One may or may not agree with the possibility or even the advisability of adopting all of Professor Gregory's suggestions. But no one interested either in the problems which underlie contributory negligence or contribution, or in the development of an efficient procedure for the settlement of tort claims, can fail to profit immensely by the vast mass of valuable material which the author presents. Particularly those who are interested in law reform will find in it not only valuable suggestions for improvement, but also practical guides to the formulation and enactment of statutes which will rid the law of torts of many of its undesirable features.

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THE EFFECT OF AN UNCONSTITUTIONAL STATUTE. By Oliver P. Field.[1] Minneapolis: University of Minnesota Press, 1935. pp. xi, 355. $5.

IN A country given to legislative experiment, poor draftsmanship and judicial review for constitutionality, many statutes are bound to be held unconstitutional. The varying meanings of the process of "declaring a statute unconstitutional" or unenforceable, the meaning of "unconstitutionality", the legal effect of the tainted statute or its defective part, and of the decision branding it, are the subject matter of this scholarly and effective book.

Its scope is limited, and wisely so, to a few of the outstanding topics in which "unconstitutionality" plays a vital role, such as the status of private and of municipal corporations organized under unconstitutional statutes, the effect of invalid statutes on the rights and duties of public officers acting under them and on their liability to private individuals for their action or refusal to act, the effect of unconstitutional statutory authority on the Government's (state or municipal) liability on public bonds or promises, and on the duty to repay taxes collected under such invalid authority. While this selection of topics is admittedly fragmentary, it is doubtless the most practical method of approach. Other chapters deal more generally with particular legal doctrines incidental to the subject, such as res judicata, stare decisis and the effect of overruled decisions; the effect of reliance on decisions later overruled; mistake of law in making payments or performing services; the effect of mandatory and curative statutes or constitutional amendments on the original defective statute. The study affords Mr. Field the opportunity for some sagacious criticism on the peculiar and unsatisfactory operation of judicial review as a governmental institution, with suggestive proposals for reform, notably, suggested limitations on private initiative in instituting a suit challenging governmental authority in matters not personally affecting the plaintiff, criticisms of the adventitious and sporadic manifestation of the process of review, the Government's exposure to private initiative in timing the challenge and determining its scope, the often prolonged uncertainty as to what the law is, the court's relative ineffectiveness as a supervisory agency in administration.

Whereas formerly it was common to assume, with *Norton v. Shelby County*,[2] that a statute held "unconstitutional" was void ab initio and created no legal effects—except possible liability for those who acted under it—a more practical and just rule has in many instances had to be adopted. The statute is an operative fact, and until it is declared "unconstitutional"—and there are many types of invalidity—it is unsafe

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2. 118 U. S. 425 (1886).

to disregard it. Vested interests are created under it, positions are changed, often irretrievably. Considerations of common sense and equity have therefore developed a variety of rules to temper an assumed logic with justice, and to protect many interests that have arisen in reliance on such tainted statutes. This more flexible view has given both color and uncertainty to a developing field of law and affords a rich opportunity for the social and legal reformer to criticize narrowmindedness and, with much support from enlightened opinions, to guide reform. Doctrines, principles and rules have been invented or evolved by courts to rationalize and explain their departure from rigid adherence to the void ab initio theory, such as the de facto doctrine in the matter of corporations, the rules of estoppel by conduct, effect of mistake of law or fact, unjust enrichment, immunity from collateral attack, equitable distribution of risk. Not that the void ab initio doctrine has no place. Quite the contrary. Few duties of specific performance or criminal penalties can arise out of an unconstitutional statute; recovery on invalid bonds is rare. But a tainted statute is generally unenforced in a particular case only, it may or may not have wider effects, depending on its nature and non-judicial considerations; in another case it may be valid, a change of circumstances may produce a change of decision; the defect may be curable by amendment.[3] Mr. Field suggests that the courts should, besides their negative rejection, include affirmative indications of the effect of their decision, or, in lieu of the inevitable piecemeal and haphazard "vetoes," there should be constant administrative-judicial supervision as a guide to legislation and administration. Others also have pointed out the disadvantages of sporadic and closely limited judicial review and have asked more help from the courts as legislative guides.[4] But given the trial by combat as the framework of the judicial process in government, we shall have either to broaden the scope of judicial review and modify the method of invoking judicial relief, or else insert between the administration and the courts an administrative reviewing hierarchy which shall afford guidance to legislator and administrator on a wider scale than the narrow issues raised in litigation. In any event, however, governmental authorities have not yet realized the opportunity they possess for initiating the occasion and scope of judicial review by themselves suing contesting corporations or individuals or even public authorities for a declaratory judgment of their challenged powers, as is done in England and the Dominions. That also is the indicated method for officers, doubtful of the legality of the authorizing statute or of their proposed invasion of private right, to raise the issue judicially, especially in the face of so antiquated a rule, as that on mandamus the question of constitutionality cannot be raised. Title to office is now frequently thus challenged.[5] In the distribution of risks when an unconstitutional trespass has taken place, neither the officer nor the citizen should bear the risks of the legislature's mistake, but where practical this should fall on the community as a whole.[6] In this connection we find no reference to the important case of *State v. McCook*,[7] invalidating some 1500 Connecticut statutes and to Professor Walter F. Dodd's analytical discussion of the effect of curative legislation.[8]

The fact that several of the chapters of this book have appeared in periodical articles, is no deterrent either to the unity or practicality of the treatment. Mr. Field has opened a most fruitful area to further inquiry and to corrective judicial and legislative therapeutics. His part of the task has been performed with signal success.

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3. See Comment (1926) 39 HARV. L. REV. 373; (1931) 40 YALE L. J. 1101.
4. See Arnold, *Trial by Combat and the New Deal* (1934) 47 HARV. L. REV. 913.
5. pp. 79-83.
6. p. 130.
7. 109 Conn. 621 (1929).
8. (1929) 3 CONN. B. J. 217.

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