

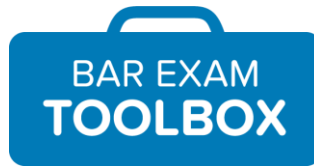


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another episode in our "Listen and Learn" series – this one is on constitutional law, specifically due process and equal protection. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. 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 check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back! Today, we're talking about a very hefty and important area of constitutional law – the Fourteenth Amendment. Specifically, we're going to talk about procedural due process, substantive due process, and equal protection. While each of these issues has a different essay answer approach, we're talking about them together because they are frequently tested together. And because each of these issues has multiple sub-issues contained within it, it's very important to have a methodical, memorized answer structure, so that you can write about these quickly and thoroughly. Today, we're going to offer tips on how to spot procedural due process, substantive due process, and equal protection in the facts, and then we'll go through a step-by-step approach to each.

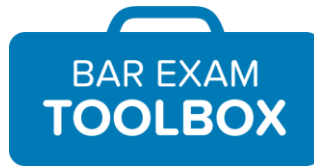
Lee Burgess: Let's start with procedural due process. Procedural due process operates directly from the language of the Due Process Clause, which says that no state shall deprive any person of life, liberty, or property without due process of law. So, the first thing you want to look for in a due process fact pattern is whether there has been a deprivation of a protected interest – life, liberty, or property. Life and liberty can be pretty easy to spot. Has someone been killed or confined by the state? Property can be more nuanced, because to establish a property deprivation, a person has to show some kind of entitlement to the property. So, with employment for example, there is no entitlement to a position when the terms of that employment are at-will. However, look out for facts in which a person may be fired for cause, such as a tenure position. In that case, there may be an entitlement, and therefore a colorable deprivation claim under the Due Process Clause.

Lee Burgess: The next part you need to look out for in a procedural due process fact pattern is the process part. Due Process has come to mean, at minimum, notice and hearing. Whether that process is sufficient is typically evaluated under the



factors from the Supreme Court case *Mathews v. Eldridge*. These factors require a balancing between, one, the importance of the private interests at stake; two, the risk of erroneous deprivation under the current procedures and the value of additional procedures; and three, the importance of the state's interest – including the state's interest cost-effectiveness, and the burden that arises from additional safeguards. If the interest at stake is a protected interest, and the current process is insufficient to protect against erroneous deprivation, and adding more process would not be disproportionately burdensome or costly on the government, then you have a procedural due process violation.

- Lee Burgess: We'll match this up to some facts soon, but for now, let's go review your step-by-step approach to procedural due process. First – this is important – always state the language of the amendment at hand. A lot of students forget to do this, but you don't want to have a Fourteenth Amendment discussion without ever actually mentioning the Fourteenth Amendment. So, step one is the rule: Under the Fourteenth Amendment, no person shall be deprived of life, liberty, or property by the government without due process of law.
- Lee Burgess: Step two: Identify the protected interest. Is it life? A liberty interest? A property interest? Depending on the type of interest, this may be a straightforward discussion, or you can have some ambiguity to play with.
- Lee Burgess: Step three: Engage in the balancing test from *Mathews v. Eldridge*. How important is the interest at stake? How well does the current process protect against erroneous deprivation, and what would be the value of adding more process? Finally, what is the state's interest in the deprivation, and what is the burden on the state if more process were added? And remember, when we're talking about process, we're talking about the bare minimum of notice and hearing. So, that's procedural due process.
- Lee Burgess: Next in this Fourteenth Amendment family is substantive due process. Substantive due process analyzes the government's power to regulate certain rights by applying the appropriate standard of scrutiny. These rights are read into the liberty interest of the Fourteenth Amendment and include voting, the right to travel freely, First Amendment Rights, and privacy interests such as parenting, marriage, contraception, abortion, education, and medical decisions. Depending on the right at stake, a different standard of scrutiny will apply. For example, the right to vote is analyzed under strict scrutiny, whereas regulation of economic rights has been viewed by the courts as permissible unless it fails rational basis review. So, you need to identify the right at stake in order to know which standard to apply.



- Lee Burgess: Now, once you've identified the right, you'll be analyzing under strict scrutiny, or intermediate scrutiny, or rational basis. Strict scrutiny requires the law at issue to be necessary to achieve a compelling governmental interest. The government has the burden of proof. For intermediate scrutiny, the law is upheld if it's substantially related to an important governmental interest. The burden of proof is on the government here as well. Note that abortion has its own standard that is considered to be within the intermediate range, which requires that the law not impose an undue burden on access to abortion. Finally, rational basis review requires only that the law be rationally related to a legitimate governmental interest. And here, the burden is on the plaintiff to show that there is no rational basis, and it tends to be a fairly easy standard for the government to overcome. That's why you always want to see if you can get a claim under strict scrutiny first.
- Lee Burgess: To review, here's our step-by-step for substantive due process. First, give the rule: Substantive due process limits the government's power to regulate certain rights under the Fourteenth Amendment. Step two: Identify the right. Is it a voting issue? A contraception issue? An economic issue? There may be multiple rights at stake, so make sure to identify each one. And third, identify the appropriate standard of scrutiny for that right.
- Lee Burgess: If it's strict scrutiny, analyze whether the governmental interest is compelling, and whether the law is narrowly tailored and necessary to achieve that interest. If it's intermediate scrutiny, analyze first whether the government's interest is important, and then whether the law is substantially related to that interest. If it's rational basis, identify whether the government interest is important, and then whether the law is rationally or reasonably related to that interest. And that's substantive due process.
- Lee Burgess: So finally, we will get to equal protection. Equal protection overlaps with substantive due process, in that you'll be using the standards of scrutiny here as well, but in a slightly different context. For equal protection, you're looking at equal protection of the laws, meaning you're examining whether a law is discriminating against a protected class or infringing on a fundamental right as to a certain group. You want to start by looking at the law itself, and the nature of the discrimination. Is it discriminatory on its face? Is it facially neutral but applied in a discriminatory way? Is it facially neutral but having a discriminatory impact, in which case, is there a discriminatory motive?
- Lee Burgess: Once you've established that there is discrimination, then you want to identify either the fundamental right or the class. If there is a non-suspect class, but a fundamental right is implicated, then you're in strict scrutiny. If there is



discrimination of a suspect class – that’s discrimination based on race, religion, national origin, or citizenship status – then you’re applying strict scrutiny. If there’s discrimination against a quasi-suspect class – gender or birth status – then you’re applying intermediate scrutiny. And if there’s discrimination against anyone else concerning an issue that is not a fundamental right, then you’re applying rational basis. Non-suspect classes include discrimination based on age, physical ability, and economic status.

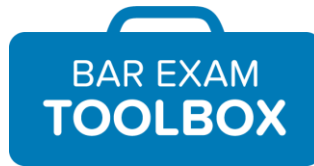
Lee Burgess: So, once you’ve identified the fundamental right or the class, you will apply the standards of scrutiny in the same manner that you did for substantive due process. So, to review, step one is to give the rule that the Fourteenth Amendment guarantees equal protection of the law. Step two: Identify whether discrimination is occurring on the face of the law, or as a result of unequal application of, or the disparate impact of a facially neutral law. Remember that disparate impact requires discriminatory motive as well. Step three: Identify the fundamental right implicated, or the protected status of the class. Step four: Apply the appropriate level of scrutiny based on the right or the class.

Lee Burgess: Remember that there may be more than one status or right at issue in the facts. For example, if a law only targets boys ages 15 to 18, then a group is being discriminated against based on gender and age. In that case, you would apply intermediate scrutiny based on gender, and do a separate rational basis analysis based on age.

Lee Burgess: So, let’s dive into a fact pattern to start pulling this all together. We’re going to work on the constitutional law fact pattern from the [July 2013 California bar exam](#). For the sake of time though, this fact pattern deals with two sets of claims – Pete’s, and his parents – and we’re going to edit the fact pattern and our answer to only address Pete’s claims. Feel free to practice this essay in full after the podcast though, in order to see what claims Pete’s parents might bring under the Fourteenth Amendment. So, here’s our edited fact pattern:

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 an 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 camps located on public lands



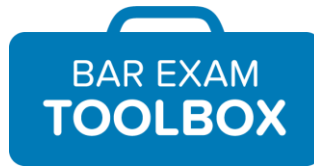
administered by the State Forest Service. It also provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.

Lee Burgess: Pete, age 15, has dropped out of school, and consequently has been drafted into the Corps. Pete has filed a declaratory relief action attacking the validity of the statute under the Fourteenth Amendment’s Due Process Clause and the Fourteenth Amendment’s Equal Protection Clause. What arguments could Pete reasonably make in support of his action, and how should the court rule on each?”

Lee Burgess: Alright, so I’m going to start with a little hint for you. In Fourteenth Amendment cases, or any constitutional case where you have to address a government interest, you’re usually going to find that interest in the first paragraph, and it’s usually going to describe in detail some kind of growing problem that is of concern to the legislature. Usually there will be a study or a report, just like we have here, and that’s what you’ll be using later in your analysis of the government interest. So, when you’ve got a first paragraph like the one you have here, you know there’s a state interest discussion happening somewhere.

Lee Burgess: So, let’s start with procedural due process steps. Is there a deprivation of a protected interest? Yeah, I’d say Pete has a strong liberty interest here, since he’s been involuntarily taken from his home and sent to live in a camp on public lands in order to work in the State Forestry Corps. That means Pete is entitled to due process.

Lee Burgess: Has Pete gotten due process? Let’s use our *Eldridge* factors. How strong is Pete’s interest in his liberty? I would think it’s pretty strong – again, he has a constitutionally protected right to be free in his movements, and that has been restricted. And he’s being forced to do labor because he dropped out of school. This is an extreme response to dropping out, and this factor weighs heavily in Pete’s favor. Does the current process sufficiently protect against erroneous deprivation? Well, if process requires notice and a hearing, then on these facts, there isn’t actually any process to speak of. There is neither notice nor a hearing. All that’s required is for a boy in this age range to drop out in order for the law to go into effect. That means there’s lots of risk of erroneous deprivation. For example, it could be that Pete withdrew from school in order to be homeschooled, or that he’s going to go ahead and get his GED instead. We don’t know, and neither does the government, because there hasn’t been a hearing to hear Pete’s side of the story.



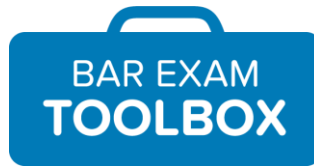
Lee Burgess: Finally, how strong is the State’s interest and how burdensome is added process? Well, we can concede that the State may have a strong interest in preventing crime, though it is not clear on these facts how extreme this increase in crime is among this age group. Is it a 1% increase, or a 99% increase? Have they found causation or merely correlation between dropouts and crime? The interest is strong but the conclusions are thin, and regardless, giving notice and an informal hearing is the bare minimum in light of such a strong deprivation. So, on balance, it does appear that Pete has a claim that his procedural due process rights were violated.

Lee Burgess: Next, we have our substantive due process framework. Is there a fundamental right at stake? As we mentioned before, Pete has a fundamental right to travel freely, which has been limited by this statute. Therefore, we apply the strict scrutiny standard.

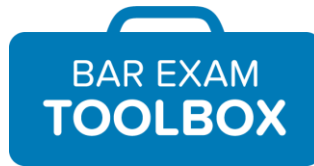
Lee Burgess: To overcome strict scrutiny, first the State has to have a compelling interest driving this law. Again, we’re looking at reducing crime, which we can concede is a compelling interest, but we also have some thin support for the problem the State is using to justify this Forestry Corps. For example, we’re told that this law is motivated by what the state legislature perceived as a social breakdown among teenagers. What does “social breakdown” mean? That’s pretty vague. And could there be other factors at play, besides just the dropout rate? So maybe we can concede a state interest, but with a grain of salt.

Lee Burgess: Our next step is to analyze whether this law is narrowly tailored to that state interest. There are so many other ways State X may have addressed this issue, short of removing children from their homes. They could have set up afterschool programs, or bolstered GED programs, or expanded community-based vocational opportunities. The list goes on. You’ll want to argue both sides here, but ultimately, this is not what I would call a narrowly tailored law. Therefore, this law fails strict scrutiny under a substantive due process analysis, and Pete has a claim that his fundamental rights were violated.

Lee Burgess: Finally, we reach equal protection. First, does this law discriminate on its face? Yes, as to two distinct categories – gender, since it only applies to boys; and age, since it falls within the 15 to 18 year old age group. You could throw high school dropouts in there as well, but that would be a rational basis test, which is the same test you’ll be applying for age, so maybe footnote it but don’t repeat the whole analysis. Because the law discriminates on its face, we can go straight to our standards of scrutiny.



- Lee Burgess: First, we'll analyze under intermediate scrutiny as to the gender discrimination. Does the state have an important government interest? This will look a lot like our earlier state interest discussions, so we won't repeat that here, except to note that the standard is important, rather than compelling. So, there may be a bit more flexibility here in terms of establishing the interest.
- Lee Burgess: Next we examine whether the Corps forestry work is substantially related to this important crime reduction interest. This could mirror some of the questions raised under the strict scrutiny analysis. How substantially is forestry work related to crime reduction? And how substantial is the relationship between gender and the State's concerns? There's not a lot of clarity or information about the scope of these studies, which raises a lot of opportunity to argue about the ambiguity here.
- Lee Burgess: Finally, the age group calls for a rational basis review, and this time the burden will be on Pete to show that the regulation fails to meet this standard. Yes, we've already found the statute to be unconstitutional under procedural due process, substantive due process, and likely under equal protection for gender discrimination. Why do we have to argue all the way down to rational basis? Well, to show the graders what we know. If it's in the facts, they want us to talk about it, and they gave us an age range for that very reason. This will be a lower burden for the State to overcome. Is crime reduction among this age group a legitimate interest? Sure, it makes sense that a state would want to reduce a reported crime spike among young people. Is the Corps rationally related to this purpose? Unless Pete can show that the Corps is not having the intended impact of keeping this particular group of boys from contributing to the crime spike, the State has a fair chance of overcoming rational basis review. Remember, this is a very low standard, so it's less common for the court to find against the government on rational basis.
- Lee Burgess: And those are the steps for a Due Process Clause and Equal Protection Clause question. Remember to practice these structures plenty of times, because they are frequently tested issues with lots of sub-issues. You want to get them down quickly in order to hit all of your points. The sooner you can get on autopilot with these answer structures, the better. And it takes practice!
- Lee Burgess: If you enjoyed this episode of the Bar Exam 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@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can



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