NOTE

Twenty-Six Amendments, but Only One Vote: Single Subject Rule as a Constitutional Defense Mechanism Against Democratic Decline

SARAH HOUSTON*

Many Turkish and foreign commentators lauded Turkey's 2010 constitutional referendum as a step in the right direction towards a stronger and more robust democracy. However, because this packaged referendum represented twenty-six separate amendments to the constitution, no one noticed the illiberal nature of the proposed changes to the judiciary or predicted that the vote would pave the way for Turkey's current authoritarian presidential system. Turkey's 'constitutional' transition to its current regime illustrates a broader global trend: When voters are presented with more than one proposed constitutional change at a time, the outcome will never reflect the true will of the majority. It is only when a constitutional referendum focuses on one subject that the electorate can truly speak.

Adding to a growing body of literature focusing on formal constitutional amendment procedures, this Note argues that one unexplored yet key way that nations may protect against democratic decline is by introducing the single subject rule into their formal constitutional amendment procedures. I develop this argument in two parts. First, this Note illustrates how the 2010 packaged referendum acted as a catalyst for Turkey's current illiberal status and traces the democratic backsliding that occurred in the decade following the vote. Second, the Note presents the three reasons why single subject rule should be adopted by other states that show early signs of constitutional devolution. The rule upholds direct democracy, strengthens deliberative democracy, and upholds constitutional best practices. In the future, single subject rule can act as an important indicator for scholars attempting to diagnose democratic decline in this new wave of authoritarianism.

* Sarah Houston is a recent graduate of the University of Virginia School of Law. She became interested in issues of citizenship and displacement during her Fulbright fellowship in Turkey in 2014, later working in refugee camps in Northern Greece and with NGOs and tech hubs in Europe to create better technological solutions for displaced women. Ms. Houston received a BA from Pepperdine University and a Masters in international development from the Institute of Development Studies (IDS) in the United Kingdom before law school. During her time at UVA, she has done pro bono work for the Bronx Defenders, Tahirih Justice Center, Al Otro Lado, and the International Refugee Assistance Project (IRAP). She represented transgender and LGBTQ+ asylum seekers at IRAP and through UVA's Immigration Clinic. She is an associate at Freshfields Bruckhaus Deringer LLP in New York City, where she focuses on international law.

I. INTRODUCTION

Exactly thirty years after the 1980 Turkish military coup, Turkish citizens all over the country waited in line to cast their vote on a constitutional referendum. Turkey's Prime Minister, Recep Tayyip Erdoğan, and his Justice and Development Party (AKP)[1] championed the referendum as a break with the old military order and a transition toward full-fledged democracy aligned with the West.[2] The sweeping referendum included twenty-six proposed changes to the Turkish Constitution, but the AKP strategically distilled the numerous provisions and their technical details into one single issue: ridding the country of its oppressive militarized past.[3] Opposition parties and civil society groups repeatedly called for separate votes on each amendment, but the AKP insisted on presenting the entire referendum as one yes or no vote.[4] Fifty-eight percent of the population voted for the packaged reforms by simply checking yes, and the international community lauded the results as "a clear step in the right direction" towards the modernization of the Turkish Constitution.[5]

However, the 2010 referendum was the turning point that marked the beginning of the end of liberal democracy in the country. The vote acted as a catalyst, politicizing the judiciary to create a contemporary Turkey far removed from what so many envisioned on the day of the referendum results.[6] In 2017, Parliament passed a constitutional referendum replacing the country's parliamentary system. A highly centralized presidential model took its place, granting Erdoğan the power to issue decrees, pass budgets, and appoint high-level cabinet members and judges without congressional

1. Erdoğan founded the Adalet ve Kalkınma Partisi (AKP) in 2001, and it soon joined the Republican People's Party (CHP) and the Nationalist Movement Party (MHP) as one of the three main political parties operating in Turkey today. The conservative party "has faced objections from some segments of Turkish society that it harbours an Islamist agenda that could undermine Turkey's secular foundation." *Justice and Development Party*, ENCYC. BRITANNICA (Apr. 3, 2019), https://www.britannica.com/topic/Justice-and-Development-Party-political-party-Turkey.

2. Sebnem Arsu & Dan Bilefsky, *Turkish Reforms Pass by Wide Margin*, N.Y. TIMES (Sept. 12, 2010), https://www.nytimes.com/2010/09/13/world/europe/13turkey.html (stating that the AKP "portrayed the constitutional overhaul as an effort to strengthen Turkey's democracy while helping clear its path toward membership in the European Union").

3. Stephen Kinzer, *Breaking the Grip of Turkey's Military*, GUARDIAN (Sept. 7, 2010), https://www.theguardian.com/commentisfree/2010/sep/07/breaking-grip-military-turkey (arguing that Erdoğan may have strategically set the date of the referendum for September 12th to remind the country of "revelations that officers have been involved in coup plots, assassinations, [and] sponsoring death squads in the mainly Kurdish south-east").

4. Haldun Gülalp, *The Battle for Turkey's Constitution*, GUARDIAN (Sept. 4, 2010), https://www.theguardian.com/commentisfree/2010/sep/04/turkey-constitution-undemocratic.

5. Arsu & Bilefsky, *supra* note 2 (describing how President Obama called Erdoğan to congratulate him on the results, and how the Venice Commission, which acts as a constitutional watchdog for the European Council, concluded in its initial report that the referendum was paving the way towards a more democratic Turkey).

6. N. Susan Gaines, *Repression, Civil Conflict, and Leadership Tenure: A Case Study of Turkey* 9 (Inst. for Int'l Econ. Pol'y, Working Paper No. 2017-14, 2017), https://tinyurl.com/y4lun5ju.

approval.[7] This presidential-authoritarian regime has distanced itself from western allies who originally lauded the 2010 vote, instead embracing populism and autocracy under the promise of a Turkey with increasing international clout.[8] But Turkey is just one in a series of countries that has introduced illiberal change via constitutional change mechanisms.[9] Most recently, Russia announced that it intended to introduce a similarly packaged referendum to its people in April 2020, which would outlaw same-sex marriage and extend presidential term limits.[10] After the outbreak of the global pandemic, the public vote was rescheduled from April 22nd to July 1st, 2020. On July 2nd, it was reported that seventy-eight percent of voters had approved of the 200-odd proposed constitutional changes, allowing Putin to rule until at least 2036.[11] However, because the pandemic has made monitoring difficult, serious questions have been raised about the authenticity of the results.[12]

These changes have contributed to a global democratic recession.[13] This recession, unlike the financial crisis of 2008, is not obvious. It has come

---

7. KEMAL KIRISCI & ILKE TOYGÜR, BROOKINGS INST., TURKEY'S NEW PRESIDENTIAL SYSTEM AND A CHANGING WEST: IMPLICATIONS FOR TURKISH FOREIGN POLICY AND TURKEY-WEST RELATIONS 5-6 (2019); *see also* TRT WORLD RSCH. CTR., TURKEY'S CONSTITUTIONAL REFORM 14 (2017), https://tinyurl.com/y3736rk2 (describing the procedural history of the constitutional amendment that transformed Turkey's political system).

8. KIRISCI & TOYGÜR, *supra* note 7, at 6 (explaining that the Parliamentary Assembly of the Council of Europe (PACE) was so concerned with lack of accountability in the new presidential system that it re-instated its monitoring program of 2004); *see also* Gaines, *supra* note 6, at 9 (arguing that "years of rejection have caused Ankara to turn away from the West and toward Russia as a more beneficial ally" as Erdoğan openly calls Europe a "center of Naziism").

9. *See* Ivan Krastev, *Eastern Europe's Illiberal Revolution*, FOREIGN AFFS. (May/June 2018), https://tinyurl.com/y27lpzah ("[T]he most alarming development has been the change of heart in eastern Europe . . . Two of the region's poster children for postcommunist democratization, Hungary and Poland, have seen conservative populists win sweeping electoral victories while demonizing the political opposition, scapegoating minorities, and undermining liberal checks and balances.").

10. Putin recently submitted a package of constitutional amendments that would allow him to stay power beyond 2024. Russian citizens will vote on this national referendum on April 22nd, 2020. Andrew E. Kramer, *Putin Proposes Constitutional Ban on Gay Marriage*, N.Y. TIMES (Mar. 3, 2020), https://tinyurl.com/wzb5xp3.

11. *A Phoney Referendum Shows Putin's Legitimacy Is Fading*, ECONOMIST (July 4, 2020), https://tinyurl.com/y554rqgh ("The 206 proposals in the referendum were designed to confuse. Voters were asked to approve a long list of crowd-pleasing ideas: inflation-proof pensions, protected status for the Russian language and the banning of gay marriage. Adding to the flim-flam were proclamations of faith in God and ancestors.").

12. Sarah Rainsford, *Putin Strongly Backed in Controversial Russian Reform Vote*, BBC NEWS (July 2, 2020), https://www.bbc.com/news/world-europe-53255964 ("[T]here was no independent scrutiny of the seven-day vote, and copies of the new constitution appeared in bookshops during the week [before the vote].").

13. Larry Diamond, *Facing up to the Democratic Recession*, 26 J. DEMOCRACY 141, 142 (2015) (arguing that democracy has been in decline since 2006 as authoritarian regimes become more authoritarian, existing rich democracies' self-confidence and functioning decline, and less liberal democracies that constitute a "gray zone," such as Turkey, shift further away from democratic ideals); ARCH PUDDINGTON & TYLER ROYLANCE, FREEDOM HOUSE, POPULISTS AND AUTOCRATS: THE DUAL THREAT TO GLOBAL DEMOCRACY (2017), https://tinyurl.com/zhkp7ck (concluding that the

about gradually, "through subtle and incremental degradations of democratic rights and procedures" that make it difficult to realize when core components of democratic constitutions are disintegrating before our eyes.[14] These shifts can be almost unrecognizable when a government offers new rights while simultaneously cutting back on existing constitutional guarantees. This process of giving and taking—offering new protections or liberties while curtailing core constitutional principles that protect the existing balance of power—has distinguished the current global trend towards populism from earlier iterations. Demagogues such as Hitler and Mussolini did not bother working through constitutional and seemingly democratic frameworks in the way that current authoritarian leaders do.[15] The Turkish example illustrates why this imperceptible and arguably deceptive avenue towards unchecked executive power is so dangerous. Although the 'give and take' existed in Turkish constitutional referendums since the early 2000s,[16] it was only after the system was radically transformed into absolute presidentialism that the citizenry could no longer ignore what had happened: Turkey was no longer a democracy.[17]

If the 2010 referendum was the turning point for Turkey, it is important to examine the procedures that led to this constitutional devolution. By doing this, other similarly situated countries may gain insight from Turkey's referendum practice in order to avoid "democratic backsliding" through executive aggrandizement.[18] The international use of referendums to facilitate constitutional change has risen significantly in the last few decades,

---

increasing levels of populism and authoritarianism around the world are having a significant impact on civil liberties, as the number of countries with decreasing liberties now outnumbers those with gains).

14. Diamond, *supra* note 13, at 144 ("One methodological challenge in tracking democratic breakdowns is . . . determin[ing] a precise date or year for a democratic failure that results from a long secular process of systemic deterioration and executive strangulation.").

15. *See generally* STEVEN LEVITSKY & DANIEL ZIBLATT, *Fateful Alliances*, *in* HOW DEMOCRACIES DIE (2018) (comparing the contemporary rise of fascism to earlier iterations).

16. The 2017 referendum was the seventh in Turkey's modern history, but the three conducted in the 2000's were all held while Erdoğan was in power and have bolstered the executive while taking power away from the courts. *Results of Previous Constitutional Referendums in Turkey*, HURRIYET DAILY NEWS (Apr. 16, 2017), https://tinyurl.com/y553rucz [hereinafter *Results of Previous Constitutional Referendums*]; *see also* LEVITSKY & ZIBLATT, *supra* note 15, at 85 ("The abuse and personalization of power and the constriction of competitive space and freedom in Turkey have been subtle and incremental, moving with nothing like the speed of Putin in the early 2000s.").

17. Felix Peterson & Zeynep Yanasmayan, *The Final Trick? Separation of Powers, Checks and Balances, and the Recomposition of the Turkish State*, VERFASSUNGSBLOG ON MATTERS CONST. (Jan. 28, 2017), https://tinyurl.com/yazd43tu (arguing the new partisan presidential system "rebuilds the state according to the interests of ruling groups, without much consideration being paid to the overall integrity of the system and long term implications"); *see also* Andreas C. Chrysafis, *Recep Tayyip Erdogan's Theocratic Ambitions: What Implications for Cyprus*, CTR. FOR RSCH. ON GLOBALIZATION (May 7, 2017), https://tinyurl.com/y2m75cxk.

18. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 6, 10 (2016) (arguing that previous manifestations of backsliding such as coups d'états are being replaced by executive aggrandizement, which occurs when checks on the executive are removed slowly, "hamper[ing] the power of opposition forces to challenge executive preferences").

and questions have been raised about the efficacy of such procedures.[19] One way to begin to answer some of these questions is by examining formal constitutional amendment rules and procedures that facilitate referendums in order to place them within wider processes of democratic decline. Just as amendment rules can foster transparency and bolster rule of law, so too can they make it easier for the ruling party to pass undemocratic changes that threaten the existing balance of power.

However, there is a gap in comparative constitutional literature, as constitutional theorists have rarely addressed or analyzed referendums and their relationship to democratic processes.[20] In the Turkish context, there is also relatively little written about referendums in this highly polarized and rapidly changing state.[21] This Note begins to fill the gap by applying research on constitutional amendment procedures to democratic and majoritarian outcomes. It explores how referendum processes might be amended to avoid democratic decline in other countries with strongman executives like Erdoğan who are likely to bundle amendments together as a vehicle for sweeping reform. Adding to a growing body of literature focusing on formal constitutional amendment procedures, this Note argues that one of the key and unexplored ways that Turkey could have protected against democratic decline was by introducing the single subject rule into their formal constitutional amendment procedures.

The single subject rule, which requires that any proposed amendment be limited to only "one subject," offers a clear-cut solution to the undemocratic nature of packaged referendums by ensuring that two or more separate changes are not presented to voters at the same time.[22] There is considerable research, both in the American state context and abroad, that documents the widespread use and the success of single subject rule as a defense mechanism against anti-majoritarian outcomes.[23] In the United

19. Stephen Tierney, *Constitutional Referendums: A Theoretical Enquiry*, 72 MOD. L. REV. 360, 361 (2009).

20. *Id.* (finding this lack of scholarship surprising, as "[c]onstitutional referendums implicate what is perhaps the central relationship within constitutional democracy - that between constituent power and constitutional form").

21. Ece Özlem Atikcan & Kerem Öge, *Referendum Campaigns in Polarized Societies: The Case of Turkey*, 13 TURKISH STUD. 1, 2-7 (2012) (suggesting this gap may be partly due to the small number of referendums that have occurred since the founding of the modern Turkish Republic, with the 2010 referendum acting as the sixth since 1923).

22. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010); *see also* CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 194, para. 2 (Switz.) (guaranteeing "the freedom of the citizen to form an opinion and to give genuine expression to his or her will" by stating that "two or several substantive questions or subject matters may not be joined into one referendum proposition in such a way that the voters face a dilemma and do not have a free choice between the several parts").

23. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 UNIV. PITT. L. REV. 803, 811 (2006) (citing ROBERT LUCE, LEGISLATIVE PROCEDURE 548 (1922)). The rule can be traced all the way back to 98 B.C., when the Romans banned laws which encompassed unrelated provisions. *Id.*

States, the rule has existed since 1844. As of the writing of this Note, forty-three states have adopted some form of the rule in their respective constitutions to improve transparency and prevent unpopular amendments from being passed solely because they are bundled with popular ones.[24] On an international level, four countries currently have the rule codified in their national constitutions.[25] If Turkey was a member of this group, the nation could have avoided the constitutional devolution and "democratic backsliding" which resulted from executive aggrandizement.[26]

Building from the Turkish case study, this Note argues that the single subject rule is an underexplored democratic defense mechanism that constitutional designers should consider. The rule is also one of the largely ignored "affirmative drivers of democracy," and could be utilized as a key indicator for those trying to diagnose democratic decline in this new wave of populism.[27] To advance this argument, this Note traces how the 2010 packaged referendum acted as a catalyst for Turkey's current illiberal status and then explains how the single subject rule could have prevented this outcome. Part II provides necessary background on the 2010 Turkish referendum. It describes the historical backdrop leading to the vote, the procedural rules governing the referendum, and the response to judicial amendments included in the package. Part III then examines the theoretical explanations for why referendums may not produce majoritarian results. Part IV applies theories of democratic backsliding to post-2010 Turkey to illustrate how the referendum's judicial amendments paved the way for later consolidation of power in the executive. Finally, Part V examines single subject rule as a possible solution. It offers three main reasons why constitutional designers should consider it as a valuable democratic defense mechanism: (1) single subject rule would produce votes that represent the "will of the people," (2) allow citizens to properly understand and analyze the proposed changes, and (3) codify international best practices and norms.

---

24. *See infra* Part V; *see also* Daniel N. Boger, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1253 (2017); Gilbert, *supra* note 23, at 813 (positing that the "three principal purposes of the single subject and title requirements can be distilled: (1) to prevent logrolling, (2) to prevent riding, and (3) to improve political transparency, both for citizens and their representatives"). Most states adopt a rule resembling Nebraska's: "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." NEB. CONST. art. III, § 14.

25. Portugal, Ireland, Australia, and Switzerland have all adopted some form of single subject rule for constitutional amendments. *See* IDEA, *infra* note 96.

26. Bermeo, *supra* note 18.

27. K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1555 (2018) (departing from the prevailing democratic backsliding discourse which rests on the assumption that traditional norms and institutions preserve democracy, instead looking for new factors that "affirmatively facilitate democratic equality, inclusion, and political action").

II. BACKGROUND OF TURKEY'S 2010 PACKAGED REFERENDUM

Turkey's 2010 referendum illustrates how anti-democratic amendments can be passed through democratic means when procedural rules are vague and open-ended. Article 175 of the Turkish Constitution lays out the procedures for constitutional amendment, which allow for referendums in several scenarios.[28] If the Grand National Assembly approves an amendment with a greater than three-fifths but less than two-thirds vote and the president does not send it back for reconsideration, the proposal automatically goes to referendum. Alternatively, if the president sends a proposal back to Parliament for reconsideration and two-thirds of the Assembly refuses to reconsider the proposal by sticking with their original proposed law, the president has the option to submit the law to popular vote. Finally, if the Assembly passes an amendment by a two-thirds vote and the president supports the proposal, the president retains the option to present it as a referendum. In all of these situations, a proposed constitutional change will pass if a simple majority of citizens vote "yes."[29]

However, the procedures outlined in Article 175 are silent on the referendum procedure itself. The Article grants the Assembly freedom to "decide on which provisions shall be submitted to referendum together and which shall be submitted individually."[30] The legislature can choose to package as many or as few amendments together as it deems necessary. Parliament has had the opportunity to decide the composition of referendums on seven different occasions since the founding of the modern Turkish State in 1923.[31] However, 2010 was the first time it presented so many changes in one package without introducing a completely new constitution.

Unlike the United States and other countries that rarely amend their constitutions, Turkey has embraced the constitutional amendment process as a way to refine the military-backed Constitution of 1982.[32] The 1982 Constitution was a reaction to one in a series of attempted coups that strengthened the power of the state over individual civil liberties, essentially protecting the state from its people. The Turkish citizenry fought against this instrument, which represented a military elitist culture out of touch with

---

28. TURKIYE CUMHURIYETI ANAYASASI [CONSTITUTION] May 8, 2017, art. 175 (Turk.) (dictating that written amendment proposals must be presented to the Grand National Assembly, and three-fifths of the Assembly must vote affirmatively via secret ballot for parliament to adopt the amendment as a bill. The president receives these bills, and then may send them back to parliament for reconsideration).

29. *Id.*

30. *Id.*

31. *Results of Previous Constitutional Referendums*, *supra* note 16.

32. Ergun Özbudun, *Turkey's Constitutional Reform and the 2010 Constitutional Referendum*, 2011 MEDITERRANEAN POL. 191, https://tinyurl.com/y25zhvtu.

majoritarian values, by amending the constitution sixteen times between 1987 and 2011.[33] These amendments were passed much more often through parliamentary agreements between majority and opposition parties than by referendum.[34] These piecemeal changes led to some liberalization and democratization in the country, but pressure to replace the entire constitution led to heated debates by the mid-2000s.[35] This discourse developed alongside increasing tensions between the separate branches of government.[36] As the AKP gained more power within the executive and legislative arena, it started to clash with the Constitutional Court, which plays a role roughly akin to that of the Supreme Court in the United States, and the judicial branch as a whole.[37]

Without the political backing necessary to introduce a completely new constitution,[38] the AKP presented the 2010 package of amendments in an attempt to answer some of the citizenry's constitutional concerns while subtly removing power from the courts. Although the larger reform package was embraced, the judicial reform components that altered the Constitutional Court, the Supreme Council of Judges and Public Prosecutors (HSYK),[39] and the relationship between military and civilian courts were highly controversial.[40] Before 2010, the judiciary was essentially autonomous.[41] But key amendments significantly altered the judicial appointment system and access to the Turkish Constitutional Court by inserting politicians into the appointment process and increasing the

33. *Id.*

34. *Results of Previous Constitutional Referendums*, *supra* note 16 (describing the three instances, out of a total of sixteen amendments, in which the Turkish constitution was changed by referendum).

35. Aslı Bâli, *Turkey's Constitutional Coup*, 48 MIDDLE EAST REP. 2, 3 (2018), https://merip.org/2018/12/turkeys-constitutional-coup/ (describing how Turkey's pursuit of EU succession in the early 2000's spurred notable reform, but there was wide consensus "that the amendments did not go far enough").

36. Özbudun, *supra* note 32, at 193.

37. Atikcan & Öge, *supra* note 21, at 6 (explaining how the constitutional court blocked the AKP's constitutional amendment efforts in 2008 to lift the ban on headscarves in schools and, only a year later, the chief prosecutor of the Supreme Court accused the AKP of being "the center of anti-secular activity" in Turkey).

38. The AKP failed to gain the two-thirds supermajority in Parliament required to pass a new constitution through the legislature, and fell four seats short of the 330 seats that would allow Erdoğan to replace the 1982 constitution by referendum. *See* Alexander Christie-Miller, *Turkey: Victorious AKP Needs Partnership for New Constitution*, EURASIANET (June 13, 2011), https://tinyurl.com/y6c7qkaj.

39. The HSYK is the key judicial body that appoints and disciplines judges and prosecutors, and "its independence is a central component of Turkey's checks and balances." The Minister of Justice, who after the referendum is now appointed by the president, acts as HSYK's president. *See* Blaise Misztal & Jessica Michek, *HSYK Elections and the Future of Judicial Independence in Turkey*, BIPARTISAN POL'Y CTR. (Dec. 12, 2014), https://tinyurl.com/y2vr4pbx.

40. Eur. Comm'n for Democracy through L., *Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey*, Opinion No. 600/2010, CDL-AD 5 (Dec. 20, 2010), https://tinyurl.com/y5ubtk5x [hereinafter Venice Commission Opinion].

41. Alan Makovsky, *Erdoğan's Proposal for an Empowered Presidency*, CTR. FOR AM. PROGRESS (Mar. 22, 2017), https://tinyurl.com/yx8jj56b.

numbers of judicial seats to facilitate court packing.[42] The traditional balance of power shifted as the AKP gained direct authority to appoint more members of both the Constitutional Court and the HSYK, which appoints, transfers, and disciplines judges and prosecutors all over the country. At the same time, the legislature's ability to check the judiciary decreased.[43] For the referendum's homegrown supporters and much of the international community, the injection of political appointees into the judiciary, such as the Minister of Justice who now acted as head of the HSYK, was a step in the right direction towards a more pluralistic society.[44] However, just as leaders in Poland and Hungary had undemocratically "restrict[ed] . . . the National Judiciary Council through the politicization of its selection,"[45] so too had Erdoğan gained enough control over the HSYK to render genuine judicial review a thing of the past.[46]

The non-judicial constitutional changes within that package were much less contentious, conferring greater recognition of fundamental rights and civilian rule.[47] Women and state employees benefited through new affirmative action and collective bargaining provisions, and after years of EU pressure, the state established an Ombudsman's Office.[48] Article 15, one of the most heralded and prominent amendments, lifted the immunity promised to military actors involved in the 1980 Coup and signaled to the electorate that the days of military control were over.[49] All of these changes could be categorized as "constitutional bribes," offering civil society greater rights to induce them to vote for the larger structural changes to the judiciary that were anti-democratic in nature.[50] However, the democratic nature of select provisions did not distract opposition parties on the ground from challenging the AKP's attempt to consolidate power in the executive.[51] A

42. Ran Hirschl, *Comparative Constitutional Law and Religion*, *in* COMPARATIVE CONSTITUTIONAL LAW 422, 423-24 (Tom Ginsburg & Rosalind Dixon eds., 2012) (noting that the constitutional court acted as the "long-time stronghold of statist-secularist views" before the referendum limited the court's ability to act as a check on the executive).

43. Gul Tuysuz, *Turkish Voters Approve Amendments in Referendum that Indicated Confidence in Nation's Leader*, WASH. POST (Sept. 12, 2010), https://tinyurl.com/y4e42qku.

44. Makovsky, *supra* note 41.

45. Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, RULE OF LAW (Jan. 5, 2018), https://tinyurl.com/y3a7equa.

46. *Id.*; *see also* Tuysuz, *supra* note 43 ("[C]hanges such as one that would give the ruling party more power in appointing judges worried secular voters, who view the judiciary as an important check on executive power.").

47. Aslı Ü Bâli, *Turkey's Referendum: Creating Constitutional Checks and Balances*, FOREIGN POL'Y (Sept. 15, 2010), https://tinyurl.com/y4bg3dba.

48. *Id.*

49. *Id.*

50. Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 771 (2018) (noting the new international trend in which proposed constitutional rights "serve as a form of inducement or 'bribe' to national movements to secure their support for constitutional changes that erode commitments to democratic competition or multiparty democracy").

51. Gülalp, *supra* note 4.

struggle ensued in the months leading up to the vote. Secularists argued that the referendum was an attempt to bring religion into the governmental sphere, Islamist-AKP supporters embraced a strongman executive unimpeded by the judiciary, and Kurdish groups boycotted the referendum process altogether.[52]

The government ignored calls from opposition groups to present amendments separately based on subject matter, instead bundling the twenty-six diverse changes and presenting them as one yes or no question.[53] After seventy-four percent of the country showed up to vote, the referendum passed with fifty-eight percent approval.[54] The international community characterized the results as a signal that Turkey was on its way to fully embracing western democratic values.[55] But nearly a decade after the 2010 changes, many onlookers, including the European Commission for Democracy through Law,[56] are beginning to realize how wrong they were.[57] Although it is possible to analyze the rationale that Turkish political parties and international watchdogs presented leading up to the vote, it is less clear why voters themselves ultimately passed the sweeping changes.

But it is clear that the numerous topics involved in the vote distorted the popular view. If the vote had been limited to only the judicial provisions, one could conclude from the outcome that the voters themselves either embraced or rejected a less independent judiciary. But that was not the case. Furthermore, the highly critical response that international commentators and rival parties CHP and MHP expressed with regards to judicial re-structuring would have been amplified if the vote focused only on the judiciary, forcing more voters to consider its direct implications without being distracted by the other "cosmetic changes geared to allure the

52. Aslı Bâli & Hanna Lerner, *Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L L.J. 227, 285 (2016) (describing how the secularist establishment argued the amendments were created to "facilitate stealth Islamization of the constitutional order by limiting the ability of the judiciary to check the AKP's majoritarian policies").

53. *See infra* Appendix A (listing all twenty-six amendments); Gülalp, *supra* note 4.

54. The original changes were approved by more than three-fifths but less than two-thirds of the National Assembly, so the package was submitted to the president in May 2010 for approval before a mandatory referendum. *See* Venice Commission Opinion, *supra* note 40, at 4.

55. *Id.* at 5.

56. The European Commission for Democracy through Law (the Venice Commission) is an independent consultative body created by the Council of Europe that provides legal advice on how to bring states' structures in line with European and international standards, organizing election observation missions and publishing best practices opinions. Their annual report also evaluates new constitutional reforms and amendments throughout the world. *See* VENICE COMM'N OF COUNCIL OF EUR., EUR. COMM'N FOR DEMOCRACY THROUGH L., ANNUAL REPORT OF ACTIVITIES 2018 (2019), https://tinyurl.com/y4hoe7x2.

57. Eur. Comm'n for Democracy through L., *Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017*, at 29, Opinion No. 875/2017, CDL-AD(2017)005 (Mar. 13, 2017), https://tinyurl.com/y6estum3. The report warned of "a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one."

electorate."[58] Thus, the executive infiltration of the judiciary and eventual presidential authoritarian regime would have been less likely to develop if Turkey had introduced procedural constraints on referendums, such as the single subject rule. Below, this Note analyzes Turkey's democratic decline since 2010 and its current status as an authoritarian state.

III. DEMOCRATIC EROSION

A. Defining Democracy

The point at which a regime ceases to be democratic depends on how one chooses to define "democracy." Although scholars cannot agree on a comprehensive definition of democracy, as evidenced by the vast body of literature that has formed around minute details of the term, most definitions require "contestation" through free and fair elections.[59] This focus on genuine challenges to power helps explain why there is remarkable uniformity in the actual classification of specific countries, even in the absence of widely-adopted criteria.[60] This Note adopts Professor José Antonio Cheibub's definition of democratic regime due to its focus on electoral contestation and general applicability.[61]

For a regime to be classified as a democracy under Cheibub's standard, four criteria must be met: (1) the chief executive must be popularly elected; (2) the legislature must be popularly elected; (3) more than one party must be competing in elections; and (4) there must be an alteration of power following the same rules under which the incumbent was elected.[62] This 'alteration of power' factor is often the least apparent, but acts as an extremely important predictor of majoritarian flourishing, as "nothing is

58. Senem Aydin Düzgit, *Constitutional Referendum in Turkey: What Next?*, CTR. FOR EUR. POL'Y STUD. (Sept. 23, 2010), https://tinyurl.com/y6xvowjk (arguing that "the way in which the government went against the Venice Commission's decisions by compiling all the amendments in one vote (where internal coherence of the package is contested) further boosted the view that this is in fact a referendum on the restructuring of the judiciary, whereas most of the other amendments are cosmetic changes geared to allure the electorate"); *see also* Atikcan & Öge, *supra* note 21, at 7 (documenting the "fierce debate on the changes to the judiciary," and how "the continuing role of the Minister of Justice in administrating and approving the decisions of the Council was highly contested as an infringement of judicial independence").

59. Mike Alvarez et al., *Classifying Political Regimes*, 31 STUD. IN COMPAR. INT'L DEV. 3, 4 (1996).

60. *Id.* (finding that independently-created scales of democracies were highly correlated even without similar definitions).

61. JOSE ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 26, 27 (2007) (adopting the Alvarez et al. (1996) definition of what constitutes a democratic regime, which was later refined by Przeworski et al. (2000), because "it provides a nonarbitrary and entirely reproducible way of distinguishing democracies from dictatorships"); *see also* Michael E. Alvarez et al., *Classifying Political Regimes*, 31 STUD. IN COMPAR. INT'L DEV. 3-36 (1996); ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 (2000).

62. *Id.* at 27-28.

more perilous than to permit one citizen to retain power for an extended period . . . herein lays the origins of usurpation and tyranny."[63] The phenomenon of incumbency advantage helps explain why alterations of power are necessary to preserve democracy. The longer an incumbent remains in office, the greater their ability to retain power. This advantage is a result of status quo bias,[64] greater control over the media and civil society, and an increased ability to improperly use public resources to remain in power.[65] Furthermore, possible contenders may view the long-standing executive's incumbency as a barrier to entry, creating a system in which citizens and other political actors expect and normalize the continuation of an entrenched leader's reign.[66] The more time one has to consolidate their power, the more difficult it becomes for others to mount legitimate challenges.

B. Democratic Backsliding

The possibility that the global democratic recession could deepen in the near future is not far-fetched. That is why "gray zone" countries, which outwardly appear to be democracies but show considerable signs of democratic decline, have become a central focus for scholars studying this new wave of authoritarianism.[67] The theory of "democratic backsliding"[68] describes the process by which an initially democratic regime becomes a "hybrid regime," placing them within a grey zone. Under a hybrid regime, regular elections still exist but informal power structures decrease "the competitiveness (or potential of competitiveness) of the electoral playing

63. John M. Carey, *The Reelection Debate in Latin America*, *in* LATIN AMERICAN DEMOCRATIC TRANSFORMATIONS: INSTITUTIONS, ACTORS, AND PROCESSES 79, 80 (William C. Smith ed., 2009) (quoting Simón Bolívar's constitutional plan to the Venezuelan Congress in 1819).

64. Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1820 (2011) (finding the more well-known a leader becomes, the more the polity's ability to evaluate performance and provide discipline becomes distorted).

65. KATHRYN DUNN TENPAS, PRESIDENTS AS CANDIDATES 105 (Routledge Press 2003) (1997); *see also* Dixon & Landau, *infra* note 118, at 483-84 (describing how the Columbian Constitutional court refused to accept a constitutional amendment to add a third term to the presidency, finding it "would create a substantial electoral inequality with any potential challengers, given the president's visibility and control of the patronage apparatus of the state over time.").

66. Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 154-55, 159 (1997); *see also* Ginsburg et al., *supra* note 64 (arguing that regulation through term limits may be an appropriate solution to address distortions in the electoral marketplace by making a pre-commitment to consider alternative candidates for office while furthering party-based rather than personality-based visions of democracy).

67. Diamond, *supra* note 13, at 147 (describing how "gray zone" countries defy simple classification because they appear to have frequent and fair elections, but substantial flaws exist that point towards democratic breakdown at the hands of "abusive executives intent upon concentrating their personal power and entrenching ruling-party hegemony").

68. Bermeo, *supra* note 18, at 5 (defining democratic backsliding as "the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy").

field due to the concentration of power in the hands of the incumbent executive, relative to other actors."[69] This backsliding stems from the executive's deliberate choices to hinder opposition parties, manipulate election coverage, and amend electoral law.[70] These moves have become endemic of the charismatic "legalistic autocrat," who comes to power as a result of wide-spread discontent and hijacks the constitution by framing it as a "democratic mandate . . . hid[ing] their autocratic designs in the pluralism of legitimate legal forms."[71] Drawing the exact line between backsliding and a full-fledged authoritarian regime is a difficult endeavor, and requires case-by-case analysis.[72] But when elections are no longer deemed truly competitive, one must question whether another win for the incumbent is actually a mandate of the people.[73] In other words, significant backsliding is usually the preamble to full-fledged constitutional retrogression and authoritarianism.[74]

C. Turkey in Democratic Decline

Applying these theories to Turkey, it is evident that significant democratic backsliding occurred as a result of executive aggrandizement.[75] This downward trajectory ultimately pushed Turkey outside Cheibub's definition of democracy, as the country was unable to meet the fourth 'alteration of power' factor. Indeed, Turkey no longer has free and fair elections that constitute democratic alterations of power.[76] This is evident when we look at the AKP's actions during the first decade of the 2000s. In the first few years of the 2000s, Erdoğan and his AKP party introduced greater civil liberty protections, empowering formerly disenfranchised Islamic groups and curtailing military power over elected officials.[77] Scholars such as Aziz Huq and Tom Ginsburg believe that this line drawing is critical

69. Jennifer Raymond Dresden & Marc Morjé Howard, *Authoritarian Backsliding and the Concentration of Political Power*, 23 DEMOCRATIZATION 1122, 1123 (2015).

70. Kadir Akyuz & Steve Hess, *Turkey Looks East: International Leverage and Democratic Backsliding in a Hybrid Regime*, 29 MEDITERRANEAN Q. 1 (2018).

71. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018).

72. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 118 (2018) (arguing that "the precise point . . . at which the volume of democratic and constitutional backsliding amounts to constitutional retrogression will be unclear—both ex ante and contemporaneously," especially when a ruling party introduces illiberal change through incremental and informal steps).

73. *See, e.g.*, THE FEDERALIST NO. 71, at 392 (Alexander Hamilton) (E.H. Scott ed., 2002).

74. Huq & Ginsburg, *supra* note 72, at 94.

75. Bermeo, *supra* note 18, at 11. Executive aggrandizement exists when "institutional change is either put to some sort of vote or legally decreed by a freely elected official—meaning that the change can be framed as having resulted from a democratic mandate."

76. Turkey's Freedom House rating went from "partly free" to "not free" in 2018. *Freedom in the World 2018: Turkey*, FREEDOM HOUSE (2018), https://tinyurl.com/yyrzx24g.

77. Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581, 1584 (2016).

as global trends evidence a marked increase in cases of subtle "constitutional regression" and a simultaneous decrease in instances of "democratic reversion," when there is a rapid and obvious collapse of democratic institutions.[78] However, the 2005 elections marked the first signs of "competitive authoritarianism"[79] as Erdoğan began to follow what Professors Steven Levitsky and Daniel Ziblatt term the "authoritarian playbook": first attacking political opponents, then the courts, and finally the electoral laws themselves.[80] The ruling party began to curtail political opposition by detaining non-AKP party leaders under the pretext of security concerns. For example, the AKP instrumentalized escalating violence with the Kurdistan Workers Party (PPK) to justify detaining rival party HDP's members in four different cities.[81] By 2013, the ruling party stopped trying to mask its suppression. The AKP openly dismissed and detained opposition members, judges, police officers, and prosecutors using legislation passed without proper public consultation.[82] Earlier appearance of "mutual toleration" and "forbearance" were replaced with overt displays of coercive power.[83] The AKP concurrently began to use government funds to win campaigns[84] and gain greater control over the national media through "intimidation, mass firings, [. . .] imprisonment of journalists, and buying off media moguls."[85]

After Erdoğan delegitimized many of his political opponents, he then focused his efforts on Turkey's apolitical "referees" by politicizing the judiciary.[86] It was these more permanent judicial changes, ushered in by the 2010 referendum, which solidified Turkey's eventual decline. After the referendum increased executive and legislative involvement in Turkey's

78. Huq & Ginsburg, *supra* note 72, at 78.

79. Esen & Gumuscu, *supra* note 77, at 1581 ("The June 2015 election results and their aftermath further confirm that Turkey has evolved into a competitive authoritarian regime.").

80. LEVITSKY & ZIBLATT, *supra* note 15, at 78-79 (analogizing this widely-used approach to a soccer game, explaining how "would-be authoritarians must capture the referees, sideline at least some of the other side's star players, and rewrite the rules of the game to lock in their advantage, in effect tilting the playing field").

81. Esen & Gumuscu, *supra* note 77, at 1587.

82. *European Commission Staff Working Document, Turkey 2014 Progress Report*, at 3, 11, SWD (2014) 307 final (Oct. 8, 2014), https://tinyurl.com/popfbzx ("[T]he government's response to allegations of corruption targeting high-level personalities, including members of the government and their families, raised serious concerns over the independence of judiciary and the rule of law.").

83. LEVITSKY & ZIBLATT, *supra* note 15, at 102, 106.

84. Esen & Gumuscu, *supra* note 77, at 1589 ("The OSCE observation reports on the 2014 presidential and 2015 general elections document that Erdoğan's campaign appearances were often combined with official events to legitimize the use of public funds for their financing.").

85. *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 15, at 84 (describing how in 2009 the AKP government fined Dogan Media, which controlled fifty percent of the Turkish media market, including the some of the most well-known secular liberal newspapers, $2.5 billion, forcing it to sell off most of its empire to pro-government businessmen).

86. *Id.* at 78 (stating that authoritarians want to shield their party from investigation and censure from the courts and official law enforcement personnel, so they seek to control these "referees" and use them as weapons against opponents).

judicial appointment process and administration, the AKP passed legislation in 2017 that ended the term for all previous members of the HSYK.[87] This allowed Erdoğan's party to completely re-populate the board in charge of judicial appointments. Finally, completing the last play in the playbook, the AKP passed electoral reform laws to ensure its continued influence. Both the 2016 judicial reform bill, which inserted AKP members into the YSK, the body tasked with election procedures, and the March 2018 electoral voting laws, which greatly favored the AKP, were passed only months before national general elections.[88] In Freedom House's 2019 Freedom in the World Report, Turkey received a one out of four ranking for the question, "Are the electoral laws and framework fair, and are they implemented impartially by the relevant election management bodies?"[89] The country also received a five out of twelve ranking for the overall electoral process.[90] These freedom scores represent a marked drop from previous years, which stems from the electoral law reforms of 2016 and 2018.

The AKP's use of state funds to control the media and electoral events, its dominance over the judicial system, and its ability to quickly pass election law reforms has created an uneven electoral playing field and represents a higher level of political manipulation than witnessed in the early 2000's. Throughout this piecemeal process, Erdoğan always justified his actions through a democratic framework to preserve the appearance of legality. This common tactic for would-be autocrats has created a world in which "the very defense of democracy is often used as a pretext for its subversion."[91] But it was only once the constitution itself was transformed that the subtle signs of backsliding morphed into permanent antidemocratic structural change. As a growing consensus emerges around the authoritarian nature of Turkey's current regime, it is critical to analyze the constitutional amendment processes which facilitated this illiberal turn.

IV. REFERENDUMS: THEORETICAL EXPLANATIONS

If constitutions are the legal foundations that insulate democratic ideals from future majoritarian whims, it is formal constitutional amendment rules which dictate the strength of such mechanisms, acting as "gatekeepers to

87. Alan Makovsky, *Turkey's Parliament*, CTR. FOR AM. PROGRESS (Dec. 19, 2017), https://tinyurl.com/y63odrcf (finding that "the judiciary is now little more than an arm of the Justice and Development Party" because the president and the AKP-dominated legislature now appoint a majority of important positions).

88. *Id.*

89. *Freedom in the World 2019: Turkey*, FREEDOM HOUSE (2019), https://tinyurl.com/yyzwfnwb.

90. *Id.*

91. LEVITSKY & ZIBLATT, *supra* note 15, at 92.

the constitutional text."[92] Formal avenues for constitutional change codify a country's commitment to democratic ideals such as transparency,[93] citizenship involvement,[94] and the rule of law,[95] while dissuading overtly unconstitutional usurpations of power. But for these benefits to be realized, constitutional designers must codify procedures that seek a proper balance between responsiveness and stability, ensuring that default rules are only modified when necessary.[96] Constitutional scholar Richard Albert argues that the best procedures are the ones that "translate popular preferences into law while balancing these preferences against the most fundamental values of the polity."[97]

Allowing too many amendments to pass can lead to "excessive constitutional mutability."[98] This constitutional instability may allow a powerful majority to insulate itself from future political competition,[99] destroy pre-commitments that protect insular minorities,[100] or create an inefficient polity that is "consumed with endless debates about how to structure its basic political institutions in a way that undermines the ability of a democracy to engage in this kind of collective action."[101] Under contemporary liberalist views, constitutions are meant to entrench individual rights and certain core structural features from changes spurred

92. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014) [hereinafter Albert, *Structure of Constitutional Amendment Rules*]; *see also* Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655 (2015) [hereinafter Albert, *Amending Constitutional Amendment Rules*].

93. JOHN RAWLS, POLITICAL LIBERALISM 238 (2d ed. 2005) (arguing transparency is necessary so that compliance with constitutional non-negotiables can be readily observable).

94. *See* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 712 (2015) (finding that when amendment procedures offer citizens the ability to consent, they are more likely to feel an attachment to the constitution and view it more favorably).

95. Stephen M. Griffin, *The Nominee Is . . . Article V*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

96. Albert, *Structure of Constitutional Amendment Rules*, *supra* note 92, at 974 ("[H]yper flexibility is as inadvisable as hyper rigidity because it erodes the distinction between a constitution and a statute."); *see also* MARKUS BÖCKENFÖRDE, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CONSTITUTIONAL AMENDMENT PROCEDURES 8 (2017), https://tinyurl.com/yxq8r5x2 [hereinafter IDEA] (primer created to assist constitutional designers in achieving an effective balance between rigidity and flexibility for their country). It is important to note that there is an inherent tension that exists between the rigidity of constitutional rules and theories of democratic legitimacy that must be addressed when drafting amendment procedures.

97. RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 39 (2019).

98. Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW 96, 106-07 (Tom Ginsburg & Rosalind Dixon eds., 2012).

99. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985 (2003) (noting that one of the hallmarks of constitutionalism is the guarantee that structural rules will not be "gamed" by those in power in order to preserve their position).

100. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1963 (2003).

101. Dixon, *supra* note 98, at 102.

by temporary popular sentiment in order to avoid constitutional de-legitimization.[102] Nonetheless, there is "broad agreement" that the referendum, when used sparingly, is a necessary component of a democratic constitution's formal amendment procedures.[103]

But as constitutional referendums become increasingly popular around the world,[104] critics contend that direct voting in this context actually encourages populist authoritarianism.[105] Recent referendums in the United Kingdom, Greece,[106] and Hungary[107] highlight how populist leaders use referendums to legitimize their gradual annexations of power. These successful referendums perpetuate the myth that there is an unbreakable bond between the "charismatic, atavistic leader" and his people, who eagerly embrace his agenda through popular vote.[108] It is difficult to evaluate these claims on a macro level, as it is still unclear how leaders use and citizens view these mechanisms for change globally.[109]

Constitutional referendums are a different and more complicated political enterprise than general elections, especially when they encompass multiple higher order proposals that voters may struggle to connect to their

---

102. Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 666 (2010).

103. Laurence Morel, *Referendum*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 505 (Michael Rosenfeld & András Sajó eds., 2012) (noting that contemporary theorists believe that direct participation in constitutional politics is necessary for the constitution to be genuinely democratic).

104. Around forty percent of the world's current constitutions make provision for the use of referendums in constitutional amendment processes. *See* IDEA, *supra* note 96, at 8; *see also* MADS QVORTRUP, A COMPARATIVE STUDY OF REFERENDUMS: GOVERNMENT BY THE PEOPLE (2002) (finding all post-communist democracies of Eastern and Central Europe included a referendum provision in their new constitutions).

105. KATHERINE COLLIN, BROOKINGS INST., POPULIST AND AUTHORITARIAN REFERENDUMS: THE ROLE OF DIRECT DEMOCRACY IN DEMOCRATIC DECONSOLIDATION 1 (2019), https://tinyurl.com/y4fbqfwt ("Referendums are often seen as a tool that empowers populist authoritarians . . . [g]lobally, democratic backsliding has coincided with increased use of popular votes.").

106. Over sixty percent of Greeks voted alongside their radical left-wing Prime Minister Alexis Tsipras to reject the eurozone's proposed austerity terms. *See Greece's Referendum: "No" to What?*, ECONOMIST (July 5, 2015), https://www.economist.com/europe/2015/07/05/no-to-what.

107. In 2016, ninety-eight percent of voters sided with Hungarian prime minister Viktor Orbán in a vote against EU migration quotas to keep refugees out of their country. However, because less than fifty percent of the overall population voted, it was rendered invalid. *See* Andrew MacDowall, *Voters Back Viktor Orbán's Rejection of EU Migrant Quotas*, POLITICO (Oct. 2, 2016), https://www.politico.eu/article/hungary-referendum-eu-migration-viktor-orban/.

108. Collin, *supra* note 105, at 2 (arguing that contemporary illiberal authoritarianism requires bursts of popular legitimization and finding that "democratic decline is discussed as a cycle punctuated by the use of referendums or other mechanisms of direct democracy").

109. Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective* 106 (U. Chi. Pub. L. & Legal Theory Working Paper Series, Paper No. 347, 2011) (arguing that the way citizens view constitutional amendment procedures plays an "important role in determining the likelihood that various actors will use formal amendments as a means of resetting various constitutional rules, engaging in democratic dialogue or reducing agency costs" and can impact long-term amendment rates in a country).

day-to-day realities.[110] Professor Lawrence LeDuc finds that voting behavior exhibits greater volatility in referendums than regular elections, which suggests that campaigns leading up to the vote are more likely to have a substantial impact on the final outcome.[111] But voters tend to receive less detailed information and ambiguous cues from political parties during these campaigns, regularly resorting to "shortcuts" to make their decision on complex constitutional changes.[112] Furthermore, because voters are not actively engaged in framing the question presented to them,[113] they tend to vote based on abstract values, events, or issues unrelated to the referendum's actual question.[114] This lack of meaningful analysis raises serious issues when one accounts for the fact that constitutional referendums tend to pass at much higher rates than other formal amendment procedures, even though voter turnout is often lower than in general elections.[115] Given that a large percentage of the population chooses not to vote, and those who do vote do not fully understand what they are voting on, it can fairly be said that such a vote does not represent the view of the people.

These discrepancies take on even greater significance in the packaged amendment context. In that scenario, would-be autocrats often use "constitutional bribes" to pass structural changes that undermine democratic institutions in the long run.[116] Professor Rosalind Dixon highlights an increasingly common pattern in which leaders bundle new human rights provisions together with antidemocratic structural changes as a form of "political insurance."[117] By offering enhanced liberties, leaders induce voters to support the structural changes necessary to ensure their party's continued dominance when citizens would not have otherwise

110. Atikcan & Öge, *supra* note 21.

111. *See* Lawrence LeDuc, *Opinion Change and Voting Behaviour in Referendums*, 41 EUR. J. POL. RSCH. 711 (2002).

112. Amanda Taub & Max Fisher, *Why Referendums Aren't as Democratic as They Seem*, N.Y. TIMES (Oct. 4, 2016), https://tinyurl.com/y63a8opo (citing research by Arthur Lupia and Mathew D. McCubbins on voter's shortcuts).

113. *See generally* Lawrence LeDuc, *Referendums and Deliberative Democracy*, 38 ELECTORAL STUD. 139 (2015) (juxtaposing deliberative democracy (which emphasizes voice) against referendums (which emphasize votes), concluding that "democracy by referendum as currently practiced in Europe and North America falls considerably short of a deliberative ideal").

114. Taub & Fisher, *supra* note 112 (describing how voters in both the UK referendum to leave the EU and the Colombia referendum to approve a peace deal with the FARC justified their vote based on the broad-based values and historical events that political parties had emphasized rather than specific details of the referendum).

115. David Butler & Austin Ranney, *Theory*, *in* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 17-18 (David Butler & Austin Ranney eds, 1994). (comparing mean turnout rates in parliamentary elections and referendums in twelve countries from 1945 to 1993 and concluding that turnout was significantly higher in regular elections). Turnout rates have declined even further since 1986.

116. Dixon, *supra* note 50.

117. *Id.* at 774.

accepted such drastic changes standing alone.[118] This trade off "pave[s] the way for the consolidation of dominant-party or presidential rule in ways that limit the effectiveness of rights-based constitutional changes themselves and pose[s] a major threat to the institutional 'minimum core' necessary for a true democracy."[119] Voters do not realize that these new human rights cannot come to fruition if the larger system allows the executive to control both the legislature and the judiciary.

One of the defining elements of the recent wave of democratic decline has been the degree of popular support for antidemocratic change.[120] Autocrats gain this support by distilling packaged referendums into one question: do you support the executive? Parties that have ruled for an extended period of time, such as the AKP in Turkey, have been particularly successful at framing packaged referendums as a stamp of approval for continued rule.[121] They simplify multi-layered issues to pass major structural changes under the thin veil of direct democracy.[122] To stop autocrats from using constitutional bribes and strategic oversimplifications, Dixon and others recommend that constitutional designers include procedural rules that mandate the unbundling of amendments.[123] Below, this Note explores why single subject rule makes this unbundling possible.

V. SINGLE SUBJECT RULE AS A DEMOCRATIC DEFENSE MECHANISM

Single subject rule offers a potential safeguard against the antidemocratic change referendums tend to facilitate. However, countries that wish to entrench certain components of their constitution have rarely considered a procedural rule to limit the number of issues that may be considered. Instead, they have deemed certain parts of the constitution unchangeable by placing them on a higher tier. This Part first describes the widespread adoption of tiered amendment structures and highlights why they are not always be the best option. Next, it enumerates the three reasons why single subject rule should be considered by constitutional designers and legislatures in nations showing early signs of democratic decline: it upholds

118. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 460 (2018) (citing Colombia and India as recent case studies in which popular support was easily garnered for antidemocratic change).

119. Dixon, *supra* note 50, at 767.

120. *Id.* at 771.

121. Taub & Fisher, *supra* note 112 (finding that the decision to propose a referendum "doesn't have a lot to do with whether this should be decided by the people . . . [i]t has to do with whether a politician can gain an advantage from putting a question to the people").

122. *Id.*

123. Dixon, *supra* note 50, at 813-14 (recommending single subject rule and tiered amendment structures as possible solutions to encourage unbundling).

direct democracy, deliberative democracy, and international best practices. Finally, it addresses foreseeable administrability critiques of the rule.

A. The Current Focus on Tiered Amendment Structures over Constitutional Amendment Rules

Constitutional design literature has focused on tiered amendment structures as a way to protect certain foundational or "higher order" segments of the constitution, largely ignoring single subject rule as an option.[124] This academic focus coincides with a growing global phenomenon of constitutional provisions that can never be changed. These "unamenable" provisions entrench existing separation of powers and fundamental rights.[125] Tiered amendment structures come in many variations, but are roughly categorized as either procedural or substantive frameworks. Procedural frameworks place heightened procedural requirements, such as higher approval thresholds,[126] on specific parts of the constitution, which "focus[es] public attention upon those decisions and improve[s] deliberation about them."[127] Alternatively, substantive frameworks adopt eternity clauses that foreclose amendment to provisions or subjects that implicate the "essential nucleus" of a regime.[128] Finally, courts can create a hierarchy of amendments without actually changing the text of the constitution by applying the doctrine of "unconstitutional constitutional amendments" in order to find "implicit unamendability" in a specific part of the constitution.[129]

All three of these frameworks have been utilized to ensure continued judicial independence. On the procedural front, some countries such as Colombia define amendments that drastically alter the balance of power as "substitutions" that require the same heightened procedures applied when a constitution is first created.[130] Unamendable provisions across the world

---

124. Yaniv Roznai, *Unamendability and the Genetic Code of the Constitution* 1, 27 (N.Y.U. Pub. L. & Legal Theory Working Papers, Paper No. 514, 2015) (holding that these pre-commitment provisions send the message domestically and abroad that the specific principle or institution is fundamental to the constitutional order, defining the collective and often aspirational 'self' of the polity and "compromis[ing] the 'genetic code' of the constitution").

125. *Id.* at 8. After analyzing 742 world constitutions from 1789 to 2015, Roznai found that the seventeen percent of constitutions in the first wave of constitutionalism with unamendable provisions rose to fifty-three percent by the third wave.

126. *See* IDEA, *supra* note 96, at 6 (stating common procedural safeguards include a supermajority of sixty to seventy-five percent or "double decision rules" which require an amendment to pass twice, making it more difficult for the ruling party to pass core changes without deliberation).

127. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 44 (2001).

128. Dixon & Landau, *supra* note 118, at 495-96 (explaining how eternity clauses may cover a specific provision, many provisions, or broader principles like separation of powers).

129. *Id.* at 494.

130. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *Constitutional Amendment and the Substitution of the Constitution Doctrine*, *in* COLOMBIAN CONSTITUTIONAL LAW 327, 328 (2017)

also insulate the judiciary, with at least eight constitutions that explicitly bar changes to provisions dealing with the "independence of the courts," and others that protect "separation of powers" or "judicial review."[131] Finally, the Supreme Court of India has developed a "basic structure doctrine," which allows the Court to strike down amendments that alter the identity of Indian constitutionalism.[132] The Court has repeatedly applied this doctrine to amendments that alter the independence or jurisdiction of the judiciary, barring changes to its judicial appointment system.[133]

But in countries with budding "legalistic autocrats" who control the legislature, such as Turkey, extensive tiered amendment structures are not a viable option to insulate the judiciary from further democratic backsliding in the immediate future.[134] In contrast, a single subject rule requirement for referendums is a more realistic goal. Although there is a clear international trend towards entrenchment of core principles in constitutional democracies, the same heightened procedural requirements are not applied to the procedural provisions themselves.[135] In other words, the rules for changing the game are not as difficult to alter. Political actors can learn from Turkey by strategically focusing on amending the procedural requirements for referendums, framing the single subject rule as a necessary measure to gauge the true will of the people in such fundamental matters. An autocrat-in-the-making is less likely to view this one procedural change as a significant encroachment on his power, as constitutional referendums are used less frequently than other avenues and, on the surface, do not threaten a leader's continued rule.[136]

If the AKP's competing political parties had realized how much power this referendum would grant Erdoğan, they may have had a chance to stop it. In Turkey in 2010, there were several feasible options that deputies could

(explaining how the constitutional court mandates that the specific provision be voted on through a constituent assembly or it will be deemed an "unconstitutional constitutional amendment").

131. Roznai, *supra* note 124, at 11. Angola, Cape Verde, Mozambique, Peru, Portugal, Romania, Sao Tome and Principe, and Timor-Leste have explicit provisions which uphold the independence of courts. *Id.*

132. *See* Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India).

133. *E.g.*, Dixon & Landau, *supra* note 118, at 496 (describing how the SCI rejected a 2015 constitutional amendment that would have changed the judicial appointment system from one run by judges to one where a commission largely controlled by the executive makes key decisions, which would have mirrored the 2010 changes made to the Turkish judiciary).

134. *See* Scheppele, *supra* note 71, at 549. A strongman executive is unlikely to condone a major tiered amendment proposal when "[l]oosening the bonds of constitutional constraint on executive power through legal reform is the first sign of the autocratic legalist." *Id.*

135. Albert, *Amending Constitutional Amendment Rules*, *supra* note 92 (concluding that "relatively few constitutional democracies set a higher threshold for formally amending formal amendment rules" and recommending that future constitutional drafters make these rules more difficult to amend).

136. This is case specific, as every country has a different "amendment culture." But overall, referendums are used less frequently than legislative approval to pass constitutional changes. *See* Ginsburg & Melton, *supra* note 94; IDEA, *supra* note 96, at 6-8 (noting that most constitutions have a legislative amendment process, whereas only forty percent have a referendum amendment option).

have pursued to try to block the AKP from passing so many amendments at once. These missed opportunities show that other countries may also have realistic options to foreclose undemocratic referendums. For example, it would have been possible for Parliament to pass legislation requiring the upcoming constitutional referendum to include only one or similar provisions. Similarly, the main opposition party, CHP, could have worked with other smaller political parties to gain the simple majority necessary to pass a law requiring that all provisions be related and granting the Supreme Election Council the power to oversee any disputes related to this new requirement.[137]

It is also plausible that Parliament could have met the three-fifths vote required to pass a formal constitutional amendment mandated in Article 94 of Turkey's National Assembly's Rules of Procedure before the referendum was presented to the public.[138] Procedural rules in the Constitution are not entrenched like principles of judicial review or fundamental rights and freedoms. Thus, non-AKP members of Parliament, who made up forty-one percent, could have worked together to convince a portion of AKP to join their cause and obtain the majority necessary to bar future packaged referendums before the passage of the pro-AKP judicial changes in 2010.[139]

Finally, deputies in Parliament could have introduced a bill to change the National Assembly's Rules of Procedure by adding a specific article dictating the procedures required for constitutional amendment proposals.[140] Legislatures in other nations should learn from the Turkish Parliament's missed opportunity by introducing single subject rule before it is too late. The three main reasons for introducing this under-recognized democratic defense mechanism in similarly-situated states are enumerated below.

---

137. TURKIYE CUMHURIYETI ANAYASASI [CONSTITUTION] May 8, 2017, art. 96 (Turk.) ("[For ordinary laws,] the Turkish Grand National Assembly shall convene with at least, one-third of the total number of members and shall take decisions by an absolute majority of those present."); *id.* art. 79 ("The general conduct and supervision of a referendum on laws amending the Constitution . . . shall be subject to the same provisions relating to the election of deputies.") (granting power to the Supreme Election Council to oversee the entire process).

138. *Id.* art. 94 (mandating that proposed amendments to the Constitution are treated the same as domestic legislation, except that the proposal must go through two sessions of debate and obtain a three-fifths majority for passage).

139. *Id.* art. 175 ("The consideration and adopting of proposals for the amendment of the Constitution shall be subject to the provisions governing the consideration and adoption of legislation.").

140. *Id.* art. 95 ("The procedure and principles regarding the deliberation of bills in the Grand National Assembly of Turkey shall be regulated by the Rules of Procedure . . . [which are] drawn up by itself."); *id.* art. 181 ("Proposals for amending the Rules of Procedure may be introduced by deputies.").

B. Single Subject Rule Strengthens Direct Democracy

First, limiting referendums to one subject is the only way to ensure amendments are reflective of the "will of the people" in line with voting-centric democratic theories.[141] Historically, referendums have been viewed as an important mechanism to ensure that direct democracy flourishes by placing fundamental constitutional decisions in the hands of the citizenry instead of leaving the decision to elites who disproportionately control amendment processes.[142] However, when a citizen votes on a package of constitutional commitments, it is impossible to discern their view on each individual amendment. Voters often make concessions on some proposed provisions to ensure their preferred change passes. However, this internal cost-benefit analysis is never translated to outside parties. The principle of "one man, one vote" that underlies majoritarian regimes does not exist in this system because a specific provision that is opposed by the majority is likely to sneak through based on the fact that it is packaged with other highly popular changes.[143]

There are two practices that rule makers engage in before a referendum is presented to the people that distort the popular will: logrolling and riding. Logrolling occurs when several provisions that garner minority support are rolled into one to achieve majority support.[144] Each individual amendment would not pass alone, so it is common for different political actors to trade votes and bargain in order to reach a majority threshold. Riders are slightly different.[145] This phenomenon occurs when an unfavorable amendment can "ride" another highly-popular proposal in the package to passage.[146] But unlike logrolling, which often empowers groups to work together, riders are not usually products of bargaining.[147] Riders are more likely to occur in

---

141. Simone Chambers, *Constitutional Referendums and Democratic Deliberation*, *in* REFERENDUM DEMOCRACY 231 (Matthew Mendelsohn & Andrew Parkin eds., 2001) (describing how the voting-centric theory conceptualizes democracy as an arena in which fixed preferences and interests compete via fair mechanisms of aggregation).

142. Butler & Ranney, *supra* note 115 (proponents of referendums argue that they act as an important supplement to representative institutions by maximizing legitimacy and participation in areas usually co-opted by legislators and executives); *see also* THEODORE ROOSEVELT, *The Right of the People to Rule*, *in* THE WORKS OF THEODORE ROOSEVELT 151, 152 (Hermann Hagedorn ed., 1926) (arguing that the power of initiative and referendum would help ensure "the majority of the people do in fact, as well as theory, rule . . . .").

143. ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 1, 40 (2000).

144. Gilbert, *supra* note 23; *see also* Boger, *supra* note 24, at 1247 (describing how voters or legislatures are "forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted").

145. Gilbert, *supra* note 23, at 809.

146. *Id.*

147. *See* Dixon, *supra* at 50, at 785 ("[L]ogrolling can provide a means of capturing the intensity of voters' preferences, thereby increasing overall social welfare . . . [and by] producing a legislative

nations such as Turkey, where the ruling party controls both the parliament and executive and has the ability to utilize its unchecked power to combine highly favorable constitutional changes with other less popular alterations. It is plausible that the amendment placing an AKP party member as the head of the body in charge of judicial appointments (HSYK) would not have had the majority support necessary to pass if it was presented alone. But because it was placed alongside so many other highly popular changes, it "rode" through. Single subject rule removes the possibility of logrolling or riding because it forecloses the bundling of multiple amendments that represent varying degrees of national support. If procedures do not foreclose these strategies, it is impossible to gauge the majority approval for one specific change.

Voter choice theory provides an explanation for why packages do not reflect the majority will. Under this theory, there are two systems in which collective decision making can occur in a democracy: bargain or median democracy.[148] Bargain democracy exists when actors compromise with each other across multiple issues.[149] In contrast, median democracy occurs when actors decide issues individually with "no opportunity to make concessions on one in exchange for favors on another."[150] When the citizenry in a bargain democracy is forced to aggregate their views on several issues into one yes or no vote, what results is "the confusion of a multitude."[151] Professor Michael D. Gilbert, applying Professor Robert D. Cooter's median voter theory, argues that bargain democracy cannot produce a "Condorcet winner"—an amendment that would defeat all other proposals in a direct vote.[152] This is because multiple majorities exist based on competing preferences for certain components of the package that are not reflected in the final outcome. The outcome is undemocratic in the sense that the citizenry would, if presented with a different package of proposals, vote to replace the first package, and then vote to replace the second package, and so on in an endless cycle. Instead of enacting the "majority's will," voting just produces circularity.

Readers may look elsewhere for a fuller explication of this circularity problem.[153] But here is a brief example. Imagine multiple, independent

---

majority in support of certain measures, it can also encourage various socially and economically productive forms of investment.").

148. Cooter & Gilbert, *supra* note 22.

149. *Id.* at 698.

150. Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1636 (2013).

151. Cooter & Gilbert, *supra* note 22, at 699 ("Tens of thousands of citizens cannot negotiate with one another, lending support on one proposal in exchange for others' support on a second proposal.").

152. Gilbert, *supra* 150, at 1633.

153. *See* Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1014-15 (1989) (describing the circularity phenomenon); Cooter & Gilbert, *supra* note 22, at 701-04 (offering an in-depth numerical example of circularity); Gilbert, *supra* note 150, at 1635-37;

issues—A, B, and C—that could be presented to nine voters. If the issues are packaged, it is quite likely that multiple majorities will emerge. One majority, voters 1 through 5, may prefer AB to BC. Another majority, voters 3 through 7, may prefer BC to AC. And still another majority—for example, voters 1, 2, 7, 8, and 9—may prefer AC to AB. This results in a cycle: a majority prefers AB to BC, a majority prefers BC to AC, and a majority prefers AC to AB. Cycles like this are almost certain to emerge when the number of voters and issues are large, such as in national packaged referendums. Indeed, the more unique individual preferences that coalesce to form a group, the more likely that intransitive, circular voting outcomes will result.[154]

Cycles matter because, depending on the order in which voters consider proposals, the law can end up anywhere. To illustrate, if the voters first choose between AC and AB, a majority will choose AC. If the voters then choose between AC and BC, a majority will choose BC. Assuming the voters do not consider rejected proposals, they then stop at BC. But BC does not reflect majority will in a meaningful sense. If we manipulated the order again, voters would have stopped at AC or AB. Instead of representing a meaningful expression of democratic will, voting runs in a pointless circle. But suppose the voters do not vote on multiple proposals at once. Instead, they vote on one issue at a time. A either passes or fails, and then, in a separate vote, B either passes or fails, and so on. When voters vote issue-by-issue, one can capture majority will on each individual issue. Issue-by-issue voting is much less likely to result in circularity. The single subject rule promotes this issue-by-issue voting.

It follows from this example that when a referendum includes twenty-six different proposals, it cannot "be taken as a decisive expression of the people's will and be binding on all."[155] Furthermore, this distortion cannot be addressed by mechanisms such as bargaining or agenda setting that are effective in small-scale local elections. It is unrealistic to think that the 72.3 million residents in Turkey in 2010 would have bargained with each other on twenty-six different constitutional changes because transaction costs are so incredibly high.[156] However, if voting had been limited to one issue in a median democracy context, a Condorcet winner would have been apparent because one "yes" vote would mean that the voter favored the proposal

---

COOTER, *supra* note 143; KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 49-102 (1997).

154. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 100, 121 (1982) ("As the number of voters and alternatives increases, so do the number of profiles without a Condorcet winner.").

155. Dillon v. Gloss, 256 U.S. 368, 374 (1921).

156. *Population, Total – Turkey*, THE WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=TR (last visited Jan. 24, 2021).

without any additional implications. This is true no matter how many people are involved.

For constitutional referendums to live up to their original purpose—to directly involve the people in the evolution of their foundational document—we must be able to discern what the majority actually stands for. Numerous complex amendments bound together will always muddy the sea of opinions coming from the electorate. How is one supposed to vote against greater rights for workers and bringing corrupt military leaders to justice, even if it may cost the judiciary in the long term? Only single subject rule can clear the waters so that each individual vote means what it purports to signify.

C. Single Subject Rule Strengthens Deliberative Democracy

Second, instituting a single subject requirement for core constitutional changes would bolster deliberative democracy by ensuring greater transparency and deeper analysis during citizens' will-formation period before the vote. Deliberative democracy requires access to information and public discourse that involves the "confrontation of opposing positions."[157] When citizens are not exposed to multiple perspectives on substantive changes or the distinct reasons that justify each view, the outcome of a referendum cannot be classified as a product of public deliberation. Voters who have no exposure to competing viewpoints cannot "freely choose," which violates the "express and unavoidable constitutional mandate to guarantee the freedom of voters in referendums" and may disproportionately affect minority groups.[158]

When citizens are presented with numerous complex amendments instead of one, it is almost impossible for them to form full opinions on each specific change.[159] Campaigns leading up to the vote play a central clarifying role in polarized societies, especially when the referendum involves several unrelated provisions. The average voter is unlikely to have

---

157. James S. Fishkin & Jane Mansbridge, *The Prospects & Limits of Deliberative Democracy: Introduction*, 146 DAEDALUS 6, 8 (2017) (noting that under a theory of deliberative democracy, "deliberation requires 'weighing' competing arguments for policies or candidates in a context of mutually civil and diverse discussion in which people can decide on the merits of arguments with good information").

158. Espinosa & Landau, *supra* note 130, at 333-36. Colombia's constitution has a voter's intent provision that mandates that all constitutional referendums be presented "in such a manner as to allow the voters to freely choose" under the idea that majoritarian decisions are only valid if "distinct reasons to justify that decision have been debated, challenged, and made known to citizens . . . [so that] minorities have been able to participate in those debates and their rights have been respected." *Id.*

159. Claus Offe, *Referendum vs. Institutionalized Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision*, 146 DAEDALUS 6, 14 (2017) (holding this is especially difficult in the referendum context, where "there is no way to make sure that the answer voters give is actually their answer to the specific question they are asked").

well-formed opinions on divergent constitutional topics and often votes based on ideological ties rather than actual substance,[160] looking to their political party for direction.[161] But political parties often lump constitutional changes together under an overarching theme or value, which is in tension with the democratic ideal of deliberation.[162] Some argue that citizens are so prone to manipulation by parties during the period leading up to the vote that outcomes cannot be viewed as a legitimate reflection of self-determination.[163] The probability that leader manipulation will produce votes that are "mere artifact[s] of media and party campaigns," which play on primordial and ethnonational identities, becomes significantly more likely when leaders have the ability to bundle together numerous unrelated provisions and place them under some vague thematic umbrella.[164]

The Turkish case highlights the lack of deliberation surrounding packaged votes. Turkey's current procedural rules governing constitutional referenda do not encourage the level of popular critique and analysis necessary to legitimize important constitutional change. The campaigns leading up to the 2010 referendum prioritized partisan rhetoric over any analysis of the actual constitutional issues at stake, acting as "no more than an exercise in aggregating pre-formed wills without any prospect that people w[ould] engage in democratic decision-making in a reflective, responsive and deliberative way with a preparedness to change their minds."[165] Ece Özlem Atikcan and Kerem Öge compared Turkish media campaign activity leading up to the 2007 and 2010 referendums and found that the reinforcement of existing social cleavages was much more pronounced in 2010, with partisan issues unrelated to the actual amendments (such as the competing views on headscarves) dominating the discourse.[166] Mobilization efforts and party communications framed the vote in terms of pre-existing

160. JOHN ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992) (finding that individuals' political preferences are largely shaped by what elites tell them); *see also* Atikcan & Öge, *supra* note 21, at 3-4 (finding that if elites are divided, ideology and social cleavages play an even more prominent role in politicians' discourse and eventual preference formation).

161. Atikcan & Öge, *supra* note 21, at 11-16.

162. Cooter & Gilbert, *supra* note 22, at 693 ("A good democratic process separates or combines policy proposals according to voters' need for information. It does not distract voters with irrelevant information."); Dixon, *supra* note 98, at 103 (citing John Elster, *Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1758 (2003), who argues that making higher standards for certain referendums that implicate fundamental constitutional principles will lead to increased deliberation and allow people to step back and evaluate while giving "momentary passions" time to cool down).

163. Tierney, *supra* note 19, at 369.

164. Offe, *supra* note 159, at 16.

165. Tierney, *supra* note 19, at 368.

166. Atikcan & Öge, *supra* note 21, at 2 ("In both cases, referendum proposals were on complex constitutional matters, political actors were almost identical, and these actors had similar mobilization potentials . . . [but] in the second case, political actors mapped certain reform items onto the existing cleavages and reinforced voters' predispositions.").

beliefs and shied away from any technical analysis, capitalizing on voters' secularist or Islamist pre-dispositions. AKP framed the vote as broad democratic reform and ignored the specific details of the twenty-six amendments, while CHP and MHP characterized it as AKP's attempt to gain greater control over the judiciary as part of its on-going project to create a civil Islamist dictatorship.[167]

Research confirms that voters did not receive information about the technical details of the various amendments. In post-referendum surveys asking about the motivation of their vote, citizens overwhelmingly cited partisan cues while very rarely mentioning the actual content of any reforms.[168] Their motivations strongly mirrored the arguments put forward by the political parties in their campaigns without any mention of the rights involved in the actual package. Özlem and Öge's study reveals that "[b]undling unrelated reform items together can easily spark a one-sided debate on the whole package, as was the case in the 2010 Turkish constitutional referendum."[169] They suggest that limiting referendums to one question, or at least splitting a package into smaller groups that are logically connected, may be the best way to ensure free information flow and a more deliberative process.[170]

D. Single Subject Rule Reflects International and Domestic Best Practices

Finally, adopting single subject rule would be in line with international best practices. There is an increasing recognition by international observers and intergovernmental organizations of the dangers that exist when unrelated constitutional amendments are presented together. International organizations now recommend that only closely related topics be combined to avoid voter manipulation or confusion. The Council for Europe's *Code of Good Practice on Referendums* establishes a "Unity of Content" requirement for referendums, stating that "there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link."[171] This unity requirement also

---

167. *Id.* at 14 ("CHP voters think that the reforms are introduced only to consolidate the government's power.").

168. *Id.* at 15.

169. *Id.* at 17.

170. Even voters who refuse to seek out information beforehand will read the title of the single subject referendum and know what they are voting on, as opposed to packaged referendum votes. Gilbert, *supra* note 23, at 816 ("[T]he title requirement embedded in most single subject rules plays a prominent role in enhancing transparency.").

171. Eur. Comm'n for Democracy through L., *Code of Good Practice on Referendums*, at 13, Study No. 371/2006, CDL-AD(2007)008 (Mar. 17, 2007), https://tinyurl.com/yy2oz8fx (one of two main reference documents the Council created to further European electoral stability and heritage).

mandates that amendments covering several chapters be split up into more manageable proposals.[172] Unless there is a total revision of the constitution, governments must make an effort to place only logically connected provisions together for a single vote. The Organization for Security and Co-operation in Europe (OSCE) utilizes these best practices to evaluate constitutional referendums. This includes the group's most recent findings that Turkey's 2017 referendum was so unequal that "the line between State and party" became "blurred" as the AKP suppressed competitors and used large amounts of state resources to ensure a constitutional victory.[173]

Scholars have also begun to explore the possibility of single subject rule as a way to improve democratic procedures in national constitution amendment processes. In 2017, Albert responded to Canadian politicians' increasingly common practice of placing unrelated amendments together for a yes or no vote by arguing that Canada should amend Part V of the *Constitution Act* of 1982 to prohibit omnibus amendments.[174] He argues for evolutionary rather than revolutionary change within constitutional amendment law, finding that "[t]he moderating effect that a single-subject rule would bring could be both positive and consistent with the way the Canadian Constitution has evolved by accretion rather than convulsion."[175] This rule would force voters to consider every single amendment on its own merits and prevent logrolling or riders that distort unabridged views.[176] Although he acknowledges that judges would be required to decide what constitutes a single rule, Albert argues that the judicial price would be worth the costs in order to ensure that the country's amendments were truly representative of the will of the people.[177] Albert's view is in line with other scholars, such as Dixon, who propose formal procedures that encourage the "unbundling" of provisions to avoid undemocratic trades in an era of increasing globalization and illiberalism.[178] When a ruling party is limited to changing one thing at a time, the probability that they will be able to dismantle the existing judicial structure is substantially reduced.

On a practical level, single subject rule has been an effective mechanism through which to distill voter's preferences in the United States and abroad. In the international context, several countries have adopted single subject rule to mandate a heightened standard for specific types of legislation, such

172. *Id.* ("[T]he revision of several chapters of a text at the same time is equivalent to a total revision.").

173. Org. for Security & Co-operation in Europe [OSCE], *Turkey, Constitutional Referendum, 16 April 2017: Statement of Preliminary Findings and Conclusions*, at 10 (Apr. 17, 2017), https://www.osce.org/odihr/elections/turkey/311721?download=true.

174. Richard Albert, *Single-Subject Constitutional Amendments*, B.C. L. SCH. FAC. PAPERS 1, 2 (2017).

175. *Id.* at 3.

176. *Id.* at 11.

177. *Id.* at 12-13.

178. *See* Dixon, *supra* note 50, at 818.

as tax legislation in Australia.[179] Similarly, other countries such as Portugal,[180] Ireland,[181] and Switzerland,[182] have used single subject rule to limit constitutional amendments across the board. These rules reinforce an amendment culture that embraces entrenchment and places constitutional amendments above standard legislation.

In the United States, forty-three states have codified the single subject rule in their state constitutions to prevent the distorting legislative practices of logrolling, riding, and pork-barrel spending, while providing greater notice to voters and legislators about the content and effects of a proposed amendment.[183] Although there has been some criticism surrounding these laws,[184] the rule is more popular than it was a decade ago.[185] The fact that the rule is still so widely used is a testament to its enduring efficacy. Furthermore, there has been a considerable effort to apply the rule to the U.S. Constitution itself through the passage of a 28th amendment.[186] This amendment would require Congress to limit each bill to one topic or subject. The Single Subject Amendment PAC has taken the lead on this effort, but it would require Congress to call an Article V convention, which critics argue is unlikely to occur under our current constitutional procedures.[187] Even so, the enduring nature of single subject rule within U.S. state constitutions is a testament to the importance of preventing riders, ensuring clarity, and obtaining majority opinion on key voting issues.[188] It seems as though the single subject rule is here to stay.

---

179. *Australian Constitution* s 55 ("Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.").

180. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] [CONSTITUTION] art. 115, para. 6 ("Each referendum shall deal with a single subject; the questions shall be formulated in objective terms, and clearly and precisely and so as to permit an answer of yes or no.").

181. CONSTITUTION OF IRELAND 1937 art. 4 ("A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.").

182. CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 194, para. 2 (Switz.) (stating that the "principle of cohesion of subject matter" applies to federal popular initiatives and parliamentary legislation subject to a referendum).

183. Boger, *supra* note 24, at 1249. Of the forty-three states that have adopted the rule, forty also have a title requirement. *Id.*

184. *See infra* Part V.E.

185. Cooter & Gilbert, *supra* note 22, at 705 nn.78-86 (finding that as more states adopt single subject rule, those who already have it have expanded the rule to cover more measures such as ballot initiatives).

186. *See Mission and Purpose*, SINGLE SUBJECT AMENDMENT, http://singlesubjectamendment.com/mission-and-purpose/ (last visited Dec. 16, 2020). "Single Subject Amendment" is a 527 Super PAC that was established to advocate for a constitutional convention and passage of the 28th Amendment. *Id.*

187. *E.g.*, Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1535 (2010) (arguing the United States' national convention method is broken and makes constitutional amendment almost impossible).

188. Justin W. Evans & Mark C. Bannister, *The Meaning and Purposes of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*, 49 VAL. U. L. REV. 87, 150-51 (2014).

E. Administrability Critiques Do Not Outweigh Benefits

It is judges who are tasked with administering the single subject rule, and they do not always agree on the best way to do so. Critics claim that judges exploit the single subject rule's indeterminacy and vagueness by making ideological rulings, which leads to disparate legal outcomes.[189] But this view ignores important nuances in judges' decision-making models. Research shows that judges utilize both the law and their own ideology when it comes to deciding if a rule has violated the single subject requirement.[190] Judges usually first attempt to analyze the plain text of the amendment, asking if the referendum contains "disconnected and incongruous measures . . . that have no necessary or proper connection."[191] But difficulties arise when judges try to draw the exact line between similar provisions and ones that are part of the exact same subject. For example, judges have struggled with whether to view same-sex marriage and same-sex civil unions as one subject.[192] Gilbert's research concludes that, although judges do vote based on their ideology in indeterminate cases, the law plays a comparably significant role in this single subject adjudication.[193] Furthermore, cases involving large-scale national referendums, such as Turkey and Russia, do not often fall into the indeterminate category. This mitigates some of the concerns from skeptics who believe that the rule leads to inefficient and biased outcomes in a substantial number of cases.

These critics also overstate the difficulty judges face when deciding what constitutes a single subject. Judges are trained to make difficult line-drawing decisions in various contexts, and academics have recently put forward several tests that are less vague or malleable than earlier proposals. For example, courts can employ Cooter and Gilbert's "Democratic Process Test" to alleviate some of the biases and intuitions imbued in single subject cases.[194] This test focuses on the voter's perspective, asking if a citizen believes they could vote on one part of an amendment without needing to know if the other parts would become law. If so, it constitutes a single subject. Cooter and Gilbert argue that "by separating issues on the ballot as voters separate them in their minds, our theory could increase voters'

189. *See* Manduley v. Superior Ct., 41 P.3d 3, 37 (Cal. 2002). The Supreme Court of California describes how "almost any two . . . measures may be considered part of the same subject if that subject is defined with sufficient abstraction." *Id.*

190. Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333 (2011) (analyzing the determinants of judicial decision-making in single subject disputes).

191. *E.g.*, Jones v. Polhill, 46 P.3d 438, 440 (Colo. 2002).

192. *E.g.*, F. for Equal. PAC v. McKeithen, 893 So. 2d 715 (La. 2005).

193. Gilbert, *supra* note 190, at 355 ("Even in single subject disputes, where conventional wisdom holds that the law is often indeterminate and many of the issues . . . [are] politically charged, law appears to influence judges' decisions. Law matters where many skeptics think it does not.").

194. Cooter & Gilbert, *supra* note 22, at 712-20.

choices," furthering the democratic process.[195] By placing themselves in the voter's shoes, judges may be less inclined to call upon their own biases when adjudicating these challenges to single subject rule.

Some also posit that the rule will lead to inefficient outcomes, with courts constantly blocking important amendments from going through. However, in instances in which judges decide a proposed change more likely than not includes more than a single subject, they can still employ the canon of constitutional avoidance to narrowly construe the proposal and avoid striking down the law altogether. Indeed, Boger argues that judges who are confronted with vague proposals that could be interpreted multiple ways should abandon the widely-applied substantive approach of single subject rule adjudication for an interpretive one.[196] Instead of focusing on policy considerations by looking for legislative or executive intent, dissecting legislative history to ascertain whether there were nefarious aims or logrolling, judges should narrowly construe the proposal to avoid any single subject issues. In other words, if there are two interpretations of an amendment and one passes the single subject test, the judge should choose that interpretation, so long as it does not offend the overarching purpose of the rule. By applying the avoidance canon, courts evade the difficult task of defining the exact contours of a subject in any case where there is even a mere likelihood of two interpretations.[197] Although Boger's theory utilizes the United States' canon of constitutional avoidance, judges in other countries can also interpret initiatives in a way that avoids a more substantive inquiry. This canon of construction is particularly helpful when applied to long and multifaceted amendments in which subjects are often intimately connected.[198]

Calls to abolish single subject rule have been largely ignored in the United States, as the rule "remains codified in state constitutions across the country, and it continues to have popular support."[199] Instead, increasing academic and judicial attention is being paid to improve single subject rule adjudication. Cooter, Gilbert, and Boger's theories are just a few of the proposed frameworks that judges may employ to create a more uniform and predictable single subject rule jurisprudence. Even if issues with judicial review exist, courts, legislatures, and voters believe that the rule has the

195. Gilbert, *supra* note 190 (suggesting that judges should also seek to ascertain how the median voter in the referendum saw the vote: as single or not).

196. Boger, *supra* note 24.

197. *Id.* at 1267 ("[J]udges do not have to reach the merits of whether there are in fact multiple subjects in a statute before interpreting it in a way to avoid a single subject violation.").

198. *Id.*

199. *See* Cooter & Gilbert, *supra* note 22, at 705, 819 (finding judicial attention to the single subject rule has increased dramatically in the past several decades, most often from elected state court judges).

requisite value to continue with this refinement project.[200] More research is needed in the comparative constitutional field to understand how judges interpreting amendments to national constitutions can utilize these tests to facilitate difficult line-drawing decisions.

VI. CONCLUSION

There are many possible explanations for the success of the AKP's 2010 referendum. The more controversial judicial changes may have "ridden" on the back of the increased civil liberty provisions. Alternatively, the AKP could have strategically placed the military and ombudsman amendments into the package as "constitutional bribes," convincing citizens to pass undemocratic structural change in a democratic manner.

But the outcome may be explained by the simple fact that a large percentage of voters just did not notice the judicial changes. There were so many provisions, yet very few resources that explained the implications of these constitutional changes in the constituents' everyday lives. All of these potential theories illustrate the inherent danger of packaged constitutional referendums: the likelihood that voters will realistically understand what these changes mean for their lives and the future of their country is severely diminished when unrelated topics are bundled into one vote.

No matter what the best explanation for the fifty-eight percent winning total may be, the Turkish case is a warning sign for other so-called democratic states with increasingly autocratic leaders. The present global trend towards illiberalism is different from democratic recessions of the past. Democratic backsliding is harder to discern as "legalistic autocrats" incrementally deploy the law to break down existing structures in order to consolidate power in the executive.[201] What makes these gray zone countries so difficult to notice early on is that outside observers only evaluate whether the executive is working within the existing legal framework and if periodic elections occur. They mistakenly conclude that a democracy is healthy when there are cracks growing rapidly beneath the surface.[202]

Because the international community and citizens within the country are less likely to discern these incremental fissures, the autocrat is afforded more time to transform the constitution until it is too late. These authoritarian leaders watch and borrow from one another, using a uniform playbook to

200. Boger, *supra* note 24, at 1250 ("[C]ourts cannot—and should not—water down or abandon the single subject rule.").

201. Scheppele, *supra* note 71, at 545 ("Some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.").

202. *Id.* at 547.

dismantle liberal constitutions.[203] One way to block this expanding group of autocrats from making lasting antidemocratic change is to mandate single subject rule for constitutional referendums.

When Erdoğan and the AKP realized they could not garner the popular support required for a brand-new constitution in 2010, they did not give up. Instead, they found a different, less obvious path in a seemingly democratic constitutional amendment process. This Note described how Turkey's open-ended constitutional amendment laws allowed the AKP to introduce blanketed changes that were internationally lauded as a democratic success. However, by applying the theory of democratic backsliding to this case, it is evident that the predicted trajectory of Turkey's democracy was misguided. To better understand why so many were incorrect in their assessment, this Note reviewed the theoretical pitfalls of constitutional referendums and reinforced their explanatory value by highlighting their real-world manifestations in the 2010 Turkish case. Finally, it presented the three central reasons why single subject rule upholds democracy. The rule acts as a crucial defense mechanism against constitutional decline for countries that continue to strive for direct and deliberative democracy in line with international best practices, even as their executive attempts to push the state farther and farther away from its democratic beginnings.

Packaged referendums may issue transformative change, but it will never be change that the people truly discussed, debated, and willed. No longer should the "will of the people" be used as a veil for autocratic authoritarianism. Single subject rule is one underexplored way that countries can reverse the tide of the current global democratic recession before it is too late. Ten years after the 2010 referendum, one thing is clear: twenty-six amendments should never be condensed into one vote.

203. *Id.* at 545.

APPENDIX A – List of Twenty-Six Amendments in the 2010 Referendum

Law 5982 Amending Certain Provisions of the Constitution[204]

- Measures ensuring equality between men and women, and protecting children, the elderly, disabled people, widows and orphans of martyrs as well as for invalid and veterans would not be considered a violation of the principle of equality. (Revises Article 10)
- The protection of personal data and privacy would be revised, and everyone would be entitled to the protection of privacy. Access to data about personal information would be included within the new protection measures. (Revises Article 20)
- Travel bans would be relaxed. Trips abroad would be restricted only if a person is subject to a criminal investigation or a legal case. (Revises Article 23)
- Additional protections would be granted regarding family and children's rights. All children would expressly have the right to have direct communication with their mother and father and continue relations with them. (Revises Article 41)
- Public servants would be allowed to be members of more than one union. Civil servants would also have the right to collective bargaining with a body for conciliation to be established in the event of disagreement. (Revises Article 53)
- The ban on general strikes would be lifted. The measure would also include strikes held for political or solidarity purposes, as well as slowdown strikes. (Revises Article 54)
- An ombudsman system to deal with problems that may arise between state institutions and citizens would be established. Every citizen would be granted the right to request information and apply to the ombudsman. (Revises Article 74)
- Deputies would remain in their posts until their elected term ends, even if their parties are closed. (Revises Article 84)
- The tenure of deputies elected for Parliament's presidential board would be modified. (Revises Article 94)
- Decisions by the Supreme Military Council (YAŞ), that result in the expulsion of military officers from the Turkish Armed Forces, or TSK,

204. *Law 5982 Amending Certain Provisions of the Constitution*, Government of Turkey, Prime Ministry, translated by Secretariat General for European Union Affairs (Aug. 19 2010), https://tinyurl.com/y6dvmkog.

would be allowed to be appealed in court. The amendment, however, has excluded YAŞ decisions that force military personnel to retire due to promotion procedures and the absence of tenure. Under current law, YAŞ decisions to expel military officers from the armed forces cannot be taken to court. (Revises Article 125)

- Public servants would be granted the right to collective bargaining with regard to their financial and social rights. (Revises Article 128)
- Public servants would be provided the right to apply to courts over censure or warning punishments they face in their workplaces. (Revises Article 129)
- Justice services and the supervision of prosecutors with regard to their administrative duties would be performed by Justice Ministry inspectors. (Revises Article 144)
- Civilian courts would be permitted to try military personnel, and military courts would not be permitted to try civilians other than during times of war. (Revises Article 145)
- The size and membership of the Constitutional Court would be restructured. The number of members of the country's top court would be raised to 17 from 11, and Parliament and the president would elect and appoint members. Currently only the president can appoint members to the Constitutional Court. (Revises Article 146)
- New court members would be selected for terms of 12 years or until they reach the age of 65. The current article does not set a term limit but stipulates that members retire upon reaching the age of 65. (Revises Article 147)
- Citizens would be allowed the right to make personal applications to the Constitutional Court. The article would also pave the way for the court to act as the Supreme Council and acquire the authority to judge the chief of General Staff, force commanders and the Parliament speaker in the event of abuses of power. It also allows for the appeal of decisions made while the court acts as the Supreme Council. (Revises Article 148)
- A quorum would be established for the Constitutional Court to convene and the minimum number of votes required to close a political party or annul constitutional amendments would be changed to two-thirds from three-fifths. (Revises Article 149)
- The organization and function of the military Supreme Court of Appeals would be restructured. (Revises Article 156)
- The function of the Supreme Military Administrative Court would be based on the principle of the freedom of the courts rather than the "necessity of military duty." (Revises Article 157)

- The HSYK would be restructured to consist of 22 regular and 12 substitute members. Nineteen members would be appointed, four by the president. The court would also function in three separate departments and would have the power to launch investigations against judges and prosecutors. (Revises Article 159)
- The Economic and Social Council would be established as a constitutional institution. The council provides consultation to the government in creating economic and social policies. (Revises Article 166)
- An article banning the prosecution of the 1980 coup leaders would be annulled. (Annuls temporary Article 15)