

ARTICLE

**POLITICS, EXECUTIVE DOMINANCE, AND  
TRANSFORMATIVE LAW IN THE CULTURE  
OF JUDICIAL INDEPENDENCE**

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ABSTRACT

In the last two decades Latin America has experienced a significant resurgence of democracy, yet efforts to strengthen the independence of the judiciary, largely focused on institutional reforms of the judiciary itself, have been disappointing. It is apparently not enough to construct an appropriate judiciary. How can one keep the nation's politicians from trying to control the judges? Through a wide-ranging historical and comparative method, this article seeks to explore the culture of judicial independence by asking what the political and social logic in favor of and opposed to judicial independence is. This article seeks to contribute to the cultural approach, first by understanding the enduring strength of the opposing culture, the culture supporting political control over the courts, and second, by exploring the argument that a belief in law's ability to transform society characterizes cultures supporting reasonable levels of judicial independence. If belief in transformative law is an important feature of the culture of judicial independence, then perhaps that belief can be deployed against the perennial claims for political control. Strategies designed to strengthen belief in transformative law by improving the effectiveness of laws intended to be transformative, it is argued, could be promising ways of supplementing institutional reforms by increasing cultural support for judicial independence.

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The argument starts by using the ancient Chinese debate over law and morality and the resulting dynastic Chinese legal system as a springboard for examining the culture that supports the primacy of politics. In the sense of that debate, politics is the primary competitor for law, and we can see that the tension between law and politics remains relevant for all societies, even or perhaps especially, for democracies. The ever-present strength of this competition means that it is counterproductive and wrong to conceive of judicial independence as a goal in and of itself. The ideal has to be, rather, a reasonable balance between judicial independence and political influence or oversight over the judges. The strength of the competition from a commitment to politics also explains why, in a modern democracy, it is the executive branch that tends to pose the chief threat to the independence of the judiciary. The executive is the political branch that is organized in a way that gives it the greatest capacity to exercise political influence over the judges.

The transformative law thesis addresses this competition between judicial independence and executive dominance over the judges. The basic argument is that the need to create structural protections for the judges such as limitations on executive involvement in the appointment, promotion, disciplining, and dismissal of judges becomes obvious to a broad public in the case of law that is expected to change society. The argument draws on scholarship comparing Western law with traditional Islamic law, another society with a developed legal tradition but one that does not appear to have been characterized by either transformative law or structural protections for judicial independence. It also uses a model proposed by Martin Shapiro for examining basic issues concerning the legitimacy of courts. An overview of the development of structural protections for judicial independence in the United States, France, and Great Britain provides some evidence in support of the transformative law thesis because in each of these countries, the development of significant institutional protections is associated with the development of judicial review of legislation, a form of public law that I argue constitutes an important source of transformative law. The article concludes with a discussion of some of the key values that appear to be associated with a culture committed to the transformative view of law, especially impersonal application of the law and an interest in strengthening equality, and a brief exploration of several suggestions for further reform in Latin America that would be warranted by the transformative thesis.

Abstract . . . . .	743	R
I. Introduction . . . . .	745	R
II. The Debate in Ancient China Between Law and Morality and the Continuing Strength of the Claims of Politics . . . . .	751	R
A. The Ancient Chinese Debate and Its Legal System . . . . .	751	R
B. The Modern Relevance of the Chinese Debate . . . . .	756	R

III. Transformative Law, Especially Public Law, and Its Potential to Generate Support for Reasonable Levels of Judicial Independence .....	761	R
A. Traditional Islamic Law .....	761	R
B. The Contrast with Western Law .....	765	R
C. The Link Between Transformative Law and Judicial Independence of Courts: Shapiro's Model for the Legitimacy of Courts .....	769	R
D. Values Related to Transformative Law: Personalism and Equality .....	775	R
E. The Apparent Weakness of Belief in Transformative Law and Values Associated with That View of Law in Latin America .....	779	R
IV. Historical Sketches of the Development of Structural Guarantees for Judicial Independence in the United States, France, and Great Britain .....	780	R
A. The United States .....	781	R
B. France .....	784	R
C. Great Britain .....	790	R
D. Chief Conclusions from Historical Sketches .....	793	R
V. Conclusions: The Culture of Transformative Law and Strategies for Fostering It .....	798	R
A. Some Key Values Associated with a Culture of Transformative Law .....	798	R
B. Examples of Reform Strategies for Strengthening the Culture of Transformative Law and Judicial Independence in Latin America .....	803	R

## I. INTRODUCTION

Judicial independence is commonly said to be at the heart of virtually all conceptions of the rule of law.<sup>1</sup> For that reason, all around the world, efforts to strengthen the rule of law often focus on reforms of the judiciary.<sup>2</sup> In Latin America, the wave of democratization in the 1980s was followed by a wave of judicial reform projects in the 1990s, primarily focusing on institutional models and procedures, often modeled expressly on developed country institutions.<sup>3</sup> But a substantial body of commentary has viewed the

1. See, e.g., Ralf Dahrendorf, *A Confusion of Powers: Politics and the Rule of Law*, 40 MODERN L. REV. 1, 9 (1977); Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 129 (2006).

2. See, e.g., Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT'L L.J. 587 (2003) (discussing problems of judicial reform in a number of countries).

3. MARK UNGAR, *ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA* 140–41 (2002) (newly democratic regimes in Latin America focused judicial reforms on four areas: (1) selection and appointment, (2) training and discipline, (3) criminal procedure, and (4) finances); Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 95

results as basically disappointing.<sup>4</sup> The persisting problems are said to include widespread popular distrust of the judiciary,<sup>5</sup> violence against the judiciary,<sup>6</sup> “inefficiency, corruption, and resistance to reform,”<sup>7</sup> and even excessive independence on the part of the judges and lack of sufficient accountability.<sup>8</sup> In fact, there are calls for greater judicial accountability.<sup>9</sup> But most ominous are the ways that executive branches in a number of countries have sought to undermine judicial independence through court packing and other direct interventions in the judiciary.<sup>10</sup> For reasons

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(2008) (emphasis on institution-building); *id.* at 99 (democratization and judicial reform); Carlos Santiso, *The Elusive Quest for the Rule of Law: Promoting Judicial Reform in Latin America*, 23 BRAZILIAN J. POL. ECON. 112, 132 (2003) (the “mirage of ‘institutional modeling’” led to replication of developed country models; “[i]t was naively assumed that the adoption of new laws and the creations of new judicial institutions would suffice to anchor the rule of law”).

4. See, e.g., LINN HAMMERGREN, *ENVISIONING REFORM 3* (2007) (describing reforms that began in the early 1980s as focused on institutions and procedures); WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 8, 19 (2000); Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: The IDB Perspective*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 99, 99–100 (Pilar Domingo & Rachel Sieder eds., 2001); Pilar Domingo & Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America*, in *THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 142, 151 (Pilar Domingo & Rachel Sieder eds., 2001); Juan C. Méndez, *Institutional Reform, Including Access to Justice: Introduction*, in *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 221 (Juan Méndez et al. eds., 1999). *But see* Esquirol, *supra* note 3 (arguing that the rhetoric of “failed law” in Latin America is a destructive overgeneralization that undermines law in the region and distorts the reform agenda).

We have also been warned not to overgeneralize about Latin American countries because there is no monolithic Latin American culture. Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT’L L.J. 595 (2005); Esquirol, *supra* note 3, at 84–85 (“there is no such thing as ‘Latin American law’ in general”; recognizing that there are, however, strong commonalities among Latin American countries and certain common problems with their legal systems, but arguing against overgeneralization of those critiques). I will try to avoid the worst excesses of generalization by specifying in the citations as carefully as possible which countries are the source for the various facts and opinions on which my argument relies.

5. PRILLAMAN, *supra* note 4, at 8; Domingo & Sieder, *supra* note 4, at 151; Linn Hammergren, *Expanding the Rule of Law: Judicial Reform in Latin America*, 4 WASH. U. GLOBAL STUD. L. REV. 601, 603–04 (2005).

6. PRILLAMAN, *supra* note 4, at 21 (Colombia).

7. Domingo & Sieder, *supra* note 4, at 147.

8. PRILLAMAN, *supra* note 4, at 21–22 (Bolivia, Ecuador); Brinks, *supra* note 4, at 613–21 (Brazil); Santiso, *supra* note 3, at 118–22 (Brazil).

9. Mary Dakolias, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT’L L.J. 353, 376 (2000); *cf.* T. Leigh Anenson, Note, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*, 4 SW. J.L. & TRADE AM. 261 (1997) (U.S. law student advocating election of judges in Latin America).

10. See, e.g., PRILLAMAN, *supra* note 4, at 19–20; UNGAR, *supra* note 3, at 143 (“[E]xecutive rarely loses its determination to stock the judiciary with friendly judges, sidelining new merit-based procedures in the process, and practices such as patronage, favoritism, and discriminatory prosecution are engrained into internal judicial functioning.”); Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT’L L. 477 (2006) (detailed account of ways that Chavez administration has undermined Venezuelan court independence; even when the restrictions have formally been imposed by legislature or independent commission, the executive has

explained below, this article concentrates on the threat of executive dominance.<sup>11</sup>

The persistence of executive interference with the courts despite recent democratization seems paradoxical in view of the widespread belief that judicial independence matters to democracy, as well as the rule of law. In an authoritarian state in which the ruling party uses force to maintain its hold on power, only a relatively small group of people, the ruler and his supporters, determine public policy. Their self-interest is obviously served by seeking to control the judiciary, which otherwise could be an arm of state power they do not control. There is no need for any further explanation for the pattern of executive efforts to control the courts. But today many countries throughout Latin America are characterized by a resurgence of significant levels of competitive democratic participation. Why do the electorates not demand more independent courts? Why do they not insist on “institutional” or “structural” guarantees of judicial independence such as rules on appointment, promotion, discipline, and dismissal of judges or guarantees of pay that eliminate or limit executive branch authority over the judges?<sup>12</sup> More importantly, why do they let politicians ignore or eliminate

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been able to dominate the process); Hugo Frühling, *Judicial Reform and Democratization in Latin America*, in *FAULT LINES OF DEMOCRACY IN POST-TRANSITION LATIN AMERICA* 237, 237 (Felipe Agüero & Jeffrey Stark eds., 1998) (Latin American courts “are neither independent nor effective”; they have “suffered from political manipulation by both democratic and military governments”); Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, 2005 J. DISP. RESOL. 399 (court packing in Venezuela); Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT’L L. 115 (2004) (limiting tenure, court packing, purges, restricting jurisdiction by creating special tribunals); Santiso, *supra* note 3, at 119 (Menem’s court packing in Argentina); cf. Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987) (long historical tradition in many Latin American countries of techniques like formally abrogating judicial independence, bypassing courts by creating special tribunals, purges of judges, transference or reassignment of judges, refusing to enforce decisions, and other forms of executive domination).

11. For argument that executive dominance is the chief threat to judicial independence, see *infra* section II(B). See also PRILLAMAN, *supra* note 4, at 19–20; UNGAR, *supra* note 3, at 143 (“Executive power and judicial weakness . . . limit reforms’ effectiveness.”); cf. Tiede, *supra* note 1, at 131–32 (defining judicial independence as independence from the executive branch on the grounds that this definition gives the most meaningful, analytically useful measure).

Bribery is also a threat to judicial independence, probably in all countries to some extent, but it is difficult to gauge the relative seriousness of the problem in different countries. Moreover, it may simply be the way executive dominance is exercised, see, e.g., ADRIAAN BEDNER, *ADMINISTRATIVE COURTS IN INDONESIA* 237 (2001) (executive branch bribes judges in Indonesia), or a method of resistance to executive dominance. See LAWRENCE ROSEN, *THE CULTURE OF ISLAM: CHANGING ASPECTS OF CONTEMPORARY MUSLIM LIFE* 66–67 (2002) (quoting Moroccan informants as saying that bribery is their form of democracy because it is through bribery of officials that they can limit the ruler’s power). At any rate, executive dominance is essentially a different problem from bribery. Section II will argue that it is systemic, and wringing our hands over corruption may obscure cultural features that support executive dominance over the courts.

12. Throughout the paper, and especially in section IV, I use the adoption of institutional or structural protections for judges as evidence of the strength of a culture supportive of judicial independence. It is, of course, only a rough measure. Institutional protections do not guarantee

existing institutional guarantees? If elected leaders can dominate the judiciary and there are popular calls to make the judges politically more answerable, then we have to take seriously the possibility that even in a democracy there can be a broad population with a set of attitudes, values, and ideologies—in short, a “culture”<sup>13</sup>—that supports significant political controls on the judiciary. What is it that promotes that culture or its opposite, a culture that supports reasonable structural protections for judicial independence?<sup>14</sup>

This article concentrates on understanding the dynamic in a democratic state that determines the balance between the culture of judicial independence and the culture of executive dominance. My assumption is that if we can identify mechanisms that promote the culture of judicial independence among the population at large, then reformers interested in strengthening judicial independence can devise strategies to put that dynamic to work, and we will also be able to identify which values appear to be associated with that dynamic. The article pursues this topic through two related lines of inquiry, using a wide-ranging and perhaps idiosyncratic historical and comparative method that starts with two older, non-Western<sup>15</sup> legal systems that

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judicial independence if politicians fail to respect the structural protections or easily amend or circumvent the laws establishing the protections. *See, e.g.*, Brinks, *supra* note 4, at 608 (Argentina); Castaldi, *supra* note 10 (Chávez’s efforts in Venezuela to undermine judicial independence); Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597, 601 (1999) (Prime Minister Lloyd George required his Lord Chief Justice to sign an undated letter of resignation upon his appointment in 1921, which he then used to remove that judge in 1922). It is also possible, though not probable, that judges could have substantial independence without the benefit of such protections. *See infra* note 144 (some commentators viewed French administrative law judges as significantly independent even before the recent institutional reforms); note 165 (Shapiro’s claim of the de facto independence of the British judges); note 170 (Islamic judges). But the adoption of institutional safeguards is at least the expression of a polity’s belief that judicial independence is important.

13. I do not think it is necessary for this paper to identify exactly whose culture I am speaking about. The important point is that the relevant group for these questions of culture is not necessarily limited to the judges and the leaders of the executive branch. It is a broader group. There are at least three possibilities: (a) the mass public as a whole; or (b) the legal elite of bench, bar, and legal academe; or (c) the broader elite that is formed by lawyers and all nonlawyers who engage in a significant and professional way with law and the courts, such as the representatives of the media who report on legal matters and perhaps even business leaders who make significant use of legal services. Probably, at different times and on different issues, one or another of these groups may be most important. I also understand “culture” to refer in general to a combination of, on the one hand, attitudes, values, and ideologies, and, on the other, behavior. Behavior such as tolerating or not tolerating executive interference with the courts or enacting institutional restraints on executive control of the courts can be strong evidence of attitudes, values, or ideology and may also shape and foster those attitudinal aspects of culture.

14. The article thus joins those who adopt a culture-based approach to the problem of judicial independence to supplement the institutional approach. *See, e.g.*, Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in RELOCATING THE RULE OF LAW (Gianluigi Palombella & Neil Walker eds., 2008) (arguing for a sociology of the rule of law); Keith S. Rosenn, *Brazil’s Legal Culture: The Jeito Revisited*, 1 FLA. J. INT’L L. 1 (1984); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT’L L.J. 1, 35 (2006) (exploring the “social moorings” for constitutionalism).

15. The dichotomy between the “West” and the rest is problematic in many ways, not the least of which is that some of my chief information about Islamic law comes from scholarship

did not develop institutional protections for judicial independence, ancient Chinese law and traditional Islamic law.

Section II opens the first line of inquiry concerning one of the chief arguments for political influence over the judges that continues to have force today, the claim for the primacy of politics. My theory is that we cannot appreciate the dynamic that might favor judicial independence unless we also understand the opposite.<sup>16</sup> Section II uses the ancient Chinese debate about governing a society through law or morality—a debate that resulted in a pronounced preference for morality over law—as a springboard for this inquiry. Because of the continuing power of the claim for the primacy of politics, this section argues, it is wrong to conceive of the rule of law ideal as requiring completely independent judges. The ideal has to be, rather, a reasonable balance between judicial independence and political influence or oversight over the judiciary. This point is not new; other scholars have emphasized the need for balance within the rule of law paradigm.<sup>17</sup> The sharpness of the contrast with the very different legal system of dynastic China is meant to provide a fresh presentation of the argument to counteract standard rule of law rhetoric claiming that judges should simply be independent. The contrast also is meant to help us see with greater clarity the importance for law of a value that was explicitly rejected in the Chinese debate, equality under the law. Section II closes with the argument that the continuing attraction of political control over the judges explains why it is the executive branch in modern democracies that tends to pose the chief threat to judicial independence, as we see in Latin America.

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about Morocco, and Morocco extends further to the west than much of Western Europe, including France. Nevertheless, I use the term “modern Western legal traditions” to refer to the legal traditions of those countries in Western Europe and North America, as well as Australia and New Zealand, which are generally thought to institute the strongest or least problematic forms of the rule of law today. By using that terminology, I do not mean to suggest either that the legal systems of these countries perfectly fit the rule of law ideal or that Latin America is not part of the “West.” Modern Latin American countries are heirs to the same Western legal traditions. But I do take as a premise to this article the suggestion of many authors that the legal systems in many Latin American legal systems differ more substantially from the rule of law ideal than do the aforementioned legal systems, especially in the respect that the judiciaries in many Latin American countries have less independence than in the aforementioned countries.

16. Cf. A.A. MILNE, *THE HOUSE AT POOH CORNER* 123–24 (1956) (in which Pooh, lost with Piglet in the misty forest but repeatedly stumbling across a certain sandpit, suggests finding the way home by deliberately wandering away from the pit and then trying to find it).

17. See, e.g., PRILLAMAN, *supra* note 4, at 19 (failure of Latin American judiciaries “to achieve the delicate balance between judicial independence and judicial accountability”); Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS* 9, 12, 14–16 (Stephen B. Burbank & Barry Friedman eds., 2002) (completely independent courts would be intolerable; rather, judicial independence and accountability are different sides of same coin); cf. MARTIN SHAPIRO, *COURTS* 34 (1981) (saying descriptively, not normatively, that the U.S. debate over election of judges is “unresolvable because it involves two conflicting goals: one, that [courts as] triadic conflict resolvers be independent; two, that [courts as] lawmakers be responsible to the people”); Tiede, *supra* note 1, at 159–60 (noting ways in which judicial independence is contrary to rule of law values).

Section III opens the second line of inquiry, which explores the argument that a belief in the role of law to transform society characterizes the Western cultures that support reasonable levels of judicial independence and that such a belief creates a dynamic capable of countering the claims of politics and building popular support for limiting executive power over courts. The basic logic of the transformative law thesis is that the need to create structural protections from executive overreaching with regard to such things as the recruitment, selection, pay, promotion, disciplining, and dismissal of judges becomes obvious to a broad public in the case of law that is expected to change society, because the executive is always an interested party in such legal disputes. This thesis is not offered as an exclusive explanation for the development of greater degrees of judicial independence, but as a restatement or refinement of some of the chief alternative theories and one that promises to be especially useful to reformers seeking to increase cultural support for judicial independence in Latin America.<sup>18</sup> I do not, however, claim that the adoption of transformative law leads quickly or inexorably toward cultural reform. I only claim that strengthening popular belief in the transformative role of law makes more likely a concomitant growth in popular support for judicial independence and that fostering that belief could therefore be a useful tool for judicial reform.<sup>19</sup>

Section III begins the argument for the transformative thesis with Lawrence Rosen's observations about traditional Islamic law,<sup>20</sup> which appears to have developed neither a transformative view of law nor structural protections for the independence of judges. The section then develops the contrary argument for the modern Western legal traditions of civil and common law and builds on Martin Shapiro's model for the sociopolitical legitimacy of courts<sup>21</sup> to explain how a transformative view of law might lead to the development of substantial public support for giving judges structural protections for their independence. Again, the sharp contrast with modern Western legal traditions permits us to appreciate more clearly ideals or values which are associated with a belief in transformative law. Section III closes with a discussion of the role that the ideals of equal and impersonal application of law play in a culture that supports transformative law and the

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18. See *infra* text accompanying notes 82–84.

19. I suggest such strategies as ways of showing the relevance of the idea of transformative law. But this article does not take a position as to whether the judges actually should have more or less independence in any given country in Latin America. One important corollary of the argument in section II about the continuing tension between law and politics is that one cannot specify an optimum level of judicial independence for all countries. One has to look at the specific situation in each country individually. Accord Burbank & Friedman, *supra* note 17, at 11, 16.

20. ROSEN, *supra* note 11, at 64; LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 61 (1989) [hereinafter ROSEN, *ANTHROPOLOGY OF JUSTICE*].

21. SHAPIRO, *supra* note 17, at 49–56; Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 620–21 (1977) [hereinafter Shapiro, *Judicial Independence*].

basis for thinking that belief in transformative law and these associated values may be quite weak in at least some considerable parts of Latin America.

Since I have been unable to find a thorough multicountry history of the development of institutional protections for judicial independence in modern Western legal systems, section IV offers brief historical sketches for the United States, France, and Great Britain. The chief purpose of these sketches is to argue the consistency of that history with both the claims made in section II about the enduring importance of some degree of political influence or control over courts and the transformative law thesis of section III. These three histories illustrate the continuing presence of at least modest degrees of political influence within contemporary protections for judicial independence, as well as the tendency of the executive power to play the principal role in asserting political control, as section II argues should be the case. The historical sketches also show a striking association between the adoption of structural guarantees of judicial independence and the adoption of constitutional review of legislation, an aspect of public law that I argue includes important examples of what I mean by transformative law. I therefore argue that the historical sketches provide some support for the transformative law thesis.

By way of conclusion, section V summarizes the key values that the two lines of inquiry have suggested are important in a culture that supports transformative law. According to the transformative law thesis, these values should therefore be part of the culture that supports a reasonable level of judicial independence. The section closes with some examples of strategies for increasing the effectiveness of transformative law that already exists in Latin American legal systems, especially law that seeks to address serious inequalities. If the transformative law thesis has merit, such reforms would appear to offer some of the best ways to mitigate cultures of personalism and inequality that appear to stand in the way of developing a stronger culture of judicial independence in Latin America.

## II. THE DEBATE IN ANCIENT CHINA BETWEEN LAW AND MORALITY AND THE CONTINUING STRENGTH OF THE CLAIMS OF POLITICS

### A. *The Ancient Chinese Debate and Its Legal System*

Ancient China witnessed an important debate that is of continuing relevance to all who are concerned with law today. The debate was between Confucius and his followers, on the one hand, and a group of writers and statesmen collectively known to history as the *Fa Chia* [the *Fa Jia*],<sup>22</sup> often

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22. In general, this paper gives Chinese names and terms in the common Anglicized form, like "Confucius," if there is one, and otherwise in the Wade-Giles system of transliteration, with the pinyin transliteration in brackets, if it is different. In some cases Wade-Giles is a better guide to pronunciation for the nonspecialist; in others, pinyin is better.

translated as “Legalists,” on the other.<sup>23</sup> Confucius and his followers argued that the best way to govern a country was through education using moral persuasion and example. Among the Legalists, those following Lord Shang were staunch advocates of governing a nation through a system of thorough and strict laws, backed up by generous rewards and severe punishments.<sup>24</sup>

Confucianists led the side of the debate rejecting reliance on rewards and punishments. Confucian thinkers believed that law (*fa*) was not nearly as important as *li*, a concept which Confucius and his followers broadened beyond its root meaning of “ritual” and “courtesy” to include “morality” and “ethical behavior.”<sup>25</sup> Confucius himself is supposed to have said: “Lead them by political maneuvers, restrain them with punishments [and] the people will become cunning and shameless. [But] [I]lead them by virtue, restrain them with ritual [and] they will develop a sense of shame and a sense of participation.”<sup>26</sup> The chief point of *li* was, at least originally, to inculcate in each person a respect for and an understanding of the importance of maintaining the five essential relationships, four of which are hierarchical.<sup>27</sup>

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23. On the debate in general, see JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA* 23–59 (2005) for a discussion with extensive citation to English and some Chinese language scholarship. See also HERRLEE G. CREEL, *WHAT IS TAOISM?* 92–120 (1970) (more detailed analysis of the various authors who together comprise the *Fa Chia*); ARTHUR WALEY, *THREE WAYS OF THOUGHT IN ANCIENT CHINA* 158–61 (1939) (on the Legalists’ conception of law); *id.* at 191–96 (on Realism in action); *A SOURCE BOOK IN CHINESE PHILOSOPHY* 251–52 (Wing-Tsit Chan ed. & trans., 1963) (on the Legalists) [hereinafter *SOURCE BOOK*].

It seems probable that only certain of the philosophers and statesmen conventionally regarded as part of the Legalist school actually advocated the use of law backed up by heavy criminal penalties while other Legalist thinkers were much more concerned with how the Emperor should rule by controlling the bureaucracy. CREEL, *supra*, at 92–120 (arguing that a better translation of *Fa Chia* would be “Administrators” because only Shang Yang (also known as Lord Yang) and his followers should be known as “Legalists” for their emphasis on the use of law; Shen Pu-hai founded another school that disapproved of the use of harsh criminal law but was primarily concerned with administrative measures the Emperor should use to control the bureaucracy; Han Fei Tzu combined the two schools in his writings, and it is his version that has tended to be regarded as the *Fa Chia* as Shen’s name came to be forgotten, but it is in fact Shen’s ideas about setting up and controlling the bureaucracy that have had the greatest impact on China); see also WALEY, *supra*, at 152 (because the concern for law was only part of their program, *Fa Chia* should be translated as “Realists” or “Amoralists”). Part of the problem is that the word “*fa*” in the name of this philosophic movement is ambiguous. It could mean “law,” but it could also mean “method,” which fits in with Shen’s emphasis on the technique of handling a bureaucracy. *Id.* at 93.

24. As indicated in the previous footnote, the *Fa Chia* probably did not constitute a unified school of thought, but rather a loose collection of related thinkers. It is clear that Shang Yang and his followers advocated reliance on the criminal laws, HEAD & WANG, *supra* note 23, at 63–70, but it appears that other Legalists agreed with the Confucianists’ criticism of relying on harsh punishments. CREEL, *supra* note 23, at 103.

25. HEAD & WANG, *supra* note 23, at 17.

26. *Id.* at 39 (quoting *THE ANALECTS OF CONFUCIUS*, Chapter 2, passage 2.3 (Simon Leys trans., 1997)).

27. The four unequal relationships were emperor-subject, father-son, older brother-younger brother, and husband-wife. The only relationship of equality was the relationship between two friends. *Id.* at 49. *Li* prescribes the appropriate behavior for each of these relationships. Thus “the ideal ruler is benevolent, the ideal subordinate is loyal; the ideal father is compassionate, the ideal

The political theory behind Confucianism was that maintaining these relationships, including the social hierarchies immanent in these relationships, was the way to maintain social harmony and a well-governed country. The Legalist champions of law thought law a more powerful tool for maintaining social harmony, and they stressed that the law, including its punishments, should apply to all persons equally, regardless of social rank and relationship. The Confucianists were horrified by such an approach because it violated their concept of *li*.<sup>28</sup> Confucian thought thus essentially called for creating a good society through rule by good men who would know how, in each situation, to maintain social harmony by treating each relationship with another person according to the rules of *li*. Legalists rejected the Confucian political theory because they thought that moral influence could not be powerful enough to guarantee social order. Instead of rule by good men according to *li*, which called for different people to be treated differently, they called for rule by laws that punished all equally.

It is important to understand that the morality at the heart of Confucianists' concept of *li* is political morality or political philosophy. Their chief interest and the chief interest of their opponents in the debate over law concerned the best way to govern a state. As Simon Leys has written,

The central importance of *rites [li]* in the Confucian order may at first appear disconcerting to some Western readers (conjuring up in their minds quaint images of smiling Oriental gentlemen, bowing endlessly to each other), but the oddity is merely semantic; one needs only to substitute for the word "rites" concepts such as "*moeurs*," "civilized usages," "moral conventions," or even "common decency," and one immediately realizes that the Confucian values are remarkably close to the principles of political philosophy which the Western world inherited from the Enlightenment. Montesquieu in particular . . . developed notions which unwittingly recouped Confucius's views that a government of rites is to be preferred to a government of laws; Montesquieu considered that an increase in law-making activity was not a sign of civilization—it indicated on the contrary a breakdown of social morality, and his famous statement, "*Quand un peuple a de bonne*

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son is filial [demonstrates filial obedience, respect, love, and care for the father]; the ideal elder brother is kind, the ideal younger brother respectful; the ideal husband is righteous, the ideal wife submissive; the ideal friend is faithful." *Id.*

28. Some scholars argue that Confucius himself, whose own statements show that he offered his instruction to members of all classes, thought that whoever distinguished himself in study should be fit to advise rulers, and criticized class distinctions, would have rejected the way the school of thought that bears his name came to represent support for and rationalization of the class-based system of inequality that characterized dynastic China. *Id.* at 38, 40, 42–44, 58–59 (citing especially Simon Leys and Herrlee G. Creel). Be that as it may, there appears to be no dispute that those who took over Confucius's mantle did uphold the class system in China and support large inequalities in the laws. *Id.* at 42–43, 58–59.

*moeurs, les lois deviennent simples*” could have been lifted straight from the *Analects* [of Confucius].<sup>29</sup>

The founder of the Ch'in [Qin] dynasty, Ch'in Shih [Shi] Huangti [Huangdi], who reigned as the first emperor of a unified China from 221 to 210 B.C.E., gave Legalists leading roles in his government and attempted to suppress Confucian thinking. He is even charged with killing many people and burning many books in the process. Wing-Tsit Chan recounts the traditional ending to the story, emphasizing the shortness of the Legalists' reign: “The brutality and violence of the Ch'in brought its early downfall in 206 B.C.E. and the Chinese, fearful of the ruthlessness of the Legalists, have ever since that time rejected them.”<sup>30</sup> It would be wrong, however, to conclude that, starting with the Han dynasty, which replaced the Ch'in and brought Confucianists back into government, China functioned essentially without law. In fact, by that time, ancient China had a long tradition of producing legal codes, to which the Legalists, with their interest in law, had been major contributors. The Han duly adopted their own legal code, which appears to have drawn heavily on the Ch'in Code and other preceding Chinese law codes. Through a process that is called “Confucianization” of the law, Legalist ideas about law, especially the utility of harsh criminal penalties and the importance of equal application of penalties, were slowly replaced by Confucian ideas favoring milder penalties and special provisions for more lenient treatment of offenders from the higher classes.<sup>31</sup> The real outcome of the debate was not a simple victory for political morality in China, but a compromise in which law and law codes continued to be important tools for governance throughout dynastic China. Confucian teaching, however, made political morality, backed up as needed by raw political power, the preferred tool for governing the country.<sup>32</sup>

While law thus had continuing importance in dynastic China, it looked very different from the concept of law we know in the West. Most importantly for our subject, dynastic China provided no protections to secure the

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29. HEAD & WANG, *supra* note 23, at 39–40 (quoting THE ANALECTS OF CONFUCIUS xxv–xxvi (Simon Leys trans., 1997)).

30. SOURCE BOOK, *supra* note 23, at 251. The story is told in much greater detail in HEAD & WANG, *supra* note 23, at 61–104. For the debate as portrayed in a Han Dynasty document, the *Discourses on Salt and Iron (Yen-tie lun)*, see MICHAEL LOEWE, FAITH, MYTH AND REASON IN HAN CHINA 172–74 (1982) (quoting parts of the *Discourses*).

31. HEAD & WANG, *supra* note 23, at 101 (during Han Dynasty the harshness of criminal penalties was considerably ameliorated and the beginnings of a system of more lenient punishments for higher ranked classes was recognized, which was to flower into much clearer legal distinctions in favor of the higher classes in the codes of later dynasties, especially the Tang and Ch'ing); *see also id.* at 96–98 (describing how Confucianist thinking came to supplant Legalist thinking in the interpretation of the law and, eventually, the drafting of legal codes); *id.* at 109–115 (describing further Confucianization of the law in the period between Han and Tang Dynasties (220 to 618 AD)); SHAPIRO, *supra* note 17, at 169 (describing Chinese law as a “mixture of mediatory and legalistic elements” under dominant Confucian philosophy).

32. HEAD & WANG, *supra* note 23, at 61–104 (again with extensive citation to English and some Chinese language scholarship).

independence of those exercising judicial function. Dynastic China was a polity that “consisted of a highly centralized government headed by an absolute ruler who ruled by means of a bureaucracy.”<sup>33</sup> Because of reliance on bureaucracy for governance, there was scarcely anything that could be called a legal system. For example, Harold Berman has suggested that the following features are chief characteristics of Western legal systems: a discrete body of legal professionals (lawyers and judges), to whom is entrusted the administration of legal institutions, who tend to engage in legal activities to the exclusion of other forms of business activity, and who have a special training in law in professional schools and their own professional literature about the law.<sup>34</sup> China, by contrast, had little legal literature,<sup>35</sup> hardly anyone who could be called a professional lawyer, no schools of law,<sup>36</sup> and not even a specialized body of judges. The judicial function was fulfilled by the chief administrator or “magistrate” in each district, who was also chief prosecutor and chief tax collector for his district. The district magistrate had no guarantees of independence. Quite the contrary, he served at the pleasure of the emperor (or whoever among the top bureaucrats or eunuchs was actually in control) and the same was true of the higher level bureaucrats who served in the various appeals boards.<sup>37</sup>

The traditional Chinese lack of interest in securing the independence of the judicial officer does not, however, result from the resolution of the

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33. THE GREAT QING CODE 6 (William C. Jones trans., 1994).

34. See HAROLD J. BERMAN, LAW AND REVOLUTION 8 (1983).

35. “The role of law and jurisprudence has been far less prominent in China than in the West,” according to Creel, though, as one would expect from a group of advocates of an expanded role for law, the Legalist followers of Lord Shang made a “considerable” contribution in the field of jurisprudence. CREEL, *supra* note 23, at 113. But Legalist jurisprudence apparently had little impact on the main body of Chinese thinking. *Id.*; see also THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA 11–12 (1992) (nothing in China like the traditions of juriconsults in Roman law; no analogue in Chinese culture to the jurisprudential writings in the legal systems of the West). There are some collections of case reports that have survived from as far back as the Sung Dynasty and many more from the Ch’ing, HEAD & WANG, *supra* note 23, at 217–18, but as far as works that concern speculative analysis of the law, I can find mention of only one book from the Han Dynasty that discussed the resolution of 232 hypothetical cases according to Confucian principles. There were also commentaries on the imperial codes, which had become quite common by the Ch’ing Dynasty. *Id.* at 96, 207–11. But there is no indication that the commentaries attempted to elaborate any system of principles underlying the specific code provisions or otherwise undertook to analyze or systematize the law in the manner of Western critical writing about law, though most of the commentaries have not yet been translated into a Western language. *Id.*

36. There were people with a “superficial knowledge of the law and formalities, who offered their services secretly,” but they were often suppressed by the government and did not play an important role in administration of the law, which was entirely in the hands of the bureaucracy, which in turn was trained in literature and Confucian philosophy, not law. Shuzo Shiga, *Some Remarks on the Judicial System in China: Historical Development and Characteristics*, in TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA 44, 48 (David C. Buxbaum ed., 1967).

37. HEAD & WANG, *supra* note 23, at 215–17 (for Ch’ing (Qing) Dynasty); accord Shiga, *supra* note 36, at 46–51 (“[d]espite the rise and fall of many dynasties,” there was no concept of “an independent court”; district magistrate functioned as judge; only at higher appeal levels were there specialized judicial bodies, but none of the officials were trained specifically in law).

debate over law and politics. Even if the Legalists had triumphed in the debate, China would no doubt have still developed a strong reliance on a bureaucratic mechanism for administering the law, for it was, after all, Legalist thinkers, albeit from a different branch of the Fa Chia than Lord Shang, who developed the forms of bureaucratic governance that China was to use for so many centuries.<sup>38</sup> And there was no more of a basis in Legalist thought than in Confucian thought for arguing that the judges needed to be independent of the absolute ruler's power. Lord Shang and his followers were not champions of the rule of law. They, like everyone else in ancient China, regarded law as a tool for securing obedience to the governing regime and its values. Like everyone else in the debate, when they spoke of law, they meant rule *by* law.

### B. *The Modern Relevance of the Chinese Debate*

It may seem strange to insist that the debate in ancient China is important to the understanding of the culture of judicial independence today. It was not a debate about the rule of law, and the version of law that was at stake in the debate was an extreme version that emphasized harsh criminal penalties joined to a totalitarian administrative system. Moreover, the debate resulted in preservation of the totalitarian administrative system with milder criminal penalties administered in a system in which Confucian political morality, not law, was the privileged form of argument. But it was a debate about law versus political morality, and therefore, I argue, in effect a debate about law versus politics. It is thus a debate that is anterior to and subsumed in all other debates about the rule of law.

The Chinese debate is ultimately a debate about the relationship between law and politics because political morality is at the heart of politics in a way that law is not. There is at least a formal division between law and politics, but there is no meaningful distinction between political morality and politics—especially in the case of a political morality as attuned to the specific persons involved and their ranks and relationships as Confucian thought required. The very claim that something is governed by law is a claim that it is not governed solely by political or moral concerns while political morality and political philosophy are inevitably at the center of political discourse. The ancient debate in China thus raises an issue that remains contested in all modern legal systems, the proper relationship between law and politics. Is it better, for example, to seek to change societal behavior through law or through political action and persuasion? Can a system of law actually achieve any lasting changes in society without concomitant political changes? And if you think that a political mobilization in favor

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38. See *supra* note 23 (discussing Herlee Creel's study of the contributions of the wing of *Fa Chia* led by Shen Pu-Hai).

of change is always necessary to create meaningful, lasting social changes, then how important can law be?<sup>39</sup>

Attempts in the modern world to eliminate law as a governing force show the continuing relevance of the Confucian side of the debate. Both the Russian Communists and the Chinese Communists, for example, ultimately had to abandon their attempts to govern without law. But even if political leaders grudgingly make room for courts and law in the governing structure, as the Russian Communists did starting with Lenin's New Economic Policy and as the Chinese Communists did after the Cultural Revolution, the view that the Confucianists had the right side of the ancient debate still predominates in many corners of the world and provides a powerful, principled basis for arguing for political control over the courts. Political leaders of all stripes tend to be convinced of the rightness of their causes. Law is easily seen as an obstacle to politics, especially the politics of change, because important aspects of law tend to reflect and protect the status quo. It is understandable that political leaders and their most ardent supporters may believe in the primacy of politics over law. It is easy to slip from that position to one that denigrates law as an obstacle to political leadership and independent courts as a suspect fragmentation of the political power necessary to rule effectively. So we see many examples of powerful political leaders from both the Right and the Left seeking to weaken or eliminate the independence of the courts in favor of political leadership.<sup>40</sup>

The ancient Chinese debate is thus relevant for helping us see how problematic it would be to view judicial independence as an absolute value, even in the Western legal tradition. The ancient debate was not resolved by a complete victory for either side, nor should either side win today. We glibly say that judicial independence is at the heart of the ideal of the rule of law,<sup>41</sup> and yet we cannot mean to deny entirely a role for political influence

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39. Cf. Mark Tushnet, *Living with a Bill of Rights*, in UNDERSTANDING HUMAN RIGHTS 3, 17 (Conor Gearty & Adam Tomkins eds., 1996) (arguing against judicial review of legislation, in part, on the grounds that "if you can pass a bill of rights that places substantial restrictions on police activity, why could you not have passed a statute that placed exactly those same restrictions on police activity?").

40. See, e.g., PAUL LEWIS, *AUTHORITARIAN REGIMES IN LATIN AMERICA* 204 (2006) (Marxist Allende's attacks on the court in Chile); MARC LINDER, *THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS* 15–31 (1987) (Nazi pressure on courts, which however never resulted in any dismissal or formal disciplining of a judge); PRILLAMAN, *supra* note 4, at 113 ("[F]ew democratically elected civilian leaders in Latin America in modern times did more to subordinate the judiciary to political influence [than Menem in Argentina]."), 139–40 (Allende undermined courts, but Pinochet did far more damage without intervening directly in internal and administrative autonomy of courts); Castaldi, *supra* note 10 (removals of judges by Chávez regime in Venezuela go beyond reasonable campaign against judicial corruption and constitute campaign to intimidate court); Derek Matyszak, *Creating a Compliant Judiciary in Zimbabwe, 2000–2003*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 331 (Kate Malleson & Peter H. Russell eds., 2006); Rosenn, *supra* note 10, at 24 (Cuba formally abrogated judicial independence after Castro revolution, subordinating courts to executive).

41. See *supra* text accompanying note 1.

over the judges. The historical sketches in section IV suggest that even among the Western countries where the rule of law ideology originated, political influence over judges has continued to be important. This is clearest in view of the admittedly political methods of judicial selection in the United States, but also in the long time that it took for France and Great Britain to adopt any structural protections for their judiciaries. Indeed, the persistence of political influence over the judiciary in these countries makes sense because all of them are, after all, well-consolidated democracies with competitive elections. While democracies may vary significantly with respect to the degree to which they accept law as a limitation on the power of the elected branches of government, none of them can deny the importance of politics. Democracy today generally means giving great importance to competitive electoral politics. Rule of law ideology has to accept that judges have some degree of political responsibility and are subject to some degree of political influence if the judicial system is to be compatible with democracy. When the rule of law calls for judicial independence, it thus should not call for absolute independence, but rather for some reasonable balance between independence and political responsibility.<sup>42</sup> Since this is not a paper on institutional design, my only point here is that any design of the office of the judge that completely eliminates either side of the balance between independence and political influence is problematic. I do not advocate great political control over judges, but I do suggest that rule of law advocates have to be willing to accept some modest measures of political influence that do not completely undermine the claim that the judges are free to decide each case before them according to the law and not according to politics.<sup>43</sup>

The ancient Chinese debate also underlines the importance, for the concept of law as we understand the term in the West, of equal treatment and a certain ability and willingness to treat individuals in an abstract or impersonal manner that ignores family and clan relationships or personal rank or status. While the Legalists' program "shared the Confucian concept that ranks and duties must be clearly differentiated, it insisted that laws must be applicable to all,"<sup>44</sup> and this insistence conflicted seriously with the dominant Confucian ideology, which was based on respect for family, relationship, and rank. Not all ideologies that privilege politics over law are necessarily based on respecting social inequalities. Many in fact profess egalitarian ideologies. Certainly that is the case with communism. And it must be conceded that systems that rely on law can just as easily enforce

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42. See authorities cited *supra* note 17.

43. For additional discussion of the limits within which the appropriate balance has to be found, see *infra* note 169.

44. SOURCE BOOK, *supra* note 23, at 252; see also HEAD & WANG, *supra* note 23, at 50; WALEY, *supra* note 23, at 170 (Legalists' program was to eliminate hereditary privileges and grant preferment only for distinction in war).

social inequalities. But the Legalists appear to have formulated a claim that would resonate with modern Western legal systems, the notion that law should apply equally to all people, without regard to who they are or what political or social clout they may have. Without trying to turn the idea of law into a full-blown constitutional principle of equal treatment, it seems fair to say that the notion of law held by the Legalists, like that underlying modern Western law, is associated with a belief in some kind of minimal level of equality that has to do with equal and impersonal application of the law.<sup>45</sup> We will recur to these points in section III's discussion of Islamic law, which will provide further insight into the role that equal treatment and impersonal or abstract treatment of people play in modern Western legal systems.

At this stage in the argument, it is important to see the way these values are related to both strengths and weaknesses of systems of political morality. Such systems are freer to ignore issues of equality. The Confucianists preferred morality to law precisely because it allows a thoroughly person-specific kind of reasoning. To them, this was more "human" than relying solely on a legal rule to be applied rigidly to all situations that can be subsumed under its terms because it allowed them to take into consideration the full personal situation, including family, rank, and status, of each human being.<sup>46</sup> But an official making decisions based primarily on political morality, not on law, has an enormous amount of discretion. That fact is not troublesome if you have great confidence in the people making the deci-

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45. Cf. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 727 (1972) (describing the notion of "legal rationality," a concept which Weber thought most strongly exemplified by continental European legal systems, as "the degree to which a legal system is capable of formulating, promulgating, and applying universal rules"). Weber classified traditional Chinese law as a form of "substantive irrationality" because it involved "judging persons according to their concrete qualities and in terms of the concrete situation, or according to equity and the appropriateness of the concrete result." *Id.* at 733 n.22 and accompanying text. Curiously, he referred to this aspect of Chinese law as "Kadi-justice," referring to the *qadi* or judge-figure of traditional Islamic law. See *infra* section III(A). For a discussion of how Westerners, including Weber, have mischaracterized the law-finding process in Islamic courts, see ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 58–79, and for a summary of the way in which *qadi* courts find law, see *infra* section III(D). The discussion there of the personalism of traditional Islamic law will reveal a legal system in which equal application of the law held a rather different meaning than it does in Western legal systems.

46. Creel says that Confucian-dominated Chinese society (speaking generally of dynastic Chinese society and specifically of Ch'ing [Qing] era China in the nineteenth and twentieth centuries) was a "much more 'human' society than ours." H.G. CREEL, CHINESE THOUGHT FROM CONFUCIUS TO MAO TSË-TUNG 240 (1953). By contrast, he wrote that we in the West

tend to dehumanize people, make them cogs in machines, move them about like pieces on a checkerboard. If they perform their jobs to the satisfaction of their superiors, well and good; if not, they are discharged. In China a whole series of relationships had to be taken into account, including customary rights and privileges. If the law of the land and the customs of a guild came into conflict, the courts would sometimes rule in favor of the guild. Even the prices of commodities were negotiated in each instance between buyer and seller, so that a man with a winning personality and the gift of bargaining could buy much more cheaply than a less talented competitor.

*Id.*

sions, and in Confucian theory, the officials should all have been educated and examined thoroughly on the Confucian classics and therefore morally “superior” men. But their qualifications notwithstanding, a system that gives priority to governance by politics is inevitably a system of rule by men. Unlike a system that relies primarily on politics, a system based on law tends toward the articulation of a set of rules that purport to cabin the discretion of the decision maker precisely because they use objectively defined categories. Law’s use of a technical, impersonal method may suit it better to limiting arbitrary decisions by government officials than political morality.<sup>47</sup> Certainly the arguments to counter contemporary movements that preach reliance on political control and persuasion rather than on law have to be based in large measure on this argument.

A final point of the Chinese debate’s relevance for modern legal systems has to do with the nature of the chief threat to judicial independence. Because a system of judicial independence has to make room for some aspects of political responsibility and influence in a modern democracy, it is the political leadership in the other two branches—the “political” branches—who can be expected to pose a continual threat to judicial independence. Moreover, as between the legislative and executive branches, today it is the executive that is better suited to serve as a main vehicle for political oversight of the courts. Both the legislature and the executive are chosen in political processes that make them suitable representatives of major political forces, but the executive, usually a single-headed,<sup>48</sup> hierarchical body with a large staff, is better organized to supervise others and to project political leadership than the legislature, which is a collective body with a large membership and a relatively small staff.<sup>49</sup> Small wonder, therefore, that, as the history canvassed in section IV will show, at least since the development of the modern executive branch in the eighteenth and nineteenth centuries, political oversight over judges has tended to come in its most threatening form from the executive branch. The long-term tendency for the executive branch to dominate the courts is the function of both the tension at the heart of the rule of law between law and politics and the very different institutional structure of the two “political” branches.

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47. In his brilliant and critical portrait of Ming Dynasty government, Ray Huang illustrates this point repeatedly. See, e.g., RAY HUANG, 1587, A YEAR OF NO SIGNIFICANCE: THE MING DYNASTY IN DECLINE 143, 149, 210 (1981). A modern Chinese writer seems to echo this idea when he writes, “A society needs courts precisely because courts can turn the solving of complicated problems into a technical, institutionalized, and legalized procedure, and thus maintain the stability and uniformity of the legal system.” Xin Chunying, *What Kind of Judicial Power Does China Need?*, 1 INT’L J. CONST. L. 58, 71 (2003).

48. There are some multiheaded executive branches, as in Switzerland, but these are not common. MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 78, 96–101(1992).

49. For an elegant discussion of this point, see Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974).

### III. TRANSFORMATIVE LAW, ESPECIALLY PUBLIC LAW, AND ITS POTENTIAL TO GENERATE SUPPORT FOR REASONABLE LEVELS OF JUDICIAL INDEPENDENCE

If the executive branch in a modern democracy is the chief counterweight and threat to judicial independence, then in order to foster the culture that favors reasonable levels of judicial independence, we need to find a political dynamic that would create support for the adoption of substantial institutional protections for the judges, limiting the executive's ability to control or influence the judiciary unreasonably. I advance the transformative law thesis because I think it does precisely that. Before explaining that thesis, it will be helpful to be clear about what I mean by "transformative law."

Much law is intended to enforce the status quo, but transformative law is intended to change society. Contemporary examples from U.S. law include Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the job market on the basis of race, color, sex, religion, or national origin,<sup>50</sup> or the Americans with Disabilities Act, which prohibits discrimination against the disabled in employment, but also in public services, accommodations, and telecommunications.<sup>51</sup> In both cases, supporters of the legislation had no doubts that there was discrimination against the class of people they intended to help. The law was not passed to confirm social practice but to provide a legal basis for enforcement action designed to change social behavior. Of course, the hope always is that the mere enactment of the law, or at least the threat of enforcement, will be sufficient to secure widespread voluntary compliance, but the point is that transformative law is adopted for the purpose of effectuating societal change.

#### A. *Traditional Islamic Law*

My basis for thinking that the concept of transformative law might be connected with judicial independence starts with an intriguing observation by Lawrence Rosen about traditional Islamic law.<sup>52</sup> I am interested in Is-

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50. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2005).

51. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2005).

52. I follow the scholars cited in this paper in referring to "Islamic law" or "traditional Islamic law" as the legal tradition based on Islam (the *sharia*) which was produced by Muslim jurists in Muslim lands during the periods of rule by Muslim rulers and largely formed before the time of European colonization, which started chiefly in the nineteenth century, except in India, where it started earlier. That tradition spans a huge geographic area—from Morocco in the West to Indonesia in the East, and up into central Asia and down into Africa at least as far as Nigeria and Tanzania—and long timelines—from the times of the Prophet in the seventh century AD until now. The sharia itself has also been marked by the major division between Sunni and Shia, and each of those traditions has for some centuries been divided into at least four main schools. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 179–83 (2000).

Generalizations about such a varied tradition might reasonably be held suspect. It might seem especially problematic to base generalizations about traditional Islamic law on practices of present day sharia courts in view of the pervasive contact between Muslim countries and modern Western

Islamic law as another sophisticated, non-Western legal tradition that did not, in general, develop any structural or institutional protections for the independence of their judge-figure, the *qadi*.<sup>53</sup> Professor Rosen's description of how Islamic law has been applied in the *qadi* courts<sup>54</sup> of Morocco suggests

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legal traditions since at least the nineteenth century, and arguably much earlier. Nevertheless, scholars have noted great commonalities within the Islamic legal tradition, especially on systemic matters like the roles of lawyer and scholar, methods of legal interpretation, methods of evaluating proof, and so forth. See ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 6 (arguing that the court in Sefrou, Morocco, was, at the time he observed it, typical in many essential ways of Islamic courts generally). For an extended but cautious argument that there are substantial continuities and common features in the various forms of Islamic law, and indeed of all the legal traditions that rub shoulders in the Middle East, see Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field* (pts. 1 & 2), 51 AM. J. COMP. L. 699 (2003), 52 AM. J. COMP. L. 209 (2004).

53. In traditional Islamic law, the caliph or sultan generally appointed the *qadi*, who was considered his agent and served at his pleasure. DAVID F. FORTE, STUDIES IN ISLAMIC LAW: CLASSICAL AND CONTEMPORARY APPLICATION 20 (1999); Mallat, *supra* note 52, 52 AM. J. COMP. L. at 210. The ruler's arbitrariness was somewhat limited, at least in the Morocco studied by Rosen, by the fact that he generally could not appoint someone as judge unless he had qualified through study in a mosque-university taught by learned scholars (*mufiti*), and the status of the scholars and the judges they trained as special guardians of the holy law undoubtedly gave them some sense of autonomy. See ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 65. But the traditional system, even though it did develop a sophisticated doctrine of sources of law and extensive written legal scholarship on all aspects of the sharia, never developed any institutional protections for the legal offices of judge or legal scholar.

Rosen tells a story from Morocco that illustrates the very limited autonomy traditional legal officials could expect: The Sultan's local administrator tried to force the local *qadi* to register land the administrator had coerced from local owners, contrary to the sharia. The *qadi* resisted and fled just as the administrator was about to seize him. The enraged administrator seized the local religious scholars and threw them in jail instead. The new *qadi* registered the land. But locally important figures refused to recognize the new *qadi*, sent a delegation to the Sultan, and persuaded him to remove the administrator to the Sultan's camp for a period of "enforced rethinking." *Id.* at 62.

Traditionally, there was also no body of professional lawyers to represent the parties in litigation. Mallat, *supra* note 52, 52 AM. J. COMP. L. at 210.

The situation was not much changed by colonial occupation by France and the subsequent development of a Moroccan state after liberation. The *qadis* observed by Rosen were, like French judges prior to 1958, *see infra* section IV(B), "wholly dependent on the administrative hierarchy for advancement and placement," though Rosen did not think that the executive powers in fact exercised their power to control the *qadis*. ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 63.

I am grateful to Kim Lane Scheppelle for reminding me that the Islamic law scholar, the *mufiti*, who might not only teach the future *qadi* at the mosque-universities where Islamic law was studied, but upon whose legal opinions the *qadi* might rely in deciding specific cases, had considerably more autonomy. Like the Roman jurisconsults, Islamic law scholars held their offices primarily by virtue of the recognition they earned from other scholars for their mastery of the law. Neither caliph nor sultan could control that process. As in Roman law, it was the opinion of these scholars, not of the *qadi*, that counted in determining what the law was on any given point. See, e.g., GLENN, *supra* note 52, at 165. The Islamic legal system thus had more autonomy from political power than might appear from the statement about the lack of protections for the *qadi*. But *see infra* note 97 (arguing that this kind of autonomy is not sufficient for transformative law).

54. The *qadi* courts Rosen observed were specialized chambers for family law and property cases for which the court itself drew up the documents. The courts were within a unified court system, so the *qadis* had to be competent to sit in criminal or civil chambers. ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 10. But they also had been educated at the mosque-universities in sharia. *Id.* at 65.

to me that he sees Islamic law as lacking a concept of law as transformative in general, and in particular, as lacking a view that law is the proper tool to attempt to rectify society's inequalities. For example, he has written that "Islamic law thus seeks neither to equalize whatever inequality exists nor to offer a preferred terrain for the reconstruction of society through judicial legislation."<sup>55</sup> Similarly, he has said, referring to Islamic law, "Nor does the law attempt, through a concept like the public interest, to offer itself as a preferred vehicle for the reconstruction of society."<sup>56</sup> One might object that all law, to the extent it penalizes or imposes costs on human behavior in any manner, seeks to change behavior. For example, Islamic law establishes punishments that by modern standards seem quite harsh for six specific types of actions, the *hudud* crimes, but these are actions which are condemned by the Qur'an itself and they therefore have long been taken by Muslim society to establish the outer bounds of behavior which is and must be proscribed. Enforcement of these rules may change the behavior of some social deviants, but society itself is not changed. Islam may have originally been intended to make some major changes in society, especially in the direction of increasing equality, and law, which lies at the heart of Islam, may have at times been meant to play a role in effectuating such changes. But over much of its history, and by the time Rosen observed it in qadi courts in Morocco in the latter part of the twentieth century, Islamic law apparently did not have, at least not to any great degree if I correctly understand Rosen's observations, a view that making changes in law is a good way to transform society.<sup>57</sup>

This is a large generalization about a complex legal tradition of huge temporal and geographic dimensions, and we have been warned by recent scholars who come out of that tradition to be careful about sweeping generalizations about Islamic law, especially if they are based on a notion of the legal exceptionalism of Islamic law. In other words, we have been warned not to fall into the orientalist trap of treating Islamic law as if it were some-

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55. *Id.* at 79.

56. *Id.* at 57.

57. The six *hudud* crimes are adultery, non-conventional sexual practices, slander, theft, highway robbery, and apostasy. The Qur'an establishes the punishment for these crimes, chiefly by a set number of lashes or by stoning. AHMED E. SOUAIAlA, *CONTESTING JUSTICE: WOMEN, ISLAM, LAW, AND SOCIETY* 37-38 (2008).

Islam was meant in its original form to change society. Huston Smith asks "whether history has ever witnessed a comparable moral advance among so many people in so short a time." HUSTON SMITH, *THE WORLD'S RELIGIONS* 248 (1991). For example, the sharia's limitation on polygyny to four wives at any one time could be understood as an attempt to protect women from the abuses of unlimited polygyny, especially in light of the injunction to "deal justly" with each one. *Id.* at 252-53; SOUAIAlA, *supra*, at 51-52. I do not understand Rosen's observation to be an argument that Islamic law is incapable of embracing transformative law, only that it came to be incorporated largely in forms that did not include the concept. For an extended argument that Islamic law is open to reinterpretation in ways that would permit it to ameliorate women's status in Muslim societies, see *id.*

thing exotic and categorically different from other forms of law.<sup>58</sup> Nevertheless, we have sound reasons to credit observations by Rosen, trained as an anthropologist and lawyer, about the practice of Islamic law in Morocco in the late twentieth century where he spent “many months stretching over nearly two decades”<sup>59</sup> observing the qadi courts and speaking with participants. One instance of the kind of legal system Rosen describes is sufficient for my purposes, for I am more interested in Rosen’s observations for the light they shed by reflection on Western legal traditions, than what they mean for Islamic law, so I will leave it to more qualified scholars to debate the validity of Rosen’s observation with respect to the whole of the Islamic legal tradition.

In one respect, Rosen’s statements are probably narrower than they might appear. I take Rosen’s observations to be statements about the law that was being applied in the qadi courts whose jurisdiction was limited to family law and property for which the court had drawn up the relevant documents.<sup>60</sup> These are matters that were primarily covered by *sharia*, the religiously based law that forms the core of what is usually meant by “Islamic law,”<sup>61</sup> and did not involve the law that had long been applied outside of the *sharia*, in special courts instituted by caliphs and sultans.<sup>62</sup> It is difficult to find, at least in the West, studies of these other sources of law, and so it is not clear whether they also lacked transformative law, and I do not therefore assert that they did not. However, prior to the twentieth century, Islamic countries did not have representative legislatures with power to en-

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58. Khaled Abou El Fadl, *Soul Searching and the Spirit of Shari’a: A Review of Bernard Weiss’s The Spirit of Islamic Law*, 1 WASH. U. GLOBAL STUD. L. REV. 553 (2002).

59. ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 5.

60. *Id.* at 10.

61. While *sharia* is not codified law, as such, it should be noted that in Morocco, the family law was codified in 1957 and 1958 in the Law of Personal Status or *Mudawwana*, which was based primarily on the Maliki school of *sharia*. There were some legislative reforms to that law over the years, but the most sweeping were in 2004. Yakaré-Oulé Jansen, *Muslim Brides and the Ghost of the Shari’a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?*, 5 NW. U. J. INT’L HUM. RTS. 181, 202 (2007); see also Laura A. Weingartner, Comment, *Family Law & Reform in Morocco—The Mudawana: Modernist Islam and Women’s Rights in the Code of Personal Status*, 82 U. DET. MERCY L. REV. 687, 692–97 (2005) (detailing the differences between *sharia* and the *Mudawwana* prior to the 2004 reforms). That major reform was well after the publication of the books by Rosen on which I rely, so I think it is safe to say that the law applied by the courts he observed was essentially the Maliki school of *sharia*.

62. FORTE, *supra* note 53, at 22–23 (describing the *mazalim* courts as a kind of equity jurisdiction beyond that of the *sharia* courts and rulers’ “legislation” as *siyasa* which could be contrary to *sharia*); BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 186–87 (1998) (penal law, tax law, and law of war all fashioned by Islamic governments without necessarily complying with *sharia*; law articulated in volumes of *fiqh* (juristic writing about *sharia*) and collections of fatwas (decisions of jurists or councils of jurists in specific cases) counted as the “true” law of Muslim society; *mazalim* courts not bound by *fiqh*). *But see* Abou El Fadl, *supra* note 58, at 563 (warning against the view, commonly expressed in Western literature about Islamic law, that Islamic law was “jurists’ law,” studied and debated for theoretical or religious reasons and not so much for its practicality).

act law, and many still do not. As I will argue below in section III(B), while the Western legal traditions began developing the concept of transformative law before it adopted democratic legislatures, that kind of body is nevertheless a key component of the modern Western culture that promotes a belief in transformative law. It would not therefore be surprising if a society without such a body also failed to develop a very strong belief in changing society through law.<sup>63</sup> In fact, within the realm of Islamic law, the whole notion of legal change has undoubtedly been constricted, at least within Sunni Islam, where it has long been arguable, though not without controversy, that no further development of sharia is possible.<sup>64</sup>

### B. *The Contrast with Western Law*

By contrast to traditional Islamic law, the Western legal traditions of civil and common law have both clearly embraced the concept of transformative law and, as section IV will illustrate, also developed significant institutional protections for judicial independence. U.S. law, for example, is full of laws intended to change society, from the aforementioned Title VII and the ADA and other statutes that authorize victims or whistleblowers to sue as “private attorneys general”<sup>65</sup> to the whole mass of explicitly regulatory law.

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63. I also argue *infra* in section III(B) that public law includes much transformative law in the West. The degree to which Islamic law included public law appears disputed. Many Western writers state that Islamic law had little public law, *see, e.g.*, GLENN, *supra* note 52, at 193, but Abou El Fadl takes Western scholarship to task for implying that Islamic law had little and therefore was a primitive legal system. Abou El Fadl, *supra* note 58, at 564. In fact, there is much agreement that Islamic law did include material on penal law, tax law, and even administrative law. *See, e.g., id.*; Mallat, *supra* note 52, 52 AM. J. COMP. L. at 223–33 (records for court in Tripoli from late seventeenth century include some criminal and administrative cases, in addition to private law cases, but no constitutional cases); WEISS, *supra* note 62, at 186–87. Pending clarification of the nature of the public law involved in sharia, one cannot point to a lack of public law to support the claim that Islamic law lacked a concept of law’s transformative role.

64. Since the thirteenth century, many authorities within the Sunni schools of law have said that the “gates of *ijtihad* [legal reasoning] have been closed,” a phrase which was understood to mean that human jurists were no longer free to develop God’s law through human reason. Even in the Sunni schools, not everyone agrees, and certainly not in the Shia schools of law, which have never known the closing off of *ijtihad*. FORTE, *supra* note 53, at 17, 22–23; GLENN, *supra* note 52, at 178–87. Nevertheless, the contemporary Islamic law scholar Ahmed Souaiaia argues, as a broad generalization about the Islamic legal tradition to date, that justice “was defined during, and did not evolve beyond, the formative period of Islamic law and practices (the first two Islamic centuries).” Unlike the Western view, in which justice is free to evolve as society changes, “[t]he Islamic religious concept of justice is locked.” SOUAIAIA, *supra* note 57, at 2. Such a view of legal change is certainly inconsistent with the concept of transformative law and provides further corroboration that transformative law did not play a large role in traditional Islamic law.

65. Statutes that harness the energy and self-interest of private parties as “private attorneys general” generally do so for the purpose of enhancing enforcement of transformative law. They typically provide for some financial incentive to sue, like the treble damage awards in antitrust suits under the Sherman Act, or the shifting of the successful plaintiff’s attorneys fees to the defendant, contrary to the usual U.S. rule that each side bears its own costs of counsel. For example, in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401–02 (1968), a case brought by a private plaintiff against a private restaurant owner under Title II of the Civil Rights Act of 1964,

The transformative view of law is basic to Western European legal systems, as well. Harold Berman has argued that each of the six great revolutions which he claims mark the development of Western law—the Papal Revolution of the eleventh and twelfth centuries, the Protestant Reformation, and the English, American, French, and Russian Revolutions—have involved an initial

interim period in which new laws, decrees, regulations, and orders were enacted in rapid succession and as rapidly amended, repealed, or replaced. Eventually, however, each of the great revolutions made its peace with the pre-revolutionary law and restored many of its elements by including them in a new system that reflected the major goals, values, and beliefs for which the revolution had been fought. Thus the new systems of law established by the great revolutions transformed the legal tradition while remaining within it.<sup>66</sup>

The great codification movements of the nineteenth and twentieth centuries furnish clear examples of this kind of legislation adopted with the intention of changing societal relations after the revolutions of the eighteenth and nineteenth centuries.<sup>67</sup> By that time, developing ideas of democracy in Western Europe included the idea of a representative legislature enacting laws. Once that idea is established, the process of enacting laws to change society seems to take on greater life, perhaps because the legislature, especially a democratically elected one, understands that it is called upon to

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which forbids racial discrimination in public accommodations, the U.S. Supreme Court stated, “[A] Title II suit is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” The Court said that Title II provided for the shifting of the successful plaintiff’s attorney’s fees to the defendant “to encourage individuals injured by racial discrimination to seek judicial relief.” *Id.* at 402.

The Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988 (2000), partially codifies the idea of the private attorney general by providing a statutory basis for recovery of attorney’s fees by plaintiffs who successfully sue state and local governments. The Senate Report accompanying this legislation stated that the intent was to level the playing field so that even private citizens with little money could serve as “private attorneys general” to bring these actions to enforce the civil rights laws. S. Rep. No. 94-1011, at 6 (1976).

66. BERMAN, *supra* note 34, at 29.

67. Consider, for example, the way in which the nineteenth-century codes reformed the civil law in order to eliminate feudal society and promote business and bourgeois society. *See, e.g.*, KONRAD ZWIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK I 82–85 (Tony Weir trans., Clarendon Press 2d ed. 1987) (French codification). Shapiro nicely captures this idea in summarizing the views of Jeremy Bentham, the chief English legal philosopher associated with the nineteenth century codification movement: “Law was not a set of external principles or hallowed rights. It was an instrument that, through the assignment of pleasures and pains, would move people to engage in socially desirable activity.” Shapiro, *Judicial Independence*, *supra* note 21, at 627. *See generally* GLENN, *supra* note 52, at 135–43 (on the philosophic and social contexts of the ever increasing receptivity in the Western legal traditions to change).

react to perceived problems.<sup>68</sup> But even before the development of legislatures, Western law revealed its tendency to use law to transform society. According to Berman, the Papal Revolution led to a process of reform in which the law in Western Europe was infused with Christian doctrine,<sup>69</sup> and the First Protestant or Lutheran Revolution in Germany taught that the ruling princes had the responsibility to promulgate positive law to ensure righteous conduct and the common weal.<sup>70</sup>

The concept of revolutionary law highlights some difficulties with the terminology of “transformative law.” The ancient Chinese debate already raised the question whether law can ever be used to change society if society is not already willing to change. I doubt that we shall ever have a definitive answer to that question, but it is clear that law is a possible lever of power for those seeking to change a society. For purposes of the transformative law thesis, I think it is only important that a substantial body of the public think that a given law could be an important tool for changing society. Perhaps more critical for the transformative law thesis is the problem of distinguishing transformative and nontransformative law. Strictly speaking, the incorporation of new values into law after society has adopted them is not really an illustration of transformative law. Law is transformative only when the enforcement of the law or the threat of enforcement has the power to change society because a substantial segment of society has not yet adopted the values of the law. But in the real world, it may often be difficult to distinguish these two cases. It is generally not clear when the revolution is over, but it usually has started before revolutionary law is adopted by statutes or court decisions.

It is relatively clear, I think, that the decision in *Brown v. Board of Education*,<sup>71</sup> for example, can be regarded as transformative law because there were many public schools and other facilities throughout the American South set up under the principle of “separate but equal,” which that case invalidated. But before that decision could be rendered by the Supreme Court, there was a substantial body of opinion, not only among human-rights activists, but also among American political and governmental leaders involved with U.S. foreign relations and military operations during the

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68. Cf. Shapiro, *Judicial Independence*, *supra* note 21, at 627 (in the nineteenth century the British Parliament reorganized itself to be capable of passing substantial new legislation, and the combination of the “Benthamite urge to create a new and rational body of law and the parliamentary capacity to do so led to an enormous body of law reform”).

69. BERMAN, *supra* note 34 *passim*.

70. HAROLD J. BERMAN, *LAW AND REVOLUTION*, II 6–7 (2003). Examples of transformative law are most obvious with respect to spiritual matters, such as church liturgy, marriage, schooling, moral discipline, and poor relief, each of which was regulated by ordinances promulgated by secular authority in Protestant German lands during the sixteenth century with a mixture of radical change and elements of continuity. *Id.* at 179–92.

71. 347 U.S. 483 (1954).

cold war that American law had to change on that point.<sup>72</sup> In the case of Title VII, it seems clear that activists for racial equality pushed for adoption of a statute in order to provide a legal basis to challenge what they saw as discrimination against racial minorities in the workplace.<sup>73</sup> In the case of some other legislation, it may be much less clear whether the law is adopted to change society or merely to codify existing practices, and some types of law, such as basic criminal and tort law concerning murder, probably reflect long-standing societal consensus in general.<sup>74</sup> However, even though there may be a number of unclear boundary cases, I believe there are enough clear examples of transformative law in the modern Western legal tradition to make the category useful.

In fact, I would argue that much of public law is transformative law. Certainly much of constitutional and administrative law qualifies. Written constitutions are generally adopted to establish a new order, rarely just to confirm an already existing political order. They often call into being—that is, they “constitute”—new political and legal bodies. Perhaps the catalogues of human rights often included in constitutional documents are not always meant to be transformative, but they may become transformative as a result of specific interpretations they are given by the courts. As a result, we come to view constitutions as potential sources of transformative law, and the transformative parts of constitutional law are obviously hugely important. Rules of administrative law are transformative in that they establish new administrative agencies, regulatory powers, and proceedings or procedural rules that did not exist before. Substantive regulatory statutes and administrative regulations are among the clearest types of transformative law because they typically impose new standards of behavior on the regulated parties.

While it may be correct that much of transformative law is public law, it would be incorrect to assume that private law cannot be. Legislative modification of private law rules is most clearly regulatory and hence transform-

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72. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2001); THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (2001).

73. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432 (1966). Title VII's inclusion of sex as a prohibited ground of discrimination provides an example of a legal rule that was passed even though it may not, by itself, have been supported by a legislative majority. It is clear that the amendment to add sex as a proscribed ground of discrimination was sponsored by an opponent of the bill's provisions on racial discrimination. *Id.* at 441–42. Perhaps he hoped by his amendment to scuttle the whole project. He was, in any event, unsuccessful. The amendment was adopted in the House with little debate and also provoked little debate in the Senate, aside from an amendment to ensure that the provisions of the bill would not nullify the Equal Pay Act. *Id.* at 441–42, 449–50. It is possible that the inclusion of sex was accepted by the legislative majority as part of the price of gaining the racial justice that was the focus of the Title VII debate. If that is true, Title VII would furnish an especially strong example of transformative law insofar as it bans discrimination on the grounds of sex.

74. Though the application of such law to certain cases, like the application of the crime of murder to abortion or euthanasia, may be quite controversial.

ative, but even courts may modify private law rules for expressly regulatory purposes. For example, when the New Jersey Supreme Court adopted the host liability rule,<sup>75</sup> making social hosts liable for serving alcohol to their guests who were already visibly drunk if they then drove their cars and caused an accident, the court said it was doing so in order to mitigate the huge damages that drunk driving inflicts on society. The majority clearly intended by its ruling to change the behavior of social hosts in a significant way. Similarly, in the case which led the French Court of Cassation to adopt a form of strict liability for automobile accidents under the French Civil Code, Procureur General Paul Matter explicitly argued that departure from the traditional fault principle was necessary to “adapt in a liberal, humane spirit the text [of the Civil Code] to the realities and requirements of modern life.”<sup>76</sup>

C. *The Link Between Transformative Law and Judicial Independence of Courts: Shapiro’s Model for the Legitimacy of Courts*

The link between transformative law and judicial independence from executive overreaching is based on Martin Shapiro’s<sup>77</sup> work on courts. In the 1970s and 1980s, Shapiro elaborated a model for exploring the issues of the legitimacy of courts in a comparative way. Although not designed for this purpose, his model provides a good basis for understanding how transformative law is capable of generating support for judicial independence from the executive branch. According to Shapiro’s theory, which I abbreviate here in order to focus on those parts of his argument which are relevant to mine, the basic sociopolitical logic of courts is that they have a triadic structure—two disputing parties and a neutral party acting as judge to resolve the dispute. This triad appeals to a universal sense of fairness. If the judge is neutral, each party has, at least in a formal sense, an equal chance to win. But the minute the judge decides for one side, the fairness of the triad is broken. Now the model looks like two ganging up against the one loser. Shapiro argues that one way of solving this problem is to have the disputing parties pick the judge, as they do in many arbitrations or mediations. It is harder for the loser to view the end-result of the litigation as a case of two ganging up against one if the loser helped pick the judge. Another way to prevent the triad from breaking down into a dyadic ganging up of two against one is to allow the judge to find compromise solutions that give something to each party. But legal rules are generally cast in binary,

75. *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984); *see also* *Scott v. Bradford*, 606 P.2d 552, 558 (Okla. 1979) (adopting rule for Oklahoma that informed consent standard requires physicians to disclose all material risks to patient).

76. Cour de cassation [Cass. ch. réuns.] [highest court of ordinary jurisdiction] Feb. 13, 1930, D.P. I 1930, 57, Ripert, S. Jur. I 1930, 121, Esmein, *translated in part in* ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 629–31 (2nd ed. 1977).

77. Shapiro is an eminent political scientist who has long taught on the Berkeley law faculty.

all-or-nothing terms: either the plaintiff has a right that should be vindicated by giving judgment for the plaintiff's whole claim, or he does not, and judgment has to be given for the defendant. The complexities of the way different legal rules intersect may permit the court to fashion a compromise result in some cases, but the whole logic of Western law is premised on binary logic. Official court systems substitute "office" for "consent"—that is, the litigants are not free to pick their judge but must accept the judge appointed by the governing regime to hear their case. Office can substitute for consent, but only if the judge is independent and neutral with respect to both parties. If the judge's neutrality is suspect, the triad breaks down into the illegitimate dyad, throwing the court's legitimacy into doubt. Governmental control over the courts is not problematic as long as the disputes resolved by the judge do not involve the government as an interested party. But when the government is interested in the outcome, it becomes important to show that the judge is not controlled by the government if the court is to maintain any legitimacy.<sup>78</sup>

In accordance with Shapiro's model, as the mix of legal cases coming before a given court begins to include more cases in which the government is clearly interested, it should become clearer that dispute resolution by the courts will only be considered legitimate if the judges enjoy some kind of protection from executive dominance. Thus it appears that as the executive's stake in cases before the courts increases, a culture that supports protecting judicial independence from executive branch control can be expected to grow in strength. My claim is that in contemporary democracies, much of transformative law is law in which the executive branch has an obvious interest, so that instances of transformative law tend to have the function of highlighting the injustice of executive branch control over the courts.

The point is easiest to see with respect to public law proceedings that may include transformative law because in many types of public law litigation, the government is formally a party. For example, the government is a party in all cases of judicial review of administrative action (suits for

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78. Shapiro, *Judicial Independence*, *supra* note 21, at 577–81. Although the explanation in his 1977 article is sufficient for purposes of this paper, Shapiro has set out a much fuller explanation of his theoretical model and its implication in SHAPIRO, *supra* note 17, at 1–64. In the fuller treatment, Shapiro explores further complicating features of courts that put further strain on the triadic model of a court. These features include the fact that courts engage in numerous administrative acts; that they can be seen as engaged in forms of social control that is based on notions of the public interest; that they are in effect dispensing a kind of public regulation, and cannot avoid making law; functions which thrust the courts inevitably into politics and dictate that political forces must take control of the courts. *Id.* at 20–32. His conclusion is that "courts remain problematical in the sense that considerable tension invariably exists between their fundamental claims to legitimacy and their actual operations." *Id.* at 37. Shapiro's conclusion is pessimistic and I do not mean to imply that he would necessarily agree with my thesis about the power of transformative law to shift the balance between political responsibility and independence of judges in the direction of greater independence.

nondamage remedies like injunctions against and declarations of invalidity of government action). Cases challenging the constitutionality of statutes may or may not involve the state as a formal party, but the executive branch is generally an interested party because judicial review of statutes on constitutional grounds tends to raise issues of high political importance, in which political leaders in both political branches, legislative and executive, cannot avoid being interested.

Other types of transformative law, including private law rules, also may not involve the government directly, but as in the case of judicial review of legislation to which the administration is not a formal party, the executive is likely to have strong interests in litigation involving such law because of the importance of the social policy at stake. Transformative law, law to change society, is by definition law that reflects social policy, and social policy is the stuff of politics. Litigation involving transformative law thus inevitably raises important political issues, so the executive cannot avoid being a concerned party. For example, a case brought by an individual against a corporate employer under the ADA for failure to make reasonable accommodations inevitably raises the general issue of how much society should burden individual employers in order to protect individuals with disabilities. The U.S. president can be expected to be quite interested in the general question, whether he or she favors business interests or workers or is merely interested in the global competitiveness of the U.S. economy.

But if transformative law is generally a kind of law in which the executive branch, headed by a major political leader, tends to have a clear interest, is it not true that the executive may have a clear interest in the application of certain types of nontransformative law, as well? For example, nontransformative criminal law, like the basic rules against murder or robbery, simply confirms social consensus that certain types of behavior must be punished. Nevertheless, in the person of the prosecutor, the executive is formally involved in every criminal case. Shapiro points out that the “weakening of the triad [his model of court legitimacy] is clearest in criminal law.”<sup>79</sup> But does the participation of the executive in every criminal prosecution tend to create political concern over executive control over the courts? As a general matter, I think not. Sadly, few outside the targets of such ordinary, nontransformative criminal law—some activists and scholars at most—are likely to be concerned about executive influence on the courts in these cases, and the targets and their allies are unlikely to constitute a politically active or influential class that can help in building support for judicial independence. However, if criminal law is perceived to be employed as a method of oppression, perhaps on racial or religious grounds, of a certain segment of the population, then the law is being used to transform

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79. SHAPIRO, *supra* note 17, at 27.

society, and if that segment includes politically active members, criminal prosecution can generate the dynamic in which I am interested.<sup>80</sup>

Shapiro uses the term “public regulation” to describe the law that invokes executive branch interests.<sup>81</sup> I think he means much the same thing as I mean by “transformative law.” I prefer my term chiefly because I think that public regulation is such a broad term that it could be taken to include nontransformative public law in which the executive branch really has no clear interest, but it might also be taken by some to exclude regulation that achieves its regulatory effect by shaping the rights of private parties against private parties, as in the case of the private rights of action under the anti-trust laws, for example, or the other examples of private law previously mentioned. Shapiro’s term is not necessarily inconsistent with the broader usage, but I believe that “transformative law” is less likely to be misunderstood in either of these ways.

This article thus focuses on transformative law because it has the potential to mobilize political support for judicial independence. I am not, however, arguing that the presence of transformative law will necessarily or quickly result in the adoption of institutional guarantees of judicial independence. By my account, Western legal systems have long been developing transformative law, yet, as section IV will show, at least for France and Great Britain, substantial institutional protections for the judges’ independence were only adopted recently. My argument is only that over time, the more transformative law a society adopts, the greater is the social support for meaningful levels of judicial independence from the executive, and as that support grows, it becomes more and more likely that the country will adopt some kind of protections to curb undue executive influence over the courts if the country remains democratic.

A more conventional thesis about this dynamic is that independent courts are promoted by the expansion of markets and the development of multiparty democracy.<sup>82</sup> The transformative law thesis is not necessarily

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80. Note, in this connection, Shapiro’s argument that the burglar subject to prosecution for burglary may deny or excuse his conduct in various ways, but he is unlikely to argue that there should not be a law against burglary, which is why I do not regard the law against burglary as transformative. “It is precisely because [the burglars] perceive the law to be legitimate and the judge obligated to enforce it that they know he is not a neutral third but a friend of the prosecution.” *Id.* My assumption is that, absent a strong element of politicization due to a perception that enforcement of such law amounts to group oppression on grounds like class, race, or religion, the burglars of the world normally stand before the criminal courts without many politically active friends. However, if criminal enforcement is politicized, as it arguably is in many countries, especially where there are strong cleavages along the lines of race or religion, then arguably criminal law is being applied in a transformative way to change the balance of power.

81. *Id.*

82. See, e.g., JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* 307, 394 (2001) (summarizing thought of Francis Nyalali, Tanzanian Chief Justice, 1976–2000); cf. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994) (realistic anticipation that party in power may lose next election is what keeps all parties in favor of independence of judges; better a neutral judiciary at all times than one controlled by

inconsistent with this conventional wisdom, but it offers a somewhat better explanation of the dynamic. The conventional thesis argues that with the growth of multiparty, competitive democracy, political leaders come to see that they need a neutral court to resolve election disputes and other matters concerning competitive politics in a fair way. Courts dominated by the political party controlling the executive are obviously unfair. Similarly, the argument is that as the market economy expands, business leaders see the need for neutral courts to resolve their disputes. The argument based on competitive elections is essentially a narrow version of the transformative law thesis because election law is a type of public law that is transformative in the same way that most regulatory law is—it establishes and enforces a set of rules that did not exist before the law in question was adopted, and its rules are clearly politically salient. The argument based on markets is overbroad by comparison with the transformative law thesis. It is clear enough why business leaders would be concerned about the fairness of executive-dominated courts handling disputes between the government and businesses, but most of those disputes will also generally involve some form of transformative law because these disputes have to do with law adopted to change business practices. To that extent the two explanations are essentially identical. But it is not clear why business leaders would be concerned about the fairness of executive-dominated courts in the case of commercial disputes among businesses or between businesses and consumers if the law concerned is not transformative. The transformative law thesis thus largely covers the same cases as the alternative one. It provides a clearer explanation of the dynamic involved than a thesis based on the development of the market economy would, but it is broader than the thesis about democracy and markets because it is not limited to commercial disputes or election law. The transformative thesis recognizes the way in which general regula-

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opponents when you are out of power). Strictly speaking, Ramseyer's thesis is about why politicians might abstain from interfering with the courts, not about why a segment of the electorate would favor independent courts, but presumably in a democracy the preferences of elected leaders and their supporters should be similar. Ramseyer's thesis is thus the electoral half of the more general conventional thesis that combines an explanation based on elections with a market-based explanation.

Landes and Posner advance a theory that is very close to the transformative thesis. They argue that interest groups in a democracy tend to favor an independent judiciary to enforce the legislative "deals" the interest groups are able to secure through legislation. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 879 (1975). While the transformative thesis does not use the terminology of legislative "deals," the two theories are similar in that both of them postulate that support for judicial independence from the executive comes from groups of voters who are concerned that the executive might use its power over judges to frustrate the intent of legislation about which they care. In Landes and Posner's theory, the legislation in question is legislation in which the interest groups were able to secure certain advantageous terms (the "deal"), and in the transformative thesis, the legislation is some kind of law adopted to transform some aspect of society. Since the legislation that can be the subject of legislative "deals" in the Landes and Posner theory is generally some kind of regulatory law, the two theories are essentially addressing the same kind of legislation.

tion, constitutional and administrative law, and even the development of tort law doctrines like the social host rule, the informed consent rule for medical care, or slander and defamation rules for elections may contribute to the dynamic favoring judicial independence.

The transformative thesis is not meant to be exclusive. There certainly are other sources of a dynamic that might also favor the development of a culture of judicial independence. Probably the most important of these is the pressure exerted on a country by foreign trade and investment. The argument is that a country desirous of obtaining substantial levels of foreign trade and investment is under pressure to provide independent courts to guarantee the foreign traders and investors a neutral forum for the resolution of trade and investment disputes. That mechanism could operate independently of the dynamic created by transformative law, and the fact that it might appear to be the chief factor leading a particular country to establish meaningful protections for their judges in certain circumstances would not show that the transformative thesis is false. It would only show that it may not be the only explanation. However, the need for neutral courts for international trade can be satisfied by special trade courts or arbitral bodies for international trade and may not necessarily lead to greater independence for the regular courts.<sup>83</sup> This mechanism therefore does not appear as likely to be useful to reformers, especially domestic reformers, seeking to increase judicial independence. Nor do other theories seem as promising a source of reform strategies as the transformative law thesis.<sup>84</sup>

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83. In modern China, the government has responded to the pressure of international trade by establishing a Chinese arbitral body for foreign trade disputes, China International Economic & Trade Arbitration Commission ("CIETAC"). China did so in part because of recognition that its regular judiciary was considered too likely to be influenced by provincial bureaucrats to favor Chinese interests over foreigners. JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* XIV (2004). Whether CIETAC has successfully established a more independent body for dispute resolution is not entirely clear. It has become the international arbitration institution with the largest caseload in the world, a factor which could indicate a degree of success but one that also could simply be attributed to the volume of foreign trade and investment involving China. In fact, since 1995, CIETAC has had a steadily declining caseload. *Id.* at 29–30. In any event, there does not appear to be any evidence that CIETAC has affected the continuing lack of independence that characterizes the regular Chinese judiciary. Xin, *supra* note 47, at 69–71.

More direct pressure may come from international agreements, of which the WTO is undoubtedly the strongest example. *See, e.g.,* Quang Nguyen, *The Organisation and Operation of Administrative Courts in Vietnam*, in *ASIA EXAMINED: PROCEEDINGS OF THE 15TH BIENNIAL CONFERENCE OF THE ASAA*, 2004, CANBERRA, AUSTRALIA 27 (Robert Cribb ed., 2004), available at <http://coombs.anu.edu.au/SpecialProj/ASAA/biennial-conference/2004/proceedings.html> (U.S.-Vietnamese Trade Agreement requires Vietnam to make its judges independent).

84. It has been argued, for example, that judicial independence is promoted by true separation of powers between the legislative and the executive branches and that it declines to the extent that the executive increases its control over the legislature. McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 108–109 (2006); Tiede, *supra* note 1, at 150–52. The collective of authors known as "McNollgast" have argued that the thesis fits the development in the United States very well and also fits data from Argentina, Mexico, and Chile. McNollgast, *supra*, at 126. It seems right in the sense that a president who is able to dominate the legislature is unlikely to be willing to be restricted by courts independent of his or her power. But

D. *Values Related to Transformative Law: Personalism and Equality*

Lawrence Rosen makes one other intriguing observation about the society in which Islamic law has traditionally been applied which I believe to be related to the absence of transformative law and which also may be relevant to significant parts of Latin American societies. The Arab<sup>85</sup> societies he has studied, Rosen says, are characterized by intense personalism.<sup>86</sup> The core of that idea is that personal qualities, or what in the West would be thought of as aspects of a person's character or psychological makeup, are for traditional Arab thought "aspects of social identity that mean something only as they cohere in a named individual. In every domain the attribution and assessment of others consists of a never-ending process of individuation."<sup>87</sup> The cultures may be worlds apart, but the Confucian insistence on li seems similar to the Arab form of personalism insofar as it requires dealing with each person differently, depending on that person's relationships, status, and rank.

The Arab insistence on "the individual as embodiment"<sup>88</sup> has consequences for the view of the self:

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the thesis also suggests that in true parliamentary systems, in which the executive often largely controls the legislative branch, judges should not have substantial levels of independence, a prediction at odds with what section IV(C) suggests to be the case in Great Britain after the most recent reforms. The recent strengthening of protections for judicial independence in France, *see infra* section IV(B), also provides a contrary example because the executive in France has even more control over the legislature than is the case in Great Britain. *See* John Reitz, *Political Economy and Separation of Powers*, 15 *TRANSNAT'L L. & CONTEMP. PROBS.* 579, 602–608 (2006).

Finally, I must mention Hiram Chodesh's creative suggestion that court systems may constitute a type of "emergent" system capable of organizing itself and even solving problems without any master plan or architect. Chodesh, *supra* note 2, at 591–94. Perhaps he only means to make a plea for the sharing of information and collaborative work on judicial reforms, but the analogy to emergent systems suggests a view that legal systems have the potential to work out reasonable solutions to their problems without any conscious, guiding force. Chodesh does not suggest any specific mechanism, but the transformative law thesis does. As governments increasingly adopt transformative law—and they tend to do so in order to deal with problems of industrial and post-industrial society—the political support for curbing unreasonable degrees of executive control over courts ought to increase so that it becomes more and more likely that the country will adopt and enforce such curbs so long as it remains a democracy and does not concentrate power unduly in the executive. I am not sure that such a process is inevitable under these conditions; I maintain only that it is likely.

85. Rosen's observations are based on his work in Morocco, which contains a large and dominant Arab population, but also a large Berber population. He uses the term "Arab" in discussing personalism, ROSEN, *supra* note 11, at 56–72, but of course the term is not coterminous with all Muslims. My purposes are served by accepting the validity of his description of the qadi courts he observed in Morocco. I leave it to Middle Eastern experts to debate the validity of his observations for other places where Islamic law is applied.

86. *See generally* ROSEN, *supra* note 11, at 56–72 (chapter entitled "Constructing Institutions in a Political Culture of Personalism"); ROSEN, *ANTHROPOLOGY OF JUSTICE*, *supra* note 20, at 54, 69, 79.

87. ROSEN, *ANTHROPOLOGY OF JUSTICE*, *supra* note 20, at 54. So Rosen says, quoting an unnamed writer, "for the Arabs history is biography." *Id.*

88. *Id.*

[I]n Arab culture the self is not divisible as in the West, and . . . as a result one cannot speak of a series of roles which somehow stand either separate from that which is properly called the self or which can be taken on, as masks of the self, allowing the performance of tasks that may contradict other aspects of one's overall identity.<sup>89</sup>

For that reason, “[i]nstitutions are attributes of the person, not the other way around; they are the garments one may wear, not as part of a distinguishable role or persona, but as part of one's overall attributes.”<sup>90</sup> Institutions in the Arab world thus cannot have the same impersonal sense that they have in the West, and as one symbol of this difference, Islamic law “has no concept of the legal person.”<sup>91</sup>

Personalism affects the whole judicial process, as Rosen illustrates with a story. When he tells his legally knowledgeable informants in Morocco about cases in the United States in which Supreme Court justices indicated in their opinions that they were ruling in the case in accordance with what they thought the law required even though their personal feelings would lead them to a contrary result, the Moroccan informants protested that he must have left out part of the story that would show why they ruled as they did. Rosen's informants simply could not accept that an officeholder like a judge could compartmentalize his thinking to act in accordance with the dictates of his office even if contrary to his personal sense of justice.<sup>92</sup>

Personalism also makes the whole trial process in Islamic courts quite different from that in Western courts. It has been described as a “law-finding trial[,] . . . one in which all cases may be seen as different and particular, and for each of which the precisely appropriate law must be carefully sought out. The law of each case is thus different from the law of every other case . . . .”<sup>93</sup> Rosen explains that the qadi's freedom to consult different law sources and stitch together a specific law for the specific case at bar results from the view that the trial is a “quest for the individuated.”<sup>94</sup> In deciding the case, “the qadi articulates the outer limits of the requisite and forbidden [for example, the *hudud* crimes] and, beyond that, seeks not the

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89. ROSEN, *supra* note 11, at 67–68.

90. *Id.* at 71.

91. *Id.* at 64.

92. *Id.* at 56–57, 71.

93. GLENN, *supra* note 52, at 163. It should be noted that Islamic law nevertheless does have a concept of equal process in the application of the law. Rosen reports that his juristic informants were not troubled by the fact that the “law-finding trial” of Islamic law may result in different judgments for two different people with similar cases. First, they said, “since no two individuals are exactly the same no two cases are precisely the same.” ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 74. More importantly, they argued, “if the mode of analysis and fact-finding is the same in each case although different judges may reach different conclusions, the results are equivalent because the process was identical.” *Id.* at 74–75. According to this account, Islamic law seeks justice in equal process to find the legal rules, not necessarily in equal rules for every party.

94. ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 54.

greater elaboration of governing precepts but, through the constantly individuated direction of the local, the lines of constancy and custom by means of which chaos may be avoided.”<sup>95</sup> The goal of Islamic law is not doctrinal refinement, but the application of the relevant local standards of everyday life.<sup>96</sup>

Such a view of the judicial process seems inconsistent with the concept of transformative law. I say this not to criticize the Islamic law and qadi courts described by Rosen, but to appreciate the distinctiveness of Western law. It is difficult to imagine that law meant to transform society could be applied in a way that results in different law for different people, based on the parties’ relationships that are not made relevant by the governing law. When law is applied in that manner, it is difficult to maintain that law is determining the outcome. The difference may only be a matter of degree since one may suspect that extralegal factors influence judicial decisions in any legal system, but at least in the modern Western legal systems, the ideal directs the judge to discount extralegal factors and apply the same law to all parties. The Islamic approach sanctioning the creation of unique law for

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95. *Id.* at 55.

96. *Id.* at 55–56. This method of finding unique law for each case appears to be related to Rosen’s argument that even customary law in Muslim legal systems illustrates the personalistic nature of power in these societies. ROSEN, *supra* note 11, at 65. As a consequence of this attitude toward applying law in specific cases, the Islamic judges do not appear to have had any sense they could or should “develop” the law and therefore do not appear to have seen themselves as using law to transform society. Rosen says that Islamic judges “articulated general guidelines for particular issues, but instead of developing a logically consistent body of doctrine allowed local circumstance and individual instance to supply particular meaning and regularity to the concept in the locale under their jurisdiction.” ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 60. As a result, “Islamic law judges do not so much develop doctrine or encourage formalism as they oversee a process that is given specific content by local practice and individual negotiation.” *Id.* at 67.

Once again, I am indebted to Professor Scheppele for pointing out to me how doctrinal refinement in Islamic law could have come, not from the qadi, but from the scholar (the mufti). Rosen’s scholarship does, however, purport to canvass scholarly writings, as well. Rosen seeks to defend the whole body of Islamic law from the charge that some Westerners have made based on the apparent lack of doctrinal refinement in Islamic legal writing. “Islamic law is not undeveloped,” Rosen writes, because it lacks the Western preoccupation with developing “logically integrated propositions.” ROSEN, ANTHROPOLOGY OF JUSTICE, *supra* note 20, at 56. Rather, “in Islamic law the concepts are measured against those cultural principles that allow people to return to the negotiation of their own arrangements. . . . [I]t seeks consistency with common-sense assumptions about humanity . . . [and] finds its touchstone not in the perfecting of doctrine but in the standards of everyday life.” *Id.* In any event, as explained in note 97, *infra*, the dynamic created by transformative law depends on law enforcement by the judge-figure (the qadi), so whatever doctrinal refinement may have come from the scholarly writings does not detract from the argument that the qadi’s method of law-finding makes transformative law a poor fit with the traditional Islamic law system.

It is striking how similar the process of applying law to a case and the concepts of personhood are in the traditional legal system of Tibet. See REBECCA REDWOOD FRENCH, THE GOLDEN YOKE 161 (2d ed. 2002) (“Western idea of the ‘individual’ as a hollow shell” or mask is incomprehensible to a Tibetan; “the unique conjunction of circumstances, elements, and karmic seeds . . . constitutes a human individual . . . no act is actually *like* another for a Tibetan in the sense that it should be treated in exactly the same way.”).

each case apparently satisfies a deeply felt need for a highly personalist approach to human relations. But law cannot be expected to change society unless it can be applied, as we expect it to be applied in the West, with a logical consistency that is unaffected by who the parties are except to the extent that their relevant characteristics are specified in the law itself. For this reason, I believe that Rosen's observations about the personalism of the culture in which Moroccan qadi courts operate confirms my understanding of his work as indicating that the transformative view of law played little or no role in that culture.<sup>97</sup>

Like the comparison with traditional Chinese law, the comparison of modern Western law with the form of the traditional Islamic legal system studied by Rosen thus highlights the importance for Western legal systems of a value we may take for granted in Europe and the United States but that is, I believe, tied to the commitment to transformative law. One of the morally attractive claims at the heart of both Confucian political morality and traditional Islamic law applied in the personalistic way described by Rosen is the claim to treat each individual as an individual, not as a cipher or a fungible unit characterized solely by whatever features are called out in the applicable law. By contrast, we can appreciate a certain willingness to treat humans in an "objective" or "abstract" or "impersonal" fashion in our Western legal systems. However, in the West, this impersonal approach is seen more positively, as necessary for achieving the ideal of applying the law equally to all persons who come within its terms.<sup>98</sup> The willingness or ability to treat people in an impersonal way is thus linked to one aspect of the ideal of equality.

The morally problematic side of Confucian political morality or, indeed, any system that relies primarily on politics, I have argued in section II(B), is a lack of technical controls to ensure the minimum degree of equal treatment inherent in the Western idea of law.<sup>99</sup> I believe that similar risks inhere in the personalistic way that Islamic law is applied. If the law can be different for every case, then it is easy for legal results to be more favorable for those who carry advantages of family or clan ties or status or rank. Islamic law may not be as frankly nonegalitarian as Confucian law codes specifying different penalties for different classes. In fact, in some impor-

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97. In view of the independent role the mufti or scholar played in articulating the law, *see supra* notes 53 and 96, one might argue that transformative law could have come from that source, but I find no suggestion that this was so. In any event, the division of authority that left the qadi in charge of deciding concrete cases, based on the qadi's fact finding and his stitching together the law for the case, and the mufti in charge of determining rules of law in the abstract renders the mufti even less able than the qadi to assure the enforcement of transformative rules of law. In light of that division of function, it is not surprising that we find little or no mention of transformative law in the Islamic legal tradition.

98. The tension between personalism and impersonalism surfaces within Western law as well, of course, as shown by the controversy over criminal sentencing guidelines.

99. *See supra* text accompanying notes 45–47.

tant ways Islamic law was quite egalitarian.<sup>100</sup> But like Confucian-dominated Chinese traditional society with its highly personalistic application of *li*, Islamic law appears to have been applied in a strongly personalistic way that made relationships and status and rank very important, arguably at least as important as the terms of law itself. Law that includes such strong forms of personalism cannot serve very effectively as a tool to transform society, especially in ways that seek to challenge the substantial social inequalities built into personalistic systems. Law in societies of personalism appears to be thought of as a tool that should conform to society more than as a tool for making society conform to it.

*E. The Apparent Weakness of Belief in Transformative Law and Values Associated with That View of Law in Latin America*

One might suppose that a belief in transformative law would permeate Latin American societies as I claim it does U.S. and Western European societies. After all, Latin America is part of the West and heir to the slow, steady development of transformative law in Western legal history to which I have pointed in section III(B). Latin America has elected legislatures, codes of law, and public law including constitutional and administrative law. In fact, Latin American law includes substantial examples of transformative law, and I will suggest in section V(B) some strategies for working with that kind of law to promote greater judicial independence. But there are grounds for suspecting that confidence in the transformative power of law may be weak in Latin America. Keith Rosenn has described a culture of legalism in Brazil, in which laws are passed in great volume to solve specific problems but without any serious efforts to ensure enforcement so that the law remains unenforced.<sup>101</sup> Such a culture would obviously weaken any belief in transformative law. There are also grounds to believe that forms of personalism remain strong in Latin America and may also weaken cultural support for transformative law.

One might suppose that the ability to deal with people impersonally and the ideal that law should be applied in an impersonal manner are so widely shared in the modern world that personalistic views of law like those Rosen describes are simply not relevant to modern society in Latin America. One might think that globalization and urbanization, both features certainly affecting Latin America, would have effectively reduced personalism in Latin American society to the point of unimportance. However, we must remember that Rosen's description of Arab personalism is based on his observations of contemporary sharia courts in Morocco. Personalism is

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100. See, e.g., Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785, 816 (2005) ("Islam's relatively egalitarian inheritance system" required division of estates among all the heirs instead of the system of primogeniture that was more typical of the medieval Western tradition.).

101. Rosenn, *Brazil's Legal Culture*, *supra* note 14, at 19.

not a relic of the past and is undoubtedly a feature of all societies to some extent. In its most basic form, it simply represents the view that relationships, status, and rank should be taken into account in dealing with other people. A form of personalism is found wherever ties of family, clan, tribe, or ethnic group can be expected to be very important in people's social dealings, and that may include most, if not all, human society. But forms of personalism are inconsistent with a culture of transformative law when they are strong enough that one cannot generally expect law to be applied according to its terms if it conflicts with the treatment that one party owes another party or the judge owes the parties based on personal or family connections, or rank or status.

There are reasons to think that personalism is still strong in Latin America. After the revolutions against Spain, the weakness of the newly independent governments led to civil war and *caudillismo*. As Mark Ungar explains, "[E]verywhere, provincial caudillos carved out personalistic regimes with separate armies and governments."<sup>102</sup> Other authors have mentioned the continued existence in at least some parts of Latin America of this form of personalism (also called "clientelism") in which a leader (the *caudillo* or *patrão*) gives his followers protection and welfare in return for loyalty and service.<sup>103</sup> Like other forms of personalism, such a form of social and political organization makes certain people more important than others based on extralegal factors of relationship or status in a way that seems inconsistent with a view of law as transformative. It could interfere with the kind of impersonal application of the law that is required for transformative law and therefore appears to be an important aspect of the relevant culture that reformers need to take into account.

#### IV. HISTORICAL SKETCHES OF THE DEVELOPMENT OF STRUCTURAL GUARANTEES FOR JUDICIAL INDEPENDENCE IN THE UNITED STATES, FRANCE, AND GREAT BRITAIN

In order to put some flesh of actual facts on the bones of theory, this section reviews the history of the adoption of structural protections for judicial independence in three Western countries, the United States, France, and Great Britain. The three countries are not presented as ideal models. They

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102. UNGAR, *supra* note 3, at 23.

103. See, e.g., LEWIS, *supra* note 40, at 14–15, 27–29, 246 (describing history and dynamic of caudillo strongmen in Latin America; in modern era of mass politics, caudillo becomes charismatic party leader benefitting his following with renewable resources of state, jobs, contracts, welfare, and graft); JOHN PEELER, BUILDING DEMOCRACY IN LATIN AMERICA 105–37, 200 (1998) (explaining modern forms of *caudillismo* in authoritarian regimes in Paraguay, Mexico, and Cuba; continuing power of clientelism in age of democracy); see also ROBERT L. GILMORE, CAUDILLISMO AND MILITARISM IN VENEZUELA, 1810–1910, 57–68 (1964) (tracing how caudillismo evolved into a more despotic presidential form in Venezuela); cf. Rosenn, *Brazil's Legal Culture*, *supra* note 14, at 14–15, 17–19 (discussing *personalismo*, by which he means "a strong sense of loyalty and obligation towards family and friends" and "the *patrão* (patron) complex of traditional Brazil").

are simply three concrete examples of Western countries that have by now adopted significant forms of institutional protections for its judges.

This history is reviewed here primarily to show the striking temporal correspondence, at least for these three countries, between adoption of structural guarantees for judicial independence and judicial review of legislation, which I have argued to be an especially important source of transformative law. This correspondence arguably provides support for the transformative law thesis. The history also illustrates several points from the discussion in section II concerning the tension between politics and law at the heart of the rule of law ideology. First, at least for France and Great Britain, the adoption of structural protections for judges is surprisingly recent,<sup>104</sup> so even in the West politics have long trumped judicial independence to a considerable extent. Second, the actual structural protections that have been adopted have tended to leave room for some political influence in the selection of judges, thus confirming the conclusion in section II that the rule of law has to involve a balance between judicial independence and political oversight or influence. Third, much of this history, especially the more recent history, shows a concern primarily for executive dominance, which section II argued to be the most important counterweight or threat to judicial independence in modern democracies. After a subsection tracing the history for each of these countries, a concluding subsection will discuss each of these points.

#### A. *The United States*

The real beginning of institutional design to assure reasonable judicial independence from both executive and legislative control took place in the drafting of the U.S. federal constitution in the late 1780s. Control over the judiciary had actually long been an issue in the English-speaking world. One of the claims over which the Stuart kings of England clashed with Parliament concerned their claim to dismiss British judges whenever they pleased.<sup>105</sup> By the Act of Settlement in 1701 (effective in 1714), Parliament abolished the British king's right to dismiss judges but arrogated that power

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104. I confess to being surprised when I researched this history, and I am apparently not alone. See Landes & Posner, *supra* note 82, at 876 (arguing that Article III of the U.S. Constitution provides substantial independence to federal judges and then saying, “[t]o a lesser degree, the same thing may be said of . . . judges in many other countries, and, for that matter, of judges at all levels, in America and elsewhere, long before Article III was conceived”). Section IV(A) below shows that Article III was really the first meaningful set of institutional protections against political control over the judiciary.

105. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 51 (7th ed. 1998); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 *LAW & CONTEMP. PROBS.* 108, 110–11 (1970); MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 17–18 (1988); Shapiro, *Judicial Independence*, *supra* note 21, at 620–21. More than other royal families in British history, the Stuarts asserted claims to absolute power.

to itself, thus exchanging one judicial overlord for another.<sup>106</sup> The British king continued, however, to assert his right to discharge colonial judges at his pleasure, and the king's tampering with the courts became one of the particular grievances pressed by the colonists against the Crown at the time of the American Revolution.<sup>107</sup>

The U.S. Constitution was drafted on the heels of that history, and since its entry into force in 1789 and the creation of the lower federal judiciary in the same year, the U.S. Constitution has provided the institutional protections that U.S. federal judges still enjoy today. U.S. federal judges must be selected through a system of checks and balances in which the president nominates, but the senate must approve by a majority.<sup>108</sup> The judges may not be discharged except by impeachment for serious misbehavior, and their pay may not be reduced during their time in office.<sup>109</sup> These institutional provisions do not eliminate political influence. They use the system of checks and balances to let executive and legislative power check each other in the nomination of judges. But they also give the judges, once in office, the very substantial protection of lifetime tenure and security of pay. Of course, federal judges are subject to impeachment, but impeachment has turned out to be a very blunt instrument of political control because it is so difficult to use.<sup>110</sup>

While it may not be certain that the U.S. creation of institutional guarantees of judicial independence occurred in express contemplation of the

106. Ervin, *supra* note 105, at 111–12; Shapiro, *Judicial Independence*, *supra* note 21, at 620–22. By rules which did not take effect until 1760, judges held their office *quamdiu se bene gesserit* (during good behavior), but they also remained subject to removal from office by impeachment or a joint address of the houses of Parliament. Ervin, *supra* note 105, at 111–12.

107. VOLCANSEK & LAFON, *supra* note 105, at 19; Ervin, *supra* note 105, at 112.

108. Article II, Section 2, Clause 2 states in relevant part that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” Lower federal court judges are not literally protected in this manner by the U.S. Constitution, but in fact they are also appointed in this manner. ABRAHAM, *supra* note 105, at 21.

109. Article III, Section 1 of the U.S. Constitution reads:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Impeachment Clause of the U.S. Constitution, Article II, Section 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”), does not literally apply to Article III judges, but the phrase “during good Behaviour” in Article III, Section 1, is taken to refer to the same mechanism. VAN-HOA TO, JUDICIAL INDEPENDENCE 242–46 (2006).

110. To remove a federal judge requires impeachment by the House and conviction by two-thirds of the Senate. *See* U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6. It is “a very arduous process, both procedurally and substantively.” TO, *supra* note 109, at 244. It is so arduous, in fact, that since 1789, only thirteen of the forty-seven impeachment cases opened against federal judges have proceeded to the Senate for trial, and only seven of those cases have resulted in a conviction. *Id.*; accord ABRAHAM, *supra* note 105, at 42–51.

introduction of judicial review of legislation, *Marbury v. Madison*<sup>111</sup> was decided only fourteen years after the Constitution entered into force, and already prior to and during the process of drafting and ratifying the Constitution, some state courts had held state legislation invalid on the grounds of violation of the state constitution.<sup>112</sup> It seems fair to say that the idea of judicial review of legislation was “in the air” at the time the U.S. Constitution adopted very substantial structural guarantees of judicial independence.

The federal system of structural guarantees of judicial independence has not been changed since 1789. But in the Jacksonian era’s renewed emphasis on popular democracy, the states were swept by enthusiasm for elective methods of judicial selection, and despite continued experimentation at the state level, we can say as a generalization that the states today have various forms of popular election for fixed terms although a few states use purely appointive systems for judicial selection.<sup>113</sup> The most popular system of state judicial appointment has been a combination of appointive and electoral systems known as the Missouri Plan. Under this system, the state governor appoints a judge from a list drawn up by a nonpartisan nominating commission composed of representatives from the bench, bar, and public, and after a short initial term, that judge then has to be confirmed in an unopposed election for a full term of office and any subsequent terms of reelection.<sup>114</sup> The states have thus also shown great attention to the issue of structural ways of protecting judges from control by either the executive or the legislature, but they have chosen rather different methods from those of the federal constitution.

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111. 5 U.S. (1 Cranch) 137 (1803).

112. Volcansek and Lafon mention without citation *Trevett v. Weeden* in Rhode Island in 1786 and *Bayard v. Singleton* in North Carolina in 1787. VOLCANSEK & LAFON, *supra* note 105, at 24–25. For the *Bayard* case citation, see *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (N.C. 1787). For the *Trevett* case, see JAMES M. VARNUM, *THE CASE TREVETT AGAINST WEEDEN (1787)* (pamphlet containing all the main documents and speeches in connection with the case as well as deliberations of the Rhode Island legislature considering whether to impeach the judges for refusing to enforce the statute), document available in Gale Eighteenth Century Collections Online, Gale Document No. CW123874424. See also JEFFERSON POWELL, *LANGUAGES OF POWER* 72–101 (1991) (section of sourcebook on early American constitutional history devoted to the emergence and development of judicial review, mentioning arguments for judicial review asserted in vain in Massachusetts courts as early as 1761; an example of judges in Virginia in 1788 asserting the power to refuse to enforce a statute they deemed unconstitutional; several cases after adoption of the Constitution but prior to *Marbury v. Madison*; and commentaries by James Kent). Powell’s summary is that, while the constitutional debates at the Philadelphia convention “did not pay close attention to the question of judicial review, for the most part . . . it seems fair to assert that supporters and opponents alike assumed that some form of it would exist.” *Id.* at 72.

113. VOLCANSEK & LAFON, *supra* note 105, at 76. “In fact, eighty-six percent of American judges run for election and state courts where judges sit for election hear the majority of all litigation in the United States.” Tiede, *supra* note 1, at 140 (footnotes omitted).

114. VOLCANSEK & LAFON, *supra* note 105, at 135–40.

### B. France

The history of judges in France starts with a cautionary example of the dangers of judges subject to no political control. The French kings, desperate to raise funds, created a rather extreme form of judicial independence through the system of venality or sale of judicial office,<sup>115</sup> a development that is surely ironic in view of the French royal claim to absolute power. The system of venality gave the French judges of the *ancien régime* an extraordinary level of independence, and may well have contributed to the degree to which the highest courts were willing to confront the king through their power to make regulations for their territories and to refuse to register royal edicts and ordinances which they thought against the public good or fundamental law. In the end, the courts came to be viewed as obstructive servants of the *ancien régime*, and a chief enemy of the revolution. The legacy was postrevolutionary suspicion of the judges.<sup>116</sup>

Although the democratic fervor of the French revolutionaries led them to adopt election of judges immediately after the fall of the *ancien régime*, the pattern of executive appointment of judges by political leaders began to assert itself during the *Directoire*. In the constitution of 1799, Napoleon assigned himself, as first consul, the task of appointing judges, originally from lists of notables.<sup>117</sup> “Judges, as a result, were men of the executive branch.”<sup>118</sup> Thus, shortly after the French Revolution, the pattern was established of executive dominance in the recruitment of the judiciary that was to become characteristic for France.<sup>119</sup>

The history of the French judiciary in the nineteenth and twentieth centuries was one of ever-increasing bureaucratization, with both its positive and negative effects.<sup>120</sup> “As the modern magistrature was organized,

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115. In 1467, King Louis XI affirmed that judges who had purchased their office could not be removed, thereby giving the judges the guarantee of irremovability during their tenure. Marie Seong-Hak Kim, “*Gouvernement des Juges*” ou “*Juges du Gouvernement*”? *The Revolutionary Traditions and Judicial Independence in France*, 26 KOREAN J. INT’L & COMP. L. 1, 8 (1998). *But see* VOLCANSEK & LAFON, *supra* note 105, at 44 (fixing the date at 1522). In 1604, that security in office was extended by recognition that the purchased office was hereditary. *Id.*

116. Kim, *supra* note 115, at 9–10. As Kim says:

Throughout the eighteenth century, the *parlements* [the chief French courts] consistently refused to register those royal enactments of which they disapproved. The judges regarded themselves as guardians of the laws of France, with a duty and a right to supervise the legislative process. They claimed to represent the national interest against authoritarian government. The inevitable consequence of the courts’ consistent interference in political matters was, however, that they increasingly became obstructive, preventing any reforms . . . which the government desperately needed to implement to save the monarchy on the eve of the Revolution.

*Id.* at 9.

117. VOLCANSEK & LAFON, *supra* note 105, at 59, 66–69, 100–01.

118. *Id.* at 101.

119. “The principles affirmed throughout the nineteenth and twentieth centuries recognized clearly that the executive power was master in recruiting the judiciary.” *Id.* at 103.

120. Unlike the common law pattern of recruitment of judges from the ranks of experienced lawyers, Napoleon wanted to bring young men into the judiciary so they could be trained. *Id.* at

common practice was that a judge stayed in office for his lifetime.”<sup>121</sup> The principle of irremovability was discussed, but it did not give French judges much of a sense of security in office. Rather, all the way into World War II, the judicial ranks were regularly subject to purges on political grounds after each change of regime (of which there were many in France in the nineteenth and twentieth centuries).<sup>122</sup> Moreover, judges were subject to disciplinary proceedings by the executive.<sup>123</sup> The judges were subject to an “obligation of reserve,” a term which came to mean not only that the judges were forbidden to adopt a position contrary to that of the government, but also that they could be disciplined on this basis. “Confronted by these two principles, the judges lost all illusions of independence.”<sup>124</sup>

The situation did not change for the judges until the inauguration of the Fifth Republic of France in 1958, which is also when France first adopted a form of judicial review of legislation. The 1958 Constitution adopted a system of judicial review of legislation in the form of a Constitutional Council.<sup>125</sup> Until the reforms of 2008, judicial review was restricted to bills before they were signed into law by the president. Despite the formal limitation, this French style of judicial review turned out to play a very significant role in the political life of the country starting in the 1970s.<sup>126</sup>

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106. But younger judges meant greater interest in subsequent promotions, and the judiciary eager for promotions was a judiciary subject to influence by the executive that held the power of promotion. Competitive examinations were first proposed in 1835 but not actually introduced until 1875, but after 1878, government ministers halted the exams because they saw that the exams were limiting their prerogatives to confer judicial appointments. An examination system was successfully instituted by decrees in 1906 and 1908. *Id.* at 109–10; see also Doris M. Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 176, 183 (Kate Malleson & Peter H. Russell eds., 2006).

121. VOLCANSEK & LAFON, *supra* note 105, at 115.

122. Volcansek and Lafon mention purges after regime changes in 1814, 1830, 1848, 1852, 1871, and 1940. But there were also purges of the judiciary “even when a new orientation was given to a regime, as in 1807, 1810, 1883, and 1941.” *Id.* at 110. These authors also mention two instances of a regime purging its own judges, first in 1807 and 1810 when Napoleon eliminated judges with revolutionary backgrounds in order to appeal to the old aristocracy, and again in 1941 when the Vichy government dismissed Jewish judges. *Id.* at 121.

123. In 1802, the Minister of Justice was given the power to preside over a disciplinary tribunal which could suspend a judge and call him to account for his attitudes. *Id.* at 117.

124. *Id.* at 118.

125. F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 *AM. J. COMP. L.* 89, 90 (1988). It is obligatory to note that the Constitutional Council was deliberately established as a “non-court” so that the French could maintain their principle of parliamentary supremacy. The Council is quite different from the regular courts. Nevertheless, it is now generally recognized that the Council functions as a type of constitutional court. TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* 74–76 (2003).

126. Two events greatly expanded the Council’s power. In 1971, in a freedom of association case, the Council read into the Preamble of the 1958 Constitution all the civil liberties and human rights in the 1789 Declaration of the Rights of Man and the Preamble of the Constitution of the Fourth Republic, thus greatly expanding the potential for French constitutional law to include transformative law affecting human rights. In 1974, a technical amendment to the standing rules made it possible for the political opposition to refer a bill to the Council as long as they could

Reforms in 2008 promise to make constitutional review even more important in France by permitting the regular and administrative courts to refer issues of constitutionality to the Constitutional Council from litigation pending before them.<sup>127</sup>

The design of the Constitutional Council shows concern for the independence of the constitutional judges. France chose an explicitly political way of achieving the right balance between political influence and judicial independence and, with regard to political influence, between executive and legislative branch influence. The Council is composed of nine members and they need not have legal credentials or experience. In fact, they are appointed by politicians and tend to be politicians, themselves. Of the nine members, three are appointed by the president of the republic, three by the president of the lower house, and three by the president of the upper house of the legislature, and the terms are staggered so that a third of the Council is replaced every three years, one by the chief executive power and two by legislative powers. Independence is secured after appointment by limiting each member of the Council to one nonrenewable nine-year term.<sup>128</sup> It has been pointed out that with two-thirds of the membership changing every six years, this is a system that is designed to keep the constitutional judges closely in step with major political movements in the country.<sup>129</sup>

In the same time period during which France was adopting judicial review, it was also adopting for the first time a series of institutional ways of protecting its regular judges from executive branch control. Ordinance no. 58-1270 of December 22, 1958, provided lifetime tenure and further specified that no judge may be transferred or promoted without his or her consent.<sup>130</sup> Perhaps most importantly, the ordinance also established a judicial training center, today known as the *Ecole nationale de la magistrature* (ENM). Admission to ENM is by competitive exam, all students pass the twenty-eight-month training program though grades play a role in determining what kind of judicial appointments are given, and ENM graduates provide most of the appointments to both the judiciary and the ranks of the prosecutors. This system of appointment after competitive examinations sharply limits the scope for executive influence in the process of making initial appointments.<sup>131</sup>

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muster 60 votes in either the Assembly or the Senate, thus greatly expanding the ease with which bills could be challenged in the Council. Morton, *supra* note 125, at 90–91.

127. Alec Stone Sweet, *The Constitutional Council and the Transformation of the Republic*, in CAHIERS DU CONSEIL CONSTITUTIONNEL (forthcoming 2008), available at [http://works.bepress.com/alec\\_stone\\_sweet/23](http://works.bepress.com/alec_stone_sweet/23).

128. To, *supra* note 109, at 309; Provine & Garapon, *supra* note 120, at 180–82.

129. Morton, *supra* note 125, at 98–101.

130. To, *supra* note 109, at 123.

131. VOLCANSEK & LAFON, *supra* note 105, at 129–31; Provine & Garapon, *supra* note 120, at 183–84.

Protection from executive dominance in that process is, however, not as strong a guarantor of judicial independence in France as it is in the United States because, unlike the common law pattern of recruitment of judges from the more senior ranks of the practicing bar, the French pattern developed in the course of the nineteenth century into a career judiciary. A desire to be promoted exposes a judge to repeated appointment proceedings, which give the appointing power—typically the executive in the career judiciaries of the civil law—repeated opportunities to punish the judge for earlier decisions the appointing power does not like by denying the request for a promotion. The ambitious judge thus repeatedly comes under pressure to conform to the legal views of the executive branch. For that reason, in a career judiciary, like that of France, limitations on executive influence over judicial promotions are vitally important.

In the Fifth Republic, executive power over judicial appointment was further reduced by the *Conseil supérieur de la magistrature* (CSM), a collegial body governing the magistracy, which in France includes both the regular judges and all prosecutors. The CSM has the power to make nominations to the president of the republic with respect to appointment of the highest judicial offices in the regular court system. Even though the CSM only nominates the highest judges, its nominations are in effect determinative because the president has no information upon which to disagree. Prior to 1993, the president might have been able to control the CSM nominations indirectly through his power to appoint the members of the CSM, but constitutional reforms in 1993 diminished his power substantially.<sup>132</sup> Opinion appears nevertheless divided as to whether the appointment of these most important judicial positions is effectively controlled by or insulated from the executive power.<sup>133</sup> At any rate, in the 1993 reforms, the number of highest judicial offices in effect determined by CSM nomination was expanded to cover more judges so that today approximately the top four hundred judges are covered.<sup>134</sup>

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132. Kim, *supra* note 115, at 30–31. Prior to 1993, the President of the Republic chose all the members of the CSM. By reforms in 1993, the President's power was reduced to choosing one member. For descriptions of the complicated way in which the rest of the membership is chosen (the specific courts from which certain members must be selected and the other nonjudicial groups who are represented), see To, *supra* note 109, at 327; Kim, *supra* note 115, at 31 n.91. The President of the Republic and the Minister of Justice preside at the meetings, and there are ten other members. *Id.*

133. The President's participation is said to be a formality only, and the President and Minister of Justice can easily be outvoted by the other members. To, *supra* note 109, at 327, 342, 344; Kim, *supra* note 115, at 33–34; Provine & Garapon, *supra* note 120, at 184–85. Provine and Garapon say very confidently that the appointment process for the senior judges is “wholly insulated from political oversight.” *Id.* at 185.

134. Prior to the 1993 reforms, that appointment power included the *Cour de cassation* (the supreme court for the regular court system) and first presidents of the courts of appeals. As a result of the reforms, that appointment power was extended to include the presidents of the most important regular first instance courts (*tribunaux de grande instance*). Kim, *supra* note 115, at 33; Provine & Garapon, *supra* note 120, at 185.

For all other regular judges and prosecutors (over six thousand positions<sup>135</sup>), it is the minister of justice who makes the determinative nominations, and the CSM can make only a recommendation on each candidate, which the minister of justice is free to ignore.<sup>136</sup> The promotion process for the highest judges may thus exclude executive branch influence to a large extent, but the promotion process for the great mass of lower judges does not,<sup>137</sup> and in a career bureaucracy like the French judiciary, one does not come to be considered for the highest posts without having advanced up the ranks from the lower judiciary, where the influence of the minister of justice is strong. Marie Seong-Hak Kim reports that “the political persuasion of an individual judge is often an important factor in determining the more or less rapid advancement of that judge.”<sup>138</sup>

Disciplinary matters have been better shielded from executive branch involvement. The CSM also resolves disciplinary charges against judges, but in this case, neither the president of the republic nor the minister of justice presides over the council as they otherwise do *ex officio*, and, as already mentioned, the reforms in 1993 further reduced the president’s power to influence the CSM. The institutional structure for judicial discipline is thus one of the strongest protections for judicial independence.<sup>139</sup>

The other development in the Fifth Republic that is thought to have contributed importantly to judicial independence from the executive was the creation of the *Syndicat de la magistrature* on June 12, 1968. The formation of the *Syndicat*, a union for judges, is meant to strengthen the judges’ ability to withstand external pressures. In particular, the union has vocally “condemned hierarchy in the judiciary as an excessive burden on a judge’s position that obliges him to adopt a conformist attitude for the satisfaction of his superiors.”<sup>140</sup> It appears that the creation of ENM, the judicial training center, may have been the catalyst for the formation of a judicial union because, through the training at ENM, judicial trainees became “accustomed to collective discussion and action.”<sup>141</sup>

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135. Kim, *supra* note 115, at 33; Provine & Garapon, *supra* note 120, at 184.

136. To, *supra* note 109, at 342–44 (describing the complex process for deciding on promotions).

137. *Id.* at 344; Kim, *supra* note 115, at 32–34, 38–39.

138. Kim, *supra* note 115, at 32.

139. To, *supra* note 109, at 336–37, 347–48; Kim, *supra* note 115, at 30. This protection and the proclamation of the principle of irremovability in Article 65 of the 1958 Constitution must, to a significant extent, neutralize the effect of the provision in the Ordinance of December 22, 1958, imposing the “obligation of reserve” (the term that had been used in the nineteenth and early twentieth centuries to bind judges to the government’s positions). See VOLCANSEK & LAFON, *supra* note 105, at 123 (Ordinance of December 22, 1958); *supra* text accompanying note 123–24 (use of term in earlier history).

140. VOLCANSEK & LAFON, *supra* note 105, at 132; see also Kim, *supra* note 115, at 40 n.124.

141. VOLCANSEK & LAFON, *supra* note 105, at 132 (footnote omitted).

Thus far we have been talking about the regular courts and the Constitutional Council, but France also has a set of administrative courts.<sup>142</sup> The administrative court judges have only much more recently been granted any guarantees of independence, and they are considerably weaker than the guarantees given to the regular judges. Traditionally considered administrative personnel within the Council of State, the judges of the lower administrative courts (first instance and appeal) finally received substantial guarantees of independence in 1986, when they were given a number of the same protections that the regular judges had received. These protections include the principle of irremovability and a selection and promotion process that restricts the president's discretion in making appointments by limiting him to lists of candidates furnished by a nominating council. However, unlike the regular judges, who enjoy relatively strong protections against executive branch interference with respect to discipline, the administrative judges are still subject to discipline by the administration, which is always a party to the cases before them, and the members of the Council of State (the highest level of administrative court judge) are also excluded from the protections concerning appointment and advancement.<sup>143</sup> In short, they remain subject to a system that could be used to exert fairly strong executive control, and French commentators appear split on the degree to which that control is actually used.<sup>144</sup>

In sum, the first set of changes in the wake of the 1958 Constitution, which introduced judicial review in France, strengthened the independence of the regular judiciary by instituting a judicial training center and an initial appointment process that is almost wholly insulated from the executive, as well as creation of a judicial union in 1968. Promotions, except to the highest levels within the regular court system, remain in the control of the min-

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142. As in the case of the Constitutional Tribunal, it is obligatory to note that the bodies reviewing administrative action were deliberately set up as part of the administration and not part of the court system. They were not originally designated as "courts" and the highest administrative court in France is still just one section of a major French administrative body, the Council of State. None of the administrative judges are considered part of the "magistracy," which includes the regular judges and prosecutors. Yet it is clear that they in effect perform the same function as administrative judges in other countries that have separate administrative courts. Provine & Garapon, *supra* note 120, at 189.

143. To, *supra* note 109, at 344–50.

144. DANIEL CHABANOL, *LE JUGE ADMINISTRATIF* 15–18 (1993) (administrative judges in fact generally independent at all levels; however, author discusses only lower administrative judges); JACQUES CHEVALLIER, *L'ÉLABORATION HISTORIQUE DU PRINCIPE DE SÉPARATION DE LA JURIDICTION ADMINISTRATIVE ET DE L'ADMINISTRATION ACTIVE* 10 (1970) (judicial independence essentially depends on good graces of those in power); OLIVIER GOHIN, *CONTENTIEUX ADMINISTRATIF* 71–76 (2d ed. 1999) (optimistic about independence after the reforms; pointing out that only twenty judges have been dismissed from *Conseil d'Etat* without pension); DANIELE LOSCHAK, *LE RÔLE POLITIQUE DU JUGE ADMINISTRATIF FRANÇAIS* 13–33 (1972) (writing before reforms; administrative judges have little independence); JACQUES VIGUIER, *LE CONTENTIEUX ADMINISTRATIF* 12, 28 (2d ed. 2005) (positive about judicial independence for administrative courts after reforms; but noting the vulnerability of the judges on the *Conseil d'Etat*).

ister of justice, but promotions to the highest levels, as well as disciplinary procedures at all levels of the magistracy, are relatively well shielded from executive control. Judicial review, first established in 1958, was substantially strengthened in the 1970s, and the constitutional reform of 1993 further reduced the possibility of executive power over promotions and disciplinary proceedings by greatly diminishing executive power to appoint the CSM, the judicial nominating and disciplinary body. In addition, pursuant to changes in 1986, most of the administrative court judges, but not the highest ones, began to enjoy similar protections from executive control over selection, but none of the administrative law judges are protected from what is perhaps the greatest form of executive control, the power to discipline sitting judges. As a result of these developments, at least the regular judiciary can finally think of their career as a reasonably secure one.<sup>145</sup>

### C. *Great Britain*

In the centuries after Parliament's victory over Stuart pretensions to absolutism, England evolved for itself a system that apparently gave British judges considerable independence in fact though the institutional arrangements suggested, first, at least a kind of symbolic dominance by Parliament, and later, and more substantially, by the executive. In the first place, the supreme appeal jurisdiction actually developed in Parliament, in the appeals jurisdiction of the House of Lords,<sup>146</sup> though as the judicial chamber of the House of Lords developed, it became clear that it was treated as a true court, and the judges in the judicial chamber of the House of Lords developed a practice of abstaining from participation in the legislative functions of the House of Lords. More significantly, the development of the system of appointment of judges by the Lord Chancellor appeared to subject the judges to strong political influence by the executive.<sup>147</sup> While in theory the Lord Chancellor was a member of all three branches of government—a personal violation of the separation of powers doctrine—he was appointed by the prime minister as part of the cabinet and was therefore first and foremost a representative of executive power. Especially because of the almost complete lack of transparency in this function, judicial appointment by the Lord Chancellor thus appeared to be open to the free play of politics. While it has been stoutly maintained that the system actually functioned largely in a nonpolitical way that emphasized professional merit, there are examples of politicization of the process throughout the twentieth century.<sup>148</sup>

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145. VOLCANSEK & LAFON, *supra* note 105, at 129.

146. Shapiro, *Judicial Independence*, *supra* note 21, at 626.

147. *Id.* at 632; *see also* ABRAHAM, *supra* note 105, at 31–34.

148. Kate Malleon, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 39, 41–42 (Kate Malleon & Peter H. Russell eds., 2006); Stevens, *supra* note 12, at 613–14.

The rules on dismissal might appear to give judges better protection from politics. By a provision of the Act of Settlement, British judges have in theory been protected against political dismissals since 1760, when the provision took effect, subject only to impeachment by both houses of Parliament.<sup>149</sup> It eventually became clear that the impeachment threat was not substantial. “[S]ince the Act of Settlement of 1701, only *one* judge has been removed on any grounds,”<sup>150</sup> and it has been asserted that “dismissal of a [British] judge for political reasons is impossible today for all practical purposes.”<sup>151</sup> However, Stevens points out that technically such a statement can be made only about the judges on the major courts (High Court, Court of Appeals, and the House of Lords) because “the vast bulk of the full-time judiciary in England (now some 1300) have no protection under the Act of Settlement, although in fairness to the Lord Chancellor’s Department, dismissals are handled with considerable natural justice [what is called in the United States “due process”].”<sup>152</sup> More importantly, Stevens cites a number of significant instances in the course of the twentieth century in which the prime minister or Lord Chancellor was able to put substantial pressure on judges from the major courts to resign, sometimes with success.<sup>153</sup>

The whole system was criticized as not being sufficiently “modern.” It was argued that even if the current system was not working in a particularly politicized way, the lack of any safeguard keeping the Lord Chancellor from playing politics, especially in the process of judicial appointments, was troubling. The lack of safeguards, the absence of a more clearly fair system for judicial appointments, and the lack of sufficient diversity in the makeup of the judiciary were argued to undermine public confidence in the courts.<sup>154</sup> As a result, around the turn of the millennium, Great Britain undertook some sweeping changes with regard to its judicial appointments system, but they were part of a much broader set of changes that can only be termed a constitutional revolution.<sup>155</sup>

One important chapter of that revolution took place in 1998, when Great Britain finally adopted a limited, but important form of judicial review of legislation. Although the British have long steadfastly adhered to the principle of parliamentary supremacy, in 1998 they adopted the Human Rights Act, a statute which incorporates into British law the European Con-

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149. See *supra* text following note 105.

150. ABRAHAM, *supra* note 105, at 52.

151. *Id.* at 52.

152. Stevens, *supra* note 12, at 601. These less-protected judges include circuit judges, recorders, district judges, and magistrates. For the hierarchy of judges in the British legal system, see GARY SLAPPER & DAVID KELLY, ENGLISH LEGAL SYSTEM 237–38 (8th ed. 2006).

153. Stevens, *supra* note 12, at 600–01. Similarly, the government has succeeded in cutting judicial salaries on occasion. *Id.* at 615–16.

154. Malleon, *supra* note 148, at 40–41.

155. Colin Picker, “A Light unto the Nations”—*The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States*, 77 TUL. L. REV. 1, 8 (2002).

vention on Human Rights as a statutory bill of rights. Pursuant to that act, the British courts may not refuse to follow statutes that they deem incompatible with that statutory bill of rights. Instead, they are enjoined to interpret statutes to be consistent with the Human Rights Act, if possible. If they cannot interpret a statute to be consistent with the Human Rights Act, then, while giving effect to the inconsistent act, certain specified higher British courts may also make a declaration of incompatibility. While that declaration places no obligation on Parliament to amend the statute in question, it does empower the executive branch and Parliament, if the political will is there, to work together on a fast-track basis to amend the statute to bring it into compliance. Like the French style of judicial review, the British version is formally quite limited, but it also is designed to let the courts play an important role in the political life of the nation through the power to declare incompatibility.<sup>156</sup>

The next chapter in the rolling constitutional revolution in Britain included the establishment of a judicial appointments commission for England and Wales in the first years of the new millennium<sup>157</sup> and then the Constitutional Reform Act of 2005.<sup>158</sup> This act initiated the move of the judicial chamber of the House of Lords out of Parliament, renaming it the Supreme Court, thus eliminating every vestige of the ancient suggestion that Parliament itself was supervising the judges through an appellate jurisdiction. It transferred the Lord Chancellor's judicial functions to other members of the judiciary to make it clear that that office is no longer part of the judicial branch.

Another major result of these changes was to subordinate the Lord Chancellor's formerly unchecked power to appoint judges to that of the new judicial appointments commissions. Technically, the commissions only make recommendations to the Lord Chancellor, but they need recommend only one name for each available position. The Lord Chancellor has the right to reject that name, but if he does so, he must give a statement of reasons.<sup>159</sup> The members of the commissions are appointed by the secretary of state for constitutional affairs and membership is required to be broadly

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156. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 732–39 (2001).

157. See generally Malleon, *supra* note 148. The Appointments Commission for England and Wales was announced by the British government in 2003. *Id.* at 39. A similar board had been established for Scotland in 2002, Alan Paterson, *The Scottish Judicial Appointments Board: New Wine in Old Bottles?*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 13, 14 (Kate Malleon & Peter H. Russell eds., 2006), and one was planned for Northern Ireland as well, Malleon, *supra* note 148, at 53 n.4. Two commissions were actually established for England, one for the Supreme Court, and one for all the other judges. *Id.* at 46.

158. See, e.g., Robert Hazell, *The Continuing Dynamism of Constitutional Reform*, 60 PARLIAMENTARY AFF. 3 (2007); Diana Woodhouse, *United Kingdom: The Constitutional Reform Act 2005—Defending Judicial Independence the English Way*, 5 INT'L J. CONST. L. 153 (2007).

159. See generally Malleon, *supra* note 148, at 46–47. It is unclear what will count as an acceptable reason. *Id.*

representative of various stakeholders in the judiciary, including lay people, but the legal influence predominates.<sup>160</sup> It is too soon to determine whether the result of these changes has been to continue executive dominance through the office of the lord chancellor or to create a corporatist control of judges over the judiciary or a process of citizen control over judges in which the executive influence is quite minimal but there is room for modest play of nonpartisan political influence in the commissions. Only time will tell.<sup>161</sup>

#### D. Chief Conclusions from Historical Sketches

The foregoing histories illustrate rather clearly the vigorous role that political oversight over judges has played in modern Western democracies and the coincidence between adoption of judicial review and adoption of structural protections for the judges. My precise arguments, however, require some additional words of explanation.

While at the turn of the eighteenth to nineteenth centuries, the legislature may still have appeared as much of a threat to judicial independence as the executive in both the United States and Great Britain, by the second half of the nineteenth century, the democratic forms of government had matured to the point that the greater capability of the executive to exercise influence over the judges had become apparent, as it was in France from the beginning of Napoleon's rule. All of the structural protections subsequently adopted in France and England were aimed at diminishing executive control or influence over the judiciary, as section II argues should be the case.

Section II also postulated that even mature democracies should preserve some role for political influence over judges. The U.S. models obvi-

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160. See generally *id.* at 48–50. Of the Commission's fifteen members, three are selected by the Judges' Council. The rest are selected through open competition, and the membership is required to be broadly representative of the various stakeholders in the judiciary. The Chairman is required to be a lay person. Five of the remaining fourteen members must be judges, one must be a barrister, one a solicitor, five must be lay persons, one must be a member of an administrative tribunal, and one must be a lay justice member. JUDICIAL APPOINTMENTS COMM'N, CHAIRMAN AND COMMISSIONERS, <http://www.judicialappointments.gov.uk/about/chair.htm> (last visited Nov. 25, 2008).

The appointment commission for the Supreme Court is much smaller and will be convened only as needed. It consists of the president of the Supreme Court, as chair, the deputy president, and one person from each of the three U.K. appointments boards or commissions. Malleson, *supra* note 148, at 46.

161. Hazell, *supra* note 158, at 18 (predicting that the commission will be dominated by its judicial membership, thus transforming the British system into kind of corporatist one); Malleson, *supra* note 148, at 39, 51. The Commission's website says that it was "set up in order to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable." JUDICIAL APPOINTMENTS COMM'N, ABOUT US, <http://www.judicialappointments.gov.uk/about/about.htm> (last visited Nov. 25, 2008). In its first year of operation, it recommended 458 candidates for judicial office, and the Lord Chancellor did not reject a single one. JUDICIAL APPOINTMENTS COMM'N, ANNUAL REPORT AND STATISTICS, <http://www.judicialappointments.gov.uk/annual/annual.htm> (last visited Nov. 25, 2008).

ously fit that postulate. By contrast, one might argue that the trend in France and Great Britain seems to be toward excluding the executive from a largely depoliticized process in which judges exercise the greatest influence over the selection and promotion of judges and in which judges are protected from discharge by tenure in office and quasi-judicialized disciplinary proceedings that are also not subject to control or substantial influence by the executive branch. If we interpret that trend as one toward complete depoliticization in favor of a bureaucratic, corporatist control of judges by judges, my analysis in section II, the example of the largely autonomous French judges under the ancien régime, and the current example of the Brazilian judiciary suggest that it could be a problematic one.<sup>162</sup>

But in fact, neither country has completely eliminated political oversight, even by the executive. In France, the minister of justice is still fully in control of most judicial promotions (except for promotions to the highest offices), and the executive branch is also represented on the committees that decide the highest-level appointments. With regard to administrative judges, the executive retains full power to appoint the top ones and to discipline or dismiss all of them. In Great Britain, the Lord Chancellor retains the power to refuse to appoint a candidate nominated for judicial office by the appointments commission though it remains to be seen whether he will try to use that power. Moreover, the nominating councils in Great Britain at least are required to be broadly representative and include lay people, a structure which allows for modest play of political influence though it may prove to be largely controlled by its judicial members.<sup>163</sup> Thus neither country has yet abolished all avenues of political control over judges although Great Britain may have gone the furthest toward that position.

Perhaps the newness of the French and British reforms adopting structural protections for the judiciary will surprise Americans because their founding fathers addressed these issues roughly two hundred years earlier in the drafting of the U.S. Constitution. The delay seems clearly related to a difference concerning the conceptions of the role of courts in the governing structure. The approach in the U.S. Constitution was part of a new conception of government that was based on creating a durable balance among the three separate powers or branches of government. The British and French were much slower to come to the view of the judiciary as a coequal branch though they both seem to be coming to something like that view by the beginning of the twenty-first century. The British delay may be explained in part by the fact that their revolution took place well before the development

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162. For French judges before the revolution, see *supra* section IV 3(b). For the Brazilian judges, see authorities cited *supra* note 8. See also Provine & Garapon, *supra* note 120, at 195 (a U.S. and a French scholar suggesting that French judges lack legitimacy because they are not chosen in an openly political process that links them to the public).

163. See *supra* text accompanying notes 159–61. The French councils are even more clearly dominated by judicial members. See Kim, *supra* note 115, at 31 n.91.

of separation of powers doctrine.<sup>164</sup> Perhaps the British delay could also be ascribed in part to a feeling that structural protections were unnecessary because the British judiciary had long had a certain degree of de facto independence rooted in the corporatist structure of the whole common law legal system.<sup>165</sup> In France the heavy legacy that the courts were saddled with from prerevolutionary days gave the French an aversion to thinking of the judiciary as a coequal branch; they readily accepted the idea of executive branch supervision and control. The inauguration of judicial review of legislation in 1958 in France and in 1998 in Great Britain, seems to have caused a reassessment of the courts' role.

For that very reason, some will therefore no doubt see the short period of time within which all three of these countries adopted both judicial review and structural protections for the judiciary as supporting, not my broad thesis about transformative law, but a narrower one to the effect that adoption of judicial review may tend to stimulate substantial support for protecting the independence of judges. I would not argue against that thesis because it is included within the transformative law thesis. I have argued in section III(B) that judicial review is an especially important source of transformative law. The history recounted here suggests that the adoption of judicial review does provide special force to the arguments for making the judges independent. With powers of judicial review, judges become more obviously the equal of the branches that make the laws. The shift in mental paradigm goes a long way to explaining the close timing, but perhaps not far enough.

The adoption of judicial review suffices to explain the adoption of protections for the independence of the judiciary in a system of diffuse review like that of the United States, in which all regular courts carry out judicial review of legislation. It is obviously problematic to subject judges to the control of either the legislature or the executive if those are the judges who are going to decide the constitutionality of laws created by those two

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164. If by "revolution," we mean the violent overthrow of an existing political order, then the British revolution was pretty much over by the beginning of the eighteenth century while separation of powers doctrine finds its earliest articulation in Montesquieu's *Spirit of the Laws*. Vile gives 1748 as the date by which Montesquieu had formulated the doctrine in "recognizably modern form." M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 90 (1967).

165. Shapiro has argued that long before the Act of Settlement (1701), English judges became independent of both the king and Parliament because "[n]o one could understand the law except the lawyers who constituted a closed guild that co-opted new members by apprenticeship. Judges were chosen from and led the guild. . . . Judges were independent because they operated a system of law that was essential to the well-being of the nation but that no one but lawyers could understand." Shapiro, *Judicial Independence*, *supra* note 21, at 624. Shapiro, however, sees the high point of British judicial independence in the eighteenth and nineteenth centuries, *id.* at 623, 630, with the courts voluntarily subordinating themselves once again to the fused executive-legislative branch of parliamentary government in the twentieth century, not so much by suffering greater interference in specific cases, but by virtue of administrative law doctrines that subordinated the courts to the policies of the administrative state. *Id.* at 633–52.

branches. The same logic applies at least to the higher British judges who have the power to make declarations of incompatibility,<sup>166</sup> though not so clearly to the lower courts judges who do not have that power. The same logic also suffices to explain why in creating a specialized constitutional court, France would provide some protection against either executive or legislative dominance over the judges of the constitutional court by distributing the power to nominate the judges on that court equally to the president of the republic and to each of the presidents of the two houses of parliament. But how can we explain why the French adopted structural protections for the regular judges at about the same time as they adopted judicial review?

Perhaps it could be argued that the adoption of judicial review is an event of such high political salience that it suffices to bring to the fore all the important issues affecting the judiciary. But what makes the independence of the regular judiciary an issue? It cannot logically be the judicial review that is assigned to a different body of judges. It is true that French administrative courts have gradually been establishing the power to adjudge the constitutionality of executive action, but even after 1958, the regular courts were not thought to have any power to determine the constitutionality of either executive or legislative action. Starting in 1975, the Court of Cassation began asserting, somewhat timidly at first, the power to interpret statutes in such a way that treaty provisions would prevail over contrary provisions of preexisting statutes. In 1988, the Court of Cassation for the first time relied on constitutionally guaranteed rights to interpret statutes. In the 1980s, the top administrative court, the Council of State, which had long used “general principles” as the basis for restrictions on administrative action, began emphasizing the constitutional basis for many of these principles, and in 1989, the administrative courts joined the regular courts in using treaties to invalidate contrary prior legislation. Since then, both the top regular and administrative courts have begun asserting much more aggressively what is in effect a form of judicial review based on treaty law.<sup>167</sup>

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166. Thus Robert Hazell has argued that the new British Supreme Court will become “more of a constitutional court,” that it will consequently have a “much higher profile,” and that these developments “will stimulate much greater interest in who the judges are and how they came to be appointed.” Hazell, *supra* note 158, at 17–18.

167. For traditional powers of regular courts and administrative courts with respect to judicial review of constitutionality of executive and legislative action, see RENÉ DAVID, *FRENCH LAW* 27, 30 (Michael Kindred trans., 1972). For the use of constitutional law to interpret statutes, see ALEC STONE SWEET, *GOVERNING WITH JUDGES* 122–24 (2000). For development of review based on international treaties, see JEAN COMBACAU & SERGE SUR, *DROIT INTERNATIONAL PUBLIC* 187–88 (6th ed. 2004); Pierre Michel Eisemann & Raphaële Rivier, *National Treaty Law and Practice: France*, in *NATIONAL TREATY LAW AND PRACTICE* 253, 269 (Duncan B. Hollis et al. eds., 2005); ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 163–64 (2d ed. 1998). For the initial timidity of the French courts in applying treaty law and the more vigorous approach led by the administrative courts, see DINH QUOC NGUYEN, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 237 (7th ed. 2002); Emmanuel Decaux et al., *France*, in *L'INTEGRATION DU DROIT INTER-*

Thus starting at least by the late 1980s, concerns about the neutrality of the judges of the Constitutional Council would properly have applied as well to the regular judges, who were asserting a kind of judicial review power. But the main reforms to protect the regular judiciary took place between 1958 and 1968, at a time when the regular judiciary was assumed to have no role in litigation over the constitutionality of legislation. So something like the transformative law thesis appears to be necessary to explain why, well before the late 1980s and even before 1975, adoption of a constitutional court for judicial review should result in structural guarantees of independence from the executive branch for the regular judiciary.

Perhaps my argument makes too much of a short gap in the historical record. The transformative law thesis, I have said, is about a slow-acting mechanism. Belief in the transformative role of law has built up slowly and steadily in the Western legal traditions over quite a few centuries. Other than the pattern of adopting structural protections for judges at about the same time as the adoption of judicial review of legislation, I cannot point to a pattern that reveals a close temporal connection between the adoption of particular forms of transformative law and structural protections for the courts, nor do I expect to find such correspondences. But I believe that the more transformative law is adopted in a society that really expects the law to be enforced, the stronger will be the popular support for shielding the courts from too much executive branch control. Maybe support for judicial review and the new view of separation of powers, which posits a much more powerful role of courts as an equal branch of government, builds in a similarly slow way and could result in concerns for judicial independence before it results in adoption of judicial review of legislation.

But even if that is true, leaving the broader category of transformative law out of the explanation would miss a key point: Transformative law is also an aspect of the separation of powers. That is, according to the mechanism based on Shapiro's model for courts, belief in any type of transformative law, even nonconstitutional types of transformative law, should produce a concern that substantial executive branch control over the courts could result in preventing the law from having the desired effect of changing society. Belief in nonconstitutional transformative law should thus engender the same concern for independence of the courts that constitutional law and judicial review engender because political leaders are involved, broadly speaking, in all legal issues that invoke important issues of social policy, not just in those involved in constitutional review. The transformative law thesis helps us see that the change in the concept of the courts' role that took place in each of the three countries studied was not just about judicial review of the constitutionality of legislation and executive action. It

was about the courts' roles in all types of cases that feature transformative law, including disputes between private parties.

## V. CONCLUSIONS: THE CULTURE OF TRANSFORMATIVE LAW AND STRATEGIES FOR FOSTERING IT

The focus of this article has been a set of twin inquiries into some key aspects of the cultural supports for executive dominance and the potential of a belief in transformative law to counter political leaders' claims for control over judges. In order to conclude this rather far-flung investigation, this section first draws together the discussion of various values that have been implicated in these investigations as a first step toward defining the culture of transformative law, and hence, by one of the chief arguments of this paper, of the culture of judicial independence. The section then closes with a brief exploration of the implications of the transformative law thesis for judicial reform in Latin America by giving some examples of strategies that could be effective if the transformative law thesis is valid.

### A. *Some Key Values Associated with a Culture of Transformative Law*

Without claiming to describe a complete catalogue of the values, attitudes, and habits of mind that are important to a culture supportive of transformative law—and by hypothesis, therefore, judicial independence—the foregoing inquiries have revealed some of the values that appear to be most important to this culture. Our discussion started with beliefs in the primacy of politics and the transformative role of law, so this summary should start there, too.

The principal hypothesis of this article is that a key value in a culture of transformative law is the belief that law can and should be a tool for transforming society. A culture of transformative law expects that law will be reasonably well enforced if it is not followed. Because it can be expected to be enforced, it can serve as a tool for reshaping society. This value thus gives a more specific meaning to the general statement that the essence of the rule of law is “a widespread assumption within society that law *matters* and should matter.”<sup>168</sup> It is this restatement of a rule of law value that, by virtue of Shapiro's model for court legitimacy, provides a connection between judicial independence and the effectiveness of law in which the executive branch has an obvious interest. It is not just a claim that decisions of courts should be enforced, though that is an important part of the idea, but an equally important part of the idea of transformative law is that courts will treat the transformative law as part of the body of law so they can fairly render judgments against parties in accordance with that law.

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168. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 646 (1990).

Politics and law have a complex relationship, but one aspect of that relationship, even in a democracy, involves a competitive tension, especially with regard to judges. The rule of law ideal suggests that judges should be sufficiently independent of political authority to decide cases according to law and not according to politics, yet we and especially our political leaders also want some assurance that judges' decisions will not be based on political values so far from the electoral majority who put the leaders in office that they will unduly obstruct the policies of the elected branches of government. Even as we accept some degree of obstruction as the inevitable result of judicial independence, we also tend to insist on some degree of political influence over judges. Political influence can come from many different sources, but the executive branch is generally best organized to project political influence over the judiciary. For that reason, the executive branch tends to pose the major threat to judicial independence, even in a democracy. There are many reasons why the citizenry may wish to give power over the courts to the executive branch or to tolerate executive dominance over the courts, but they all amount to one major claim of the primacy of politics over law—typically, that the current situation is so difficult or dangerous that the executive needs to be able to assert its political leadership without interference by the courts. Because belief in the importance of the guiding role of a strong political leader is not confined to authoritarian societies, we have to have a healthy respect for politics as part of the culture of transformative law. Judicial reform to strengthen judicial independence should not therefore seek complete independence from political influence, but only enough to preserve the courts' central claim to be able to decide individual cases according to law, not politics.<sup>169</sup>

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169. This article focuses on culture, not on design of judicial institutions, but our discussion permits us to see the outlines of the chief dilemmas for this kind of design issue. Instead of eliminating political influence altogether, the goal should be a reasonable balance between political influence and judicial independence so that neither political influence over the judges nor the judges' ability to decide cases according to law (and not just according to politics) is completely eliminated. Because executive power over sitting judges can so easily eliminate any appearance of judicial independence, finding the right balance might seem a simple matter of allowing executive influence over judicial appointments but eliminating executive power to discipline or dismiss judges after appointment and giving judges long, nonrenewable or lifetime terms. Such systems permit a degree of political influence over judges without allowing the executive to retaliate against the judges for specific decisions. The tendency in all legal systems, however, for judges to seek promotions to new judgeships complicates the problem. The power not to promote is almost as strong a power to discipline judges as the power to dismiss. Eliminating executive power entirely from the appointment, promotion, and disciplinary process might seem an attractive solution, but the sorts of judicial councils that are typically substituted for the executive may too easily become corporatist bodies controlled by the judges and impervious to political influence. Finding the right balance appears quite difficult indeed, and for that reason, I doubt that any one model is the optimum solution for every society. *But see* Mary L. Volcansek, *Appointing Judges the European Way*, 34 *FORDHAM URB. L.J.* 363 (2007) (arguing that the European methods of judicial selection, which she characterizes as either bureaucratic or as shared appointment systems, typically with quotas, are the best).

The important role that judicial review plays in the adoption of structural protections for judicial independence shows that another important value in the culture of transformative law is belief in the value of separation of powers, and it is that value which is especially important for countering excessive claims by political leaders to concentrate power at the expense of the courts. Lord Acton's famous dictum that "[p]ower tends to corrupt and absolute power corrupts absolutely" appears to state an eternal truth. Together with regular elections, separation of power and various systems of checks and balances are democracy's principal defenses against overweening political power. The discussion in section IV(D) shows that when judicial review was adopted, popular support for the courts' checking powers was apparently not limited to cases involving constitutional review. Thus the understanding that through their broad powers of interpretation, the courts can shape the law, even statutory law, in ways that ultimately provide some check on the power of the political branches appears to be part of the culture of transformative law.<sup>170</sup>

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170. Some scholars have argued that true judicial independence requires a certain critical approach to the law itself, especially the statutory law. Frühling, *supra* note 10, at 243, 250 (Chilean courts failed to show independence from Pinochet regime by investigating human rights abuses because "they abdicated their duty to interpret and develop the law to uphold democratic principles"; to be sufficiently independent to defend human rights, Latin American courts need "to undertake a critical interpretation of rules passed by their legislatures"); Kim Lane Scheppelle, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS* 227 (Stephen B. Burbank & Barry Friedman eds., 2002) (extreme positivism, unleavened by constitutional principles or general principles of justice, results in making the courts just as dependent on the political powers that promulgate the written law as if those powers dictated directly to the courts in individual cases).

I have no doubt that this kind of "independence" from the law is an important aspect of judicial independence. It should be noted that traditional Islamic law courts appear to have enjoyed this kind of independence at times, too, and probably to a very large degree in view of the indeterminate method of finding the law described above in section III(D). See ROSEN, *ANTHROPOLOGY OF JUSTICE*, *supra* note 20, at 66–67 (examples from Islamic law of decisions in which the qadi manipulates or ignores the legal rules to achieve what he believes to be a more just result).

But the question for purposes of reform is how much judicial independence from the positive law is to be encouraged. As I argued in section III(D), too much indeterminacy in the law finding process, as in traditional Islamic courts, would seem to destroy the utility of law as a tool of social transformation. Perhaps some general reforms of legal education aimed at counteracting traditions of excessive legal positivism could be worthwhile. But reforms aimed at increasing in general the degree to which judges feel free to modify or nullify the effect of statutory law based on the constitution or general legal principle could destabilize the legal system. Reformers may want judges to give real effect to constitutional provisions on human rights, for example, despite an inadequate statutory basis for doing so, but they do not want judges to view statutes as blank slates upon which to write their own versions of law. Frühling, a professor of political science at the University of Chile, questions whether Latin American courts have the legitimacy necessary to adopt such a critical stance toward statutory law. Frühling, *supra* note 10, at 250.

The best course for reform is to concentrate on specific cases. Thus in section V(B), I suggest efforts to make certain types of law in Latin America more effective. Those efforts could, in appropriate cases, include specific arguments based on constitutional or general principles to modify the apparently inadequate or contrary statutory law to reach a result more in accord with basic principles of justice.

This article has looked at ancient Chinese and traditional Islamic law in order to use the stark contrast with very different systems to highlight features of the familiar Western legal systems whose importance might otherwise not strike us as clearly. Two features of these non-Western legal systems that stand out in that contrast are (1) an extreme degree of personalism in the dominant mode of thinking about human relationships and (2) the consequent potential for unequal application of the law, whether because the laws expressly distinguish among social classes, as in dynastic Chinese law, or because of a personalistic method of applying law, as in traditional Islamic law. By contrast, we can see that the transformative law culture in the Western legal traditions of the civil and common law is based on an ideal that insists on the equal treatment of people through an impersonal manner in applying law. Law tends to be regarded primarily as a system of formal distinctions, and to that extent, Western law does not ask the court to look at each party as a whole person with all her social and family ties, but only as a person abstracted to the specific features that the applicable law calls out as relevant in the specific case.<sup>171</sup> The rule of law adopts impersonal application of law in an effort to ensure that law is applied equally to all persons who come within the terms of the law. The ability and willingness to deal with people on an impersonal basis is thus linked to a very limited or basic aspect of equality having to do with the equal application of law.

While varying degrees of personalism are no doubt found in every society, personalism is inconsistent with a culture of transformative law when it is so strong that one cannot expect law to be applied by its terms when it conflicts with the treatment that one party owes another party or the judge owes the parties based on personal or family connections, or rank or status. Section III(D) above has argued that there is some evidence suggesting that personalistic systems of caudillismo may continue to be strong enough in some Latin American countries to be an obstacle to judicial reforms to strengthen transformative law.

Factors that would appear to work against extremely personalistic cultures include the expanding role for bureaucracy in governments and in large businesses. Impersonal application of law by the state bureaucracy is part of the development by which modern states project bureaucratic power over social divisions based on more traditional societal ties of family, clan, and tribe. Modern business places similar expectations on its bureaucracies. To enable efficient action in markets, bureaucracies are expected to function largely according to internal rules and directions promulgated by the

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171. There is of course a contrary trend within the Western legal traditions, linked to equity within the common law tradition and to general principles of law within the civil law tradition, that prefers to see law as a series of principles to be applied with sensitivity to the social context, rather than formal rules to be applied rigorously according to its terms, but that is not the dominant approach in the Western legal traditions, especially in applying statutes.

business's leaders, not primarily according to the personal relations among the bureaucrats or between them and outsiders. Strengthening a culture of impersonal bureaucratic interactions would seem likely to strengthen a similar culture among jurists, including judges, in the long run. While the prominent role that politics plays in the selection of U.S. judges somewhat obscures this pattern, judges in most countries, as illustrated by the histories in section IV for both France and Great Britain, are part of a specialized bureaucracy and are selected and supervised in largely bureaucratic fashion. The development of transformative law and judicial independence thus appears to be linked to the development of a culture of impersonal bureaucratic action in all its forms in both state and private sectors.<sup>172</sup>

Finally, this inquiry into transformative law and cultures that are not characterized by transformative law suggests an important—though less direct—relationship to the general idea of equality. I have already claimed that the impersonal and formal method of applying law to individuals by considering only their traits that are made relevant by the applicable law is a very basic form of equal treatment. But it does not of course follow that all societies committed to such an impersonal application of law that they can adopt transformative law are necessarily committed to a broad equality principle. Clearly, transformative law can just as easily be used to increase inequality as decrease it. Think, for example, of laws adopted by the Nazis to purge the German civil service of Jews.<sup>173</sup> Transformative law is a tool to decrease inequality only if it is specifically designed to do so.

But it often is, and that is the connection between transformative law and judicial independence, on the one hand, and equality, on the other. Many examples of transformative law are adopted for the purpose of increasing equality. For example, the two instances of transformative law

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172. Globalization of trade and investment, if it continues to be sustained, may provide some encouragement to reformers seeking to strengthen judicial independence. Multinational corporations bring their bureaucratic organization to the countries in which they do business. If local businesses are able to respond with market competition, they also will be pushed to adopt a more impersonal, market-based style. Thus it seems quite likely that both liberalization and globalization of the economy will eventually expose large parts of the population of a given country to the impersonalism of market-based, business bureaucracies. This exposure could help moderate the extreme forms of personalism that may still be found in some Latin American countries though reform efforts are needed to hasten this process. Economic reforms to encourage the growth of private business may thus do much to strengthen key values of a culture of transformative law and judicial independence. Cf. John Reitz, *Export of the Rule of Law*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 429, 472–74 (2003) (arguing that development of commercial law could be an engine to develop the rule of law culture). The development of governmental bureaucracy is not by itself necessarily benign. For example, the kind of “bureaucratic authoritarianism” to which Guillermo O’Donnell has pointed in Latin America moves in the opposite direction by leading to authoritarianism instead of democracy and a state-dominated economy instead of liberalization. See GUILLELMO O’DONNELL, *MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM* (1973).

173. LINDER, *supra* note 40, at 247–50 (describing the “Law pertaining to the Restoration of the Professional Civil Service (BBG) of 7 April 1933,” which provided for the retirement of all tenured civil servants of non-Aryan descent, and other related laws that gradually prohibited Jews from positions in government and from quite a few private sectors of the economy).

cited at the beginning of section III, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, are both intended to increase formal and substantive equality by eliminating certain forms of discrimination against women and racial minorities and against the disabled, respectively. Moreover, the goal of increasing equality may be a politically attractive one, especially in today's world, strongly influenced by international human rights discourse, in which principles of equality play a leading role. Transformative law for the purpose of expanding equality may therefore be likely to attract substantial public support. Such transformative law seems most likely to set up the type of dynamic described in section III that could lead to substantial support for curbing undue executive influence over the courts. Law that seeks to transform society by expanding equality is thus an especially important type of transformative law. There are grounds to think that the ideal of equality is not well supported on the whole in Latin America,<sup>174</sup> but efforts to strengthen the implementation of transformative law that already exists in Latin America could be a particularly effective way to strengthen the social commitment to equality and thus increase social support for transformative law. In the next and last section of the article, we will look at some examples of this kind of law in Latin America that might offer an especially useful basis for reform efforts attempting to strengthen the transformative law culture in various Latin American countries.

*B. Examples of Reform Strategies for Strengthening the Culture of Transformative Law and Judicial Independence in Latin America*

This article has focused on the social and political logic of popular support for judicial independence in a democracy for the purpose of developing strategies for reforms that could use that logic to strengthen popular support for judicial independence from the extremes of executive control. The article has proposed belief in the transformative role of law as a key

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174. I do not know whether one can say that Latin American culture generally lacks sufficient commitment to equality, *see, e.g.*, Rosenn, *supra* note 10, at 35 (suggesting that commitment to equality is too superficial in Latin America to support an independent judiciary), but Latin American society remains characterized by enormous economic and social inequalities. Jorge Domínguez, *The Politics of Hope: Free Politics and Free Markets in Latin America*, 5 U. ST. THOMAS L.J. 625 (2009). Latin America experienced a revival of democratic governance at the end of the twentieth century, and democracy suggests substantially egalitarian thinking, but democracies have not proven to be very stable in Latin America in the nineteenth and twentieth centuries. In the twentieth century, Latin America has also been strongly influenced by forms of social and political organization known as "corporatism," essentially a theory that society should be composed of groups, each of which had specific functions and the rights and obligations that relate to those functions. Although corporatism takes a variety of forms, in most cases it rejected egalitarianism, teaching that inequality is part of the natural order. LEWIS, *supra* note 40, at 129–31. To the extent that way of thinking is still important in Latin America, it represents a further obstacle to reform based on transformative law.

value which has the potential to engender that kind of popular support. I would suppose that many kinds of reform strategies could be devised to take advantage of the logic discussed in this article, but there is space here to discuss only a few examples. It is important to preface this discussion with the caveat that I am not arguing that belief in transformative law will quickly or easily lead to formation of a culture supportive of greater degrees of judicial independence. My argument is only that a culture that adopts law for the purpose of changing society sets up the dynamic that Shapiro has described. In time, it seems likely that this dynamic should induce popular support for judicial freedom from executive dominance.

One clear implication of the historical sketch in section IV is that roughly around the time of adoption of judicial review of the constitutionality of legislation there is likely to be a rethinking of the role of courts that creates significant popular support for curbing executive power over the regular courts, and this seems to be true whether or not judicial review is confined to a constitutional court. The period of adoption of judicial review has already passed in a literal sense for many Latin American countries because they adopted judicial review of the constitutionality of both legislative and executive action some time ago. However, in many countries, judicial review has not prospered, and Latin American history is littered with attempts to suppress or restrict constitutional review.<sup>175</sup> In countries that have experienced significant curtailment of judicial review and have not yet succeeded in reestablishing a credible form of judicial review, there is an opportunity to renew the commitment to judicial review in ways that might bring the issue of executive domination of the judiciary to the top of the political agenda and cause a reconsideration of the courts' role as a third branch of government equal to the other two branches. Thus working to establish or strengthen judicial review of legislation may have the potential in some countries to strengthen support for greater independence of the judiciary as a whole.

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175. For example, Argentina has witnessed the routine replacement *en masse* of its supreme court after each regime change from the 1930s through the 1980s, followed by President-Elect Carlos Menem's court-packing scheme in 1990. Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292 (2002); see also Robert Barros, *Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)*, in RULE BY LAW 156 (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter "RULE BY LAW"]; Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, in RULE BY LAW 102; Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, in RULE BY LAW 180 (how Mexican presidents from the 1930s to 1994 manipulated the constitution and the courts); Anthony W. Pereira, *Of Judges and Generals: Security Courts Under Authoritarian Regimes in Argentina, Brazil, and Chile*, in RULE BY LAW 23 (use of special courts to take sensitive cases out of jurisdiction of regular courts); Schor, *supra* note 14, at 4 (examples from Mexico, Venezuela, Peru, Argentina, and Ecuador of presidents who attempted to manipulate their constitutions and/or supreme courts).

Another part of public law that seems particularly promising is administrative law though it must be conceded that the historical sketch in section IV may seem to suggest the contrary. Both Great Britain and France developed judicial review of administrative action in the nineteenth century, but France did not adopt significant structural protections for the independence of the regular judiciary until the second half of the twentieth century, and Great Britain followed even later. France finally adopted some structural protections for the lower administrative court judges in the 1990s, but it still preserves a disciplinary system for the administrative court judges that threatens them with political control and subjects the judges of the highest administrative court to blatant political control in both their selection and discipline. As a motor for driving the development of a more independent judiciary, administrative law would appear fairly ineffectual.

But judicial review of administrative action fits Shapiro's model in a compelling way. The government is a formal party to every case. Moreover, these kinds of cases involve regulation, which, as I have conceded,<sup>176</sup> means generally the same thing as transformative law and tends to involve politically salient law. The executive is thus both formally and substantively an interested party in most cases. Executive control over the courts should be obviously troublesome for the broad public affected by judicial review. Perhaps in an earlier day, governments could get away with providing for judicial review of administrative action in courts they controlled. The prestigious French system was developed from a model of administrative justice that was restricted to asking a higher body within the administration itself to take another look at challenged administrative action.<sup>177</sup> But the French model has developed into a case of true judicial review, as the recent adoption of structural protections for the lower administrative court judges suggests, and it is becoming less and less acceptable throughout the world to restrict review of administrative action to a second look by higher levels of the administration. Today, even the few countries still ruled by communist parties see the need to provide *judicial* review of administrative action as a way of bolstering regime legitimacy.<sup>178</sup> Popular desire to be protected from arbitrary and illegal administrative action may be propelling judicial review of at least some significant forms of administrative action into the ranks of a legal universal.<sup>179</sup> Efforts to strengthen judicial review of administrative

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176. See *supra* section III(C).

177. That model helps explain why the nineteenth-century French thought that review by a body within the administration, the judicial chamber of the Council of State, was a sufficient form of review. See *supra* section IV(B).

178. KARIN BUHMANN, IMPLEMENTING HUMAN RIGHTS THROUGH ADMINISTRATIVE LAW REFORMS: THE POTENTIAL IN CHINA AND VIETNAM 469, 561 (2001) (China and Vietnam).

179. Cf. John Reitz, *Progress in Building Institutions for the Rule of Law*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 144, 159–62 (Robert Grey ed., 1997) (describing the “long historical roots” of judicial review of administrative acts in socialist countries and the rapid expansion of that kind of judicial review after 1989 in Russia and Poland).

action by trying to increase the degree to which it actually protects individuals from arbitrary government action should therefore be an effective way to build support for reasonable levels of judicial independence from the government, at least over the long term.<sup>180</sup>

Finally, the discussion of the connection between transformative law and equality suggests that strategies of promoting law reform in areas that seek to expand equality ought to be particularly effective at building public support for judicial independence from executive control. In this connection, Jorge Esquirol names three areas of substantive law as representing lasting achievements of Latin American law—he calls them part of the *acquis légaux* in Latin America—labor law, the social function doctrine in property law, and economic and social rights that have been recognized as constitutional rights.<sup>181</sup> These examples all appear to involve transformative law that seeks to expand equality. Working to secure a just and effective implementation of the rules in these areas of law—perhaps by educating lawyers and judges, amending the law to eliminate problems or defects with the law, educating the public, devising arguments to use constitutional or general principles of law to modify or supplement statutory terms that are lacking in justice,<sup>182</sup> and facilitating the formal assertion of rights under the

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180. Most important cases are said to be in the administrative courts in Latin America, not in the regular courts. Jorge Santistevan de Noriega, *Reform of the Latin American Judiciary*, 16 FLA. J. INT'L L. 161 (2004).

181. Esquirol, *supra* note 3, at 118–24. It is clear enough how labor law and economic and social rights that have the status of constitutional rights represent attempts to transform society and expand equality. The social function doctrine of property law is illustrated by the Brazilian Federal Constitution of 1988 and the new Brazilian Civil Code of 2002, both of which adopted a concept of property as having social and environmental functions, as well as individual economic functions. Daniela Diz & Lars T. Soeftestad, *Water Resources as a Common Good in Brazil: Legal Reform Between Theory and Practice* (2004), available at Digital Library of the Commons, [http://dlc.dlib.indiana.edu/archive/00001529/00/Diz\\_Water\\_040806.pdf](http://dlc.dlib.indiana.edu/archive/00001529/00/Diz_Water_040806.pdf) (property rights have to be exercised in accordance with economic and social aims to preserve the environment); Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 436, 452–55 (2006) (Articles 182 and 183 of the 1988 Brazilian Constitution tie the social function of property to master plan process for urban land use, and the City Statute of 2001 provides for implementation of those constitutional rules so that, under certain circumstances, squatters can gain a legal right to use both private and public land). If it is correct that the issue of squatters' rights presents a risk of extreme politicization that could cause the Brazilian military to intervene again in political life, see Daniel Zirker, *Property Rights, Democratization, and Military Politics in Brazil*, 33 J. POL. & MIL. SOC. 125 (2005), perhaps that issue might not be a reasonable one on which to base reform efforts. Reformers have to pick their battles with an eye toward protecting the courts. But the social function doctrine appears to be suitable for application across a broad spectrum of property issues, and the environmental applications may be more likely to engender broad public support. It should be noted that “[t]he 1988 Constitution was drafted at a time when the belief in the transformative power of law was at its height and the Brazilian government played a central role in ordering economic and social development,” Megan Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT'L L. 230, 247 (1999) (cited in Pindell, *supra*, at 452), so the doctrine of social function represents about as clear an example of transformative law as one can imagine.

182. See *supra* note 170 (regarding judicial “independence” from positive law).

law by making counsel available or securing evidence—is therefore likely to contribute significantly to building a culture of transformative law and judicial independence, and if these really do constitute part of the *acquis légaux* in Latin America, efforts devoted to these areas are likely to be supported by a substantial part of the population.

I recognize that there is a certain “chicken and egg” quality to these recommendations. For a country in which the executive branch exerts too much influence over the judges, judicial review based on constitutional rights or nonconstitutional administrative law, labor law, or the social function doctrine of property would all no doubt be more effective if the judges were more independent, and yet I am urging that efforts be made to strengthen judicial independence by strengthening the effectiveness of the law. Which comes first, the office of the judge or the judge’s function in these various areas of law? The answer of course is that they are so interrelated that neither comes before the other. We have to work on both at the same time. The main point is that for too long legal reform efforts have concentrated on trying to influence the substantive functioning of law by concentrating on institutional reforms. Those efforts are important, but not sufficient. Reform also has to address the substantive functioning of the law because that is what builds popular support for the courts in their continual battle against the threat of executive dominance.

In the end, however, the success of reform efforts aimed at the courts depends on the judges themselves and on the quality of their decisions. We cannot escape that fact. But it also leads us to consider a kind of miracle. In the midst of his argument that judges cannot and will not be free of governmental control and right after listing the ways that various regimes have undercut judicial independence, Shapiro writes, “the prevalence of these . . . tactics is testimony to the real independence of judiciaries. In many nations at many times judges have been sufficiently their own masters to require even highly centralized regimes to adopt special tactics to avoid sharing power with them.”<sup>183</sup> That despite strong political influence, some judges assert their independence to decide cases before them as they think the law requires without yielding to political pressure is testimony to their dedication to the ideal of deciding cases under law, not politics. This kind of judicial behavior may actually make the greatest contribution to promoting popular support for judicial independence. To those judges this article is dedicated.

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183. SHAPIRO, *supra* note 17, at 34.