

The Democratic Coup d'État

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The Democratic Coup d'État

Ozan O. Varol*

This Article examines the typical characteristics and constitutional consequences of a largely neglected phenomenon that I call the “democratic coup d’état.” To date, the academic legal literature has analyzed all military coups under an anti-democratic framework. That conventional framework considers military coups to be entirely anti-democratic and assumes that all coups are perpetrated by power-bungry military officers seeking to depose existing regimes in order to rule their nations indefinitely. Under the prevailing view, therefore, all military coups constitute an affront to stability, legitimacy, and democracy.

This Article, which draws on fieldwork that I conducted in Egypt and Turkey in 2011, challenges that conventional view and its underlying assumptions. The Article argues that, although all military coups have anti-democratic features, some coups are distinctly more democracy-promoting than others because they respond to popular opposition against authoritarian or totalitarian regimes, overthrow those regimes, and facilitate free and fair elections.

Following a democratic coup, the military temporarily governs the nation as part of an interim government until democratic elections take place. Throughout the democratic transition process, the military behaves as a self-interested actor and entrenches, or attempts to entrench, its policy preferences into the new constitution drafted during the transition. Constitutional entrenchment may occur in three ways: procedural, substantive, and institutional. The Article uses three comparative case studies to illustrate the democratic coup phenomenon and the constitutional entrenchment thesis: (1) the 1960 military coup in Turkey, (2) the 1974 military coup in Portugal, and (3) the 2011 military coup in Egypt.

INTRODUCTION

On February 11, 2011, the Egyptian Armed Forces seized power from President Hosni Mubarak in a coup d'état. The coup was staged in response to determined protests over eighteen days by hundreds of thousands of Egyptians demanding the ouster of the autocratic and corrupt Mubarak regime and its replacement with democracy. The demonstrations were largely non-ideological and the protestors hailed from all facets of Egyptian society. Women and men, Muslims and Christians, secularists and Islamists, the poor and the wealthy all joined hands in the aptly named al-Tahrir, or Liberation Square, in a call for freedom and democracy after decades of rule by dictators.¹ That call was answered, not by a foreign power, but by the coun-

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1. See, e.g., David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES, Feb. 11, 2011, <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html?pagewanted=all> (“This is a revolution for all Egyptians; there is no room for a single group’s slogans, not the [Muslim] Brother-

try's own military, which seized power from Mubarak and assumed control of the government.

Mubarak's fall sparked a wave of celebrations around the world. As the "touchstone for change" in the Arab world,² Egypt gave hope to the oppressed people of Libya, Syria, Yemen, and beyond to revolt against their oppressors.³ Credit for the successful overthrow of the Mubarak regime went in large part to the Egyptian Armed Forces, who refused to fire on the protestors during the demonstrations and stepped in to assume control of the government when Mubarak stubbornly refused to relinquish his stronghold. President Barack Obama heaped praise on the Egyptian military for "serv[ing] patriotically and responsibly as a caretaker to the state" and expressed his confidence that the military would "ensure a transition that is credible in the eyes of the Egyptian people."⁴

The Egyptian military coup appears to break the traditional mold of military coups. Historically, most military coups have been perpetrated by power-hungry military officers, primarily in South America and Africa, seeking to depose existing regimes in order to rule their nations indefinitely.⁵ The term military coup d'état—French for "stroke of the state"—brings to mind coups staged through corrupt backroom plots by officers like Colonel Muammar Gaddafi. Military officers in most coups abuse public trust and overthrow the existing regime, not to bring about structural regime change, but to concentrate power in their own hands as dictators.⁶

The assumption that all military coups fit within this traditional, anti-democratic model pervades the literature. According to the prevailing view, a democratic military coup is an oxymoron. For example, Richard Albert's recent work on democratic revolutions states that "by definition, a coup cannot be democratic."⁷ Military coups, according to Professor Albert, constitute "an affront to the democratic ideals of stability, consent, and legitimacy."⁸ Andrew Janos likewise has argued that a coup d'état "is the reversal

hood's or anybody else." (quoting Mohamed Saad el-Katatni, a spokesman for the Muslim Brotherhood); Robert F. Worth, *In Cairo, A Room with a View of the Revolution*, N.Y. TIMES, Mar. 4, 2011, <http://www.nytimes.com/2011/03/06/magazine/06YouRHere-t.html>.

2. Editorial, *Egypt's Unfinished Revolution*, N.Y. TIMES, Mar. 24, 2011, <http://www.nytimes.com/2011/03/25/opinion/25fri2.html?ref=middleeast>.

3. The first uprising of the Arab Spring began in Tunisia after Mohamed Bouazizia, an unlicensed fruit vendor, set himself on fire in protest when a municipal inspector attempted to confiscate his produce and slapped him in the face when he refused. See Kareem Fahim, *Slap to a Man's Pride Set Off Tumult in Tunisia*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/22/world/africa/22sidi.html>.

4. Steve Benen, *Obama: Egyptians 'Bent the Arc of History Toward Justice Once More'*, WASH. MONTHLY (Feb. 11, 2011, 4:10 PM), http://www.washingtonmonthly.com/archives/individual/2011_02/027961.php.

5. Jonathan M. Powell & Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 J. PEACE RES. 249, 255 (2011) ("Coups have been most common in Africa and the Americas . . .").

6. See Richard Albert, *Democratic Revolutions*, 89 DENV. U. L. REV., no. 2 (forthcoming Apr. 2011) (manuscript at 22), available at <http://ssrn.com/abstract=1808021>.

7. *Id.* at 20.

8. *Id.*

of the process of revolution.”⁹ Other examples of this academic view abound.¹⁰ Federal law in the United States reflects the same disdain for military coups by prohibiting, with certain exceptions, any financial assistance “to the government of any country whose duly elected head of government is deposed by military coup or decree.”¹¹ The European Union made a similar commitment in 1991.¹²

In this Article, I challenge this conventional intellectual framework and its underlying assumptions. First, I propose that although all coups have anti-democratic features insofar as they place the military in power by force or the threat of force, some military coups are distinctly more democracy-promoting than others. In these coups, the military responds to popular opposition against an authoritarian or totalitarian regime, overthrows that regime, and facilitates fair and free elections within a short span of time. Although military leaders, like civilian leaders, can abuse and have abused their powers, examples exist of military coups d'état that have successfully transitioned authoritarian regimes to democracies. This Article thus advocates a more nuanced approach to evaluating the desirability of coups that accounts for coups that produce democracies, especially where other paths to democratization have been blocked by an authoritarian or totalitarian regime. Drawing on fieldwork that I conducted in Egypt and Turkey during the summer of 2011, this Article describes the typical characteristics of democratic coups and examines their constitutional consequences using three comparative case studies: (1) the 1960 military coup in Turkey, (2) the 1974 military coup in Portugal, and (3) the 2011 military coup in Egypt.

9. *Id.* (quoting Andrew C. Janos, *The Seizure of Power: A Study of Force and Popular Consent*, in Research Monograph No. 16, at 36 (Ctr. Int'l Studies, Woodrow Wilson Sch. Pub. & Int'l Affairs, Princeton Univ., 1964)).

10. See, e.g., Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 WIDENER L. REV. 265, 265 (2007) (noting that the international community has universally condemned military coups and has supported “democracy as increasingly central to a variety of traditional legal concerns”); Stephen E. Gottlieb, *Does What We Know About the Life Cycle of Democracy Fit Constitutional Law?*, 61 RUTGERS L. REV. 595, 604 n.43 (2009) (noting that a coup is a “non-democratic” form of regime change); Venkat Iyer, *Restoration Constitutionalism in the South Pacific*, 15 PAC. RIM L. & POL'Y J. 39, 39 (2006) (noting that coups often lead to “regimes antithetical to freedom and democracy”); Enrique Lagos & Timothy D. Rudy, *The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly*, 96 AM. J. INT'L L. 173, 175 (2002) (noting that a coup constitutes “undemocratic behavior”); Salvador Maria Lozada, *The Successful Appeal from Ballots to Bullets: The Herculean Hardships of Judicializing Politics in Latin America*, 25 N.Y.U. J. INT'L L. & POL. 123, 125 (1992) (“The coup d'état extinguishes democratic government and establishes a military dictatorship, which implies the disappearance of legislative power. From then on the laws are no longer made by people's representatives, elected politicians under the influence and control of their fellow citizens. Now, the military makes the laws with the help of civilian collaborators recruited among the conservative, opportunistic, and reactionary elements of the population.”); Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 51 (1994) (“Since an incumbent regime forms part of the constitutional order, its extra-constitutional overthrow is not only illegal but amounts to the high crime of treason.”).

11. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 7008, 123 Stat. 3034, 3345 (2010).

12. Nikolay Marinov & Hein Goemans, *Coups and Democracy* 7 (Mar. 12, 2012) (unpublished manuscript), available at <http://www.nikolaymarinov.com/wp-content/files/GoemansMarinovCoup.pdf>.

Democratic military coups commonly feature seven attributes: the military coup is staged against an authoritarian or totalitarian regime; the military responds to popular opposition against that regime; the authoritarian or totalitarian leader refuses to step down in response to the popular opposition; the coup is staged by a military that is highly respected within the nation, ordinarily because of mandatory conscription; the military executes the coup to overthrow the authoritarian or totalitarian regime; the military facilitates free and fair elections within a short span of time; and the coup ends with the transfer of power to democratically elected leaders.

The democratic coup is the exception, not the norm. The vast majority of coups do not fit within the democratic coup framework put forth in this Article, primarily because either they are staged against a democratically elected government, not an authoritarian or totalitarian regime, or they result in a dictatorship, not in free and fair elections. But neither is the democratic coup phenomenon limited to the three cases explored in this Article. According to a recent empirical study, in the post-Cold War era, seventy-four percent of coups were followed by democratic elections within five years.¹³ As the authors of that study note, the “new generation of coups has been less of a menace for democracy than their historical predecessors.”¹⁴

Following a democratic coup, the military temporarily governs the nation as part of an interim government until democratic elections of civilian leaders take place. During that democratic transition process, which typically lasts for one to two years, the military must oversee a number of housekeeping tasks to transition the nation to a democracy. This Article focuses on one specific task: drafting a new constitution to replace the constitution that governed during the authoritarian or totalitarian regime.

The Article's second thesis is that, even though a democratic coup ends in free and fair elections, the military behaves as a self-interested actor during the democratic transition process and entrenches, or attempts to entrench, its policy preferences into the new constitution drafted during the transition process.¹⁵ Constitutional entrenchment may occur in three modes: procedu-

13. *Id.* at 12. This does not mean, however, that seventy-four percent of all coups in the post-Cold War era conform to the democratic coup framework in this article. For example, if the coup was staged against a democratically elected government (as opposed to a totalitarian or an authoritarian government), that coup would fall outside this article's democratic coup framework, whether or not democratic elections followed the coup. See *infra* Part I (analyzing the typical characteristics of a democratic coup).

14. Marinov & Goemans, *supra* note 12, at 12.

15. The vast literature on public choice has analyzed self-interested behavior by politicians and agency costs in democratic rule. See, e.g., DAVID AUSTEN-SMITH & JEFFREY S. BANKS, POSITIVE POLITICAL THEORY II: STRATEGY AND STRUCTURE 326 (2005); TIMOTHY BESLEY, PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT 36–38 (Oxford Univ. Press 2006); HANS GERSBACH, DESIGNING DEMOCRACY: IDEAS FOR BETTER RULES 13–14 (2005) (advocating a combination of incentive contracts and elections to motivate politicians to pursue socially desirable down-up policies); WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973); Robert J. Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5, 8 (1986); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Markus Muller, *Motivation of Politicians and Long-Term*

ral, substantive, and institutional. In the procedural mode, the military sets up the democratic transition process so that the process produces a substantive constitutional outcome favorable to the military. In the substantive mode, the military reserves substantive powers for itself under the new constitution. In the institutional mode, the military establishes counter-majoritarian institutions under the new constitution that continue to enforce the military's policy preferences even after the military relinquishes power to democratically elected leaders. In democratic coups, therefore, the people and the military seem to strike a Faustian bargain where the military extracts a price in the form of constitutional entrenchment in exchange for depositing a dictatorship and turning power over to the people.

Although military coups were once a hot topic in academia, scholarship on coups has significantly decreased in recent years.¹⁶ Scholars recently noted that the academy "continue[s] to lack a basic understanding of how coups might have a broad impact on a range of topics."¹⁷ That dearth of scholarly understanding extends to the military's role in constitutional design, on which there is little literature.¹⁸ The military thus remains the "least studied of the factors involved in new democratic movements."¹⁹

This scholarly shortcoming is even more pronounced for democratic military coups, which have been largely neglected by the literature. The concept of a democratic coup, including both its aims and its constitutional consequences, remains foreign for academics and politicians alike. We are therefore unable to grasp and properly address, *ex ante*, the potential effects that a democratic military coup may have on the resulting democratic constitution.²⁰ Especially given the recent high-profile coup in Egypt, there is an urgent need for academic attention to the concept and constitutional consequences of a democratic military coup. This Article is an attempt to fill that scholarly void.

This Article proceeds in three Parts. Part I analyzes the typical characteristics of a democratic military coup d'état. Part II sets forth the constitutional entrenchment thesis. Part III applies the constitutional entrenchment thesis to three case studies: Part III.A examines the 1960 military coup in Turkey; Part III.B studies the 1974 military coup in Portugal; and Part III.C analyzes the 2011 Egyptian military coup.

Policies, 132 PUB. CHOICE 273 (2007). To my knowledge, however, self-interested behavior by military officials during military rule has attracted little attention in the literature.

16. See Powell & Thyne, *supra* note 5, at 249; see also Mahmud, *supra* note 10, at 52 (noting that the last article on judicial responses to coups d'état was published in 1986).

17. Powell & Thyne, *supra* note 5, at 249.

18. See, e.g., Mahmud, *supra* note 10, at 103 ("A coup d'état, on the other hand, typically aims only at capturing political power extra-constitutionally. Only that part of the Constitution which bears on the formation of political organs of the state is subverted.")

19. See ALFRED STEPAN, *RETHINKING MILITARY POLITICS* xi (1988).

20. See JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* 67 (1996).

I. TYPICAL CHARACTERISTICS OF A DEMOCRATIC COUP D'ÉTAT

The primary purpose of a military is to protect the state from external threats.²¹ To achieve that purpose, the state must endow the military with the means to use coercive power via military equipment and personnel.²² This ability to use coercive force, though necessary to defend the nation against threats, creates the danger that the military will turn its weapons on the very regime that empowered its existence.²³ In a seminal article on what he termed the “civil-military problematique,” Peter Feaver succinctly summarized the fundamental tension caused by maintaining a military within a civilian government: “The very institution created to protect the polity is given sufficient power to become a threat to the polity.”²⁴ Although most nations employ legal and administrative measures to keep the military subservient to the civilian government, those measures are effective only insofar as the military chooses to follow them.²⁵ When the military disregards those measures and unleashes its coercive power to topple the civilian government, the result is a coup d'état.

The literature is rife with competing definitions of a coup d'état. A coup d'état, as the term is used in this Article, occurs “when the military, or a section of the military, turns its coercive power against the apex of the state, establishes itself there, and the rest of the state takes its orders from the new regime.”²⁶ This definition excludes coups perpetrated by state actors other than the military and also excludes revolutions, which are defined as episodes where non-state actors effectuate regime change.²⁷ The definition further excludes cases where the military plays a more passive role in a democratic transition by, for example, refusing to suppress a popular opposition without overtly assisting it, or by allowing a governing council comprised of elected representatives, not military officers, to run the process of transition to democracy. Because this Article studies the military's role in democratic transitions and democratic constitutional design, I focus on cases where the military itself deposes the existing authoritarian regime and supervises the democratic-transition process.

To date, academic discussion has primarily centered on defining a coup in terms of its targets, perpetrators, tactics, and success or failure.²⁸ For exam-

21. Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 214 (1999).

22. *Id.*

23. *Id.*; see also WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 148 (2007) (“For any political system, at least passive acceptance by the armed forces is an absolute precondition. If those who virtually monopolize violence instruments are ready to turn their weapons against a regime, that regime will either conform to military demands or become a civil war victim.”).

24. Feaver, *supra* note 21, at 214.

25. *Id.*

26. Charles Sampford, *Coups d'Etat and Law*, in SHAPING REVOLUTION 164 (E. Attwooll ed., 1991).

27. See *id.*

28. Powell & Thyne, *supra* note 5, at 250–52.

ple, scholars disagree on whether the target of a coup is the entire government or only the chief executive.²⁹ Likewise, scholars have debated whether the perpetrator of a coup should be limited to the armed forces or may include any participating part of the state apparatus (e.g., security services, civilian members of the government, etc.).³⁰ Scholars also disagree on whether the coup must be illegal³¹ and whether the definition should include coup plots and rumors.

The definitions in the existing literature have an important shortcoming. These definitions focus primarily on the process by which the coup takes place. The literature thus reduces coups d'état to mechanical terms, while neglecting possible substantive components.³² This Part attempts to address this scholarly oversight by developing a substantive framework for assessing military coups that focuses on the resulting change, or lack thereof, to the governance structure of the regime following the coup.

My goal here is not to create a “universal one-size-fits-all theory” of democratic coups or an “elegant model that abstracts away the distinctive.”³³ The chaotic actuality of a coup d'état rarely fits within neat legal categories. Coups tend to involve a range of different motivations, actors, and outcomes. The objectives of the military, as well as the outcome of the coup, will often be context-dependent. It is nonetheless possible to categorize coups d'état into two admittedly simplified groups that focus on whether the coup produces democratic regime change.

The first type of coup—which, for ease of reference, I call the “non-democratic coup”—typically brings about only personified change, not structural regime change.³⁴ In other words, the coup leaders replace the political leaders of the pre-existing regime with military officers, but the form of the government and the political system remain unaltered. In a non-democratic coup, the objective of the military officers is often to concentrate power in

29. *Id.* at 250.

30. *Id.* at 251.

31. *Id.* For example, Samuel Finer's definition of a coup includes the military's “intervention” into political affairs—whether that intervention is legal or extra-legal. See SAMUEL FINER, *THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS* 3 (1988). In contrast, Jonathan Powell and Clayton Thyne restrict their definition to illegal attempts. See Powell & Thyne, *supra* note 5, at 251. Under Hans Kelsen's seminal theory of revolutionary legality, the success of a coup determines its legality. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 118 (Anders Wedberg trans., 1961) (“[If the revolution] succeed[s], if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order.”); see also Mahmud, *supra* note 10, at 90–91 (“[N]othing succeeds like success.” (internal citations omitted)), 106–07. For a criticism of Kelsen's theory, see Albert, *supra* note 6, at 21–22.

32. Richard Albert recently addressed a similar problem in the context of revolutions. See generally Albert, *supra* note 6. Professor Albert argues that the existing revolution theories mechanically focus on a revolution's procedural components, while lacking a normative lens through which to evaluate the purpose that a revolution serves. *Id.* at 8.

33. See Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC. REV. 389, 391 (2004).

34. See Albert, *supra* note 6, at 23.

their own hands and rule the nation indefinitely as dictators. Some of the most infamous recent examples of non-democratic coups d'état include Muammar al-Gaddafi's overthrow of the Libyan regime and Omar Hasan Ahmad al-Bashir's coup in Sudan.

But there is a second category of military coups, largely neglected in the existing literature, whose outcomes are substantively different than those of non-democratic coups. These coups overthrow a totalitarian or authoritarian regime, not to bring about indefinite personified change, but to effectuate structural regime change by facilitating fair and free democratic elections within a short span of time. The end of such a coup is marked by the transfer of power by the military officers to democratically elected leaders. For ease of reference, I refer to such a coup as a "democratic coup."

Before I describe the typical characteristics of a democratic coup, three caveats are in order. First, I do not mean to suggest that a military coup can ever be democratic in the traditional sense of that word. Free and fair elections are the *sine qua non* of democracy, and the military assumes power not through elections, but by force or the threat of force during a coup.³⁵ All coups, including what I call the "democratic coup," therefore have non-democratic features. My argument here is that not all coups are equally anti-democratic; some coups are distinctly more democracy-promoting than others because they depose an authoritarian or totalitarian regime and transfer power to democratically elected leaders.

Second, I also do not argue that a coup d'état is preferable to other methods of regime change. In certain contexts, a people's revolution in which civilians, and not military leaders, control the transition process may be preferable to a military coup. But in others, military intervention may be the only available option to shepherd a nation through the tumultuous transition process to democracy because other methods of democratization have been blocked by the authoritarian or totalitarian regime. For example, in Portugal in 1974, the authoritarian government ensured that the popular opposition against the regime remained too disorganized, socially and politically, to take the primary role in deposing the government, which prompted the Portuguese military to stage a coup to topple the government and replace it with a democratic regime.³⁶

Third, my focus here is on the typical attributes of a democratic coup, from the initial spark for the coup to the handoff of power to democratically elected leaders. I do not discuss whether the regime that results after the military hands over power to democratically elected leaders is "democratic"

35. See LINZ & STEPAN, *supra* note 20, at 4; see also YOSSI SHAIN & JUAN J. LINZ, BETWEEN STATES: INTERIM GOVERNMENTS AND DEMOCRATIC TRANSITIONS 9 (1995) ("As long as those who hold power during the interim period do not organize themselves as a contending party and win a mandate in free and fair elections, they have no democratic legitimacy.").

36. See Jordi Sole Tura, *Iberian Case Study: The Constitutionalism of Democratization*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 289 (Douglas Greenberg et al. eds., 1993).

in the traditional sense of that word or whether the military's entrenchment of its policy preferences into the resulting constitution, which I discuss in Part II, prevents democratic consolidation. I intend to examine the normative implications of constitutional entrenchment in future projects.

With these three caveats in mind, how does one determine whether a military coup fits within the second, more democratic, prototype described above? A democratic military coup typically features the following seven attributes: (1) the coup is staged against an authoritarian or totalitarian regime; (2) the military responds to persistent popular opposition against that regime; (3) the authoritarian or totalitarian regime refuses to step down in response to the popular uprising; (4) the coup is staged by a military that is highly respected within the nation, ordinarily because of mandatory conscription; (5) the military stages the coup to overthrow the authoritarian or totalitarian regime; (6) the military facilitates free and fair elections within a short span of time; and (7) the coup ends with the transfer of power to democratically elected leaders.

First, a democratic coup seeks to overthrow a totalitarian or authoritarian regime. In a totalitarian system, the ruling party has eliminated almost all political, social, and economic pluralism that existed before the advent of that regime.³⁷ The official party of the state has a virtual monopoly on power that it exercises to further a unified utopian ideology.³⁸ The political leaders of the ruling party govern the nation, usually charismatically, with undefined limits on their authority and great vulnerability and unpredictability for both members and non-members of the ruling party.³⁹

In an authoritarian regime—a watered-down version of a totalitarian regime—there is little or no responsible political pluralism.⁴⁰ The ruling party often acts affirmatively, via legal or extra-legal means, to suppress political opposition. Although an authoritarian regime lacks responsible political opposition, fairly extensive economic and social pluralism exists that predates the establishment of the authoritarian regime.⁴¹ The ruling leader or leaders often lack an elaborate and guiding ideology and exercise power within ill-defined norms.⁴²

A coup staged against a non-authoritarian or non-totalitarian government therefore does not constitute a democratic coup under this framework. Many coups have been perpetrated with the ostensible purpose of toppling what military leaders view as corrupt, inefficient, or shortsighted politicians. Those coups fall outside the democratic coup framework because the people may depose such politicians by voting them out of office, without the need

37. LINZ & STEPAN, *supra* note 20, at 40, 43.

38. *Id.*

39. *Id.* at 45.

40. *Id.* at 38, 43.

41. *Id.*

42. *Id.* at 38.

to resort to military intervention.⁴³ A coup may be democratic only when elections are not a meaningful mechanism for deposing a political leader because that leader is unwilling to relinquish power.

Second, in a democratic coup, the military responds to a persistent popular opposition against a totalitarian or authoritarian leader. That opposition ordinarily takes the form of a popular uprising.⁴⁴ A popular uprising, as I use that phrase here, refers to a massive gathering of citizens from many facets of society united by a common political cause—in this context, the overthrow of the authoritarian or totalitarian regime.⁴⁵ Citizens usually gather in a symbolic place—e.g. al-Tahrir Square in Cairo or Tiananmen Square in Beijing—to call for the resignation of an autocratic leader and the ushering in of democracy.⁴⁶ The gathering continues over a period of time and crowds grow in size, density, and fervor each day, indicating broad popular support for regime change.⁴⁷ The citizens regard themselves as the vanguard of a better future, one in which they control their own destiny without the stronghold of an oppressive regime.⁴⁸ They are united by a common will for democracy—a will that has been denied to them at the ballot box.⁴⁹ Although united by the common cause of democratic reform, the crowds typically lack a coherent blueprint for achieving democratic reform and rarely see far beyond the singular goal of the overthrow or resignation of the autocratic leader.⁵⁰

During the popular opposition, the citizens might expressly call upon the nation's military to intervene. For example, “the people and the army are one hand” was a chant frequently invoked during the popular uprising that

43. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 10 (1991) (“Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities may make such governments undesirable, but they do not make them undemocratic.”).

44. The popular opposition, however, need not take the form of a popular uprising. For example, in the case of Portugal, there was no massive popular uprising against the regime, primarily due to the oppressive practices of the secret police that crushed any opposition before it blossomed. The popular uprising came after the coup, when thousands poured into the streets of Portugal to lend their support to the military officers who perpetrated the coup. I discuss the Portugal coup *infra* in Part III.B.

45. See Randolph S. David, *People Power and the Legal System: A Sociological Note*, in *REFLECTIONS ON SOCIOLOGY & PHILIPPINE SOCIETY* 241, 242 (Randolf S. David ed., 2001).

46. See *id.*

47. See *id.*

48. See *id.*; see also Dante B. Gatmaytan, *It's All the Rage: Popular Uprisings and Philippine Democracy*, 15 *PAC. RIM L. & POL'Y J.* 1, 29–30 (2006) (“That public officials actually leave office cannot make popular pressure for their resignation undemocratic. These popular uprisings are, at their core, a reflection of adherence to democratic principles.”); Randolph David, *The Third Time as Farce*, *PHIL. DAILY INQUIRER*, Apr. 29, 2001, at A7.

49. A democratic coup resembles a people's revolution insofar as the initial spark for a democratic coup is popular opposition by the people against the existing regime. See Sampford, *supra* note 26 and text accompanying note 27 (noting that revolutions are instances where non-state actors effectuate regime change). A democratic coup is unlike a revolution, however, because it is the military or a section of the military—not civilians—that overthrows the existing regime and runs the process of transition to democracy.

50. See Gatmaytan, *supra* note 48, at 22.

occurred in Egypt in early 2011.⁵¹ An Egyptian who took part in the al-Tahrir protests described to me how the crowds erupted in celebration at the sight of the first military tank that entered the square. The crowds knew that the military was there either to shield the protestors from the state riot police who had been firing live ammunition upon them, to use the square as the initial stage of a coup intended to effectuate regime change, or both.⁵² Mohamed ElBaradei, former head of the International Atomic Energy Agency and a well known opposition leader in Egypt, expressly called for a military coup on his Twitter page: “I ask the army to intervene immediately to save Egypt.”⁵³ Likewise, following the Portuguese coup in 1974, crowds flocked to the streets to cheer on the military officers and a banner that read “THANK YOU, ARMED FORCES” was unfurled in a soccer stadium packed with a crowd of 200,000.⁵⁴

Popular support for the coups in nations such as Egypt and Portugal also calls into question the prevailing view in the literature that a military coup can never enjoy popular support. For example, Richard Albert has argued that “a coup is more than simply a revolution without popular support It is an arrogation of power by unlawful means.”⁵⁵ Likewise, Douglas Litowitz writes that a coup is “a mere seizure of the state apparatus by the revolutionary party without popular support.”⁵⁶ Contrary to this prevailing view, as illustrated above, citizens may express popular support for a military coup that effectuates structural regime change.

Third, in response to this sustained popular opposition, the autocratic leader remains defiant and refuses to relinquish power. The moment of final triumph awaited by the crowds does not come, at least not voluntarily.

Fourth, democratic military coups tend to happen in nations with mandatory national conscription.⁵⁷ The military forces are comprised primarily of sons, daughters, neighbors, relatives, and friends—not paid professionals. After decades of national conscription, the military, in a very real sense, becomes the society. In the otherwise corrupt and oppressive authoritarian sphere, a military comprised of citizen-soldiers may earn a reputation as the only uncorrupt and stable institution impenetrable by the other arms

51. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

52. See *Hosni Mubarak Resigns as President*, AL JAZEERA, Feb. 11, 2011, <http://www.aljazeera.com/news/middleeast/2011/02/2011021125158705862.html> (noting that Egyptian protestors were “calling on the army to side with them and remove Mubarak”).

53. Anthony Shadid & David D. Kirkpatrick, *Mubarak Refuses to Step Down, Stoking Revolt's Fury and Resolve*, N.Y. TIMES, Feb. 10, 2011, <http://www.nytimes.com/2011/02/11/world/middleeast/11egypt.html>.

54. *Portugal: Cheers, Carnations, and Problems*, TIME, May 13, 1974, available at <http://www.time.com/time/magazine/article/0,9171,908577-1,00.html>.

55. Albert, *supra* note 6, at 20.

56. Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 521 (2000).

57. I do not mean to suggest that militaries in nations with mandatory conscription will *always* stage democratic coups. A number of factors, such as a charismatic military leader, might motivate even a military comprised of citizen-soldiers to stage a non-democratic coup. Rather, I argue that when democratic coups do occur, they tend to happen in nations with mandatory conscription.

of the corrupt and autocratic state apparatus.⁵⁸ For example, a poll conducted by the daily newspaper *Hürriyet* in September 2005 found that the military is Turkey's most trusted institution,⁵⁹ despite its history of meddling in Turkish political affairs, largely because of compulsory military service for all men.⁶⁰ Sendoff of soldiers to perform military service still prompts public celebrations in Turkey with music and parades, and Turks continue to think of themselves as an "army nation" (*asker millet*), reflecting the "perception that a symbiotic relationship binds the state to the armed forces that founded it and now protect it."⁶¹

For similar reasons, many of the founders of the United States were deeply skeptical about maintaining a military comprised of professional soldiers.⁶² The framers viewed professional soldiers as automatons, "stripped of individuality and susceptible of identifying more with their leaders than with the general population."⁶³ "Composed of officers from the aristocracy and soldiers from the bottom of society brutalized by harsh discipline, isolated from the rest of society, loyal not to an ideal or to a government but to a command wed to its own traditions," professional soldiers were perceived as more likely to be beholden to their leaders than to the greater ideals for which they fought or the people who they purported to protect.⁶⁴ For Madison, professional soldiers were thus "more readily turned by corrupt commanders against the interests of The People."⁶⁵ Likewise, in *Federalist* No. 29, Hamilton argued, "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests?"⁶⁶ And according to John Hancock, "[f]rom a well-regulated militia we have nothing to fear; their interest is the same with that of the state . . . [T]hey do not jeopardize their lives for a master who considers them only as the

58. See Eboe Hutchful, *Reconstructing Political Space: Militarism and Constitutionalism in Africa*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 36, at 215, 216 ("The military sees itself, and is frequently seen, as the only organization sufficiently removed from political partisanship to be able to claim an arbitrating role and to set common rules of political discourse. Its relative autonomy . . . promotes this self-conception within the military and grants it varying degrees of legitimation within society as a whole."); Mahmoud Hamad, *The Constitutional Challenges in Post-Mubarak Egypt*, 14 *INSIGHT TURK.* 51, 53 (2012) ("Many Egyptians saw the army as a main pillar of state stability and national security, an image that the regime controlled media carefully nurtured.")

59. Ersel Aydinli et al., *The Turkish Military's March Toward Europe*, 85 *FOREIGN AFF.* 77, 78 (2006).

60. *See id.* at 80.

61. *Id.*

62. See Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 *TEX L. REV.* 797, 842 (2012).

63. *Id.*

64. *Id.* (quoting RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 2 (1975)) (internal quotation marks omitted).

65. *Id.* at 49–50.

66. *THE FEDERALIST* No. 29, at 186 (Alexander Hamilton).

instruments of his ambition.”⁶⁷ A military comprised of citizen-soldiers is therefore less likely than its professional counterparts to stray too far from the demands of the public or to establish a military dictatorship, and more likely to stage a democratic coup.⁶⁸

Fifth, the military answers the people’s call for regime change and stages a coup to overthrow the authoritarian or totalitarian regime.

Sixth, the military holds fair and free elections of democratic leaders within a short span of time. As Juan Linz and Alfred Stepan have noted, “the strongest democratic countervailing power to the nondemocratic dynamic of an interim government is free elections with a set date.”⁶⁹ The promise of elections “presuppose[s] a democratic regime in formation.”⁷⁰ A fixed date for elections is necessary to create a new marketplace for democratic political actors, organizations, and institutions.⁷¹ Elections can also provide some legitimacy to the interim military government. By setting a fixed date for elections, the temporary military government acknowledges the limited nature of its role and signals that its term is, in fact, temporary.

One of the military’s first priorities in a democratic coup is therefore to set a quick date for elections and to serve as a relatively neutral caretaker for those elections.⁷² For example, the Portuguese military, in a statement issued the day after a 1974 coup, committed itself to holding democratic parliamentary and presidential elections within two years.⁷³ As a neutral caretaker, the military does not use intimidation or fraud to rig the elections. The military also allows political parties to freely organize and participate in the elections, with the exception of the political party associated with the deposed authoritarian or totalitarian regime. In many cases, that party is dissolved following the coup and therefore does not participate in the democratic elections—at least not under the same name.⁷⁴ For example,

67. John Hancock, Boston Massacre Oration (Mar. 5, 1774), available at <http://law2.umkc.edu/faculty/projects/ftrials/bostonmassacre/hancockoration.html>.

68. Democratic coups also tend to pit the uncorrupt military against the corrupt state police. In a democratic coup, the military represents the people, and the state police represent the corrupt and autocratic regime. For example, during the 2011 Egyptian coup, the much-despised black-clad Egyptian riot police brutally opened fire on the protestors to end the protests against the regime, whereas the military refused to fire on the protestors, instead shielding them from the riot police, and eventually staged a coup d’état to overthrow the Mubarak government. See David D. Kirkpatrick, *Mubarak’s Grip on Power is Shaken*, N.Y. TIMES, Jan. 31, 2011, www.nytimes.com/2011/02/01/world/middleeast/01egypt.html?pagewanted=all.

69. LINZ & STEPAN, *supra* note 20, at 120; see also GIUSEPPE DI PALMA, TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITION 85 (1990) (arguing that swift elections during the transition process tend to “curb chaos” and “even when variously thwarted, confined, manipulated, or just not in the cards, once they are called, elections can still energize and possibly protect democratization beyond the hopes or fears, and indeed beyond the understanding, of the principal actors”).

70. See Thomas C. Bruneau, *From Revolution to Democracy in Portugal: The Roles and Stages of the Provisional Governments*, in SHAIN & LINZ, *supra* note 35, at 152.

71. LINZ & STEPAN, *supra* note 20, at 120.

72. See *id.* at 71.

73. *Id.* at 120.

74. See, e.g., *infra* notes 75, 219, 314, and accompanying text.

following the 2011 coup in Egypt, political parties were allowed to freely establish themselves and participate in parliamentary elections, but Egypt's High Administrative Court dissolved Hosni Mubarak's National Democratic Party for monopolizing power and manipulating elections.⁷⁵

In democratic coups, elections tend to happen within a short span of time, usually one to two years.⁷⁶ A military determined to transfer power to democratically elected leaders typically wants to get out of the unfamiliar business of governing a country and get back to what it knows best: defending the nation from external threats. For example, the Turkish and Portuguese militaries, which staged democratic coups in 1960 and 1974, respectively, both returned power to democratically elected leaders within two years. During the transition period, a number of housekeeping tasks necessary to holding free and fair elections may occur. For example, the military may create the requisite political infrastructure for political parties to organize and for free and fair elections of democratic leaders to take place (e.g., the formation of an election commission, the enactment of election laws and regulations, etc.). The military may hold elections for a constituent assembly to draft a new constitution before parliamentary or presidential elections, as did the Portuguese military following a coup in 1974, or itself handpick a group of persons to draft a new constitution, as did the Turkish military following a coup in 1960. But regardless of which events transpire during the transition process, the military does not attempt to perpetuate its time in power and stays in power no longer than is necessary to transition the nation to democracy.

The regime that emerges out of a democratic coup thus conforms to Samuel Huntington's seminal definition of democracy: a regime in which political leaders are selected through free and fair elections.⁷⁷ Huntington's definition, which focuses on electoral process, has two dimensions: contestation and participation.⁷⁸ Contestation means that candidates freely compete for the contested seat of the incumbent.⁷⁹ And participation requires that

75. See Shaimaa Fayed & Patrick Werr, *Egypt Court Dissolves Mubarak's Former Ruling Party*, REUTERS, Apr. 16, 2011, available at <http://www.reuters.com/article/2011/04/16/us-egypt-politics-idUSTRE73F11X20110416>. The dissolution of the deposed authoritarian or totalitarian party does not render the coup non-democratic. In many cases, the dissolved party organizes under another name and the deputies of the deposed party may still run for election. For example, in Egypt, former deputies of the dissolved National Democratic Party were allowed to participate in parliamentary elections as long as they had not been convicted of corruption. Further, the dissolution of the deposed party serves important democracy-promoting functions. The dissolution symbolizes a break from the authoritarian past and serves as the first step in dismantling the structures that supported the authoritarian regime. Further, if not dissolved, the former authoritarian party would have a significant advantage over the newly established political parties who lack the organizational structure and the funds available to the former authoritarian party to mount an electoral campaign.

76. Cf. SHAIN & LINZ, *supra* note 35, at 8, 104–05 n.16 (“‘Provisionality’ in our work . . . begins with the explicit promise of transitional regimes to hold free and contested election within a reasonable frame of time—up to two years.”).

77. See HUNTINGTON, *supra* note 43, at 7–8.

78. See *id.* at 7.

79. *Id.* at 7–8.

virtually all of the adult population be allowed to vote.⁸⁰ The use of Huntington's dichotomous, procedural approach suits the framework in this Article, which draws a distinction between coups that result in free and fair elections and those that do not. Because this Article employs Huntington's definition of democracy, it does not use the term "democracy" to make a normative judgment on the quality of the democracy that emerges out of a democratic coup.

Even though Huntington's definition of democracy focuses on process, the procedural right to participate in free and fair elections has important substantive values, especially in societies that have long been denied that right. "I vote, therefore I am," read the headline of a Tunisian newspaper following democratic elections there in 2011.⁸¹ Likewise, in Egypt, where a whole generation grew up without any meaningful right to vote, voters patiently waited in line for hours to vote in parliamentary elections following the 2011 coup.⁸² Echoing the sentiments of its Tunisian counterpart, the headline of an Egyptian newspaper read "The beginning" on the first day of the parliamentary elections.⁸³

Even though democratically elected leaders can abuse and have abused individual liberties, the correlation between democracy and individual liberties is very high.⁸⁴ Elected leaders use far less violence on their citizens than authoritarian leaders.⁸⁵ In democracies, there are also fewer incentives to resort to violence because accepted avenues exist for the expression of dissent, including the ballot box, where voters may sanction government officials by voting them out of office.⁸⁶ Popular participation in elections therefore not only encourages individual autonomy, but also deters government incursions into individual rights.⁸⁷ As the U.S. Supreme Court put it, the right to vote is a "fundamental right, because preservative of all other rights."⁸⁸

80. See *id.* at 7.

81. See Lizzy Davies, *Tunisian Elections: Polling Day as it Happened*, GUARDIAN (U.K.), Oct. 23, 2011, <http://www.guardian.co.uk/world/middle-east-live/2011/oct/23/tunisian-elections-2011-arab-and-middle-east-protests>.

82. See Anthony Shadid, *Hope Glimmers in Long Lines at Polls in Cairo*, N.Y. TIMES, Nov. 28, 2011, <http://www.nytimes.com/2011/11/29/world/africa/in-cairo-an-election-bridges-egypts-divides.html>.

83. *Id.*

84. HUNTINGTON, *supra* note 43, at 28.

85. *Id.*

86. *Id.*

87. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 36, at 3, 4.

88. *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886). John Stuart Mill has also written about the virtues of decision-making by leaders elected in free and fair elections. See Tom Christiano, *Democracy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 2008), available at <http://plato.stanford.edu/archives/fall2008/entries/democracy>. Mill argues that, since elections give political power to each citizen, democratically elected leaders must take into account the interests and opinions of more people than authoritarian or totalitarian leaders. *Id.* Democratic decision-making tends to be more informed because it brings more people into the decision-making process. *Id.* Finally, according to Mill, democracy improves the characters of the citizens by encouraging more autonomy. *Id.*

Seventh, following fair and free elections, the military promptly transfers power to democratically elected leaders. The military does not alter or void the election results and ensures that the results are promptly certified. The military then hands power to the leaders selected by the people, regardless of their identities and whether or not their policy preferences are in line with those of the military.⁸⁹

The literature assumes that the purpose of a coup d'état is to maintain continuity in the legal system and bring about only personified change in the political leadership through the usurpation of political offices, rather than structural regime change.⁹⁰ In fact, Edward Luttwak's seminal definition of a coup—"the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder"—assumes that a coup does not alter the governing structure of the state.⁹¹

That assumption cannot be correct. Militaries that stage democratic coups d'état bring about structural regime change by tearing down an authoritarian regime to forge a path to democracy. Of course, the transition to democracy does not happen simultaneously with the coup. At the outset, the only change is to the leadership of the regime (i.e., personified change). The unyielding autocratic leaders must necessarily be dethroned to transition the nation to democracy. Personified change becomes the means with which the military achieves its ultimate purpose in a democratic coup: to facilitate the fair and free elections of civilians. For example, following the democratic coup in Turkey in 1960, General Cemal Gürsel ruled the nation as head of state for seventeen months before returning power to democratically elected leaders.⁹²

As the recent events in Egypt demonstrate, however, democratic coups do not ensure a smooth transition to democracy. Democratic coups, like other revolutions that break down decades-old governance structures and replace

89. In some democratic coups, the military may field a candidate to compete in the democratic elections. For example, General Ramalho Eanes ran for and was elected President following a democratic coup in Portugal in 1974. See *infra* note 337 and accompanying text. A military officer's participation in the elections does not render the coup non-democratic as long as the elections are not rigged in favor of that candidate. There may be instances where a well-respected military leader, such as George Washington, is elected to office because of his or her merits.

90. See, e.g., Albert, *supra* note 6, at 22–23 (noting that the purpose of a coup is “to change the hands controlling the state” and “to hijack it by commandeering the reigns of its institutions”); Mahmud, *supra* note 10, at 107.

91. See EDWARD LUTTWAK, *COUP D'ÉTAT: A PRACTICAL HANDBOOK* 27 (1979). Samuel Huntington's conception of a “breakthrough coup” is also agnostic on whether the coup results in structural regime change. See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 198–219 (1968). Huntington defines a “breakthrough coup” as a coup in which the military overthrows an existing regime to inaugurate a new bureaucratic (and usually middle class) elite in power. See *id.* at 207. Under Huntington's definition, however, a coup can be “breakthrough” even if an authoritarian regime is replaced with a new set of authoritarian leaders, as in the case of Libya in 1969.

92. See Michael V. McCrae, *Coup Prevention: A Critical Ingredient of Nation-Building Operations* 7–8 (Mar. 30, 2010) (unpublished M.S.S. thesis), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA520041>.

them with a new regime, can be quite turbulent. Interim military leaders empowered with the unfamiliar task of running a government often face enormous difficulties in ensuring an orderly transition to democracy. The interim leaders of Egypt have performed especially poorly in that task, resulting in the deaths and beatings of protestors on several occasions.⁹³ As the French revolutionary Mirabeau put it, “when you undertake to run a revolution, the difficulty is not to make it go; it is to hold it in check.”⁹⁴ The same is true for a democratic coup. The military must be tried, by civilian prosecutors, for any criminal law violations that occur during the transition process. Although militaries usually negotiate immunity agreements as a condition for surrendering power to civilian leaders, countries such as Egypt can follow the examples of Argentina and Uruguay, which both recently repealed amnesty laws for military officers for crimes committed in the context of non-democratic coups.⁹⁵ The military must also train its rank-and-file soldiers, who may have never been deployed to police the population, on how to maintain order during peaceful protests. International influence can also play a determinative role during the transition process. For example, strings can be placed on financial assistance to aid-dependent countries—such as Egypt—to ensure that the military leaders maintain an orderly transition to democracy.⁹⁶ Likewise, international organizations can impose conditions on their existing or future members to promote democratic governance structures and to decrease the influence that the military plays in democratic politics.⁹⁷

II. THE CONSTITUTIONAL ENTRENCHMENT THESIS

Following a democratic coup, a transition period follows during which the military leadership rules the country as part of an interim or provisional government. During the transition period, the military must oversee a num-

93. *Egypt Protests: Death Toll up in Cairo's Tahrir Square*, BBC NEWS, Nov. 20, 2011, <http://www.bbc.co.uk/news/world-africa-15809739>.

94. See Tom Ginsburg, *Libya's New Constitution: Lessons from Iraq's Missteps*, CHI. TRIB., Oct. 21, 2011, http://articles.chicagotribune.com/2011-10-21/site/ct-oped-1021-libya-20111021_1_new-constitution-post-gadhafi-libya-national-transitional-council.

95. See Ashley Hileman, *Argentina Ex-Military Officers Sentenced to Life for Crimes Against Humanity*, JURIST, Oct. 27, 2011, <http://jurist.org/paperchase/2011/10/argentina-ex-military-officers-sentenced-to-life-for-crimes-against-humanity.php>; Dan Taglioli, *Uruguay Legislature Repeals Amnesty Law*, JURIST, Oct. 27, 2011, <http://jurist.org/paperchase/2011/10/uruguay-legislature-repeals-amnesty-law.php>.

96. See Marinov & Goemans, *supra* note 12, at 2 (noting that, in the post-Cold War era, “dependence on Western aid tends to make countries more likely to hold competitive elections after coups”).

97. For example, the European Union has played that role in the case of Turkey by conditioning Turkey's membership in the European Union on, among other things, Turkey's agreement to limit the influential role that the military has played in Turkish politics. See, e.g., Council Decision 2008/157, Turkey 2007 Accession Partnership, Annex, 2008 O.J. (L 051) 4–18, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:051:0004:01:EN:HTML> (“Ensure that the military does not intervene in political issues and that civilian authorities fully exercise supervisory functions on security matters, including as regards the formulation of the national security strategy and its implementation.”).

ber of housekeeping tasks before democratic elections may be held. I focus on one task in this Part: the preparation of a new constitution to replace the constitution that governed the authoritarian or totalitarian regime.

In drafting a new constitution, the military leadership has three primary options. First, it can reinstate a previous democratic constitution that governed the nation before the introduction of totalitarianism or authoritarianism.⁹⁸ Second, the leadership may amend the existing non-democratic constitution to eliminate the autocratic elements and introduce new democratic governing structures.⁹⁹ Third, the military may scrap the non-democratic constitution and rewrite a new constitution with or without the aid of a democratically elected and independent constituent assembly.¹⁰⁰ In addition to the first three options, if the military chooses to suspend the pre-existing authoritarian constitution, it may also draft an interim constitution that fills the constitutional void during the transition period.

This Part argues that if the military chooses to draft an interim constitution, amend the existing non-democratic constitution, or rewrite a new constitution, it engages in the constitutional entrenchment of its policy preferences. Before explaining how constitutional entrenchment works, I first discuss what makes constitutional entrenchment possible during the transition period. This is a classic case of self-interested behavior by a state actor. Section A briefly analyzes the literature on self-interested behavior by politicians and mechanisms for mitigating self-interested behavior during democratic rule. Section B then analyzes why these mechanisms are largely unavailable to mitigate self-interested behavior by military leaders during the transition process following a democratic coup. Section C sets out the constitutional entrenchment thesis and explains how the military, as a self-interested actor, entrenches, or attempts to entrench, its policy preferences into the new constitution drafted during the democratic-transition process.

A. *Self-Interested Behavior in Democratic Politics*

The existing literature widely views politicians as self-interested individuals.¹⁰¹ As early as 1742, David Hume wrote that in “contriving any system of government and fixing several checks and controls of the constitution, every man ought to be supposed a knave and to have no other end, in all his

98. See LINZ & STEPAN, *supra* note 20, at 83. Although the restoration of a previous democratic constitution avoids a potential stalemate over the drafting of new constitutional provisions, it presents two primary problems. *Id.* First, if the nation has undergone significant changes during the authoritarian regime, a previous democratic constitutional arrangement may not reflect existing societal norms and desires. *Id.* Second, the previous democratic constitution may have been responsible, at least partially, for the breakdown of democracy and the introduction of autocracy. *Id.* If that is the case, it might be more desirable start anew with a new and improved constitution less susceptible to democratic breakdown. See *id.*

99. *Id.*

100. *Id.*

101. Ferejohn, *supra* note 15, at 7–9.

actions, than private interest."¹⁰² In more recent seminal works, Robert Barro and John Ferejohn have constructed theories of political behavior on the assumption that politicians are self-interested actors. For example, in developing an economic model for the control of politicians, Professor Barro assumes that the public officeholder acts "to advance his own interests, and these interests do not coincide automatically with those of his constituents."¹⁰³ Likewise, Professor Ferejohn's model of incumbent performance and electoral control is based upon the possibility that "the politician's preferences may diverge from those of his constituents and that he may therefore choose policies at variance with his platform."¹⁰⁴ Professor Ferejohn assumes that officeholders "desire reelection in order to take advantage of the perquisites of office as well as to pursue their own ideas about policy."¹⁰⁵

At least three mechanisms exist in democratic politics to mitigate self-interested behavior and create an incentive structure so that the politician acts, to the extent possible, in the best interests of the citizenry: (1) screening politicians before electing them into office, (2) monitoring the politicians' conduct to mitigate the informational asymmetry between the politicians and the citizens, and (3) sanctioning politicians by voting them out of office. As discussed in Part II.B, these mechanisms are ordinarily unavailable during military rule, which provides the military ample leeway to maximize its welfare by engaging in the constitutional entrenchment of its policy preferences. Before explaining why these mechanisms are unavailable during military rule, I first discuss how they operate in democratic politics to mitigate self-interested behavior.

First, the voters may screen the politicians before electing them into office by using rough proxies to predict whether they are likely to diverge from the voters' interests.¹⁰⁶ These rough proxies include political ideology, competence, honesty, and work ethic, as demonstrated by prior experience in politics and other fields.¹⁰⁷ Politicians who lack these rough proxies desired by the electorate will not be elected into office. Screening thus provides a method to the voters for filtering out politicians whose interests diverge from the citizenry before they even take office.

102. See DAVID HUME, OF THE INDEPENDENCY OF PARLIAMENT (1742), reprinted in HUME: POLITICAL ESSAYS 24 (Knud Haakonssen ed., 1994).

103. See Barro, *supra* note 15, at 19.

104. See Ferejohn, *supra* note 15, at 5.

105. See *id.* at 11; see also ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 28 (1957) (assuming that politicians "act solely in order to attain the income, prestige, and power which come from being in office"); Moe, *supra* note 15, at 761 ("[P]oliticians are not primarily motivated by productive efficiency or the public interest in making [their] decisions. Most obviously, electoral considerations prompt concern for constituency service, pleasing interest groups, rewarding contributors, avoiding conflict, taking symbolic stands, and claiming credit for popular outcomes.").

106. See Moe, *supra* note 15, at 767.

107. Cf. *id.* Although these proxies do provide the voters with an imperfect method for screening politicians, they do not guarantee, of course, that politicians will behave as predicted once they take office.

Second, the voters may employ monitoring devices to observe the politicians' behavior and mitigate the necessary informational asymmetry between the politicians and the citizenry.¹⁰⁸ Transparency is critical in ensuring that politicians conform their behavior to the voters' interests.¹⁰⁹ As early as 1765, John Adams wrote that "[l]iberty cannot be preserved without a general knowledge among the people who have a right . . . and a desire to know . . . the characters and conduct of their rulers."¹¹⁰ If voters can observe the politicians' actions and have sufficient information about the reasons behind those actions, they can more effectively reward or punish political behavior.¹¹¹ In promoting transparency, the media, non-profit organizations, think tanks, and other independent watchdogs play an important role by providing information on the quality of politicians and their policies.¹¹² But even with a free media and civil society, the electorate may be unable to observe many political activities and will instead judge political performance based on its effects on their own well-being.¹¹³

Third, citizens may employ sanctioning mechanisms designed to punish a politician when the politician's performance diverges from the citizens' best interests. The primary mechanism for sanctioning self-interested politicians is to vote them out of office.¹¹⁴ Voters delegate political authority to politicians through elections.¹¹⁵ If politicians engage in self-interested actions detrimental to the voters during their term, voters may punish them by

108. *Id.* at 766.

109. BESLEY, *supra* note 15, at 37; *id.* at 203 ("Transparency is fast becoming the motherhood and apple pie of good governance.").

110. See JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), reprinted in 3 THE WORKS OF JOHN ADAMS 447, 456 (Charles Francis Adams ed., 1851).

111. BESLEY, *supra* note 15, at 37, 99; Ferejohn, *supra* note 15, at 10 ("With perfect information the voter is able to extract most of the rents in the transaction Intuitively, the greater the informational advantage that officials hold, the greater their ability to earn rents from office-holding.").

112. BESLEY, *supra* note 15, at 37, 203.

113. Ferejohn, *supra* note 15, at 11.

114. BESLEY, *supra* note 15, at 36 ("The main sanction of poor performance [by politicians] is electoral—those who perform badly will not be re-elected."); GERSBACH, *supra* note 15, at 32; Ferejohn, *supra* note 15, at 8 ("The natural mechanism to transmit . . . incentives is the fact that elections take place repeatedly and that officeholders desire to retain office. Under these circumstances, voters can adopt strategies that can affect the incentives of officeholders in various ways."). In Federalist No. 57, James Madison similarly noted the role of popular elections in policing politicians:

[T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

THE FEDERALIST NO. 57, at 385 (James Madison).

115. BESLEY, *supra* note 15, at 36.

denying them reelection.¹¹⁶ The politicians' desire to retain office thus motivates them to conform their behavior to the interests of the electorate.¹¹⁷

B. Self-Interested Behavior by Military Leaders in a Democratic Coup

Like politicians, military leaders are self-interested actors. For the purposes of this Article, the military as an institution, represented by its leaders, has two interests.¹¹⁸ First, the military desires to preserve and promote its privileged status in society. Militaries in nations such as Egypt and Turkey enjoy many economic and social privileges and it is in their self-interest to protect those privileges. Second, the military has an interest in preserving intra-state stability.¹¹⁹ An unstable regime is a distraction for the military and detracts the military's focus from its primary task, which is to defend the nation from external threats. These two interests are at work from the inception of a democratic coup until its completion.

In an authoritarian regime, an inherent tension exists between the government and the people because authoritarian leaders ordinarily resort to force or the threat of force to silence opposition voices and prevent competitive elections. The military must continuously weigh that tension between

116. *Id.*

117. GERSBACH, *supra* note 15, at 32. Even electoral control is only a partially effective method of motivating the politicians to advance the interests of their constituents. See Barro, *supra* note 15, at 20; Muller, *supra* note 15, at 273 (“[D]emocratic elections alone cannot motivate politicians to undertake long-term, socially beneficial projects that do not perform well in the short run, when politicians are short-term oriented or future elections do not sufficiently reflect the success of past policies.”).

118. Institutional interest is often a shorthand for the motivations of individuals who are members of that institution. Jon Elster, Essay, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380 n.40 (1995). Jon Elster has argued that legislators tend to identify with the legislature for various reasons, including the need for cognitive consonance (“This must be an important institution since I am a member of it”) or socialization. See *id.* For example, if members of a political party deviate from the party line, they may be sanctioned by failing to get re-nominated or reelected. *Id.* The same dynamic is largely at work in a military. The interests of the military as an institution and the interests of its leaders will often converge since it is the military leaders that benefit from the military's economic and social privileges and the intra-state stability that allows them to focus on external threats. See LINZ & STEPAN, *supra* note 20, at 67 (“The officer corps, taken as a whole, sees itself as a permanent part of the state apparatus, with enduring interests and permanent functions that transcend the interests of the government of the day.”); Juan Rial, *Providing for the Common Defense: What Latin American Constitutions Have to Say About the Region's Armed Forces*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 36, at 235, 243 (“The armed forces, however, are strongly unified in their political views. It is precisely this unity of political views that makes civilians perceive the military as a single corporation.”). The hierarchical command structure of the military also contributes to the coherence of its members' ideology and often ensures that junior officers and rank-and-file soldiers follow the commands of their leaders. I do not mean to suggest, however, that the military always acts as a monolithic unit or that the interests of the military as an institution and its members will always be aligned. For example, the interests of the military as an institution and the interests of its leaders may diverge where factional disputes arise within the leadership and the leaders decide to pursue conflicting goals or where a military leader acts irrationally. In addition, junior officers, guided by their own personal ideologies and without the consent of their leaders, may perpetrate a coup even where the coup is against the interests of the military as an institution.

119. LINZ & STEPAN, *supra* note 20, at 67 (“[A]s members of a situational elite who derive their power and status from the existence of a functioning apparatus, the military-as-institution have an interest in a stable state, and this requires a government.”).

the regime and the people. If the authoritarian regime is strong enough to suppress a popular opposition, the military will often yield to that regime to preserve stability and its privileged status in society. For example, for decades, the Egyptian military supported the authoritarian Mubarak regime.¹²⁰ Until early 2011, Mubarak kept opposition voices in check through extra-legal measures and appeared strong enough to remain in power indefinitely.¹²¹ As discussed in Part III.C, the Egyptian military had amassed enormous privileges during Mubarak's rule and thus had an incentive to support his regime as long as he remained powerful enough to maintain control.

What motivates a military, when it initially supports an authoritarian regime, to turn its arms against that regime and stage a coup d'état? At some point during the authoritarian regime's rule, the power dynamic between the regime and the people might change, and popular opposition may become powerful enough to thwart suppression efforts by the authoritarian leaders. The change in that power dynamic might cause the military's incentives to change as well. When the balance of power shifts to the people, the military will have three primary options.

First, the military might side with the regime and suppress the protests through the use of force. In many cases, that option will not be in the military's interest. If the military uses force to suppress a popular opposition, it might face retaliation by a foreign power that comes to the aid of the revolutionaries, as in the case of Libya in 2011.¹²² By using force on the population, the military would risk irreversibly losing its popular and privileged role in society. The military would also risk defections from the rank-and-file soldiers who might refuse to fire on the protestors and perhaps stage a coup against the government and the military leadership. That risk is especially great in a military comprised of citizen-soldiers who are more likely than professional soldiers to identify with the population on whom they are ordered to use force. Because rank-and-file conscripts may refuse to obey orders to use violence on the general population, resulting in a breakdown of the command structure, democratic coups tend to occur in nations that have mandatory national conscription.¹²³

Second, the military might remain neutral and allow the revolution to carry its course. That option is also a risky one. If the popular opposition succeeds in overthrowing the authoritarian regime, the people, and not the military, will be in charge of the transition process to democracy. During

120. See Tony Karon, *Egyptian Military Proving to Be Rival Power Center to Mubarak*, TIME, Feb. 1, 2011, available at <http://www.time.com/time/world/article/0,8599,2045455,00.html>.

121. See *id.*

122. See *Libya: How the Opposing Sides Are Armed*, BBC NEWS, Aug. 23, 2011, <http://www.bbc.co.uk/news/world-africa-12692068>.

123. See *supra* text accompanying notes 58–68.

that process, the people might eliminate or curb the privileged status of a military that blissfully chose to remain on the sidelines during the uprising.

Third, the military might stage a coup d'état and seize power from the authoritarian regime and oversee a transition process that ends with the transfer of power to the people. That option would allow the military to enable the establishment of a more stable regime, emerge in the eyes of the people as a credible state institution, and preserve its own interests during a transition process that the military leaders themselves control. In many cases, staging a democratic coup will therefore be in the military's interests of preserving continuity and stability, even if those interests are achieved through a fundamental change of the governing structure. Note, however, that the primary purpose of the military in a democratic coup is not democracy promotion. It is the preservation of stability. The establishment of a democratic regime constitutes the means with which the military achieves the end result of intra-state stability.¹²⁴

Following the coup, and during the democratic transition process, the military will continue on its self-interested path. What is more, the primary methods for mitigating self-interested behavior in democratic politics—screening politicians before electing them, monitoring their performance, and sanctioning self-interested politicians by voting them out of office¹²⁵—are generally unavailable during military rule. I discuss each in turn below.

In electoral politics, the selection of the most competent politicians whose motives are most likely to be in line with the public interest filters self-interested politicians before they take office.¹²⁶ But in a military coup, the people are incapable of meaningful selection between competing agents. The military, not the people, chooses to intervene to overthrow the existing regime. And there is little, if anything, that the people can do to prevent the military from assuming control of the government.

Second, the opportunity of the people to monitor the actions of the military is significantly curtailed by a lack of transparency during the demo-

124. This self-interest model is admittedly a reductive account of the options available to the military in an authoritarian regime. The model may not capture the entire complexity of the incentives and motivations of the military leaders that stage democratic coups. Perhaps, in addition to acting in self-interest, a military that stages a democratic coup has an independent commitment to the establishment and promotion of democracy, especially since the type of military that stages democratic coups tends to be comprised of citizen-soldiers, some of whom may act altruistically to protect the welfare of the society as a whole. See *supra* text accompanying note 68. Nevertheless, altruism is unlikely to be the primary motivator. If it were, the militaries that have staged democratic coups would be expected to stage the coup regardless whether strong popular opposition existed against the authoritarian regime. The Egyptian military, for example, would not have supported the authoritarian Mubarak regime for decades and would have staged a coup when Mubarak first adopted an authoritarian stance. Because democratic coups tend to happen only when the power dynamic between the authoritarian government and the popular opposition shifts, and the people become strong enough to thwart suppression attempts by the regime, self-interest appears to be the primary motivator.

125. See Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1590–91 (2010).

126. BESLEY, *supra* note 15, at 99.

cratic transition period. Much happens in relative secrecy during military rule. Due in large part to the hierarchical command structure of its regular operations, the military junta rarely feels the need to justify or explain the reasons behind its actions during the transition process. Laws, proclamations, and interim constitutions are often drafted behind closed doors through a largely opaque process, with little or no participation by ordinary citizens.¹²⁷ What is more, the voices of the organizations that play an important role in ensuring transparency in democratic politics—e.g., the media, non-profit organizations, think tanks, and other independent watchdogs—may be curtailed or even completely silenced, at least on certain subjects, by the military during the democratic transition process.¹²⁸ The citizens thus lack meaningful monitoring mechanisms to observe the conduct of the military.

The primary monitoring method available to the citizens is direct observation of the *results* of the military's actions. Although the populace in most cases cannot monitor, for example, the internal debates over the content of an interim constitution, the citizenry can observe whether the military has announced a schedule for the transition to democracy (e.g., a date certain for democratic elections) and whether the deposed despots from the authoritarian regime have been put on trial. These results provide an avenue for a modicum of monitoring to the citizenry, but, as discussed below, there is very little by way of sanctions that the citizenry can impose on the military for what they observe as self-interested conduct.

Finally, in most cases, the primary mechanism for sanctioning self-interested politicians—voting them out of office—is unavailable for the military. Ordinarily, the military does not seek reelection at the end of a democratic coup. Its purpose is limited to transitioning the nation to a democracy and returning to the barracks. Although the military remains in power until the transition is complete, the people cannot vote the military out of office before the transition ends. Further, the imposition of sanctions on the military after the transition to democracy may also be very difficult. The military usually negotiates immunity from prosecution as a condition for relinquishing power to democratically elected leaders, which prohibits the imposition of criminal sanctions on the military after the coup.¹²⁹ The mili-

127. For example, among the most common complaints in the ongoing democratic transition in Egypt “is that the military is utterly opaque, issuing edicts from behind closed doors” and with “no sense of popular consultation.” Neil MacFarquhar, *Protestors Scold Egypt's Military Council*, N.Y. TIMES, Apr. 1, 2011, <http://www.nytimes.com/2011/04/02/world/middleeast/02egypt.html>.

128. See, e.g., *Egypt: Torrid Post-Revolutionary Times*, ECONOMIST, July 30, 2011, available at <http://www.economist.com/node/21524851> (noting attempts by the ruling Egyptian military to “plant plain-clothes agitators in protests and to mute the thriving independent press while encouraging state-owned media to portray protesters as hooligans”).

129. For example, the constitution drafted following a 1960 coup in Turkey prohibited the imposition of any civil or criminal sanctions against the military rulers that governed the nation during the transition process. See TÜRKIYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, temp. art. 4 (Turk.).

tary thus has little fear of present or future sanctions for self-interested behavior.

The availability of sanctions is also limited because there exists no external enforcer of the bargain between the people and the military.¹³⁰ Upon seizing power, the military ordinarily disbands the Parliament, annuls the constitution, and suspends judicial review,¹³¹ providing itself a virtual monopoly on coercive power.¹³² The people cannot invoke the power of the courts to ensure that the military remains faithful to the best interests of the populace. And even where judicial review is available, the judiciary lacks the power to enforce any judgment against the military.¹³³ The military may ignore the judiciary's rulings, abolish or suspend judicial review, or even impeach uncooperative judges.¹³⁴

The one limited avenue for sanctions is the protest, akin to what the political-science literature labels "the decibel meter."¹³⁵ In political science, the decibel meter refers to the feedback that politicians receive from their constituents about bureaucratic performance.¹³⁶ The military likewise receives feedback from the citizens in the form of protests. When unhappy about the military's performance during the transition, the frustrated masses rush back to the symbolic square in which the initial uprising against the autocratic regime began in order to force the ruling military to accede to their demands. For example, in the ongoing transition process in Egypt, the crowds returned to al-Tahrir Square to protest the slow pace of the transition and the military's failure to speedily prosecute the members of the Mubarak regime.¹³⁷ One of the organizers of the al-Tahrir Square protests told me during an interview that a crowd of about 100 to 200 protestors would remain in the Square indefinitely "just so the military knows we are still here and will take over the Square again if things go awry."¹³⁸ As another Egyptian protestor put it: "Protests and popular pressure [against the military] must return, because they are only the real method of realizing the

130. See Ginsburg & Posner, *supra* note 125, at 1589.

131. See Mahmud, *supra* note 10, at 103, 127.

132. See Ginsburg & Posner, *supra* note 125, at 1592; Mahmud, *supra* note 10, at 104 ("Because the military enjoys a preponderance, even a monopoly, of coercive power in the society, it can enforce its will on any section of the state or civil society while it remains relatively immune from countervailing pressure from any other quarter.")

133. Mahmud, *supra* note 10, at 104.

134. *Id.*

135. *Cf.* Moe, *supra* note 15, at 767.

136. *Id.*

137. See *The Arab Awakening: Revolution Spinning in the Wind*, ECONOMIST, July 14, 2011, available at <http://www.economist.com/node/18958237?fsrc=scn/fb/wl/ar/revolutioninthewind> ("In the absence of parliaments a sort of rolling dialogue has unfolded [in the Arab world], whereby public anger builds at the lack of progress, resulting in protests that prompt interim governments to further concessions.")

138. Interview with Haytham Hammad in Cairo, Egypt (Aug. 1, 2001); see also Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1 ("Even if [the protestors] leave, any government will know that we can get them to the streets again in a minute.") (quoting Shady el-Ghazaly Harb, one of the organizers who guided the Egyptian revolution)).

people's demands."¹³⁹ By invoking the power or the threat of protests, the citizens thus provide feedback to the military about their wishes.¹⁴⁰

In addition to providing feedback, protests also serve a limited sanctioning function. They divert the military's resources from other areas of concern to respond to the protests. The power of the people expressed through persistent protests therefore may also motivate the military to act. For example, the Egyptian Supreme Council of Armed Forces hastened to bring to trial several members of Mubarak's deposed cabinet in response to determined protests in al-Tahrir Square demanding accountability for the Mubarak regime.¹⁴¹ The decibel meter that measures the voice of the people is thus relevant in policing the conduct of the military, but ultimately, the power of the protests is limited. The military possesses the coercive power to quell the protests, arrest the protestors, and continue on its self-interested path.¹⁴² And in response, there is very little, if anything, that the people can do.

With little or no opportunity for screening, monitoring, and sanctions, the military is ordinarily unaccountable for many of its actions during the democratic transition process.¹⁴³ The military is not obliged to act on behalf of the people, and the people generally lack a legal mechanism for sanctioning or rewarding the military for its performance during the transition.¹⁴⁴ This virtual monopoly on power, with few mechanisms for mitigating self-interested behavior, provides the military ample leeway to maximize its welfare during the transition process. In the next section, I focus on one specific form of welfare maximization: constitutional entrenchment.

C. *Constitutional Entrenchment During Military Rule*

Constitutional entrenchment refers to the military's placement into the interim constitution or the resulting democratic constitution provisions that favor the military's institutional or policy preferences or seek to perpetuate the military's voice in the nation's political affairs beyond the end of the democratic transition period. Although, as described in Part I, the military relinquishes power at the end of a democratic coup, it also sets its terms

139. See MacFarquhar, *Protestors Scold Egypt's Military Council*, *supra* note 127.

140. Cf. *The Arab Awakening: Revolution Spinning in the Wind*, *supra* note 137.

141. See Hamza Hendawi, *Mubarak Prosecutors Demand the Death Penalty*, GLOBE & MAIL, Jan. 5, 2012, <http://www.theglobeandmail.com/news/world/mubarak-prosecutors-demand-the-death-penalty/article2292647/>.

142. Indeed, the Supreme Council of Armed Forces in Egypt outlawed demonstrations and sit-ins in response to continued protests. Michael Slackman, *Islamist Group Is Rising New Force in a New Egypt*, N.Y. TIMES, March 24, 2001, <http://www.nytimes.com/2011/03/25/world/middleeast/25egypt.html?page-wanted=all>; see also MacFarquhar, *Protestors Scold Egypt's Military Council*, *supra* note 127 (noting a "heavy military hand in breaking up demonstrations and credible allegations of torturing arrested protestors").

143. Cf. BESLEY, *supra* note 15, at 101 ("[A]chieving accountability is one of the key roles of elections.")

144. See James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55 (Bernard Manin et al. eds., 1999).

through constitutional entrenchment.¹⁴⁵ A democratic coup may show any one or a combination of three types of entrenchment: institutional, substantive,¹⁴⁶ and procedural. I discuss each in turn.

First, the military may create counter-majoritarian institutions in the new constitution (e.g., national security councils, constitutional courts, etc.) that continue to enforce the military's institutional or policy preferences after the military relinquishes power to democratically elected leaders. Institutionalized prerogatives allow the military to "exercise effective control over its internal governance, to play a role within extra-military areas within the state apparatus, or even to structure relationships between the state and political or civil society."¹⁴⁷ For example, a national security council, designed as a forum for exchange of views between civilian and military leaders, may allow the military to influence political policy-making. Likewise, a constitutional court comprised of judges aligned with the military's policy preferences may strike down democratically enacted legislation contrary to those preferences.

Tom Ginsburg and Ran Hirschl have developed theories on the creation of institutional prerogatives in a separate but closely analogous context: the establishment of a constitutional court to preserve the political prerogatives of civilian political leaders threatened with the loss of power. According to Professor Ginsburg's "insurance model" of judicial review, if politicians drafting a new constitution foresee themselves losing power in post-constitutional elections, they may entrench judicial review in the constitution as political insurance.¹⁴⁸ The form of the constitutional court empowered with judicial review, argues Professor Ginsburg, will tend to reflect the interests of the constitutional drafters.¹⁴⁹ Even if the constitutional drafters lose the elections, another avenue—judicial review—remains available to challenge legislation passed by their opponents.¹⁵⁰ Likewise, Professor Hirschl has argued that threatened political elites transfer power from political institutions to the judiciary to preserve their political hegemony and entrust their

145. Constitutional entrenchment is not unique to democratic coups; it may also occur in non-democratic coups. Entrenchment, however, is more likely to occur, and with longer-lasting effects, in a democratic coup where the military oversees the drafting of a new constitution and possesses the authority to extract a price in the form of constitutional entrenchment as a condition for voluntarily handing over power to democratically elected leaders. In contrast, the leaders of non-democratic coups may be brought down involuntarily, by force or the threat of force, without the same opportunity as the leaders of a democratic coup to set conditions for the surrender of power or to engage in constitutional entrenchment. The recent ouster of coup leader Muammar Gaddafi in Libya is a good example. Because Gaddafi was brought down involuntarily, he lacked the opportunity to dictate the content of Libya's new constitution.

146. In the political-science literature, the possibility of a hierarchical military imposing "reserve domains" on an elected government has been discussed previously. See LINZ & STEPAN, *supra* note 20, at 67.

147. ALFRED STEPAN, *RETHINKING MILITARY POLITICS: BRAZIL AND THE SOUTHERN CONE* 93 (1988).

148. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 18 (2003).

149. See *id.*

150. See *id.*

policy preferences to unelected judges who share the elites' ideology and shield the elites' policies from the vagaries of domestic politics.¹⁵¹ Even if the political elites lose power, the unelected judges continue to enforce the elites' policy preferences via judicial fiat.¹⁵²

In a democratic coup, by definition, the military leaders will eventually hand over power to democratically elected leaders—which, in most cases, will not be the members of the military junta that staged the coup. In such cases, the military has an incentive, in line with the theories of Professors Ginsburg and Hirschl, to create counter-majoritarian institutions that will perpetuate their policy preferences long after they relinquish power.¹⁵³ In fact, the military's incentive to create counter-majoritarian institutions during a democratic transition is greater than that of civilian elites.¹⁵⁴ Although civilian elites may run again for office and possibly win elections after the transition, military leaders do not ordinarily run for election following democratic coups.¹⁵⁵ In many cases, the only option for the military to perpetuate its policy preferences is to entrench those preferences in a counter-majoritarian institution before the military leaders relinquish office.¹⁵⁶ Of course, counter-majoritarian institutions may disappoint the military leaders that established them, but these institutions, whose structure and membership have been defined by the military, are likely to be more reliable partners than the elected branches.

A particularly attractive option for institutional entrenchment is the establishment of a constitutional court. Unlike an institution such as a national security council comprised partly of military officers, a constitutional court ordinarily has no military members. The creation of a constitutional court thus allows the military to enforce its interests through a separate institution with no overt military involvement.¹⁵⁷ By entrenching its policy preferences in a judiciary, the military can let a different branch of government protect its interests and avoid accountability in the process.¹⁵⁸ As discussed in Part III.A, to make sure that the constitutional court follows its policy preferences, the military may provide the authority to appoint mem-

151. See Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 *TEX. L. REV.* 1819, 1857 (2004). See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

152. See Hirschl, *supra* note 151, at 1857.

153. As A.W. Pereira has also noted, “[m]ilitary strength and autonomy cannot be achieved by the military alone but must be nurtured and sustained by legal and legislative projects that convert parts of the judiciary and the congress into defenders of the status-quo.” A.W. Pereira, *Virtual Legality: Authoritarian Legacies and the Reform of Military Justice in Brazil, the Southern Cone, and Mexico*, 34 *COMP. POL. STUD.* 555, 557–58 (2001).

154. See Hootan Shambayati, *The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective*, in *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST* 99, 103 (Saïd Amir Arjomand ed., 2008).

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.*

bers to the court to institutions that are friendly to its policy preferences.¹⁵⁹ Likewise, the military may adopt a liberal definition of standing and allow institutions aligned with its ideology to seek judicial review before the constitutional court, providing the court with additional opportunities to engage in judicial review and to enforce the policy preferences that it shares with the military.¹⁶⁰ The creation of an independent and sympathetic judiciary might thus be the best “insurance policy” for the military.¹⁶¹

Second, the military may reserve substantive powers for itself in the new constitution. Substantive entrenchment is distinct from institutional entrenchment in that the former provides the military itself with substantive constitutional powers, whereas the latter delegates constitutional authority to a separate institution. At its most extreme, as in the case of Portugal (discussed in Part III.B), the military may provide itself the power to enact laws and regulations or to judge the constitutionality of laws passed by the democratically elected legislature. To a lesser extent, as in the cases of Ecuador and Turkey, the military may include a “guardian of the nation” clause in the new constitution, expressly declaring itself to be the protector of the state.¹⁶² At first blush, this provision may seem innocuous; after all, the military is authorized to guard the state from external threats. But in many cases, the military inserts a guardian-of-the-state clause to protect what it deems to be the fundamental principles of the state from democratically elected governments. This clause may thus provide the military with constitutional authority to have an ongoing voice in political affairs and to dictate what democratically elected governments may or may not do. For example, as discussed in Part III.A, the Turkish military has frequently intervened in political affairs to protect the secular nature of the state against theocratic-leaning governments.

Third, the military may design the transition process so that it produces a substantive constitutional outcome favorable to the military. Procedural entrenchment is most likely to happen when the constitution is drafted, not by the military, but by a democratically elected legislative branch or constituent assembly. If that is the case, the military may not have the power to directly dictate the content of the new constitution and may thus resort to procedural entrenchment to influence the constitution’s content. For example, the military may decide to hold elections within a short time frame, making it very difficult for new parties to effectively organize and mount an

159. See *infra* notes 243–46 and accompanying text (analyzing the appointments process for the Turkish Constitutional Court).

160. See *infra* notes 246–49 (discussing the scope of standing for bringing petitions for judicial review before the Turkish Constitutional Court).

161. See Shambayati, *The Guardian of the Regime*, *supra* note 154, at 103.

162. See Aurel Croissant et al., *Beyond the Fallacy of Coup-ism: Conceptualizing Civilian Control of the Military in Emerging Democracies*, 17 *DEMOCRATIZATION* 950, 956 (2010).

electoral campaign.¹⁶³ The military may have an incentive to protect established political parties against new and unfamiliar ones, believing that the established parties will better protect the military's preferences when drafting the new constitution. As discussed in Part III.C, the Egyptian Armed Forces, for example, may have established a speedy timeline for elections following the February 2011 coup in order to favor the more established and organized parties against newly formed parties comprised primarily of Egyptian youth.

In addition to controlling the timeline for the elections, the military may also alter the sequence of the elections that take place during the transition so that the electoral process produces a substantive constitutional outcome favorable to the military.¹⁶⁴ Three primary types of elections may take place in various orders during the democratic transition process.¹⁶⁵ Presidential elections may be held first, with the newly elected president holding power for a fixed period of time and without any check by an independent parliament.¹⁶⁶ Alternatively, parliamentary elections may be held first, with the legislature giving its confidence to a government executive such as a prime minister or a cabinet.¹⁶⁷ Finally, elections for a constituent assembly to draft a new constitution may be held before presidential or parliamentary elections.¹⁶⁸

The determination of which institution is elected first—the president, the parliament, or the constituent assembly—is “of major importance to the relationship between the legislative and the executive branches, the role of political parties, and the nature of political life in general.”¹⁶⁹ For example, the decision to elect a president first may have a profound effect on the nation's constitutional future.¹⁷⁰ With a popularly elected president already in place, the constitutional drafters are much less likely and able to alter the status quo and opt for a parliamentary, as opposed to a presidential, design.¹⁷¹ In contrast, if elections for a constituent assembly or the parliament

163. Procedural entrenchment does not render the resulting elections unfair or not free. As long as universal adult suffrage and meaningful competition exist, the elections that occur following the democratic coup are free and fair under Samuel Huntington's definition of that term. See *supra* notes 69–88 and accompanying text. Procedural entrenchment may tilt the electoral playing field toward one or more political parties, but even in established democracies, the electoral field is rarely level. In the United States, for example, procedural mechanisms such as gerrymandering, voter identification requirements, and felon disenfranchisement laws may produce substantive effects.

164. See SHAIN & LINZ, *supra* note 35, at 9 (noting that the determination of electoral sequence by an interim government can be critical).

165. See Yossi Shain & Juan J. Linz, *Timing of First Democratic Elections*, in SHAIN & LINZ, *supra* note 35, at 76, 83.

166. *Id.*

167. *Id.*

168. *Id.* The democratic transition process in Tunisia after the revolution in 2011 followed this third sequence.

169. *Id.* at 84.

170. See *id.*

171. *Id.* If presidential elections occur first, the constitutional drafters have to work with an elected leader who is not accountable to the legislature and whose term is fixed and may extend beyond the

are held first, then the establishment of a parliamentary system remains a possibility.¹⁷² And the military, as in the case of Egypt discussed in Part III.C, may favor a presidential system over a parliamentary one on the basis that a strong president will better preserve its policy and institutional preferences.

Even though a democratic coup ends in free and fair elections, substantive, institutional, and procedural entrenchment allow the military to play an ongoing role in the nation's political affairs. Nevertheless, constitutional entrenchment does not last forever. Turkey and Portugal, for example, which respectively experienced democratic coups in 1960 and 1974 and resulting constitutional entrenchment by their militaries, both have established vibrant democracies. Portugal removed the entrenchment from its constitution by amending it six short years after the coup ended. And beginning in 2001, Turkey amended its constitution a number of times to chip away the provisions entrenched by the military.¹⁷³ At the time of this writing, Turkey is in the process of drafting a new constitution that will likely render the military forces completely subservient to the civilian branches.

III. CASE STUDIES

This Part uses three comparative case studies to illustrate the democratic coup phenomenon and the constitutional entrenchment thesis. Part III.A analyzes the Turkish coup of 1960; Part III.B studies the Portuguese coup of 1974; and Part III.C examines the Egyptian coup of 2011. Employing constitutional ethnography, I use these case studies to create a repertoire of democratic coups.¹⁷⁴ Constitutional ethnography is “the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape.”¹⁷⁵ Constitutional ethnography aims for comprehension and identification of themes through the translation of concepts across locations, times, and research questions.¹⁷⁶ Although it focuses on particular constitutional settings, it aims to teach about “more general constitutional processes that might illuminate sites not specifically in focus.”¹⁷⁷ To that end, this Part analyzes the historical and cultural context within which each of the three coups took place and traces, using the seven-step framework described in Part I, how each democratic coup unfolded.

ratification of the new constitution. *Id.* The President may also exert pressure on the constitutional drafters to prevent the replacement of the existing presidential structure with a parliamentary system, as President Sarney did in Brazil. *Id.*

172. *Id.*

173. See *infra* Part III.

174. See Scheppele, *supra* note 33, at 391.

175. *Id.* at 395.

176. *Id.* at 392.

177. *Id.* at 402.

A. *The Turkish Coup of 1960: Institutional Entrenchment*

For at least the past fifty years, the Turkish Armed Forces have exerted a formidable influence in Turkish political affairs. The Armed Forces have staged four coups, forced political leaders to resign, and acted as a de facto, if not de jure, fourth branch of the Turkish government. The political influence of the Turkish Armed Forces has its roots in counter-majoritarian institutions that the military established in a constitution drafted following a coup on May 27, 1960. I first discuss the prelude and aftermath of the coup and then analyze how the military engaged in the institutional entrenchment of its policy preferences.

1. *The Prelude and Aftermath of the Coup*

Between 1923, the year of Turkey's founding, and 1950, the Republican People's Party (*Cumhuriyet Halk Partisi*) ("CHP") governed Turkey in a single-party framework.¹⁷⁸ CHP was established by Mustafa Kemal Atatürk, the first President of Turkey, and the rest of the nation's founding elite.¹⁷⁹ During those twenty-seven years of single-party rule, the state and the party were one. Likewise, the state's ideology was the party's ideology, which was based on "Kemalism" and espoused Mustafa Kemal Atatürk's beliefs on modernization, national unity, and, above all, secularism.¹⁸⁰

When Turkey transitioned from a single-party system to a multi-party regime between 1946 and 1950, the Democrat Party (*Demokrat Parti*) ("DP") was established.¹⁸¹ CHP and DP split over cultural and political fault lines. CHP continued to represent the nation's secular elite, but DP emerged as a populist, anti-bureaucracy party, representing a largely rural constituency.¹⁸² In 1950, DP won a sweeping majority in the Parliament and ousted CHP from the government seat it had occupied for the previous twenty-seven years.¹⁸³ For the first time since the republic's formation, the founding secular elite did not govern the nation. Although CHP was no longer in power, both the military and the civil bureaucracy remained firmly loyal to CHP and its Kemalist ideology.¹⁸⁴ The military's support for CHP was buttressed by the fact that CHP's leader, İsmet İnönü, had served alongside Atatürk as a well-respected general in the Turkish Revolution.¹⁸⁵

178. Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 *LAW & SOC'Y REV.* 653, 659 (2006).

179. *Id.*

180. *Id.*

181. *Id.* at 659–60.

182. *Id.*; OZAN ERGUL, *TURK ANAYASA MAHKEMESİ VE DEMOKRASI* [THE TURKISH CONSTITUTIONAL COURT AND DEMOCRACY] 219–21 (2007).

183. Belge, *supra* note 178, at 659–60.

184. *Id.* at 660.

185. FERÖZ AHMAD, *DEMOKRASI SURECİNDE TÜRKİYE 1945–1980* [TURKEY IN THE PATH TO DEMOCRACY 1945–1980] 63 (1994).

Well aware of the sturdy support CHP still enjoyed among many circles, DP quickly took an authoritarian and repressive turn after it assumed power.¹⁸⁶ Over the ten years during which it governed the Republic (1950 to 1960), DP suppressed the CHP-friendly press, forced disobedient civil servants, judges, and professors into early retirement, passed laws to quell political opposition,¹⁸⁷ and exploited religion to influence the public.¹⁸⁸ For example, DP empowered the Ministry of Finance to audit CHP's internal finances and froze a substantial portion of CHP's assets pending the audit.¹⁸⁹ DP monopolized the state radio—the primary news source at the time—and prevented CHP from airing opposition commentary.¹⁹⁰ It passed a law prohibiting university professors from engaging in political activities, which cut off political speech by a large portion of the intelligentsia, a constituency aligned primarily with CHP.¹⁹¹ In December 1954, shortly before the general parliamentary elections, the DP-led Parliament voted to confiscate all financial assets of CHP, which significantly curtailed CHP's ability to mount an election campaign.¹⁹² Despite its authoritarian tendencies, DP managed to win another term in office, buoyed primarily by a booming economy and improved social welfare.¹⁹³

Following its reelection, DP continued its authoritarian streak. It imposed criminal penalties on journalists whose writings were deemed to damage the political or economic prestige of the government.¹⁹⁴ It passed a law that authorized the government to force into retirement professors and judges who had served for twenty-five years or were over the age of sixty.¹⁹⁵ In response to DP's growing authoritarian tendencies, a group of protestors took to the streets against the DP government in September 1955 in Istanbul.¹⁹⁶ DP responded by swiftly declaring martial law in three metropolitan cities—Istanbul, Izmir, and Ankara—as a knee-jerk reaction to quell the protests.¹⁹⁷

Despite the comfortable majority it enjoyed in the Parliament, the DP government, led by Prime Minister Adnan Menderes, remained uncertain and uneasy about its political prospects.¹⁹⁸ To ensure his political future, Menderes advocated a “new type of democracy” that would allow suppressing the opposition in the name of preserving national security and

186. Belge, *supra* note 178, at 660.

187. *Id.*

188. Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 76 (2002).

189. AHMAD, *supra* note 185, at 63.

190. *Id.* at 68.

191. *Id.* at 73.

192. *Id.* at 74.

193. *Id.* at 75.

194. *Id.* at 75.

195. *Id.* at 80–81.

196. *Id.* at 81–82.

197. *Id.* at 82.

198. *Id.* at 93.

preventing “destructive activities.”¹⁹⁹ Menderes’s dogma smacked of a desire to establish authoritarian rule and eliminate political pluralism. Under Menderes’s leadership, DP established a McCarthy-style parliamentary commission, comprised entirely of DP members, to investigate “subversive activities” by the opposition parties.²⁰⁰ DP authorized the commission to censor the press and to impose criminal sanctions, including up to three years’ imprisonment, against those who prevented or undermined the commission’s activities.²⁰¹ During its investigation, the commission prohibited all political activity by the investigated parties for three months and prohibited the press from reporting on the subjects of the investigations.²⁰²

The establishment of this investigatory commission prompted widespread protests beginning on April 19, 1960.²⁰³ On April 26, a group of law professors issued a declaration arguing that the investigatory commission violated the Turkish constitution.²⁰⁴ The next day, DP, in a defiant attempt to flex its political muscles, passed a law increasing the powers granted to the commission.²⁰⁵ DP then prohibited the leader of CHP, İsmet İnönü, from attending the Parliament for twelve days on trumped-up charges of inciting the nation to revolt and violate the law.²⁰⁶

DP’s witch-hunt against the opposition prompted renewed protests against the DP regime in Istanbul and Ankara on April 28 and 29.²⁰⁷ In response, DP again declared martial law in both cities to suppress the protests and authorized the military to fire on the protestors.²⁰⁸ The Turkish military, like its Egyptian counterpart in 2011, sided with the people, refused to fire on them, and staged a coup d’état on May 27, 1960, toppling the DP government.²⁰⁹

As is typical of other militaries that stage democratic coups, the Turkish military is an “extremely popular” institution.²¹⁰ In the tumultuous decades following the Republic’s founding, the military emerged as the “most serious, well-organized, and effective institution around.”²¹¹ The military’s popularity is bolstered by compulsory military service for all men.²¹² The

199. *Id.* at 132.

200. AHMAD, *supra* note 185, at 97; Belge, *supra* note 178, at 660.

201. AHMAD, *supra* note 185, at 98.

202. *Id.* at 97–98.

203. *Id.* at 98; Belge, *supra* note 178, at 660.

204. AHMAD, *supra* note 185, at 98.

205. *Id.*

206. *Id.*

207. *Id.* at 205.

208. *Id.*

209. See ENGIN SAHİN, *SIYASET VE HUKUK ARASINDA: ANAYASA MAHKEMESİ [BETWEEN POLITICS AND LAW: THE TURKISH CONSTITUTIONAL COURT]* 64 (2010); Belge, *supra* note 178, at 660.

210. Aydınli et al., *supra* note 59, at 78.

211. *Id.* at 79.

212. See *id.* at 80.

soldiers serving in the military are primarily the sons, relatives, neighbors, and friends of the people—not paid professionals loyal to the government.²¹³

After seizing power in 1960, the Armed Forces issued a statement declaring that the coup was intended to “rescue the Turkish democracy from the unfortunate situation in which it [had] found itself.”²¹⁴ The Armed Forces made a firm commitment to “hold fair and free elections as quickly as possible” and to hand over the regime to the electoral victors.²¹⁵ During the transition period, according to the declaration, the military leaders would govern the nation as part of the National Unity Committee (*Milli Birlik Kurulu*) (“MBK”).

Shortly after the issuance of this declaration, the MBK announced that a committee of professors, handpicked by the leaders of the military coup, would begin the process of drafting a new democratic constitution in consultation with the MBK.²¹⁶ In a report prepared for the military leaders, the group of professors declared that the DP regime had lost its political legitimacy by repeatedly engaging in actions that amounted to flagrant violations of the constitution.²¹⁷ These actions, the professors contended, provided legitimacy for the military coup and required the drafting of a new constitution that would protect the rule of law and prevent a future breakdown of democracy.²¹⁸ Once drafted, the constitution would be submitted for approval first to a constituent assembly and then to popular referendum.²¹⁹ The constituent assembly would be composed of “members of the MBK and its appointees, representatives of ‘still operative’ political parties (thus excluding the [dissolved Democrat Party]), elected regional representatives, and members of several professional organizations.”²²⁰

On June 12, 1960, an interim constitution went into effect expressly authorizing the MBK to govern the country until democratic elections were held and a new constitution was ratified.²²¹ During the democratic transition process, the MBK would have the authority to enact and execute laws through a Cabinet of Ministers appointed by the MBK.²²² The meetings of the MBK would be held in secret and its internal debates and decisions would not be reported to the public.²²³ As in many democratic transition

213. *See id.*

214. AHMAD, *supra* note 185, at 207.

215. *Id.*

216. *Id.* at 208.

217. *Id.* at 210.

218. *Id.*

219. Belge, *supra* note 178, at 660–61.

220. *See id.* at 661. Specifically, the constituent assembly excluded members and supporters of DP by enacting a law that prohibited the election of those who “with their activities, publications, and behavior, had supported acts in violation of the Constitution or of human rights before the Revolution of 27 May 1960.” *Id.* (quoting Law 157 of 1960 (Turk.)) (internal quotation marks omitted).

221. AHMAD, *supra* note 185, at 211.

222. *Id.*

223. *Id.* at 212.

periods led by the military, the Turkish military would thus govern the nation through a largely opaque process, creating a significant informational asymmetry between the public and the military.

On May 27, 1961, the first anniversary of the coup, the constituent assembly approved the constitution drafted by the MBK's hand-picked group of professors and enacted an election law to govern the democratic elections.²²⁴ The new constitution was drafted to address, in particular, those problems that had inspired the coup: abuse of government power, oppression of political dissidents, and a decay of the Republic's founding principles.²²⁵ The new constitution expanded the individual rights and liberties guaranteed in the 1924 Constitution, expressly recognizing, for example, the right to privacy, the right to travel, and the freedoms of speech, assembly, and association.²²⁶ The new constitution added a second house of Congress, the Senate, as an additional check on the existing Parliament, and required bills to be passed by both the Parliament and the Senate in order to become law.²²⁷ The constitution was submitted to a popular referendum on July 9, 1961 and was approved with 61.5% of the vote.²²⁸

Following the popular approval of the new constitution, the MBK scheduled democratic elections for October 15, 1961.²²⁹ Ahead of the elections, the MBK arranged a meeting with the leaders of the major political parties. After the meeting, the leaders signed a joint declaration agreeing, among other things, to: (1) protect Atatürk's reforms and principles; (2) refrain from using Islam as a political tool; (3) avoid questioning the legitimacy of the May 27, 1960 coup; and (4) refrain from criticizing the outcome of the military tribunals that would decide the fate of former President Celal Bayar, former Prime Minister Menderes, and several former Cabinet members.²³⁰ These officials were on trial for "crimes against the Turkish Constitution" during a decade of DP rule.²³¹

224. *Id.* at 219.

225. See SAHIN, *supra* note 209, at 65; Belge, *supra* note 178, at 663.

226. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, arts. 14–62 (Turk.); TULIN CAGDAS, 1921-1924-1961-1982 ANAYASALARININ ÖZELLİKLERİ [THE CHARACTERISTICS OF THE CONSTITUTIONS OF 1921, 1924, 1961, AND 1982] 15–16 (2009); see also Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in A Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT'L L.J. 1, 20–21 (2006) (discussing the 1961 Constitution).

227. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, arts. 70, 92 (Turk.).

228. SAHIN, *supra* note 209, at 64 n.1. The new Constitution would govern Turkey for the next two decades, until a military coup on September 12, 1980, after which the Constitution was scrapped and re-drafted.

229. AHMAD, *supra* note 185, at 220.

230. *Id.* The verdicts of the military tribunals were announced on September 15, 1960. Fifteen former DP leaders were sentenced to death, but the MBK commuted the sentences of all but three of the leaders to a term of imprisonment. SAHIN, *supra* note 209, at 220. The remaining three leaders—Prime Minister Menderes, Foreign Minister Fahit Rustu Zorlu, and Finance Minister Hasan Polatkan—were executed by hanging on the Island of Imrali. *Id.*

231. *Turkey: Message to a Son*, TIME, Sept. 29, 1961, available at <http://www.time.com/time/magazine/article/0,9171,895700,00.html>.

Democratic elections were held as scheduled in October 1961. CHP won the elections with 36.7% of the popular vote.²³² Three newly formed parties split the remaining votes, with the Justice Party (*Adalet Partisi*) winning 34.8%, the Republican National Peasants Party (*Cumhuriyetci Koylu Millet Partisi*) obtaining fourteen percent, and the New Turkey Party (*Yeni Turkiye Partisi*) receiving 13.7% of the popular vote.²³³ Following the elections, the MBK promptly handed power to democratically elected leaders.²³⁴ In 1962, the democratically elected Parliament voted to make May 27, 1960—the date of the military coup—a national holiday called the Liberty and Constitution Day.²³⁵

The Turkish coup of 1960 fits squarely within the democratic coup framework. The Turkish military staged a coup against the authoritarian DP regime in response to popular opposition against that regime. Upon assuming control, it set a timetable for democratic elections and relinquished its power to democratically elected leaders within two years. As with the other democratic coups analyzed in this Article, however, the military behaved as a self-interested actor and engaged in the institutional entrenchment of its policy preferences, the topic of the next section.

2. *Institutional Entrenchment*

The new constitution, drafted by a panel of law professors hand-picked by the MBK, established a number of counter-majoritarian institutions and gave these institutions significant supervisory power over elected officials.²³⁶ These changes divided the exercise of political power between political institutions and independent counter-majoritarian institutions aligned with the policy views of the military, and virtually marked the end of the Parliament's supremacy.²³⁷ In establishing these institutions, the military sought to protect the founding principles of the Republic—primarily secularism and national unity—which, according to the military, had preserved stability the face of threats to revert to theocratic governance structures.²³⁸ Specifically, the new constitution established two new institutions to perpetuate the military's policy preferences: (1) the Turkish Constitutional Court and (2) the National Security Council.²³⁹ I discuss each in turn below.

232. SAHIN, *supra* note 209, at 220.

233. *Id.*

234. *Id.*

235. *Id.* at 229.

236. Belge, *supra* note 178, at 663.

237. Hootan Shambayati, Shambayati, *The Guardian of the Regime*, *supra* note 154, at 99, 100–01.

238. See Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANS-NAT'L L. 1239, 1284 (2011).

239. The 1961 Constitution established other counter-majoritarian institutions as well, but I focus on the two primary institutions here. See Belge, *supra* note 178, at 663.

a. *The Turkish Constitutional Court*

The Turkish Constitutional Court (*Anayasa Mahkemesi*) was one of the counter-majoritarian institutions established by the military to perpetuate its policy preferences. The constitution expressly authorized the newly instituted Court to “review the constitutionality of laws and the By-laws of the Turkish Grand National Assembly.”²⁴⁰ The military leaders believed that an independent judiciary was necessary to prevent government oppression and abuse of power by elected officials and to protect the founding principles of the Republic, primarily secularism and national unity, much cherished by the military.²⁴¹ As Cener Belge and Hootan Shambayati have observed, the formation of the Turkish Constitutional Court supports Ran Hirschl’s hegemonic preservation thesis.²⁴² The military leaders, foreseeing their inevitable loss of power through democratic elections, created and empowered a sympathetic Constitutional Court to preserve their values and interests.²⁴³

The newly instituted Court consisted of fifteen permanent and five substitute members.²⁴⁴ Eight of the fifteen permanent members would be selected by other appellate courts (Council of State, High Court, and Court of Accounts), three by the Parliament, two by the Senate, and two by the President of the Republic.²⁴⁵ The power to select a majority of the members on the Constitutional Court was thus given to the unelected judiciary, whose members were more likely to be aligned with the military’s policy preferences than were elected political actors.²⁴⁶ As Hootan Shambayati has explained:

[I]n Turkey, where the military has no direct control over the judiciary, the military is likely to find the courts more sympathetic than elected political institutions such as legislatures and city councils. Unlike legislative bodies, courts are not directly accountable to voters, and at least in theory, they are not influenced by public opinion. Furthermore, the “merit-based” promotion and selection process used in Turkey produces a judicial system that, at least at its upper levels, where most politically sensitive cases are likely to end up, is sympathetic to the views of the guardians.²⁴⁷

240. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, art. 147 (Turk.).

241. See Belge, *supra* note 178, at 662–63.

242. *Id.* at 664; see also Shambayati, *The Guardian of the Regime*, *supra* note 154, at 103.

243. See Belge, *supra* note 178, at 664 (“[The Turkish Constitutional Court] was not established as an impartial referee of a contract between Republicans and Democrats, but as the guardian of a Republican constitution against Democrats.”); Shambayati, *The Guardian of the Regime*, *supra* note 237, at 103.

244. SAHİN, *supra* note 209, at 68.

245. *Id.* at 68–69.

246. See Belge, *supra* note 178, at 662–63.

247. Hootan Shambayati, *A Tale of Two Mayors: Courts and Politics in Iran and Turkey*, 36 INT’L J. MIDDLE EAST STUD. 253, 270 (2004).

Underscoring the importance that the military placed on the Court, the new constitution also adopted a liberal definition of standing.²⁴⁸ Under Article 149, a wide range of persons and institutions could petition the Court for abstract constitutional review of legislation: The President of the Republic, political parties that were represented in the Parliament, political parties that had obtained at least ten percent of the votes in the last general election, and one-sixth of the members of both the Grand National Assembly and the Senate.²⁴⁹ Unlike most other European constitutions that allow abstract judicial review, universities and the other appellate courts—institutions aligned at the time with the military's Republican policy preferences—could also petition the Court for constitutional review “in cases concerning their duties and welfare.”²⁵⁰

This expansive definition of standing once again highlights the military's distrust of government actors and trust of sympathetic unelected guardians. The unelected guardians aligned with the military's support for the Republic's founding principles would thus be entrusted with a liberal standing doctrine to clean up what the military viewed as the mess that self-seeking politicians would inevitably create. And in practice, the broad definition of standing in the new constitution provided the Constitutional Court with more opportunities to engage in judicial review, strike down more laws and regulations passed by the political branches, and enforce the policy preferences that it shared with the military.²⁵¹

The constitution also empowered the Constitutional Court with the profound authority to permanently dissolve political parties whose “statutes, programs, and activities” did not “conform to the principles of a democratic and secular republic, based on human rights and liberties, and to the fundamental principle of the State's territorial and national integrity.”²⁵² Furthermore, the authority to bring a case for party dissolution was provided to the Chief Public Prosecutor of the Republic, a democratically unaccountable lawyer appointed by the President from a short list of nominees prepared by other prosecutors.²⁵³ The constitution also required political parties to “account for their sources of income and expenditures” to the Constitutional Court and authorized the Court to audit the finances of political parties.²⁵⁴ With these provisions, political parties thus became accountable and arguably subservient to a democratically unaccountable counter-majoritarian in-

248. Shambayati, *The Guardian of the Regime*, *supra* note 154, at 106.

249. *Id.*

250. *Id.*; Belge, *supra* note 178, at 662–63.

251. Shambayati, *The Guardian of the Regime*, *supra* note 154, at 106 (“Between 1962 and the military coup in September 1980, the Court received an average of 19 applications for abstract review every year. It found grounds for unconstitutionality in 37 percent of the cases.”).

252. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, art. 57 (Turk.).

253. See *id.* at Section Three: The Judiciary.

254. See *id.*

stitution, most of whose members were appointed by other counter-majoritarian institutions.²⁵⁵

The Court has exercised with zeal its authority to shut down political parties.²⁵⁶ Since its establishment, it has dissolved over twenty political parties.²⁵⁷ The Court has wielded its dissolution power primarily against Islamist parties, such as the Welfare Party (*Refah Partisi*)²⁵⁸ and the Virtue Party (*Fazilet Partisi*), and political parties that have aimed to form a separate Kurdish state within Turkey, such as the People's Democratic Party (*Halkın Demokrasi Partisi* or HADEP) and the People's Labor Party (*Halkın Emek Partisi*).²⁵⁹ The Court's targeting of Islamist and separatist parties is in line with the founding principles of the Republic—in particular, national unity and secularism—cherished by the military junta that created the Constitutional Court.²⁶⁰

Finally, the constitution also empowered the Constitutional Court to act as a High Council to conduct criminal trials for government leaders.²⁶¹ The Court is authorized to try, among other individuals, the President of the Republic, members of the Council of Ministers, and the Chairman and members of the highest courts of appeal “for offenses connected with their duties.”²⁶² The Court's authority to try high-level politicians for criminal offenses related to their duties provides the military-friendly Constitutional

255. The changes brought by the 1982 Constitution, which was drafted following the 1980 coup, further reduced the involvement of the political branches in the appointments process. See Shambayati, *The Guardian of the Regime*, *supra* note 154, at 104. Under the 1982 Constitution, the Parliament played no role in appointing members to the Constitutional Court. *Id.* Nevertheless, a referendum package adopted in September 2010 increased the involvement of the political branches in making appointments to the Court. See Ozan O. Varol, *Turkey's New Majoritarian Difficulty*, COMPARATIVE CONSTITUTIONS (Sept. 29, 2010, 8:24 PM), <http://www.comparativeconstitutions.org/2010/09/turkeys-new-majoritarian-difficulty.html>.

256. See Shambayati, *A Tale of Two Mayors*, *supra* note 247, at 262.

257. Shambayati, *The Guardian of the Regime*, *supra* note 154, at 113.

258. Wing & Varol, *supra* note 226, at 5 (discussing the dissolution of the Welfare Party).

259. Shambayati, *The Guardian of the Regime*, *supra* note 154, at 116–17; Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 INT'L SOC. 258, 259 (2003). The Court's power to dissolve political parties was curbed by constitutional amendments ratified in October 2001 to advance Turkey's candidacy to the European Union. See Shambayati, *The Guardian of the Regime*, *supra* note 237, at 116–17. The amendments require, *inter alia*, a three-fifths majority—rather than just a bare majority—to shut down a political party. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 2001, art. 149 (Turk.). Further, a political party may be closed only if the actions meriting party dissolution are “carried out *intensively* by the members of that party.” *Id.* (emphasis added). Finally, the Court now has the authority to impose monetary sanctions or deny public aid to a political party in lieu of dissolving it. See *id.*

260. See Aydinli et al., *supra* note 59, at 80 (“The [military] considers Turkey's religious, sectarian, and ethnic fragmentation—pitting Islamists against secularists, Sunnis against Alevis (who are members of a branch of Islam related to Shiism), and Turks against Kurds—to be a danger that must be kept at bay.”); Shambayati, *A Tale of Two Mayors*, *supra* note 247, at 263 (“The Turkish judiciary sees itself as the defender of such concepts as republicanism, secularism, the indivisible integrity of the state, and democracy.”).

261. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, art. 147 (Turk.).

262. See *id.*

Court with another avenue for ensuring that the politicians' political agendas do not diverge from the founding principles of the Republic.

b. The National Security Council

In addition to the Constitutional Court, the 1961 Constitution also established a National Security Council (*Milli Güvenlik Kurulu*). The council would consist of "the Ministers as provided by law, the Chief of the General Staff, and representatives of the armed forces," with the President of the Republic presiding over the council.²⁶³ The council's stated purpose was to "communicate the requisite fundamental recommendations to the council of Ministers with the purpose of assisting in the making of decisions related to national security and coordination."²⁶⁴ In other words, the council would serve as an advisory body and facilitate the exchange of views between the military and the civilian leaders on national security matters.²⁶⁵

Notwithstanding its apparently innocuous advisory mission, the National Security Council became the primary institutional avenue for the Turkish Armed Forces to influence the nation's political affairs.²⁶⁶ Although the constitution limited the council's role to advice on matters of "national security and coordination," the military members of the council interpreted that phrase broadly to encompass many matters of domestic and foreign policy unrelated to security.²⁶⁷

The military believed the council to be the most effective venue through which to influence the nation's political affairs and thus increased its influence over the council over time.²⁶⁸ The number of military representatives on the council increased steadily: with the revisions brought by the 1982 Constitution, drafted following another coup in 1980, the council consisted of five military members and five civilians, with the council's civilian President frequently voting with the military.²⁶⁹ The 1982 Constitution also required the Cabinet to give "priority consideration" to the council's

263. See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1961, art. 111 (Turk.).

264. See *id.*

265. Shambayati, *The Guardian of the Regime*, *supra* note 237, at 101.

266. See *id.* at 102 ("While the 'decisions' of the [National Security Council] are theoretically only advisory, and the final decision for their implementation is left to the council of ministers and the parliament, it is clear that the framers of the constitution conceived of [the Council] as an important actor in the decision-making process."); Shambayati, *A Tale of Two Mayors*, *supra* note 247, at 259 ("[Under the 1982 constitution], far from returning to the barracks, the military retained considerable influence over governmental policy making through . . . the National Security Council.").

267. Shambayati, *A Tale of Two Mayors*, *supra* note 247, at 259. The Council exerted its influence on the nation's political affairs especially to protect the secularist principles of the Republic, a darling of the Turkish military. General Cevik Bir put it crudely: "In Turkey we have a marriage of Islam and democracy The child of this marriage is secularism. Now, this child gets sick from time to time. The Turkish Armed Forces is the doctor which saves the child. Depending on how sick the kid is, we administer the necessary medicine to make sure the child recuperates." Ugur Akinci, *Turkey and the US in 1997: Different Voices, Same Chord*, HURRIYET DAILY NEWS, Jan. 18, 1998, available at <http://www.hurriyetdailynews.com/h.php?news=turkey-and-the-us-in-1997different-voices-same-chord-1998-01-18>.

268. See Aydınli et al., *supra* note 59, at 82.

269. *Id.*

“decisions” (which no longer were mere “recommendations”).²⁷⁰ What was originally conceived as an advisory body thus became an instructing body, whose views were given priority over other government agencies.²⁷¹ Military representatives on the council also gained control of the council’s Secretary-General, giving them the power to set the council’s agenda.²⁷²

The institutionalization of the military’s influence on Turkish political affairs through the council gave the military a “firm hand” in Turkish politics.²⁷³ The National Security Council served as a constitutional avenue for the military to influence the political branches.²⁷⁴ At the same time, the Constitutional Court, created by the military to perpetuate its institutional preferences, has continued to play a formidable role in Turkish political affairs, striking down legislation and dissolving political parties whose agendas are inconsistent with the founding principles of the Republic.

B. *The Portuguese Coup of 1974: Substantive Entrenchment*

In 1974, the Portuguese military overthrew the authoritarian *Estado Novo* (New State) regime in a coup d’état known as the Carnation Revolution.²⁷⁵ I first discuss the prelude and aftermath of the coup and then analyze the drastic substantive powers that the Portuguese military reserved for itself in the new constitution drafted following the coup.

1. *The Prelude and Aftermath of the Coup*

The authoritarian *Estado Novo* regime was created by António de Oliveira Salazar in 1930.²⁷⁶ The regime represented a classic example of authoritarianism.²⁷⁷ It denied a political voice to all but a small part of the population and maintained the existing socioeconomic structures.²⁷⁸ Strikes were prohibited, and Portuguese workers were the most poorly paid in Western Eu-

270. See Shambayati, *A Tale of Two Mayors*, *supra* note 247, at 259.

271. Aydinli et al., *supra* note 59, at 82–83.

272. *Id.* at 83.

273. *Id.*

274. “In preparation for Turkey’s eventual entry into the European Union the Parliament has adopted a number of constitutional amendments with the aim of reducing the military’s role in politics. Accordingly, in 2001 the composition of the [Council] was changed to increase the number of civilian members and to emphasise the council’s advisory role. In addition, a civilian replaced the council’s military Secretary-General.” Shambayati, *The Guardian of the Regime*, *supra* note 237, at 102 n.7.

275. LINZ & STEPAN, *supra* note 20, at 118, 128.

276. Thomas C. Bruneau, *From Revolution to Democracy in Portugal: The Roles and Stages of the Provisional Governments*, in SHAIN & LINZ, *supra* note 35, at 144.

277. *Id.* at 144–45; LINZ & STEPAN, *supra* note 20, at 117; António Costa Pinto, *The Legacy of the Authoritarian Past in Portugal’s Democratization, 1974–6*, 9 *TOTALITARIAN MOVEMENTS AND POL. RELIGIONS* 265, 267 (2008) (“Salazarism was close to Linz’s ideal-type of authoritarian regime: it was a regime that survived the fascist era, and was not too dissimilar in nature from the final phase of neighbouring Spain’s Franco regime, despite its single party being weaker, and its limited pluralism greater.” (internal footnote and quotation marks omitted)). For a definition of authoritarianism, see *supra* notes 40–42.

278. Bruneau, *supra* note 276, at 144–45.

rope.²⁷⁹ Political parties were generally outlawed as well, and even when the regime allowed political contestation, it was granted only immediately before the elections,²⁸⁰ leaving little opportunity for the opposition to mount an election campaign. Voter registration was discouraged, such that only fifteen percent of the population was registered to vote in the 1973 elections.²⁸¹ And, when necessary, the regime achieved desired political outcomes through fraud.²⁸² The periodic elections held by the regime thus had little significance and no consequence.²⁸³ The regime's political police, the PIDE (*Polícia Internacional e de Defesa do Estado*), suppressed civil liberties, freedom of speech, and political opposition with "sadistic efficiency,"²⁸⁴ by censoring, torturing, imprisoning, and killing dissidents.²⁸⁵ The regime also committed the nation to costly colonial wars in Angola, Guinea-Bissau, and Mozambique.²⁸⁶

Under the authoritarian *Estado Novo* regime, Portugal remained the most underdeveloped nation in Western Europe.²⁸⁷ Disaffection with the regime was widespread, but the regime ensured that the opposition remained too weak to catalyze any structural change.²⁸⁸ Salazar remained committed to sustaining the authoritarian regime he had established²⁸⁹ and no signs of reform were in sight.²⁹⁰

One of the only respected government institutions in Portugal was the military.²⁹¹ The military came to represent the Portuguese populace primarily because of the nation's lengthy colonial wars and the need to supply the military machine from only a small population.²⁹² In contrast to many nations wherein the military is isolated from society and is staffed by multi-generational military families, Portugal's continuous colonial wars rendered isolation impossible.²⁹³ Over one million Portuguese had fought in the colonial wars.²⁹⁴ Further, the low pay levels of the military officers required

279. *Portugal: Cbeers, Carnations, and Problems*, *supra* note 54.

280. See Bruneau, *supra* note 276, at 152.

281. See David Corkill, *The Political System and the Consolidation of Democracy in Portugal*, 46 *PARLIAMENTARY AFFAIRS* 517, 518 (1993).

282. See *id.*

283. See Bruneau, *supra* note 276, at 152.

284. *Portugal: Cbeers, Carnations, and Problems*, *supra* note 54.

285. See LINZ & STEPAN, *supra* note 20, at 128; Corkill, *supra* note 281, at 519.

286. Nancy Bermeo, *War and Democratization: Lessons from the Portuguese Experience*, 14 *DEMOCRATIZATION* 388, 391 (2007).

287. See Bruneau, *supra* note 276, at 145.

288. *Id.* at 145; Kenneth Maxwell, *Regime Overthrow and the Prospects for Democratic Transition in Portugal*, in *TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE* 109, 115 (Guillermo O'Donnell et al. eds., 1986) ("[O]pposition to the [Portuguese] dictatorship had always existed and provided almost automatically a cadre of civilian collaborators for the military in the vacuum that had emerged.")

289. LINZ & STEPAN, *supra* note 20, at 117.

290. See Bruneau, *supra* note 276, at 151.

291. Bermeo, *supra* note 286, at 398.

292. *Id.*

293. See *id.*

294. *Id.*

them to work in the civilian sector to supplement their income while off duty, which kept the officers in frequent contact with Portuguese civilian society.²⁹⁵ In short, the armed forces became Portuguese society.²⁹⁶

Dissatisfaction with the *Estado Novo* regime grew rampant, and approximately two hundred junior military officers who were part of the Armed Forces Movement (*Movimento das Forças Armadas*) (“MFA”) staged a coup d’état on April 25, 1974.²⁹⁷ The coup brought an end to the nearly five-decades-old *Estado Novo* regime, Western Europe’s oldest dictatorship.²⁹⁸ Thousands immediately flocked to the streets to support the junior officers who had staged the coup²⁹⁹ and to celebrate “the sudden, surprising gift of freedom.”³⁰⁰ The coup came to be known as the Carnation Revolution, named after the carnations (*cravos*) that the crowds picked up from the Lisbon flower market, a central gathering point, and placed in the gun barrels of the military officers as symbols of support.³⁰¹ In the following weeks, red carnations became a ubiquitous symbol across Portugal, “sprout[ing in] buttonholes and blouses everywhere.”³⁰² In Lisbon, car horns honked the rhythm of “Spín-Spín-Spínola,” referring to the head of the military junta, General António de Spínola.³⁰³ A prominent communist leader, Alvaro Cunhal, newly returned from exile, spoke highly of General Spínola: “What intellectual stature this man has He accepted what was thrust upon him by the revolution, and he has done a great thing for his people.”³⁰⁴ A banner that read “THANK YOU, ARMED FORCES” was unfurled in a soccer stadium packed with a crowd of 200,000 to hear speeches by leftist leaders who returned from exile following the coup.³⁰⁵

After the celebrations, a two-year transition period known as the Ongoing Revolutionary Process (*Processo Revolucionario Em Curso*) (“PERC”) began. The day after the coup, the military officers issued a short communiqué to justify and state the reasons for the coup.³⁰⁶ In the communiqué, the military committed itself to the abolishment of the authoritarian regime and the institution of fundamental political and socioeconomic reforms intended to establish a democratic regime.³⁰⁷ The military promised to hold popular elections within twelve months for a constituent assembly, which would

295. *Id.*

296. *Id.*

297. See Bruneau, *supra* note 276, at 144.

298. LINZ & STEPAN, *supra* note 20, at 118; Bruneau, *supra* note 276, at 144.

299. LINZ & STEPAN, *supra* note 20, at 118, 128.

300. *Portugal: Cheers, Carnations, and Problems*, *supra* note 54.

301. LINZ & STEPAN, *supra* note 20, at 118.

302. *Portugal: Cheers, Carnations, and Problems*, *supra* note 54.

303. *Id.*

304. *Id.*

305. *Id.*

306. Bruneau, *supra* note 276, at 145.

307. MURPHY, *supra* note 23, at 379–80 (“[T]he young leaders of the Portuguese coup wanted to reform their governmental system” and establish “constitutional democracy.”); Bruneau, *supra* note 276, at 145.

then draft a new democratic constitution.³⁰⁸ The military further committed itself to “elections for a parliament and a president, under a framework to be determined by the constituent assembly within another year.”³⁰⁹ The communiqué also announced the military’s intention to find a political solution to the debilitating wars in the African colonies of Angola, Guinea-Bissau, and Mozambique, which had been dragging on with no sign of victory since 1961.³¹⁰ In short, the military promised “what came to be known as the three Ds of Decolonization, Democratization, and Development.”³¹¹

Political parties started to form shortly after the coup.³¹² Within a few months, approximately fifty political movements began competing for power in the newly opened democratic marketplace.³¹³ Out of these fifty groups emerged “twelve officially recognized major political parties.”³¹⁴ Parties that were associated with the *Estado Novo* regime were banned.³¹⁵ The military also freed political prisoners who were jailed during the *Estado Novo* regime.³¹⁶

Although new political parties were formed, the military remained deeply involved in the political process during the transition.³¹⁷ After the coup, “the Junta of National Salvation, headed by seven [military] officers, assumed sovereign power, elected a new president from its members, and appointed the government.”³¹⁸ The officers authorized themselves to: “arrest, . . . carry out police inquiries, . . . and submit to military jurisdiction any civilians they deemed were involved in offenses concerning the military.”³¹⁹ The military’s jurisdiction also covered “‘counter-revolutionary’ crimes, including those exercised by the mass media.”³²⁰ The Junta of National Salvation was eventually replaced by a body called the Council of the Revolution,³²¹ comprised primarily of senior military officers.³²²

Elections for a constituent assembly were held as scheduled on the first anniversary of the coup, April 25, 1975.³²³ These elections were the first in Portuguese history to feature universal suffrage and a secret vote and the

308. Bruneau, *supra* note 276, at 146.

309. LINZ & STEPAN, *supra* note 20, at 120.

310. Bruneau, *supra* note 276, at 145.

311. Bermeo, *supra* note 286, at 391 (“[A] cease-fire and the creation of some form of democracy were the coup-makers’ top priorities.”); Pinto, *supra* note 277, at 267 (“This was a ‘non-hierarchical’ military coup, which had a political programme that promoted democratisation and decolonization.”); Bruneau, *supra* note 276, at 145.

312. Bruneau, *supra* note 276, at 147.

313. *Id.*

314. *Id.*

315. LINZ & STEPAN, *supra* note 20, at 118.

316. *Id.*

317. *Id.* at 119.

318. *Id.*

319. *Id.*

320. *Id.*

321. Bruneau, *supra* note 276, at 149.

322. Corkill, *supra* note 281, at 519.

323. Bruneau, *supra* note 276, at 149.

first meaningful elections in Portugal since the 1920s.³²⁴ The twelve major political parties participated in the elections, which were fair and free by all objective accounts.³²⁵ The turnout was an impressive ninety-two percent.³²⁶ Seventy-two percent of the vote went to a center-left party, a center-right party, and a conservative party—whose agendas were all dedicated to establishing Western-style democracy.³²⁷ In addition to determining the distribution of seats for drafting a new constitution, the elections for the constituent assembly, through the staggering turnout, “legitimated the idea of popular participation and democracy” in Portugal.³²⁸

But the constituent assembly was unable to draft the constitution its members desired.³²⁹ Although democratically elected, the constituent assembly was not independent because the major political parties, acceding to demands from the military, signed a written pact agreeing to a supervisory role for the military during the constitution drafting process.³³⁰ The constituent assembly completed its work after a year and proclaimed the new constitution in April 1976.³³¹ The constitution was not put to a popular referendum.³³²

As specified in the constitution, parliamentary elections were held on the second anniversary of the coup, April 25, 1976.³³³ The same three parties that obtained a majority of the popular vote in the elections for the constituent assembly won “75 percent of the vote and 222 of the 263 seats in the assembly.”³³⁴ Two months after the parliamentary elections, on June 27, 1976, presidential elections were held.³³⁵ The major political parties “agreed to support a military officer for the presidency,” but were allowed to choose the specific candidates.³³⁶ In the presidential elections, General Ramalho Eanes, the Commander-in-Chief of the Armed Forces and the President of the Council of the Revolution, was elected President.³³⁷ Following parliamentary and presidential elections, the coup leaders, successful in dismantling the structures of the previous autocratic regime and establishing democracy, turned power over to the democratically elected leaders.³³⁸

April 25, the date of the coup, became a national holiday in Portugal to commemorate the overthrow of the authoritarian *Estado Novo* regime and the

324. *Id.* at 152–53.

325. *Id.* at 149.

326. *Id.* at 153.

327. LINZ & STEPAN, *supra* note 20, at 121.

328. Bruneau, *supra* note 276, at 153.

329. LINZ & STEPAN, *supra* note 20, at 123.

330. *Id.* at 123.

331. Bruneau, *supra* note 276, at 150.

332. Corkill, *supra* note 281, at 522.

333. Bruneau, *supra* note 276, at 150.

334. LINZ & STEPAN, *supra* note 20, at 121.

335. Bruneau, *supra* note 276, at 151, 157.

336. *Id.* at 150.

337. *Id.* at 151, 157. Portuguese voters re-elected Eanes for a second term until 1986. *Id.* at 153.

338. *Id.* at 158.

achievement of democracy. Salazar's name was removed from all monuments, streets, squares, as well as from an iconic bridge in Lisbon over the River Tagus, which was renamed the April 25 Bridge (*Ponte 25 de Abril Bridge*).³³⁹ Many other streets and squares in Portugal were also renamed to celebrate the coup.³⁴⁰ In 1999, an exhibition to commemorate the twenty-fifth anniversary of the military coup and to celebrate the achievement of democracy allowed thousands of Portuguese to travel through "the dark passages of Salazarism, through the torture chambers of the political police, and along corridors that were lined with photographs of political prisoners."³⁴¹

The Portuguese coup of 1974 fits within the democratic coup framework. The highly respected Portuguese military staged a coup against the authoritarian *Estado Novo* regime in order to transition the nation to a democracy. Although there was no massive and persistent popular uprising against the regime before the coup—primarily because of the regime's repressive tactics—disaffection with and opposition to the regime were widespread. Elections for the constituent assembly and the Parliament were held as scheduled within two years of the coup, and the military promptly relinquished power to democratically elected leaders. But the military ensured an ongoing voice in the nation's political affairs by reserving substantive powers for itself in the new constitution, the topic of the next section.

2. *Substantive Entrenchment*

The constitution that the constituent assembly drafted in 1976 reflects the military's supervisory role in the drafting process and shows substantive entrenchment. The new constitution authorized the Council of the Revolution, comprised predominantly of the military junta, to pass its own laws, which would have "the same validity as laws of the Assembly of the Republic."³⁴² The constitution further authorized the Council to judge the constitutionality of all laws passed by the parliament.³⁴³ Under the new constitution, the Council also had the power, exclusive of the other branches, to "make laws concerning the organizational functioning, and discipline of the Armed Forces."³⁴⁴ What is more, the constitution prohibited its revision until 1982 and even then, revision required a two-thirds majority of the Parliament.³⁴⁵

The new constitution thus divided power between the Council of the Revolution and the democratically elected Parliament.³⁴⁶ But the balance of

339. Pinto, *supra* note 277, at 285.

340. *Id.* at 285.

341. *Id.* at 284.

342. LINZ & STEPAN, *supra* note 20, at 123.

343. *Id.*

344. *Id.*

345. Maxwell, *supra* note 288, at 132.

346. *Id.*

power was skewed drastically in favor of the Council. Running roughshod over any concept of separation of powers, the Council had the power, not only to pass laws, but also to act as a *de facto* constitutional court to strike down unconstitutional laws passed by the legislature.³⁴⁷

The substantive entrenchment found in the post-coup constitution in Portugal is the most drastic example of constitutional entrenchment. Despite its drastic nature, or perhaps because of it, the entrenchment did not have long-lasting effects. Under the constitution, the Council of the Revolution would perform its functions until at least the end of the first legislative session of five years.³⁴⁸ In 1982, it thus became possible to amend the constitution and eliminate the Council.³⁴⁹ That year, a coalition of the existing political parties garnered the requisite two-thirds majority to revise the constitution.³⁵⁰ The amendments decreased the powers of the President, transferred them to the Parliament or other institutions, and most importantly, abolished the Council of the Revolution.³⁵¹ The Council of the Revolution was replaced with “a civilian advisory body, the Council of State, and the Constitutional Court.”³⁵² The amendments also established a legal framework for democratic civilian control of the military.³⁵³ Following the amendments, Portugal has remained “not simply a democracy, but a relatively high-quality democracy.”³⁵⁴

C. *The Egyptian Coup of 2011: Procedural Entrenchment*

The Egyptian military coup of 2011—still in progress as this Article was going to press—has the beginnings of a democratic coup d'état and has already exhibited signs of procedural entrenchment. The ruling military has transferred legislative power to the lower house of the Parliament following parliamentary elections, which began in November 2011, and has vowed to hand over executive power following presidential elections in May 2012. But the military also appears to be behaving as a self-interested actor and setting up the transition process so that the resulting constitution favors its policy and institutional preferences. This Part discusses the prelude and aftermath of the 2011 coup, followed by an analysis of the procedural entrenchment that has taken place thus far.

347. See Bruneau, *supra* note 276, at 154. Unlike the Turkish military, which created a separate constitutional court with the power of judicial review, the Portuguese military gave itself the substantive power to review the constitutionality of legislation.

348. *Id.* at 150.

349. *Id.* at 158.

350. *Id.*

351. *Id.*

352. Corkill, *supra* note 281, at 525.

353. LINZ & STEPAN, *supra* note 20, at 124.

354. Bermeo, *supra* note 286, at 391; see also Marinov & Goemans, *supra* note 12, at 22 (“In some ideal world, all coups are like the Portugal 1974 one: they end an autocratic spell, usher in a swift transition to democracy, and place the military under strong civilian control.”).

1. *The Prelude and Aftermath of the Coup*

In October 1981, members of the Islamic Jihad assassinated President Anwar al-Sadat during a military parade in Cairo.³⁵⁵ Upon al-Sadat's assassination, his Vice President, a former Commander of the Air Force by the name of Hosni Mubarak, assumed the office of the Presidency.³⁵⁶ Mubarak would go on to become the longest-serving President in Egypt, completing twenty-nine years in office until a coup d'état removed him from power in February 2011.

Mubarak's term in office was marked by authoritarian practices and corruption. His party, the National Democratic Party (*Al-Hizb al-Wataniy ad-Dîmûqrâtiy*) ("NDP"), dominated the government throughout his term in office, consistently winning landslide majorities in the People's Assembly (*Majlis Al-Sha'ab*).³⁵⁷ The NDP ensured its perpetuation in office by preventing the opposition from competing on equal footing for seats in the legislature.³⁵⁸ For example, the NDP, under Mubarak's leadership, routinely denied the opposition access to broadcast media and to other campaign resources, shut down television stations, and forced critical talk shows off the air and opposition journalists out of their jobs, all of which effectively paralyzed the opposition parties' efforts to publicize their views.³⁵⁹ Where cutting off access to campaign outlets did not suffice, the NDP jailed opposition leaders. For example, immediately before the 1995 elections, eighty-one members of the Muslim Brotherhood were imprisoned on trumped up charges of inciting violence in order to preclude their participation as independent candidates in the upcoming elections.³⁶⁰ Allegations of electoral fraud, already widespread during Mubarak's rule, were bolstered by his rejection of calls by opposition parties for international election monitors.³⁶¹

A local Independent Commission for Election Review ("ICER"), established against the wishes of Mubarak, reported numerous improprieties in the parliamentary elections.³⁶² For example, during the 1995 elections, ICER found that the representatives of opposition parties were "expelled or turned away from polling stations, where ballot boxes arrived stuffed with

355. Kristen Stilt, "Islam Is the Solution": *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT'L L.J. 73, 77-78 (2010).

356. *Id.* at 78.

357. Charles Robert Davidson, *Reform and Repression and Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75, 82 (2000). For example, the NDP won eighty-six percent of the seats in the Assembly in 1990, ninety-four percent in 1995, *id.*, and eighty-one percent in 2010. *Egypt Country Update*, EUR. F. FOR DEMOCRACY & SOLIDARITY, <http://www.europeanforum.net/country/egypt> (last visited Mar. 18, 2012).

358. See Davidson, *supra* note 357, at 82.

359. *Id.* at 83 (internal quotation marks omitted); Jack Shenker, *Egyptian Elections: Independents Fight for Hearts and Minds in 'Fixed Ballot'*, GUARDIAN (U.K.), Nov. 22, 2010, <http://www.guardian.co.uk/world/2010/nov/22/egypt-elections-muslim-brotherhood-ndp>.

360. Davidson, *supra* note 357, at 86.

361. *Id.* at 83.

362. *Id.*

voting papers or else disappeared prior to the count. Numerous polling stations were ransacked by paid thugs, and several opposition candidates were prevented from voting”³⁶³ Although Egyptian administrative courts ordered the invalidation of the 1995 election results in 109 out of the 222 electoral districts for electoral improprieties,³⁶⁴ the NDP-dominated legislature refused to enforce the orders.³⁶⁵

The NDP’s repressive and fraudulent electoral practices led to widespread apathy toward parliamentary elections.³⁶⁶ In each election, voters viewed NDP’s victory as a foregone conclusion.³⁶⁷ As Mona El-Ghobashy, an Egyptian political scientist, writes: “No one thinks parliamentary elections in Egypt are democratic or even semi-democratic Citizens know that elections are rigged, with polling places often blocked off by baton-wielding police, so few of them vote.”³⁶⁸ For example, voter turnout for the 2010 parliamentary elections stood at a meager twenty-seven percent.³⁶⁹

In addition to parliamentary elections, the Mubarak regime also stifled the opposition in presidential elections. Elections for president took place by referendum for a single candidate, Mubarak, until 2005, when multi-candidate presidential elections were instituted in response to increased pressure from Egyptians and foreign allies.³⁷⁰ Although opposition presidential candidates were permitted to run in 2005, Ayman Nour—the distant second-place finisher after Mubarak with 7.3% of the vote³⁷¹—was convicted of falsifying government documents and sentenced to five years’ imprisonment.³⁷² Nour’s sentence sent a loud and clear message to opposition candidates to back away from challenging Mubarak’s stronghold on the presidential seat.

Throughout his term in office, Mubarak also kept in place an emergency law that had been instituted following Sadat’s assassination.³⁷³ The law permitted, among other things, arbitrary arrests and searches, indefinite detention without trial, the legalization of censorship, and trials of civilians by

363. *Id.*

364. *Id.*

365. Mona Makram-Ebeid, *Egypt’s 1995 Elections: One Step Forward, Two Steps Back?*, 4 MIDDLE E. POL’Y 119, 131 (1996).

366. See *Egypt Referendum Strongly Backs Constitution Changes*, BBC NEWS, Mar. 20, 2011, <http://www.bbc.co.uk/news/world-middle-east-12801125> (“Under former President Hosni Mubarak, elections were stage-managed affairs with pre-determined results and turnout was very low.”).

367. See *id.*

368. Shenker, *supra* note 359.

369. See *Voter Turnout Data for Egypt*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, available at http://www.idea.int/vt/country_view.cfm?CountryCode=eg (last visited Mar. 18, 2012).

370. Daniel Williams, *Egypt Extends 25-Year-Old Emergency Law*, WASH. POST, May 1, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/30/AR2006043001039.html>.

371. *Protesters Demand Reform After Election*, L.A. TIMES, Sept. 11, 2005, <http://articles.latimes.com/2005/sep/11/world/fg-briefs11.3>.

372. Williams, *supra* note 370.

373. Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 69 n.331 (2009).

military tribunals, infamous for handing out swift, reliable, and severe punishments with few procedural safeguards.³⁷⁴ The emergency law also prohibited the gathering of more than five people, an extraordinary restriction on the freedom of association.³⁷⁵ In accordance with the emergency law, the Mubarak regime jailed thousands of opposition figures, dissident journalists, and ordinary citizens.³⁷⁶

The Mubarak regime thus was a fairly typical authoritarian government. The regime tolerated little political pluralism, employing the emergency law, the state's infamous police forces, and repressive and fraudulent measures to silence opposition voices and prevent competition at the ballot box. Many expected Mubarak to remain in office indefinitely until he handed off power to his heir-apparent, Gamal Mubarak, whom he had been priming to be the next pharaoh of Egypt.³⁷⁷

Everything changed in early 2011. On January 25, 2011, inspired by the revolts that toppled President Zine el-Abidine Ben Ali in nearby Tunisia,³⁷⁸ thousands of Egyptians decided to stage a protest in al-Tahrir Square in Cairo and other cities throughout Egypt.³⁷⁹ The date, January 25, was deliberately chosen to coincide with Egypt's National Police Day.³⁸⁰ The police was the face of an autocratic and repressive Mubarak regime that had ruled Egypt for three decades. And the protestors were clear in their demands: "The people want to topple the regime" ("*Al-Sha'b Yorid Isqat Al-Nitham*") was the revolution's unifying slogan.³⁸¹

As the protestors grew in number and fervor, the regime called in the much-reviled black-clad riot police, notorious for their brutal repression tactics. First came the tear gas. This weapon had little effect on the determined protestors, who had learned from their Tunisian counterparts that gas masks and vinegar would mollify its adverse effects.³⁸² Tear gas turned into rubber bullets,³⁸³ and rubber bullets turned into real ones. The riot police entered al-Tahrir Square on camel and horseback and opened fire at the protestors.³⁸⁴ The bullets from the ground were accompanied by sniper fire atop nearby buildings.³⁸⁵ The government shut off the Internet and disrupted mobile

374. *Id.*; Davidson, *supra* note 357, at 86–87; Williams, *supra* note 370.

375. Williams, *supra* note 370.

376. See Davidson, *supra* note 357, at 90.

377. Amro Hassan, *Mr. Mubarak and Son go to Washington*, L.A. TIMES, Aug. 17, 2009, <http://latimesblogs.latimes.com/babylonbeyond/2009/08/egypt-pessimism-amid-mubaraks-visit-to-washington.html>.

378. See Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

379. Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests Against Mubarak's Rule*, N.Y. TIMES, Jan. 25, 2011, <http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html>.

380. *Id.*

381. Hussein Agrama et al., *Anti-Authoritarian Revolution and Law Reform in Egypt: A JADALIYYA E-Roundtable*, JADALIYYA, Feb. 24, 2011, <http://www.jadaliyya.com/pages/contributors/10573>.

382. Interview with Maggie Morgan, in Cairo, Egypt (Aug. 3, 2011).

383. See Fahim & El-Naggar, *supra* note 379.

384. *Id.*

385. Robert Mackey, *Updates on Day 10 of Egypt Protests*, N.Y. TIMES: THE LEDE (Feb. 3, 2011, 8:56 AM), <http://thelede.blogs.nytimes.com/2011/02/03/latest-updates-on-day-10-of-egypt-protests>.

service in an attempt to disable the protestors' primary lines of communication: Facebook, Twitter, and cellular phones.³⁸⁶ But none of these brutal measures were sufficient to disperse the defiant protestors. "Leave, leave," they continued to chant, "Down, down with Mubarak."³⁸⁷

Unable to confront the hundreds of thousands gathered in al-Tahrir Square, Mubarak called on the military to intervene.³⁸⁸ But, as many of the protestors expected, the military did nothing to quash the protests.³⁸⁹ As one of the leaders of the protests explained to me, the soldiers gathered in al-Tahrir Square were well aware that their friends and relatives were amongst the protestors and would not fire upon them.³⁹⁰ Indeed, the military seemed to be siding with the protestors.³⁹¹ The protestors appeared to gain confidence from the military's presence as well, rushing in celebration toward the first military tank that rolled into al-Tahrir Square.³⁹²

In a sign of support, four military vehicles moved as a shield to the front of thousands of protestors who were engaged in a fight with the Egyptian riot police.³⁹³ With the soldiers' approval, protestors drew anti-Mubarak graffiti on military tanks.³⁹⁴ The protestors began to express hopes that the military, having refused to turn its arms on the people, would instead turn its arms on the Mubarak regime and stage a coup d'état.³⁹⁵ Mohamed ElBaradei, former head of the International Atomic Energy Agency and a well-known opposition leader, expressly called for a military coup on his Twitter page: "I ask the army to intervene immediately to save Egypt The credibility of the army is being put to the test."³⁹⁶

386. See David D. Kirkpatrick, *Mubarak Orders Crackdown, with Revolt Sweeping Egypt*, N.Y. TIMES, Jan. 28, 2011, <http://www.nytimes.com/2011/01/29/world/middleeast/29unrest.html>.

387. *Id.*

388. See David D. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, N.Y. TIMES, Jan. 29, 2011, <http://www.nytimes.com/2011/01/30/world/middleeast/30-egypt.html>.

389. *Id.*

390. Interview with Haytham Hammad, in Cairo, Egypt (Aug. 1, 2011).

391. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *supra* note 388 ("[The soldiers'] displays of support for the protesters were conspicuous throughout the capital."); Neil MacFarquhar, *Egypt's Military Is Seen as Pivotal in Next Step*, N.Y. TIMES, Jan. 28, 2011, <http://www.nytimes.com/2011/01/30/world/middleeast/30-egypt.html> ("If the military fires on civilians after demonstrations that are clearly popular, that will imperil the standing of the military, its integrity This time the institution's future is at risk." (internal quotation marks omitted) (quoting Samer Shehata, Professor of Arab Politics at Georgetown University)).

392. See also MacFarquhar, *Egypt's Military Is Seen as Pivotal in Next Step*, *supra* note 391 ("Demonstrators cheered on Friday as tanks deployed in front of government buildings like the Foreign Ministry and the main broadcast center.").

393. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *supra* note 388.

394. *Id.*

395. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *supra* note 388; MacFarquhar, *Egypt's Military Is Seen as Pivotal in Next Step*, *supra* note 391 ("The demonstrators were partly inspired by the Tunisian example, analysts said, and some hoped that the military might play a similar role in Egypt.").

396. Anthony Shadid & David D. Kirkpatrick, *Mubarak Refuses to Step Down, Stoking Revolt's Fury and Resolve*, N.Y. TIMES, Feb. 10, 2011, <http://www.nytimes.com/2011/02/11/world/middleeast/11egypt.html>.

Confronted with growing numbers of protestors and a defiant military, Mubarak fired his cabinet and appointed Omar Suleiman, the Intelligence Chief, as his Vice President.³⁹⁷ But that did little to mollify the protestors, who merely added resignation calls for Suleiman to their chants.³⁹⁸ Mubarak promised to step down following presidential elections in September and to appoint a committee to propose constitutional amendments, but the protestors, all too familiar with Mubarak's broken vows, refused to relent.³⁹⁹

When Mubarak announced that he would give a televised speech on Thursday, February 10, the crowds widely expected him to resign.⁴⁰⁰ But a defiant Mubarak appeared on television and vowed to finish his term as President, promising to hand only the functions, but not the title, of the presidency to Vice President Suleiman.⁴⁰¹ Mubarak's stubborn stronghold on power enraged the crowds at al-Tahrir Square, sending "a million Egyptians onto the Cairo streets on Friday."⁴⁰²

On Friday, February 11, the sign of hope that the crowds had been awaiting came in the form of a communiqué from the military. The communiqué declared that the military was intervening to protect the country⁴⁰³ and "to sponsor the legitimate demands of the people."⁴⁰⁴ In the communiqué, the military "declared that [it]—not Mr. Mubarak, Mr. Suleiman or any other civilian authority—would ensure the amendment of the Constitution to 'conduct free and fair elections.'"⁴⁰⁵ The military announced that democracy would be established "within defined time frames" and at the end of the transition process, the military would hand off its authority to a "free democratic community."⁴⁰⁶ The military announced its commitment, "as soon as the current circumstances are over," to repeal the much-despised emergency law.⁴⁰⁷ The military also promised immunity for the protestors, whom it called "the honest people who refused the corruption and demanded reforms."⁴⁰⁸ Hours after the release of the communiqué, Mubarak's Vice President, Omar Suleiman, announced that Mubarak had resigned his post and the Supreme Council of the Armed Forces had assumed power.⁴⁰⁹ Mubarak's

397. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *supra* note 388.

398. *Id.*

399. David D. Kirkpatrick, *As Egypt Protest Swells, U.S. Sends Specific Demands*, N.Y. TIMES, Feb. 8, 2011, <http://www.nytimes.com/2011/02/09/world/middleeast/09egypt.html>; Anthony Shadid, *Obama Urges Faster Shift of Power in Egypt*, N.Y. TIMES, Feb. 1, 2011, <http://www.nytimes.com/2011/02/02/world/middleeast/02egypt.html>.

400. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

401. *Hosni Mubarak Resigns as President*, *supra* note 52.

402. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

403. Shadid & Kirkpatrick, *supra* note 396.

404. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *See id.* Suleiman's announcement made a feeble attempt to portray Mubarak's decision to resign as a voluntary one: "Taking into consideration the difficult circumstances the country is going through,

fall thus came at the hands of a military that had faithfully served him for three decades and that once counted Mubarak among its ranks.⁴¹⁰

The initial reaction to the military coup was “ecstatic.”⁴¹¹ The crowds “hugged, kissed, and cheered the soldiers, lifting children on tanks to get their pictures taken.”⁴¹² The soldiers likewise honored the protestors by attaching to their tanks photos of “martyrs” killed during the revolution.⁴¹³ Some soldiers relinquished their posts to join the crowds in celebration.⁴¹⁴ In the words of a popular chant in al-Tahrir, the people and the army were “one hand.”⁴¹⁵

The Egyptian coup of 2011, still in progress at the time of this writing, thus far conforms to the attributes of a democratic coup set forth in Part I. The coup toppled the authoritarian Mubarak regime in response to a persistent popular uprising against that regime. The military intervened after Mubarak repeatedly refused to step down and, upon assuming power, announced its intention to transition the nation to a democracy and hold free and fair elections. Although the transition process is ongoing, the military has transferred legislative authority to the lower house of the Parliament and has promised to transfer executive power to a democratically elected president after presidential elections in May 2012. If such a power transfer indeed occurs, the Egyptian military coup will constitute a democratic coup. As with the other democratic coups discussed so far, however, the military appears to be engaging in the entrenchment of its policy preferences into the new constitution. The next section analyzes the procedural entrenchment that has occurred to date.

2. *Procedural Entrenchment*

At the time of the February 2011 revolution, the military was a “widely popular”⁴¹⁶ institution in Egypt.⁴¹⁷ It had built a stellar reputation in part because of national conscription for all men and because the Mubarak regime ordinarily did not use the military to police the population.⁴¹⁸ Unlike

President Mohammed Hosni Mubarak has decided to leave the post of president of the republic and has asked the Supreme Council of the Armed Forces to manage the state's affairs.” *Id.*

410. *See id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *See id.*

416. Kirkpatrick, *Egyptians Defiant as Military Does Little to Quash Protests*, *supra* note 388.

417. Despite the unrest and popular protests that have occurred during the democratic transition process, the Egyptian military retains “considerable respect” among Egyptians, as the protests have targeted primarily the chairman of the ruling Supreme Council of the Armed Forces (General Mohamed Hussein Tantawi), and not the institution of the military itself. Anthony Billingsley, *Writing Constitutions in the Wake of the Arab Spring*, FOREIGN AFF., Nov. 30, 2011, available at <http://www.foreignaffairs.com/print/133981>.

418. Gary C. Gambill, *What is at Stake in Egypt's Referendum*, JURIST: HOTLINE (Mar. 19, 2011, 3:30 PM), <http://jurist.org/hotline/2011/03/whats-at-stake-in-egypts-referendum-gary-c-gambill-editor->

most militaries, the Egyptian Armed Forces have amassed “enormous political and economic privileges” and own “vast commercial interests.”⁴¹⁹ The military has “its own social clubs and shopping centers.”⁴²⁰ In the economic realm, it functions like a civilian business, engaging in real estate development and engineering.⁴²¹ In fact, military industries comprise “an estimated 5 to 15 percent of the Egyptian economy.”⁴²² The military enjoys benefits such as officers clubs and a boat on the Nile for the air force, benefits that are beyond the reach of most Egyptian citizens.⁴²³ What is more, the military receives \$1.3 billion in annual aid from the United States as a dividend of the Camp David peace agreement with Israel.⁴²⁴ The status quo thus has treated the Egyptian military very well.

The Egyptian military would therefore be expected to behave as a self-interested actor during the transition process to protect the benefits it has reaped from the Mubarak-era political structures. And the democratic transition process that the military has announced, and thus far followed, shows that it is acting as a self-interested agent and attempting to preserve the status quo and its privileges in that status quo.⁴²⁵

The military began to display the first signs of self-interested behavior from the moment it seized power from Mubarak. Despite popular support, it rejected proposals for a power-sharing arrangement with civilians for the transition period.⁴²⁶ Rather, it opted for a ruling council comprised solely of military officers, called the Supreme Council of Armed Forces (“SCAF”).⁴²⁷ The absence of any civilian membership in the Council increases the military’s ability to engage in self-interested behavior with little monitoring or input by the citizenry.

mid-east-monitor.php; Kirkpatrick, *Mubarak Orders Crackdown*, *supra* note 386 (“The military remains one of Egypt’s most esteemed institutions, a source of nationalist pride.”).

419. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1; *see also* Agrama et al., *supra* note 381 (“The Supreme Council of the Armed Forces has particular political and economic connections that are far from neutral.”).

420. MacFarquhar, *Egypt’s Military Is Seen as Pivotal in Next Step*, *supra* note 391.

421. *Id.*

422. Scott Shane & David D. Kirkpatrick, *Military Caught Between Mubarak and Protesters*, N.Y. TIMES, Feb. 10, 2011, <http://www.nytimes.com/2011/02/11/world/middleeast/11military.html>.

423. *See id.*

424. Julian Borger & James Ball, *WikiLeaks Cables: Egyptian Military Head is ‘Old and Resistant to Change’*, GUARDIAN (U.K.), Feb. 14, 2011, <http://www.guardian.co.uk/world/2011/feb/14/wikileaks-cables-egyptian-military-head>.

425. *See* Agrama et al., *supra* note 381 (“[T]he army seems to want to put back in place, albeit in a somewhat restructured form, existing institutions of the regime”); Hamad, *supra* note 58, at 53–54 (noting that the Egyptian military has sought to influence the new constitution to “ensure the institutional autonomy of the armed forces away from the elected officials and particularly the parliament; maintain the army’s financial independence and the privileges of senior staff with minimal intervention from the state; and safeguard a voice in the policy making process through the establishment of a national security council with strong military membership”).

426. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, *supra* note 1.

427. *Id.*

After assuming power, the SCAF suspended the constitution, dissolved the Parliament, and announced that it would govern the country until democratic elections were held.⁴²⁸ The Council also established a Constitutional Amendment Committee, whose members were handpicked by the ruling military, not by popular vote.⁴²⁹ The SCAF then authorized the committee to draft proposed changes to certain provisions in the Egyptian constitution within ten days in order to facilitate democratic elections.⁴³⁰

The membership of the committee was widely criticized as unrepresentative of Egyptian society.⁴³¹ The chair of the committee, Judge Tarek al-Bishry, had been associated with Al-Wassat, an offshoot of the Muslim Brotherhood.⁴³² A Muslim Brotherhood member, Sobhi Saleh, was also on the committee.⁴³³ No women served on the committee,⁴³⁴ and the youth movement, the vanguard of the 2011 Revolution, was also excluded.⁴³⁵ The committee's deliberations were held in secret and the public had little, if any, opportunity to comment on the proposed amendments, which were "presented as if they were a sacred book that should not be discussed."⁴³⁶ These circumstances led to widespread ignorance in Egypt about the content of the amendments and their implications.⁴³⁷

The committee completed its work on schedule and proposed eight amendments. Among other things, the amendments significantly lower the threshold to run for presidency, creating the possibility for competitive elec-

428. Evan Hill, *Scorecard: Egypt's Army and The Revolution*, AL JAZEERA, Jun. 30, 2011, <http://www.aljazeera.com/news/middleeast/2011/06/2011629124848564932.html>.

429. Yasmine Saleh, *Rewrite Egypt Constitution from Scratch, Say Critics*, REUTERS, Feb. 16, 2011, available at <http://af.reuters.com/article/topNews/idAFJ0E71F0N620110216>.

430. Adrien K. Wing & Hisham A. Kassim, *After the Last Judgment: The Future of the Egyptian Constitution*, 52 HARV. INT'L L.J. ONLINE 302, 304 (2011), http://www.harvardilj.org/2011/04/online_52_wing_kassim.

431. See, e.g., Agrama et al., *supra* note 381 ("This committee is staffed mostly by jurists with legal expertise, but makes almost no attempt to represent various political trends. This is obviously objectionable from the standpoint of democratic representation, and it clearly undermines the legitimacy of the process."); Nawal El Saadawi, *Shortcomings of the New Constitution Committee*, AHAM ONLINE, Feb. 21, 2011, <http://english.ahram.org.eg/NewsContentPrint/4/0/6129/Opinion/0/Shortcomings-of-the-new-Constitution-committee.aspx>; Richard Spencer, *Egypt: Islamist Judge to Head New Constitution Committee*, TELEGRAPH (U.K.), Feb. 15, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8326469/Egypt-Islamist-judge-to-head-new-constitution-committee.html>; Wing & Kassim, *supra* note 430, at 305.

432. Spencer, *supra* note 431.

433. Nathan J. Brown & Michele Dunne, *Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others*, CARNEGIE FOUND. FOR INT'L PEACE, Mar. 1, 2011, <http://www.carnegieendowment.org/publications/index.cfm?fa=view?id=42817>.

434. Spencer, *supra* note 431.

435. El Saadawi, *supra* note 431.

436. Noha El-Hennawy, *Q&A With Tabani al-Gebali: Say "No" to Constitutional Amendments*, AL-MASRY AL-YOUM, Mar. 10, 2011, <http://www.almasryalyoum.com/en/print/347797>.

437. Kristen Stilt, *Dispatch From Cairo: What the Egyptian Constitutional Amendment Referendum is Really About*, COMP. CONST. PROJECT (Mar. 19, 2011, 11:03 AM), <http://www.comparativeconstitutions.org/2011/03/dispatch-from-cairo-what-egyptian.html>.

tions;⁴³⁸ limit the presidential term to two terms of four years;⁴³⁹ abolish the authority of the People's Assembly to determine the validity of the election of its own members—a power which had previously allowed the Assembly to ignore court rulings invalidating parliamentary election results—and grant that authority to the Supreme Constitutional Court;⁴⁴⁰ and require a public referendum in order for a state of emergency to last more than six months.⁴⁴¹ Notably, and despite the participation of a Muslim Brotherhood member on the committee, the committee did not propose any revisions to Article 5 of the constitution, which prohibited the Muslim Brotherhood and other groups with a religious orientation from forming political parties.⁴⁴² The committee kept in place, however, Article 2, which establishes Islam as the state religion and *Sharia* law as the principal source of legislation.⁴⁴³

The proposed amendments also paved the way for the drafting of a new constitution and determined the sequence of the elections that would lead up to the new constitution. Under Article 189, either the President (with the approval of the Cabinet) or half of the members of both houses of Parliament (the People's Assembly and Shura Council) may call for the drafting of a new constitution by a constituent assembly of 100 members.⁴⁴⁴ The constituent assembly will be elected in a joint session of the two houses of Parliament and complete its work within six months.⁴⁴⁵

The proposed amendments were submitted to a popular referendum on March 20, 2011.⁴⁴⁶ The amendments were offered as a non-severable package. The people could not pick and choose among them; the ruling military had already made that choice for them.⁴⁴⁷ The turnout for the referendum was an unprecedented eighteen million, and an overwhelming 77.2% of the voters approved the amendments.⁴⁴⁸ After the ratification, the SCAF was

438. Under Article 76, a candidate may appear on the presidential ballot in one of three ways: (1) endorsement by "at least 30 elected members of the People's Assembly or the Shura Council," (2) endorsement by "at least 30,000 eligible voters in at least 15 governorates" with at least 1000 signatures from each governorate, or (3) the nomination by "any political party whose members obtained at least one seat" in the People's Assembly or the Shura Council. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, March 30, 2011, art. 76, available at <http://www.sis.gov.eg/En/Story.aspx?sid=53903> [hereinafter EGYPT CONST.]; see also Brown & Dunne, *supra* note 433.

439. See EGYPT CONST. art. 77.

440. See *id.* art. 93; see also Tamir Moustafa, *It's Not a Revolution Yet*, FOREIGN POL'Y (Feb. 28, 2011, 5:24 PM), http://mideast.foreignpolicy.com/posts/2011/02/28/it_s_not_a_revolution_yet.

441. See EGYPT CONST. art. 148.

442. Moustafa, *supra* note 440. Article 5 states, in relevant part: "[C]itizens have the right to establish political parties according to the law and no political activity shall be exercised, nor political parties established, on the basis of religion" EGYPT CONST. art. 5.

443. See EGYPT CONST. art. 2.

444. See *id.* art. 189.

445. See *id.*

446. Wing & Kassim, *supra* note 430, at 305.

447. *Id.*

448. Slackman, *supra* note 142.

expected to announce a constitutional declaration that would keep the 1971 Constitution in place, as amended by the popular referendum.⁴⁴⁹

But two weeks after the referendum, something unexpected happened. On March 30, 2011, the SCAF announced a constitutional declaration on its Facebook page that completely scrapped the 1971 Constitution and replaced it with an interim constitution consisting of sixty-three provisions.⁴⁵⁰ The new provisions included the eight provisions that were amended in the popular referendum, but also scores of others that the referendum did not include.⁴⁵¹ The military adopted the new provisions primarily from the 1971 Constitution, but altered them without submitting them to a popular vote.⁴⁵² The SCAF also unilaterally amended the wording of one provision that had already been approved in the referendum.⁴⁵³ The military thus drafted a new constitution outside of the process that it had implied would be required with the popular referendum it had held two weeks earlier.⁴⁵⁴

Four provisions in this new constitutional declaration are noteworthy. First, the declaration amends Article 5 (which addresses political parties and their formation), even though the amendment was not approved in the referendum.⁴⁵⁵ The previous Article 5 prohibited the formation of political parties “with a religious frame of reference or on a religious basis.”⁴⁵⁶ The declaration amends Article 5 to remove the “religious frame of reference” restriction, leaving only the narrower prohibition on political parties with a “religious basis.”⁴⁵⁷ Because the Muslim Brotherhood has used the term “religious frame of reference” to describe its political orientation, this amendment allowed the Brotherhood to establish its own political party: the Freedom and Justice Party.⁴⁵⁸ Second, the declaration adopts a requirement from the 1971 Constitution that half of the members of the People’s Assembly and the Shura Council be “workers and peasants,” a provision reminiscent of the country’s social past.⁴⁵⁹ Third, the constitutional declaration retains the National Security Council.⁴⁶⁰ And fourth, the declaration expressly recognizes the status of the SCAF as a constitutional actor and autho-

449. Neil MacFarquhar, *Egyptians Approve Constitutional Changes*, N.Y. TIMES, Mar. 20, 2011, <http://www.nytimes.com/2011/03/21/world/middleeast/21egypt.html>.

450. Nathan J. Brown & Kristen Stilt, *A Haphazard Constitutional Compromise*, CARNEGIE FOUND. FOR INT’L PEACE, Apr. 11, 2011, <http://carnegieendowment.org/publications/index.cfm?fa=view&id=43533>. The interim constitution governs Egypt during the transition process, before a permanent constitution is drafted by a constituent assembly elected by the parliament.

451. *Id.*

452. *Id.*

453. *Id.* The change authorizes the SCAF to instruct the legislature to elect a constituent assembly to draft a new constitution, which allows the legislature to begin the constitution drafting process before presidential elections. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *See id.*

459. *Id.*

460. *Id.*

rizes it to enact legislation, represent the state domestically and abroad, and appoint and dismiss ministers, including the Prime Minister.⁴⁶¹ The SCAF's authorities will last through the parliamentary elections and until a new president assumes office.⁴⁶²

Elections for the lower house of the Parliament began on November 28, 2011 and continued in staggered rounds until January 2012. The elections were widely viewed as free and fair by independent monitoring organizations.⁴⁶³ On January 23, 2012, the SCAF formally handed legislative power to the newly elected lower house of the Parliament, while it continued to occupy the executive branch of the government.⁴⁶⁴ The presidential elections are scheduled for May 2012,⁴⁶⁵ after which the military leaders have vowed to surrender their executive authority to the newly elected President and to return to the barracks.⁴⁶⁶ The elections for the upper house of the Parliament, the Shura Council, are scheduled to begin in late January 2012 and end in February 2012.⁴⁶⁷ The two parliamentary chambers will then elect a 100-member constituent assembly to draft a new constitution.⁴⁶⁸

Throughout the transition process, the military has appeared intent to preserve the Mubarak-era political structures and the benefits that the military has reaped from those structures. "It is an open secret" that the Egyptian military has aimed to preserve its status by influencing the constitution-making process, according to Hossam Bahgat, Executive Director of the Egyptian Initiative for Personal Rights.⁴⁶⁹ And ever since it became apparent that the Islamists would dominate the Egyptian legislature, at least some secularists in Egypt have supported the military's constitutional quest. In fact, these secularists have argued publicly that the military should engage in the type of entrenchment described in this Article by defining for itself "its own powers and role under the new constitution, in-

461. *Id.*

462. *Id.*

463. Charles Levinson et al., *Egypt's Voters Begin Historic Ballot*, WALL ST. J., Nov. 29, 2011, at A8 ("There doesn't appear to be any intention by the government to commit fraud as we have seen in previous elections." (internal quotation marks omitted) (quoting Madgy Belal, head of an independent Egyptian election-monitoring organization)); *id.* ("There's a big difference compared to past elections. There's security and there's no one menacing me." (internal quotation marks omitted) (quoting Jamal Khamis Azir, a forty-six-year-old member of Egypt's Coptic Christian minority)).

464. Jailan Zayan, *Egypt Army Hands Legislative Power to New Parliament*, AFP, Jan. 23, 2012, available at <http://www.google.com/hostednews/afp/article/ALeqM5iHG1caI64f2zjhd7Fc7U-VWtW6xQ?docId=CNG.f2aa3559729718e5b4dfcfe0b84c2b.aa1>.

465. *Egypt to Hold Presidential Poll 'in May'*, AL JAZEERA, Feb. 15, 2012, <http://www.aljazeera.com/news/middleeast/2012/02/201221510046239254.html>.

466. Zayan, *supra* note 464.

467. *Id.*

468. *Id.*

469. David D. Kirkpatrick, *Egypt's Military Expands Power, Raising Alarms*, N.Y. TIMES, Oct. 14, 2011, http://www.nytimes.com/2011/10/15/world/middleeast/egypts-military-expands-power-raising-alarms.html?_r=1 (internal quotation marks omitted).

cluding the broad autonomy and authority to intervene to protect the secular character of the state.”⁴⁷⁰

To date, the military has influenced the constitution-making process in Egypt through procedural entrenchment, orchestrating the transition process so that the new constitution that will eventually be drafted will favor its institutional and policy preferences. The military has attempted to achieve that outcome in four primary ways: (1) by holding elections under a condensed timeframe, (2) by holding parliamentary elections before the constitution drafting process begins, (3) by influencing the political makeup of the first People’s Assembly and Shura Council, and (4) by favoring a presidential system over a parliamentary system.⁴⁷¹

First, the swift timeline under which elections occurred favored the pre-existing political groups, primarily the Muslim Brotherhood, who have the financial and organizational capability to quickly organize election campaigns.⁴⁷² Although the military postponed the initial June date for the parliamentary elections, the parliamentary elections took place in staggered rounds beginning in November 2011,⁴⁷³ a relatively short timetable for new political parties to form, organize, raise funds, and campaign. The military anticipated that “the principal beneficiaries of quick elections”—i.e., the

470. See *id.*; see also *Egypt’s Elections: Voting Begins*, ECONOMIST (Nov. 29, 2011, 2:12 PM), <http://www.economist.com/blogs/newsbook/2011/11/egypts-elections-0?fsrc=scn/fb/wl/bl/votingbegins> (“Some Egyptians do, however, welcome the military’s role, seeing it as necessary in the context of the stark political polarisation between Islamists and secularists, and between older conservatives and younger progressives, that is likely to be reflected in the outcome of the elections.”); *Egypt Military Rulers Say Parliament Won’t Be Representative After Islamists Dominate Election*, PHARAOHS TODAY, Dec. 8, 2011, <http://www.pharaohstoday.com/Eng/2011/12/08/egypt-military-rulers-say-parliament-won%E2%80%99t-be-representative-after-islamists-dominate-election> (“Some liberals may find solace in the military’s attempt to protect the constitution from overzealous Islamist tendencies.”); *id.* (“Many of the liberal forces, which were before against interference of the military, will not object whenever there are attempts (by Islamists) to alter basic civic rights.” (internal quotation marks omitted) (quoting Ammar Ali Hassan, a political analyst)).

471. The military also engaged in two other unsuccessful attempts to influence the new constitution. First, it announced a set of supra-constitutional principles that would bind the constituent assembly. Hamad, *supra* note 58, at 54. The Islamist parties and some liberal groups resisted the proposals as intrusions on elected representatives, causing the generals to relent and put the principles to rest. *Id.* Second, the military also attempted to influence the composition of the constituent assembly. *Id.* at 55. It announced that it would name eighty of the 100 members of the constituent assembly to ensure that it was representative of the Egyptian society. See *id.*; see also *Egypt Military Rulers Say Parliament Won’t Be Representative After Islamists Dominate Election*, *supra* note 470. After persistent opposition, the military abandoned that proposal as well. Hamad, *supra* note 58, at 56.

472. See Gambill, *supra* note 418; see also Slackman, *supra* note 142 (“I worry about going too fast towards elections, that the parties are still weak.” (internal quotation marks omitted) (quoting Nabil Ahmed Helmy, former dean of the Zagazig law school and a member of the National Council for Human Rights)); *id.* (“I voted ‘no’ [in the referendum] to give more time to the secular parties. I don’t want to have the Muslim Brotherhood here right away.” (internal quotation marks omitted) (quoting Rifaat Abdul Massih, a Christian construction worker)); *Egypt’s Presidential Vote to be Held by November*, WASH. POST, Mar. 30, 2011, http://www.washingtonpost.com/world/egypts-presidential-vote-to-be-held-by-november/2011/03/30/AF56Mm6B_story.html; *Egypt Referendum Strongly Backs Constitution Changes*, *supra* note 366 (“Activists have argued that the established parties stand to gain the most from holding an election quickly.”).

473. Levinson, *supra* note 463.

pre-existing political groups—“[would] oppose a major constitutional overhaul”⁴⁷⁴ and protect the Mubarak-era political structures that had benefited the military’s interests.⁴⁷⁵ And as expected, the established parties scored landslide victories in the parliamentary elections. The Muslim Brotherhood’s Freedom and Justice Party emerged as the clear victor of the elections, obtaining 47.18% of the seats in the lower house.⁴⁷⁶ The more conservative Salafist Al-Nour party came in second, with 24.29% of the seats.⁴⁷⁷ Collectively, Egypt’s two main Islamist parties therefore captured nearly three-quarters of the 498 seats in the lower house of the Parliament.⁴⁷⁸

In contrast, rapid elections worked to the detriment of emerging opposition parties, including youth groups, which had splintered into numerous factions with incoherent agendas and needed more time to establish and promote themselves. For example, the liberal New Wafd Party and the secular Egyptian bloc, many of whose members had served as the vanguard of the revolution, came in a distant third and fourth in the elections for the lower house of the Parliament, respectively obtaining a meager 7.6% and 6.8% of the seats.⁴⁷⁹ And unlike the established political parties, the youth opposition groups may have been more willing to challenge prevailing orthodoxies and alter pre-existing political structures, which might have worked to the military’s detriment. Quick elections have marginalized these groups and their visions for constitutional change.

In addition to supporting the military’s goal of largely preserving the constitutional status quo, established parties such as the Muslim Brotherhood also promised stability after a tumultuous revolution and a messy transition period.⁴⁸⁰ It is in the interest of the military to end the persistent protests and the resulting economic and social instability so that the military can return to the barracks.⁴⁸¹ And the Muslim Brotherhood “is one address where you can go to get 100,000 people off the street.”⁴⁸² Although the Egyptian military has traditionally kept Islamists out of its ranks,⁴⁸³ the Islamists have been “natural partners in keeping order” during the transition to democracy because the Islamist parties are, by their nature, more

474. Gambill, *supra* note 418.

475. Fouad Ajami, *Egypt and the Fruits of the Pharaohs*, WALL ST. J., Nov. 29, 2011, at A19 (“To the mighty Egyptian officer corps the Brotherhood offers the promise of live and let live—the privileges and allotments of the armed forces would be left intact and opaque, while the Brotherhood, for the first time in its 84-year history, comes to political power.”).

476. Zayan, *supra* note 464.

477. *Id.*

478. *Id.*

479. *Id.*; *Egypt’s Islamist Parties Win Elections to Parliament*, BBC NEWS, Jan. 21, 2012, <http://www.bbc.co.uk/news/world-middle-east-16665748>.

480. Gambill, *supra* note 418; Slackman, *supra* note 142.

481. *Id.*

482. *Id.*

483. *Egypt Military Rulers Say Parliament Won’t be Representative After Islamists Dominate Election*, *supra* note 470.

“conservative, xenophobic and more disciplined” than the secularists.⁴⁸⁴ Throughout the democratic transition process, there have been widespread rumors in Egypt of backroom deals between the military and the Muslim Brotherhood.⁴⁸⁵

Second, the sequence of the elections also supports the military’s policy and institutional preferences. Under the constitutional amendments adopted by referendum in March 2011, the constitution will be drafted by a constituent assembly elected by the two houses of Parliament.⁴⁸⁶ In other words, the rulers of government will choose the rules of government.⁴⁸⁷ The military chose to forego the election of a constituent assembly, which would have been charged with drafting a new constitution, before parliamentary elections take place—a path taken by the Portuguese military, as discussed in Part III.B. Instead, it opted to delegate the task of writing a new constitution to a constituent assembly that will be elected by the new Parliament.⁴⁸⁸ Although the election of a constituent assembly and the drafting of a new constitution before parliamentary elections might have prolonged the transition period, a constituent assembly elected before parliamentary elections would have had more leeway to make structural changes to the political system than an assembly that will draft a constitution after the legislature is already in place.

The parliamentary elections therefore carried particular weight. Due in part to the swift timetable for the elections, Egypt’s two Islamist parties captured three-quarters of the seats in the lower house of the Parliament.⁴⁸⁹ The constituent assembly in charge of drafting the new constitution will thus reflect in large part the preferences of those two parties.⁴⁹⁰ Perhaps for that reason, the Islamists, unlike the newly formed parties, lauded the military’s plans to postpone the constitution drafting process until after the par-

484. *Egypt: Torrid Post-Revolutionary Times*, *supra* note 128.

485. *Id.* (“There are even whispers of a quiet alliance between the army and Islamist parties”); Slackman, *supra* note 142 (“The Muslim Brotherhood, an Islamist group once banned by the state . . . transformed into a tacit partner with the military government”); *id.* (“There is evidence the Brotherhood struck some kind of a deal with the military early on.” (internal quotation marks omitted) (quoting Elijah Zarwan, a senior analyst with the International Crisis Group)); *End Impunity Now*, ECONOMIST, July 30, 2011, available at <http://www.economist.com/node/21524875> (“Some suspect [the military is] keen to strike a closet bargain with the Islamists to fend off those who seek to rebuild Egypt as a paragon of pluralism and tolerance.”); Spencer, *supra* note 431 (“The army seems to have made some sort of deal with the Muslim Brotherhood.” (internal quotation marks omitted) (quoting Wael Abbas, a well-known human rights blogger in Egypt)).

486. See Stilt, *supra* note 437.

487. Gambill, *supra* note 418.

488. *Id.*

489. Zayan, *supra* note 464.

490. El-Hennawy, *supra* note 436. It is unclear, however, to what extent the Muslim Brotherhood’s Freedom and Justice Party will collaborate with the Salafi al-Nour party in the election of a constituent assembly and the drafting of a new constitution. To project a more tolerant image of its agenda, the Freedom and Justice Party may avoid any perception that it is colluding with the more conservative Salafists. See Matt Bradley & Tamer El-Ghobashy, *Egypt Islamists’ Mandate Lacks Unity*, WALL ST. J., Dec. 5, 2011, at A6.

liamentary selections.⁴⁹¹ Confident that the elections would produce a large bloc in their favor, the Islamists expected that they would then be able to dominate the constitution drafting process as well.⁴⁹² And for the reasons discussed above, the military stands to benefit from the conservative approach that the established parties, including the Islamists, will take to drafting the new Egyptian constitution. The military has also refused to relinquish power before the constitution is drafted, which might allow the military to assert direct influence on the constitution drafting process.⁴⁹³

Third, the military also has attempted to influence the makeup of the legislature in the interim constitution. As noted above, the constitutional declaration contains a provision—absent from the popular referendum—that preserves a requirement that half of the seats in the People’s Assembly and Shura Council be held by “workers and peasants,” terms that are left to be defined by legislation.⁴⁹⁴ This provision allows parties whose members fit within these definitions to have a significant edge in the parliamentary elections.⁴⁹⁵ Although the terms “worker” and “peasant” have been interpreted broadly in the past, political activists believed that members of the newly formed parties, including youth groups, would be less likely to be considered “workers” or “peasants” within the meaning of that provision.⁴⁹⁶ The provision, according to the activists, would therefore reinforce the existing power structure and boost the electoral prospect of established political groups with a pre-existing electoral patronage, including the Muslim Brotherhood.⁴⁹⁷ Perhaps for that reason, the youth parties strongly opposed the inclusion of this provision in the interim constitution.⁴⁹⁸

Fourth, the interim constitution will likely preserve the presidential system, which has, to date, favored the military’s institutional prerogatives. The 1971 Constitution of Egypt establishes a presidential system and grants the President a number of “extraordinary powers.”⁴⁹⁹ For example, the President may issue decree laws, unilaterally dismiss the Prime Minister, and dissolve the Parliament.⁵⁰⁰ Under this system, the military needs the cooperation of only one civilian officeholder—the President, who has always been a former military officer—to exert its influence on the nation’s political affairs.⁵⁰¹ The military would also benefit from the increased autonomy that

491. *Egypt: Torrid Post-Revolutionary Times*, *supra* note 128.

492. *See id.*

493. *Egypt Sets May Election for President to Replace Hosni Mubarak, Take Over from Military*, WASH. POST, Feb. 29, 2012, http://www.washingtonpost.com/world/middle_east/egypt-sets-may-23-24-for-1st-presidential-election-since-hosni-mubarak-ouster/2012/02/29/gIQA6cjGiR_story.html.

494. Wing & Kassim, *supra* note 430, at 308.

495. Brown & Stilt, *supra* note 450.

496. *See id.*

497. *Id.*

498. *Egypt’s Presidential Vote to be Held by November*, *supra* note 472.

499. *See Gambill*, *supra* note 418.

500. *Id.*

501. *Id.*; Hamad, *supra* note 58, at 61 (“It appears that the generals in the Supreme Council of the Armed Forces are well disposed to some form of continuity of the presidential system of government.”)

might result from the division of power between the executive and the legislative branches created by a presidential system.⁵⁰²

The interim constitution announced by the military preserves the presidential system. Although the Parliament will select the constituent assembly that will draft the constitution, the current transition timeline makes a possible transition to a parliamentary system highly unlikely. Under the current timeline, the parliamentary elections for both houses of the Parliament will be completed at the end of February 2012 and presidential elections will take place in May 2012.⁵⁰³ Theoretically, the Parliament may unilaterally call for a new constitution, elect a constituent assembly, and begin the drafting of the constitution in the interim, before presidential elections take place. And without a president in place, the constituent assembly may have more leeway in replacing the extant presidential system with a parliamentary one.

But that theoretical scenario is highly unlikely. The interim constitution expressly foresees a presidential election by noting that the authorities of SCAF will continue until a new president is sworn in.⁵⁰⁴ Under the current timeline, the presidential elections will take place within approximately three months from parliamentary elections. Thus, even if the constitution drafting begins before the election of the President, by the time the committee finishes its work—which, under the interim constitution, may take up to six months—a president will likely be in place.⁵⁰⁵

If a President is in place during the constitution-drafting process, the President will have strong incentives to preserve the presidential system and the prerogatives of the office, which, at least until now, has favored the military. Although the constitution will be drafted by a constituent assembly to be elected by the Parliament, a strong President unaccountable to the Parliament may shape the drafting process and influence the content of the resulting constitution.⁵⁰⁶ The President may, for example, exert pressure on the constituent assembly to keep the presidential system in place. Further, the Muslim Brotherhood, which won approximately forty-seven percent of the seats in the lower house of the Parliament, favors a strong presidency, and the members it elects to the constituent assembly will likely share that preference.⁵⁰⁷ For that reason, many political activists objected to the elec-

Statements by SCAF members repeatedly indicated, 'Egypt is a presidential system.' Some argued that the generals believe they have a better chance influencing the choice for the presidency than the parliament which Islamist groups are likely to dominate. Many in Egypt suspect that the SCAF will try to sway popular sentiments towards a candidate with a military background or at least someone who is friendly to the military establishment.”)

502. Hamad, *supra* note 58, at 61 (“Among this camp also there are a number of secular forces that hope a strong presidency could provide a counterbalance to the Islamist majority in the parliament.”).

503. *Egypt to Hold Presidential Poll 'in May,' supra* note 465.

504. Brown & Stilt, *supra* note 450.

505. Bradley & El-Ghobashy, *supra* note 490.

506. Brown & Stilt, *supra* note 450.

507. Gambill, *supra* note 418.

tion of the Parliament and the President before the drafting of the constitution.⁵⁰⁸

The Egyptian coup of 2011, though incomplete at the time of this writing, thus has the makings of a democratic coup. Like the other democratic coups analyzed in this Article, the Egyptian military appears to be behaving as a self-interested actor by setting up the transition process so that the new constitution will favor its policy and institutional preferences.

IV. CONCLUSION

This Article called attention to the largely neglected phenomenon of a democratic coup d'état. The academic literature, to date, has analyzed all military coups under an anti-democratic framework and viewed them as an affront to stability and democracy. But not all coups are equally anti-democratic. Some coups are distinctly more democratic than others because they respond to a popular uprising against an authoritarian or totalitarian regime and topple that regime for the limited purpose of holding the free and fair elections of civilian leaders. The conventional view, which views all coups as a menace to democracy and stability, should be replaced with a more nuanced approach to evaluating their desirability that takes into account coups that produce democratic regimes. In this Article, I offered a framework for a democratic coup d'état by examining its typical attributes and constitutional consequences. In so doing, the Article laid the preliminary groundwork for future scholarship on democratic coups.

Although power is transferred to democratically elected leaders at the end of a democratic coup, the new constitution drafted during the transition process reflects the military's policy and institutional preferences. During the democratic transition process, the military takes advantage of its virtual monopoly on power and entrenches, or attempts to entrench, its preferences into the new constitution through substantive, institutional, or procedural entrenchment. As a result of constitutional entrenchment, the military emerges out of the transition process as a *de facto*, if not *de jure*, fourth branch of government. Constitutional entrenchment has important normative implications for democratic transitions and for our views on the role of the military in a constitutional order, which I plan to explore in future projects.

508. *Id.*