Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2024-14

PRIVATE, SPECIAL, AND LOCAL LAWS: CONSTITUTIONAL RESTRICTIONS

Three provisions of the Wisconsin Constitution restrict the enactment of a law having limited applicability as to a person, place, or thing. The constitution refers to this type of law interchangeably as a private law, a special law, or a local law. A law of that type is distinguishable from a general law, which has uniform applicability throughout the state.

This information memorandum describes the circumstances under which a private, special, or local law may be enacted, explores whether such an enactment will be afforded a presumption of constitutionality if challenged, describes two tests that a court might use to resolve a constitutional challenge, and summarizes illustrative case law.

OVERVIEW

A law may be "private," "special," or "local" if it applies by its terms or by its operation only to a particular person, place, or thing. For example, a law requiring the construction of an at-grade railroad crossing at the intersection of "state trunk highway 13 and the Soo Line Railroad tracks located west of the village of Prentice in Price County" was a private law. [*Soo Line R.R. Co. v. Dep't of Transp.*, 101 Wis. 2d 64 (1981).]

The Wisconsin Constitution prohibits the enactment of some types of private, special, or local laws, but permits the enactment of other types if drafted in proper form. The constitution does not define the terms "private," "special," and "local." They are used mostly interchangeably in case law. For ease of reference, this information memorandum will use "private" when referring to any of the three.

For a private law to be acceptable, the constitution mandates that the Legislature enact it in the form of a single-subject bill. The bill must also have a title that identifies its subject matter. Thus, the constitution prevents the Legislature from including a provision having limited application within a broader piece of legislation, such as a budget bill. Furthermore, the constitution prohibits the enactment of a private law on certain topics, whether enacted separately or as part of a larger law.

Whether a private law is constitutional is ultimately a matter for judicial interpretation. The Legislature, however, might influence the constitutionality of a private law by the way it drafts the language and by the process it uses to consider and enact the law.

CONSTITUTIONAL LIMITATIONS

Wisconsin Constitution, Article IV, contains three sections relevant to the enactment of a private law.

SECTION 18

SECTION 18 requires that a private law, if not otherwise prohibited, may contain only one subject, which must be expressed in the title of that law. This section is mandatory, not directory, upon the Legislature and is not a mere technicality. Its main purpose is to prevent specialized items that serve the interests of a few from being "smuggled" through the Legislature within larger, general interest legislation. [*Milwaukee Cnty. v. Isenring*, 109 Wis. 9, 22-23 (1901).]

> **SECTION 18**. No private or local bill[1] which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

[Wis. Const. art. IV, s. 18.]

SECTION 31

SECTION 31 prohibits altogether the enactment of a private law on any of nine specified topics, regardless of the method or form of enactment.

> **SECTION 31**. The legislature is prohibited from enacting any special or private laws in the following cases:
>
> (1) For changing the names of persons, constituting one person the heir at law of another or granting any divorce.
>
> (2) For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands may be granted by congress.
>
> (3) For authorizing persons to keep ferries across streams at points wholly within this state.
>
> (4) For authorizing the sale or mortgage of real or personal property of minors or others under disability.
>
> (5) For locating or changing any county seat.
>
> (6) For assessment or collection of taxes or for extending the time for the collection thereof.
>
> (7) For granting corporate powers or privileges, except to cities.
>
> (8) For authorizing the apportionment of any part of the school fund.
>
> (9) For incorporating any city, town or village, or to amend the charter thereof.

[Wis. Const. art. IV, s. 31.]

---

[1] The word "bill" also means "law" in this section. See *Durkee v. Janesville*, 26 Wis. 697, 703 (1870).

SECTION 32

SECTION 32 authorizes the enactment of a general law on the nine topics prohibited by SECTION 31 if the law operates uniformly throughout the state, subject to reasonable classifications. The question here often centers on the reasonableness of a classification. Essentially, a court tries to determine whether a classification in the law is in fact a "sham" generality employed by the Legislature to conceal an impermissible private law. [*City of Brookfield v. Milwaukee Sewerage Dist.*, 144 Wis. 2d 896, 914, 921 (1988) ("*Brookfield*").]

> **SECTION 32**. The legislature may provide by general law for the treatment of any subject for which lawmaking is prohibited by section 31 of this article. Subject to reasonable classifications, such laws shall be uniform in their operation throughout the state.

[Wis. Const. art. IV, s. 32.]

THE PRESUMPTION OF CONSTITUTIONALITY

In General

When reviewing a law for compliance with the constitutional strictures on private laws, a court must decide the threshold question of whether to apply a presumption of constitutionality to the enactment.[2] This can affect the outcome of the case. If the presumption applies, the party challenging the law prevails only if it proves beyond a reasonable doubt that the law is unconstitutional. [See, e.g., *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 536-38 (1998).]

Whether the presumption applies will depend on the section of Article IV forming the basis of the challenge and sometimes also on the fashion in which the Legislature enacted the measure.

Application to Private Law Litigation

When a law is challenged as an impermissible private law on one of the nine prohibited topics specified in SECTION 31, a court will presume that the law is constitutional. [See, e.g., *Libertarian Party v. State*, 199 Wis. 2d 790 (1996).]

When a law is challenged as impermissible under SECTION 18 on the basis that it is a private law contained within a multi-subject, improperly titled bill, a court will usually begin without a presumption that such a law was constitutionally enacted.[3] This is because SECTION 18 tests whether the law-making *process* was constitutional and not whether the law in *substance* is constitutional. [*Brookfield*, 144 Wis. 2d at 912, n. 5.] In certain circumstances, however, a court may restore the presumption of constitutionality in this kind of challenge.

---

[2] On occasion, a court may decline to establish whether a presumption of constitutionality applies if its decision would be unaffected thereby. See, e.g., *Pace v. Oneida Cnty.*, 212 Wis. 2d 448, 451 (Ct. App. 1997), *rev. denied*, 212 Wis. 2d 690 (1997); *Sills v. Dep't of Admin.*, No. 2004AP496, unpublished slip op., n. 2 (Wis. Ct. App. May 26, 2005). Note that an unpublished opinion is binding only as to the particular case it addresses and generally does not serve as legal precedent or authority. [s. 809.23 (3), Stats.]

[3] There have been exceptions to this usual approach. See *Soo Line R.R. Co.*, 101 Wis. 2d at 76; *State v. LaPlant*, 204 Wis. 2d 412, 418-19 (Ct. App. 1996), *rev. denied*, 560 N.W. 2d 273 (1996). Interestingly, the court in *LaPlant* cited a case involving a challenge under SECTION 31, not under SECTION 18, as authority for applying the presumption.

Beginning with a 1992 Wisconsin Supreme Court decision in a SECTION 18 case, courts have applied a presumption of constitutionality if the party defending the law can show that the Legislature devoted sufficient attention to the issue during the law-making process. In essence, a court wants to know whether the Legislature "intelligently participated" in the process of enactment of the provision within a larger piece of legislation, or whether the narrow legislative item was "smuggled" past the Legislature as part of that larger legislation. In the words of the landmark ruling, a court should evaluate whether the Legislature "adequately considered or discussed" the legislative issue before it voted on it. [*Davis v. Grover,* 166 Wis. 2d 501, 520 (1992).]

When has the Legislature "Adequately Considered or Discussed" a Legislative Issue?

When deciding whether the Legislature adequately considered or discussed an allegedly private provision of law for purposes of whether to apply a presumption of constitutionality, a court will often review the legislative history of the provision for evidence of thoughtful consideration. A court tries to decipher whether all members of the Legislature had been alerted to the precise nature of the narrow provision before that provision was voted on as part of a larger, multi-subject bill.

For example, a court might view favorably the following circumstances:

- The provision was discussed at a committee hearing or was debated and amended in a committee executive session.[4]
- The provision was separately voted on by a house of the Legislature as a single-subject bill before the same language was added to a larger, multi-subject bill.[5]
- The provision had a large number of cosponsors or other legislator support, including a majority in each house of the Legislature.[6]
- The provision had a history of being introduced in previous sessions of the Legislature as a single-subject bill before eventual enactment within a multi-subject bill.[7]
- The larger legislative vehicle in which the provision rode was a natural or logical choice to carry the narrow provision.[8]

On the other hand, a court has viewed a lack of hearings or other individualized consideration as evidence of inadequate legislative attention to an allegedly private provision of law that is carried in a comprehensive, multi-subject legislative vehicle.[9] In addition, a court might not take into account matters external to the legislative process, such as press coverage of, or lobbying efforts on, a provision.[10]

---

[4] *Jackson v. Benson*, 218 Wis. 2d 835, 886 (1998).

[5] *Id.*

[6] *Lake Country Racquet & Ath. Club v. Morgan*, 2006 WI App 25 at ¶¶ 14-19.

[7] *Davis*, 166 Wis. 2d at 521-23.

[8] *Flynn*, 216 Wis. 2d at 537. The court said that the budget bill was a logical choice for a legislative vehicle because the provision also pertained to a fiscal matter (court system funding).

[9] *Oak Creek v. Dep't of Natural Resources*, 185 Wis. 2d 424, 438-39 (Ct. App. 1994). The court noted that the bill contained over 700 pages of legislation unrelated to the challenged provision and thus it was unlikely that the Legislature could have adequately focused on the provision.

[10] *Lake Country Racquet & Ath. Club*, 2006 WI App 25 at ¶¶ 12-13.

DETERMINING WHETHER A PROVISION IS PRIVATE

A provision challenged as an impermissible private law might be specific in its terms with regard to a person, place, or thing, or it might be nonspecific in that regard. For example, a provision might refer specifically to the "City of Milwaukee" or it might instead refer nonspecifically to "a city of the first class." Whether a provision is drafted specifically or nonspecifically will affect which of two tests a court will apply to determine whether the provision is private or general. When a provision is specific on its face, a court will apply a **two-part test**. When a provision is nonspecific on its face, a court will apply a **five-part test**.

Brewers Two-Part Test for Specific Provisions

If a provision is specific as to a person, place, or thing, a court will apply a test articulated by the Wisconsin Supreme Court in 1986. In that decision, *Milwaukee Brewers Baseball Club v. Wisconsin Department of Health and Social Services* ("*Brewers*"), the court established a two-part test to determine whether a specific provision is a private law and thus is subject to either constitutional restriction or outright prohibition. Under the *Brewers* two-part test, a specific provision is a private law unless these two elements are satisfied:

1. The general subject matter of the provision relates to a state responsibility of statewide dimension.

2. Enactment of the provision will have a direct and immediate effect on a specific statewide concern or interest.

[*Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Servs.*, 130 Wis. 2d 79, 115 (1986).]

Establishment of the *Brewers* Two-Part Test

In *Brewers*, the court examined a provision of law requiring the state to build a prison on 40 acres of land in the Menomonee Valley in Milwaukee County. Under the first part of the test, the court concluded that the correctional system was a matter of state responsibility. Under the second part of the test, the court concluded that building a prison at that one site would have a direct and immediate effect on the prison population statewide.

The court reached its conclusion even though the law specified the location of the prison with a "precision approaching a conveyancer's description." [*Id.* at 118.] The essential lesson of *Brewers* is that specificity itself does not make a provision private. One must examine the purpose and effect of the provision using a two-part test.

Part 1: "State Responsibility of Statewide Dimension"

Regarding the first part of the test, the *Brewers* court articulated that a matter is of statewide dimension or concern if the state itself has an interest, either as a proprietor or for the benefit of the general public. In such circumstances, even a provision of law limited in its application with regard to a person, place, or thing can be a general law where the subject matter is of statewide dimension as opposed to a purely local concern. As an example, the *Brewers* court cited an older decision upholding as a general law a provision regulating fishing in Lake Michigan but not in any other body of state water. [*Monka v. State Conservation Comm'n*, 202 Wis. 39 (1930).] Such a law was a matter of statewide concern even if it was implemented entirely in one locale. [*Brewers*, 130 Wis. 2d at 110.]

Part 2: "Direct and Immediate Effect on a Specific Statewide Concern"

Regarding the second part of the test, the *Brewers* court said that the word "specific" means that the state must have more than a generic legislative concern like public safety, health, welfare, morals, or security. [*Id.* at 115.]. As an example, the court noted that the state's general interest in traffic safety was not a specific statewide concern. Therefore, a law requiring a certain type of crossing where a state highway intersected railroad tracks at a specified location was a private law. [*Id.* at 111-15, discussing *Soo Line R.R. Co.,* 101 Wis. 2d 64.]

As for "direct and immediate effect," courts subsequent to the *Brewers* decision have viewed favorably a provision of law that appears likely to achieve its end in rapid and certain fashion, such as by making a funding lapse or a tax exemption effective upon enactment.

Application of the *Brewers* Two-Part Test

Most of the laws that have been challenged based on their specificity as to a named location or entity have passed the *Brewers* two-part test for a general law. The second part of the test has been decisive when a law has failed the test.

With regard to geographic reach, courts have found a statewide concern both when a law addressed entities located around the state and when a law addressed just one location but with broader effects. For instance, a law adding the YMCA and the YWCA to the list of charitable organizations that are exempt from property taxation was general because the YMCA and the YWCA have locations statewide. [*Lake Country Racquet & Ath. Club*, 2006 WI App 25.] A law appropriating funds to a named private entity for the operation and maintenance of a specified parcel of property in the City of Lake Geneva was nevertheless general because all residents of the state could visit the site and benefit from its historic preservation.[11] [*Sills*, No. 2004AP496.] Along those same lines, the Attorney General opined that restricting funds for additional lanes on a stretch of Interstate Highway 43 only in Milwaukee and Ozaukee Counties was a general law because that highway influences traffic and economic development in parts of the state far beyond those two counties.[12] [79 Op. Att'y Gen. 43 (1990).]

Courts have found statewide concern in laws addressing state funding or state agency functions. For example, a law lapsing money from a state Supreme Court appropriation account that had been set aside for an information system to electronically connect all courts across the state was a general law, as was one requiring the Department of Agriculture, Trade and Consumer Protection to conduct a study on a statewide housing issue. [*Flynn*, 216 Wis. 2d 521; *LaPlant*, 204 Wis. 2d 412.]

Courts have also recognized a statewide concern in laws addressing state employees. For example, the Legislature enacted a law allowing any assistant district attorney (ADA) in a county having a population over 500,000 to transfer retirement benefits into the statewide employee retirement system. This law was challenged on the basis that Milwaukee County was the only qualifying county.[13] The court acknowledged a statewide concern because an ADA is a state employee and the law created statewide uniformity among all ADAs. [*Ass'n of State Prosecutors*

---

[11] This provision qualified as having a "direct and immediate" effect even though the funds were contingent on the state receiving the property as a gift from private ownership.

[12] The Attorney General afforded the statute a presumption of constitutionality in his analysis even though his opinion predated the 1992 *Davis* decision.

[13] Interestingly, the court applied the *Brewers* two-part test (legislation specifying a locality by name) instead of the B*rookfield* five-part test (legislation nonspecifically identifying a locality by population or other characteristic), discussed later.

ex rel. Feiss v. Milwaukee Cnty., 189 Wis. 2d 291 (Ct. App. 1994), *rev'd on other grounds*, 199 Wis. 2d 549 (1996).] In a related vein, the court decided that a law providing funds for the construction of a parking ramp for use by state employees at an office building at a specific address in the City of Madison was a matter of statewide concern.[14] [*Shoreline Park Preservation v. Dep't of Admin.*, 195 Wis. 2d 750 (Ct. App. 1995).] The latter case is particularly notable because the court did not afford the law a presumption of constitutionality.

In a few legal challenges, however, the court has failed to see a statewide concern under the second part of the test. For instance, even though control of navigable waters is a state responsibility of statewide dimension under the first part of the test, the court held that a law exempting the City of Oak Creek from having to remove a nonconforming structure from Crawfish Creek was private. The court recognized a local effect on the budget of the city but no statewide effect. [*Oak Creek*, 185 Wis. 2d 424.] In another case, a court speculated that establishing a special rule of incorporation for the Town of Ledgeview that was different from the rule applicable to the other 1,200 towns across the state would be a matter of local concern, not statewide concern. [*State ex rel. Kuehne v. Burdette*, 2009 WI App 119, n. 4.]

Legislative Response to the *Brewers* Two-Part Test

The Legislature has occasionally incorporated language from the *Brewers* case into an enactment that is specific on its face as to a person, place, or thing, perhaps to bolster the chance that the law would pass the two-part test if challenged.[15] The effect of such legislative language on the application of the two-part test will remain unknown until such a law is challenged as an impermissible private law.

Brookfield Five-Part Test for Nonspecific Provisions

A provision of law that is nonspecific on its face as to a person, place, or thing may at first glance appear to be a general law (and thus not subject to constitutional restriction). If, however, a nonspecific provision has a limited **application** as to a person, place, or thing, it might draw scrutiny as a private law. A court may refer to this type of law as "classification legislation" because the law achieves a narrow application not by using names of persons, places, or things, but rather by describing classes to which the law applies. Recall that "reasonable classifications" are permitted by Wis. Const. art. IV, s. 32.

When faced with a challenge that a nonspecific provision is invalid because it was not enacted as a single-subject, properly titled bill, the *Brewers* two-part test discussed above is not used. Instead, a court will apply a five-part test articulated by the Wisconsin Supreme Court in 1988 in the *Brookfield* decision.

---

[14] This provision qualified as having a "direct and immediate" effect even though the funds were contingent on the city taking certain future action.

[15] See, e.g., s. 13.48 (36) (a), Stats. ["The legislature finds that supporting the Hmong people in their efforts to recognize their heritage and to realize the full advantages of citizenship in this state is a statewide responsibility of statewide dimension. [T]he legislature finds that it will have a direct and immediate effect on a matter of statewide concern for the state to facilitate the purchase or construction and operation of a Hmong cultural center."]

Establishment of the *Brookfield* Five-Part Test

In order for a law to remain general instead of private, the use of a classification in the law must meet each part of the following five-part[16] test:

1. The classification must be based on "substantial distinctions which make one class really different from another."

2. The classification must be germane to the purpose of the law (meaning that the use of classes bears some relationship to the reason for the law).

3. The classification must be open, such that other entities can join the class by meeting its criteria.

4. The law must apply equally to all members of the class.

5. The characteristics of a class should be so different from the characteristics of other classes to justify substantially different legislation.

[*Brookfield*, 144 Wis. 2d at 907-08.]

The law in question in *Brookfield* regulated the way a sewerage district that served a city of the first class assessed charges on outlying municipalities for capital costs. The law was challenged as private on the basis that it applied to only one sewerage district because the City of Milwaukee was the only first class city (meaning a city having a population of 150,000 or more and meeting certain other conditions). The court applied the first two parts of the test and decided that the law failed both.

First, the court said that there was not a substantial distinction between sewerage districts serving a first class city and other sewerage districts. All sewerage districts have similar financial needs. Second, the court said that defining the class of sewerage districts on the basis of size was not sufficiently related to the purpose of the law, which was to regulate the financing of capital costs.

Having failed the first two parts of the test, the provisions were stricken as unconstitutional private law because they were not enacted in a single-purpose, properly titled bill. A presumption of constitutionality was not applied in this case.

Application of the *Brookfield* Five-Part Test

Subsequent to the *Brookfield* decision, a few nonspecific classification laws enacted within larger pieces of legislation have been challenged as impermissible private laws. Each of them passed the *Brookfield* five-part test, regardless of whether the court applied a presumption of constitutionality.

---

[16] "Curative" legislation that retroactively validates a previously unauthorized action need comply only with the fourth part of the test to qualify as general. See *Madison Metro. Sewerage Dist. v. Stein*, 47 Wis. 2d 353, 364 (1970).

Even though a population-based law was determined to be a private law in the *Brookfield* decision, the courts have determined that other laws that have used population to form a classification were permissible general laws.

A law establishing a school choice program only in cities of the first class survived challenge even though the City of Milwaukee was the only first class city. The court felt that using population as a classification for an educational program was acceptable because large cities are substantially different from other cities with regard to educational challenges and opportunities. For instance, the court noted that the program was a trial of limited parameters. Thus, a first class city was a logical venue due to the unique abundance of private schools that could participate in an experiment aimed at improving student outcomes. [*Davis,* 166 Wis. 2d 501.]

Subsequent legislation expanded the school choice program to increase the number of eligible students from 1.5 percent to 15 percent of the public school population and to replace an annual reporting requirement with a one-time audit. Even then, the court ruled that it was still germane to use a first class city as a classification. The court stated that the program remained more or less experimental and a large city was the natural option for such an experiment based on its unique educational characteristics.[17] [*Jackson,* 218 Wis. 2d 835.]

In similar fashion, a law establishing a professional sports taxation district in any county with a population of more than 500,000 was upheld as a general law even though Milwaukee County was the only such county. Again, the court said that the class of large urban areas was uniquely distinct from other classes with regard to its ability to financially support professional sports. [*Libertarian Party*, 199 Wis. 2d at 807.]

In each of the three preceding cases, the class was open because any qualifying city or county could join the respective class, and each member of the class would be treated the same. In addition, the court began each case with a presumption that the law was constitutional.

Two laws that addressed classifications on a basis other than population also survived challenge.

The first case involved an existing legal restriction on building certain new, or rebuilding certain existing, boathouses. In 1995, the Legislature enacted a law that waived that restriction to allow rebuilding of a boathouse that had been destroyed by specified causes (wind, vandalism, or fire) on or after January 1, 1984. The 1995 law was challenged under the first two parts of the *Brookfield* test on the basis that: (1) the identified class of boathouses was not substantially different from other classes of boathouses; and (2) using the class was not germane to the purpose of the law. The court disagreed.

On the first part of the test, it said that boathouses destroyed more than a decade before enactment of the law were in a substantially different class than those destroyed more recently. The court assumed that the owner of an older such boathouse probably did not wish to rebuild given that so much time had elapsed since its destruction, but the same could not be said of an owner who only recently lost the boathouse.

On the second part of the test, the court said that allowing rebuilding of boathouses destroyed by some causes but not others was germane to the Legislature's overall goal of minimizing and eventually eliminating boathouses. [*Pace*, 212 Wis. 2d at 448.] The court left the presumption of constitutionality undetermined in this case.

The second case involved tax-exempt status. The law in question removed the tax exemption for any health maintenance organization (HMO) operated by a benevolent organization but not any

[17] The law was challenged under only the second part of the test (germaneness).

other type of HMO. The court decided that the law did not actually create a new classification but rather removed an existing classification from the law by treating each HMO in similar fashion upon enactment. Therefore, removing the tax exemption for one class of HMO was germane to the purpose of the law, which was to treat all HMOs the same. The court noted that the class was open because any new HMO, whether started by a benevolent organization or not, would automatically join the class of taxable HMOs. The court reached its conclusion even without affording the law a presumption of constitutionality. [*Group Health Coop. v. Wisconsin Dep't of Revenue*, 229 Wis. 2d 846 (Ct. App. 1999), *rev. denied*, 231 Wis. 2d 374 (1999).]

CONCLUSION

Courts have noted a recurring problem with determining whether an enactment of limited applicability as to a person, place, or thing violates the strictures on private laws in the Wisconsin Constitution. Landmark decisions in 1986, 1988, and 1992 attempted to articulate durable standards to guide future judicial analysis, but resolution of this issue will remain dependent on facts.

If the Legislature desires to enact a narrow provision that might qualify as "private" within the meaning of the constitution, it could enact the provision as a single-subject bill with a title that identifies the subject of the bill. Such a law would be constitutional, unless it addresses one of the nine subject areas for which all private laws are prohibited.

If the Legislature instead places a narrow provision within a larger piece of legislation, it should be cognizant of both the drafting of the item and the method of consideration of the item.

In drafting the item, if the provision is specific on its face as to a person, place, or thing, the Legislature might be able to frame the issue in terms of a state responsibility of statewide concern. If the provision is nonspecific on its face, the Legislature should ensure that any classifications used by the law are based on the standards of reasonableness identified by judicial decisions.

In considering the item during the legislative process, the Legislature might enhance the litigation position of the item by separately investigating, debating, voting, or directing public attention to the provision before it is voted on as part of the larger piece of legislation. Doing so might prompt a court to begin its analysis of the provision with a presumption that it is constitutional.

This information memorandum was prepared by Ethan Lauer, Senior Staff Attorney, on September 9, 2024.