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- I. Untitled introduction: **the principles of constitutional design**
- A. Definition: a **constitution** is a set of rules & principles (written & unwritten) by which power is distributed within a group
- B. **Major topics:**
1. How the three major governmental functions are carried out (law making, enforcing, adjudicating) and by whom
  2. How the powers of government are limited
  3. How office holders are appointed and elected
  4. How the constitution is amended
- C. **Variations** in formality (length & specificity)
1. Older constitutions are typically shorter & more general (e.g., U.S., 7200 words); newer are typically longer & more specific (e.g., Germany, 20,000 words)
  2. Some countries (e.g., U.K.) operate successfully without a central written constitution, the basic rules & principles are embodied in a variety of documents, customs, & traditions
- D. Custom & tradition can sometimes **informally amend** the original intent of the framers
1. Prime minister's cabinet in U.K.
  2. Electoral college & political parties in U.S.
- E. The virtue of **vagueness** versus **specificity**
1. Advantage of *specificity*: reduces ambiguity and arbitrary application – examples:
    - a. *Term limits* (U.S. & Russia)
  2. Advantage of *vagueness*: increases flexibility in the face of unforeseen or changing circumstances
    - a. *Separation of powers* between the branches of the federal government
      - (1) **Implied powers**: Congress is granted this type of power by Article I, Section 8 of the U.S. Constitution -- so long as such powers are necessary and proper to carry out its enumerated powers.
      - (2) **Inherent powers**: the name for those powers not enumerated in the Constitution but nevertheless claimed by either the executive or judicial branches as a part of some broad grant of power given to them by Article II or Article III.
        - (a) *Executive privilege*: the inherent power, claimed by U.S. presidents, to withhold information from the Congress or its committees and the courts in order to preserve confidential communications within the executive branch or to secure the national interest.
        - (b) *Presidential war*: a commitment of U.S. military forces to foreign combat by the president as commander in chief that is not authorized by a Congressional declaration of war (there have been over 150 such presidential wars)
        - (c) *Judicial review*: the inherent power, claimed by U.S. federal courts, to review executive actions, legislative acts, or decisions of lower courts to confirm or uphold their constitutionality.
    - b. *Division of powers* between the federal and state levels of government
      - (1) **States' rights**: are guaranteed by the *10<sup>th</sup> Amendment* – “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”
      - (2) But, *delegated powers* are not defined –
        - (a) States'-rights advocates argue that the federal government's delegated powers are limited to *enumerated powers*.
        - (b) National supremacists argue that these delegated federal powers include *implied & inherent powers*.
    - c. **Martial law** & the U.S. Constitution,
      - (1) In Article 1, Section 9 “... the privilege of the **writ of habeas corpus** shall not be suspended and **martial law** imposed, unless when in cases of rebellion or invasion the public safety may require it.”
      - (2) The U.S. Supreme Court, has added two additional restrictions
        - (a) After the end of the Civil War, in *ex parte Milligan* (71 US 2 [1866]), the Court ruled unconstitutional Lincoln's 1863 declaration of martial law (with prior Congressional authorization) because:
          - i) "Martial rule can never exist where the [civilian] courts are open, and in the proper and unobstructed exercise of their jurisdiction.
          - ii) It is also confined to the locality of actual war."
        - (b) After the end of WWII, in *Duncan v. Kahanamoku*, (327 U.S. 304 [1946]), the Court reached a similar judgment declaring unconstitutional Gov. Poindexter's declaration of martial law in Hawaii – which had been approved by President Roosevelt.
      - d. Mass media (and the bureaucracy) as the *4<sup>th</sup> branch of government*

F. Other principles of constitutional design

1. **Tradition** versus **innovation**:

- a. Monarchy
- b. Slavery
- c. Prohibition

2. **Amendments**

- a. Easy (most parliamentary democracies) – concentrated power
- b. Difficult (U.S.) – dispersed power
  - (1) *Formal process*
    - (a) Proposal
    - (b) Ratification
  - (2) *Judicial interpretation*
    - (a) Enumerated v. inherent power
    - (b) Relationship to political ideology

3. **Incentive compatibility**

- a. Definition: the match between office holders' rewards & punishments and the public good
- b. The founding fathers' solution: checks & balances through dispersion of both –
  - (1) Power
  - (2) Representation

G. Constitution writing (as attempts to resolve group conflict)

1. U.S.: class, race, & place conflicts
2. Canada: ethnic & religious conflicts
3. Lebanon: religious conflicts
4. Iraq: sectional, ethnic, & religious conflicts (the current constitution & any future amendments require popular referendum with a veto imposed if 2/3s majority oppose in any 3 of the 18 provinces)

II. The **geographic concentration (or dispersion) of power**

A. Definitions

1. **Confederal state**: power is dispersed to regional governments that may delegate some contingent power to the national government (past examples: America, Canada, Switzerland)
2. **Unitary state**: power is centralized in the national government that may delegate some contingent power to the regional governments (as of 2005, 172 out of 193 states)
3. **Federal state**: power is divided between the national and regional governments such that on some matters the national government is supreme and on other matters the regional governments are supreme. (most often found in geographically large states with heterogeneous cultures – 21 out of 193 states) Figure 9.1

B. The distinction between unitary and centralized states Table 9.1 (often blurred in practice, e.g., devolution in U.K. & France)

C. How much centralization is good?

1. *Large v. small states*
2. *Heterogeneous v. homogeneous states*
3. *Normal v. crisis times*
4. In modern democracies there is a **pattern of convergence**: *unitary states* are becoming less centralized while *federal states* are becoming more centralized (exception = Canada).

III. **Constitutionalism**

A. Definition: the doctrine that mandates that states' powers should be constitutionally limited to provide due process & equal protection of the laws

B. Examples

1. *Strong constitutionalism* (in normal rather than crisis times): U.K. U.S., Canada, Australia, New Zealand
2. *Weak constitutionalism*:
  - a. France, Russia, China, & military governments of the left (Myanmar/Burma) & right (Thailand)
  - b. The U.S. in times of major wars
    - (1) Martial law
    - (2) Extraordinary presidential emergency powers