Constitutional Highlights

From the Legislative Reference Bureau

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Wisconsin Constitution
Article I, Section 1
EQUAL PROTECTION CLAUSE

All people are born equally free…

History and purposes of this section

The equal protection clause of the Wisconsin Constitution requires that the state treat all people who are similarly situated similarly, but it does not oblige the state to treat all people identically.

The equal protection clause was adopted as part of the original 1848 constitution. The full language of article I, section 1, which contains the equal protection clause, is based on the Declaration of Independence:

> Article I, section 1: *All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.*
>
> Declaration of Independence: *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed…*

Interpretation of the equal protection clause, however, is linked to a different federal text, the 14th Amendment to the U.S. Constitution, ratified in 1868, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." After ratification of the 14th Amendment, the Wisconsin Supreme Court treated it as a duplication of article I, section 1, of the Wisconsin Constitution. "It is not conceived, however, that [the enactment of the 14th Amendment] by the nation placed any new limitations upon the legislature of this state, for, in the light of several decisions of this court, the very first paragraph of our declaration of rights has been held a substantially equivalent limitation."

Kellogg v. Currens, 111 Wis. 431, 434 (1901). As 14th Amendment jurisprudence grew, Wisconsin courts formally tied interpretation of the equal protection clause of the Wisconsin Constitution to federal interpretation of the equal protection clause in the 14th Amendment, labeling the Wisconsin equal protection clause the functional equivalent of the equal protection clause in the 14th Amendment. *Reginald D. v. State*, 193 Wis. 2d 299, 306 (1995). Wisconsin courts therefore apply the same analysis to evaluate whether a state law violates the equal protection clause of the Wisconsin Constitution that federal and state courts use to evaluate whether a law violates the 14th Amendment.

How courts interpret the section

Courts apply two different standards of review when determining whether a law violates the constitutional guarantee of equal protection of the laws. If a law affects a fundamental right, such as the right to vote or to free speech, or if a law classifies people on the basis of a suspect criterion, such as race, alienage, or gender, courts subject the law to heightened scrutiny. In all other cases, courts apply the rational basis test to determine whether a law violates the equal protection clause.

Rational Basis

Under the rational basis test, a law is constitutional "if the classification drawn by the statute is rationally related to a legitimate state interest." *Funk v. Wollin Silo & Equipment, Inc.*, 148 Wis. 2d 59, 69 (1989) (cites omitted). Differentiation in treatment, and even inequality of result, is permitted under the test as long as this condition is met. Or, stated in the negative, a law that classifies people is invalid under the rational basis test if the classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy. The rational basis test has two parts: first, a law must be designed to fulfill a legitimate state interest; and second, the means employed under the law must be rationally related to achieving that legitimate state interest.

A law reviewed under the rational basis test is presumed constitutional unless the person challenging the law proves otherwise. Courts are obligated to search for a rational basis to uphold a law even if that rational basis is not readily apparent. If the legislature does not specify a legitimate state interest for a law, either in the text of the law or in accompanying legislative history, the courts will attempt to supply a legitimate state interest and presume that the legislature's intent was to fulfill the interest identified by the courts. Further, courts recognize that there are multiple methods for achieving any particular interest and do not require that the legislature choose the best or most efficient means.

Since the rational basis test is general in its requirements, Wisconsin courts often use the following five-part test to provide further guidance in determining whether a classification passes the rational basis test (see *Omernik v. State*, 64 Wis. 2d 6, 19 (1974)):

1. A classification must be based on substantial distinctions.

2. A classification must be germane to the purpose of the law.

3. A classification may not be based on existing circumstances only.

4. The law must apply equally to each member of a class.

5. The characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation.

Heightened Scrutiny

If a law affects a fundamental right, courts apply heightened scrutiny to the law. A fundamental right is a right that is either explicitly or implicitly protected by the U.S. Constitution. Examples of fundamental rights include voting, free speech, procreation, access to courts, and freedom of travel. Courts will uphold a law that affects a fundamental right against an equal protection challenge only if the law promotes a compelling governmental interest and is narrowly tailored to achieve that interest. This level of review is often referred to as "strict scrutiny."

Similarly, if a law discriminates based on a suspect classification, the law is subject to heightened scrutiny. Recognized suspect classifications include race, alienage, national origin, and gender. A classification may be suspect for a number of reasons including that it is more likely than others to reflect deep-seated prejudice rather than legislative rationality; that it is irrelevant to any proper legislative goal; or that some groups have been historically relegated to such positions of political powerlessness as to command extraordinary protection from the majoritarian political process. See *Plyler v. Doe*, 457 U.S. 202 (1982). A suspect classification is generally one into which a person falls by accident of birth. The degree of heightened scrutiny depends upon the suspect classification. If a law discriminates on the basis of race, alienage, or national origin, the law is subject to strict scrutiny. However, if a law discriminates on the basis of gender or illegitimacy of birth, courts tend to apply "intermediate scrutiny," requiring, for example, that the classification be substantially related to a sufficiently important governmental interest.

Rational Basis in Practice

In practice, courts have upheld most legislation reviewed under the rational basis test. However, rational basis review is not merely a rubber stamp. In recent years, Wisconsin courts have overturned the following laws for violation of the equal protection clause under rational basis review:

- A law that provided different provisions for environmental reviews of a prison construction project sited at a particular location in Milwaukee than for prison projects sited elsewhere, thus affording persons different levels of environmental protection based on geographic location. See *Milwaukee Brewers v. DH&SS*, 130 Wis. 2d 79 (1986).

- A law that allowed persons who held both a retail and a wholesale liquor license before a specific date to keep both licenses, but limited any person who had not previously owned both types of licenses to either a retail license or a wholesale license, but not both. See *Wisconsin Wine & Spirits Institute v. Ley,* 141 Wis. 2d 958 (App. 1987).

- A law that permitted mental health institutions to forcibly administer psychotropic drugs to involuntarily committed patients without a showing that the committed patients were incompetent to refuse medication, but did not allow such forcible administration of drugs to persons detained prior to commitment without a showing of incompetence to refuse medication. See *Jones v. Gerhardstein,* 141 Wis. 2d 710 (1987).

- A law that limited the tort liability of certain persons involved in making improvements to real property, such as designers and construction workers, but did not limit liability for other persons, such as owners of the land to which improvements are made. See *Funk v. Wollin Silo & Equipment, Inc.*, 148 Wis. 2d 59 (1989).

Strategies for reconciling legislation with the section

Comply with the Omernik five-part test

Most legislation that raises an equal protection question will be reviewed under the rational basis test. Therefore, if a bill creates a classification, it is useful to question whether the classification complies with the five *Omernik* requirements discussed above.

Eliminate or restructure the classification

If a bill creates a classification that might be found to violate the equal protection clause and the classification is incidental to the requester's purpose, perhaps the bill can be modified to eliminate or restructure the classification. For example, if the requester wishes to provide a benefit to or apply a regulation to a certain class of people and the requester's intent is not compromised by providing the benefit or applying the regulation to a broader set of people, the classification can be eliminated or restructured.

Statement of legislative intent

If a bill creates a classification and it is reasonably probable that the classification will be found to violate the equal protection clause, it may be helpful to include a statement of legislative intent in the bill. A statement of legislative intent is language that expresses the legislature's intent, purpose, or findings in the text of a bill. The statement of intent can express the governmental interest that the legislature intends to address and explain why the legislature chooses particular means to achieve that governmental interest.

The Legislative Reference Bureau attorneys would be happy to help you reconcile your proposal with the equal protection clause in article I, section 1.

Prepared by Robin Ryan, Legislative Attorney.

LRB
P.O. Box 2037
Madison, WI 53701

100 North Hamilton Street
Madison, WI 53701-2037
608/266-3561
www.legis.state.wi.us/lrb/