

**IF AN AMENDMENT WERE ADOPTED DECLARING THE UNITED STATES A
CHRISTIAN NATION, WOULD IT BE CONSTITUTIONAL?
WELL...LET'S LOOK AT TURKEY**

Gary Jeffrey Jacobsohn
University of Texas at Austin

Polls in the United States have long indicated that a clear majority of Americans believe that “the United States [is] a Christian nation.”¹ At the same time they indicate that a minority – no more than 30% -- support a constitutional amendment that would make the belief a feature of the nation’s fundamental law. But suppose it were the case that the sentiment for constitutional change corresponded with the public’s perception on this question, culminating in a successful deployment of Article V of the Constitution? Would the Supreme Court declare the amendment unconstitutional?

The rationale for doing so is clear: the text of the First Amendment and generations of judicial interpretation of its religion clauses are unambiguous in affirming the official neutrality of the American regime with respect to religion. Whatever disagreement has existed as to the role of government in supporting religion in a non-preferential way, no serious constitutional position can be found for permitting the authoritative embrace of a specific faith.

It is also the case, however, that the Supreme Court, unlike courts in some other countries, has never declared a constitutional amendment unconstitutional on substantive grounds. Moreover, it has indicated a clear disinclination to do so. One country that has exercised its judicial power in this manner is Turkey, which very recently overturned an amendment that violated the nation’s constitutional commitment to a secular way of life, that requires eliminating religion from the public domain. Turkey, a country whose people is nearly entirely Muslim, arguably would accept some official recognition of that fact, but its identity as a constitutional republic

¹ See, for example, Andrew Kohut, John C. Green, Scott Keeter, and Robert C. Toth, *The Diminishing Divide: Religion’s Role in American Politics* (Washington: Brookings Institution Press, 2000), 100.

has led it over the years to insist on an aggressively secular subordination of religion to a private, and largely hidden, sphere.

Before returning to the original question, consider the following Turkish story, beginning with two similar statements that in context demand opposite things.

“It is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system.”²

“We need to change the soul of the Turkish Constitution.”³

Four score and three years separate these calls to action by two Turkish political figures. The occasion for the first was a speech in 1925 delivered by Mustafa Kemal Ataturk at a new law school in Ankara, in which the founder and first President of the Republic of Turkey laid out the case for a new civil code that promised to transform the ways in which the people of his nation would henceforth relate to one another. For the second it was an appearance at an old law school in Cambridge, Massachusetts by the Deputy Chairman of Turkey’s governing party, who was explaining why his Constitution required certain changes that would enable it to reflect the shifting underling realities of Turkish society. A few months after Ataturk’s address, the Turkish Assembly adopted a radical new civil code modeled after the Swiss example; nine weeks after the party leader’s appeal for a change in the nation’s constitutional soul, the country’s highest court invalidated amendments to the Constitution, whose soul-altering ambitions were deemed too radical for maintaining the coherence of the document.⁴

Both of the speakers were arguably engaged in some measure of rhetorical excess; for example, it had been a staple of the governing Justice and Development Party’s (AK Party) professed ideological commitments to preserve the fundamentals

² Mustafa Kemal Ataturk, as quoted in Bernard Lewis, *The Emergence of Modern Turkey* (3rd ed.) (Oxford: Oxford University Press, 2002), 274.

³ Dengir Firat, as quoted in *The Record* (Harvard Law School), April 24, 2008.

⁴ E. 2008/16, K. 2008/16 (case 2008/16, decision, 2008/16) 2008.

of the secular settlement codified in Kemalist constitutionalism, which, to be sure, the party had conveniently chosen to understand as not having succeeded in completely eviscerating Turkey's pre-existing Ottoman legal foundations.⁵ But rhetoric aside, these statements call attention to a critical and perplexing issue in comparative constitutional theory: what are we doing when we invoke the particular attributes or characteristics of a constitution that enable us to identify it as a unique legal and political phenomenon?

The Turkish case, as embodied in the transition from Ottoman rule to secular republicanism is, to be sure, an unusually dramatic instance of an attempt to destroy an existing constitutional identity; while not unique, most narratives of transition have unfolded more seamlessly than in Turkey. An important recent turning point may have occurred in the Constitutional Court's decision in 2008 overturning two constitutional amendments that had been adopted with the support of 80% of the Grand National Assembly. The amendments were inspired by concerns about religious liberty that, in the language acceded to by the legislature, were draped in an article of clothing. Since the time of Atatürk and his attack on the fez and other items of traditional Muslim attire, garments had become an important symbolic focus for the effort to re-constitute Turkish national identity; indeed, as was well understood by everyone involved in the amendments controversy, the religious liberty issue itself had a constitutive significance that transcended the debate over theologically prescribed head coverings.⁶

Whether or not the underlying purpose of the amendments was to "change the soul of the Turkish Constitution," at a minimum it represented the next logical step in

⁵ See, for example, Esra Ozyurek, "Public Memory as Political Battleground: Islamist Subversions of Republican Nostalgia," in Esra Ozyurek, ed., *The Politics of Public Memory in Turkey* (Syracuse: Syracuse University Press, 2007).

⁶ As has been vividly detailed by Bernard Lewis, Atatürk launched his assault on the fez in an August 1925 speech, in which he and his compatriots wore Panama hats for the occasion. In his speech he made clear how his sartorial concerns implicated a larger purpose. "[T]he aim of the revolutions we have been and are now accomplishing is to bring the people of the Turkish Republic into a state of society entirely modern and completely civilized in spirit and form. This is the central pillar of our Revolution, and it is necessary utterly to defeat those mentalities incapable of accepting this truth." Bernard Lewis, *The Emergence of Modern Turkey*, 410.

an ongoing political contest over the right of women in Turkey to wear headscarves in institutions of higher learning. For those who opposed the official ban on this religiously freighted apparel choice, the more conventional avenues to achieving their goal had been exhausted, as had been made very clear as early as 1989 in a judgment by the Constitutional Court annulling headscarf-friendly legislation.⁷ But societal developments subsequent to that decision (including the enhancement in wealth and status of religious Turks) had markedly improved the political environment for a relaxation of the more demanding of secular requirements, with polls showing overwhelming support for allowing university students to wear the headscarf. As a Turkish constitutional lawyer put it, “The rules [banning scarves, etc.] served a purpose when Turkey was forging a national identity out of the remains of the Ottoman Empire. But now Turkey has outgrown them.”⁸

Outgrowing the rules implied a need to amend the principle of laicity (requiring in the Turkish experience a public space free from expressions of religious identity), which its advocates insisted was not tantamount to rejecting the Constitution’s commitment to secularism. But for the defenders of the divergent Kemalist understanding, the two amendments that explicitly provided for the headscarf right did precisely that by contradicting the very foundations of the secular state. These foundations, they maintained, were “irrevocable” under the Constitution, which meant that any effort to amend them would have to be deemed illegitimate. Thus Article 4 states: “The provisions of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic [‘a democratic, secular and social state governed by the rule of law’], and the provision of Article 3 [the state as ‘an indivisible entity’] shall not be amended, nor shall their amendment be proposed.” Translation: the essentials of Turkish constitutional identity are unalterable.

With a decisive 9-2 vote the Constitutional Court concluded that the

⁷ The 1989 decision received international legitimacy when the European Court of Human Rights upheld its ruling in 2005 in *Leyla Sahin v. Turkey* .

⁸ Quoted in the *New York Times*, July 20, 1997.

amendments did indeed undermine secularism, “the basic principle of the Republic,” and therefore they were in express violation of the mandate of Article 2.⁹ But in doing so, the Court’s bold decision raised as many questions about constitutional fundamentals as it answered, particularly with respect to the significance of its own actions. Under Article 148, which establishes the functions and powers of the Constitutional Court, the Court may examine constitutional amendments “only with regard to their form.” This limited jurisdiction stands in contrast with its review power over ordinary legislation, where it is authorized to evaluate laws “in respect of both form and substance.” Thus in striking down the amendments on substantive grounds, the Court exposed itself to the criticism that it was itself transgressing the Constitution.¹⁰ And so after its ruling people were urged to express their opposition to “the judiciary’s breach of constitutional order and popular sovereignty [by] pressuring their representatives to leave aside political differences and prioritize constitutional change as the most urgent issue facing Turkey today.”¹¹ To be sure, political affiliation can account for the most intense reactions to the decision, as in the ominous declaration, “This is the end of democracy as we know it and the emergence of juristocracy in its place.”¹² But partisan hyperbole to the contrary notwithstanding, the subverting of a constitutional change supported by 441 of the country’s 550

⁹ The Court’s decision led many to believe that its outcome foreshadowed the much-anticipated ruling on the possible banning of the AKP, which at the time of the headscarf litigation was already before the Court. It came, therefore, as something of a surprise when on July 30, 2008 the Court narrowly rejected the closing option. In doing so, however, it issued a “serious warning” to the Party not to continue steering the nation in an Islamic direction. The outcome probably avoided a constitutional crisis; what remained unclear was the effect of the decision, in connection with the headscarf ruling, on the evolving Turkish constitutional identity.

¹⁰ That it did so must have taken some observers by surprise, as this statement written prior to the ruling suggests. “An attempt by the Turkish Constitutional Court to review the constitutionality of amendments made in Article 10 and 42 of the Constitution, which the Turkish Grand National Assembly passed, in terms of content such as laicity, would therefore amount to a blatant violation of the Constitution. We see no possibility that the Constitutional Court would dare to take this route.” Mustafa Sentop, “The Headscarf Ban: A Quest for Solutions,” *Seta Policy Brief*, March 2008, No. 8, 6. The author’s sympathies for the ruling party may have colored his opinion, but given the aggressiveness of the Court’s move it is unlikely that he was alone in his prediction.

¹¹ Saban Kardas, “The Turkish Constitutional Court and Civil Liberties: Question of Ideology and Accountability,” *Seta Policy Brief*, June 2008, No. 16, 6.

¹² *Ibid.*, 2.

parliamentarians presents an inescapable challenge to theorists of constitutional democracy.

Thus however tendentiously put, the anti-democratic critique hardly seems far-fetched in light of the extraordinary display of judicial activism inherent in any judicial invalidation of a duly enacted constitutional amendment. Surely it provokes one to consider the ironic possibility that in its determination to defend the secular identity of the state the Court had run afoul of its republican identity. But there is an additional identity-related concern to consider. The indictment of the Court for abusing its authority was only partially based on procedural objections; it also had a substantive dimension: “[t]he judiciary’s insistence on a static identity,” its imposition of “an archaic ideology through judicial activism.”¹³ In short, the accusation against the Court included the contention that it had become an impediment in the way of achieving a necessary convergence between constitutional law and the changing realities of Turkish society.¹⁴ To the charge that the amendments represented a frontal assault on the Constitution’s very identity, the rejoinder was that identity must be viewed as an evolving phenomenon whose meaning and vitality could only be preserved if its content reflected significant shifts in societal mores and behavior.

It is beyond the scope of this paper to attempt anything like a comprehensive assessment of the issues raised by this case; instead I want to highlight several points that may be pertinent to the question raised at the outset.

a) Invocation of the irrevocability provisions of Article 4 to protect the essentials of the Turkish Constitution rests on the assumption that “the characteristics of the Republic” – specifically in this instance, secularism – have a discernible meaning and coherence that will enable political actors (the Constitutional Court?) to defend them when they are under assault, even if the assault materializes through the precise form specified in the document. Let us assume that such characteristics establish the basics

¹³ Ibid., 4.

¹⁴ Procedure and substance are of course inseparable. Thus “the judiciary’s breach of constitutional order and popular sovereignty” prevented the system from “prioritiz[ing] constitutional change as the most urgent issue facing Turkey today.” Ibid.,

of the constitutional identity of the Turkish Republic. Let us also assume that we have, based on an extensive documentary record of Kemal Atatürk's radical transformation of state/religion relations in that country, a fairly clear sense of the core meaning of secularism as it had been understood by the framers of the post-Ottoman Constitution and its later incarnations. And let us further assume that this meaning is closely tied to the Western orientation of the regime's revolutionary founders and their fervently held goal of Turkish modernization.

Can we then know with certainty what is and is not irrevocable when speaking of Turkish constitutional identity? I would suggest that an affirmative response ought to be received skeptically. The reason for such uncertainty is not unique to the Turkish case, nor does it require adherence to a theory of constitutional indeterminacy; instead it lies in the dynamic quality of identity and the dialogical process by which it is formed and develops. Turkey's secularism, for example, was not a simple product of the imagination, but was and remains embedded in a deep cultural matrix from which counter-pressures to the dominant ideology exert a continuing, if irregular, force seeking a more favorable standing for religious identity, specifically for the nation's overwhelmingly Muslim majority (99% of the population). As noted by Bernard Lewis, "Westernization has posed grave problems of identity for a people who, after all, came from Asia, professed Islam, and belonged by old tradition to the Middle Eastern Islamic world where, for many centuries, they had been unchallenged leaders."¹⁵ The removal of Islam from the Constitution in 1928 may rightly be taken to have signaled the triumph of legal secularism, but then to

¹⁵ Bernard Lewis, *The Emergence of Modern Turkey*, xi. In line with this observation, Serif Mardin concludes, "The Turkish Revolution was... primarily a revolution of values in which the revolutionaries still showed the influence of their Ottoman-Islamic background." Serif Mardin, *Religion, Society, and Modernity in Turkey* (Syracuse: Syracuse University Press, 2006), 203. Or as a Turkish scholar has observed about that nation's problem of identity, "[T]he danger with the Republic is that while it tries to eliminate primordialism, it opens itself to being possibly kidnapped by a monological retribalization. In other words, as it shrinks the dialogical space between the public persona and self-identity and it leaves itself most vulnerable to the distortions of both, when under real or imagined duress." "From Affiliation to Affinity: Citizenship in the Transition from Empire to the Nation-State," in Seyal Benhabib, Ian Shapiro, and Danilo Petranovic, *Identities, Affiliations, and Allegiances* (Cambridge: Cambridge University Press, 2007), 41.

understand that subtraction as having excluded a religious presence from the domain of constitutional identity would be highly questionable. Rather, the pervasiveness of Islamic traditions in Turkish society strongly suggests that the content and parameters of the Constitution's secular mandate possess a mutability that varies with the relative strength of these traditions and their more worldly competitors. An Islamic presence relegated to the sidelines by a largely unchallenged judiciary and military will push the boundaries of secularism in the direction of a stronger commitment to religious liberty as its political and economic condition improves. But any additional push fueled by theocratic ambitions will doubtless be successfully resisted as an unambiguous threat to constitutional identity.

Thus one way of interpreting the political struggles in Turkey today is to see them as an integral part of the give and take of identity politics, as a central element of the interactive process intrinsic to a constitutional work in progress. "Turkey is an unfinished symphony. We have been looking for a constitution for the last 150 years."¹⁶ As the actors in this process work to shape a public consensus supportive of their positions on constitutional change and continuity, they seek to turn the discordant notes of Turkey's complex constitutionalism into a harmonious composition that, while serving their political interests, can be presented as the fulfillment of the common good. The headscarf problem is a focal point for these efforts, with both sides to the controversy drawing heavily on different parts of the nation's conflicted tradition to advance their vision of a secular republic true to the authentic voice of the Turkish people.

b) Unlike symphonies performed for concert, there is no one composer of a constitution to whom the responsibility lies to create a work that, if successful, may dazzle us with its compelling unity and harmonious compositional integrity. For all its distinctive features, the Turkish constitutional arrangement has, in the fashion of its genre, multiple creators with sometimes competing agendas, who may find

¹⁶ Quoting Zuthtu Arslan in Brendan Sweeney, *Turkey's Search for a Workable Constitution*," <http://www.humanrights.dk/News/Turkey's+Search+for+workable=Constitution>.

themselves pressing their cases from different institutional vantage points. As the developments in Turkey illustrate, a constitution is a large piece of a nation's constitutional identity, but it is not coterminous with it. In most cases it lays down key markers of that identity, which are then adapted to changing political and social realities in ways that modify, clarify, or reinforce it through the dialogical engagement of various public and private sources of influence and power.

The debate over the legitimacy of a given constitutional amendment reflects this dynamic. In the headscarf case, the Court said that a basic principle – X (secularism) – is unamendable, and that an amendment – Y – was invalid because it contradicted X; thus its proponents were in effect committing an act of constitutional identity theft. The Assembly, on the other hand, while also accepting X as unamendable, viewed Y as consistent with X, as well as to its commitment to basic principle Z (republicanism) and its corollary obligation to interpret X in accordance with the sovereign popular will. From its alternative perspective the Court, by virtue of its aggressive judicial activism, was itself a perpetrator of constitutional identity theft through its improper flouting of Z. Moreover, any claim by the Court that the only valid identity-fixing meaning of X was its own rendering of the specific authorial intent behind X, was undermined by the embarrassing detail of X's having been included in 1982 as part of an undemocratically produced document, the only genuine voice of the constituent power was actually located in the legislative branch through its assertion of the amendment power. Not only, therefore, did the Court's own unaccountability undercut its assertion of monopolistic authority over constitutive foundational questions, but its critics could argue that the document over which it claimed such authority was, by virtue of its authoritarian adoption, similarly suspect.¹⁷

¹⁷ This a point well made by Anthony Arato. He notes that the Court's act of striking down an amendment follows the example of the Indian Supreme Court, which has been the leading implementer of this practice. The difference? "[T]he Indian Constitution was democratically made, and there the Court could arguably defend the work of the democratic *pouvoir constituant*, against mere governmental organs, including the qualified parliamentary majority. In Turkey the [1982] Constitution was an authoritarian product, and it may seem paradoxical to defend its unchangeable

I now return to the original question and ask whether there are any lessons from the Turkish experience that might illuminate the predicament of the American Supreme Court were it faced with a challenge to an amendment that violated the prescribed place of religion in the constitutional order. Without providing answers myself, I will, in the hope that it might stimulate useful discussion, list a series of relevant questions and considerations drawn from the Turkish case.

1) In a subsequent ruling by the Turkish Constitutional Court a narrow majority decided not to use its specific powers under Articles 68 and 69 to ban the country's governing party for doing things like generating the constitutional amendments previously declared unconstitutional for violating the secular foundations of the state. Does the absence of a similar provision in the American Constitution indicate a greater tolerance in the US for the sort of constitutional incoherence that would result from the adoption of the Christian nation amendment mentioned earlier? Is the Guaranty Clause of Article IV relevant to how one ought to think about this question?

2) Do the religion clauses of the First Amendment assume the same constitutive role in the American Constitution as the "irrevocable" provision in the Turkish Constitution guaranteeing a secular state? In other words, would the explicit constitutional recognition of the United States as a Christian nation be a radical enough assault on the country's constitutional identity as to render it substantively something other than an "amendment."?

3) In Turkey it was plausibly argued that allowing women the right to wear headscarves was in fact consistent with the secular commitment of the Constitution. While the wearing of such religious apparel might not have found favor with the nation's founders, some rather conventional interpretive theories can easily be deployed to overcome whatever originalist commitments there might be in Turkish jurisprudence. Can the same be said in the United States? Is there a theory available

provisions against democratically elected parliaments." Anthony Arato, "The Turkish Constitutional Crisis and the Road Beyond," *The American: A Magazine of Ideas*, June 30, 2008.

for changing the American Constitution such that its identification with a particular religion could avoid the unconstitutional amendment charge in light of the interpretive freedom implicit in the Establishment Clause?

4) Given the extraordinary difficulties involved in achieving constitutional change through the formal amendment process in the United States, would not the adoption of a “Christian nation” amendment represent compelling evidence that the underlying social tectonics of the polity had shifted to an extent large enough to require acceptance of the altered change in constitutional identity inherent in ratification? Are the procedural hurdles of the US amendment process a sufficient basis for distinguishing the American and Turkish cases?

5) From a constitutional perspective, is the United States an “unfinished symphony”? What Rogers Smith has offered to students of American politics may have adaptive potential to the study of comparative constitutionalism: “[A] multiple traditions approach leads us to expect that the major political parties and actors will offer varying civic conceptions blending liberal, republican, and ascriptive elements in different combinations, and that important conflicts will occur over all these contrasting elements.”¹⁸ As the Constitution changes can we afford to incorporate these alternative conceptions into the document as a rational plan in the finishing of the composition?

¹⁸ Rogers Smith, *Civic Ideals* (New Haven: Yale University Press,), 8.