



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Con Law, specifically the standards of review a court will apply when reviewing a law’s constitutionality. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Law School Toolbox podcast. Today, we will be discussing the different standards of review a court will apply when dealing with questions of constitutionality. You may also hear these referred to as “levels of scrutiny”. Standards of review might seem technical and boring, but they are incredibly important in practice. They tell you how a court is going to approach a question before it does, and how much deference they will give Congress, an agency, or the court below. This is important to know, because it tells you how high the bar is that you need to clear to win and, accordingly, may help you determine how likely you and your client are to succeed in a lawsuit.

Lee Burgess: To start off, standards of review generally operate in two realms. First, the term refers to the type of review an appellate court will apply when reviewing a case appealed from a lower court. Second, it deals with how any court, trial or appellate, will review a question of constitutionality.

Lee Burgess: When we talk about appellate review, we’re talking about how much deference an appellate court is going to give the decisions of a lower court. How deeply are they going to dive into the question? Well, that depends on the type of question being raised. Courts review questions of law, questions of fact, and mixed questions of law and fact. Each of those three categories enjoy a different standard of review, and lower courts enjoy a different degree of deference. Con Law questions – that is, challenges to the constitutionality of a law – are pure questions of law, so an appellate court will always review that question de novo. De novo is a Latin term that means “anew” or “from the beginning”. So, questions of law, and of constitutional law specifically, will be looked at with fresh eyes by the appellate court. They will not be bound by decisions, reasoning, or analysis of the lower courts, nor are they to give them much weight.

Lee Burgess: With that framework, let’s dive in to the second type of standard of review and our topic for the day: standards of review any court will apply when dealing with



questions of constitutionality. Here, we are asking how much deference a court will give the legislature – the body that wrote the law – when determining whether a law violates the Constitution. There are three basic Con Law standards of review – rational basis, intermediate scrutiny, and strict scrutiny. We also refer to these as “level of scrutiny”.

- Lee Burgess: Side note here: Questions of constitutionality are not limited to legislation. Judicial acts and precedent, which we refer to as common law, may also be reviewed for constitutionality. It doesn't operate in exactly the same way and it's beyond the scope of this podcast, but I wanted you to know that it exists.
- Lee Burgess: Now, back to today's topic. We have two key questions to answer today: First, how does the court apply rational basis, intermediate scrutiny, and strict scrutiny? Second, when do they apply each one? Let's dive in!
- Lee Burgess: I'm going to start with question one, how the court applies each level of scrutiny. Let's start with the least restrictive and most common level of scrutiny or review: rational basis review. When applying rational basis review, courts seek to determine whether a law being challenged is rationally related to a legitimate government interest. Inversely, for a plaintiff to succeed in bringing a constitutional challenge, they must show the law they are challenging is not rationally related to a legitimate government interest. It's a broad test and it's hard to win these arguments as a plaintiff. The assumption in these cases is the legislature is following the Constitution.
- Lee Burgess: So, the law must be a pretty egregious constitutional violation to be overturned under rational basis review! In fact, the court won't even look to what the law's intent or purpose actually was. Crazy, right? As long as the defense can provide a rational relationship – any rational relationship – between the law being challenged and a legitimate government interest, it will stand. As you study this area of the law, you sometimes see courts perform some pretty incredible logical gymnastics to find that a law is rationally related to a legitimate government interest and, therefore, constitutional.
- Lee Burgess: One step up from rational basis review is intermediate scrutiny. To survive a constitutional challenge under intermediate scrutiny, the government must show the law is substantially related to an important governmental interest. Sounds similar, right? But see the difference? Instead of showing that the law is rationally related, the government must show that it is substantially related. And instead of showing the law relates to a legitimate government interest, the government must show an important government interest. The bar is raised for the government under intermediate scrutiny!
- Lee Burgess: But the bar is raised one step higher under strict scrutiny. To survive a constitutional challenge under strict scrutiny, the government must show the



law is necessary to serve a compelling government interest. Note the difference: This time we're determining whether the law is necessary and whether the government's interest is compelling. This is an incredibly high bar and only applies in very limited circumstances.

Lee Burgess: Now we have the framework, but with just the framework, it's sort of hard to see how this works in practice. So, let's move on to discuss the second question, when the courts apply each standard of review. We'll dive into some examples as well, so you have a good grasp of how all of this works in the real world.

Lee Burgess: So, how do we know when courts will apply the most common rational basis review, or when the court is going to level up and apply intermediate or strict scrutiny instead? Does the plaintiff get to pick? Does the government? No. The court determines which level of scrutiny to apply based on a set of factors – whose rights are affected by the law and how important or fundamental those rights are. To flesh this out, let's look at two major topics under constitutional law – [due process and equal protection](#).

Lee Burgess: Starting with due process – the main question here is: What is the government seeking to regulate? Any time the government regulates some activity, they are requiring individuals to do or not to do something. So, what is the government forcing its people to do, or what are they taking away their ability to do? And how important is that right to individuals under the Constitution?

Lee Burgess: As I mentioned earlier, rational basis review is our baseline. It is the typical standard the court applies when deciding questions of procedural or substantive due process. Basically, rational basis review applies when no fundamental right is at issue – that is, the law is seeking to regulate activity that does not constitute a fundamental right, like driving. Most laws fall under this category. Governments regulate all sorts of things in order to have a functioning and orderly society. Think of speeding limits, grass height restrictions, drinking ages. All of these laws limit an individual's ability to do something – drive as fast as they might want, let their lawn grow all summer, or drink under the age of 21. But none of those things – driving, lawn care, or drinking – are fundamental rights under the Constitution. So, if an individual wants to challenge one of those laws, they must show the law is not rationally related to a legitimate government interest.

Lee Burgess: However, if the government is regulating a fundamental right, strict scrutiny applies, and the government must show that the law is necessary to serve a compelling governmental interest. So, what are fundamental rights? Fundamental rights under the Constitution include the right to vote, interstate travel, and privacy, among other things. I encourage you to look at some cases where the court has applied strict scrutiny to see what qualifies, because it isn't always obvious. For example, courts have found the right to privacy to include



the right to marry, procreate, use contraceptives, raise one's child, keep family together, and maintain custody over one's children.

Lee Burgess: So, let's look at an example adapted from the California bar exam:

Lee Burgess: "The growth of City has recently accelerated, putting stress on municipal infrastructure. City's water supply, roads, sewers, and schools are all operating in excess of designed capacity. The Assembly of Future Life was organized in City not long ago. Its members adhere to certain unpopular religious beliefs. City gave the Assembly preliminary zoning approval for plans to build a worship center on a one-acre parcel of real property the Assembly owned within City's borders. The Assembly's plans incorporated a dwelling for its minister. Soon after the preliminary zoning approval, newspapers in City featured articles about the Assembly and its members' beliefs.

Lee Burgess: After these newspaper articles appeared, City adopted a 'slow growth' ordinance providing for an annual lottery to allocate up to 50 building permits, with applicants for certain 'priority status' dwellings entitled to participate first. Priority status dwellings were defined as, one, affordable housing; two, housing on five-acre lots with available sewer and water connections; or three, housing with final zoning approval as of the date the ordinance was adopted. Only after all applicants for priority status dwellings had received permits in the lottery could other applicants participate.

Lee Burgess: Over 500 applicants for priority status dwellings participated in the first annual lottery. Realizing that its opportunity to participate in a lottery could be years away, the Assembly submitted an application for retroactive final zoning approval and a building permit. City denied its application. The Assembly brought suit in federal district court against City, alleging that City's ordinance was invalid under the Due Process Clause of the U.S. Constitution."

Lee Burgess: What do you think? Will the court apply strict scrutiny here, or rational basis review?

Lee Burgess: The Assembly will argue that the City enacted the ordinance in order to prevent it from exercising its unpopular religious beliefs, violating its fundamental right to exercise its religion, as well as its members' right to free assembly. Remember, in cases where a statute denies a plaintiff the exercise of a fundamental right, the statute should receive strict scrutiny. However, if the law does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review. So the question isn't just whether a religious group is impacted, but whether a fundamental right is actually at issue here, and whether that fundamental right is actually being impeded. Which is it?



- Lee Burgess: The law would likely receive rational basis review, because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. The members are still free to assemble where they please and freely exercise their religion. Though the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities, and they are still entitled to do so.
- Lee Burgess: Now that we know we're applying rational basis review, let's discuss how likely the Assembly is to prevail on such a claim. Remember, rational basis review is an uphill climb. All the City has to show here is that the ordinance is rationally related to a legitimate government interest. What interest do you think the government might put forth?
- Lee Burgess: The City may argue that they have a legitimate interest in preserving the city infrastructure for necessary housing purposes and delaying approval for development that may otherwise tax the city's resources until they can be improved. This ordinance is rationally related to achieve this purpose, because it gives priority to housing development and development with pre-existing infrastructure, therefore limiting growth to necessary housing, and housing that will not sufficiently burden the resources of the city. Under rational basis review the ordinance will likely be found valid.
- Lee Burgess: Remember, the City does not have to prove its actual intent behind the ordinance. It may seem fishy that they passed this ordinance soon after the negative press broke about the Assembly, but under rational basis review, that doesn't matter. All they need to show is a possible legitimate government interest, whether that interest was their true intent or not.
- Lee Burgess: Let's look at another area of constitutional law to help us more deeply understand how the levels of scrutiny operate – equal protection. The Equal Protection Clause prohibits the government from denying citizens equal protection under the law. The Fourteenth Amendment applies to the states, while the Fifth applies to the federal government. On an exam, look out for laws that classify people into groups. That's a big hint we're dealing with an equal protection question!
- Lee Burgess: Rational basis review is, again, the most common standard for review when the court is deciding questions of equal protection under the Fifth or Fourteenth Amendments, but I think it will be most helpful to work in the reverse here. If the law regulates a suspect class or, again, infringes on a fundamental right, strict scrutiny applies. As a review, fundamental rights are the rights listed in the Bill of Rights or due process rights in the Fourteenth amendment. Suspect classes include things like race, nationality, citizenship status, and religion. There is no bright-line rule for suspect class, but the Supreme Court of the United



States has provided us with certain criteria to help determine when a class is suspect, like if the group has been historically discriminated against or subject to stigma or prejudice, if the group has a trait that is highly visible and cannot or shouldn't have to be changed, if the group is a discrete minority and powerless to protect itself within the political process. As you can see, the definition is pretty squishy outside from well-accepted classes such as race and religion. If either of those categories apply – suspect class or fundamental right – the court will apply strict scrutiny. In such a case, the government must show the law is narrowly tailored to address a compelling state interest.

Lee Burgess: The next level down from strict scrutiny under equal protection cases is intermediate scrutiny. The court will apply intermediate scrutiny when the law targets a quasi-suspect class like gender, a child born outside of marriage, or an undocumented non-citizen. Remember, in that case, the government must prove the law is substantially related to an important government interest. As you might guess, this test is less strict than strict scrutiny but more stringent than rational basis review. It is, in fact, the intermediate level of scrutiny.

Lee Burgess: Finally, we have rational basis review, which applies when a law regulates any other class or group of people. It's essentially the catch-all review.

Lee Burgess: Let's look back to the hypo we discussed earlier since the Assembly could also have brought an Equal Protection claim against City. We've already discussed whether the law implicates a fundamental right. But what about class? Does the law regulate a suspect class, a quasi-suspect class, or any class at all? What do you think?

Lee Burgess: The Assembly would likely argue that the ordinance discriminates against them due to their unpopular religious beliefs, making the law invalid under the Fifth amendment because it discriminates against them based on their religion. What do you think of that argument? On its face, the statute does not discriminate against religion – it doesn't mention religion at all. The ordinance classifies groups into affordable housing and non-affordable housing, and between groups that have already been approved and those that have not. I think the Assembly would have a hard time arguing the law, on its face, discriminates against any group because of its religion.

Lee Burgess: Now, let's take a look at another example to really hammer this home, this one adapted from the [2013 California bar exam](#):

Lee Burgess: "The legislature of State X recently completed a study on the behavior of teenagers residing in the state that revealed a connection between an increase in the school dropout rate and the increase in the level of criminal activity. The study indicated that the connection was most pronounced among boys ages 15 to 18 years old.



- Lee Burgess: Troubled by what it perceived as a breakdown in personal responsibility and social order among its teenagers, State X’s legislature has enacted a statute creating the State Forestry Corps. The Corps drafts boys ages 15 to 18 who have dropped out of school. It sends them to a remote camp and provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.
- Lee Burgess: Pete, age 15, has dropped out of school, and coincidentally has been drafted into the Corps. Pete and his parents have filed a declaratory relief action attacking the validity of the statute under the Fourteenth Amendment’s Equal Protection Clause. Can Pete or his parents reasonably argue that State X has denied him equal protection under the law?”
- Lee Burgess: Remember, equal protection claims arise where a state discriminates based on class. Pete will first argue that the law discriminates against him in his exercise of a fundamental right – liberty. Because liberty is a fundamental right, strict scrutiny applies and the State will have to show the law is narrowly tailored to address a compelling interest.
- Lee Burgess: Pete will likely argue the law is not narrowly tailored – the program goes too far and does not provide any alternatives or flexibility. It sends young men to a remote camp and subjects them to daily physical labor that has nothing to do with education or avoiding criminal behavior and everything to do with defraying costs. It also fails to narrowly tailor the group – it targets all boys between 15 to 18 who drop out without any assessment of their reason for dropping out or their fitness for the program. Pete is likely to prevail on an argument that the law is unconstitutional as applied to him. Even if the State raised its interest in decreasing criminal activity – a compelling government interest – because the law is not narrowly tailored, the law remains unconstitutional.
- Lee Burgess: Pete could also argue that the law violates equal protection in targeting males based on their gender. Because gender is a quasi-suspect class, intermediate scrutiny would apply and the government will need to show that the law has a substantial relationship to a compelling government interest. We already know the government’s interest in reducing criminal behavior is likely compelling. But is there a substantial relationship between that interest and the law’s targeting of this quasi-suspect class?
- Lee Burgess: Pete will argue “No”. Though the connection between dropout rates and criminal behavior is most pronounced in boys ages 15 to 18, the State fails to show the statistical difference between the boys and girls studied here, and why the State has decided to take no action at all against girls who drop out. Pete



will argue that the state's law is based on stereotypes including the utility of manual labor in teaching boys to be respectful and law abiding. The State also fails to show if there is any other trait that would make a person more likely to engage in criminal behavior. Because the State has failed to provide this justification, it has failed to show that targeting this group is substantially related to decreasing crime.

Lee Burgess: But there's another group targeted by this law – did you catch that? Pete can also argue that the law discriminates based on age, since it's only boys between 15 and 18. Remember, though, that age is neither a suspect nor a quasi-suspect class, meaning the court will only apply rational basis review. The State is likely to prevail if the court applies rational basis review, as the Corps is arguably rationally related to the State's interest in decreasing crime and protecting the community – a legitimate government interest. The State has evidence that boys 15 to 18 who drop out are more likely to engage in criminal behavior, so it created a program to help them complete school and keep them away from the city while they do so. As distasteful as it may be, a rational relationship certainly exists.

Lee Burgess: I know those hypos get in the weeds a bit, but I hope they helped you remember to see what you should be looking for in exam questions on standards of review. Remember to look for the regulation of rights and groups, and then determine what standard applies. Only then can you move on to determine whether there was a constitutional violation.

Lee Burgess: And that's all the time we have for today. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](https://www.lawschooltoolbox.com/contact-form) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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