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978-1-107-03870-7 - Fragile Democracies: Contested Power in the Era of Constitutional Courts

Samuel Issacharoff

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## FRAGILE DEMOCRACIES

Twenty-five years after the fall of the Berlin Wall, the democratic ascendancy of the post-Soviet era is under severe challenge. While fragile democracies in Eastern Europe, Africa, and East Asia face renewed threats, the world has witnessed the failed democratic promises of the Arab Spring. What lessons can be drawn from these struggles? What conditions or institutions are needed to prevent the collapse of democracy?

This book argues that the most significant antidote to authoritarianism is the presence of strong constitutional courts. Distinct in the Third Wave of democratization, these courts serve as a bulwark against vulnerability to external threats as well as internal consolidation of power. Particular attention is given to societies riven by deep divisions of race, religion, or national background, for which the courts have become pivotal actors in allowing democracy to take root.

Samuel Issacharoff is the Reiss Professor of Constitutional Law at New York University School of Law. A pioneer in the field of law of the political process, he is the author of more than 100 articles, books, and other academic works, including the seminal *The Law of Democracy* casebook (with Pamela Karlan and Richard Pildes, 4th ed., 2012). Issacharoff is a Fellow of the American Academy of Arts and Sciences.

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# Fragile Democracies

CONTESTED POWER IN THE ERA  
OF CONSTITUTIONAL COURTS

SAMUEL ISSACHAROFF

New York University School of Law



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UNIVERSITY PRESS

32 Avenue of the Americas, New York, NY 10013-2473, USA

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Information on this title: [www.cambridge.org/9781107654549](http://www.cambridge.org/9781107654549)

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First published 2015

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Issacharoff, Samuel, author.

Fragile democracies : contested power in the era of constitutional courts / Samuel Issacharoff, New York University School of Law.

pages cm. – (Cambridge studies in election law and democracy)

ISBN 978-1-107-03870-7 (hardback) – ISBN 978-1-107-65454-9 (paperback)

1. Constitutional history. 2. Democracy. 3. New democracies.

4. Constitutional courts. I. Title.

K3161.I84 2015

347'.035–dc23 2014047370

ISBN 978-1-107-03870-7 Hardback

ISBN 978-1-107-65454-9 Paperback

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## Preface

About a decade ago I began to redirect a significant part of my academic focus away from the study of the law of American democracy. My new attention was the product of a renewed sense of common enterprise across democracies that emerged from two critical events. The first was the contested presidential election of 2000; in particular, the failure of the Florida electoral machinery to produce a clear result and the subsequent intervention of the Supreme Court in *Bush v. Gore*. The second was the emergence of difficult national security decisions within the United States following the attacks of September 11. Each represented a significant challenge to the structure and integrity of American democracy, each exposing a characteristic vulnerability of democracy either to process failure from within or to external enemies.

In the aftermath of these events, I began to wonder more systematically about how other democracies deal with such challenges. American democracy is no doubt exceptional in its duration and in its constitutional pedigree. But it has also had the benefit of a relatively stable political order and geographic isolation (or insulation) from potential military threats. What if the workings of democracy in this country were themselves challenged? Or, what if the War on Terror forced a recalibration of the delicate balance between liberty and security?

If American democracy were suddenly more vulnerable, perhaps the experiences of other democracies would help in thinking about the resulting challenges. This inquiry assumes no universalism of law, no sense that a foreign consensus should obligate a response in American law – although it does not presume either that informed judgments from abroad should be rejected *per se* because of their foreign origins. Rather, comparative assessments sometimes help to illuminate certain characteristics of domestic difficulties that might otherwise be obscured by their apparent intimate relations to our lived experiences.

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The results of this decade-long inquiry have emerged in a series of articles in journals in law and political science and in book chapters. This book draws from these prior publications but brings them together more synthetically around a single concern: How is it that democracies manage conflict, and what are the institutional preconditions for democracies to be able to perform this function? Much as the central organization of the work is new, it is nonetheless important to acknowledge the earlier versions of work from which I have drawn here.

The part of this inquiry addressing democratic responses to antidemocratic forces, as well as the title of this book, is based heavily on an earlier work of mine, *Fragile Democracies*, which appeared in the Harvard Law Review in 2007. The part addressing the perils of what I term *one-partyism* draws most heavily from another earlier work, *Constitutional Courts and Democratic Hedging*, which in turn appeared in the Georgetown Law Journal in 2011. Some of the themes have also appeared in a series of articles that look more broadly at the relation between democracy and constitutionalism, most notably *The Enabling Role of Democratic Constitutionalism* and *Constitutionalizing Democracy in Fractured Societies*, which appeared in the Texas Law Review in 2003 and 2006, respectively; *Democracy and Collective Decisionmaking*, which appeared in 2008 in the International Journal of Constitutional Law; *The Democratic Risk to Democratic Transitions*, which appeared in Constitutional Court Review in 2015; and *Constitutional Courts and Consolidated Power*, which appeared in the American Journal of Comparative Law in 2014.

A project of this scale demands great research assistance to try to make sense of subtle developments in political and legal systems around the world. I have tested many of the hypotheses and observations in many settings over the past decade and have most benefited from the ability to hear responses in numerous national settings. While all the institutions are too numerous to mention, I have profited from great exchanges in Argentina, Australia, England, France, Germany, India, Israel, Italy, Mexico, Peru, South Africa, Spain, Switzerland, and the United States. I received wonderful backing from the NYU School of Law and my deans while here, Richard Revesz and Trevor Morrison, and the added benefit of a year at the Straus Institute where these themes were pursued in a great collegial setting. I also received support for the book manuscript from the Rosenthal Lectures at Northwestern Law School and from the Filomen D'Agostino and Max E. Greenberg Research Fund at the NYU School of Law. Special thanks to Bonnie and Richard Reiss, who created the chair I occupy at NYU and who have been wonderfully supportive of my ventures.

Many colleagues have been sounding boards for the ideas presented here over the years, and while not saddling them with responsibility for what

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follows, I do thank Giovanni Capoccia, Sujit Choudhry, William Forbath, Pamela Karlan, Brendan O'Leary, Pasquale Pasquino, Richard Pildes, and Wojciech Sadurski.

In addition, over the years that I have been engaged in this project I have had a number of great research assistants and they should be thanked: Yotam Barkai, Matt Brown, Kirti Datla, Thad Eagles, Nathan Foell, Philip Fortino, Camden Hutchison, Anna Morawiec Mansfield, Swapna Maruri, Jeremy Peterman, Maria Ponomarenko, Aaron Kates Rose, Peter Ross, Ian Samuel, Zach Savage, Josh Stillman, Daniel Suleiman, Alec Webley, and Josh Wilkenfeld. This list includes four former research assistants who are now colleagues in the academy: Chris Brummer, Erin Delaney, Ari Glogower, and Teddy Rave. Finally, special thanks to Matthew Holbreich and Mitchell Stern for tremendous labor in helping get the final manuscript in shape.

Finally, behind every work that allows contemplation of broad themes there are those who make life go on and give meaning to our daily engagements. For me they are my wife, Cindy, and my children, Jessica and Lucas.