, and objective interpretive method because it tethers judges to text and history.³⁰¹ In contrast, living constitutionalism, according to originalists, is a discretion-granting interpretive method that allows judges to take into account considerations other than text and history.³⁰² An originalist judge may thus have less flexibility to respond to widespread political disagreement on a constitutional question than a non-originalist judge. That inflexibility, in turn, puts more weight on a constitutional-amendment mechanism, because the evolution of the Constitution, at least under the traditional understanding of originalism, does not occur via interpretation.

This interpretive inflexibility was on full display in the originalist decisions of the Turkish Constitutional Court discussed above. The Court was unwilling to interpret away Atatürk's original vision of secularism, view the secularism standard at a high level of generality, or allow any room for evolution in its originalist methodology. The Court's narrow interpretation of the secularism

300. A similar version of this hypothetical scenario appears to have recently played out in Iowa. In *Varnum v. Brien*, the Iowa Supreme Court interpreted the Iowa Constitution to recognize a constitutional right to same-sex marriage. 763 N.W.2d 862, 906 (Iowa 2009). When social conservatives sought to propose a constitutional amendment to reverse the *Varnum* decision, Democrats in the Iowa legislature thwarted their efforts. Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 722–23 (2011). The Democrats' move prompted social conservatives to begin a non-retention campaign against three of the Iowa Supreme Court's seven justices who were up for retention elections in November 2010—the “only immediately available way for social conservatives to try to undermine the court's ruling in *Varnum*.” *Id.* at 723, 743–44. Todd Pettys argues that, were constitutional amendment an available option to reverse the Court's ruling in *Varnum*, “the campaign against the Iowa justices might never have taken off.” *Id.* at 743–44.

301. Smith, *supra* note 1, at 710, 712, 731.

302. *Id.* at 711–12.

provisions thus created a rather static constitutional rule—i.e., no Islamic headscarves in universities—as opposed to a broad standard that may have provided the Court more interpretive flexibility.³⁰³ That, in turn, placed more weight on the availability of constitutional evolution by amendment.

Faced with a relentlessly originalist Court on the Islamic headscarf question, there was thus another option available to the Turkish Parliament: amend the Constitution. After all, if a court prevents the legislature from achieving a legislative goal by striking down laws on constitutional grounds, the legislature may still pursue that goal through constitutional amendment. And the Turkish legislature did just that. On February 23, 2008, the Parliament, led by the politically powerful and Islamist-leaning Justice and Development Party, amended the Constitution to state: “No one shall be deprived of the right to higher education for whatever reason unless clearly stipulated by law.”³⁰⁴ Though neutral on its face as to religion, the amendment was dubbed the “Headscarf Amendment” in legislative debates.³⁰⁵ Its purpose was to override the 1989 and 1991 decisions of the Constitutional Court and allow students to wear Islamic clothing, including the Islamic headscarf, in higher-education institutions.³⁰⁶ The amendment was enacted by 411 of the 550 members of the Parliament—more than the requisite supermajority to amend the Constitution³⁰⁷—and was approved by the President.³⁰⁸ Members of the Republican People’s Party (*Cumhuriyet ve Halk*

303. See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW 101 (Univ. of Chi. Law Sch., Pub. Law and Legal Theory Working Paper No. 347, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833634&download=yes (noting that the freedom of courts to interpret specific constitutional rules, as opposed to standards, “is generally understood to be much narrower even in instances involving attempts at dialogue by the legislature”).

304. Uzun, *supra* note 114, at 418. The phrasing of the Headscarf Amendment was broader than necessary to overrule a specific ruling of the Constitutional Court that disallowed only those students who wore the Islamic headscarf from attending higher-education institutions. As Rosalind Dixon has observed, “amendments designed to trump prior judicial interpretations of a constitution are more frequently framed in concrete, rule-like terms (see, e.g., the text of the 11th Amendment)” and less in broad, open-ended terms. Dixon, *supra* note 303, at 99. Although I am aware of no evidence as to why the Parliament chose this broad phrasing, the Parliament may have been concerned about drawing the ire of the Constitutional Court by overtly and solely targeting the Islamic headscarf for protection. After all, the Constitutional Court had struck down a prior legislative attempt to allow Islamic headscarves in universities partially because the legislature had singled out the Islamic headscarf for protection. See *supra* Part III.C.1.

305. Uzun, *supra* note 114, at 418.

306. *Id.*

307. See ANA, art. 175. (Turk.).

308. SAHIN, *supra* note 116, at 110.

Partisi), founded by Atatürk, immediately applied to the Turkish Constitutional Court for annulment of the amendment.³⁰⁹

But the jurisdiction of the Court to review constitutional amendments was far from clear. The 1961 Constitution, which established the Turkish Constitutional Court and empowered it with judicial review of legislation, was silent on whether the Court could review constitutional amendments.³¹⁰ In two separate decisions rendered in 1970 and 1971, the Turkish Constitutional Court interpreted constitutional silence as constitutional authorization and assumed the power to review constitutional amendments both for form and procedure, as well as for substance.³¹¹ First, in a split eight to seven decision, the Court invalidated a constitutional amendment on procedural grounds because the Parliament neglected to vote separately on each provision in the amendment, as required by the Constitution.³¹² In a second decision, the Court extended its power of review to the substance of constitutional amendments and held that the Parliament lacked the authority to alter certain fundamental principles in the Constitution, even with a constitutional amendment.³¹³

In response, the Parliament amended the Constitution in 1971 to prevent the Constitutional Court from reviewing constitutional amendments for substance. Article 147 was amended to authorize the Constitutional Court to review constitutional amendments only as to "form."³¹⁴ But the new Article 147 failed to delineate the meaning of "form," which allowed the Court to define its own jurisdiction.

In a 1975 decision, the Turkish Constitutional Court used the 1971 Amendment's definitional silence on "form" to its advantage and interpreted the newly amended Article 147 to authorize review of constitutional amendments for their substance.³¹⁵ The Court based its newfound authority on Article 9 of the 1961 Constitution, which prohibited the Parliament from amending or proposing to amend the republican form of the Turkish Republic.³¹⁶ The Court held that a law allowing the majority of a military court to consist of non-judges in times of war violated the rule of law principle in Article 2, which, in

309. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Turk.).

310. SAHIN, *supra* note 116, at 70-71.

311. *Id.* at 71-72.

312. Anayasa Mahkemesi [Constitutional Court], Esas No. 1970/1, Karar No. 1970/31 (Turk.).

313. See Anayasa Mahkemesi [Constitutional Court], Esas No. 1970/41, Karar No. 1971/37 (Turk.); see also E. 1970/1, K. 1970/31 (Turk.).

314. ANA. 1961 art. 147 (Turk.).

315. Anayasa Mahkemesi [Constitutional Court], Esas No. 1973/19, Karar No. 1975/87 (Turk.).

316. *Id.*

turn, was an integral part of the republican form of government.³¹⁷ The Court concluded that its review of the constitutional amendment was therefore of the amendment's form, not its substance, because the Parliament lacked the authority to propose the amendment in the first instance.³¹⁸ Between 1975 and 1980, the Court continued to strike down constitutional amendments that, according to the Court, sought to amend the unamendable provisions in the Turkish Constitution.³¹⁹

The 1982 Constitution, drafted following the 1980 military coup, sought to put an end to the Court's persistence on reviewing constitutional amendments for their substance. The 1982 Constitution once again restricted the Court's review of constitutional amendments only to "form,"³²⁰ but this time defined the meaning of that previously undefined phrase. Under the 1982 Constitution, the Court has jurisdiction to review a constitutional amendment only to ensure that the amendment garnered the requisite supermajority in the legislature and that the legislature complied with debate procedures.³²¹ The 1982 Constitution prohibits state actors from exercising any authority that "does not emanate from the Constitution,"³²² which further confines the Court's jurisdiction to that expressly provided by the Constitution.

In decisions interpreting the jurisdictional provisions in the 1982 Constitution, the Constitutional Court repeatedly recognized the new limits on its jurisdiction.³²³ In 1987, the Court for the first time held that it lacked jurisdiction to adjudicate a constitutional challenge to a constitutional amendment, where the challenge did not invoke one of the limited grounds of review as to form specified in the 1982 Constitution.³²⁴ As recently as 2007, the Court held that it was "impossible" to review constitutional amendments for substance and

317. *Id.*; KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 42–43 (2008).

318. E. 1973/19, K. 1975/87 (Turk.).

319. *See, e.g.*, Anayasa Mahkemesi [Constitutional Court], Esas No. 1976/38, Karar No. 1976/46 (Turk.); Anayasa Mahkemesi [Constitutional Court], Esas No. 1976/43, Karar No. 1977/4 (Turk.); Anayasa Mahkemesi [Constitutional Court], Esas No. 1977/82, Karar No. 1977/117 (Turk.).

320. ANA. art. 148 (Turk.) ("Constitutional amendments shall be examined and verified only with regard to their form.").

321. *Id.* ("[T]he verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with.").

322. *Id.* art. 6.

323. Anayasa Mahkemesi [Constitutional Court], Esas No. 1987/9, Karar No. 1987/15 (Turk.).

324. *Id.*

that its review as to form was limited to the instances expressly specified in the Constitution.³²⁵

So, when the substantive challenge to the Headscarf Amendment reached the Court in 2008, one might have expected the Court to refuse to hear the case on jurisdictional grounds. But this the Court did not do. Instead, the Court established jurisdiction to review and strike down the Headscarf Amendment by holding that the legislature lacked the constitutional authority to propose the amendment in the first place.³²⁶

The Court's jurisdictional holding closely tracked its 1975 decision establishing jurisdiction to review constitutional amendments that attempt to alter the unamendable provisions in the Turkish Constitution. The 1982 Constitution prohibits the Parliament from amending, or proposing to amend, the constitutional provisions governing the characteristics of the Republic, including its secular regime.³²⁷ The Court concluded that, by enacting the Headscarf Amendment, the legislature had effectively attempted to amend the unamendable secularism provision in the Constitution.³²⁸ According to the Court, its review of the Headscarf Amendment was therefore of the amendment's form—not its substance.³²⁹

In so holding, the Court ignored the limitations placed on its jurisdiction in the 1982 Constitution and the process that led up to those limitations. The 1982 Constitution represented the second attempt by the legislature to restrict the Court's review of constitutional amendments to form in response to Court decisions reviewing such amendments for substance. This time around, the constitutional language could not be clearer. Under the 1982 Constitution, the Court had no business engaging in substantive review, as it had done in the 1970s—even in the name of saving the unamendable provisions.

325. Anayasa Mahkemesi [Constitutional Court], Esas No. 2007/72, Karar No. 2007/68 (Turk.).

326. Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Turk.).

327. ANA. art. 4 (“[T]he provisions in Article 2 on the characteristics of the Republic . . . shall not be amended, nor shall their amendment be proposed.”). Other nations such as Djibouti, France, Germany, Italy, Kazakhstan, Namibia, Norway, and Romania also have unamendable provisions in their constitutions that entrench principles of constitutional structure, territorial integrity, or fundamental rights. Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURISPRUDENCE 9, 29 n.122 (2009). Even the U.S. Constitution prohibits constitutional amendments that would deprive a state of its equal suffrage in the Senate. See U.S. CONST. art. V.

328. E. 2008/16, K. 2008/116 (Turk.).

329. *Id.*

Like its predecessor laws, the Headscarf Amendment went down in flames.³³⁰ The Headscarf Amendment was neutral on its face as to religion; it merely guaranteed the right to higher education.³³¹ But the Court reasoned that the legislative intent behind the amendment, as evidenced by the debates in the Constitution Committee and the Parliament, was to allow the wearing of religious clothing in higher-education institutions.³³² Closely tracking the originalist reasoning of its 1989 and 1991 decisions on the Islamic headscarf, the Court then invoked the various provisions in the Constitution protecting the Republic's secular regime and Atatürk's reforms and principles to hold that the Headscarf Amendment was unconstitutional.³³³

In this decision, the Turkish Constitutional Court treated the secularism provisions in the Constitution like a religious text. In so doing, the Court failed to heed its own criticism of the originalist interpretations of the Quran in a 1989 decision striking down the first legislative attempt to allow headscarves in Turkish universities.³³⁴ As I discussed above, the Court in that case stressed the need to interpret the Quran in light of modern societal conditions and criticized originalist interpretations of that document that would require a modern society to conform to seventh century norms.³³⁵ What drove the Court to advocate a living-constitutionalism-type approach to the Quran was the unamendable nature of that document. But to the Court in the Headscarf Amendment case, the secularism provisions in the Turkish Constitution were akin to the Quran—sacred, permanent, and unalterable. Although a constitution may evolve by interpretation or amendment,³³⁶ in the Headscarf Amendment case, the Court foreclosed both avenues for constitutional evolution. Instead, the Court insisted on interpreting

330. The Turkish Constitutional Court does not stand alone in its self-assumed power to review the substance of constitutional amendments. The constitutional courts of India, Germany, and South Africa also have assumed the authority to strike down constitutional amendments. See Albert, *supra* note 327, at 21. As the German Constitutional Court explained: "That a constitutional provision may be null and void is not conceptually impossible. . . . There are constitutional principles that are so fundamental . . . that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1951, I ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 14 (Ger.), reprinted in part in WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 503 (2007).

331. See Uzun, *supra* note 114, at 418.

332. E. 2008/16, K. 2008/116 (Turk.).

333. *Id.*

334. See *supra* Part III.C.1.a.

335. See *supra* Part III.C.1.a.

336. See Khan, *supra* note 157, at 179.

the secularism provisions in the Constitution in accordance with their original meaning, but rejected a legislative attempt to amend them, thereby preserving their original understanding indefinitely.

With this decision, the Turkish Constitutional Court rang its own death knell. The Turkish Justices failed to display the political deft of Justices such as John Marshall of the U.S. Supreme Court, who treaded carefully in *Marbury v. Madison* in establishing the power of judicial review while managing not to antagonize the hostile political branches led by Thomas Jefferson.³³⁷ Marshall's opinion in *Marbury* acknowledged that the Jefferson Administration had wrongfully withheld Marbury's judicial commission.³³⁸ But Marshall held that the Court lacked jurisdiction to hear the case because the portion of the Judiciary Act of 1789 conferring jurisdiction to the Court to hear Marbury's petition was unconstitutional.³³⁹

Following in Marshall's footsteps, the Turkish Constitutional Court could have acknowledged that the Headscarf Amendment was inconsistent with the original understanding of the secularism provisions in the Constitution and with Atatürk's reforms and principles. But then, like Marshall, the Court could have held that the jurisdictional limitations in the 1982 Constitution had tied its hands and the Court was without jurisdiction to strike down the Headscarf Amendment. That course of action may have prevented any retaliation against the Court by the Parliament, while handing the secularists some firepower to criticize the governing party for eroding the Republic's secular foundations as well as Atatürk's principles.

For guidance, the Court also could have looked across the Mediterranean to Israel, which hosted a similar clash between the legislative and judicial branches in the 1990s. The conflict began when the Israeli Supreme Court overturned as unconstitutional the refusal of the Ministry of Religious Affairs to allow a private company to import non-Kosher meats into Israel.³⁴⁰ The Court held that the Ministry had infringed on the company's constitutional right to freedom of occupation.³⁴¹ In response, the Israeli Legislature amended the Israeli Basic Law to prohibit the importation of non-Kosher meat.³⁴² The Legislature's purpose was to overrule the Court's earlier decision and prevent further judicial scrutiny of the question.³⁴³ Based on the constitutional amendment, the Ministry

337. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.).

338. *Id.* at 162.

339. *Id.* at 178-79.

340. Hirschl, *supra* note 24, at 1837-38.

341. *Id.*

342. *Id.* at 1838.

343. *Id.*

renewed its denial of a license to import non-Kosher meat.³⁴⁴ When the case went up to the Israeli Supreme Court for the second time, the Court sided with the Ministry.³⁴⁵ Because of the amendment to the Basic Law, the private company no longer had a valid constitutional challenge.³⁴⁶

But in a similar standoff, the Turkish Constitutional Court marched straight ahead with an opinion that stretched its own jurisdiction beyond constitutional limits. The Court was attempting to protect its stronghold on secularism against any encroachment—no matter how minor—by the political branches. In doing so, however, the Court may have damaged the cause of secularism more so than the allowance of Islamic headscarves in universities. Although the opinion received some support among secularists, it was widely criticized for undermining the separation of powers³⁴⁷ and elevating the will of the judiciary over the will of the people.³⁴⁸ Some members of the governing party went as far as threatening to shut down the Constitutional Court if “national will” demanded it.³⁴⁹

The Parliament had had enough. Two years after the Court rendered its decision on the Headscarf Amendment, the politically powerful and Islamist-leaning Justice and Development Party (*Adalet ve Kalkınma Partisi*) (AKP) proposed, and the Turkish people adopted, a constitutional amendment packing the Court.³⁵⁰ The Constitutional Court had won the battle, but would lose the war.

The court-packing plan was a small part of a broader package of twenty-six constitutional amendments, which included other reforms such as expanding the constitutional right to privacy and empowering the Parliament to pass affirmative-action laws for women and the elderly.³⁵¹ Approved by 58 percent of the vote in a popular referendum on September 12, 2010, the amendments increase the

344. *Id.*

345. *Id.*

346. *Id.*

347. See Dixon, *supra* note 303, at 5 (“[T]he problem with allowing courts to invalidate constitutional amendments is that it creates far greater potential for unbounded judicial interpretive discretion—*ex post*, as well as *ex ante*.”). To cabin the judiciary’s discretion, Professor Dixon argues that courts should treat “inconsistency between an amendment and ‘generic’ transnational constitutional principles as a presumptively necessary—if not sufficient—requirement for striking down an amendment on substantive grounds.” *Id.* at 3 (footnote omitted).

348. SAHIN, *supra* note 116, at 114–15; Hidir Goktas, *Court Annuls Turkish Headscarf Bill, Blow to Government*, REUTERS (June 5, 2008), <http://www.reuters.com/assets/print?aid=USL0583906420080605> (“With this decision the Constitutional Court has exceeded its authority. I see this decision as contrary to the constitution.” (quoting Bekir Bozdog, AKP Deputy Group Chairman)).

349. Uzun, *supra* note 114, at 425 n.168.

350. See Varol, *supra* note 30 (discussing the effect of the amendments).

351. *Id.*

number of permanent seats on the Court from eleven to seventeen.³⁵² The amendments also pack the Supreme Board of Judges and Prosecutors (*Hakimler ve Savcilar Yuksek Kurulu*), which appoints, removes, and disciplines the judges of the Turkish High Court (*Yargitay*) and the Turkish Council of State (*Danistay*).³⁵³

As anticipated, the appointments to the newly created seats on the Constitutional Court and the Supreme Board of Judges and Prosecutors ignited fierce political battles. Many view the newly appointed Justices as AKP loyalists.³⁵⁴ Likewise, the members appointed and elected to the Supreme Board were all backed by the AKP-controlled Ministry of Justice.³⁵⁵ Riding on the coattails of its successful plan packing the Constitutional Court, AKP also implemented legislation to pack the other civilian appellate courts, the High Court (*Yargitay*) and the Council of State (*Danistay*). A law that went into effect in February 2011 increased the number of judges on the High Court from 250 to 387 and on the Council of State from 95 to 156.³⁵⁶ The new appointments to these courts will be made by the recently packed Supreme Board of Judges and Prosecutors.

V. CONCLUSION

This Article contributes to a nascent academic debate on comparative originalism. Three overarching themes deserve emphasis. First, the study of comparative originalism is a promising one. Academics of originalism have focused their attention almost exclusively on the United States. And those few who ventured outside American borders primarily examine the same usual suspects for case studies (e.g., Canada and Australia). But little-studied nations such as Turkey, where American-style originalism has found a following, have plenty to contribute to the ongoing debates in the United States on originalism and beyond.

Second, a comparison between the Turkish and American versions of originalism challenges the existing theories in the legal literature about why originalism thrives in certain nations. The

352. *Id.*

353. *Id.*

354. *See, e.g.,* Bulent Serim, *Iste Anayasa Mahkemesinin Yeni Uyelerinin Bilinmeyenleri* [*The Unknowns About the New Constitutional Court Members*], ODATV.COM (Oct. 17, 2010), <http://www.odatv.com/n.php?n=iste-anayasa-mahkemesinin-yeni-uyelerinin-bilinmeyenleri-1710101200> (Turk.).

355. *Listede Hata Bile Yapilmadi* [*No Deviance from the Ministry of Justice List*], MILLIYET (Oct. 19, 2010), <http://www.milliyet.com.tr/Guncel/HaberDetay.aspx?aType=HaberDetay&KategoriD=24&ArticleID=1303341&PAGE=1> (Turk.).

356. *Yargi Reformuna Onay* [*Judiciary Reform Approved*], HURRIYET (Feb. 13, 2011), <http://www.hurriyet.com.tr/gundem/17012322.asp> (Turk.).

existing distinction in the literature between revolutionary and reorganizational constitutions fails to explain why originalism thrives under the reorganizational Turkish Constitution. My hypothesis is that where political leaders associated with the creation or revision of a Constitution, such as Mustafa Kemal Atatürk or James Madison, develop a cult of personality, their posterity continues to look for guidance to their ideas and principles that are crystallized in the Constitution. This, in turn, promotes the use of originalism as an interpretive tool.

Third, the Turkish case study suggests that one of the foundations necessary to sustain originalism is the existence of a viable method for constitutional amendment when the original understanding of that document no longer comports with prevailing norms. Where no such method is available—or worse yet, where the judiciary thwarts an available avenue for constitutional amendment—the continued use of originalism by the judiciary may motivate the legislature to place political constraints on the courts and undermine judicial independence.
