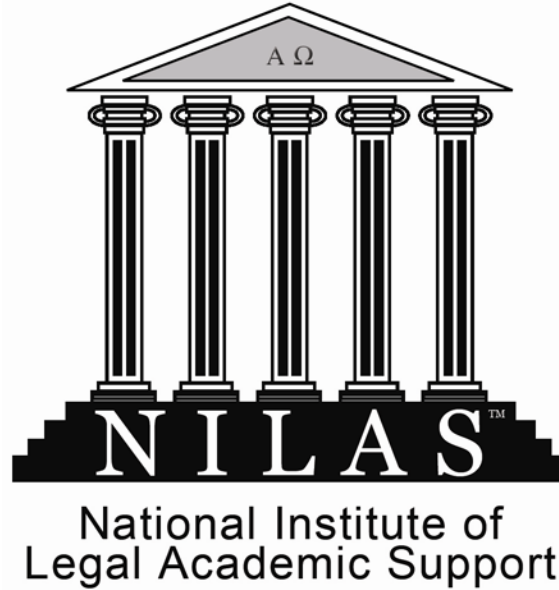


# **CONSTITUTIONAL LAW**

**2009 Legal Rubric™**

**MBE BAR REVIEW**



# CONSTITUTIONAL LAW

## LEGAL RUBRIC <sup>TM</sup>

# NILAS - Constitutional Law Legal Rubric

## INTRODUCTION

**C**onstitutional law grows out of the study of how the United States Constitution has affected the people of the United States.

### The NILAS Legal Rubric™ Approach

This Legal Rubric™ is far more than a mere outline. In a typical outline, you are given what amounts to a set of diagrammed directions assembled in a linear format, whereas, the Legal Rubric™ will help you to understand the way the law is actually applied by the examiners. You may find that Legal Rubrics looks similar to an outline, it is not. The Legal Rubric™ is actually a carefully organized curriculum of the topical material that has been organized in much more logical way. NILAS has learned that just reading an outline won't do it for most students; you must also have overall meaning to the material, a place for the content to fit in your brain.

Definitions of **rubric** on the Web:

- an authoritative rule of conduct or procedure
- A rubric is a scoring tool for subjective assessments. It is a set of criteria and standards linked to learning objectives that is used to assess a student's performance on papers, projects, essays, and other assignments, also; an explanation or definition of an obscure word in a text
- A rubric is a word or section of text which is written or printed in red ink to highlight it. The term derives from the *rubrica*, meaning red ochre or red chalk, and originates in medieval illuminated manuscripts from the 13th century or earlier.
- A rubric is a set of descriptions of performance tailored to specific tasks and arranged at different levels of quality. Teachers use rubrics to evaluate student performance on performance tasks. Students are given the rubric so they know in advance what they are expected to do.

## **How to use this Legal Rubric™**

As a student, the Co-Founder of NILAS found that typical law school outlines were not very effective in really adapting the reality of law to specific situations. For example, when a question comes up regarding a specific concept in the law, a legal practitioner has learned from years of experience that if a fact exists in (A), then (B) must also be present. Put a better way, some concepts in the law travel together, for example, the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. The problem with a typical outline is that these are taught at a different time, so in a normal outline would not appear together. The Legal Rubric™ Approach will make the connections you need.

Each Legal Rubric™ will give you a unique approach to the same old material. The real value in the Legal Rubric Approach is that the legal doctrines will be broken down into useful but simple sub sections that you can get your mind around. For example in this Legal Rubric™, we have broken the areas of study into four useable areas of Constitutional Law:

1. The Article One issues: the Constitution and the Legislative Branch
2. The Article Two issues: the Constitution and the Executive Branch
3. The Article Three issues: the Constitution and the Judicial Branch
4. Federalism and the States: the tension between the citizen the Federal Government and the states.

### **Watch for Dualities!**

In the law, there will be certain legal concepts that will either raise another legal doctrine or must raise a legal doctrine. NILAS calls this a duality in the law. Here is an example; if you see the test asking you about the 14<sup>th</sup> Amendment, you will need to also analyze article 5 (due process), the equal protection clause and perhaps substantive due process.

Bar exams test your understanding and application of two core areas:

1. How well you understand the actual TEXT of the Constitution and;
2. How well you understand the Supreme Court's interpretation and application of the TEXT.

As we go through this Legal Rubric™, you need to keep these two doctrines in focus. Because misunderstanding the scope of the question can often lead you to the wrong answer.

HOW BOBEX tests on the subjects will depend. Most of the time, the facts will be long and complex with the idea that they want to confuse you into thinking that the question is about Congress, when in fact, it is about something else. Your task is to understand the scope and nature of the question and don't fall into the trap of thinking you know what they are asking, wait until you get all the facts first.

BOBEX uses several key areas to test. As discussed in each section, the key is to understand the area of testing; again, there are **FOUR KEY** areas that BOBEX will test on:

- I. The **ARTICE ONE** power granted to the Legislative Branch, (Congress);
- II. The **ARTICE TWO** Power granted the President of the United States (POTUS);
- III. The **ARTICE THREE** Power granted to the United States Supreme Court (SCOTUS);
- IV. The **POWER of the PEOPLE** under the Amendments and the Tension between the States and the Federal Government. (FEDERALISM)

**Word about Administrative Law:** Even though you are going to be tested on the area of Constitutional law, there will be Administrative Law questions sewn into fact patterns.

Generally, all the questions asked by BOBEX, whether on the MBE or on an essay, will fall into a category. For testing purposes, you need to be able to define the area quickly, and then decide the scope of the question. Typically, if BOBEX is testing on one area, they will use similar concepts to confuse the issue.

*For example, BOBEX will ask you a question regarding the right of Congress to act in a certain way...The facts will lead you to believe that Congress has the authority, but the real answer has to do with the President's power to veto.*

DEF: When one area of the law is present, another **MUST** be present as well. For example, when the 14<sup>th</sup> Amendment is invoked, the 5<sup>th</sup> **MUST** be present there as well. This is very important in Constitutional law. Since we have a separation of powers, you must always do a check and balance.

**NOTE BENE:** Remember to draft Study cards for sections you don't easily remember. NILAS always recommends that you study with active rather than passive learning. If helpful, print this document and use the side margins to take notes and then go back and add information later.

**NOTE BENE:** Means take special note!

### **Methods of Study**

Arguably a lawyer should know the constitution. It comes as a shock to the staff here at NILAS that so few practicing lawyers really know what is in the constitution. (A copy of the Constitution of the United States is reprinted at the end of this document). The problem is that you may know the document from stem to stern and still fail the bar exam because the BOBEX tests on the Rules, the Sub Issues and the Exceptions to the rules.

Therefore, as you build on your understanding of constitutional law, remember that for every rule, statute, law or common law idea, there will be a definition of that rule.

**MAXIM:** KNOW THE RULE; then stick with it.

## Section 1

### LEGISLATIVE POWER – ARTICLE I

*Every act by the government must be traced back to a power granted in the Constitution.*

#### The Power to Act

**Article I** – Grants the authority to Congress to regulate any area that the Constitution expressly / enumerated or impliedly reserves to it. NO General Police power: Except military, Indian Reservations, Fed lands, DC

- 1) **Necessary and Proper Clause:** Congress has the authority to exercise those “Expressed” or “Implied” powers plus all auxiliary powers necessary and proper to carry out the powers vested in any Branch of federal government. E.g. Congress can pass a law that enables the Pres to do his job. (*McCulloch v Maryland Bank*)
- 2) **Commerce Clause:** Congress has the power to regulate commerce “among” the several states. This clause has been held to mean that Congress may regulate:
  - a) **Channels:** roads of interstate commerce
  - b) **Instrumentalities:** Trucks and transportation of interstate commerce, person’s things, electricity.
  - c) **Activities with Substantial Effect:** on interstate commerce.
    - i) **Commercial Activities:** An aggregate effect on Commerce– That is to say, when an activity in totality affects a collective interstate commerce. *Katzenbach. V. McClung (Ollies)*. *Wickers v. Filburn Wheat case* and *US. V Morrison*
    - ii) **Non-Commercial Activities:** If the activity is not commercial by nature, then there must be a connection between the activity and interstate commerce. *US v. Lopez*, (firearms sold on a private sale— cannot be regulated for possession at schools by commerce clause, since it is non-economic.
- 3) **Tax and Spending Power:** Taxing for the General welfare is a limiter on tax ONLY
  - a) Congress can lay and collect taxes– Congress may use its taxing power to enact taxes that have no other purpose than to regulate.
  - b) Congress and the states are prohibited from taxing exports.