

# CONSTITUTIONALISM IN DIVIDED SOCIETIES

GOV 355M (38474) | Fall 2022  
Classroom: JGB 2.202  
Class time: TTH 11:00am-12:30pm  
Office hours: W 9:00am-12:00pm (Virtual)

Ashley Moran (she/her)  
Department of Government  
University of Texas at Austin  
ashleymoran@utexas.edu

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 these divisions, 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 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 laws be blended in a coherent way? Is ambiguity helpful in constitutional design? What 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. Regular attendance, a high level of preparation, and consistent contributions to class discussion will earn full credit for class participation.
- 40% Reaction papers: These assignments will be due most (but not all) Mondays to facilitate students' engagement with the topics under study and generate points of departure for in-class discussions.

Papers can be on any topic covered in the readings that week. The papers can analyze the authors' arguments, apply them to current events anywhere in the world, pose other approaches, or grapple with that week's topics in any other way that stays true to our class objectives. More detailed instructions are on Canvas. Papers should be 400-500 words, submitted to Canvas on assigned Mondays by 11am (see due dates below).

- 20% 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 Tuesday, October 11.
- 20% Take-home final exam: The exam will look holistically at issues across the whole course. The exam will be distributed in class on Thursday, December 1, and will be due via submission to Canvas by Friday, December 9, 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. Additionally, students are excused for religious holy days, with written advance notice. If an assignment is due on the date of an absence, please make arrangements to turn in the assignment before or shortly after the absence.

**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. All written work must be your individual work, and group collaboration on written assignments is not allowed.

**Late work:** The reaction papers intend to allow you to reflect on the readings prior to our discussion of them. Late assignments thus will not be accepted, except in extenuating circumstances or in the case of absences as noted above.

## 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 reaction paper.

Aug 29, 11am:	Reaction paper 1 on constitutionalism and constitutional design
Sep 5, 11am:	Reaction paper 2 on ethnicity and religion
Sep 12, 11am:	Reaction paper 3 on nationality and language
Sep 19, 11am:	Reaction paper 4 on power sharing, power dividing, and centripetalism
Sep 26, 11am:	Reaction paper 5 on federalism, territorial asymmetry, and partition
Oct 11, 11am:	In-class midterm exam
Oct 17, 11am:	Reaction paper 6 on election system and adaptation
Oct 24, 11am:	Reaction paper 7 on constitutional drafting
Oct 31, 11am:	Reaction paper 8 on constitutional elaboration
Nov 7, 11am:	Reaction paper 9 on constitutional reform
Nov 14, 11am:	Reaction paper 10 on transitional justice
Dec 9, 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 are expected to abide by the university's honor code and uphold its 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 at <https://deanofstudents.utexas.edu/conduct/academicintegrity.php>, and in the university's rules on Student Discipline and Conduct at <https://catalog.utexas.edu/general-information/appendices/appendix-c/student-discipline-and-conduct>. I highly encourage you to review the very helpful resources UT has compiled on how to avoid plagiarism (<https://guides.lib.utexas.edu/c.php?g=539686&p=8083280>) and how to properly cite sources (<https://guides.lib.utexas.edu/c.php?g=539686&p=3694907>).

**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 Division of Diversity and Community Engagement, Disability and Access Services (D&A). Please refer to its website for contact and more information at <https://diversity.utexas.edu/disability>. 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, schedule time during office hours, or email me anytime.

**Prohibition on sharing course materials:** No materials used in this class, including, but not limited to, readings, handouts, 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 instructor.

## MATERIALS

All course materials are posted on the class Canvas site. This includes the syllabus, readings, announcements, assignments, and grades.

## SCHEDULE

**Aug 23 | Introduction and Overview**

## Conceptual Foundations

### Aug 25 | Divided Societies

Questions:

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

Assigned:

- 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): 715-735.
- 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 Rowsell, 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 29 | Reaction paper 1 on constitutionalism and constitutional design due by 11am

### Aug 30 | Constitutionalism

Questions:

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

Assigned:

- 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, 12-54.
- 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 Albers. 2009. How Constitutions Constrain. *Comparative Politics* 41(2): 127-143.

### Sep 1 | Constitutional Design in Divided Societies

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?

Assigned:

- 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, 1-7. 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 5 | Reaction paper 2 on ethnicity and religion due by 11am

#### Sep 6 | Ethnicity

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?

Assigned:

- Yash Ghai. 2011. Ethnic Identity, Participation, and Social Justice: A Constitution for New Nepal? *International Journal on Minority and Group Rights* 18: 309-334.
- Explore ethnicity provisions in a few constitutions on [Constitute](#).

Background:

- 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.
- H. Kwasi Prempeh. 2013. Constitutionalism, Ethnicity and Minority Rights in Africa. *International Journal of Constitutional Law* 11(2): 438-443.
- 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, 151-168. Oxford: Hart Publishing
- Jan Hessbrügge 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 8 | Religion

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?

Assigned:

- 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).
- Explore religion provisions in a few constitutions on [Constitute](#).

Background:

- 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 12 | Reaction paper 3 on nationality and language due by 11am

## Sep 13 | Nationality

### 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?

### Assigned:

- 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.
- Chile’s to become “Plurinational” State under New Constitution? *MercoPress*, March 24, 2022.
- Explore nationality and citizenship provisions in a few constitutions on [Constitute](#).

### Background:

- 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.
- Amaya Alvez Marín. 2012. Forcing Consensus: Challenges for Rights-based Constitutionalism in Chile. In *Rights in Divided Societies*, edited by Colin Harvey and Alex Schwartz, 245-264. Oxford: Hart Publishing.

## Sep 15 | Language

### 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?

### Assigned:

- 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).
- Explore language provisions in a few constitutions on [Constitute](#).

### Background:

- Ruth Rubio-Marín. 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 19 | Reaction paper 4 on power sharing, power dividing, and centripetalism due by 11am**

**Sep 20 | Power Sharing**

Questions:

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

Assigned:

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

Background:

- Pippa Norris. 2008. *Driving Democracy: Do Power-Sharing Institutions Work?* Cambridge: Cambridge University Press, 132-156.
- Andrew Reynolds. 2011. *Designing Democracy in a Dangerous World*. Oxford: Oxford University Press, 139-158.
- 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. In *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, edited by Rainer Grote and Tilmann J. Röder, 387-402.

**Sep 22 | Power Dividing and Centripetalism**

Questions:

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

Assigned:

- Allison McCulloch. 2014. *Power-Sharing and Political Stability in Deeply Divided Societies*. New York: Routledge, 92-142.

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, 51-82. 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 Ejibowah. 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.

**Sep 26 | Reaction paper 5 on federalism, territorial asymmetry, and partition due by 11am**

## Sep 27 | Federalism

Questions:

- Do federalism and devolution ‘work’? What issues do they address? What are their drawbacks?

Assigned:

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

Background:

- Donald Rothchild and Caroline A. Hartzell. 1999. Security in Deeply Divided Societies: The Role of Territorial Autonomy. *Nationalism and Ethnic Politics* 5: 254-271.
- 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.

## Sep 29 | Territorial Asymmetry

Questions:

- Does territorial asymmetry ‘work’? What issues does it solve? What are its drawbacks?

Assigned:

- 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, skim 17-45.

Background:

- Michael Keating. 2015. Territorial Autonomy in Nationally Divided Societies: The Experience of the United Kingdom, Spain, and Bosnia and Herzegovina. In *Territorial Pluralism: Managing Difference in Multinational States*, edited by Karlo Basta, John McGarry, and Richard Simeon, 121-147. Vancouver: UBC Press.

## Oct 4 | Partition and Secession

Questions:

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

Assigned:

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

Background:

- Donald L. Horowitz. 2003. A Right to Secede? *Secession and Self-Determination* 45: 50-76.
- 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.

## Oct 6 | Constitutional Amendment Exercise

Class exercise putting you in the drafter’s seat, using Constitute to research and collect ideas, propose and discuss them, and come to a collective decision about them

## Oct 11 | In-class midterm exam at 11am



## Representation

### Oct 13 | Election System

Questions:

- What is the rationale behind centripetal, proportional representation, and majoritarian election systems? Which do you see as the best approach to manage conflict and build inclusive democracy?

Assigned:

- 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, 71-87.

Background:

- Pippa Norris. 2008. *Driving Democracy: Do Power-Sharing Institutions Work?* Cambridge: Cambridge University Press, 103-131.
- Christina Murray and Richard Simeon. 2008. Recognition without Empowerment: Minorities in a Democratic South Africa. In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 409-437. Oxford: Oxford University Press.

### Oct 17 | Reaction paper 6 on election system and adaptation due by 11am

### Oct 18 | Election System

Questions:

- How does the choice of election system shape group inclusion? How can party bans or other election design choices shape identity group dynamics?

Assigned:

- Andrew Reynolds. 2011. *Designing Democracy in a Dangerous World*. Oxford: Oxford University Press, 89-118.

Background:

- 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.
- Thibaud Bodson and Neophytos Loizides. 2017. Consociationalism in the Brussels Capital Region: Dis-proportional Representation and the Accommodation of National Minorities. In *Power-Sharing: Empirical and Normative Challenges*, edited by Allison McCulloch and John McGarry, 87-102. London: Routledge.

### Oct 20 | Adaptation

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?

Assigned:

- 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. 2003. Power-Sharing after Civil Wars: Matching Problems to Solutions. In *Contemporary Peacemaking: Conflict, Violence, and Peace Processes*, edited by John Darby and Roger

Mac Ginty, 139-150. 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.

### Process

#### **Oct 24 | Reaction paper 7 on constitutional drafting due by 11am**

#### **Oct 25 | Constitutional Drafting: Participants**

Questions:

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

Assigned:

- 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.

#### **Oct 27 | Constitutional Drafting: Ambiguity and Deferral**

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?

Assigned:

- Hanna Lerner. 2011. *Making Constitutions in Deeply Divided Societies*. Cambridge: Cambridge University Press, 30-46, skim 193-229.

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.

#### **Oct 31 | Reaction paper 8 on constitutional elaboration due by 11am**

#### **Nov 1 | Constitutional Elaboration: Democracy**

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?

Assigned:

- 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 3 | **Constitutional Elaboration: Identity**

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?

Assigned:

- Ashley Moran. 2022. Hybrid Constitutional Design: Court Elaboration of Contested Constitutional Principles in Iraq.

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 7 | **Reaction paper 9 on constitutional reform due by 11am**

### Nov 8 | **Constitutional Reform**

Questions:

- 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? Which types of provisions do countries make more difficult to amend?

Assigned:

- Feisal Amin al-Istrabadi. 2006. Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law. *New York School Law Review* 50: 269-302.
- Feisal Amin al-Istrabadi. 2009. A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process. *Texas Law Review* 87: 1627-1655.
- Explore amendment provisions in a few constitutions on [Constitute](#).

Background:

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

### Nov 10 | **Discussion with Ambassador Feisal Amin Rasoul al-Istrabadi**

Michael A. and Laurie Burns McRobbie Professor in Global Strategic Studies and Director of the Center for the Study of the Middle East, Indiana University Bloomington; Former Iraqi Ambassador to the United Nations (2004-2007); Principal legal drafter of the Iraqi Transitional Administrative Law

### Nov 14 | **Reaction paper 10 on transitional justice due by 11am**

### Nov 15 | **Transitional Justice**

Questions:

- How can transitional justice supplement constitutional design in addressing the challenges of a divided society? How is a state's constitutional identity transformed by transitional justice or, regrettably, by a return to conflict? How can a state and society protect constitutional gains made if conflict resumes?

Assigned:

- Ruti Teitel. 2011. Transitional Justice and the Transformation of Constitutionalism. In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon, 57-76. Cheltenham: Edward Elgar Publishing.

Background:

- Roger Duthie. 2017. *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*. New York: International Center for Transitional Justice.

**Nov 17 | Discussion with Professor Yuriy Barabash**

Vice-Rector for Academic Affairs, Yaroslav Mudryi National Law University, Kharkiv, Ukraine;  
Head of the Research and Advisory Council, Constitutional Court of Ukraine

**Nov 19-27 | Thanksgiving Break**

**Taking Stock**

**Nov 29 | Risk and Benefit Analysis**

Questions:

- Which constitutional strategies have the biggest risks in your view? How can these be offset? Do any have clear payoffs? Can combining strategies balance their risks and benefits? Which strategies seem most conducive to managing diverse groups without cementing divisions?

**Dec 1 | Measures of Success**

Questions:

- 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 1 | Take-home final exam distributed**

**Dec 9 | Take-home final exam due by 5pm**