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Survey of Articles I-VII of the Proposed Draft for a Revised South Carolina Constitution

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SURVEY OF ARTICLES I - VII OF THE PROPOSED DRAFT FOR A REVISED SOUTH CAROLINA CONSTITUTION

I. Introduction

In June, 1969, the Committee to Make a Study of the South Carolina Constitution of 1895 submitted its final report to the Governor and General Assembly. Included in that report was a proposed new state constitution. The purpose of this paper is to point out the significant changes in the present constitution should the first seven articles of the proposed seventeen article constitution be adopted. It is anticipated that a later paper will present a similar treatment of the remaining articles. This present survey does not attempt to evaluate the desirability of the Committee's proposals; rather, it merely places them in perspective with the provisions of the present constitution in order to illustrate the changes and problems they would or might create.

A substantial amount of the committee's revision is a mere "recodification" of existing provisions of the present Constitution for better organization. Many provisions were retained intact by the Committee and a substantial number of sections were altered only to clarify or modernize the language used. A number of provisions were considered legislative rather than constitutional concerns and were, together with the large number of local amendments to present sections, omitted entirely. Some recommended changes such as the proposed provision for the election of the members of the Legislature, merely incorporate recent Constitutional decisions of the United States Supreme Court.

On certain specific but important questions, substantive changes in the fundamental law were made. The Committee's recommendations concerning urban renewal, the office of Comptroller General, and the number of terms a Governor may serve are among the most significant.

Extensive and basic changes and reorganization were effectuated by the proposals on local government, finance and property taxation, and, to a lesser degree, the Judicial Department. This

paper will present an article by article summary of these changes.

II. Article I—The Declaration of Rights

The Committee recommended several changes in the present Declaration of Rights. Though the changes recommended would not cause major reform in any present state activity, they are nonetheless interesting for they attempt to protect the rights of the people from forms of encroachment not anticipated in 1895.

A. Invasions of Privacy, Searches

To article 1, section 16 of the Constitution of 1895, which contains the same language as the fourth amendment to the Constitution of the United States, the Committee would add two paragraphs. The first of these would protect the right of the people to be secure from unreasonable invasions of privacy.[1] For years South Carolina has recognized the common law tort action for invasion of privacy.[2] Presumably the Committee's provision is directed solely at state action and thus it would neither enlarge nor restrict the civil cause of action; however, it would limit government or government-authorized investigation or retention of information. But because of the broadness of the language used (unreasonable invasions of privacy), it is difficult to say exactly what state practices might be proscribed by the new provision, which is an apparent invitation to the South Carolina judiciary to develop a constitutional common law of privacy. On the federal level, the United States Supreme Court has been groping for a concept of constitutional privacy and several recent decisions of that Court perhaps shed some light on the scope of the proposed new provision.

In *Griswold v. Connecticut*[3] the Court struck down a Connecticut anti-birth control statute on the theory that it violated the privacy of the marital bedroom. This heretofore unknown constitutionally protected right was derived from the penumbras of the specific guarantees of the Bill of Rights. Since *Griswold*

1. Committee to Make a Study of the South Carolina Constitution of 1895, Final Report, Art. 1, § J (1969). (Hereinafter cited as Report).

2. The right of privacy action was first acknowledged in South Carolina in Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940). The cause of action is discussed and its elements defined in Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). It should be noted, however, that the power of states to protect the privacy of their citizens is severely limited where the right to privacy conflicts with the first amendment rights of free speech and press. Time, Inc. v. Hill, 385 U.S. 374 (1967).

3. 381 U.S. 479 (1965).

the Court has not used the penumbral approach to expand the right of privacy. Indeed, in *Katz v. United States*[4] the Court declined to follow the *Griswold* approach. There the petitioner, who had been convicted of transmitting wagering information by telephone, argued, inter alia, that the government had violated his right to privacy by eavesdropping on his telephone conversation. The Court implied that there is no general constitutional right to privacy at all.[5] It further said that the Constitution protects an individual's privacy only from governmental interference.[6]

> [T]he protection of a person's *general* right to privacy —his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states.[7]

In *Stanley v. Georgia*[8] the appellant was convicted under a Georgia statute of knowingly possessing obscene material after federal and state agents found three stagg films while searching his home for evidence of bookmaking activity. The Court reversed the conviction and held that the mere private possession of obscene material could not constitutionally be made a crime.[9] The Court reasoned that, although the first amendment does not protect obscenity, it does protect the right to receive information and ideas and that this right to receive takes on added dimension when exercised in the privacy of one's own home.[10] Perhaps the language proposed by the Committee is nothing more than a recognition of the fundamental right described in *Stanley*—the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[11] As pointed out by the Supreme Court in *Katz*, "Virtually every governmental action interferes with personal privacy to some degree."[12] The Committee, as a matter of policy, drew the line between reasonable and unreasonable interference and left it to the courts to balance the interests of the state against those of the individual. It also left open the question of whether the right extends only to state action.

4. 389 U.S. 347 (1967).
5. *Id.* at 350.
6. *Id.* at 350 n.5.
7. *Id.* at 351.
8. 89 S. Ct. 1243 (1969).
9. *Id.* at 1247-48.
10. *Id.* at 1248.
11. *Id.*
12. 389 U.S. at 350 n.5.

The second addition recommended by the Committee was the following sentence:

> Warrants issued in the execution of laws relating to the general health, safety, and welfare shall be issued upon such cause as the General Assembly shall by law determine.[13]

The purpose of this provision is to allow the General Assembly to set standards for the issuance of warrants to be used by officials in making inspections of the physical condition of private property where the owner refuses to give his consent. The inclusion of the provision was probably brought about by the United States Supreme Court's opinion in *Camara v. Municipal Court of City and County of San Francisco*[14] where it was held that building inspectors could not gain access to private property over the protest of the owner without a warrant issued upon a showing of probable cause. The Court went on to explain, however, that "probable cause" could take into account the nature of the search or inspection and that the necessary probable cause would exist, "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[15] Thus, the effect of the provision would be merely to insure that such searches will not fall within the general restrictions of the first paragraph of proposed section J dealing with searches in criminal investigations.

B. Grand Jury Indictment, Double Jeopardy, Self-Incrimination

The Committee would make three separate provisions of article I, section 17 of the present constitution. The part dealing with the right to indictment by the grand jury would be slightly altered. The requirement would be effective only when the punishment authorized exceded thirty days, instead of two hundred dollars[16] or thirty days. The defendant would also be allowed to waive presentment to the grand jury. This represents a change from the position of many courts,[17] possibly ours included,[18]

13. *Report,* Art. 1, § J. Although the language of the provision is broad enough to include searches for evidence of criminal activity, the first paragraph of the article and the fourth and fourteenth amendments make it clear that if a criminal charge is contemplated, nothing short of probable cause would be sufficient to justify the issuance of a warrant.
14. 387 U.S. 523 (1967).
15. *Id.* at 538.
16. Article I, section 17 was amended in 1963 to raise the fine permissible without grand jury indictment from $100 to $200.
17. *E.g.,* Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928).
18. *See* State v. Hann, 196 S.C. 211, 12 S.E.2d 720 (1940).

that the right to presentment to a grand jury and trial only on its indictment was not only a personal right but also an expression of the state's public policy that could not be waived by a defendant. The double jeopardy and self-incrimination portions of article I, section 17 would be retained intact.[19]

C. Jury Trial, Venue

The Committee's proposal on the right to jury trial combined three sections of the present constitution,[20] and made only two changes in the requirements of those sections. First, the General Assembly would determine the number of jurors in courts below the circuit court, whereas now article V, section 22 sets the number of jurors in inferior courts at six. The second change would remove the disqualification of those over the age of sixty-five.[21] This change would reflect the lengthened life expectancy of the state's population and certainly a senior citizen in poor health would be excused from jury duty.

Section 2 of article VI of the Constitution of 1895 would be transferred into the Declaration of Rights with a minor change. The right of either party in a civil or criminal case to a change of venue would be preserved. The requirements that venue be changed to another county within the same judicial circuit, and that venue not be changed in criminal cases prior to grand jury indictment would be deleted. The deletions were dictated by the possibility that an urban circuit might have only one county and that criminal defendants who are entitled to a change of venue might waive presentment to the grand jury.

D. Urban Renewal

The prohibition of article I, section 17 against the taking of private property for private use without the consent of the owner was changed by the Committee in the proposed article on eminent domain. Urban renewal and the taking of private property for resale would be allowed under the conditions stated there.[22] Thus, the rule of *Edens v. City of Columbia Housing Authority*[23] that land taken for resale to private parties is taken for private use and therefore forbidden by article I, section 17, would be changed and South Carolina would be in accord with

19. REPORT, Art. I, § L.
20. S.C. CONST. art. I, § 18, art. I, § 25, art. V, § 22.
21. REPORT, Art. I, § N.
22. REPORT, Art. XI, § E.
23. 228 S.C. 563, 91 S.E.2d 280 (1956).

all other states in permitting urban renewal projects and would cease to be the only state in which the practice is not generally permissible in clearing slum areas. Heretofore, several local amendments to article I, section 17 have been passed to permit specific urban renewal projects. A general change such as that proposed by the Committee would make such local amendments unnecessary.

E. Procedural Due Process in Administrative Hearings

The only new section that the committee recommended contained the following language:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard; nor shall he be subject to the same official for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode or procedure prescribed by the General Assembly, and he shall have in such instances the right to judicial review.[24]

Article I, section 5 of the South Carolina Constitution and the fifth and fourteenth amendments of the United States Constitution provide substantial protection in assuring due process of law.[25] In light of the increasing responsibilities and powers of governmental agencies, the Committee's recommendation, which would provide broad and clearly stated protection from arbitrary or illegal administrative rulings, should be a welcome addition to the Declaration of Rights.

III. Article II—Suffrage and Elections

The present requirement that electors be state citizens and 21 years of age would remain unchanged.[26] In accordance with the recent trend elsewhere,[27] the residence requirements for voting in federal and state elections would be shortened to six months residence in the state, three months in the county, and a one-month residence in the precinct,[28] from the present requirements

24. Report, Art. I, § W.
25. *E.g.*, Shealy v. Seaboard Air Line Ry., 131 S.C. 144, 125 S.E. 622 (1924).
26. Only Georgia, Kentucky, Alaska, and Hawaii have a minimum voting age of less than 21 years. Council of State Governments, The Book of the States 1968-69, at 30 (1968).
27. *Id.* at 19.
28. Report, Art. II, § D.

of one year, six months and three months, as set by the 1963 amendment to article II, section 4. The qualification for municipal electors would be made the same as for state electors with the additional requirement of one month's residence within the municipality,[29] eliminating the present discrepancy resulting from the requirement of four months' residence within the corporate limits.[30]

The Committee recommended change in the present registration requirement that one must either pass a literacy test or own and have paid taxes on property assessed at more than $300.[31] It would provide that the General Assembly may establish a literacy test by statute.[32] It would further require that the General Assembly disqualify by law, persons convicted of "serious crimes" and those mentally incompetent. But it would allow the Legislature to provide that the disqualification for conviction of crime be removed at some point subsequent to the individual's release from prison.[33] Article II, section 6 now requires disqualification upon conviction of any of an assortment of named crimes and that disqualification can be removed only by pardon of the Governor.[34] It has been argued convincingly that permanent disenfranchisement upon conviction of crime is neither necessary nor wise in the case of persons who have been rehabilitated.

The details providing for the registration of voters would be left to the General Assembly. The proposed constitution would require only that the period of registration should not be less than 10 years, that there be provision made for registration every year, and that the registration lists be public.[35] This would allow the General Assembly to determine the time of closing of

29. REPORT, Art. II, § E.
30. S.C. CONST. Art. II, § 12.
31. S.C. CONST. Art. II, § 4(d).
32. REPORT, Art. II, § F. The literacy test is still considered a legitimate control of suffrage, both in state and national elections, so long as it is not used to discriminate. Gray v. Sanders, 372 U.S. 368 (1963). Louisiana v. United States, 380 U.S. 145 (1965) indicated that any test provided by the General Assembly should explicitly state the standard required leaving little to the discretion of the registrar. In Gaston County v. United States, 89 S. Ct. 1720 (1969), a case decided under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965), the Court said that a literacy test could result in discrimination where Negroes had been required to attend inferior schools.
33. REPORT, Art. II, § G.
34. *See* Green v. Board of Elections, 380 F.2d 445 (2d cir. 1967), *cert. denied*, 389 U.S. 1048 (1968), where a New York statute requiring permanent disqualification on conviction of certain crimes successfully withstood an equal protection argument.
35. REPORT, Art. II, § H.

the registration books,[36] the composition and function of the election boards,[37] and the status of the registration certificate,[38] all of which the Committee considered legislative rather than constitutional concerns.[39] Article II, section 5, providing for the right to appeal denial of registration to the Court of Common Pleas, would be altered slightly by giving a right of appeal to any court of record.[40]

The Committee also recommended that a general mandate be given to the General Assembly to provide for the proper functioning of the election process.[41] That section would simply make providing for a sound election process a constitutional duty of the General Assembly.

IV. ARTICLE III—THE LEGISLATIVE DEPARTMENT

A. Apportionment

Since the decisions of the Supreme Court in *Reynolds v. Sims*[42] and *Lucas v. Forty-Fourth General Assembly of Colorado*,[43] apportionment has been a very difficult political problem in South Carolina as well as in most other states. In drafting its recommendation on the subject, the Committee did not attempt to formulate a constitutional solution to the political problem. Rather it altered the present provisions sufficiently to conform with federal requirements, leaving to the Legislature the determination of the method in which the required periodic reapportionment should be effected.

Thus the Committee did not have to make extensive change in the present provisions concerning the House of Representatives. The present membership of the House, set at 124 by article III, section 3 and the requirement of article I, section 2 and article III, section 3—that representatives be apportioned by population—would be retained. The requirement that each county constitute an election district[44] was altered to allow the Legislature to provide for election districts not made up solely of

36. S.C. CONST. Art. II, § 11.
37. S.C. CONST. Art. II, § 8.
38. S.C. CONST. Art. II, § 4(f).
39. S.C. CONST. Art. II, § 4(b).
40. REPORT, Art. II, § I. *See* Louisiana v. United States, 380 U.S. 145 (1965). Lack of an established method for appealing denial of registration was a factor in finding of unconstitutionality of election laws.
41. REPORT, Art. II, § J.
42. 377 U.S. 533 (1964).
43. 377 U.S. 713 (1964).
44. S.C. CONST. Art. III § 3.

one county so long as the district was a compact and contiguous territory.[45] The Committee's proposal is that only as far as possible under the federal decisions should each county have at least one representative,[46] rather than the present absolute requirement that each county have at least one representative.[47] Although one purpose of the change in the provision on House election districts was to allow them to be enlarged,[48] the recommendation would at the same time permit a reduction in size of the districts and the creation of up to 124 such districts.

In its provisions regarding the composition of the Senate, the Committee retained the four year term of office and the forty-six senator limit on membership implicit[49] in article III, section 6.[50] The recommended provision allows the General Assembly to create any number of senatorial election districts.[51] No provision was made as to the residence of senators within a particular county in an election district; the only requirement is that senators reside within the district in which elected.[52] Presumably methods of spreading the senators among the counties in the district such as the "numbered seat"[53] would continue to be legitimate.

Both the House and the Senate would be subjected to the requirement, now applicable only to the House, of reapportionment within the first year following the publication of the decennial census. The new apportionment would take effect in the next following election.[54]

The present provision for filling vacancies in the House and Senate would be changed sufficiently to allow the General Assembly to determine by law the procedure to be followed when less than one year remains in the term when the vacancy occurs.[55]

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45. REPORT, Art. III, § C.
46. REPORT, Art. III, § D.
47. S.C. CONST. Art. III, § 4. *But see* O'Shields v. McNair, 254 F. Supp. 708 (D.S.C. 1966).
48. *See* REPORT, Art. III, § D (Comment).
49. For discussion of the effect of Article III, § 6, in limiting Senate membership subsequent to *Reynolds* see *O'Shields v. McNair*, 254 F. Supp. 708 (D.S.C. 1966); State *ex rel.* McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967).
50. REPORT, Art. II, §§ E, F.
51. REPORT, Art. III, § F.
52. REPORT, Art. III, § G. It is substantially the same provision as the present article III, section 7, as amended in 1967.
53. S.C. CODE ANN. §§ 23-281 to -285 (Supp. 1968).
54. S.C. CONST. Art. III, §§ 3, 5; *Report*, Art. III, § H.
55. S.C. CONST. Art. III, § 25; *Report*, Art. III, § I.

B. Veto Power

The Committee would include the provision establishing the veto power of the Governor in the article on the Legislature with only two minor changes. It would make clear that the Governor's item veto applied only to bills appropriating money and would extend the time in which the Governor may exercise his veto from three to seven days.[56]

C. Legislative Election of the Comptroller General

To aid the Legislature in budgeting and controlling the expenditure of state funds, a constitutional change in the status and function of the office of Comptroller General was recommended. The Comptroller General would be elected by the Legislature and would be responsible to it, his office functioning as a legislative agency rather than an executive one.[57] Whereas the present function of the office is primarily pre-auditing or insuring that the expense is authorized before payment is made,[58] the Committee's recommendation would give the office the responsibility of post-auditing to insure that accounts balanced and funds were properly spent. The Comptroller General would also perform such other duties as the Legislature prescribed. It was felt that the Legislature, which is responsible for appropriations, should have its own agency to give advice and insure that the funds were properly spent. This change would conform with a recent trend which saw Colorado, Kentucky, Wisconsin, and South Dakota transfer post-auditing responsibility to a legislative agency in the years 1966 and 1967.[59] Some change in the office of Auditor would be indicated. He presently has responsibility for post-auditing and making annual reports to the Governor,[60] which reports may then be sent to the General Assembly.[61]

V. Article IV—The Executive Department

As the services provided by state governments have expanded, the duties and responsibilities of the chief executives of many

56. S.C. Const. Art. IV, § 23; *Report,* Art. 3, § U.
57. The State, Oct. 13, 1967, at 10A, Col. 1.
58. S.C. Code Ann. §§ 1-841 to -864 (1962).
59. Council of State Governments, The Book of the States 1968-69, at 30 (1968).
60. S.C. Code Ann. § 1-882 (1962).
61. S.C. Code Ann. § 1-883 (1962).

states have shown corresponding increases.[62] Accordingly, the Committee's provisions strengthened the Governor's office to aid him in meeting these responsibilities.

The first substantial change would be the deletion of the present prohibition against a governor's succeeding himself. The Committee's proposal limiting the number of terms a governor can serve is the same as the twenty-second amendment's limitation on the number of terms a president may serve. It would allow two full terms provided the candidate has not served more than two years of his predecessor's term.[63] The change would also be effective for the office of Lieutenant Governor.[64]

Several changes were recommended in the present provisions concerning succession to the offices of Governor and Lieutenant Governor. A vacancy in the office of Lieutenant Governor would be filled immediately by the election of a Senator by a majority of the Senate.[65] Therefore, that office could be vacant for only a short period and any vacancy in the office of Governor would always be filled by the Lieutenant Governor.[66] In the event of temporary absence or disability of the Governor, the Lieutenant Governor would exercise only emergency powers[67] as opposed to the requirement of article IV, section 9 of the present constitution that he perform the duties of the Governor in that situation.

A new provision would give the supreme court original and exclusive jurisdiction to determine the absence or disability of the Governor or Lieutenant Governor[68] to avoid the possibility that an incapacitated man might hold office for an extended period of time.

The Governor would retain his present power to grant reprives and to commute death sentences, but the constitutional material establishing and regulating the Parole Board[69] would

62. *See* GOVERNOR'S COMMITTEE ON CONSTITUTIONAL REVISION AND GOVERNMENTAL REORGANIZATION, STATE BY STATE SUMMARY OF CONSTITUTIONAL REVISION AND GOVERNMENTAL REORGANIZATION—JANUARY 1, 1963 TO JUNE 30, 1967, PART II (1968).
63. REPORT, Art. IV, § C. Louisiana (1966), Oklahoma (1966), Missouri (1965), and Pennsylvania (1967) have recently adopted constitutional amendments to allow governors to hold two consecutive terms.
64. REPORT, Art. IV, § H.
65. REPORT, Art. IV, § I.
66. REPORT, Art. IV, § K.
67. *Id.*
68. REPORT, Art. IV, § L.
69. S.C. CONST. Art. IV, § 11.

be deleted, leaving its organization and function for the determination of the General Assembly.[70]

Article IV, section 12 of the constitution of 1895, contains the following language concerning the Governor: "He shall take care that the laws be faithfully executed in mercy." The meaning of the provision has not been explained by our court, but its wording and position following the section giving the Governor power to grant reprives or commute death sentences suggest that it dealt with his exercise of that power; the section was once cited by our court in explaining that mercy rested with neither the trial nor appellate courts but with the Governor.[71] The Committee has changed the section by deleting the words "with mercy" and adding a second sentence that would give the Governor direct access to the courts either to enforce compliance with or to enjoin violation of "any constitutional or legislative power or duty by any officer, department or agency of the state,"[72] excepting the General Assembly or supreme court. This section would give needed authority and control to the Governor.

VI. Article V—The Judicial Department

Recent trends in the reformation of state judicial systems have been toward the establishment of uniform systems and the abolition of special courts serving geographic areas.[73] The Committee recommendations on the judicial system are in keeping with that trend.

Only the supreme court and the circuit court retain constitutional status. County and other inferior courts would be created and regulated by general law. The jurisdiction of inferior courts would no longer necessarily be limited to one county and there would be no constitutional provision concerning the organization, powers, or jurisdiction of any such inferior courts except that the General Assembly provide for them by general law[74] and that the Chief Justice be administrative head of all courts of the state.[75] This approach would result in the deletion of

70. Report, Art. IV, § 11.
71. State v. Floyd, 174 S.C. 288, 330, 177 S.E. 375, 392 (1934).
72. Report, Art. IV, § O.
73. *See* Dobbs, *Court Reform—Suggested Legislative Action under the 1962 Constitutional Amendment*, 42 N.C.L. Rev. 858 (1964); Overton, *The Judicial System in Tennessee and Potentialities for Reform*, 32 Tenn. L. Rev. 501, 541 (1965).
74. Report, Art. V, § A.
75. Report, Art. V, § D.

present provisions and amendments concerning county courts,[76] magistrates,[77] and magistrates courts.[78] The present provision leaving the status of probate courts to legislative determination[79] would be retained.[80] Article V, section 1 now gives the legislature power to create inferior courts but does not require that it be done by general law or that the courts so created be administered by the Chief Justice.[81]

The Committee recommended that the size,[82] method of selection of judges,[83] and quorum of the supreme court remain unchanged.[84] The provision of article V, section 12 dealing with an *en banc* court would be eliminated. The supreme court would make rules governing the practice and procedure in all courts, and the Chief Justice would be administrative head of all courts. However, the Chief Justice would be authorized to appoint an administrator of the courts and such assistants as might be necessary to assist him in the administration of the courts.[85]

Selections 15 and 18 of article V, which gave civil and criminal jurisdiction respectively to the court of common pleas and the court of general sessions, would be combined into one section granting jurisdiction to the circuit court.[86] The jurisdiction granted there would extend to all cases, civil and criminal, and would effect no change in the present original or appellate civil jurisdiction of the circuit court. The circuit court's original criminal jurisdiction, however, would be enlarged to include offenses that are presently in the exclusive jurisdiction of the magistrates.[87] The Committee's proposal also would allow the

76. S.C. CONST. Art. V, §§ 1, 1A.
77. S.C. CONST. Art. V, § 20.
78. S.C. CONST. Art. V, §§ 21, 23.
79. S.C. CONST. Art. V, § 19; Greenfield v. Greenfield, 245 S.C. 604, 141 S.E.2d 920 (1965).
80. REPORT, Art. V, § H.
81. The requirement of the consent of the voters for establishment of a county court would also be eliminated.
82. Twenty-four states have seven members on their highest court and seventeen including South Carolina, have five. At least nineteen states have now established intermediate appellate courts. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1968-69, at 103 (1968).
83. For a listing of the methods for selecting judges in each state, see COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1968-69, at 110-11.
84. REPORT, Art. V, §§ B, C.
85. REPORT, Art. V, § D. During the years 1966-67, Idaho, Oklahoma, Utah, Vermont, and Louisiana created administrative offices for the courts. That brought to thirty-five the number of states which had such offices. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1968-69, at 103 (1968).
86. REPORT, Art. V, § G. The same merger of the civil and criminal courts is expressed in section A of article V of the report.
87. *See* State v. Castleman, 219 S.C. 136, 64 S.E.2d 250 (1951).

General Assembly to provide for direct appeal from the county courts to the supreme court in cases of riot, assault and larceny.[88] The constitutional requirements of two terms of civil and criminal court in each county each year[89] would also be deleted.

The present number of judicial circuits would be made a constitutional limit. However, the General Assembly would have authority to create up to five additional at large judgeships, the judges to be assigned by the Chief Justice to those circuits in which they are needed.[90]

To provide a means for the removal of a judge from office because of inability to perform his duties or for misconduct,[91] the Committee suggested that the supreme court be given the power to remove any judge after a hearing for misconduct or persistent failure to perform his duties and to retire any judge for permanent disability interfering with the performance of his duty.[92]

The present provisions concerning the clerks of court, solicitors, sheriffs, and coroners would be deleted in favor of a provision directing the General Assembly to provide for sufficient officials to enforce the law and carry on the administration of the courts. The provision makes it clear, however, that the Attorney General should have some degree of control over solicitors for it gives him authority to supervise all prosecutions.[93]

VII. ARTICLE VI—FINANCE, TAXATION, AND BOND INDEBTEDNESS

A. Property Taxes

The South Carolina system of property taxation has been the object of considerable criticism in recent years.[94] The Committee recommended basic change in the present system. Constitutional

88. REPORT, Art. V, § M.
89. S.C. CONST. Art. V, § 16.
90. REPORT, Art. V, § I.
91. A number of states have constitutionally established procedures for the removal of judges without endangering the independence of the judiciary. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1968-69, at 104 (1968).
92. REPORT, Art. V, § M. The California approach to the problem is to establish a commission composed of members of the judiciary and others to hear complaints about judges and it is the plan most often copied. *See* CAL. CONST. Art. VI, §§ 8, 18; CAL. GOV'T. CODE §§ 68-701 to -755 (Supp. 1968). *See also* Traynor, *Who Can Best Judge the Judges,* 53 VA. L. REV. 1266 (1967); Frankel, *Removal of Judges: California Tackles an Old Problem,* 49 A.B.A.J. 166 (1963).
93. REPORT, Art. V, § P.
94. *E.g.,* P. ALGEA, THE ROLE OF THE STATE OF SOUTH CAROLINA IN THE TAXATION OF PROPERTY (1965).

provisions now require that the General Assembly provide for one assessment of property for taxation,[95] that the assessment be based on the actual or market value of the property,[96] and that the rate be uniform and equal within the subdivision levying the tax.[97] A substantial reason for the dissatisfaction with the present system is not its constitutional foundation but rather the inequities resulting from its administration: as the foreword of the Third Annual Report of the Tax Study Commission said, "The property tax, as spelled out by constitutional provision and by statute, bears no resemblance to that actually in existence."[98]

Assessment of the personal property of manufacturing industries, of merchants' inventories, equipment, furniture and fixtures, and of public utilities, is made by the South Carolina Tax Commission. The owners of these properties bear a disproportionate share of the tax burden because the state's assessment ratio is different from the assessment ratio of the county that assesses other property therein. Although the Legislature has acted to reduce the assessment ratio on these properties,[99] a discrepancy inevitably results so long as the assessment ratios used by the various counties are not uniform.[100] Further inequities arise from the fact that within many counties, the assessments are not uniform.[101]

Therefore, the Committee would retain the requirements that the General Assembly should provide for the assessment of all property not exempted from taxation by the constitution,[102] and that the one assessment be used for all levies.[103] It would also require that the assessment rate should apply uniformly throughout the state,[104] clarifying the requirement of article 1, section 10, and reversing the interpretation of that section that it required uniformity only within the subdivision levying the tax.[105]

95. S.C. CONST. Art. X, §§ 1, 13; S.C. CODE ANN. § 65-1503 (1962).
96. S.C. CONST. Art. 1, § 6, Art. III, § 29, Art. X, § 5(9); S.C. CODE ANN. § 65-1648 (1962).
97. S.C. CONST. Art. X, § 1; Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947); Nettles v. Cantwell, 112 S.C. 24, 99 S.E. 765 (1919).
98. P. ALGEA, *supra* note 94, at 77.
99. S.C. CODE ANN. §§ 65-1667 to -1668 (Supp. 1968).
100. For a sample of 1961 county assessment ratios see P. ALGEA, *supra* note 88 at 67.
101. *Id.*; Discrimination by local officials in making the assessment, so long as the discrimination is not required or sanctioned by the statute, does not make the tax void. Fuller v. Payne, 96 S.C. 471, 81 S.E. 176 (1914).
102. REPORT, Art. VI, § A.
103. REPORT, Art. VI, § D.
104. REPORT, Art. VI, § A.
105. Smith v. Robertson, 210, S.C. 99, 41 S.E.2d 631 (1947).

The second major change in property taxation would be the removal of the requirement that assessment be determined from actual or market value. The Committee would allow the General Assembly to establish classifications of real or personal property for which different bases might be used.[106] For example, under this provision, the General Assembly might determine to assess rural land according to its market value as is presently required, or it could establish some other standard such as the value that the land has for agricultural, horticultural, or forest use.[107] The use value basis of assessment would be much preferred by property owners on the fringes of metropolitan areas who feel that the assessment of their property at its sale value constitutes a hardship when they use it for farming or growing trees. On the other hand, the lower tax burden imposed on such property would encourage withholding it from its best use and contribute to the rising price of land required for industrial and residential purposes.[108]

The Committee would substantially retain the classifications of property presently exempted from taxation by article X, section 4[109] and would permit the Legislature to establish further exemptions by general law.[110]

The Committee would also include a provision to insure that political subdivisions may be authorized to assess and collect taxes so long as the tax is uniform within the subdivision. The requirement of uniformity would not, however, prohibit special levies on property receiving special benefit.[111]

B. Bonds

The changes recommended by the Committee for the regulation of finance and bonded indebtedness are a complete departure from the present provisions. Article 19, section 11 now forbids increase in the public debt of the state without the consent of two-thirds of the electors voting on the question. Millions of dollars worth of bonds, however, have been issued by the state since the ratification of the constitution of 1895,

106. REPORT, Art. VI, § A.
107. *See,* DEL. CODE ANN. § 9-8330-31 (Vol. 4, Supp. 1968).
108. For an extensive system of classification see MINN. STAT. § 273.13 (1967).
109. REPORT, Art. VI, § B. Property of political subdivisions, schools, asylums, libraries, churches, parsonages and burying grounds is presently constitutionally exempt from taxation.
110. REPORT, Art. VI, § C.
111. REPORT, Art. VI, § F.

without such approval by the voters. In *State ex. rel. Richards v. Moorer*,[112] the supreme court developed the special fund doctrine, which permitted bonds to be issued and obligations incurred by the state so long as annual revenue, other than that from property taxes, was sufficient to make the annual principal and interest payments required for the bonds.[113] If that requirement was met, the obligation did not constitute a "public debt" within the meaning of article X, section 11.[114] Subsequently the court held that so long as the special fund was sufficient, the fact that the bonds were secured by the full faith, credit and taxing power of the state did not make them "public debt."[115]

The Committee would delete the ineffectual requirement of consent of two-thirds of the people. In its stead, it would provide that the Legislature be able to authorize by simple majority vote the issuance of bonds in an amount equal to twice the average of the amount of tax collections[116] in each of the three preceding years, and amounts in excess of that on the approval of two-thirds of the members of each house. Further, all obligations must be secured by the full faith, credit and taxing power of the state, in order to prevent the issuance of bonds secured by new special funds in circumvention of the new policy.[117] In light of the court's decision in *Crawford v. Johnson*,[118] it is questionable whether the language of the Committee's provision is sufficiently specific to prevent special bond issues. However, the Committee's use of the term "indebtedness" rather than "public debt," plus the requirement that bonds be issued within the authorization and limitation of the section, should ensure that the effect intended will be realized.

C. Bonds of Subdivisions

Unlike the present provisions imposing only procedural limitations on the state's increasing its bonded indebtedness, the present provisions on the indebtedness by subdivisions limit the amount

112. 152 S.C. 455, 150 S.E. 269 (1929); *See* Sinkler, *Constitutional Limitation on Public Finance in South Carolina*, 3 S.C.L.Q. 303 (1951).
113. For discussion of the sufficiency of the special fund see Arthur v. Byrnes, 224 S.C. 51, 77 S.E.2d 311 (1953).
114. State *ex rel.* Richards v. Moorer, 152 S.C. 455, 490-92, 150 S.E.2d 269, 281-82 (1929).
115. Crawford v. Johnston, 177 S.C. 399, 181 S.E. 476 (1935).
116. Total state tax collection for the fiscal year ending June 30, 1968, was $377,158,371.39, for the preceding year $363,002,307.87. 1968 S.C. TAX COMM. ANN. REP'T 7.
117. REPORT, Art. X, § M (Comment).
118. 177 S.C. 399, 181 S.E. 476 (1935).

of indebtedness that can be incurred,[119] the purposes for which any indebtedness may be incurred,[120] and require approval by a majority of the voters.[121]

The original debt limitations proved impractical and soon were largely undermined by numerous amendments and judicial decisions. The fifteen percent limit on the aggregate indebtedness of all subdivisions in which the property was situate sustained a series of reverses by the court, from which it might have been argued that the limitation had been effectively nullified.[122] However, *Ashmore v. Greater Greenville Sewer District*[123] held that the fifteen percent limit must be observed by a special service district established to build an auditorium. Thus, although it can be said that the limitation does not apply in several situations, it is still a factor in situations not within the exceptions. A constitutional amendment to article VII, section 7, removed the limits on municipal corporations in incurring indebtedness to purchase or maintain waterworks, or sewerage or lighting plants. Numerous local amendments have removed both debt limitations for specific projects in designated areas.[124]

Article VIII, sections 3 and 6 specify that cities may levy taxes or incur indebtedness only for public and corporate purposes. Counties and townships, however, could only be authorized to levy a tax or issue bonds for the specific purposes stated in article X, section 6. The court has literally followed that provision,[125] the purpose of which was to weaken home rule by denying power to the counties.[126]

119. S.C. CONST. Art. VIII, § 7, Art. X, § 5. Article X, section 5, provides that the total bonded debt of any subdivision shall not exceed eight percent of the assessed value of the property therein and that where there are two or more subdivisions extending over the same territory, the aggregate debt on the territory may not exceed fifteen percent of the assessed value of the property in the territory.

120. S.C. CONST. Art. X, § 6.

121. S.C. CONST. Art. VIII, § 7.

122. Lancaster School Dist. v. Robinson-Humphrey Co., 64 S.C. 545, 42 S.E. 998 (1902) (state indebtedness not to be included in computing aggregate); Elliot v. Heyward, 127 S.C. 468, 121 S.E. 257 (1924) (county could issue full 8% regardless of article X, § 5 15% limit); Banks v. School Dist., 129 S.C. 218, 123 S.E. 834 (1924) (school district not bound by 15% limit); Winstead v. Williams, 132 S.C. 365, 128 S.E. 46 (1925) (city not bound by 15% limit); Berry v. Milliken, 234 S.C. 518, 109 S.E.2d 354 (1959) (airport district not subject to 15% limit). *But see*, Sinkler, *Constitutional Limitations on Public Finance in South Carolina*, 3 S.C.L.Q. 303, 322 (1951).

123. 211 S.C. 77, 44 S.E.2d 88 (1947).

124. S.C. CONST. Art. VII, § 7 (1-51); art. X, § 5 (2-135).

125. *E.g.*, Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949).

126. Sinkler, *Constitutional Limitations on Public Finance in South Carolina*, 3 S.C.L.Q. 303, 310 (1951).

Although no procedural limitations were placed on county increase of public debt, article VIII, section 7, requires the consent of a majority of the electors within the city before municipalities can incur indebtedness. The same section also requires the creation of a sinking fund for retirement of bonds at their maturity.

The Committee provided for both counties and municipalities in the same provision. It would allow all subdivisions to incur bonded indebtedness secured by the full faith and credit of the subdivision for such purposes and on such terms as the General Assembly might prescribe. There would be no limit on the indebtedness. The governing body of the subdivision could issue bonds, provided the indebtedness did not exceed the amount of taxes and licenses collected in the three previous years. Amounts in excess of that amount would have to be approved by the electors. The requirement of a "sinking fund" would be eliminated but the Committee would provide that bonds must mature within thirty years.[127] Thus the Committee would provide much simpler and less restrictive regulation of finances for local governments.

VIII. ARTICLE VII—LOCAL GOVERNMENT

The Committee felt that broad and basic changes were required in the constitutional provisions on local government,[128] and consequently, it has largely rewritten the present provisions on county and city government combining them into one article, in the hope of providing the framework for functional local government.

The Committee would constitutionally limit the maximum number of counties in the state to the present forty-six.[129] It would delete the provisions of article VII, sections 1, 2, 3, 4 and 5 concerning the creation of new counties, but would retain the part of article VII, section 10 providing for a merger of counties with the approval of a majority of those voting in a referendum on the question.[130] Should two counties merge, presumably another county could be created on any terms the General Assembly might formulate.

The Constitution of 1895 made no provision regulating the form or power of county government. Article VII, section 11 is

127. REPORT, Art. VI, § N.
128. REPORT 6.
129. REPORT, Art. VII, § C.
130. REPORT, Art. VII, § D. The section further provides that the election shall be called at the request of the counties' governing bodies or on the petition of ten percent of the voters in each county.

said to have given the General Assembly complete control of the government and internal affairs of counties,[131] and to have relaxed the requirement of article II, section 34(9), which prohibits the enactment of a special law where a general one could be made effective.[132] As a practical matter, the General Assembly can grant to the counties or to any one county "power to discharge such governmental functions as it thinks proper to promote prosperity, safety, convenience, health, and common good of the county's inhabitants."[133] Moreover, the General Assembly apparently would have the power under the present constitution to prescribe any system of county government it might choose. However, should it provide for county government, the functioning of the county government would be restricted by the prohibition against delegation of legislative power.[134] For example, it was once held that police powers could not be delegated to counties.[135] This was later restricted in *Ruggels v. Padgett*[136] to proscribe only the creation or definition of crimes or misdemeanors by the local government; the local government could designate sanctions short of criminal prosecution to advance the public welfare.

The proposed revision directs the General Assembly to establish up to five classes of counties.[137] The General Assembly would be required to set up a form, or alternate forms, of government for each class of county and to establish the powers and duties of government in each class of county.[138] Special laws applicable to less than all of the counties in a class would be prohibited[139] and the present provision permitting special provisions in general laws[140] would be deleted.[141] Further, the limit of five that would be placed on the number of classes of counties[142] would effectively foreclose the creation of a separate class each time a problem unique to one county arose. Therefore, the coun-

131. *See, e.g.*, Reese v. Hinnant, 187 S.C. 474, 198 S.E. 403 (1938).
132. *See* [1962-63] *S.C. Att'y Gen. Annual Rep.* 93.
133. Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870 (1934).
134. *See* Note, *An Analysis of Delegation of Legislative Power in South Carolina*, 14 S.C.L. REV. 510 (1962).
135. Owens v. Smith, 216 S.C. 382, 58 S.E.2d 332 (1950).
136. 240 S.C. 494, 126 S.E.2d 533 (1962).
137. REPORT, Art. VII, § G.
138. This would take the form of a comprehensive act on the subject of county government, similar to the Municipal Corporations Act. S.C. CODE ANN. §§ 47-1 to -1711 (1962). The Committee's proposal here is similar to S.C. CONST. art. VIII, § 1 dealing with municipal government.
139. REPORT, Art. VII, § H.
140. S.C. CONST. Art. III, § 34(10).
141. REPORT, Art. III, § BB.
142. REPORT, Art. VII, § G.

ties would have to have functional governments with substantial power to deal with their local problems.

The Committee's treatment of municipal government is more comprehensive than article VIII of the present constitution. The requirement of article VIII, section 2, that the majority of electors residing in an area to be incorporated consent to that incorporation, which was the subject of recent controversy in North Charleston,[143] would be deleted in favor of a provision authorizing the General Assembly to fix the criteria and procedure for incorporation or annexation by general law.[144]

The Committee recommended the same classification[145] and administration by general law[146] for municipalities that it recommended for counties. However, those provisions would not constitute a major change for article VIII, section 1 and the *Municipal Corporations Act*[147] now require and provide substantially the type of municipal government proposed by the Committee.

The Committee's most substantial changes in the area of municipal government are in its provision requiring the General Assembly to provide a procedure by which municipalities may adopt a charter and exercise home rule.[148] The provision would have the General Assembly determine the class or classes of municipalties eligible for home rule and no charter would become effective until approved by the electors voting on the question.[149] The home rule referred to by the Committee is the right of the people to establish a government in a form they may choose and to have that government attend to all matters of purely local concern without interference by the state.[150] The city's charter, which would be approved by the people, would correspond to the state or federal constitution and would designate the form of government to be used as well as processes for amending the charter. No charter could contain provisions inconsistent with the constitu-

143. Clay v Thornton, 169 S.E.2d 617 (S.C. 1969).
144. REPORT, Art. VII, § I.
145. REPORT, Art. VII, § J.
146. REPORT, Art. VII, § K.
147. S.C. CODE ANN. §§ 47-1 to -1711 (1962).
148. Recent developments in local government throughout the country have increased home rule of cities and counties. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1968-69, at 257 (1968).
149. REPORT, Art. VII, § L.
150. *E.g.*, People v. Johnson, 34 Colo. 143, 86 P. 233 (1905).

tion or with general laws relating to certain subjects of statewide concern.[151]

The Committee would also provide that counties with a population density greater than one hundred per square mile[152] could merge with their political subdivisions to form a single unit of government.[153] This unification could take place only with the consent of the people as evidenced in a referendum that the General Assembly would be required to call at the request of the county's governing body or on the petition of ten percent of the electors. After consolidation the county could then adopt a charter and achieve home rule.

The Committee's proposal on local government also contains a provision requiring that the constitution and all laws relating to local government be liberally construed in favor of the local government and that the powers specifically granted by the constitution to local governments include those fairly implied.[154] The purpose of the section is to effect the abrogation of the Dillon rule.[155] The Dillon rule reasoned that since local governments were agencies of the state deriving all their powers from it, those powers should be strictly construed against the local government.

CONCLUSION

In these first seven articles, the Committee dealt with areas of considerable difficulty and recommended simpler and more flexible treatment of them. That same approach was continued throughout the draft. The latter articles would bring about some important changes in such areas as the composition of the State Board of Education,[156] the selection of the State Superintendent of Education[157] and the Adjutant General,[158] eminent domain for slum clearance,[159] and procedures for adopting a new constitution.[160] In its article entitled "Miscellaneous

151. REPORT, Art. VII, §§ L, M. The matters of state-wide concern with respect to which general law of the state would control are listed in section O of Article VII of the report.
152. Anderson, Charleston, Florence, Greenville, Richland, Spartanburg, Sumter, and York Counties presently meet this requirement.
153. REPORT, Art. VII, § M.
154. REPORT, Art. VII, § R.
155. 1 Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).
156. REPORT, Art. VIII, § A.
157. REPORT, Art. VIII, § B.
158. REPORT, Art. XII, § C.
159. REPORT, Art. XI, § E.
160. REPORT, Art. XV, § D.

Matters" the Committee retained the present constitutional provisions on divorce, lotteries, and alcoholic beverages.[161] Perhaps the most striking feature of several of the last ten articles proposed by the committee is their brevity. The proposed article on corporations has only two sections as opposed to the present 21; to education four sections were devoted as opposed to twelve; and charitable and penal institutions were covered in two sections rather than the nine presently devoted to them. This reduction in the constitutional treatment of these areas was accompanied by broad constitutional mandates to the General Assembly to provide for their sound regulation.[162]

An amendment to the constitution in 1969,[163] as recommended by the Committee,[164] provides that for the years 1970 and 1972, amendment to the Constitution may be made article by article, whereas formerly item by item amendment was required. The Committee recognized that serious problems might arise should the voters approve some articles and disapprove others.[165] The committee therefore, attempted to make each article complete and independent of the others,[166] but some articles contain material previously found in several different articles. The 1969 amendment setting up the article by article procedure provides, however, that after approval by a majority of the voters, the article must again be approved by the Legislature. Thus, should some articles be rejected by the voters, the legislature could avoid these problems by not approving articles that are dependent on the articles that were rejected by the voters.

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161. REPORT, Art. XVI.
162. REPORT, Art. VIII, § C; REPORT, Art. IX §§ A-B; REPORT, Art. X, §§ A-B.
163. S.C. CONST., Art. XVI, § 1.
164. REPORT 135.
165. REPORT 136.
166. *Id.*