

'Politics as Markets' Goes Global

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Samuel Issacharoff, [Fragile Democracies: Contested Power in the Era of Constitutional Courts](#) (2015).

Comparative constitutional law is a field crowded with rich and complex ideas about the role of courts and judicial review in a democracy. Yet into this field has now come an important new argument, which is bound to make a distinctive impression on how constitutional scholars and political scientists around the world understand the positive origins, and normative functions, of judicial review in democratic settings: [Samuel Issacharoff's](#) argument that constitutional courts around the world can and do play a valuable role in "democratic hedging."

The idea of hedging of this kind arises in response to two basic threats: first, that within many democratic systems there are a range of anti-democratic actors who attempt to use the freedoms enshrined by constitutional democracy to launch an attack on its most basic institutions and stability, from within; and second, that in many new democracies in particular, there are often political elites that are so dominant that they effectively stifle the degree of political competition needed for true democracy, even in the most minimal sense.

Issacharoff argues, however, that we live in "the age of constitutional courts"—that is, an era in which many democracies now have specialized constitutional courts with explicit power to review the constitutionality of legislative and executive action. In many cases, these courts also have the authority to rule on the outcome of elections, and to invalidate formal constitutional amendments, or even the replacement of constitutions.¹ This means that there is a natural third party that can act as supervisor of both the electoral process and ordinary politics: constitutional courts are in a position to enforce, and regulate, limits on anti-democratic speech and participation in elections by antidemocratic parties. In some cases, they may also be placed to restrict attempts by dominant political actors to use *law* as a means of entrenching their hold on power.

This argument builds on important work by Issacharoff, [Richard Pildes](#) and [Pamela Karlan](#) about the potential role of the US Supreme Court in policing the boundaries of political competition within the US—the so-called "politics as markets" idea for which they are jointly famous.² And it has some resonance with [work by David Landau on the dangers of "abusive constitutionalism,"](#) and [my own work with Landau on the ways in which courts may be able to limit anti-democratic forms of constitutional change.](#) But it also quite clearly a major leap in our thinking about the relationship between constitutional courts and democracy: it takes the idea of "politics as markets" and for the first time gives it a truly global focus and inflection.

Scholars for years to come may be expected to debate and analyze the degree to which this kind of role for courts is likely to succeed in different institutional contexts. One obvious question raised by *Fragile Democracies* is whether the idea of democratic hedging is in fact restricted to specialized constitutional courts, or could just as easily be performed by ordinary courts with general appellate jurisdiction. Often these courts will have just as broad a range of legal tools at their disposal to engage in democratic hedging as more specialized courts.³ But it may also be more dangerous for generalist courts to play a role of this: if their role in the "political thicket" leads them to be attacked by the political branches, judicial independence as a whole may suffer in a country, whereas if the court performing this role is

more specialized, the damage may be more contained.⁴

Another set of questions raised by the book relates to when and under what conditions courts are likely to have the power *effectively* to check dominant political elites. In some cases, dominant political actors may control so many of the levers of political power that there is in fact no meaningful prospect of court-imposed limits being enforced, rather than disregarded or circumvented. Even the strongest courts, in these circumstances, may simply be too weak to effectively to protect democracy.⁵

Conversely, in other countries civilian control of the military may be so weak that judicial intervention in the name of democratic competition almost always proves too strong a form of democratic medicine: it may simply create a form of legal or political vacuum that leads directly to an increase in military involvement in politics, or even a full-scale military coup, in ways that ultimately destroy rather than protect democracy in the short- to medium-term.⁶

Understanding these dynamics, and when they apply, is a crucial part of understanding the full implications of Issacharoff's argument. For my own part, I am probably more skeptical than Issacharoff that democratic hedging can succeed in a large number of cases: as Landau and I have suggested elsewhere, successful judicial intervention of this kind seems to depend on a quite specific confluence of political circumstances, which are more the exception than the rule in global politics.^[4] And it also likely depends on how courts calibrate their attempt at hedging, or how sensitive they are to considerations of time, context and institutional strength in intervening in democratic politics. (A disclosure here: Issacharoff and I are currently working on a joint paper on judicial review exploring some of these latter themes.)

Saying this, however, is not to diminish the importance of democratic hedging by courts, where the supporting political conditions exist. It simply suggests we should be cautious in concluding that hedging it is a *universal* role courts can play, regardless of the background political circumstances, or way in which they approach such a role.

In (re)framing the relevant questions in these terms, what is clear is that Issacharoff has created a major shift in the existing terms of debate over democratic constitutionalism: instead of the debate being largely about "consociational" versus federal forms of power-sharing in divided societies or new democracies,⁷ it is now also about the way in which courts, and various rights-based and structural constitutional principles, may play a role in facilitating, and stabilizing, majority-based rule in these circumstances.

Issacharoff claims at the outset of the book that he speaks largely as a lawyer, rather than a political scientist, but his engagement with these long-standing debates in political science belies the modesty of this claim. His book is of central interest and importance to *both* lawyers and political scientists. It also contains a masterly treatment of political science, and economics-based accounts of why political actors might be willing to authorize this kind of judicial role in the first place. Chapter 10 of the book, on the "constitutional bargain," draws on the insights of the incomplete contracts literature and game theory to show why empowering a constitutional court to play this role may actually increase the efficiency of the constitutional bargain between political elites, *ex ante*.

People may disagree with some of the details of particular case studies in the book, based on their greater local knowledge of particular cases analyzed by Issacharoff. This, however, is both inevitable and important: Issacharoff analyses literally dozens of case studies and countries, and there are bound to be others in the field who know more about particular cases than he does. There is also independent value to re-analysis of particular case-studies by different scholars: one of the ways in which the field of comparative constitutional law can improve, I have argued elsewhere, is by embracing this kind of

overlap, and eschewing an exclusive focus on original theorization or case-description.⁸

But having said that, few people may be persuaded by my argument when they have finished reading *Fragile Democracies*: this is a major new work in comparative constitutional theory, which achieves that rare blend of novelty and insight that define all great works in the field. It reminds us of why we attempt to do constitutional theory in the first place.

1. See further David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 51 **Wake Forest L. Rev.** (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624842.
2. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 **Stan. L. Rev.** 643 (1998); Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, **The Law of Democracy: Legal Structure of the Political Process** (4th ed. 2012).
3. Consider the Supreme Court of India post-1970s: Manjo Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, in **Consequential Courts: Judicial Roles in Global Perspective** 262 (Diana Kapiszewski et al eds., 2013); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 **Wash. U. Glob. Stud. L. Rev.** 1 (2009). Consider also the Supreme Court of Kenya: Christina Murray, *Kenya's 2010 Constitution*, 61 **Neuge Folge Band Jahrbuch des offentlichen Rechts** 747 (2013), http://www.iapo.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf.
4. Cf. Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 **Colum. J. Transnat'l L.** 285 (2015).
5. See Mark Tushnet, *Preserving Judicial Independence in Dominant Party Sides*, **N.Y.L. Sch. L. Rev.** (forthcoming 2016).
6. See, e.g., the response of the Thai military to the ruling by the Thai constitutional court disbanding the ruling party in Thailand: Sam Sarifi, *A Reckless Coup in Thailand*, **NY Times**, May 22, 2014. *But cf.* also Ozan O. Varol, *The Democratic Coup d'Etat*, 53 **Harv. Int'l L.J.** 292 (2012).
7. See, e.g., Arend Lijphart, **Democracy in Plural Societies: A Comparative Exploration** (1977); Arend Lijphart, *Constitutional Design for Divided Societies*, 15 **J. Democracy** 96 (2004), <https://is.muni.cz/el/1423/jaro2005/EUP405/lijphart69.pdf>.
8. Rosalind Dixon, *Book Review: Comparative Matters: The Renaissance of Comparative Constitutional Law*, **Am. J. Comp. L.** (forthcoming 2015).

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