

by railroad companies,²⁰ and the fact that not all the surviving soldiers and sailors of the civil war and their immediate relatives are in indigent circumstances.¹ In passing on the validity of laws regulating the conditions of employment the courts have noticed the fact that more than half of the states have enacted laws on the same subject.²

Effect of Unconstitutional Statutes

117. General Principles.—The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law,³ but is wholly void,⁴ and in legal contemplation is as inoperative as if it had never been passed.⁵ Since an unconstitutional law is void, it imposes no duties⁶ and confers no power or authority on any one;⁷ it affords protection to no one,⁸ and no one is bound to obey it,⁹ and no courts are bound to enforce it.¹⁰ When a judgment

20. *People v. Detroit United Ry.*, 134 Mich. 682, 97 N. W. 36, 104 A. S. R. 626, 63 L.R.A. 746.

1. *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B 946.

2. *People v. Elerding*, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893.

3. *Ex parte Siebold*, 100 U. S. 371, 25 U. S. (L. ed.) 717; *Huntington v. Worthen*, 120 U. S. 97, 7 S. Ct. 469, 30 U. S. (L. ed.) 588; *Threadgill v. Cross*, 26 Okla. 403, 109 Pac. 558, 138 A. S. R. 964; *Ex p. Hollman*, 79 S. C. 9, 60 S. E. 19, 14 Ann. Cas. 1105, 21 L.R.A.(N.S.) 242; *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834, 24 L.R.A.(N.S.) 1260; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 A. S. R. 1061, 17 L.R.A.(N.S.) 486.

Note: 3 Ann. Cas. 581.

4. *Cohen v. Virginia*, 6 Wheat. 264, 5 U. S. (L. ed.) 257; *Ex parte Siebold*, 100 U. S. 371, 25 U. S. (L. ed.) 717; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *State v. Tufly*, 20 Nev. 427, 22 Pac. 1054, 19 A. S. R. 374 and note; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L.R.A.(N.S.) 299; *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 14 Ann. Cas. 1105, 21 L.R.A.(N.S.) 242; *Servonitz v. State*, 133 Wis. 231, 113 N. W. 277, 126 A. S. R. 955.

Note: 22 A. S. R. 649.

5. *Gunn v. Barry*, 15 Wall. 610, 21 U. S. (L. ed.) 212; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 U. S. (L. ed.) 1090; *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834, 24 L.R.A.(N.S.) 1260; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 A. S. R. 1061, 17 L.R.A.(N.S.) 486.

6. *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834, 24 L.R.A.(N.S.) 1260.

7. *Felix v. Wallace County Board of Com'rs*, 62 Kan. 832, 62 Pac. 667, 84 A. S. R. 424.

8. *Huntington v. Worthen*, 120 U. S. 97, 7 S. Ct. 469, 30 U. S. (L. ed.) 588; *Board of Highway Com'rs v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A 471; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L.R.A.(N.S.) 299; *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 A. S. R. 1061, 17 L.R.A.(N.S.) 486. See *infra*, par. 118.

9. *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L.R.A.(N.S.) 299.

10. *U. S. v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 U. S. (L. ed.) 215; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 33 S. Ct. 581, 57 U. S. (L. ed.) 966; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.

of any court is based on an unconstitutional law, it has been said that it has no legitimate basis at all, and is not to be treated as a judgment of a competent tribunal,¹¹ and courts of other states are not required to give to it the full faith and credit commanded by the provisions of the United States constitution as to the public acts, records and judicial proceedings of other states.¹² An unconstitutional law cannot operate to supersede any existing valid law;¹³ and accordingly where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of prior laws will fall with it and will not be permitted to operate as repealing such prior laws.¹⁴ A contract which rests on an unconstitutional statute is void,¹⁵ and creates no obligation to be impaired by subsequent legislation.¹⁶ These general principles apply to the constitutions as well as to the laws of the several states in so far as they are repugnant to the constitution and laws of the United States.¹⁷

118. Protection of Rights under Unconstitutional Laws.—The general rule is that an unconstitutional act of the legislature protects no one.¹⁸ It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one. Consequently, if any person acts under an unconstitutional statute, the general rule is that he does so at his peril, and must take the consequences.¹⁹ It has been declared that an unconstitutional act cannot operate to create an office,²⁰ and any department of government exceeding the limits of its constitutional power acts wholly without authority, and can confer no authority on others;¹ but this doctrine is not enforced rigorously, and it is generally recognized that until a statute has been declared unconstitutional, it is sufficient to confer on an officer acting under it such color of title as will constitute him an officer *de facto*.² Whether an unconstitutional act of the legislature is sufficient to form

(N.S.) 77; *State v. Williams*, 146 N. 341, 81 N. E. 437, 118 A. S. R. 884, C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 10 L.R.A.(N.S.) 1112.

17 L.R.A.(N.S.) 299.

11. *Servonitz v. State*, 133 Wis. 231, 113 N. W. 277, 126 A. S. R. 955.

12. *Vanuxem v. Hazlehursts*, 4 N. J. L. 192, 7 Am. Dec. 582. See JUDGMENTS.

13. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 33 S. Ct. 581, 57 U. S. (L. ed.) 963.

14. *State v. Rice*, 115 Md. 317, 80 Atl. 1026, Ann. Cas. 1913A 1247, 36 L.R.A.(N.S.) 344. As to the effect of partial unconstitutionality in general, see *infra*, par. 121 *et seq.*

15. Note: 64 Am. Dec. 51.

16. *Thomas v. State*, 76 Ohio St.

17. *Cohen v. Virginia*, 6 Wheat.

264, 5 U. S. (L. ed.) 257; *Gunn v. Barry*, 15 Wall. 610, 21 U. S. (L. ed.) 212.

18. See *supra*, par. 117.

19. *Sumner v. Bealer*, 50 Ind. 341, 19 Am. Rep. 718.

Note: 64 Am. Dec. 53.

20. *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 A. S. R. 1061, 17 L.R.A.(N.S.) 486.

1. *Kelley v. Bemis*, 4 Gray (Mass.) 83, 64 Am. Dec. 50 and note.

2. *State v. Carroll*, 38 Conn. 449, 9

the basis for a corporation de facto is a question as to which the courts are not entirely agreed.³ The courts also appear to be divided on the question as to the extent to which moral obligations may be recognized as arising out of unconstitutional laws. Some hold that persons acting under such a statute are recognized as having moral obligations sufficient to sustain appropriation for their payment from the public treasury,⁴ while others take the opposite view.⁵ One result of the unconstitutionality of a statute is to relieve a person from the obligation of complying with provisions inserted in a contract merely to comply with the requirements of such law. In cases of that sort the binding force of the stipulations and provisions so inserted depends on the validity of the statute requiring their insertion, and if this statute is unconstitutional these stipulations, although incorporated in the contract, are not considered as of binding force upon the parties to such contract.⁶ Similarly the acceptance of a license under a state law does not impose on the holder any obligation to comply with any provisions of the statute or regulations prescribed by the state which in fact are repugnant to the constitution.⁷

119. Effect in Criminal Cases.—The general principle that legal effect should not be given to unconstitutional laws⁸ has been applied to criminal statutes which are in violation of the constitution. It has been decided that an offense created by an unconstitutional law is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment, and the courts must liberate a person imprisoned under it just as if there had never been the form of a trial, conviction and sentence.⁹ It has been said that if a state legislature pass an ex post facto law, or a law impairing the obligation of contracts, it remains a harmless enactment on the statute book.¹⁰ There are, however, certain apparent limitations and exceptions to the general principle, occasioned either by the interests of the community or the rights of individuals.

Am. Rep. 409; *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 1 A. S. R. 67; *State v. Pooler*, 105 Me. 224, 74 Atl. 119, 134 A. S. R. 543, 24 L.R.A.(N.S.) 408; *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90, 122 A. S. R. 391, 12 Ann. Cas. 961, 15 L.R.A.(N.S.) 93. See also PUBLIC OFFICERS.

3. See CORPORATIONS.

4. U. S. v. Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 U. S. (L. ed.) 215; *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 1 A. S. R. 67.

5. *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625, 83 A. S. R. 354, 56 L.R.A. 329.

6. *Cleveland v. Clements Bros.*

Const. Co., 67 Ohio St. 197, 65 N. E. 885, 93 A. S. R. 670, 59 L.R.A. 775. 7. *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 S. Ct. 423, 45 U. S. (L. ed.) 619.

8. See *supra*, par. 117.

9. *Ex parte Siebold*, 100 U. S. 371, 25 U. S. (L. ed.) 717; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L.R.A.(N.S.) 299; *Ex p. Hollman*, 79 S. C. 9, 60 S. E. 19, 14 Ann. Cas. 1105, 21 L.R.A.(N.S.) 242.

Note: 3 Ann. Cas. 581.

10. *Craig v. Missouri*, 4 Pet. 410, 7 U. S. (L. ed.) 903.

16A Am. Jur. 2d Constitutional Law § 195

American Jurisprudence, Second Edition August 2017 Update
Constitutional Law

George Blum, J.D., James Buchwalter, J.D., Paul M. Coltoff, J.D., Jefferson James Davis, J.D., Laura Hunter Dietz, J.D., Ronualdo P. Eclavena, J.D., Tracy Farrell, J.D., J.S., Richard Link, J.D., Lucas Martin, J.D., Thomas Muskas, J.D., Jeffrey J. Shampo, J.D., Eric C. Surette, J.D., Susan L. Thomas, and Eleanor L. Grossman, J.D., Glenda K. Harnad, and Anne E. Melley, J.D., LL.M. of the staff of the National Legal Research Group, Inc.

V. Determination of Constitutionality of Legislation
D. Effect of Totally or Partly **Unconstitutional** Statutes
1. Total **Unconstitutionality**

§ 195. Generally

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Constitutional Law ¶1045 to 1047
- West's Key Number Digest, Statutes ¶63

Model Codes and Restatements

- Unif. Statute and Rule Construction Act (1995) § 9

The general rule is that an **unconstitutional** statute, whether federal or state, though having the form and name of law, is in reality no law¹ but is wholly void² and ineffective for any purpose.³ Since **unconstitutionality** dates from the time of its enactment and not merely from the date of the decision so branding it,⁴ an **unconstitutional** law, in legal contemplation, is as inoperative as if it had never been passed⁵ and never existed;⁶ that is, it is void ab initio.⁷ Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.⁸

Since an **unconstitutional** law is void, it follows that generally the statute imposes no duties,⁹ confers no rights,¹⁰ creates no office¹¹ or liabilities,¹² bestows no power or authority on anyone,¹³ affords no protection,¹⁴ is incapable of creating any rights or obligations,¹⁵ does not allow for the granting of any relief,¹⁶ and justifies no **acts** performed under it.¹⁷

Once a statute is determined to be **unconstitutional**, no private citizen or division of the state may take any further action pursuant to its provisions.¹⁸ A contract that rests on an **unconstitutional** statute creates no obligation to be impaired by subsequent legislation.¹⁹ No one is bound to obey an **unconstitutional** law,²⁰ and no courts are bound to enforce it.²¹ A law contrary to the United States Constitution may not be enforced.²² Once a statute has been declared **unconstitutional**, courts thereafter have no jurisdiction over alleged violations.²³ Persons convicted and fined under a statute subsequently held **unconstitutional** may recover the fines paid.²⁴