

MBE Overview: Constitutional Law

NOTE: The terms “Constitution,” “constitutional,” and “unconstitutional” refer to the federal Constitution unless indicated otherwise.

Approximately half of the Constitutional Law questions on the MBE will be based on category IV, and approximately half will be based on the remaining categories—I, II, and III.

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I. The nature of judicial review

A. Organization and relationship of state and federal courts in a federal system

B. Jurisdiction

1. Congressional power to define and limit
2. The Eleventh Amendment and state sovereign immunity



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C. Judicial review in operation

1. The “case or controversy” requirement, including the prohibition on advisory opinions, standing, ripeness, and mootness
2. The “adequate and independent state ground”
3. Political questions and justiciability

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II. The separation of powers

A. The powers of Congress

1. Commerce, taxing, and spending powers
2. War, defense, and foreign affairs powers
3. Power to enforce the 13th, 14th, and 15th Amendments
4. Other powers

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B. The powers of the president

1. As chief executive, including “take care” clause
2. As commander in chief
3. Treaty and foreign affairs powers
4. Appointment and removal of officials



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C. Federal interbranch relationships

1. Congressional limits on the executive
2. The presentment requirement and the president's power to veto or to withhold action
3. Non-delegation doctrine
4. Executive, legislative, judicial immunities

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III. The relation of nation and states in a federal system

A. Intergovernmental immunities

1. Federal immunity from state law
2. State immunity from federal law, including the 10th Amendment

B. Federalism-based limits on state authority

1. Negative implications of commerce clause
2. Supremacy clause and preemption
3. Authorization of otherwise invalid state action

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IV. Individual rights

A. State action

B. Due process

1. Substantive due process

a. Fundamental rights

b. Other rights and interests

2. Procedural due process

C. Equal protection

1. Fundamental rights

2. Classifications subject to heightened scrutiny

3. Rational basis review



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D. Takings

E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws



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F. First Amendment Freedoms

1. Freedom of religion and separation of church and state
 - a. Free exercise
 - b. Establishment



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F. First Amendment Freedoms (cont.)

2. Freedom of expression

a. Content-based regulation of protected expression

b. Content-neutral regulation of protected expression

c. Regulation of unprotected expression



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F. First Amendment Freedoms (cont.)

2. Freedom of expression (cont.)

d. Regulation of commercial speech

e. Regulation of, or impositions upon, public school students, public employment, licenses, or benefits based upon exercise of expressive or associational rights

f. Regulation of expressive conduct

g. Prior restraint, vagueness, and overbreadth

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F. First Amendment Freedoms (cont.)

3. Freedom of the press

4. Freedom of association

