

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 47

ment in some jurisdictions is conclusive of that fact, and the amendment thereby becomes *eo instanti* a part of the constitution.⁴ Elsewhere, the rule is established that a proposed amendment to the constitution goes into operation on the canvass of the vote, and not at the time it is cast.⁵

In a case where the provisions of a new state constitution will become effective upon the affirmative vote and sanction of the electorate, if the schedule accompanying the constitution and election expressly requires the polls to be kept open until sunset, the people cannot be regarded as having adopted the new constitution or amendments nor can the constitution or amendments be considered as in force and effect until the time for the closing of the polls on election day has elapsed.⁶

§ 47. — Schedules and continuity.

Whenever a state makes changes in its fundamental law or adopts a new constitution, there is no break in the continuity of the government, and in theory the new constitution is an amendment of the one formerly existing, since a new constitution does not create a new state.⁷ Accordingly, the principle is recognized that there is a presumption that the people, in adopting a constitution, are familiar with the previous and existing laws.⁸ In order that no inconvenience may result by reason of changes arising out of the adoption of a new constitution, it is the custom to adopt a schedule which will set forth temporary regulations covering the interim before the new machinery of government is thoroughly established.⁹ The only office of a schedule is to provide for the transition from the old to the new government and to obviate confusion which would otherwise arise during the transition period, and this fact may be material in determining the construction and effect to be given to provisions contained in schedules.¹⁰

It seems that provisions in a schedule or ordinance attached to a state constitution may be abrogated under certain circumstances in a manner different from that required for making changes in the constitution itself. Thus, it has been held that an ordinance appended to a state constitution is revocable either entirely or pro tanto by agreement between the state government and the United States, and that the powers therein disclaimed, on assent of the constituted authorities of the United States and of the state, can be resumed and immediately exercised by the state authorities.¹¹

2. EFFECT UPON EXISTING LAWS

§ 48. Prospective or retrospective effect, generally.

The presumption that statutory enactments are not to be considered retrospective in their operation unless the intention to make them so is clearly apparent.

4. *Worman v Hagan*, 78 Md 152, 27 A 616. 146; *State ex rel. Dunning v Giles*, 2 Pinney (Wis) 166, 1 Chand 112.

5. *State v Kyle*, 166 Mo 287, 65 SW 763.

6. *Louisville v Portsmouth Sav. Bank*, 104 US 469, 26 L ed 775.

7. *State v Lynch*, 88 Ohio St 71, 102 NE 670.

8. *Barry v Truax*, 13 ND 131, 99 NW 769.

9. *Mann v Osborne*, 128 Okla 32, 261 P

10. *Mann v Osborne*, 128 Okla 32, 261 P 146; *Willis v Kalmbach*, 109 Va 475, 64 SE 342.

One function of a schedule is to set forth the dates when the various provisions of the new constitution are to take effect. *Hockett v State Liquor Licensing Bd.* 91 Ohio St 176, 110 NE 485.

11. *Duke v Cahawba Nav. Co.* 10 Ala 82.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 49

parent from their terms¹² has application as well to constitutional provisions.¹³ Thus, the general rule is that prospective effect alone is given to provisions of state constitutions.¹⁴ The ultimate determinative factor is, however, the intent of the framers.¹⁵

Although, as a general rule, the provisions of a new constitution take effect immediately and become operative on pending litigation¹⁶ and on criminal proceedings in reference to offenses committed prior to its adoption,¹⁷ a constitutional amendment may be prospective and therefore not applicable to pending cases.¹⁸

§ 49. Effect upon statutes and common law.¹⁹

When a new constitution is established, it is customary to insert a provision that all statutes in force and not inconsistent with the new constitution shall continue until amended or repealed by the legislature,²⁰ although it is

12. See *STATUTES* (1st ed § 478).

13. *San Antonio v San Antonio Pub. Serv. Co.* 255 US 547, 65 L ed 777, 41 S Ct 428; *Shreveport v Cole*, 129 US 36, 32 L ed 589, 9 S Ct 210; *Calhoun County v Galbraith*, 99 US 214, 25 L ed 410; *Phoenix Assur. Co. v Fire Dept.* 117 Ala 631, 23 So. 843; *American Federation of Labor v American Sash & Door Co.* 67 Ariz 20, 189 P2d 912, affd 335 US 538, 93 L ed 222, 69 P2d 258, 260, 6 ALR2d 481; *Barber Asphalt Paving Co. v Jurgens*, 170 Cal 273, 149 P 560, 9 ALR 597; *Wilcox v Edwards*, 162 Cal 455, 123 P 276; *Strickler v Colorado Springs*, 16 Colo 61, 26 P 313; *Swank v Tydal*, 226 Ind 204, 78 NE2d 535; *Paulsen v Reinecke*, 181 La 917, 160 So 629, 97 ALR 1184; *State v Spence & Goldstein* (La App) 6 So 2d 102; *State ex rel. Stutsman v Light*, 68 ND 513, 281 NW 777; *State ex rel. Linde v Hall*, 35 ND 34, 159 NW 281; *Hupp v Hock-Hocking Oil & Natural Gas Co.* 88 Ohio 61, 101 NE 1053; *Hall v Dunn*, 52 Or 475, 97 P 811; *Evans v Phillips*, 117 Pa 226, 11 A 630; *Kirby v Western U. Tel. Co.* 4 SD 105, 55 NW 759, contrary conclusion reached on reh 7 SD 623, 65 NW 37; *Jungk v Holbrook*, 15 Utah 198, 49 P 305; *Swift & Co. v Newport News*, 105 Va 108, 52 SE 821.

14. *Robinson v Indiana & A. Lumber & Mfg. Co.* 128 Ark 550, 194 SW 870, 3 ALR 1426 (applying rule to constitutional provision granting exemption from taxation); *Ingersoll v Nassau Electric R. Co.* 157 NY 453, 52 NE 545 (applying rule to constitutional provision prohibiting private and local bills and special legislation); *Cutting v Taylor*, 3 SD 11, 51 NW 949 (applying rule to constitutional provision prescribing form and method of passing appropriation bills).

A constitutional prohibition against the reelection of public officers applies only to future elections and does not affect those holding office at the time the new constitution took effect. *State v Giles*, 2 Pinney (Wis) 166. Compare *Worman v Hagan*, 78 Md 152, 27 A 616 (holding that a constitutional

amendment prescribing the terms of office may be applied to existing officeholders).

15. To determine whether a constitutional amendment operates prospectively, the courts must ascertain as nearly as possible the intention of those who enacted the amendment. *State ex rel. Stutsman v Light*, 68 ND 513, 281 NW 777.

16. *Cassard v Tracy*, 52 La Ann 835, 27 So 368; *State ex rel. Northwestern Mut. L. Ins. Co. v Bland*, 354 Mo 391, 189 SW2d 542, 161 ALR 423 (holding that so long as a judgment remains subject to review, the rights of the parties are not so fixed by it as to render inapplicable a subsequently effective constitutional provision relating to procedure on review; and that a constitutional grant of power to the supreme court of the state to determine on the merits a case which comes to it by certiorari operates upon cases pending on certiorari when such grant was made).

17. *State v Richardson*, 47 SC 166, 25 SE 220.

18. *Lem Woon v Oregon*, 229 US 586, 57 L ed 1340, 33 S Ct 783; *State v Ross*, 55 Or 450, 104 P 596, 106 P 1022.

Where the judgment of a circuit court is rendered prior to the date of the taking of effect of a new constitution, but the petition in error to the supreme court is not filed until after that time, the case is a "pending case" within a saving provision of the constitution that "all pending cases and proceedings in the Circuit Court shall proceed to judgment and be determined by the respective Courts of Appeals, and the Supreme Court, as now provided by law." *Hupp v Hock-Hocking Oil & Natural Gas Co.* 88 Ohio St 61, 101 NE 1053.

19. As to the effect of an amendment upon existing constitutional provisions, see § 68, infra.

20. *Keokuk & W. R. Co. v Missouri*, 152 US 301, 38 L ed 457, 14 S Ct 592; *Norton v Brownsville*, 129 US 479, 32 L ed 780, 9 S Ct

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 49

generally recognized that such laws remain in force without an express provision to that effect.¹ Thus, rights existing under a statute in force when a constitutional amendment is adopted are not affected by it unless it contains some provision which expressly abrogates such pre-existing rights.² The principle is, it seems, fully applicable to constitutional provisions which, instead of being restrictive, permit greater freedom of action.³

It is also the general rule that a statute existing at the adoption of a constitution cannot be upheld if it is opposed to the plain terms of the constitution.⁴ If there is a conflict between a statute and such a constitutional provision, the former must give way,⁵ since all statutes which are actually inconsistent with a new constitution are repealed by implication, unless they consist with a new constitution within the meaning of the federal provision prohibiting the impairment of the obligation of contracts.⁶ Similarly, an amendment of the constitution must be held to amend the existing statute law to agree with

331; Callaway County v Foster, 93 US 567, 23 L ed 911; Leser v Lowenstein, 129 Md 244, 98 A 712; Hockett v State Liquor Licensing Bd. 91 Ohio St 176, 110 NE 485; Daniel v Daniel, 116 Wash 82, 198 P 728, 27 ALR 177.

An ordinance which is in effect when a new state constitution is adopted, although inconsistent therewith, may be within the saving clause of such constitution, even though no action may have been taken under the ordinance until afterward. Sears v Akron, 246 US 242, 62 L ed 688, 38 S Ct 245.

1. Vahlberg v Keaton, 51 Ark 534, 11 SW 878; Leser v Lowenstein, 129 Md 244, 98 A 712; Norfolk S. R. Co. v McArtan, 185 NC 201, 116 SE 731; State ex rel. Toledo v Lynch, 88 Ohio St 71, 102 NE 670.

The constitution of a state, restricting the power of the legislature to authorize municipal subscriptions, is not retroactive so as to have any controlling application to laws in existence when the constitution was adopted. Scotland County Ct v United States, 140 US 41, 35 L ed 351, 11 S Ct 697; Scotland County v Hill, 132 US 107, 33 L ed 261, 10 S Ct 26; Dallas County v McKenzie, 110 US 686, 28 L ed 285, 4 S Ct 184; Jonesboro v Cairo & St. L. R. Co. 110 US 192, 28 L ed 116, 4 S Ct 67; Louisville v Portsmouth Sav. Bank, 104 US 469, 26 L ed 775. And see Annotation: 152 ALR 501.

Although a new constitution may contain prohibitions as to special legislation, it will not be construed as effecting a repeal of, or making inoperative, special laws passed before its adoption. Barber Asphalt Paving Co. v Jurgens, 170 Cal 273, 149 P 560, 9 ALR 597; Smith v Simmons, 129 Ky 93, 110 SW 336; Leser v Lowenstein, 129 Md 244, 98 A 712.

Adoption of a constitutional amendment cannot in any way be helpful in the interpretation of the meaning of legislation enacted prior thereto. Ursuline Academy v Board of Tax Appeals, 141 Ohio St 563, 26 Ohio Ops 152, 49 NE2d 674.

2. Barber Asphalt Paving Co. v Jurgens, 170 Cal 273, 149 P 560, 9 ALR 597; Ex parte Dalton, 73 Idaho 542, 255 P2d 333.

3. A constitutional provision which empowers the voters of every city to enact and amend their municipal charter does not, of itself, alter existing charters. Leser v Lowenstein, 129 Md 244, 98 A 712; Hall v Dunn, 52 Or 475, 97 P 811.

4. Veterans' Welfare Bd. v Riley, 189 Cal 159, 208 P 678, 22 ALR 1531; Jelms v Jelms, 155 Ohio St 226, 44 Ohio Ops 246, 98 NE2d 401, 22 ALR2d 1300.

5. State v Wilson, 162 SC 413, 161 SE 104, 81 ALR 580.

6. Veterans' Welfare Bd. v Riley, 189 Cal 159, 208 P 678, 22 ALR 1531; Washingtonian Home v Chicago, 157 Ill 414, 41 NE 893; Fesler v Brayton, 145 Ind 71, 44 NE 37; Leser v Lowenstein, 129 Md 244, 98 A 712; Wren v Dixon, 40 Nev 170, 161 P 722, 167 P 324; Pennsylvania R. Co. v Bowers, 124 Pa 183, 16 A 836; Nelson v Haywood County, 87 Tenn 781, 11 SW 885; State ex rel. Dunning v Giles, 2 Pinney (Wis) 166, 1 Chand 112.

An act inconsistent with a new constitution of the state becomes void. United States v Villato (CC) 2 Dall 370, 1 L ed 419, F Cas No 16622.

A statute inconsistent with a subsequently adopted constitution is annulled by the latter's adoption. Criswell v Montana C. R. Co. 18 Mont 167, 44 P 525.

As to the obligation of contracts generally, see §§ 434 et seq., infra.

Statutes may be nullified, insofar as future operation is concerned, by the constitution as well as by statute, since the constitution is the pe-direct, positive, and limiting voice of the people and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants. Wren v Dixon, 40 Nev 170, 161 P 722, 167 P 324.

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 50

such an amendment.⁷ The exception must be noted, however, that where the constitutional provision is not self-executing,⁸ in some instances an inconsistent state statute is not thereby superseded.⁹ If it is self-executing, it necessarily annuls all inconsistent acts of the legislature passed prior to its adoption.¹⁰

A new constitution, by removing a limitation on the scope of an existing statute, may have the effect of extending its operation without restricting it.¹¹ On the other hand, the authorities are not in agreement as to whether amendment of a constitution, or repeal of one of its provisions, may have the effect of validating an existing statute which, prior to the amendment or repeal, was in conflict with the constitution.¹²

To the extent to which constitutional provisions are in conflict with the common law, whether pertaining to rights or remedies, the common-law principles must be regarded as superseded.¹³

B. SUPREMACY OF CONSTITUTIONS; SUPREME LAWS

1. FEDERAL CONSTITUTION AND LAWS

§ 50. Supremacy of Constitution, generally.

The Constitution of the United States, together with laws made in pursuance thereof¹⁴ and treaties made under the authority of the United States,¹⁵ are, by the express declaration of Article 6, § 2, the supreme law of the land.¹⁶

7. Tombstone v Macia, 30 Ariz 218, 245 P 677, 46 ALR 828; McKnight v Decatur, 200 Ga 611, 37 SE2d 915; Board of County Comrs. v State Board of Equalization (Okla) 363 P2d 242.

A constitutional amendment exempting from taxation and local assessment property used for burial of the dead is presumed to have altered, and not merely to have declared, the previously existing law. Hollywood Cemetery Asso. v Powell, 210 Cal 121, 291 P 397, 71 ALR 310.

8. As to distinctions between provisions which are and are not self-executing, see §§ 93-96, infra.

9. Leser v Lowenstein, 129 Md 244, 98 A 712; Hawley v Anderson, 99 Or 191, 190 P 1097, 195 P 358; Newport News v Woodward, 104 Va 58, 51 SE 193.

10. Neal v Delaware, 103 US 370, 26 L ed 567; Monaghan v Lewis, 5 Penn (Del) 218, 59 A 948; Wren v Dixon, 40 Mo 170, 161 P 722, 167 P 324.

11. People v Roberts, 148 NY 360, 42 NE 1082.

12. § 180, infra.

13. See COMMON LAW.

14. As to supremacy of federal statutes, see § 53, infra.

15. As to supremacy of treaties, see TREATIES (1st ed §§ 17 et seq.).

16. Panhandle Oil Co. v Mississippi, 277 US 218, 72 L ed 857, 48 S Ct 451, 56 ALR 583;

Hawke v Smith, 253 US 221, 64 L ed 871, 40 S Ct 495, 10 ALR 1504; Buchanan v Warley, 245 US 60, 62 L ed 149, 38 S Ct 16; House v Mayes, 219 US 270, 55 L ed 213, 31 S Ct 234; Southern R. Co. v Green, 216 US 400, 54 L ed 536, 30 S Ct 287; Rison v Farr, 24 Ark 161; People v Western U. Teleg. Co. 70 Colo 90, 198 P 146, 15 ALR 326; Gray v Winthrop, 115 Fla 721, 156 So 270, 94 ALR 804; Featherstone v Norman, 170 Ga 370, 153 SE 58, 70 ALR 449; Iowa Motor Vehicle Asso. v Railroad Comrs. 207 Iowa 461, 221 NW 364, 75 ALR 1, affd without op in 280 US 529, 74 L ed 595, 50 S Ct 151; Atkinson v Woodmansee, 68 Kan 71, 74 P 640; Straight Creek Bus v Saylor, 299 Ky 309, 185 SW2d 253, app dismd 325 US 835, 89 L ed 1962, 65 S Ct 1201; Louisville & N. R. Co. v Falls City Ice & Beverage Co. 249 Ky 807, 61 SW2d 639, 91 ALR 509; Commonwealth v International Harvester Co. 131 Ky 551, 115 SW 703; State v Old Tavern Farm, 133 Me 468, 180 A 473, 101 ALR 810; State ex rel. Tate v Sevier, 333 Mo 662, 62 SW2d 895, 87 ALR 1315, cert den 290 US 679, 78 L ed 586, 54 S Ct 102; State v Warner, 165 Mo 399, 65 SW 584; State v Cudahy Packing Co. 33 Mont 179, 82 P 833; Dow v Norris, 4 NH 16; Bott v Wurts, 63 NJL 289, 43 A 744; State v Williams, 146 NC 618, 61 SE 61; Homestead Cases, 22 Gratt (Va) 266.

The interpretation of the Fourteenth Amendment enunciated by the Supreme Court of the United States in Brown v Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR2d 1180 (holding that the amendment forbids states to use their governmental powers to bar children on racial grounds from attending public schools) is the supreme law of the land, and Article 6 of the Federal Con-

§ 50

The Federal Constitution is binding on all officers and departments of both the federal¹⁷ and state governments,¹⁸ including every court (whether it derives its authority from a state or from the United States),¹⁹ individual members of the legislature,²⁰ and the whole people of the United States, governing and restraining their acts and conduct, whether exercised by their representatives in the Federal Congress or by their representatives in state conventions and state constitutions.¹ Every part of the Constitution is as binding on the Con-

stitution makes it of binding effect on the states "any Thing in the Constitution or Laws of any State to the contrary notwithstanding," every state legislator and executive by oaths taken pursuant to Article 6, clause 3, to support the Federal Constitution. *Cooper v Aaron*, 358 US 1, 3 L ed 2d 5, 78 S Ct 1401.

17. *Pointexter v Greenhow*, 114 US 270, 29 L ed 185, 5 S Ct 903, 962; *Dodge v Woolsey*, 18 How (US) 331, 15 L ed 401; *Travelers Ins. Co. v Marshall*, 124 Tex 43, 76 SW2d 1007, 96 ALR 802.

18. *Cary v Curtis*, 3 How (US) 236, 11 L ed 576; *Rison v Farr*, 24 Ark 161; *Travelers' Ins. Co. v Marshall*, 124 Tex 43, 76 SW2d 1007, 96 ALR 802; *Homestead Cases*, 22 Gratt (Va) 266.

Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. *Gomillion v Lightfoot*, 364 US 339, 5 L ed 2d 110, 81 S Ct 123.

Every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments, United States v Raines, 362 US 17, 4 L ed 2d 524, 80 S Ct 319.

No state legislator or executive or judicial officer can war against the Federal Constitution without violating his oath, taken under Article 6, clause 3 thereof, to support it; if the legislatures of the several states may, at will, annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. *Cooper v Aaron*, 358 US 1, 3 L ed 2d 5, 78 S Ct 1401.

"The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee v Davis*, 100 US 257, 25 L ed 648.

The status, as the supreme law of the land, of an interpretation of the Fourteenth Amendment by the United States Supreme Court, may not be annulled under the doctrine of "interposition" on the theory that laws and decisions in the area reserved for the states by the Tenth Amendment are by definition

unconstitutional, and hence are not governed by the supremacy clause. *Bush v Orleans Parish School Board* (DC La) 188 F Supp 916, aff'd (in per curiam opinion) 365 US 569, 5 L ed 2d 806, 81 S Ct 754.

19. *Cook v Moffat*, 5 How (US) 295, 12 L ed 159; *Farmers' & M. Bank v Smith*, 6 Wheat (US) 131, 5 L ed 224; *People v Western Union Teles. Co.* 70 Colo 90, 198 P 146, 15 ALR 326.

The Federal Constitution is the supreme law of the land, and upon the state courts, equally with the federal courts, rests the obligation to guard and enforce every right secured by such Constitution. *Smith v O'Grady*, 312 US 329, 85 L ed 859, 61 S Ct 572; *Mooney v Holohan*, 294 US 103, 79 L ed 791, 55 S Ct 340, 98 ALR 406, reh den 294 US 732, 79 L ed 1261, 55 S Ct 511.

Equity cannot arbitrarily grant relief in the face of the Constitution of the United States and the laws thereof. *Federal Land Bank v Wilmarth*, 218 Iowa 339, 252 NW 507, 94 ALR 1338.

Law and court-made rules of expediency must not be placed above the Constitution. *State v Arregui*, 44 Idaho 43, 254 P 788, 52 ALR 463.

20. *State v Cudahy Packing Co.* 33 Mont 179, 82 P 833.

1. *Dodge v Woolsey*, 18 How (US) 331, 15 L ed 401; *Homestead Cases*, 22 Gratt (Va) 266.

The Federal Constitution is the supreme law of the land and all its applicable provisions are binding upon all within the territory of the United States. *Southern R. Co. v Greene*, 216 US 400, 54 L ed 536, 30 S Ct 287.

The Constitution and laws of the United States are the supreme law of the land and to them every citizen of every state owes obedience, whether in his individual or official capacity. *Ex parte Siebold*, 100 US 371, 25 L ed 717.

The Constitution is the mandate of a sovereign people to its servants and representatives which no one of them has a right to ignore or disregard. *John F. Jelke Co. v Emery*, 193 Wis 311, 214 NW 369, 53 ALR 463.

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *L. N. Dantzier Lumber Co. v Texas & P. R. Co.* 119 Miss 328, 80 So 770, 4 ALR 1669.

gress as on the people,² and acts of Congress which are not consistent with its provisions are invalid.³

No public policy of a state can be allowed to override the positive guaranties of the Federal Constitution.⁴

§ 51. — Effect of emergency.

It is sometimes argued that the existence of an emergency allows the existence and operation of powers, national or state, which violate the inhibitions of the Federal Constitution. The rule is quite otherwise. No emergency justifies the violation of any of the provisions of the United States Constitution. An emergency, however, while it cannot create power, increase granted power, or remove or diminish the restrictions imposed upon power granted or reserved, may furnish the occasion for the exercise of power already in existence, but not exercised except during an emergency.⁵

§ 52. — Supremacy as to states in rebellion and under martial law.

As to the status of the constitutions and government of the southern states during the period of the Civil War, it is now recognized that at no time were these states out of the pale of the Federal Union and that their rights under the Federal Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same as theretofore.⁶ The state governments did not cease to exist, and their legislation in the exercise of such powers as were theirs under the Federal Constitution

2. *Scranton v Wheeler*, 179 US 141, 45 L ed 126, 21 S Ct 48; *Sinking Fund Cases*, 99 US 700, 25 L ed 496; *Gunn v Barry*, 15 Wall (US) 610, 21 L ed 212; *Nashville v Cooper*, 6 Wall (US) 247, 18 L ed 851; *State v Williams*, 146 NC 618, 61 SE 61; *Homestead Cases*, 22 Gratt (Va) 266.

3. *United States v Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914; *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758; *United States v Germaine*, 99 US 508, 25 L ed 482; *Worcester v Georgia*, 6 Pet (US) 512, 8 L ed 483; *Marbury v Madison*, 1 Cranch (US) 137, 2 L ed 60; *State v Williams*, 146 NC 618, 61 SE 61.

The Constitution of the United States is the supreme law of the land to which all statutes must conform. *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758.

The Federal Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down. *United States v Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

Statutes enacted by Congress and treaties made by the President and the Senate must yield to the paramount and supreme law of the Constitution. *United States v Wong Kim Ark*, 169 US 649, 42 L ed 890, 18 S Ct 456.

4. *Hill v Woodward*, 100 Miss 879, 57 So 294; *State ex rel. Cleveringa v Klein*, 63 ND

514, 249 NW 118, 86 ALR 1523; *Kintz v Harriger*, 99 Ohio St 240, 124 NE 168, 12 ALR 1240.

See also 16 AM JUR 2d, CONFLICT OF LAWS § 7.

5. *Veix v Sixth Ward Bldg. & L. Asso.* 310 US 32, 84 L ed 1061, 60 S Ct 792; *Home Bldg. & L. Asso. v Blaisdell*, 290 US 398, 78 L ed 413, 54 S Ct 231, 88 ALR 1481.

Annotation: 86 ALR 1539, s. 88 ALR 1519, 96 ALR 312, 96 ALR 826 (comment discussion of governmental powers, both national and state, which are exercised during peacetime emergency).

The Constitution was adopted in a period of grave emergency and its grants of power to the federal government and its limitations of the power of the states were determined in the light of emergency, and are not altered by emergency. *First Trust Co. v Smith*, 134 Neb 84, 277 NW 762.

As to emergency police legislation, see § 270, infra.

6. *Gunn v Barry*, 15 Wall (US) 610, 21 L ed 212; *Hall v Hall*, 43 Ala 488; *Homestead Cases*, 22 Gratt (Va) 266.

Even a state of war and the declaration of secession by the people cannot suspend the Constitution or remove its protection. *Houston County v Martin*, 232 Ala 511, 169 So 13.

Generally, as to continuation of constitutional guaranties during war, see WAR (1st ed § 20).

§ 52

was valid;⁷ but all such acts on their part as were in hostility to the United States or in disregard of or in conflict with its Constitution, or were intended directly or indirectly to aid the rebellion, were absolute nullities and could not be invoked in support of any rights or for the protection of any persons acting under them.⁸

The Federal Constitution has not inhibited military government in the theater of warfare in which the military power of the federal government is engaged, and therefore such government apparently should not be regarded as a violation of the Federal Constitution. Public danger may warrant the substitution of executive process for judicial process, and a state may use its military power to put down an armed insurrection too strong to be controlled by the civil courts, and the operation of the writ of habeas corpus should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. The fact that a military occupation of a territory, in a state of peace and order, differs radically from the prosecution of a war in the same territory, is well established. Martial law is operative only in such portions of the country as are actually in a state of war and continues only until pacification. Ordinarily, the entire country is in a state of peace, and on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, and it is powerless to try citizens for offenses or to sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But in all the undisturbed, peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside.⁹

7. *Horn v Lockhart*, 17 Wall (US) 570, 21 L ed 637; *Luter v Hunter*, 30 Tex 689.

8. *Hall v Hall*, 43 Ala 488; *Ray v Thompson*, 43 Ala 434; *Houston v Deloach*, 43 Ala 364; *Thomas v Taylor*, 42 Miss 651; *Luter v Hunter*, 30 Tex 689.

Generally, as to inferiority of state laws to the Federal Constitution and federal laws passed in pursuance thereof, see §§ 50 et seq., *infra*.

The mandates of the Federal Constitution continued in full force and effect in the southern states during the period of the secession; these states during that period and before their representation was restored had no more power to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or to do anything else prohibited by the Constitution of the United States, than they had before the rebellion began or after the restoration of their normal position in the Union. *White v Hart*, 13 Wall (US) 646, 20 L ed 685.

An ordinance of a convention of a seceding state to raise means for defense of the state was void as in direct aid of those seeking to destroy the Union. *State v McGinty*, 41 Miss 433; *Luter v Hunter*, 30 Tex 689.

9. *Luther v Borden*, 7 How (US) 1, 12 L ed 581; *Ex parte Jones*, 71 W Va 567, 77 SE 1029.

10. *United States v L. Cohen Grocery Co.* 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045; *Ex parte Milligan*, 4 Wall (US) 2, 18 L ed 281 (leading case); *Ex parte Jones*, 71 W Va 567, 77 SE 1029; *State v Brown*, 71 W Va 519, 77 SE 243.

War does not of itself suspend at once and everywhere constitutional guaranties of liberty and property. Martial law cannot be resorted to in that part of the country where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, even though the government may be prosecuting a war for the suppression of a rebellion in other parts of the country; and if a person is arrested in such a loyal community and deprived of his liberty by order of the President of the United States as Commander in Chief and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful and the parties making it will be liable to an action therefor. *Johnson v Jones*, 44 Ill 142.

§ 54

§ 53. Supremacy of acts of Congress.

Since the Constitution of the United States provides (Article 6, § 2) that the laws made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding,¹¹ an act of Congress constitutionally passed within the limits of its authority becomes a part of the supreme law of the land in connection with the Federal Constitution itself.¹² Federal statutes operate essentially as a part of the law of each state and are as binding on its authorities and people as are its own local constitution and laws¹³ in the same manner as if they were actually embodied in the Federal Constitution.¹⁴

§ 54. Inferiority of state constitutions and laws; as respects Federal Constitution.¹⁵

A state law, even if passed in the exercise of the state's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution.¹⁶ No act of a state legislature which is repugnant to the Constitution of the United States can be of any validity.¹⁷

11. *Northern Securities Co. v United States*, 193 US 197, 48 L ed 679, 24 S Ct 436; *M'Culloch v Maryland*, 4 Wheat (US) 316, 4 L ed 579.

12. *Bunch v Cole*, 263 US 250, 68 L ed 290, 44 S Ct 101; *Flint v Stone Tracy Co.* 220 US 107, 55 L ed 389, 31 S Ct 342; *House v United States*, 219 US 270, 55 L ed 213, 31 S Ct 234; *Northern Securities Co. v United States*, 193 US 197, 48 L ed 679, 24 S Ct 436; *Van Brocklin v Tennessee (Van Brocklin v Anderson)* 117 US 151, 29 L ed 845, 6 S Ct 670; *California State Board of Equalization v Gox* (CA9 Cal) 191 F2d 726, 27 ALR2d 1211, 117 US 151, 29 L ed 845, 6 S Ct 670; *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560.

13. *Farmers' & M. Nat. Bank v Dearing*, 91 US 29, 23 L ed 196.

The several states are subject to the supremacy of the laws made in pursuance of the Federal Constitution. *Northern Securities Co. v United States*, 193 US 197, 48 L ed 679, 24 S Ct 436; *Pointdexter v Greenhow*, 114 US 270, 29 L ed 185, 5 S Ct 903, 962; *Gibbons v Ogden*, 9 Wheat (US) 1, 6 L ed 23; *M'Culloch v Maryland*, 4 Wheat (US) 316, 4 L ed 579; *Exchange Nat. Bank v United States*, 147 Wash 176, 265 P 722, 62 ALR 139, affd 279 US 80, 73 L ed 621, 49 S Ct 317.

14. *Northern Securities Co. v United States*, 193 US 197, 48 L ed 679, 24 S Ct 436.

15. Generally, as to distribution of power between state and federal governments, see §§ 198 et seq., *infra*.

16. *Second Employers' Liability Cases*, 223 US 1, 56 L ed 327, 32 S Ct 169; *Northern Securities Co. v United States*, 193 US 197, 48 L ed 679, 24 S Ct 436; *Connolly v Union Sewer Pipe Co.* 184 US 540, 46 L ed 679, 22 S Ct 431; *Kidd v Pearson*, 128 US 1, 32 L ed 346, 9 S Ct 6; *Van Brocklin v Tennessee (Van Brocklin v Anderson)* 117 US 151, 29 L ed

845, 6 S Ct 670; *Gibbons v Ogden*, 9 Wheat (US) 1, 6 L ed 23; *Iowa Motor Vehicle Assn. v Railroad Comrs.* 207 Iowa 461, 221 NW 364, 75 ALR 1, affd 280 US 529, 74 L ed 595, 50 S Ct 151; *Atkinson v Woodmansee*, 68 Kan 71, 74 P 640; *Glover v Minneapolis Bldg. Trades Council*, 215 Minn 533, 10 NW 2d 481, 147 ALR 1071; *Baily v Gentry*, 1 Mo 164.

As to validity of state police measures which are in conflict with the Federal Constitution, see §§ 284 et seq., *infra*.

17. *Chae Chan Ping v United States*, 130 US 581, 32 L ed 1068, 9 S Ct 623; *Worcester v Georgia*, 6 Pet (US) 515, 8 L ed 483; *Cohen v Virginia*, 6 Wheat (US) 264, 5 L ed 257; *State v Williams*, 146 NC 618, 61 SE 61; *State v Miller*, 87 Ohio St 12, 99 NE 1078; *Homestead Cases*, 22 Gratt (Va) 266.

Every act of a state legislature repugnant to the Constitution is absolutely void. *Vanhorne v Dorrance (CC)* 2 Dall 304, 1 L ed 391, F Cas No 16857.

Legislative acts of a state which are hostile in their purpose or mode of enforcement to the authority of the national government or which impair the rights of citizens under the Constitution are invalid and void. *Taylor v Thomas*, 22 Wall (US) 479, 22 L ed 789.

In determining whether a local ordinance imposes such unreasonable conditions upon the use or enjoyment of property as to violate due process, a state court, if it finds the ordinance invalid under the state constitution, is free to hold it unconstitutional regardless of the Fourteenth Amendment to the Federal Constitution, but if it finds the enactment invalid under the amendment, although valid under the state constitution, it must nullify the ordinance. *East Coast Lumber Terminal, Inc. v Babylon (CA2 NY)* 174 F2d 106, 8 ALR2d 1219.

As to the invalidity of state laws conflicting with the Federal Constitution, where such

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 55

Even a state constitution is of no effect where it is in conflict with the Constitution of the United States,¹⁸ and provisions in state constitutions have often been held void as inconsistent with federal constitutional provisions.¹⁹ While every word of a state constitution should be given its appropriate meaning and effect, yet the meaning and legal effect of words in a state constitution may be restrained or modified by applicable controlling commands or limitations contained in the Federal Constitution,²⁰ and within their proper sphere of operation the applicable provisions of the Federal Constitution are to be regarded as the dominant authority in the interpretation and enforcement of provisions of a state constitution.²¹

Congress has no power by authorization or ratification to give effect to a state law or constitution not consistent with the Constitution of the United States.²² But the fact that over a long period of time it has been tacitly assumed that no conflict existed between a state constitutional provision and a provision of the Federal Constitution is a factor indicative of the validity of the state constitutional provision.²³

§ 55. — As respects acts of Congress.

Since laws enacted in pursuance of the Federal Constitution are given supreme status by the terms of the Constitution itself,²⁴ it follows that such federal laws control the constitutions and laws of the states, and cannot be controlled by them.²⁵ State laws are always subordinate, and federal laws, enacted pursuant to the Federal Constitution, are always paramount.²⁶

Laws were enacted during time of rebellion, see § 52, supra.

18. *Second Employers' Liability Cases*, 223 US 1, 56 L ed 327, 32 S Ct 169; *Neal v. Delaware*, 103 US 370, 26 L ed 567; *Cohen v. Ware*, 103 US 370, 26 L ed 567; *Cohen v. Ware*, 103 US 370, 26 L ed 567; *Wheat (US)* 316, 4 L ed 579; *A. F. of L. v. Wheat (DC Fla)* 60 F Supp 1010, rev'd on other grounds 327 US 582, 90 L ed 873, 67 S Ct 67; *Ariz* 20, 189 P2d 912, aff'd 335 US 538, 93 L ed 222, 69 S Ct 258; *6 ALR2d 481*; *People v. Western U. Tel. Co.* 70 Colo 90, 198 P 146, 15 ALR 326; *Gray v. Winthrop*, 115 Fla 721, 156 So 270, 94 ALR 804; *Atkinson v. Woodmansee*, 68 Kan 71, 74 P 649; *Miller v. Johnson*, 92 Ky 389, 18 SW 322; *Household Finance Corp. v. Shaffner*, 336 Mo 808, 203 SW2d 734; *Wren v. Dixon*, 40 Nev 170, 161 P 722, 167 P 324; *Homestead Cases*, 22 Gratt (Va) 266.

The protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted, whether by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, such as an ordinance of a municipality or an order of a commission. *Standard Computing Scale Co. v. Farrell*, 249 US 571, 63 L ed 780, 39 S Ct 380.

A state must recognize as binding an amendment to the Constitution of the United States and enforce it within its own limits, without reference to any inconsistent provisions in its own constitution or statutes. *Neal v. Delaware*, 103 US 370, 26 L ed 567.

A state constitutional amendment which

conflicts with federal constitutional guarantees is invalid. See § 54, supra.

19. *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 US 132, 53 L ed 441, 29 S Ct 246 (state constitutional provision involved taking of property without just compensation); *Re Tuthill*, 163 NY 133, 57 NE 303 (state constitutional provision involved taking of property without just compensation); *State v. Bates*, 14 Utah 293, 47 P 78, over'd on another point in *Thompson v. Utah*, 170 US 343, 42 L ed 1061, 18 S Ct 620 (state constitutional provision was invalid as ex post facto).

For similar holdings regarding state constitutional provisions impairing the obligation of contracts, see § 450, infra.

20. The Nineteenth (woman suffrage) Amendment to the Constitution of the United States automatically strikes from state constitutions or statutes the word "male," wherever it is used in defining electors. Annotation: 71 ALR 1332.

1. *Gray v. Winthrop*, 115 Fla 721, 156 So 270, 94 ALR 804.

2. *Gunn v. Barry*, 15 Wall (US) 610, 21 L ed 212.

3. *Way v. Barney*, 116 Minn 285, 133 NW 801.

4. § 53, supra.

5. *Panhandle Oil Co. v. Mississippi*, 277 US 218, 72 L ed 857, 48 S Ct 451, 56 ALR 583; *Buchanan v. Warley*, 245 US 60, 62 L ed 149, 38 S Ct 16; *Second Employers' Liability Cases*, 223 US 1, 56 L ed 327, 32 S Ct 169;

[16 Am Jur 2d]

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 56

suant to the Constitution, are always paramount;²⁷ hence, a state law is void if contrary to a valid act of Congress.²⁸ And Congress may, with the support of the supremacy clause, declare state regulations inapplicable to federal government activity.²⁹

The United States Supreme Court has said that since the powers exercisable by the United States may not be exercised throughout the nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state.³⁰

2. STATE CONSTITUTIONS

§ 56. Generally.

A written constitution is not only the direct and basic expression of the sovereign will, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it.³¹ No function of government can be discharged in disregard of or in opposition to the fundamental law.³² The state constitution is the mandate

McCulloch v. Maryland, 4 Wheat (US) 316, 4 L ed 579; *United States v. Miller (CA8)* 28 F2d 846, 61 ALR 405; *Featherstone v. Norman*, 170 Ga 370, 153 SE 58, 70 ALR 449; *Straight Creek Bus v. Saylor*, 299 Ky 309, 185 SW2d 253, app. dismd 325 US 835, 89 L ed 1962, 65 S Ct 1201; *Illinois C. R. Co. v. Doherty*, 153 Ky 363, 155 SW 1119; *White v. Southern R. Co.* 208 SC 319, 38 SE2d 111, 165 ALR 988.

A state may not discriminate against rights accruing under federal laws. *Republic Pictures Corp. v. Kappler (CA8 Iowa)* 151 F2d 543, 162 ALR 228, aff'd 327 US 757, 90 L ed 991, 66 S Ct 523, reh den 327 US 817, 90 L ed 1040, 66 S Ct 804.

A state constitution can no more detract from the force of federal law than can a state statute. *Wall v. Norfolk & W. R. Co.* 52 W Va 485, 44 SE 294.

A state constitution, like a state statute, must fall if it is in conflict with any provisions of the federal statutes which were enacted within the scope of the power conferred upon Congress by the Federal Constitution. *A. F. of L. v. Watson (DC Fla)* 60 F Supp 1010, rev'd on other grounds 327 US 582, 90 L ed 873, 67 S Ct 761.

State constitutional amendments are inferior to federal laws. See § 28, supra.

6. *Florida v. Mellon*, 273 US 12, 71 L ed 511, 47 S Ct 265; *Gelston v. Hoyt*, 3 Wheat (US) 246, 4 L ed 381; *Re Neagle (CC)* 14 Sawy 232, 39 F 833; *Southern R. Co. v. Harrison*, 119 Ala 539, 24 So 552; *McPherson v. Blacker*, 92 Mich 377, 51 NW 469, aff'd 146 US 1, 36 L ed 869, 13 S Ct 3; *Fields v. Multnomah County*, 64 Or 117, 128 P 1045; *Ex parte Young*, 36 Or 247, 59 P 707; *Loughin v. McCaulley*, 186 Pa 517, 40 A 1020; *Gilliland v. Southern R. Co.* 85 SC 26, 67 SE 20.

7. *Kelly v. Washington*, 302 US 1, 82 L ed 3, 58 S Ct 87; *Bunch v. Cole*, 263 US 250, 68

L ed 290, 44 S Ct 101; *Savage v. Jones*, 225 US 501, 56 L ed 1182, 32 S Ct 715; *Re Rahrer*, 140 US 545, 35 L ed 572, 11 S Ct 865; *Kidd v. Pearson*, 128 US 1, 32 L ed 346, 9 S Ct 6; *Sinnot v. Davenport*, 22 How (US) 227, 16 L ed 243; *Re Neagle (CC)* 14 Sawy 232, 39 F 833; *Illinois C. R. Co. v. Doherty*, 153 Ky 363, 155 SW 1119; *Hanson v. Union Pacific R. Co.* 160 Neb 669, 71 NW2d 526, rev'd on other grounds 351 US 225, 100 L ed 1112, 76 S Ct 714, motion den 351 US 979, 100 L ed 1494, 76 S Ct 1014, reh den 352 US 859, 1 L ed 2d 69, 79 S Ct 22; *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560.

When there is a collision between an action of a state under its police power and an act of Congress, the state action must give way by virtue of the supremacy clause. *Morris v. Jones*, 329 US 545, 91 L ed 488, 67 S Ct 451, 168 ALR 656, reh den 330 US 854, 91 L ed 1296, 67 S Ct 858.

8. *Penn Dairies v. Milk Control Com.* 318 US 261, 87 L ed 748, 63 S Ct 617.

9. *Mayo v. United States*, 319 US 441, 87 L ed 1504, 63 S Ct 1137, 147 ALR 761, reh den 320 US 810, 88 L ed 489, 64 S Ct 27. And see §§ 204 et seq., infra.

10. *State ex rel. Crenshaw v. Joseph*, 175 Ala 579, 57 So 942; *Schmitt v. F. W. Cook Brewing Co.* 187 Ind 623, 120 NE 19, 3 ALR 270; *Wren v. Dixon*, 40 Nev 170, 161 P 722, 167 P 324; *Wright v. Hart*, 182 NY 330, 75 NE 404; *Collins v. Martin*, 290 Pa 388, 139 A 122, 55 ALR 311; *Travelers' Ins. Co. v. Marshall*, 124 Tex 45, 76 SW2d 1007, 96 ALR 802; *State ex rel. Lemon v. Langlie*, 45 Wash 2d 82, 273 P2d 464.

11. *Collins v. Martin*, 290 Pa 388, 139 A 122, 55 ALR 311; *State ex rel. Lemon v. Langlie*, 45 Wash 2d 82, 273 P2d 464.

A state constitution is the fundamental,

§ 56

of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates,¹² and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.¹³

The constitution of each state, so far as it is consistent with the provisions of the Federal Constitution,¹⁴ is the fundamental law of the state and a part of its supreme law,¹⁵ and acts passed by the legislature to act in subordination to the state constitution,¹⁶ for with reference to the subjects upon which the

basic, and substantive law of the state. *Ran-kin v Love*, 125 Mont 184, 232 P2d 998.

12. *State ex rel. Lemon v Langlie*, 45 Wash 2d 82, 273 P2d 464; *John F. Jelke Co. v Emery*, 193 Wis 311, 214 NW 369, 53 ALR 463.

All of the people of the state are bound by state constitutional limitations and all provisions of the land. *State v Garden City*, 74 Idaho 513, 265 P2d 328.

The constitution of the state is a higher authority than any act or law of any officer or body assuming to act under it, and in case of conflict the constitution must govern the act or law. *Johnson v Duke*, 180 Md 434, 24 A2d 304.

A mandate of a state constitution is supreme. *O'Bannon v Gustafson*, 130 Mont 402, 303 P2d 938.

The constitution of a state is its paramount law, being a self-imposed restraint upon the people of the state in the exercise of their governmental sovereign power, either by themselves through the initiative, or by their agents, the legislature. *Sloat v Board of Examiners*, 274 NY 367, 9 NE2d 12, 112 ALR 660.

13. *Travelers' Ins. Co. v Marshall*, 124 Tex 45, 76 SW2d 1007, 96 ALR 802; *State ex rel. Lemon v Langlie*, 45 Wash 2d 82, 273 P2d 464; *Puget Sound Power & Light Co. v Cow-litz County*, 38 Wash 2d 907, 234 P2d 506, overrd on other grounds *Air Base Housing, Inc. v Spokane County*, 56 Wash 2d 642, 354 P2d 903.

The branches of the state government derive their existence from the state constitution, though all of them must exercise their power and authority under it, and solely and strictly in accordance with the will of its people as expressed in it. *Harbert v Harrison County Court*, 129 W Va 54, 39 SE2d 177.

14. As to the inferiority of a state constitution to the Federal Constitution and federal statutes passed in pursuance thereof, see §§ 54, 55, supra.

15. *Harbert v Harrison County Court*, 129 W Va 54, 39 SE2d 177; *Bower v Big Horn Canal Assn*, 77 Wyo 80, 307 P2d 593.

16. *East St. Louis v Amy*, 120 US 600, 30 L ed 798, 7 S Ct 739; *Banks v State*, 207 Ala 179, 93 So 293, 24 ALR 1359, cert den 260 US 736, 67 L ed 488, 43 S Ct 96; *Commonwealth v International Harvester Co.* 131 Ky 551, 115 SW 703; *Re Election Supers.* 114 Mass 247; *State ex rel. Putnam v Holm*, 172 Minn 162, 215 NW 200, 54 ALR 333; *Chicago, B. & Q. R. Co. v Gildersleeve*, 219 Mo 170, 118 SW 86; *State v Tooker*, 15 Mont 8, 37 P 840; *Wright v Hart*, 182 NY 330, 75 NE 404; *State v Emery*, 224 NC 581, 31 SE2d 858, 157 ALR 441; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875; *Jones v Williams*, 121 Tex 94, 45 SW2d 130, 79 ALR 983; *State v Theriault*, 70 Vt 617, 41 A 1030; *Commonwealth v National F. Ins. Co.* 161 Va 737, 172 SE 448.

The doctrine of a higher law than the constitution has no place in American jurisprudence. *State v Peel Splint Coal Co.* 36 W Va 802, 15 SE 1000.

Every state law must conform in the first place to the Constitution of the United States, and then to the subordinate constitution of the particular state; and if it infringes upon the provisions of either, it is so far void. *Houston v Moore*, 5 Wheat (US) 1, 5 L ed 19.

Economic necessity cannot justify a disregard of cardinal constitutional guarantees. *Riley v Carter*, 165 Okla 262, 25 P2d 666, 88 ALR 1018.

An act which the state constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation except for such prohibition. *Wood v Hamaguchi*, 207 Cal 79, 277 P 113, 63 ALR 861; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875; *State v Froehlick*, 115 Wis 32, 91 NW 115.

Disobedience or evasion of a constitutional mandate may not be tolerated, even though such disobedience may, at least temporarily, promote in some respects the best interests of the public. *Sloat v Board of Examiners*, 274 NY 367, 9 NE2d 12, 112 ALR 660.

17. *Montana v Rice*, 204 US 291, 51 L ed 490, 27 S Ct 281; *Scown v Czarniecki*, 264 Ill 305, 106 NE 276; *Pitman v Drabelle*, 267 Mo 78, 183 SW 1055; *Wren v Dixon*, 40 Nev 170, 161 P 722, 167 P 324; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875.

constitution assumes to speak, its declarations¹⁸ and necessary implications¹⁹ are conclusive upon the legislature. Thus, constitutional provisions prevent the enactment of any law which extinguishes or limits the powers conferred by the constitution.²⁰ And a constitutional limitation which in itself is valid and not in conflict with the Federal Constitution cannot be made invalid by any act of the legislature.²¹

A state constitution is equally binding on the political subdivisions²² and courts²³ of the state, and on every officer and every citizen. Any attempt to do that which is prescribed in any manner other than that prescribed or to do that which is prohibited is repugnant to that supreme and paramount law and is invalid.²⁴

The principle of the supremacy of a state constitution has been applied to the fundamental law of territories.²⁵

§ 57. Effect of emergency.

The principles already stated with reference to the exercise of powers during emergency and the relation thereto of the provisions of the United States Constitution²⁶ are equally applicable to the provisions, inhibitions, and guaranties of the various state constitutions.²⁷

18. *State ex rel. Du Fresno v Leslie*, 100 Mont 449, 50 P2d 959, 101 ALR 1329.

The adoption of a constitutional amendment providing for the adoption and promulgation of a criminal code does not authorize the adoption, as amendments to such code, of provisions at variance with the constitution. *State v Lange*, 168 La 958, 123 So 639, 67 ALR 1447.

19. Limitations on legislative action may be by implication. For example, where a constitution prescribes the qualifications of electors, the legislature cannot require additional qualifications. See *ELECTIONS* (1st ed § 51).

20. *State ex rel. Du Fresno v Leslie*, 100 Mont 449, 50 P2d 959, 101 ALR 1329.

1. *Beveridge v Lewis*, 137 Cal 619, 67 P 1040, 70 P 1083.

2. Thus, county bonds, though issued under authority of a statute, are null and void if prohibited by the state constitution. *Wilkes County v Call*, 123 NC 308, 31 SE 481; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875.

Local laws enacted by a city must be consistent with state constitution. *Evans v Berry*, 262 NY 61, 186 NE 203, 89 ALR 387.

If the state constitution establishes the procedure for amending city charters, the method specified is exclusive and controlling. *Uhl v Collins*, 217 Cal 1, 17 P2d 99, 85 ALR 1370.

3. *Hunter v Colfax Consol. Coal Co.* 175 Iowa 245, 154 NW 1037, 157 NW 145; *Byrne v Maryland Realty Co.* 129 Md 202, 98 A 547; *Chicago, B. & Q. R. Co. v Gildersleeve*, 219 Mo 170, 118 SW 86; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875; *Commonwealth v National F. Ins. Co.* 161 Va 737, 172 SE 448.

Judicial decisions, however numerous, are

subject to correction by the constitution itself. *State v Bunte*, 256 Mo 227, 165 SW 340.

Law and court-made rules of expediency must not be placed above the state constitution. *State v Arregui*, 44 Idaho 43, 254 P 788, 52 ALR 463.

A judge has no more right to disregard and violate the constitution than a criminal has to violate the law. *People ex rel. Sammons v Snow*, 340 Ill 464, 173 NE 8, 72 ALR 798.

4. *Norwalk Street R. Co.'s Appeal*, 69 Conn 576, 37 A 1080, 38 A 708; *O'Bannon v Gustafson*, 130 Mont 402, 303 P2d 938; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875; *Commonwealth v National F. Ins. Co.* 161 Va 737, 172 SE 448.

5. An act of the territorial legislature inconsistent with the general history of our jurisprudence and with the organic act of the territory is void. *Ferris v Higley*, 20 Wall (US) 375, 22 L ed 383.

6. § 51, supra.

7. *Mobile v Rouse*, 233 Ala 622, 173 So 266, 111 ALR 349.

"We likewise wish to disclaim any view that the Constitution of this state is in abeyance because the nation is at war; or that the Constitution is inadequate to serve the state at such a time, or that the exigency justifies or has called forth any canon of construction not applicable in a season of 'profoundest peace.' Whatever is legally done by any public agency at any time must be done either with the sanction or without the inhibition of the Constitution; for, like the national charter, it is a law for rules and people, equally in war and peace, and . . . no doctrine involving more pernicious consequences was ever invented by the wit of man than that any

During the Civil War the constitutions of states which had seceded prevailed and the judgments and decrees of the courts of such states, rendered during the war, were valid and binding.⁹

V. CONSTRUCTION OF CONSTITUTIONS

A. IN GENERAL

§ 58. Generally; necessity of construction.

The construction and interpretation of the provisions of the federal and state constitutions involve some of the most important problems in the field of constitutional law. As a matter of fact, every constitutional question depends for its ultimate solution upon the construction of constitutions, whether it relates to powers or limitations directly pertaining to a constitution itself, or to the constitutionality of various legislative acts and the conduct and powers of the various officers of the departments of government. The final test applied in all constitutional questions is whether the act done or legislation conceived is permissible within the limits of the constitutions, and this always involves in a final analysis the meaning of the constitutions.

A constitution should be construed with reference to well-recognized and fundamental principles lying back of all constitutions, and it is to be regarded as fundamental law to which all other laws must yield.¹⁰

In line with the rule that the determination of the constitutionality of legislation is for the courts,¹¹ it is held that although those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the constitution in some instances, the construction of the constitution is, generally, the peculiar province of the courts, and where a court of last resort has construed a constitutional provision, such construction is binding on all departments of government, including the legislature.¹²

It is to be observed that it is not in every case involving a constitutional provision that "construction" of the provision (at least as the word "construction" is ordinarily used) is required. A constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads;¹³ in such a case no construction is permissible,¹⁴ and there is no excuse for interpolation or addition.¹⁵ In other words, the courts are not at liberty to search

of its provisions can be suspended, without its authority for any reason." State v. Stewart, 54 Mont 504, 171 P 755.

Annotation: 86 ALR 1539, s. 88 ALR 1519, 96 ALR 312, 96 ALR 826 (comment discussion of governmental powers, both national and state, which are exercised during peacetime emergency).

8. Houston County v. Martin, 232 Ala 511, 169 So 13.

9. State ex rel. Dalton v. Dearing (Mo) 263 SW2d 381.

10. § 104, infra.

11. State ex rel. Threl v. Board of Comrs. 188 Okla 184, 107 P2d 542.

12. Adams v. Bolin, 74 Ariz 269, 247 P2d 617, 33 ALR2d 1102; Cooke v. Iverson, 108

for its meaning beyond the instrument,¹⁶ nor are they at liberty, by a resort to the refinements of legal learning, to restrict an obvious meaning.¹⁷ Language which is plain and easily understood should be looked to without extrinsic aid for the meaning intended,¹⁷ and it is only where a constitutional provision is not clear that resort must be had to construction.¹⁸ As otherwise stated, that which the words of a constitutional provision declare is its meaning cannot be added to or taken away from by the court or legislature,¹⁹ or by any other department of government.²⁰

The principles stated above with regard to the necessity of construction of constitutional provisions are important ones. Indeed, each rule of construction applicable to constitutions²¹ is to be read as subject to the qualification that it may be applied only in a situation in which construction of the constitution is permissible.

§ 59. Applicability of rules of statutory construction.

As will be readily seen from an examination of the following sections of this article, questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all

75 L ed 640, 51 S Ct 220, 71 ALR 1381; Sandelin v. Collins, 1 Cal 2d 147, 33 P2d 1009, 93 ALR 956; Platte Valley Pub. Power & Irrig. Dist. v. Lincoln County, 144 Neb 584, 14 NW2d 202, 155 ALR 412.

If constitutional language is clear and unambiguous, interpretation by the courts is improper; but if the language is unclear and ambiguous, judicial interpretation is not only proper but is an essential responsibility of the courts. State ex rel. Swan v. Jones, 47 Wash 2d 710, 289 P2d 982.

If a constitutional provision is clear in its terms and the intention of the electorate is clearly embraced in the language of the provision itself, the court must apply and not interpret the provision. State ex rel. Trent v. Sims, 138 W Va 244, 77 SE2d 122.

15. Maxwell v. Dow, 176 US 581, 44 L ed 597, 20 S Ct 448, 494; Lake County v. Rollins, 130 US 662, 32 L ed 1060, 9 S Ct 651; Griffin v. Vandegriff, 205 Ga 288, 53 SE2d 345; People v. Carroll, 3 NY2d 636, 171 NYS2d 812, 148 NE2d 875.

The intent of the framers and adopters is to be found in the instrument itself, and where the text of the provision is not ambiguous the courts are not at liberty to search for its meaning beyond the instrument. Lattin v. Cordell, 197 Okla 369, 172 P2d 397.

And see § 70, infra.

16. State ex rel. Simpson v. Mankato, 117 Minn 458, 136 NW 264.

Where the meaning of the constitution is clear and unambiguous, there can be no resort to construction to attribute to the founders a purpose or intent not manifest in its letter. Norris v. Baltimore, 172 Md 667, 192 A 531.

Where the words of a constitution are unambiguous and in their commonly received sense lead to a reasonable conclusion, it should be read according to the natural and

most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation. State ex rel. Torryson v. Grey, 21 Nev 370, 32 P 190.

17. Jacobson v. Massachusetts, 197 US 11, 49 L ed 643, 25 S Ct 350; Laird v. Sims, 16 Ariz 521, 147 P 738.

While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words, and neither practice nor extrinsic circumstances can control its clear language. Sturges v. Crowninshield, 4 Wheat (US) 122, 4 L ed 529.

There is no room for construction of a constitution outside of the words themselves, if they are unambiguous, and the rules as to the authority of contemporaneous exposition are unimportant in such cases. State ex rel. Weiss v. Dist. Bd. 76 Wis 177, 44 NW 967.

In Button v. Drake, 302 Ky 517, 195 SW2d 66, 167 ALR 1046, the court held that the term "property" in a constitutional provision that "all property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value" is not of such doubtful meaning as to justify a resort to contemporaneous construction in determining its meaning.

18. E. B. Jones Motor Co. v. Industrial Com., Div. of Employment Secur. (Mo) 298 SW2d 407, app trans (Mo App) 305 SW2d 889.

19. State ex rel. Childs v. Sutton, 63 Minn 147, 65 NW 262.

20. Plain and unambiguous constitutional provisions cannot be varied by legislative, executive, or departmental construction. State ex rel. Hudson v. Carter, 167 Okla 32, 27 P2d 617, 91 ALR 1497.

1. §§ 60 et seq., infra.

written instruments, particularly statutes, although because of their fundamental dignity and weight and because of the manner in which they are adopted, constitutions are subject in their interpretation to certain modifications of these well-known doctrines.¹ Consequently, in the determination of constitutional questions, the same rules of interpretation may be resorted to as with other laws, inasmuch as the duty imposed upon the judiciary to disavow the spirit and intention of the lawgivers or the true meaning of the instrument is not less imperative than in the case of statutes.² However, external aids or arbitrary rules applied to the construction of a constitution are of uncertain value and should be used with hesitation and circumspection.³ A good statement of the governing general rule is that the constitution is subject to the same general rules of construction as are other laws, due regard being had to the broader objects and scope of the constitution as a charter of popular government.⁴

B. RULES OF CONSTRUCTION, GENERALLY

1. IN GENERAL

§ 60. Uniformity.

Constitutions do not change with the varying tides of public opinion and desire.⁵ The will of the people therein recorded is the same inflexible law until changed by their own deliberative action.⁶ Thus, a cardinal rule in dealing with constitutions is that they should receive a consistent and uniform

2. The subject, the context, and the intention of the body inserting a word in the Federal Constitution are all to be considered in determining its construction. *M'Culloch v. Maryland*, 4 Wheat (US) 316, 4 L ed 579.

Clauses of the Constitution which involve a conflict of governmental powers must be considered with reference to the literal meaning of the words, their connection with other words, and the general object to be accomplished. *Brown v. Maryland*, 12 Wheat (US) 419, 6 L ed 678.

Generally, as to rules of construction, see §§ 60 et seq., *infra*.

3. *Badger v. Hoidale* (CA8) 88 F2d 208, 109 ALR 798; *De Jarnette v. Hospital Authority of Albany*, 195 Ga 189, 23 SE2d 716; *Thority of Albany*, 195 Ga 189, 23 SE2d 716; *Kirkpatrick v. King*, 228 Ind 236, 91 NE2d 785; *Davis v. Synhorst* (DC Iowa) 225 F Supp 689; *State ex rel. Kemp v. Baton Rouge*, 215 La 315, 40 So 2d 477; *State v. Joseph*, 143 La 428, 78 So 663; *State ex rel. Du Fresno v. Leslie*, 100 Mont 449, 50 P2d 959, 101 ALR 1329; *Perry v. Stancil*, 237 NC 442, 75 SE2d 512; *Egbert v. Dunseith*, 74 ND 1, 24 NW2d 907, 168 ALR 621.

The Constitution and laws of the United States are construed like other instruments granting power or property. *Rhode Island v. Massachusetts*, 12 Pet (US) 657, 9 L ed 1233.

4. *Gaiser v. Buck*, 203 Ind 9, 179 NE 1, 82 ALR 1348.

5. *State ex rel. Dalton v. Dearing* (Mo) 263 SW2d 381.

Generally speaking, the principles of construction applicable to statutes are applicable also to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn. *Egbert v. Dunseith*, 74 ND 1, 24 NW2d 907, 168 ALR 621.

Annotation: 168 ALR 628.

6. *State ex rel. Lemon v. Langlie*, 45 Wash 2d 82, 273 P2d 464.

7. *Scott v. Sandford* (US) 19 How 393, 15 L ed 691; *McPherson v. Secretary of State*, 92 Mich 377, 52 NW 469; *Flaska v. State*, 51 NM 13, 177 P2d 174; *State ex rel. Clithero v. Showalter*, 159 Wash 519, 293 P 1000, app dismd 284 US 573, 76 L ed 498, 52 S Ct 15; *State ex rel. Banker v. Clausen*, 142 Wash 450, 253 P 805.

The constitution is a written instrument and its meaning does not change, and that which it meant when adopted it means now; those things which are within its grants of power, as the grants were understood when made, are still within them, and those things not then within them remain still excluded. *Zangerle v. Cleveland*, 145 Ohio St 347, 30 Ohio Ops 567, 61 NE2d 720, overrd on other grounds *Cleveland v. Board of Tax Appeals*, 167 Ohio St 263, 4 Ohio Ops 2d 309, 147 NE 2d 663.

The meaning of the constitution is fixed when the constitution is adopted and is not different at any subsequent time when a court has occasion to pass upon it. *Wimberly v. Deacon*, 195 Okla 561, 144 P2d 447; *Rasmussen v. Baker*, 7 Wyo 117, 50 P 819.

interpretation,⁸ so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable.⁹ In accordance with this principle, a court should not allow the facts of the particular case to influence its decision on a question of constitutional law,¹⁰ nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like circumstances and conditions.¹¹ Moreover, the courts should never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of its founders.¹²

It has been said that the rule of stare decisis is peculiarly applicable in the construction of written constitutions.¹³

The preservation of uniformity of construction of the Federal Constitution operates to limit the effect of any state interpretations of that document. If

8. *State ex rel. Lemon v. Langlie*, 45 Wash 2d 82, 273 P2d 464.

9. *South Carolina v. United States*, 199 US 437, 50 L ed 261, 26 S Ct 110; *Scott v. Sandford* (US) 19 How 393, 15 L ed 691; *Tindall v. Searan*, 192 Ark 173, 90 SW2d 476; *State ex rel. West v. Butler*, 70 Fla 102, 476; *State ex rel. Dye*, 178 Ind 336, 69 So 771; *Ellingham v. Dye*, 178 Ind 336, 69 So 771; *error dismd* 231 US 250, 58 L ed 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; *Cory v. Carter*, 48 Ind 327; *Hunter v. Colfax Consol. Coal Co.* 175 Iowa 245, 154 NW 1037, 157 NW 145; *State ex rel. Dawson v. Sessions*, 84 Kan 856, 115 P 641; *People v. Case*, 220 Mich 379, 190 NW 289, 27 ALR 686; *First Trust Co. v. Smith*, 134 Neb 84, 277 NW 762; *State ex rel. Phillips v. Carter*, 186 Okla 571, 99 P2d 1025; *Ex parte Woods*, 52 Tex Crim 575, 108 SW 1171; *State ex rel. Lemon v. Langlie*, 45 Wash 2d 82, 273 P2d 464; *State ex rel. Clithero v. Showalter*, 159 Wash 519, 293 P 1000, app dismd 284 US 573, 76 L ed 498, 52 S Ct 15; *Jessner v. State*, 202 Wis 184, 231 NW 634, 71 ALR 1005.

In construing constitutions, courts have nothing to do with the argument ab inconvenienti and should not bend the constitution to suit the law of the hour. *State ex rel. Kinsworthy v. Martin*, 60 Ark 343, 30 SW 421; *Keller v. State* (Tex Crim) 87 SW 669.

A constitutional provision operates on new subjects and conditions with the same meaning and intent which it had when adopted and does not change with time or conditions. *Travelers' Ins. Co. v. Marshall*, 124 Tex 45, 76 SW2d 1007, 96 ALR 802.

10. *Tindall v. Searan*, 192 Ark 173, 90 SW 2d 476; *Re Wallon*, 16 Idaho 737, 102 P 374; *State ex rel. Clithero v. Showalter*, 159 Wash 519, 293 P 1000, app dismd 284 US 573, 76 L ed 498, 52 S Ct 15.

When the sovereign will of the people has been expressed in a written constitution it is the duty of the courts rigidly to enforce it, and not to circumvent it because of private notions of justice or because of personal inclinations. *Gordon v. Conner*, 183 Okla 82, 80 P2d 322, 118 ALR 783.

11. *Tindall v. Searan*, 192 Ark 173, 90 SW 2d 476; *Murphy v. Com.* 172 Mass 264, 52 NE 505; *State ex rel. Howie v. Brantley*, 113 Miss 786, 74 So 662; *State ex rel. Clithero v. Showalter*, 159 Wash 519, 293 P 1000, app dismd 284 US 573, 76 L ed 498, 52 S Ct 15.

12. *Scott v. Sandford* (US) 19 How 393, 15 L ed 691; *Cory v. Carter*, 48 Ind 327; *Flaska v. State*, 51 NM 13, 177 P2d 174; *State ex rel. Clithero v. Showalter*, 159 Wash 519, 293 P 1000, app dismd 284 US 573, 76 L ed 498, 52 S Ct 15.

13. *McCulley v. State*, 102 Tenn 509, 53 SW 134.

"If ever there should be an adherence to former decisions, it should be in cases of construction of the Constitution involving the rights of citizens as declared by that instrument." *Scown v. Czarnecki*, 264 Ill 305, 106 NE 276.

But note that it has been said that constitutional questions must be determined as of the time the questions are presented for determination, and not as of the time of the adoption of the applicable constitutional provision, or as of the time of decision of an earlier case involving similar questions. See *Brown v. Board of Education*, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR2d 1180, supp op 349 US 294, 99 L ed 1083, 75 S Ct 753, holding that, in determining whether segregation in public schools deprives Negro students of the equal protection of the laws guaranteed by the Fourteenth Amendment, the court must consider public education in the light of its full development and its present place in American life throughout the nation; the clock cannot be turned back to the time when the Amendment was adopted, nor to the time when the Supreme Court announced the "separate but equal" doctrine, under which equality of treatment was viewed as accorded by providing Negroes and whites substantially equal, though separate, facilities.

§ 61

the effect of a clause of the Constitution depended wholly or in part upon the construction given it by a state, different constructions would be given it by different states and the spirit, if not the letter, would be broken.¹⁴

§ 61. Flexibility.

A constitution usually announces certain basic principles to serve as the perpetual foundation of the state.¹⁵ It is not intended to be a limitation on the state's healthful development nor an obstruction to its progress. Accordingly, the courts are not inclined to adopt such a technical or strained construction as will unduly impair the efficiency of the legislature to meet responsibilities occasioned by changing conditions of society.¹⁶ It is proper to assume that a constitution is intended to meet and be applied to new conditions and circumstances as they may arise in the course of the progress of the community.¹⁷ The courts in this country have shown a determination to give our written constitutions, by interpretation, such flexibility as will bring them into accord with what the courts believe to be public interest.¹⁸

14. *Per M'Lean, J., in Prigg v Pennsylvania*, 16 Pet (US) 539, 10 L ed 1060.

15. The Constitution is a continuously operative charter of government. *Yakus v United States*, 321 US 414, 88 L ed 834, 64 S Ct 660.

The words of the Constitution are to be read, not as legislative acts subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. *United States v Classic*, 313 US 299, 85 L ed 1368, 61 S Ct 1031, reh den 314 US 707, 86 L ed 565, 62 S Ct 51.

Although the meaning or principles of the constitution remain fixed and unchanged from the time of its adoption, a constitution must be construed as if intended to stand for a great length of time. *State ex rel. Dalton v Dearing*, 364 Mo 475, 263 SW2d 381.

16. *Kelso v Cook*, 184 Ind 173, 110 NE 987; *State v Fairmont Creamery Co.* 153 Iowa 702, 133 NW 895; *John Hancock Mut. Life Ins. Co. v Ford Motor Co.* 322 Mich 209, 33 NW2d 763; *Jenkins v State Bd. of Elections*, 180 NC 169, 104 SE 346, 14 ALR 1247; *Parkinson v Watson*, 4 Utah 2d 191, 291 P2d 400; *Payne v Racine*, 217 Wis 550, 259 NW 437.

No unlawful change in a constitution is involved in the application thereof to new conditions arising by natural processes. *Collins v Mills*, 198 Ga 18, 30 SE2d 866.

A constitution should not receive too narrow or literal an interpretation, but its meaning should be applied in such a manner as to meet new or changed conditions as they arise. *Flaska v State*, 51 NM 13, 177 P2d 174.

17. *Home Bldg. & L. Asso. v Blaisdell*, 290 US 398, 78 L ed 413, 54 S Ct 231, 88 ALR 1481; *Euclid v Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016; *Merrick v N. W. Halsey & Co.* 242 US 568, 61 L ed 498, 37 S Ct 227; *South Caro-*

lina v United States, 199 US 437, 50 L ed 261, 26 S Ct 110; *Re Debs*, 158 US 564, 39 L ed 1092, 15 S Ct 900; *State v Atlantic Coast Line R. Co.* 56 Fla 617, 47 So 569; *State v Missouri P. R. Co.* 96 Kan 609, 152 P 777, affd 248 US 276, 63 L ed 239, 39 S Ct 93, 2 ALR 1589; *John Hancock Mut. Life Ins. Co. v Ford Motor Co.* 322 Mich 209, 33 NW2d 763; *Elwell v Comstock*, 99 Minn 261, 109 NW 113, 698; *Albritton v Winona*, 181 Miss 75, 178 So 799, 115 ALR 1436; *State ex rel. State R. Com. v Ramsey*, 151 Neb 333, 37 NW2d 502; *Ely Lilly & Co. v Saunders*, 216 NC 163, 4 SE2d 528, 125 v *Jenkins v State Bd. of Elections*, ALR 1308; *Jenkins v State Bd. of Elections*, 180 NC 169, 104 SE 346, 14 ALR 1247; *State ex rel. Columbus v Ketterer*, 127 Ohio State 483, 189 NE 252; *Payne v Racine*, 217 Wis 550, 259 NW 437.

The Federal Constitution is intended to endure for ages to come and to be adaptable to various crises of human affairs. *Opp Cotton Mills, Inc. v Administrator of Wage & Hour Div.* 312 US 126, 85 L ed 624, 61 S Ct 524.

Under the test of reasonableness many acts are sustained today which would not have been sustained 100 years ago, since industrial conditions and political theories are constantly changing. *Carter v Craig*, 77 NH 200, 90 A 598.

In construing the general language or policy of a constitution, the changed social, economic, and governmental conditions and ideals of the time and the problems which the changes have produced are to be considered as well as the conditions prevailing at the time of the adoption of the constitution. *Borgnis v Falk Co.* 147 Wis 327, 133 NW 209.

18. *Euclid v Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016; *Gaiser v Buck*, 203 Ind 9, 179 NE 1, 82 ALR 1348; *John Hancock Mut. Life Ins. Co. v Ford Motor Co.* 322 Mich 209, 33 NW2d 763; *State v Van Riper v Traffic Tel. Workers' Federation*, 2 NJ 335, 66 A2d 616,

There is a definite obligation of law to progress which should not be ignored in the interpretation of constitutions.¹⁹ Their terms and provisions are being constantly expanded and enlarged by construction to meet the advancing and improving affairs of men.²⁰ The United States Supreme Court has said that the scope of "the vague, undefinable, admonitory provisions of the Constitution" is inevitably addressed to changing circumstances.¹

It has been authoritatively stated that as changes come in social and political life the Federal Constitution embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable.² And it has been said that in determining whether a provision of the constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar, for in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men various fundamental

9 ALR2d 854; *Travelers Ins. Co. v Marshall*, 124 Tex 45, 76 SW2d 1007, 96 ALR 802; *Payne v Racine*, 217 Wis 550, 259 NW 437.

19. *State v Harris*, 216 NC 746, 6 SE2d 854, 128 ALR 658.

20. *Euclid v Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016; *Gaiser v Buck*, 203 Ind 9, 179 NE 1, 82 ALR 1348; *John Hancock Mut. Life Ins. Co. v Ford Motor Co.* 322 Mich 209, 33 NW2d 763; *Brown v Smallwood*, 130 Minn 492, 153 NW 953; *State v Wolfer*, 119 Minn 368, 138 NW 315; *State v Mankato*, 117 Minn 458, 136 NW 264; *Travelers Ins. Co. v Marshall*, 124 Tex 45, 76 SW2d 1007, 96 ALR 802; *Payne v Racine*, 217 Wis 550, 259 NW 437.

While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. *Euclid v Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016.

The language of a constitution is generally extended to include new things and new conditions of the same class as those specified, which were not known or contemplated when it was adopted. *Gaiser v Buck*, 203 Ind 9, 179 NE 1, 82 ALR 1348.

The concept of the general welfare is not static. "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times." *Helvering v Davis*, 301 US 619, 81 L ed 1307, 57 S Ct 904, 109 ALR 1319.

1. *Ullmann v United States*, 350 US 422, 100 L ed 511, 76 S Ct 497, 53 ALR2d 1008, reh den 351 US 928, 100 L ed 1457, 76 S Ct 777.

Constitutional restrictions which are not specific, but are contained in general principles, are flexible enough not to impair the efficiency of the legislature to meet responsi-

bility occasioned by changing conditions of society. *Board of Education v Louisville*, 288 Ky 656, 157 SW2d 337.

Constitutional provisions couched in general terms have such a degree of elasticity as to make them applicable to new conditions not in existence at the time of their adoption, and hence not thought of by those who framed and adopted them. *Wimberly v Deacon*, 195 Okla 561, 144 P2d 447.

2. *Patton v United States*, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263; *South Carolina v United States*, 199 US 437, 50 L ed 261, 26 S Ct 110; *People v Western Air Lines, Inc.* 42 Cal 2d 621, 268 P2d 723, app dismd 348 US 859, 99 L ed 677, 75 S Ct 87; *State ex rel. State R. Com. v Ramsey*, 151 Neb 333, 37 NW2d 502; *Payne v Racine*, 217 Wis 550, 259 NW 437.

In *Missouri v Holland*, 252 US 416, 64 L ed 641, 40 S Ct 382, 11 ALR 984, Justice Holmes said: "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

The meaning of constitutional guarantees never varies: it is the scope of their application which must expand or contract to meet new and different conditions which are constantly coming within the fields of their operation, some degree of elasticity being thereby ordered, not to the meaning, but to the application of constitutional principles. *Milwaukee Co. of Jehovah's Witnesses v Mullen*, 214 Or 281, 330 P2d 5, 74 ALR2d 347, app dismd and cert den 359 US 436, 3 L ed 2d 932, 79 S Ct 940.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 62

principles which the instrument itself discloses.³ A constitution is interpreted in the light of developments which have appeared at the time of the interpretation, and such developments may include things and conditions which not only did not exist but were not contemplated when it was drafted, so long as the new developments are in their nature within the scope of the purposes and powers for the furtherance of which the constitution was established.⁴ Thus, constitutional law may to some extent be likened to a progressive science.⁵

On the other hand, the principle of flexibility does not overbalance or destroy the doctrine of uniformity; the actual meaning of the provision always remains the same.⁶ Constitutions are not so flexible as to bend to circumstances or be modified by public opinion.⁷ A state constitution has been described as a fundamental instrument, not to be stretched and strained to meet the exigencies and necessities of the moment, and as a basic instrument which is rigid and firm and will withstand the emotional upheavals of the time, in the interest of protecting conditions which did not exist when it was drafted, the courts cannot read into the instrument provisions which are not there merely because so doing will be helpful in dealing with conditions which exist at the present.¹⁰

§ 62. Liberty.

The rule that constitutions are to be liberally construed¹¹ is a well-settled one.¹² Thus, it is said that constitutional provisions should always receive a

3. *United States v. Classic*, 313 US 299, 85 L ed 1368, 61 S Ct 1031, reh den 314 US 707, 86 L ed 565, 62 S Ct 51.

The great clauses of the constitution must be considered in the light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time. *Hillsborough County v. Breggenner*, 151 Fla 747, 10 So 2d 498.

While principles of the constitution are unchangeable, the language by which they are expressed will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people which the people did not and could not foresee. *Norris v. Baltimore*, 172 Md 667, 192 A 531.

4. *Stepp v. State*, 202 Miss 725, 32 So 2d 447, 33 So 2d 307.

5. *Holden v. Hardy*, 169 US 366, 42 L ed 780, 18 S Ct 383; *State v. Cannon (Del)*, 190 A2d 514; *People v. Beakes Dairy Co.* 222 NY 416, 119 NW 115, 3 ALR 1260.

6. § 60, supra.

7. *First Trust Co. v. Smith*, 134 Neb 84, 277 NW 762.

8. *Finney v. Johnson*, 242 Ind 465, 179 NE 2d 718, commenting that under the doctrine of flexibility "the states of the United States have lost most of the powers originally reserved to them under the United States Constitution."

236

9. *Hunter v. Colfax Consol. Coal Co.* 175 Iowa 245, 154 NW 1037, 157 NW 145; *Hupp v. Hock-Hocking Oil & Natural Gas Co.* 88 Ohio St 61, 101 NE 1053; *Scribner v. State*, 9 Okla Crim 465, 132 P 933.

10. *Hunter v. Colfax Consol. Coal Co.* 175 Iowa 245, 154 NW 1037, 157 NW 145.

11. *Norris v. Baltimore*, 172 Md 667, 192 A 531; *State ex rel. Ronish v. School Dist. of A 531*; *Mont* 453, 348 P2d 797; *Fergus County, 136 Mont* 453, 348 P2d 797; *Kent Club v. Toronto*, 678 ALR2d 1012; *Parkinson v. Wat.* 78 ALR2d 67, 305 P2d 870; *Parkinson v. Wat.* 78 ALR2d 67, 305 P2d 870; *Parkinson v. Wat.* 78 ALR2d 67, 305 P2d 870; *Parkinson v. Wat.* 78 ALR2d 67, 305 P2d 870.

A constitution must be interpreted liberally to carry into effect the principles of government which it embodies. *Hunt v. Eddy*, 150 Kan 1, 90 P2d 747; *State ex rel. Dalton v. Dearing*, 364 Mo 475, 263 SW2d 381.

12. For example, the rule of liberal construction has been applied in connection with constitutional provisions which—

—afford protection from self-incrimination in criminal cases. See *WITNESSES* (1st ed § 37, 57).

—forbid cruel and unusual punishment. See *CRIMINAL LAW* (1st ed §§ 523 et seq.).

—forbid imprisonment for debt. §§ 386-388, infra.

—provide for intrastate extradition. See *EXTRADITION* (1st ed § 8).

—prohibit unreasonable searches and seizures. See *SEARCHES AND SEIZURES* (1st ed § 9).

—bar the giving or loaning of the state's credit. See *PUBLIC FUNDS* (1st ed § 6).

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 62

broader and more liberal construction than statutes,¹³ since the power dealt with in the former case is original and unlimited, and in the latter case limited.¹⁴ A constitution is expected to be effective over a longer period of time than a statute, and its method of revision or amendment is more cumbersome than the legislative process.¹⁵ Consequently, constitutions are not subject to rules of strict construction,¹⁶ such as, for example, the rules applicable to construction of criminal statutes.¹⁷ The rule has also been stated that a constitution is not to be interpreted with the strictness of a private contract.¹⁸

A constitution cannot, by construction, be carried out with mathematical nicety to logical extremes.¹⁹ The provisions of the Federal Constitution are not mathematical formulas having their essence in form, but they are organic living institutions transplanted from English soil. Their significance is vital, not formal, and is to be gathered by considering their origin and the line of their growth, not simply by taking the words and a dictionary.²⁰ The

—grant homestead exemptions. See *HOME-STEAD* (1st ed §§ 11, 12).

—allow the exercise of eminent domain. See *EMINENT DOMAIN* (1st ed §§ 34 et seq.).

—require that the subject of a statute be clearly expressed in its title. See *STATUTES* (1st ed §§ 163 et seq.).

—guarantee the right of assembly. *State v. Butterworth*, 104 NJL 579, 142 A 57, 58 ALR 744. And see §§ 353-355, infra.

—state a remedial power imposing an obligation which does not attach at common law. *Chisholm v. Georgia (US)* 2 Dall 419, 1 L ed 440 (involving Federal Constitution); *Tide-water R. Co. v. Shartzer*, 107 Va 562, 59 SE 407 (involving state constitution).

—aim to enlarge the power of the legislature or to remove doubts concerning its power. *Western Metal Supply Co. v. Pillsbury*, 172 Cal 407, 156 P 491.

13. *Rathjen v. Reorganized School Dist.* 365 Mo 518, 284 SW2d 516; *Riley v. Carter*, 165 Okla 262, 25 P2d 666, 88 ALR 1018; *Scribner v. State*, 9 Okla Crim 465, 132 P 933; *Caples v. State*, 3 Okla Crim 72, 104 P 493.

14. *Riley v. Carter*, 165 Okla 262, 25 P2d 666, 88 ALR 1018.

15. *Rathjen v. Reorganized School Dist.* 365 Mo 518, 284 SW2d 516.

16. The Supreme Court has said that the Federal Constitution is to be broadly construed as a document creating a system of government, the provisions of which are designed to make effective and operative all of the governmental powers granted; it is not to be construed technically and narrowly as an indictment or even as a grant presumably against the interest of the grantor, which narrow construction would only permit the passing of such matters as are clearly included within its language. *Kansas v. Colorado*, 206 US 46, 51 L ed 956, 27 S Ct 655.

But note that it is the rule in Washington that a constitutional provision be given a strict construction, especially where its terms are clear; however, it is also the rule that the reason and intention of the lawgiver will control the strict letter of the law where

the latter would lead to palpable injustice, contradiction, and absurdity. *State ex rel. Willis v. Monfort*, 93 Wash 4, 159 P 889; *State P 954*. *Reynolds v. Howell*, 70 Wash 467, 126 P 954.

17. *Re Siegel*, 263 Mo 375, 173 SW 1; *Hockett v. State Liquor Licensing Bd.* 91 Ohio St 176, 110 NE 485.

The constitutional provision making directors of a corporation personally liable for money misappropriated by its officer renders them sureties, creates a contractual relation, and is therefore not within the rule that penal statutes are to be strictly construed. *Dean v. Shingle*, 198 Cal 652, 246 P 1049, 46 ALR 1156.

Generally, as to the applicability to construction of a constitution of rules regarding the construction of statutes, see § 59, supra.

18. *Juilliard v. Greenman*, 110 US 421, 28 L ed 204, 4 S Ct 122.

19. *Paddell v. New York*, 211 US 446, 53 L ed 275, 29 S Ct 139.

Constitutions are made for practical purposes, and not for the exercise of critical gymnastics; they should be construed so as to carry out the intention of the lawmakers, which should be reasonable rather than absurd. *Railroad Com. v. Alabama G. S. R. Co.* 185 Ala 354, 64 So 13.

The language of a constitution is not to be limited to the precise things considered therein, but it should embrace other things of the same general nature or class as they come into being. *Flaska v. State*, 51 NM 13, 177 P2d 174.

20. *American Communications Asso. v. Douds*, 339 US 382, 94 L ed 925, 70 S Ct 674, reh den 339 US 990, 94 L ed 1391, 70 S Ct 1017, quoting statement to this effect by *Holmes, J.*, in *Gompers v. United States*, 233 US 604, 58 L ed 1115, 34 S Ct 893.

The contract clause of the Federal Constitution is not a specific, particularized, absolute, or unqualified prohibition to be read with literal exactness like a mathematical formula, although associated in the same section with

237

§ 62

§ 62

Constitution of the United States should not be allowed to become nullified or evaded by astute verbal criticism, without regard to the fundamental aim and object of constitutional provisions rather than the interpretation of constitutional principles. In support of the view that the form of expression should be regarded.¹ In support of the view that the interpretation of constitutional principles must not be too literal it has been said that it must be remembered that the machinery of government would not work "if it were not allowed a little play in its joints."

Constitution should receive a liberal interpretation in favor of a just, true and security of the citizen in regard to both person and property. The provision intended to confer a benefit clearly intended and expressly

citizen is especially true with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property.⁴ And a constitutional provision intended to confer a benefit should be liberally construed in favor of the clearly intended and expressly designated beneficiaries.⁵

more specific prohibitions, but is general, affording a broad outline and requiring construction to fill in the details. *Home Bldg. & L. Ass'n v. Blaisdell*, 290 US 390, 78 L Ed 413, 54 S Ct 231, 83 ALR 1481.

L. Noble State Bank v Haskell, 219 US 104,
55 L ed 112, 51 S Ct 186; Smith v Turner, 7
How. (US) 283, 12 L ed 702; State v J. J.
Newman Lumber Co. 102 Miss 802, 59 So
923.

The general principles contained in the Constitution are not to be regarded as rules to fence and control, but as matter merely declaratory and directed. *Cooper v Telfair*, 4 Dall (US) 14, 1 L ed 721.

2. State v Birmingham S. R. Co. 182 Ala 475, 62 So 77; Hupp v Hock-Hocking Oil & Natural Gas Co. 88 Ohio St 61, 101 NE 1053.

The words of the Constitution are not to be read with a stultifying narrowness. United States v. Classic, 313 US 299, 85 L ed 1368, 61 S Ct 1031, reh den 314 US 707, 86 L ed 565, 62 S Ct 51.

The prohibitions of the Constitution must be taken largely with a regard to substance, rather than to form, or they are likely to do more harm than good. *Tyler v Judges of Ct. of Registration*, 175 Mass 71, 55 NE 812, error dismissed 179 US 405, 45 L ed 252, 21 S Ct 206.

It is the sole duty of the court in considering a constitutional amendment to ascertain and give effect to the intention of the people in adopting it, and rules which are purely technical should not be permitted to thwart its attainment. Steele, H. & M. Co. v. Miller, 92 Ohio St 115, 110 NE 648.

And see § 65, *infra*.

3. *Wilson & Co. v Hickey*, 186 Okla 324, 97 P2d 564, quoting *Holmes, J.*, in *Bain Peanut Co. v Pinson*, 282 US 499, 75 L ed 482, 51 S Ct 228.

4. Byars v United States, 273 US 28, 71
L ed 520, 47 S Ct 248; Fairbank v United
States, 180 US 283, 45 L ed 862, 21 S Ct 648;
States, 180 US 283, 45 L ed 862, 21 S Ct 648;
Gulf, C & S. F. R. Co. v Ellis, 165 US 150,
41 L ed 666, 17 S Ct 255; Boyd v United
States, 116 US 616, 29 L ed 746, 6 S Ct 524;
Legal Tender Case, 110 US 421, 28 L ed
4, S Ct 122; Ex parte Ashton, 231 ALR
204, 4 S Ct 773, 104 ALR 54; Banks v State,
497, 165 So 736, 20 S 293, 24 ALR 1359, cert
den 260 US 179, 93 L ed 488, 43 S Ct 96;
Hend 260 US 179, 93 L ed 488, 43 S Ct 96;
v Winona Coal Co. 206 ALA 254, 89
790, 19 ALR 118; State ex rel. Dawson
Sessions, 84 Kan 856, 115 P 641; State v
Joseph, 143 La 428, 78 So 663; People ex
rel. Moll v Danziger, 238 Mich 39, 213 NW
48, 52 ALR 36; Sinclair v State, 161 Miss
242, 132 So 581, 74 ALR 241; Martien v
Porter, 68 Mont 450, 219 P 817; State v But-
trorth, 104 N.J.L. 579, 142 A 57, 58 ALR
44; People v King, 110 NY 418, 18 NE 245;
State v Harris, 216 NC 746, 6 SE2d 854, 128
ALR 658; State v Nomland, 3 ND 427, 57
N 85; State v Lindway, 131 Ohio St 166,
NE2d 490, app dismissed 299 US 506, 81 L ed
537, 5 S Ct 36; Hockett v State Liquor Li-
censing Bd. 91 Ohio St 176, 110 NE 485;
v McIntosh, 141 Okla 220, 284 P 875;
Bibner v State, 9 Okla Crim 465, 132 P
7; Gillespie v State, 5 Okla Crim 546, 115
20; State ex rel. Gladden v Lonergan, 201
163, 296 P2d 491; Kirkland v Allendale
nity, 128 SC 541, 123 SE 648; People v
Wells, 6 Utah 288, 22 P 159; State v Wills,
W Va 659, 114 SE 261, 24 ALR 1398;
Jones, 71 W Va 567, 77 SE 1029; Allen
State, 183 Wis 323, 197 NW 808, 39 ALR

In the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen. *Bradley v Superior Court of San Francisco*, 48 Cal 2d 509, 310 P2d 634.

5. *De Jarnette v Hospital Authority of Albany*, 195 Ga 189, 23 SE2d 716; *Flesher v Board of Review*, W. Va. Dept. of Veterans Affairs, 138 W Va 765, 77 SE2d 890 (constitutional provision conferring benefits on veterans and their survivors).

CONSTITUTIONAL LAW

16 Am Jur 2d

ALTHOUGH it is the rule that constitutional provisions are to be liberally construed in order that legislative enactments may be sustained, the courts cannot permit such provisions to be disregarded or overridden in the enactment of legislation.^a

Practicality.

§ 64

§ 63. Practicality.

§ 63. *Practical construction.* The practical construction of a constitution is to be followed,⁷ in order that effect may be given the purpose of its provisions.⁸ The established practical construction of a constitutional provision should not be disregarded unless the terms of the provision furnish clear and definite support for a contrary construction.⁹ Particularly in dealing with claims under broad provisions of the Federal Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations which give rise to them, must not be applied out of context in disregard of variant controlling facts.¹⁰ However, the rule of practical construction is of no value in construing a constitution where it is plain that the practice has been in open violation of that instrument.¹¹

A constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable.¹²

§ 64. Effectuation of intent of framers.
The fundamental principle of constitu

The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it.¹³ This is the polestar in the construction of constitutions.¹⁴ A

6. *Galpin v Chicago*, 269 Ill 27, 109 NE 713.

Generally as to constitutionality of legislation, see §§ 101 et seq., *infra*.

7. Wakem v Van Buren, 137 Me 127, 15 A2d 873; Gordon v Conner, 183 Okla 82, 80 P2d 322, 118 ALR 783; Parkinson v Watson, 4 Utah 2d 191, 291 P2d 400.

g. § 65, *infra*.

9. *Smiley v Holm*, 285 US 355, 76 L ed 795, 52 S Ct 397; *Greene v Esquibel*, 58 NM 499, 272 P2d 330.

Practical construction of a constitutional provision is entitled to great weight in considering the validity of a statute thereunder. *Cooke v Iverson*, 108 Minn 388, 122 NW 251.

10. Gomillion v Lightfoot, 364 US 339, 5
L ed 2d 110, 81 S Ct 125.

The Federal Constitution is concerned with practical, substantial rights, not with those which are unclear and gain hold by subtle and involved reasoning. Federal Housing Administration v Darlington, Inc. 358 US 84, 3 L ed 2d 132, 79 S Ct 141.

11. **Tucker v State**, 218 Ind 614, 35 NE2d 270; **Parker v State**, 133 Ind 178, 32 NE 836, 33 NE 119.

Generally, as to the effect upon construction of a constitution of the practice thereunder, see §§ 83 et seq., *infra*.

12. Hirabayashi v United States, 320 US
81, 87 L ed 1774, 63 S Ct 1375; Opp Cotton

Mills, Inc. v Administrator of Wage & Hour
Div. 312 US 126, 85 L ed 624, 61 S Ct 524.

13. Whitman v National Bank, 176 US 559,
44 L ed 587, 20 S Ct 477; Lake County v
Rollins, 130 US 662, 32 L ed 1060, 9 S Ct
651; Railroad Commission v Alabama G. S.
R. Co. 185 Ala 354, 64 So 13; Downs v Sulphur
Springs Val. Elec. Co-op. Inc. 80 Ariz
286, 297 P2d 339; Miller v Dunn, 72 Cal
462, 14 P 27; People ex rel. Keenan & Mc-
Guane, 13 Ill 2d 520, 150 NE2d 168, 71
ALR2d 580, cert den 358 US 828, 3 L ed 2d
67, 79 S Ct 46; Cook County v Chicago In-
dustrial School, 125 Ill 540, 18 NE 183; Chad-
wick v Crawfordsville, 216 Ind 399, 24 NE
2d 937, 129 ALR 469; Cory v Carter, 48 Ind
327; Grantz v Grauman (Ky) 302 SW2d 364;
State Journal Co. v Commonwealth, 289 Ky
808, 160 SW2d 145; Rouse v Johnson, 234
Ky 473, 28 SW2d 745, 70 ALR 1077; State
ex rel. Putnam v Holm, 172 Minn 162, 215
NW 200, 54 ALR 333; Sinclair v State, 161
Miss 142, 132 So 581, 74 ALR 241; Rathjen
v Reorganized School Dist. 365 Mo 518, 284
SW2d 516; State v Hope, 100 Mo 347, 13
SW 490; State ex rel. Ronish v School Dist.
of Fergus County, 136 Mont 453, 348 P2d
797, 78 ALR2d 1012; State ex rel. State R.
Com. v Ramsey, 151 Neb 333, 37 NW2d 502;
Wren v Dixon, 40 Nev 170, 161 P 722, 167
P 324; Gangemi v Berry, 25 NJ 1, 134 A2d
1; Greene v Esquibel, 58 NM 429, 272 P2d
330; State ex rel. Delgado v Romero, 17
NM 81, 124 P 649; Perry v Stancil, 237 NC
442, 75 SE2d 512; Egbert v Dunseith, 74 ND
1, 24 NW2d 907, 168 ALR 621; State v
Ligaarden, 59 ND 475, 230 NW 729, 70

CONSTITUTIONAL LAW

§ 64

constitutional clause must be construed reasonably to carry out the intention of the framers,¹⁴ and should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent.¹⁵ The intent must be gathered from both the letter and spirit of the document,¹⁷ the rule being that a written constitution is to be interpreted in the same spirit in which it was produced.¹⁸ The court should put itself as nearly as possible in the position of the men who framed the instrument.¹⁹

Wherever the purpose of the framers of a constitution is clearly expressed, it will be followed by the courts.²⁰ If the terms of a constitutional provision are in consonance with the objects and purposes in contemplation at the time of their adoption,¹ because in construing a constitutional provision, its general scope and object should be considered.²

As to construction in conformity with constitutional language, see §§ 70 et seq., infra.

As to consideration of spirit, see § 71, infra.

Truax, 13 ND 131, 99 N. D. 369, 197 Okla. 369, 183 Okla. 369.

Wells v. Missouri P. R. Co. 110 Mo. 286, Tulsa v. McIntosh, 141 Okla.

in consequence of becoming
scope and object should be

ALR 126; Barry v Truax, 15 ND 131, 99
NW 769; Lutting v Cordell, 197 Okla 368,
172 Fed 597; Gordon v Conner, 183 Okla
82, 80 P2d 322, 113 ALR 783; Kreps v
Brady, 37 Okla 534, 118 P 216; Deason v
Orange County Water Catchment, 90 Utah
151 Tex 288 of E. R. S. 150 Tex 572,
Board of Teachers v Cordner, 90 Utah
423 of 688; Keech v Cordner, 92 Tex 934,
243 SW2d 273, 108 ALR 52; State ex rel.
423, 62 Howells, 70 Wash 467, 126 P
Reynolds v Board of Review, W. Va. Dept.
Fletcher v Board of Review, W. Va. 765, 77 SE2d
Veterans Affairs, 136 W Va 765, 107
W Va 1, 60 SE2d 722; Rasmussen v Baker,
7 W Va 117, 50 P 819.

The purpose of construction of constitutional provisions is to ascertain truly the will of the people therein recorded. *Alaska v State*, 51 NM 13, 177 P2d 174.

The primary principle underlying an interpretation of constitutions is that the intent is the vital part and the essence of the law. *Rasmussen v Baker*, 7 Wyo 117, 50 P 819.

14. Hunt v Eddy, 150 Kan 1, 90 P2d 747;
Grantz v Grauman (Ky) 302 SW2d 364;
Greene v Esquebil, 58 NM 429, 272 P2d 330;
Steele, H. & M. Co. v Miller, 92 Ohio St
115, 110 NE 648; Hockett v State Liquor
Licensing Bd. 91 Ohio St 176, 110 NE 485.

15. Woodson v Murdock, 22 Wall (US) 351, 22 L ed 716; Flesher v Board of Review, W. Va. Dept. of Veterans Affairs, 138 W Va 765, 77 SE2d 890.

16. *Prigg v Pennsylvania*, 16 Pet (US) 539, 10 L ed 1060; *Greene v Esquirol*, 58 N 429, 272 P2d 330; *Boeing Aircraft Co v RM construction Finance Corp*, 25 Wash 2d 652, 171 P2d 838, 168 ALR 539, app dismd 330 US 803, 91 L ed 1262, 67 S Ct 972; *Fletcher v Board of Review*, W. Va. Dept. of Veterans Affairs, 138 W Va 765, 77 SE2d 890.

17. *State v Martin*, 60 Ark 343, 30 SW 421; *Hunt v Eddy*, 150 Kan 1, 90 P2d 747; *Fletcher v Board of Review*, W. Va. Dept. of Veterans Affairs, 138 W Va 765, 77 SE2d 890.

As to construction in conformity with constitutional language, see §§ 70 et seq., infra.
As to consideration of spirit, see § 71, infra.

18. Wells v Missouri P. R. Co. 110 Mo 286,
19 SW 530; Tulsa v McIntosh, 141 Okla
220, 284 P 875; Payne v Racine, 217 Wis
220, 284 P 437.

19. Ex parte Bain, 121 US 1, 30 L ed 849,
7 S Ct 781; Perry v Stancil, 237 NC 442, 75
SE2d 512. Able, scholarly men, embarking

SE2d 512.
Intelligent, able, scholarly men, embarking upon the drafting of a charter of government, with grants unalterable, delegations of power, unchangeable, and commands supreme, would seek to create a conflicting and contradictory plan, free from steadfastly adhering to dominant provisions, and steadfastly isolated provi-
nant principles. In examining isolated provisions and determining their meaning, the time plan of government must be considered; there must be attributed to the framers an intention to construct the instrument as a consistent whole, without contradictory provisions at cross-purposes, and there must be attributed to the separate provisions a meaning consistent with such an intention, if that is possible. Tucker v State, 218 Ind 614, 35 NE2d 270.

20. Keller v State (Tex Crim) 87 SW 669.

1. *Story v Richardson*, 186 Cal 162, 198 P 1057, 18 ALR 750; *State Journal Co. v Commonwealth*, 289 Ky 808, 160 SW2d 145; *Boeing Aircraft Co. v Reconstruction Finance Corp.* 25 Wash 2d 652, 171 P2d 838, 168 ALR 539, app dismd 330 US 803, 91 L ed 1262, 67 S Ct 972.

Where language used in a constitution is capable of two constructions, it must be so construed as to carry into effect the purpose of the constitutional convention. *Ratliff v Beale*, 74 Miss 247, 20 So 865.

2. Groves v Slaughter, 15 Pet (US) 449, 10 L ed 800; Hunt v Eddy, 150 Kan 1, 90 P2d 747.

As to the construction as based on the purpose of the provision, see § 65, *infra*.

§ 65. — Purpose sought to be accomplished by provision.

The familiar rule of interpretation of changes in statutory law, that an inquiry should be directed to the old law, the mischief, and the remedy,¹ has frequently been applied in the interpretation of constitutional provisions.² Constitutions are to be construed in the light of their purpose³ and should be given a practical interpretation⁴ so that the plainly manifested purpose of those who created them may be carried out.⁵ The rule is well stated in

3. § 61, *supra*.

4. *Minersville School Dist. v Gobitis*, 310 US 586, 84 L ed 1375, 60 S Ct 1010, 127 ALR 1493, *ovrld* on other grounds in *West Virginia State Board of Education v Barnett*, 319 US 624, 87 L ed 1628, 63 S Ct 1178, 147 ALR 674.

5. See STATUTES (1st ed § 305).

5. Rhode Island v Massachusetts, 12 Pet (US) 657, 9 L ed 1233; Washington v State, 75 Ala 582; Kerby v Luhrs, 44 Ariz 208, 36 P2d 549, 94 ALR 1502; Kelso v Cook, 184 Ind 713, 110 NE 987; Cory v Carter, 48 Ind 327; State v Gibson, 36 Ind 389; Hunt v Eddy, 74 Miss 247, 20 So 865; Shohoney v Beale, 74 Miss 247, 20 So 865; Shohoney v Quincy, O. & K. C. R. Co. 231 Mo 131, 132 SW 1059, error dismd 223 US 705, 56 L ed 621, 32 S Ct 517; E. K. Buck Retail Stores v Harkert, 157 Neb 867, 62 NW2d 288, 45 ALR2d 774; Hale v Everett, 53 NH 9; Perry v Stancil, 237 NC 442, 75 SE2d 512; Cleveland v Board of Tax Appeals, 153 Ohio St 97, 41 Ohio Ops 176, 91 NE2d 480, 16 ALR2d 1354; Pelzer v Campbell, 15 SC 581; Grasso v Cannon Ball Motor Freight Lines, 125 Tex 154, 81 SW2d 482; Travelers Ins. Co. v Marshall, 124 Tex 45, 76 SW2d 1007, 96 ALR 802; Smith v St. Paul, M. & M. R. Co. 39 Wash 355, 81 P 840.

The object which the framers of the constitution sought to accomplish by inserting particular provisions is relevant in arriving at a proper definition of a term used in such a provision. *Baltimore v Hofrichter*, 178 Md 91, 11 A2d 375.

The mischief to be prevented, as disclosed in the history of the country, has been considered by the court in the construction of the constitutional provision against the emission of bills of credit by the states. *Craig v Missouri*, 4 Pet (US) 410, 7 L ed 903.

In order to obtain a just interpretation of constitutional provisions bearing on or affecting the fundamental guaranties of liberty, reference should be made to the historical causes to which they owe their origin, and the mis-

Adams v Yazoo & M. Valley R. Co. 77 Miss
194, 24 So 200, 317, 28 So 956.

7. *Adams v. Bolin*, 74 *Ariz* 269, 247 *P2d*
617, 33 *ALR2d* 1102; *Kerby v. Luhn*, 44 *Ariz*
208, 36 *P2d* 549, 94 *ALR* 1502; *Story v. Rich-*
ardson, 186 *Cal* 162, 198 *P* 1057, 18 *ALR*
750; *Lancaster v. Board of Comrs. of Jefferson*
County, 115 *Colo* 261, 171 *P2d* 987, 166
ALR 839; *Birdsey v. Wesleyan College*, 211
Ga 583, 87 *SE2d* 378, *ovrd* on other grounds
in *Vulcan Materials Co. v. Griffith*, 215 *Ga*
811, 114 *SE2d* 29; *People ex rel. McDavid*
v. Barrett, 370 *Ill* 478, 19 *NE2d* 356, 121 *ALR*
1311; *State ex rel. Black v. Burch*, 226 *Ind*
445, 80 *NE2d* 294, 560, 81 *NE2d* 850; *Rath-*
jen v. Reorganized School Dist. 365 *Mo* 518,
284 *SW2d* 516; *State ex rel. Dalton v. Dear-*
ing, 364 *Mo* 475, 263 *SW2d* 381; *State ex*
rel. Randolph County v. Walden, 357 *Mo* 167,
206 *SW2d* 979; *Riley v. Carter*, 165 *Okla* 262,
25 *P2d* 666, 88 *ALR* 1018; *Farrar v. Board*
of Trustees, 150 *Tex* 572, 243 *SW2d* 688.
In *investigation* of

In investigating the nature and extent of the powers conferred by the Federal Constitution on Congress, it is indispensable to keep in view the objects for which those powers were granted, and resort may be had to the universal rule of construction which applies alike to statutes, wills, contracts, and constitutions. *Legal Tender Cases*, 12 Wall (US) 457, 20 L ed 287; *Re Russell*, 163 Cal 668, 126 P 875, *revd on another point* 233 US 195, 58 L ed 912, 34 S Ct 517.

8. § 63, *supra*.

9. Department of Finance v Dishman, 298 Ky 545, 183 SW2d 540, 155 ALR 1428; Rouse v Johnson, 234 Ky 473, 28 SW2d 745, 70 ALR 1077.

In reading the words of the Constitution the courts search for admissible meanings of its words which, in the circumstances of their application, will effectuate the purposes of the framers. *United States v Classic*, 313

CONSTITUTIONAL LAW

§ 66

no court is authorized so to construe any clause of the Constitution as to defeat its obvious ends where another construction equally accordant with the words and sense thereof will enforce and protect it; it should be construed so as to give it effective operation and suppress the mischief at which it is aimed.¹¹ Thus, it is said that a state constitution must be interpreted so as to carry out the general purposes of the government, and not defeat them.¹² The objects of a constitutional provision are often expressed in the instrument itself, and a statement of such objects is, of course, to be given great weight in its interpretation.¹³

§ 66. Construction as entirety, generally. In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision.¹⁴ Every statement in a state constitution

consider the reason for the provision and the purpose of the convention in adopting it, and no part of the constitution is to be construed so as to defeat its substantial purpose or the reasonable intent in adopting it. Runyon v Smith, 308 Ky 73, 212 SW2d 521.

12. People ex rel. McDavid v Barrett, 370 Ill 478, 19 NE2d 356, 121 ALR 1311; Jenkins v State Bd. of Elections, 180 NC 169, 104 SE 346, 14 ALR 1247.

13. Gibbons v Ogden, 9 Wheat (US) 1, 6 L ed 23.

14. Downes v Bidwell, 182 US 244, 45 L ed 1088, 21 S Ct 770; State ex rel. Biggs v Corley, 36 Del 135, 172 A 415; Bailey v Philadelphia, W. & B. R. Co. 4 Harr (Del) 389; delphia, W. & B. R. Co. 4 Harr (Del) 389; Thomas v State (Fla) 58 So 2d 173, 34 ALR 2d 140; Boise-Payette Lumber Co. v Challis Independent School Dist. 46 Idaho 403, 268 P 26; Cory v Carter, 48 Ind 327; Meyers v Flournoy, 209 La 812, 25 So 2d 601; State v Mockus, 120 Me 84, 113 A 39, 14 ALR 871; State ex rel. Board of Education v Brown, 97 Minn 402, 108 NW 477; Sinclair v State, 161 Miss 142, 132 So 581, 74 ALR 241; State ex rel. Johnson v Consumers Pub. Power Dist. 143 Neb 753, 10 NW2d 784, 152 ALR 480; Wilkes County v Call, 123 NC 308, 31 SE 481, error dismd 173 US 461, 43 L ed 768, 19 S Ct 464; Steele, H. & M. Co. v Miller, 92 Ohio St 115, 110 NE 648; State v Tollefson, 142 Or 192, 16 P2d 625; Ft. Worth Elevators Co. v Russell, 123 Tex 128, 70 SW2d 397; State ex rel. Mays v Brown, 71 W Va 519, 77 SE 243.

The courts cannot rightly prefer, of the possible meanings of the words of the Constitution, that which will defeat rather than effectuate the constitutional purpose. United States v Classic, 313 US 299, 85 L ed 1368, 61 S Ct 1031, reh den 314 US 707, 86 L ed 565, 62 S Ct 51.

The constitution is an instrument from the people and a construction thereof should effectuate their purpose from the words employed in the document; and the courts may not color it by the addition of words or the ingrafting of their views as to how it should be written. Ervin v Collins (Fla) 85 So 2d 852, 59 ALR2d 706.

In arriving at the proper construction of any part of the constitution, the courts must

15. Bower v Big Horn Canal Asso. 77 Wyo 80, 307 P2d 593.

CONSTITUTIONAL LAW

§ 66

must be interpreted in the light of the entire document, rather than as a sequestered pronouncement;¹⁵ and because fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other,¹⁶ if there is an apparent repugnancy between different provisions, the court should harmonize them if possible.¹⁷

It is an established canon of constitutional construction that no one provision of the constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument.¹⁸ Frequently, the meaning of one provision of a

In delineating the essential quality and reach of constitutional limitations, the courts are enjoined to consider the whole of the instrument with a view to arriving at the true intention of each part, bearing in mind that the primary design of the constitution is to put the fundamentals of government beyond the control of the varying moods of public opinion. Gangemi v Berry, 25 NJ 1, 134 A2d 1.

15. Bower v Big Horn Canal Asso. 77 Wyo 80, 307 P2d 593.

In construing one section of a constitution a court should not isolate it from other sections, but all sections bearing on any particular subject should be brought into consideration and be so interpreted as to effectuate the whole purpose of the constitution. Grantz v Grauman (Ky) 302 SW2d 364; Runyon v Smith, 308 Ky 73, 212 SW2d 521.

16. Dick v United States, 208 US 340, 52 L ed 520, 28 S Ct 399.

As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion. Ullmann v United States, 350 US 422, 100 L ed 511, 76 S Ct 497, 53 ALR 2d 1008, reh den 351 US 928, 100 L ed 1457, 76 S Ct 777.

17. Ghera v State, 16 Ariz 344, 146 P 494; State v Martin, 60 Ark 343, 30 SW 421; People v Western Air Lines, Inc. 42 Cal 2d 621, 268 P2d 723, app dismd 348 US 859, 99 L ed 677, 75 S Ct 87; Rose v State, 19 Cal 2d 713, 123 P2d 505; Re Morgan, 26 Colo 415, 58 P 1071; Lamborn v Bell, 18 Colo 346, 32 P 989; De Jarnette v Hospital Authority of Albany, 195 Ga 189, 23 SE2d 716; Hammond v Clark, 136 Ga 313, 71 SE 479; Cory v Carter, 48 Ind 327; Meyers v Flournoy, 209 La 812, 25 So 2d 601; Re Opinion of Justices, 303 Mass 631, 22 NE2d 49, 123 ALR 199; State ex rel. Collins v Jackson, 119 Miss 727, 81 So 1; Killgrove v Morris, 39 Nev 224, 156 P 686; People v Mosher, 163 NY 32, 57 NE 88; People ex rel. McClelland v Roberts, 148 NY 360, 42 NE 1082; State ex rel. Germain v Ross, 39 ND 630, 170 NW 121; Smith v Board of Education, 97 Ohio App 507, 56 Ohio Ops 463, 127 NE2d 623, app dismd 162 Ohio St 144, 54 Ohio Ops 67, 121 NE2d 10; Lattin v Cordell, 197 Okla 369, 172 P2d 397; State ex rel. Cloud v State Election Bd. 169 Okla 363, 36 P2d 20, 94 ALR 1007; Riley

v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018; Morrow v Corbin, 122 Tex 553, 62 SW2d 641; Jones v Williams, 121 Tex 94, 45 Min. & Mill. Co. v Tingey, 34 Utah 369, 93 P 180; Portsmouth v Weiss, 145 Va 94, 133 SE 781; Willis v Kalmbach, 109 Va 475, 64 SE 342; State v Bancroft, 148 Wis 124, 134 NW 330.

The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each. Meyers v Flournoy, 209 Education, 97 Ohio App 507, 56 Ohio Ops 463, 127 NE2d 623, app dismd 162 Ohio St 144, 54 Ohio Ops 67, 121 NE2d 10; State v Bates, 14 Utah 293, 47 P 78.

Apparent conflicts in provisions must be reconciled if possible, upon the theory that the instrument was carefully prepared and intended to be a consistent whole. Tucker v State, 218 Ind 614, 35 NE2d 270.

As to the effect of irreconcilable conflict, see § 69, infra.

18. Old Wayne Mut. L. Asso. v McDonough, 204 US 8, 51 L ed 345, 27 S Ct 236; People v Barber, 348 Ill 40, 180 NE 633, 92 ALR 1131; People ex rel. Nauert v Smith, 327 Ill 1, 158 NE 418; State v Smith, 155 Kan 588, 127 P2d 518, 141 ALR 1023; Rhea v Newman, 153 Ky 604, 156 SW 154; Baltimore v Fuget, 164 Md 335, 165 A 618, 88 ALR 1058; State ex rel. Collins v Jackson, 119 Miss 727, 81 So 1; State ex rel. Randolph County v Walden, 357 Mo 167, 206 SW2d 979; Killgrove v Morris, 39 Nev 224, 156 P 686; People v Metz, 193 NY 148, 85 NE 1070; State v Emery, 224 NC 581, 31 NE2d 858, 157 ALR 441; Goughnour v Brant, 47 ND 368, 182 NW 309; State ex rel. Germain v Ross, 39 ND 630, 170 NW 121; State ex rel. Donahey v Edmondson, 89 Ohio St 93, 105 NE 269; State ex rel. Cloud v State Election Bd. 169 Okla 363, 36 P2d 20, 94 ALR 1007; Thomas v Reid, 142 Okla 38, 285 P 92; Smart v Craig County, 67 Okla 141, 169 P 1101; Weiss v Ziegler, 327 Pa 100, 193 A 642, 112 ALR 102; Portsmouth v Weiss, 145 Va 94, 133 SE 781; Boeing Aircraft Co. v Reconstruction Finance Corp. 25 Wash 2d 652, 171 P2d 838, 168 ALR 539, app dismd 390 US 803, 91 L ed 1262, 67 S Ct 972.

And see § 67, infra.

§ 67

CONSTITUTIONAL LAW

constitution standing by itself may be obscure or uncertain, but is readily apparent when resort is had to other portions of the same instrument.¹⁰ It is often necessary to interpret the constitutional provisions with an eye to their relation to other provisions.¹¹ The best mode of ascertaining the meaning affixed to any word or sentence by which it stands connected,¹ and a constitutional provision² or a phrase in a constitutional provision must be read in connection with the words and sentences with which it stands connected, and the meaning of a term may be ascertained by referring to the object of the whole clause in which it is used.³ Noscitur a sociis is a rule of construction applied to all written instruments. And the meaning of a term may be ascertained by referring to the object of the whole clause in which it is used.⁴ Therefore, particular phrases of a constitution must be construed with regard to the remainder of the instrument and to the express intent of the constitutional convention in adopting it.⁵

effect to every part.

construction is that if possible, effect should be given to every part of a constitution and that unless there is a conflict of the fundamental law

§ 67. — Giving effect to every part.
Elementary rule of a construction and every word

§ 67. — Giving effect to every part. An elementary rule of a construction is that if possible, effect should be given to every part and every word of a constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous.⁶ A court should avoid a construction which

19. Rhea v Newman, 153 Ky 604, 156 SW 154; Morgan v Dudley, 18 B Mon (Ky) 693
State ex rel Collins v Jackson, 119 Miss 727,
81 So 1; Killgrove v Morris, 39 Nev 224, 156
P 686; Portsmouth v Weiss, 145 Va 94, 133
SE 781.

20. Gray v Golden (Fla) 89 So 2d 785.

SE 781.
20. Gray v Golden (Fla) 89 30 1
1. Wheaton v Peters, 8 Pet (US) 591, 8
L ed 1055; State v Emery, 224 NC 581, 31
SE2d 858, 157 ALR 441.
Tennessee, 148 US 503, 37
v Fuget,

2. Virginia v Tennessee, 148 US 503, 37 L. ed 537, 13 S Ct 728; Baltimore v Fugot, 164 Md 335, 165 A 618, 88 ALR 1058.

3. Griffin v Vandegriff, 205 Ga 288, 53 SE2d 345; People v Barber, 348 Ill 40, 180 NE 633, 92 ALR 1131.

The court seeks for the sense and meaning of a particular constitutional provision related to the context and the essential character of the instrument itself. *Gangemi v Berry*, 25 NJ 1, 134 A2d 1.

4. Virginia v Tennessee, 148 US 503, 37
Led 537, 13 S Ct 728.

5. Riley v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018.

The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in *pari materia*. *Patton v United States*, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263.

Determination of whether the right to jury trial in disbarment proceedings is guaranteed by the constitutional provision that the right of trial by jury shall remain inviolate, or is preserved upon the theory that such right, originally given by the Mississippi territorial legislation, being in force at the time of the adoption of the first state constitution, received

constitutional sanction, involves consideration of other pertinent provisions of the constitution, because its several provisions must be construed as standing in *pari materia*. Ex parte Thompson, 228 Ala 113, 152 So 229, 107 ALR 671.

In the interpretation of a constitutional provision, consideration may be given to sections in *pari materia*, the circumstances under which the provision was adopted, the purposes which the provision was adopted for, and the evils to be accomplished by its use, and the evils to which it was addressed. *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617, 33 ALR2d 1102.

6. *Wright v United States*, 302 US 583, 82 L ed 439, 58 S Ct 395; *Williams v United States*, 289 US 553, 77 L ed 1372, 53 S Ct 251; *Knowlton v Moore*, 178 US 41, 44 L ed 251, 20 S Ct 747; *Hurtado v California*, 110

33 States, 289 US 333, 77 L Ed 101, 24 S Ct 177, 100
NE 751; Knowlton v Moore, 178 US 41, 44 L Ed 101,
969, 20 S Ct 747; Hurtado v California, 110
US 516, 28 L Ed 232, 4 S Ct 111; Marbury
v Madison, 1 Cranch (US) 137, 2 L Ed 60;
Wade v State, 207 Ala 1, 92 So 101; Gherna
v State, 16 Ariz 344, 146 P 494; Lamborn
v Bell, 18 Colo 346, 32 P 989; State ex rel
West v Butler, 70 Fla 102, 69 So 771; Craw-
ford v Gilchrist, 64 Fla 41, 59 So 963; Bird-
sey v Wesleyan College, 211 Ga 583, 87 SE2d
378, over'd on other grounds Vulcan Ma-
terials Co. v Griffith, 215 Ga 811, 114 SE2d
29; Tuttle v National Bank, 161 Ill 497, 44
NE 984; Runyon v Smith, 308 Ky 73, 212
SW2d 521; Johnson v Duke, 180 Md 434,
24 A2d 304; People v Case, 220 Mich 379,
190 NW 289, 27 ALR 586; State ex rel
Collins v Jackson, 119 Miss 727, 81 So 1;
Thompson v Grand Gulf R. & Bkg. Co. 3
How (Miss) 240; State ex rel. Palagi v Re-
gan, 113 Mont 343, 126 P2d 818; Steele, H.
& M. Co. v Miller, 92 Ohio St 115, 110 NE
648; Oklahoma Natural Gas Co. v State, 187
Okla 164, 101 P2d 793; State ex rel. Cloud
v Election Bd. 169 Okla 363, 36 P2d 20, 94
ALR 1007; Riley v Carter, 165 Okla 262, 25

renders any constitutional provision meaningless⁷ or inoperative,⁸ and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.⁹ This is exempli-

§ 67

P2d 666, 88 ALR 1018; State ex rel. Gladden v. Lonergan, 201 Or 163, 269 P2d 491; Comm. on monowleath ex rel. Boyle v. Wert, 282 Fa 575, 128 A 484; Jones v. Williams, 121 Tex 229, 215 SW2d 155; Jones v. Williams, 121 Tex 219, 45 SW2d 130, 79 ALR 983; State v. Gillette (Tex Com App) 10 SW2d 984; State ex rel. Atkinson v. Evans, 46 WASH 219, 89 ex rel. Fleisher v. Board of Review, 138 W Va 565; 77 SE2d 890; Re Jones, 71 W Va 567, 77 765, 77 SE2d 890; State ex rel. Mays v. Brown, 71 SE 1029; State ex rel. Mays v. Brown, 71 SE 1029; 77 SE 243.

SE 519, 77 SE 214.
W Va 519, 77 SE 214.
All parts of a state constitution are of equal
moment and are equally binding upon the
courts. Lamar Water & Electric Light Co. v
Lamar, 128 Mo 188, 26 SW 1025, 31 SW
756. Constitutions are supposed to be carefully

Constitutions are supposed to be carefully prepared, and effect should be given to every word if possible. State ex rel. Walker v. Board of Education, 35 Mo. 325, 36 SW 636.

In the construction of the Constitution, real effect must be given to the words it uses.

7. Wade v State, 207 Ala 1, 92 So 101;
State ex rel. West v Butler, 70 Fla 102, 69
So 771; Tuttle v National Bank, 161 Ill 497,
44 Ne 984; State ex rel. Collins v Jackson,
119 Miss 727, 81 So 1; State v Hostetter, 137
Mo 636, 39 SW 270; State ex rel. State R.
Com. v Ramsey, 151 Neb 333, 37 NW2d 502;
Oklahoma Natural Gas Co. v State, 187 Okla
164, 101 P2d 793; Oklahoma Cotton Gin-
ners' Asso. v State, 174 Okla 243, 51 P2d
237; Hanson v Jordan, 145 Tex 320, 198
SW2d 262; State v Gillette (Tex Com App)
10 SW2d 984.

It cannot be presumed that any clause in the Constitution is intended to be without effect. *Marbury v Madison*, 1 Cranch (US) 137, 2 L ed 60.

Words employed in the Federal Constitution cannot be regarded as meaningless. *United States v Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

Courts are bound, in construing a constitution, to presume that the authors of the instrument had some purpose in inserting every clause found in it, and every word of the clause, and that they intended them to have some effect. *Diamond v Parkersburg-Aetna Corp.* (W Va) 122 SE2d 436, quoting *State v Harden*, 62 W Va 313, 58 SE 715, 60 SE 394.

Effect is to be given to every clause and word of a constitutional provision, and no word is to be treated as unmeaning if a construction can be legitimately found which will preserve it and make it effectual. *Denny v State*, 144 Ind 503, 42 NE 929.

It is not to be supposed that a single word was inserted in the organic law of the state without the intention of conveying thereby

some meaning. 382, 21 *rel.* Jameson v Denny, 118 Ind 382, ex *rel.* Jameson v The Court cannot assume that the words "within its jurisdiction" in the constitutional provision prohibiting any state from denying to any person within any state from denying protection of the laws its jurisdiction the equal any object; nor is it as liberty to eliminate them from the Constitution and interpret the clause in question as if they were not to be found in that instrument. Blake v McClung, 172 US 239, 43 L ed 432, 19 S Ct 165.

8. Wade v. State, 207 Ala. 1, 92 So 101;
State ex rel. West v. Butler, 70 Fla 102, 69
So 771; State v. Atlantic Coast Line R. Co.,
56 Fla 617, 47 So 969; State ex rel. Collins
v. Jackson, 119 Miss 727, 81 So. 1. Hanson
v. Jordan, 145 Tex 320, 198 SW2d 262;
State v. Gillette (Tex Com App) 10 SW2d
984.

A construction nullifying a specific clause will not be given to a constitution unless absolutely required by the context. *Marbury v Madison*, 1 Cranch (US) 137, 2 L ed 60.

The Constitution is not self-destructive; in other words the powers which it confers on the one hand it does not immediately take away on the other. Hence, the authority to tax, which is given in express terms, is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. *Brushaber v. Union P. R. Co.* 240 US 1, 60 L ed 493, 36 S Ct 236; *United States v. Billings*, 232 US 289, 58 L ed 608, 34 S Ct 428; *Billings v. United States*, 232 US 261, 58 L ed 596, 34 S Ct 421; *Flint v. Stone Tracy Co.* 220 US 107, 55 L ed 389, 31 S Ct 342; *McCray v. United States*, 195 US 27, 49 L ed 78, 24 S Ct 769.

9. *Lamborn v Bell*, 18 Colo 346, 32 P 989; *Chadwick v Crawfordsville*, 216 Ind 399, 24 NE2d 937, 129 ALR 469; *Hanson v Jordan*, 145 Tex 320, 198 SW2d 262; *Jones v Williams*, 121 Tex 94, 45 SW2d 130, 79 ALR 983; *State ex rel. Atkinson v Evans*, 46 Wash 219, 89 P 565.

A constitution is an instrument of such high and solemn import that every word thereof is to be regarded as though hammered into place. State ex rel. Lewis v Smith, 158 Ind 543, 63 NE 25, 214, 64 NE 18.

Effect must be given to every section and clause as well as the whole instrument. *Swanson v State*, 132 Neb 82, 271 NW 264.

However, one construction of a constitutional provision will not be preferred to another on the ground that such other would render the provision meaningless, where a contingency might arise in which the provision as so construed could become effective,

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 68

fixed by the doctrine, applied in the construction of the state constitutions, that where a provision of a state constitution is capable of two constructions, one of which would be in conflict with the Federal Constitution, the other must be adopted.¹⁰ The general principle has also been employed to the extent of permitting a court, in construing a constitutional amendment, to transpose sentences and sections to aid in arriving at the true construction thereof.¹¹

The rules stated above are of course fully applicable to amended constitutions.¹²

§ 68. — Harmonizing amendments with antecedent constitutional provisions. Many troublesome questions of constitutional construction arise in the interpretation of constitutional amendments with reference to the earlier constitutional provisions to which they have been added. In accordance with the general rule that harmony in constitutional construction should prevail whenever possible,¹³ an amended constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law.¹⁴ A constitutional amendment is not to be considered as an isolated bit of design and color, but must be seen as an integral part of the entire harmonious picture of the constitution.¹⁵ A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former law and existing system.¹⁶ Similarly, order is in manifest repugnance to the new constitution, but such a provision should be read in the light of the former law and existing system.¹⁷ Similarly, a constitutional amendment which takes the form of a repeal will not ordinarily be held to affect constitutional provisions to which the repealed provision was related.¹⁸ At the same time, amendments are usually adopted for the express purpose of making changes in the existing system. Hence, it is very likely that conflict may arise between an amendment and portion of a constitution adopted at an earlier time. In such a case, the rule is firmly established that an amendment duly adopted is a part of the constitution and is to be construed as an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions and effect must be given to every section and clause as well as the whole instrument. *Swanson v State*, 132 Neb 82, 271 NW 264.

even though such a contingency is remote. *Grant & McNamee v Payne*, 60 Nev 250, 107 P2d 307, 132 ALR 568.

10. *Steinhart v Superior Ct.* 137 Cal 575, 70 P 629.

11. *Cherna v State*, 16 Ariz 344, 146 P 494.

12. § 68, *infra*.

13. § 66, *supra*.

14. *Badger v Hoidale* (CA8) 88 F2d 208, 109 ALR 798; *Shamburger v Duncan* (Ky) 253 SW2d 388; *Bigney v Secretary of Commonwealth*, 301 Mass 107, 16 NE2d 573, 120 ALR 669; *State ex rel. McKittrick v Bode*, 342 Mo 162, 113 SW2d 805.

"Effect should be given to every part of the instrument as amended." *Steele, H. & M. Co. v Miller*, 92 Ohio St 115, 110 NE 648.

15. *Kirkpatrick v King*, 228 Ind 236, 91 NE2d 785.

A constitutional amendment becomes an

integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions and effect must be given to every section and clause as well as the whole instrument. *Swanson v State*, 132 Neb 82, 271 NW 264.

16. *State v Birmingham S. R. Co.* 182 Ala 475, 62 So 77; *Sylvester v Tindall*, 154 Fla 663, 18 So 2d 892; *State ex rel. McKittrick v Bode*, 342 Mo 162, 113 SW2d 805.

17. *Egbert v Dunseith*, 74 ND 1, 24 NW2d 907, 168 ALR 621, holding that the repeal of Article 20 of the Constitution of North Dakota prohibiting traffic in intoxicating liquor in the state, subsequent to the adoption of an amendment to another section of the Constitution authorizing the state and any county or city to engage in any industry, enterprise, or business "not prohibited by Article 20," did not affect the prohibition upon the state, its counties and cities, against engaging in the liquor business, the negation of which continued in effect as though there had been no repeal of the prohibition article.

Annotation: 168 ALR 628.

CONSTITUTIONAL LAW

16 Am Jur 2d

strued accordingly. It is not invalid merely because it conflicts with pre-existing provisions.¹⁹

§ 69

§ 69. — Effect of irreconcilable conflict between provisions. The requirement that constitutional provisions be harmonized wherever possible has already been noted.¹⁹ Distinct provisions of the constitution are repugnant to each other in such a way as to be irreconcilable only when they are related to the same subject, are adopted for the same purposes, and cannot be enforced without material and substantial conflict.²⁰ In such a case, if there is a conflict between a general and a special provision in a constitution, the special provision must prevail in respect of its subject matter, since it will be regarded as a limitation on the general grant,²¹ but the general provision will be left to control in cases where the special provision does not apply.²²

If there is a real inconsistency between a constitutional amendment and an antecedent provision, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions.²³ If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded.²⁴

18. *Sylvester v Tindall*, 154 Fla 663, 18 So 2d 892; *De Jarnette v Hospital Authority of Albany*, 195 Ga 199, 23 SE2d 716; *State ex rel. Collins v Jackson*, 119 Miss 727, 81 So 1; *State ex rel. McKittrick v Bode*, 342 Mo 162, 113 SW2d 805; *State ex rel. Johnson v Chicago, B. & Q. R. Co.* 195 Mo 228, 93 SW 704.

As to the mode of resolving such conflicts, see § 69, *infra*.

19. § 67, *supra*.

20. *State ex rel. West v Butler*, 70 Fla 102, 69 So 771; *Meyers v Flournoy*, 209 La 812, 25 So 2d 601; *Swanson v State*, 132 Neb 82, 271 NW 264.

1. *State ex rel. Palagi v Regan*, 113 Mont 343, 126 P2d 818; *State ex rel. Public Service Com. v Southern Pac. Co.* 95 Utah 84, 79 P2d 25.

2. *Johnson v Duke*, 180 Md 434, 24 A2d 304; *Swanson v State*, 132 Neb 82, 271 NW 264.

If it is impossible to harmonize or reconcile portions of the constitution, special provisions can control more general provisions, and the general and special provisions operate together, neither working the repeal of the other. *People v Western Air Lines, Inc.* 42 Cal 2d 621, 268 P2d 723, app dismd 348 US 859, 99 L ed 677, 75 S Ct 87.

3. *Allison v Phoenix*, 44 Ariz 66, 33 P2d 927, 93 ALR 354; *Sylvester v Tindall*, 154 Fla 663, 18 So 2d 892; *Birdsey v Wesleyan College*, 211 Ga 583, 87 SE2d 378, overd on other grounds *Vulcan Materials Co. v Griffith*, 215 Ga 811, 114 SE2d 29; *Cooper v Lewis*, 177 Ga 229, 170 SE 68, 88 ALR

808; *Hammond v Clark*, 136 Ga 313, 71 SE 479; *Shamburger v Duncan* (Ky) 253 SW2d 388; *State ex rel. Collins v Jackson*, 119 Miss 727, 81 So 1; *State ex rel. Board of Fund Comrs. v Holman* (Mo) 296 SW2d 482; *State ex rel. McKittrick v Bode*, 342 Mo 162, 113 SW2d 805; *State ex rel. Missoula v Holmes*, 100 Mont 256, 47 P2d 624, 100 ALR 531; *People ex rel. Williams Engineering & Contracting Co. v Metz*, 193 NY 148, 85 NE 1070; *Lassiter v Northampton County Board of Elections*, 248 NC 102, 102 SE2d 853, affd 360 US 45, 3 L ed 2d 1072, 79 S Ct 935; *State ex rel. Lein v Sathre* (ND) 113 NW2d 679; *Ex parte Kerby*, 103 Or 612, 205 P 279, 36 ALR 1451; *Egan Independent Consol. School Dist. v Minnehaha County*, 65 SD 32, 270 NW 527, 108 ALR 572; *Farrar v Board of Trustees*, 150 Tex 572, 243 SW2d 680.

If an amendment duly adopted necessarily conflicts with some previous provision, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision. *De Jarnette v Hospital Authority of Albany*, 195 Ga 199, 23 SE2d 716.

It is only when there is no room for the application of the rule of harmonizing inconsistent provisions that an amendment should prevail. *Shamburger v Duncan* (Ky) 253 SW2d 388.

The original wording of a constitutional provision cannot be used to add anything to its meaning after an amendment thereof "so as to read" in a specified manner. *Yoncalla State Bank v Gemmill*, 134 Minn 334, 159 NW 798.

4. *Badger v Hoidale* (CA8) 88 F2d 208,

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 70

Still another occasion of conflict may arise in the case of two amendments adopted at the same time, but impossible of reconciliation. It is the rule, of course, that when two amendments are adopted on the same day, they should, if possible, be so construed that effect may be given to both,⁵ but where a section of the constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail.⁶

2. CONFORMITY WITH CONSTITUTIONAL LANGUAGE

a. GENERALLY

§ 70. Necessity for conformity.

It is a general principle that the intention to which force is to be given is that which is embodied and expressed in the constitutional provisions themselves,⁷ for words are the common signs that mankind make use of to declare their intentions to one another. When the words of a man express his meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation.⁸ The court, therefore, in construing a con-

109 ALR 798; *McLucas v State Bridge Bldg. Authority*, 210 Ga 1, 77 SE2d 531; *State ex rel. McKinnick v Bode*, 342 Mo 162, 113 SW2d 805.

Upon amendment of a constitution, an earlier provision remains in force insofar as it is not repugnant to the amendment, in the absence of an express repeal; in order to effect a repeal, that the earlier provision clear and positive cannot consistently stand together, and to effect an amendment of an existing provision, the intent to amend, which is to be gathered from the language employed, must be clear and unmistakable. *De Jaurette v Hospital Authority of Albany*, 195 Ga 189, 23 SE2d 716.

Existing constitutional provisions may be amended or repealed by implication through an amendment, but such repeals are not favored and there must be an irreconcilable repugnance between the two. *Moore v Brown*, 350 Mo 236, 165 SW2d 657.

A constitutional provision can be impliedly abrogated by the adoption of another and later one which is antagonistic to it, although the original provision may in terms remain unaltered. *People ex rel. Carter v Rice*, 135 NY 473, 31 NE 921.

Provisions of a state constitution may be impliedly repealed or abrogated by adoption of changes in other portions which render such provisions obnoxious or ineffectual. *Egbert v Dunsen*, 74 ND 1, 24 NW2d 907, 168 ALR 611.

5. *Fitzgerald v Cleveland*, 88 Ohio St 338, 103 NE 512; *Opinion to Governor*, 78 RI 144, 92 A2d 165.

6. *Uiter v Mosley*, 16 Idaho 274, 100 P 1050 (wherein it was held that since one of two conflicting amendments was not adopted

in accordance with the constitutional requirements, and since such amendment was necessarily invalid, due effect should be given to the other amendment where it had in fact been properly adopted); *McBee v Brady*, 15 Idaho 761, 100 P 97; *Opinion to Governor*, 78 RI 144, 92 A2d 165.

7. *Child Labor Tax Case (Bailey v Drexel Furniture Co.)* 259 US 20, 66 L ed 818, 42 S Ct 449, 21 ALR 1432; *Lake County v S Ct* 449, 21 ALR 1432; *Lake County v S Ct* 449, 21 ALR 1432; *Rollins v Emmerson*, 302 Ill 300, 134 651; *People v Emmerson*, 302 Ill 300, 134 651; *People v Stevenson*, NE 707, 21 ALR 636; *People v Stevenson*, NE 707, 21 ALR 636; *Re Ming*, 42 Nev 281 Ill 17, 117 NE 747; *Wren v* 472, 181 P 319, 6 ALR 1216; *Wren v* 472, 181 P 319, 6 ALR 1216; *Dixon v Hock-Hocking Oil & Natural Gas Hupp v Hock-Hocking Oil & Natural Gas* 88 Ohio St 61, 101 NE 1053; *Scribner Co.* 88 Ohio St 61, 101 NE 1053; *State v State*, 9 Okla Crim 465, 132 P 933; *State ex rel. Clark v Harris*, 74 Or 573, 144 P 109; *Rasmussen v Baker*, 7 Wyo 117, 50 P 819.

The Sixteenth Amendment, authorizing Congress to impose taxes on incomes, from whatever source derived, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used. See separate opinion by Whitaker, Black, and Douglas, JJ., in *James v United States*, 366 US 213, 6 L ed 2d 246, 81 S Ct 1052.

8. *Lake County v Rollins*, 130 US 662, 32 L ed 1060, 9 S Ct 651; *Sandelin v Collins*, 1 Cal 2d 147, 33 P2d 1009, 93 ALR 956; *Platte Valley Pub. Power & Irrig. Dist. v Lincoln County*, 144 Neb 584, 14 NW2d 202, 155 ALR 412.

That which the words declare is the meaning of the instrument, and neither the courts nor the legislature have a right to add to or take away that meaning. *State ex rel.*

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 71

stitutional enactment, is usually said to be limited to the language of the enactment itself. It may not be governed by what the framers of the amendment might have meant to say, but is of necessity controlled by what they did say.⁹ The rule is sometimes stated more completely that a constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads, and in such a case no construction is acceptable.¹⁰

In accordance with the rule requiring adherence to clear constitutional language, it is held that in expounding the Federal Constitution, the omission in one place of an adjective used in others cannot be regarded as accidental, under the rule that in expounding the Constitution every word must have its due force and appropriate meaning.¹¹

§ 71. Consideration of spirit, as against letter.

The view that the true aim of constitutional interpretation, both as to grants of powers and in respect of prohibitions and limitations, is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose,¹² has considerable support in the cases.¹³ Under the rule that it is

Randolph County v Walden, 357 Mo 167, 206 SW2d 979.

The courts must give effect to constitutional provisions according to their language and obvious intent. *Utah Builders' Supply Co. v Gardner*, 86 Utah 250, 39 P2d 327, 103 ALR 928.

9. *Pacific Tel. & Tel. Co. v Eshleman*, 166 Cal 640, 137 P 1119; *Lyons v Spaeth*, 220 Minn 563, 20 NW2d 481, 162 ALR 1041.

It is the function of the courts to construe, not rewrite, the constitution. *State ex rel. Randolph County v Walden*, 357 Mo 167, 206 SW2d 979.

It is the duty and responsibility of the court to ascertain the meaning of the constitution as written, neither adding to nor subtracting from it, and neither deleting nor distorting. *Rankin v Love*, 125 Mont 184, 232 P2d 998.

The intent of the adopters is to be found in the language of the constitution itself, and the courts are not to hold that the people intended anything different from what the language employed imports. *Swanson v State*, 132 Neb 82, 271 NW 264.

10. § 58, supra.

11. *Williams v United States*, 289 US 553, 77 L ed 1372, 53 S Ct 751.

Generally, as to giving effect to every part of a constitution, see § 67, supra.

12. *Fairbank v United States*, 181 US 283, 45 L ed 862, 21 S Ct 648.

The Constitution of the United States is not intended as a facility for crime; it is intended to prevent oppression. Its letter and its spirit are satisfied if, where a criminal purpose is executed, the criminal purpose is punished. *Brown v Elliott*, 225 US 392, 56 L ed 1136, 32 S Ct 812.

Generally, as to rule of liberal construction, see § 62, supra.

13. There seems to be a conflict in theory, although no mention of it is made in the cases themselves, between those cases which state that in order to arrive at the intent of the adopters of the constitution and to give effect to its true spirit and purpose the court will look back of the literal meaning of the language, not only to ascertain the intention, but also to give effect to it, and those cases, discussed in § 58, supra, which state that where the language is unambiguous no construction is possible and no intent can be derived other than that which may be derived from the meaning of the language itself. The place where the one rule ceases to operate and the other starts is not clearly marked out by the decisions, although an examination of them discloses that in many of the cases which adopt the principle of looking back of the language to arrive at the spirit of the adopters, personal and civil rights of individuals, in the protection of which the courts have always been very zealous, are involved. As a result of this apparent inconsistency, a slightly different rule seems, therefore, to be adopted in a few jurisdictions with reference to the question of construing the language of constitutional provisions. Basing its conclusions on the fact that the construction of constitutional provisions is directly analogous to the construction of statutes, and further maintaining that in order to arrive at and carry out the intention of the framers an extremely liberal construction should be employed—although it seems that it may be carried to the extent of altering the meaning of words—one court has stated that to give effect to the intention expressed in constitutional provisions when such an intention can be deduced therefrom, words may be modified, altered, or supplied so as to obviate any repugnancy to or inconsistency with such an intention, even though in so doing particular provisions may not be read or construed according to their literal meaning. *Clark v Boyce*, 20 Ariz 544, 185 P 136, in which the court cites as authorities for its position

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 71

the spirit which vivifies and the letter which killeth,¹⁴ whenever the language is not explicit, or admits of doubt, it is presumed that it is intended to be in accordance with the acknowledged principles of justice and liberty,¹⁵ even though, according to some views, this would require a deviation from the strict letter.¹⁶ A constitutional provision should receive a fair and liberal construction, not only according to its letter, but also to its true spirit and the general purpose of its enactment,¹⁷ and the interpretation of constitutional principles must not be too literal.¹⁸ In the interpretation of constitutional provisions, it is also true that words are often limited and restrained to a scope and effect somewhat narrower than their literal import on a presumption against an intent to interfere with or innovate upon well-established and generally recognized rules and principles of public policy not expressly abolished.¹⁹

On the other hand, although the spirit and true meaning of the Federal Constitution will govern in its construction, they must be very apparent to overrule words actually used therein.²⁰ Thus, a case falling within the words of a constitutional provision must also be within its operation, unless there is something in the literal construction so obviously absurd, mischievous, or

cases which deal with the construction of statutes rather than of constitutional provisions. If the court means that in order to give effect to true intention the spirit of the provisions rather than the letter of them should be looked to, the case is in accord with the general principle of liberal construction stated in § 62, supra. If the court means that it can search for an intention in spite of plain and unambiguous words and change the meaning of those words, the holding seems in effect to violate the principle that the intention is to be gathered from the words of the provision when those words are plain. These two theories can be reconciled—perhaps these two theories can be reconciled—between (1) broadly looking at the spirit of the constitution to carry out a purpose which is held to be paramount, although not expressed by the language actually employed, hence, postulating an intent in spite of clear language, and (2) not postulating any intent where language is clear and unambiguous. The line of demarcation, however, is not pointed out in the decisions.

14. *Downes v Bidwell*, 182 US 244, 45 L ed 1088, 21 S Ct 770; *Norris v Baltimore*, 172 Md 667, 192 A2d 531; *Tulsa v McIntosh*, 141 Okla 220, 284 P 875; *Payne v Racine*, 217 Wis 550, 259 NW 437.

15. *Gautier v Dimar*, 204 NY 20, 97 NE 464.

In doubtful cases that particular construction will be preferred which does not violate these fundamental principles. *Salem v Eastern R. Co.* 98 Mass 431.

16. *Davis v Minor*, 1 How (Mia) 183.

17. *State v Joseph*, 143 La 428, 78 So 663; *People ex rel. McClelland v Roberts*, 148 NY 360, 42 NE 1082.

230

18. *Bain Peanut Co. v Pinson*, 282 US 499, 75 L ed 482, 51 S Ct 228; *Dunn v Love*, 172 Miss 342, 155 So 331, 92 ALR 1323, affd 295 US 64, 79 L ed 1303, 55 S Ct 558, 96 ALR 1438; *Phillips Petroleum Co. v Smith*, 177 Okla 539, 61 P2d 184, 107 ALR 858.

The principles upon which the Federal Constitution was established, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions. *United States v Lefkowitz*, 285 US 452, 76 L ed 877, 52 S Ct 420, 82 ALR 775.

It is unsafe to apply to the constitution a literal construction in every instance. *Griffin v Vandegriff*, 205 Ga 288, 53 SE2d 345.

"Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subvert these instruments . . . to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power." *Ellingham v Dye*, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92.

19. *Sun Printing & Pub. Asso. v New York*, 152 NY 257, 46 NE 499; *State v Brown*, 71 W Va 519, 77 SE 243.

As to construction to avoid absurd results, see § 76, infra.

20. *Cohen v Virginia*, 6 Wheat (US) 264, 5 L ed 257.

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 72

repugnant to the general spirit of the constitutional instrument as to justify an exception.¹

b. EFFECT OF IMPLICATIONS

§ 72. Generally.

Since constitutions must of necessity be general rather than detailed and prolix,² many of the essentials with which they treat are impliedly controlled or dealt with by them,³ and implication plays a very important part in construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed.⁴ The rule is equally applicable to the construction of state constitutions.⁵

The intent of a constitution may be shown by the implications, as well as by the words of express provisions.⁷ However, it is to be presumed that the words employed in a constitution have been carefully measured and weighed to convey a certain and definite meaning, with as little as possible left to implication.⁸

The fact that some degree of implication must be given to words is a proposition of universal adoption; implication is only another term for meaning and intention apparent in the writing on judicial inspection.⁹ Thus, a court, affirmative words where the implication promotes, but not where it defeats, the intention.¹⁰

The doctrine of construction by implication is limited to the extent of preventing judicial amendment of the fundamental law. The Supreme Court

1. *Dartmouth College v Woodward*, 4 Wheat (US) 518, 4 L ed 629; *Parkinson v Watson*, 4 Utah 2d 191, 291 P2d 400.

2. § 5, supra.

3. As to the implied powers of Congress under the Federal Constitution, see §§ 202, 203, infra.

As to implied repeal or abrogation of a constitutional provision by a conflicting amendment, see § 69, supra.

4. *State ex rel. Green v Collison*, 39 Del 245, 197 A 836, revd on another point 39 Del 460, 2 A2d 97, 119 ALR 1422.

5. *Dillon v Gloss*, 256 US 368, 65 L ed 994, 41 S Ct 510; *Luria v United States*, 231 US 9, 58 L ed 101, 34 S Ct 10; *South Carolina v United States*, 199 US 437, 50 L ed 261, 26 S Ct 110; *McHenry v Alford*, 168 US 651, 42 L ed 614, 18 S Ct 242; *Ex parte Yarbrough*, 110 US 651, 28 L ed 274, 4 S Ct 152.

6. *State ex rel. Nuveen v Greer*, 88 Fla 249, 102 So 739, 37 ALR 1298; *Page v Allen*, 58 Pa 338.

7. *State ex rel. Nuveen v Greer*, 88 Fla 249, 102 So 739, 37 ALR 1298.

In the interpretation of a constitutional provision, the omission of a particular phrase

is a circumstance to be regarded in ruling against the meaning the phrase would give the provision, particularly where such phrase is used in other constitutional provisions. *Adams v Bolin*, 74 Ariz 269, 247 P2d 617, 33 ALR2d 1102.

8. *Gangemi v Berry*, 25 NJ 1, 134 A2d 1.

9. *Rhode Island v Massachusetts*, 12 Pet (US) 657, 9 L ed 1233; *Payne v Davis (Ky)* 254 SW2d 710.

10. *Cohen v Virginia*, 6 Wheat (US) 264, 5 L ed 257; *State ex rel. Morris v Wrightson*, 56 NJL 126, 28 A 56.

Prohibitions need not be expressly made in the constitution, for a declaration of a fundamental right may be the equivalent of a prohibition against legislation impairing the right. *Lawrence E. Tierney Coal Co. v Smith (Lawrence E. Tierney Coal Co. v Kash)* 180 Ky 815, 203 SW 731, 4 ALR 1540.

An exception of foreign vessels from the operation of the provisions of the Eighteenth Amendment to the Federal Constitution when within the territorial waters of the United States would tend to embarrass the enforcement of the amendment and defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied. *Cunard S. S. Co. v Mellon*, 262 US 100, 67 L ed 894, 43 S Ct 504, 27 ALR 1306.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 73

has declared that a court has no right to insert any clause in the Constitution which is not expressed and cannot be fairly implied.¹¹ And it has been said that if inconsistent intention is to be avoided in construing the express provisions of a constitution, it is certainly not permitted to imply an intention that conflicts with a definite and express intention.¹²

§ 73. Implications from words of limitation and grant, generally; words of limitation. Although it has been said that the maxim "expressio unius est exclusio alterius" does not apply with the same force to a constitution as to a statute,¹³ there is authority to the effect that in construing a constitution, resort may be had to the maxim, and the expression of one thing in a constitution may necessarily involve the exclusion of other things not expressed.¹⁴ This general rule is subject to the limitation that like all other mere rules of construction applied to ambiguous words, it must yield to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended was different.¹⁵

Another important canon of construction of similar nature which is frequently applied to constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power.¹⁶

11. *Prigg v Pennsylvania*, 16 Pet (US) 539, 10 L ed 1360.
A power clearly legislative in its character, and not expressly denied to the legislature, ought not to be held denied by implication, unless its exercise will interfere with or defeat the exercise of a power expressly granted.
Imperial Irrig. Co. v Jayne, 104 Tex 395, 138 SW 373.

12. *Tucker v State*, 218 Ind 614, 35 NE2d 270.

13. *State ex rel. Green v Collison*, 39 Del 345, 197 A 836, rev'd on another point 39 Del 460, 2 A2d 97, 119 ALR 1422; *Gangemi v Berry*, 25 NJ 1, 134 A2d 1; *Myers v Oklahoma Tax Com.* (Okla) 303 P2d 443.

The maxim "expressio unius est exclusio alterius" is not to be applied with the same rigor in construing a state Constitution as a statute, and only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as inhibiting the powers of the legislature. *State v Martin*, 60 Ark 343, 36 SW 421.

The application of the rule of "expressio unius est exclusio alterius" to a constitutional provision calling for per diem and mileage to disallow any other expenses for legislators, where the application was unnecessary to the decision reached in the case, was disapproved in *Eberle v Nielson*, 78 Idaho 572, 306 P2d 1083, expressing disapproval of *Peck v State*, 63 Idaho 373, 120 P2d 820.

14. *Ex parte Vallandigham*, 1 Wall (US) 243, 17 L ed 589; *Brown v Maryland*, 12

Wheat (US) 419, 6 L ed 678; *People ex rel. Mooney v Hutchinson*, 172 Ill 486, 50 NE 599; *Election Comrs. v Knight*, 187 Ind 108, 117 NE 565, 650; *Denney v State*, 144 Ind 503, 42 NE 221; *Morris v Powell*, 125 Ind 281, 25 NE 221; *State ex rel. Griffith v Turner*, 117 Kan 753, 233 P 510; *McKinney v Barker*, 180 Ky 526, 203 SW 303; *Cooke v Iverson*, 108 Minn 388, 122 NW 251; *Henderson v Koenig*, 168 Mo 356, 68 SW 72; *Marx & H. Jeans Clothing Co. v Watson*, 168 Mo 133, 67 SW 391; *Martien v Porter*, 68 Mont 450, 219 P 817; *State ex rel. Hastings v Smith*, 35 Neb 13, 52 NW 700; *Board of Elections v State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Mason v State*, 58 Ohio St 30, 50 NE 6; *Page v Allen*, 58 Pa 338; *Thompson v Kay*, 124 Tex 252, 77 SW 2d 201; *Pace v Eoff* (Tex Com App) 48 SW 2d 956; *Collingsworth County v Allred*, 120 Tex 473, 40 SW2d 13; *State ex rel. Banker v Clausen*, 142 Wash 450, 253 P 805.

15. *State ex rel. Griffith v Turner*, 117 Kan 753, 233 P 510; *Jones v Hoss*, 132 Or 175, 285 P 205; *Collingsworth County v Allred*, 120 Tex 473, 40 SW2d 13; *State ex rel. Banker v Clausen*, 142 Wash 450, 253 P 805; *Nunnemacher v State*, 129 Wis 190, 108 NW 627.

16. *Gibbons v Ogden*, 9 Wheat (US) 1, 6 L ed 23; *People v Hutchinson*, 172 Ill 486, 50 NE 599; *Postlethwaite v Edson*, 102 Kan 619, 171 P 773; *State v Cunningham*, 83 Wis 90, 53 NW 35.

A constitutional provision prohibiting the legislature from remitting fines, penalties, and forfeitures "by special law," implies power to remit them by general laws. *Jones v Williams*, 121 Tex 94, 45 SW2d 130, 79 ALR 983.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 74

A constitutional exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. The rule is likewise well established that where no exception is made in terms, none will be made by mere implication or construction.¹⁷ Where a restriction is not general, but is stated in connection with a specific situation, its application will not be carried to other situations.¹⁸ It cannot be mechanically inferred from a constitutional provision which is prohibitory in nature that what is not prohibited is thereby affirmatively guaranteed; the decision to prohibit is simply a decision to foreclose a contrary view as to the area dealt with, and what is left untouched remains within the jurisdiction of the government.¹⁹ Similarly, the Supreme Court has held that limitations upon a general grant of executive power should not be enlarged beyond the words used.²⁰

A specific prohibition does not bar additional prohibitions so long as the power to prohibit exists without an express constitutional grant.¹

§ 74. — Words of grant.

It is generally understood that grants of power to the federal government as contained in the United States Constitution are subject to no limitations except those expressed in the Constitution itself. A power stated and delegated by the Constitution to the federal judiciary² or to Congress³ is comprehensive and complete without limitations other than those found in the Constitution.

Where the means for the exercise of a granted power are given in a constitution, no other or different means can be implied as being more effectual or convenient,⁴ for where a power is expressly given by the constitution and the mode of its exercise is prescribed, such mode is exclusive⁵ of all others.⁶

The question whether powers granted by a state constitution, in the absence of a particular expressed method of exercising them, are subject to implied

17. *Rhode Island v Massachusetts*, 12 Pet (US) 657, 9 L ed 1233; *Morris v Powell*, 125 Ind 281, 25 NE 221; *Postlethwaite v Edson*, 102 Kan 619, 171 P 773; *Ex parte Massey*, 49 Tex Crim 60, 92 SW 1086; *Carr v Wilson*, 32 W Va 419, 9 SE 31; *State ex rel. Lamb v Cunningham*, 83 Wis 90, 53 NW 35.

18. *State ex rel. White v Grant Superior Ct.* 202 Ind 197, 172 NE 897, 71 ALR 1354.

A constitutional provision forbidding the appointment of a member of the legislature to any civil office under the state cannot be extended to include the mere employment of a legislator by the board of railroad commissioners. *State ex rel. Barney v Hawkins*, 79 Mont 506, 257 P 411, 53 ALR 583.

19. *Reilly v Ozzard*, 33 NJ 529, 166 A2d 360, 89 ALR2d 612.

20. *Myers v United States*, 272 US 52, 71 L ed 160, 47 S Ct 21.

1. *Lee v Miami*, 121 Fla 93, 163 So 486, 101 ALR 1115, holding that where the Constitution prohibits lotteries, the legislature, while it cannot legalize any gambling device which in effect amounts to a lottery, has inherent power to regulate or to prohibit any and all other forms of gambling.

2. Although the Constitution does not in terms extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is therefore a question of construction whether the controversy in a given case is within the grant of judicial power. *Rhode Island v Massachusetts*, 12 Pet (US) 657, 9 L ed 1233.

3. *South Carolina v United States*, 199 US 437, 50 L ed 261, 26 S Ct 110.

As to the implied powers of the Congress, see §§ 202, 203, infra.

4. *Ellingham v Dye*, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; *State ex rel. Edwards v Osborne*, 195 SC 295, 11 SE2d 260; *Jones v Williams*, 121 Tex 94, 45 SW2d 130, 79 ALR 983.

5. *Crabb v Celeste Independent School Dist.* 105 Tex 194, 146 SW 528.

6. *People ex rel. Mooney v Hutchinson*, 172 Ill 486, 50 NE 599; *Denney v State*, 144 Ind 503, 42 NE 929; *Morris v Powell*, 125 Ind 281, 25 NE 221; *Quinn v State*, 35 Ind 485; *Sapulpa v Land*, 101 Okla 22, 223 P 640, 35 ALR 872; *Page v Allen*, 58 Pa 338.

§ 97. Generally.

One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles,⁷ but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment.⁸ In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, and there is no language indicating that the subject is referred to the legislature for action.⁹ The fact that a right granted by the constitution might be better or further protected by supplementary legislation does not prevent the provision from being self-executing.¹⁰ But if a constitutional provision is so vague as not to admit of an understanding of its intended scope, it cannot be self-executing.¹¹ A constitutional provision will not be construed as self-executing when to do so would work confusion and mischief.¹²

An additional test is expressed in the general rule that where there is no ambiguity and the purpose of the provision would be frustrated unless given

SE 842; *Brice v McDow*, 116 SC 324, 108 SE 84.

Constitutional provisions should never be construed as dependent for their efficacy and operation upon legislative will. *Swift & Co. v Newport News*, 105 Va 108, 52 SE 821.

7. *Detroit v Oakland Circuit Judge*, 237 Mich 446, 212 NW 207; *Re V (Mo)* 306 SW2d 461; *Wann v Reorganized School Dist. (Mo)* 293 SW2d 408; *State ex rel. Miller v Toberman*, 360 Mo 1101, 232 SW2d 904; *Toberman*, 360 Mo 1101, 232 SW2d 904; *Wren v Dixon*, 40 Nev 170, 161 P 722, 167 P 324; *State ex rel. Linde v Hall*, 35 ND 34, 149 NW 281; *State ex rel. Russell v Bliss*, 156 Ohio St 147, 46 Ohio Ops 3, 101 NE2d 289.

8. *Davis v Burke*, 179 US 399, 45 L ed 249, 21 S Ct 210; *Whitman v National Bank*, 176 US 559, 44 L ed 587, 20 S Ct 477; *Groves v Slaughter*, 15 Pet (US) 449, 10 L ed 800; *People v Western Air Lines, Inc.* 42 Cal 2d 621, 268 P2d 723, app dismd 348 US 859, 99 L ed 677, 75 S Ct 87; *Winchester v Howard*, 136 Cal 432, 64 P 692, 69 P 77; *Gates v Sweitzer*, 347 Ill 353, 179 NE 837, 79 ALR 1151; *Gaiser v Buck*, 203 Ind 9, 179 NE 1, 82 ALR 1348; *State v Redman*, 183 Ind 332, 109 NE 184; *Detroit v Oakland Circuit Judge*, 237 Mich 446, 212 NW 207; *Re V (Mo)* 306 SW2d 461; *Wann v Reorganized School Dist. (Mo)* 293 SW2d 408; *State ex rel. Miller v Toberman*, 360 Mo 1101, 232 SW2d 904; *Wren v Dixon*, 40 Nev 170, 161 P 722, 167 P 324; *State ex rel. Linde v Hall*, 35 ND 34, 159 NW 281; *State ex rel. Delgado v Romero*, 17 NM 81, 124 P 649; *State ex rel. Russell v Bliss*, 156 Ohio St 147, 46 Ohio Ops 3, 101 NE2d 289; *Riley v Carter*, 165 Okla 262, 25 P2d 666, 88 ALR 1018; *State ex rel. Clark v Harris*, 74 Or 573, 144

P 109; *Washington County Election Com. v Johnson City*, 209 Tenn 131, 350 SW2d 601; *Newport News v Woodward*, 104 Va 58, 51 SE 193; *Anderson v Whatcom County*, 15 Wash 47, 45 P 665; *Thorne v Clarksburg*, 88 W Va 251, 106 SE 644.

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles without affording means by which these principles may be given the force of law. *Maddox v Hunt*, 183 Okla 465, 83 P2d 553.

9. *Willis v Mabon*, 48 Minn 140, 50 NW 1110; *Wann v Reorganized School Dist. (Mo)* 293 SW2d 408; *State ex rel. Miller v Toberman*, 360 Mo 1101, 232 SW2d 904; *State ex rel. Fulton v Smith*, 355 Mo 27, 194 SW2d 302; *State ex rel. Linde v Hale*, 35 ND 34, 159 NW 281; *State ex rel. Russell v Bliss*, 156 Ohio St 147, 46 Ohio Ops 3, 101 NE2d 289; *O'Connor v Armstrong*, 299 Pa 390, 149 A 655.

If a constitutional provision is complete in itself, it executes itself. *State ex rel. Miller v Toberman*, 360 Mo 1101, 232 SW2d 904.

The test is, does the provision indicate that it was intended as a present enactment, complete in itself, or does it contemplate subsequent legislation to carry it into effect? *Lattin v Cordell*, 197 Okla 369, 172 P2d 397.

10. *People v Carroll*, 3 NY2d 686, 171 NYS 2d 812, 148 NE2d 875.

11. *Re V (Mo)* 306 SW2d 461.

12. *Re V*, supra.

immediate effect, it will be treated as self-executing.¹³ It has also been decided that when a constitutional provision or a statute is declarative of the common law, it may usually be treated as self-executing.¹⁴

The question whether a constitutional provision is or is not self-executing is ultimately one of intention.¹⁵

§ 98. Provision as addressed to legislature.

Since a constitutional provision which depends upon legislative action for its effectiveness is ipso facto not self-executing,¹⁶ it follows that in determining whether a provision is self-executing, the question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature.¹⁷ One court has concisely declared that in determining when a constitutional provision is self-executing, it would distinguish between declarative constitutional limitation of legislative power on a given subject, within which limitation legislation might or should be enacted, and positive constitutional inhibition, which inhibition no legislative act could relieve or modify. The former might require future legislation; the latter must, by reason of its very nature, be self-executing.¹⁸

A provision that the legislature should make suitable provisions for carrying a constitutional amendment into effect is obviously addressed to the legislature and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature.¹⁹

On the other hand, minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions.²⁰ The mere fact that legislation may supplement and add to, or prescribe a penalty for

13. *Tuttle v National Bank*, 161 Ill 497, 44 NE 984.

14. *Trust Co. of Georgia v State*, 109 Ga 736, 35 SE 323; *Knight & J. Co. v Miller*, 172 Ind 27, 87 NE 823.

15. *Illinois C. R. Co. v Ihlenberg (CA6)* 75 F 873; *Tuttle v National Bank*, 161 Ill 497, 44 NE 984; *Leser v Lowenstein*, 129 Md 244, 98 A 712; *State ex rel. Linde v Hall*, 35 ND 34, 159 NW 281; *Maddox v Hunt*, 183 Okla 465, 83 P2d 553; *Newport News v Woodward*, 104 Va 58, 51 SE 193.

16. § 94, supra.

17. *State v Redman*, 183 Ind 332, 109 NE 184; *Leser v Lowenstein*, 129 Md 244, 98 A 712; *Farmers & M. State Bank v Consolidated School Dist.* 174 Minn 286, 219 NW 163, 65 ALR 1407; *Willis v Mabon*, 48 Minn 140, 50 NW 1110; *State v Kyle*, 166 Mo 287, 65 SW 763; *State ex rel. Linde v Packard*, 35 ND 298, 160 NW 150.

A provision is not self-executing if its terms look forward to and require ulterior action upon the part of the lawmaking branch of the government. *State ex rel. Linde v Packard*, supra.

18. *Wren v Dixon*, 40 Nev 170, 161 P 722, 167 P 324.

19. *Tuttle v National Bank*, 161 Ill 497, 44 NE 984; *Russell v County Board of Education*, 247 Ky 703, 57 SW2d 681; *Leser v Lowenstein*, 129 Md 244, 98 A 712; *State v Lynch*, 88 Ohio St 71, 102 NE 670; *Ex parte Wagner*, 210 Okla 33, 95 P 435; *Maddox v Hunt*, 183 Okla 465, 83 P2d 553; *O'Connor v Armstrong*, 299 Pa 390, 149 A 655.

A constitutional provision to the effect that all actions may be conducted "as provided by law" states only a general principle and directs the legislature to provide the rules by which the general right which it grants may be enjoyed and protected. *Wann v Reorganized School Dist. (Mo)* 293 SW2d 408.

A constitutional provision specifying that the legislature "shall provide by law" in what manner a certain thing shall be done is not self-executing, requiring legislative action to make it effective. *Cox v State*, 134 Neb 751, 279 NW 482.

20. In adopting constitutions the people frequently leave to the legislature the enactment of statutes as to detailed matters in order to make the provisions fully operative. *State ex rel. Burnett v Deck*, 106 Kan 518, 188 P 238; *Ex parte Smith*, 24 Okla Crim 415, 218 P 708; *State ex rel. Flanagan v South Dakota Rural Credits Bd.* 45 SD 619, 189 NW 704; *State ex rel. Shepard v Superior Ct.* 60 Wash 370, 111 P 233.

§ 99

the violation of, a self-executing provision of a constitution does not render such a provision ineffective in the absence of such legislation.¹

§ 99. Provision as failing to state remedies in connection with rights and liabilities provided for.

The omission from a constitution of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The maxim "ubi jus ibi remedium" (where there is a right there is a remedy) is as old as the law itself. Accordingly, it has been decided that if a state constitution declares that a liability shall exist in certain specified circumstances, an action may be maintained to enforce such liability, notwithstanding the nonexistence of any legislation upon the subject.² This is based upon the principle that if there is no statute especially adapted to enforce a constitutional right, it enforces itself by its own inherent potency.³

§ 100. Provision as stating prohibition.

Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void.⁴ But the general principle that prohibitory provisions prevent their violation without legislation does not go beyond reasonable limits. Such provisions are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law.⁵

VI. DETERMINATION OF CONSTITUTIONALITY OF LEGISLATION

A. POWER TO DECLARE LEGISLATION VOID

1. IN GENERAL

§ 101. Judicial power, generally.

It is, and long has been, clear that the power of construing the constitution must necessarily be lodged in some department of the government to insure that

1. State ex rel. Delgado v Romero, 17 NM 81, 124 P 649.

A mandate to the legislature to enact appropriate legislation to carry into effect a constitutional amendment will not prevent the amendment from being self-executing. Ghera v State, 16 Ariz 344, 146 P 494.

A constitutional provision which permits such legislation to be enacted "as may aid the operation" thereof may be self-executing. State ex rel. Clark v Harris, 74 Or 573, 144 P 109.

And see § 95, supra.

2. Gaier v Buck, 203 Ind 9, 179 NE 1, 82 ALR 1348; State v Redman, 183 Ind 332, 109 NE 184; Willis v Mabon, 48 Minn 140, 50 NW 1110; Swift v Newport News, 105 Va 108, 52 SE 821.

3. State v Warner, 165 Mo 399, 65 SW 584.

4. Ghera v State, 16 Ariz 344, 146 P 494; Beard v Hopkinsville, 95 Ky 239, 24 SW 872; Payne v Lee, 222 Minn 269, 24 NW2d 259;

Willis v Mabon, 48 Minn 140, 50 NW 1110; J. J. Newman Lumber Co. v Robertson, 131 Miss 739, 95 So 244; State ex rel. Dalton v Dearing, 364 Mo 475, 263 SW2d 381; State ex rel. Palagi v Regan, 113 Mont 343, 126 P2d 818; Wren v Dixon, 40 Nev 170, 161 P 722, 167 P 324; State ex rel. Delgado v Romero, 17 NM 81, 124 P 649.

A prohibitory provision in a constitution limiting the power of the legislature necessarily carries with it a like prohibition as to the lawmaking power of every municipal corporation, the creature of the legislature. Subsequently to the adoption of the constitution, every ordinance of a municipal corporation, in the exercise of its legislative powers, must be construed as if that section of the constitution was written into it. New Decatur v American Teleph. & Teleg. Co. 176 Ala 492, 58 So 613.

Exemptions when regarded as prohibitions are self-executing. Miller v Marx, 55 Ala 322; Beecher v Baldy, 7 Mich 488.

5. Wren v Dixon, 40 Nev 170, 161 P 722, 167 P 324.

practical sanction to its mandates which seems essential for the preservation of their vitality and force.⁶ Although the doctrine was not established without dispute, it is now a settled principle of the American system of constitutional law that the courts have inherent authority to determine whether statutes enacted by the legislature transcend the limits imposed by the federal and state constitutions and to determine whether such laws are or are not constitutional.⁷ The determination of the constitutionality of a statute is within the especial province and duty of the courts,⁸ and no express constitutional authority for

6. Wells v Missouri P. R. Co. 110 Mo 286, 19 SW 530.

"In no other way known to intelligent men can a government by written Constitution exist except there be power somewhere to make statutes square with that instrument, and to say whether or not they do. That high power is now lodged with the courts; there it has been for generations and there it must remain until the people by the exercise of their sovereign will, expressed in a constitutional way, take it away and lodge it elsewhere." Tuberculosis Hospital Dist. v Peter, 253 Mo 520, 161 SW 1155.

7. The principle is so familiar and so firmly established as to make extended citation of authority superfluous. The following decisions represent the virtually limitless number of cases in point: United States v Butler, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914; Adkins v Children's Hospital, 261 US 525, 67 L ed 785, 43 S Ct 394, 24 ALR 1238, overruling on other grounds West Coast Hotel Co. v Parrish, 300 US 379, 81 L ed 703, 57 S Ct 578, 108 ALR 1330; McCrary v United States, 195 US 27, 49 L ed 78, 24 S Ct 769; Pollock v Farmers' Loan & T. Co. 157 US 429, 39 L ed 759, 15 S Ct 673; Marbury v Madison (US) 1 Cranch, 137, 2 L ed 60 (the leading case); Dyer v Tuscaloosa Bridge Co. (Ala) 2 Port 296; Lockard v Los Angeles, 33 Cal 2d 453, 202 P2d 38, 7 ALR2d 990, cert den 337 US 939, 93 L ed 1744, 69 S Ct 1516; Derby Turnp. Co. v Parks, 10 Conn 522; Goshen v Stonington, 4 Conn 209; Bailey v Philadelphia, W. & B. R. Co. 4 Del (4 Harr) 389; State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298; Denham v Holmann, 26 Ga 182; Winter v Jones, 10 Ga 190; Joseph Triner Corp. v McNeil, 363 Ill 559, 2 NE2d 929, 104 ALR 1435; People v Love, 298 Ill 304, 131 NE 809, 16 ALR 703; People v Elending, 254 Ill 579, 98 NE 982; Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; State ex rel. Brown v Bailey, 16 Ind 46; Hubbell v Higgins, 148 Iowa 36, 126 NW 914; Richman v Muscatine County, 77 Iowa 513, 42 NW 422; Atkinson v Woodmansee, 68 Kan 71, 74 P 640; Bliss v Commonwealth, 12 Ky (2 Litt) 90; Johnson v Duncan (La) 3 Mart 530; Bowdoinham v Richmond, 6 Me 112; Salisbury Land & Improv. Co. v Commonwealth, 215 Mass 371, 102 NE 619; Durgin v Minot, 203 Mass 26, 89 NE 144; King v Dedham Bank, 15 Mass 447; Greene County v Lydy, 263 Mo 77, 172 SW 376; Tuberculosis Hospital Dist. v Peter, 253 Mo

520, 161 SW 1155; Moeller, McPherrin & Judd v Smith, 127 Neb 424, 255 NW 551; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Sherill v O'Brien, 188 NY 185, 81 NE 1176; State v Harris, 216 NC 746, 6 SE2d 834, 128 ALR 658; State ex rel. Atty.-Gen. v Knight, 169 NC 333, 85 SE 61; State v Williams, 146 NC 618, 61 SE 61; State v Moore, 104 NC 714, 10 SE 143; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; State v Robins, 71 Ohio St 273, 73 NE 470; State ex rel. Cruce v Cease, 28 Okla 271, 114 P 251; Page v Allen, 58 Pa 338; Re Legislative Adjournment, 18 RI 824, 27 A 324; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408; Girdner v Stephens (Tenn) 1 Heisk 280; Tate v Bell (Tenn) 4 Yerg 202; Rio Grande Lumber Co. v Darke, 50 Utah 114, 167 P 241; Block v Schwartz, 27 Utah 387, 76 P 22; Starr v Robinson (Vt) 1 D Chip 257; Morgan v Commonwealth, 168 Va 731, 191 SE 791, 111 ALR 62; Carter v Commonwealth, 96 Va 791, 32 SE 780; Tuckahoe Canal Co. v Tuckahoe & J. R. Co. (Va) 11 Leigh 42; Booten v Finson, 77 W Va 412, 89 SE 985; Harmison v Ballot Comrs. 45 W Va 179, 31 SE 394; Price v Moundsville, 43 W Va 523, 27 SE 218; State ex rel. Froedtert Grain & Malting Co. v Tax Com. 221 Wis 225, 265 NW 672, 267 NW 52, 104 ALR 1478.

By express provisions of the Constitution or by necessary inference and implication the judicial department of the government is competent to determine whether a given law of the United States is or is not enacted pursuant to the Constitution, and to pronounce it valid or void accordingly. Pollock v Farmers' Loan & T. Co. 157 US 429, 39 L ed 759, 15 S Ct 673.

For a relatively early, but truly classical discussion of the origin and scope of the American doctrine of constitutional law, treating the question of the power of the courts to declare laws unconstitutional see this article by James B. Thayer, 7 Harvard L Rev 129.

8. Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60.

"The supremacy of the law requires that where enacted Constitutions form the fundamental law there be some authority which can pronounce whether the legislature itself has or has not transgressed it in the passing of some law, or whether a specific law conflicts with the superior law, the Constitution. If a separate body of men were established to pronounce upon the constitutionality of a law,

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 102

such action is necessary.⁹ It has been said that if a court has jurisdiction to try a case it has inherent power to determine whether an act, on which the existence of the right of action depends, conforms to the constitution.¹⁰

The courts have just as much power and right to inquire into the constitutionality of a statute adopted by the initiative method as they have with reference to statutes enacted by the legislature in the ordinary manner.¹¹

The basis of the power of a court to declare an act of a legislature or an act of Congress invalid is the province and duty of the judicial department to say what the law is.¹²

§ 102. — Express constitutional limitations.

In some states, by specific provisions inserted in the state constitutions themselves by the people of the state, the otherwise unlimited power of the courts to declare statutes unconstitutional has been confined, limited, and made subject to restrictions and qualifications. An Ohio constitutional provision states that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges," except upon appeal from a court of appeals which has already held the law to be unconstitutional.¹³ A more specific constitutional amendment, in reference to the state

nothing would be gained. It would be as much the creature of the Constitution as the legislature, and might err as much as the latter. Quis custodiet custodes? Tribunes or ephori? They are as apt to transgress their powers as other mortals. But there exists a body of men in all well-organized polities, who, in the regular course of business assigned to them, must decide upon clashing interests, and do so exclusively by the force of reason, according to law, without the power of armies, the weight of patronage or imposing pomp, and who, moreover, do not decide upon principles in the abstract, but upon practical cases which involve them—the middlemen between the pure philosophers and the pure men of government. These are the judges—courts of law." Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92.

And see § 104, infra.

9. Jones v Freeman, 193 Okla 554, 146 P2d 564, cert den 332 US 717, 88 L ed 1558, 64 S Ct 1288.

10. In Georgia the constitution not only recognizes the necessary power of the courts to declare laws in violation of the state or federal constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void. Cutsinger v Atlanta, 142 Ga 535, 83 SE 263.

11. Payne v Griffin (DC Ga) 51 F Supp 588.

12. Commonwealth v Higgins, 277 Mass 191, 178 NE 536, 79 ALR 1304.

13. State ex rel. Ezzell v Shumate, 172 Tenn 451, 113 SW2d 381.

Generally, as to judicial functions, see §§ 220, 221, infra.

13. Ohio Const Art 4 § 2. As applying this

provision, see, for example, State v Chester, 140 Ohio St 210, 23 Ohio Ops 426, 42 NE 2d 993.

The effect of the Ohio provision is to make it possible for a statute to be regarded as valid in one district, while at the same time it is invalid in another, and its validity is entirely conjectural in any of the other districts (there being nine in all) in which it has not come before the court of appeals. Perhaps the view may be taken that as soon as the majority of the supreme court has been able to give effect to its view that a statute is unconstitutional, the lower courts will be bound by that decision, so that the supreme court will not again be confronted by a case in which the constitutionality of the statute is upheld by the court of appeals. Annotation: 66 ALR 1467.

In Ohio ex rel. Bryant v Akron Metropolitan Park Dist. 281 US 74, 74 L ed 710, 50 S Ct 228, 66 ALR 1460, it was held that neither the due process clause nor the equal protection clause of the Federal Constitution is violated by the Ohio constitutional provision to the effect that even the supreme court of that state cannot hold a statute to be unconstitutional where the court of appeals from which the case has been taken up has upheld its validity and more than one of the supreme court judges concur in that view.

In Colorado it had been held that a state constitution cannot deny to the trial judges of the state power to determine whether or not the statutes of the state violate the Federal Constitution. People v Western U. Tel. Co. 70 Colo 90, 198 P 146, 15 ALR 326. Annotation: 15 ALR 333, s. 66 ALR 1466.

The Colorado Supreme Court has also held that a constitutional provision authorizing the people of the state or of a municipality to recall a judicial decision holding a state statute or a municipal ordinance viola-

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 104

supreme court, that "in no case shall any legislative enactment or law of the state . . . be declared unconstitutional unless at least four of the judges shall so decide" (the court consisting of five judges), has been held to require that a certain act be held constitutional where only two of the judges are satisfied that it is so and where the other two who participated in the case are of the opinion that it is invalid. And a statute has been upheld under this amendment even though three of the five judges considered the act to be unconstitutional.¹⁴

§ 103. — Limitation by statute of rule of practice.

Judicial power to determine constitutionality of state legislation may be subject to procedural limitations, as where a statute or rule of court requires that, in any action in which the constitutionality of state legislation is drawn in question and to which the state or a state officer, agency, or employee is not a party, the party asserting unconstitutionality notify the attorney general in time to permit him to intervene.¹⁵ A statutory requirement that the attorney general be served and given an opportunity to be heard in a declaratory judgment proceeding in which a statute, ordinance, or franchise is alleged to be unconstitutional, has been held jurisdictional.¹⁶ But the United States Supreme Court has said that rules of practice limiting judicial determination of constitutional issues which, although weighty, fall short of the status of principles ordained by the Constitution, may be made subject to exceptions where there are weighty countervailing policies.¹⁷

§ 104. Exercise of power by nonjudicial agencies; judicial power as exclusive.

From the very nature of the American system of government with constitutions prescribing the jurisdiction and powers of each of the three branches of government,¹⁸ it has devolved on the judiciary to determine whether the acts of the other two departments are in harmony with the fundamental law.¹⁹ All the departments of the government are unquestionably entitled and compelled to judge of the constitution for themselves; but, in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. When the judiciary has once spoken, if the acts of the other two departments are held to be unauthorized or despotic, in violation of the constitution or the vested rights of the citizen, they cease to be operative or binding.²⁰ The final responsibility of passing upon the constitutionality of a

tive of the Federal Constitution is null and void. People v Western U. Tel. Co., supra. Annotation: 66 ALR 1466.

The decision by the United States Supreme Court in Ohio ex rel. Bryant v Akron Metropolitan Park Dist. 281 US 74, 74 L ed 710, 50 S Ct 228, 66 ALR 1460, would seem to destroy the force of the Colorado decisions so far, at least, as they have held that the limitations there in question upon the power of trial courts to declare statutes unconstitutional violate the same provisions of the Federal Constitution.

14. Annotation: 66 ALR 1468, 1469 (referring to Constitution of North Dakota).

15. Oak Center Creamery Co. v Grove, 264 Minn 435, 119 NW2d 729, holding such a rule jurisdictional.

16. Busch Jewelry Co. v Bessemer, 266 Ala 492, 98 So 2d 50.

17. United States v Raines, 362 US 17, 4 L ed 2d 524, 80 S Ct 519.

18. §§ 210 et seq., infra.

19. Walling v Bown, 9 Idaho 740, 76 P 318; Dullam v Willson, 53 Mich 392, 19 NW 112; Albritton v Winona, 181 Miss 75, 178 So 799, 115 ALR 1436; Denison v State (Tex Civ App) 61 SW2d 1017, error ref 122 Tex 459, 61 SW2d 1022; Willis v Kalmbach, 109 Va 475, 64 SE 342.

And see § 101, supra.

20. McFarland v State Bank, 4 Ark 44; State ex rel. Atlantic Coast Line R. Co. v Board of Equalizers, 84 Fla 592, 94 So 681, 30 ALR 362; State ex rel. Suddoth v Tann, 172 Miss 162, 158 So 777, 159 So 539; Deni-

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 104

statute rests upon the courts,¹ and they alone are by the organic law empowered authoritatively to declare or adjudge a statute to be in accord or in conflict with the constitution, so that the statute, if valid, stands, or, if contrary to organic law, will, by the operation of the constitution, be rendered invalid from its enactment.²

It has been stated that the right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution. The oath of office "to obey the Constitution" means to obey the constitution, not as the officer decides, but as judicially determined, for since every law found on the statute books is presumptively constitutional until declared otherwise by the court, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement.³

In assuming this high function, the courts do not proceed on the theory that the judiciary is in any way superior to the two other co-ordinate departments, but solely on the theory that they are required to declare the law in every case coming before them and accordingly must enforce the constitution as the paramount law whenever they find an act of the other departments in conflict with it.⁴ But it is important to bear in mind that it is only when

son v State (Tex Civ App) 61 SW2d 1017, error ref 122 Tex 459, 61 SW2d 1022; Homestead Cases, 22 Gratt (Va) 266; John F. Jelke Co. v Emery, 193 Wis 311, 214 NW 369, 53 ALR 463.

1. Parsons v State, 251 Ala 467, 38 So 2d 209; John F. Jelke Co. v Emery, 193 Wis 311, 214 NW 369, 53 ALR 463.

Whether the legislature is acting entirely within constitutional limitations is a matter for the courts, and legislative determinations in this field are subject to review. State v Harris, 216 NC 746, 6 SE2d 854, 128 ALR 658.

2. State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298.

The concept of "interposition," based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress (irrespective of the fact that the constitutionality of the act has been established by a decision of the Supreme Court), and that once interposed, the law or decision would then have to await approval by Constitutional amendment before enforcement within the interposing state, is fatally inconsistent with the fundamental principle that the Supreme Court of the United States is the final arbiter on questions of constitutionality; the states, whose proceedings are subject to revision by the Supreme Court, can no more pretend to review that Court's decisions on constitutional questions than an inferior can dispute the ruling of an appellate court. Bush v Orleans Parish School Board (DC La) 188 F Supp

916, affd (in per curiam opinion) 365 US 569, 5 L ed 2d 806, 81 S Ct 754.

Every law must be received and obeyed as the law until questioned and set aside by the courts. It cannot be questioned at the bar of private judgment. Prevelin v Derby & A. Developing Co. 112 Conn 129, 151 A 518, 70 ALR 1462; State v Carroll, 38 Conn 449.

The courts alone have the power to authoritatively determine the constitutionality of a statute. State ex rel. Tharel v Board of Comrs. of Creek County, 188 Okla 184, 107 P2d 542.

3. State ex rel. Atlantic Coast Line R. Co. v Board of Equalizers, 84 Fla 592, 94 So 681, 30 ALR 362.

Under the provisions of the Rhode Island Constitution that the supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity, the constitutionality of a statute does not depend upon the construction placed upon it by a board of commissioners, and it is presumed to be constitutional until the supreme court has decided otherwise. Payne & Butler v Providence Gas Co. 31 RI 295, 77 A 145.

Generally, as to whether public officers may challenge the constitutionality of legislation, see § 128, infra.

4. Bailey v Philadelphia, W. & B. R. Co. 4 Harr (Del) 389; Chicago, B. & Q. R. Co. v Gildersleeve, 219 Mo 170, 118 SW 86; State v Layton, 160 Mo 474, 61 SW 171; State v Van Wye, 136 Mo 227, 37 SW 938; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Rio Grande Lumber Co. v Darke, 50 Utah 114, 167 P 241; Carter v Com. 96

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 105

the courts are exercising the judicial power vested in them by the constitution that they are authorized to declare acts of the legislature in contravention of the organic law.⁵

2. NATURE OF POWER

§ 105. As imposing obligatory duty.

Since the constitution is intended for the observance of the judiciary as well as the other departments of government and the judges are sworn to support its provisions,⁶ the courts are not at liberty to overlook or disregard its commands,⁷ or countenance evasions thereof.⁸ It is their duty in authorized proceedings to give effect to the existing constitution⁹ and to obey all constitutional provisions, irrespective of their opinion as to the wisdom of such provisions,¹⁰ and irrespective of the consequences.¹¹

In accordance with these basic principles, the rule is fixed that the duty in a proper case to declare a law unconstitutional cannot be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question.¹²

Va 791, 32 SE 780; John F. Jelke Co. v Emery, 193 Wis 311, 214 NW 369, 53 ALR 463.

5. State v Lueders, 214 NC 558, 200 SE 22.

6. United States v Fisher, 2 Cranch (US) 396, 2 L ed 304; Re Clarke, 65 Conn 17, 31 A 522; Carr v State, 127 Ind 204, 26 NE 778; University of Maryland v Williams, 9 Tuckey, 40 Miss 29; Edwards v Lesueur, 132 Mo 410, 33 SW 1130; Pacific Live Stock Co. v Ellison Ranching Co. 46 Nev 351, 213 P 700; Southern R. Co. v Cherokee County, 177 NC 86, 97 SE 758; State ex rel. Atty. Gen. v Knight, 169 NC 333, 85 SE 418; McCullough v Brown, 41 SC 220, 19 SE 458, overrd on another point State v Aiken, 42 SC 222, 20 SE 221; Ex parte Meyer, 84 Tex Crim 288, 207 SW 100; Thoe v Chicago, M. & St. P. R. Co. 181 Wis 456, 195 NW 407, 29 ALR 1280.

7. Dartmouth College v Woodward, 4 Wheat (US) 518, 4 L ed 629; State use of Washington County v Baltimore & O. R. Co. 12 Gill & J (Md) 399, affd 3 How (US) 534, 11 L ed 714; Coffman v Bank of Kentucky, 40 Miss 29; Pacific Live Stock Co. v Ellison Ranching Co. 46 Nev 351, 213 P 70; Southern R. Co. v Cherokee County, 177 NC 86, 97 SE 758; State ex rel. Atty. Gen. v Knight, 169 NC 333, 85 SE 418; State v Williams, 146 NC 618, 61 SE 61; Kintz v Harriger, 99 Ohio St 240, 124 NE 168, 12 ALR 1240; State v Nuss (SD) 114 NW2d 633; Ex parte Meyer, 84 Tex Crim 288, 207 SW 100.

8. It is the duty of the courts, when called upon, to take cognizance of the facts and arrest an attempted evasion of the Constitution. Williams v Louisiana, 103 US 637, 26 L ed 595.

9. Crawford v Gilchrist, 64 Fla 41, 59 So 963.

[16 Am Jur 2d]—19

Courts must give effect to a constitutional amendment establishing a budget system for disbursement of state finances, and safeguard it wherever necessary. Baltimore v O'Connor, 147 Md 639, 128 A 759, 40 ALR 1058.

10. Lake County v Rollins, 130 US 662, 32 L ed 1060, 9 S Ct 651; People ex rel. Moore v Perkins, 56 Colo 17, 137 P 55; Kentucky State Journal Co. v Workmen's Comp. Bd. 161 Ky 562, 170 SW 1166, affd on reh 162 Ky 387, 172 SW 674, overrd on other grounds Wells v Jefferson County (Ky) 255 SW2d 462; Moose v Alexander County, 172 NC 419, 90 SE 441; Snodgrass v State, 67 Tex Crim 615, 150 SW 162.

The wisdom of a constitutional provision as to formalities of legislative procedure is not a matter of concern to either the legislature or the judiciary. Kavanaugh v Chandler, 255 Ky 182, 72 SW2d 1003, 95 ALR 275.

As to immateriality of wisdom of legislation to determination of its constitutionality, see §§ 163, 164, infra.

11. Dalton v State Property & Bldg. Com. (Ky) 304 SW2d 342.

12. Shelley v Kraemer, 334 US 1, 92 L ed 1161, 68 S Ct 836, 30 ALR2d 441; Carter v Carter Coal Co. 298 US 238, 80 L ed 1160, 56 S Ct 855; United States v Butler, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914; Lottery Case (Champion v Ames), 188 US 321, 47 L ed 492, 23 S Ct 321; Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60; Adams v Spillyards, 187 Ark 641, 61 SW 2d 686, 86 ALR 1493; State v Travelers' Ins. Co. 73 Conn 255, 47 A 299, affd 185 US 364, 46 L ed 949, 22 S Ct 673; Re Clark, 65 Conn 17, 31 A 522; State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298; State ex rel. Clarkson v Philips, 70 Fla 340, 70 So 367; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001; Flint River

§ 105

If the constitution prescribes one rule and the law another and a different rule, it is the duty of the courts to declare that the constitution, and not the law, governs in cases before them for judgment.¹⁸ When it is clear that a statute

S. B. Co. v Foster, 5 Ga 194; Booth v People, 186 Ill 43, 57 NE 798; Lane v Dorman, 4 Ill 238; Carr v State, 127 Ind 204, 26 NE 778; Patterson v Iowa Bonus Board, 246 Ky 1087, 71 NW2d 1; Sperry & Hutchinson Co. v Hoegh, 246 Iowa 9, 65 NW2d 410; Iowa Co. v Hoegh, B. & Q. R. Co. 131 Iowa 393, 15 L ed 691; Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60; State v Williams, 146 NC 618, 61 SE 61; State v Wilson, 162 SC 413, 161 SE 104, 81 ALR 580.

Where, in adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the constitution, by its own superior force and authority, eliminates the statute or the portion thereof which conflicts with organic law and renders it inoperative ab initio, so that the constitution, and not the statute, will be applied by the court in determining the litigated rights. State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298.

"When laws conflict in actual cases, courts must decide which is the superior law and which must yield; since according to our principles every officer remains answerable for what he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the Constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The court, bound to do justice to everyone, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doings of the legislature. It simply decides, for the case in hand, whether there actually are conflicting laws, and, if so, which is the higher law that demands obedience when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until, indeed, proper and legitimate authority shall reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate, and safe manner, according to the principle of the supremacy of the law and the independence of justice. It is one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may be called a very jewel of Anglican liberty, one of the best fruits of our political civilization." Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92.

It is the duty of the United States Supreme Court, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the federal government. Gordon v United States, 117 US 697, 76 L ed 347; Union P. R. Co. v United States, 99 US 700, 25 L ed 496.

Congress is supreme within its legitimate sphere, but if it steps outside its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the states or the people. United States v Reese, 92 US 214, 23 L ed 563.

transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional, because they cannot shrink from it without violating their oaths of office.¹⁴ This duty of the courts to maintain the constitution as the fundamental law of the state is imperative and unceasing¹⁵ and cannot be evaded,¹⁶ as Chief Justice Marshall said, whenever a statute is in violation of the fundamental law, the courts must so adjudge and thereby give effect to the constitution.¹⁷ Any other course would lead to the destruction of the constitution.¹⁸

Since the question as to the constitutionality of a statute is a judicial matter, the courts will not decline the exercise of jurisdiction upon the suggestion that action might be taken by political agencies in disregard of the judgment of the judicial tribunals.¹⁹ And an act of Congress must be declared invalid if there is a clear incompatibility between it and the constitution, even though very serious consequences are involved in such a declaration.²⁰

The duty of the court to prevent violations of the constitution does not de-

14. Child Labor Tax Case (Bailey v Drexel Furniture Co.), 259 US 20, 66 L ed 818, 42 S Ct 449, 21 ALR 1432; Rogers v Alabama, 192 US 226, 48 L ed 417, 24 S Ct 257; Powell v Pennsylvania, 127 US 678, 32 L ed 253, 8 S Ct 992, 1257; Union P. R. Co. v United States, 99 US 700, 25 L ed 496; Green v Biddle, 8 Wheat (US) 1, 5 L ed 547; McCall v Automatic Voting Machine Corp. 236 Ala 10, 180 So 695; State ex rel. Crenshaw v Joseph, 175 Ala 579, 57 So 942; Gherna v State, 16 Ariz 344, 146 P 494; Adams v Spill-Yards, 187 Ark 641, 61 SW2d 686, 86 ALR 1493; Leonard v Franklin, 84 Fla 402, 93 So 688; State ex rel. Clarkson v Philips, 70 Fla 340, 70 So 367, Ann Cas 1918A 138; Jacksonville v Bowden, 67 Fla 181, 64 So 769, LRA1916D 913, Ann Cas 1915D 99; Wilker-son v Rome, 152 Ga 762, 110 SE 895, 20 ALR 1334; Scowen v Czarnecki, 264 Ill 305, 106 NE 276; State ex rel. Holt v Denny, 118 Ind 449, 21 NE 274; Atkinson v Woodmansee, 68 Kan 71, 74 P 640; Bosworth v State University, 166 Ky 436, 179 SW 403; Baltimore v O'Connor, 147 Md 639, 128 A 759, 40 ALR 1058; Salisbury Land & Improv. Co. v Commonwealth, 215 Mass 371, 102 NE 619; State ex rel. Lachman v Houghton, 134 Minn 226, 158 NW 1017; Coffman v Bank of Kentucky, 40 Miss 29; State ex rel. Pollock v Becker, 289 Mo 660, 233 SW 641; Bailey v Gentry, 1 Mo 164; State v Gateway Mortuaries, 87 Mont 225, 287 P 156, 68 ALR 1512; Stanley v Jeffries, 86 Mont 114, 284 P 134, 70 ALR 166; State ex rel. Ralston v Turner, 141 Neb 556, 4 NW2d 302, 144 ALR 138; Pacific Live Stock Co. v Ellison Ranching Co. 46 Nev 351, 213 P 700; People ex rel. Metropolitan Street R. Co. v State Tax Comrs. 174 NY 417, 67 NE 69, affd 199 US 1, 48, 53, 50 L ed 65, 79, 85, 25 S Ct 705, 713, 715; Southern R. Co. v Cherokee County, 177 NC 86, 97 SE 758; State ex rel. Atty. Gen. v Knight, 169 NC 333, 85 SE 418; State v Williams, 146 NC 618, 61 SE 61; Cass County v Nixon, 35 ND 601, 161 NW 204; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Barry v Truax, 13 ND

131, 99 NW 769; State ex rel. Weinberger v Miller, 87 Ohio St 12, 99 NE 1078; Kurtz v Pittsburgh, 346 Pa 362, 31 A2d 257, 145 ALR 1134; State v Dalton, 22 RI 77, 46 A 234; State v Narragansett, 16 RI 424, 16 A 901; Pray v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408; St. Louis S. W. R. Co. v Griffin, 106 Tex 477, 171 SW 703; State ex rel. Richards v Armstrong, 17 Utah 166, 53 P 931; Commonwealth v National F. Ins. Co. 161 Va 737, 172 SE 448; State ex rel. Case v Howell, 85 Wash 294, 147 P 1159; Dennis v Moses, 18 Wash 537, 52 P 333; Price v Mountsville, 43 W Va 523, 27 SE 218; Thoe v Chicago, M. & St. P. R. Co. 181 Wis 456, 195 NW 407, 29 ALR 1280; State ex rel. Hustung v State Canvassers, 159 Wis 216, 150 NW 542; Bonnett v Vallier, 136 Wis 193, 116 NW 885.

15. State v Butler, 105 Me 91, 73 A 560.

16. Grasse v Dealers Transport Co. 412 Ill 179, 106 NE2d 124, cert den 344 US 837, 97 L ed 651, 73 S Ct 47.

17. Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60; Sanders v Com. 117 Ky 1, 77 SW 358.

A statute enacted under the forms of law by a state legislature with no purpose on its part to violate the United States Constitution may nevertheless, by its necessary operation, be destructive of rights granted or secured by that instrument, and the courts must sustain the supreme law of the land by declaring such a statute unconstitutional and void. Minnesota v Barber, 136 US 313, 34 L ed 455, 10 S Ct 862.

18. State v Miller, 87 Ohio St 12, 99 NE 1078; State v Goodwill, 33 W Va 179, 10 SE 285.

§ 108, infra.

19. McPherson v Blacker, 146 US 1, 36 L ed 869, 13 S Ct 3.

20. Legal Tender Cases, 12 Wall (US) 457, 20 L ed 287.

§ 106

pend upon the degree to which the principles of the organic law are violated. It is not the province of the court to measure the extent to which the constitution has been contravened and ignore any violation merely because in the opinion of the court it is not relatively as bad as it might have been.¹ And the duty is not limited to direct violations of the constitution, but extends to any evasion or indirection which may be practiced by the legislature.² What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.³ The courts should not permit constitutional provisions to be avoided by any pretext or subterfuge.⁴ The foundation of the power of the federal courts to declare acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.⁵

§ 106. — Duty of state courts with respect to Federal Constitution.
State courts, as well as federal courts, are under an obligation to guard and enforce every right secured by the Federal Constitution,⁶ and it is the

1. *Patton v United States*, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263.
Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure, and the courts must be vigilant to prevent such encroachments. *Fairbank v United States*, 181 US 283, 45 L ed 862, 21 S Ct 648; *Gulf, C. & S. F. R. Co. v Ellis*, 165 US 150, 41 L ed 666, 17 S Ct 255; *Brown v Walker*, 161 US 591, 40 L ed 819, 16 S Ct 644; *Boyd v United States*, 116 US 616, 29 L ed 746, 6 S Ct 524; *Thomas v State*, 201 Ala App 145, 75 So 821, cert den 201 Ala 697, 77 So 1001; *Cerajewski v McVey*, 225 Ind 67, 72 NE2d 650, 171 ALR 723.
The ultimate power to preserve the constitution in its integrity is conferred by it on the courts, whose duty it is to prevent its dismemberment by illegitimate and unconstitutional practices which usually gain a foothold by insidious and apparently harmless approaches to meet imagined emergencies or supposed calamities. *Yielding v State*, 232 Ala 292, 167 So 580.

The fact that a violation of the Constitution is not a great one is no reason for permitting it. A mere opinion as to the degree of wrong which would arise if the Constitution were violated does not afford a measure of the duty of enforcing its provisions. *Looney v Crane Co.* 245 US 178, 62 L ed 230, 38 S Ct 85.

It is the constitutional duty of the courts to be vigilant to detect and turn aside any attempt to substitute the mere will of an official or an official body for an allowable official discretion or a standing law as a rule of human conduct and to resist even petty encroachments upon the fundamental rights, privileges, and immunities of the people. *Jones v Securities & Exch. Commission*, 298 US 1, 80 L ed 1015, 56 S Ct 654.

2. *Charles River Bridge v Warren Bridge*, 11 Pet (US) 420, 9 L ed 773; *Parker v Otis*, 130 Cal 322, 62 P 571, 927. aff'd 187 US 606, 47 L ed 323, 23 S Ct 168; *Robb v Nielson*, 71

- Idaho* 222, 229 P2d 981; *Atkinson v Ada County*, 18 Idaho 282, 108 P 1046; *State v Butterfield Livestock Co.* 17 Idaho 441, 106 P 453; *People v Wilson*, 249 Ill 195, 94 NE 141; *Cook County v Chicago Industrial School*, 125 Ill 540, 18 NE 183; *Voss v Waterloo Water Co.* 163 Ind 69, 71 NE 208; *Commonwealth v O'Harrish (Ky)* 262 SW2d 385; *Stanley v Jeffries*, 86 Mont 114, 284 P 134, 70 ALR 166; *Kulp v Fleming*, 65 Ohio St 321, 61 NE 334; *Lesser v Warren*, 237 Pa 501, 85 A 839; *State ex rel. Troy v Yelle*, 27 Wash 2d 99, 176 P2d 459, 170 ALR 1425.

3. *Macallen Co. v Massachusetts*, 279 US 620, 73 L ed 874, 49 S Ct 432, 65 ALR 866, reh den 280 US 513, 74 L ed 585, 50 S Ct 14; *Fairbank v United States*, 181 US 283, 45 L ed 862, 21 S Ct 648; *Rainey v Michel*, 6 Cal 2d 259, 57 P2d 932, 105 ALR 148; *Robb v Nielson*, 71 Idaho 222, 229 P2d 981; *Commonwealth v O'Harrish (Ky)* 262 SW2d 385; *State ex rel. Childs v Copeland*, 66 Minn 315, 69 NW 27; *Doubleday, D. & Co. v R. H. Macy & Co.* 269 NY 272, 199 NE 409, 103 ALR 1325; *McClintock v Richards Brick Corp.* 152 Va 1, 145 SE 425, 61 ALR 1033.

Where there is an absence of public liability and public interest and the action of the legislature is clearly evasive of a constitutional limitation of taxing power to public purposes, the mere fiat of the legislature that an act comes within its constitutional power is not binding, and it is the duty of the court to declare the act void. *Stanley v Jeffries*, 86 Mont 114, 284 P 134, 70 ALR 166.

4. *Brown v Maryland*, 12 Wheat (US) 419, 6 L ed 678; *Toney v State*, 141 Ala 120, 37 So 332.

5. *United States v Raines*, 362 US 17, 4 L ed 2d 524, 80 S Ct 519.

6. *Irvin v Dowd*, 359 US 394, 3 L ed 2d 900, 79 S Ct 825; *Mooney v Holohan*, 294 US 103, 79 L ed 791, 55 S Ct 340, 98 ALR 406, reh den 294 US 732, 79 L ed 1261, 55

duty of the state courts as much as of the federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question and to hold the law void if it violates that instrument.⁷

§ 107. As solemn responsibility.

The exercise of the right and power of judicial tribunals to declare whether enactments of the legislature exceed the constitutional limitations and are invalid is one of the highest functions and authorities of the courts.⁸ It involves a grave responsibility⁹ and a solemn duty,¹⁰ and is at all times a matter of much delicacy,¹¹ because apart from the necessity of avoiding conflicts between coordinate branches of the government, whether state or national, it is often

7. *Thomas v Collins*, 323 US 516, 89 L ed 430, 63 S Ct 315, reh den 323 US 819, 89 L ed 650, 65 S Ct 557; *Baker v Grice*, 169 US 284, 42 L ed 748, 18 S Ct 323; *Baily v Gentry*, 1 Mo 164.

The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. *Smyth v Ames*, 169 US 466, 42 L ed 819, 18 S Ct 418.
A judge does not, by taking oath to support the state constitution, absolve himself from the duty of upholding the Federal Constitution if it conflicts with the constitution of the state. *People v Western U. Teleg. Co.* 70 Colo 90, 198 P 146, 15 ALR 326. Annotation: 15 ALR 333, s. 66 ALR 1466.

8. *State v Hogreiver*, 152 Ind 652, 53 NE 921; *Hubbell v Higgins*, 148 Iowa 36, 126 NW 914.

The necessities of the American system require the judiciary to determine the constitutionality of acts of the legislature, and this represents the highest exercise of judicial power and one that even the judiciary is reluctant to exercise. *Panitz v District of Columbia*, 72 App DC 131, 112 F2d 39.

9. *Nicol v Ames*, 173 US 509, 43 L ed 786, 19 S Ct 522; *People v Wm. Henning Co.* 260 Ill 554, 103 NE 530; *Laughlin v Portland*, 111 Me 486, 90 A 318; *Soper v Lawrence Bros. Co.* 98 Me 268, 56 A 908; *State v Rogers*, 95 Me 94, 49 A 564; *Fensterwald v Burk*, 129 Md 131, 98 A 358, 3 ALR 1562, error dismd 248 US 592, 63 L ed 436, 39 S Ct 21; *Edwards v Lesueur*, 132 Mo 410, 33 SW 1130; *People v Beakes Dairy Co.* 222 NY 416, 119 NE 115, 3 ALR 1260; *State ex rel. Fargo v Wetz*, 40 ND 299, 168 NW 835, 5 ALR 731; *Rio Grande Lumber Co. v Darke*, 50 Utah 114, 167 P 241; *Booten v Pinson*, 77 W Va 412, 89 SE 985.

The exercise by the United States Supreme Court of its power to declare an act of Congress unconstitutional is the gravest and most delicate duty that the court is called upon to perform. *Kennedy v Mendoza-Martinez*, 372 US 144, 9 L ed 2d 644, 83 S Ct 554; *United*

- States v Raines*, 362 US 17, 4 L ed 2d 524, 80 S Ct 519.

"To challenge the constitutionality of a solemn and deliberate act of legislation by the lawmaking power of a sovereign state always presents a serious question, however trifling or insignificant may be the amount involved in the particular case." *Rio Grande Lumber Co. v Darke*, 50 Utah 114, 167 P 241.

10. *McCray v United States*, 195 US 27, 49 L ed 78, 24 S Ct 769; *Butler v Pennsylvania*, 10 How (US) 402, 13 L ed 472; *United States v Fisher*, 2 Cranch (US) 358, 2 L ed 304; *Quong Ham Wah Co. v Industrial Acci. Commission*, 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373; *Internal Improv. Fund v Bailey*, 10 Fla 112; *University of Maryland v Williams*, 9 Gill & J (Md) 365; *Davison v Johnnot*, 7 Met (Mass) 388; *Ordelheide v Modern Brotherhood*, 226 Mo 203, 125 SW 1105; *State v Camp Sing*, 18 Mont 128, 44 P 516; *State v Williams*, 146 NC 618, 61 SE 61; *State ex rel. Fargo v Wetz*, 40 ND 299, 168 NW 835, 5 ALR 731.

11. *Nicol v Ames*, 173 US 509, 43 L ed 786, 19 S Ct 522; *Powell v Pennsylvania*, 127 US 678, 32 L ed 253, 8 S Ct 992, 1257; *Nashville v Cooper*, 6 Wall (US) 247, 18 L ed 851; *Ogden v Saunders*, 12 Wheat (US) 213, 6 L ed 606; *Dartmouth College v Woodward*, 4 Wheat (US) 518, 4 L ed 629; *Jacksonville v Bowden*, 67 Fla 181, 64 So 769; *Atlantic Coast Line R. Co. v State*, 135 Ga 545, 69 SE 725; *Santo v State*, 2 Iowa 165; *Fensterwald v Burk*, 129 Md 131, 98 A 358, 3 ALR 1562, error dismd 248 US 592, 63 L ed 436, 39 S Ct 21; *Vernon-Woodberry Cotton Duck Co. v Frankfort Marine Acci. & Plate Glass Ins. Co.* 111 Md 561, 75 A 105; *Harrison v State*, 22 Md 468; *Dullam v Willson*, 53 Mich 392, 19 NW 112; *Coffman v Bank of Kentucky*, 40 Miss 29; *Tuberculosis Hospital Dist. v Peter*, 253 Mo 520, 161 SW 1155; *State v Van Wye*, 136 Mo 227, 37 SW 938; *Wells v Missouri P. R. Co.* 110 Mo 286, 19 SW 530; *State v Camp Sing*, 18 Mont 128, 44 P 516; *State ex rel. Fargo v Wetz*, 40 ND 299, 168 NW 835, 5 ALR 731; *State v Aiken*, 42 SC 222, 20 SE 221; *Rio Grande Lumber Co. v Darke*, 50 Utah 114, 167 P 241; *Brimm v*

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 108

difficult to determine whether such enactments are within the powers granted to, or possessed by, the legislature.¹²

§ 108. As essential to protection of liberty.

The principle which permits the courts to pronounce an act of the legislature null and void, because it conflicts with the provisions of the constitution, has been declared to be one of the strongest barriers ever devised against the tyrannies of political assemblies.¹³ The United States Supreme Court has declared that it is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis* (resist the beginnings).¹⁴

The perpetuity of our institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation clearly repugnant to the supreme law of the land.¹⁵ It has been said that the judiciary should protect the rights of the people with great care and jealousy, not only because this is its duty, but also because in times of great popular excitement it is usually their last resort.¹⁶

3. JUDICIAL SELF-RESTRAINT IN EXERCISING POWER

§ 109. Caution observed.

The courts invariably give the most careful consideration to questions involving the interpretation and application of the constitution¹⁷ and approach constitutional questions with great deliberation,¹⁸ exercising their power in

Jones, 11 Utah 200, 39 P 825; Willis v Kalmbach, 109 Va 475, 64 SE 342; Carter v Commonwealth, 96 Va 791, 32 SE 780; Danmonwealth, 25 Gratt (Va) 1; Ah Lim v ville v Pace, 25 Gratt (Va) 1; Ah Lim v Territory, 1 Wash 156, 24 P 588; State v Pinson, 77 W Va 412, 89 SE 985; State v Goodwill, 33 W Va 179, 10 SE 285; Madison v Chicago, Mo., St. P. & P. R. Co. 2 Wis 2d 467, 87 NW2d 251.

The authority to declare a statute void is of such a delicate and awful nature that the court will never resort to that authority except in a clear and urgent case. *Calder v Bull*, 3 Dall (US) 386, 1 L ed 648.

12. *Powell v Pennsylvania*, 127 US 678, 32 L ed 253, 8 S Ct 992, 1257.

13. *Rathbone v Wirth*, 150 NY 459, 45 NE 459.

When a statute plainly violates the organic law as expressed in the constitution, then, if this is to remain a government of law and not of men, it is the plain duty of the court to hold the statute unconstitutional, leaving the perfection of the statute to be brought about by proper constitutional amendment. *State v Lyons*, 40 Del 77, 5 A2d 495.

14. *Byars v United States*, 273 US 28, 71 L ed 529, 47 S Ct 248; *Boyd v United States*, 116 US 616, 29 L ed 746, 6 S Ct 524.

If "there be one thing more than others to be guarded against encroachment it is the Federal and state Constitutions. . . . To disobey them is to jeopardize fundamental rights and liberties of the people, imperil

their welfare and happiness, and to menace the very existence of government." *Saville v Corless*, 46 Utah 495, 51 P 51.

And see § 105, supra.

15. *Smyth v Ames*, 169 US 466, 42 L ed 819, 18 S Ct 418.

16. *Miller v Johnson*, 92 Ky 589, 18 SW 522.

17. *Durousseau v United States*, 6 Cranch (US) 307, 3 L ed 232; *State v First State Bank*, 52 ND 231, 202 NW 391; *Great Atlantic & Pacific Tea Co. v McCanless*, 178 Tenn 354, 157 SW2d 843; *Ah Lim v Territory*, 1 Wash 156, 24 P 588.

18. *Dartmouth College v Woodward*, 4 Wheat (US) 518, 4 L ed 629; *Beach v Bradstreet*, 85 Conn 344, 82 A 1030; *Atlantic Coast Line R. Co. v State*, 134 Ga 545, 69 SE 725; *Price v People*, 193 Ill 114, 61 NE 844, *ovrld* on another point in *Mathews v People*, 202 Ill 389, 67 NE 28; *State v Fairmont Creamery Co.* 153 Iowa 702, 133 NW 895; *McGuire v Chicago, B. & Q. R. Co.* 131 Iowa 340, 108 NW 902; *Greene County v Lydy*, 263 Mo 77, 172 SW 376; *People v Budd*, 117 NY 1, 22 NE 670, 682; *State v Williams*, 146 NC 618, 61 SE 61; *State ex rel. Sathre v Board of University & School Lands*, 65 ND 687, 262 NW 60; *State v First State Bank*, 52 ND 231, 202 NW 391; *Ah Lim v Territory*, 1 Wash 156, 24 P 588.

The judicial responsibility is a solemn one. § 107, supra.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 110

this respect with the greatest possible caution¹⁹ and even reluctance,²⁰ and they should never declare a statute void, unless its invalidity is, in their judgment, beyond reasonable doubt.¹ At the same time, there is no valid reason why a court, if it has jurisdiction of a constitutional question, should refuse to decide the question merely because of discretion.²

The importance of correctly deciding constitutional questions is so great that the Supreme Court of the United States has announced that it is not accustomed to hear them in the absence of a full court if this can be avoided.³

§ 110. — By courts other than courts of last resort.

The established principles regarding the duties of care and caution which the judiciary has imposed upon itself in exercising the judicial power to rule on the constitutionality of legislation⁴ have given rise to questions as to whether legislation is properly to be struck down on constitutional grounds by nisi

19. *Alabama State Federation of Labor v McArdy*, 246 Ala 1, 18 So 2d 810, cert dismd 325 US 450, 89 L ed 1725, 65 S Ct 1304; *State ex rel. Wilkinson v Murphy*, 237 Ala 332, 186 So 487, 121 ALR 203; *State v Moore*, 76 Ark 197, 88 SW 881; *Patterson v Iowa Bonus Board*, 246 Iowa 1087, 71 NW2d 1; *Hubbell v Higgins*, 148 Iowa 36, NW2d 1; *Rouse, H. & Co. v Donovan*, 126 Mich 234, 62 NW 359; *Dimke v Finke*, 104 Minn 29, 295 NW 75; *Standard Oil Co. v Stone*, 191 Miss 897, 2 So 2d 155; *Russell v Invest. Corp. v Russell*, 182 Miss 411, 182 So 102; *Greene County v Lydy*, 263 Mo 77, 172 SW 376; *Tuberculosis Hospital Dist. v Peter*, 253 Mo 520, 161 SW 1155; *Jenkins v State Bd. of Elections*, 180 NC 169, 104 SE 346, 14 ALR 1247; *State ex rel. Sathre v Board of University & School Lands*, 65 ND 687, 262 NW 60; *State v First State Bank*, 52 ND 231, 202 NW 391; *State ex rel. Fargo v Wetz*, 40 ND 299, 168 NW 835, 5 ALR 731; *Rupe v Shaw (Okla)* 286 P2d 1094; *De Treville v Groover*, 219 SC 313, 65 SE2d 232; *Great Atlantic & Pacific Tea Co. v McCanless*, 178 Tenn 354, 157 SW2d 843; *Rio Grande Lumber Co. v Darke*, 50 Utah 114, 167 P 241; *State ex rel. Bolens v Frear*, 148 Wis 456, 134 NW 673, 135 NW 164.

Forbearance by the courts from hasty invalidation of legislation is imperative. *Accounting Corp. of America v State Board of Accountancy*, 34 Cal 2d 186, 208 P2d 904.

A court should proceed most carefully in the exercise of this, its highest prerogative, and go no further than it deems absolutely necessary in declaring unconstitutional and void the considered action of the legislature which is composed of the people's popularly elected representatives. *Parker v Bates*, 216 SC 52, 56 SE2d 723.

An adjudication that an act of the legislature is violative of the constitution, state or federal, calls into play a delicate power of the courts and should be exercised with utmost caution and only in clear cases. *State ex rel. Edwards v Query*, 207 SC 500, 37 SE2d 241.

20. *United States v Butler*, 297 US 1, 80

L ed 477, 56 S Ct 312, 102 ALR 914; *Pollock v Farmers' Loan & T. Co.* 157 US 429, 39 L ed 759, 15 S Ct 673; *Atchison, T. & S. F. R. Co. v State*, 33 Ariz 440, 265 P 602, 58 ALR 563; *Ellingham v Dye*, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; *State v Hogreiver*, 152 Ind 652, 53 NE 921; *Wenham v State*, 65 Neb 394, 91 NW 421; *People ex rel. Bryant v Zimmerman*, 241 NY 405, 150 NE 497, 43 ALR 909, *affd* 278 US 63, 73 L ed 184, 49 S Ct 61; *State ex rel. Sathre v Board of University & School Lands*, 65 ND 687, 262 NW 60; *State v First State Bank*, 52 ND 231, 202 NW 391; *Marr v Fisher*, 182 Or 383, 187 P2d 966; *Morrison v Lamarre*, 75 RI 176, 65 A2d 217; *Gorham v Robinson*, 57 RI 1, 186 A 832; *Great Atlantic & Pacific Tea Co. v McCanless*, 178 Tenn 354, 157 SW2d 843.

Courts are loath to hold statutes unconstitutional. *Board of County Comrs. v General Secur. Corp.* 157 Kan 64, 138 P2d 479.

As reluctant as are the courts to pass upon the constitutionality of legislation of their own state, they should be still more reluctant in pronouncing unconstitutional an act of a sister state which has never been passed upon by the highest court of the state of its enactment. *Fensterwald v Burk*, 129 Md 131, 98 A 358, 3 ALR 1562, error dismd 248 US 592, 63 L ed 436, 39 S Ct 21.

1. § 175, infra.

2. *Union Interchange, Inc. v Allen*, 140 Mont 227, 370 P2d 492.

3. *Hepburn v Griswold*, 8 Wall (US) 603, 19 L ed 513.

In this connection, note the provision (discussed in § 102, supra) found in the Constitution of Ohio that no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.

4. § 109, supra.

§ 111

prius and other courts of less than the highest rank.⁶ Although there seems to be no doubt that such inferior tribunals do not lack power to rule on constitutionality-of-legislation issues,⁷ a reluctance is expressed by many courts of first instance against exercising the power to declare an act of the legislature unconstitutional.⁸ In fact, it has been stated that a court of first instance will assume a statute to be constitutional until otherwise determined by the higher courts (especially where the state has acted).⁹ There has been, in some jurisdictions, a similar reluctance demonstrated by appellate courts of intermediate rank.¹⁰ But the question is an unsettled one, and there are holdings to the effect that the duty to determine constitutionality rests as much upon courts of the first instance as upon appellate courts.¹¹

§ 111. Avoidance of unnecessary decisions, generally.

While courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved,¹² they will not make a ruling on a matter of constitutional law where there is a lack of this necessary involvement;¹³ needless consideration of attacks on their

5. Annotation: 15 ALR 332, s. 66 ALR 1466.

6. A county court can adjudge a state statute to be unconstitutional. *Lent v Tillson*, 140 US 316, 35 L ed 419, 11 S Ct 825.

7. Annotation: 15 ALR 332, s. 66 ALR 1466.

8. In New Jersey and other states the proposition has been laid down forcefully that inferior courts should assume an act of the legislature to be constitutional unless it so clearly conflicts with the constitution as to leave no reasonable doubt of its defectiveness. *State v Cannarozzi*, 77 NJ Super 236, 186 A2d 113.

Annotation: 15 ALR 332, s. 66 ALR 1466.

9. Annotation: 15 ALR 333, s. 66 ALR 1466.

10. Annotation: 15 ALR 333, s. 66 ALR 1466.

11. *Taylor v Davis*, 212 Ala 282, 102 So 433, 40 ALR 1052; *Re Wimberly Chapel Baptist Church*, 170 Kan 684, 228 P2d 540; *Bedford v Schilling*, 4 Serg & R (Pa) 401; *State v Phillips*, 193 SC 273, 8 SE2d 626; *State v Candland*, 36 Utah 406, 104 P 285.

Determination of a constitutional question is necessary and proper wherever it is essential to the decision of the case, as where the right of a party is founded solely on a statute, the validity of which is attacked. *Payne v Griffin* (DC Ga) 51 F Supp 588.

12. *Peters v Hobby*, 349 US 331, 99 L ed 1129, 75 S Ct 790; *United States v Spector*, 343 US 169, 96 L ed 863, 72 S Ct 591, reh den 343 US 951, 96 L ed 1353, 72 S Ct 1040; *United States v Hayman*, 342 US 205, 96 L ed 232, 72 S Ct 263; *United States v CIO*, 335 US 106, 92 L ed 1849, 68 S Ct 1349; *Toomer v Witsell*, 334 US 385,

92 L ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L ed 389, 69 S Ct 12; *Huston v Iowa Soap Co.* (CA8) 85 F2d 649, 108 ALR 173; *Taylor v Davis*, 212 Ala 282, 102 So 433, 40 ALR 1052; *Foster v Lee*, 172 Ala 32, 55 So 125; *Girgis v Moore*, 48 Ariz 33, 58 P2d 1249, 64 P2d 819, 110 ALR 314; *Woods v Carl*, 75 Ark 328, 87 SW 621, affd 203 US 358, 51 L ed 219, 27 S Ct 99; *Palermo v Stockton Theatres*, 32 Cal 2d 53, 195 P2d 1; *Re Johnson*, 139 Cal 532, 73 P 424; *Collison v State*, 39 Del 460, 52 A2d 97, 119 ALR 1422; *Pusey & Jones Co. v Love* (Sup) 22 Del (6 Penn) 80, 66 A 1013; *State ex rel. Atlantic Coast Line R. Co. v Board of Equalizers*, 84 Fla 592, 94 So 681, 30 ALR 362; *Wooten v State*, 24 Fla 335, 5 So 39; *Sumter County v Allen*, 193 Ga 171, 17 SE2d 567; *Smith v Georgia Granite Corp.*, 186 Ga 634, 198 SE 772, 119 ALR 550; *Carter v Dominey*, 157 Ga 167, 121 SE 236; *State ex rel. Nielson v Gooding*, 75 Idaho 36, 266 P2d 655; *State v Heitz*, 72 Idaho 107, 238 P2d 439; *Re Brainard*, 55 Idaho 153, 39 P2d 769; *Sarlis v State*, 201 Ind 88, 166 NE 270, 67 ALR 718; *State ex rel. Hunter v Winterrowd*, 174 Ind 592, 91 NE 956, 92 NE 650; *Smith v Stephens*, 173 Ind 564, 91 NE 167; *Lee v Hoffman*, 182 Iowa 1216, 166 NW 563; *Schultz v Parker*, 158 Iowa 42, 139 NW 173; *Re Wimberly Chapel Baptist Church*, 170 Kan 684, 228 P2d 540; *Preston v Clements*, 313 Ky 479, 232 SW2d 85; *Stein v Kentucky State Tax Com.* 266 Ky 469, 99 SW2d 443; *Warren v Norwood*, 138 Me 180, 24 A2d 229; *Payne v Graham*, 118 Me 251, 107 A 709, 7 ALR 516; *Tyler v State*, 93 Md 309, 48 A 840; *Bowe v Secretary of Commonwealth*, 320 Mass 230, 69 NE2d 115, 167 ALR 1447; *Teagan Transp. Co. v Board of Assessors*, 139 Mich 1, 102 NW 273; *Minnesota Baptist Convention v Pillsbury Academy*, 246 Minn 46, 74 NW2d 286; *State v One Oldsmobile Two-Door Sedan*, 227 Minn 280, 35 NW2d 525; *State ex rel. Clinton Falls Nursery Co. v Steele County*, 181

validity and unnecessary decisions striking down statutes will be avoided.¹⁴ Courts will not assume to pass upon constitutional questions unless properly before them,¹⁵ and where a litigant has abandoned a question involving the constitutionality of a statute, the question will not be decided by the court.¹⁶ On the other hand, although it is not considered good practice for courts to resolve cases on grounds not urged by the parties or their counsel, yet in a case in which much of the argument revolves around the intention of the

its constitutionality, "to so declare and dispose of any supposed conflict."

Minn 427, 232 NW 737, 71 ALR 1190; *Hart v State*, 87 Miss 171, 39 So 523; *State ex rel. State Board of Mediation v Pigg*, 362 Mo 798, 244 SW2d 75; *Moler v Whisman*, 243 Mo 571, 147 SW 985; *Ordelheide v Modern Brotherhood*, 226 Mo 203, 125 SW 1105; *Hersey v Neilson*, 47 Mont 132, 131 P 30; *Re Davies*, 168 NY 89, 61 NE 118; *People v O'Brien*, 111 NY 1, 18 NE 692; *M. L. H. Rhodes, Inc. v Raleigh*, 217 NC 627, 9 SE2d 389, 130 ALR 311; *State v Lueders*, 214 NC 558, 200 SE 22; *Bickett v State Tax Commission*, 177 NC 433, 99 SE 415; *State v American Petroleum Corp.* (ND) 71 NW2d 675; *State v Cavalier County*, 68 ND 242, 278 NW 243; *Reeves & Co. v Russell*, 28 ND 265, 148 NW 654; *Threadgill v Cross*, 26 Okla 403, 109 P 558; *State v Schriber*, 185 Or 615, 205 P2d 149; *Oregon Creamery Mfrs. Assn. v White*, 159 Or 99, 78 P2d 572; *Winslow v Fleischner*, 112 Or 23, 228 P 101, 34 ALR 826; *Bedford v Shilling* (Pa) 4 Serg & R 401; *McCullough v Brown*, 41 SC 220, 19 SE 458; *Sioux Falls v Cleveland*, 75 SD 548, 70 NW2d 62; *Haas v Independent School Dist.* 69 SD 303, 9 NW2d 707; *Clark v Smith*, 193 Tenn 194, 245 SW2d 197; *Tigner v First Nat. Bank*, 153 Tex 69, 264 SW2d 85; *Cravens v State*, 57 Tex Crim 135, 122 SW 29; *Sabre v Rutland R. Co.* 86 Vt 347, 85 A 693; *Bischoff v Commonwealth*, 199 Va 397, 100 SE2d 1; *Fruth v Board of Affairs*, 75 W Va 456, 84 SE 105; *Re Zeimet's Estate*, 259 Wis 619, 49 NW2d 924; *Fristam v Sheridan*, 66 Wyo 143, 206 P2d 741; *Public Serv. Com. v Grimshaw*, 49 Wyo 158, 53 P2d 1, 109 ALR 534; *State ex rel. Lee v Continental Oil Co.* 48 Wyo 152, 43 P2d 686.

"There is no occasion to consider . . . constitutional questions unless their answers are indispensable to the disposition of the cause before us." *Stefanelli v Minard*, 342 US 117, 96 L ed 138, 72 S Ct 118.

It is the established policy of the United States Supreme Court "not [to] go beyond the constitutional issues necessarily raised by the record." *Solebee v Balkcom*, 339 US 9, 94 L ed 604, 70 S Ct 457, reh den 339 US 926, 94 L ed 1348, 70 S Ct 618.

The question of the constitutionality of an act of Congress may be considered by the Supreme Court of the United States only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon it. *Massachusetts v Mellon*, 262 US 447, 67 L ed 1078, 43 S Ct 597. Compare *State ex rel. Bland v St. John*, 244 Ala 269, 13 So 2d 161, in which the court stated that it believes it to be its duty, where an inspection of an act indicates

13. *Communist Party v Catherwood*, 367 US 389, 6 L ed 2d 919, 81 S Ct 1465; *McElroy v United States*, 361 US 281, 4 L ed 2d 282, 80 S Ct 305; *NAACP v Alabama*, 357 US 449, 2 L ed 2d 1488, 78 S Ct 1163; *Crowell v Benson*, 285 US 22, 76 L ed 598, 52 S Ct 285; *Bandini Petroleum Co. v Superior Ct.* 284 US 8, 76 L ed 136, 52 S Ct 103, 78 ALR 826; *Trade Mark Cases*, 100 US 82, 25 L ed 550; *Boyd v Alabama*, 94 US 645, 24 L ed 302; *People v Perry*, 212 Cal 186, 298 P 19, 76 ALR 1331; *Re Johnson*, 139 Cal 532, 73 P 424; *State ex rel. Atlantic Coast Line R. Co. v Board of Equalizers*, 84 Fla 592, 94 So 681, 30 ALR 362; *Miami Coal Co. v Fox*, 203 Ind 99, 176 NE 11, 79 ALR 333; *Sarlis v State*, 201 Ind 88, 166 NE 270, 67 ALR 718; *State ex rel. Anderson v Fadelly*, 180 Kan 652, 308 P2d 537; *State v Wilson*, 101 Kan 789, 168 P 679; *Payne v Graham*, 118 Me 251, 107 A 709, 7 ALR 516; *Smith v Curran*, 267 Mich 413, 255 NW 276, 94 ALR 766; *State ex rel. Clinton Falls Nursery Co. v Steele County*, 181 Minn 427, 232 NW 737, 71 ALR 1190; *Milton Dairy Co. v Great Northern R. Co.* 124 Minn 239, 144 NW 764; *State ex rel. Powell v State Bank*, 90 Mont 539, 4 P2d 717, 80 ALR 1494; *State ex rel. Davies v White*, 36 Nev 334, 136 P 110; *Copp v Henniker*, 55 NH 179; *Reeves & Co. v Russell*, 28 ND 265, 148 NW 654; *Winslow v Fleischner*, 112 Or 23, 228 P 101, 34 ALR 826; *Bedford v Schilling*, 4 Serg & R (Pa) 401; *Narragansett Electric Lighting Co. v Sabre*, 51 RI 37, 150 A 756, 70 ALR 46; *State v Phillips*, 193 SC 273, 8 SE2d 626; *Ex parte Sepulveda*, 108 Tex Crim 533, 2 SW2d 445; *Benz v Kremer*, 142 Wis 1, 125 NW 99.

A constitutional question does not arise merely because it is raised and a decision thereon sought; a party who assails the validity of a statute on constitutional grounds must show that a decision of the constitutional question is necessary in order to protect him in the enjoyment of rights guaranteed to him by the federal or state constitution. *Tooz v State*, 76 ND 599, 38 NW2d 285; *Murie v Cavalier County*, 68 ND 242, 278 NW 243.

14. § 115, infra.

15. *Shohoney v Quincy, O. & K. C. R. Co.* 231 Mo 131, 132 SW 1059, 1912A 1143, error dismd 223 US 705, 56 L ed 621, 32 S Ct 517.

§ 114

§ 114

When the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, the Supreme Court of the United States will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.¹⁶

In other hands, in some jurisdictions the courts may determine a question of constitutionality of a statute, although it is not absolutely fair or reasonable to do so, if its invalidity appears upon the face of the statute itself. And where one State has established a public institution under which it

When the validity of a statute is brought in question by a party who has no standing to sue, it is not the duty of the court to pass upon its constitutionality. The court will only decide the question if it is necessary to do so in order to dispose of the case.

On the other hand, in some jurisdictions the courts may determine a question as to the constitutionality of a statute, although it is not absolutely necessary to the disposition of the cause, if it is involved in the suit and the settlement of the question is one of public importance.¹⁷ And where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, the United States Supreme Court will rest its decision on the Constitution and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer.¹⁸

The breadth of investigation and decision of constitutional issues. The United States has announced that it rigidly adheres to the principle that questions of constitutional law broadly presented are to be decided on their merits.

§ 114. Limiting breadth of investigation and decision of constitutional issues. The Supreme Court of the United States has announced that it rigidly adheres to the rule which it has formulated to formulate a rule of constitutional law broader than the question which it is to be applied.¹⁹ Thus,

The Supreme Court of the United States adheres to the rule never to formulate a rule than is required by the precise facts to which it is to be applied. Thus,

Emigration Comrs. 113 US 33, 28 L. ed 899,
5 S. Ct 352; State ex rel. Wollen v. Apalachicola
Fla. 294. 88 So 310; Bickett v.

determining that a Federal Court of Appeals had before it not only a constitutional question which was decided but also a nonconstitutional question which might properly alone have served as adequate ground on which to dispose of the case but which was not considered or decided, will vacate the judgment of the Court of Appeals and remand the case to it for decision of the nonconstitutional issue. *Alma Motor Co. v Timken-Detroit Axle Co.* 329 US 129, 91 L ed 128, 67 S Ct 231.

16. Ullmann v United States, 350 US 422, 100 L ed 511, 76 S Ct 497, 53 ALR2d 1008, reh den 351 US 928, 100 L ed 1457, 76 S Ct 777; Guessfeldt v McGrath, 342 US 308, 96 L ed 342, 72 S Ct 338; Wright v Vinton Mountain Trust Bank, 300 US 440, 81 L ed 736, 57 S Ct 556, 112 ALR 1455; Crowell v Benson, 285 US 22, 76 L ed 598, 52 S Ct 285.

As to construing a statute to avoid a doubt concerning validity, see § 146, *infra*.

17. *People v Kennedy*, 207 NY 533, 101 NE 442; *Borgnis v Falk Co.* 147 Wis 327, 133 NW 209.

18. *Thompson v Consolidated Gas Utilities Corp.* 300 US 55, 81 L ed 510, 57 S Ct 364.

Generally, as to decisions of state statutory questions by federal courts, see **COURTS** (1st ed § 121).

19. United States v Raines, 362 US 17, 4 L. ed 2d 524, 80 S Ct 519; Alabama State Federation of Labor v McAdams, 325 US 450, 89 L ed 1725, 65 S Ct 1384; Tennessee Pub. Co. v American Nat. Bank, 299 US 18, 81 L ed 13, 57 S Ct 85; Arizona v California, 283 US 423, 75 L ed 1154, 51 S Ct 522; Cincinnati v Vester, 281 US 439, 74 L ed 950, 50 S Ct 360; Liverpool, N. Y. & P. S. S. Co. v

Emigration Comrs. 113 US 33, 28 L ed 899,
5 S Ct 352; State ex rel. Wolyn v Apalachicola
N. R. Co. 81 Fla 394, 88 So 310; Bickett v
State Tax Commission, 177 NC 433, 99 SE
415; Tooz v State, 76 ND 599, 38 NW2d
285; Olson v Ross, 39 ND 372, 167 NW 385;
State ex rel. Linda v Taylor, 33 ND 76, 156
NW 561.

The Supreme Court will decide the constitutionality of only those provisions of a town ordinance which are sought to be enforced in the case before it. Goldblatt v Hempstead, 369 US 590, 8 L ed 2d 130, 82 S Ct 987.

No constitutional question will be decided except with reference to the particular facts to which it is to be applied. *Alabama State Federation of Labor v McAdory*, 325 US 450, 89 L ed 1725, 65 S Ct 1384.

The United States Supreme Court in dealing with constitutional questions will not go beyond the limits of what is required by the exigencies of the case in hand. *Hauenstein v Lynham*, 100 US 483, 25 L ed 628.

In *Euclid v. Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016, Justice Sutherland said: "This is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases, as they arise, rather than by out-of-hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the

16 Am Jur 2d

16 Am Jur 2d

the courts will not go beyond the issues raised in order to decide momentous constitutional questions not contained within the framework of the pleadings or the evidence in the case.²⁰ And in every case in which an act is declared to be unconstitutional, the courts must be able to point out the specific provision of the constitution which is violated by the statute which is stricken down as invalid.¹ Similarly, they will view statutes whose constitutionality is in issue as of restricted scope, if decision of the constitutional question can thereby be avoided.² And the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional where they are of the opinion that if such provision should in fact be invalid, it may be severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court.³

1. State v Birmingham S. R. Co. 182 Ala 475, 62 So. 77; Ex parte Owens, 148 Ala

flexible powers of police, with which we are here concerned."

Where the state courts have enforced an administrative order based on one part only of a state statute, the Supreme Court of the United States in passing on the constitutionality of such statute must consider that portion of the statute as complete in itself, and unaffected by any possible unconstitutionality of other portions. *Allen-Bradley Local, etc. v Wisconsin Employment Relations Bd.* 315 U.S. 740, 86 L. ed 1154, 62 S. Ct 820.

A court will ordinarily inquire into the constitutionality of a statute only to the extent required by the case before it, and will not formulate a rule broader than that necessitated by the precise situation in question. *Grasse v Dealer's Transport Co.* 412 Ill 179, 106 NE2d 124, cert den 344 US 837, 97 L ed 651, 73 S Ct 47.

651, 73 S Ct 47.

A court will determine the validity of a statute only in the light of the facts before it, and will not go out of its way to test the operation of a law under every conceivable set of circumstances, and hence will not determine whether a statute making it an offense for an employer of both males and females in the manufacture or production of any article to pay females a lower wage for the same work than is paid to males is unconstitutional as imposing an obligation on employees of male and female help which is not placed on competitors employing female help only, where it does not appear that there are such. *General Motors Corp. v Read*, 294 Mich 558, 293 NW 751, 130 ALR 429.

20. *Korematsu v United States*, 323 US 214, 89 L ed 194, 65 S Ct 193, reh den 324 US 885, 89 L ed 1435, 65 S Ct 674; *Tooz v State*, 76 ND 599, 38 NW2d 285.

It is the practice of the Supreme Court of the United States not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record. *Garner v Louisiana*, 368 US 157, 7 L ed 2d 207, 82 S Ct 248.

In determining the constitutionality of a statute the courts must deal only with the rights actually involved. *Guaranty Trust Co. v. Virginia*, 305 US 19, 83 L ed 16, 59 S Ct 1. And see § 111, *supra*.

1. State v Birmingham S. R. Co. 182 Ala 475, 62 So 77; Ex parte Owens, 148 Ala 402, 42 So 676; Anderson v Ocala, 67 Fla 204, 64 So 775; Jacksonville v Bowden, 67 Fla 181, 64 So 769; Durand v Dyson, 271 Ill 382, 111 NE 143; Lawrence E. Tierney Coal Co. v Smith (Lawrence E. Tierney Coal Co. v Kash) 180 Ky 815, 203 SW 731, 4 ALR 1540; Bowerman v Sheehan, 242 Mich 95, 219 NW 69, 61 ALR 859; Lommen v Minneapolis Gaslight Co. 65 Minn 196, 68 NW 53; Cleveland v Watertown, 222 NY 159, 118 NE 500; State ex rel. Fargo v Wetz, 40 ND 299, 168 NW 835, 5 ALR 731; Cass County v Nixon, 35 ND 601, 161 NW 204; State ex rel. Linde v Pacard, 35 ND 298, 160 NW 150; Rio Grande Lumber Co. v Darke, 50 Utah 114, 167 P 241; Lawrence University v Outagamie County, 150 Wis 244, 136 NW 619, 2 ALR 465; Zancanelli v Central Coal & Coke Co. 25 Wyo 511, 173 P 983.

2. § 147, *infra*.

3. Champlin Ref. Co. v Corp. Com. 286
US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR
403; Shevlin-Carpenter Co. v Minnesota, 218
US 57, 54 L ed 930, 30 S Ct 663; United
States ex rel. Atty. Gen. v Delaware & H.
Co. 213 US 366, 53 L ed 836, 29 S Ct 527;
Gatewood v North Carolina, 203 US 531, 51
L ed 305, 27 S Ct 167; Presser v Illinois,
116 US 252, 29 L ed 615, 6 S Ct 580; Gherna
v State, 16 Ariz 344, 146 P 494; Woods v
Carl, 75 Ark 328, 87 SW 621, affd 203 US
358, 51 L ed 219, 27 S Ct 99; Ft. Smith v
Scruggs, 70 Ark 549, 69 SW 679; Ex parte
Schuler, 167 Cal 282, 139 P 685; Re Spencer,
149 Cal 396, 86 P 896; Ex parte Gerino, 143
Cal 412, 77 P 166; State v Stoddard, 126
Conn 623, 13 A2d 586; State v Kievman, 116
Conn 458, 165 A 601, 88 ALR 962; Wooten
v State, 24 Fla 335, 5 So 39; People ex rel.
Patterson v Long, 297 Ill 194, 130 NE 515;
Springfield Gas & E. Co. v Springfield, 292
Ill 236, 126 NE 739, 18 ALR 929, affd 257
US 66, 66 L ed 131, 42 S Ct 24; Chicago,
B. & Q. R. Co. v Jones, 149 Ill 361, 37 NE
247, error dismd (US) 41 L ed 1184, 17 S Ct
992; Pittsburgh, C. C. & St. L. R. Co. v
State, 180 Ind 245, 102 NE 25; Hammer v
State, 173 Ind 199, 89 NE 850; State v Robb,
100 Me 180, 60 A 874; Commonwealth v
Anselvich, 186 Mass 376, 71 NE 790; Com-

CONSTITUTIONAL LAW

§ 115

From the foregoing principles it follows that a decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attacks upon different grounds and does not preclude the court from subsequently declaring the statute unconstitutional where it is assailed upon other constitutional grounds.⁴ On the other hand, the rationale of rules of practice limiting the United States Supreme Court's determination of constitutionality of statutes may disappear where (1) a particular statute has already been declared unconstitutional in the vast majority of its intended applications and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, in a mere fraction of the cases it was originally designed to cover; or (2) a state statute comes to the Supreme Court and is conclusively pronounced by a state court as having an otherwise valid provision inextricably tied up with an invalid one; or (3) the Supreme Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.⁵

B. RAISING QUESTIONS OF CONSTITUTIONAL VALIDITY

1. TIME, PLACE, AND MANNER OF RAISING QUESTIONS

§ 115. Generally.

A person whose rights are invaded by an act of the legislature or of an administrative board must raise the objection at the earliest available opportunity.

monwealth v Farmers & M. Bank, 21 Pick Mass 542; *Jackson v State*, 102 Miss 663, 59 So 873; *Williams v Cammack*, 27 Miss 209; *Greene County v Lydy*, 263 Mo 77, 172 SW 376; *State ex rel. Abelman v Douglas*, 46 Nev 121, 208 P 422; *State v Ehr*, 57 ND 310, 221 NW 883; *Collins-Dietz-Morris*, 154 Okla 121, 7 Co. v State Corp. Com. 154 Okla 121, 7 P2d 123, 80 ALR 561; *Minsinger v Rau*, 236 Pa 327, 84 A 312; *State ex rel. Thompson v RI*, 196, 47 A 312; *State ex rel. Thompson v Crump*, 134 Tenn 121, 183 SW 505; *State v McDermott v State*, 143 Wis 18, 126 NW 888, *revid* on other grounds 228 US 115, 57 L ed 754, 33 S Ct 431; *Milwaukee Industrial School v Milwaukee County*, 40 Wis 328.

Where that portion of a statute which is involved in a controversy is complete in itself the court will not consider the constitutionality of other provisions of the statute which are not necessarily involved. *Tooz v State*, 76 ND 599, 38 NW2d 285.

Unless a person's rights are directly involved, courts will postpone inquiry into constitutional questions which are separable from the issue then before them until they are met upon the proposition at issue directly, unless the unconstitutional feature, if it exists, is of such character as to render the entire act void. *State v Grabinski*, 33 Wash 2d 603, 206 P2d 1022.

A necessity for passing on the constitutionality of provisions of a statute other than those directly involved in the suit does not exist where such provisions are separable.

304

Champlin Ref. Co. v Corporation Com. 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403.

A railroad company prosecuted for violating the provisions of a statute requiring it to remodel caboose cars which go into the shop for repairs cannot question the validity of sections of the statute attempting to confer powers upon the railroad commission, the provisions of which are not necessary to the determination of the cause and are separable from the sections under which the prosecution is conducted. *Pittsburgh, C. G. & St. L. R. Co. v State*, 180 Ind 245, 102 NE 25.

A provision of a public power district statute forbidding power districts from acquiring plants within municipalities supplied by plants owned by the United States for one year immediately prior to the passage of the statute is separable from the other provisions of the statute so as to permit the court to pass upon its constitutionality without considering the entire statute, this result being clear both from the statute itself and from its legislative history, where the prohibitory provision was considered separately by the legislature and lifted from the body of the statute and placed separately at the end thereof, being adopted without a negative vote. *State v Consumers Pub. Power Dist.* 143 Neb 753, 10 NW2d 784, 152 ALR 480.

4. *Grasse v Dealer's Transport Co.* 412 Ill 179, 106 NE2d 124, *cert den* 344 US 837, 97 L ed 651, 73 S Ct 47.

5. *United States v Raines*, 362 US 17, 4 L ed 2d 524, 80 S Ct 519.

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 115

16 Am Jur 2d

portunity and exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute.⁶ He must raise the constitutional issue in a proper manner.⁷

Where a genuine issue of fact must be resolved before the constitutionality of legislation can be decided, it has been held that a decision regarding the constitutionality of legislation will not be made on a motion for summary judgment.⁸ Conversely, where a decision as to the constitutionality of legislation does not involve a finding on a genuine issue of fact, it has been held that such a decision will be made on motion for summary judgment.⁹

The right to raise a constitutional question may be waived by failure to make timely objection to the invasion of a constitutional right.¹⁰ Courts

6. *Carter v Texas*, 177 US 442, 44 L ed 839, 20 S Ct 687; *Western & A. R. Co. v Michael*, 172 Ga 561, 158 SE 426; *Willoughby v Willoughby*, 178 Kan 62, 283 P2d 428; *Owen v Mutual Benefit Health & Acci. Asso.* 171 Kan 457, 233 P2d 706, *app dismd* 342 US 937, 96 L ed 697, 72 S Ct 560; *Shohoney v Quincy, O. & K. C. R. Co.* 231 Mo 131, 132 SW 1059, *error dismd* 223 US 705, 56 L ed 621, 32 S Ct 517; *Union Interchange, Inc. v Allen*, 140 Mont 227, 370 P2d 492; *State ex rel. Powell v State Bank*, 90 Mont 539, 4 P2d 717, 80 ALR 1494; *Salley v McCoy*, 186 SC 1, 195 SE 132.

A constitutional right may be forfeited by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Yakus v United States*, 321 US 414, 88 L ed 834, 64 S Ct 660.

The right collaterally to attack the constitutionality of a statute may be lost by failure to object to its validity when the opportunity is presented, and interposing instead an objection on the merits in proceedings under the statute. *Phillips v Kankakee Reclamation Co.* 178 Ind 31, 98 NE 804.

A constitutional question should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances, and must thereafter be kept alive by appropriate steps; otherwise it will be waived. *Kenmike Theatre, Inc. v Moving Picture Operators, etc.* 139 Conn 95, 90 A2d 881; *Crescent Planing Mill Co. v Mueller (Mo)* 117 SW2d 247, 118 ALR 709, *transf* 234 Mo App 1243, 123 SW2d 193.

7. *Arkansas Fuel Oil Co. v Louisiana*, 304 US 197, 82 L ed 1287, 58 S Ct 832, *reh den* 304 US 589, 82 L ed 1549, 58 S Ct 1044; *Champlin Ref. Co. v Corporation Com.* 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; *Flint v Stone Tracy Co.* 220 US 107, 55 L ed 389, 31 S Ct 342; *Taylor v Davis*, 212 Ala 282, 102 So 433, 40 ALR 1052; *Ashland Transfer Co. v State Tax Com.* 247 Ky 144, 56 SW2d 691, 87 ALR 534; *State ex rel. Clinton Falls Nursery Co. v Steele County*, 181 Minn 427, 232 NW 737, 71 ALR 1190; *State ex rel. Powell v State Bank*, 90 Mont 539, 4 P2d 717, 80 ALR 1494; *Bickett v State Tax*

Com. 177 NC 433, 99 SE 415; *State ex rel. Johnson v Baker*, 74 ND 244, 21 NW2d 355; *State ex rel. Stutsman v Light*, 68 ND 513, 281 NW 777; *State ex rel. Linde v Taylor*, 33 ND 76, 156 NW 561, *error dismd* 245 US 627, 62 L ed 518, 38 S Ct 60; *Winslow v Fleischner*, 112 Or 23, 228 P 101, 34 ALR 826; *State ex rel. Taylor v Lord*, 28 Or 498, 43 P 471; *Sabre v Rutland R. Co.* 86 Vt 347, 85 A 693.

The court will avoid volunteering an opinion on any question involving the construction of the Constitution, where the case itself does not bring the question directly before it and make it the duty of the court to decide upon it. *Charles River Bridge v Warren Bridge*, 11 Pet (US) 420, 9 L ed 773.

It is the rule of the courts, both state and federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court. *Baker v Grice*, 169 US 284, 42 L ed 748, 18 S Ct 323.

The question whether a state statute giving a lien upon a vessel, enforceable in a state court, for materials and supplies furnished on the credit of the vessel, is an unconstitutional infringement upon the exclusive admiralty jurisdiction of the federal courts of liens of a maritime character, is not open in a case in which no maritime lien is asserted. *The Winnebago (Iroquois Transp. Co. v DeLaney Forge & Iron Co.)* 205 US 354, 51 L ed 836, 27 S Ct 509.

Constitutional questions may come to the United States Supreme Court from a state court only if properly raised in the state court. *Hague v C. I. O.* 307 US 496, 83 L ed 1423, 59 S Ct 954.

Practice Aids.—Pleading unconstitutionality of statutes. 1 AM JUR PL & PR FORMS 1:46.

—Allegations of unconstitutionality of statutes. 6 AM JUR PL & PR FORMS 6:316–6:327.

As to the necessity of notice to the Attorney General in cases involving constitutional questions, see § 101, *supra*.

8. *Annotation*: 83 ALR2d 840, § 4.

9. *Anderson v Carlson*, 171 Neb 741, 107 NW2d 535, 83 ALR2d 831.

Annotation: 83 ALR2d 839, § 2.

10. § 132, *infra*.

[16 Am Jur 2d]—20

305

may thus refuse to consider a constitutional objection, even though a like objection had previously been sustained in a case in which it was properly taken.¹¹

It is also a principle recognized in many jurisdictions that the constitutionality of a statute cannot be raised for the first time in an appellate court of a state¹² or upon a rehearing in a civil case.¹³ An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention.¹⁴ And the United States Supreme Court has stated that it will not consider a constitutional question that was neither raised nor briefed nor argued before it.¹⁵ Similar authority is to be found in the decisions of state courts.¹⁶

In some states, in cases involving punishment of a person for crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings on the principle that an unconstitutional law is wholly void and has no effect.¹⁷ Thus, where an act creating a crime is found to be unconstitutional, the question may be raised for the first time on appeal, since the question is regarded as jurisdictional.¹⁸ This principle extends to raising such a question on a rehearing.¹⁹

Where the entire proceedings under a statute are void because of the unconstitutionality of sections relating to the mode of procedure, it is not always necessary first to seek redress by the slow process of appeal, but the courts may permit a more speedy remedy.²⁰ Furthermore, in proper cases a suit may be brought at once in a federal court without first exhausting the right of appeal to a state tribunal.¹

The question is often presented to the courts as to whether the constitu-

11. *Yakus v United States*, 321 US 414, 88 L ed 834, 64 S Ct 660.

12. See 5 Am Jur 2d, *APPEAL AND ERROR* § 574.

13. *Company "A," First Regiment v Hughes*, 53 ND 291, 205 NW 722; *C. F. Trantow Co. v Industrial Com.* 262 Wis 586, 55 NW2d 884.

14. *Beck v Washington*, 369 US 541, 8 L ed 2d 98, 82 S Ct 955 (in which the court was stating the law of the state of Washington).

15. *United States v Spector*, 343 US 169, 96 L ed 863, 72 S Ct 591, reh den 343 US 951, 96 L ed 1353, 72 S Ct 1040.

The court will not rule on constitutional questions that are not precisely in issue. *United States v Petrillo*, 332 US 1, 91 L ed 1877, 67 S Ct 1538.

Constitutional questions will be dealt with only as they are "appropriately raised upon a record before [the court]." *Oil, C. & A. W. I. Union v Missouri*, 361 US 363, 4 L ed 2d 373, 80 S Ct 391; *Allen-Bradley Local, etc. v Wisconsin Employment Relations Bd.* 315 US 740, 86 L ed 1154, 62 S Ct 820.

16. *Porter v Eyer*, 80 Ariz 169, 294 P2d 661; *Miller v State*, 174 Md 362, 198 A 710; *Oklahoma City v Wahlberg*, 185 Okla 28, 89 P2d 962.

The court will not presume to pass upon constitutional questions not duly raised and

insisted upon, since they are not properly before it. *State ex rel. Anderson v Fadely*, 180 Kan 652, 308 P2d 537; *Re Wimberly Chapel Baptist Church*, 170 Kan 684, 228 P2d 540.

The question of constitutionality of a statute must be formally submitted to the court for determination. *Miller v State*, 174 Md 362, 198 A 710.

Constitutional questions will be considered only when insisted upon and adequately argued. *Hickey v Riley*, 177 Or 321, 162 P2d 371.

The court will not ordinarily consider the constitutionality of a statute, unless the specific provision claimed to have been violated is pointed out. *Riverton Valley Drainage Dist. v Freemont County*, 52 Wyo 336, 74 P2d 871, 114 ALR 1093.

17. *Commonwealth v Hana*, 195 Mass 262, 81 NE 149; *Ex parte Lewis*, 45 Tex Crim 1, 73 SW 811.

18. *State v Diamond*, 27 NM 477, 202 P 988, 20 ALR 1527.

19. *State v Bickford*, 28 ND 36, 147 NW 407.

20. *Bell v First Judicial Dist. Ct.* 28 Nev 280, 81 P 875.

1. *Prentiss v Atlantic Coast Line Co.* 211 US 210, 53 L ed 150, 29 S Ct 67.

tionality of legislation may be raised in extraordinary proceedings. Although some of the courts hold that the constitutionality of a statute or ordinance is not a proper subject of investigation on habeas corpus, the weight of authority is to the effect that a court in such proceedings may inquire into the validity of the statute under which the petitioner has been convicted and sentenced, and if it proves to be invalid, may discharge him.²

In mandamus proceedings the courts are not in accord in regard to the question as to when the constitutionality of a statute may be raised. It is generally held that the relator may attack the validity of a statute relied on by the respondent as excusing him from the performance of a duty. The respondent is generally held not to be able to raise the validity of legislation in mandamus proceedings if the act sought to be required to be done by him is ministerial or if he is a subordinate whose superior should raise the question.³

In prohibition proceedings it is a general rule that where the validity of legislation is involved, a writ of prohibition will not be granted in advance of a determination in the inferior court where the question is presented, when a plain remedy by appeal is afforded, even though the higher court may, when the question is presented to it, hold that the statute or ordinance is invalid. Where, however, the remedy by appeal is inadequate, prohibition lies to restrain a prosecution under a void statute, notwithstanding it is necessary to pass on the constitutionality of the statute in the prohibition proceedings.⁴

The right to attack the constitutionality of statutes in quo warranto proceedings follows no definite rule.⁵

§ 116. Pleading.

Courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings.⁶ Although unconstitutionality need not be pleaded with any greater definiteness or certainty than other issues,⁷ a party should, by proper averments, bring himself within the scope of the act and show the feature of it which would injure him.⁸ As to how such an issue should be pleaded, there are many authorities which state that the constitutionality of a law will not be considered unless the point is specially pleaded,⁹

2. See *HABEAS CORPUS* (1st ed §§ 29, 30).

3. See *MANDAMUS* (1st ed §§ 81 et seq.).

As to when officers may question validity of a statute, see § 128, *infra*.

4. See *PROHIBITION* (1st ed § 32).

5. See *QUO WARRANTO*.

6. *Henderson v Antonacci* (Fla) 62 So 2d 5.

The courts will not go beyond the issues raised in order to decide constitutional questions not contained within the framework of the pleadings or the evidence in the case. *Korematsu v United States*, 323 US 214, 89 L ed 194, 65 S Ct 193, reh den 324 US 885, 89 L ed 1435, 65 S Ct 674.

7. *Owen v Mutual Benefit Health & Acci. Assn.* 171 Kan 457, 233 P2d 706, app dismd 342 US 937, 96 L ed 697, 72 S Ct 560; *Union Interchange, Inc. v Allen*, 140 Mont 227, 370 P2d 492.

8. A complaint in a suit to enjoin the enforcement of a regulation is not rendered sufficient by allegations which are merely general conclusions of law or fact, but must set forth the facts relied upon to rebut the presumption of constitutionality. *Pacific States Box & Basket Co. v White*, 296 US 176, 80 L ed 138, 56 S Ct 159, 101 ALR 853; *State ex rel. Kenosha Auto Transport Corp. v Flanigan*, 349 Mo 54, 159 SW2d 598.

The particular provision of the constitution alleged to be violated must be pointed out, and it is not enough to set out constitutional provisions and assert that rights have been violated, but the facts constituting the violation must be set out. *State ex rel. Kenosha Auto Transport Corp. v Flanigan*, *supra*.

A constitutional question raised by a motion is not entitled to consideration where the motion does not specify the provision of the constitution alleged to have been violated. *Brown v Waldman* (RI) 177 A2d 179.

9. *Pacific States Box & Basket Co. v White*,

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 117

although the view has been taken that it is unnecessary to plead unconstitutionality specially where an attack is made on the constitutionality of a municipal ordinance.¹⁰

§ 117. — Raising constitutional issue by demurrer.

It is a fairly well-established rule that the constitutionality of a statute may be generally raised by demurrer.¹¹ The rule is more accurately stated in a decision pointing out that when a complaint states in form a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer.¹² Where this mode of attack is employed, it seems that under the rule adopted by some of the courts, it is not necessary for the demurrer to specify the particular grounds on which the constitutionality of the statute is attacked,¹³ a general demurrer being sufficient for such a purpose.¹⁴

On a demurrer to a bill, a law attacked as unconstitutional is to be tested as to its validity by its language in light of such matters as are subject of judicial notice.¹⁵

§ 118. Admissions and stipulations.

In the consideration of attempts to fix the validity of legislation by admission or agreement, the principle should be kept in mind that the constitutionality of any act is a question of law for the court, and not a matter of

296 US 176, 80 L ed 138, 56 S Ct 159, 101 ALR 853; *Re Wimberly Chapel Baptist Church*, 170 Kan 684, 228 P2d 540; *Ward v Leche*, 189 La 113, 179 So 52; *Barber v Louisiana R. & Nav. Co.* 141 La 1059, 76 So 199; *State ex rel. Carr v Cabana Terrace, Inc.* (Miss) 153 So 2d 257.

A court will not pass upon the question of the unconstitutionality of an act of the legislature unless the party raising the issue specifically designates the particular portion of the constitution which he claims is violated by the legislative act; it is necessary to particularize to the fullest extent possible. *Gorham v Robinson*, 57 RI 1, 186 A 832.

10. *Almond v Day*, 197 Va 419, 89 SE2d 851; *Adkins v Richmond*, 98 Va 91, 34 SE 967.

11. *Beauvoir Club v State*, 148 Ala 643, 42 So 1040; *Hoxie v New York, N. H. & H. R. Co.* 82 Conn 352, 73 A 754; *Christy v Elliott*, 216 Ill 51, 74 NE 1035; *Chicago & N. W. R. Co. v Farhaman (Iowa)* 125 NW2d 210; *Owen v Mutual Benefit Health & Acci. Assn.* 171 Kan 457, 233 P2d 706, app dismd 342 US 937, 96 L ed 697, 72 S Ct 560; *State v Hales*, 256 NC 27, 122 SE2d 768, 90 ALR2d 804; *Adkins v Richmond*, 98 Va 91, 34 SE 967; *State ex rel. Weeks v Wisconsin State Board of Examiners*, 252 Wis 32, 30 NW2d 187.

Annotation: 71 ALR 1194.

12. *State ex rel. Clinton Falls Nursery Co. v Steele County*, 181 Minn 427, 232 NW 737, 71 ALR 1190; *Ocean Acci. & G. Corp. v Paulsen*, 244 Wis 286, 12 NW2d 129, 152 ALR 810.

308

The general rule that a demurrer to a petition admits all material allegations thereof has been held inapplicable to preclude an attack by demurrer upon the constitutionality of a statute upon which the action is based. *State ex rel. Whetsel v Wood*, 207 Okla 193, 248 P2d 612, 34 ALR2d 1321.

13. *Hoxie v New York, N. H. & H. R. Co.* 82 Conn 352, 73 A 754. But see *Wright v Georgia*, 373 US 284, 10 L ed 2d 349, 83 S Ct 1240, in which the court said that under Georgia law, the constitutionality of a statute may be attacked by demurrer; the defendant is required to set up the ground of his attack with particularity in the demurrer.

14. Annotation: 71 ALR 1194-1196.

15. *McSweeney v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508.

The question of the constitutionality of a public law, such as the Illinois Employees' Compensation Act, cannot be determined simply on the pleadings, on demurrer to a pleading alleging that the bill for the act and the amendments thereto were not printed, as required by the constitution, before vote on the final passage, and purporting to set out all the entries and proceedings concerning the bill shown by the senate and house journals, but the court should require proof of each step taken by the legislature, before passing on the demurrer, or should strike the demurrer from the files and require a joinder of issue. *Nakwosa v Western Paper Stock Co.* 260 Ill 172, 102 NE 1041.

As to judicial notice, see §§ 155, 156, infra.

CONSTITUTIONAL LAW

§ 118

16 Am Jur 2d

fact for a jury or for private parties.¹⁶ This question affects the rights of the public generally, as well as the rights of parties to a particular proceeding.¹⁷ For this reason courts should be careful not to declare legislative acts unconstitutional on agreed and general statements and without the fullest disclosure of all material facts.¹⁸

It has very generally been held that stipulations that particular statutes of the state are invalid, as well as stipulations as to the steps taken in the passing of statutes and stipulations as to their construction, which in effect amount to stipulations of invalidity, are without binding effect.¹⁹ And the courts have consistently refused to allow litigants, either specifically or by admissions, to agree privately as to the constitutionality of statutes. This principle has been expressed in the rule that a judgment of invalidity of a statute cannot be predicated on an admission.²⁰ In other words, the court will not declare a statute to be unconstitutional because facts showing its unconstitutionality are alleged in the pleading of one party and admitted by the other.¹ A party cannot admit the invalidity of a law by a failure to deny an allegation that it was not constitutionally enacted.²

The parties cannot stipulate as to the interpretation of a constitution. Thus, a stipulation that a particular provision of a constitution does not apply to the case will not bind the court. Similarly, a stipulation as to when a constitutional amendment went into effect is of no validity.³ There is some minority inclination, on the other hand, to uphold stipulations that legislation is valid.⁴

16. *Pittsburgh, C. C. & St. L. R. Co. v State*, 180 Ind 245, 102 NE 25.

17. *Nakwosa v Western Paper Stock Co.* 260 Ill 172, 102 NE 1041.

18. *Chicago & G. T. R. Co. v Wellman*, 143 US 339, 36 L ed 176, 12 S Ct 400.

Constitutional questions will not be passed on in a friendly or fictitious suit, or on waiver of other than constitutional questions involved, or on the admissions of a district attorney, or on an agreed statement of facts. *Greenville County Fair Assn. v Christenberry*, 198 SC 338, 17 SE2d 857.

19. *Adams v Clark*, 36 Colo 65, 85 P 642; *E. Fougere & Co. v New York*, 224 NY 269, 120 NE 612, 1 ALR 1467; *State ex rel. Weldon v Thomason*, 142 Tenn 527, 221 SW 491. Annotation: 92 ALR 667, 668.

In the determination whether a statute is valid by reason of having been duly submitted to a referendum vote of the people, the court is not bound by stipulations of parties as to the official action taken in connection therewith. *Allen v State*, 14 Ariz 438, 130 P 1114.

A stipulation that a statute regulating the length of truck-semitrailer combinations excludes from the highways a combination safer than the types permitted is not, even though one of the parties is the state, conclusive that the statute has no reasonable relation to public safety on the highways. *State v Wetzel*, 208 Wis 603, 243 NW 768, 86 ALR 274.

20. *State v Aloe*, 152 Mo 466, 54 SW 494.

1. *Adams v Clark*, 36 Colo 65, 85 P 642; *Peckham v People*, 32 Colo 140, 75 P 422; *Nakwosa v Western Paper Stock Co.* 260 Ill 172, 102 NE 1041; *Bank of Commonwealth v Spilman*, 33 Ky (3 Dana) 150; *Atty. Gen. v Rice*, 64 Mich 385, 31 NW 203; *State ex rel. Hawes v Withrow*, 154 Mo 397, 55 SW 460; *State ex rel. McCaffery v Aloe*, 152 Mo 466, 54 SW 494; *McLane v Paschal*, 8 Tex Civ App 398, 28 SW 711, error ref.

2. *Adams v Clark*, 36 Colo 65, 85 P 642.

3. Annotation: 92 ALR 670.

4. Annotation: 92 ALR 669.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 165

declared valid simply because, in the opinion of the court, they are unwise. Questions as to wisdom are for the legislature,⁹ and for protection against unwise legislation within the limits of recognized legislative power, the people must look to the polls and not to the courts.¹⁰

The mere fact that legislation makes necessary the incurring of large expense is no sufficient reason for not obeying its provisions if it is otherwise valid.¹¹

§ 165. — Expediency.

It is a mandate often repeated in the decisions of the courts that the expediency of legislation is not a matter for judicial concern and that inexpediency does not warrant invalidation on constitutional grounds.¹² In judging the

standards. *Goesart v Cleary*, 335 US 464, 93 L ed 163, 69 S Ct 198.

9. *United States v American Union Transp. Co.*, 327 US 437, 90 L ed 772, 66 S Ct 644; *Markham v Cabell*, 326 US 404, 90 L ed 165, 66 S Ct 193; *Glass City Bank v United States*, 326 US 265, 90 L ed 56, 66 S Ct 108; *Robinson v United States*, 324 US 282, 89 L ed 944, 65 S Ct 666, reh den 324 US 889, 89 L ed 1437, 65 S Ct 910, 325 US 889, 89 L ed 2006, 65 S Ct 1401, 326 US 895, 89 L ed 491, 66 S Ct 86, 328 US 878, 807, 90 L ed 1646, 66 S Ct 1017; *Roberts v Spray*, 71 Ariz 60, 223 P 808; *Liquor Store, Inc. v Continental Distilling Corp. (Fla)*, 40 So 2d 371; *Phelps v Childers*, 184 Okla 40, 89 P2d 782; *Ex parte Strauch*, 80 Okla Crim 89, 157 P2d 201.

10. That to permit the reduction of overassessments of property for taxation to its true value, irrespective of whether such assessments are discriminatory, will be disastrous to the income structure of the state, is a matter for consideration of the legislature and not for the courts. *Werner v Riebe*, 70 ND 533, 296 NW 422, 156 ALR 1254.

11. *Newport & C. Bridge Co. v United States*, 105 US 470, 26 L ed 1143. See also the dissenting opinion of Stone, J., in *United States v Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

12. *Atty. Gen. ex rel. Conely v Detroit*, 78 Mich 543, 44 NW 388.

A workmen's compensation act will not be held invalid on the ground that it will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses. *State ex rel. Davis-Smith Co. v Clausen*, 65 Wash 156, 117 P 1101.

13. *Greenough v Tax Assessors*, 331 US 486, 91 L ed 1621, 67 S Ct 1400, 172 ALR 329, reh den 332 US 784, 92 L ed 367, 68 S Ct 28; *United Public Workers v Mitchell*, 330 US 75, 91 L ed 754, 67 S Ct 556; *Railroad Retirement Bd. v Alton R. Co.*, 295 US 330, 79 L ed 1468, 55 S Ct 758; *Nebbia v New York*, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; *Williams v Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431; *Ghera v State*, 16 Ariz 344, 146 P 494; *Cap. F. Bourland Ice Co. v Franklin*

standards. *Goesart v Cleary*, 335 US 464, 93 L ed 163, 69 S Ct 198.

9. *United States v American Union Transp. Co.*, 327 US 437, 90 L ed 772, 66 S Ct 644; *Markham v Cabell*, 326 US 404, 90 L ed 165, 66 S Ct 193; *Glass City Bank v United States*, 326 US 265, 90 L ed 56, 66 S Ct 108; *Robinson v United States*, 324 US 282, 89 L ed 944, 65 S Ct 666, reh den 324 US 889, 89 L ed 1437, 65 S Ct 910, 325 US 889, 89 L ed 2006, 65 S Ct 1401, 326 US 895, 89 L ed 491, 66 S Ct 86, 328 US 878, 807, 90 L ed 1646, 66 S Ct 1017; *Roberts v Spray*, 71 Ariz 60, 223 P 808; *Liquor Store, Inc. v Continental Distilling Corp. (Fla)*, 40 So 2d 371; *Phelps v Childers*, 184 Okla 40, 89 P2d 782; *Ex parte Strauch*, 80 Okla Crim 89, 157 P2d 201.

10. That to permit the reduction of overassessments of property for taxation to its true value, irrespective of whether such assessments are discriminatory, will be disastrous to the income structure of the state, is a matter for consideration of the legislature and not for the courts. *Werner v Riebe*, 70 ND 533, 296 NW 422, 156 ALR 1254.

11. *Newport & C. Bridge Co. v United States*, 105 US 470, 26 L ed 1143. See also the dissenting opinion of Stone, J., in *United States v Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

12. *Atty. Gen. ex rel. Conely v Detroit*, 78 Mich 543, 44 NW 388.

A workmen's compensation act will not be held invalid on the ground that it will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses. *State ex rel. Davis-Smith Co. v Clausen*, 65 Wash 156, 117 P 1101.

13. *Greenough v Tax Assessors*, 331 US 486, 91 L ed 1621, 67 S Ct 1400, 172 ALR 329, reh den 332 US 784, 92 L ed 367, 68 S Ct 28; *United Public Workers v Mitchell*, 330 US 75, 91 L ed 754, 67 S Ct 556; *Railroad Retirement Bd. v Alton R. Co.*, 295 US 330, 79 L ed 1468, 55 S Ct 758; *Nebbia v New York*, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; *Williams v Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431; *Ghera v State*, 16 Ariz 344, 146 P 494; *Cap. F. Bourland Ice Co. v Franklin*

CONSTITUTIONAL LAW

§ 165

16 Am Jur 2d

constitutionality of a particular statutory provision, it is not for the court to determine whether the provision comports well or ill with the purposes of the statute of which it is a part.¹³ The mandate is in all respects applicable to police legislation.¹⁴ Similarly, it has been said that mere cumbersomeness in administration will not of itself make a statute unconstitutional.¹⁵

Utilities Co., 180 Ark 770, 22 SW2d 993, 68 ALR 1018; *Dabbs v State*, 39 Ark 353; *People v Hupp*, 53 Colo 80, 123 P 651; *State ex rel. Smith v Butts*, 111 Fla 630, 149 So 746, 89 ALR 946; *Davis v Florida Power Co.*, 64 Fla 246, 60 So 759; *Atlantic Coast Line R. Co. v Coachman*, 59 Fla 130, 52 So 377; *Ind 171*, 191 NE 158, 96 ALR 271; *Blue v Bolivar Twp. Bd. of Finance v Hawkins*, 207 Ind 171, 191 NE 158, 96 ALR 271; *State, 206 Ind 98*, 188 NE 583, 91 ALR 334; *Schmitt v F. W. Cook Brewing Co.*, 187 Ind 623, 120 NE 19, 3 ALR 270; *Dalton v State Property & Bldg. Com. (Ky)*, 304 SW2d 342; *Manning v Sims*, 308 Ky 587, 213 SW2d 577, 5 ALR2d 1154; *Louisville & J. County Metropolitan Sewer Dist. v Joseph E. Seagram & Sons*, 307 Ky 413, 211 SW2d 122, 4 ALR2d 588; *Drury v Franke*, 247 Ky 758, 57 SW2d 969, 88 ALR 917; *Dirken v Great Northern Paper Co.*, 110 Me 374, 86 A 320; *Northern Paper Co.*, 106 Me 62, 75 A 295; *County State v Mayo*, 106 Me 62, 75 A 295; *County Comrs. of Anne Arundel County v English*, 182 Md 514, 35 A2d 135, 150 ALR 842; *Re Opinion of Justices*, 303 Mass 631, 22 NE2d 49, 123 ALR 199; *Welch v Swasey*, 193 Mass 364, 79 NE 745, affd 214 US 91, 53 L ed 923, 29 S Ct 567; *State v Chicago, M. & St. P. R. Co.*, 114 Minn 122, 130 NW 545; *Kansas City v Liebi*, 298 Mo 569, 252 SW 404, 28 ALR 295; *State ex rel. Barker v Merchants' Exch.*, 269 Mo 346, 190 SW 903, affd 248 US 365, 63 L ed 300, 39 S Ct 114; *State v Scullin-Gallagher Iron & Steel Co.*, 268 Mo 178, 186 SW 1007; *Worthington v District Ct.*, 37 Nev 212, 142 P 230; *Chronicle & Gazette Pub. Co. v Atty. Gen.*, 94 NH 148, 48 A2d 478, 168 ALR 879; *Woolf v Fuller*, 87 NH 64, 174 A 193, 94 ALR 1067; *State v Griffin*, 69 NH 1, 39 A 260; *Roswell v Bateman*, 20 NM 77, 146 P 950; *State v Harris*, 216 NC 746, 6 SE2d 854, 128 ALR 658; *Ely Lilly & Co. v Saunders*, 216 NC 163, 4 SE2d 528, 125 ALR 1308; *Werner v Riebe*, 70 ND 533, 296 NW 422, 156 ALR 1254; *Herbring v Lee*, 126 Or 588, 269 P 236, 60 ALR 1165, affd 280 US 111, 74 L ed 217, 50 S Ct 49, 64 ALR 1430; *Winston v Moore*, 244 Pa 447, 91 A 520; *Henley v State*, 98 Tenn 665, 41 SW 352, 1104; *Louisville & N. R. Co. v County Ct.*, 1 Sneed (Tenn) 637; *St. Louis S. W. R. Co. v State*, 113 Tex 570, 261 SW 996, 33 ALR 367; *Ex parte Allison*, 48 Tex Crim 634, 90 SW 492; *Stillman v Lynch*, 56 Utah 540, 192 P 272, 12 ALR 552; *Denver & R. G. R. Co. v Grand County*, 51 Utah 294, 170 P 74, 3 ALR 1224; *Staples v Gilmer*, 183 Va 338, 33 SE2d 49, 158 ALR 495; *Hadfield v Lundin*, 98 Wash 657, 168 P 516; *Sallasker v Fletcher*, 73 Wash 593, 132 P 648; *Sutherland v Miller*, 79 W Va 796, 91 SE 993; *State v Peel Splint Coal Co.*, 36 W Va 802, 15 SE 1000.

The expediency of statutes relating to tax-

ation, within constitutional limits, is a subject with which the courts will not intermeddle. *Stanley v Jeffries*, 86 Mont 114, 284 P 134, 70 ALR 166; *Stillman v Lynch*, 56 Utah 540, 192 P 272, 12 ALR 552; *Nathan v Spokane County*, 35 Wash 26, 76 P 521.

Whether the plan of insurance provided by the State Fire and Tornado Fund Law is adequate or inadequate, safe or unsafe, is a matter for legislative, and not for judicial, determination. *Minot Special School Dist. v Olmstead*, 53 ND 683, 208 NW 968, 45 ALR 1337.

13. *Flemming v Nestor*, 363 US 603, 4 L ed 2d 1435, 80 S Ct 1367, reh den 364 US 854, 5 L ed 2d 77, 81 S Ct 29.

An act cannot be declared unconstitutional merely because in the opinion of the courts it is unsuited to its ostensible end. *Rast v Van Deman & L. Co.*, 240 US 342, 60 L ed 679, 36 S Ct 370.

But it has also been said that while a court may not substitute its judgment for the discretion of the lawmaking body, where the effectiveness of an act is doubtful, it may weigh this doubtful element in connection with the interference of property rights in determining the validity of the act. *State v Park*, 42 Nev 386, 178 P 389, 3 ALR 75.

14. *Sligh v Kirkwood*, 237 US 52, 59 L ed 835, 35 S Ct 501; *Purity Extract & Tonic Co. v Lynch*, 226 US 192, 57 L ed 184, 33 S Ct 44; *Brodnax v Missouri*, 219 US 285, 55 L ed 219, 31 S Ct 238; *New York ex rel. Silz v Hesterberg*, 211 US 31, 53 L ed 75, 29 S Ct 10; *California Reduction Co. v Sanitary Reduction Works*, 199 US 306, 50 L ed 204, 26 S Ct 100; *Dobbins v Los Angeles*, 139 Cal 179, 72 P 970, revd on other grounds 195 US 223, 47 L ed 169, 25 S Ct 18; *Cureton v State*, 135 Ga 660, 70 SE 332, error dismd 229 US 630, 57 L ed 1358, 33 S Ct 778; *Welch v Swasey*, 193 Mass 364, 79 NE 745, affd 214 US 91, 53 L ed 923, 29 S Ct 567; *Davis v State*, 26 Ohio App 340, 159 NE 575, affd 118 Ohio St 25, 160 NE 473, which has error dismd 277 US 571, 72 L ed 993, 48 S Ct 432; *State v Packer Corp.*, 77 Utah 500, 297 P 1013; *Hadfield v Lundin*, 98 Wash 657, 168 P 516; *State v Phelps*, 144 Wis 1, 128 NW 1041; *State v W. S. Buck Mercantile Co.*, 38 Wyo 47, 264 P 1023, 57 ALR 675.

But note that while the courts may not condemn police legislation because they regard it as inexpedient or unwise, yet the expediency is to be taken into account with respect to the importance of the public benefit that the legislation seeks to promote, as well as the means that it adopts to secure

§ 166

Propriety, necessity, desirability.

§ 166. — Propriety, necessity, desirability. Propriety of legislation is not a factor going to its constitutional validity.¹⁶ And a statute or ordinance which is unnecessary is not for that reason unconstitutional; indeed, in determining the constitutional validity of legislation, the courts are unconcerned with issues as to the necessity for the enactment of the legislation in question.¹⁷ Thus, it has been said that it is not for the court to decide whether a law is needed and advisable in the general government of the people.¹⁸ Where the legislative purpose has been declared in plain and unmistakable language, it is not within the province of the court to interpose contrary views of what the public need demands, although as individuals the members of the court may hold convictions contrary to those of the legislature.¹⁹ It is similarly true that a court will not strike down legislation as unconstitutional merely because, in its view, the legislation is undesirable.²⁰ Note, in

the benefit. *Woolf v Fuller*, 87 NH 64, 174 A 193, 94 ALR 1067.

15. *Henry Bickel Co. v Louisville*, 282 Ky 38, 137 SW2d 717, 127 ALR 1084.

16. *State ex rel. Edwards v Osborne*, 195 SC 295, 11 SE2d 260.

The courts are not concerned with whether the legislature might have adopted a better method of legislation, so long as the method adopted is not prohibited by the constitution. *Marr v Fisher*, 182 Or 383, 187 P2d 966.

17. *Queenside Hills Realty Co. v Saxl*, 328 US 80, 90 L ed 1096, 66 S Ct 850; *Oklahoma ex rel. Phillips v Guy F. Atkinson Co.*, 313 US 508, 85 L ed 1487, 61 S Ct 1050; *Cincinnati Soap Co. v United States*, 301 US 308, 81 L ed 1122, 57 S Ct 764; *James Everard's Breweries v Day*, 265 US 545, 68 L ed 1174, 44 S Ct 628; *Hamilton v Kentucky Distilleries & Warehouse Co.*, 251 US 146, 64 L ed 194, 40 S Ct 106; *New York, C. & H. R. R. Co. v Price (CA1)*, 159 F 330; *Re Porterfield*, 28 Cal 2d 91, 168 P2d 706, 167 ALR 675; *Collison v State*, 39 Del 460, 2 A2d 97, 119 ALR 1422; *Booth v People*, 179 Ill 43, 57 NE 798; *Booth v State*, 179 Ind 405, 100 NE 563, affd 237 US 391, 59 L ed 1011, 35 S Ct 617; *Moore v Grillis*, 205 Miss 865, 39 So 2d 505, 10 ALR2d 1425; *State v J. J. Newman Lumber Co.*, 102 Miss 802, 59 So 923, sugg error ovrr 103 Miss 263, 60 So 215; *Kansas City v Lieb*, 298 Mo 569, 252 SW 404, 28 ALR 295; *State ex rel. Linde v Taylor*, 33 ND 76, 156 NW 561; error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; *Herrin v Arnold*, 183 Okla 392, 82 P2d 977, 119 ALR 1471; *Ashton-Jenkins Co. v Bramel*, 56 Utah 587, 192 P 375, 11 ALR 752; *State v Holden*, 14 Utah 71, 46 P 756, affd 169 US 366, 42 L ed 780, 18 S Ct 383; *State v Walter Bowen & Co.*, 86 Wash 23, 149 P 330; *Sutherland v Miller*, 79 W Va 796, 91 SE 993.

If certain means to carry into effect any of the powers expressly given by the Constitution to the government of the Union constitute an appropriate measure not prohibited by the Constitution, the degree of its necessity

is a question of legislative discretion, not of judicial cognizance. *McCulloch v Maryland*, 4 Wheat (US) 316, 4 L ed 579.

The choice of means adopted by Congress to protect the election of President and Vice President from corruption presents a question primarily addressed to its judgment; and if it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained are matters for congressional determination alone. *Burroughs v United States*, 290 US 534, 78 L ed 484, 54 S Ct 287.

The courts will not undertake to determine whether the particular structures proposed for damming a river in the exercise of the federal power to improve navigation are reasonably necessary. *Arizona v California*, 283 US 423, 75 L ed 1154, 51 S Ct 522.

18. *State v J. J. Newman Lumber Co.*, 102 Miss 802, 59 So 923, sugg of error ovrr 103 Miss 263, 60 So 215.

19. *Wait v Pierce*, 191 Wis 202, 209 NW 475, 210 NW 822, 48 ALR 276.

20. *Salsburg v Maryland*, 346 US 545, 98 L ed 281, 74 S Ct 280; *Kalb v Feuerstein*, 308 US 433, 84 L ed 370, 60 S Ct 343.

With respect to the appraisal of economic conditions and determinations of questions of fact the existence of which makes legislation desirable, the decision of Congress is final. *Norman v Baltimore & O. R. Co.*, 294 US 240, 79 L ed 885, 55 S Ct 497, 95 ALR 1352.

It is immaterial to the constitutionality of police legislation whether such laws, if they meet constitutional requirements of reasonableness, are for the good of the community. *Grainger v Douglas Park Jockey Club (CA6)*, 148 F 513; *Com. v Pear*, 183 Mass 242, 66 NE 719; *Chicago, B. & Q. R. Co. v State*, 47 Neb 549, 66 NW 624; *Davis v State*, 26 Ohio App 340, 159 NE 575, affd 118 Ohio St 25, 160 NE 473, error dismd 277 US 571, 72 L ed 993, 48 S Ct 432; *State v Packer Corp.*, 77 Utah 500, 297 P 1013.

§ 167

this connection, that it has been said that the courts are not concerned with the uniqueness of a statute whose constitutionality is questioned,¹ and that the fact that legislation is novel is no evidence of its unconstitutionality.²

§ 167. Conformity with public policy.

It is generally recognized that the public policy of a state is to be found in its constitution and statutes.³ Only in the absence of any declaration in these instruments may it be determined from judicial decisions.⁴ The Supreme Court has pointed out the limitations both of judicial declaration of public policy and of the application of the theory, stating that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.⁵

1. *Grasse v Dealer's Transport Co.*, 412 Ill 179, 106 NE2d 124, cert den 344 US 837, 97 L ed 651, 73 S Ct 47.

2. *Railroad Retirement Bd. v Alton R. Co.*, 295 US 330, 79 L ed 1468, 55 S Ct 758; *Arizona Employers' Liability Cases (Arizona Copper Co. v Hammer)*, 250 US 400, 63 L ed 1058, 39 S Ct 553, 6 ALR 1537.

3. *Baker v United States (CA1)*, 27 F2d 863, cert den 287 US 656, 73 L ed 565, 49 S Ct 185; *Boise-Payette Lumber Co. v Chalis Independent School Dist.*, 46 Idaho 403, 268 P 26; *John Griffiths & Son Co. v National Fireproofing Co.*, 310 Ill 331, 141 NE 739, 38 ALR 559; *People ex rel. Watseka Teleph. Co. v Emmerson*, 302 Ill 300, 134 NE 707, 21 ALR 636; *Collins v Metropolitan L. Ins. Co.*, 232 Ill 37, 83 NE 542; *State ex rel. St. Louis v Public Serv. Commission*, 335 Mo 448, 73 SW2d 393; *State v Gateway Mortuaries*, 87 Mont 225, 287 P 156, 68 ALR 1512; *Dunlap v Dunlap*, 84 NH 352, 150 A 905, 71 ALR 1055; *Speed v Tomlinson*, 73 NH 46, 59 A 376, 68 ALR 432; *People v Hawkins*, 157 NY 1, 51 NE 257; *Rickey v Slingerland*, 143 Misc 583, 256 NYS 901; *Cavender v Hewitt*, 145 Tenn 471, 239 SW 767, 22 ALR 755; *Bohn v Salt Lake City*, 79 Utah 121, 8 P2d 591, 81 ALR 215; *La Bove v Balthazor*, 180 Wis 419, 193 NW 244, 32 ALR 862.

The Supreme Court can know nothing of public policy except from the Constitution and the laws and the course of administration and decision, and while there are cases in which arguments drawn from public policy must have large influence, these are cases in which the course of legislation leaves no doubt upon the question of what the public policy is and in which what would otherwise be obscure may be cleared by reference to what is already received and established. *License Tax Cases*, 5 Wall (US) 462, 18 L ed 497.

The laws and policy of a state may be framed and shaped to suit its condition of climate and soil. *Bacon v Walker*, 204 US 311, 51 L ed 499, 27 S Ct 289.

The public policy of the state is determined by the Constitution so far as jury trials are concerned, and the legislature is not permitted to circumvent the constitutional provision in order to secure even a better public policy. That can only be done through constitutional amendment. *Labowe v Balthazor*, 180 Wis 419, 193 NW 244, 32 ALR 862.

4. *Baker v United States (CA1)*, 27 F2d 863, cert den 287 US 656, 73 L ed 565, 49 S Ct 185; *John Griffiths & Son Co. v National Fireproofing Co.*, 310 Ill 331, 141 NE 739, 38 ALR 559; *People ex rel. Watseka Teleph. Corp. v Emmerson*, 302 Ill 300, 134 NE 707, 21 ALR 636; *State ex rel. St. Louis v Public Serv. Commission*, 335 Mo 448, 73 SW2d 393; *State v Gateway Mortuaries*, 87 Mont 225, 287 P 156, 68 ALR 1512; *Pickett Pub. Co. v Carbon County*, 36 Mont 188, 92 P 524; *Dunlap v Dunlap*, 84 NH 352, 150 A 905, 71 ALR 1055; *Speed v Tomlinson*, 73 NH 46, 59 A 376, 68 ALR 432; *Rickey v Slingerland*, 143 Misc 583, 256 NYS 901; *Cavender v Hewitt*, 145 Tenn 471, 239 SW 767, 22 ALR 755; *Bohn v Salt Lake City*, 79 Utah 121, 8 P2d 591, 81 ALR 215.

The public policy of a state is to be found in its constitution and statutes, and where these are silent, in its judicial decisions. *John Griffiths & Son Co. v National Fireproofing Co.*, 310 Ill 331, 141 NE 739, 38 ALR 559.

No act or transaction should be held to be void as against public policy unless it contravenes some positive well-defined expression of the settled will of the people of the state or nation as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public. *Re Rahn*, 316 Mo 498, 291 SW 120, 51 ALR 877.

5. *Patton v United States*, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 167

In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to,⁶ because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned.⁷ With the foregoing considerations as its basis, the rule has become securely settled that all questions of policy, including changes therein,⁸ are for the determination of the legislature,⁹ and not for the courts.¹⁰

6. *Twin City Pipe Line Co. v. Harding Glass Co.* 283 US 353, 75 L ed 1112, 51 S Ct 476, 83 ALR 1168; *Baker v. United States (CA1)* 27 F2d 863, cert den 287 US 656, 73 L ed 565, 49 S Ct 42, 21 P2d 929; *People ex rel. Co. 42 Ark 383, 73 So 525*; *State v. Surety Finance Co.* 198 Ala 383, 73 So 525; *State v. Surety Finance Co.* 42 Ark 42, 21 P2d 929; *Kirksey v. Ft. Smith*, 227 Ark 630, 300 SW2d 257, 66 ALR2d 627; *Colorado Wheat Growers Assn. v. Theede*, 80 Colo 529, 253 P 30; *McFadden v. Blocker*, 3 Indian Terr 224, 54 SW 873; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa 340, 108 NW 902, affd 219 US 549, 55 L ed 328, 31 S Ct 259; *Park Comrs. v. Diamond Ice Co.* 130 Iowa 603, 105 NW 203; *Workmen's Comp. Bd. v. Abbott*, 212 Ky 123, 278 SW 533, 47 ALR 789; *Commonwealth v. Hazel*, 155 Ky 30, 159 SW 673; *Silva v. Newport*, 150 Ky 781, 150 SW 1024; *Bellfast Water Co.* 115 Me 234, 98 A 738; *State v. Gateway Mortuaries*, 87 Mont 225, 287 P 156, 68 ALR 1512; *State v. Sunapee Dam Co.* 70 NH 458, 50 A 108; *Greenway v. Board of Education*, 129 NJL 461, 29 A2d 890, 145 ALR 404; *Rickey v. Slingerland*, 143 Misc 583, 256 NYS 901; *State ex rel. Linde v. Taylor*, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; *Miller v. Henry*, 62 Or 4, 124 P 197; *Wheeler v. Walter J. Bryson Co.* 162 Tenn 163, 35 SW2d 391; *Cavender*

v. Hewitt, 145 Tenn 471, 239 SW 767, 22 ALR 755; *State Road Comrs. v. County Ct.* 112 W Va 98, 163 SE 815; *State v. Evans*, 253 Wis 146, 33 NW2d 305, 13 ALR2d 1201; *Wis. 146, 33 NW2d 305, 13 ALR2d 1201*; *Jessner v. State*, 202 Wis 184, 231 NW 634, 71 ALR 1005.

Public policy, if not declared in the constitution, is to be looked for in legislative enactments, which are exclusive unless they actuate some provision of the constitution. *District Grand Lodge, G. U. O. F. v. Jones*, 138 Tex 537, 160 SW2d 915.

If a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state. *Baker v. United States (CA1)* 27 F2d 863, cert den 278 US 656, 73 L ed 565, 49 S Ct 42; *Perkins v. Heert*, (CA1) 27 F2d 863, cert den 278 US 656, 73 L ed 565, 49 S Ct 42; *Cavender v. Hewitt*, 158 NY 306, 53 NE 18; *Cavender v. Hewitt*, 145 Tenn 471, 239 SW 767, 22 ALR 755.

8. Although public policy and comity may be decisive in the determination of what law shall be applied in given circumstances, the judges may not recognize or deny, at their pleasure or caprice, the rights which individuals may claim under it, but the rule thus adopted, having obtained the force of law by user and acquiescence, belongs only to the political department of the state, as far as changes are concerned, whenever such changes become desirable. *Hutchison v. Ross*, 262 NY 381, 187 NE 65, 89 ALR 1007.

9. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* 313 US 508, 85 L ed 1487, 61 S Ct 1050; *Sunshine Anthracite Coal Co. v. Adkins*, 310 US 381, 84 L ed 1263, 60 S Ct 907; *Home Bldg. & L. Asso. v. Blaisdell*, 290 US 398, 78 L ed 413, 54 S Ct 231, 88 ALR 1481, affg 189 Minn 422, 249 NW 334, 86 ALR 1507; *Williams v. Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431; *State Tax Comrs. v. Jackson*, 283 US 527, 75 L ed 1428, 51 S Ct 540, 73 ALR 1464, 75 ALR 1536; *Butterworth v. Boyd*, 12 Cal 2d 140, 82 P2d 434, 126 ALR 838; *Cowart v. Union Paving Co.* 216 Cal 375, 14 P2d 764, 83 ALR 1185; *Co. 216 Cal 375, 14 P2d 764, 83 ALR 1185*; *Chicago, B. & Q. R. Co. v. Provolt*, 42 Colo 317, 103 P 1126; *Keefe v. People*, 37 Colo 317, 87 P 791; *McAdams v. Barbieri*, 143 Conn 405, 123 A2d 182; *State ex rel. Dowling v. Butts*, 111 Fla 630, 149 So 746, 89 ALR 946; *Hirth-Krause Co. v. Cohen*, 177 Ind 1, 97 NE 1; *McAllister v. Fair*, 72 Kan 533, 84 P 112; *Workmen's Compensation Bd. v. Abbott*, 212 Ky 123, 278 SW 533, 47 ALR 789; *Power v. Nordstrom*, 150 Minn 228, 184 NW 967, 18 ALR 733; *Lommen v. Minneapolis Gaslight Co.* 65 Minn 196, 68 NW 53; *Mississippi Baptist Hospital v. Holmes*, 214 Miss 906, 55 So 2d 142, 25 ALR2d 12,

16 Am Jur 2d

CONSTITUTIONAL LAW

Where courts include in their decrees their opinions on questions of public policy, they in effect make the judicial tribunals lawmaking bodies in usurpa-

§ 167

tion of error overr 214 Miss 940, 56 So 2d 709; *State ex rel. St. Louis v. Public Serv. Commission*, 335 Mo 448, 73 SW2d 393; *State v. Safeway Stores*, 106 Mont 182, 76 P2d 81; *State ex rel. Barney v. Hawkins*, 79 Mont 506, 257 P 411, 53 ALR 583; *Nickel v. School Board of Axtell*, 157 Neb 813, 61 NW2d 566; *Board of Lincoln*, 101 Neb 163, 162 NW 488; *Meistrich v. Casino Arena Attractions, Inc.* 31 NE 44, 155 A2d 90, 82 ALR2d 1208; *Rickey v. Slingerland*, 143 Misc 583, 256 NYS 901; *Baltimore & O. R. Co. v. Chambers*, 73 Ohio St 16, 76 NE 91, affd 207 US 142, 52 L ed 143, 28 S Ct 34; *Rush v. Brown*, 187 Okla 97, 101 P2d 262; *Ex parte Fowler*, 85 Okla Crim 64, 184 P2d 814; *Ex parte Strauch*, 80 Okla Crim 89, 157 P2d 201; *Gooch v. Rogers*, 193 Or 158, 238 P2d 274; *Com. v. Hall*, 291 Pa 341, 140 A 626, 58 ALR 1023; *Busser v. Snyder*, 282 Pa 440, 128 A 80, 37 ALR 1515; *Scibilia v. Philadelphia, A. & P. Co.* 124 A 273, 32 ALR 981; *Pennsylvania R. Co. v. Ewing*, 241 Pa 581, 88 A 279, 19 Pa 549, 124 A 273, 32 ALR 981; *Sylvania R. Co. v. Nolan*, 159 Tenn 379, 19 SW 775; *Cooper v. Hewitt*, 145 Tenn 471, 239 SW 767, 22 ALR 755; *Sutton v. State*, 239 Tenn 696, 36 SW 697; *Ex parte Allison*, 96 Tex Crim 634, 90 SW 492; *Smoot v. People's Perpetual Loan & Bldg. Asso.* 95 Va 686, 29 SE 746; *State v. Walter Bowen & Co.* 86 Wash 23; 149 P 330; *State ex rel. Hickey v. Levitan*, 190 Wis 646, 210 NW 111, 48 ALR 434.

The judicial province is construction only; the policy of the law is the prerogative of the legislative department. *United States v. Jones*, 131 US 1, 33 L ed 90, 9 S Ct 669.

Public policy, where the legislature has spoken, is what it has declared that policy to be. *Park Constr. Co. v. Independent School Dist.* 209 Minn 182, 296 NW 475, 135 ALR 59.

10. *Cohen v. Beneficial Industrial Loan Corp.* 337 US 541, 93 L ed 1528, 69 S Ct 1221; *Robinson v. United States*, 324 US 282, 89 L ed 944, 65 S Ct 666, reh den 324 US 889, 89 L ed 1437, 65 S Ct 910, 325 US 895, 89 L ed 2006, 65 S Ct 1401, 326 US 807, 90 L ed 491, 66 S Ct 86, 328 US 878, 90 L ed 1646, 66 S Ct 1017; *Home Bldg. & L. Asso. v. Blaisdell*, 290 US 398, 78 L ed 413, 54 S Ct 231, 88 ALR 1481, affg 189 Minn 422, 249 NW 334, 86 ALR 1507; *Williams v. Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431; *State Tax Comrs. v. Jackson*, 283 US 527, 75 L ed 1428, 51 S Ct 540, 73 ALR 1464, 75 ALR 1536; *Davis v. State*, 68 Ala 58; *Gherna v. State*, 16 Ariz 344, 146 P 494; *Ft. Smith v. Scruggs*, 70 Ark 549, 69 SW 679; *Cowart v. Union Paving Co.* 216 Cal 375, 14 P2d 764, 83 ALR 1185; *People ex rel. Arkansas Valley Sugar Beet & Irrig. Land Co. v. Burke*, 72 Colo 486, 212 P 837, 30 ALR 1085; *Beach v. Bradstreet*, 85 Conn 344, 82 A 1030; *Lott v. Orlando*, 142 Fla 338, 196 So 313; *Perkins v. Cook County*, 271 Ill 449, 111 NE 580; *Hirth-Krause Co. v. Cohen*,

177 Ind 1, 97 NE 1; *Re Disinterment of Body of Jarvis*, 244 Iowa 1025, 58 NW2d 24; *McAllister v. Fair*, 72 Kan 533, 84 P 112; *Baughn* 436; *Farren v. Maine C. R. Co.* 112 Me 69, 7 NE2d 577, 110 ALR 297; *Mass Powell*, 280 Mich 699, 274 NW 372, 111 ALR 721; *Power v. Nordstrom*, 150 Minn 228, Div. of Superior Court Corp. v. Cottrell, 216 Miss 358, 62 So 2d 383; *State ex rel. St. Louis v. Public Serv. Com.* 335 Mo 448, 73 SW2d 393; *Re Wilson*, 102 Mont 178, 56 P2d 733, 105 ALR 367; *Sinclair v. Lincoln*, 101 Neb 163, 162 NW 488; *Worthington v. District Ct. ward*, 125 NJL 461, 29 A2d 890, 145 ALR 404; *People v. Chen*, 15 A2d 798, 159 ALR 427; *affd 293 US 195*, 60 L ed 151, 108 NE 85; *Cox v. Kingston*, 217 NC 391, 36 S Ct 252; *Northern P. R. Co. v. Richmond County*, 28 ND 172, 148 NW 515; *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Herbinger v. Lee*, 126 Or 580, 269 P 236, 60 ALR 1165, affd 280 US 111, 74 L ed 217, 50 S Ct 49, 64 ALR 1430; *Commonwealth v. Hall*, 291 Pa 341, 140 A 626, 58 ALR 1023; *Morrison v. Lamare*, 75 RI 176, 65 A2d 217; *Cummings v. Beeler*, 189 Tenn 151, 223 SW2d 913; *Stillman v. Lynch*, 56 Utah 540, 192 P 272, 12 ALR 552; *Jones v. Jones*, 1403; *State ex rel. Cashman v. Sims*, 130 W Va 430, 43 SE2d 805, 172 ALR 1389; *Wait v. Pierce*, 191 Wis 202, 209 NW 475, 210 NW 822, 48 ALR 276.

The United States Supreme Court does not sit as a superlegislature to decide whether the policy which legislation expresses offends the public welfare. *Day-Brite Lighting, Inc. v. Missouri*, 342 US 421, 96 L ed 469, 72 S Ct 405, reh den 343 US 921, 96 L ed 1334, 72 S Ct 674.

The function of the courts when an act of Congress is appropriately challenged as not conforming to the constitutional mandate is merely to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and not to approve or condemn its policy. *United States v. Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

Courts are not at liberty to entertain any discussions in relation to the policy of the government except so far as that policy is brought judicially to their notice in the positive enactments and declared will of the legislature. *The Star*, 3 Wheat (US) 78, 4 L ed 338.

A Supreme Court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command but merely to construe; and where the people have spoken, either in the form of a constitutional enact-

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 167

tion of the powers of the legislature,¹¹ in violation of the principle that the province of the courts is not to regulate, but to effectuate, the policy of the law as expressed in valid statutes.¹² In this connection, it has been said that nothing as the structure of the government of the United States or the text of the Constitution warrants judicial review of legislation by standards which require the courts to equate their political judgment with that of Congress.¹³

Not only is there no public policy which prohibits the legislature from doing anything which the Constitution does not prohibit,¹⁴ but, as has been noted, a statute is conclusive as to the public policy of the state unless it contravenes constitutional provisions. Hence, the courts are not at liberty to declare a law void as in violation of public policy.¹⁵ In determining the constitutionality

ment or a valid and constitutional statute, it must be controlled by their decisions and conclusions. Northern P. R. Co. v Richland County, 28 ND 172, 148 NW 545.

"When the legislature passes a constitutional law, that law establishes public policy upon the subjects covered by it, and that policy is not open to question by the courts." Peterson v Widule, 157 Wis 641, 147 NW 966.

11. Baker v United States (CA1) 27 F2d 663, cert den 278 US 656, 73 L ed 565, 49 S Ct 185; Ex parte Birmingham, 199 Ala 9, 74 So 51; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Cooper v Nolan, 159 Tenn 379, 19 SW2d 274; Cavender v Hewitt, 145 Tenn 471, 239 SW 767, 22 ALR 755; State v Superior Ct. 67 Wash 37, 120 P 861; Healy Lumber Co. v Morris, 33 Wash 490, 74 P 681.

It is "out of bounds for the judiciary to deny the legislature a choice of policy" so long as it is not unrelated to the problem and not forbidden by some explicit limitation on the state's power. Beauharnais v Illinois, 343 US 250, 96 L ed 919, 72 S Ct 725, reh den 343 US 988, 96 L ed 1375, 72 S Ct 1070.

12. United States v Butler, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914; Williams v Baltimore, 289 US 36, 77 L ed 1015, 53 S Ct 431; Wabash Valley Electric Co. v Young, 287 US 488, 77 L ed 447, 53 S Ct 234; Arizona Employers' Liability Cases (Arizona Copper Co. v Hammer), 250 US 400, 63 L ed 1058, 39 S Ct 553, 6 ALR 1537; Buchanan v Warley, 245 US 60, 62 L ed 149, 38 S Ct 16; Jacksonville v Bowden, 67 Fla 181, 64 So 769; Davis v Florida Power Co. 64 Fla 246, 60 So 759; People v Johnson, 288 Ill 442, 123 NE 543, 4 ALR 1535; Schmitt v F. W. Cook Brewing Co. 187 Ind 623, 120 NE 19, 3 ALR 270; Bolden v Grand Rapids Operating Corp. 239 Mich 318, 214 NW 241, 53 ALR 183; People v Gibbs, 186 Mich 127, 152 NW 1053; State v Moilen, 140 Minn 112, 167 NW 345, 1 ALR 331; Chicago, B. & Q. R. Co. v v Gildersleeve, 219 Mo 170, 118 SW 86; State ex rel. Barney v Hawkins, 79 Mont 506, 257 P 411, 53 ALR 583; State v Standard Oil Co. 100 Neb 826, 161 NW 537; State v Park, 42 Nev 386, 178 P 389, 3 ALR 75; State v Sutton, 87 NJL 192, 94 A 788, affd 244 US 258, 61 L ed 1117, 37 S Ct 508; Roswell v

Bateman, 20 NM 77, 146 P 950; People v Tompkins, 186 NY 413, 79 NE 326; State v Revis, 193 NC 192, 136 SE 346, 50 ALR 98; State ex rel. Fargo v Wetz, 40 ND 299, 168 NW 835, 5 ALR 731; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Allion v Toledo, 99 Ohio St 416, 124 NE 237, 6 ALR 426; Zarbaugh v Ellinger, 99 Ohio St 133, 124 NE 68, 6 ALR 208; Ex parte Mode, 77 Tex Crim 432, 180 SW 708; Denver & R. G. R. Co. v Grand County, 51 Utah 294, 170 P 74, 3 ALR 1224; Exchange Nat. Bank v United States, 147 Wash 176, 265 P 722, 62 ALR 139, affd 279 US 80, 73 L ed 621, 49 S Ct 321; Malette v Spokane, 77 Wash 205, 137 P 496; State ex rel. Voris v Seattle, 74 Wash 199, 133 P 11, 4 ALR 198; Boote v Pinson, 77 W Va 412, 89 SE 985; Milwaukee v State, 193 Wis 423, 214 NW 820, 54 ALR 419.

13. Harisiades v Shaughnessy, 342 US 580, 96 L ed 586, 72 S Ct 512, reh den 343 US 936, 96 L ed 1344, 72 S Ct 767, 768.

14. Baker v United States (CA1) 27 F2d 663, cert den 278 US 656, 73 L ed 565, 49 S Ct 185; Flowers v Logan County, 138 Ky 59, 127 SW 512; Rickey v Slingerland, 143 Misc 583, 256 NYS 901; Cooper v Nolan, 159 Tenn 379, 19 SW2d 274; Cavender v Hewitt, 145 Tenn 471, 239 SW 767, 22 ALR 755; Borgnis v Falk Co. 147 Wis 327, 133 NW 209; Julien v Model Bldg. L. & Invest. Assn. 116 Wis 79, 92 NW 561.

The subjects to be regulated by the legislature and the order of their regulation are within the prerogatives of the lawmaking body, and when such body has acted within the proper province, the courts cannot interfere. State ex rel. Hickey v Levitan, 190 Wis 646, 210 NW 111, 48 ALR 434.

15. Bayside Fish Flour Co. v Gentry, 297 US 422, 80 L ed 772, 56 S Ct 513; Red "C" Oil Mfg. Co. v Board of Agriculture, 222 US 380, 56 L ed 240, 32 S Ct 152; Baker v United States (CA1) 27 F2d 863, cert den 278 US 656, 73 L ed 565, 49 S Ct 185; Gherna v State, 16 Ariz 344, 146 P 494; District of Columbia v Kraft, 35 App DC 253, cert den 218 US 673, 54 L ed 1205, 31 S Ct 223; Jacksonville v Bowden, 67 Fla 181, 64 So 769; Perkins v Cook County, 271 Ill 449, 111 NE 580; Booth v State, 179 Ind 405, 100 NE 563;

CONSTITUTIONAL LAW

16 Am Jur 2d

of a legislative act, the question is one, not of legislative policy, but of legislative power.¹⁶

§ 168

§ 168. Legislative motivation; presumption.

There is a general presumption of the good faith of all lawmaking bodies¹⁷—that is, primarily the courts will assume that the lawmaking body considers the effect of legislation on the constitutional rights of citizens, that it acts from patriotic and just motives¹⁸ with a desire to promote the public good,¹⁹ and that laws are passed in good faith in order to remedy by proper regulations some evil not reached or corrected by previous legislation.²⁰ Courts cannot impute to the legislative department a disregard of any fundamental principle of civil liberty;²¹ nor will they impute an intention to defy or evade the Constitution.²²

Hunter v Colfax Consol. Coal Co. 175 Iowa 245, 154 NW 1037, 157 NW 145; Board of Park Comrs. v Diamond Ice Co. 130 Iowa 603, 105 NW 203; Wheeler v Weightman, 96 Kan 50, 149 P 977; Drury v Franke, 247 Ky 758, 57 SW2d 969, 88 ALR 917; Lawrence E. Tierney Coal Co. v Smith (Lawrence E. Tierney Coal Co. v Kash), 180 Ky 815, 203 SW 731, 4 ALR 1540; Belfast v Belfast Water SW 731, Me 234, 98 A 738; Baltimore v State, 15 Md 376; Pickett Pub. Co. v Carbon County, 36 Mont 188, 92 P 524; Worthington v District Ct. 37 Nev 212, 142 P 230; Rickey v Slingerland, 143 Misc 583, 256 NYS 901; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Winston v Moore, 244 Pa 447, 91 A 520; Cooper v Nolan, 159 Tenn 379, 19 SW2d 274; Cavender v Hewitt, 145 Tenn 471, 239 SW 767, 22 ALR 755; Rio Grande Lumber Co. v Darke, 50 Utah 114, 167 P 241; State v Walter Bowen & Co. 86 Wash 23, 149 P 330; Mallette v Spokane, 77 Wash 205, 137 P 496; Ah Lim v Territory, 1 Wash 156, 24 P 588; Boote v Pinson, 77 W Va 412, 89 SE 985; Borgnis v Falk Co. 147 Wis 327, 133 NW 209; Julien v Model Bldg. L. & Invest. Assn. 116 Wis 79, 92 NW 561.

The courts cannot strike down a legislative exercise of the police power because they deem it to be impolitic. Magoun v Illinois Trust & Sav. Bank, 170 US 283, 42 L ed 1037, 18 S Ct 594.

The courts, in their private opinions, need not concur in Congress' policies to hold its enactments constitutional. Harisiades v Shaughnessy, 342 US 580, 96 L ed 586, 72 S Ct 512, reh den 343 US 936, 96 L ed 1344, 72 S Ct 767, 768.

The public policy of legislative enactments cannot be questioned by the courts, nor can a statute be avoided merely because the courts might not agree with the public policy so announced. State v Garden City, 74 Idaho 513, 265 P 328.

16. Prentiss v National Airlines, Inc. (DC NJ) 112 F Supp 306.

The question is one of legislative power and not at all one of sound policy. Gorham v Robinson, 57 RI 1, 186 A 832.

17. Sperry & Hutchinson Co. v Hoegh, 246 Iowa 9, 65 NW2d 410.
Generally, as to presumptions regarding legislative proceedings, see § 142, supra.

18. Southwestern Oil Co. v Texas, 217 US 114, 54 L ed 688, 30 S Ct 496; Amsel v Brooks, 141 Conn 288, 106 A2d 152, 45 ALR2d 1234, app dismd without op 348 US 880, 99 L ed 693, 75 S Ct 125; Price v People, 193 Ill 114, 61 NE 844, overrd on another point in Mathews v People, 202 Ill 389, 67 NE 28; Schmidt v Indianapolis, 168 Ind 631, 80 NE 632; Louisville School Bd. v Kings, 127 Ky 824, 107 SW 247; People ex rel. Ellis v Calder, 153 Mich 724, 117 NW 314, affd 218 US 591, 54 L ed 1163, 31 S Ct 122; People v Griswold, 213 NY 92, 106 NE 929; State v Womble, 112 NC 862, 17 SE 491; St. Louis Southwestern R. Co. v Griffin, 106 Tex 477, 171 SW 703; Sabre v Rutland R. Co. 86 Vt 347, 85 A 693.

19. Grainger & Douglas Park Jockey Club (CA6) 148 F 513; Russell Invest. Corp. v Russell, 182 Miss 385, 182 So 102; People v Lochner, 177 NY 145, 69 NE 373, revd on other grounds 198 US 45, 49 L ed 937, 25 S Ct 539.

20. State v Moore, 104 NC 714, 10 SE 143.

1. Minnesota v Barber, 136 US 313, 34 L ed 455, 10 S Ct 862; Soon Hing v Crowley, 113 US 703, 28 L ed 1145, 5 S Ct 730; Grainger v Douglas Park Jockey Club (CA6) 148 F 513; Beach v Bradstreet, 85 Conn 344, 82 A 1030.

And see § 142, supra.

Nothing short of the most explicit language will induce the court to attribute to Congress the intent to authorize investigations into private papers, on the possibility that they may disclose evidence of crime, in view of the provision of the Constitution against unreasonable searches and seizures. Federal Trade Commission v American Tobacco Co. 264 US 298, 68 L ed 696, 44 S Ct 336, 32 ALR 786.

2. § 142, supra.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 171

Because every inquiry into the constitutionality of a statute involves only a question of law, without regard to how the question arises,¹⁰ the validity of an enactment cannot be made to depend on the facts found on the trial of the first case involving the validity of such statute.¹¹ If the rule were otherwise, the trial of the main issue would necessarily be delayed until the preliminary fact on which the validity of the contested legislative act depended should be first tried and determined on testimony; and since this testimony might be different in different cases, there would be involved an absurdity of declaring the law constitutional one day and unconstitutional the next.¹²

§ 171. — Extent to which judicial review is permissible.

Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature,¹³ the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.¹⁴ Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably a basis for sustaining the conclusion reached, its findings are not subject to judicial review.¹⁵ There is no right to a trial by jury as to facts within the scope of legislative determination.¹⁷

10. *People v Love*, 298 Ill 304, 131 NE 809, 16 ALR 703; *Prescott v Memphis*, 154 Tenn 462, 285 SW 587, 48 ALR 1378.

11. *Pittsburgh, C. C. & St. L. R. Co. v Hartford City*, 170 Ind 674, 82 NE 787, 85 NE 362; *People v Detroit United R. Co.* 134 Mich 682, 97 NW 36; *St. Louis v Liessing*, 190 Mo 464, 89 SW 611.

12. *State v Layton*, 160 Mo 474, 61 SW 171. "It would be a dangerous rule to declare that the validity or invalidity of an act of the legislature can be the subject of collateral attack as to the facts upon which the legislature has acted; that is, that a jury may determine from evidence adduced before it, or from lack of evidence, that an act is or is not invalid, with as many varying conclusions as there might be bodies of triers, upon such facts as ingenuity might suggest, upon matters of opinion or actual facts in evidence." *Pittsburgh, C. C. & St. L. R. Co. v State*, 180 Ind 245, 102 NE 25, in which case it was held that evidence is not admissible to show that a statute requiring caboose cars to be of a certain length and to be mounted on certain running gear is unreasonable because cars corresponding to those specified are not required for safety, and therefore that the statute, which places additional expense on railroad companies, is void as taking property without due process of law.

13. § 170, *supra*.

14. *Re Spencer*, 149 Cal 396, 86 P 896; *McSween v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508; *Bosworth v Harp*, 154 Ky 559, 157 SW 1084; *Mt. Vernon-Woodberry Cotton Duck Co. v Frankfort Marine Acci. & P. G. Ins. Co.* 111 Md 561, 75 A 105; *Smith v Command*, 231 Mich 409, 204 NW 140, 40 ALR 515; *State ex rel.*

16. *Norman v Baltimore & O. R. Co.* 294 US 240, 79 L ed 885, 55 S Ct 407, 95 ALR 1352, affg 265 NY 37, 191 NE 726, 92 ALR 1523; *Radice v New York*, 264 US 292, 68 L ed 690, 44 S Ct 325; *Calder v Michigan*, 218 US 591, 54 L ed 1163, 31 S Ct 122; *Consumers' League v Colorado & S. R. Co.* 53 Colo 54, 125 P 577; *McSween v State Live*

Linde v Packard, 35 ND 298, 160 NW 150; *Stettler v O'Hara*, 69 Or 519, 139 P 743, affd 243 US 629, 61 L ed 937, 37 S Ct 475; *Poulnot v Cantwell*, 129 SC 171, 123 SE 451; *Bristol Redevelopment & Housing Authority v Denton*, 198 Va 171, 93 SE2d 288; *Chapman v Huntington Housing Authority*, 121 W Va 319, 3 SE2d 502.

The mere recital in a statute of the conditions which gave rise to its enactment is not controlling on the courts so that they must declare that to be which palpably is not. *Herrin v Arnold*, 183 Okla 392, 82 P2d 977, 119 ALR 1471.

15. *Miami Laundry Co. v Florida Dry Cleaning & Laundry Bd.* 134 Fla 1, 183 So 759, 119 ALR 956; *McSween v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508; *Bristol Redevelopment & Housing Authority v Denton*, 198 Va 171, 93 SE2d 288; *Chapman v Huntington Housing Authority*, 121 W Va 319, 3 SE2d 502.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing the court that those facts have ceased to exist. *United States v Carolene Products Co.* 304 US 144, 82 L ed 1234, 58 S Ct 778.

CONSTITUTIONAL LAW

§ 171

16 Am Jur 2d

In cases involving the validity of legislation the courts have no power to determine the merits of conflicting theories,¹⁸ to conduct an investigation of facts which may enter into questions of public policy or expediency, or to sustain or disapprove of the determination of such questions of fact by the legislature.¹⁹ It is not the function of the courts to reweigh the diverse factors which the legislature has considered or to question the conclusion which the legislature has reached.²⁰ If any state of facts, known or to be assumed, justifies the law, the court's power of inquiry ends.¹

The foregoing has relation to legislative findings of facts. The rules as to the limited judicial function with regard to such findings are not to be taken as indicating that the courts, in determining constitutional questions in a particular case, may not consider matters requiring the introduction of evidence

Stock Sanitary Bd. 97 Fla 750, 122 So 239, 65 ALR 508; *People v Price*, 257 Ill 587, 101 NE 196; *Pittsburgh, C. C. & St. L. R. Co. v Hartford City*, 170 Ind 674, 82 NE 787, 85 NE 362; *Viemeister v White*, 179 NY 235, 72 NE 97; *State v Muller*, 48 Or 252, 85 P 855; *Peay v Nolan*, 157 Tenn 222, 7 SW2d 815, 60 ALR 408; *Chapman v Huntington Housing Authority*, 121 W Va 319, 3 SE2d 502.

Where the constitutional validity of a statute depends upon the existence of facts, the courts cannot, where the question of what the facts establish is a fairly debatable one, set up their opinions with respect to it against the opinion of the legislature. *Radice v New York*, 264 US 292, 68 L ed 690, 44 S Ct 325.

The legislature is the proper authority to determine what should and what should not constitute a public burden, and with the exercise of its discretion in such matters the courts are loath to interfere. *Stanley v Jeffries*, 86 Mont 114, 284 P 134, 70 ALR 166.

Appellate courts are slow to declare that a state legislature is wrong in its facts where the courts have inadequate knowledge of local conditions. *Wright v May*, 127 Minn 150, 149 NW 9.

If the question is fairly debatable and the legislative determination is not manifestly arbitrary or unreasonable, it must be sustained. *Bristol Redevelopment & Housing Authority v Denton*, 198 Va 171, 93 SE2d 288.

With respect to the appraisal of economic conditions and determinations of questions of fact the existence of which makes legislation desirable, the decision of Congress is final. *Norman v Baltimore & O. R. Co.* 294 US 240, 79 L ed 885, 55 S Ct 407, 95 ALR 1352.

The court cannot interfere with a provision for sterilization of feeble-minded persons, on the ground that the probability of transmission of such quality cannot be determined with reasonable certainty, unless it is convinced of such fact beyond a reasonable doubt. *Smith v Wayne Probate Judge (Smith v Command)*, 231 Mich 409, 204 NW 140, 40 ALR 515.

17. *Sisson v Buena Vista County*, 128 Iowa 442, 104 NW 454.

18. *McSween v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508; *Nelson v Minneapolis*, 112 Minn 16, 127 NW 445.

The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for a difference of opinion is not material. *Holcombe v Georgia Milk Producers Confederation*, 188 Ga 358, 3 SE2d 705.

19. *Consumers' League v Colorado & S. R. Co.* 53 Colo 54, 125 P 577; *McSween v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508; *Sanders v Commonwealth*, 117 Ky 1, 77 SW 358; *Ex parte Kair*, 28 Nev 127, 80 P 463; *Woodall v Darst*, 71 W Va 350, 77 SE 264, 80 SE 367.

This principle has been applied to statutes relating to such subjects as—
—the mode of executing death sentences. *People ex rel. Kemmler v Durston*, 119 NY 569, 24 NE 6, error den 136 US 436, 34 L ed 519, 10 S Ct 930.

—the declaration of emergencies. *State ex rel. Asotsky v Regan*, 317 Mo 1216, 298 SW 747, 55 ALR 773; *State ex rel. Schorr v Kennedy*, 132 Ohio St 510, 8 Ohio Ops 494, 9 NE2d 278, 110 ALR 1428. Annotation: 7 ALR 522, s. 110 ALR 1438 (statute); 35 ALR2d 586 (ordinance).

—the inheritable tendency to mental defectiveness. *Smith v Wayne Probate Judge (Smith v Command)*, 231 Mich 409, 204 NW 140, 40 ALR 515.

—the testing of milch cows with tuberculin. *Nelson v Minneapolis*, 112 Minn 16, 127 NW 445; *Adams v Milwaukee*, 144 Wis 371, 129 NW 518.

—the compulsory vaccination of school children. *Blue v Beach*, 155 Ind 121, 58 NE 89.

20. *American Power & L. Co. v Securities & Exch. Com.* 329 US 90, 91 L ed 103, 67 S Ct 133.

1. *Defiance Milk Products Co. v Du Mond*, 309 NY 537, 132 NE2d 829.
See § 143, *supra*.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 172

by the parties. On this point the law is not clear. In some jurisdictions consideration of such extrinsic evidence is deemed permissible.² Other jurisdictions hold that extrinsic evidence may not be introduced, the courts being limited to facts judicially noticed.³ In still other jurisdictions the controlling rule does not appear clearly.⁴

With reference to a legislative determination and declaration of an emergency (warranting exercise of the police power),⁵ the view which is prevalent (but far from universal)⁶ is that such a question is primarily for the legislature to determine,⁷ and that its determination is entitled to great respect, but is not conclusive,⁸ because the courts possess the final authority to determine whether an emergency in fact exists.⁹ And it has been held that a finding by the legislature of the existence of a moral obligation of the state, relating to a matter primarily juristic in nature and not merely factual, is subject to judicial investigation and consideration, and the determination of the existence of such obligation is a judicial, not a legislative, function.¹⁰

3. BURDEN, QUANTUM, AND SUFFICIENCY OF PROOF

§ 172. Burden of proof.

In consequence of the general presumption in favor of the validity of acts of the legislature,¹¹ and the duty of the courts to resolve all doubts in favor of their validity,¹² the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim.¹³ The burden

Annotation: 35 ALR2d 587.

10. State ex rel. Cashman v. Sims, 130 W Va 430, 43 SE2d 805, 172 ALR 1389, in which the court said that although a legislative finding of a juristic fact is entitled to great weight and serious consideration, such finding is not conclusive.

11. §§ 137 et seq., supra.

12. § 146, supra.

13. Morey v. Doud, 354 US 457, 1 L ed 2d 1485, 77 S Ct 1344; Queenside Hills Realty Co. v. Saxl, 328 US 80, 90 L ed 1096, 66 S Ct 850; Metropolitan Casualty Ins. Co. v. Brownell, 294 US 580, 79 L ed 1070, 55 S Ct 538, reh den 295 US 767, 79 L ed 1708, 55 S Ct 647; Williams v. Baltimore, 289 US 36, 77 L ed 1015, 53 S Ct 431; Detroit International Bridge Co. v. Corporation Tax Appeal Bd., 287 US 295, 77 L ed 314, 53 S Ct 137; Frazier v. State Tax Com., 234 Ala 353, 175 So 402, 110 ALR 1479; Ex parte Ashton, 231 Ala 497, 165 So 773, 104 ALR 54; Randle v. Winona Coal Co., 206 Ala 254, 89 So 790, 19 ALR 118; State ex rel. Kimberlite Diamond Min. & Washing Co. v. Hodges, 114 Ark 155, 169 SW 942; Scarborough v. Webb's Cut Rate Drug Co., 150 Fla 754, 8 So 2d 913; Mayo v. Texas Co., 137 Fla 218, 188 So 206; Amos v. Mosley, 74 Fla 555, 77 So 619; Kocis v. Chicago Park Dist., 362 Ill 24, 198 NE 847, 103 ALR 141; People v. Linde, 341 Ill 269, 173 NE 361, 72 ALR 997; Hanley v. State, 234 Ind 326, 123 NE2d 452, 126 NE2d 879; State v. Fox, 158 Ind 126, 63 NE 19; State ex rel. Harrison v. Menaugh, 151 Ind

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 172

is a heavy one;¹⁴ it is well settled that to sustain it, the assailant¹⁵ must negative

SW2d 170; Watts v. Mann (Tex Civ App) 187 SW2d 917, error rel.

A corporation claiming that legislation applicable to corporations but not to individuals in a similar situation denies the equal protection of the laws has the burden of establishing the fact. Bain Peanut Co. v. Pinson, 282 US 499, 75 L ed 482, 51 S Ct 228.

Practice Aids.—Allegations as to unconstitutionality. 6 Am Jur Pl. & Pa Forms 6:316 et seq.

14. Loomis v. Board of Education, 376 Pa 428, 103 A2d 769.

Generally, as to sufficiency of proof of unconstitutionality, see §§ 173 et seq., infra.

15. One claiming that a state tax operates as a discrimination against transactions in interstate commerce has the burden of showing the fact. Greenville v. Query, 286 US 472, 76 L ed 1232, 52 S Ct 631, 84 ALR 831.

The burden of establishing the unconstitutionality of a state workmen's compensation act as applied to interstate carriers, because of the difficulty or impossibility of making the allocation for insurance premiums to the time of employment in intrastate commerce provided for in such act, is upon the carrier attacking its validity. Denton & M. R. Co. v. Armbrugg, 285 US 234, 76 L ed 729, 52 S Ct 336.

A carrier doing an interstate and intrastate business has the burden of showing that the enforcement of a statute requiring a license to do intrastate business operates to prejudice interstate business. Interstate Busses Corp. v. Holyoke Street R. Co., 273 US 45, 71 L ed 530, 47 S Ct 298.

Where the alleged infringement of the Fourteenth Amendment turns on the asserted non-existence of a contractual obligation to do that which the challenged statute exacts, one asserting such infringement must satisfy the court that he was not so bound. Shriver v. Woodbine Sav. Bank, 285 US 467, 76 L ed 884, 52 S Ct 430.

The burden of proof is upon one asserting that a municipal ordinance is so unreasonable and arbitrary as to amount to a deprivation of property without due process of law. New Orleans Pub. Service v. New Orleans, 281 US 682, 74 L ed 1115, 50 S Ct 449.

It is incumbent upon the opponents of a workmen's compensation law to demonstrate that it is clearly unreasonable and arbitrary. Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer), 250 US 400, 63 L ed 1058, 39 S Ct 553, 6 ALR 1537.

An act of a state legislature fixing rates for either passenger or freight transportation is to be regarded as prima facie valid, and the onus rests upon the carrier to prove its assertion to the contrary. Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441.

One who attacks the classification embodied in a statute has the burden of establishing its unconstitutionality. Zink v. Kessler Trucking Co., 38 Del 271, 190 A 637; George Benz Sons v. Ericson, 227 Minn 1, 34 NW2d 725; Standard Oil Co. v. Stone, 191 Miss 897, 2 So 2d 155; Wilson & Co. v. Hickey, 186 Okla 324, 97 P2d 564; Ex parte Strauch, 80 Okla Crim 89, 157 P2d 201; Thompson v. Dickson, 202 Or 394, 275 P2d 749; Mascari v. International Brotherhood of Teamsters, C. W. & H. 187 Tenn 345, 215 SW2d 779, cert dismd 335 US 907, 93 L ed 440, 69 S Ct 410; Ex parte George, 152 Tex Crim 465, 215

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 172

every reasonable, ¹⁶ conceivable ¹⁷ basis which might support the statute attacked, must be able to point out the particular provision that has been violated and the ground on which it has been infringed, ¹⁸ and must overcome the strong presumption in favor of its validity. ¹⁹ He must show how, as to him, the legislation in question is unconstitutional. ²⁰

It is a settled principle of constitutional law that the government which has a right to do an act and is charged with the duty of doing that act must be allowed to select the means of doing it; and those who contend that it may not adopt an appropriate means and that one particular mode of attaining the object is excepted assume the burden of Commerce Clause exception. *Intestate Commerce Com. v. Brimmon*, 154 US 447, 38 L ed 1047, 14 S Ct 1125.

As to the burden of proof to show that the assailant has sufficient reason to question the validity of a statute, see § 119, supra.

16. *Faber v Loveless*, 249 Iowa 593, 88 NW 2d 112.

17. *Steinberg-Baum & Co. v Countryman*, 247 Iowa 923, 77 NW2d 15; *Dickinson v Porter*, 240 Iowa 393, 35 NW2d 66, app dismd 338 US 843, 94 L ed 515, 70 S Ct 88.

18. *Middleton v Texas Power & Light Co.*, 249 US 152, 63 L ed 527, 39 S Ct 227; *Mountain Timber Co. v Washington*, 243 US 219, 61 L ed 685, 37 S Ct 260, affg 75 US 219, 61 L ed 685; *Erie R. Co. v Williams*, Wash 581, 135 P 615; 34 S Ct 761; *Wash 581*, 135 P 615; 34 S Ct 761; *233 US 685*, 58 L ed 1155, 34 S Ct 761; *Pine Grove Twp. v Talcott*, 19 Wall (US) 666, 22 L ed 227; *Re Madera Irrig. Dist.*, 92 Cal 296, 28 P 272, 675; *State ex rel. John-son v Goodgame*, 91 Fla 871, 108 So 836, 47 ALR 118; *Amos v Mosley*, 67 Fla 181, 64 So 619; *Chicago v Washington Home*, 289 Ill 769; *Chicago v Washington*, 1584; *Hawthorn*, 124 NE 416, 6 ALR 1584; *State v State*, 175 Ind 206, 124 NE 302; *Carr v State*, 156 Ind v People, 109 Ill 302; *French v State*, 141 Ind 618, 241, 93 NE 1071; *Overshiner v State*, 141 Ind 618, 187, 59 NE 468; *French v State*, 141 Ind 618, 41 NE 2; *Dickinson v Porter*, 240 Iowa 393, 35 NW2d 66, app dismd 338 US 843, 94 L ed 515, 70 S Ct 88; *Campbell v Jackman Bros.*, 140 Iowa 475, 118 NW 755; *McGuire v Chi-cago, B. & O. R. Co.*, 131 Iowa 340, 108 NW 902, affd 219 US 549, 55 L ed 328, 31 S Ct 259; *Ward v Leche*, 189 La 113, 179 So 52; *Laughlin v Portland*, 111 Me 486, 90 A 318; *Opinion of Justices*, 103 Me 506; *69 A 627*; *Maynard v Board of Canvassers*, 84 Mich 228, 47 NW 756; *State ex rel. Simpson v Mankato*, 117 Minn 458, 136 NW 264; *State v Corbett*, 57 Minn 345, 59 NW 317; *Hart v State*, 87 Miss 171, 39 So 523; *Cleveland v Watertown*, 222 NY 159, 118 NE 500; *People v West*, 106 NY 293, 12 NE 610; *State v Lizaarden*, 59 ND 475, 230 NW 729, 70 ALR 126; *State ex rel. Linde v Taylor*, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; *Valley v Park Commr.*, 16 ND 25, 111 NW 615; *Winston v Moore*, 244 Pa 447, 91 A 520; *Mackin v Greenville*, 42 SC 293, 20

SE 842; *Henley v State*, 98 Tenn 665, 41 SW 352, 1104; *Reelfoot Lake Levee Dist. v Daw-son*, 97 Tenn 151, 36 SW 1041, overrd on another point in *Arnold v Knoxville*, 115 Tenn 195, 90 SW 469; *Stratton Claimants v Morris Claimants*, 89 Tenn 497, 15 SW 87; *Ex parte Allison*, 48 Tex Crim 634, 90 SW 492; *Henrico County v Richmond*, 106 Va 282, 55 SE 683; *State ex rel. Thompson v McAllister*, 38 W Va 485, 18 SE 770.

The rule is applicable in declaratory judg-ment actions. Annotation: 23 ALR2d 1243. The burden rests upon one assailing the validity of a state statute to establish that it infringes the constitutional guaranty which he invokes. *Toombs v Citizens Bank*, 281 US 643, 74 L ed 1088, 50 S Ct 434.

But note that since statutes may be held to be unconstitutional as being in excess of leg-islative authority, it would seem that it does not follow in every case that the courts, be-fore they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded or some express command which has been disobeyed. *State v Denny*, 118 Ind 449, 21 NE 274.

19. *Lawrence v State Tax Com.* 286 US 276, 76 L ed 1102, 52 S Ct 556, 87 ALR 374; *Gorrie v Fox*, 274 US 603, 71 L ed 1228, 47 S Ct 675, 53 ALR 1210; *Roberts & S. Co. v Emmerson*, 271 US 50, 70 L ed 827, 46 S Ct 375, 45 ALR 1495; *Mountain Timber Co. v Washington*, 243 US 219, 61 L ed 685, 37 S Ct 260; *Dribin v Superior Court*, 37 Cal 2d 345, 231 P2d 809, 24 ALR 2d 864; *People v Hayne*, 83 Cal 111, 23 P 1; *State v Di Paglia*, 247 Iowa 79, 71 NW2d 601, 49 ALR2d 1223; *State ex rel. Maxwell v Kent-Coffey Mfg. Co.* 204 NC 365, 168 SE 397, 90 ALR 476, affd 291 US 642, 78 L ed 1040, 54 S Ct 437.

The presumption of validity which attends legislative and official actions imposes on one who alleges unreasonable discrimination the burden of showing it. *Concordia F. Ins. Co. v Illinois*, 292 US 535, 78 L ed 1411, 54 S Ct 830.

20. *People's Bkg. Co. v Sterling*, 300 US 175, 81 L ed 586, 57 S Ct 386; *Premier-Pabst Sales Co. v Grosscup*, 298 US 226, 80 L ed 1155, 56 S Ct 754; *Whitney Nat. Bank v Little Creek Oil Co.* 212 La 949, 33 So 2d 693; *State v Amerada Petroleum Corp.* (ND) 71 NW2d 675.

The burden of showing unconstitutionality is satisfied when the facts are laid bare to the court and the situation is found wanting in those conditions and those circumstances upon which alone the power of the legisla-

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 173. Sufficiency of proof, generally; underlying judicial duty to uphold legisla-tion.

§ 173

A clear understanding of the principles of law regarding the sufficiency of proof of unconstitutionality of legislation requires that it be borne in mind that by reason of the presumption of constitutionality of legislation¹ it is the general duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power² if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law.³ In accordance with principles of liberal construction, the courts are not justified in declaring an act of the legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect.⁴ It has been

ture must depend. *State v Harris*, 216 NC 746, 6 SE2d 854, 128 ALR 658.

1. §§ 137 et seq., supra.

2. *Graves v Minnesota*, 272 US 425, 71 L ed 331, 47 S Ct 122; *Gitlow v New York*, 268 US 652, 69 L ed 1138, 45 S Ct 625; *Dane v Jackson*, 256 US 589, 65 L ed 1107, 41 S Ct 566; *Green v Frazier*, 253 US 233, 64 L ed 878, 40 S Ct 499; *Singer Sewing Mach. Co. v Brickell*, 233 US 304, 58 L ed 974, 34 S Ct 493; *Alabama State Federa-tion of Labor v McAdory*, 246 Ala 1, 18 So 2d 810, cert dismd 325 US 450, 89 L ed 1725, 65 S Ct 1384; *Jefferson County v Busby*, 226 Ala 293, 148 So 411; *Fox v McDonald*, 101 Ala 51, 13 So 416; *Laird v Sims*, 16 Ariz 521, 147 P 738; *Gherna v State*, 16 Ariz 344, 146 P 494; *Cap F. Bourland Ice Co. v Franklin Utilities Co.* 180 Ark 770, 22 SW2d 993, 68 ALR 1018; *Western U. Teleg. Co. v State*, 82 Ark 309, 101 SW 748; *State v Moore*, 76 Ark 197, 88 SW 881; *Macmillan Co. v Clark*, 184 Cal 491, 194 P 1030, 17 ALR 288; *Re Spencer*, 149 Cal 396, 86 P 896; *Sherman v Buick*, 32 Cal 241; *Sage-Allen Co. v Wheeler*, 119 Conn 667, 179 A 195, 98 ALR 897; *Blakeslee v Hartford*, 106 Conn 642, 139 A 106, 55 ALR 1319; *State v Bassett*, 100 Conn 430, 123 A 842, 37 ALR 131; *Clendaniel v Conrad*, 26 Del (3 Boyce) 549, 83 A 1036, error dismd 235 US 712, 59 L ed 437, 35 S Ct 203; *Mayo v Texas Co.* 137 Fla 218, 188 So 206; *State v Atlantic Coast Line R. Co.* 56 Fla 617, 47 So 969; *Dell v Marvin*, 41 Fla 221, 26 So 188; *Georgia F. Ins. Co. v Cedartown*, 134 Ga 87, 67 SE 410; *Winter v Jones*, 10 Ga 190; *Smallwood v Jeter*, 42 Idaho 169, 244 P 149; *Vallat v Radium Dial Co.* 360 Ill 407, 196 NE 485, 99 ALR 607; *Victor Chemical Works v Industrial Bd.* 274 Ill 11, 113 NE 173; *People ex rel. Deneen v Simon*, 176 Ill 165, 52 NE 910; *State ex rel. Mavity v Tyndall*, 225 Ind 360, 74 NE2d 914, app dismd 333 US 834, 92 L ed 1118, 68 S Ct 609, reh den 333 US 858, 92 L ed 1138, 68 S Ct 732; *Vandalia R. Co. v Stillwell*, 181 Ind 267, 104 NE 289, affd 239 US 637, 60 L ed 480, 36 S Ct 445; *State v Louisville & N. R. Co.* 177 Ind 553, 96 NE 340; *Patter-son v Iowa Bonus Board*, 246 Iowa 1087, 71 NW2d 1; *State ex rel. Anderson v Fadley*, 180 Kan 652, 308 P2d 537; *Commonwealth v Boston Transcript Co.* 249 Mass 477, 144 NE 400, 35 ALR 1; *Kelley v Judge of Recorder's*

Ct. (*Kelley v Boyne*) 239 Mich 204, 214 NW 316, 53 ALR 273; *Mathison v Minne-apolis Street R. Co.* 126 Minn 286, 148 NW 71; *Standard Oil Co. v Stone*, 191 Minn 897, 2 So 2d 155; *Allied Mut. Ins. Co. v Bell*, 353 Mo 891, 185 SW2d 4, 158 ALR 415; *State v Gateway Mortuaries*, 87 Mont 225, 287 P 351, 68 ALR 1512; *Dinuzzo v State*, 85 Neb 351, 123 NW 309; *Boston Ice Co. v Boston & M. R. Co.* 77 NH 6, 86 A 356; *Leavitt v Lovering*, 64 NH 607, 15 A 414; *Re San-tillanes*, 47 NM 140, 138 P2d 503; *Admiral Realty Co. v New York*, 206 NY 110, 99 NE 241; *State v Revis*, 193 NC 192, 136 SE 346, 50 ALR 98; *State v Weddington*, 188 NC 643, 125 SE 257, 37 ALR 573; *Wood v Byrne*, 60 ND 1, 232 NW 303; *Lahoma Oil Co. v State Industrial Com.* 71 Okla 160, 175 P 836, 15 ALR 817, overrd on other grounds in *Western Indem. Co. v State Industrial Com.* 96 Okla 100, 219 P 147, 29 ALR 1419; *Bishop v Tulsa*, 21 Okla Crim 457, 209 P 228, 27 ALR 1008; *Eastern & W. Lumber Co. v Patterson*, 124 Or 146, 264 P 441, 60 ALR 528, affd 278 US 581, 71 L ed 518, 49 S Ct 184; *Commonwealth v Girard L. Ins. Co.* 305 Pa 558, 158 A 262, 83 ALR 460; *Gorham v Robinson*, 57 RI 1, 186 A 832; *Payne v Jones*, 47 SD 448, 199 NW 472; *Standard Oil Co. v State*, 117 Tenn 618, 100 SW 705; *Ex parte Townsend*, 64 Tex Crim 350, 144 SW 628; *Stillman v Lynch*, 56 Utah 540, 192 P 272, 12 ALR 552; *Sabre v Rutland R. Co.* 86 Vt 347, 85 A 693; *State v Pitney*, 79 Wash 608, 140 P 918; *Ex parte Bornee*, 76 W Va 360, 85 SE 529; *Van Dyke v Tax Com.* 217 Wis 528, 259 NW 700, 98 ALR 1332; *State v W. S. Buck Mercantile Co.* 38 Wyo 47, 264 P 1023, 57 ALR 675.

As to the very similar duty of the court to adopt a construction of a statute which will render it constitutional where it is possible to do so, and, further, so to construe statutes as to avoid a doubt of constitutionality where possible, see §§ 144 et seq., supra.

3. *Duham v State Tax Com.* 65 Ariz 268, 179 P2d 252, 171 ALR 684; *Vallat v Radium Dial Co.* 360 Ill 407, 196 NE 485, 99 ALR 607; *New York C. & H. R. R. Co. v Wil-liams*, 199 NY 108, 92 NE 404; *Common-wealth v Girard L. Ins. Co.* 305 Pa 558, 158 A 262, 83 ALR 460.

4. *Re Spickler (CC)* 43 F 653; *State v*

393

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 174

unmistakably,¹⁶ and by highly persuasive,¹⁷ irrefragable evidence.¹⁸ The statute must be manifestly in contravention of the constitution.¹⁹ It has also been said

43 Wyo 494, 5 P2d 255; State v W. S. Buck Mercantile Co. 38 Wyo 47, 264 P 1023, 57 ALR 675.

Only in cases of plain abuse will the court declare a statute to be violative of a constitutional provision prohibiting the passage of a special law for any case for which provision has been made by an existing general law. Williams v Baltimore, 289 US 36, 77 L ed 1015, 53 S Ct 431.

Ordinarily, it must be plain that no circumstances could justify an act, before the courts can declare it invalid. Pittsburgh, C. & St. L. R. Co. v State, 180 Ind 245, 102 NE 25.

The rules requiring courts to proceed with caution in considering the constitutionality of a statute and not to declare it unconstitutional unless it is plainly so are founded on the best of reasons, because while the judicial power may interfere to prevent the legislative and other departments from exceeding their powers, no tribunal has yet been devised to check the encroachments of the judicial power itself. Jenkins v State Bd. of Elections, 180 NC 169, 104 SE 346, 14 ALR 1247.

12. Marr v Fisher, 182 Or 383, 187 P2d 966.

13. "Findings to support a conclusion against constitutionality [must] be unequivocal." Mayo v Lakeland Highlands Canal Co. 309 US 310, 84 L ed 774, 60 S Ct 517.

14. Home Tel. & Tel. Co. v Los Angeles, 211 US 265, 53 L ed 176, 29 S Ct 50; Atkin v Kansas, 191 US 207, 48 L ed 148, 24 S Ct 124; Booth v Illinois, 184 US 425, 46 L ed 623, 22 S Ct 425; People v Hupp, 53 Colo 80, 123 P 651; Cooper Co. of Gainesville v State, 187 Ga 497, 1 SE2d 436; Floyd County v Scoggins, 164 Ga 485, 139 SE 11, 53 ALR 1286; Wilkerson v Rome, 152 Ga 762, 110 SE 895, 20 ALR 1334; State ex rel. Welsh v Darling, 216 Iowa 533, 246 NW 390, 88 ALR 218; Iowa Motor Vehicle Assn. v Railroad Comrs. 207 Iowa 461, 221 NW 364, 75 ALR 151; Des Moines 529, 74 L ed 595, 50 S Ct 151; Des Moines v Manhattan Oil Co. 193 Iowa 1096, 184 NW 823, 188 NW 921, 23 ALR 1322; State ex rel. Missoula v Holmes, 100 Mont 256, 47 P2d 624, 100 ALR 581; Portland v Welch, 154 Or 286, 59 P2d 228, 106 ALR 1188; Smith v Cameron, 106 Or 1, 210 P 716, 27 ALR 510; Parkinson v Watson, 4 Utah 2d 191, 291 P2d 400; Hardwick v Wolcott, 98 Vt 343, 129 A 159, 39 ALR 1222; Malette v Spokane, 77 Wash 205, 137 P 496.

Although the Supreme Court stands ready to correct violations of constitutional rights, the burden of showing the essential unfairness violative of such rights must be sustained by one who claims such injustice and seeks

to have the results set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. Beck v Washington, 369 US 541, 8 L ed 2d 98, 82 S Ct 955.

15. Johnson v Gentry, 220 Cal 231, 30 P2d 400, 92 ALR 1264.

16. State v Coppes, 247 Iowa 1057, 78 NW2d 10; Calcutt v McGeachy, 213 NC 1, 195 SE 49.

17. Proof of a statute's invalidity by reason of its conflict with the constitution must be highly persuasive. Eastern & W. Lumber Co. v Patterson, 124 Or 146, 264 P 441, 60 ALR 528, affd 278 US 581, 73 L ed 518, 49 S Ct 184.

A high degree of proof is required to overcome the presumption of constitutionality. Foster Trading Corp. v Luckett (Ky) 303 SW2d 315.

18. State v Douglas, 117 Vt 484, 94 A2d 403; Hardwick v Wolcott, 98 Vt 343, 129 A 159, 39 ALR 1222; State v Clement Nat. Bank, 84 Vt 167, 78 A 944, affd 231 US 120, 58 L ed 147, 34 S Ct 31.

19. Minnesota Rate Cases (Simpson v Shepard) 230 US 352, 57 L ed 1511, 33 S Ct 729; Knoxville v Knoxville Water Co. 212 US 1, 53 L ed 371, 29 S Ct 148; United States v Hall (CC) 44 F 883; Dell v Marvin, 41 Fla 221, 26 So 188; People v William Henning Co. 260 Ill 554, 103 NE 530; Wunderle v Wunderle, 144 Ill 40, 33 NE 195; State v Gerhardt, 145 Ind 439, 44 NE 469; French v State, 141 Ind 618, 41 NE 2; Callen v Junction City, 43 Kan 627, 23 P 652; Schwegmann Bros. v Louisiana Board of Alcoholic Control, 216 La 148, 43 So 2d 248, 14 ALR2d 680; Ulmer v Lime Rock R. Co. 98 Me 579, 57 A 1001; Hanna v Young, 84 Md 179, 35 A 674; People v Morris, 80 Mich 634, 45 NW 591; State ex rel. Corcoran v Chapel, 64 Minn 130, 66 NW 205; St. Louis v Liessing, 190 Mo 464, 89 SW 611; State v Hope, 100 Mo 347, 13 SW 490; State v Rosenbloom v State, 64 Neb 342, 89 NW 1053; High School Dist. v Lancaster County, 60 Neb 147, 82 NW 380; Bott v Wurts, 63 NJL 289, 43 A 744, 881; People ex rel. Carter v Rice, 135 NY 473, 31 NE 921; Cleveland, C. C. & St. L. R. Co. v Wells, 65 Ohio St 313, 62 NE 332; State ex rel. Richards v Cincinnati, 52 Ohio St 419, 40 NE 508; Rupe v Shaw (Okla) 286 P2d 1094; Russ v Commonwealth, 210 Pa 544, 60 A 169; Wheelon v South Dakota Land Settlement Bd. 43 SD 551, 181 NW 359, 14 ALR 1145; Ex parte Mode, 77 Tex Crim 432, 180 SW 708; Long v State, 58 Tex Crim 209, 127 SW 208; Willis v Kalmbach, 109 Va 475, 64 SE 342; Thurston County v Tenino Stone Quarries, 44 Wash 351, 87 P 634; State v Evjue, 253 Wis 146, 33 NW2d 305, 13 ALR2d 1201.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 174

that the validity of a law ought not to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy.²⁰

Similarly, the opinion has been expressed that the conviction required to overcome the presumption in favor of a statute must be clear and strong,²¹ that a law should never be lightly overthrown or set aside as unconstitutional,²² and that the courts do not feel called upon to grope blindly about the important business of determining the constitutionality of a statute upon a mere suggestion.²³

The principles stated above are of course fully applicable in cases in which the legislation whose constitutionality is in issue is an exercise of the police power. It is the duty of the courts to sustain police measures unless such are clearly, plainly, and palpably in violation of the constitution.²⁴

The general principles are equally applicable to legislation which is attacked as embodying an unconstitutional classification. Thus, it is said that to strike down an act as class legislation requires the strongest of showings,²⁵ that discrimination must be shown to be invalid with convincing clarity,²⁶ that a classification must be shown to be not merely possibly, but clearly and actually, unreasonable;²⁷ that it must be clear that there is no fair reason or basis for

In order for the courts to hold an act of the legislature unconstitutional, they must be able to point out the specific provision which inhibits the legislation, and if the constitutional limitation is not expressed it should be clearly implied. Shepherd v San Jacinto Junior College Dist. (Tex) 363 SW2d 742.

The United States Supreme Court will not strike down a state statute which is within the state's constitutional power "even though it approaches the verge of that power." Everson v Board of Education, 330 US 1, 91 L ed 711, 67 S Ct 504, 168 ALR 1392, reh den 330 US 855, 91 L ed 1297, 67 S Ct 962.

20. State ex rel. George v Aiken, 42 SC 222, 20 NE 221.

1. Ogden v Saunders, 12 Wheat (US) 213, 6 L ed 606 (per Trimble, J.); Friesleben v Shallcross, 9 Houst (Del) 1, 19 A 576; Carr v State, 175 Ind 241, 93 NE 1071; Eames v Savage, 76 Me 212; Hill v Rae, 52 Mont 378, 158 P 826; Wilson v Fargo, 48 ND 447, 186 NW 263; Brimm v Jones, 11 Utah 200, 39 P 825, affd 165 US 180, 41 L ed 677, 17 S Ct 282; State ex rel. Case v Howell, 85 Wash 294, 147 P 1159; Ah Lim v Territory, 1 Wash 156, 24 P 588.

2. Atchison, T. & S. F. R. Co. v Matthews, 174 US 96, 43 L ed 909, 19 S Ct 609; State v Hogreiver, 152 Ind 652, 53 NE 921; Wilson v Fargo, 48 ND 447, 186 NW 263; Re Ten Hour Law, 24 RI 603, 54 A 602; Tintic Standard Min. Co. v Utah County, 80 Utah 491, 15 P2d 633.

3. State ex rel. Crain v Moore, 339 Mo 492, 99 SW2d 17.

4. Euclid v Ambler Realty Co. 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016; Thomas Cusack Co. v Chicago, 242 US 526,

61 L ed 472, 37 S Ct 190; Hadacheck v Sebastian, 239 US 394, 60 L ed 348, 36 S Ct 143; Erie R. Co. v Williams, 233 US 685, 58 L ed 1155, 34 S Ct 761; Schmidinger v Chicago, 226 US 578, 57 L ed 364, 33 S Ct 182; Miller v Board of Public Works, 195 Cal 477, 234 P 381, 38 ALR 1479, error dismd 273 US 781, 71 L ed 889, 47 S Ct 460; Bland v People, 32 Colo 319, 76 P 359; Hunter v Colfax Consol. Coal Co. 175 Iowa 245, 154 NW 1037, 157 NW 145; State v Hutchinson Ice Cream Co. 168 Iowa 1, 147 NW 195, affd 242 US 153, 61 L ed 217, 37 S Ct 28; People v Charles Schweinler Press, 214 NY 395, 108 NE 639, error dismd 242 US 618, 61 L ed 530, 37 S Ct 214; New Castle v Withers, 291 Pa 216, 139 A 860, 57 ALR 132; State v McKay, 137 Tenn 280, 193 SW 99; Buck v Bell, 143 Va 310, 130 SE 516, 51 ALR 855, affd 274 US 200, 71 L ed 1000, 47 S Ct 584.

A police measure will be held unconstitutional only when it is so clearly unreasonable that the court can say that no fairminded man can think it reasonable. Carter v Craig, 77 NH 200, 90 A 598.

An earnest conflict of serious opinion does not suffice to bring police legislation within the range of judicial cognizance. Erie R. Co. v Williams, 233 US 685, 58 L ed 1155, 34 S Ct 761; People v Charles Schweinler Press, 214 NY 395, 108 NE 639, error dismd 242 US 618, 61 L ed 530, 37 S Ct 214.

5. Ex parte Lewinsky, 66 Fla 324, 63 So 577.

6. Corporation Com. v Lowe, 281 US 431, 74 L ed 945, 50 S Ct 397; People v Linde, 341 Ill 269, 173 NE 361, 72 ALR 997.

7. Georgia R. & Power Co. v Decatur, 262 US 432, 67 L ed 1065, 43 S Ct 613; Bachtel v Wilson, 204 US 36, 51 L ed 357, 27 S Ct

CONSTITUTIONAL LAW

§ 175

substantial,¹ or rational¹ doubt, or, as some courts have said, beyond all doubt,² In no doubtful case should the courts pronounce legislation to be contrary to the constitution;³ on the contrary, such a pronouncement should be made only

19 S Ct 553; Munn v Illinois, 94 US 113, 24 L ed 77; Dartmouth College v Woodward, 4 Wheat (US) 518, 4 L ed 629; Mobile & Great Northern Ry v Mobile, 146 Ala 198, 40 So 2d 282; R. v. Madiera Irrig., 228 Cal 276, 28 P 272, 67 ALR 225; Cooper v Collins, 18 R 1425; Gangemi v Berry, 222 Ind 282, 22 NE2d 829; In re Estate of Mink, 100 Kan 100, 170 P 100, 101 P 100, 102 P 100, 103 P 100, 104 P 100, 105 P 100, 106 P 100, 107 P 100, 108 P 100, 109 P 100, 110 P 100, 111 P 100, 112 P 100, 113 P 100, 114 P 100, 115 P 100, 116 P 100, 117 P 100, 118 P 100, 119 P 100, 120 P 100, 121 P 100, 122 P 100, 123 P 100, 124 P 100, 125 P 100, 126 P 100, 127 P 100, 128 P 100, 129 P 100, 130 P 100, 131 P 100, 132 P 100, 133 P 100, 134 P 100, 135 P 100, 136 P 100, 137 P 100, 138 P 100, 139 P 100, 140 P 100, 141 P 100, 142 P 100, 143 P 100, 144 P 100, 145 P 100, 146 P 100, 147 P 100, 148 P 100, 149 P 100, 150 P 100, 151 P 100, 152 P 100, 153 P 100, 154 P 100, 155 P 100, 156 P 100, 157 P 100, 158 P 100, 159 P 100, 160 P 100, 161 P 100, 162 P 100, 163 P 100, 164 P 100, 165 P 100, 166 P 100, 167 P 100, 168 P 100, 169 P 100, 170 P 100, 171 P 100, 172 P 100, 173 P 100, 174 P 100, 175 P 100, 176 P 100, 177 P 100, 178 P 100, 179 P 100, 180 P 100, 181 P 100, 182 P 100, 183 P 100, 184 P 100, 185 P 100, 186 P 100, 187 P 100, 188 P 100, 189 P 100, 190 P 100, 191 P 100, 192 P 100, 193 P 100, 194 P 100, 195 P 100, 196 P 100, 197 P 100, 198 P 100, 199 P 100, 200 P 100, 201 P 100, 202 P 100, 203 P 100, 204 P 100, 205 P 100, 206 P 100, 207 P 100, 208 P 100, 209 P 100, 210 P 100, 211 P 100, 212 P 100, 213 P 100, 214 P 100, 215 P 100, 216 P 100, 217 P 100, 218 P 100, 219 P 100, 220 P 100, 221 P 100, 222 P 100, 223 P 100, 224 P 100, 225 P 100, 226 P 100, 227 P 100, 228 P 100, 229 P 100, 230 P 100, 231 P 100, 232 P 100, 233 P 100, 234 P 100, 235 P 100, 236 P 100, 237 P 100, 238 P 100, 239 P 100, 240 P 100, 241 P 100, 242 P 100, 243 P 100, 244 P 100, 245 P 100, 246 P 100, 247 P 100, 248 P 100, 249 P 100, 250 P 100, 251 P 100, 252 P 100, 253 P 100, 254 P 100, 255 P 100, 256 P 100, 257 P 100, 258 P 100, 259 P 100, 260 P 100, 261 P 100, 262 P 100, 263 P 100, 264 P 100, 265 P 100, 266 P 100, 267 P 100, 268 P 100, 269 P 100, 270 P 100, 271 P 100, 272 P 100, 273 P 100, 274 P 100, 275 P 100, 276 P 100, 277 P 100, 278 P 100, 279 P 100, 280 P 100, 281 P 100, 282 P 100, 283 P 100, 284 P 100, 285 P 100, 286 P 100, 287 P 100, 288 P 100, 289 P 100, 290 P 100, 291 P 100, 292 P 100, 293 P 100, 294 P 100, 295 P 100, 296 P 100, 297 P 100, 298 P 100, 299 P 100, 300 P 100, 301 P 100, 302 P 100, 303 P 100, 304 P 100, 305 P 100, 306 P 100, 307 P 100, 308 P 100, 309 P 100, 310 P 100, 311 P 100, 312 P 100, 313 P 100, 314 P 100, 315 P 100, 316 P 100, 317 P 100, 318 P 100, 319 P 100, 320 P 100, 321 P 100, 322 P 100, 323 P 100, 324 P 100, 325 P 100, 326 P 100, 327 P 100, 328 P 100, 329 P 100, 330 P 100, 331 P 100, 332 P 100, 333 P 100, 334 P 100, 335 P 100, 336 P 100, 337 P 100, 338 P 100, 339 P 100, 340 P 100, 341 P 100, 342 P 100, 343 P 100, 344 P 100, 345 P 100, 346 P 100, 347 P 100, 348 P 100, 349 P 100, 350 P 100, 351 P 100, 352 P 100, 353 P 100, 354 P 100, 355 P 100, 356 P 100, 357 P 100, 358 P 100, 359 P 100, 360 P 100, 361 P 100, 362 P 100, 363 P 100, 364 P 100, 365 P 100, 366 P 100, 367 P 100, 368 P 100, 369 P 100, 370 P 100, 371 P 100, 372 P 100, 373 P 100, 374 P 100, 375 P 100, 376 P 100, 377 P 100, 378 P 100, 379 P 100, 380 P 100, 381 P 100, 382 P 100, 383 P 100, 384 P 100, 385 P 100, 386 P 100, 387 P 100, 388 P 100, 389 P 100, 390 P 100, 391 P 100, 392 P 100, 393 P 100, 394 P 100, 395 P 100, 396 P 100, 397 P 100, 398 P 100, 399 P 100, 400 P 100, 401 P 100, 402 P 100, 403 P 100, 404 P 100, 405 P 100, 406 P 100, 407 P 100, 408 P 100, 409 P 100, 410 P 100, 411 P 100, 412 P 100, 413 P 100, 414 P 100, 415 P 100, 416 P 100, 417 P 100, 418 P 100, 419 P 100, 420 P 100, 421 P 100, 422 P 100, 423 P 100, 424 P 100, 425 P 100, 426 P 100, 427 P 100, 428 P 100, 429 P 100, 430 P 100, 431 P 100, 432 P 100, 433 P 100, 434 P 100, 435 P 100, 436 P 100, 437 P 100, 438 P 100, 439 P 100, 440 P 100, 441 P 100, 442 P 100, 443 P 100, 444 P 100, 445 P 100, 446 P 100, 447 P 100, 448 P 100, 449 P 100, 450 P 100, 451 P 100, 452 P 100, 453 P 100, 454 P 100, 455 P 100, 456 P 100, 457 P 100, 458 P 100, 459 P 100, 460 P 100, 461 P 100, 462 P 100, 463 P 100, 464 P 100, 465 P 100, 466 P 100, 467 P 100, 468 P 100, 469 P 100, 470 P 100, 471 P 100, 472 P 100, 473 P 100, 474 P 100, 475 P 100, 476 P 100, 477 P 100, 478 P 100, 479 P 100, 480 P 100, 4

A statute which prescribes a rule of purely governmental policy and relates mainly to the conduct and administration of public affairs will not be declared unconstitutional unless repugnant to the organic law beyond a reasonable doubt. *Ex parte Ashton*, 231 Ala 497, 165 So 773, 104 ALR 54.

The legislative judgment as to what is a sufficient distinction cannot be overthrown by the courts unless it is, beyond rational doubt, erroneous. *Re Stephan*, 170 Cal 48, 48 P 196.

State Co. v Mohler, 152 150

1. Feldman v Cincinnati (DC Ohio) 20 F
Supp 531; Lincoln Federal Labor Union v
Northwestern Iron & Metal Co. 149 Neb
507, 31 NW2d 477.

3. *Williams v Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431; *Euclid v Ambler Realty Co.* 272 US 365, 71 L ed 303, 47 S Ct 114, 54 ALR 1016; *Henderson Bridge Co. v Henderson*, 173 US 592, 43 L ed 823,

To establish the unconstitutionality of an act of Congress requires a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. *United States v. Butler*, 297 US 1, 80 L ed 477, 56 S Ct 312, 102 ALR 914.

16 Am Jur 2d

CONSTITUTIONAL LAW

in a case that is free from doubt,⁴ that is, in a case in which, all in all, invalidity is disclosed in such a manner as to leave no reasonable doubt.⁵ § 175

§ 175

12 Wheat (US) 213, 6 L ed 606.

Courts should seldom, if ever, declare a law to be void for its repugnance to the Constitution in a doubtful case, but the opposition between the Constitution and the law should be such that the court feels a clear and strong conviction of their incompatibility with each other. *Fletcher v Peck*, 6 Cranch (US) 87, 3 L ed 162.

Suspicion is not sufficient to warrant a court in pronouncing a legislative act unconstitutional. *Schmitt v Nord*, 71 SD 575, 27 NW2d 910, app dismd 334 US 809, 92 L ed 1741, 68 S Ct 1018.

For a police measure to be struck down as unconstitutional, it is not enough that the case is a doubtful one. State v Hutchinson Ice Cream Co. 168 Iowa 1, 147 NW 195, aff'd 153, 61 L ed 217, 37 S Ct 28.

But note that it has been said that while it is the duty of the court to sustain an act of the legislature where its constitutionality is merely a matter of doubt, this principle does not require that one asserting the unconstitutionality of a statute be made the victim of two mistakes—one by the legislature and another by the court. State v Harris, 216 NC 746, 6 SE2d 854, 128 ALR 658.

4. Eubank v Richmond, 226 US 137, 57 L ed 156, 33 S Ct 76; Fairbank v United States, 181 US 283, 45 L ed 862, 21 S Ct 648; Nicol v Ames, 173 US 509, 43 L ed 786, 19 S Ct 522; Union P. R. Co. v United States, 99 US 700, 25 L ed 496; Nashville v Cooper, 6 Wall (US) 247, 18 L ed 851; State v Birmingham S. R. Co. 182 Ala 475, 62 So 77; State v Double Seven Corp. 70 Ariz 287, 219 P2d 776, 19 ALR2d 1007; Atchison, T. & S. F. R. Co. v State, 33 Ariz 440, 265 P 602, 58 ALR 563; Cap. F. Bourland Ice Co. v Franklin Utilities Co. 180 Ark 770, 22 SW2d 993, 68 ALR 1018; Lockheed Aircraft Corp. v Superior Ct. of Los Angeles County, 28 Cal 2d 481, 171 P2d 21, 166 ALR 701; American Federation of Labor v Reilly, 113 Colo 90, 155 P2d 145, 160 ALR 873; State v Bassett, 100 Conn 430, 123 A 842, 37 ALR 131; Jacksonville v Bowden, 67 Fla 181, 64 So 769; Davis v Florida Power Co. 64 Fla 246, 60 So 759; People v William Henning Co. 260 Ill 554, 103 NE 530; Henderson v State, 137 Ind 552, 36 NE 257; State ex rel. Holt v Denny, 118 Ind 449, 21 NE 274; Burlington & Summit Apartments v Manoloto, 233 Iowa 15, 7 NW2d 26, 144 ALR 251; Flood v City Nat. Bank, 218 Iowa 898, 253 NW 509, 95 ALR 1168; Iowa Motor Vehicle Asso. v Railroad Comrs. 207 Iowa 461, 221 NW 364, 75 ALR 1, affd 280 US 529, 74 L ed 595, 50 S Ct 151; State v Butler, 105 Me 91.

73 A 560; Super v Lawrence Bros. Co 98
 Me 268, 56 A 568; State v Rogers, 95 Me
 94; 56 A 564; Harrison v Young, 84 Me
 v Baltimore & O. R. R. State 22 Md 179,
 399; State v O. R. R. State 22 Md 179,
 Miss 202, 56 J. J. Newman & Co 102
 171, 39 So 923; Har v Lumber Co 102
 410, 33 SW 2; Edwards v Lumber, 87 Miss
 63; State v Lenoir, 137 Miss 182
 P 516; Werbach & Co 137, 41 Mo
 89 N 421; Rosebush v State, 65 Feb 394, 91
 N 100 1053; Lonn v State, 64 Neb 342,
 170, 202 NYS 491, aff'd 122 Miss
 293, 177 935; Morris v Holbrook, 220 NC
 Williams, 146 NC 518, 137 ALR 732; State v
 v Ardmore, 30 Okla 518, 61 Se 61; Kay v
 Smith v Cameron, 196 Crim 8, 234 P 793
 ALR 510; Busser v Snyder, 1 P 216 P 716, 27
 A 80, 37 ALR 1515; State ex Pal 440, 128
 v Moorer, 152 SC 453, 159 Se 269, cert den
 281 US 691, 74 L Ed 1120, 50 S Ct 238;
 SC 116, 144 SE 846; Drumm v Jones, 117
 Utah 200, 39 P 825; Willis v Kalmback,
 109 Va 475, 64 SE 342; Re Milecke, 52
 Wash 312, 100 P 743; State v Peel Splint
 Coal Co. 36 W Va 802, 15 SE 1090.
 To warrant a complaint

To warrant a court in pronouncing legisla-
tion unconstitutional, it must indubitably in-
fringe some constitutional right. *Minnesota v*
Martin, 124 Minn 498, 145 NW 383; *State*
v *Lawing*, 164 NC 492, 80 SE 69.

Those who affirm the unconstitutionality of an act of Congress must clearly show that the act is in violation of the provisions of the Constitution; it is insufficient merely to raise a doubt or show that the legislation is unwise. *Norman v Baltimore & O. R. Co.* 265 NY 37, 191 NE 726, 92 ALR 1523, aff'd 294 US 240, 79 L ed 885, 55 S Ct 407, 95 ALR 1352.

5. El Paso & N. E. R. Co. v Gutierrez, 215
US 87, 54 L ed 106, 30 S Ct 21; Butler v
Pennsylvania, 10 How (US) 402, 13 L ed
472; Consumers' League v Colorado & S. R.
Co. 53 Colo 54, 125 P 577; Jacksonville v
Bowden, 67 Fla 181, 64 So 769; McPherson
v State, 174 Ind 60, 90 NE 610; State ex rel.
Welsh v Darling, 216 Iowa 553, 246 NW
390, 88 ALR 218; Des Moines v Manhattan
Oil Co. 193 Iowa 1096, 184 NW 823, 188
NW 921, 23 ALR 1322; Hunter v Colfax
Consol. Coal Co. 175 Iowa 245, 154 NW
1037, 157 NW 145; Cochran v Preston, 107
Md 220, 70 A 113; Pawlowski v Hess, 250
Mass 22, 144 NE 760, 35 ALR 945; Salis-
bury Land & Improv. Co. v Commonwealth,
215 Mass 371, 102 NE 619; Re Wellington,
16 Pick (Mass) 87; Anway v Grand Rapids
R. Co. 211 Mich 592, 179 NW 350, 12 ALR
26; Tuberculosis Hospital Dist. v Peter, 253
Mo 520, 161 SW 1155; State v Gateway
Mortuaries, 87 Mont 225, 287 P 156, 68 ALR
1512; Mills v Stewart, 76 Mont 429, 247 P
332, 47 ALR 424; National City Bank v

§ 176

§ 176. — *Proof* In all instances where the conflict of laws is on constitutional grounds, the conflict of laws, in line with the principle of irreconcilability,⁸ this principle is, of course, in line with the principle as to constitutionality should be resolved in favor of constitutionality.⁷

D. EFFECT OF TOTALLY OR PARTIALLY UNCONSTITUTIONAL STATUTES

1. TOTAL UNCONSTITUTIONALITY

1. TOTAL UNCONSTITUTIONAL

§ 177. Generally.

§ 177. Generally. The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law,⁶ but is wholly void,⁷ and ineffective for

Del Sordo, 16 N1 530, 109 A2d 631; Fearon
v. Treanor, 272 NY 268, 5 NE2d 815, 109
ALR 1229; State v. Weddington, 188 NC
443, 125 SE 257, 37 ALR 573; State v.
Williams, 146 NC 618, 61 SE 992; State ex
v. Homer, 139 NC 219, 51 SE 992; State v.
rel. Sathre v. Board of University & School
lands, 65 ND 687, 262 NW 60; State v.
First State Bank, 52 ND 231, 202 NW 263;
Wilson v. Fargo, 48 ND 447, 186 NW 263;
L'uren v. Bagley, 118 Or 77, 243 P 1074, 46
ALR 1173; Templeton v. Linn County, 22
Or 313, 29 P 793; State v. Kofines, 33 RI
211, 80 A 432; Beaulieu County v. Parker v.
County, 220 SC 469, 68 SE2d 421; Parker v.
Bates, 216 SC 52, 56 SE2d 723; Gaud v.
Walker, 214 SC 451, 53 SE2d 316; Rio
Grande Lumber Co. v. Darke, 50 Utah 114,
167 P 241; Shea v. Olson, 185 Wash 143,
53 P2d 615, 111 ALR 1011, 101 ALR 1011;
Uden v. Greenwood, 181 Wash 412, 43
Wash 98, 98 ALR 1181; State v. Pitney, 79
P Wash 608, 140 P 918; State Road Com. v.
County Ct. 112 W Va 98, 165 SE 815; Booten
County Ct. 112 W Va 412, 89 SE 985; Van
Dyke v. Tax Com. 217 Wis 528, 259 NW
700, 98 ALR 1332.

A reasonable doubt in favor of the validity of a statute is enough to sustain it. *McGlaughlin v Warfield*, 180 Md 75, 23 A2d 12.

6. Nashville v Cooper, 6 Wall (US) 247,
18 L ed 851; Cap. F. Bourland Ice Co v
Franklin Utilities Co. 180 Ark 770, 22 SW
2d 993, 68 ALR 1018; Davis v Florida Power
Co. 64 Fla 246, 60 So 759; Des Moines v
Manhattan Oil Co. 193 Iowa 1096, 184 NW
823, 188 NW 921, 23 ALR 1322; Naudiusz v
Lahr, 235 Mich 216, 234 NW 581, 74 ALR
1189; Hopper v Britt, 203 NY 144, 96 NE
377; Lynn v Nichols, 122 Misc 170, 202 NYS
401, aff'd 210 App Div 812, 205 NYS 935;
Jones v Crittenden, 4 NC (1 Car L Repos
385); Minsinger v Rau, 236 Pa 327, 84 A
902; State ex rel. Richards v Moorer, 152
SC 455, 150 SE 269, cert den 281 US 691,
74 L ed 1120, 50 S Ct 238; Wingfield v
South Carolina Tax Comm. 147 SC 116, 144
SE 846; State ex rel. Reuss v Giessel, 260
Wis 524, 51 NW2d 547.

Unless a statute is in positive conflict with

402

some designated or identified provision of the constitution, it should not be held unconstitutional. State ex rel. Johnson v Goodgame, 91 Fla 871, 108 So 836, 47 ALR 118.

A school code which is the product of the deliberate thought of a commission of prominent citizens who worked upon it for several years, and has been passed by two legislatures after prolonged consideration before final approval by the governor, will not be set aside as unconstitutional unless the violations of the fundamental law are so glaring that there is no escape. *Minsinger v Rau*, 236 Pa 327, 84 A 902.

7. § 146, supra.

8. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; United States v Realty Co. 163 US 427, 41 L ed 215, 16 S Ct 1120; Huntington v Worthen, 120 US 97, 30 L ed 588, 7 S Ct 469; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Ex parte Royall, 117 US 241, 29 L ed 868, 6 S Ct 734; Hirsh v Block, 29 L ed 56, 267 F 614, 11 ALR 1238, 50 App DC 56, 640, 65 L ed 452, 41 S Ct cert den 254 US State, 31 Ariz 485, 254 P 13; Texas Co. v State, Quong Ham Wah Co. 1060, 53 ALR 258; Quong Ham Wah Co. v Industrial Acci. Com. 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373; State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; State v Garden City, 74 Idaho 513, 265 P2d 328; Security Sav. Bank v Connell, Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Opinion of Justices, 269 Mass 611, 168 NE 536, 66 ALR 1477; State ex rel. Miller v O'Malley, 342 Mo 641, 117 SW2d 319; Garden of Eden Drainage Dist. v Bartlett Trust Co. 330 Mo 554, 50 SW2d 627, 84 ALR 1078; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 733; Daly v Beery, 45 ND 287, 178 NW 104; Threadgill v Cross, 26 Okla 403, 109 P 558; Atkinson v Southern Exp. Co. 94 SC 6, 60 SE 516; Ex parte Hollman, 79 SC 6, 60 SE 19; Henry County v Standard Oil Co. 167

[16 Am Jur 2d]

[16 Am Jur 2d]

16 Am Jur 2d

any purpose;¹⁰ since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it,¹¹ an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed.¹² Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.¹³

Since an unconstitutional law is void, the general principles follow that it imposes no duties,¹⁴ confers no rights,¹⁵ creates no office,¹⁶ bestows no power or

Tenn 485, 71 SW2d 683, 93 ALR 1483;
Pray v Nolan, 157 Tenn 222, 7 SW2d 815
60 ALR 408; State v Candland, 36 Utah 406,
104 P 285; Miller v State Entomologist
(Miller v Schone) 146 Va 175, 135 SE 813,
67 ALR 197, affd 276 US 272, 72 L ed 568,
48 S Ct 246; Bonnett v Vallier, 136 Wis
193, 116 NW 885.

48 S Ct 193, 116 NW 885. A discriminatory law is, equally with the other laws offensive to the constitution, no law at all. *Quong Ham Wah Co. v Industrial Acci. Com.* 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373. The effect of unconstitutionality of laws, crimes, sec

As to the effect of unconstitutionality of statutes creating and defining crimes, see CRIMINAL LAW (1st ed § 307).

9. *Ex parte Royall*, 117 US 241, 29 L ed 868, 6 S Ct 734; *Ex parte Siebold*, 100 US 371, 25 L ed 717; *Cohen v Virginia*, 6 Wheat (US) 264, 5 L ed 257; *State ex rel. Nuveen v Greer*, 88 Fla 249, 102 So 739, 37 ALR 1298; *Commissioners of Roads & Revenues v Davis*, 213 Ga 792, 102 SE2d 180; *Grayson-Robinson Stores, Inc. v Oneida, Ltd.* 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; *Hillman v Pocatello*, 74 Idaho 69, 256 P2d 1072; *Henderson v Lieber*, 175 Ky 15, 192 SW 830, 9 ALR 620; *Flournoy v First Nat. Bank*, 197 La 1067, 3 So 2d 244; *Opinion of Justices*, 269 Mass 611, 168 NE 536, 66 ALR 1477; *Michigan State Bank v Hastings*, 1 Dougl (Mich) 225; *Garden of Eden Drainage Dist. v Bartlett Trust Co.* 330 Mo 554, 50 SW2d 627, 84 ALR 1078; *Anderson v Lehmkuhl*, 119 Neb 451, 229 NW 773; *State v Tufty*, 20 Nev 427, 22 P 1054; *State v Williams*, 146 NC 618, 61 SE 61; *Daly v Beery*, 45 ND 287, 178 NW 104; *Atkinson v Southern Exp. Co.* 94 SC 444, 78 SE 516; *Ex parte Hollman*, 79 SC 9, 60 SE 19; *Henry County v Standard Oil Co.* 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; *Peay v Nolan*, 157 Tenn 222, 73 SW2d 815, 60 ALR 408; *Miller v Davis*, 136 Tex 299, 150 SW2d 973, 136 ALR 177; *Almond v Day*, 197 Va 419, 89 SE2d 851; *Miller v State Entomologist (Miller v Schoene)* 146 Va 175, 135 SE 813, 67 ALR 197, affd 276 US 272, 72 L ed 568, 48 S Ct 246; *Servonitz v State*, 133 Wis 231, 113 NW 277.

Unconstitutionality is illegality of the highest order. Board of Zoning Appeals v Decatur Company of Jehovah's Witnesses, 233 Ind 83, 117 NE2d 115.

10. State v One Oldsmobile Two-Door Sedan, 227 Minn 280, 35 NW2d 525. Com

pare *Swift v Calnan*, 102 Iowa 206, 71 NW 233, holding that while no right may be based upon an unconstitutional statute, part of its provisions may be considered in construing other provisions confessedly good, in arriving at the correct interpretation of the latter.

11. State ex rel. Miller v O'Malley, 342 Mo 641, 117 SW2d 319.

12. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Louisiana v Pilsbury, 105 US 278, 26 L ed 1090; Gunn v Barry, 15 Wall (US) 610, 21 L ed 212; Hirsh v Block, 50 App DC 56, 267 F 614, 11 ALR 1238, cert den 254 US 640, 65 L ed 452, 41 S Ct 13; Morgan v Cook, 211 Ark 755, 202 SW2d 355; Texas Co. v State, 31 Ariz 485, 254 P 1060, 53 ALR 258; Connecticut Baptist Convention v McCarthy, 128 Conn 701, 25 A2d 656; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Cooke v Iverson, 108 Minn 388, 122 NW 251; Clark v Grand Lodge, B. R. T. 328 Mo 1084, 43 SW2d 404, 88 ALR 150; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104; State ex rel. Tharel v Board of Comrs. 188 Okla 184, 107 P2d 542; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; Henry County v Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; State v Candland, 36 Utah 406, 104 P 285; Bonnett v Vallier, 136 Wis 193, 116 NW 885.

13. Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Clark v Grand Lodge, B. R. T. 328 Mo 1084, 43 SW2d 404, 88 ALR 150.

14. Norton v Shelby County, 118 US 425,
30 L ed 178, 6 S Ct 1121; Security Sav. Bank
v Connell, 198 Iowa 564, 200 NW 8, 36
ALR 486; Flournoy v First Nat. Bank, 197
La 1067, 3 So 2d 244; Anderson v Lehmkuhl,
119 Neb 451, 229 NW 773; Daly v Beery, 43
ND 287, 178 NW 104; Henry County v

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 177

authority on anyone,¹⁷ affords no protection,¹⁸ and justifies no acts performed under it.¹⁹ A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.²⁰

No one is bound to obey an unconstitutional law¹ and no courts are bound to enforce it.²

A void act cannot be legally inconsistent with a valid one.³ And an uncon-

Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; State v Candland, 36 Utah 406, 104 P 285.

15. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Hirsch v Block, 50 App DC 36, 267 F 614, 11 ALR 1238, cert den 254 US 640, 65 L ed 452, 41 S Ct 13; Smith v Costello, 77 Idaho 205, 290 P2d 742, 56 ALR2d 1020; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Garden of Eden Drainage Dist. v Barlett Trust Co. 350 Mo 554, 50 SW2d 627, 84 ALR 1078; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Watkins v Dodson, 159 Neb 745, 68 NW2d 508; Henry County v Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483.

Under Nebraska law an unconstitutional statute is an utter nullity, is void from its date of its enactment, and is incapable of creating any rights. Proprietors of Board of Education v Board of Education, 103 F Supp 437, app dismd 343 US 901, 96 L ed 1321, 72 S Ct 636, reh den 343 US 937, 96 L ed 1344, 72 S Ct 769.

As to the effect of, and rights under, a judgment based upon an unconstitutional law, see JUDGMENTS (Rev ed § 19); as to the res judicata effect of such a judgment, see JUDGMENTS (Rev ed § 356).

16. Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244.

17. Felix v Wallace County, 62 Kan 832, 62 P 667; Henderson v Lieber, 175 Ky 15, 192 SW 830, 9 ALR 620; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104.

18. Huntington v Worthen, 120 US 97, 30 L ed 588, 7 S Ct 469; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Smith v Costello, 77 Idaho 205, 290 P2d 742, 56 ALR2d 1020; Highway Comrs v Bloomington, 253 Ill 164, 97 NE 280; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehm-

kuhl, 119 Neb 451, 229 NW 773; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104.

Only the valid legislative intent becomes the law to be enforced by the courts. State ex rel. Clarkson v Phillips, 70 Fla 340, 70 So 367; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244.

3. Re Spencer, 228 US 652, 57 L ed 1010, 33 S Ct 709; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749.

19. Osborn v Bank of United States, 9 Wheat (US) 738, 6 L ed 204; Flournoy v Wheat (US) 738, 6 L ed 204; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749; State ex rel. Tharel v Board of Comrs. 188 Okla 184, 107 P2d 542; Sharber v Florence, 131 Tex 341, 115 SW2d 604.

20. A contract executed solely for the purpose of complying with the provisions of an unconstitutional statute is not valid, and the person who under its terms is obligated to comply with the provisions of the unconstitutional act is entitled to relief. Cleveland v Clements Bros. Constr. Co. 67 Ohio St 197, 65 NE 885; Jones v Columbian Carbon Co. 132 W Va 219, 51 SE2d 790.

Generally, as to the application to invalid contracts of the obligation of contracts guaranty, see § 439, infra.

1. Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; State ex rel. Clinton Falls Nursery Co. v Steele County, 181 Minn 427, 232 NW 737, 71 ALR 1190; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Amyot v Caron, 88 NH 394, 190 A 134; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104.

2. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; United States v Realty Co. 163 US 427, 41 L ed 215, 16 S Ct 1120; Payne v Griffin (DC Ga) 51 F Supp 588; Hammond v Clark, 136 Ga 313, 71 SE 479; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104.

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 178

stitutional law cannot operate to supersede any existing valid law.⁴ Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.⁵ Since an unconstitutional statute cannot repeal or in any way affect an existing one,⁶ if a repealing statute is unconstitutional, the statute which it attempts to repeal remains in full force and effect.⁷ And where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law.⁸

The general principles stated above apply to the constitutions as well as to the laws of the several states insofar as they are repugnant to the Constitution and laws of the United States.⁹ Moreover, a construction of a statute which brings it in conflict with a constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith.¹⁰

§ 178. Protection of rights.

The actual existence of a statute prior to a determination that it is unconstitutional is an operative fact and may have consequences which cannot justly be ignored; when a statute which has been in effect for some time is declared unconstitutional, questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, and of public policy in the light of the nature both of the statute and of its previous application, demand examination.¹¹ It has been said that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.¹²

The general rule is that an unconstitutional act of the legislature protects no one.¹³ It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one; if any person acts under an unconstitutional statute, he does so at his peril and must take the consequences.¹⁴

Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid

4. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Berry v Summers, 76 Idaho 446, 283 P2d 1093; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749; State v Savage, 96 Or 53, 184 P 567, 189 P 427.

5. Thiede v Scandia Valley, 217 Minn 218, 14 NW2d 400.

6. State v One Oldsmobile Two-Door Sedan, 227 Minn 280, 35 NW2d 525.

7. State v One Oldsmobile Two-Door Sedan, supra.

8. See § 185, infra.

9. Gunn v Barry, 15 Wall (US) 610, 21 L ed 212; Cohen v Virginia, 6 Wheat (US) 264, 5 L ed 257.

10. Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Gilkeson v Missouri P. R. Co. 222 Mo 173, 121 SW 138; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408.

11. Chicot County Drainage Dist. v Baxter State Bank, 308 US 371, 84 L ed 329, 60

S Ct 217, reh den 309 US 695, 84 L ed 1035, 60 S Ct 581.

12. Chicot County Drainage Dist. v Baxter State Bank, supra.

13. § 177, supra.

14. Sumner v Beeler, 50 Ind 341.

This warning has been so phrased as to present the actual concept underlying the utter nullity of an invalid law by a holding to the effect that all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the constitution, and also that should a conflict between a statute and any express or implied provision of the constitution be duly adjudged, the constitution by its own superior force and authority would render the statute invalid from its enactment, and further that the courts have no power to control the effect of the constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the constitution. State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298.

§ 179

are subject to be lost if the statute is adjudged invalid, though the statute was considered valid by eminent attorneys, public officers, and others.¹⁵ This general principle as to rights has varied practical applications. Thus, it is held that the fact that one acts in reliance on a statute which has theretofore been adjudged unconstitutional does not protect him from civil or criminal responsibility, if his act otherwise subjects him to such liability.¹⁶ In a majority of jurisdictions it is held that reliance on a statute which is subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon which would otherwise subject him to liability.¹⁷ On the other hand, occasionally the position has been taken, as far as omissions to perform an act which, but for the statute, would be required by law.¹⁸ It has been stated that an unconstitutional law should not be applied to work a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid.¹⁹ And it has also been held that reliance on a statute subsequently declared unconstitutional may properly be considered by the jury on the issue of damages in a civil action against the one who relied upon the statute.²⁰

§ 179. Validation—generally; by amendment of legislation.

While it has been broadly stated that an unconstitutional act cannot be validated by the legislature,¹ it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the constitution.² The true rule seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing

15. *State ex rel. Nuven v Greer*, supra; *Trustees of Wofford College v Burnett*, 209 SC 92, 39 SE2d 155.

16. *Annotation*: 53 ALR 269.

17. *Fleming v South Carolina Electric & Gas Co.* (CA4 SC) 239 F2d 277; *Highway Comrs. v Bloomington*, 253 Ill 164, 97 NE 280; *Fisher v McGirr*, 1 Gray (Mass) 1; *Chenango Bridge Co. v Paige*, 83 NY 178.

Annotation: 53 ALR 269.

18. *Texas Co. v State*, 31 Ariz 485, 254 P 1060, 53 ALR 258.

Annotation: 53 ALR 273.

19. *State v Garden City*, 74 Idaho 513, 265 P2d 328 (holding that an unconstitutional act protects citizens dealing with public officers under its provision up to the time it is declared unconstitutional).

20. *Fleming v South Carolina Electric & Gas Co.* (CA4 SC) 239 F2d 277.

1. *Thomas v State*, 76 Ohio St 341, 81 NE 406

437; *Atkinson v Southern Exp. Co.* 94 SC 444, 78 SE 516; *State v Whitesides*, 30 SC 579, 9 SE 661.

2. *Magnolia Petroleum Co. v Carter Oil Co.* (CA10 Okla) 218 F2d 1, cert den 349 US 916, 99 L ed 1249, 75 S Ct 605; *Los Angeles County v Jones*, 6 Cal 2d 695, 59 P2d 489; *Commissioners of Roads & Revenues v Davis*, 213 Ga 792, 102 SE2d 180; *State v Silver Bow Refining Co.* 78 Mont 1, 252 P 301, later app 83 Mont 380, 272 P 684; *Allison v Corker*, 67 NJL 596, 52 A 362; *State v Cincinnati*, 52 Ohio St 419, 40 NE 508; *Oklahoma Natural Gas Co. v State*, 187 Okla 164, 101 P2d 793; *Commonwealth v Great American Indem. Co.* 312 Pa 183, 167 A 793; *Paris Mountain Water Co. v Greenville*, 110 SC 36, 96 SE 545.

A statute valid and enforceable within a certain limited field, but unconstitutional and unenforceable in a wider field, may by amendment or law removing unconstitutional features be extended into the wider field. *Re Gillette Daily Journal*, 44 Wyo 226, 11 P2d 265, supp op 45 Wyo 173, 17 P2d 665.

against it, then the statute may be rendered valid by amendment, so far as its future operation may extend.³

On the other hand, it is clear that Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution which is in conflict with the Constitution of the United States.⁴ Whether an act of Congress can validate state statutes which were previously invalid because inconsistent with a federal legislation has not been uniformly decided. One view states that a state statute which was unconstitutional because it amounted to a violation of the power of Congress over interstate commerce is not validated by an act of Congress dealing with the subject matter which would render a later application of the state act merely supplemental to the act of Congress. This holding results from the theory that the removal of constitutional objections to an unconstitutional statute does not validate or revive it.⁵ Other cases dealing with similar laws, however, have held that state laws previously enacted which were unconstitutional come into full operation after passage of an act by Congress removing constitutional objections, without re-enactment, but these cases have also taken the position that the statutes thus vivified by congressional action were not unconstitutional, but merely inoperative as to interstate commerce.⁶

Questions occasionally arise as to the extent to which the legislature may validate proceedings under unconstitutional laws. The general rule is that this cannot be done.⁷ The rule seems to rest on the principles underlying the separation of the powers of government.⁸

A statute once declared unconstitutional, and later held to be constitutional,⁹ does not require re-enactment by the legislature to restore its operative force.¹⁰ Note, however, that it has been said that although a legislative enactment may

3. *Territory v Hawkins*, 9 Alaska 573; *Walsh v State*, 142 Ind 357, 41 NE 65; *People v De Blasy*, 137 Mich 402, 100 NW 593; *Seneca Min. Co. v Osmun*, 82 Mich 573, 47 NW 25; *State v Tully*, 20 Nev 427, 22 P 1054; *Paris Mountain Water Co. v Greenville*, 110 SC 36, 96 SE 545 (this later view must be taken as modifying the effect of *Atkinson v Southern Exp. Co.* 94 SC 444, 78 SE 516, which holds that the removal of the constitutional objections to a statute that rendered it null and void does not, by operation of law, give it force and effect, nor can it be made valid by a subsequent statute); *Re Gillette Daily Journal*, 44 Wyo 226, 11 P2d 265, supp op 45 Wyo 173, 17 P2d 665.

4. *Gunn v Barry*, 15 Wall (US) 610, 21 L ed 212; *Grayson-Robinson Stores, Inc. v Oneida, Ltd.* 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; *General Electric Co. v Packard Bamberger & Co.* 14 NJ 209, 102 A2d 18.

5. *Grayson-Robinson Stores, Inc. v Oneida, Ltd.* 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; *Atkinson v Southern Exp. Co.* 94 SC 444, 78 SE 516; *State v Miller*, 66 W Va 436, 66 SE 522.

6. *Re Rahrer (Wilkinson v Rahrer)*, 140 US 545, 35 L ed 572, 11 S Ct 865; *Re Van Vliet (CC)* 43 F 761; *Re Spickler (CC)* 43 F 653; *Blair v Ostrander*, 109 Iowa 204, 80 NW 330; *General Electric Co. v Packard Bamberger & Co.* 14 NJ 209, 102 A2d 18.

The same principle has been applied to state insolvency laws after repeal of a federal bankruptcy statute, and it has been held unnecessary to re-enact such laws to make them effective. *Tua v Carriere*, 117 US 201, 29 L ed 855, 6 S Ct 565; *Palmer v Hixon*, 74 Me 447; *Austin v Caverly*, 51 Mass (10 Met) 332.

7. *Denny v Mattoon*, 2 Allen (Mass) 361; *State v Matson Co.* 182 Wash 507, 47 P2d 1003 (orders which were void under an invalid state agricultural law cannot be validated under a subsequent law of the same nature).

It has been decided that the legislature cannot legalize municipal warrants issued under void statutes. *Felix v Wallace County*, 62 Kan 832, 62 P 667.

8. This subject is discussed in detail infra, §§ 210 et seq.

9. The Supreme Court of the United States has freedom to change its decision on the constitutionality of laws. *State Board of Ins. v Todd Shipyards Corp.* 370 US 451, 8 L ed 2d 620, 82 S Ct 1380.

10. *Jawish v Morlet (Mun Ct App Dist Col)* 86 A2d 96, pointing out the underlying principle to be that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished, and that if the decision is reversed the statute is valid from its first effective date.

men's association rents -
funeral, but ...
in acco-

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 180

be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language where the elimination of that language would substantially extend the operation of the enactment beyond the scope contemplated by all of its language.¹¹

§ 180. — By amendment of constitution.

Various principles are applicable to the question whether an unconstitutional statute may be validated by amendment of the constitution (as contrasted with amendment of the statute). An unconstitutional statute which does not ratify and is invalidated by a subsequent constitutional amendment which does not ratify and is confirmed by the statute, but merely authorizes the enactment of such a statute.¹² And it has been held that a law, originally void as in contravention of prohibitions contained in the constitution, is not made valid by the repeal of such constitutional limitations.¹³ But in some jurisdictions the view has been taken that a constitutional amendment may have the effect of ratifying as of their respective dates legislative acts which have been declared void as inconsistent with the constitution prior to such amendment.¹⁴ On the other hand, it seems clear that statutes in conflict with the constitution are validated by a constitutional amendment which expressly or impliedly ratifies and confirms them, provided such validation does not impair the obligations of a contract or divest vested rights.¹⁵ But it has also been held that a statute inconsistent with the constitution at the time the statute was enacted can, following the adoption of a constitutional amendment which, although obviating the inconsistency, is not self-executing, be given life only by re-enactment.¹⁶

There is authority to the effect that a legislature has power to enact a

11. *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St 116, 1 Ohio Ops 2d 342, 140 NE2d 411, aff'd 358 US 522, 3 L ed 2d 480, 79 S Ct 437.

12. *Fleming v. Hance*, 153 Cal 162, 94 P 620; *Norris v. Union City*, 184 Ga 283, 131 SE 105; *Etchison Drilling Co. v. Flournoy*, 131 La 442, 59 So 867; *People v. Frencavage*, 233 Mich 369, 206 NW 567; *Seneca Min. Co. v. Osmun*, 82 Mich 573, 47 NW 25; *State ex rel. Miller v. O'Malley*, 342 Mo 641, 117 SW2d 319; *State v. Safeway Stores*, 106 Mont 182, 76 P2d 81; *Whetstone v. Slonaker*, 110 Neb 343, 193 NW 749; *State ex rel. Stevenson v. Tully*, 20 Nev 427, 22 P 1054; *Trustees of Phillips Exeter Academy v. Exeter*, 90 NH 472, 27 A2d 569; *Woodall v. Western Wake Highway Com.* 176 NC 377, 97 SE 226; *Ursuline Academy of Cleveland v. Board of Tax Appeals*, 141 Ohio St 563, 26 Ohio Ops 152, 49 NE2d 674; *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Smith v. Cameron*, 123 Or 501, 262 P 946; *State v. Ellis*, 22 Wash 129, 60 P 136, *ovrd* on other grounds *State v. Lane*, 40 Wash 2d 734, 246 P2d 474.

A constitutional amendment does not validate or enlarge any previously enacted legislation for which there was no constitutional authority at the time of enactment. *Ursuline Academy of Cleveland v. Board of Tax Appeals*, 141 Ohio St 563, 26 Ohio Ops 152, 49 NE2d 674.

An unconstitutional statute is not validated by a subsequent constitutional amendment, except, possibly, where the latter ratifies and confirms the statute. *State ex rel. Miller v. O'Malley*, 342 Mo 641, 117 SW2d 319.

13. *Mt. Pleasant v. Vansice*, 43 Mich 361, 5 NW 378.

14. *Hammond v. Clark*, 136 Ga 313, 71 SE 479; *Fontenot v. Young*, 128 La 20, 54 So 408 (holding that where a statute attacked as unconstitutional is ratified and affirmed by a constitutional amendment, there remains no basis for further constitutional attack).

15. *Red Rover Copper Co. v. Industrial Com.* 58 Ariz 203, 118 P2d 1102, 137 ALR 740; *Lee v. Superior Court*, 191 Cal 46, 214 P 972; *Golden v. People*, 101 Colo 381, 74 P2d 715; *Peck v. Tugwell*, 199 La 125, 5 So 2d 524; *Peck v. New Orleans*, 199 La 76, 5 So 2d 508; *State ex rel. Faust v. Thomas*, 313 Mo 160, 282 SW 34; *People ex rel. McClelland v. Roberts*, 148 NY 360, 42 NE 1082; *Boyd v. Olcott*, 102 Or 327, 202 P 431; *Hutchinson v. Patching*, 103 Tex 497, 129 SW 603, 131 SW 400.

16. *Jelm v. Jelm*, 155 Ohio St 226, 44 Ohio Ops 246, 98 NE2d 401, 22 ALR2d 1300; *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417.

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 181

statute not authorized by the present constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such a constitutional amendment.¹⁷

2. PARTIAL UNCONSTITUTIONALITY

a. RULE OF SEVERABILITY; IN GENERAL

§ 181. Generally.

Although it is manifest that an unconstitutional provision in a statute is not cured because included in the same act with valid provisions,¹⁸ nonetheless it is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected.¹⁹ Indeed, it has been said that whenever a

17. *Druggan v. Anderson*, 269 US 36, 70 L ed 151, 46 S Ct 14 (holding the National Prohibition Act, which was enacted after ratification of the Eighteenth Amendment to the Federal Constitution, not invalid because enacted before the time when the amendment's prohibitory provisions became effective); *Re Opinions of Justices*, 227 Ala 296, 149 So 781; *Re Opinions of Justices*, 227 Ala 291, 149 So 776; *Alabama's Freight Co. v. Hunt*, 29 Ariz 419, 242 P 658; *Busch v. Turner*, 26 Cal 2d 817, 161 P2d 456, 171 ALR 1063; *Neisel v. Moran*, 80 Fla 98, 85 So 346; *Peck v. Tugwell*, 199 La 125, 5 So 2d 524; *State ex rel. State Bldg. Com. v. Smith*, 335 Mo 840, 74 SW2d 27; *State v. Hecker*, 109 Or 520, 221 P 808.

18. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 US 326, 30 L ed 1200, 7 S Ct 1118.

19. The rule appears to be universally recognized and applied. The following cases represent but a small part of the virtually overwhelming amount of supporting authority: *Chaplinsky v. New Hampshire*, 315 US 568, 86 L ed 1031, 62 S Ct 766; *Nashville, C. & St. L. R. Co. v. Walters*, 294 US 405, 79 L ed 949, 55 S Ct 486; *Lynch v. United States*, 292 US 571, 78 L ed 1434, 54 S Ct 840; *Champlin Ref. Co. v. Corporation Com.* 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; *Utah Power & L. Co. v. Pfost*, 286 US 165, 76 L ed 1038, 52 S Ct 548; *Millett v. Frohmler*, 66 Ariz 339, 188 P2d 457; *Wasson v. Planters' Bank & T. Co.* 188 Ark 343, 65 SW2d 528, 90 ALR 141; *Gillum v. Johnson*, 7 Cal 2d 744, 62 P2d 1037, 63 P2d 810, 108 ALR 595; *Jardine v. Superior Ct.* 213 Cal 301, 2 P2d 756, 79 ALR 291, *app dismd* 284 US 592, 76 L ed 510, 52 S Ct 197; *Jackson v. Denver*, 109 Colo 196, 124 P2d 240; *State v. Hurllman*, 143 Conn 502, 123 A2d 767; *Amsel v. Brooks*, 141 Conn 288, 106 A2d 152, 45 ALR2d 1234, *app dismd* without op 348 US 880, 99 L ed 693, 75 S Ct 125; *Clendaniel v. Conrad*, 26 Del (3 Boyce) 549, 83 A 1036, *error dismd* 235 US 712, 59 L ed 437, 35 S Ct 203; *Greenblatt v. Goldin (Fla.)* 94 So 2d 355, 59 ALR2d 877; *Territory*

v. Hoy Chong, 21 Hawaii 39; *Ballentine v. Willey*, 3 Idaho 496, 31 P 994; *Henrys v. Raborn*, 395 Ill 118, 69 NE2d 491, 169 ALR 927; *Sarlis v. State*, 201 Ind 88, 166 NE 270, 67 ALR 718; *Davidson Bldg. Co. v. Mulock*, 212 Iowa 730, 235 NW 45; *Voran v. Wright*, 129 Kan 601, 284 P 807; *Pollitt v. Lewis*, 269 Ky 680, 108 SW2d 671, 113 ALR 691; *Ricks v. Close*, 201 La 242, 9 So 2d 534; *Baltimore v. O'Connor*, 147 Md 639, 128 A 759, 40 ALR 1058; *Bowe v. Secretary of Commonwealth*, 320 Mass 230, 69 NE2d 115, 167 ALR 1447; *People v. Victor*, 287 Mich 506, 283 NW 666, 124 ALR 316; *State ex rel. Matteson v. Luecke*, 194 Minn 246, 260 NW 206, 99 ALR 1053; *American Exp. Co. v. Beer*, 107 Miss 528, 65 So 575; *State ex rel. State Board of Mediation v. Pigg*, 362 Mo 798, 244 SW2d 75; *Hill v. Rac*, 52 Mont 378, 158 P 826; *Redell v. Moores*, 63 Neb 219, 88 NW 243; *Rosenblum v. Griffin*, 89 NH 314, 197 A 701, 115 ALR 1367; *Hudspeth v. Swayze*, 85 NJL 592, 89 A 780; *State v. Brooken*, 19 NM 404, 143 P 479; *People v. Mancuso*, 255 NY 463, 175 NE 177, 76 ALR 514; *City Bank Farmers' Trust Co. v. New York C. R. Co.* 253 NY 49, 170 NE 489, 69 ALR 940; *Tooz v. State*, 76 ND 599, 38 NW2d 285; *State ex rel. Cleveringa v. Klein*, 63 ND 514, 249 NW 118, 86 ALR 1523; *Treasurer v. People's & D. Bank*, 47 Ohio St 503, 25 NE 697; *Johnson v. State Election Board*, 197 Okla 211, 167 P2d 891; *Castle v. Gladden*, 201 Or 353, 270 P2d 675; *Knowles's Estate*, 295 Pa 571, 145 A 797, 63 ALR 1086; *Newport v. Horton*, 22 RI 196, 47 A 312; *Gillespie v. Pickens County*, 197 SC 217, 14 SE2d 900; *Wheeler v. South Dakota Land Settlement Bd.* 43 SD 551, 181 NW 359, 14 ALR 1145; *Rhinehart v. State*, 121 Tenn 420, 117 SW 508; *Sharber v. Florence*, 131 Tex 341, 115 SW2d 604; *Smith v. Carbon County*, 95 Utah 340, 81 P2d 370; *Sabre v. Rutland R. Co.* 86 Vt 347, 85 A 693; *Kizee v. Conway*, 184 Va 300, 35 SE 2d 99; *State v. Grabinski*, 33 Wash 2d 603, 206 P2d 1022; *State v. Heston*, 137 W Va 375, 71 SE2d 481; *State ex rel. Wisconsin Teleph. Co. v. Henry*, 218 Wis 302, 260 NW 486, 99 ALR 1267; *McFarland v. Cheyenne*, 48 Wyo 86, 42 P2d 413.

CONSTITUTIONAL LAW

§ 181

statute contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court so to declare and to maintain the unconstitutionality, it is as firmly affixed in the field of constitutional law as the rule itself. It is that where it is not possible to separate that part of an act which is unconstitutional from the rest of the act, the whole statute falls.¹

For example, the following have been held to be separable portions of statutes:

—a discrimination against former citizens who entered the armies of the Allies, in a statute providing for loans by the state to enable war veterans to secure land. *Wheeler v. South Dakota Land Settlement Bd.* 43 SD 551, 181 NW 359, 14 ALR 1145.

—provisions inserted in a statute against usury which fix a limitation upon the commissions of loan brokers and which are invalid because not covered by the title. *Wallace v. Zimman*, 200 Cal 585, 254 P 946, 62 ALR 1341.

—a provision in an eminent domain statute (which statute is otherwise valid in authorizing the acquisition of described land by purchase) which is inoperative, insofar as it attempts to exercise the power of eminent domain, by reason of its failure to provide just compensation. *State v. McCook*, 109 Conn 621, 147 A 126, 64 ALR 1453.

—a provision, in a statute regulating the production of petroleum and natural gas, prohibiting the taking of petroleum at a time when there is not a market demand therefor at the well at a price equivalent to its actual value as determined by a standard prescribed by the statute. *Champlin Ref. Co. v. Corporation Com.* 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403.

—a provision for breaking a deadlock with respect to the transaction of county business by county commissioners where the statute otherwise validly affects the appointment of incumbents for offices created by the legislature. *Kirchdorfer v. Tinscher*, 204 Ky 366, 264 SW 766, 40 ALR 801.

—a provision creating an unconstitutional presumption of guilt of corporate directors in case of fraudulent insolvency, in a general fraudulent insolvency statute. *People v. Mancuso*, 255 NY 463, 175 NE 177, 76 ALR 514.

The provisions of a statute requiring a license to engage in the business of reselling tickets to places of amusement and fixing the resale price are severable, so that a conviction for engaging in such business without a license may be sustained, although the provision fixing the resale price may be found to be invalid. *Weller v. New York*, 268 US 319, 69 L ed 978, 45 S Ct 556.

The possible invalidity of so much of a statute, licensing and regulating private employment agencies, as prescribes the fees which may be demanded or retained does not affect the validity of other provisions of the act from which the provision in respect of fees is sepa-

table. *Brazee v. Michigan*, 241 US 340, 60 L ed 1034, 36 S Ct 561.

20. *El Paso & N. E. R. Co. v. Gutierrez*, 215 US 87, 54 L ed 106, 30 S Ct 21.

If a construction can be given an act which will render it constitutional, that construction will be adopted, even though it may eliminate a part of the act. *Bishop v. Tulsa*, 21 Okla Crim 457, 209 P 228, 27 ALR 1008.

For general rules of construction favoring validity, see §§ 144 et seq., supra.

1. *Lynch v. United States*, 292 US 571, 78 L ed 1434, 54 S Ct 84; *Hill v. Wallace*, 259 US 44, 66 L ed 822, 42 S Ct 453; *Bowman v. Continental Oil Co.* 256 US 642, 65 L ed 1139, 41 S Ct 606; *McFarland v. American Sugar Ref. Co.* 241 US 79, 60 L ed 899, 36 S Ct 498; *Harrison v. St. Louis & S. F. R. Co.* 232 US 318, 58 L ed 621, 34 S Ct 333; *Ghera v. State*, 16 Ariz 344, 146 P 494; *Adams v. Spillards*, 187 Ark 641, 61 SW2d 686, 86 ALR 1493; *American Federation of Labor v. Reilly*, 113 Colo 90, 155 P2d 145, 160 ALR 873; *Wadsworth v. Union P. R. Co.* 18 Colo 600, 33 P 515; *Greenblatt v. Goldin (Fla)* 94 So 2d 355, 59 ALR2d 877; *State ex rel. Moodie v. Bryan*, 50 Fla 293, 39 So 929; *People ex rel. Thomson v. Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044; *Mathews v. People*, 202 Ill 389, 67 NE 28; *Henderson v. State*, 137 Ind 552, 36 NE 257; *State v. Santee*, 111 Iowa 1, 82 NW 445; *State ex rel. White v. Wyandotte County*, 140 Kan 744, 39 P2d 286; *State v. Smiley*, 65 Kan 240, 69 P 199, affd 196 US 447, 49 L ed 546, 25 S Ct 289; *Ricks v. Close*, 201 La 242, 9 So 2d 534; *Gretna v. Bailey*, 141 La 625, 75 So 491; *Paine v. Savage*, 126 Me 121, 136 A 664, 51 ALR 1194; *State v. Montgomery*, 94 Me 192, 47 A 165; *Baltimore v. O'Connor*, 147 Md 639, 128 A 759, 40 ALR 1058; *Somerset County v. Pocomoke Bridge Co.* 109 Md 1, 71 A 462; *Nalley v. Home Ins. Co.* 250 Mo 452, 157 SW 769; *State ex rel. Ragan v. Junkin*, 85 Neb 1, 122 NW 473; *Lane Distributors v. Tilton*, 7 NJ 349, 81 A2d 786; *Fougera v. New York*, 224 NY 269, 120 NE 642, 1 ALR 1467; *People v. Orange County Road Constr. Co.* 175 NY 84, 67 NE 129; *Rathbone v. Wirth*, 150 NY 459, 45 NE 15; *State v. Harris*, 216 NC 746, 6 SE2d 854, 128 ALR 658; *Keith v. Lockhart*, 171 NC 451, 88 SE 640; *State v. Bickford*, 28 ND 36, 147 NW 407; *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Mendiola v. Graham*, 139 Or 592, 10 P2d 911; *Standard Lumber Co. v. Pierce*, 112 Or 314, 228 P 812; *Ex parte Massey*, 49 Tex Crim 60, 92 SW 1086; *Smith v. Carbon County*, 95

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 182

16 Am Jur 2d

There is nothing in the rule of severability which prevents the severance and elimination not only of words, clauses, or sentences, but also of whole sections of laws.¹

In line with the rule of severability, the courts will decline to consider the constitutionality of a particular statutory provision where (1) that provision is not necessarily involved in the litigation before the court, and (2) that provision may be severed from the provisions which are necessarily before the court.²

§ 182. Application of rule, generally; tests of severability.

The question whether the rule of severability shall be applied to save partially unconstitutional legislation from being struck down in toto involves, fundamentally, a determination of and conformity with the intent of the legislative body which enacted the legislation.³ However, in determining what was (or must be deemed to have been) the intention of the legislature, certain tests of severability have been developed. Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions.⁴ It is also held that in any case where it is sought to apply the general rule, the constitutional

by the preference attempted to be created. *People ex rel. Barrett v. Union Bank & T. Co.* 362 Ill 164, 199 NE 272, 104 ALR 1090.

—an act imposing a tax as a condition of admitting a foreign corporation to do business within the state and an act imposing a franchise tax based upon the aggregate amount of capital stock, surplus, and undivided profits are, from the character of the subject matter and the mode in which it is dealt with, interdependent, and the unconstitutionality of one will invalidate the other. *Looney v. Crane Co.* 245 US 178, 62 L ed 230, 38 S Ct 85.

For example, the corollary has been applied to invalidate the following:

—a provision of the statute for payment from the state treasury of salaries of certain officers charged with the administration of justice in a certain city, as well as another provision of the statute relieving the city from liability to pay certain fees to which the officers are entitled as compensation. *Baltimore v. O'Connor*, 147 Md 639, 128 A 759, 40 ALR 1058.

—a provision of an act of the legislature for a jury list including electors of both sexes and a provision therein that it shall not be in force unless the question of its adoption is submitted to the legal voters of the state and approved by a majority of the votes cast upon the proposition. *People ex rel. Thomson v. Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044.

—a section of a state code providing for the quadrennial election of county recorders, beginning with the election of 1936, and providing that a recorder so elected shall hold office for 4 years, and another portion of the statute eliminating an election in 1934, which would automatically extend the term of incumbents unconstitutionally. *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417.

—a provision of a state "Bank Collection Code," as applied to national banks, allowing a preference in the assets of a bank which has failed after having charged an item presented to it to the account of the maker or drawer without having settled for the same in money or an unconditional credit, regardless of ability to trace the fund, as well as the entire act, where it comprises one entire scheme and rights taken away are compensated for

2. *Andrews v. Heiney*, 178 Ind 1, 98 NE 628; *State v. Smiley*, 65 Kan 240, 69 P 199.

3. § 114, supra.

4. § 186, infra.

5. *Ft. Smith v. Scruggs*, 70 Ark 549, 69 SW 679; *Greenblatt v. Goldin (Fla)* 94 So 2d 355, 59 ALR2d 877; *McDougall v. Lueder*, 389 Ill 141, 58 NE2d 899, 156 ALR 1059; *Polzin v. Rand*, 250 Ill 561, 95 NE 623; *People v. Olsen*, 222 Ill 117, 78 NE 23; *Sinking Fund Comrs. v. George*, 104 Ky 260, 47 SW 779; *State v. Firemen's Fund Ins. Co.* 152 Mo 1, 52 SW 595; *State v. Adams Exp. Co.* 85 Neb 25, 122 NW 691; *Redell v. Moores*, 63 Neb 219, 88 NW 243.

For the closely allied rule that elimination of nonessential portions of an act is permissible where it will not affect the validity or the operation of the general scheme, see § 191, infra.

The elimination from a tax statute of provision unconstitutionally allowing special exemptions to holders of bank stock will not invalidate the statute if a complete and valid system for assessing such property remains after the elimination. *Stillman v. Lynch*, 56 Utah 540, 192 P 272, 12 ALR 552.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 183

and unconstitutional parts should be so severable that the valid portion may be read and may stand by itself.⁶ If it is impossible to tell what part of a statute is intended to be operative when some of its provisions are unconstitutional, it is wholly invalid.⁷

In the determination whether the parts of a statute are severable within the meaning of these tests, courts act by inspection of the statute,⁸ and should not be unmindful of the effect upon the entire enactment of the holding of any particular provision invalid.⁹

It has been recognized that a preamble of an act may be severed from the rest of a statute.¹⁰

§ 183. — Partial invalidity of single section or subdivision of statute.

The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall.¹¹ It has been said that the test is not whether they are contained in the same section, since the division of a statute into sections is frequently artificial, but whether the valid and the invalid sections are inseparably connected in substance,¹² and whether after eliminating the invalid parts suf-

6. *Dorchy v Kansas*, 264 US 286, 68 L ed 686, 44 S Ct 323; *Pollock v Farmers' Loan & T. Co.* 158 US 601, 39 L ed 1108, 15 S Ct 912; *Baldwin v Franks*, 120 US 678, 30 L ed 766, 7 S Ct 656, 763; *Pointexter v Green-how*, 114 US 270, 29 L ed 185, 5 S Ct 903, 962; *Trade-Mark Cases*, 100 US 82, 25 L ed 550; *Cella Com. Co. v Bohlinger* (CA8) 147 F 419; *People v Kipley*, 171 Ill 44, 49 NE 229; *Sarlis v State*, 201 Ind 88, 166 NE 270, 67 ALR 718; *Taggart v Claypool*, 145 Ind 590, 44 NE 18; *State ex rel. Corwin v Indiana* NE 778; *Davidson Bldg. Co. v Mulock*, 212 Iowa 730, 235 NW 45; *State v Santee*, 111 Iowa 1, 82 NW 445; *Bosworth v State University*, 166 Ky 436, 179 SW 403; *Ballard v Mississippi Cotton Oil Co.* 81 Miss 507, 34 Mo 492, 89 SW 617; *St. Louis v Liessing*, 190 Mo 464, 89 SW 611; *Grimes v Eddy*, 126 Mo 168, 28 SW 756; *State v Adams Exp. Co.* 85 Neb 25, 122 NW 691; *State ex rel. Ragan v Junkin*, 85 Neb 1, 122 NW 473; *Wenham v State*, 65 Neb 394, 91 NW 421; *City Bank Farmers' Trust Co. v New York C. R. Co.* 253 NY 49, 170 NE 489, 69 ALR 940; *Skaneateles Waterworks Co. v Skaneateles*, 161 NY 154, 55 NE 562, reh den 161 NY 658, 57 NE 1124, affd 184 US 354, 46 L ed 585, 22 S Ct 400; *State v Bickford*, 28 ND 36, 147 NW 407; *Board of Elections v State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Fite v State*, 114 Tenn 646, 88 SW 941.

7. *Woolf v Fuller*, 87 NH 64, 174 A 193, 94 ALR 1067.

Where the legislature intends to substitute a new system of taxation as a whole for the existing one, and all the provisions cannot be carried into effect because of constitutional infirmity, and it is impossible to tell what part the legislature would have adopted independently, the entire statute is void. *Williams v State*, 81 NH 341, 125 A 661, 39 ALR 490.

412

8. *Redell v Moores*, 63 Neb 219, 88 NW 243. See also *Utah Power, etc. Co. v Pfozt*, 286 US 165, 76 L ed 1038, 52 S Ct 548, referring to what conclusions may be drawn from the face of the legislation.

9. *Springfield Gas & E. Co. v Springfield*, 292 Ill 236, 126 NE 739, 18 ALR 929, affd 257 US 66, 66 L ed 131, 42 S Ct 24.

10. *Townsend v State*, 147 Ind 624, 47 NE 19; *State v Ehr*, 57 ND 310, 221 NW 883.

11. *Berea College v Kentucky*, 211 US 45, 53 L ed 81, 29 S Ct 33; *Loeb v Columbia Twp.* 179 US 472, 45 L ed 280, 21 S Ct 174; *Newton v Tuscaloosa*, 251 Ala 209, 36 So 2d 487; *Little Rock & Ft. S. R. Co. v Worthen*, 46 Ark 312, error dismd 120 US 97, 30 L ed 588, 7 S Ct 469; *Ghera v State*, 16 Ariz 344, 146 P 494; *Re Campbell*, 143 Cal 623, 77 P 674, affd 200 US 87, 50 L ed 382, 26 S Ct 182; *Hyde v Southern R. Co.* 31 App DC 466; *Donald v State*, 31 Fla 255, 12 So 695; *People ex rel. Barrett v Union Bank & T. Co.* 362 Ill 164, 199 NE 272, 104 ALR 1090; *Shellbarger Elevator Co. v Illinois C. R. Co.* 278 Ill 333, 116 NE 170; *Scown v Czarnecki*, 264 Ill 305, 106 NE 276; *Bosworth v State University*, 166 Ky 436, 179 SW 403; *Airey v Tugwell*, 197 La 982, 3 So 2d 99; *State v Robb*, 100 Me 180, 60 A 874; *Soper v Lawrence Bros. Co.* 98 Me 268, 56 A 908, affd 201 US 359, 50 L ed 788, 26 S Ct 473; *Baltimore v O'Connor*, 147 Md 639, 128 A 759, 40 ALR 1058; *Redell v Moores*, 63 Neb 219, 88 NW 243; *Hudspeth v Swayze*, 85 NJL 592, 89 A 780; *State v Ehr*, 57 ND 310, 221 NW 883; *Treasurer v People's & D. Bank*, 47 Ohio St 503, 25 NE 697; *Rothermel v Meyerle*, 136 Pa 250, 20 A 583; *Steed v Harvey*, 18 Utah 367, 54 P 1011; *Nathan v Spokane County*, 35 Wash 26, 76 P 521.

12. *State v Robb*, 100 Me 180, 60 A 874; *State v Heston*, 137 W Va 375, 71 SE2d 481.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 185

efficient remains to carry out the legislative intent.¹³ However, there is a presumption that the legislature did not intend that the constitutional portion of a single section of a statute should stand after the remainder has been invalidated.¹⁴

§ 184. — Invalidity of amendment.

The rule that the invalidity of a part of a statute does not extend to the whole statute unless the parts are interdependent is especially applicable to the whole statute proves unconstitutional, the original statute stands wholly unaffected by it.¹⁵ It has even been held that if a portion of an act which is an amendment of another act already in force is invalid and is inseparable from the remainder in any way affecting the original act,¹⁷ the entire amending act may be declared inoperative without

§ 185. — Invalidity of substantive portion of statute containing repealing provision.

In cases in which statutes containing repealing clauses have been held to be unconstitutional, the general rule is that the clause containing the repeal is incidental to the rest of the statute, and that if the latter is invalid, the clause containing the repeal will likewise be deemed invalid, leaving the prior general law unrepealed.¹⁸ It must be pointed out, however, that the question

13. *People v Olsen*, 222 Ill 117, 78 NE 23; *Andrews v Heiney*, 178 Ind 1, 98 NE 628; *Buffalo v Till*, 192 App Div 99, 182 NYS 418; *State v Minneapolis & N. Elevator Co.* 17 ND 23, 114 NW 482; *Crawford v State*, 116 Ohio St 312, 156 NE 191; *Bishop v Tulsa*, 21 Okla Crim 457, 209 P 228, 27 ALR 1008. Generally, as to legislative intent, see §§ 186 et seq., infra.

14. § 188, infra.

15. *Harper v State*, 109 Ala 28, 19 So 857, disapproved on other grounds *Richmond v State*, 28 Ala App 562, 189 So 914; *People v McNulty*, 3 Cal Unrep 441, 28 P 816, mod on reh on other grounds 93 Cal 427, 26 P 597, 29 P 61, error dismd 149 US 645, 37 L ed 882, 13 S Ct 959; *Gunnison County v Owen*, 7 Colo 467, 4 P 795; *People ex rel. Sellers v Brady*, 262 Ill 578, 105 NE 1; *Campau v Detroit*, 14 Mich 276.

16. *Davis v Wallace*, 257 US 478, 66 L ed 325, 42 S Ct 164; *Eberle v Michigan*, 232 US 700, 58 L ed 803, 34 S Ct 464; *L'Hote v Milford*, 212 Ill 418, 72 NE 399; *New Orleans v Levy*, 223 La 14, 64 So 2d 798; *People v C. Klinck Packing Co.* 214 NY 121, 108 NE 278; *State v Reed*, 75 SD 300, 63 NW2d 803.

A proviso to a statute requiring a license to operate a cotton gin, which may be granted only in case of public necessity, which proviso is added by amendment some time after the statute is passed and excepts certain classes of corporations from the operation of the statute, is separable from the statute itself so that its unconstitutionality will not render the whole act unconstitutional. *Frost v Corporation Com.* 278 US 515, 73 L ed 483, 49 S Ct 235.

Where a statute, as originally enacted, provided that a judgment in an action brought under it against members of an association shall bind the joint property of the associates, a provision added by amendment that such judgment shall also bind the individual property of the party or parties served with process is severable, so that even if the amending provision should be held unconstitutional, the validity of the original provision will not be affected. *Jardine v Superior Ct.* 213 Cal 301, 2 P2d 756, 79 ALR 291, app dismd 284 US 592, 76 L ed 510, 52 S Ct 197.

17. *Morgan v Cook*, 211 Ark 755, 202 SW 2d 355; *Diepenbrock v Superior Court*, 153 Cal 597, 95 P 1121; *Re Mahoney*, 133 Cal 180, 65 P 389, overd on another point *Re Johnson*, 139 Cal 532, 73 P 424.

18. *State ex rel. Law v Blend*, 121 Ind 514, 23 NE 511; *State v Rice*, 115 Md 317, 80 A 1026; *People v De Blaay*, 137 Mich 402, 100 NW 598; *State ex rel. Keyser v Hallock*, 14 Nev 202; *Williams v State*, 81 NH 341, 125 A 661, 39 ALR 490; *Crater v Somerset County*, 123 NJL 407, 8 A2d 691; *People ex rel. Farrington v Mensching*, 187 NY 8, 79 NE 884; *Board of Managers of James Walker Memorial Hospital v Wilmington*, 237 NC 179, 74 SE2d 749; *Board of Elections v State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *State v Savage*, 96 Or 53, 184 P 567, 189 P 427; *Mazurek v Farmers' Mut. F. Ins. Co.* 320 Pa 33, 181 A 570, 102 ALR 798; *State ex rel. Kempinger v Whyte*, 177 Wis 541, 188 NW 607, 23 ALR 67.

Annotation: 102 ALR 803.

413

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 186

distinct objects, it has been held that it may be sustained as to one of them, although the provisions relating to the other may be unconstitutional and void.⁴ Even when material provisions in a statute as enacted must be eliminated because of their invalidity, the remaining valid provisions thereof are not rendered ineffective if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone.⁵ And it is a familiar rule that if the parts of a law are divisible and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts;⁷ the portion which remains after deletion must express the legislative will independently of the void part.⁸

In any case where it is sought to apply parts of an act after elimination of invalid portions, what will result from partial application must be considered to see if a law consistent with the legislative intent will be put into effect; and where the enforcement of portions of a statute after the elimination of unconstitutional sections would produce results not contemplated or desired by the legislature, the entire statute is usually held to be inoperative and void.⁹

5. Noel v People, 187 Ill 587, 58 NE 616; Chicago, B. & Q. R. Co. v Jones, 149 Ill 361, 37 NE 247, error dismd (US) 41 L ed 1184, 17 S Ct 992; State v Robb, 100 Me 180, 60 A 874; Koch v North Ave. R. Co. 75 Md 222, 23 A 463; Davis v White (Tex Civ App) 260 SW 138.

6. State ex rel. Wisconsin Teleph. Co. v Henry, 218 Wis 302, 260 NW 486, 99 ALR 1267.

If, when a portion of a statute—even a substantial and important portion—is eliminated, that which remains is capable of being executed in accordance with the legislative intent, wholly independent of that which has been rejected, the valid portion will be sustained. Parker v Bates, 216 SC 52, 56 SE2d 723.

7. Champlin Ref. Co. v Corporation Com. 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; Dorchy v Kansas, 264 US 286, 68 L ed 686, 44 S Ct 323; Employers' Liability Cases (Howard v Illinois C. R. Co.) 207 US 463, 52 L ed 297, 28 S Ct 141; Tierman v Rinker, 102 US 123, 26 L ed 103; Keokuk Northern Line Packet Co. v Keokuk, 95 US 80, 24 L ed 377; Hoxie v New York, N. H. & H. R. Co. 82 Conn 352, 73 A 754; Harper v Galloway, 58 Fla 255, 51 So 226; Vissering Mercantile Co. v Annunzio, 1 Ill 2d 108, 115 NE2d 306, 39 ALR2d 728, app dismd 347 US 949, 98 L ed 1096, 74 S Ct 680; Elmhurst v Buettgen, 394 Ill 248, 68 NE2d 278; People v Olsen, 222 Ill 117, 78 NE 23; State v Santee, 111 Iowa 1, 82 NW 445; State v Montgomery, 94 Me 192, 47 A 165; Leavitt v Morris, 105 Minn 170, 117 NW 393; Davis v St. Louis County, 65 Mian 310, 67 NW 997; Poole & Creber Market Co. v Breshears, 343 Mo 1133, 125 SW2d 23; State ex rel. Johnson v Chicago, B. & Q. R. Co. 195 Mo 228, 93 SW 784; Comanche Light & P. Co. v Nix, 53

Okla 220, 156 P 293; Malin v Lamoure County, 27 ND 140, 145 NW 582; Riggins v District Ct. 89 Utah 183, 51 P2d 645; North Tintic Min. Co. v Crockett, 75 Utah 259, 284 P 328; Hodges v Public Serv. Com. 110 W Va 649, 159 SE 834.

The invalidity of part of the scheme for which a state bond issue is authorized will not defeat the project unless the whole scheme is so intimately connected as to indicate that the legislature would not have adopted it in the absence of the unconstitutional part. Veterans' Welfare Bd. v Riley, 189 Cal 159, 208 P 678, 22 ALR 1531.

The entire statute will fall where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the portion eliminated is so intimately connected with the rest of the statute as to make it useless to accomplish any of the purposes of the legislature. Re Hendrickson, 12 Wash 2d 600, 123 P2d 322.

8. Ballentine v Willey, 3 Idaho 496, 31 P 994; State v Junkin, 85 Neb 1, 122 NW 473; Comanche Light & P. Co. v Nix, 53 Okla 220, 156 P 293.

The test is whether or not, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the legislature would have enacted if it had known that the excised portions were invalid. Poole & Creber Market Co. v Breshears, 343 Mo 1133, 125 SW2d 23.

9. Connolly v Union Sewer Pipe Co. 184 US 540, 46 L ed 679, 22 S Ct 431; Sprague v Thompson, 118 US 90, 30 L ed 115, 6 S Ct 988; Re Mahoney, 133 Cal 180, 65 P 389;

16 Am Jur 2d

CONSTITUTIONAL LAW

§ 187

However, it is frequently the case that giving effect to the remaining valid portions of a statute after elimination of invalid parts thereof is in accordance with the general intent of the legislature.¹⁰ In many instances the legislature may be presumed to have intended that the other provisions of a statute should be enforced even though the defective portions might be eliminated.¹¹

§ 187. Expressed intent; saving clauses.

Occasionally, the legislature expressly states its will that the valid provisions of a statute be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is generally carried out by the courts.¹² Saving clauses of this kind

Westlake v Merritt, 85 Fla 28, 95 So 662 (concurring opinion); Harper v Galloway, 58 Fla 255, 51 So 226; State v Patterson, 50 Fla 127, 39 So 398; Springfield Gas & E. Co. v Springfield, 292 Ill 236, 126 NE 739, 18 ALR 929, affd 257 US 66, 66 L ed 131, 42 S Ct 24; People ex rel. Phillips v Strassheim, 240 Ill 279, 88 NE 821; State ex rel. Corwin v Indiana & O. Oil, Gas & Min. Co. 120 Ind 575, 22 NE 778; State v Cudahy Packing Co. 33 Mont 179, 82 P 833; State v Bickford, 28 ND 36, 147 NW 407; Comanche Light & P. Co. v Nix, 53 Okla 220, 156 P 293; Smith v Carbon County, 95 Utah 340, 81 P2d 370.

If part of an act is unconstitutional and the remainder is so interrelated with the invalid part that it cannot be sustained without doing violence to the legislative intention as a whole, the entire act is invalid. Wilson v Marsh, 162 Neb 237, 75 NW2d 723.

10. People v Monroe, 349 Ill 270, 182 NE 439, 85 ALR 605; State v Smiley, 65 Kan 240, 69 P 199; St. Louis v Liessing, 190 Mo 464, 89 SW 611; State ex rel. Hudson v Carter, 167 Okla 32, 27 P2d 617, 91 ALR 1497; Sabre v Rutland R. Co. 86 Vt 347, 85 A 693.

11. Cella Com. Co. v Bohlinger (CA8) 147 F 419.

But note that it has been held that an amendment enacted many years after the original act cannot be used to show that the framers of the original statute would have enacted the valid portions of a statute independently of the invalid portions. Commonwealth v Hana, 195 Mass 262, 81 NE 149.

12. Marsh v Buck, 313 US 406, 85 L ed 1426, 61 S Ct 969, 136 ALR 1434; Electric Bond & Share Co. v Securities & Exch. Com. 303 US 419, 82 L ed 936, 58 S Ct 678, 115 ALR 105.

Carmichael v Southern Coal & Coke Co. 301 US 495, 81 L ed 1245, 57 S Ct 868, 109 ALR 1327; Helvering v Davis, 301 US 619, 81 L ed 1307, 57 S Ct 904, 109 ALR 1319; Charles C. Stewart Mach. Co. v Davis, 301 US 548, 81 L ed 1279, 57 S Ct 883, 109 ALR 1293; Hale v State, 217 Ala 403, 116 So 369, 58 ALR 1333; Giragi v Moore, 48 Ariz 33, 58 P2d 1249, 64 P2d 819, 110 ALR 314; Wasson v Planters' Bank & T. Co. 188 Ark 343, 65 SW2d 528, 90 ALR 141; Adams v Spillyards, 187 Ark 641, 61

SW2d 686, 86 ALR 1493; Cap. F. Bourland Ice Co. v Franklin Utilities Co. 180 Ark 770, 22 SW2d 993, 68 ALR 1018; Danskin v San Diego Unified School Dist. 28 Cal 2d 536, 171 P2d 885; Ingels v Riley, 5 Cal 2d 154, 53 P2d 939, 103 ALR 1; People v Perry, 212 Cal 186, 298 P 19, 76 ALR 1331; Louis K. Liggett Co. v Lee, 109 Fla 477, 149 So 8; People v Monroe, 349 Ill 270, 182 NE 439, 85 ALR 605; Miles v Department of Treasury (Ind) 193 NE 855, 97 ALR 1474, superseded 209 Ind 172, 199 NE 372, 101 ALR 1359, app dismd 298 US 640, 80 L ed 1372, 56 S Ct 750; State v Wilson, 101 Kan 789, 168 P 679; Re Extension of Boundaries of Brookhaven, 217 Miss 876, 65 So 2d 832; American Exp. Co. v Beer, 107 Miss 528, 65 So 575; Southwestern Bell Tel. Co. v Morris (Mo) 345 SW2d 62, 85 ALR2d 1033; State ex rel. Missoula v Holmes, 100 Mont 256, 47 P2d 624, 100 ALR 581; People ex rel. Stafford v Travis, 231 NY 339, 132 NE 109, 15 ALR 1319; State ex rel. Dushek v Watland, 51 ND 710, 201 NW 680, 39 ALR 1169; Collins-Dietz-Morris Co. v State Corp. Com. 154 Okla 121, 7 P2d 123, 80 ALR 561; Standard Lumber Co. v Pierce, 112 Or 314, 228 P 812; Prata Undertaking Co. v State Bd. of Embalming, 55 RI 454, 182 A 808, 104 ALR 389; Jordan v Crudginton, 149 Tex 237, 231 SW2d 641; State v Clausen, 65 Wash 156, 117 P 1101; State v Heston, 137 W Va 375, 71 SE2d 481; J. C. Penney Co. v Tax Com. 233 Wis 286, 289 NW 677, 126 ALR 1333, revd on other grounds Wisconsin v J. C. Penney Co. 311 US 435, 85 L ed 267, 61 S Ct 246, 130 ALR 1229, reh den 312 US 712, 85 L ed 1143, 61 S Ct 444.

Annotation: 73 L ed 287 et seq.

Where separate provisions of the same statute can each be given effect standing alone, and the statute contains a severability provision, the constitutionality of one part of the statute will be considered separated from the constitutionality of the other. McElroy v United States, 361 US 281, 4 L ed 2d 282, 80 S Ct 305.

The provisions of the Alabama Unemployment Compensation Act for the taxation of employers for the purposes of the act are separable from those providing for the taxation of employees for such purposes, the statute containing a separability clause and there

[16 Am Jur 2d]—27

417

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 187

are recognized as valid and are not an invalid delegation of legislative authority or a presentation of an inconsistent alternative.¹³ The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded to statutes,¹⁴ but an opposite presumption clearly evidencing a legislative intention not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the statute which would render them invalid should not be indulged.¹⁵

being nothing in the language of the statute to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of such a clause. *Car-michael v Southern Coal & Coke Co.* 301 US 495, 81 L ed 1245, 57 S Ct 868, 109 ALR 1327.

If the act contains a clause providing that the invalidity of part of the act shall not affect the balance, the possible unconstitutionality of a provision of a statute punishing wilful failure or refusal to pay on demand for fruit purchased by a cash dealer from growers, which makes the mailing of such demand conclusive evidence that such demand was made, does not affect the validity of other provisions of the act. *People v Perry*, 212 Cal 186, 298 P 19, 76 ALR 1331.

Where there is a saving clause, the fact that a provision in a statute imposing a privilege tax on motor vehicles operated upon the state highways is invalid as beyond the legislative power, as exempting vehicles so taxed from further taxation according to value, and that other portions of the statute imposing an annual license fee upon motor vehicles for the privilege of operating in the state contain a provision purporting to appropriate a portion of the funds collected to cities for municipal purposes, in violation of the state constitution, will not invalidate the remainder of the act. *Jingels v Riley*, 5 Cal 2d 154, 53 P2d 939, 103 ALR 1.

Where there is saving clause, the unconstitutionality, as to partnerships, of a statute assuming to tax the privilege of doing business in the state as a corporation, business trust, or partnership, does not render the statute inoperative as to corporations. *Corn v Fort*, 170 Tenn 377, 95 SW2d 620, 106 ALR 647.

The principle also controls to salvage the balance of statutes where each of them contains a saving clause, notwithstanding the invalidity or possible invalidity of portions of such statutes, as, for example:

— a provision exempting electricity used in pumping water for irrigation, in a statute taxing the generation of electricity for sale. *Utah Power & Light Co. v Plost*, 286 US 165, 76 L ed 1033, 52 S Ct 548.

— a provision continuing liability of bank stockholders for existing bank debts and for the issuance of certificates of indebtedness to owners of frozen deposits, added by an amendment to a bill providing for conversion of double liability bank stock into non-assessable and single liability stock. *Wasson*

v Planters' Bank & T. Co. 90 Ark 343, 65 SW2d 528, 90 ALR 141.

— a provision classifying taxpayers in an income tax law. *Miles v Department of Treasury*, 209 Ind 172, 199 NE 372, 101 ALR 1359, superseding (Ind) 193 NE 855, 97 ALR 1474, and app dismd 298 US 640, 80 L ed 1372, 56 S Ct 750.

— a provision compelling submission to arbitration of differences which may arise between owners of cattle and the livestock sanitary board and its officers, in an act for the elimination of cattle fever tick. *McSweeney v State Live Stock Sanitary Bd.* 97 Fla 750, 122 So 239, 65 ALR 508.

— a provision creating monopolistic conditions, in a statute relating to the business of manufacture, sale, and distribution of ice. *Cap. F. Bourland Ice Co. v Franklin Utilities* 180 Ark 770, 22 SW2d 993, 68 ALR 1018.

— a provision canceling the prices established for a market area if the cancellation is requested by a majority of the producers and distributors in such area, in an act establishing a milk commission with power to create within the state natural market areas and to fix the minimum and maximum prices to be charged for milk and cream therein. *Highland Farms Dairy v Agnew*, 300 US 608, 81 L ed 835, 57 S Ct 549.

13. *Snetzer v Gregg*, 129 Ark 542, 196 SW 925, LRA1917F, 999.

Annotations: 73 L ed 288, 289.

14. § 188, infra.

15. *Electric Bond & Share Co. v Securities & Exch. Com.* 303 US 419, 82 L ed 936, 58 S Ct 678, 115 ALR 105; *Charles C. Steward Mach. Co. v Davis*, 301 US 548, 81 L ed 1279, 57 S Ct 883, 109 ALR 1293; *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758; *Champlin Ref. Co. v Corporation Com.* 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; *Tooz v Hanna State*, 76 ND 599, 38 NW2d 285; *Hannabass v Maryland Casualty Co.* 169 Va 559, 194 SE 808; *J. C. Penney Co. v Tax Com.* 233 Wis 286, 289 NW 677, 126 ALR 1333, *rev'd on other grounds Wisconsin v J. C. Penney Co.* 311 US 435, 85 L ed 267, 61 S Ct 246, 130 ALR 1229, *reh den* 312 US 712, 85 L ed 1143, 61 S Ct 444.

16. *Crowell v Benson*, 285 US 22, 76 L ed

[16 Am Jur 2d]

CONSTITUTIONAL LAW

§ 187

16 Am Jur 2d

The saving clause is not absolute, for the reason that it is merely an aid to interpretation, and not an inexorable command.¹⁷ It is to be given a reasonable interpretation and does not operate to save provisions which clearly would not have been inserted except upon the supposition that the entire act was valid.¹⁸ The rule that in order for a part of a statute to be upheld as separable, where another part is unconstitutional, they must not be mutually dependent on one another is in no way altered by a legislative declaration that the invalidity of a portion of a statute shall not affect the remainder.¹⁹ The courts have steadfastly declared that the presumption which a saving clause creates is rebuttable although in order to defeat the entire act such presumption must be overcome

598, 52 S Ct 285; *Tooz v State*, 76 ND 599, 38 NW2d 285.

17. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758; *Utah Power & L. Co. v Plost*, 286 US 165, 76 L ed 1033, 52 S Ct 548; *Dorchy v Kansas*, 264 US 286, 68 S Ct 323; *State ex rel. English v Industrial Com.* 160 Ohio St 215, 52 Ohio Ops 27, 115 NE2d 395, *adhered to on reh* 160 Ohio St 443, 52 Ohio Ops 335, 117 NE 2d 22.

Annotation: 73 L ed 290.

A saving clause in a statute is invalid insofar as it attempts to control the judicial construction of the statute. *Spitcaufsky v Hatten*, 353 Mo 94, 182 SW2d 86, 160 ALR 990.

The effect of the inclusion of a severability clause in a statute is to minimize the possibility of a holding that the entire statute is invalid; it is merely an aid to interpretation and is not binding upon the courts. *State ex rel. Pennock v Coe*, 42 Wash 2d 569, 257 P2d 190.

The presumption of separability of the provisions of the Bituminous Coal Conservation Act of 1935 created by a legislative declaration that the invalidity of any portion of the statute shall not affect the remainder is not aided by a provision therein that no producer shall, by reason of his acceptance of the code of regulations therein provided for or of the drawback of taxes allowed to producers accepting such regulations, be held to be precluded or estopped from contesting the constitutionality of any provision of such code. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855.

18. *Mazurek v Farmers' Mut. F. Ins. Co.* 320 Pa 33, 181 A 570, 102 ALR 798.

A saving clause will not be given effect where the invalid provisions affect the dominant aim of the whole statute. *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758 (holding that, for that reason, invalid portions of the Railroad Retirement Act carry the whole statute down with them).

If the elimination of the unconstitutional parts of an act of the legislature would result in an act other and different from that

which the legislature intended to enact, a saving clause will not operate to save the remaining parts of the act. *State ex rel. Trent v Sims*, 138 W Va 244, 77 SE2d 122.

19. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Hoover v Brown*, 186 Ga 519, 198 SE 231.

If the test of separability can be met, a saving clause or separability clause is persuasive to the judicial mind that the legislature intended that the invalid portion be stricken and the valid portion survive. *Newton v Tuscaloosa*, 251 Ala 209, 36 So 2d 487.

The invalidity of the Future Trading Act of August 24, 1921, § 4, with its tax penalty to secure compliance with the regulations of boards of trade prescribed by that act, and of the regulations affected by the so-called tax, invalidates all the regulations, that section being so interwoven with the regulations that they cannot be separated, notwithstanding the direction in § 11 of the act that if any provision thereof or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby. This latter section did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations which it does not contain. This is legislative work beyond the power and function of the court. *Hill v Wallace*, 259 US 44, 66 L ed 822, 42 S Ct 453.

In view of the close interrelation of wages in the bituminous coal-mining industry and the price of coal, the price-fixing provisions of the Bituminous Coal Conservation Act of 1935 must be regarded as so inseparably connected with the labor provisions that the invalidity of the labor provisions renders the price-fixing provisions inoperative, notwithstanding the saving clause. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855.

The exception of groups from the provisions of a statute requiring wholesale produce dealers to obtain licenses and give bond is such a vital part of the statute that if it is invalid, the whole statute falls, notwithstanding such a clause. *State ex rel. Hickey v Levitan*, 190 Wis 646, 210 NW 111, 48 ALR 434.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 188

by considerations which make evident the inseparability of the provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remained.²⁰ When the presumption of separability which is created by such a provision in a statute is overcome by a showing of the indivisible character of the act in spite of the provision, the entire act must fall with any invalid portion.¹

In line with the general rule that saving clauses will be given effect, it is held that where the legislature provides that sections of a statute are dependent and that if any part is invalid then the whole statute shall be invalid, such intent will be given effect, and if part is declared invalid, the entire statute falls.²

§ 188. Implied intent; effect of absence of saving clause.

Absent a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety or not at all.³ Similarly, it has been said that the fact that certain provisions of a statute are found in the same section with an invalid provision is significant of a legislative intention that if the latter cannot be given effect, the former shall not be operative.⁴ It is, however, held that the legislature may not have expressed its duty of the courts, even though the legislature may not have expressed its will to that effect, to sever the valid from the invalid provisions of a statute and preserve the former if they relate to a distinct purpose which is not dependent upon the invalid provisions.⁵

20. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Utah Power & L. Co. v Plost*, 286 US 165, 76 L ed 1038, 52 S Ct 548; *Williams v Standard Oil Co.* 278 US 233, 73 L ed 287, 49 S Ct 115, 60 ALR 596.

The presence of a saving clause will not permit a part of a statute to be upheld if it is inseparably connected with a part held unconstitutional. *Cottrell v Faubus*, 233 Ark 721, 347 SW2d 52.

A provision in a statute that if any part of the statute shall be adjudged to be invalid this shall not affect the remainder of the statute but shall be confined to the part held invalid creates a presumption of separability, which is overcome only when inseparability is evident, or where there is a clear probability that with the provisions eliminated, the legislature would not have adopted the remaining provisions. *State v Consumers Pub. Power Dist.* 143 Neb 753, 10 NW2d 784, 152 ALR 480.

1. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758; *Hill v Wallace*, 259 US 44, 66 L ed 822, 42 S Ct 453; *Tucson v Stewart*, 45 Ariz 36, 40 P2d 72, 96 ALR 1492; *Adams v Spillyards*, 187 Ark 641, 61 SW2d 686, 86 ALR 1493; *American Federa-*

tion of Labor v Reilly, 113 Colo 90, 155 P2d 145, 160 ALR 873; *Springfield Gas & E. Co. v Springfield*, 292 Ill 236, 126 NE 739, 18 ALR 929, affd 257 US 66, 66 L ed 131, 42 S Ct 24; *People ex rel. Atty. Gen. v Sperry & H. Co.* 197 Mich 532, 164 NW 503; *State ex rel. Missoula v Holmes*, 100 Mont 256, 47 P2d 624, 100 ALR 581; *Mazurek v Farmers' Mut. F. Ins. Co.* 320 Pa 33, 181 A 570, 102 ALR 798.

Annotation: 73 L ed 289.

2. *Holgate Bros. Co. v Bashore*, 331 Pa 255, 200 A 672, 117 ALR 639.

3. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855; *Railroad Retirement Bd. v Alton R. Co.* 295 US 330, 79 L ed 1468, 55 S Ct 758; *Utah Power & L. Co. v Plost*, 286 US 165, 76 L ed 1038, 52 S Ct 548; *Williams v Standard Oil Co.* 278 US 235, 73 L ed 287, 49 S Ct 115, 60 ALR 596; *Riccio v Hoboken*, 69 NJL 649, 55 A 1109; *Tooz v State*, 76 ND 599, 38 NW2d 285.

4. *Carter v Carter Coal Co.* 298 US 238, 80 L ed 1160, 56 S Ct 855.

5. *Cap. F. Bourland Ice Co. v Franklin Utilities Co.* 180 Ark 770, 22 SW2d 993, 68 ALR 1018.

CONSTITUTIONAL LAW

16 Am Jur 2d

C. PARTIAL UNCONSTITUTIONALITY IN PARTICULAR RESPECTS

§ 190

§ 189. Invalidity of inducement.

It is a well-established rule regarding severability of partially unconstitutional statutes that if the valid and the invalid parts of a statute are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.⁶ This test is merely a means of ascertaining and carrying out the presumed intention of the legislature. If it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone.⁷ The principle has been applied in cases of schemes of legislation for a particular purpose created by the enactment of a law specially referring to the subject and to other laws required for a complete plan. If the special enactment is the inducing provision and is unconstitutional, it has been held that the whole is inefficient and invalid.⁸

§ 190. Invalidity of provision which, although not inducement, is essential.

One of the tests used to determine the intention of the legislature as to severability of a statute is whether the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part held to be unconstitutional.⁹ Whenever

6. *A. Bertolla & Sons v State*, 247 Ala 269, 24 So 2d 23; *Union Bank & T. Co. v Blan*, 229 Ala 180, 155 So 612; *State ex rel. Clarkson v Philips*, 70 Fla 340, 70 So 367; *State ex rel. Atty. Gen. v Hilburn*, 70 Fla 55, 69 So 784; *Ballentine v Willey*, 3 Idaho 496, 31 P 994; *Smith v Thompson*, 219 Iowa 888, 258 NW 190; *State ex rel. Taylor v Hall*, 129 Neb 669, 262 NW 835; *State ex rel. O'Shea v Farmers Irrig. Dist.* 98 Neb 239, 152 NW 372, affd 244 US 325, 61 L ed 1168, 37 S Ct 630; *State v Junkin*, 85 Neb 1, 122 NW 473; *State v Bickford*, 28 ND 36, 147 NW 407; *Fullerton v Lamm*, 177 Or 694, 165 P2d 63; *State v Candland*, 36 Utah 406, 104 P 285; *State ex rel. Kempinger v Whyte*, 177 Wis 541, 188 NW 607, 23 ALR 67; *State ex rel. Hustung v State Canvassers*, 159 Wis 216, 150 NW 542; *State v Frear*, 148 Wis 456, 134 NW 673, 135 NW 164.

7. *Scown v Czarniecki*, 264 Ill 305, 106 NE 276; *Smith v Thompson*, 219 Iowa 888, 258 NW 190; *State v Santee*, 111 Iowa 1, 82 NW 445; *Northwestern Mut. L. Ins. Co. v Lewis & Clarke County*, 28 Mont 484, 72 P 982; *State ex rel. Taylor v Hall*, 129 Neb 669, 262 NW 835; *Low v Rees Printing Co.* 41 Neb 127, 59 NW 362; *Singer Mfg. Co. v Fleming*, 39 Neb 679, 58 NW 226.

If the invalid provision is so connected with the residue as to furnish the consideration therefor and as to warrant the belief that the two were intended as a whole and that the legislature would not have passed the residue had it known the other part would be held invalid, then the entire act must fall. *State ex rel. State Board of Mediation v Pigg*, 362 Mo 798, 244 SW2d 75.

The invalidity, under the Fifteenth Amend-

ment to the United States Constitution, of the exemption from the literacy test prescribed by the 1910 Amendment of Oklahoma Const Art 3, § 1, as a condition to voting, which that amendment makes in favor of persons who, on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government or who at that time resided in some foreign nation, and their lineal descendants, renders invalid the literacy test itself. *Guinn v United States*, 238 US 347, 59 L ed 1340, 35 S Ct 926.

Where those provisions of an old-age pension law which are invalid as an attempt to confer judicial powers on the board of county commissioners were enacted apparently for the purpose of giving such board control over the administration of the act and the elimination of such invalid provisions would leave the control in the hands of the county judge, the entire act must be held invalid. *Denver v Lynch*, 92 Colo 102, 18 P2d 907, 86 ALR 907.

A statute providing for the creation of a board of examiners of plumbers in cities, with authority to examine applicants for plumbers' licenses, formulate rules regulating the work of plumbing, and inspect plumbing work, falls in its entirety when the provision for examination and licensing of applicants proves to be unconstitutional, if it appears that the legislature would not have passed the act with such provision eliminated. *Replogle v Little Rock*, 166 Ark 617, 267 SW 353, 36 ALR 1333.

8. *Huber v Martin*, 127 Wis 412, 105 NW 1031, 1135.

9. *Utah Power & L. Co. v Plost*, 286 US

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 190

the ruling feature of a law or an essential part from which the remaining portions take their cast is unconstitutional, the act must fall as a whole.¹⁰ If the portions of a statute rejected as in themselves unconstitutional are not merely incidental and subordinate so that they could be stricken out without impairing the efficiency of the act, their invalidity will render the entire law void.¹¹ Hence, if a law has one or more invalid features pervading it as a whole, it must be regarded as an entirety and all be condemned as unconstitutional.¹²

It is clear that the invalidity of one section of a statute which is in material relation to its other portions so as to modify, restrict, or extend its application will cause the failure of such other portions also.¹³ The same rule governs acts intended for general operation throughout the state.¹⁴

165, 76 L ed 1038, 52 S Ct 548; Willcox v Consolidated Gas Co. 212 US 19, 53 L ed 362, 29 S Ct 192; A. Bertolla & Sons v State, 247 Ala 269, 24 So 2d 23; Union Bank & T. Co. v Bian, 229 Ala 180, 155 So 612; Ex parte Gerino, 143 Cal 412, 77 P 166; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; State v Deal, 24 Fla 293, 4 So 899; Shellabarger Elevator Co. v Illinois C. R. Co. 278 Ill 333, 116 NE 170; Noel v People, 187 Ill 567, 58 NE 616; Smith v Thompson, 219 Iowa 888, 258 NW 190; 262 NW 835; Taylor v Hall, 129 Neb 669, 226 NW 464; Searle v Yensen, 118 Neb 669, 226 NW 464; 69 ALR 257; Singer Mfg. Co. v Fleming, 39 Neb 679, 58 NW 226; American Exch. Nat. Bank v Lacy, 188 NC 25, 123 SE 475, 36 ALR 680; Becker County Sand & Gravel Co. v Wosick, 62 ND 740, 245 NW 454; Trustees v Tyler, 4 ND 278, 60 NW 392; Exrs' & Securities Inc. Corp. v Hooton, 53 Okla 530, 157 P 293; White v Maverick County Water Control & Improv. Dist. (Tex. Com. App.) 35 SW2d 107; Nathan v Spokane County, 35 Wash 26, 76 P 521. And see § 189, supra (invalid inducement).

10. Williams v Standard Oil Co. 278 US 235, 73 L ed 277, 49 S Ct 115, 60 ALR 596; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; Mathews v People, 202 Ill 389, 67 NE 28; Smith v Thompson, 219 Iowa 888, 258 NW 190; State ex rel. Chess & Wymond Co. v Grace, 188 La 129, 175 So 825; McPherson v Blacker, 92 Mich 377, 51 NW 469, affd 146 US 1, 36 L ed 869, 13 S Ct 3; Nalley v Home Ins. Co. 250 Mo 452, 157 SW 769; Smithberger v Banning, 129 Neb 651, 262 NW 492, 100 ALR 686; E. Fougere & Co. v New York, 224 NY 269, 120 NE 642, 1 ALR 1467; Rathbone v Wirth, 150 NY 459, 45 NE 15; Hannabass v Maryland Casualty Co. 169 Va 559, 194 SE 808; State v Thompson, 149 Wis 488, 137 NW 20; State ex rel. Wausau Street R. Co. v Bancroft, 148 Wis 124, 134 NW 300; McFarland v Cheyenne, 48 Wyo 86, 42 P2d 413.

A proviso in a statute attempting to bring injuries in maritime work under state Workmen's Compensation Acts, which denies jurisdiction in such cases to the United States district courts, falls when the main provision is declared invalid. Washington v W. C.

Dawson & Co. 264 US 219, 68 L ed 646, 44 S Ct 302.

11. Ricks v Close, 201 La 242, 9 So 2d 534; State ex rel. Chess & Wymond Co. v Grace, 188 La 129, 175 So 825; Malone v Williams, 118 Tenn 390, 103 SW 798.

12. Bonnett v Vallier, 136 Wis 193, 116 NW 885.

13. Lemke v Homer Farmers' Elevator Co. 258 US 65, 66 L ed 467, 42 S Ct 250; Lemke v Farmers Grain Co. 258 US 50, 66 L ed 458, 42 S Ct 244; Smith v Thompson, 219 Iowa 888, 258 NW 190; State ex rel. Taylor v Hall, 129 Neb 669, 226 NW 835; Taylor v Anderson, 40 Okla 316, 137 P 1183; State v Swan, 7 Wyo 166, 51 P 209.

The invalidity of provisions of a sales tax law avowedly enacted for the purpose of providing an additional source of revenue for schools and for the relief of the unemployed, the making appropriation of the proceeds of the tax to one or the other of these purposes dependent upon the determination of the state emergency relief commissions in counties of over 500,000 inhabitants and county boards in other counties, renders the whole invalid, since the elimination of the invalid provisions would result in imposing a tax to be paid into the state treasury, without any appropriation of its proceeds to its avowed purposes. Winter v Barrett, 352 Ill 441, 186 NE 113, 89 ALR 1398.

A libel law requiring persons who have been libeled in a newspaper to give notice to the publisher so as to permit its publishing a retraction within a designated time has also been regarded as an entirety and void as a whole where the provisions prohibiting the recovery of actual damages are invalid, this conclusion being reached although the legislature could have provided that such publication of a retraction would protect the publisher from punitive, and yet not from actual, damages. Hanson v Krehbiel, 68 Kan 670, 75 P 1041.

A statute allowing a taking of property in violation of constitutional provisions, while literally providing a substitute remedy for an action of trespass, is a legislative attempt to grant authority as well as to provide a remedy; and when the statute is held void as to

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 191

This test of essentiality is distinct from (although related to) that which demonstrates the invalidity of an entire statute whenever its inducement is unconstitutional.¹⁵ Frequently a single part of an act may be of so great importance that although in itself it may not be an inducing cause for the enactment of the legislation, its invalidity may render the whole act void.¹⁶

§ 191. Invalidity of nonessential provision.

Another rule to which recourse is had in determining and carrying out the legislative intent regarding severability of partially unconstitutional legislation is that nonessential provisions may be eliminated and the remainder given effect.¹⁷ Stated differently, the principle is that where the part of an act that is unconstitutional does not enter into the life of the act itself and is not essential

the authority, it will not be uselessly severed to sustain the remedial provisions, but will be held void in its entirety. Paine v Savage, 126 Me 121, 136 A 664, 51 ALR 1194.

14. A statute conferring jurisdiction over juvenile offenders by which in some counties unconstitutional powers are conferred upon officers designated to execute the law must stand or fall in its entirety. Hunt v Wayne Circuit Judges, 142 Mich 93, 105 NW 531.

15. § 189, supra.

16. Under this principle it has been held that an apportionment law must stand or fall in its entirety. Ballentine v Willey, 3 Idaho 496, 31 P 994; Smith v Thompson, 219 Iowa 888, 258 NW 190; State ex rel. Taylor v Hall, 129 Neb 669, 226 NW 835.

The same principle of inseparability was applied to an income tax law (prior to the Sixteenth Amendment to the Federal Constitution). Income Tax Cases (Pollock v Farmers' Loan & T. Co.) 158 US 601, 39 L ed 1103, 15 S Ct 912.

And the principle of inseparability has also been applied to a schedule of rates established by a railroad commission. Reagan v Farmers' Loan & T. Co. 154 US 362, 38 L ed 1014, 14 S Ct 1047.

Likewise, the invalidity as respects interstate commerce of an annual license tax imposed by a statute upon gasoline distributing stations or places of business, with a prohibition against further conduct of the business without making the required payment, has been held to render the tax unenforceable as to the domestic commerce of a dealer who conducts his interstate and domestic business indiscriminately at the same stations and by the same agencies. Bowman v Continental Oil Co. 256 US 642, 65 L ed 1139, 41 S Ct 606.

The failure to make an exception in favor of the transmission of messages for the Federal Government in a municipal ordinance imposing a license fee upon the doing of local business within the state by a telegraph company which has accepted the provisions of the act of July 24, 1866 (14 Stat at L 221, ch 230, US Rev Stat §§ 5263, 5268, 47

USC §§ 1, 5), renders the whole tax invalid. Williams v Talladega, 226 US 404, 57 L ed 275, 33 S Ct 116.

17. People ex rel. Moll v Danziger, 238 Mich 39, 213 NW 448, 52 ALR 136; McPherson v Secretary of State, 92 Mich 377, 52 NW 469; State v Stevens, 78 NH 268, 99 A 723; Becker County Sand & Gravel Co. v Wosick, 62 ND 740, 245 NW 454; State v McFarland, 60 Wash 98, 110 P 792; McFarland v Cheyenne, 48 Wyo 86, 42 P2d 413.

For example, the courts have held severable, as nonessential, the following:

— a provision as to time of meeting of presidential electors in a statute providing for the choice of such electors. McPherson v Secretary of State, 92 Mich 377, 52 NW 469.

— a provision of an act prescribing the method of permitting electors to designate their choice of a candidate for the United States Senate as not dependent for its validity on other provisions requiring an oath and pledge on the part of candidates for that office. State v Blaisdell, 18 ND 55, 118 NW 141.

— a provision in a civil service law disqualifying for office persons who should be convicted of violating such law. People v Kipley, 171 Ill 44, 49 NE 229; State ex rel. Buell v Frear, 146 Wis 291, 131 NW 832.

— a provision that an act should be submitted to the vote of the people before it should take effect. Santo v State, 2 Iowa 165.

— a general provision conferring suffrage upon women, in which, in some particulars which could be segregated, the legislature exceeded its authority. Scown v Czarnicki, 264 Ill 305, 106 NE 276.

A statute which provided that every grand jury should consist of twelve persons and that the assent of eight of them should be sufficient to find an indictment has been held valid insofar as it provides that the jury may consist of twelve persons, although the clause requiring the assent of only eight is unconstitutional and void. Jacksonville, T. & K. W. R. Co. v Adams, 33 Fla 608, 15 So 257 (also holding that the invalidity of a provision allowing a verdict by a majority of the jury, in a statute concerning condemnation proceedings, does not make the whole statute void).

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 192

from the provisions of a general statute may have been a material consideration with the legislature in the passage of the act, and the courts may properly infer that it would not have been enacted if such group had not been excluded from its operation and protected from its provisions.⁶ The answer to the argument that if an exception makes a statute unconstitutional the exception should be disregarded and the statute held valid has been said to be that the courts have no lawmaking power and cannot extend a statute to cover that which is excluded by the legislature.⁷

The rule is equally well settled that exceptions may be stricken out when doing so does not defeat the general intent of the legislature.⁸ Where an exception is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain.⁹ The general provisions of the statute are so intimately and inherently related to and connected with the general provisions to which it relates that the legislature would not have enacted the latter without the former.¹⁰

The United States Supreme Court has held that an invalid proviso which is

Texas-Louisiana Power Co. v Farmersville (Tex Com App) 67 SW2d 235; *State v Inland Empire Refineries*, 3 Wash 2d 651, 101 P2d 975, cert den 311 US 713, 85 L ed 464, 61 S Ct 395; *State v Parmenter*, 50 Wash 164, 96 P 1047; *Nathan v Spokane County*, 35 Wash 26, 76 P 521.

Instances of the application of this rule may be found in cases involving—

—statutes prohibiting trusts or combinations to fix prices or restrict the production of articles of commerce, but excepting from the prohibitions all persons engaged in agriculture or horticulture. *Connolly v Union Sewer Pipe Co.* 184 US 540, 46 L ed 679, 22 S Ct 431 (holding that elimination of the unconstitutional portion of the Illinois Trust Act of June 20, 1893, which exempts agriculturists and livestock dealers from the provisions which prohibit combinations in restraint of trade, cannot be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid, overruling on other grounds in *Tigner v Texas*, 310 US 141, 84 L ed 1124, 60 S Ct 879, 130 ALR 1321, reh den 310 US 659, 84 L ed 1422, 60 S Ct 1092); *Gramling v Maxwell (DC)* 52 F2d 256; *State v Cudahy Packing Co.* 33 Mont 179, 82 P 833.

—statutes requiring all hawkers and peddlers to pay a license fee, but exempting all residents of a town who pay taxes amounting to \$25 on their stock of goods. *Gramling v Maxwell (DC)* 52 F2d 256; *State v Mitchell*, 97 Me 66, 53 A 887.

—statutes exempting designated cities from the operation of a general law. *Gramling v Maxwell (DC)* 52 F2d 256; *State ex rel. Johnson v Chicago, B. & Q. R. Co.* 195 Mo 228, 93 SW 784.

6. *Gramling v Maxwell (DC)* 52 F2d 256;

Kellyville Coal Co. v Harrier, 207 Ill 624, 69 NE 927; *State ex rel. English v Industrial Com.* 160 Ohio St 215, 52 Ohio Ops 27, 115 NE2d 395, adhered to on reh 160 Ohio St 443, 52 Ohio Ops 335, 117 NE2d 22.

7. *State ex rel. English v Industrial Com.*, supra.

8. *Frost v Corporation Com.* 278 US 515, 73 L ed 483, 49 S Ct 235; *Union Bank & T. Co. v Blan*, 229 Ala 180, 155 So 612; *State v Santee*, 111 Iowa 1, 82 NW 445; *Southwestern Bell Tel. Co. v Morris (Mo)* 345 SW2d 62, 85 ALR2d 1033.

9. *Davis v Wallace*, 257 US 478, 66 L ed 325, 42 S Ct 164.

10. *Frost v Corporation Com.* 278 US 515, 73 L ed 483, 49 S Ct 235; *People v Monterey Fish Products Co.* 195 Cal 548, 234 P 398, 38 ALR 1186; *Re Zeimet's Estate*, 259 Wis 619, 49 NW2d 924.

A statute purporting to impose a tax on insurance corporations based on the excess of premiums received over losses and expenses incurred and exempting the corporation from all other taxation, although it is void as to the exemption, has been decided to be valid and enforceable in other respects. *Union Bank & T. Co. v Blan*, 229 Ala 180, 155 So 612; *Northwestern Mut. L. Ins. Co. v Lewis & Clarke County*, 28 Mont 484, 72 P 982.

Where a subdivision exempting from a wheelage tax vehicles used for the purpose of selling or peddling the products of farm or garden is unconstitutional, it is not so connected with the rest of the act as to render the whole unconstitutional, and there is left a workable and constitutional statute. *Fairley v Duluth*, 150 Minn 374, 185 NW 390, 32 ALR 1258.

CONSTITUTIONAL LAW

§ 194

16 Am Jur 2d

added to an original statute by way of amendment at some time after the original enactment is to be regarded as separable. The invalid proviso cannot make any invalid discrimination, because an existing statute which does not by anything short of a constitutional enactment and an invalid proviso is not such an enactment.¹¹ It has also been held that a statute containing an unconstitutional exception which creates an invalid discrimination violating the Fourteenth Amendment to the Federal Constitution, where the exception amounts to the denial of a privilege, may be construed to be valid to extend such privilege to unfavored nonresidents.¹²

§ 193. Insufficient title.

In accordance with the general principles governing the severability of statutes already discussed,¹³ where the title of an act is insufficient, the rule is that the matters in the body of the statute not embraced are invalid, but the remainder of the act is not unconstitutional unless the parts are inextricably interwoven in the texture of the statute.¹⁴

§ 194. Invalidity as to part of subject matter.

Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts,¹⁵ or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others.¹⁶ It has been said

11. *Frost v Corporation Com.* 278 US 515, 73 L ed 483, 49 S Ct 235.

As to amendatory acts generally, see § 184, supra.

12. The fact that a statute providing compensation for resident workmen injured in other states while working under contracts entered into in the state where the statute was enacted discriminates in its operation against residents of other states working under similar contracts does not prevent the application of the statute creating the privilege for the former resident class to which it had been generally extended, but merely removes the invalid discrimination and automatically extends the operation of the privilege to the latter class as well. *Quong Ham Wah Co. v Industrial Acci. Com.* 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373.

13. §§ 181 et seq., supra.

14. *Unity v Burrage*, 103 US 447, 459, 26 L ed 405; *State v Davis*, 130 Ala 148, 30 So 344; *Sheppard v Dowling*, 127 Ala 1, 28 So 791; *Ex parte Maginnis*, 162 Cal 200, 121 P 723; *People ex rel. Chapman v Sacramento Drainage Dist.* 155 Cal 373, 103 P 207; *Callahan v Jennings*, 16 Colo 471, 27 P 1055; *State v Ferschke*, 25 Del (2 Boyce) 477, 81 A 401; *Ex parte Knight*, 52 Fla 144, 41 So 786; *Pearson v Bass*, 132 Ga 117, 63 SE 798; *People v McBride*, 234 Ill 146, 84 NE 865; *Dixon v Poe*, 159 Ind 492, 65 NE 518; *Gustafson v McPherson County*, 88 Kan 335, 128 P 186; *Louisville & N. R. Co. v Hernon*, 126 Ky 589, 104 SW 732; *State v Jack-*

son, 137 La 741, 69 So 158; *Somerset County v Pocomoke Bridge Co.* 109 Md 1, 71 A 462; *Berry v Baltimore & D. P. R. Co.* 41 Md 446; *Davis v State*, 7 Md 151; *People v De Blaay*, 137 Mich 402, 100 NW 598; *State ex rel. Anderson v Sullivan*, 72 Minn 126, 75 NW 8; *Simpson v Witte Iron Works Co.* 249 Mo 376, 155 SW 810; *State v Courtney*, 27 Mont 378, 71 P 308; *Union P. R. Co. v Sprague*, 69 Neb 48, 95 NW 46; *Board of Health v Schwarz Bros. Co.* 86 NJL 170, 90 A 1061; *People ex rel. Corscadden v Howe*, 177 NY 499, 69 NE 1114; *Minsinger v Rau*, 236 Pa 327, 84 A 902; *Commonwealth v Moir*, 199 Pa 534, 49 A 351; *Bekker v White River Valley R. Co.* 28 SD 84, 132 NW 797; *State v Hayes*, 116 Tenn 40, 93 NW 98; *Clark v Finley*, 93 Tex 171, 54 SW 343; *Swedish Hospital v Department of Labor & Industries*, 26 Wash 2d 819, 176 P2d 429; *State ex rel. Lindsey v Derbyshire*, 79 Wash 227, 140 P 540; *Shields v Bennett*, 8 W Va 74, overruling on other grounds in *Simms v Sawyers*, 85 W Va 245, 101 SE 467; *Koppala v State*, 15 Wyo 398, 89 P 576, 93 P 662.

15. *Jaehne v New York*, 128 US 189, 32 L ed 398, 9 S Ct 70; *John Woods & Sons v Corl*, 75 Ark 328, 87 SW 621; *St. Paul v Dalsin*, 245 Minn 325, 71 NW2d 855; *Lee v Smith*, 189 Miss 636, 198 So 296; *Commonwealth v Carolina Coach Co.* 192 Va 745, 66 SE2d 572; *Harbert v Harrison County Court*, 129 W Va 54, 39 SE2d 177; *McFarland v Cheyenne*, 48 Wyo 86, 42 P2d 413.

16. *Sanitation Dist. No. 1 v Campbell (Ky)* 249 SW2d 767; *Thurman v Chicago, M. & St. P. R. Co.* 254 Mass 569, 151 NE 63, 46

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 194

that if a statute is reasonably appropriate in its overall approach, it should be upheld notwithstanding it may be unconstitutional in special circumstances, especially when it is apparent that the legislature would want the act to prevail where constitutionally it may. And even though the provision is a single subject matter covered by the legislature and enforceable as to the one portion and inoperative as to the other if the subject matter is of such a nature that it may be divided.¹⁴

A statute which contains separate prohibitions of different acts or a prohibition applying to different classes of objects may usually be severed without much difficulty.¹⁵ A law may be unconstitutional so far as it affects natural persons, and yet as to corporations it may be valid.¹⁶

In some cases the statute cannot be severally construed so as to be given partial application consistent with its purpose as designed by the lawmakers, and if it cannot be made effective in accordance with the legislative intent in enacting it originally by limiting its operation to proper subject matter, the whole statute falls.¹⁷ Moreover, where the same general clause of a statute appears to operate equally on all classes of cases, it seems that it is not proper judicially to limit the effect of the language to those who alone may be properly subject to statutory regulation.¹⁸

ALR 563; St. Paul v Dalsin, 245 Minn 325, 71 NW2d 855; Moore v Grillis, 205 Miss 863, 39 So 2d 505, 10 ALR2d 1425; Sayreville v Pennsylvania R. Co. 26 NJ 197, 139 A2d 97, app dismd 358 US 44, 3 L ed 2d 45, 79 S Ct 43; Harbert v Harrison County Court, 129 W Va 54, 39 SE2d 177.

A law general in terms and enacted to apply to all conditions of fact, both those prohibited by the constitution and those concerning which the legislature has power to legislate, will be held to be valid to the extent of legislative power and void only as to the excess. Hansen v Raleigh, 391 Ill 536, 63 NE 2d 851, 163 ALR 1425.

17. Sayreville v Pennsylvania R. Co. 26 NJ 197, 139 A2d 97, app dismd 358 US 44, 3 L ed 2d 45, 79 S Ct 43.

18. Missouri Rate Cases (Knott v Chicago, B. & Q. R. Co.) 230 US 474, 57 L ed 1571, 33 S Ct 975; Berea College v Kentucky, 211 US 45, 53 L ed 81, 29 S Ct 33, affg 123 Ky 209, 94 SW 623; Leep v St. Louis, I. M. & S. R. Co. 58 Ark 407, 25 SW 75, error dismd 159 US 267, 40 L ed 142, 15 S Ct 1042; Brady v Mattern, 125 Iowa 158, 100 NW 358; State ex rel. Young v Standard Oil Co. 111 Minn 85, 126 NW 527; O'Brien v Krenz, 36 Minn 136, 30 NW 458; State v Parker Distilling Co. 236 Mo 219, 139 SW 453; Clark Implem Co. v Wadden, 34 SD 550, 149 NW 424; McCamey v Cummings, 130 Tenn 494, 172 SW 311; Freeman v Swan (Tex Civ App) 143 SW 724, error ref; Bittenhaus v Johnston, 92 Wis 588, 66 NW 805.

19. State v Robb, 100 Me 180, 60 A 874.

Provisions prohibiting discrimination between shippers may be severed from those prohibiting extortion in the matter of the rates of carriers. Chicago, B. & Q. R. Co. v Jones,

149 Ill 361, 37 NE 247, error dismd (US) 41 L ed 1184, 17 S Ct 992.

Where a statute prohibits different acts, such as the taking of fish and the sale of fish, it may be given effect as to one prohibited act although invalid as to the other. Territory v Hoy Chong, 21 Hawaii 39.

20. Leep v St. Louis, I. M. & S. R. Co. 58 Ark 407, 25 SW 75.

The validity of a statute so far as it prohibits foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state is not affected by its possible invalidity as respects partnerships, where it is apparent on the face of the statute that the application of its provisions to corporations is severable from and independent of its application to partnerships. Diamond Glue Co. v United States Glue Co. 187 US 611, 47 L ed 328, 23 S Ct 206.

The possible invalidity as to individual carriers of the provisions of the Elkins Act of February 19, 1903, imputing to the carrier the acts, omissions, or failures of the officers and agents of such carrier, acting within the scope of their employment, does not affect the validity of so much of that act as imputes to corporate carriers the commission by officers and agents of such carriers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates. New York, C. & H. R. R. Co. v United States, 212 US 481, 53 L ed 613, 29 S Ct 304.

1. Butts v Merchants' & M. Transp. Co. 230 US 126, 57 L ed 1422, 33 S Ct 964; Sargent v Rutland R. Co. 86 Vt 328, 85 A 654.

2. A portion of a statute relating to foreign corporations which are not engaged in busi-

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 195

§ 195. — Cases beyond legislative jurisdiction.

A class of cases in which a statute may be in part valid and in part invalid consists of laws enacted by a legislature in general terms, covering not only persons and property as to which the legislature clearly has the right to make regulations, but apparently applying also to individuals and property protected from such legislation.¹ A law may be unconstitutional and properly protected to other cases which differ from the former in material characteristics. In other words, where a statute has been passed by the legislature and, in relation to certain cases which it affects, some part of it is not within the competency of the legislative power or is repugnant to some provision of the constitution, such part may be adjudged void and of no avail, while all other parts of the act not obnoxious to the same objection may be upheld as valid and have the limited effect of a statute to cases clearly within the field of legislative control.²

The rule which sustains portions of a law in and of themselves valid in their operation arises from the theory that a statute which is unsustainable in its literal terms because it is valid in some of its applications but not in others is to be read as though the latter were excepted from its operation.³

It has been said by the Supreme Court of the United States that an exception of a class constitutionally exempted cannot be read into general words merely for the purpose of saving what remains.⁴

ness in the state cannot be severed from the portion relating to such corporations as are engaged in business in the state, inasmuch as both classes are included in the same general clause. Cella Com. Co. v Bohlinger (CA8) 147 F 419.

3. Chicago, B. & Q. R. Co. v Jones, 149 Ill 361, 37 NE 247, error dismd (US) 41 L ed 1184, 17 S Ct 992; State v Montgomery, 94 Me 192, 47 A 165; Sault Ste. Marie Hospital v Sharpe, 209 Mich 684, 177 NW 297; Milwaukee Industrial School v Milwaukee County, 40 Wis 328; McFarland v Cheyenne, 48 Wyo 86, 42 P2d 413.

Legislative regulation of railway rates which is not confiscatory as to certain railroads is enforceable as against them, although it may be unenforceable as against another carrier, differently situated, because the rates prescribed may, as to it, be unreasonably low. Knott v St. Louis, K. C. & C. R. Co. 230 US 512, 57 L ed 1596, 33 S Ct 983; Missouri Rate Cases (Knott v Chicago, B. & Q. R. Co.) 230 US 474, 57 L ed 1571, 33 S Ct 975.

4. Oglesby v Pacific Finance Corp. 44 Ariz 449, 38 P2d 646; Sanitation Dist. No. 1 v Campbell (Ky) 249 SW2d 767; Sault Ste. Marie Hospital v Sharpe, 209 Mich 684, 177 NW 297; Barry v Iseman, 48 SCL (14 Rich) 129; Commonwealth v Carolina Coach Co. 192 Va 745, 66 SE2d 572.

5. § 147, supra.

6. Woolf v Fuller, 87 NH 64, 174 A 193, 94 ALR 1067.

In Scown v Czarnecki, 264 Ill 305, 106 NE

276, it was held that the fact that in conferring the privilege of suffrage upon women the legislature exceeded its constitutional power in some particulars did not destroy the act in toto, but such matters might be segregated and the statute upheld so far as it applied to offices the privilege of voting for which might legally be conferred upon women.

7. United States v Ju Toy, 198 US 253, 49 L ed 1040, 25 S Ct 644.

Where an act of Congress in attempting to give effect to the Fifteenth Amendment of the United States Constitution went beyond the purview of that amendment and denounced as a crime any act by which a voter might be deprived of his vote whether by race, color, or previous condition of servitude, or for other cause, it was not possible to eliminate that part of the act which was invalid and retain the balance which might be within the power of Congress. United States v Reese, 92 US 214, 23 L ed 563.

Compare holdings to the effect that a state tax law which is general in its terms and on its face applies alike to all taxpayers may be restricted by the court so as to exempt from its operation stockholders in national banks; such a statute would not be declared void as a whole, but should be given effect in reference to all persons embraced within the general language employed, with the exception of those outside the proper field of such legislation. Albany County v Stanley, 105 US 305, 26 L ed 1044; Oglesby v Pacific Finance Corp. 44 Ariz 449, 38 P2d 646; State v Smiley, 65 Kan 240, 69 P 199; Sault Ste. Marie Hospital v Sharpe, 209 Mich 684, 177 NW 297.

CONSTITUTIONAL LAW

16 Am Jur 2d

§ 195

The most common cases in which the field of legislation is restricted by implication are those in which certain individuals are protected from legislative interference by reason of the operation of the clauses prohibiting the impairment of the obligation of contracts,⁸ the passage of retrospective laws,⁹ and encroachments by Congress and the state legislatures respectively on each other's domain.¹⁰ Thus, an act of the legislature may be unconstitutional so far as it purports to operate retrospectively,¹¹ or to have retroactive application to past contracts,¹² or to the extent that it is found to impair the obligation of a contract, and yet it may be valid and constitutional in other respects and as applied to future cases.¹³

The general principle has also been applied to the large and important class of cases where state laws are partially invalid as interfering with interstate commerce. Such statutes have frequently been treated as severable and sustained to the extent of the obligation of commerce, while embracing subjects within the extent of the case where an act of Congress, also includes subjects not within its reverse is the case where an act of Congress, also includes subjects not within its authority in regulating commerce, also includes subjects not within its constitutional power. If the two are so interblended in the statute that they are incapable of separation, the entire statute will be held to be repugnant to the Federal Constitution and nonenforceable.¹⁴ Thus, if the terms of a state law are broad enough to apply to trusts and conspiracies of all persons, including those engaged in interstate commerce, it would be proper for the courts to limit such a statute by construction to those cases to which it could alone legally apply. On the other hand, if Congress should pass an antitrust law the general terms of which should include subjects lying without as well as those within its sphere of legislation, such act might be restricted by construction to those matters in respect to which Congress was qualified to enact regulations, without nullifying it as a whole.¹⁵

8. §§ 434 et seq., *infra*.

9. *Purdy v Erie R. Co.* 162 NY 42, 56 NE 508. And see §§ 413 et seq., *infra*.

10. *State v Smiley*, 65 Kan 240, 69 P 199.

The validity of state statutes insofar as they impose liability upon a railway company for an injury to an employee engaged in interstate commerce, arising from the negligence of a coemployee, and modify the rule of contributory negligence, is not affected because such statutes also cover subjects dealt with by the Federal Safety Appliance Act of March 2, 1893, such as acts of negligence of railway companies in respect of their cars, roadbed, machinery, etc. *Missouri P. R. Co. v Castle*, 224 US 541, 56 L ed 875, 32 S Ct 606.

11. *Purdy v Erie R. Co.* 162 NY 42, 56 NE 508.

12. *Jachne v New York*, 128 US 189, 32 L ed 398, 9 S Ct 70; *Barry v Iseman*, 48 SCL (14 Rich) 129; *Goggans v Turnipseed*, 1 SC 80.

The provision of § 17 of the Economy Act

of March 20, 1933, repealing "all laws granting or pertaining to yearly renewable term insurance" issued under the War Risk Insurance Act, void insofar as it purports to take away contractual rights, cannot be given effect to the extent that it operates to take away the remedy for the enforcement of such contracts of insurance. *Lynch v United States*, 292 US 571, 78 L ed 1434, 54 S Ct 840.

13. *Brady v Mattern*, 125 Iowa 158, 100 NW 358; *State ex rel. Cleveringa v Klein*, 63 ND 514, 249 NW 118, 86 ALR 1523.

An insolvency law void so far as it attempts to discharge obligations created before its passage may be valid insofar as its operation is prospective. *Sturges v Crowninshield*, 4 Wheat (US) 122, 4 L ed 529.

14. See 15 Am Jur 2d, *COMMERCE* §§ 66, 79.

15. *Chicago, I. & L. R. Co. v Hackett*, 228 US 559, 57 L ed 966, 33 S Ct 581; *Employers' Liability Cases* (Howard v Illinois C. R. Co.) 207 US 463, 52 L ed 297, 28 S Ct 141.

16. *State v Smiley*, 65 Kan 240, 69 P 199.

CONSTITUTIONAL LAW

16 Am Jur 2d

d. PARTIAL UNCONSTITUTIONALITY OF CRIMINAL AND PENAL STATUTES AND STATUTES RELATING TO PUBLIC OFFICES § 196

§ 196. Criminal and penal statutes.

Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions,¹⁷ it is sometimes difficult to apply this process to penal statutes, because they are always construed strictly.¹⁸ Hence, the courts incline toward treating a penal statute as void in its entirety whenever one section or clause is clearly unconstitutional.¹⁹ The usual doctrine as to the separability of constitutional and unconstitutional applications of statutes have been said not to apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution.²⁰ The rule is firmly established, however, that when penal provisions are inserted in general statutes for the regulation of business or matters requiring the exercise of the police power, such penal provisions may be eliminated without impairing the rest of the statute, unless it appears that the penalty clauses are the inducement for the passage of the law.¹

17. §§ 181 et seq., *supra*.

18. See *STATUTES* (1st ed §§ 407 et seq.).

19. *Butts v Merchants & M. Transp. Co.* 230 US 126, 57 L ed 1422, 33 S Ct 964; *State ex rel. White v Wyandotte County*, 140 Kan 744, 99 P2d 286; *State v Cudahy Packing Co.* 33 Mont 179, 82 P 833; *McFarland v Cheyenne*, 48 Wyo 86, 42 P2d 413.

The unconstitutionality of the classification attempted in a statute regulating the business of sugar refining and of the provisions of that statute creating presumptions of guilt requires that the act fall as a whole. *McFarland v American Sugar Ref. Co.* 241 US 79, 60 L ed 899, 36 S Ct 498.

The imprisonment features of the provisions of the Philippine Penal Code for the punishment of the falsification by a public official of a public and official document are not separable from the invalid accessory punishments therein provided, of deprivation of civil rights and subjection to perpetual disqualification to enjoy political rights and to perpetual surveillance of the authorities. *Weems v United States*, 217 US 349, 54 L ed 793, 30 S Ct 544.

20. *Smith v California*, 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399.

1. *Ohio Tax Cases* (Ohio River & W. R. Co. v Dittiey) 232 US 576, 56 L ed 737, 34 S Ct 372; *Grand Trunk R. Co. v Michigan R. Co.* 231 US 457, 58 L ed 310, 34 S Ct 152; *Louisville & N. R. Co. v Garrett*, 231 US 298, 58 L ed 229, 34 S Ct 48; *Southern P. Co. v Campbell*, 230 US 537, 57 L ed 1610, 33 S Ct 1027; *Western U. Tel. Co. v Richmond*, 224 US 160, 56 L ed 710, 32 S Ct 449; *State v Atlantic Coast Line R. Co.* 56 Fla 617, 47 So 969; *People ex rel. Akin v Kipley*, 171 Ill 44, 49 NE 229, error dismd 170 US 182, 42

L ed 998, 18 S Ct 550; *State v Bevins*, 210 Iowa 1031, 230 NW 865; *State v Adams Exp. Co.* 85 Neb 25, 122 NW 691; *Singer Mfg. Co. v Fleming*, 39 Neb 679, 58 NW 226; *Department of State Highways v Baker*, 69 ND 702, 290 NW 257, 129 ALR 925; *Minot Special School Dist. v Olness*, 53 ND 683, 208 NW 968, 45 ALR 1337; *State ex rel. Dushek v Watland*, 51 ND 710, 201 NW 680, 39 ALR 1169; *Bonnett v Vallier*, 136 Wis 193, 116 NW 885.

Taxation statutes will not necessarily be stricken down by the invalidity of clauses relating to penalties. *Southwestern Oil Co. v Texas*, 217 US 114, 54 L ed 688, 30 S Ct 496 (holding that the possible invalidity under the due process of law clause of the Federal Constitution of the provisions as to penalties, contained in a state statute taxing wholesale dealers in oils, does not invalidate the wholly independent provisions of that statute for the collection by civil suit of the taxes due the state); *Winter v Barrett*, 352 Ill 441, 186 NE 113, 89 ALR 1398.

The provisions of a statute authorizing the regulation of petroleum production by the state corporation commission will not be denied effect because of any invalidity of a provision for fine and imprisonment of one violating the act. *Champlin Ref. Co. v Corporation Com.* 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403.

The possible unconstitutionality of criminal portions of a petroleum regulation and sale law does not invalidate sections providing for inspection and branding. *Waters-Pierce Oil Co. v Deselms*, 212 US 159, 53 L ed 453, 29 S Ct 270.

The provisions in an act regulating the licensing of real-estate brokers, conferring power upon the licensing officer to revoke a license in case the licensee is guilty of certain acts, and providing for a review of his acts by

§ 197

§ 197

A statute which provides for both criminal and civil liability may be upheld as to the civil penalties although the provisions for criminal liability are unconstitutional.⁵ And provisions imposing duties may be severed from those establishing liabilities,⁶ and regulations for the disposition of fines may be eliminated without impairing the validity and effectiveness of clauses requiring the payment of fines into the public treasury.⁴

A statute which prohibits the carrying on of two or more allied businesses as to one occupation, although invalid as to the other,⁸ and sentences in criminal cases may be upheld as to such a sentence as may be imposed for the extent of the sentence although it is unconstitutional as to the longer period.⁹

been held to be valid of the minimum period, although relating to public offices.

A statute held to be valid although it was beyond the minimum period, although

§ 197. Statutes relating to public offices.

Provisions of a statute creating a public office may be separated from other provisions naming the incumbent.⁷ It has been held that the right and title to occupy a public office may be severed from provisions in the same statute which define the powers of the incumbent of such office,⁸ and that a part of the term of an office which is invalid may be severed from that part of the term which is within the constitutional requirements.⁹ A statute may be valid with respect to some officers and invalid as regards others.¹⁰

A statute which authorizes judicial proceedings to determine the title to office and contains provisions improperly depriving parties in interest of the right to a trial by jury has been held entire, the courts refusing merely to disregard these provisions as unconstitutional and uphold the remainder of the statute as valid.¹¹

7. Trahan v State Highway Com. 169 Miss 732, 151 So 178; McCormick v Thatcher, 8

the court, are separable from the balance of the statute so as not to defeat the whole act if they are unconstitutional because conferring judicial power. *Riley v Chambers*, 181 Cal 589, 185 P 855, 8 ALR 418.

judicial power.
589, 185 P 855, 8 ALR 418.
2. *Kimmish v Ball*, 129 US 217, 32 L ed
695, 9 S Ct 277; *State v Bickford*, 28 ND 36,
147 NW 407.
3. *Co. v Parsons*,

3. Birmingham Mineral R. Co. v Parsons,
100 Ala 662, 13 So 602.

4. State v Atlantic Coast Line R. Co. 56
Fla 617, 47 So 969; Singer Mfg. Co. v Flem-
ing, 39 Neb 679, 58 NW 226.

S. Gatewood v North Carolina, 203 US 531,
51 L ed 305, 27 S Ct 167.

51 L. Ed. 303, 27 S. Ct. 167.

In *Weller v New York*, 268 U.S. 319, 69 L. ed. 978, 45 S. Ct. 556, it was held that the provisions of a statute requiring a license to engage in the business of reselling tickets to places of amusement and fixing the resale price are severable, so that a conviction for engaging in such business without a license may be sustained, although the provision fixing the resale price may be found to be invalid.

6. *People v Cummings*, 88 Mich 249, 50 NW 310.

7. Trahan v State Highway Com. 169 Miss
732, 151 So 178; McCormick v Thatcher, 8
Utah 294, 30 P 1091.

8. Springer v State, 229 Ala 339, 157 So
219; Best v Moorhead, 96 Neb 602, 148 NW
551; Newport v Horton, 22 RI 196, 47 A 312;
Sabre v Rutland R. Co. 86 Vt 347, 85 A 693.

9. Springer v State, 229 Ala 339, 157 So 219; Sinking Fund Comrs. v George, 104 Ky 260, 47 SW 779 (wherein it was held that where a state constitution required the legislature in creating offices to limit the term to 4 years, a law creating an office with a 6-year term could be upheld to the extent of allowing the incumbent to occupy the office for 4 years).

10. State ex rel. Geake v Fox, 158 Ind 126, 63 NE 19; Henderson v State, 137 Ind 552, 36 NE 257. Compare Davidson v Hine, 151 Mich 294, 115 NW 246, holding that a statute creating a board of public safety to be appointed by the governor and to have control of the police and fire department of a municipality, if unconstitutional as to one department, is invalid as to the other also.

11. State ex rel. Atty. Gen. v Hilburn, 70 Fla 55, 69 So 784; Metz v Maddox, 189 NY 460, 82 NE 507.

CONSTITUTIONAL LAW

VII. DISTRIBUTION OF POWERS OF FEDERAL AND STATE GOVERNMENTS

§ 198

A. IN GENERAL.

§ 198. Generally.

§ 198. One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the federal government.¹² In the United States the powers of government are divided between the federal and the state governments. By the terms of the Constitution certain powers are entrusted to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.¹³ The United States Supreme Court has divided these powers into four classes: (1) those which belong exclusively to the national government, (2) those which belong exclusively to the state, (3) those which may be exercised concurrently and independently by both, and (4) those which may be exercised by the state, but only until Congress shall see fit to act upon the subject. In the latter case the authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur.¹⁴ The two governments—state and national—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers.¹⁵ The distinctive operations of the state and federal governments within their respective spheres is basic to a federal constitutional system, however complicated and difficult the practical accommodation to it may be.¹⁶

The powers which are delegated by the Constitution to the federal government, either by its express terms or by necessary implication,¹⁷ are comprehensive and complete, without limitations other than those found in the Constitution itself.¹⁸

Since the government of the United States is supreme within its sphere of action,¹⁹ the principle is recognized that if a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence or to its exercise that the property or rights of individuals may thereby be

12. Bute v Illinois, 333 US 640, 92 L ed 986, 68 S Ct 763.

13. *Hoke v United States*, 227 US 308, 57 L ed 523, 33 S Ct 281; *Chicago & N. W. R. Co. v Fuller*, 17 Wall (US) 560, 21 L ed 710; *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560.

"It has often been said that this government is a government of divided powers; those powers of a national character being vested in the National Government, and all other powers vested in the state government." L. N. Dantzler Lumber Co. v Texas & P. R. Co. 119 Miss 328, 80 So 770, 4 ALR 1669.

See also UNITED STATES (1st ed § 5).

14. *Chicago & N. W. R. Co. v Fuller*, 17 Wall (US) 560, 21 L ed 710, quoting from *Ex parte McNiel*, 13 Wall (US) 236, 20 L ed 624.

As to commerce, see 15 Am Jur 2d, COMMERCE §§ 20 et seq.

15. § 204, *infra*.

16. Feldman v United States Oil & Refin-

[16 Am Jur 2d]—28

§ 254

§ 254. — Executive power as to international or external affairs of United States. — Congress must retain the lawmaking power given to it by the Federal Constitution, and cannot abdicate its powers. Quite a different principle applies, in which the power of the

§ 254. — Executive power as to international States. In internal affairs Congress must retain the lawmaking power given to it in the enumerated grants of the Federal Constitution, and cannot abdicate its functions to the executive department.¹⁶ Quite a different principle applies, however, to matters which are solely external and in which the power of the United States is exercised as a sovereign nation in the field of international relations. The differences between the powers of the United States government in respect of foreign or external affairs and those in respect of domestic or internal affairs are such that legislative power is not unlawfully delegated by a joint resolution of Congress to the effect that if the President shall find that the prohibition of the sale of arms and munitions of war in the United States to certain belligerents may contribute to the re-establishment of peace between them, and if after consultation with the governments of other American republics and with their co-operation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, then it shall be unlawful to sell—except under such limitations and exceptions as the President prescribes—any arms or munitions of war in any place in the United States to such belligerents or to anyone acting in the interest of either, until otherwise authorized by the President or Congress.¹⁶

§ 255. To judiciary.

§ 255. To judiciary. One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government¹⁷ consists in the rule prohibiting the vesting of legislative power in the courts or The legislature cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature.¹⁸ An act of the legislature delegating legislative powers to courts is unconstitutional.¹⁹

15. § 252, *supra*.
16. *United States v. Curtiss-Wright Export Corp.* 299 US 304, 81 L ed 255, 57 S Ct 216.
17. §§ 210 et seq., *supra*.
18. *United States v. Todd*, 13 How (US) 52, 14 L ed 47; *Burnett v. Greene*, 97 Fla 1007, 122 So 570, 69 ALR 244; *State ex rel. White v. Barker*, 116 Iowa 96, 89 NW 247; *Wicomco County v. Todd*, 97 Md 247, 54 A 963; *Re Opinion of Justices*, 279 Mass 607, 180 NE 725, 81 ALR 1059; *Anway v. Grand Rapids R. Co.* 211 Mich 592, 179 NW 350, 12 ALR 767; *State v. Bates*, 96 Minn 110, 104 NW 709; *Pearle v. Yensen*, 118 Neb 835, 226 NW 464, 9 ALR 257; *Re Phillips*, 82 Neb 45, 116 NW 950; *State v. Roy*, 40 NM 397, 60 P2d 46, 110 ALR 1; *Thompson v. Redington*, 106 Ohio St 101, 110 NE 652; *Langever v. Miller*, 124 Tex 80, 76 SW2d 1025, 96 ALR 767; *Territory ex rel. Kelly v. Stewart*, 1 Wash 23, 3 P 405; *State ex rel. Richardson v. Anawha County Court*, 138 W Va 885, 78 2d 569.
See also § 223, *supra*.

See also § 223, *supra*.

19. *Burnett v Greene*, 97 Fla 1007, 122 So 570, 69 ALR 244; *State v Bates*, 96 Minn 110, 104 NW 709; *State v Field*, 17 Mo 529;

16 Am Jur 2d

§ 256. — Vesting discretionary power in judiciary.

§ 256. — Vesting discretionary power in judiciary.

An apparent exception to the general rule forbidding the delegation of legislative authority to the courts exists in cases where discretion is conferred upon the courts. It is clear, however, that when the courts are said to exercise a discretion, it must be a mere legal discretion which is exercised in discerning the course prescribed by law and which, when discerned, it is the duty of the court to follow.²⁰ In such instances, the exercise of judicial discretion by the courts is not an attempt to use legislative power or to prescribe and create a law, but is an instance of the administration of justice and the application of existing laws to the facts of particular cases.¹ However, the legislature cannot lawfully transfer to the judiciary the power to exercise a discretion to determine in the first instance whether a statute ought or ought not to be given an operative effect in any given case logically within its legitimate scope and intentment,² for the reason that a court cannot be vested with discretion to determine whether a precedent law shall or shall not go into effect in particular cases.³

It has even been held in some states that by reason of the necessary separation of the departments of government, the legislature cannot impose upon a court the duty of receiving and acting on petitions for the subverting to the voters of the question whether or not intoxicating liquors shall be sold (*Wicomico County v Todd*, 97 Md 247, 54 A 963), in the absence of a constitutional provision regulating or prohibiting the traffic in intoxicating liquors, the power so to regulate or prohibit is vested exclusively in the legislature, and that this function cannot be delegated by it to the courts or be lawfully assumed by the judicial branch of the government. (*Wicomico County v Todd*, supra; *Re Phillips*, 82 Neb 45, 116 NW 950; *Tyson v Washington County*, 78 Neb 211, 110 NW 634.

634. On the other hand, where the making of party nominations by political parties is regulated by law, a statute empowering courts to pass upon the right of a candidate to have his name on the official primary ballot is not void as seeking to confer political power on the courts. *Love v Wilcox*, 119 Tex 256, 28 SW2d 515, 70 ALR 1484.

And it has been held that an act providing that a circuit judge shall determine whether the circumstances have arisen which require an election for the purpose of adopting the local option part of a liquor law, and appointing the day for the election, does not violate the constitutional provisions defining the powers of the departments of government. *Paul v Gloucester County*, 50 NJL 585, 15 A 272.

20. *Osborn v Bank of United States*, 9 Wheat (US) 738, 6 L ed 204; *Hubbard v Hubbard*, 77 Vt 73, 58 A 969; *State v Cunningham*, 83 Wis 90, 53 NW 35.

Annotation: 79 L ed 501.

1. The principle of separation of powers is not violated by vesting in courts discretion as to—

—granting licenses. *McCrea v Roberts*,
89 Md 238, 43 A 39.

— the length of sentence or amount of fine beyond designated limits in sentencing persons convicted of crime. *Ohio v Dollison*, 194 US 445, 48 L ed 1062, 24 S Ct 703; *State v Creamery Package Mfg. Co.* 115 Minn 207, 132 NW 268.

—whether the facts in a given case fall within or without the provisions of a statute. Standard Oil Co. v United States, 221 US 1, 55 L ed 619, 31 S Ct 502; State ex rel. Young v Duval County, 76 Fla 180, 79 So 692; Re Davies, 168 NY 89, 61 NE 118; Cass County v Nixon, 35 ND 601, 161 NW 204. See also Porter v Investors Syndicate, 287 US 346, 77 L ed 354, 53 S Ct 132.

The legislature, having declared its policy and determined the facts and conditions which must form the basis for the organization, incorporation, powers, and government of an electric light, heat, and power district, or other public body, may vest authority in the courts to determine whether the law has been complied with, as a condition upon which such organization shall come into being. In such case, the court does not adjudicate upon the necessity or political propriety of forming the corporation, and hence does not exercise any political function. *Searle v Yensen*, 118 Neb 835, 226 NW 464, 69 ALR 257.

2. Sutherland v Miller, 79 W Va 796, 91 SE 993.

3. Minneapolis, St. P. & S. Ste. M. R. Co.
v Railroad Com. 136 Wis 146, 116 NW 905.

A statute has been held to be unconstitutional which attempted to authorize a judge to whom application was made to order a judicial inquiry, if in his opinion the interests of public justice so required, to ascertain whether a candidate for the United States Senate in person or by agents expended, to secure his election, money or other things of value in excess of the amount allowed by law. *Sutherland v Miller*, 79 W Va 796, 91 SE 993.

§ 257

The vesting of discretion in the judiciary may violate the rule⁴ against delegation of legislative power to suspend laws.⁵

C. MODE OF DELEGATION

§ 257. Incomplete statute.

One of the most important tests of whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature.⁶ The generally recognized principle is that a law must be so complete in all its terms and provisions when it leaves the legislative branch of the government that nothing is left to the judgment of the electors or other appointee or delegate of the legislature.⁷ The rights, duties, privileges, or obligations granted or imposed must be definitely fixed or determined, or the rules by which they are to be fixed and determined must be clearly and definitely established, when the act is passed by the legislature and approved by the governor.⁸ The law must be given must relate only to execution.⁹ One court has laid down the rule that in considering whether a section of a statute is complete or incomplete, the test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights and obligations thereunder.¹⁰

A statute will be held unconstitutional as an improper delegation of legisla-

4. § 243, supra.

5. It has been held that an act attempting to change the practice in a certain class of criminal trials, so as to give the judge discretion to allow the jury to disperse and not be placed in charge of an officer, is unconstitutional because it attempts to confer upon each judge the power to suspend the general law, making his discretion the only rule for his conduct. *King v State*, 87 Tenn 304, 10 SW 519.

6. *Holcombe v Georgia Milk Producers Confederation*, 188 Ga 358, 3 SE2d 705; *Stovall v Sawyer*, 181 SC 379, 187 SE 821.

7. *Tillotson v Frohmler*, 34 Ariz 394, 271 P 867; *Re Kinney*, 53 Cal App 792, 200 P 966; *Sapero v State Medical Examiners*, 90 Colo 568, 11 P2d 535; *People ex rel. Thomson v Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044; *Chicago v Washingtonian Home*, 289 Ill 206, 124 NE 416, 6 ALR 1584; *Arms v Ayer*, 192 Ill 601, 61 NE 851; *State ex rel. Portier v Smith*, 184 La 263, 166 So 72; *State v Watkins*, 176 La 837, 147 So 8; *State v Butler*, 105 Me 91, 73 A 560; *Williams v Evans*, 139 Minn 32, 165 NW 495, 166 NW 504; *State ex rel. Ginocchio v Shaughnessy*, 76 Nev 129, 217 P 581; *State v Normand*, 85 NH 541, 85 A 899; *Hudspeth v Swayze*, 85 NJL 592, 89 A 780; *Cleveland v Watertown*, 222 NY 159, 118 NE 500; *Insurance Co. of N. A. v Welch*, 49 Okla 620, 154 P 48; *State ex rel. Richards v Moorner*, 152 SC 455, 150 SE 269, cert den 281 US 691, 74 L ed 1120, 50 S Ct 238; *Dowling v Lancashire Ins. Co.* 92 Wis 63, 65 NW 738.

8. *Nelson v Dean*, 27 Cal 2d 873, 168 P2d 16, 168 ALR 467; *People ex rel. Thomson v Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044.

9. *Mutual Film Co. v Industrial Com.* 236 US 247, 59 L ed 561, 35 S Ct 393; *Mutual Film Corp. v Industrial Com.* 236 US 230, 59 L ed 552, 35 S Ct 387; *Public Serv. Com. v Grimshaw*, 49 Wyo 158, 53 P2d 1, 109 ALR 534.

Legislative power is not delegated by a statute conferring discretionary power upon county officers to waive or reduce the penalty or interest imposed upon delinquent taxpayers, if such action appears likely to facilitate the collection of taxes, since a law, to be complete, need not command to be done everything for which it provides. *Livesay v De Arthing*, 131 Or 563, 284 P 166, 68 ALR 422, mond, 131 Or 563, 284 P 166, 68 ALR 422, Annotation: 68 ALR 431, s. 79 ALR 999.

So far as provisions of a statute empowering the state public service commission to attach to the permit to be issued to a contract motor carrier upon the highways of the state "such terms and conditions as it may deem proper for the best interests of the public" are construed to permit the insertion of conditions other than those entirely within the purview of the explicit provisions of the statute, they involve an unconstitutional delegation of legislative power. *Public Serv. Com. v Grimshaw*, 49 Wyo 158, 53 P2d 1, 109 ALR 534.

10. *McDougall v Lueder*, 389 Ill 141, 58 NE2d 899, 156 ALR 1059; *People ex rel. Rice v Wilson Oil Co.* 364 Ill 406, 4 NE2d 847, 107 ALR 1500.

And see § 552, infra.

16 Am Jur 2d

tive power if it is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law,¹¹ because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid.¹²

§ 258. Laws effective on contingencies.

The rule is well settled that while the legislature may not delegate its power to make a law, it may make a law to become operative on the happening of a certain contingency or future event.¹³ The legislature may enact a general law, complete in its terms, to become operative only upon the happening of a subsequent event, and this event may be the subject of control by human agencies.¹⁴ Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal.¹⁵ The reason for this rule is that it is not always essential that a legislative act must in any event take effect as a law after it leaves the hands of the legislature. If the law is in its provisions a complete statute in other respects, its taking effect may be made conditional upon some subsequent event. When that event happens, the statute takes effect and becomes the law by force of legislative action as fully as if the time when it should take effect had been unconditionally fixed.¹⁶

11. *Schaezlein v Cabaniss*, 135 Cal 466, 67 P 755; *State v Kievan*, 116 Conn 458, 165 A 601, 88 ALR 962; *People v Belcastro*, 356 A 144, 190 NE 301, 92 ALR 1223; *People v Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044; *State v Normand*, 76 NH 541, 85 A 899; *Cancilla v Gehlhar*, 145 Or 184, 27 P2d 179 (approving rule but holding statute did not violate the rule).

12. *Vallat v Radium Dial Co.* 360 Ill 407, 196 NE 485, 99 ALR 607.

13. *Union Bridge Co. v United States*, 204 US 364, 51 L ed 523, 27 S Ct 367; *Phenix City v Alabama Power Co.* 239 Ala 547, 195 So 894; *Terrell v Loomis*, 218 Ark 296, 235 SW2d 961; *State v Davis*, 178 Ark 153, 10 SW2d 513; *Pueblo County v Smith*, 22 Colo 534, 45 P 357; *Telford v Gainesville*, 208 Ga 56, 65 SE2d 246; *People ex rel. Thomson v Barnett*, 344 Ill 62, 176 NE 108, 76 ALR 1044; *Chicago v Stratton*, 162 Ill 494, 44 NE 853; *Sarlls v State*, 201 Ind 88, 166 NE 270, 67 ALR 718; *McPherson v State*, 174 Ind 60, 90 NE 610; *Alexandria v Alexandria Fire Fighters Assn.* 220 La 754, 57 So 2d 673; *State ex rel. Crain v Moore*, 339 Mo 492, 99 SW2d 17; *People v Butte*, 4 Mont 174, 1 P 414; *People v Kennedy*, 207 NY 533, 101 NE 442; *People v Fire Asso. of Phila.* 92 NY 311, affd 119 US 110, 30 L ed 342, 7 S Ct 108; *State ex rel. Krieg v Matia*, 138 Ohio St 504, 21 Ohio Ops 384, 37 NE2d 53; *Marr v Fisher*, 182 Or 383, 187 P2d 966; *Board of Directors of Northern Wasco County v Kelly*, 171 Or 691, 137 P2d 295; *Locke's Appeal*, 72 Pa 491; *Beaufort County v Jasper County*, 220 SC 469, 68 SE2d 421; *Clark v State*, 172 Tenn 429, 113 SW2d 374, 782; *Trimmer v Carlton*, 116 Tex 572, 296 SW 1070; *Peterson v Grayce Oil Co. (Tex Civ App)* 37 SW2d 367, affd 128 Tex 550, 98 SW2d 781; *Port of Tacoma v Parosa*, 52 Wash 2d 181, 324 P2d 438; *Mil-*

waukee v Sewerage Com. 268 Wis 342, 67 NW2d 624; *State v Frear*, 142 Wis 320, 125 NW 961; *Dowling v Lancashire Ins. Co.* 92 Wis 63, 65 NW 738.

Annotation: 79 L ed 558.

As to whether an improper delegation of power occurs where the operation of a law is made contingent upon proclamation by the chief executive, see § 253, supra.

14. *Holcombe v Georgia Milk Producers Confederation*, 188 Ga 358, 3 SE2d 705.

15. *Busch v Turner*, 26 Cal 2d 817, 161 P2d 456, 171 ALR 1063; *People v Fire Asso. of Phila.* 92 NY 311, affd 119 US 110, 30 L ed 342, 7 S Ct 108; *Beaufort County v Jasper County*, 220 SC 469, 68 SE2d 421; *Minneapolis, St. P. & S. Ste. M. R. Co. v Railroad Com.* 136 Wis 146, 116 NW 905.

The legislature may make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact on which the law makes its own action depend. *Sarlls v State*, 201 Ind 88, 166 NE 270, 67 ALR 718.

The legislature may constitutionally enact a law and make its operation depend upon the contingency of another statute being, or not being, in effect on and after a specified date. *Marr v Fisher*, 182 Or 383, 187 P2d 966.

16. *Commonwealth v Beaver Dam Coal Co.* 194 Ky 34, 237 SW 1086, 27 ALR 920; *Alexandria v Alexandria Fire Fighters Assn.* 220 La 754, 57 So 2d 673; *Elwell v Comstock*, 99 Minn 261, 109 NW 113, 698; *Hudspeth v Swayze*, 85 NJL 592, 89 A 780; *State v Crawford*, 36 ND 385, 162 NW 710; *Beaufort County v Jasper County*, 220 SC 469, 68 SE2d 421; *Ex parte Mode*, 77 Tex Crim 432, 180 SW 708.

CONSTITUTIONAL LAW

IX. POLICE POWER

A. IN GENERAL

1. SOURCE: DEFINITIONS

§ 259. Generally.

The police power is an indispensable, essential attribute of sovereignty,¹¹ indeed, some courts have viewed it as of higher status than an attribute of sovereignty,¹² describing the power as constituting sovereignty.¹³ In any case, it is clear that the power is a necessary attribute of every civilized government.¹⁴

9. "The police power is an indispensable prerogative of sovereignty." *Muller v. Board of Public Works*, 195 Cal 477, 234 P 381, 38 ALR 1149, error dismd 273 US 784, 71 L ed 869, 45 S Ct 460.

10. *McInerney v. Ervin*, Fla 46 So 2d 458; *State v. Langley*, 52 Wyo 332, 84 P2d 767.

11. *Kindleberger v. Lincoln Nat. Bank*, 81 App DC 101, 153 F.2d 281, 167 ALR 1011, cert den 329 US 673, 91 L ed 666, 67 S Ct 493; *Marr v. Oxford*, 330 F.2d 134, 67 ALR 1316, cert den 260 US 573, 74 L ed 625, 50 S Ct 38; *Muller v. Public Works*, 195 Cal 477, 234 P 381, 38 ALR 1179; *Ingram v. Coleman*, 106 Cal 113, 38 P 315; *People v. Hupp*, 50 Colo 123, 123 P 631; *Van Winkle v. State*, 4 Boyce (Del) 578, 91 A 385; *People v. Linde*, 341 Ill 269, 173 NE 561, 72 ALR 997; *Chicago v. Washington Home*, 289 Ill 296, 124 NE 416, 6 ALR 1504; *People v. Johnson*, 288 Ill 442, 123 NE 543, 4 ALR 1535; *State v. Roby*, 142 Ind 168, 41 NE 145; *Henry v. Parrish*, 307 Ky 559, 211 SW2d 418; *Byrne v. Maryland Realty Co.*, 93 Md 596, 57 NE 547; *State v. Hyman*, 93 Md 596, 57 NE 547; *State v. Girardeau v. St. Louis-San Fran.* 6; *Cape Girardeau v. St. Louis-San Fran.* 6; *Cisco R. Co.* 305 Mo 590, 267 SW 601, 36 ALR 1488; *Taft v. Shaw*, 284 Mo 531, 225 SW 457; *State v. Safeway Stores*, 106 Mont 182, 76 P2d 81; *People v. Budd*, 117 NY 186, 167 SE 638, 87 ALR 237; *State v. Locky*, 198 NC 551, 152 SE 693; *Skinner v. Thomas*, 171 NC 98, 87 SE 976; *Franklin County v. Public Utilities Com.* 107 Ohio St 442, 140 NE 87, 30 ALR 429; *Cincinnati v. Harth*, 101 Ohio St 344, 128 NE 263, 13 ALR 308; *Cincinnati v. Public Utilities Com.* 98 Ohio St 320, 121 NE 688, 3 ALR 705, overrid on another point *United Fuel Gas Co. v. Ironton*, 107 Ohio St 173, 140 NE 884, 29 ALR 342; *National Bank of Tulsa Bldg. v. Goldsmith*, 204 Okla 45, 226 P2d 916; *State ex rel. Short v. Riedell*, 109 Okla 35, 233 P 684, 42 ALR 765; *Ex parte Fowler*, 85 Okla Crim 64, 184 P2d 814; *White's Appeal*, 287 Pa 259, 134 A 409, 53 ALR 1215; *Commonwealth v. Vrooman*, 164 Pa 306, 30 A 217; *Shealy v. Southern R. Co.* 127 SC 15, 120 SE 561; *Aetna F. Ins. Co. v. Jones*, 78 SC 445, 59 SE 148; *Motlow v. State*, 125 Tenn 547, 145 SW 177, error dismd 239 US 653, 60 L ed 487, 36 S Ct 161; *Williams v. State*, 146 Tex Crim 430, 176 SW2d 177; *Beaumont Petroleum Syndicate v. Broussard*

(Tex Civ App) 64 SW2d 993, app dismd 123 Tex 408, 73 SW2d 92; *Bohn v. Salt Lake City*, 79 Utah 121, 8 P2d 591, 81 ALR 215; *Sowma v. Parker*, 112 Vt 241, 22 A2d 513; *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560; *Sabre v. Rutland R. Co.* 86 Vt 347, 85 A 693; *Virginia-Western Power Co. v. Clifton Forge (Virginia Western Power Co. v. Commonwealth)* 125 Va 469, 99 SE 723, 9 ALR 1148, cert den 251 US 557, 64 L ed 413, 40 S Ct 179; *State ex rel. Webster v. Superior Ct.* 67 Wash 37, 120 P 861; *Prager v. W. H. Chapman & Sons Co.* 122 W Va 428, 9 SE2d 880, 129 ALR 1114; *State v. Langley*, 53 Wyo 332, 84 P2d 767.

12. The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government. *State ex rel. Webster v. Superior Ct.* 67 Wash 37, 120 P 861.

13. "The police power . . . might be deemed sovereignty rather than a mere attribute of sovereignty." *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560; *Sabre v. Rutland R. Co.* 86 Vt 347, 85 A 693. And *land R. Co.* 86 Vt 347, 85 A 693. And *see Cady v. Detroit*, 289 Mich 499, 286 NW 805, app dismd 309 US 620, 84 L ed 984, 60 S Ct 470.

14. *Geurin v. Little Rock*, 203 Ark 103, 155 SW2d 719; *East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co.* 279 Ill 123, 116 NE 720; *Watertown v. Mayo*, 109 Mass 315; *People v. Brazee*, 183 Mich 259, 149 NW 1053, affd 241 US 340, 60 L ed 1034, 36 S Ct 561; *Taft v. Shaw*, 284 Mo 531, 225 SW 457; *Ives v. South Buffalo R. Co.* 201 NY 271, 94 NE 431; *People v. Budd*, 117 NY 186, 167 SE 638; *Barker v. Palmer*, 217 NC 519, 8 SE2d 610; *Calcutt v. McGeachy*, 213 NC 1, 195 SE 49; *Brewer v. Valk*, 204 NC 186, 167 SE 638, 87 ALR 237; *Colletti v. State*, 12 Ohio App 104, 31 Ohio CA 81, err overr 17 Ohio L Rep 364, 64 WL Bull 462; *C. C. Julian Oil & Royalties Co. v. Capshaw*, 145 Okla 237, 292 P 841; *State ex rel. Short v. Riedell*, 109 Okla 35, 233 P 684, 42 ALR 765; *Ex parte Tindall*, 102 Okla 192, 229 P 125; *White's Appeal*, 287 Pa 259, 134 A 409, 53 ALR 1215; *Shealy v. Southern R. Co.* 127 SC 15, 120 SE 561; *Cavalier Vending Corp. v. State Board of Pharmacy*, 195 Va 626, 79 SE2d 636, app dismd 347 US 995, 98 L ed 1127, 74 S Ct 871; *State ex rel. Web-*

16 Am Jur 2d

CONSTITUTIONAL LAW

16 Am Jur 2d

The police power is as old as the civilized governments which exercise it. The states existed before the Constitution of the United States, and they possessed the police power before the adoption of that organic document.¹⁵ Moreover, it has been held many times that the Constitution supposes the pre-existence of the police power, and must be construed with reference to that fact.¹⁶

§ 260. Source.

"Police power" is often said to be a general term used to express the particular right of a government which is inherent in every sovereignty.¹⁷ Thus, it is an inherent power of the states,¹⁸ possessed by every one of them as sovereign.¹⁹

State ex rel. Short v. Riedell, 109 Okla 35, 233 P 684, 42 ALR 765; *Ex parte Strauch*, 80 Okla Crim 89, 157 P2d 201; *State v. Central Lumber Co.* 24 SD 136, 123 NW 504, affd 226 US 157, 57 L ed 164, 33 S Ct 66; *Nance v. O. K. Houck Piano Co.* 128 Tenn 1, 155 SW 1172; *Motlow v. State*, 125 Tenn 547, 145 SW 177, error dismd 239 US 653, 60 L ed 487, 36 S Ct 161; *Sabre v. Rutland R. Co.* 86 Vt 347, 85 A 693; *Carty v. Winooski*, 78 Vt 104, 62 A 45; *Hopkins v. Richmond*, 117 Va 592, 86 SE 139; *State v. Rossman*, 93 Wash 530, 161 P 349; *Quesenberry v. Estep*, 142 W Va 426, 95 SE2d 832; *Huntington v. State Water Com.* 137 W Va 786, 73 SE2d 833.

15. *New York v. Miln*, 11 Pet (US) 102, 9 L ed 648; *Geurin v. Little Rock*, 203 Ark 103, 155 SW2d 719; *McInerney v. Ervin* (Fla) 46 So 2d 458; *People v. Weiner*, 271 Ill 74, 110 NE 870; *Quesenberry v. Estep*, 142 W Va 426, 95 SE2d 832; *Huntington v. State Water Com.* 137 W Va 786, 73 SE2d 833.

16. *Geurin v. Little Rock*, 203 Ark 103, 155 SW2d 719; *Chicago & N. W. R. Co. v. Illinois Commerce Com.* 326 Ill 625, 158 NE 376, 55 ALR 654; *Borden v. Louisiana State Bd. of Edu.* 168 La 1005, 123 So 655, 67 ALR 1183; *Carthage v. Frederick*, 122 NY 268, 25 NE 480; *State ex rel. Minot v. Gronna*, 79 ND 673, 59 NW2d 514; *Quesenberry v. Estep*, 142 W Va 426, 95 SE2d 832; *Huntington v. State Water Com.* 137 W Va 786, 73 SE2d 833.

17. *Nebbia v. New York*, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; *Lake Shore & M. S. R. Co. v. Smith*, 173 US 684, 43 L ed 858, 19 S Ct 565; *Munn v. Illinois*, 94 US 113, 24 L ed 77; *per Taney, Ch. J.*, *Thurlow v. Massachusetts*, 5 How (US) 504, 12 L ed 256; *Alabama State Federation of Labor v. McAdory*, 246 Ala 1, 18 So 2d 810, cert dismd 325 US 450, 89 L ed 1725, 65 S Ct 1384; *Birmingham v. Hood-McPherson Realty Co.* 233 Ala 352, 172 So 114, 108 ALR 1140; *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* 224 Ark 558, 275 SW2d 455; *Geurin v. Little Rock*, 203 Ark 103, 155 SW2d 719; *Denver v. Denver & R. G. R. Co.* 63 Colo 574, 167 P 969, affd 250 US 241, 63 L ed 958, 39 S Ct 450; *State v. Bassett*, 100 Conn 430, 123 A 842, 37 ALR 131; *Van Winkle v. State*, 4 Boyce (Del) 578, 91 A 385; *Eccles v. Stone*, 134 Fla 113, 183 So 628; *Fernandez v. Alford*, 203 La 111, 13 So 2d 483; *Cochran v. Prestin*, 108 Md 220, 70 A 113; *Williams v. Evans*, 139 Minn 32, 165 NW 495, 166 NW 504; *Kansas City v. Holmes*, 274 Mo 159, 202 SW 392; *State v. Safeway Stores*, 106 Mont 182, 76 P2d 81; *Boyd v. Allen*, 246 NC 150, 97 SE2d 864; *State ex rel. Linde v. Taylor*, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60;

State ex rel. Short v. Riedell, 109 Okla 35, 233 P 684, 42 ALR 765; *Ex parte Strauch*, 80 Okla Crim 89, 157 P2d 201; *State v. Central Lumber Co.* 24 SD 136, 123 NW 504, affd 226 US 157, 57 L ed 164, 33 S Ct 66; *Nance v. O. K. Houck Piano Co.* 128 Tenn 1, 155 SW 1172; *Motlow v. State*, 125 Tenn 547, 145 SW 177, error dismd 239 US 653, 60 L ed 487, 36 S Ct 161; *Sabre v. Rutland R. Co.* 86 Vt 347, 85 A 693; *Carty v. Winooski*, 78 Vt 104, 62 A 45; *Hopkins v. Richmond*, 117 Va 592, 86 SE 139; *State v. Rossman*, 93 Wash 530, 161 P 349; *Quesenberry v. Estep*, 142 W Va 426, 95 SE2d 832; *Huntington v. State Water Com.* 137 W Va 786, 73 SE2d 833; *State ex rel. Morris v. West Virginia Racing Com.* 133 W Va 179, 55 SE2d 263; *State ex rel. Carter v. Harper*, 182 Wis 148, 196 NW 451, 33 ALR 269.

18. *Pierce v. New Hampshire*, 5 How (US) 554, 12 L ed 279; *Atkinson, Kier Bros. Spicer Co. v. Industrial Commission*, 35 Ariz 48, 274 P 634; *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla 311, 31 So 2d 483, 172 ALR 168; *Railroad Com. v. Louisville & N. R. Co.* 140 Ga 817, 80 SE 327; *East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co.* 279 Ill 123, 116 NE 720; *People v. Weiner*, 271 Ill 74, 110 NE 870; *Chicago v. Bowman Dairy Co.* 234 Ill 294, 84 NE 913; *Chicago, T. H. & S. E. R. Co. v. Anderson*, 182 Ind 140, 105 NE 49, affd 242 US 283, 61 L ed 302, 37 S Ct 124; *Eastman v. State*, 109 Ind 278, 10 NE 97; *Singer v. State*, 72 Md 464, 19 A 1044; *State v. Gurry*, 12 Md 534, 88 A 546; *Williams v. Evans*, 139 Minn 32, 165 NW 495, 166 NW 504; *Taft v. Shaw*, 284 Mo 531, 225 SW 457; *Hadden v. Aitken*, 156 Neb 215, 55 NW2d 620, 35 ALR2d 1003; *State v. Drayton*, 82 Neb 254, 117 NW 768; *Wenham v. State*, 65 Neb 394, 91 NW 421; *Re Boyce*, 27 Nev 299, 75 P 1; *State v. Broken*, 19 NM 404, 143 P 479; *People v. Budd*, 117 NY 1, 22 NE 670, 682; *Brewer v. Valk*, 204 NC 186, 167 SE 638, 87 ALR 237; *State v. Locky*, 198 NC 551, 152 SE 693; *State v. Yarboro*, 194 NC 498, 140 SE 216; *State v. Boone*, 84 Ohio St 346, 95 NE 924; *Colletti v. State*, 12 Ohio App 104, 31 Ohio CA 81, err overr 17 Ohio L Rep 364, 64 WL Bull 462; *C. C. Julian Oil & Royalties Co. v. Capshaw*, 145 Okla 237,

