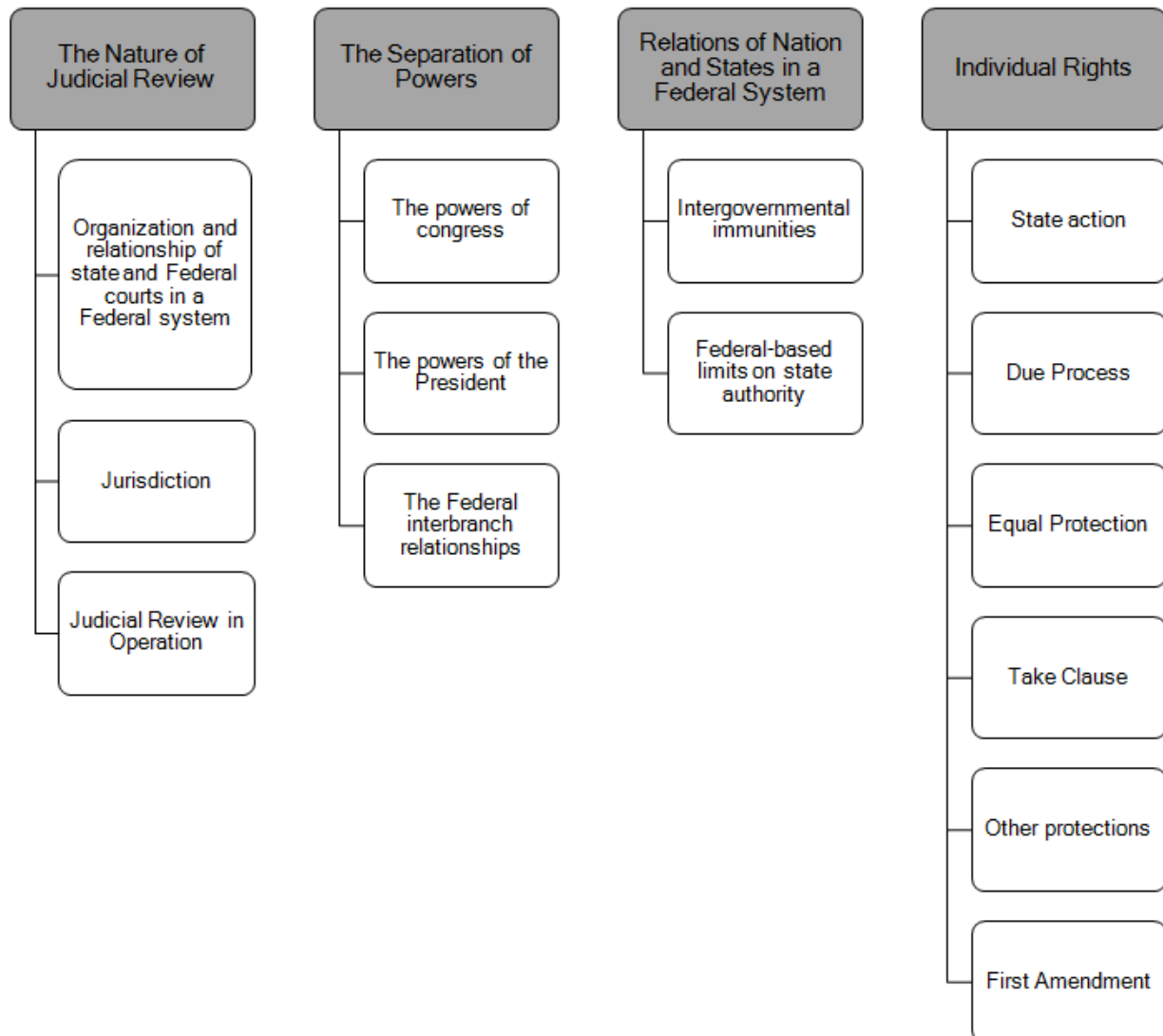


MBE Constitutional Law Sample

Approximately 50% of the Constitutional Law questions for each MBE will be based on "Individual Rights" such as due process, equal protections, and state action. "State Action" is when State is trying to have some rules that may interfere with the US Constitution.

Constitutional Law Check List



I. The Nature of Judicial Review (10% of the Constitutional Questions)

A. Organization and relationship of state and Federal courts in a Federal system:

1. Federal:
 - a) Congress has the power to create lower federal courts.
 - b) Federal courts have jurisdiction only if the Constitution clearly grants such.
 - c) Federal court has the final judge of its own powers.
2. State:
 - a) The Constitution and laws of each state establish the State Courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts.
 - b) There is a very large group of powers belonging to the states, and the Federal courts are limited to only those powers explicitly listed in the Constitution.
 - c) Only certain cases are eligible for review by the U.S. Supreme Court.

B. Jurisdiction

1. Constitutional basis: The U.S. Constitution gives the Federal courts jurisdiction over all cases arising under the Constitution.
2. Congressional power to define and limit: Congress has power to define and limit jurisdiction of all courts, including the Supreme Court. Congress cannot take away a state's 11th Amendment immunity from Federal Lawsuits.
3. The 11th amendment and state sovereign immunity: The 11th amendment prohibits the Federal courts from hearing damage claims against a state without their consent.

C. Judicial review in operation

1. The case or controversy requirement: There must be an actual dispute between parties before a court can hear the case.
 - a) Prohibition on advisory opinions: The case or controversy requirement in Constitution prohibits Federal courts from issuing advisory opinions.
 - b) Standing
 - (1) Plaintiff must show he has been injured or will be injured (economic, aesthetic, environmental) and can only assert injuries that have

personally suffered.

- (a) If seeking injunctive or declaratory relief, must show likelihood of future harm.
- (b) Causation/redressibility: Relief sought must eliminate the harm alleged.

Hints:

1. If asked which Plaintiff has best standing, it is the one who has personally suffered an injury.
2. If more than one Plaintiff has suffered an injury, it is the one who has suffered an economic or monetary injury.

(2) 3rd Party Standing: Plaintiff cannot assert claims of others who are not before the court unless

- (a) Close relationship between Plaintiff and 3rd party,
- (b) 3rd party not likely to assert own right (criminal Defendant has standing to raise rights of jury to be free from discrimination),
- (c) Organization suing for its members.

(3) No Generalized Complaints:

- (a) Plaintiff cannot sue solely as a citizen or taxpayer.
- (b) Example: Taxpayer lacks standing to challenge grants of property by the Government to religious institutions.
- (c) Except that taxpayer has standing to challenge Government expenditures as violating Establishment Clause.

c) Ripeness

- (1) There must be a genuine immediate threat of harm.
- (2) Consider the harshness that will be suffered without pre-enforcement review and the fitness of the issues and records for judicial review.

Hint: If someone is requesting a declaratory judgment, probably a ripeness question.

d) Mootness: If file and then events happen that cause Plaintiff's injury to end,

case is moot and must be dismissed except

(1) Where the injury is capable of repetition yet evading review: Pregnancy is over yet can still continue case dealing with abortion, *Roe v. Wade*.

(2) Voluntary cessation: Defendant stops offensive practice but is free to resume it at any time.

(3) Class action suits: Named Plaintiff's case is moot, but at least 1 member of the class still has an injury.

2. The adequate and independent state ground: A doctrine governing the power of the U.S. Supreme Court to review judgments entered by State Courts.

a) General rule: If the law is Federal, then the U.S. Supreme Court has jurisdiction to review the State Court judgment. If it is State Law, then it does not.

b) If it is a mix of Federal and State Law, then if the state ground is adequate to support the judgment and independent of Federal Law, then the Federal court does not have the jurisdiction.

(1) Adequate to support the judgment: State procedural rule is presumed to be adequate unless it is arbitrary, unforeseen, or unreasonable.

(2) Independent of Federal Law: If it is not "apparent from the four corners" of the opinion that the judgment rests on an independent State Law rule, then, unless it is "necessary or desirable" to obtain clarification from the State Court itself, the Supreme Court will presume that the decision rested in part on Federal Law, thus rendering it reviewable.

c) Other rules:

(1) All cases from State Courts go to US Supreme Court by writ of certiorari.

(2) Federal courts can only hear cases from State Courts after there has been a final judgment from the highest State Court.

3. Political questions: A statement used by Federal courts to decline ruling.

a) Constitutional violations which Federal court will not hear:

(1) Republican form of Government clause: A Government in which decisions are made wholly by the people's representatives, not by the people themselves.

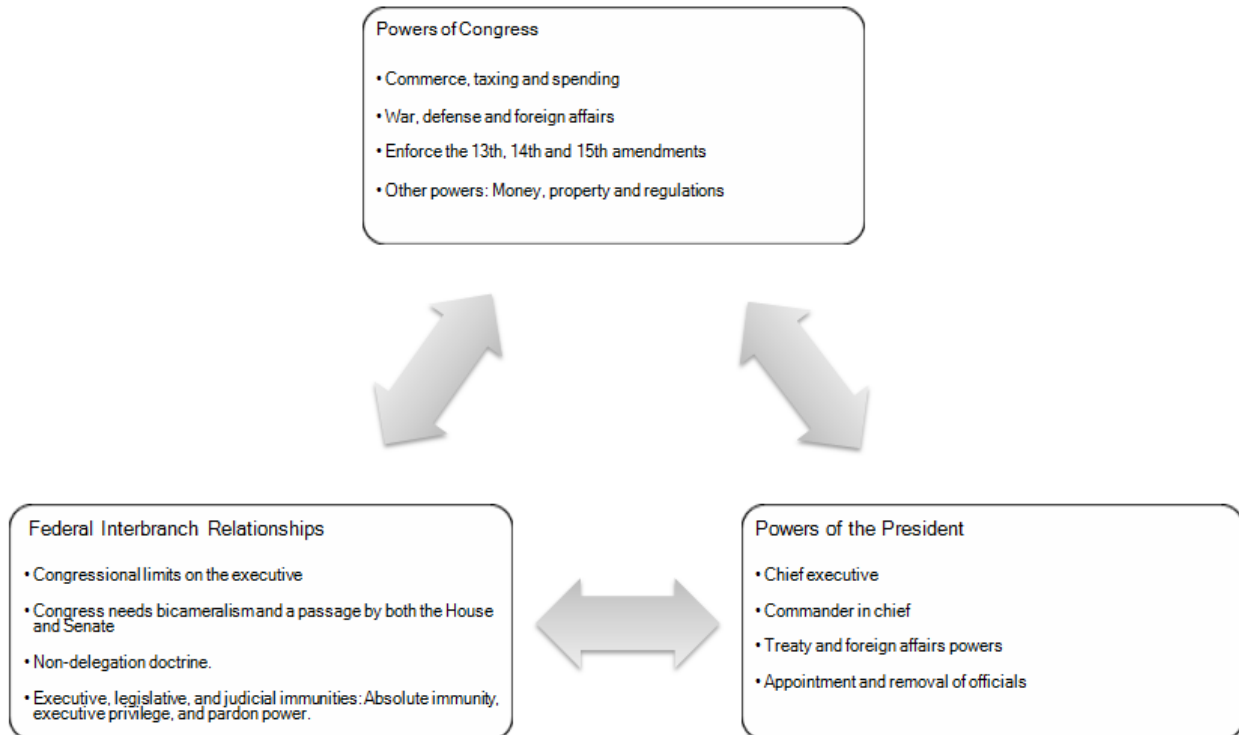
(2) Challenges to the President's conduct of foreign policy/affairs, includes

rescinding a treaty.

(3) Challenges to the impeachment and removal process.

b) If U.S. waives its sovereign immunity (e.g. Federal Torts Claims Act) then political question does not apply.

II. The Separation of Powers (20% of the Constitutional Questions)



A. The powers of congress:

1. Commerce, taxing and spending:

a) Commerce power:

(1) Can regulate channels of interstate commerce.

(2) Instrumentalities of interstate commerce such as trucks and planes.

(3) Can regulate economic activities that have a substantial economic effect on interstate commerce: applies to both domestic and foreign commerce.

(4) Cannot regulate a non-economic activity.

(a) Possession of a firearm in a school zone does not affect interstate commerce.

(b) Keeping a wild animal does not have a substantial economic effect.