January 1920

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Recommended Citation
James W. Simonton, The Validity of Special Legislation Granting Admission to a Profession, 26 W. Va. L. Rev. (1920).
Available at: https://researchrepository.wvu.edu/wvlr/vol26/iss2/3

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THE VALIDITY OF SPECIAL LEGISLATION GRANTING
ADMISSION TO A PROFESSION

BY JAMES W. SIMONTON*

THE West Virginia Legislature at various times has enacted
general legislation regulating the admission of persons to
different professions affected with a public interest by providing
the qualifications for admission and prescribing examinations to
be passed by applicants. The constitutional validity of such leg-
islation was sustained by the West Virginia Supreme Court of
Appeals and the United States Supreme Court in the case of
State v. Dent, which upheld the general law passed by the West
Virginia Legislature in 1882, prescribing requirements for ad-
mission to the medical profession. For more than a hundred years
there has been general legislation regulating the licensing of at-
torneys at law and in 1901 the existing general legislation on this
matter was passed. In addition to this rather early general legis-
lation providing requirements for admission to the medical and
legal professions, there are now to be found in the West Virginia
Code general legislative provisions and requirements for the exam-
ination and licensing of veterinary physicians and surgeons, dentists, pharmacists, registered nurses and chiropodists.

In 1915, apparently for the first time, the West Virginia Legis-
lature interfered with the application of the existing general laws
relating to admission to various professions by passing two joint
resolutions which authorized and directed the State Board of
Health to grant licenses to practice medicine to two person spe-
cifically named. The Legislature evidently considered the per-

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125 W. Va. 1 (1884); 129 U. S. 114 (1889).
5W. Va. Code, c. 150, § 29b.
6Acts of W. Va. 1917, c. 32.
8House Joint Resolution No. 7, Acts of W. Va. 1915, p. 597, which recited
that it appeared by affidavits that Anthony R. Brown of Duck, in the County of
Braxton, had practiced medicine and surgery for more than ten years prior to
sons named in these joint resolutions to be competent to practice medicine and surgery and believed that the application of the general legislation then in force would cause hardship to these particular individuals. At the next regular session of the Legislature, meeting in 1917, one more joint resolution of similar import was passed, authorizing and directing the Public Health Council to grant a license to practice medicine and surgery to one other individual.\textsuperscript{9} The same Legislature also passed a joint resolution directing the Veterinary Examining Board to grant a license to practice veterinary medicine and surgery to a person named.\textsuperscript{10} At the regular session of 1919 the West Virginia Legislature extended this type of legislation to admission to the legal profession by passing two joint resolutions which in one instance "requested" and in the other instance "authorized and required" the Supreme Court of Appeals to grant licenses to practice law in all of the courts of the state to two persons named in one of the joint resolutions and to another person named in the other resolution.\textsuperscript{11} At the same session another resolution was passed directing the Public Health Council to grant a license to practice medicine and surgery to a specific individual.\textsuperscript{12} The

\textsuperscript{9} Senate Joint Resolution No. 16, ACTS OF W. VA. 1919, p. 498 authorizing and requesting the State Board of Health to issue to U. G. Morton a license to practice medicine and surgery. The resolution states:

"Whereas, the said U. G. Morton is prevented by a technicality from obtaining a license to practice his profession; and

\textsuperscript{10} Senate Joint Resolution No. 2, ACTS OF W. VA. 1919, p. 498 authorizing and requesting the State Board of Health to issue to U. G. Morton a license to practice medicine and surgery. The resolution states:

"Whereas, the said U. G. Morton is a respectable, honorable and intelligent citizen of said county of Clay, and

\textsuperscript{11} House Joint Resolution No. 10, ACTS OF W. VA. 1919, p. 513 authorizing and requesting the State Board of Health to issue to Dr. Thadeus C. Jones a certificate to practice veterinary medicine and surgery.

\textsuperscript{12} House Joint Resolution No. 14, ACTS OF W. VA. 1917, p. 561. "authorizing, empowering and directing" the Veterinary Examining Board to issue to Dr. Thadeus C. Jones a certificate to practice veterinary medicine and surgery.

\textsuperscript{13} House Joint Resolution No. 11, ACTS OF W. VA. 1915, p. 597. This recited that S. J. Ross of Schultz, Pleasants County, has been engaged in the practice of medicine since 1870 but by an oversight failed to secure a license under the act of 1881 and is prevented by a technicality from obtaining a license and is an ethical practitioner and a useful man in his community, that therefore the State Board of Health be "authorized and requested" to issue to him a license to practice medicine and surgery.
demand for the passage of still other joint resolutions of a similar character was obviated by the passage of an act purporting to be general in its nature and granting relief to those individuals who were seeking admission to the medical profession by means of joint resolutions then pending. The validity of this act will be considered later in this article.

The validity of the specific joint resolutions enacted at the 1915, 1917 and 1919 sessions, directing the admission of specific individuals to the medical or veterinary professions has never come before the courts for consideration, but the validity of the joint resolutions passed in 1919 either authorizing and requiring or requesting the admission of specific individuals to the legal profession did come before the Supreme Court of Appeals upon motions made for the granting of licenses to practice law to the individuals named. As soon as these motions were made before the Court, leave was granted to the West Virginia Bar Association to appear as protestant to the granting of the licenses requested and the question was argued orally before the court by counsel for the West Virginia Bar Association and counsel for the applicants as well as upon briefs submitted.

The decision of the Court which denied the motions to grant the licenses was based on several grounds. In the first place, the court briefly held, in affirmance of its previous decision in the case of In Re Application to Practice Law, that the right to practice law is not one of the citizen’s inherent rights, but is a privilege which may be granted to him within prescribed regulations under the exercise of the state’s police power and that the granting of the license is a judicial, and not a mere ministerial act. A second reason given by the Court for denying the motions was that the Legislature may not by joint resolution give the force and effect of law to a matter which is properly the subject of enactment. Additional reasons of the Court for its decision may best be stated in the words of the Court itself:

"Whereas, the said U. G. Morton is an ethical practitioner, and is a useful man in his community; therefore; be it
Resolved, etc."

In re Atkins, 98 S. E. 888 (1919).
67 W. Va. 213, 67 S. E. 598 (1910). The decision in this case is in accord with the weight of authority. See collection of cases in 6 C. J. 571-2. See also 13 Harv. L. Rev. 235.
Boyers v. Crane, Auditor, 1 W. Va. 176 (1865).
"It is not contended that these joint resolutions have the force or effect of a statute, or that they amount to more than an ascertainment by the Legislature of the qualifications of the applicants to practice law, and their recommendation to the court for licenses. Even if the resolutions had the form required by section 1, art. 6, of the Constitution, for an act of the Legislature, it would nevertheless be unconstitutional for three reasons: (1) It was not read on three separate days in each House as required by section 29, art. 6, of the Constitution; (2) it was not presented to the Governor for his approval or disapproval as required by section 14, art. 7, of the Constitution; and (3) it contravenes section 39, art. 6, of the Constitution. After forbidding the passage of special laws covering a large number of enumerated subjects, the section last cited concludes with this general provision:

"'And in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for.'

"There is now and for several years has been, a general statute intended to cover every case of application for license to practice law in this state. It is not necessary in this opinion to enter upon a discussion of the question to what extent the Legislature may, in the exercise of its police power, regulate the granting of licenses to practice law. It is enough to say that, whatever may be the extent of its power in this respect, it must exercise it by general, and not by special, law. . . . So far as we know, this is the first attempt on the part of an applicant for license to evade or avoid those requirements.'

From the decision in the Adkins Case it is submitted that certain conclusions may definitely be reached respecting the validity of special legislation either in the form of joint resolutions or acts regularly passed which admit specific individuals or a special class of individuals to the practice of a profession, the admission to which is fully provided for by general acts already on the statute books.

In the first place, the conclusion can certainly be reached that neither joint resolutions nor acts regularly passed will avail to procure the admission of specific individuals to the practice of law. This is particularly true in view of the Court's holding that the granting of a license to practice law is a judicial act and not within legislative control.

In the second place, it follows from the decision in the Adkins
Case that the Legislature cannot by means of joint resolutions secure the admission of specific individuals to the medical profession or to any other profession, at least where there is general legislation fully covering the subject. Except on the question of judicial control of admission to the bar, the words of the court in the Adkins Case apply with equal force to joint resolutions authorizing the granting of licenses to practice medicine and surgery or veterinary medicine and surgery. The joint resolutions passed at the sessions of 1915, 1917 and 1919, authorizing the licensing by the Public Health Council (or State Board of Health) without examination, of certain persons as physicians and surgeons, and the resolution passed in 1917 authorizing the licensing by the Veterinary Examining Board of a person as a veterinary physician and surgeon were clearly as much in violation of the constitutional provisions named in the Adkins Case as were the joint resolutions relating to admission to the bar. If the joint resolutions relating to the practice of medicine and surgery and veterinary medicine and surgery were, as we have suggested, unconstitutional and void, then it would seem to follow that the Public Health Council and the Veterinary Examining Board had no authority to grant such licenses except in compliance with the general laws on the subject. Since the general laws provided that all who might then be licensed must comply with certain qualifications and pass specific examinations, it must follow that if any licenses to practice either profession were granted under those void joint resolutions, then such acts of admission were of no effect.  

In this connection, it is interesting to note that because of its inherent power relating to admission to the bar, a court, without legislation to support it, may license persons to become lawyers. The Public Health Council and the Veterinary Examining Board, however, possess no inherent power to license persons to practice medicine and surgery or veterinary medicine and surgery and therefore could do so only in pursuance of the provisions of the general law.

In the third place, the court by dictum says that if an act had been passed in due form which authorized the granting of licenses to specific individuals, it would be void as being special

\[\text{It is possible that any person practicing under such a void license may be subject to prosecution.}\]
legislation in violation of Section 39, Article 6 of the Constitution, which reads as follows:

"The Legislature shall not pass special or local laws in any of the following enumerated cases:"
"The Legislature shall provide by general laws, for the foregoing and all other enumerated cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for."

The dictum of the Court to the effect that a special law in the form of an act authorizing the granting of licenses to practice a profession would be void under the Constitutional provision named above if there were general laws relating to admission to that profession raises what is more than a moot question in view of the fact that at the 1919 session of the West Virginia Legislature an act was passed which seems to come within the dictum of the court. The act in question reads as follows:

"That the public health council of this state is authorized so to do and shall, during the period of one year from the date this act becomes effective, upon the production of satisfactory evidence that the person applying is of good moral character, is proficient in the science of medicine and surgery, has had at least ten years previous experience in the practice in the state of West Virginia and is otherwise qualified and is a bona fide resident of this state and after a practical examination grant and issue to such persons license or certificate of authority to practice the profession of medicine and surgery."

This act became effective May 22, 1919. It is in form a general law applying to a particular class of persons, but nevertheless, had the same object and served the same purposes as the joint resolutions which preceded it. It comes within the language of Justice Paxton of the Pennsylvania Supreme Court, who says: "It is special legislation under the attempted disguise of a general law. Of all forms of special legislation this is the most vicious." It authorizes the granting of licenses to practice medicine and sur-

\[\text{\textsuperscript{18}}\text{Acts of W. Va. 1919, c. 90, p. 319 referred to in note 13, supra.}
\[\text{\textsuperscript{19}}\text{Scowden's Appeal, 96 Pa. St. 422, 425 (1880).}

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urgery to a class of persons, one essential qualification of which is that each member of such class shall have practiced medicine in this state for a period of at least ten years prior to his application for license under the act, without regard to the fact that, except in the case of persons who practiced for ten years prior to 1882, such practice was necessarily carried on in violation of law. It is obvious that this act was not intended to have the limited operation which would result if it applied only to those necessarily old men who had practiced for ten years prior to 1882. It is probably true that many of those who voted for this bill did so without noticing that, as to most of the persons within the class, violation of the law for ten years is a necessary qualification.

If the Legislature is restrained by Article 6, Section 39 of the Constitution from passing a law admitting an individual to the practice of medicine and surgery without meeting the qualifications required in the general law of all other candidates, can it by this apparent general law secure the admission of all who fall within this class? Is not this a special law camouflaged as a general law?

The law is well settled that constitutional provisions forbidding special legislation in specific cases do not make invalid a reasonable and proper classification of the objects of legislation, and that a legislature may classify and make different provisions apply to different classes. In other words, legislation based on proper classification is not special legislation. There are at least two fundamental considerations in determining the propriety of a classification. In the first place the legislature cannot adopt an arbitrary classification, for it must be based on some reason suggested by such differences in the circumstances of the subjects placed in the different classes as to disclose the necessity or propriety of different legislation in respect thereto. It is also settled law that the classification cannot be based on existing or past conditions only, excluding persons or things thereafter coming into the same situation or condition. The West Virginia Supreme Court of

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20See Lewis' Sutherland, Statutory Construction, 2 ed., §§ 202-203, where many cases are cited.
21Stato v. Cooley, 56 Minn. 540, 58 N. W. 150 (1893).
22Lougher v. Soto, 129 Cal. 610, 62 Pac. 184 (1900); Thomas v. Austin, 103 Ga. 701, 30 S. E. 627 (1888); Hetland v. County Commissioners, 89 Minn. 492, 59 N. W. 305 (1903); Murnane v. City of St. Louis, 123 Mo. 479, 27 S. W. 711 (1894); State v. Boyd, 19 Nev. 43, 5 Pac. 735 (1885); Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970 (1891); State v. O'Connor, 64 N. J. L. 36, 22 Atl. 1091 (1891); State v. Trenton, 55 N. J. L. 72, 25 Atl. 113 (1892); Burlington v. Pennsylvania R. R. Co., 56 N. J. Eq. 259, 38 Atl. 849 (1897), affirmed 58 N.
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Appeals has stated the law as to the proper manner of classification in Groves v. County Court,23 where it says:

"Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are special as to place. . . . A general law is that which relates to a whole class of persons, places, relations or things grouped according to some specified class characteristic, binding all within the jurisdiction of the law making power, limited as that power may be by its territorial operation or by constitutional restraint. And it is none the less general though at the date of its passage there may be but one, or in fact not one, individual of the class thus created, provided it be reasonable, and not illusory in its generalization; and provided that the circle or ring of classification be such as to remain open to receive the potentials which may arise bearing the peculiar mark of the class."

To illustrate the latter part of the above rule, a classification of cities or counties based on existing population or upon the population shown by a specified census is void, not because cities or counties may not be classified at all, but because such classification is based on past or existing facts, while if it is based on population reached from time to time it is valid, for other cities or counties may reach the required population and join the class. Is the act under discussion void within this principle? It provides that for a period of one year all those who have practiced medicine ten years or more in West Virginia must be licensed by the Public Health Council on application and after a practical examination, if they show certain other qualifications. The act became effective May 22, 1919, and continues in force one year. It is therefore plain that the classification is based on an existing set of conditions, and that "the circle or ring of classification" is not "such as to remain open to receive the potentials which may arise bearing the peculiar mark of the class." One who had not practiced in this state for at least nine years before the act became effective could never become a member of the class. If the authority given

J. Eq. 547, 43 Atl. 700 (1899); State v. Newark, 57 N. J. L. 83, 30 Atl. 388 (1894); State v. Post, 55 N. J. L. 264, 26 Atl. 683 (1893); State v. Trenton, 56 N. J. L. 469, 29 Atl. 183 (1894); County Commissioners v. Rosche Bros., 50 O. St. 103, 33 N. E. 408 (1893); Siberman v. Hays, 59' O. St. 582, 53 N. E. 258 (1899); Commonwealth v. Patton, 58 Pa. St. 253 (1879); Scowden's Appeal, 86 Pa. St. 422 (1880); Johnson v. Milwaukee, 88 Wis. 383, 60 N. W. 270 (1894).24 W. Va. 587, 26 S. E. 460 (1896)
to the Public Health Council were not limited to one year then
other persons might become members of the class from time to
time and the act would not be open to this objection. But, as the
act stands, the maximum number of this class was fixed as defini-
tely as if they had all been mentioned by name. There clearly
was no emergency which could bring this case within the doc-
trine to this effect announced in some cases.\textsuperscript{24} It is a plain attempt
to grant special privileges and immunities to certain individuals
and is null and void unless the Legislature has power under Article
6, Section 39, to pass special legislation as to all matters not ex-
pressly included within the specific prohibitions of this section or
of some other part of the Constitution.

The act is also special or class legislation for the other reason
above-mentioned, namely, that it does not follow a reasonable
basis of classification and is therefore void unless the Constitution
does not prohibit such special legislation. While a legislature may
designate classes and fix different requirements as to each class,
such classification must not be arbitrary or intended to evade the
Constitution but must be based on differences which might rea-
sonably call for different legislative action. Thus it is conceivable
that a city or county of large population may require regulations
different from those applicable to small cities or counties or that
different regulations may be reasonably imposed on different
classes of business, or on different professions, but there must al-
ways be some such reasonable basis of classification. A purely ar-
bitrary basis will not do. This principle has been stated by the
New Jersey court as follows:\textsuperscript{25}

\begin{quote}
"But the true principle requires something more than the
mere designation by such characteristics as will serve to
classify; for the characteristics which thus serve as a basis
of classification must be of such a nature as to mark the ob-
jects so designated as peculiarly requiring special legislation.
There must be a substantial distinction, having a reference
to the subject-matter of the proposed legislation, between the
objects or places embraced in such legislation and the objects
or places excluded. The marks of distinction on which the
classification is founded, must be such, in the nature of things,
as will, in some reasonable degree, at least, account for or
justify the restriction of the legislation."
\end{quote}

\textsuperscript{24}See Alexander v. Duluth, 77 Minn. 445, 80 N. W. 623 (1899); State v. Gut-
tenborg, 62 N. J. L. 605, 48 Atl. 765, 63 N. J. L. 616, 44 Atl. 758 (1899).
\textsuperscript{25}State v. Hammer, 42 N. J. L. 435 (1890).
The Legislature, if it had full power to classify as it pleased, could nullify all the prohibitions contained in Article 6, Section 39 by passing laws general in form but special in fact. There would seem to be no sound reason for permitting those persons who have been practicing medicine and surgery in this state without a license for a definite number of years, now to secure licenses under terms and conditions different from the terms and conditions which apply to all other persons who may desire such licenses. Certainly practicing a profession for ten years in violation of the law cannot be considered a reasonable basis for classification. The passage of such an act is in itself a practical reason why the Supreme Court of Appeals ought to hold that under the Constitutional provisions above-mentioned the Legislature’s acts are subject to review by the Court.

Provisions to the effect that no special or local law shall be passed where a general law is proper and can be made applicable are found in the constitutions of many of the states though such provisions are usually not stated in such sweeping language as in Article 6, Section 39 of the West Virginia Constitution. Since the language is not the same, these provisions of the West Virginia Constitution do not necessarily bear the same construction as similar provisions in other constitutions.

The courts have always held that a special or local law which violates a specific prohibition such as one of the eighteen given in Article 6, Section 39, is void since such provisions are mandatory and the question as to whether there has been a violation is for the court. But a special act admitting persons to the practice of medicine and surgery does not fall within any of the eighteen enumerated prohibitions of Article 6, Section 39 and therefore such an act is valid unless the court holds it void as violating the general prohibition at the end of that section. A general law governing the admission of candidates to practice medicine has been in force in this state for thirty-seven years and so it has been plainly demonstrated that a general law can be made applicable.

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26 See constitutions of: Arizona, Art. 4, § 19; Arkansas, Art. 5, § 25; California, Art. 4, § 25; Colorado, Art. 5, § 25; Illinois, Art. 4, § 22; Indiana, Art. 4, § 23; Iowa, Art. 3, § 20; Kentucky, §§ 59 & 60; Maryland, Art. 3, § 33; Mississippi, Art. 4, § 87; Montana, Art. 5, § 26; Nevada, Art. 4, § 21; New Mexico, Art. 4, §§ 24 & 26; North Dakota, Art. 2, § 70; Oklahoma, Art. 5, § 69; South Carolina, Art. 3, § 34; South Dakota, Art. 3, § 23; Texas, Art. 3, § 56; Utah, Art. 6, § 26; Wyoming, Art. 3, § 27.

27 See Lewis’ Sutherland on Statutory Construction, 2 ed., § 190.
This is a consideration which the West Virginia court recognized as of importance in the Adkins Case where the Court calls attention to the fact that there has been for many years "a general statute intended to cover every case of application for license to practice law." How then can there be any doubt as to the soundness of the dictum of the court to the effect that had such a joint resolution been passed regularly as a bill it would be unconstitutional and void?

The whole matter depends upon whether, under the general constitutional provision quoted above, the question whether a general law is proper and can be made applicable is a matter solely within the discretion of the legislature or is one which the court has jurisdiction to decide. The fact that the language used seems to indicate a command is by no means conclusive that the legislature can be compelled to obey it, for many constitutional provisions, such as directions to the legislature to pass certain laws, are in effect merely directory though in language they would seem to be commands laid upon the legislature. There is no way to compel the legislature to pass such acts.

Who is to judge whether a special law or a general law is applicable to a particular case? Is it the court or is it the legislature? In the first instance the legislature must judge whether a general law or a special law shall be passed. It must determine which sort of law is properly applicable to the particular circumstances, provided the law is one which does not fall within any specifically enumerated prohibition, for, if it were otherwise, the legislature would be greatly hampered in its action. If the court has a right to interfere at all, it is a somewhat limited right—a right to decide whether the law passed, if special or local, is a plain violation of the constitutional provision. To do this the court must determine whether or not a general law is proper and can be made applicable to the particular case.

The first clause of Article 6, Section 39, following the enumerated prohibitions reads: "The Legislature shall provide by general laws, for the foregoing [the eighteen enumerated cases] and all other cases for which provision can be so made." This clause in effect is not mandatory; for, as stated above, it is well settled that the courts cannot compel the Legislature to enact laws even

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29It is sometimes said such provisions are mandatory but if the legislature fails to act there is no remedy since there is no way in which a legislative body can be compelled to pass an act. See 12 C. J. 741.
where the constitution expressly provides that such laws shall be enacted, nor is there any other authority which can compel the Legislature to act. On the other hand, it seems plain that the last clause, "nor in any other case where the courts have jurisdiction, and are competent to give the relief asked for" is intended to be mandatory and that the courts and not the legislature have the right to determine whether or not they have jurisdiction and are competent to give the proper relief. It follows that little aid can be derived from the consideration of these prior and subsequent clauses of the provision under discussion since the question as to whether the latter has been violated is for the courts, while the courts have no power in case of a violation of the former, and the language in which we are chiefly interested is sandwiched between the two.

The language which is pertinent is: "... and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case." As was previously stated, it is evident that the Legislature must decide in each case whether a general or a special law should be passed and the court cannot be concerned unless a case arises where the Legislature has passed a special law instead of a general law and the validity of such special law is questioned. The Legislature must necessarily be allowed a broad discretion in deciding whether a general or a special act is proper in a particular case, and the court ought not to venture to declare any such special law unconstitutional except in a case where it is clear and obvious that a general law would be proper and can be made applicable. The crucial question is: Was the Legislature intended to have absolute discretion to determine whether a general or a special law will best accomplish the intended purpose or has the court power to declare a law void on the ground that a general law would clearly be proper and can be made applicable?

There seems to be no satisfactory rule or test by which to determine the question as to whether in a given case the courts have power to nullify an act of the legislature in violation of a constitutional provision. As a general rule courts regard constitu-

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29"Generally 'shall' when used in constitutions and statutes, leaves no way open for the substitution of discretion." Baer v. Gore, 79 W. Va. 50, 90 S. E. 530 (1916).

30"It is an established general rule that constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest. Some cases even go as far as to hold that all
tional provisions as presumptively mandatory and will declare acts in violation thereof null and void. But sometimes the courts hold that a legislature has sole discretion to decide a particular question because they say the question is in its nature purely legislative.

Why were provisions such as this inserted in so many of the state constitutions? They were intended to put an end to a form of legislative abuse which caused the vast amount of legislative corruption which existed somewhat generally fifty or sixty years ago when it was said that a term in the legislature frequently resulted in the legislator being able to retire with a comfortable fortune. Many special and local laws were passed for the benefit of private corporations and individuals who frequently secured such passage by means of bribery. Furthermore, local laws applying to small portions of a state were so frequently passed that the great number of such laws caused great confusion

constitutional provisions are mandatory. But more accurately, the test as to whether a provision is mandatory or directory is the intention of those who framed and adopted it. This intention is to be gathered, not so much from a technical construction of particular words, as from a consideration of the language and purpose of the entire clause. There is a strong presumption in favor of its being mandatory. But if it appears from the express terms of a provision, or by necessary implication from the language used, that it was intended to be directory only, it will be so construed.” 12 C. J. 740.


See People v. Wilcox, 237 Ill. 421, 86 N. E. 672 (1905); Maize v. State, 4 Ind. 342 (1853); Thomas v. Clay County Commissioners, 5 Ind. 4 (1854). Judge Schofield of Illinois, who introduced the section of the Constitution of that state prohibiting special and local laws in certain cases, at the constitutional convention said: “The thousands of private charters that have been passed by former Legislatures of the state were not demanded by the people as a body politic at all. They were satisfied with general laws upon the subject. It was in most instances individuals who demanded these special laws—individuals who were not satisfied to do business upon a broad and honest basis upon which all might be equal, but who wanted special favoritism, chances to plunder the public treasury or their fellow men, covered up by a private charter to avoid detection or punishment. Those were the men who demanded these special laws, and at this bidding and by their behests they were passed. It was they who filled our lobby with the instruments and appliances of corruption. It was the applicants for these special favors that made legislation profitable, and enabled legislators, on a salary of $2.00 per day, to at the end of a session display their wealth like successful gamblers.” 1 DEBATES OF THE ILLINOIS CONSTITUTIONAL CONVENTION, 512.

Freund, Standards of American Legislation, 152, says:

“The numerous additional restraints which the nineteenth century brought were all directed against the legislative power, for the executive had practically ceased to be an independent source of authority. Being, moreover, the fruit of experience derived from the legislative history of the states, they were no longer dictated by a fear of suppression of popular liberties. Political danger now meant the danger of practical politics: waste, improvidence, fraud, local and special interests. Popular right was no longer identified with individual right, but rather with common public interests.”
and it was frequently difficult to tell which statute applied to a particular case. Consequently constitutional provisions were provided in many states which prohibited the legislature from passing local and special laws in the classes of cases where the inconvenience had been most marked. These provisions have proved very effective and beneficial and have doubtless aided materially by removing many of the temptations to legislative corruption. It is a fair inference that those who drafted such constitutional provisions intended to put an end to both these forms of abuse so far as possible and to bring all matters so far as practicable under general laws. With this end in view they inserted specific prohibitions as to those matters in which the abuse had been marked and then inserted a blanket provision to cover all other cases which subsequently might arise and could best be controlled by general laws applying alike to the whole jurisdiction. In other words, the intent probably was to limit the power of the legislature to pass local and special laws by means of the blanket provision as well as by the specific prohibitions. It is therefore doubtful whether the general prohibition under consideration was intended to be a mere cautionary restraint on the Legislature. Such restraints are too frequently of little or no effect. Doubtless there is little or no legislative corruption at the present time but there are nevertheless sound reasons why matters, so far as reasonably possible, ought to be covered by general laws which apply alike to all the state and why special privileges and immunities ought not to be granted to individuals, associations or private corporations by legislative action.

In states where such a constitutional provision exists and the constitution is silent as to whether its violation is a question which is within the jurisdiction of the courts, the weight of authority is to the effect that the question as to whether a special or a general law is proper is solely within the discretion of the legislature and that the courts have no power to declare a special or local act void.

54"Unqualified praise, on the other hand, may be given to the practical abrogation of private and special legislation, and although the attempt to secure absolute uniformity of local legislation has not proved equally successful (as the experience of Ohio and Illinois has shown), the benefit of these restrictions has greatly outweighed their occasional inconvenience, caused in the main by the problem of the metropolitan city, which modern constitutions attempt to deal with by a policy of constitutional home rule." FREUND, STANDARDS OF AMERICAN LEGISLATION 157.
because it contravenes this provision. Therefore the dictum of the majority opinion in the principal case is contrary to the weight of authority though it can reasonably be urged that the language of the West Virginia Constitution is such as to make the case fairly distinguishable from cases arising under the constitutions of many of the other states. It is frequently asserted that the question in its nature is purely legislative and not judicial, but as a matter of fact there is no definite line of demarkation between questions which are legislative and those which are judicial, so it is by no means clear why this assertion is so confidently made. Certainly, courts often decide questions which seem as purely legislative as


There are many more decisions in Illinois, Indiana and Arkansas. Undoubtedly the decisions from Illinois have had great influence in other states, particularly in Indiana and Arkansas. In Johnson v. Joliet Ry. Co., 23 Ill. 124 (1859) the court sustained a special law chartering a corporation though the Constitution of 1848 contained a provision requiring such corporations to be chartered under general laws. The ground of the decision was that the legislature had always disregarded this constitutional provision and had chartered a vast number of corporations and it was safer and more just to all parties to sustain these charters since they had been so long unquestioned. When the question as to special laws under Article 4, Section 22 of the Constitution of 1870 arose, the Court relied on this old case. See People v. Harper, 91 Ill. 387 (1878) and Owners of Lands v. People, 113 Ill. 296 (1886).

In a number of states the framers of the constitutions were not content to leave the question under consideration open but expressly provided that whether a special or local act was in violation of the general prohibition should be a judicial question. See constitutions: Alabama, Art. 4, § 105; Georgia, Art. 1, § 4; Kansas, Art. 2, § 17; Michigan, Art. 5, § 30; Minnesota, Art. 4, § 33; Missouri, Art. 4, § 55, Par. 32.

In Missouri the constitution was originally silent as to whether the question was judicial or legislative and the courts, following the majority view, held that whether a special or local law should be passed was a matter solely within the legislative discretion. The constitution was then amended so as to expressly provide that the question should be for the courts to decide. See St. Louis Commissioners v. Shields, 62 Mo. 247 (1876).

In three states the constitution expressly provides that the question shall be for the legislative judgment. See constitutions: New Jersey, Art. 4, § 7, Par. 11; New York, Art. 3, § 18; Virginia, Art. 4, § 64. In all of these states, however, a law such as that under consideration would be contrary to other express provisions and therefore void.

Lack of time and space has prevented any attempt to distinguish the cases cited in note 26, supra, on this ground.
this one, and so if this question is purely legislative, it must be because the courts have so treated it, rather than because it falls within any definite test as to what is a legislative matter. A court could take jurisdiction of such a question and it is not easy to see why it should not do so if the legislature has plainly violated the supreme law. Where a legislature does not pass legislation as directed by a constitutional provision the violation of the constitution is not subject to remedy for the courts cannot enforce specific performance against the legislature but a court can very easily declare an act void which plainly contravenes a constitutional provision. Some courts have adopted this view and have held special or local acts unconstitutional where such acts plainly violated this sort of constitutional provision,\(^{37}\) while other courts in sustaining specific legislative acts have asserted that an act clearly violating this constitutional provision would be void.\(^ {38}\) Curiously enough, if the rule laid down by this respectable minority were fairly applied to all the cases which have been decided under the majority rule it probably would not change the result in a single case. In the cases following the minority view the special or local acts in question which were declared unconstitutional involved matters which clearly ought to have been provided for by general law. In nearly all the cases following the weight of authority the acts in question involved matters where there was some doubt as to whether a general law would be more appropriate, and hence not a plain violation of the constitutional provision.

As stated above, in view of the reasons which gave rise to constitutional provisions like that under consideration, the probable intent of those who drafted such provisions was to prevent the

\(^{37}\)Krause v. Durbrow, 127 Cal. 681, 60 Pac. 438 (1900); City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (1891); Ex Parte Westerfield, 55 Cal. 550 (1880); Thomas v. Railway Co., 100 S. C. 478, 85 S. E. 50 (1915); Tisdale v. Scarborough, 99 S. C. 377, 83 S. E. 594 (1914); Barfield v. Stevens Mercantile Co., 85 S. C. 186, 67 S. E. 158 (1910); Brubaker v. Bennett, 19 Utah 401, 57 Pac. 170 (1899); Stratton v. Commonwealth, 137 Ky. 500, 125 S. W. 1094 (1910); Armstrong v. State, 170 Ind. 188, 84 N. E. 3 (1908). In the Indiana case above the court apparently forgot its former decisions to the effect that this is a matter solely for the legislature.

\(^{38}\)In the following cases the courts state that they are not justified in declaring an act void as violating this provision unless it appears that a general law would be clearly applicable. As a matter of fact this is practically the rule a court always applies in considering whether an act violates the constitution. Richman v. Board of Supervisors, 77 Ia. 513, 42 N. W. 422 (1889); Evans v. Job, 8 Nev. 322 (1873); Quilici v. Strausslinder, 115 Pac. 177 (Nev. 1911); Woodall v. Darst, 71 W. Va. 350, 360, 77 S. E. 264 (1912). These cases at least contain dicta in accord with the above cases and in a proper case these courts are free to follow the rule laid down in the preceding cases and quite probably will do so.
passage of special or local laws where general laws could plainly be made applicable and would in effect be more just and equitable. The usual rule applied by the courts in considering the constitutionality of a statute is that the statute in question will be sustained unless it is a clear violation of the constitution. If this general rule is applied to the question as to whether a special or local law is in violation of the constitutional provision under consideration it would mean that every special or local law would be sustained unless it was clearly apparent that a general law would be preferable, that is, unless it appeared that the legislature had plainly abused its discretion. It would follow that the legislature would have a broad discretion in the matter but would be restrained in the extreme cases in which restraint would be for the good of the public. This would seem to come as near as possible to carrying out the apparent intent expressed by the language of the Constitution. As a practical matter it is difficult to see how such a rule could possibly work any harm. As stated above, if this rule were applied to the decided cases it probably would not lead to a change in the decision of a single case, for the extreme cases seem to have arisen in the states where the minority view has been adopted.

There is a special reason why the minority rule would be preferable in West Virginia, a reason which does not apply in most of the states where the law is settled in accord with the weight of authority. The constitutions of all these states except Texas, Arkansas and North Dakota contain express prohibitions against legislative grants of special privileges, immunities or franchises to individuals, private corporations, or associations while the Constitution of West Virginia unfortunately contains no such prohibition. In Arkansas the legislature is forbidden to suspend the operation of any general law for the benefit of any particular individual, corporation or association while North Dakota has a provision which has a like effect. It follows that the legislatures of Arkansas and North Dakota, as well as of all the other states which follow the majority rule, with the exception of Texas,

39See statement of rule and collection of cases in 12 C. J. 784 et seq. See also article by Prof. Thayer, entitled, "American Doctrine of Constitutional Law," 7 Harv. L. Rev. 129, 144.
40Constitutions: Illinois, Art 4, § 22; Indiana, Art 1, § 23; Nebraska, Art 4, § 15; South Dakota, Art 3, § 23; Oklahoma, Art 5, § 51.
41ARKANSAS CONSTITUTION, Art. 5, § 25.
42NORTH DAKOTA CONSTITUTION, Art. 2, § 70.
are expressly prohibited from doing the sort of thing the Legislature of West Virginia has been doing during the past three sessions. Here is an excellent opportunity for legislative abuse which is not prohibited by our Constitution unless it falls within the provision requiring general laws in all cases where applicable, but if the dictum under consideration is law then this possible defect is effectively corrected.

Some cases indicate a tendency to hold that while the question is solely for the legislature in the first instance, yet where a general law is in existence and has worked well, then, since it has been demonstrated that the general law is applicable, the question ceases to be legislative and becomes judicial. One author states this as the law but most of the cases cited as authority are not in point.\(^4\) The principal case would fall within such a rule for there have been general laws governing the admission of lawyers and physicians to practice for many years, so that it has been demonstrated beyond a doubt that this is the best way to control the matter of admission to these professions. It is doubtful if the rule suggested is sound on principle. How a question which is purely legislative in the beginning becomes judicial merely because the legislature has once exercised its discretion is difficult to see. If the legislature has the sole right to determine whether a general or a special law shall be passed it certainly should have the right to change its decision and decide the other way. The fact a general law had been passed and has worked well would effectively demonstrate that this is a proper way in which to control the situation but should not convert a purely legislative question into a judicial one.

In conclusion it may be stated that there is no test by which one can determine in the first instance whether this is a judicial question or a legislative question. According to the weight of authority it is purely a legislative question but if all these cases are examined it will be found that they were not extreme cases and had the general rule applied by the courts in deciding the constitutionality of statutes been applied to these cases the resulting decision in practically every case would have been the same. In extreme cases the courts have shown a decided tendency to treat the question as a judicial one and there is a respectable body of authority to this effect. There could be no harm in the

\(^4\)See Lewis' Sutherland on Statutory Construction, § 191.
courts taking jurisdiction in such cases and such action would be beneficial to the public by imposing a check on possible legislative abuse. The rule stated in the dictum in the principal case would be particularly valuable in West Virginia because the Legislature would otherwise be free to grant special privileges and immunities to individuals or corporations except in so far as prohibited by other clauses in the Constitution, and the Legislature has unfortunately shown some inclination to grant such special privileges and immunities. There is certainly some ground for apprehending that future legislatures may continue to exhibit a like tendency if it appears that they have such power. The courts by reason of their freedom from political influence and pressure are safe guardians of the rights of the public. Therefore it is submitted that the courts ought to establish as law the rule suggested in the dictum in the Adkins Case.