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Introduction

Latin America and Judicial Reform:
Why Would Politicians Enact Institutional Reforms
That Appear to Limit Their Own Political Power?

Judicial reform, defined here as institutional changes claiming to increase the independence and authority of the judicial branch, swept Latin America in the 1990s. Argentina, Peru, and Mexico, for example, each engaged in constitutional revisions that appeared to empower their judiciaries. Following their respective judicial reforms, high courts in each country were asked to decide the constitutionality of a ruling party’s attempt to manipulate political rules. In Argentina, the Supreme Court refused to rule against the president; in Peru, the Constitutional Court justices who did so were fired and their decision ignored. The Mexican Supreme Court, on the other hand, ruled against that country’s long-standing dominant party, and its decision was accepted and enforced. Politicians in each of these countries had introduced what appeared to be very similar judicial reforms—yet these three court cases present extreme variations in judicial power. Why do some instances of judicial reform succeed at establishing a judiciary able to constrain elected leaders while others fail to do so? Even more striking, why would politicians who previously enjoyed decision-making powers unfettered by judicial constraints willfully engage in reforms that place limits on their own political power?
This book attempts to answer this question by analyzing the judicial reform experiences of three Latin American countries: Argentina, Peru, and Mexico. As was typical throughout the region, these countries’ judicial reforms began with constitutional revisions consisting of a package of institutional changes dramatically altering judicial structures. However, passage of constitutional reforms is but the first step in the process of meaningful judicial reform. In Latin America, judicial reform is a two-stage process of *initiation* (the passage of constitutional revisions) followed by *implementation* (the enactment of congressional legislation). The crucial point is that while passage of constitutional reforms may signal an intent to increase judicial autonomy, the real outcome of judicial reform is determined by the details and vigor of the implementing legislation. In our three cases, while Mexico’s judicial reform was meaningfully implemented, Argentina’s and Peru’s were not. This book is an attempt to explain variations in the implementation of Latin America’s judicial reforms and, thus, variations in the power of each country’s postreform judiciary.

Historically, the judiciaries of Latin America have been impotent and unable to prevent even the most blatant constitutional violations by the prevailing political elite.¹ Repeatedly trampled on and ignored by politicians, the courts of Latin America were also routinely neglected by scholars. However, as elected governments replaced authoritarian regimes across the globe at the end of the twentieth century, interest in the judiciary in the developing world underwent a dramatic reversal. Latin American courts, after decades of academic neglect, have today become a major concern of research in the region.² Democratic theorists, viewing institutional reform as key to the consolidation of “third-wave” democracies, have focused on the development of judicial counterweights capable of imposing limits on elected leaders and upholding the rule of law (Schedler, Diamond, and Plattner 1999; Larkins 1996; Stotzky 1993). Multilateral development agencies have published numerous works stressing the need to foster a legal environment conducive to the development of a market economy (Jarquin and Carrillo 1998; Rowat, Malik, and Dakolias 1995). Additional scholarly work has examined the international promotion of other aspects of judicial reform, such as access to justice and judicial efficiency in Latin America (United States Agency for International Development 2002; Domingo and Sieder 2001).
There are now also a number of academic studies describing a particular country’s judiciary (Mexico: Domingo 2000 and Finkel 2003; Peru: Hammergren 1998a; El Salvador: Popkin 2000; Chile: Hilbink 2003). Research on Argentina has been especially abundant. Bill-Chavez examines two Argentine provinces and argues that divided government is key for the development of judicial autonomy (2003). Helmke’s analysis of the Argentine Supreme Court during the years 1976–95 demonstrates that antigovernment rulings cluster at the end of both weak democratic and weak nondemocratic governments alike (2002). Iaryczower, Spiller, and Tomassi, examining Argentina between 1935 and 1998, show that the probability of a justice voting against the government increases the less aligned the justice is with the president but decreases the stronger the president’s control over the legislature (2002). Using the case of Mexico, Staton argues that supreme courts selectively issue press releases to publicize specific decisions as a strategy to bolster judiciary authority (2006). As for more inclusive studies, Prillaman gives an overview of the judiciary in several Latin American countries by discussing inputs and outputs to measure reform (2000). Central American judiciaries, and the challenges they present for that region’s transitioning governments, have also been detailed in recent works (Dodson and Jackson 2001; Siedler 1996).

We are deepening our knowledge of the Latin American judiciary, but the question of when politicians take actions to promote the development of a more powerful judicial branch remains understudied. I argue that in order to understand the outcomes of judicial reform, as well as to predict where reforms are likely to empower courts, it is necessary to examine the political incentives faced by politicians at the implementation phase. If ruling parties believe that they are unlikely to maintain political power, then they have a strong rationale for proceeding with judicial empowerment. Implementation of judicial reform in such a situation may serve the ruling party as an “insurance policy” in which a stronger judicial branch reduces the risks the ruling party faces should it become the opposition. This book suggests that the likelihood of meaningful implementation, the crucial determinant of judicial reform, increases as the ruling party’s probability of re-election declines. By separating the constitutional adoption of judicial advancement from its legislative enactment, this book contributes to a better understanding of the conditions under which proclaimed judicial independence is converted into real judicial oversight.
This introductory chapter proceeds in five sections. The first section provides an overview of the judicial concepts necessary to evaluate Latin America's recent reforms. The second describes the region's traditional judiciary and details the general package of reforms pursued in the 1990s. The third section summarizes two alternative explanations for the region's reforms as well as my “insurance policy” theory, and briefly addresses the ability of these three arguments to explain differences in the power of Latin America's postreform judiciaries. The fourth section presents the case selection and research method, and the last gives an overview of the book.

The Judiciary in a Democratic Government: The Rule of Law, Checks and Balances, and Judicial Power

The rule of law, or the absolute supremacy of law over arbitrary power, underpins democratic government. In a democracy based on the rule of law, all subjects are treated equally and no individual (even one enjoying political power) is above the law. The courts, as the primary guardian of the rule of law, are responsible for safeguarding individual liberties against unconstitutional encroachment in a democratic political system. Thus, the duty of the judiciary is to guarantee that law, and not raw power, is the foundation of government. Additionally, judiciaries provide for conflict resolution, social control, and supplementary detailing of the law (Shapiro 1981, chap. 1; Hammergren 2002a).

In presidential democracies, where government structure is based on the separation-of-powers principle, a central mandate of the judiciary is to ensure that legislative and executive authority remain within their constitutional limits. In a system of checks and balances, it is the obligation of the judicial apparatus to exert “constitutional control”: to interpret the constitution, to place limits on the other branches, and to determine when those limits have been violated. In all presidential systems, the judiciary ostensibly serves the same purpose, yet in practice the judicial branch only fulfills its role where it wields real power.

Judicial independence has been widely discussed in scholarly literature (Landes and Posner 1975; Iaryczower, Spiller, and Tomassi 2002; Fiss © 2008 University of Notre Dame Press
Definitions of judicial independence range from the minimal to the expansive, extending from an exclusive focus on the judiciary’s structural features to a broader concern with the behavior of courts vis-à-vis other government institutions. Peter Russell, seeking to build a general theory of judicial independence, uses the term in two distinct ways: (1) as a relationship between judges and judicial institutions with respect to other individuals, groups, and interests in society; and (2) as demonstrated behavior by judges to rule independently of those who enjoy power (Russell 2001). Each of these two definitions has been used by scholars examining Latin America. Helmke uses the latter for her work on Argentina (2002), while Dodson and Jackson use the former for their research on Central America (2001). This book, in seeking to determine under what conditions the courts are enabled to act “as a countervailing force within the larger governmental structure” (Fiss 1993, 56), encompasses both of Russell’s definitions of judicial independence.

However, for the purpose of this study, I prefer to use the term judicial power, rather than judicial independence, to best capture the idea of a court whose actions demonstrate that it enjoys independence as well as authority. Thus, judicial independence is used here in a narrow sense to signify that judges make decisions according to expressed rules and free from external manipulation. It requires that judges be named in an impartial manner and that they be protected from political retribution while on the bench. Formal arrangements to operationalize independence include tenure (security in office), selection procedures (appointment and career advancement), and salary (financial compensation may not be diminished while in office). In this more restricted sense of judicial independence, however, independence in itself does not ensure the existence of a judiciary capable of fulfilling its role as an effective check on the use of political power in a presidential democracy. For a court to enjoy real power, it must also possess authority.

Authority, or the rightful exercise of power with the claim to be obeyed, refers to the legitimacy of a government branch. Judicial authority requires that court rulings be accepted and complied with by affected parties, members of society, and power holders in the larger political structure. Furthermore, authority requires that courts possess broad jurisdiction: a wide range of subject matter upon which the courts
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may rule. If a court was able to make impartial decisions yet by law was permitted to make decisions only on a severely circumscribed set of issues, then judicial authority would be meaningless in practice. Thus, for a court to have the potential to wield real power, its jurisdiction must envelop salient social, political, and economic questions. In sum, the exercise of judicial power refers to the promulgation of decisions by impartial judges, covering a wide range of issues and based on written laws, which are obeyed by societal interests as well as by those who wield political authority.

The Traditional Judiciary in Latin America and the Reforms of the 1990s

The Weakest Branch

Upon achieving independence in the early nineteenth century, Latin American countries established separation-of-powers presidential democracies and granted formal independence to their courts. Although Latin America’s founding documents included a tripartite institutional structure, judiciaries in the region never achieved the political power formally ascribed to them in their national constitutions. Indeed, the judiciary was neither separate nor equal, nor was it expected to be (Wiarda and Kline 1985). However, that is not to say that the courts wielded no power. Hammergren refers to Latin American judiciaries as enjoying “bounded independence”—in other words, exercising some autonomy in areas that did not threaten government interests (Hammergren 1998b). Still, from the perspective of democratic checks and balances, political domination left the courts generally unable to constrain either elected officials or de facto governments.

The subordination of the Latin American judiciary to the prevailing political powers is a result of a combination of factors, including executive dominance, instability of judicial posts, civil law and a formalistic legal culture, and lack of popular support for the judiciary (Verner 1984; Hammergren 2002a). First, Latin American presidents have wielded overwhelming political power, with executives refusing to respect formal constitutional limits or submit to counterbalancing by the other branches
Determined to inhibit court capacity to check executive authority, presidents have repeatedly manipulated judicial institutions. In particular, executives have used control over the selection and promotion of judges to debilitate judicial will to challenge political leadership (Frühling 1993). Second, Latin America’s judicial branch has also suffered from extreme institutional instability. Repeated cycling of governments in the twentieth century resulted in purges and packings that frequently altered judicial postings (Domingo 1999; Prillaman 2000). In addition, the justices themselves, who often saw the court as a temporary stepping-stone to a more lucrative political office rather than as an end in itself, opted to serve short tenures and thus contributed to the high rate of turnover on the bench. Hand-picked and often temporary, the region’s judiciaries were unable to develop the institutional autonomy from which to build their own base of power.

Third, Latin America’s legal system, rooted in civil law, has traditionally denied the courts the right to vigorously engage in constitutional control. Historically, judges in civil law systems, in contrast to those of common law, do not have the power of *stare decisis* (the power and obligation of courts to base decisions on prior decisions) or the power of judicial review (the authority to declare a law null and void should it be found unconstitutional). Although a civil law judge may declare a law unconstitutional as applied in a particular case, the law itself is not invalidated and remains in effect for the rest of the population. Thus, Latin American judges have not been empowered to “strike a law from the books.” (It should be noted that while traditional civil law rejected both *stare decisis* and judicial review, increasingly modern civil legal systems are beginning to accept these two common law principles, and since World War II many countries of Continental Europe have established special constitutional courts that are exclusively empowered to determine the constitutionality of legislation.)

Additionally, civil law’s more restrictive role for judges is exacerbated by Latin America’s rigid legal culture, which applies the *letter*, rather than the *spirit*, of the law. Supreme court justices have adopted a legal philosophy that limits their powers of constitutional control to reviewing compliance with formal requirements instead of examining the constitutional principles at stake (Saez Garcia 1998). Hilbink, in her work on the Chilean judiciary, claims that a judicial ideology that equated judicial
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Professionalism with apoliticism rendered judges unequipped to assert authority and check abuses of power (1999). Judges in Latin America’s conservative legal culture, rather than viewing their role as one of determining whether laws are just, have viewed their role as one of making sure that laws are properly enforced.

Fourth, public perception of the courts as inefficient and corrupt has contributed to the weak position of the judicial branch in the region (Dakolias 1996; Buscaglia, Dakolias, and Ratliff 1995). According to surveys conducted in the first half of the 1990s in Argentina, Bolivia, Peru, and Venezuela, more than 80 percent of the population prefers to avoid the formal justice system (Ciurlizza 1999, 5). Public dissatisfaction with the justice system is notorious (Pásara 1998), and the judiciary suffers from an absence of popular support (Méndez 1999) and low credibility. A judiciary that is perceived as inept and dishonest lacks the authority to sanction abuses of authority, creating leeway for presidents and other political figures to engage in such abuses.

Finally, augmenting the conventional explanations for the traditional weakness of the judicial branch in Latin America, we must add that judges’ concerns for self-preservation reduce their will to confront powerful politicians. Hence, even in the cases where Latin American supreme courts have formally possessed the power of judicial review, judges have been hesitant to exert their authority, as attempting to impose limits could result in dismissal from the bench (at best) and/or more severe forms of political retribution (Wiarda and Kline 1985; Verner 1984). In consequence, Latin American judiciaries have broadly defined their range of proscribed issues and frequently engaged in voluntary self-censorship.

Thus, the historical development of Latin America’s courts resulted in judiciaries that relinquished any claim to resolve political conflicts or constrain the executive branch. This remained true even though the region’s judiciaries were subjected to multiple constitutional reforms throughout the twentieth century. While past reforms claimed to strengthen Latin America’s courts, each successively failed to alter the pattern of judicial impotence that had long beset the region. Once again in the 1990s, Latin America embarked on a new round of judicial reform that, at least in national constitutions, redefined the independence and authority of each country’s judicial branch.
The Judicial Reforms of the 1990s

Latin America’s recent wave of judicial reform, enacted with the stated intent of increasing judicial power, dramatically restructured national judiciaries throughout the region. In general, these constitutional reform packages centered on changes affecting the supreme court (and the constitutional court where it existed), the selection of judges, and the administration of the judicial branch. With respect to high court changes, judicial reforms altered the composition of these courts’ membership (either by a total replacement of justices or by adding new members to the court), the selection process of justices, the ability of the executive and legislature to change the rules that govern the court, and the extent of judicial review powers. As for the latter, the countries of Latin America have experimented with different mechanisms to establish judicial review, including creating separate constitutional tribunals as well as explicitly granting judicial review powers to existing supreme courts.

As for changes to lower-level judicial selection and administration, national judicial councils were established throughout the region. Even though Latin America’s judicial councils vary with respect to their specific functions, at a minimum most are charged with (1) the selection, discipline, and removal of judges below the supreme court level, and (2) professionalization of the judicial career track. Council membership also varies across countries, but council composition may include judicial representatives, members of the executive and legislative branches, and legal professionals and academics. Taken together, these supreme court and lower-level institutional changes appear to decrease executive influence while increasing the quality of judicial rulings and the efficiency of the judicial branch.

In addition to this “recipe” of institutional changes, Latin America’s recent judicial reforms were also alike in that they encompassed two distinct phases. The first, initiation, can be viewed as a “proclamation period” in which coming judicial changes are formally announced via the rewriting of the national constitution. The second, implementation, entails the passage of congressional legislation that translates abstract constitutional concepts into concrete structures. Thus, although the promulgation of
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constitutional changes may declare profound institutional changes and elegant new principles, these remain in limbo until the passage of the implementing legislation.

Despite professed goals of empowering the judiciary, for the greater part of the twentieth century Latin American judicial reforms did little to reduce the dominance of presidents over the courts. The 1990s reforms, at least in Argentina, Peru, and Mexico, were similar in form to one another and appeared to grant greater powers to the courts. But the implementation of these reforms—and therefore the resulting impact on the balance of power—varied considerably. To understand why these differences came to be, the next section briefly presents three potential arguments, one societal, one economic, and one political, to explain the region’s judicial reforms during the last decade of the twentieth century.

Possible Explanations for the Range of Outcomes of Judicial Reform

One potential explanation for the recent wave of judicial reform in Latin America is that such reform was provided in response to demands of societal groups that pressed for a more effective judicial branch. However, to understand reforms desired by domestic civil organizations, it is important to distinguish between the macro-level structural reforms mentioned above (for example, changes to supreme courts and creation of judicial councils) and other types of “justice” reforms that may be contained under the rubric of judicial reform. This latter category broadly includes “improving access to justice and legal aid programmes, strengthening alternative dispute resolution and mediation facilities, enhancing professional development and training, increasing the awareness of legal and judicial reform issues, improving technical and management assistance, and conducting research on the issues and practices in the field” (Dakolias 2001, 85). Justice reforms may also include such topics as revising the penal code, police reform, and human rights trials.

While the activities of the nongovernmental organizations (NGOs) have focused on justice reforms (Dakolias 2001), they have not played a major role in the process of constitutional revisions to restructure judicial institutions in either Mexico (Finkel 2005) or South America (Pásara...
In my in-country interviews (conducted across a wide range of sources, including political, legal, business, and human rights representatives), I found little emphasis on the role of civil society in the structural reforms pursued in Argentina, Peru, or Mexico. For example, interviewees were asked open-ended questions such as: Who pushed for judicial reform? How did it get on the agenda? But their responses did not highlight NGO activity as a prominent factor behind the constitutional reforms to the judiciary in any of the three countries. Latin American legal expert Luis Pásara, in his examination of judicial reforms in Argentina, Chile, Colombia, and Peru, argues that “civil society did not have a significant presence in the reforms produced” (2003, 15).

Indeed, this lack of civil society involvement in the institutional reforms of the 1990s was true even for those groups most likely to be concerned with such reform, for example, human rights organizations and legal associations. As for Latin American human rights NGOs, it is true that these groups actively pressed for strengthening habeas corpus protections, for bringing former leaders to trial for human rights violations, and for delineating appropriate spheres of jurisdiction between civil and military tribunals. In particular, these goals were vigorously pursued where elected governments had recently replaced brutal military regimes. Yet, as affirmed by prominent members of the human rights community in all three countries under study here, domestic human rights concerns were not the impetus for undertaking major institutional reforms of the judiciary in either Argentina, Peru, or Mexico (Zamorano 1999; Basombrío 1997a; Harel 1998).

As for other civil organizations that would be most interested in judicial reform, such as bar associations, judges’ groups, and law schools, their participation in the constitutional reforms redefining the judiciary was also quite limited. At the request of the executive branch, individual members of these organizations drafted judicial proposals for which they were financially compensated, but as groups they had not been pressing for constitutional reforms. In fact, these organizations frequently opposed the reforms precisely because they had not been consulted about them (Cossío-Díaz 1998b) and because they perceived that the reforms undermined their interests. For example, members of supreme courts opposed the reforms because new judicial councils usurped their traditional...
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powers and because the reforms often resulted in their expulsion from the bench. In addition, legal associations resisted many aspects of judicial reform because they implied new burdens as well as a loss of control over financial perks (Moody 2000; Pásara 2003). Rigorous examinations for judicial promotion make advancement more difficult, and moving from lengthy written procedures to speedier oral ones means that lawyers have to learn to think on their feet. Additionally, decreasing the number of required procedural filings reduces the processing fees received by lawyers as well as the opportunities for accepting bribes to move paperwork forward.

In sum, while domestic interest groups pressed for a range of justice reforms, and in some cases opposed specific judicial reforms, civil society did not place constitutional revisions of judicial institutions on the political agenda, and the activities of civilian actors cannot explain the variation in judicial outcomes that occurred throughout the region.

A second popular argument to explain the Latin American experience with judicial reform is based on the premise that these measures were undertaken in order to ensure successful economic reforms. Since the 1980s, the governments of Latin America have embarked on dramatic economic restructuring, replacing their state-led economic models with more market-based policies. The conventional wisdom holds that the consolidation of Latin America’s new private-sector-led economies requires the existence of independent judiciaries—judiciaries capable of upholding property rights and enforcing business contracts—to facilitate economic transactions and foster private investment. Indeed, government officials throughout Latin America have noted this connection explicitly. However, the fact that judicial reform has produced different results in these countries, despite similar economic motivations across borders, means that an economic argument alone cannot explain the resulting variation in institutional power in postreform judiciaries.

While today it is widely accepted that judicial reform is good for a country’s economy and that such reform will therefore benefit a country, it must be remembered that reforms are not undertaken by “countries” but by politicians. Economic explanations fail because they only consider the “best interests of countries” rather than investigating the motivations of politicians. If countries were the agents for judicial reform, then all of
the judicial reforms would have been successfully implemented. Instead, we have variations in the outcomes of judicial reform precisely because politicians—although they would benefit from a healthy economy—must weigh the economic benefits from judicial reform against its political costs. These costs, the possibility of judicial interference with a ruling party’s ability to achieve preferred policies, are potentially severe. However, these costs are not constant over both periods of reform; rather, they only take effect following meaningful implementation.

During the initiation period, when constitutional changes are first enacted, the costs of reform are minimized as they are neither immediate nor certain. Costs are incurred only once the implementing legislation (which specifies exactly how to complete these constitutional reforms) is enacted by a simple majority vote in congress. Hence, at implementation, presidents who enjoy a congressional majority can undermine increases in judicial power that were agreed on at initiation. Rather than yielding to an empowered judiciary at implementation, ruling parties may subvert the reform process at this second stage.

While these insights help explain why impressive constitutional changes stumble after initiation, they still cannot explain why some judicial reforms are meaningfully implemented. After considering the political costs of such reform, and the ability of politicians to stymie implementation, we must ask, why would any politician seek meaningful implementation? I hold that chances of retaining political power determine whether politicians will proceed with or will dilute promised judicial reforms during the implementation phase.

When a ruling party is confident about its continued control over political power, it should be hesitant to enact legislation that will curtail its room to maneuver and therefore has little incentive to follow through with promised judicial empowerment at implementation. On the other hand, when a ruling party’s chances of continuing to control office are low, the ruling party has the incentive to follow through with judicial advancements. In such a situation, a stronger judicial branch decreases the risks the ruling party faces should it become the opposition. An independent judiciary may check the capacity of incoming politicians to harm the interests of the outgoing ruling party. For example, an independent judiciary can prevent the incoming party from changing the rules of the
game in ways that would hinder the outgoing party from returning to office in the future. It can also prevent the incoming party from altering policies established by the outgoing party. Thus, in an uncertain political environment, a weakening ruling party may undertake judicial reform as an “insurance policy.” By empowering the judiciary, the current ruling party hedges against likely downturns in its own political position. This book suggests that the implementation of judicial reform depends on the ruling party’s perception of its probability of retaining political control. As chances of maintaining political power decline, the likelihood of meaningful implementation of judicial reform increases. This book attempts to test this argument about judicial reform in Argentina, Peru, and Mexico.

Case Selection and Research Method

While many Latin American countries experienced judicial reform during the 1990s, I opted to focus on three cases: Argentina, Mexico, and Peru. Each of these countries’ reforms is representative of the general pattern of judicial reform that occurred in the larger countries of the region. This is true with respect to both the timing of reform and the overall package of constitutional changes affecting the judiciary. Furthermore, Argentina, Mexico, and Peru, like most of Latin America in the 1990s, were engaged in dramatic economic restructuring. Thus, these three cases allow me to hold constant economic reform as a cause of demand for judicial reform within each country while varying political institutions and actors—and it is the effect of these factors on judicial reform that is of interest here.

Finally, these three countries were chosen in order to have variation on the outcome of judicial reform: Mexico’s reforms went the furthest in granting real power to the judiciary; Argentina’s reforms were delayed five years before being implemented; and Peru’s reforms were eviscerated by executive interference shortly after they were undertaken. All three countries initiated judicial reform, but there was substantial variation in how these reforms were implemented, resulting in dramatic variation in the power of their postreform courts. It is this variation that this book seeks to explain.
I conducted field research in all three countries during the period 1996–2000. The goal of my research abroad was to investigate four aspects of reform: (1) how judicial reform came to be on the political agenda; (2) the bargains that led to the initial package of constitutional changes; (3) the details of the implementing legislation; and (4) the real effect of the reforms on the independence and authority of the judicial branch.

First, I wanted to determine how judicial reform came to be a political priority. Was it a response to pressures from domestic interests (for example, human rights groups or the business community) or from multilateral financial institutions (such as the World Bank and the International Monetary Fund)? Or was judicial reform a result of bargaining among the political elite? To answer these questions, I interviewed representatives from a wide range of societal groups, multilateral organizations, and political parties. From these interviews I concluded that the decision to introduce constitutional reforms, and the subsequent decision whether to follow through with legislation to empower the judiciary, reflected the will of domestic politicians seeking to further their unique political interests.

Second, I analyzed the bargains over judicial restructuring that were negotiated during the constitutional sessions. I began by identifying each party’s original judicial proposal in order to determine its initial preferred outcome. I then followed the evolution of judicial changes at the constitutional convention, relying both on the published constitutional debates and on personal interviews with individuals who served on the constitutional conventions’ judicial committees. I also interviewed legal experts who were asked by political parties to draft judicial reform proposals for use at the conventions. This book shows that presidents, at least at initiation, were willing to agree to institutional increases in judicial power. Additionally, in order to obtain the support of opposition forces whose approval was necessary for passage of the new constitution, presidents were often forced to write in further increases in judicial power. Hence, the resulting constitutional changes empowering the judicial branch in all three countries.

Third, I tracked each country’s implementing legislation following the initiation of its constitutional reforms (1993 or 1994) until 2000. In each case I discuss the debates surrounding this legislation, the legislation itself, and the political context at the time. It is this legislation, both
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in its details and timing, that is crucial in determining the real outcome (the degree of political power enjoyed by the restructured judiciary) of judicial reform.

Fourth, to develop a true understanding of the effect of reform on the judicial branch, it is not sufficient just to follow the paper trail in Latin America. Latin America’s political reality is often quite distinct from what is written in its constitutions; hence, the only way to understand the power of a particular Latin American political institution is to conduct in-country research. Thus, my evaluation of the power of postreform courts also includes a broad range of interviews. I spoke with judges at all levels of the judicial apparatus as well as representatives of the national judicial councils and departments of justice. Additionally, I interviewed politicians from a range of political parties, constitutional experts, legal scholars, other academics, and representatives from domestic groups and international organizations. Finally, I tracked court cases, including both cases that the courts have ruled upon and those that the courts have refused to consider, on controversial issues and key political matters. By discussing the reform process with those involved and affected and by monitoring the behavior of postreform judiciaries, I was able to develop a nuanced understanding of each country’s judicial reform.

An Overview of the Book

The book is divided into five chapters. Chapter 1 presents two potential arguments to explain Latin America’s judicial reforms, one derived from economic concerns and the other from political interests. First, it provides an overview of the literature on law and economic performance in a market economy and discusses the role of international financial institutions (IFIs) in the process of judicial reform. The chapter next demonstrates the limitations of economics-based hypotheses and argues that the transition to a market economy and IFI pressures are insufficient to explain the implementation of a particular country’s judicial reform. The chapter then provides a theory of institutional reform that relies on the incentives of political actors and applies this argument to judicial reform’s two stages. Finally, it identifies the probability of retaining political power
as the crucial variable for determining a ruling party’s willingness to implement meaningful judicial reform.

Chapters 2, 3, and 4 test my argument with in-depth analyses of the judicial reform experiences in Argentina, Peru, and Mexico, respectively. In Argentina (chapter 2), judicial reform was a negotiated deal between the Peronist and Radical parties, included as part of that country’s 1994 constitutional reform. In exchange for the right to re-election, Argentina’s then-president Carlos Menem, of the Peronist Party, agreed to Radical Party demands for reappointing the Supreme Court (which he had packed four years earlier) as well as the creation of an independent national judicial council to appoint lower-level judges. However, after Menem’s successful re-election bid in 1995, the president failed to recompose the Supreme Court and used his party’s control of Congress to delay the creation of the council. It was not until five years later, at a time when it appeared that the Peronist Party would lose the presidency in that year’s national election, that the National Judicial Council was finally established and the president effectively relinquished control over the judicial branch.

Chapter 3 presents the Peruvian case study. In Peru, as in Argentina, judicial changes empowering the courts were part of a larger rewriting of the country’s constitution. Peru’s 1993 constitutional convention was established following the April 1992 “self-coup” carried out by then-president Alberto Fujimori. In exchange for the right to seek a second term, the president agreed to the creation of a powerful National Judicial Council as well as the continued existence of the Constitutional Court (alongside the traditional Supreme Court). However, upon his 1995 re-election, Fujimori used his congressional majority to enact legislation systematically eviscerating all judicial autonomy and power. The Peruvian judiciary was placed under an executive committee in 1996, and shortly thereafter, as a result of executive actions, both the Judicial Council and the Constitutional Court ceased to function. Not until Fujimori announced that he would be stepping down, following a corruption scandal in September 2000, did Congress enact implementing legislation to remove the judiciary from executive control and to establish the judicial institutions specified in Peru’s 1993 constitution.

Chapter 4 details the recent Mexican judicial reform experience carried out by Mexico’s long-dominant ruling party, the Institutional
Revolutionary Party (PRI). In 1994, after seven decades of judicial subordination, Mexico's PRI president introduced a package of constitutional reforms that increased the independence and authority of the judicial branch. The reforms created the Federal Judicial Council to select judges and also granted the Mexican Supreme Court judicial review powers that the court had never previously enjoyed. The Congress, controlled by the ruling party, fully implemented the reforms just five months after initiation. Four years later Mexico's restructured Supreme Court unanimously ruled against the PRI on a key electoral law, clearly demonstrating that the country's 1994 judicial reforms had fundamentally altered Mexico's traditional balance of power. At initiation, PRI politicians were increasingly unable to control political outcomes at the state and local level and were unsure whether they would maintain their dominance of the national government in the future. The ruling party had the incentive not only to introduce judicial reform, but also to follow through with its meaningful implementation.

Chapter 5 concludes by summarizing my research and drawing conclusions from my three case studies for attaining meaningful judicial reform in other countries in the developing world. First, while political leaders in Latin America have repeatedly recognized that judicial reform is a necessary complement to consolidate their new economic policies, economic concerns have proved expendable when they conflict with the political interests of those in power. For this reason, similar economic motivations cannot account for the significant variation in the de facto power of these countries' reformed judiciaries. Second, constitutional increases in judicial independence and power may later be undermined or postponed by implementing legislation that often remains in the hands of the ruling party. Thus, the benchmark for evaluating a country's progress on judicial reform should be its implementation, not its initiation.

Finally, empowering the courts requires politicians to cede political power and to accept new institutional constraints on the exercise of their authority. Thus, for political leaders to follow through with the enactment of judiciary-strengthening reforms, they must perceive political gains that offset the potential costs. In all three countries, only once the ruling parties believed that they were unlikely to maintain their position of political dominance did they seek full implementation of judicial ad-
vancements promised in the revised constitution. This book suggests that reforms granting the judiciary increased independence and authority are more likely to occur when the ruling party fears loss of office: as the probability of retaining control over political office decreases, the likelihood of meaningful implementation of judicial reform increases.

Institutional reforms ensuring judicial power are crucial for the achievement of full democracy in Latin America. By explaining variations in outcomes of judicial power in Argentina, Peru, and Mexico, this book seeks to determine the circumstances in which judicial reform leads to the development of a judiciary capable of placing constraints on those who wield political power. The significance of judicial reform is not limited just to countries in Latin America; rather, it extends to all developing countries attempting to consolidate new democracies as they enter the twenty-first century.