

# CONSTITUTIONAL LAW



## POWERS OF THE THREE BRANCHES

### POWER OF THE JUDICIARY

Federal courts have the power to hear cases and controversies that are based on a federal question, diversity cases, and admiralty and maritime cases.

- **Standing:** An individual needs an injury in fact, causation, and redressability in order to file a lawsuit. The case must be ripe and cannot be moot. A court will not render advisory opinions!
- **Organization:** For an organization to have standing, it must show: a member has standing, the member's injury is related to the purpose of the organization, and individual members are not required to participate in the lawsuit.
- **Adequate and independent state grounds:** The Supreme Court can review decisions of the federal courts of appeals and federal decisions made by state courts. The Supreme Court can hear the latter type of case if the case involves a matter of federal law. It is a final judgment from the highest state court authorized to hear the case, and there are no adequate and independent nonfederal (state) grounds on which the state court decision is based. **Tip:** If a state court decision rests on two grounds (a state ground and a federal ground) and the Supreme Court's reversal of the federal decision would not change the outcome, the Supreme Court cannot hear the case.
- **Political question:** Federal courts will not hear political questions (those given to another branch of government by the Constitution). **Tip: Examples include:** "republican form of government" clause challenges, military or foreign affairs decisions, or impeachment.
- **Pending state court proceedings:** federal courts should not enjoin pending state court proceedings unless the case is brought in bad faith or for harassment purposes.

### POWERS OF CONGRESS

Congress makes the laws but needs bicameralism (approval by both houses) and presentment (approval by the president) in order to pass a law.

Congress gets its power from the Constitution. These powers include:

- **Necessary and proper power:** **Tip:** This must be connected with another power.
- **Taxing and spending power:** Congress may tax and spend for the general welfare. **Tip:** It cannot "act" for the general welfare.
- **Commerce power:** This is very broad. Congress can regulate anything economic and anything noneconomic that substantially affects interstate commerce.
- **War and defense power:** Congress has the power to declare war.
- **Enforcement power:** Congress may enact legislation that is "congruent and proportional" to the Thirteenth Amendment (which outlaws slavery and badges of slavery), the Fourteenth Amendment (which contains the Equal Protection and Due Process Clause) and Fifteenth Amendment (which prohibits states from enacting racially discriminatory voting laws).
- **Other powers:** admiral and maritime power, property power, investigatory power, postal power, copyright and patent power, power to coin money, power to impeach, and the power to delegate powers.

**Note:** Congress can delegate legislative power to executive agencies or the judiciary. However, the power cannot be uniquely delegated to Congress by the Constitution (e.g., the power to declare war). **Tip:** Congress does not have police powers except over (OMDI) military bases, Indian territories, federal lands, and D.C.

A legislative veto is unconstitutional. This occurs when Congress tries to overturn action by the executive branch without bicameralism and presentment.

### POWERS OF THE PRESIDENT

The President executes the laws and must enforce laws that are passed even if the President disagrees with them.

The President has the following powers:

- **Veto power:** The President can veto a law (but this can be overridden by a 2/3 majority vote by Congress). A line item veto (crossing out certain portions of the bill that the President does not approve of) is not permitted.
- **Appointment and removal power:** The President has the power to appoint federal judges, ambassadors, and other principal officers of the United States, with the advice and consent of the Senate. The President may also remove executive officials without cases, at will unless Congress limits removal for "good cause."
- **Pardons:** the President may grant pardons for federal crimes.
- **War power:** the President can respond to attacks or emergency situations. The President cannot declare war.
- **Foreign affairs:** the President has broad foreign affairs powers.
- **Treaties and executive agreements:** the President may enter into treaties with 2/3 Senate approval. The President may enter into executive agreements with the heads of foreign countries.
- **Immunity:** the President is absolutely immune from civil suits for damages for any official acts as President (but not purely personal or pre-presidential acts).

### JURISDICTION OF COURTS

- **Eleventh Amendment:** A private individual cannot sue a state for money damages in federal court. **Tip:** this is usually the wrong answer on the MBE. Congress cannot eliminate the Supreme Court or divide it. However, Congress may establish lower federal courts and give those courts jurisdiction to hear the same types of cases that go to the Supreme Court (and it has done so for all cases besides cases between states).

#### SUPREME COURT'S JURISDICTION

- **Original and exclusive jurisdiction** for cases between states. **Tip:** remember that only the Supreme Court can hear cases between states.
- **Original jurisdiction** over any case that involves (A)PS: ambassadors, public ministers and consuls, or where the state is a party.
- **Appellate jurisdiction** over a final judgment from the highest state court if the case has a federal issue and there are no adequate and independent state grounds. (There is also rare mandatory appellate jurisdiction.)

### FEDERALISM AND STATE POWERS

#### Federal government vs. states—federal government wins

- **Supremacy Clause:** Pursuant to the Supremacy Clause, federal law is supreme and prevails over state law. States may not pass laws (1) that conflict with federal law, (2) that interfere with a federal objective, or (3) in areas where Congress has intended to "occupy the field."
- **Federal immunity from state law:** A state cannot regulate or tax the federal government. However, a state may tax federal employees the same that they tax everyone else. **Tip:** this is a law exam favorite. E.g., the federal government does not have to abide by state environmental regulations.
- **Tenth Amendment:** Any powers not given to the federal government are given to the states. **Tip:** This means the federal government cannot compel states to enforce federal statutes. (However, the federal government is permitted to "incentivize" states to enforce such statutes by offering money to the states.)

#### Restriction on state powers

- **The Article IV Privileges and Immunities Clause:** States may not discriminate against out-of-state citizens with respect to fundamental rights unless there is a substantial justification and no less restrictive means. **Tip:** This is usually the issue when a state gives a state privilege to its own citizens and discriminates against out-of-state citizens. Employment is only a fundamental right for purposes of Article IV.
- **The Fourteenth Amendment Privileges or Immunities Clause:** States are not allowed to pass laws that would restrict access to vital governmental services (e.g., welfare benefits) to newcomers because such laws would interfere with a citizen's fundamental right to travel from state to state. **Tip:** this is usually the wrong answer on the MBE.
- **Dormant Commerce Clause**
  - There are two kinds of discrimination: (1) Laws that expressly discriminate for the purpose of favoring in-state commerce. These are automatically struck down. (E.g., state law imposes high taxes on out-of-state goods and low taxes on in-state goods.) (2) Laws that discriminate against interstate commerce but are supposedly passed to promote the health, safety, or welfare of the state's citizens. These are almost always invalid unless the state can show the law was necessary to serve a compelling state interest and there is no reasonable non-discriminatory alternative (strict scrutiny).
  - If a state passes a non-discriminatory in-state law that is a burden on commerce in-state and out-of-state parties are treated the same, e.g., "everyone driving through the state must have a certain kind of tire," a balancing test is used (weigh the effects of the law on interstate commerce against the state's interest served by the law). The law is more likely to be upheld.

**Note:** A commonly tested exception is where the state acts as a market participant—that is, where a state acts as a business rather than a regulator. **Tip:** Remember that these rules apply to the states. Congress can pass laws that discriminate against commerce.

**Full Faith and Credit Clause:** states must enforce judgments of other states if the court that rendered the judgment had jurisdiction and the judgment was a final judgment on the merits.

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**Strategies and Tactics for the MBE 2** Steven Emanuel,2010 A comprehensive resource created in the

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Strategies & Tactics for the MBE 2 Steven L. Emanuel, 2023-03-06 With over 465 questions of which 445 were asked on actual past Multistate Bar Exams and detailed explanations of the right and wrong answers Strategies all are actual past MBE questions with detailed answers written by Steve Emanuel Students will benefit from Questions organized by subject matter subtopics so you can easily locate questions on the topics on which you need to focus Detailed step by step explanations for each of the four answer choices in each question written by Steve Emanuel Editor in Chief of the Emanuel Law Outlines the outlines that got you through law school Actual Civil Procedure Constitutional Law Contracts Criminal Law and Procedure Evidence Property and Torts questions asked on past Multistate Bar Exams plus many Civil Procedure questions in MBE format written by Steve Emanuel

**Mastering Multiple Choice for Federal Civil Procedure MBE Bar Prep and 1L Exam Prep** William M. Janssen, Steven Baicker-McKee, 2014-11-06 This multiple choice exam practice book is designed for a bar exam takers who are preparing to take the MBE multiple choice bar exam Civil Procedure is a new testing topic added to the MBE multiple choice bar exam as of February 2015 and b 1L law students who are preparing to take their course examinations The book offers practical easy to follow advice on multiple choice exam taking strategies clear suggestions on effective multiple choice practicing techniques and a lengthy set of Civil Procedure multiple choice practice questions with answers and explanations designed to simulate MBE style questions Tables help users decode the tested topic for each practice question



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