

# CONSTITUTIONALISM IN DIVIDED SOCIETIES

GOV 355M (38304) | Fall 2023

Classroom: JES A218A

Class time: MW 11:30am-1:00pm

Office hours: Tu 9:00am-12:00pm (Virtual)

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Deeply divided societies remain one of the thorniest challenges in constitutional design. In such communities, social divisions like race, ethnicity, or religion are a driving force in politics, forming a core basis for political discourse, alliances, and mobilization. These societies thus challenge traditional models of democratic politics that assume the composition of coalitions and majorities will change over time in response to varied issues and changing circumstances. Instead, in divided societies, the identity-based considerations that shape politics can lead to persistent polarization and political stalemate, discrimination, group exclusion, and even violent conflict. Constitutions are often charged with avoiding these dire outcomes and bringing disparate groups together to live peacefully under a unified state.

This course analyzes a wide range of constitutional strategies to manage division, exploring many of the same questions constitution drafters must consider in divided societies: How should territory, governance, and elections be structured to meet the needs of a particular state? Who gains and loses under various formulations? Which institutions and rights are needed to ensure government responsiveness to all groups in society? What guarantees are there for communities at risk of marginalization or persecution? Should certain languages, religions, or other identities be recognized by the state? Can secular, religious, and customary law be blended in a coherent way? Is ambiguity helpful in constitutional design? Which steps give traction to the constitution after adoption? How will courts guide the process? And how will the constitution provide both needed stability and the flexibility to evolve as society evolves?

The course covers a wide range of cases from Asia, Australia, Europe, the Middle East and North Africa, North America, South America, and Sub-Saharan Africa. In doing so, it provides an opportunity to learn about and reflect on our own constitutional system in the United States.

## OBJECTIVES

The course aims for students to: (1) analyze constitutional development in a range of contexts, legal traditions, and geographic regions, (2) assess the historical, socioeconomic, and political factors that shape divided societies today, (3) assess constitutional design options and their potential benefits and risks related to group dynamics, and (4) diagnose (where applicable) the constitutional factors contributing to current political crises and identify alternative designs that could in theory alleviate them.

## REQUIREMENTS

**Assignments:** Coursework includes the following components, weighted as noted:

- 20% Class participation: Part of each class will center around structured discussion. Students should be prepared to discuss key points from the readings, make insightful arguments or counterarguments, and respond to points raised by others in class. Half of the class participation grade will be determined by attendance tracked in Canvas. The other half will be determined by the level of preparedness and contributions in class.
- 20% Discussion posts: Discussion posts will be due most (but not all) Sundays to facilitate students' engagement with topics under study that week. Discussion posts can address any topic covered in the

readings that week. They can analyze the authors' arguments, apply them to current events, or grapple with that week's readings in any other way that stays true to our class objectives. Detailed instructions are on Canvas. Discussion posts must be submitted on Canvas on assigned Sundays by 5pm (see due dates below).

- 10% Constitutional amendment exercise: Students will work in groups to propose an amendment to the U.S. Constitution addressing a challenge related to social divisions in the United States. Detailed instructions are on Canvas. Groups will submit their amendment text on Canvas by Sunday, October 8 at 5pm. Groups will present their amendment pitch in class on Monday, October 9 or Wednesday, October 11.
- 25% In-class midterm exam: The exam will cover readings and lectures from the first half of the course. The exam will be held in class on Wednesday, October 18.
- 25% Take-home final exam: The exam will look holistically at issues across the whole course. The exam will be distributed in class on Monday, December 4, and will be due via submission to Canvas by Thursday, December 7 at 5pm.

**Attendance:** Attendance includes being on time, being fully present (meaning, not on phones or checking email), and staying for the full class. Students may miss two classes for any reason without the absences affecting class participation grades. Students wishing to have an absence excused must submit the reason and any needed documentation to the professor within one week of returning to class. A one-day absence due to illness may be counted as excused without a note. A multi-day absence due to illness requires a note from the university or a medical professional to be counted as excused.

**Readings:** Keeping up with the reading is essential to your success in class discussions and discussion posts. Readings listed as "required" are, of course, required. Readings listed as "background" are meant to be a resource for you in this class and beyond; they provide more nuance, cases, or historical background on topics raised in or related to the required reading. If you have interest in a particular area, you might want to read one or skim all of the background readings in that area. I'll also synthesize them in my lectures.

**Grading:** All assignments will be graded on a 100-point scale. The final course grade will be the weighted average of these grades, rounded to the nearest whole number, on the following UT scale: A = 94-100, A- = 90-93, B+ = 87-89, B = 83-86, B- = 80-82, C+ = 77-79, C = 73-76, C- = 70-72, D+ = 67-69, D = 63-66, D- = 60-62, F = 0-59.

**Individual work:** The written assignments are an opportunity to engage with constitutional design issues that defy singular or simple answers. I am thus interested in your individual analysis and perspective on these issues. Group collaboration on written assignments is not allowed, except on the group constitutional amendment exercise. Use of artificial intelligence tools is not allowed on any assignments.

**Late work:** The discussion posts intend to allow you to reflect on the readings prior to our discussion of them. Late discussion posts thus will only be accepted for up to two days after the due date for full credit; after that, the assignment will receive a grade of 0. Late work will not be accepted for the amendment text and amendment pitch. There are no exceptions to these late policies without approval prior to the due date or a note from the university or a medical professional.

## DUE DATES

Below is a summary of the due dates for assignments described above. The schedule further below provides more information on the specific readings covered by each discussion post.

Aug 27, 5pm:	Discussion post 1 on constitutionalism and constitutional design
Sep 3, 5pm:	Discussion post 2 on ethnicity, religion, and race
Sep 17, 5pm:	Discussion post 3 on nationality and language
Sep 24, 5pm:	Discussion post 4 on power sharing, power dividing, and centripetalism
Oct 1, 5pm:	Discussion post 5 on federalism, partition, and secession
Oct 8, 5pm:	Constitutional amendment text
Oct 9 or 11, in class:	Constitutional amendment pitch (due date depends on the group's presentation date)
Oct 18, in class:	In-class midterm exam
Oct 22, 5pm:	Discussion post 6 on election system and combined strategies
Oct 29, 5pm:	Discussion post 7 on constitution making
Nov 5, 5pm:	Discussion post 8 on constitutional elaboration
Nov 12, 5pm:	Discussion post 9 on constitutional reform
Nov 26, 5pm:	Discussion post 10 on constitutional crises
Dec 7, 5pm:	Take-home final exam

## COURSE POLICIES

**Prerequisites:** This class requires six hours of lower-division coursework in government.

**Academic environment:** Our classroom provides an open space for the civil exchange of ideas. It is my intent to ensure that students from diverse backgrounds and viewpoints are well served by this course, that all students' learning needs are addressed, and that the diversity students bring to this class can be comfortably expressed and viewed as a resource, strength, and benefit for all students. I ask students to help create an atmosphere of mutual respect for, and interest in, others' views and experiences.

**Academic integrity:** Students must abide by the university's honor code and standards of academic integrity. Students who violate university rules on academic integrity are subject to disciplinary penalties, including the possibility of failure in the course and/or dismissal from the university. The university's policies on this topic are available on the Office of the Dean of Students website on [Standards of Conduct](#). I highly encourage you to also review UT's very helpful resources on [avoiding academic misconduct](#) and [avoiding plagiarism](#).

**Citation standards:** In this course, you are welcome to use APA, Chicago, or MLA citation styles.

**Disabilities:** The university is committed to creating an accessible and inclusive learning environment consistent with university policy and federal and state law. Please let me know if you experience any barriers to learning so I can work with you to ensure you have equal opportunity to participate fully in this course. If you are a student with a disability, or think you may have a disability, and need accommodations, please contact the [Disability and Access Services](#) (D&A) in the Division of Diversity and Community Engagement. Please refer to its website for contact and more information at. If you are already registered with D&A, please deliver your Accommodation Letter to me as early as possible in the semester so we can discuss your approved accommodations and needs in this course.

**Communication:** Your success in this course and at UT is important to me. If there are aspects of this course or other challenges that prevent you from learning, please let me know as soon as possible. Together we'll develop strategies to meet both your needs and the requirements of the course. I also encourage you to reach out as any questions come up or just to chat. You can talk with me after class, drop in or schedule time during office hours, or email me anytime.

**Office hours:** Regular office hours are held on Tuesdays from 9am-12noon on the class Zoom line. Students can drop in or email to reserve a time. I'm also happy to schedule a time outside these office hours as needed.

**Prohibition on sharing course materials:** No materials used in this class, including, but not limited to, readings, handouts, lectures, exams, papers, assignments, review sheets, and any other course materials, may be shared online or with anyone outside of the class without explicit, written permission of the professor. Lecture recordings are reserved only for students in this class for educational purposes and are protected under FERPA. The recordings should not be shared outside the class in any form.

## MATERIALS

All course materials are posted on the class [Canvas](#) site. This includes the syllabus, readings, lectures, announcements, assignments, and grades. We will also regularly use the [Constitute](#) site to review texts of current constitutions. From the Constitute home page, click on “constitutions” in the top navigation bar to see all constitutions, then click on “search | topics | filters” to search constitutions by keyword or filter by topic.

All lectures are recorded using the UT Lectures Online recording system. This records the audio and video material presented in class so you can review it after class or if you miss class. Recording links will appear in the Lectures Online tab on the left-side navigation on our class Canvas page.

## SCHEDULE

### Aug 21 | Introduction and Overview

#### Conceptual Foundations

### Aug 23 | Divided Societies

Discussion questions:

- What are the features of a divided society? What are the risks? Why do divided societies deserve special attention in constitutional design?

Required:

- Adrian Guelke. 2012. *Politics in Deeply Divided Societies*. Cambridge: Polity Press, 13-32.

Background:

- Kanchan Chandra. 2006. What Is Ethnic Identity and Does It Matter? *Annual Review of Political Science* 9: 397-424.
- Karl Cordell and Stefan Wolff. 2010. *Ethnic Conflict: Causes, Consequences, and Responses*. Cambridge: Polity Press, 25-75.
- James D. Fearon and David D. Laitin. 1996. Explaining Interethnic Cooperation. *American Political Science Review* 90(4): 715-719, 730 only.
- Toby Dodge. 2007. State Collapse and the Rise of Identity Politics. In *Iraq: Preventing a New Generation of Conflict*, edited by David Malone, Markus E. Bouillon, and Ben Rowswell, 23-39. Boulder: Lynne Rienner Publishers.
- Michael Hechter and Dina Okamoto. 2001. Political Consequences of Minority Group Formation. *Annual Review of Political Science* 4: 189-215.

### Aug 27 | Discussion post 1 on constitutionalism and constitutional design readings due by 5pm

### Aug 28 | Constitutionalism

Discussion questions:

- How do constitutions matter? What are their limitations? What did the drafters of these preambles want from their constitutions?

Required:

- András Sajó and Renáta Uitz. 2017. Constitutions and Constitutionalism. In *The Constitution of*

*Freedom: An Introduction to Legal Constitutionalism*, edited by András Sajó and Renáta Uitz, 12-23, skim 24-44.

- Preambles of constitutions in Bosnia and Herzegovina, Ecuador, Iraq, Nepal, Rwanda, and the United States (feel free to explore others on [Constitute](#)).

Background:

- Gary Jacobsohn. 2006. Constitutional Identity. *The Review of Politics* 68: 361-397.
- Susan Alberts. 2009. How Constitutions Constrain. *Comparative Politics* 41(2): 127-143.

## Aug 30 | Constitutional Design in Divided Societies

Discussion questions:

- Is the role of a constitution different in a divided society? What are the rationales behind accommodative and integrative (or, power-sharing and power-dividing) approaches to constitutional design? How do they differ in their proposals for structuring power, electing officials, and protecting rights?

Required:

- Sujit Choudhry. 2008. Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 3-7. Oxford: Oxford University Press.
- John McGarry, Brendan O'Leary, and Richard Simeon. 2008. Integration or Accommodation? The Enduring Debate in Conflict Regulation. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 41-71 (72-88 optional). Oxford: Oxford University Press.

Background:

- Donald L. Horowitz. 2002. Constitutional Design: Proposals Versus Processes. In *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, edited by Andrew Reynolds, 15-36. Oxford: Oxford University Press.
- Arend Lijphart. 2002. The Wave of Power-Sharing Democracy. In *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, edited by Andrew Reynolds, 37-54. Oxford: Oxford University Press.
- Philip G. Roeder. 2012. Power Dividing: The Multiple-Majorities Approach. In *Conflict Management in Divided Societies: Theories and Practice*, edited by Stefan Wolff and Christalla Yakinthou, 66-83. London: Routledge.

## State Identities and Rights

### Sep 3 | Discussion post 2 on ethnicity, religion, and race readings due by 5pm

### Sep 4 | Labor Day Holiday

### Sep 6 | Ethnicity

Discussion questions:

- Is granting rights to specific groups beneficial or essential to their protection? Does recognition of specific groups challenge equality for all, or state unity? How should a polity decide which identities receive special status?

Required:

- Yash Ghai. 2011. Ethnic Identity, Participation, and Social Justice: A Constitution for New Nepal? *International Journal on Minority and Group Rights* 18: 309-334.

Background:

- Explore ethnicity provisions in a few constitutions on [Constitute](#).
- Amy Gutmann. 1992. Introduction. In *Multiculturalism and the "Politics of Recognition,"* edited by

- Amy Gutmann, 3-24. Princeton: Princeton University Press.
- Will Kymlicka. 1995. *Multicultural Citizenship*. Oxford: Oxford University Press, 10-48.
  - David Feldman. 2012. The Nature and Effects of Constitutional Rights in Post-Conflict Bosnia and Herzegovina. In *Rights in Divided Societies*, edited by Colin Harvey and Alex Schwartz, 151-167. Oxford: Hart Publishing.
  - H. Kwasi Premeh. 2013. Constitutionalism, Ethnicity and Minority Rights in Africa. *International Journal of Constitutional Law* 11(2): 438-443.
  - Jan Hessbruegge and Carlos Fredy Ochoa García. 2011. Mayan Law in Post-Conflict Guatemala. In *Customary Justice and the Rule of Law in War-Torn Societies*, edited by Deborah Isser, 77-118. Washington: United States Institute of Peace.

## Sep 10 | No discussion post due this week

### Sep 11 | Religion

Discussion questions:

- Should religion be explicitly addressed in a constitution? How? What are the advantages and risks? Can secular and religious law be blended in a coherent way?

Required:

- Asli Bâli and Hanna Lerner. 2016. Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies. *Cornell International Law Journal* 49: 101-168 (skim where possible while still capturing the main points of each section).

Background:

- Explore religion provisions in a few constitutions on [Constitute](#).
- Intisar A. Rabb. 2008. “We the Jurists”: Islamic Constitutionalism in Iraq. *Journal of Constitutional Law* 10(3): 527-579.
- John Nagle. 2022. Northern Ireland: Still a Deeply Divided Society? *Foreign Policy Centre*. July 19.
- Stacey Gutkowski, Craig Larkin, and Ana Maria Daou. 2019. Religious Pluralism, Interfaith Dialogue, and Postwar Lebanon. In *Emergent Religious Pluralisms*, edited by Jan-Jonathan Bock, John Fahy, and Samuel Everett, 95-122. Cham: Palgrave MacMillan.

## Sep 13 | Race

Discussion questions:

- How can constitutions ameliorate racial divisions? What does it mean to recognize identity differences in private life versus public life? Are these useful strategies for bridging divisions?

Required:

- Christina Murray and Richard Simeon. 2007. Recognition without Empowerment: Minorities in a Democratic South Africa. *International Journal of Constitutional Law* 5(4): 699-729.

Background:

- Explore race provisions in a few constitutions on [Constitute](#).
- Donald L. Horowitz. 1991. A Democratic South Africa? Constitutional Engineering in a Divided Society. Berkeley: University of California Press. 1-23.

## Sep 17 | Discussion post 3 on nationality and language readings due by 5pm

### Sep 18 | Nationality

Discussion questions:

- What are different visions for the relationship between state and national identities? Who wins and loses under each approach? How can constitutions best meet the needs of multiple nationalities in divided societies?

Required:

- Brendan O'Leary and Khaled Salih. 2005. The Denial, Resurrection, and Affirmation of Kurdistan. In *The Future of Kurdistan in Iraq*, edited by Brendan O'Leary, John McGarry, and Khaled Salih, 3-36 only. Philadelphia: University of Pennsylvania Press.
- Nick Burns. 2022. [Chile Could Become “Plurinational.” What Does That Mean?](#) *Americas Quarterly*, August 29.

Background:

- Explore nationality and citizenship provisions in a few constitutions on [Constitute](#).
- Margarette Moore. 1997. On National Self-Determination. *Political Studies* 45(5): 900-913.
- Ernest Gellner. 2006 (1983). *Nations and Nationalism*, 2<sup>nd</sup> Ed. Oxford: Blackwell Publishing Ltd., 52-61.
- Harris Mylonas. 2012. *The Politics of Nation-Building: Making Co-Nationals, Refugees, and Minorities*, 17-37, 170-186.
- Shireen Morris. 2020. *A First Nations Voice in the Australian Constitution*. Oxford: Hart Publishing, 8-41.

## Sep 20 | Language

Discussion questions:

- How can constitutions address linguistic diversity? What are the advantages and risks of each approach? Does the intersection of language, nationality, and other identities complicate constitutional recognition of identity groups?

Required:

- David D. Laitin. 1998. *Identity in Formation: The Russian-Speaking Populations in the Near Abroad*. Ithaca: Cornell University Press, 3-9, 85-93.
- Sujit Choudhry. 2009. Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia. *International Journal of Constitutional Law* 7: 577-618 (skim where possible while still capturing the main points of each section).

Background:

- Explore language provisions in a few constitutions on [Constitute](#).
- Ruth Rubio-Marín. 2003. Language Rights: Exploring the Competing Rationales. In *Language Rights and Political Theory*, edited by Will Kymlicka and Alan Patten, 52-79. Oxford: Oxford University Press.
- Balázs Vizi. 2016. Territoriality and Minority Language Rights. *International Journal on Minority and Group Rights* 23: 429-453.

## State Institutions

## Sep 24 | Discussion post 4 on power sharing, power dividing, and centripetalism readings due by 5pm

## Sep 25 | Power Sharing

Discussion questions:

- Do power-sharing institutions ‘work’? What issues do they address? What are their drawbacks?

Required:

- Allison McCulloch. 2014. *Power-Sharing and Political Stability in Deeply Divided Societies*. New York: Routledge, 34-91.

Background:

- Andrew Reynolds. 2011. *Designing Democracy in a Dangerous World*. Oxford: Oxford University Press, 139-158.
- Pippa Norris. 2008. *Driving Democracy: Do Power-Sharing Institutions Work?* Cambridge: Cambridge

- University Press, 132-136, 149-156.
- Sumantra Bose. 2017. Mostar as Microcosm: Power-Sharing in Post-War Bosnia. In *Power-Sharing: Empirical and Normative Challenges*, edited by Allison McCulloch and John McGarry, 189-210. London: Routledge.
  - Stef Vandeginste. 2017. Power-Sharing in Burundi: An Enduring Miracle? In *Power-Sharing: Empirical and Normative Challenges*, edited by Allison McCulloch and John McGarry, 166-188. London: Routledge.
  - Joanne McEvoy. 2017. Power-Sharing and the Pursuit of Good Governance: Evidence from Northern Ireland. In *Power-Sharing: Empirical and Normative Challenges*, edited by Allison McCulloch and John McGarry, 211-228. London: Routledge.
  - Cordelia Koch. 2012. The Separation of Powers in a Fragmented State: The Case of Lebanon. In *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, edited by Rainer Grote and Tilman J. Röder, 387-402. Oxford: Oxford University Press.

## Sep 27 | Power Dividing and Centripetalism

Discussion questions:

- Do power-dividing and centripetal institutions ‘work’? What issues do they address? What are their drawbacks?

Required:

- Allison McCulloch. 2014. *Power-Sharing and Political Stability in Deeply Divided Societies*. New York: Routledge, 92-105, 117-142 only (skip Sri Lanka case).

Background:

- Philip G. Roeder. 2005. Power Dividing as an Alternative to Ethnic Power Sharing. In *Sustainable Peace: Power and Democracy after Civil Wars*, edited by Philip G. Roeder and Donald Rothchild, 51-67, 76-82 only. Ithaca: Cornell University Press.
- Donald L. Horowitz. 2013. *Constitutional Change and Democracy in Indonesia*. Cambridge: Cambridge University Press, 261-296.
- Jon Fraenkel. 2017. Mandatory Power-Sharing in Coup-Prone Fiji. In *Power-Sharing: Empirical and Normative Challenges*, edited by Allison McCulloch and John McGarry, 103-123. London: Routledge.
- John Boye Ejebowah. 2008. Integrationist and Accommodationist Measures in Nigeria’s Constitutional Engineering: Successes and Failures. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 233-257. Oxford: Oxford University Press.

## Oct 1 | Discussion post 5 on federalism, partition, and secession readings due by 5pm

## Oct 2 | Federalism

Discussion questions:

- Do federalism and devolution ‘work’? What issues do they address? What are their drawbacks? What is the case for territorial asymmetry?

Required:

- Pippa Norris. 2008. *Driving Democracy: Do Power-Sharing Institutions Work?* Cambridge: Cambridge University Press, 157-185.

Background:

- Zachary Elkins and John Sides. 2007. Can Institutions Build Unity in Multiethnic States? *American Political Science Review* 101(4): 693-708.
- Cheryl Saunders. 2000. The Implications of Federalism for Indigenous Australians. In *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, edited by Yash Ghai, 266-286. Cambridge: Cambridge University Press.
- Dawn Brancati. 2009. *Peace by Design: Managing Intrastate Conflict through Decentralization*. Oxford:

Oxford University Press, 1-17, 225-31.

- Patricia Popelier. 2019. Asymmetry and Complexity as a Device for Multinational Conflict Management: A Country Study of Constitutional Asymmetry in Belgium. In *Constitutional Asymmetry in Multinational Federalism: Managing Multinationalism in Multi-Tiered Systems*, edited by Patricia Popelier and Maya Sahadžić, 17-45.

#### **Oct 4 | Partition and Secession (1/2 of class)**

Discussion questions:

- Is partition a viable last resort? Might other strategies we've discussed enflame or quell secession? Does a right to secession undermine other constitutional strategies?

Required:

- Adrian Guelke. 2012. *Politis in Deeply Divided Societies*. Cambridge: Polity Press, 95-112.

Background:

- Nicholas Sambanis and Jonah Schulhofer-Wohl. 2009. What's in a Line? Is Partition a Solution to Civil War? *International Security* 34(2): 82-118.
- Christalla Yakinthou. 2012. A Never-Ending Story: Cyprus. In *Conflict Management in Divided Societies: Theories and Practice*, edited by Stefan Wolff and Christalla Yakinthou, 233-248. London: Routledge.
- Donald L. Horowitz. 2003. A Right to Secede? *Secession and Self-Determination* 45: 50-76.

#### **Constitutional Amendment Exercise: Research and Draft (1/2 of class)**

In-class group work to research and draft your proposed constitutional amendment text

#### **Oct 8 | Constitutional amendment text due by 5pm**

#### **Oct 9 | Constitutional amendment pitch due in class for groups presenting on Oct 9**

#### **Oct 9 | Constitutional Amendment Exercise: Propose, Deliberate, and Vote**

In-class group presentations of proposed constitutional amendments

#### **Oct 11 | Constitutional amendment pitch due in class for groups presenting on Oct 11**

#### **Oct 11 | Constitutional Amendment Exercise: Propose, Deliberate, and Vote**

In-class group presentations of proposed constitutional amendments

#### **Oct 15 | No discussion post due this week**

#### **Oct 16 | Midterm review**

#### **Oct 18 | In-class midterm exam**

### **Representation**

#### **Oct 22 | Discussion post 6 on election system and combined strategies readings due by 5pm**

#### **Oct 23 | Election System**

Discussion questions:

- What is the rationale behind majoritarian, centripetal, and proportional representation election systems? How does the choice of election system shape group inclusion? How can party bans shape identity group dynamics?

Required:

- Benjamin Reilly. 2002. Electoral Systems for Divided Societies. *Journal of Democracy* 13(2): 156-170.
- Andrew Reynolds. 2011. *Designing Democracy in a Dangerous World*. Oxford: Oxford University Press, 71-118.

Background:

- Pippa Norris. 2008. *Driving Democracy: Do Power-Sharing Institutions Work?* Cambridge: Cambridge University Press, 103-131.
- Ashley Moran. 2022. Engineered Majorities: U.S. Senate Malapportionment in Comparative Context. *Balkinization*. September 25.
- Mattias Basedau and Anika Moroff. 2011. Parties in Chains: Do Ethnic Party Bans in Africa Promote Peace? *Party Politics* 17(2): 205-222.
- Marina Ottaway and Danial Kaysi. 2010. *De-Baathification as a Political Tool: Commission Ruling Bans Political Parties and Leaders*. Washington: Carnegie Endowment for International Peace.

## Oct 25 | Combined Strategies

Discussion questions:

- Of all the constitutional design strategies we've discussed, which are most flexible in responding to demographic or political changes over time? Which are less so? Can strategies be combined to balance the risks and benefits of each?

Required:

- Richard H. Pildes. 2008. Ethnic Identity and Democratic Approaches: A Dynamic Perspective. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 173-201. Oxford: Oxford University Press.

Background:

- Donald Rothchild. 2005. Reassuring Weaker Parties after Civil Wars: The Benefits and Costs of Executive Power-Sharing Systems in Africa. *Ethnopolitics* 4(3): 247-267.
- Timothy D. Sisk. 2022 (2003). Power-Sharing after Civil Wars: Matching Problems to Solutions. In *Contemporary Peacemaking: Peace Processes, Peacebuilding, and Conflict*, 3<sup>rd</sup> Ed., edited by Roger Mac Ginty and Anthony Wanis-St. John, 407-425. London: Palgrave Macmillan.
- Jacques Bertrand. 2008. Indonesia's Quasi-Federalist Approach: Accommodation Amid Strong Integrationist Tendencies. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 205-232. Oxford: Oxford University Press.

## Processes

## Oct 29 | Discussion post 7 on constitution making readings due by 5pm

## Oct 30 | Constitution Making: Participation

Discussion questions:

- Who should have input into the constitution-making process? At what points? How important is inclusiveness versus efficiency in drafting a constitution in a divided society? How does the constitution-making process shape the constitution's legitimacy or effectiveness?

Required:

- Tom Ginsburg, Zachary Elkins, and Justin Blount. 2009. Does the Process of Constitution-Making Matter? *Annual Review of Law and Social Science* 5: 201-23.

Background:

- Jennifer Widner. 2008. Constitution Writing in Post-Conflict Settings: An Overview. *William and Mary Law Review* 49: 1513-1541.
- Jorge Contesse. 2021. Chile's Kaleidoscopic Constituent Assembly. *VerfassungsBlog*, June 22.

- Jonathan Morrow. 2005. *Iraq's Constitutional Process II, An Opportunity Lost*. Washington: United States Institute of Peace.

## Nov 1 | Constitution Making: Ambiguity and Deferral

Discussion questions:

- How might ambiguous or conflicting language be useful in constitutions in divided societies? Or is it more damaging? Is it advisable to defer some decisions to a later lawmaking process?

Required:

- Hanna Lerner. 2010. Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach. *Nations and Nationalism* 16(1): 68-88.

Background:

- Rosalind Dixon and Tom Ginsburg. 2011. Deciding Not to Decide: Deferral in Constitutional Design. *International Journal on Constitutional Law* 9: 636-672.
- Asli Bâli and Hanna Lerner. 2016. Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies. *Cornell International Law Journal* 49: 168-172 only.

## Nov 5 | Discussion post 8 on constitutional elaboration readings due by 5pm

## Nov 6 | Constitutional Elaboration: Democracy

Discussion questions:

- What roles do courts with constitutional jurisdiction play in advancing democracy in a divided society? Does this provide a useful independent arbiter, or leave too much responsibility to the courts?

Required:

- Samuel Issacharoff. 2011. Constitutional Courts and Democratic Hedging. *The Georgetown Law Journal* 99: 961-1012 (skip Introduction and Section I).

Background:

- Tom Ginsburg. 2013. The Politics of Courts in Democratization: Four Junctures in Asia. *Consequential Courts: Judicial Roles in Comparative Perspective*, edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, 45-66. Cambridge: Cambridge University Press.
- Diego González. 2020. Explaining the Institutional Role of the Colombian Constitutional Court. In *From Parchment to Practice: Implementing New Constitutions*, edited by Tom Ginsburg and Aziz Z. Huq, 189-207. Cambridge: Cambridge University Press.

## Nov 8 | Constitutional Elaboration: Identity

Discussion questions:

- How do courts with constitutional jurisdiction help resolve constitutional ambiguity and competing state visions in a divided society? Is this role unique to divided societies?

Required:

- Ashley Moran. 2023. *Constitutional Elaboration Amid Division: Court Impact on Institutional Development and Minority Inclusion in Iraq*, excerpts.

Background:

- Robert Schertzer. 2016. *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*. Toronto: University of Toronto Press, 62-98.

## Nov 12 | Discussion post 9 on constitutional reform readings due by 5pm

## Nov 13 | Constitutional Reform: Approaches

Discussion questions:

- What are the varied approaches constitutions take in providing for their own amendment? What

are the rationales and implications of each approach? Which types of provisions do countries make more difficult to amend?

Required:

- Rosalind Dixon and David Landau. 2018. Tiered Constitutional Design. *The George Washington Law Review* 86(2): 438-512.

Background:

- Explore amendment provisions in a few constitutions on [Constitute](#).
- Yaniv Roznai. 2013. Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea. *The American Journal of Comparative Law* 61(3): 657-719.

## Nov 15 | Constitutional Reform: Timing

Discussion questions:

- How do we know if constitutional arrangements are working (even partially) or if they need amending? Is constitutional reform too dangerous or difficult to achieve in a polarized society? Is *lack* of reform too dangerous to avoid if it's needed?

Required:

- Tom Ginsburg and Aziz Z. Huq. 2016. Assessing Constitutional Performance. In *Assessing Constitutional Performance*, edited by Tom Ginsburg and Aziz Z. Huq, 12-23 only. Cambridge: Cambridge University Press.

Background:

- Feisal Amin al-Istrabadi. 2009. A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process. *Texas Law Review* 87: 1627-1655.

## Nov 20-24 | Thanksgiving Break

## Nov 26 | Discussion post 10 on constitutional crises readings due by 5pm

## Nov 27 | Constitutional Crises

Discussion questions:

- What, exactly, is a constitutional crisis? How does it emerge, and how should we respond? How is a state's constitutional identity challenged by crisis or conflict? How can a state and society protect constitutionalism during crises?

Required:

- Yurii Barabash and Hryhorii Berchenko. 2019. Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine. *Baltic Journal of European Studies* 9(3): 3-24.

Background:

- Kim Lane Schepppe. 2023. [States of Emergency as a Script for Undermining Constitutional Government](#). *Balkinization*. May 16.
- Keith Whittington. 2023. [Bad Faith Constitutionalism](#). *Balkinization*. May 17.

## Nov 29 | Discussion with Professor Yurii Barabash

Vice-Rector for Academic Affairs, Yaroslav Mudryi National Law University, Kharkiv, Ukraine; Chair of the Scientific Advisory Board, Constitutional Court of Ukraine; Deputy Chair of the Working Group for Drafting Constitutional Amendment Proposals, Legal Reform Commission of the President of Ukraine; Corresponding Member, National Academy of Legal Sciences of Ukraine

## Taking Stock

## Dec 3 | No discussion post due this week

## **Dec 4 | Risk and Benefit Analysis**

Discussion questions:

- Which constitutional strategies have the biggest risks in your view? How can these be offset? Do any have clear payoffs? How should we measure the success of a constitution in a divided society? Is there a 'low bar' that reflects the minimum a constitution must do? Are there high bars we can target as well?

**Dec 4 | Take-home final exam distributed**

**Dec 7 | Take-home final exam due by 5pm**