Institut de Droit Comparé  
Université Jean Moulin Lyon 3  
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Outline: United States Constitutional Law  
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Part One - A Summary of the Constitutional System

Introduction

I. Background: Covenants and Compacts; from Colonies to States

   A. The Mayflower Compact (1620)
   B. The Declaration of Independence (1776)
   C. The Articles of Confederation (1777)
   D. Questions: How does the French Constitutional background compare to that of the U.S.?

II. The Constitution: From These United States to This United States

   A. The original Constitution (1787)
   B. Article 5 of the Constitution (the amendment process)
   C. The Bill of Rights (Amendments 1-10) (1789)
   D. The Amendments after the Civil War (Amendments 13-15) (1865, 1868, 1870)
   E. “Constitutional Moments” (1930's? 1950's and 1960's?)
   F. Question: Briefly and in general, how does French Constitutional history compare to that of the U.S.?
Federal-State Relations

III. Federalism: Creating and Limiting Governmental Power; the Federal/State Division

A. Article VI, paragraph 2: The Supreme Law of the Land

B. The role of the States

1. Article I, section 10; Amendment 10

2. The Law of the States: Article IV

3. Legal-political experiments

4. The Electoral College: [Article II, section 1]; Amendment 12

5. Amendment 14; 1930's; present

C. The Role of the Federal Government: Overview

1. Article I, section 8: Congress

2. Article II, section 2: President

3. Article III, section 2: Court

4. Amendment 10: Delegated powers only.

D. The unwritten and developing law of federalism

E. Question: Are there equivalents to federalism in the French Constitutional structure? In the European Union?

F. The Third Sovereign: Indian Nations (Native American Tribes)

G. Is there an equivalent in France to the indigenous people of North America?

Legislative, Executive, and Judicial Branches of Government

1 Both federal and state governments are divided into three branches. State's legislative branches are generally called the Legislature (usually with both a Senate and a House of Representatives). The state executive is the Governor.
IV. Creating and Limiting Governmental Power: Congress, President, Supreme Court

A. Congress: Article I (House of Representatives and Senate)

B. President: Article II

C. Courts: Article III

D. The relations between the three branches: conflict and statesmanship

E. Constitutional Law as Supreme Court Law (brief summary; for more see Part Two below)

F. Question: How is the division of power in the Constitutional government of France similar and dissimilar to that in the U.S.?

Citizens

V. Creating and Limiting Governmental Power: Elections

A. The role of parties (Democratic Party; Republican Party)

B. The role of money and television

C. Question: The role of parties, money and TV in France?

D. Voter qualifications

1. Article I, section 2 (determined by States)

2. Amendment 14, section 1 (former slaves made citizens)

3. Amendment 15 (race, color, or former slavery)

4. Amendment 19 (women)

5. Amendment 24 (no poll tax)

6. Amendment 26 (age: 18 years old)

7. Question: What are voter qualifications in France? Set by whom?

E. Federal, state, and local voting

F. Party primaries and nominating conventions
G. Most U.S. citizens do not vote

H. Questions: What is the structure of voting in France? What degree of participation?

VI. Creating and Limiting Governmental Power: Citizen’s Rights (brief summary, for more see Part Three below)

A. The Bill of Rights

B. Amendment 14
Part Two - The Role of the Court: Constitutional Law as Supreme Court Law

I. Background: From the Bottom Up

A. The people and the Court: A brief history

1. An abstract dilemma: The unelected branch

2. John Marshall and the Court as the voice of the people (Marbury v. Madison; McCulloch v. Maryland)

3. Late 19th Century to 1937 (Roosevelt and the Court-packing plan)

4. The Civil Rights movement

   i. Footnote 4 of United States v. Carolene Products (1938)

   ii. Brown v. Board of Education

5. The present

B. The people and the Court: A living connection

1. Not an abstract dilemma: Regard (and disregard) for the Court

2. Various explanations

   a. Disillusion with the other branches

   b. Fascination with the Court and the seldom-seen Justices

   c. A society saturated with law

C. The people and the law and the courts: The central importance of trial by jury

1. Magistrate court, the people’s court: Between the people and the state

2. Trial courts

   a. Service on juries

   b. Juries and law

   c. Democratic responsibility for practical justice
3. The courthouse in the community: The people’s place

4. A feeling of alignment between the people and the courts: Myth? Reality?

D. Appellate Courts

E. “I’ll take it all the way to the Supreme Court”

F. Questions: Similarities and dissimilarities in France? What is the relation between French citizens and courts? How does it compare to the U.S.? What is the place or what are the places in which the voices of individuals are heard and have an effect in the French constitutional polity?

II. The Court in Relation to the Elected Branches of Government: Speaking With and For the People

A. Preliminary: The Court’s failures (and injustices?)

1. Incoherence

2. Indian Nations (Native American Tribes)

3. Dred Scott v. Sandford (1857)

4. Lochner v. New York (1905)

5. Korematsu v. United States (1944)
   a. The role of dissenting opinions
   b. The standard of judicial review

B. The Court and the President

1. Roosevelt and the Court-packing plan

2. Youngstown Sheet & Tube Co. v. Sawyer (1952)

   a. Marbury v. Madison (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”)
b. Cooper v. Aaron (1958) (Marbury "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system.")


5. President Clinton


C. The Court and Congress

1. Deference to ordinary economic and social legislation (the Interstate Commerce Clause)
   a. The end of Lochner
   b. The standard of review
   c. The examples of environmental legislation (ICC) and civil rights legislation (Amendments 13, 14, and 15)

2. Judicial constraints on other types of legislation
   a. The aftermath of Brown
   b. Standards of review
   c. Current federalism constraints
   d. City of Boerne v. Flores (1997) (Religious Freedom Restoration Act and Amendment 14, section 5)

3. Questions: How does the relation between the judicial and legislative branches in the French system compare to that in the U.S. system? Which branch best represents the people?

D. The Court, the President and Congress: Foreign Affairs and the War Power

E. The Court and the States

1. The aftermath of Brown

2. Amendment 14
a. Due Process of Law
b. Equal Protection of the Law

III. The Power and Authority of the Court: Dialogue and Judgment

A. "The Least Dangerous Branch"

B. Dialogue

1. Among the justices: successes and failures
2. With the people: Planned Parenthood v. Casey (1992)
3. With the other federal branches and with state governments
4. Question: Is there an equivalent to this dialogue in France? In the European Union?

C. The Court and governance

1. Public interest litigation
2. Class actions
3. Questions: Are there equivalents in the French legal system to #1 or #2? In the EU?

IV. Not So Much the Opinions as the Performance

A. Forms of argument and the language of law: strengths and weaknesses

1. Applying rules (positivism, legal realism, textualism)
2. Upholding the unwritten constitution (higher law, natural law, equity)
3. Codes
4. Common law (analogy and precedent)

B. The prior commitment: a willingness to persuade and be persuaded

C. The commitment expressed in compact or covenant rather than social contract
D. The commitment expressed in the jury trial and the Supreme Court: Performing who we are and would be as a people

1. The theatrical nature of trials (and appellate courts?)
   a. Not a science
   b. If truth, practical truth

2. The evocative role of dramatic narrative

E. The role of stories of origin: Myth, history, and hope

F. The power and authority of the Court: What it holds and no more

G. The role of attorneys in the U.S.

H. Question: How does the role of attorneys in France compare?

I. The rule of law as the rule of persuasive argument made in the language of law

J. Question: How describe the rule of law in France?
Part Three - Protection of Constitutional Rights in the Jurisprudence of the Supreme Court

Introduction

I. Rights

A. The idea of rights

B. The role of rights (Federal and State)

C. The role of courts (Federal and State)

D. The written rights

   1. Original Constitution (structure and rights) (Article I, sections 9-10)

   2. The Bill of Rights (Amendments 1-10) (Article V provides for amendment)

   3. The post Civil War amendments (Amendments 13-15) [Articles XII-XV]

E. Principal rights not specifically related to the process of criminal law

   1. Freedom of religion and of speech (Amendment 1)

   2. Due process (Amendment 5; Amendment 14); just compensation (Amendment 5)

   3. Jury trial in common law (civil) cases

   4. The end of slavery (Amendment 13)

   5. Equal protection (Amendment 14)

   6. Rights related to voting (Amendments 15, 19, 24, 26)

F. Principal rights specifically related to the process of criminal law

   1. Habeas corpus (Article I, section 9)

   2. Searches, seizures, and warrants (Amendment 4)

   3. Grand jury indictment, double jeopardy, self-incrimination (Amendment 5)

   4. In criminal prosecution: speedy trial, impartial jury, notice, confrontation with witnesses, power to obtain witnesses, representation by a lawyer (Amendment 6)
5. Bail, no cruel and unusual punishment (Amendment 8)

G. Questions: How do the rights of French citizens compare to those of U.S. citizens? What effect does the European Union have on rights in France?

Rights and Courts

II. The open-ended rights: a brief summary

A. Privileges and Immunities

1. Article IV, section 2

2. Amendment 14, section 1

B. Equal Protection: Amendment 14, section 1


2. Equity

   a. The difference between “law” and “equity”

   b. Legal remedies: imprisonment, fines, money damages

   c. Equitable remedies: temporary restraining orders, injunctions, contempt

(3. Public interest litigation)

C. Due Process: Amendment 5; Amendment 14, section 1

III. Interpretation and Standards of Review

A. The example of Equal Protection: What does “equal protection of the law” mean?

1. Carolene Products v. United States, footnote 4 (1938)

2. Standards of review

3. Suspect Classifications (race, ethnic origin, and gender, for example)

4. Implied Fundamental rights (voting, interstate travel, access to courts) (Amendment 9)
5. Uncertainty

B. The example of Due Process: "Substantive" due process

1. What does "due process of law" mean?
   a. "Fundamental fairness," "Implicit in the concept of ordered liberty"
   b. Implied fundamental rights: the example of the right of privacy

2. Standards of review

3. Uncertainty

4. The difference between implied fundamental rights in Due Process and Equal Protection jurisprudence

C. The example of Due Process: "Procedural due process"


2. Criminal law
   a. Amendment 5; Amendment 14, section 1
   b. Federal and State criminal law
   c. The "incorporation" of Federal rights as applicable to the States

IV. Selected stages in the criminal process and selected rights

A. Investigation: Warrants and probable cause (Amendment 4)

B. Interrogation and confession (and trial): Privilege against self-incrimination (Amendment 5) [Miranda v. Arizona (1966)]

C. Interrogation / confession / critical stages (and trial and appeal): Right to Counsel (Amendment 6) [Gideon v. Wainwright (1963)]

D. Trial: Exclusion of evidence taken in violation of Amendments 4-6 and 14 [Mapp v. Ohio (1961)]

G. Trial: Other trial rights (and negotiated pleas)