Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we have another episode in our series "Law Every 1L Should Know", and this one is on constitutional law. 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'll 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 or rating 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.

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Lee Burgess: Welcome back! If you're new to this series, "Law Every 1L Should Know", it's designed for incoming 1Ls – students who are getting ready for law school and want a head start on the law they're about to spend the next year learning. Each episode gives you a simplified overview of one of the core 1L subjects. We're not trying to cover every doctrine or every exception. We want to give you the framework, so that when you walk into class on day one, you already have mental shelves to put the new material on. And if you want to go deeper on any of the specific topics we mention today, our podcast also has a series called "Listen and Learn". Those episodes take one specific legal argument, review the rules in more detail, and apply the law to a fact pattern. We'll link to relevant "Listen and Learn" episodes in the show notes.

Lee Burgess: Today, we're talking about constitutional law. Con Law is a vast subject, and it really splits into two big halves. The first half is about the structure of government – the powers of Congress, the president, and the courts, and how power is divided between the federal government and the states. The second half is about individual rights – the protections the Constitution gives people against the government, like equal protection and due process. We're not going to cover all of that today. We're going to do two things. First, we'll look at justiciability – the set of threshold doctrines that decide whether a federal court is even allowed to hear a constitutional case in the first place. Then we'll move

to the individual rights side and dig into the single most important analytical tool in the entire area – the levels of scrutiny, sometimes called the standards of review. We'll finish by working through a fact pattern that uses both. A quick reminder, especially if you're listening before law school starts – don't try to memorize everything. Just let it wash over you. The goal is recognition. When your professor says "standing" or "strict scrutiny", those words should already have a shape to them. And with that, let's dive in.

Lee Burgess: Let's orient first. Constitutional law is the law of the Constitution itself. It governs what the government is allowed to do and what it's forbidden from doing. The thing that makes constitutional law work as a body of law that courts enforce is a power called "judicial review" – the power of courts to strike down laws and government actions that violate the Constitution. That power isn't actually spelled out in the Constitution's text. It was established by the Supreme Court in the foundational 1803 case *Marbury v. Madison*, which you will read in your first week of Con Law. The idea from *Marbury* is that it is the job of the courts to say what the law is, and that includes deciding when a statute conflicts with the Constitution and therefore can't stand. Every constitutional case you'll ever study rests on that power.

Lee Burgess: But here's the catch, and it's where we'll start: Federal courts can't just rule on any constitutional question they feel like addressing. The Constitution limits federal courts to deciding actual cases and controversies. That limitation gives rise to a set of threshold doctrines called "justiciability". Justiciability is the gatekeeper. Before a court ever reaches the question of whether a law is constitutional, it has to decide whether this particular dispute, brought by this particular plaintiff, at this particular time, is something a federal court is permitted to hear at all. If the case isn't justiciable, the court dismisses it without ever reaching the merits.

Lee Burgess: This is a lot like the role personal jurisdiction plays in civil procedure – a threshold gate you have to clear before anyone looks at the substance. One difference worth noting, though – unlike personal jurisdiction, which a defendant can waive, standing can never be waived. A federal court has to assure itself that standing exists, even if neither party raises the issue.

Lee Burgess: The most important justiciability doctrine, and the one most heavily tested, is standing. Standing asks whether this plaintiff is the right person to bring this lawsuit. The basic idea is that you can't sue just because you're upset about something the government did. You have to be genuinely affected by it. Standing has three requirements, and you need all three. The first is injury in fact. The plaintiff must have suffered, or be about to suffer, a concrete and particularized injury. "Concrete" means it's a real harm, not abstract.

"Particularized" means it affects this plaintiff personally, not just everyone in general. And the injury has to be actual or imminent – something that's happened or is about to, not hypothetical. A vague, generalized grievance that you share with the whole public, like, "I don't know how the government is spending money", is not enough.

Lee Burgess: The second requirement is causation. The plaintiff's injury has to be fairly traceable to the challenged government action. There has to be a real causal link between what the government did and the harm the plaintiff suffered.

Lee Burgess: The third requirement is redressability. A favorable court decision has to be capable of actually fixing the plaintiff's injury. If winning the lawsuit wouldn't actually help the plaintiff – if the harm would persist regardless – then there's no point, and the plaintiff lacks standing.

Lee Burgess: Now, here's a quick way to feel the difference. Suppose a taxpayer is upset that the government spent money on a program she believes is unconstitutional, and she sues. Does she have standing? Almost certainly not. Her injury – that her tax dollars went somewhere she disapproves of – is a generalized grievance she shares with millions of other taxpayers. It's not concrete and particularized to her. Now, compare someone who is denied a government benefit, or a business shut down by a new regulation, or a person arrested under a challenged statute – those are real particularized injuries that give standing. The line runs between, "I personally got hurt" and "I object as a citizen."

Lee Burgess: Injury, causation, redressability. The case laying out this three-part test is *Lujan v. Defenders of Wildlife*, which you'll likely read. If you can remember those three words, you can spot a standing issue on an exam.

Lee Burgess: Standing is the big one, but there are a few other justiciability doctrines you should be able to recognize by name. Ripeness asks whether the case is ready for review. A plaintiff generally can't sue over a harm that hasn't happened yet and might never happen. The dispute has to be sufficiently developed. Mootness is the flip side. A case must remain a live controversy throughout the litigation. So if the dispute is resolved or the situation changes, such as there's no longer anything for the court to decide, the case becomes moot and gets dismissed. The political question doctrine says that some issues are committed by the Constitution to the elected branches – the President and Congress – rather than the courts, and so are off-limits for judicial resolution. And finally, federal courts will not issue advisory opinions. They won't answer hypothetical legal questions outside the context of a real dispute between adverse parties. All of these flow from that same "case or controversy" requirement. For today, just know standing in depth and recognize the others by name.

Lee Burgess: Okay, say our plaintiff clears the justiciability gate. They have standing, the case is ripe, it's not moot, and it's not a political question. Now the court can actually reach the merits: Is the challenged law constitutional? This is where we move to the individual rights side and to the single most important tool in the entire area – the levels of scrutiny. Here's the core idea: When the government treats people differently or burdens some right or group, courts don't evaluate every law the same way. Instead, courts apply one of three levels of scrutiny – three different tests, with three different levels of demandingness, depending on what kind of classification or right is involved. The level of scrutiny usually determines the outcome. So the most important skill in this area is figuring out which level applies, and then applying its test. So let's walk through all three from the most demanding to the least.

Lee Burgess: The most demanding is strict scrutiny. Under strict scrutiny, the government has to prove that its law is necessary to achieve a compelling government interest, and that the law is narrowly tailored to that interest, meaning it doesn't sweep more broadly than necessary.

Lee Burgess: Strict scrutiny is very hard for the government to satisfy. Lawyers sometimes say it's "strict in theory, fatal in fact", because laws subjected to strict scrutiny usually get struck down. Strict scrutiny applies in two main situations: when the law involves a "suspect classification" – most importantly, race or national origin, and, with some significant exceptions you'll learn later, alienage – meaning non-citizen status; and when the law burdens a fundamental right, like the right to vote, to travel, or to marry.

Lee Burgess: Here's a concrete example: Imagine a state law that makes it a crime for two people of different races to marry each other. That law classifies people by race – a suspect classification – and it also burdens the fundamental right to marry. So a court applies strict scrutiny. The state would have to identify a compelling interest to show the law was the narrowest possible way to achieve it, and a bare racial line like that can't survive. The law fails. That's not a hypothetical, by the way. It's essentially the analysis in *Loving v. Virginia* – the 1967 case that struck down state bans on interracial marriage.

Lee Burgess: The middle level is intermediate scrutiny. Under intermediate scrutiny, the government has to show its law is substantially related to an important government interest. That's a real burden – more than just a rational explanation – but it's less demanding than the "compelling interest, narrowly tailored" standard of strict scrutiny. Intermediate scrutiny applies to what are called "quasi-suspect classifications" – most importantly, classifications based on sex or gender, and classifications based on whether a child was born to

unmarried parents. For gender classifications in particular, the Supreme Court has said the government needs an exceptionally persuasive justification. Here's a real and slightly quirky example: In a real case called *Craig v. Boren*, Oklahoma had a law that let women buy low-alcohol beer at age 18, but made men wait until they were 21. Because the law treated men and women differently, the court applied intermediate scrutiny. The state argued the line promoted traffic safety, since young men were statistically more likely to drink and drive, but the statistical connection was too weak to be substantially related to that goal, and the law was struck down. That case is where intermediate scrutiny for gender classifications got its start.

Lee Burgess: The least demanding level is rational basis. Under rational basis review, a law is constitutional as long as it is rationally related to any legitimate government interest. This is an extremely easy standard for the government to meet. The law doesn't even have to be a good idea; it just has to be rational. And courts will often mitigate legitimate purposes the legislature might have had, even ones it never actually stated. Lawyers say rational basis is highly deferential to the government, and laws reviewed under it are almost always upheld. Rational basis is the default. It applies to every classification that isn't suspect or quasi-suspect. So, classifications based on age, wealth, disability, and most ordinary economic and social regulation, all get rational basis review.

Lee Burgess: For example, imagine a city requires all taxi drivers to retire at age 70. Age isn't a suspect or quasi-suspect classification, so the law gets rational basis review. The city only has to show the rule is rationally related to something legitimate – say, road safety – and because a court can easily draw that connection, the law will almost certainly be upheld, even if you personally think a flat age cutoff is a blunt or unfair way to promote safety.

Lee Burgess: So, the whole game when you see an individual rights problem is to identify the classification or the right at issue, and then match it to the right level of scrutiny. Race, national origin, alienage, with the exceptions we noted, or a fundamental right get strict scrutiny. Gender or illegitimacy – intermediate scrutiny. Everything else – rational basis. Once you've picked the level, you apply its test, and the test usually tells you the answer. Get the level wrong, and the rest of your analysis falls apart. Get it right, and you're most of the way home. Same Equal Protection Clause, three very different outcomes – all driven by what level of scrutiny applies.

Lee Burgess: Hopefully you're still with me. Let's bring the whole episode together with a fact pattern – one that runs through justiciability first and then the levels of scrutiny. As I read it, listen for the standing question and then for the classification that tells you which level of scrutiny applies. Here's the hypo:

Lee Burgess: A state legislature passes a law providing that only women may be licensed to operate childcare centers for infants under the age of three. The state's stated justification is that women are, in the legislature's words, "naturally better suited to caring for very young children". James is a trained early childhood educator with years of experience. He applies for a license to open an infant childcare center, and his application is denied solely because he is a man. James sues the state in federal court, arguing that the law violates the Equal Protection Clause of the Fourteenth Amendment. How should we analyze this? Well, let's walk through it in two stages – first, justiciability, and then the merits.

Lee Burgess: Stage 1: Does James have standing? Remember the three requirements. Injury in fact – yes. James applied for a license and was denied. That's a concrete, particularized injury. It happened to him personally, and it's a real, actual harm, not a hypothetical or generalized grievance. Causation – yes. His injury is directly traceable to the challenged law. He was denied precisely because the statute bars men. Redressability – yes. If the court strikes the law down, James can apply for a license without the gender bar. All three requirements are satisfied, so James has standing, and there's no ripeness or mootness problem. The injury has already happened, and the dispute is live. And this isn't a political question, so the case is justiciable, and the court can reach the merits.

Lee Burgess: Stage 2: Is the law constitutional? Well, start by identifying the classification. On its face, this law classifies based on sex. It allows women to do something it forbids men from doing. So we're in equal protection, and a sex-based classification triggers intermediate scrutiny. That means the state has to show that the law is substantially related to an important government interest, and for a gender classification, the state needs an exceedingly persuasive justification.

Lee Burgess: Now apply the test. What's the state's justification? That women are naturally better suited to caring for young children. This is exactly the kind of justification the Supreme Court has repeatedly rejected. It's an overbroad generalization about the sexes – a stereotype about what women and men are naturally good at, rather than a real substantially-related reason. Even if we credit the state with an important interest in the well-being of infants, barring all men categorically is not substantially related to that interest. Plenty of men are perfectly capable of caring for infants, and the law sweeps them all out based on a stereotype. So the law almost certainly fails intermediate scrutiny, and James should win. The Equal Protection Clause does not permit the state to bar men from this profession based on a generalization about gender. If this fact pattern feels real – that's because it essentially is. It's the gender mirror of a Supreme Court case called *Mississippi University for Women v. Hogan*, where

the court struck down a state woman's university's policy of excluding men from its nursing program, applying intermediate scrutiny to a sex classification that happened to disadvantage a man.

Lee Burgess: Notice the structure of that analysis. First, the justiciability gate: Does this plaintiff get to be in federal court at all? Then, and only then, the merits: Identify the classification, pick the level of scrutiny, and apply its test. The level of scrutiny did almost all the work. Once we knew it was a gender classification getting intermediate scrutiny, and once we saw the state's justification was a bare stereotype, the outcome followed. That's the rhythm of nearly every individual rights question you'll see.

Lee Burgess: Now, before we wrap up, a quick recap. Constitutional law has two halves – government structure and individual rights – and the court's power to enforce it comes from judicial review established in *Marbury v. Madison*. Before a federal court can decide a constitutional question, the case has to be justiciable. Most importantly, the plaintiff needs standing, which requires injury in fact, causation, and redressability. You should also recognize ripeness, mootness, and the political question doctrine, and the bar on advisory opinions. Once a case clears that gate, individual rights analysis usually turns on the levels of scrutiny. Strict scrutiny for suspect classifications like race and for fundamental rights; intermediate scrutiny for quasi-suspect classifications like sex; and rational basis for everything else. Identify the classification, pick the level, and apply the test.

Lee Burgess: If you want to go deeper on these topics, check out the show notes. We've linked to "Listen and Learn" episodes on due process and equal protection, and on the standards of review. Those go into more depth than we did here.

Lee Burgess: Next time in the "Law Every 1L Should Know" series, we'll tackle another core 1L subject. Until then, take a breath. Constitutional law can feel enormous and abstract, but most of it runs on a few repeatable frameworks. Learn the gates and the levels of scrutiny, and a huge amount of the subject suddenly has a shape. Stay with it.

Lee Burgess: Thanks again to Juno for supporting this podcast. If you're thinking about student loans for law school, head to JoinJuno.com to explore your options and see how Juno can help you find a better rate.

Lee Burgess: 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

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