

7397/26003: CONSTITUTIONAL DESIGN

Preliminary Syllabus – Fall 2026

Professor David Froomkin

Constitutional design is normative constitutional theory. Whereas lawyers typically focus on discerning what the law is, the field of constitutional design considers what constitutional rules are most desirable. Our primary focus will be on assessing the U.S. Constitution's rules, but we will also consider alternative or additional rules that it could have included, such as a specification of the electoral system. An overarching question will be the value of hard-wiring constitutional rules rather than permitting innovation and experimentation.

Despite our focus on normative rather than interpretive questions, constitutional design is also relevant to the practice of constitutional law. Indeed, constitutional design is a modality of constitutional interpretation: one thing that judges consider in interpreting the Constitution is the wisdom of the constitutional principles they glean from the text. Part of deciding what the rules are involves considering what the rules ought to be. Thus, we will also think about how arguments about constitutional design relate to arguments about constitutional law, and we will apply this analysis to some important cases in separation of powers and the law of democracy.

Topics will include electoral rules, legislative organization, separation of powers and veto points, appointments and removals, oversight and impeachment, judicial review and judicial independence, and constitutional amendment.

The course will meet on Tuesdays and Thursdays from 2:30pm to 4:00pm. This is a discussion-based course, and you are expected to come to class having read and reflected on the assigned readings. The assigned readings for each class session are listed in the schedule of assignments below. All assigned readings will be posted on Canvas, unless a hyperlink is provided. Any readings marked "optional" are not assigned readings.

Grading will be based on a 10,000-word final paper (75%), due December 14, and participation (25%). There are several intermediate paper deadlines (each graded only for timely completion): a one-paragraph topic description due October 2, an outline due October 16, and a first draft due November 13. I encourage you to meet with me to discuss ideas well before these deadlines.

The content of this syllabus is subject to change before the start of the fall semester. Please check Canvas for an updated version of the syllabus at the beginning of the semester.

Schedule of Assignments

In addition to listed assignments, please read the entirety of the U.S. Constitution before the first meeting of the course. This is very important: we will refer back to the constitutional text frequently, and having familiarity with the document's overarching structure is essential for the kind of work we will be doing.

1. Tuesday, August 25 – Madisonianism and Its Critics I

Madison, *Federalist 51*, https://avalon.law.yale.edu/18th_century/fed51.asp

ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY (1956), ch. 1

2. Thursday, August 27 – Madisonianism and Its Critics II

Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, pp. 2312-2347 (2006)

ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010), pp. 18-34

3. Tuesday, September 1 – Electoral Systems

Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian, and Mixed Systems*, 18 INT'L POL. SCI. REV. 297 (1997)

Tom van der Meer & Bastiaan Rijkema, *Militant Democracy and the Minority to Majority Effect: on the Importance of Electoral System Design*, 18 EUR. CONST. L. REV. 511 (2022)

4. Thursday, September 3 – Group Representation

Donald L. Horowitz, *The Challenge of Ethnic Conflict: Democracy in Divided Societies*, 4 J. DEMOCRACY 18 (1993)

Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96 (2004)

Optional: Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993)

5. Tuesday, September 8 – Political Parties

Richard H. Pildes, *Political Parties and Constitutionalism*, in COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., 2012)

California Democratic Party v. Jones, 530 U.S. 567 (2000)

Daniel R. Ortiz, *Duopoly versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 (2000)

6. Thursday, September 10 – Districting

Nicholas O. Stephanopoulos, *Partisan Gerrymandering*, in OXFORD HANDBOOK OF AMERICAN ELECTION LAW (Eugene D. Mazo ed., 2024)

Alexander Kustov, Maikol Cerda, Akhil Rajan, Frances Rosenbluth & Ian Shapiro, *The Rise of Safe Seats and Party Indiscipline in the U.S. Congress*, <https://jackson.yale.edu/wp-content/uploads/2022/08/Kustov-et-al.-2021.pdf>

7. Tuesday, September 15 – Electoral Reform

Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985 (2021)

Richard H. Pildes, *Skepticism about Proportional Representation for Congress*, 2024 U. ILL. L. REV. 1529 (2024)

Optional: Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, pp. 1-29 (2021)

8. Thursday, September 17 – The Electoral College

Chiafalo v. Washington, 591 U.S. 578, pp. 581-597 (2020)

Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205 (2007)

9. Tuesday, September 22 – Qualification and Disqualification

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)

Trump v. Anderson, 601 U.S. 100 (2024)

SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006), ch. 5

10. Thursday, September 24 – Direct Democracy

Samuel Issacharoff & J. Colin Bradley, *The Plebiscite in Modern Democracy*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM (2021), pp. 505-516

William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMPAR. L. 485 (2006)

11. Tuesday, September 29 – Veto Points

SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006), ch. 2

JOSH CHAFETZ, CONGRESS'S CONSTITUTION (2017), Conclusion

12. Thursday, October 1 – Bicameralism

Jeremy Waldron, *Bicameralism and the Separation of Powers*, in POLITICAL POLITICAL THEORY (2016), pp. 72-92

Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, pp. 1435-1474 (2011)

13. Tuesday, October 6 – Upper Chamber Reform

MEG RUSSELL, THE CONTEMPORARY HOUSE OF LORDS (2013), ch. 2-3

Reynolds v. Sims, 377 U.S. 533, pp. 572-575 (1964)

Optional: David B. Froomkin & A. Michael Froomkin, *Saving Democracy from the Senate*, 2024 UTAH L. REV. 397, available at <https://papers.ssrn.com/abstract=3797782>

14. Thursday, October 8 – The Presidential Veto

Kristin E. Eichensehr, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245 (2021)

SANFORD LEVINSON, FRAMED (2012), ch. 7

15. Tuesday, October 13 – Legislative Organization

Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765 (2021)

George J. Stigler, *The Sizes of Legislatures*, 5 J. LEGAL STUD. 17 (1976)

16. Thursday, October 15 – Separation of Powers 101

Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225 (2007)

Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990)

17. Tuesday, October 20 – Presidentialism and Parliamentarism

Anthony W. Bradley & Cesare Pinelli, *Parliamentarism*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012), ch. 30

STEFFEN GANGHOF, BEYOND PRESIDENTIALISM AND PARLIAMENTARISM (2021), ch. 2

18. Thursday, October 22 – Appointments

Jennifer Mascott, *The Ratifiers' Theory of Officer Accountability* (unpublished manuscript)

Lawrence Claus, *The Law of Constitutional Capture*, 19 ICL J. 267 (2025)

19. Tuesday, October 27 – Removals I

John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, pp. 708-719 (1997)

Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995)

20. Thursday, October 29 – Removals II

Seila Law LLC v. CFPB, 591 U.S. 197 (2020)

David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1 (2020)

21. Tuesday, November 3 – The Legislative Veto

INS v. Chadha, 462 U.S. 919 (1983)

Josh Chafetz, *The Chadha Presidency*, 115 GEO. L.J. ____ (forthcoming)

22. Thursday, November 5 – Oversight & Impeachment

Jonathan Shaub, *Congress's Power of Inquiry in Impeachment*, 112 VA. L. REV. ____ (forthcoming)

23. Tuesday, November 10 – Judicial Review

Jeremy Waldron, *The Core of the Case against Judicial Review*, in POLITICAL POLITICAL THEORY (2016), pp. 195-245

Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)

Optional: Adam Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016)

Optional: RAN HIRSCHL, TOWARDS JURISTOCRACY (2007)

24. Thursday, November 12 – Judiciary Reform & Judicial Independence

Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021) (n.b. if pressed for time, focus on pp. 1720-1752, surveying and assessing proposed reforms)

Kriszta Kovacs and Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 J. COMMUNIST & POST-COMMUNIST STUD. 189, pp. 189-200 (2018)

Optional: John Ferejohn, Frances Rosenbluth & Charles R. Shipan, *Comparative Judicial Politics*, OXFORD HANDBOOK OF COMPARATIVE POLITICS (2009), 727-747

25. Tuesday, November 17 – Constitutional Amendment I

Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016)

26. Thursday, November 19 – Constitutional Amendment II

SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006), ch. 6

Additional Information/Policies

Attendance: Attendance is mandatory. If you fail to attend at least 80% of class meetings (i.e. at least 21 of our 26 meetings in fall 2026), you will be in violation of ABA and Law Center policy and may be dropped from the course. Even aside from this requirement, excessive unexplained absences may affect your participation grade. Additionally, please be in class on time: late arrivals are disruptive to other students, and they may be treated as absences.

Office hours: I encourage you to meet with me. Please email me at dfroomkin@central.uh.edu to set up a meeting time via Zoom. We will schedule a meeting at a time that works for you.

Computer Policy: Use of laptops or other electronic devices is permitted for class-related purposes only. Audio or visual recording of class by students is prohibited.

Honor Code: The UHLC Honor Code applies to all aspects of this course. You are responsible for knowing all Honor Code provisions and for complying with the Honor Code. Please inquire if you have any questions regarding how the Honor Code's provisions apply to specific activities or situations related to this course. Your continuing enrollment in this course is deemed to be a pledge by you under the Honor Code to comply with the Honor Code in relation to this course and to comply with the instructions in the course syllabus.

AI Policy: Your continuing enrollment in this course is deemed to be a pledge by you under the Honor Code not to generate or use any AI-generated text—whether from yourself or others—in relation to any assessment in this course. The term “assessment” means any graded or ungraded work product for this course that is submitted to the instructor, presented in a class session, or used in a graded written assignment for this course. However, you may generate and use AI-generated text for class preparation or for study supplements to aid with general understanding of course content, although you must disclose the full extent of that use if your professor asks. Nevertheless, you should be cautious about relying on the substance of AI-generated text: for legal analysis, in particular, it is very error-prone.

Mental Health and Wellness: The University of Houston has a number of resources to support students' mental health and overall wellness, including CoogsCARE and the UH Go App. UH Counseling and Psychological Services (CAPS) offers 24/7 mental health support for all students, addressing various concerns like stress, college adjustment and sadness. CAPS provides individual and couples counseling, group therapy, workshops and connections to other support services on and off-campus. For assistance visit uh.edu/caps, call 713-743-5454, or visit a Let's

Talk location in-person or virtually. Let's Talk are daily, informal confidential consultations with CAPS therapists where no appointment or paperwork is needed.

Need Support Now? - If you or someone you know is struggling or in crisis, help is available. Call CAPS crisis support 24/7 at 713-743-5454, or the National Suicide and Crisis Lifeline: call or text 988, or chat 988lifeline.org.

Title IX/Sexual Misconduct: Per the UHS Sexual Misconduct Policy, your instructor is a “responsible employee” for reporting purposes under Title IX regulations and state law and must report incidents of sexual misconduct (sexual harassment, non-consensual sexual contact, sexual assault, sexual exploitation, sexual intimidation, intimate partner violence, or stalking) about which they become aware to the Title IX office. Please know there are places on campus where you can make a report in confidence. You can find more information about resources on the Title IX website at <https://uh.edu/equal-opportunity/title-ix-sexual-misconduct/resources/>.

Reasonable Academic Adjustments/Auxiliary Aids: The University of Houston is committed to providing an academic environment and educational programs that are accessible for its students. Any student with a disability who is experiencing barriers to learning, assessment or participation is encouraged to contact the Justin Dart, Jr. Student Accessibility Center (Dart Center) to learn more about academic accommodations and support that may be available to them. Students seeking academic accommodations will need to register with the Dart Center as soon as possible to ensure timely implementation of approved accommodations. Please contact the Dart Center by visiting the website: <https://uh.edu/accessibility/> calling (713) 743-5400, or emailing jdcenter@Central.UH.EDU.

The Student Health Center offers a Psychiatry Clinic for enrolled UH students. Call 713-743-5149 during clinic hours, Monday through Friday 8 a.m. - 4:30 p.m. to schedule an appointment.

The A.D. Bruce Religion Center offers spiritual support and a variety of programs centered on well-being.

The Center for Student Advocacy and Community (CSAC) is where you can go if you need help but don't know where to start. CSAC is a “home away from home” and serves as a resource hub to help you get the resources needed to support academic and personal success. Through our Cougar Cupboard, all students can get up to 30 lbs of FREE groceries a week. Additionally, we provide 1:1 appointments to get you connected to on- and off-campus resources related to essential needs, safety and advocacy, and more. The Cougar Closet is a registered student organization advised by our office and offers free clothes to students so that all Coogs can feel good in their fit. We also host a series of cultural and community-based events that fosters social connection and helps the cougar community come closer together. Visit the CSAC homepage or follow us on Instagram: @uh_CSAC and @uhcupbrd. YOU belong here.

Recording of Class: Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor. If you have or think you may have a disability such that you need to record class-related activities, please contact the Justin Dart, Jr. Student Accessibility Center. If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use the instructor's recordings for their own studying and notetaking. Instructor's recordings are not authorized to be shared with anyone without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action.

Security Escorts and Cougar Ride: UHPD continually works with the University community to make the campus a safe place to learn, work, and live. The security escort service is designed for the community members who have safety concerns and would like to have a Security Officer walk with them, for their safety, as they make their way across campus. Based on availability either a UHPD Security Officer or Police Officer will escort students, faculty, and staff to locations beginning and ending on campus. If you feel that you need a Security Officer to walk with you for your safety, please call 713-743-3333. Arrangements may be made for special needs. Parking and Transportation Services also offers a late-night, on-demand shuttle service called "Cougar Ride" that provides rides to and from all on-campus shuttle stops, as well as the MD Anderson Library, Cougar Village/Moody Towers and the UH Technology Bridge. Rides can be requested through the UH Go app. Days and hours of operation can be found at <https://uh.edu/af-university-services/parking/cougar-ride/>.

Syllabus Changes: Any updates to this syllabus will be announced on Canvas. It is the responsibility of students to ensure that they have an up-to-date version of the syllabus.