

米国カリフォルニア州 司法試験合格ノート [第3版]

米国カリフォルニア州司法試験に黙々と独学で挑戦する会

独学でカリフォルニア州司法試験に 合格する必携ノート

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California Bar Exam Note (for 2020)

ラルフ・ウォルドー・エマーソン

『浅はかな人間は運を信じ、流れを信じる。
強い人間は、因果関係を信じる。』

アムンゼン

『完璧な準備のあるところに勝利は訪れる。
人はそれを幸運と呼ぶ。』

まえがき

本書を手にとってください、誠にありがとうございます。この本には個人的な思いが込められております。

それは、米国LLMへ留学中の方のみならず、日本で米国留学に行きたい気持ちはあるが、さまざまな理由・ご事情で叶えられない方が、米国カリフォルニア州司法試験へ挑戦するための情報を広く共有したいという願いです。

私もその1人でした。私はもともと英国外資系法律事務所でキャリアをスタートさせましたが、日本のスタートアップに留学前に転職をしました。経営資源は全て目の前の事業につき込むスタートアップに社内人材を留学させる制度も余裕もなく、2014年当時、同期が米国留学に向けて着実にステップアップしている中で、やり場のない思いを抱えておりました。そのような中、米国カリフォルニア州の司法試験の受験資格は日本法弁護士の資格で足りるという情報を学び、ゼロから国内で情報を集め始めました。その後も、ご結婚され子育てのため留学は難しいと話される先生、私と同じように会社に留学制度がない先生、また法律事務所においても留学に2年間を使えないが米国資格を取得したいという先生、そして1番多かったのが「組織内弁護士として勤務している会社で得られる成長曲線と自分の思い描く成長曲線が一致していない」という大きな挑戦を求める若手の先生の姿でした。

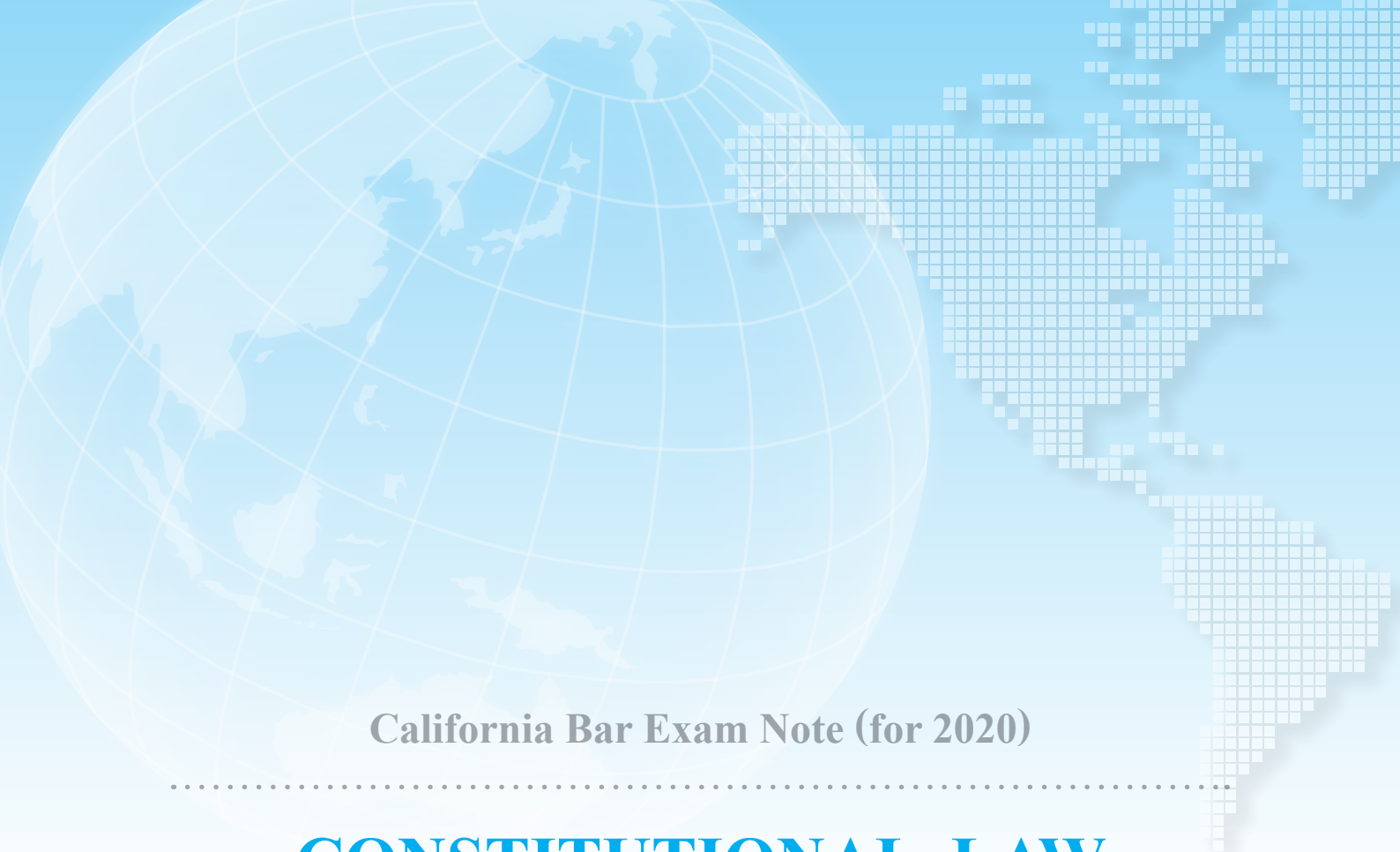
そこで、私は、もともとのノートの骨格を整え提供されていたT先輩に相談し、ノートの最新の情報への加筆変更と配布についてご了解をいただき、本ノートの共有をはじめました。初版と比べて「親切さ」は幾分増しましたが、まだ個人的には納得できておりません。いつか、国内からカリフォルニア州司法試験を目指す先生方があたりまえのように手にとってくださいような内容に高めるのが私の1つの夢でございます。至らぬところも多々ありお見苦しいかは存じますが、本ノートが先生のお役に立つことを心から願っております。

米国カリフォルニア州司法試験に黙々と独学で挑戦する会、という小さなコミュニティもございますので <https://www.facebook.com/calbarfromjapan/> 先生の勉強法や合格の秘訣など、ぜひ後進たちにご共有いただければ喜びます。

2019年5月筆者

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CONSTITUTIONAL LAW

I. FEDERAL JUDICIAL POWER

(Issue)
Federal judicial power
(司法権)

(Rule)
US Constitution requires **“case and controversy”** for federal courts to hear the case. Case and Controversy Clause prohibits federal courts from rendering **adversary opinions**. Also, federal courts may not hear a **collusive case**, where there is **no real dispute** between the parties.

Federal courts will hear the case if (1) P has standing, (2) the case or the issue is ripe, (3) the case or the issue is not moot, and (4) the case or the issue does not involve political question.

(Issue)
Standing
(当事者適格)

(Rule)
(Answer pattern)
Before a plaintiff may sue in federal court, she must show that she has a sufficient stake in the controversy and will suffer an injury in fact that will be remedied by a decision in her favor. In this case...

Standing is the question of whether the P is the **proper party to bring a matter to the court** for adjudication.
As a **general rule**, Ps only may assert **injuries that they personally have suffered**.
If Ps are seeking **injunctive or declaratory relief**, Ps must show **a likelihood of future harm**.
Also, the Ps must allege and prove that the D caused the injury so that a **favorable court decision** is **likely to remedy the injury**.

Generally, P **cannot assert claims of third parties** who are not before the court.
However, there are **some exceptions**. Third party standing is allowed if (1) there is **a close relationship** between the P and the injured third party, (2) the injured **third party is unlikely to assert her own rights**, or (3) some situation allows an **organization to sue for its members**.

- ▶ For (1), **doctor-patient relationship** allows doctor to argue abortion rights for her patient.
- ▶ For (1), a father lacks standing to sue on behalf of daughter, who is not in his custody.
- ▶ For (2), criminal Ds have third party standing to raise rights of perspective jurors to be free from race or gender bias during the jury selection process because prospective jurors experiencing bias are unlikely to sue
- ▶ For (3), an organization may sue for its members if (1) the **individual members would have standing** to sue, (2) the **interests are germane to the organization’s purpose**, and (3) **neither the claim nor relief requires participation** of individual members

The P **must not** be suing **solely as a citizen or a taxpayer** interested in having the government follow the law. However, taxpayers **may** have standing to challenge government **expenditure** as violating **Establishment Clause** (e.g., government gave a special favor to a particular religion).

(Issue)
Ripeness
(成熟性)

(Rule)
(Answer pattern)
[Defendant] may argue that the issue is not ripe for review because...

Ripeness is the question of whether a **federal court may grant pre-enforcement review** of a statute or regulation. (e.g., when P seeks declaratory judgment)
Ripeness is measured by (1) the **hardship** that will be suffered without pre-enforcement review, (2) the **fitness** of the issues and the record for judicial review.

- ▶ For (1), As hardship increases, more likely court will hear the case
- ▶ (2) is whether the courts have everything they need to decide the case

(Issue)
Mootness
(争訟性を欠くこと)

(Rule)
A federal court will not hear a case that has become moot. A real, live controversy must exist at all stages of review. [However, where there is a **reasonable expectation** that the **same complaining party** will be **subjected to the same action** and would **again be unable to resolve the issue because of the short duration of the action**, the controversy will not be deemed moot] In this case...

If **events after the filing** of a lawsuit **end the P’s injury**, the case **must be dismissed as moot**.

	<p>However, there are some exceptions.</p> <p>(1) Wrong capable of repetition but evading review; see above answer pattern [].</p> <p>(2) Voluntary cessation; the case is not moot, where <u>D voluntarily ceases to take certain action but can resume the action afterward at anytime.</u></p> <p>(3) Class action; even if the <u>named P's case is moot</u>, the action will not be dismissed <u>so long as a member</u> of the class <u>is injured</u>.</p>
<p>(Issue) Political question doctrine (政治的問題)</p>	<p>(Rule) The political question doctrine refers to <u>allegations of constitutional violations</u> that the <u>federal courts will not adjudicate</u>.</p> <p>Examples of cases that are always dismissed as political question are (1) cases under Article IV, "Republican form of government clause," (2) challenges to the President's conduct of foreign policy, (3) challenges to impeachment and removal process, and (4) challenges to partisan gerrymandering (a political party that controls the legislature, draws the line of electoral disputes, in order to maximize its seats in the legislature)</p>
<p>(Issue) Supreme court review</p>	<p>(Rule) Virtually all cases come to the Supreme Court by writ of certiorari. The SC has complete discretion on whether to grant a writ of certiorari.</p> <p>Generally, the SC may hear cases only after there has been final judgment of (1) the highest state court, (2) Federal Court of Appeals, or (3) 3-judge federal district court</p> <ul style="list-style-type: none"> ▶ All cases from state courts and Federal Court of Appeals come to the SC by writ of certiorari. ▶ The SC is required to hear the case, if the party so requires about the decision of 3-judge federal district courts ▶ SC has <u>original and exclusive jurisdiction</u> for <u>suits between state governments</u> <p>For the SC to review a state court decisions, there <u>must not be an independent and adequate state law ground</u> of decision. If a state court decision rests on ground of state law and if the SC's reversal of the federal law ground will not change the result in the case, the SC cannot hear it.</p> <ul style="list-style-type: none"> ▶ If it is not clear whether the state court ruled on state law or federal law, SC may hear the case on the federal law ground
<p>(Issue) Lower federal court review</p>	<p>(Rule) In addition to above justifiability requirements, federal courts (and state governments) <u>may not hear suits against state governments</u> because of <u>principle of sovereign immunity</u>.</p> <p>The <u>11th Amendment</u> bars suits against states in federal courts. Moreover, <u>sovereign immunity</u> bars suits against states <u>in state courts or federal agencies</u>.</p> <p>However, states may be sued if (1) <u>states waives</u> its sovereign immunity, (2) the lawsuit is <u>brought pursuant to federal laws</u> adopted under <u>the 14th Amendment Section 5</u>, (3) the lawsuit is brought by <u>federal governments</u> in federal courts, or (4) bankruptcy proceeding.</p> <ul style="list-style-type: none"> ▶ For (1), the waiver must be <u>explicitly made</u> ▶ For (2), <u>Congress cannot authorize suits against states under other constitutional provisions</u> (such as <u>Commerce Clause</u>) <p>However, <u>suits against state officers are allowed</u>. State officers may be sued for injunctive relief. State officers may be sued for money damages to be paid out of their pockets. But state officers may not be sued, if the state treasury will be paying retroactive damages.</p> <p>Federal courts <u>may not enjoin pending state court proceeding</u>. However, may enjoin pending state court proceeding <u>if a state court prosecution is conducted in bad faith</u> (e.g., merely to harass the D)</p> <p>11th Amendment does <u>not bar</u> the <u>local governments to be sued in a federal court</u></p>
<u>II. FEDERAL LEGISLATIVE POWER</u>	
<p>(Issue) Congress' authority to act (立法權)</p>	<p>(Rule) If Congress moves to act, there <u>must be express or implied Congressional power</u>.</p> <ul style="list-style-type: none"> ▶ There is <u>no general federal police power</u>, unless it involves (1) legislation for the <u>military</u>, (2) <u>Indian tribes</u>, (3) <u>federal land and territories</u>, or (4) legislation for <u>the District of Columbia</u>. ▶ States and local governments do have police power.

<p>(Issue) Taxing and spending power (Art. I, Sec. 8, Clause 1) (歳出権限)</p>	<p>(Rule) Congress may regulate general welfare only if (1) it is acting under the Taxing and Spending power granted by Article I, Section 8, Clause 1, or (2) it falls within one of the exceptions where Congress has police power.</p>
<p>(Issue) Commerce power (Art. I, Sec. 8, Clause 2) (通商権限)</p>	<p>(Rule) Congress has the power to regulate interstate commerce with (1) foreign nations, (2) Indian tribes, and (3) activities between states. Commerce is all interstate intercourse and has 3 manifestations; Congress may regulate (1) the channels of interstate commerce (e.g., highways, internets), (2) the instrumentalities of interstate commerce and persons or things in interstate commerce (e.g., trucks, goods), and (3) activities that have a substantial effect on interstate commerce ▶ For (3), in the area of non-economic activity, a substantial effect cannot be based on cumulative impact (e.g., gender motivated violence reduces economic activity by putting women in hospitals, but is not an economic activity. Therefore, Congress cannot regulate such act under the Commerce Clause)</p>
<p>(Issue) Congress' power under Section 5 of the 14th Amendment</p>	<p>(Rule) Congress may not create new rights or expand the scope of rights under Section 5 of the 14th Amendment. Congress may act only to prevent or remedy violations of rights recognized by the courts, and such laws must be "proportionate" and "congruent" to remedying constitutional violations. ▶ Moreover, Congress may not create rights that can be asserted against non-governments</p>
<p>(Issue) Necessary and Proper Clause (Article I, Section 8, Clause 18)</p>	<p>(Rule) (Answer pattern) Congress may exercise any enumerated powers and any powers to make all laws necessary and proper for carrying into execution its powers. ▶ Any means not prohibited by the constitution are allowed, if it is necessary and proper for carrying out some authority granted by the constitution to the Congress</p>
<p>(Issue) 10th Amendment as a limit on Congressional powers</p>	<p>(Rule) (Answer pattern) The 10th Amendment provides that all powers not delegated to the federal government by the Constitution are reserved to the states. This reservation of power is often cited as a restriction on Congress' power to regulate the state. [However the SC will likely not to strike down on 10th Amendment grounds a regulation that subjects states or local governments to regulations that apply both to the public sector and private sector. It has held, in such cases, that the states' interests are best protected by the states' representation in Congress. In this case...] The 10th Amendment does, however, limit Congress' power to regulate the states alone by requiring the states to act in a particular way. Congress may not compel states to enact or enforce a regulatory (or legislative) action (or program). In this case... However, Congress can induce state government action by putting strings on grants, so long as the conditions are expressly stated, and are related to the purposes of the spending program. Congress may prohibit harmful commercial activity by state government because in this case Congress is not imposing a duty but it is prohibiting a commercial transaction.</p>
<p>(Issue) Delegation of powers (立法権の委任)</p>	<p>(Rule) Congress may not delegate executive power to itself or its officers ▶ Congress cannot have the power to implement a law (e.g., discretionary budget cutting after the budget is passed) ▶ Congress can give its power away, but cannot take the powers of the other branches No limit exists on Congress' ability to delegate legislative power to executive agencies or even to judiciary. ▶ A delegation of legislative power must be accompanied by intelligible principles. A legislative veto is unconstitutional because there is no bicameralism and presentment For Congress to act, there always must be bicameralism (passage by both the House and the Senate) and presentment (giving the bill to the President to sign or veto)</p>

	<p><u>The President must sign or veto the bill in its entirety</u></p> <ul style="list-style-type: none"> ▶ <u>Line-item veto</u> are always unconstitutional <p>When <u>Congress wants to overturn executive action</u>, (1) both the <u>Senate and the House must pass the resolution</u> and (2) the resolution <u>must be presented to the President</u>.</p> <ul style="list-style-type: none"> ▶ Anything less is unconstitutional
III. FEDERAL EXECUTIVE POWER	
(Issue) Federal executive power (行政権)	(Rule) (Answer pattern) The entire federal executive power is vested in the President under Article II, Section 1 of the US Constitution.
(Issue) Foreign policy (外政に関する権限)	(Rule) 1. Treaties; treaties are agreements between the US and a foreign country that are negotiated by the President and are effective when ratified by the Senate. - In order to void a treaty, the President is not required to obtain consent of the Senate - Treaties prevail over conflicting state laws - If a treaties conflicts with a federal statute, the one adopted last in time controls - If a treaty conflicts with the US Constitution, it is invalid 2. Executive agreement; executive agreement is an agreement between US and a foreign country that is effective when signed by the President and the head of the foreign nation - No senate approval is required for executive agreements. - Executive agreements can be used for any purpose (no executive agreement has ever been struck down for being a violation of the Senate's approval power) - Executive agreements prevail over conflicting state laws, but never over conflicting federal law or the Constitution
(Issue) Powers as Commander-in-Chief	(Rule) The President has broad powers <u>as Commander-in-Chief to use American troops in foreign countries</u> . President has <u>extensive military powers</u> , including the <u>power to act over domestic affairs</u> involving <u>military necessities</u> . ▶ Use of US troops in foreign countries has never been held unconstitutional <u>Congress</u> has the <u>power to declare war</u> . However, the <u>President may send troops</u> to foreign countries, <u>even if Congress has not declared war</u> .
(Issue) Domestic affairs/Veto (拒否権)	(Rule) The President has the power to veto legislation. But line-item veto is unconstitutional
(Issue) Appointment power (任命権)	(Rule) The President <u>appoints ambassadors, federal judges and officers</u> of the US The appointment <u>must be approved</u> by the <u>Senate to take effect</u> ▶ Congress may vest the <u>appointment of inferior officers</u> in the President, the heads of departments or the lower federal courts. “ <u>Inferior officers</u> ” are officers who can be fired by their supervisor ▶ Congress may not give itself or its officers the appointment power. Congress cannot appoint agency heads.
(Issue) Removal power (解任権)	(Rule) Unless removal is <u>limited by statute</u> , the President <u>may fire any executive branch office</u> For congress to limit removal, (1) it <u>must be an office</u> where <u>independence from the President is desirable</u> , and (2) Congress cannot prohibit removal, it <u>can only limit</u> removal to cases <u>where there is good cause</u> . ▶ For (1), Congress may limit removal of special prosecutors, who investigate the wrongdoing by the President or high-level executives. ▶ Congress may not limit removal or Cabinet
(Issue) Executive order (行政命令)	(Rule) The President may issue <u>executive orders, subject to the following three-part test</u> ; (1) where the President <u>acts with the express or implied authority of Congress</u> , his authority is <u>at its maximum</u> and <u>his actions likely are valid</u> , (2) where the President acts <u>where Congress is silent</u> , his action will be <u>upheld as long as the act does not take over the powers of another branch</u> of the government or <u>prevent another branch from carrying out its tasks</u> , (3) where the President acts <u>against the express will of Congress</u> , he has <u>little authority</u> and <u>his action likely is invalid</u> .

(Issue) Executive privilege (行政免責)	(Rule) The President has executive privilege for presidential papers and conversations , but such privilege must yield to other important government interests . To determine this, balancing President's interest in maintaining the privilege with Congress' interest in disclosure is necessary ▶ Executive privilege allows the President to keep the materials confidential
(Issue) Pardon power (恩赦)	(Rule) The President has the power to pardon those accused or convicted of federal crimes . ▶ The President cannot pardon a person who was impeached ▶ The President cannot pardon a person convicted of state crimes . ▶ The President cannot pardon a person from civil liability
(Issue) Removal, impeachment and liability (弾劾)	(Rule) The President , the Vice-President , federal judges and officers of the US can be impeached and removed from the office for treason, bribery, or for high crimes and misdemeanors ▶ Impeachment itself does not remove a person from office. In order to remove a person from the office, he must be convicted by the Senate . Impeachment by the House of Representatives requires a majority vote . Conviction in the Senate requires a 2/3 vote The President has absolute immunity to civil suits for money damages for any actions while in office . However, the President does not have any immunity for his act that allegedly occurred before he took the office .
IV. FEDERALISM	
(Issue) Preemption (連邦法による専占)	(Rule) (Answer pattern) Where both the state and federal government pass legislation on the same subject matter , the Supremacy Clause provides that the federal law is supreme , and the conflicting state law is rendered void . A local law will fail under the Supremacy Clause, even if it does not conflict with federally regulated conduct or objectives, if it appears that Congress intended to "occupy" the entire field . The Supremacy Clause of Article III provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. Express preemption If a federal statute expressly says that it wholly occupies the field , all other state law is preempted If the purpose of the federal statute and the state statute is different , it is likely that the intent of the federal statute is not to occupy the field which the state statute is regulating. Implied preemption Even if law is silent , federal law preempts state law if (1) federal and state law are mutually exclusive , (2) state law impedes the achievement of a federal objective, or (3) Congress evidences a clear intent to preempt state law (through legislative history). ▶ Example of (1); if a person is not able to conform with both federal and state law at the same time , they are mutually exclusive ▶ In the environmental law area , state can impose restrictions stricter than federal restrictions, unless the federal statute explicitly prohibits ▶ For (2), state law that conditions some benefit on not using federal procedures or seeking relief from the federal government. The state law will be preempted ▶ Example of (3); immigration law ; States cannot regulate immigration because Congress clearly intends to occupy the field
(Issue) Inter-governmental immunities	(Rule) States may not tax or regulate federal government activity , unless Congress consents to the taxation or the regulation. ▶ It is unconstitutional to pay state tax out of federal treasury