Many countries across the globe have begun transitions from authoritarian rule to democracy, marking what has become popularly known as the ‘third wave’ of democratization. While there have been some complete and partial failures, this most recent outbreak of democratization has certainly given scholars much hope. As a result, democratization has become a common topic of discussion in the literature, and many studies have attempted to explain preconditions of the transition to democracy, factors influencing its success and failure, and the relationship of particular institutions to society in politically developing countries. Not only may the insights provided by these studies be used to understand this phenomenon better, but they may also be applied one day to help foster democratic consolidation in those countries which have initiated transitions from authoritarian rule.

Given that democratization is generally defined in the literature as a gradual, evolutionary, and delicate process during which ‘democratic procedures of government’ are established and maintained, the preservation of the rule of law becomes an essential task in these transitional regimes. This is because the institutionalization of the rule of law (or the ‘submission of the state to law’) helps the new democratic state achieve two important goals: (1) the realization of a clear break with the past, and (2) the development of a constitutional culture which teaches state actors that the legal bounds of the system cannot be transgressed for the achievement of partisan political gains. As the rule of law is espoused during the transition, and as these above aims are realized, democratic procedures of government become more secure and the new political system can progress more smoothly toward consolidation.

The significance of the rule of law to the process of democratization creates a uniquely important role for the courts in transitional countries. The judicial branch, after all, is the institution normally charged with the enforcement of the constitution, rights, and other democratic procedures in constitutional democracies. Ideally, through the application of judicial or constitutional review, judges cannot only mediate conflicts between political actors but also prevent the arbitrary exercise of government power. In fulfilling this role, the courts become powerful actors in maintaining the submission of the state to law.

Nonetheless, the ability of the courts to fulfill this role is by no means automatic. Instead, it is heavily contingent upon the independence of the judicial branch. It is normally believed that without independence, the judiciary can be easily manipulated to
prevent it from questioning the illegal or arbitrary acts of state actors. Where independence exists, however, it is believed that the courts are able to be more forceful mechanisms for the defense of constitutionalism and justice. Given the aforementioned relationship between the rule of law and democratic consolidation, the establishment and security of judicial independence have therefore been actively sought by scholars and even by many politicians as an added institutional safeguard for newly democratizing countries. [FN7]

*607 The importance of judicial independence to democratic rule has been strongly advocated and to many degrees forcefully demonstrated in comparative political and legal studies. [FN8] However, despite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law. On some level, as Theodore Becker noted more than twenty-five years ago, ‘we all know what it means,’ [FN9] yet its full significance, intricacies, and implications still seem beyond our reach. This is especially true in reference to judicial independence during the democratization process; its manifestations, limitations, and meaning, as well as methods of fostering greater autonomy among a transitional country's judges, have not been thoroughly explored. [FN10] The little attention that has been paid to judicial independence during democratization is truly unfortunate, as the development of a more accurate understanding of this ideal would certainly benefit scholars and be of concrete use to those nations undergoing transitions from authoritarian rule. Thus, it is crucial to more carefully consider the meaning of the concept and investigate its fundamental qualities.

In this essay, I will not attempt to sort out all of the theoretical and conceptual problems related to judicial independence and its establishment in democratizing countries. Instead, I will take some important first steps toward accomplishing this by refining the core meaning of judicial independence and improving upon some common definitions. In addition, I will review some particular problems related to identifying and gauging judicial independence, so that it may be more clearly recognized in a given political system. Finally, I will examine the specific problems of fostering and assessing judicial independence in democratizing countries. In particular, I will discuss Owen Fiss' concept of ‘regime relative independence’ (see infra Section IV) and highlight the special needs of an institutionalized judiciary in transitional countries. While much of this analysis will unfortunately isolate the study of judicial independence from the process of democratization, it is necessary for political and legal scholars to more fully understand the first concept better before analyzing it in terms of the second.

*608 II. judicial independence: a definition

Any analysis of judicial independence must begin with some idea of its core meaning. At the most basic level, judicial independence is related to the notion of conflict resolution by a ‘neutral third;’ in other words, by someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws. [FN11] It is this type of independence that Fiss has called “party detachment,” or the idea that a dispute should be decided by a judge who has no relation to the litigants and no direct interest in the outcome of the case. [FN12] As noted by Martin Shapiro, this ideal is at the root of the “social logic” of courts, and is indispensable lest dispute resolution becomes a “two against one” situation. [FN13]

Judicial independence as adjudication by a ‘neutral third’ is deemed important for two
primary reasons. First, it is essential for the principled enactment of justice. Ideally, when judges have no interest in the issues of the case and no bias toward either of the parties, all citizens—rich, poor, strong, and weak—are put on an equal footing before the law and are able to protect their rights and security against encroachment by others. [FN14] After all, independent judges are supposed to decide cases based upon the objective principles of the law, and not the social or political standing of the disputants. Thus, dominant members of the populace are not able to manipulate the law to serve their own ends, as any aggrieved citizen can obtain relief by presenting his or her case to an independent judge.

Second, judicial independence takes on critical significance when the government is one of the parties to a dispute, as the case then involves general issues of the rule of law. If the enforcement of this principle is to be entrusted to the courts, then it is absolutely essential that judges not be biased in favor of the government. Likewise, it is important that judges not be subject to control by the regime, and that they be shielded from any threats, interference, or manipulation which may either force them to unjustly favor the state or subject themselves to punishment for not doing so. The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal. [FN15]

*609 With the basic meaning and value of judicial independence conceived of in this manner, two of its necessary characteristics are evident. The first is impartiality, or the idea that judges will base their decisions on the law and facts, and not any predilection toward one of the litigants. [FN16] Although it is a quality which is often difficult to identify, [FN17] it can be thought of as related to judges’ attitudes and beliefs as well as their behavior vis-a-vis particular political and social actors.

A second trait of independence is what Fiss has called ‘political insularity,’ [FN18] or the notion that judges should not be used as tools to further political aims nor punished for preventing their realization. Judges may not be removed for reaching decisions which are unpopular, the makeup of the courts should not be altered for political gain, and judges should be shielded from threats which might compromise their impartiality. [FN19] According to most scholars, insularity is believed to result from the establishment of certain formal and structural safeguards which give judges life tenure, provide for significant checks and balances in their appointment, and protect their salary against diminution while in office. [FN20]

Thus, in formulating a general definition of judicial independence, most scholars have placed a great deal of emphasis on impartiality and insularity. For example, in an oft-quoted definition, Becker referred to judicial independence as:

(a) the degree to which judges . . . decide [cases] consistent with . . . their interpretation of the law, (b) in opposition to what others, who are perceived to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision averse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court. [FN21]

Along the same lines (although slightly simplified and improved), [FN22] legal scholar Keith Rosenn defined judicial independence as:

*610 the degree to which judges actually decide cases in accordance with their
own determinations of the evidence, the law and justice, free from the coercion, blandishments, interference, or threats from governmental authorities or private citizens. [FN23]

Finally, consider Joel G. Verner's brief definition of judicial independence as:

[the ability] to decide cases on the basis of established law and the ‘merits of the case’, without substantial interference from other political or governmental agents. [FN24]

Besides these two necessary attributes, however, another important component must be incorporated into the definition of judicial independence: the scope of the judiciary's authority as an institution or, in other words, the relationship of the courts to other parts of the political system and society, and the extent to which they are collectively seen as a legitimate body for the determination of right, wrong, legal, and illegal.

In order to understand this better it might help to consider the following quote from Joel Verner's discussion of the Costa Rican judicial branch:

Costa Rica's supreme court . . . is the only court in the region . . . which has successfully resisted encroachments upon its independent authority and has been able to say ‘no’ to other governmental agencies and ‘make it stick’. [FN25]

Verner continues by quoting from Latin American scholar James L. Busey, that:

There is no doubt that the Costa Rican judiciary is free of presidential control . . . In Costa Rica, the judiciary operates as an independent branch, and can and does issue judgements which are contrary to presidential policy and design. [FN26]

Why, according to these descriptions, is the Costa Rican Supreme Court independent? Surely it has displayed some features of impartiality, and other characteristics of insularity as well. However, the additional trait of the Costa Rican judiciary was its operation as an independent branch and the fact that it has issued judgments against powerful political actors (i.e., a Latin American President) and made them stick. In other words, it had the qualities of an institution *611 which is respected by other actors as a separate, autonomous entity whose rightful and legitimate purpose is the determination of what is legally acceptable. This suggests that the Costa Rican courts had a broad scope of authority to affect the behavior of powerful actors in the political system.

While the other two traits of independence concentrate on the status of single judges, this third component places emphasis on the position of the courts within the larger political system and their functional relationship with the other branches of government. It makes the existence of significant levels of independence contingent on the degree to which the judicial institution has a distinct and discrete role--detached from the interests of the political system, the concerns of powerful social groups, or the desires of the general public--to regulate the legality of state acts, enact justice, and determine general constitutional and legal values. Judicial independence is not meaningful if the courts cannot exercise it to check the arbitrary or unjust exercise of power by political and social actors. Thus, the courts must be somewhat uninhibited as an institution, in relation to other institutions of the government, to carry out the ideal judicial role. To be sure, judges need to be impartial and insulated from political pressure, but more importantly to be so within a broadly defined institutional scope of authority for the judicial branch.

Thus, a more accurate definition of judicial independence might look something like
Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact ‘neutral’ justice, and determine significant constitutional and legal values.

III. problems of identification and measurement

From the above definition, it may at first appear simple to identify and measure judicial independence. All one would need to do, it seems, is find evidence of impartiality, insularity, and the courts’ scope of authority, and determine the degree to which these traits exist. However, it is not that elementary, as there are a number of problems which must be taken into consideration before judicial independence can be identified and measured.

First and foremost among these is the problematical nature involved in interpreting evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution. In theory and practice, some of these traits could be exhibited by non-independent as well as independent judicial branches. Thus, evidence of one but not all of them does not decisively indicate the existence of judicial independence.

Consider this point in reference to the impartiality of judges. Hypothetically, evidence which suggests that judges are impartial and see themselves as something other than the simple applicants of the regime's law should bode well for a high degree of judicial independence. However, by itself it may be totally inconclusive as to the degree of independence possessed by the courts. Judges may be impartial but not insulated; they may have the mindset to act objectively when dealing with the behavior of powerful political and social actors, but will pay the price if and when they attempt to do so. Likewise, judges may be impartial but have no scope of authority with which to challenge the legality of certain agents’ actions. In actuality, both insularity and scope of authority may be lacking while judges remain impartial. Under these circumstances, notwithstanding the high degree of impartiality, it would be less than accurate to label such judges independent.

As an example of this, consider the case of the Spanish judiciary under the authoritarian regime of Francisco Franco. In a survey of Spanish judges, political scholar Jose Toharia discovered that many were quite impartial, due to the fact that they held distinct values apart from the Franco government. [FN27] For example, on four issues of extreme importance to the regime-- the 'law and order state' (including civil liberties), the legality of divorce, the use of languages other than Castillian Spanish, and the death penalty-- Toharia's data showed that a majority of Franco's judges strongly disagreed with the government's official positions. [FN28] Furthermore, his findings indicated that Spanish judges did not merely see themselves as instruments to help rigidly govern society. [FN29]

However, as Toharia proceeds to explain, this high level of impartiality was qualified by subtle limits on the impartiality of judges and a significantly abridged scope of authority. [FN30] For instance, while the lower rungs of the federal Spanish judiciary were professionally staffed and relatively free from political interference, the highest (and hierarchically most important) levels of the courts were closely controlled by the Franco regime. [FN31] Furthermore, the courts' scope of authority was seriously restricted during Franco's
rule: Toharia *613 points out that the judiciary was not seen as a legitimate institution to regulate the legality of the government's behavior in reference to many important issues such as labor policy, economic and commercial matters, and certain aspects of criminal procedure--many of the same issues on which the judges were deemed impartial! [FN32] For the adjudication of these cases the regime created special courts which could be counted on to support its interests. [FN33] Thus, in a manner which was well described by Shapiro in Courts, [FN34] no meaningful degree of independence existed in Spain, as the judiciary was inhibited from determining significant constitutional and legal values. [FN35]

Similar difficulties with identification are related to insularity. There may be little or no political interference in the judiciary because (1) the regime knows that judges will habitually incline toward its concerns, or (2) the courts' scope of authority is so small that judges do not have the opportunity to reach decisions which might jeopardize their career or physical security. An example of this might be the Chilean courts under Augusto Pinochet. During the sixteen-year duration of Pinochet's strong-armed military government, there were no instances of purges, packings, or other corrupting influences, indicating the enjoyment of relative political insularity. [FN36] However, 'we all know' that it would be practically absurd to label it an independent judicial body during this time. This is a result of the clear partiality of Supreme Court Justices to the policies and interests of the Pinochet regime, as well as certain restrictions on the courts' scope of authority. [FN37]

Finally, it should be acknowledged that the courts' scope of authority (as important as it is) may not by itself indicate significant degrees of judicial independence. Courts may be given a wide scope of authority, and be publicly acknowledged by powerful political and social actors to be an important, separate institution for the determination of what is 'legally acceptable'--for the very reason that it is not an impartial body. If the courts always favored the interests of *614 the state or certain social groups, there would actually be extraordinary value in giving them a great deal of 'work-space' to 'regulate' the legality of certain issues. Likewise, if there is little insularity, the scope of the courts' authority does not matter, as judges can easily be removed or bribed if they threaten the significant interests of certain parties.

A second, but somewhat related, problem with accurately identifying judicial independence relates to the fact that the courts do not exist or operate in a vacuum. A number of exogenous factors, some political and some social, will influence judges' opinions and will have varying impacts on their impartiality, insularity, and scope of authority. For instance, reasonable checks might be placed on the freedom of judges and jurisdiction of the courts in the name of important democratic ideals like majority rule and popular sovereignty, effectively restricting their insularity and scope of authority. Furthermore, as part of the state, the courts will often be sensitive to the interests of the political branches of government, somewhat limiting their impartiality in certain circumstances. [FN38] Finally, emergent circumstances, for example, the outbreak of war, will tend to circumscribe the courts' impartiality and scope of authority. To what extent should these factors influence our judgment of the independence of a country's judiciary?

The obvious answer is the degree to which these concerns restrict the courts' impartiality, insularity, and scope of authority, as well as the reasonableness of these restrictions. In situations of near-chaos, it might not be too excessive to limit the courts' scope of authority by temporarily curtailing their criminal justice powers (i.e., habeas cor-
pus). However, absent rampant terrorism, full-blown war, or grave natural disaster, such restrictions on judicial power and independence would be uncalled for. This is why most scholars do not see Lincoln's actions during the U.S. Civil War as extremely egregious abuses of judicial independence, while the behavior of Latin American militaries in the 1960s, 70s, and 80s in reference to the judiciary is interpreted as quite destructive of it.  [FN39]

Before turning to this paper's suggestions as to how judicial independence should be identified and gauged, I should first address the issue of whether employing a positivist model to mathematically measure judicial independence would be a better way to identify its presence and degree. Some scholars might suggest that doing so would help overcome many of the aforementioned conceptual obstacles,*615 thus permitting the analysis of evidence without tainting it with the subjectivity of interpretation.  [FN40]

Despite the fact that many such positivist methods have been applied by scholars, an analysis of these attempts reveals that they have failed to fully and/or reliably gauge judicial independence. This is simply because the component concepts of judicial independence do not automatically lend themselves to rigid scientific analysis. Upon an examination of the most common applications of positivist, quantitative methods, it becomes clear that they have failed to fully capture the independence of the judiciary for one or more of the following reasons: (1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

The first of the above difficulties with empirically determining judicial independence is well-demonstrated by a 1975 study by David S. Clark which attempted to numerically measure the autonomy of Latin American Supreme Courts.  [FN41] In developing a 'judicial effectiveness score,' Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees, for which data were readily available in the constitutions and organic laws of the Latin American countries.  [FN42] The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees,  [FN43] the Supreme Court had already been purged at least five times since the 1940s.  [FN44] By including these factors, Clark overstated (by his own admission) the independence of some countries' courts, placing such dependent courts as Brazil's  [FN45] ahead of Costa Rica's, the country which is almost universally seen as having the most independent judicial branch in Latin America.  [FN46] In short, Clark's study, using formal indicators, revealed little about how independent the judiciaries of Latin America really were in 1975.

One might suggest, then, that the answer to this problem would be to include those indicators of judicial independence which were behavioral*616 or actual in nature. If only it were that easy. At present, there is nowhere near sufficient information on the actual independence of judges.  [FN47] To illustrate, assume that one wished to determine to what extent judges actually decided cases based on evidence and not political pressures. How could this be done? Judges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy.  [FN48] Or, suppose a scholar would like to discover whether political pressure has been applied on the courts to decide a case in favor of the government. Is the state
likely to admit that it compelled judges to unfairly support it? It is precisely because such information does not exist that scholars like Clark are forced to rely on formal indicators in the first place.

In order to get around this problem, some scholars have utilized methods which look at outcomes of the courts, and have attempted to inductively gauge judicial independence from this. In other words, they have examined the frequency by which courts decide cases against the government. Logically, if the courts did this often, it might be claimed that they were sufficiently independent to challenge the regime when necessary. Conversely, if practically all decisions were in support of state policy, one could surmise that the courts were unwilling (perhaps due to pressure) to critically scrutinize government policy or behavior. This mode of analysis has been applied at least twice, by renowned Mexican scholar Pablo Gonzalez Casanova [FN49] and comparative judicial scholar Carl E. Schwarz, [FN50] to assess judicial independence in Mexico.

Analyzing amparo (habeas corpus) decisions of the Mexican Supreme Court, Gonzalez Casanova found that an equal number of petitions for amparo were granted (34%) as were denied (34%) in those cases which named the President as a defendant. [FN51] Schwarz, undertaking a more meticulous analysis, similarly found that in cases where the government was a party to labor and criminal amparo petitions, a like proportion of cases were decided against the state (10.9%) as for it (9%). [FN52] Consequently, both determined that Mexican judges operated with a good level of autonomy from dominant political actors, contrary to the conventional wisdom that the courts were quite subordinate to the country's President and the ruling Partido Revolucionario Institucional (PRI). [FN53]

At first glance, the findings of these two scholars seem to support their conclusions and provide a good method for overcoming the drawbacks of other methods of measuring judicial independence. Nonetheless, as Keith Rosenn has pointed out, these studies suffer from some serious weaknesses as well. [FN54] Foremost among the deficiencies is that simply looking at the number of cases decided for and against the state, especially in Mexico, [FN55] does not really reveal the degree of autonomy of judges. Using this method absent more in-depth interpretation would cause one to label a judicial branch as dependent if many cases were decided in favor of the government. However, as Rosenn notes, infrequent grants of habeas corpus or declarations of unconstitutionality may also indicate that the government is doing a good job of conforming to the law, and that the courts are finding in favor of the state because few violations of the constitution really occur. [FN56] It is certainly possible that out of 1,000 habeas corpus petitions, 800, 900, or perhaps even 999 are frivolous. In the end, mere numbers do not necessarily indicate the degree of a judiciary's independence because all the cases the government lost may have concerned issues that it cared little about and those it won may have involved major exercises of state power. [FN57]

The limitations of one last attempt to empirically measure judicial independence should also be noted. Political scientist Kenneth Johnson attempted to overcome the weaknesses of other methods by polling 84 social scientists and determining their expert views as to which courts in Latin America were more or less independent. [FN58] Johnson asked these scholars to consider pressures exerted on the courts, the amount of respect they received, and the belief of judges as to whether they were independent, among other factors. From this poll, Johnson developed a rank-ordering of the independence of Latin America's courts. [FN59] This ranking, in turn, has been used by some scholars [FN60] as
authoritative on the issue of the independence of Latin American Supreme Courts. However, Johnson's classification is fairly arbitrary, and the numerical values ascribed to the independence of the Latin American courts do not really signify anything but, as Rosenn has described them, the 'collective hearsay of 84 social scientists.' [FN61]

This is not to say, of course, that empirical studies cannot be useful in eventually surmising the degree of independence of the judiciary. For example, statistics on judicial workloads, case backlogs, the public's impression of the courts, and the judiciary's own perception of its role [FN62] can lend themselves to interpretation, which may eventually lead to a better understanding of the courts' independence as an institution in the larger political process. The point is, however, that the degree of independence enjoyed by a judiciary cannot be directly inferred from such studies.

How, then, can judicial independence be identified and gauged? Obviously, given the previous discussion, it is no easy task. Nevertheless, I would suggest that there is a way to recognize and measure it. The first key to this approach is to look for evidence of dependence instead of independence. In other words, one should identify obstacles to the exercise and manifestation of independence--to judges' impartiality and insularity and the courts' institutional scope of authority. Too often scholars look for independence when it is quite likely that in its pure form it does not exist anywhere. Judicial dependence, by contrast, exists in virtually every political system and is much more easily identifiable.

Gauging judicial independence in this manner is to be conducted through a careful interpretive exercise in which the structural conditions of the courts are analyzed along with the judiciary's functional relationship with other political institutions. In addition, judicial independence must be gauged through a careful reading of the courts' decisions and written opinions. As previously stated, examining outcomes alone is insufficient: exactly what a court decides, the way it reaches its decisions, and the words it uses can speak volumes more about the position of the judiciary in a given country. [FN63]

One possible hermeneutical tool to assess judicial independence might be the courts' application of the political question doctrine or its equivalent. Because this doctrine often enables us to delineate the boundaries of the courts' scope of authority and is applied in reference to very sensitive issues, it may provide many insights into a judicial branch's independence within a political system. Now, the doctrine will likely be used to some extent by even relatively independent courts, as there certainly are purely political questions in every country. But if the courts apply the doctrine broadly--or, in other words, paint issues as political questions with a thick brush--this could imply a lack of insularity, impartiality, and limits to the scope of the judiciary's authority as well.

Thus, one should identify for which issues, for which political actors, and in which historical contexts the doctrine is applied. In addition, it is important to discern under what circumstances significant exceptions to the doctrine are upheld, and at what degree of frequency. Doing so can illuminate possible obstacles which exist to the enjoyment of impartiality, insularity, and a broad scope of authority. For instance, in reference to the United States, one might argue that an analysis of the Supreme Court's use of the political question doctrine clearly delineates its scope of authority in reference to such issues as the President's direction of foreign policy. [FN64] One may further argue that only in cases where significant support from one other branch of the government or the public exists will the Supreme Court directly challenge a President. These examples involving the political
question doctrine may highlight certain institutional aspects of the American judiciary's dependence.

In sum, one will encounter a number of difficulties identifying and gauging judicial independence. It is a concept with many intricacies and cannot be fully grasped without very deliberate interpretation of the courts' behavior and treatment within a regime. This is not to say that the recognition of judicial independence is entirely beyond the reach of political scholars. Identifying the obstacles to judicial independence in the context of an interpretive exercise can provide great insights into the strength of a judicial branch. Looking for indicators of dependence, by analyzing the political question doctrine and other such behavioral aspects of the courts, can certainly aid in this. However, it is important to emphasize that without more attentive analysis of the concept it will continue to be very difficult to gauge the degree of independence enjoyed by a particular judicial branch as well as to understand those factors which tend to hinder its manifestation.

IV. independence and democratization: judicial institutionalization and “regime relativ-

Several other theoretical and conceptual problems come to fore when judicial independence is considered in the context of democratization. In any such analysis, two key ideas must be kept in mind from the start. First and foremost, we are addressing the development of a historically dependent judiciary into an institution which can operate forcefully--vis-a-vis other political and societal institutions--to enact neutral justice, regulate the legality of government behavior, and mandate important legal and constitutional values. Second, this development is being encouraged amidst a delicate and evolutionary political process during which the newly inaugurated government is often unstable, and powerful actors from the past (e.g., the military) can still apply considerable pressure.

Given the courts' history under authoritarianism and the uncertainty involved in transitional regimes, how can judicial independence be fostered? The structural components of judicial independence--salary guarantees, checks and balances in appointment, etc.--can be easily included in constitutional or judicial reform. But how can we get the courts to act upon their structural independence to assert for themselves a broad scope of authority?

It is not unreasonable to expect that the courts will only be functionally independent when they are comfortable and secure in their position as constitutional adjudicators. Achieving this means providing the judiciary with an environment in which it can undergo a process of institutionalization to eventually become a more forceful body for the preservation of the rule of law. According to Huntington, a good degree of stability is instrumental to the concept of institutionalization, eventually enabling an organization to attain the four important qualities of a viable institution: adaptability, complexity, autonomy, and coherency. [FN65]

In reference to judicial systems, political and legal stability allows the courts to develop properly, eventually giving them the strength to assert their independence within the constitutional system. A judiciary which is more coherent, for instance, can speak with a more united voice to regulate the legality of state behavior and, with this, the judicial branch may be better able to assert itself vis-a-vis other institutions. [FN66] Likewise, a court which has developed to become more adaptable can more skillfully confront any
obstacles which may materialize to the exercise of its constitutional powers. [FN67] In all, a more institutionalized judiciary is by default more independent. This is not only because one of its defining characteristics is autonomy, but also because an institutionalized judicial system implies one which has a broad scope of authority within the political system. An institutionalized judiciary, in other words, exhibits the traits of functional independence described earlier in the paper (see supra pp. 608-11).

Given that stability is deemed so significant for the enjoyment of judicial independence, several important and related questions arise for newly installed democratic regimes. Particularly, how should the new transitional government treat judges who were either appointed by or served under the past authoritarian regime? Should the government do away with the old judges or seek to reform the judiciary with the current personnel? How does this decision affect the independence of the judiciary? These precise issues were considered by Owen Fiss in an article on the “limits of judicial independence.” [FN68] In that work, Fiss offered a new interpretation of judicial independence as “regime relative,” meaning that:

One regime need not respect the independence of the judiciary established by a previous regime, any more than one nation is obliged to respect the independence of the judiciary established by another. [FN69]

Fiss used this theory to advocate the wholesale dismissal of a judiciary by newly installed democratic governments. Such a move, Fiss insinuates, should have no consequences on the actual or perceived independence of the judiciary.

Taken at face value, what Fiss advocates makes some sense. It could be argued, for instance, that the transition to democracy would be injured if the judges who determined constitutional values were appointed by those who were not dedicated to democratic ideals in the first place. Furthermore, those judiciaries which were highly discredited by their complicity with or treatment by past authoritarian regimes may not be up to the task of constitutional adjudication. Yet there are some dangers to this theory that require it be carefully qualified, for the concept of judicial independence is much more complex than Fiss seems to consider.

*622 The consideration of Argentina--one of Fiss' own examples of why independence should be regime relative--would more accurately demonstrate the significance and limitations of regime relativity. For much of the twentieth century, Argentina experienced incredible political instability: numerous coups d'etat, serious civil rights abuses, strong military interference in the political system, and even two periods of direct military rule-1966-1973 and 1976-1983. [FN70] During the latter era, human rights abuses were especially grave, as some 10,000-20,000 people simply ‘disappeared’ at the hands of the government and unofficial paramilitary groups. [FN71]

Quite understandably, this environment had a very negative impact on the Argentine judicial system and the independence of judges. [FN72] The Supreme Court was often the target of partisan political attacks, being purged at least five times between 1946-1983. In addition, hundreds of judges and other members of the bar can be counted among the disappeared. As a result of the shakiness of the political system and the heavy-handedness of the military, the Supreme Court often closed its eyes to countless violations of the constitution and civil rights. [FN73] During the period known as the ‘dirty war’ (1976-83), the Supreme Court consistently applied a broad interpretation of the political question doctrine.
to justify virtually all government actions under a state of siege--especially in those cases involving the disappeared. [FN74]

It is against this backdrop that the Argentine transition to democracy began with the election of Raul Ricardo Alfonsin as President in 1983. Upon the inauguration of his government, the entire Supreme Court--somewhat discredited by its behavior during the dirty war but nonetheless composed of some noted jurists--resigned to allow the new democratic President to appoint a new Court. However (and this is where the concept of regime relativity gets problematic), Fiss contends that had the judges not stepped down, Alfonsin should have had the moral power to seek the Court's wholesale dismissal and recomposition. He further complicates this issue by claiming that:

Alfonsin should not have been required to respect the independence of the justices appointed by the previous regime, not merely because the previous regime was non-democratic, *623 but more fundamentally and more simply because it was another regime. [FN75]

Such a blanket theory of judicial independence is risky, and notwithstanding Fiss' belief that it has no bearing on the actual or perceived degree of autonomy of a court, it can actually injure the long-term functional independence of the judiciary as an institution. It is certainly difficult for the courts to evolve when they are continually being altered, especially without precise cause. Making an argument that the past Court was not consistent with the new democratic ideals being established in Argentina is one thing; saying that it should be dismissed without regard to it is another.

As argued above, the courts need to institutionalize before they will be able to more forcefully act upon their independence. It has to be ingrained in the constitutional culture of the country that, unlike before, the judiciary cannot be transformed without a very good reason. When the judicial body is dismissed and reconstituted, it needs to begin its process of development all over again, thereby delaying by many more years the establishment of a judiciary which can be a forceful mechanism in the protection of the rule of law.

Because the concerns of having judges appointed by the previous authoritarian regime are real, there admittedly needs to be some procedure that newly democratizing regimes could follow that would not be too injurious to judicial independence and institutionalization. I would suggest that a better route would be to deal with this problem on a judge-by-judge basis, removing those members of the courts who demonstrate their partiality toward old methods of governance or disregard clear constitutional stipulations to thwart the process of democratization. For instance, if the Supreme Court were to go against constitutional mandates or common jurisprudence to allow the trials of those accused of past rights abuses to be heard by military courts, the judges who came to this decision might rightfully be subjected to the constitutional impeachment process. Yet it must be made clear that, in this case, the removal attempts are for direct cause and come after, not upon, the initiation of democratization.

The case of Chile comes to mind as one which followed the above procedure. In 1993, a special panel of the Supreme Court voted to transfer a prominent human rights case from the civilian courts to the jurisdiction of a military tribunal. [FN76] Immediately following this decision, three of the justices on that panel (all of whom were Pinochet appointees) were impeached by the Chamber of Deputies, and one was eventually removed by the Senate. The charges against these judges stemmed directly from their decisions made sub-
sequent to the transition--i.e., their transfer of the case to the military court as well as improper collaboration with the Solicitor General of the Army. [FN77] This procedure cleansed the Court of authoritarian influence while respecting its integrity: removal resulted due to charges of misconduct, not for reasons of a regime shift.

Fiss implicitly criticizes the Chilean example, arguing that the Court should have been purged of its membership immediately upon the election of President Aylwin and reassembled with new judges. [FN78] Yet six years after the transition began in Chile, a consensus is beginning to form that the Supreme Court and other judicial bodies are beginning to assert themselves as a more independent institution. [FN79] In Argentina, on the other hand, after twelve years of transition, the Court is still somewhat timid when considering cases pertaining to states of siege, habeas corpus, or executive policies. [FN80] In fact, shortly after the transition began there, the Supreme Court once again used the political question doctrine to facilitate the declaration of a state of siege. [FN81]

This fact may highlight yet another limitation of ‘regime relative’ independence--not only does reconstituting the judiciary without cause possibly hinder its institutionalization, but it also does not necessarily remove the real obstacles which impede the independence of the judiciary. In fact, in Argentina, the legacy of the military continued to linger for some time after 1983, while the appointment of the entire court by the Radical Party President Alfonsin gave Justicialist Party President Menem a rationale to successfully enact a court packing plan. [FN82]

I am sympathetic, however, to the argument that some Supreme Courts, due to their loss of repute during authoritarianism, may need some alteration of their personnel. For instance, in Argentina, a Court which was not linked to the desaparicion was desirable, and in the Philippines a non-Marcos Court was necessary to make a clear break with twenty years of strong-armed rule. Yet, if this path is to be followed, I would argue that any changes in personnel must take place right away and should ideally be in the form of Philippine President Corazon Aquino's call for 'courtesy resignations.' In other words, they should be voluntary. Otherwise, the courts are in danger of having their stability as an institution further undermined by a wholesale reconfiguration of the judicial system.

With all this said, does dismissing the judiciary in the manner advocated by Fiss necessarily result in a dependent judiciary? The likely answer is that it does not necessarily result in a fully dependent judicial branch, although the damage done to the institutionalization of the judiciary will likely hurt its functional independence in the long run. However, when determining the independence of the courts during democratization, the context under which the judiciary was dismissed needs to be taken into careful consideration. If it occurred under voluntary resignations or the impeachment of Supreme Court personnel as cause, the possible damage to independence might be assessed as slight. The dismissal of the judiciary must also be gauged in light of other evidence, such as the consideration of the political question doctrine, the environment of the political system, and other obstacles presented by the comportment of other government actors and institutions.

The above discussion demonstrates that the nurturing of judicial independence during the process of democratization is no easy task. It will largely rely on the behavior of state actors and the degree to which they are willing to respect the rules regarding the makeup of the judiciary and the political system. If government officials are willing to accept defeat when their actions are deemed unconstitutional, the judiciary's prestige as well as its
independence will be greatly furthered. When state actors behave in a manner which respects and promotes legal and political stability, the courts will be able to institutionalize into more forceful bodies for the preservation of the rule of law. This, however, also identifies one of the most significant quagmires for the courts during the transition to democracy: while the viability and stability of democratization relies to a large extent on the independence of the courts, so also does the independence of the courts hinge quite a bit upon the stability of the transition. With this reality in mind, the adequate development of the courts into the kind of institution that “we want them to be” is likely to be a gradual process.

V. some tentative conclusions

The courts’ enjoyment of judicial independence will be important to the proper operation of any constitutional democracy, as it allows them to act as an institutional mechanism to safeguard the rule of law. This is especially the case for those countries undergoing *626 processes of democratization, where institutionalizing respect for the rule of law is of utmost importance. Once state actors learn not to transgress the legal bounds of the system to attain political goals, a constitutional culture will be attained, and lead to the consolidation of democratic rule. The courts can have a significant role in establishing this culture of legality if they are given adequate latitude to enact neutral justice, regulate the legality of government behavior, and mandate important legal and constitutional values.

Given the great value of judicial independence to democratizing nations, it is incumbent upon political and legal scholars to more fully discuss and develop the concept. In this analysis, I have attempted to bring the fields of politics and law closer to attaining a better understanding of judicial independence by identifying the theoretical and conceptual problems surrounding the term. In addition, I have suggested that a better way to gauge the strength of a particular country’s judiciary may be to look for evidence of dependence instead of independence. Perfect, unobstructed independence is unlikely to exist in any society for any number of reasons; thus, analyzing the courts in terms of how independent they are may place a handicap on the scholar. Identifying the contexts under which the courts feel pressures upon their impartiality, insularity, and scope of authority from other institutions in society will more clearly expose its relative strength. One way of accomplishing this, I suggested, was to examine which issues, actors, and circumstances lead the courts to apply the political question doctrine or its equivalent. Furthermore, I argued that, absent significant political and legal stability, the task of fostering judicial independence in democratizing nations will be a difficult one.

Eventually overcoming the problems related to identifying and fostering judicial independence will require additional theoretical analyses, especially from comparative perspectives. The examples of all countries currently undergoing transitions to democracy can speak volumes about all the intricacies of the concept and lead to a viable method of nurturing it in different societies. More careful study and sophisticated interpretation will lead to a stronger basis for assessing judicial independence as well as fostering it in transitional regimes.

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[FN5]. This is the definition provided by Allan R. Brewer-Carias, Judicial Review in Comparative Law (1989).

[FN6]. Garro, “Nine Years Transition to Democracy in Argentina: Partial Failure or Qualified Success?,” 31 Colum. J. Transnat'l L. 1-102 (1993); and Baloyra, supra n. 2.

[FN7]. See, e.g., Stotzky (ed.), supra n. 4.


[FN9]. Becker, supra n. 8, at 1-8.

[FN10]. This question was considered to some extent in a recent book edited by Irwin Stotzky, supra n. 4. However, the concept was mostly explored in terms of its counter-majoritarian nature.


[FN13] Shapiro, supra n. 11, at 1-8.


[FN15] A good example of this principle might be Argentina, where judges do not challenge the legality of many questionable government acts due to President Menem's interference in the makeup of the judicial branch. See, for example, Horacio Verbitsky, Hacer la Corte: La creacion de un poder absoluto sin control ni justicia (1993); and Garro, supra n. 6, at 1-102.


[FN18] Fiss, supra n. 12, at 59-60.

[FN19] Rosenn, supra n. 8, at 13-32; Becker, supra n. 8, at 145-61.


[FN21] Becker, supra n. 8, at 144.

[FN22] For example, Rosenn deletes the reference to independence from ‘those with... judicial power,’ since such a condition would make independence questionable in those countries where the courts are arranged hierarchically and must customarily heed the decisions of other judges in the form of stare decisis. Also, Rosenn notes that Becker failed to consider judicial independence from private citizens. See Rosenn, supra n. 8, at 3-8.

[FN23] Rosenn, supra n. 8, at 7.


[FN25] Id. at 479-80.


[FN28] Id. at 476-82.

[FN29] Indeed, upon considering this evidence Toharia concludes one section of his paper by stating that ‘We may conclude that the Spanish judiciary does not form a homogeneous and rigidly authoritarian body. On the contrary, a considerable ideological diversity is
found within it, including some clearly liberal patterns of thought.’ Id. at 481-82.

[FN30] Id. at 482-96.

[FN31] Id.

[FN32] Id.

[FN33] Id.

[FN34] Shapiro describes four methods which varying regimes customarily use to bypass impartial and powerful judicial branches, including the elimination of the courts' jurisdiction concerning certain sensitive issues. See Shapiro, supra n. 11, at 32-34.

[FN35] This point is acknowledged by Toharia. The title to Section II of the article is ‘A Basically Independent Judiciary...’ and the title of Section III is ‘...But a Basically Controlled Jurisdictional Structure.’ Toharia, supra n. 27, at 476, 486.

[FN36] Correa Sutil, “The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy,” in Stotzky, ed., supra n. 4, at 90-91; and Fiss, supra n. 12, at 70-73.

[FN37] As Correa Sutil notes, Supreme Court Justices were clearly in tune with the Pinochet regime, and even downplayed (to the point of denying) the epidemic of the thousands of desaparecidos (disappeared) in the country. Furthermore, formal limits on the courts' jurisdiction as well as many judges' own restrictive opinions about their role negatively impacted the judiciary's scope of authority. Correa Sutil, supra n. 36, at 90-101.

[FN38] Shapiro, supra n. 11, at 22-35.


[FN41] Clark, supra n. 20.

[FN42] Id.

[FN43] Id., 432.


[FN45] For historical analyses of judicial independence in Brazil, see Feinrider, supra n. 44, at 176-86; and Rosenn, supra n. 8, at 23-31.


[FN47] See Tate, “Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics,” in Comparative Judicial Politics: Challen-


[FN51]. Gonzalez Casanova, supra n. 49, at 23.

[FN52]. Schwarz, supra n. 50, at 290.


[FN54]. Rosenn, supra n. 8, at 9-12.

[FN55]. Id. As Rosenn explains, the President is always named as a party to an amparo lawsuit in Mexico, since he signed the law under question, and not because he has a strong interest in or connection to the policy under review by the courts. Thus, because Gonzalez Casanova does not explain whether the 34% of amparo petitions granted were for matters of importance to the President, it is not clear that this represents a major assertion of independence from the powerful executive by the Mexican courts.

[FN56]. Id. at 12.


[FN59]. Id. at 130.

[FN60]. See Verner, supra n. 23.

[FN61]. Rosenn, supra n. 8 at 9.

[FN62]. See, e.g., Edgardo Buscaglia & Maria Dakolias, “Judicial Reform in Latin America: Economic Efficiency vs. Institutional Intertia,” presented to the First Congress of the Latin American and Caribbean Law and Economics Association, Mexico, D.F., Mexico, February 2-3, 1995 (on file with author). Therein, the authors' examination of the workloads and prestige of the Latin American courts is quite illustrative of their role in the re-
gion’s newly democratized countries.

[FN63]. See, particularly, Gillman, supra n. 57.


[FN65]. Samuel P. Huntington, Political Order in Changing Societies 12-32 (1968). Judiciaries are very infrequently thought of in terms of institutionalization, despite the fact that the concept captures many of the qualities we expect in a forceful mechanism for the preservation of the rule of law. The only recent attempt at applying it to the judicial branch was conducted by George E. Gadbois’ 1987 analysis of the Indian courts. See Gadbois, “The Institutionalization of the Supreme Court of India,” in Comparative Judicial Systems: Challenging Frontiers in Conceptual and Theoretical Analysis 11-42 (John R. Schmidhauser, ed., 1987).

[FN66]. Gadbois, supra n. 65.

[FN67]. Huntington, supra n. 65, at 13-17.

[FN68]. Fiss, supra n. 12.

[FN69]. Id., 60.


[FN71]. For essays on the disappearances, see Asamblea Permanente de Derechos Humanos, La Desaparicion: Crimen contra la humanidad (1987).

[FN72]. See Garro, supra n. 6, at 54-58; Feinrider, supra n. 44, at 186-97; and Verner, supra n. 24, at 487-88.

[FN73]. Garro, supra n. 39, at 326-36. For but one example of these cases, see “Antonio Sofia y otro,” 243 Fallos de la Corte Suprema de Justicia de la Republica Argentina 304 (1959).

[FN74]. Garro, supra n. 39, at 326-36; and Feinrider, supra n. 44, at 186-97.

[FN75]. Fiss, supra n. 12, at 69 (emphasis added).

[FN76]. Id., 70-76.

[FN77]. Id. at 75.

[FN78]. Id. at 76. Fiss argues that utilizing the impeachment process is too messy, since it will ‘put the political branches of government into the business of second-guessing the Court on the merits of its decisions.’ Yet given the difficulty of impeachment and the impression in democratic regimes that it should only be used for cause, this approach is less dangerous to judicial independence than the wholesale, immediate dismissal of judges upon the onset of the transition.

[FN79]. See Buscaglia & Dakolias, supra n. 62.
[FN80]. Garro, supra n. 6, at 72-81.

[FN81]. The case, Grenada (307 Fallos 2304, 1984), upheld the doctrine first employed in Antonia Sofia y otro (supra n. 73), which stated that the Courts could not determine whether the Executive's declaration of a state of siege conformed with the constitutional stipulations regulating such a declaration. See Mandler, “Habeas Corpus and the Protection of Human Rights in Argentina,” 16 Yale J. Int'l L. 32 (1991).

[FN82]. Verbitsky, supra n. 15. On another level, the Colombian judiciary would likely be susceptible to the same obstacles to the enjoyment of independence—corruption and threats from drug traffickers—regardless of whether the currently dependent judges were replaced or not.

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