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WHO CARES ABOUT COURTS? CREATING A CONSTITUENCY FOR JUDICIAL INDEPENDENCE IN AFRICA

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BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA. By *Jennifer A. Widner*. New York: W.W. Norton & Company, Inc. 2001. Pp. 454. Cloth, $29.95; paper, $18.75.

While American scholars and judges generally assume that it is beneficial to insulate courts from politics,[1] Jennifer Widner[2] offers a contrasting perspective from another region of the world. In *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, Widner examines the role of courts and judicial review in democratization in Africa. She focuses on the role of one judge, a man who would see himself as embodying a role in Tanzania similar to that of Chief Justice John Marshall in the United States.[3] Francis Nyalali, Chief Justice of the High Court of Tanzania, worked to carve out a role for courts in the politics of his nation. He focused especially on the importance of public support for the courts, on judicial engagement with political culture, and on creating a constituency for judicial review. Creating a public that cared about courts was, for Nyalali, an essential component of democratic government.

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1. *See generally* Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1125-28 (1977).

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3. Francis Nyalali explicitly identified with American Supreme Court Justice John Marshall, and he drew from the American experience to make sense of his own role in Tanzania. Nyalali and Marshall both were comparatively young when appointed to their positions. Both faced the challenge of institution building, of crafting legal institutions and a culture that would support a judiciary and judicial review. Pp. 34, 98-99, 139. On Chief Justice John Marshall, see CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2002); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996); G. EDWARD WHITE WITH GERALD GUNTHER, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 (1988).

Widner, an African politics scholar, focuses on the development of the judiciary within common law Africa,[4] especially Tanzania. Yet in constructing this narrative, she writes from a perspective sensitive to the ideas and assumptions held by U.S. scholars about American law and legal institutions. As a result, she often frames points by placing them within the context of ideas about the law prevalent in American scholarship. What results is a narrative about Africa that opens up new perspectives on legal institutions in general, including legal institutions in the United States.

This Review first examines Widner's depiction of Nyalali's role in Tanzania. It then turns to the questions of how this African example can shed light on debates about courts in the United States and other nations. In particular, this essay argues that the example of Nyalali raises questions about the downsides of American assumptions about virtues of judicial disengagement.

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Widner provides an interior view on institutional development by telling the story of courts in Africa through the professional life of Chief Justice Francis Nyalali. What drives this narrative, however, is not the complex texture of one individual's life, the conventional subject of biography. It is a judicial biography of a different sort — a biography of the institution of the judiciary in a region of the world undergoing institutional change. Nyalali served as chief justice of Tanzania's highest court from 1976 to 2000, and he led the Tanzanian judiciary through a crucial period of institution building. As Widner sees it, "[h]is experiences provide a window for understanding the interaction between judges, politicians, and publics throughout the African region and the consequences for judicial independence and the rule of law" (p. 38).

Widner sets this story within the context of the role of judicial independence and the rule of law in other developing areas of the world. In earlier years, she suggests, "many people in developing countries either considered courts to be the agents of political leaders or thought them frail, without the power of the sword or the power of the purse behind them." By the end of the twentieth century, however, "infringements of judicial independence . . . [generated] street protests as well as foreign censure. The public relationship to the judiciary appeared to have changed and with it, the institutional position of courts and law" (p. 24).

4. Widner identifies common law Eastern and Southern Africa as the nations of Uganda, Kenya, Tanzania, Malawi, Zambia, Zimbabwe, Botswana, Namibia, South Africa, Swaziland, and Lesotho. P. 19.

Was this idea of judging a Western value being awkwardly imposed on Africa?[5] In Nyalali's view, it was a universal democratic value, and it was an African value. "[I]ndependence of the judiciary, impartiality of adjudication, fairness of trial, and integrity of the adjudicator are so universally accepted that one may reasonably conclude that these principles are inherent to any justice system in a democracy," he argued. "[T]here is no doubt that these same principles are part of the African dream, resulting from the liberation struggle against colonial and racial oppression. . . . They are inherent to the statehood which came into being when our respective countries became politically independent" (pp. 29-30; internal quotation marks omitted).

A driving force of Nyalali's role as a judge was to carve out an effective role for the courts in the life of his country. The challenges he faced are illustrated by a political crisis that developed five years into his tenure as Chief Justice. In the early 1980s, in the midst of an economic and political crisis in Tanzania, the government cracked down on corruption by passing an "Economic Sabotage Act" that not only defined a class of economic crimes, but placed their prosecution outside the purview of the judiciary. Those accused of economic sabotage were not entitled to bail or to legal representation. They were to be tried before a tribunal that did not follow the rules of evidence and procedure that governed the regular Tanzanian courts (p. 144). How should the nation's highest judicial officer respond to this challenge to judicial authority? "Suddenly I had to ask myself whether I should continue as chief justice or resign," Nyalali later recalled. "How could I continue to preside over the courts when it was declared a matter of policy to bypass the judiciary?" (p. 145).

The difficulty Nyalali faced is one that has confronted other judges in other regimes. What should a judge do when she finds herself presiding in a system that is itself unjust? Is it best to resign so as not to confer legitimacy on an illegitimate system? Or is it better to stay on, and to ameliorate the system's faults to the extent she can? Francis Nyalali faced this question, but he did not choose between leaving or staying. He chose instead a third path. He took his case to the political process. In their efforts to fight corruption, he argued, Tanzanian lawmakers were themselves being lawless. In a speech before the National Executive Committee of Tanzania's state party, Nyalali insisted that "no one however high or low is above the law" (p. 151). Although criticized by some as a "stooge of imperialism," Nyalali gained the support of President Julius Nyerere, and ultimately the legislature passed a resolution supporting the rule of law (pp. 150-51).

5. For an argument that current democratization efforts in Africa are based on ideas about the state that stem from a Western capitalist world view, not from African traditions, see CLAUDE AKE, THE FEASIBILITY OF DEMOCRACY IN AFRICA (2000).

Through this story Widner illuminates the role of judges as strategic political actors. And the focus of strategic politics in this story is the courts themselves. Nyalali acted politically to generate a constituency for judicial review.

Reform was not a matter of gradual evolution. Instead, Nyalali had to capitalize on moments when change could be accomplished. Sometimes there were "openings" when institution building was possible.[6] One such moment for Tanzania was the crisis precipitated by the Economic Sabotage Act. In that context, several matters converged, creating an opportunity for judges to "renegotiate the relationship between branches and engage in institution building" (p. 151). There was an economic crisis, coupled with pressure for reform from foreign aid agencies. This coincided with concerns about loss of control on the part of political leaders, and with the President's impending retirement and his concern with the image of his leadership. This confluence of factors, Widner argues, created an "opening," but whether the opportunity would lead to meaningful reform depended on Nyalali and his judicial colleagues (p. 151). "Openings" in other nations would not always be taken advantage of, and when there was no crisis, no "opening," there was also no institution building.

When moments of crisis created an opening conducive to change, what factors influenced whether reform took place? Widner makes the interesting argument that the "capacity to use this new political space to build stronger judicial institutions was intricately bound up in the character of substantive law" (p. 155). Her focus is on the role of public opinion in judicial institution building, and on the way substantive legal developments helped create a constituency, or a culture, supportive of judicial review. According to Widner:

> Courts could function effectively and independently, but still fail to win the public affection that is important as a long-term protection against encroachment. . . . The content or substance of the law, as well as the interpretive strategies judges employed in their work, could enhance or impede the bid to invigorate the separation of powers. (p. 155)

The crisis that created an opening for a politics in support of a rule of law, Widner argues, led to new support for individual rights.

While bills of rights were adopted in many African countries at independence, the Tanzanian independence constitution had none. Yet in the years before foreign donors promoted rights as conducive to economic development, Widner argues that a "home grown" interest in rights developed in Tanzania. A combination of international developments within Africa and domestic politics led to the creation of a Tanzanian Bill of Rights and Duties. Adopted as an

6. For an elaboration of this idea in the American context, see generally BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991), and BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

amendment to the Tanzanian Constitution in 1984, the Bill of Rights and Duties protected equality rights, and rights to "life; freedom from torture and inhumane or degrading treatment; to the presumption of innocence; to a fair hearing by a court of law or other body; to freedom of speech, religion, and association," among others (p. 169). The rights were subject to limitations. For example, rights were not to be exercised "in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest" (p. 169). The juxtaposition of rights and limitations meant that the actual scope of enforceable rights would depend on the courts. The amendment also outlined duties of the individual to society: the duty to work, the duty to abide by law, the duty to safeguard public property, and the duty "to defend, protect and promote national independence" (p. 170). These new provisions were subject to a three-year grace period to enable lawmakers to modify statutes if needed before the new rights went into effect.

How would the new Bill of Rights and Duties affect judicial independence in Tanzania? Some judges hoped to capitalize on this development. They believed that cases enforcing individual rights would strengthen the courts' independence from other branches and would enhance the courts' legitimacy. Others felt that individual rights enforcement by the courts would place the courts in conflict with the legislative and executive branches, ultimately undermining judicial independence. In a speech before the law faculty of the University of Dar es Salaam, Nyalali addressed the concern that judicial independence would be impaired. He tried to put down the "doubts and darkness" that gripped the legal profession after the constitutional amendment had passed (p. 173; internal quotation marks omitted). He also spoke to the question of whether the limitations clauses would undermine the effectiveness of the nation's new rights. Drawing from constitutional case law in India, Nyalali argued that limitations clauses must be read in a way that did not derogate individual rights. "Together, not individually," such principles "form the core of the constitution," he argued. "Together, not individually, they constitute its true conscience." In interpreting constitutional rights and duties, "the spirit of the constitution is made to speak loudly and clearly in the provisions" (p. 175).

Nyalali's sense of the nature of the "spirit of the constitution" would become clear as the court took up the question of the nature of constitutional interpretation. According to Widner, a need to gain public acceptance to enhance judicial legitimacy affected strategies of interpretation. Widner describes the beginnings in the mid-1980s and '90s of "a new jurisprudence that took account of the sharp divisions of opinion that existed in [the] country and allowed the court to build institutional legitimacy" (p. 179). As Justice Nyalali put it, "If the law is to have roots in the hearts and minds of the people of our own

country, we must articulate it upon principles which have been tested or enunciated in our own history" (p. 181; internal quotation marks omitted).

To inform his interpretation of the Bill of Rights and Duties with Tanzanian history, Nyalali turned to the writings of nationalists from the independence era. The values underlying the Tanzanian constitutional order were not new, Nyalali argued. "These principles and values were articulated on African soil by the great leaders of modern Africa" (p. 181). In turning to the past, Nyalali did not invoke the narrow conceptions of history that sometimes inform constitutional interpretation, such as the idea of the "intent of the framers."[7] Instead, Nyalali looked more broadly to Tanzanian political culture at the time the new nation, and its legal institutions, were created. The values that informed Tanzanian constitutionalism, he argued, "are the principles and values which underlay the African liberation struggle and gave birth to our nationhood" (p. 181). Moreover, the history of Tanzania, Nyalali argued, "is a history of the internalization of the principles and values of a world-wide liberation movement" (p. 183).

In later years, through his efforts to engage the public, Nyalali would find himself even more fully at the center of Tanzanian politics. At one moment, his role in Tanzania came perilously close to obliterating the separation of powers he had so diligently championed. Tanzania had a one-party government until the early 1990s. In 1991, President Ali Hassan Mwinyi assembled a commission to consider changing to a multiparty system. In need of a respected person to chair this important commission, the president turned to Nyalali. This placed the Chief Justice in a difficult position. Nyalali supported the move to a multiparty system, but worried that serving on the commission could undermine the independence of the judiciary. He ultimately served on the commission, which recommended that the country move to political pluralism. Three years later, Tanzania had its first multiparty election. Nyalali found himself in an even more awkward position when the major parties approached him about running for president. However, as Widner sees it, Nyalali's ambition was not for power per se, but for judicial power; his ambition was not for judicial supremacy, but instead for the authority that would facilitate judicial independence. He declined the call to stand for election.

The struggle for a multiparty system ultimately enhanced the role of the judiciary in Tanzania. Here, again, Widner stresses the impor-

7. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988). *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

tance of public opinion in creating a political culture within which an independent judiciary might flourish. Following Tanzania's multiparty elections, the courts had the responsibility of hearing petitions about election disputes. Hearings on the petitions attracted so much public interest that, according to Nyalali, "[i]n some places, we had to set up loudspeakers outside the courtroom, in trees, because there was not enough space in the courtrooms for all the people who wanted to attend" (p. 310). The court, Widner concluded, "had become a center for deliberation and public education about democratic norms. It had also found a new set of constituents in the men and women who sought to run for office on fair terms" (p. 310). While judicial independence is often seen as a measure of democratization in Africa,[8] Widner helps us to see that courts are themselves sites for democratization. Courts themselves can enhance the development of a democratic political culture. In this sense, the judiciary is not only reflective of democracy, but constitutive of it.

In developing a constituency for courts in Africa, the substantive area of law that Widner finds to be of most importance is family law. "Some day," she suggests, "judges and lawyers might look back on the end of the twentieth century and say that the cases that had contributed most to law development in this period were not those that concerned political liberties but those that were about gender and family" (p. 335). Nyalali hoped that women especially "would turn to the courts for help in resolving conflicts" (p. 335). According to Widner, he believed that "there was no better way to draw African principles into the common law and to begin to build an understanding of constitutional norms than to support judicial development of family law" (p. 335).

The importance of family law in Africa stems in part from high rates of urbanization, which did not sever kinship relationships, but complicated them. Mortality from AIDS and civil conflict also "scrambled the conventional division of labor, as well as norms governing succession and inheritance. Yet women's participation in the family, community, and economy was often restricted in ways that impeded adaptation to changed new circumstances" (p. 336). When African women went to court, they "appealed to principles in the common law or to the antidiscrimination clauses in new constitutions and international covenants" (p. 338). Their cases presented a challenge for courts, as most African constitutions both forbade

8. *See, e.g.*, Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996); Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64 (2001). For a critique of current democratization efforts, see AKE, *supra* note 5.

discrimination against women and mandated respect for customary law, which restricted women's role.

While Widner effectively makes the case for the importance of gender to the clash between customary and constitutional law, this issue does not fit neatly within the focus of her narrative: Nyalali's experience as a window into the development of judicial independence. Her most illuminating examples come not from Tanzania, but from Botswana and Zimbabwe. This underscores an awkward feature of Widner's use of one person's story when at times she wishes to illuminate judicial development in a region. In the Tanzanian family law case, the court ruled in favor of an appellant who argued that a woman's attempt to sell property violated customary law that disallowed women from disposing of clan property. In rejecting the woman's constitutional arguments, Nyalali's opinion noted that the new Bill of Rights did not yet apply to such claims, since the three-year grace period had not yet lapsed. His opinion emphasized, however, that the court had ruled previously that customary law had no exceptional status, so that claims like the one at issue might be heard in the future. So although he did not take up the substantive issue of sex discrimination in this case, he did make it clear that customary law would be subject to constitutional review (pp. 359-60).

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Can a book on courts in Africa inform legal scholarship in America? In recent years, as law schools have taken up the question of the impact of globalization on the practice of law, interest in the law and the courts in other nations has increased. The traditional focus of comparative law in the United States has been on comparing American law with the law of European nations.[9] Recent scholarship has encompassed more of the globe,[10] and important work has focused

9. Some doubt that comparative law has significant value unless the systems being compared have certain cultural similarities. *See* Aharon Barak, *The Supreme Court 2001 Term — Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 113 (2002) ("[I]nterpretive inspiration is only proper if there is an ideological basis common to the two legal systems and a common allegiance to basic democratic principles."); P. G. Monateri, *"Everybody's Talking": The Future of Comparative Law*, 21 HASTINGS INT'L & COMP. L. REV. 825, 826 (1998) ("Culture (and the differences between them) has always been a central concern of comparative law, and the first step of the conventional approach is to divide the legal world into families by tracing back common roots, as genealogies to explain the present. Genealogies define who we think we are or would like to think we are. They define an 'us' and a 'them,' and they are an essential mechanism of how identities are constructed."). Additionally, "[f]or the past half century, comparative law in the United States has been led by the generation of émigrés who fled Hitler's Europe to become professors of comparative law," which has influenced the focus of comparative legal scholarship. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 43-44 (1998).

10. *See, e.g.*, Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87

on South Africa.[11] What of the rest of the continent of Africa? Amidst the blossoming of comparative scholarship, most of the continent of Africa is usually overlooked, as if it were a legal "Heart of Darkness,"[12] as if it were a lawless world. How could such a world offer lessons for our own? Although there was a flurry of interest during the independence years, Africa has remained largely off the agenda of American legal scholarship.[13]

American lawyers embraced Africa in the 1960s. Before the current generation of American legal scholars who have advised other nations about constitutional development, American lawyers went to Africa to counsel nations emerging from colonialism about constitutions, courts, and legal education.[14] A number of American law

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CORNELL L. REV. 1093 (2002); Kwang-Rok Kim, *The Tender Offer in Korea: An Analytic Comparison Between Korea and the United States*, 10 PAC. RIM L. & POL'Y J. 497 (2001); Yoshiro Miwa & J. Mark Ramseyer, *Corporate Governance in Transitional Economies: Lessons from the Prewar Japanese Cotton Textile Industry*, 29 J. LEGAL STUD. 171 (2000); Chester S. Spell, *The Evolution of Rights Disputes and Grievance Procedures: A Comparison of New Zealand and The U.S.*, 28 CAL. W. INT'L L.J. 199 (1997); Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1 (2002).

11. *See, e.g.*, RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994 (1995); KENNETH S. BROUN, BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW (2000); STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992); HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000). An important focus of comparative work has been on race relations in the U.S. and South Africa. *See* JOHN W. CELL, THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH (1982); GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); *see also* Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L.J. 745 (2000).

12. *See* JOSEPH CONRAD, HEART OF DARKNESS (1902); *see also* BILL BERKELEY, THE GRAVES ARE NOT YET FULL: RACE, TRIBE, AND POWER IN THE HEART OF AFRICA 7 (2001) (criticizing "the conventional American conception of Africa as a unitary landscape of unremitting despair").

13. There are, of course, exceptions to this trend. *See, e.g.*, Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259 (2001); James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407 (1999); Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights, and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 1 (1996); Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263 (1999); Annmarie M. Terraciano, *Contesting Land, Contesting Laws: Tenure Reform and Ethnic Conflict in Niger*, 29 COLUM. HUM. RTS. L. REV. 723 (1998); Adrien Katherine Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia & South Africa*, 11 WIS. INT'L L.J. 295 (1993).

14. Aspects of this story will be explored in KEVIN GAINES, FROM BLACK POWER TO CIVIL RIGHTS: AFRICAN AMERICAN EXPATRIATES IN NKRUMAH'S GHANA, 1957-1966 (forthcoming); and Mary L. Dudziak, Exporting American Dreams: Thurgood Marshall and the Constitution of Kenya (Nov. 2002) (unpublished manuscript, on file with author). *See also* PAUL L. EDENFIELD, THE AMERICAN HEARTBREAK: A BIOGRAPHICAL SKETCH OF PAULI MURRAY (Robert Crown Law Library, Stanford Law School, Women's Legal History Biography Project, Autumn 2002), *available at* http://www.stanford.edu/group/WLHP/

teachers taught law in Africa.[15] Because there were very few indigenous African lawyers in most nations immediately after independence, building a legal profession in African countries was an aspect of nation building.

One of the many contributions of Widner's very rich book is that she traces the history of the engagement of American lawyers and legal academics with Africa, from the earlier "law and development" movement, through its demise, and to the current involvement of American lawyers and scholars in Africa. During the independence era, foundations and government agencies supported the development of legal institutions and education in Africa. Idealistic Americans went to Africa to aid new African governments. This movement was short-lived, however, as law came to be seen in Africa as a neocolonial instrument. Law was thought to "serve the interests of state authorities and social engineers. It had lost its status as a source of norms that could help define appropriate limits on the use of political power."[16] Law reform would be back on the agenda of international aid agencies by the 1990s, "responding to the 'pull' of African judges like Nyalali and the 'push' of their own policy makers" (p. 207). Law reform was now thought to aid democratization and to create a better climate for economic growth.

The issue at the heart of this study, the idea of judges as strategic political actors, is both familiar to scholars in the United States, and for some, an anathema.[17] However, the picture of judges and politics

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papers/paulimurray.pdf. On connections between the U.S. civil rights movement and African nationalists, see JAMES H. MERIWETHER, PROUDLY WE SHALL BE AFRICANS: BLACK AMERICANS AND AFRICA, 1935-1961 (2000); YEVETTE RICHARDS, MAIDA SPRINGER: PAN-AFRICANIST AND INTERNATIONAL LABOR LEADER (2002); PENNY M. VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937-1957 (1997).

15. Pp. 52-53, 200; *see* James C. N. Paul, *American Law Teachers in Africa: Some Historical Observations*, 31 J. AFR. L. 18 (1987).

16. P. 203. For an important contemporaneous critique of the law and development movement, see David M. Trubec & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

17. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). On courts and electoral politics in the United States, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002); and Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993). *See also* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999). On recent "partisan entrenchment" in Supreme Court politics, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). On judicial review and democratic politics, see generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). On post-World War II scholarship on judicial review, see Mary L. Dudziak, *The Politics of the Least Dangerous Branch: The Courts, The Constitution, and Constitutional Politics Since 1945*, *in* A COMPANION TO POST-1945 AMERICA (Jean-Christophe Agnew & Roy Rosensweig eds., 2002); Barry E. Friedman,

that emerges from scholarship on United States courts is different from the sort of intersection between courts and politics in Widner's book. For example, following the 2000 election, scholars debated whether the United States Supreme Court had been partisan in its decision in *Bush v. Gore*.[18] More frequently, the Court is seen as supporting the interests of particular social classes,[19] or as championing a liberal or conservative ideology.[20] Judicial politics is discussed in terms of the substantive values judges support.

The fictional character Mr. Dooley famously said that "th' supreme court follows th' illiction returns,"[21] and scholars often argue that the United States Supreme Court is careful not to move too far beyond public opinion, lest it damage its legitimacy.[22] In this sense, public opinion is seen as a boundary constraining the scope of judicial action. This conception of political culture as a boundary is different, and more limited, than Nyalali's proactive engagement.

The notion of courts reaching out to the public runs directly contrary to some American perspectives on the judicial role. Most prominently, Supreme Court Justice Antonin Scalia has decried the idea that courts should have regard for public opinion, suggesting that it is important for the Supreme Court to ignore it. He has said: "I don't know what the most profoundly held beliefs of the American people

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The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE L.J. 153 (2002).

18. *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 ELECTION (2001); RICHARD A POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION (2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass A. Sunstein & Richard A. Epstein eds., 2001).

19. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); CRITICAL LEGAL STUDIES (James Boyle ed., 1992); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); POLITICS, POSTMODERNITY, AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT (Costas Douzinas et al. eds., 1994).

20. *See, e.g.*, STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE (1998); LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION (2000); THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T (Vincent Blasi ed., 1986); THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? (Bernard Schwartz ed., 1998); THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark V. Tushnet ed., 1993).

21. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

22. *See* Barry E. Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics* 148 U. PA. L. REV. 971, 1058-59 (2000) [hereinafter Friedman, *The History of the Countermajoritarian Difficulty, Part Four*]; *see also* BICKEL, *supra* note 17, at 127-29; JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 48 (1980).

are. I don't go to the neighborhood pub and raise a glass with Joe Six-pack."[23] When the United States Supreme Court considered abortion rights in the 1989 case *Webster v. Reproductive Health Services*, Scalia suggested that the Court should not be "the object of the sort of organized public pressure that political institutions in a democracy ought to receive."[24] Scalia reiterated his concern about public engagement with the Court in another abortion case, *Planned Parenthood v. Casey* in 1992. "How upsetting it is," he complained, "that so many of our citizens (good people, not lawless ones, on both sides of the abortion issue, and on various of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus."[25] This argument for disengagement is consistent with Scalia's theory of law and interpretation.[26] Because, for Scalia, law stands apart from culture, rather than being constructed by it, the rule of law depends upon insulation rather than engagement. In contrast, for Nyalali, a rule of law requires judicial engagement with political culture. Engagement does not undermine the rule of law, but enhances it by fostering a culture supportive of judicial review. In this sense, Nyalali sees law and culture as mutually constitutive,[27] while Scalia views them as separate spheres that must not commingle. In this way, *Building a Rule of Law* helps us to broaden our conception of the relationship between courts and politics. It also helps us to take seriously the question of whether the Joe and Jane "Six-packs" of the world should be very much on the agenda of courts interested in maintaining their own legitimacy.

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Jennifer Widner's fascinating study of courts and politics in Africa helps us reflect on courts and politics in the United States. As the United States Supreme Court has undergone an ideological shift to the right in the late twentieth century, affecting the nature of individual rights and the scope of congressional power, some scholars have argued for a turn away from the courts. They advocate "populist constitutionalism," or an emphasis on the constitution outside the

23. *Obiter Dicta; So They Say*, A.B.A. J., June 1996, at 16.

24. Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., dissenting).

25. Planned Parenthood v. Casey, 505 U.S. 833, 999-1000 (1992) (Scalia, J., dissenting).

26. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 41, 43, 44-45 (1997).

27. On the idea of law and culture as mutually constitutive, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 63-65, 123-24 (1984).

courts.[28] While this scholarly move is a helpful corrective in its emphasis that the judiciary is not the only locus of constitutional analysis, it may also deflect political debate from a focus on the role of the judiciary itself. If courts are constitutive of popular democracy, rather than simply a reflection of it, then even populists must engage the courts since the courts play a role in constructing political culture.

At this moment in the history of American courts, it may be helpful to reflect on the lesson Widner offers about Tanzania. In a democracy, judicial legitimacy and authority ultimately flow from a public, from a culture, supportive of judicial review.[29] And as we can see in this example from Africa, support for the courts can depend on the very nature of judicial action. The courts and the people together worked to build a rule of law in Tanzania premised on the idea that the courts play a central role in a democracy: the protection of individual rights against government tyranny.

In this sense, perhaps, Francis Nyalali also has a lesson for popular constitutionalism. He emphasizes a public conception, a political culture, not just on the nature of rights, but also on the role of courts in a democracy. And so, paradoxically, the popular constitutionalism we see in *Building the Rule of Law* is not only a popular constitutional vision about rights. It is also a popular vision of the importance of courts. How interesting that as African nations embrace judicial review, there is less consensus among American scholars that it matters to care about courts.

28. *See, e.g.*, RICHARD PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); *see also* Barry E. Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. (forthcoming 2003).

29. For an analysis of this idea in the American context, see Friedman, *The History of the Countermajoritarian Difficulty, Part Four*, *supra* note 22.