A Constitutional History of the Property Tax in South Carolina

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On May 23, 1974, the South Carolina Supreme Court, in a three to two decision, held that the South Carolina Constitution permits the classification of real property for purposes of property taxation. Consequently, Spartanburg County was allowed to impose a heavier effective rate of tax on property used for manufacturing purposes than for other real property in the county. The majority observed:

We find nothing in our Constitution that prohibits the General Assembly of this State from classifying property according to its use so long as such classification is reasonable and not arbitrary, and the tax imposed is uniform on the same class of property.

The majority also found that the federal equal protection clause was not violated, quoting with approval the following language:

It is elementary that if the classification bears a reasonable relation to the legislative purpose sought to be effected, and if all the members of each class are treated alike under similar circumstances, the equal protection clauses of the [federal and state] Constitutions are fully complied with.

There can be no disagreement with the court's conclusion that the South Carolina system is valid under equal protection standards. However, its conclusion of validity under the state constitution ignores the language of four provisions and the distinctive constitutional history which brought those four provisions into being.

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2. Id. at 704.
The federal equal protection clause, of course, restrains the state from enacting an unreasonable or arbitrary tax scheme. Clearly, in the majority's view, the state constitution imposes no additional restraints on the legislature. The only relevant issue then becomes whether a taxing system is arbitrary in a fourteenth amendment sense. If it can pass this standard it will be upheld by the South Carolina courts. This is not a rigorous standard, particularly in a tax context. Indeed, according to the United States Supreme Court, a state taxing scheme will be upheld unless it is "palpably arbitrary." Only a whimsical system is forbidden.\(^5\)


5. In 1973, the Supreme Court upheld an Illinois constitutional provision which taxed tangible personal property owned by a corporation and exempted tangible personal property owned by an individual. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). The plaintiff argued that such a distinction violated the equal protection clause in view of Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), which held that a gross receipts tax could not be imposed upon corporations engaged in the taxi business unless a tax was also imposed upon partnerships and individuals engaged in the same business. Justice Douglas, however, wrote that Quaker City was "only a relic of a bygone era." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. at 365 (1973). In view of Lehnhausen, it seems unlikely that any state classification will be violative of equal protection. The Court, per Justice Douglas, stated:

> Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

*Id.* at 359.

The Court then quoted favorably from *Allied Stores*:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

*Id.* at 369-60.

Justice Douglas then added:

> In that case [Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959)] we used the phrase "palpably arbitrary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution.

*Id.* at 360.

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The dissenting justices believed that the state constitution had been violated. They noted:

If real property could be classified by the General Assembly into two sub-categories, one for manufacturers, and one for non-manufacturers. . . it could be sub-classified into three, or six, or a dozen, or fifty, or more. . . . The equality provisions of the State Constitution would thus be reduced to a shambles. It was to avoid that very evil, in my judgment, that the framers of the Constitution wrote the uniformity requirement into that instrument, not once, but four times. 6

The four provisions mentioned are as follows:

(1) Article III, section 29, originating in the 1865 constitution provides:

All taxes upon property, real and personal shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax. 7

(2) Article X, section 3A, originating in the 1868 constitution provides:

All property subject to taxation shall be taxed in proportion to its value. 8

(3) Article X, section 1, originating in the 1868 constitution provides:

The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the products of which alone shall be taxed; and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes. 9

If any question remained as to the weakness of the equal protection standard, it was removed by Kahn v. Shevin, 94 S. Ct. 1734 (1974), where the Court upheld a Florida statute granting a $500 property tax exemption to widows but not to widowers.

6. Holzwasser v. Brady, 205 S.E.2d 701, 706-07 (S.C. 1974). The dissent is here quoting from the opinion of the lower court which had found the statute unconstitutional.

7. This article was art. I, § 8 of the 1865 constitution and art. II, § 33 of the 1868 constitution.

8. This article was art. I, § 36 of the 1868 constitution, and art. I, § 6 of the 1895 constitution. See No. 276, [1971] 57 S.C. Stat. 315.

9. This article was art. IX, § 1 of the 1868 constitution and is currently art. X, § 1.
(4) Article X, section 5(1), originating in the 1868 constitution, provides:

The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. . . .¹⁰

All of the above provisions came into the constitution in either 1865 or 1868. Their purpose becomes clear when viewed in the context of the state's fiscal history prior to that time. Certain very specific problems existed which the draftsmen of the constitutional provisions sought to solve. As noted, the Holzwasser opinion found that these provisions did not restrain the legislature. It was restrained by the federal equal protection clause but no further. However, the history is clear that the framers of these provisions did not believe they were duplicating the federal fourteenth amendment. They thought they were addressing themselves to abuses which had arisen in the state's taxing system and preventing the repetition of such abuses in the future.

I.

COLONIAL HISTORY

Prior to the 1865 and 1868 amendments, the power of the legislature with respect to taxation was complete. The state's early constitutions of 1776, 1778 and 1790 placed no limitations on the taxing power.¹¹ In the absence of specific restraints, the supreme court has noted:

It is elementary, of course, that the power of the Legislature is plenary in the absence of any constitutional limitation, that a State Constitution is not a grant of power but rather a limitation of legislative power, and that the right to tax is not granted by the Constitution.

Except insofar as it is limited by the State and Federal Constitutions, this taxing power of the State is general and absolute and extends to all persons, property, and business within its jurisdiction or reach.¹²

¹⁰ This article was art. IX, § 8 of the 1868 constitution.
¹¹ The text of the 1776 constitution can be found at 1 S.C. Stat. 128; the 1778 constitution at 1 S.C. Stat. 137; and the 1790 constitution at 1 S.C. Stat. 184.
Consequently, the early period is one of legislative supremacy undisturbed by any constitutional limits.\textsuperscript{13}

Prior to the American Revolution all land was taxed at a fixed rate per acre regardless of quality, type or use. The historian David Ramsay, writing in 1808, states:

From the first settlement of the province till that period [1783] the lands had been uniformly taxed according to quantity without regard to quality. A hundred acres of pine barren and a hundred acres of the most highly cultivated tide swamp, paid the same tax. The owners of the former were clamorous for an alteration so as to make quality as well as quantity a ground of taxation. The owners of the latter were very slowly convinced of the practicability of the discrimination, though they acknowledged its justice.\textsuperscript{14}

In 1751, Colonial Governor Glen reported that the fixed rate per acre method of taxation was a "great burden and injustice to many owners."\textsuperscript{15} The system, he wrote, should be reformed so that taxes would be imposed "in proportion to value."\textsuperscript{16} The Governor stated:

Taxes are the same on all negroes, and the same on all lands per acre, to the great burden and injustice to many owners. Quit-rents are usually three shillings sterling a hundred acres, and taxes about two shillings a hundred acres. I have often urged that taxes should be in proportion to value, as, for instance, a tax being imposed on the produce exported.\textsuperscript{17}

An example of the system criticized by the Governor is found in Act No. 360 of 1716.\textsuperscript{18} This act was intended to raise 95,000 pounds, over a three year period, in order to finance Indian wars.\textsuperscript{19}

\textsuperscript{13.} Interestingly, for all practical purposes, the Holzwasser opinion brings the state around full circle to a new period of legislative supremacy.

\textsuperscript{14.} 2 D. RAMSAY, HISTORY OF SOUTH CAROLINA 107 (1st ed. 1858). See also 1 D. WALLACE, HISTORY OF SOUTH CAROLINA 453 (1934).

\textsuperscript{15.} 1 D. WALLACE, HISTORY OF SOUTH CAROLINA 451 (1934) [hereinafter cited as [D. WALLACE]].

\textsuperscript{16.} Id.

\textsuperscript{17.} Id. Governor Glen's view that property should be taxed "in proportion to value" was adopted by the 1865 constitution, art. I, § 8 and is presently found in the constitution at art. III, § 29 and art. X, § 3A. Its function, however, after Holzwasser, is questionable.

\textsuperscript{18.} No. 360, [1716] 2 S.C. Stat. 662.

\textsuperscript{19.} Id.
The fixed rate per acre provision, found in section XXIV, directed the assessors "to impose and assess thereon five shillings for every hundred acres which shall be so returned."\textsuperscript{20} If the designated sum was not raised by the land tax the assessors were to collect the deficiency, "by way of poll, or so much per head on all and every the negro and Indian slaves, mustees and mulattoes, according to the numbers belonging to each inhabitant."\textsuperscript{21} The third source of wealth in the Province, the Charleston merchants, was also reached by the act. Noting that a tax on land and slaves would substantially exempt this group, the statute separately apportioned 16,000 pounds of the 95,000 pound total to the citizens of Charleston.\textsuperscript{22} The 16,000 pounds were to be "equally and indifferently imposed, levied and raised on the real and personal estates, stocks and abilities of the several merchants and other inhabitants, living or residing with the limits of the town plot of Charleston . . . ."\textsuperscript{23} As a result citizens outside of Charleston were taxed on their land and slaves while the merchants of Charleston were taxed on their buildings, stock in trade and other personal property.

The 1716 act was a comprehensive taxing statute establishing procedures for the reporting of property, appeals and the collection of the tax. The penalty for concealing property was forfeiture.\textsuperscript{24} In addition such a person was, upon conviction, subject to the "same punishment as in the case of wilful perjury."\textsuperscript{25}

The earlier taxing statutes were not as elaborate. Only the title has survived from the first tax act of record, that of June 8, 1682.\textsuperscript{26} The act was entitled, "An Act for raising a Tax of £400, or the value thereof, for defraying the publick charges of this Province."\textsuperscript{27} The earliest surviving text of a tax act is that of October 15, 1686. This act provided for the raising of 500 pounds to repel the invasion of "subjects of the King of Spaine."\textsuperscript{28} These subjects had,

\begin{quote}
[L]ately in a barbarous and hostile manner, invaded us his majestie's subjects, inhabitants of that parte of this province
\end{quote}

\textsuperscript{20} Id. at 671.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 667-68.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 669.
\textsuperscript{25} Id.
\textsuperscript{26} No. 5, [1682] 2 S.C. Stat. Table of Contents.
\textsuperscript{27} Id.
\textsuperscript{28} No. 30, [1686] 2 S.C. Stat. 15.
which lyeth to the South and Westward of Cape Feare, and under this Government, burning our houses, killing our stock, cutting off our crops and provisions, murdering and making prisoners as many of us as by the unexpectedness of the attempt, had not the opportunity to escape, and are still designing and contriving our utter ruin and the subversion of this government; for the more speedy prevention thereof, and the better to enable us to defend ourselves against and repel these our enemies.  

This statute lacks the comprehensive and sophisticated provisions found in the 1716 act. Essentially, the Assessors were simply to collect the 500 pounds from the inhabitants “according to their several estates, stores and abilities.” In more complete form, the statute provided:

And the charge of this present expedition may bee equally and indifferently borne by the respective freeholders, and others the inhabitants of this Province, Bee it further enacted, by the authority aforesaid, that a tax of five hundred pounds sterling bee equally assessed, imposed and leavyed upon the several inhabitants, merchants and others, (not servants for tyme or terme of yeares,) which now are, or hereafter shall come into this province before this assessment shall be made, (Seaman excepted,) according to their several estates, stores and abilities, and according to the profits indifferently computed of every publicque officer, arising from, or by his respective office or any other employment whatsoever, to be collected and paid in the manner herein-after mentioned.  

The language of this early statute is not entirely clear, but it seems to have imposed a tax “equally and indifferently” upon the actual value of real and personal property.

Five years later, in 1691, the province imposed a duty on the export of all skins and furs. An export duty was probably less likely to aggravate the citizenry than a property tax. In any event, Ramsay notes that the duty must have produced substantial revenue since no tax acts appear of record for ten years after the duty was imposed.

29. Id.
30. Id. at 15-16.
31. The use of the phrase “equally and indifferently” in both the 1686 and 1716 acts will be noted.
32. No. 73, [1691] 2 S.C. Stat. 64.
33. 2 D. RAMSAY, HISTORY OF SOUTH CAROLINA 90 (1st ed. 1858).
The first years of the eighteenth century saw a tremendous increase in the amount of taxes collected. Between 1682 and 1700 only 2,320 pounds were collected compared with 215,000 pounds in the next eighteen year period, 1700-1718. Ramsay explains the need for increased revenues as follows:

The abortive expedition against Augustine - the invasion of the province by Feboure - the expedition under Col. Barnwell against the Tuscarora Indians of North Carolina - the Yamasee war and the suppression of the pirates, all took place between 1701 and 1719, and drew after them debt, taxes, paper-money and depreciation. As a result of the increased demands on the tax structure, the informal approach taken by the act of 1686 was replaced by the more elaborate approach of the 1716 act. As noted, the 1716 act imposed a tax of “five shillings for every hundred acres” regardless of the actual value of the land.

II. REVOLUTIONARY AND POST-REVOLUTIONARY PERIOD (1776-1865)

The injustice discussed above by Governor Glen was terminated shortly after the Revolution. The historian David Wallace reports:

Amid the mass of laws reorganizing the life of the State after the Revolution was that of 1784 classifying land into town lots and nine classes in the country according to its value for taxation, thus ending the abuse so bitterly resented by the back countrymen of their new grounds 200 miles from Charleston being taxed at the same rate as the richest rice field close to market. The taxable values thus established ranged from 20 cents to $26 an acre - one to 130, instead of the former equality. Modified during the next 31 years, this classification lasted through the War of Secession. Equitable when adopted, the unchanged valuations through the generations themselves became an injustice. The classification system was a step toward the actual value system later adopted by the 1865 constitution.

The first of the classification statutes was Act No. 1234 of

34. Id. at 90-91.
35. Id. at 91.
36. 2 D. Wallace at 336.
1784. It imposed a one percent ad valorem tax on all lands “in the manner and under the several regulations hereinafter set forth” in nine general classifications (most of the nine classes contain subclassifications). The relevant factors were the nature of the land and its location. For example, Class No. 1, with its subclassifications, reads as follows:

No. 1, all tide swamp, not generally affected by the salts or freshets, of the first quality, shall stand rated at six pounds per acre; all tide swamp of the second quality, four pounds per acre; of third quality, two pounds per acre; all pine barren lands adjoining such swamp, or contiguous thereto, with respect to the benefit of water carriage, at ten shillings per acre; all prime inland swamp, cultivated and uncultivated, at an average of three pounds per acre; second quality of swamp, cultivated and uncultivated at an average of two pounds per acre; third quality swamp, cultivated and uncultivated, at an average of one pound per acre; pine barren lands adjoining or contiguous thereto, salt marsh or inland swamp, clearly proved to the assessors to be incapable of immediate cultivation, five shillings per acre.

Class No. 9, involving the northern part of the state, refers to: “all oak and hickory high lands above the old Indian boundary, the first quality six shillings per acre; the second quality three shillings per acre, the third quality, one shilling per acre.”

Consequently in accord with market value at the time, the rice lands on the coast paid a much heavier tax than land in the northern part of the state. Under this system, the assessors had a degree of discretion, e.g., in determining if land was of the first quality or second, but essentially the legislature, by statute, fixed the value.

In the years following 1784, the statute discussed above was annually re-enacted. In 1815 the land classification system was separately enacted as a “permanent” system. The 1815 statute

38. Id. § 1. The statute also contained a separate method of taxing town lots, i.e., “the sum of one per cent. on every hundred pounds value of every such lot, wharf, or other lands, and on all buildings within the limits of any town, village, or borough in this State. . . .” Id. § II, 628. In addition, certain personal property was subject to the same rate of “the sum of one per cent. upon every hundred pounds upon every persons stock in trade, of persons in trade, shopkeepers and others.” Id.
39. Id., § 1.
41. No. 2079, [1815] 6 S.C. Stat. 7. The term “permanent” does not, of course, mean...
is included here in its entirety since it was the basis of the taxing system for fifty years. The classification ranges from $26 per acre for "tide swamps of the first quality" to 20 cents per acre for certain "pine barrens." It provided:

That all the lands within this State shall be, and they are hereby, distributed and divided among the following classes:

Class No. 1 shall contain all the tide swamp of the first quality, not generally affected by salts or freshets, which shall be rated at twenty-six dollars per acre; all tide swamp of the second quality, not generally affected by salts or freshets, which

that the statute could not be repealed. Rather, the 1815 Act separated the classification system from the annual taxing act. The classification act could be changed but the legislature gave it some protection by assuring that changes would not be considered under the stress of enacting the annual tax act.

The operative taxing act then simply had to establish the rate of tax and cross refer to the classification system which would establish value. For example, section II of Act No. 2094 of 1815 provided:

That forty-five cents ad valorem on every hundred dollars, be paid in specie, paper medium, or in notes of the incorporated banks of the State of South Carolina, on all lands granted within this State.


The same statute imposed a forty-five cent per hundred dollars tax on the value of all lots and lands and buildings within any city, town, village or borough. Id. § II. See Martin v. Tax Collector of St. Luke's Parish, 1 Speers 343, 345 (S.C. 1843) for a discussion of what is a "village." Quite clearly, the standard of value imposed on such town lots was actual value.

A higher rate of tax was imposed on a merchant's stock in trade: one dollar per hundred dollars of value. No. 2094, [1815] 6 S.C. Stat. 19, § II.

The statute also imposed what seems to be an early gross receipts or income tax, of one dollar per hundred dollars on "employments, faculties and professions." Id. For similar annual statutes see No. 2128, [1816] 6 S.C. Stat. 45 and No. 2173, [1817] 6 S.C. Stat. 81.

The general tax act of 1788 (No. 1383, [1788] 5 S.C. Stat. 50) established the procedural rules for the assessment and collection of taxes. For a discussion of this act see Butler v. Baily, 2 Bay 244 (S.C. 1800). Butler involved the paramount nature of the state's lien for taxes. In reaching its conclusion, the court expounded a general theory of government and taxes as follows:

That the soil of every country, and all the property of the inhabitants thereof, by the nature of the social compact, and the fundamental principles of every well regulated government stood pledged, and were liable for the support and defense of the state, and its government, to the extent which might be necessary for such defense and protection; and without such aid and assistance, the government could not be maintained and kept up, nor the state protected. In return for which, the government on its part, was bound to support and protect every individual citizen within the limits of the state, in all their rights and privileges, in peace and tranquility; and in order to accomplish this great end effectually, there was nothing which it [the government] ought not to hazard, either of blood or treasure, which might tend to secure and perpetuate these inestimable blessings. Hence, the origin of those great and reciprocal duties of allegiance and protection, and hence also, the origin of taxes and taxation.
shall be rated at seventeen dollars per acre; all tide swamp of the third quality, not generally affected by salts or freshets, which shall be rated at eight dollars and fifty cents per acre; all pine barren lands adjoining such swamps, or contiguous thereto with respect to the benefit of water carriage which shall be rated at two dollars per acre; all prime inland swamp, cultivated and uncultivated, which shall be rated at an average of thirteen dollars per acre; all inland swamp of the second quality, which shall be rated at eight dollars and fifty cents per acre; all inland swamp of the third quality, which shall be rated at four dollars per acre; all pine barren lands adjoining or contiguous thereto, which shall be rated at one dollar per acre; and all salt marsh, or inland swamp, clearly proved to the collectors to be incapable of immediate cultivation, which shall be rated at one dollar per acre.

Class No. 2 shall comprehend all high river swamp and low ground cultivated, including such as are commonly called second low grounds, lying above the flow of the tides, and as high up the country as Snow Hill on Savannah river, and the fork of Broad and Saluda rivers on the Congaree, Grave's Ford on the Wateree, and the boundary line on Pedee; the first quality to be rated at thirteen dollars per acre; the second quality at eight dollars and fifty cents per acre; the third quality at four dollars per acre; excepting such as may be clearly proven to the collectors to be incapable of immediate cultivation, which shall be rated at one dollar per acre.

Class No. 3 shall comprehend all high river swamps and low grounds lying above Snow Hill and the fork of Broad and Saluda rivers, Graves's Ford on the Wateree, and the Old Indian boundary line on Pedee, which shall be rated at three dollars per acre.

Class No. 4 shall comprehend all high lands without the limits of St. Philip's and St. Michael's parishes, within twenty miles of Charleston, and on John's Island and James's Island, which shall be rated at four dollars per acre.

Class No. 5 shall comprehend all lands lying on the sea islands, (Sllan's island included,) or lying on or contiguous to the seashore, usually cultivated, or capable of cultivation, in corn, cotton or indigo, not within the limits prescribed in Class No. 4, which shall be rated at four dollars per acre.

Class No. 6 shall comprehend all oak and hickory high lands lying below Snow Hill and the fork of Broad and Saluda rivers, Grave's Ford on the Wateree, and the new boundary line on Pedee, and not included in the description or limits of the two preceding classes, numbers 4 and 5, which shall be rated at three dollars per acre.
Class No. 7 shall include all pine barren lands not included in classes Nos. 1, 4 and 5, which shall be rated at twenty cents per acre.

Class No. 8 shall comprehend all oak and hickory high lands lying above Snow Hill, the fork of Broad and Saluda rivers, and Graves's Ford on the Wateree, the first quality of which shall be rated at one dollar and fifty cents per acre; the second quality at one dollar per acre; and the third quality at forty cents per acre.

Class No. 9 shall comprehend all oak and hickory high lands above the old Indian boundary line, the first quality of which shall be rated at one dollar and twenty cents per acre; the second quality at sixty cents per acre; and the third quality at twenty cents per acre.

Class No. 10 shall include all lands within the parishes of St. Philip’s and St. Michael’s, which shall be assessed in the same manner and upon the same principles as houses and lots in Charleston, and in a relative proportion to lands in the country.42

The classification system originated by the 1784 act and continued in the 1815 act reflected market values, or at least relative market values, current at the time.43 However, the system became

42. No. 2709, [1815] 6 S.C. Stat. 7. One of the reasons the “low country” was willing to accept the classification system with with its lands bearing the greatest burden was in part the result of a constitutional amendment adopted, and known as the “compromise of 1808.” It was ratified December 17, 1808, and was the first amendment to the 1790 constitution. In relevant part it reads:

In assigning representatives to the several districts of this State, the legislature shall allow one representative for every sixty-second part of the whole number of white inhabitants in the State and one representative also for every sixty-second part of the whole taxes raised by the legislature of the State.

The Senate shall be composed of one member from each election district, as now established for the election of members of the House of Representatives, except the district formed by the parishes of St. Philip and St. Michael [Charleston], to which shall be allowed two senators as heretofore.

1 S.C. Stat. 194-95 (1836). Thus representation was decided on the basis of two factors, people and property. The population factor favored the “up-country.” For example, a census in 1790 showed the “upper division” contained 111,534 whites while the “lower division” contained 28,644. The taxes paid factor favored the “low country” which in 1790 paid £28,081 while the upper division paid only £8,390. The city of Charleston alone paid £10,761. For a general discussion of the above see 2 D. WALLACE, supra note 11, at 360-75 and 3 D. WALLACE at 136.

43. See SOUTH CAROLINA, THE GRAND TOUR 21 (T. D. Clark ed. 1973) where John Drayton (Governor of South Carolina at the time) wrote in 1802:

The best lands in this state, which are tide swamps, if cultivated, have sold for one hundred and seventy dollars an acre. In general, however, they sell from seventy to ninety dollars an acre; on a credit of one or two years. Uncultivated
inaccurate with changing economic conditions, particularly with the development of the up-country and the decline of the rice industry.\textsuperscript{44} By 1843, the changed conditions caused the supreme court to comment: "The system of taxation in South Carolina is extremely arbitrary, and in many respects, unequal. The classification of lands do not indicate their real value."\textsuperscript{45}

Two solutions were available: (1) the classification system could be updated and refined or (2) the classification system could be eliminated.

III.
THE 1865 CONSTITUTIONAL CONVENTION

On June 30, 1865, President Andrew Johnson appointed Benjamin F. Perry as Provisional Governor for the State of South Carolina.\textsuperscript{46} In July of that year Perry had a series of conversations with the President during which Johnson indicated his policy for the removal of military rule.\textsuperscript{47} A Constitutional Convention was to be held which would repeal the Ordinance of Secession and abolish slavery.\textsuperscript{48} In addition, the popular election of Governor and President was to be provided for.\textsuperscript{49} Johnson was unhappy with the 1808 compromise which based representation in the House of Representatives partly on the amount of taxes paid rather than on a strict population basis. He was, however, persuaded to permit its continuation.\textsuperscript{50} Consequently, representation

\begin{quote}
tide land sells proportionably lower. Inland swamps, if cultivated, sell at prices betwixt twenty and fifty dollars each acre. Good cotton land, has sold in Beaufort district, as high as sixty dollars per acre. In general, however, its value, in different parts of the state, is from six to forty dollars; the same depending much on its situation; as that nearest the sea, is considered the most valuable, and produces the finest cotton. Other high lands, sell from one to six dollars an acre; according to their respective situation, and convenience to navigation.
\end{quote}

\textsuperscript{44} See 1 D. Wallace at 381-83 and 3 D. Wallace at 232 and 397.
\textsuperscript{46} 3 D. Wallace at 237.
\textsuperscript{47} B.F. Perry, Reminiscences of Public Men With Speeches and Addresses 245-49 (1889) [hereinafter cited as B. F. Perry].
\textsuperscript{48} Id. at 245.
\textsuperscript{49} Id. at 247. Perry later addressed the 1865 Convention as follows:
It is very desirable that you should avail yourselves of the present opportunity of reforming and popularizing the State Constitution in several particulars. It is the reproach of South Carolina abroad that her Constitution is less popular and republican in its provisions than that of any other State in the Union.
\textsuperscript{50} B. F. Perry, at 246. This part of the 1808 compromise was continued in the new constitution as art. 1, § 5. Johnson further suggested that the parish system, which had
to the 1865 Convention was on the same basis that had existed in 1861.

On July 20, 1865, Perry issued a proclamation declaring in force the laws which had existed prior to the war and calling for the election of delegates to a Constitutional Convention on the first Monday of September, the Convention to meet on September 13.\textsuperscript{51}

The Convention met on that date at the Baptist Church in Columbia.\textsuperscript{52} On September 14, 1865, the Convention received a message from the Provisional Governor reading in part as follows:

You have been convened in obedience to the proclamation of his Excellency Andrew Johnson, President of the United States, for the purpose of organizing a State Government, "whereby justice may be established, domestic tranquility insured, and loyal citizens protected in all their rights of life, liberty and property."\textsuperscript{53}

The Convention met for only two weeks and made few changes in the old constitution other than those agreed to at the Perry-

determined Senate seats, should be ignored in the election of delegates to the convention. \textit{Id.} Perry replied:

I had, all my life, been opposed to this Parish system of electing members of the Legislature, on the ground that there was no justice or political equality in a small Parish, with twenty or thirty voters, having the same voice and representation in legislation with a large District which polled five or six thousand votes, and had ten times the property of the Parish. It was the rotten Borough system of England, which had, at length been abolished in that Kingdom. When the Parish system was adopted in South Carolina, and the rotten Borough system in England, it may have been a fair representation of the two countries. But the condition of both had since changed. Wealth and population had increased most astonishingly in one section of the country, and diminished in another. The lower country of South Carolina had declined since the adoption of the Parish system, and the upper part of the State had prospered and quadrupled her population and wealth. I said if I left the Parish system for the convention to abolish it would give very little dissatisfaction, but if I ignored it in calling a convention, it would produce a very unpleasant excitement.

\textit{Id.} at 247.

The 1865 constitution did abolish the parish system. Art. I, §§ 3 and 11. All election districts were to have one Senate seat except Charleston which was granted two. Art. I, § 11. However, under the parish system Charleston had held ten seats. 3 D. WALLACE at 238.

51. F. SIMKINS & R. WOODY, SOUTH CAROLINA DURING RECONSTRUCTION 34-35 (1932). Perry had already asked Johnson if the new constitution would have to be submitted to Congress for its approval. Perry reported the President's response as follows: "He replied that it would not, and expressed a wish that I would use all diligence in having the State reconstructed, and members of Congress elected to take their seats as soon as that body assembled." B. F. PERRY, supra note 96 at 247. However, in December 1866, Congress refused to seat the State's elected Representatives and Senators. \textit{Id.} at 55.

52. 1865 \textit{CONVENTION} at 30.

53. \textit{Id.} at 11.
Johnson talks. The major substantive accomplishment was abolition of the classification system and the adoption of the actual value standard.

On September 15, Mr. Charles Macbeth of Charleston introduced a resolution reading as follows: "Resolved, That the Constitution of this State shall be amended, so that all taxes hereafter levied shall be levied on the actual value of the property." The resolution was referred to the Committee on Amendments to the Constitution. After several unsuccessful efforts by Macbeth to bring the matter to the floor, it became part of the report of the Committee on Amendments to the Constitution which was adopted on September 25.

Article I, section 8, as adopted and ratified by the Convention, provided:

SECTION 8: All taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax. In the first apportionment which shall be made under this Constitution, the amount of taxes shall be estimated from the average of the two years next preceding such apportionment; but in every subsequent apportionment, from the average of the ten years then next preceding.

The background of the 1865 provision is discussed by Wallace as follows:

But there had arisen an injustice to the low country in the system of taxation, of which she now complained, as the back country had complained when the legislature of planters and Charleston merchants, had before 1784, taxed every acre of land in the province or State the same amount. But now the values of classes of lands, fixed in 1784 from twenty-six dollars down to twenty cents an acre, and made permanent in 1815, worked similar injustice to the low country, whose lands had not increased in value in proportion to those of the more rapidly growing up country.

In a similar vein Wallace summarizes the background and purpose of the new provision as follows:

54. Id. at 37.
55. Id.
56. Id. at 53 and 87.
57. Id. at 105 and 112.
58. Id. at 140.
59. 2 D. WALLACE 481.
By up country development, the fixed classification of lands adopted in 1784 to correct the former injustice of taxing all lands at the same value had now come to work an injustice to the low country, where values had lagged. Therefore, it was enacted that all property should be assessed at its real value.  

Contemporaneous accounts, particularly those from the low country, were highly critical of the classification system. On September 19, shortly after the 1865 Convention met, the Charleston Daily Courier published an editorial pointing out to the Convention the inequities of the existing tax system:

The present mode of taxation on lands is according to an artificial valuation, made in 1815, and introduced by the late Mr. Blanding. It was a compromise proposed with the up country by which, in consideration of the representation remaining with the Parishes, the low country was practically to bear the burdens of taxation. The lands of the State were, therefore, estimated at prices ranging from 20 cents to $26 an acre, being in many instances not one tenth part, at present rates, of their marketable worth, while on the lots and buildings in the city of Charleston the imposts were levied at full value. It thus happens that the proprietors of a small house and lot here will pay more revenue to the Government, and a larger tax, than the owner of one of the finest and richest plantations in the State. The result is as we have heretofore shown, that Charleston alone paid more taxes on the lots and buildings within her corporate limits than the whole of the upper division of the State on all its lands. The condition of things which exist now are entirely different from when this arrangement was made, and the reasons for its institution, if they were valid, have long since ceased to have any weight. Now that the Constitution is to be changed, all needful reforms should be made. No argument can be adduced why lands in the country worth, in some instances forty dollars per acre, should pay, on a valuation fixed in 1815, at four dollars per acre, while lands and lots in the cities should be assessed at their market price. The only true and equitable principle is for all property to be taxed according to its bona fide worth. This proposition is so plain and so consonant with the very elements of justice and equity that the only surprise is that there should be the slightest objection to it. Any other plan would be partial and unequal, and without any foundation in right.
The solution, then, was that suggested by Governor Glen in 1751, that property be taxed according to actual value.

There are two elements to any property tax system: (1) the rate of tax and (2) the valuation. Article I, section 8 of the 1865 Constitution prohibited the old statutory valuation by classes. Section 8 mandated that all taxes upon property "be laid upon the actual value of the property taxed." But while section 8 provided for the actual value standard, it did not expressly require that an equal and uniform rate of tax be applied against it. The question consequently arises as to whether the constitution, at this point, would have permitted classification by the use of different rates, e.g., a tax of $1.00 on every $100 of actual value for rice land, a tax of $.50 on every $100 of actual value for town lots and a tax of $.10 on every $100 of actual value for pine barrens. Quite plainly, the intent of the 1865 change was not to permit such classification, but did a technical flaw exist? Following the 1865 amendment the state legislature established a clear one-class system for real property. The last taxing act during the war, Act No. 4699 of December 28, 1864, had provided for a tax of:

Six dollars *ad valorem* on every hundred dollars of the value of all lands granted in this State, according to the existing classification, as heretofore established; One dollar and fifty cents *ad valorem* on every hundred dollars of the value of all lots, lands and buildings within any city, town, village or borough of this State.\(^{62}\)

In December of 1865, the first taxing act after the 1865 amendment, put its terms into effect as follows: "Fifteen cents *ad valorem* on every hundred dollars of the value of all the lands granted in this State . . . and on all lots, lands and buildings within any city, town, village or borough in this State."\(^{63}\) The following year this language was further simplified to read: "On all real estate, thirty cents on every hundred dollars . . . ."\(^{64}\) A consistent pattern is therefore apparent: the existing classifica-

tion system of real property was considered unfair, the 1865 Con-
vention acted to abolish it, and the legislature subsequently 
treated real property as one class for tax purposes.65

The history with respect to personal property is also of inter-
est. Section 8 of the 1865 Constitution provided that all "taxes 
upon property, real or personal, shall be laid upon the actual 
value of the property taxed." It might be reasonably argued that 
this language established two classes of property, real and per-
sonal, which could be treated differently. This, in fact, was the 
view of the legislature in 1866. This legislature, as noted above, 
taxed "all real estate" at 30 cents for each $100 of value. With 
respect to personal property, however, an entirely different ap-
proach was taken. It was not only treated as a separate class but 
was further subclassified. The actual value standard as mandated 
by the 1865 amendment was applied, but classification was 
achieved by use of different tax rates. Thus, the personal property 
classes were:

I. Capital stock of 
gas-light companies $0.50 per $100

II. Manufactured articles $1.00 per $100

III. Liquor $10.00 per $100

IV. Buggies, carriages, gold 
and silver plate, watches, 
jewelry and pianos $1.00 per $100

V. All other personal 
property Not mentioned and 
presumably exempt.

The validity of this personal property classification may be ques-
tioned. Section 8 prescribes the same limitation for personal 
property as it does for real property. However, the legislature 
clearly thought it had the power to act as it did and there is no 
reported case involving a challenge to the statute. Any question 
was removed, however, by the 1868 constitution which corrected

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65. Over a hundred years later, the Holzwasser court upheld the classification of real 
property stating: "We find nothing in our Constitution that prohibits the General Assem-
bly of this State from classifying property according to its use so long as such classification 
is reasonable." 205 S.E.2d at 704.

66. The tax on liquor was in the nature of a sales tax, being imposed upon the gross 

67. Id. No statutes were enacted in 1867. The 1866 Act was continued in effect by 
General Order 139 of the military government. General Orders, No. 139, [1867] 14 S.C. 
Stat. 160. The only reported case involving the statute concerned the exemption provided 
14 (S.C. 1867).
the drafting flaw of the 1865 constitution by prohibiting classification by the use of different rates. Article IX, section 1 of the 1868 constitution provided: “The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation . . .”

In summary, the 1865 provision established a single standard for valuation, that standard being actual value. Thus, classification by the use of different valuation standards was prohibited. The 1868 constitution added the idea that the rate of tax must be “uniform and equal.” Thus, classification by the use of different tax rates was prohibited.

IV.
THE 1868 CONSTITUTION

The state’s next constitution, the Reconstruction Constitution of 1868, was drafted by a Convention meeting in Charleston between January 14 and March 17, 1868. The Convention perfected and substantially elaborated the constitutional limitations dealing with taxation. Its provisions included:

(1) Article I, section 36.
All property subject to taxation shall be taxed in proportion to its value. Each individual of society has a right to be protected in the enjoyment of life, liberty and property, according to standing laws. He should, therefore, contribute his share to the expense of his protection and give his personal service when necessary.

(2) Article II, section 33.
All taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax.

68. This provision is art. X, § 1 of the present constitution.
69. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA (1868) [hereinafter cited as 1868 CONVENTION].
70. This provision was new with the 1868 constitution; it became art. I, § 6 of the 1895 constitution and later art. X, § 3A, No. 276, [1971] S.C. Acts & Jt. Res. 2316. Its history in the 1868 CONVENTION is as follows: Reported and first reading, 1868 CONVENTION at 255, 258; second reading, Id. at 353; third reading, Id. at 788, 792.
71. This provision is identical with the first sentence of art. I, § 8 of the 1865 constitution. It became art. III, § 29 of the 1895 constitution. The history of the provision in the 1868 convention is as follows: Reported and first reading, 1868 CONVENTION at 310, 315; second reading, Id. at 510-511; third reading, Id. at 842, 846.
(3) **Article IX, section 1.**
The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed; and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.\(^\text{72}\)

(4) **Article IX, section 6.**
The General Assembly shall provide for the valuation and assessment of all lands and improvements thereon prior to the assembling of the General Assembly of one thousand eight hundred and seventy, and thereafter on every fifth year.\(^\text{73}\)

(5) **Article IX, section 8.**
The corporate authorities of Counties, Townships, School Districts, Cities, Towns and Villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property, except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law.\(^\text{74}\)

The constitution was adopted as a whole by the Convention on March 17, 1868,\(^\text{75}\) and ratified by popular vote in April.\(^\text{76}\)

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72. This provision, as previously noted, corrected the drafting flaw in the 1865 amendment by requiring a "uniform and equal rate" of tax. It became art. X, § 1 of the 1895 constitution. This section also corrected another oversight in the 1865 constitution. The 1865 constitution adopted the one class system but neglected to provide express exemptions for public, religious and charitable property. This section authorized such exemptions. Of course, if Holzwasser is correct, no express exemption is necessary; the legislature may create reasonable classes, which these would seem to be. The history of the provision in the 1868 convention is as follows: Reported, 1868 Convention at 362; second reading, Id. at 656; third reading, Id. at 865.

73. This provision was derived from the second sentence of art. I, § 8 of the 1865 constitution. It became, with modifications, art. X, § 13 of the 1895 constitution. The history of the provision in the 1868 constitution is as follows: Reported, 1868 Convention at 362; second reading, Id. at 656; third reading, Id. at 865-66.

74. This provision was new with the 1868 constitution; it became art. X, § 5(1) of the 1895 constitution. The history of the provision in the 1868 Convention is as follows: Reported, 1868 Convention at 362-63; second reading, Id. at 658; third reading, Id. at 865-66.

75. 1868 CONVENTION at 923. Interestingly, on January 29, 1868, the convention adopted an ordinance imposing a highly classified special tax to raise money to meet the
The Convention considered and rejected one proposal which would have had a far reaching effect on the state's taxing system. Mr. Parker proposed that the legislature be restrained from imposing any tax other than a property tax. His resolution providing for an exclusive property tax read in part: "That all taxes on property in this State, shall be assessed in exact proportion to the value of such property . . . and that no other tax shall be imposed upon the people of this State." This resolution was referred to the Executive Committee but not reported out. A supreme court decision in 1873 was required to determine whether the legislature could impose other taxes in addition to the property tax.

On September 17, 1868, five months after the ratification of the new constitution, the legislature enacted a comprehensive forty-page statute providing for the assessment and taxation of property. The statute, in conformity with the constitution, was premised upon an unclassified tax on all real and personal property. It defined the taxable base as "all real and personal" property in the state; required that such property be valued at "actual value;" and mandated that all property be taxed at the same rate.

Section 1 described taxable property as follows:

_That all real and personal property in this State, and personal property of residents of this State, which may be kept or used temporarily out of the State, with the intention of bringing the_

expenses of the Convention. This tax was imposed as follows: (1) on all real estate - 7.5 cents per $100 of value, (2) on manufactured articles - 15 cents per $100, (3) on buggies, carriages, gold and silver plate, watches, jewelry, and pianos - 50 cents per $100, and (4) a sales tax of 15 cents per $100. 1868 CONVENTION at 186. It is clear that this special tax could not have been imposed after the Convention completed its work.

76. 3 D. WALLACE, at 257. The constitution included two other new tax provisions which became the subject of litigation in State v. Hayne, 4 S.C. 403 (1873). Art. IX, § 3, provided:

_The General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State of each year; and whenever it shall happen that such ordinary expenses of the State for any year shall exceed the income of the State for such year, the General Assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year._

Art. IX, § 4, provided:

_No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object such tax shall be applied._

77. 1868 CONVENTION at 69.

78. Id. The resolution may have been the original source of art. I, § 36 of the 1868 constitution.
same into the State, or which has been sent out of the State for sale and not yet sold; all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of parties resident in this State, shall be subject to taxation.  

Section 48 further defined the constitutional standard of "actual value" as follows:

All real and personal property shall be valued for taxation at its true value in money, which, in all cases not otherwise specially provided for in this Act, shall be held to be the usual selling price of similar property at the place where the return is to be made; and if there be no usual selling price, then, at what is honestly believed could be obtained for the same at a fair sale at the place aforesaid; but each parcel of real property shall be separately appraised without reference to the value of any growing crops thereon.

Section 76 provides that real and personal property shall be taxed at the same rate. It provides:

Each County Auditor, after receiving from the Auditor of the State, and from such other officers and authorities as shall be legally empowered to determine the rates or amount of taxes to be levied for the various purposes authorized by law, statements of the rates and sums to be levied for the current year, shall forthwith proceed to determine the sums to be levied upon each tract and lot of real property, adding the taxes of any previous year that may have been omitted, and upon the amount of personal property, moneys and credits listed in his County, in the name of each person, company or corporation, which shall be assessed equally on all real and personal property subject to such taxes, and set down in one or more columns, in such manner and form as the Auditor of the State shall prescribe.

The state appropriation act for the year commencing October 1868, specified various appropriations for the executive, judiciary, state police, education department, etc. The last section of the act authorized the auditor to impose a "sufficient percentum of taxes" to meet the authorized expenses "upon the assessed valuations of the property of the State." Similarly, when the

81. Id. at 27 (emphasis added).
82. Id. at 41 (emphasis added).
83. Id. at 50 (emphasis added).
85. Id. § 11, at 239. This section states:
The Auditor of the State is hereby authorized and directed to levy, and cause
legislature authorized borrowing it provided for an unclassified property tax sufficient to pay interest.\(^{66}\)

The one-class property tax system adopted by the 1865 and 1868 constitutions and implemented by the legislature was consistently followed for over a hundred years. The state imposed a one-class tax to meet state expenses from 1868 to 1938, when the state discontinued use of the property tax.\(^{87}\) From 1868 to 1972 the

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\(^{66}\) For example, No. 14 [1868] 14 S.C. Stat. 18 authorized the Governor to borrow one million dollars to pay interest on the public debt. The last section provided:

SECTION 6. That an annual tax, in addition to all other taxes shall be levied upon the property of the State, sufficient to pay the interest on the loan hereinabove authorized, at the times when such interest shall fall due.

\(^{87}\) The annual state property tax was unclassified from 1869 until its demise in 1938.

The following chart lists the acts imposing the annual state property tax from 1869 to 1938:

state also adhered to a one-class system in authorizing or imposing taxes to meet county expenses.\footnote{In 1972 the legislature enacted No. 1266, [1972] S.C. Acts & Jt. Res. 2467, which directed the Tax Commission to apply a 9.5% assessment ratio (see text accompanying note 326 infra) on manufacturer's property. This statute led to the Holzwasser litigation. The state, in imposing taxes to meet county expenses, has consistently levied an unclassified property tax. For example, No. 659, [1920] S.C. Acts & Jt. Res. 1211, pro-}

\begin{verbatim}
\end{verbatim}
Be it enacted by the General Assembly of the State of South Carolina: That a tax of eleven (11) mills is hereby levied upon all taxable property in the county of Berkeley for county purposes for the fiscal year beginning January 1, 1920.

The following chart traces the county supply bills for five counties at ten year intervals from 1890 to the present:

**Berkeley County**


**Chesterfield County**


**Lexington County**


**Richland County**


In 1966, by No. 3, [1967] S.C. Acts 5, the General Assembly devolved to the Board of Administrators of Richland County the power to make appropriations and levy taxes. The Board of Administrators became the County Council by Act No. 33, [1969] S.C. Acts 34 with the power to levy taxes.

**Spartanburg County**

V.

JUDICIAL CONSTRUCTION: 1868-1895

The state's next constitutional convention did not meet until 1895. Between 1868 and 1895 a number of important tax cases reached the supreme court for decision. A common thread that runs through these cases is the argument by the state that the challenged tax act did not impose a "property" tax which would be subject to the severe constitutional limitations. Rather, according to the state, the act imposed a "special assessment" or an "excise" or "license" or "franchise" tax. The taxpayer, on the other hand, argued that the tax in question was a "property" tax and hence unconstitutional. Categorization of the tax consequently was decisive, it being understood by all parties that a true property tax is inflexible: that a "uniform and equal rate" must be applied against the constitutionally defined class, i.e., the actual value of property. A non-property tax would be upheld if the tax were applied against some reasonable class as defined by the legislature. With respect to a property tax, however, the constitution had removed legislative discretion, and the class was established by the constitution itself.

In August of 1873 the supreme court decided State v. Railroad Corporations. The statute in issue was enacted in 1872 and entitled, "An Act To Provide For A General License Law." Section 7 of this act required every railroad company or corporation in the state to pay a lump sum based on the length of its track and provided for seven classes. The court held this classified tax to be unconstitutional. It categorized the tax as one on property and held that the constitution prohibited "the levy of any tax on

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By No. 1035, [1868] S.C. Acts 2455 a county commission form of government was created for Spartanburg County and it was given the power to levy taxes. Id. at 2458.

89. 4 S.C. 376 (1873).
90. No. 165, [1872] 15 S.C. Stat. 195. This act was approved on March 13, 1872. On December 20, 1872, the act was repealed effective April 1, 1873. No. 221 [1872] 15 S.C. Stat. 308.

91. 15 S.C. Stat. at 199. The seven classes provided for by the statute were (1) if a company owned less than 50 miles it paid $187.50; (2) 50 to 75 miles - $375; (3) 75 to 100 miles - $625; (4) 100 to 150 miles - $875; (5) 150 to 200 miles - $1,000; (6) 200 to 250 miles - $1,125; (7) and over 250 miles - $1,250.

https://scholarcommons.sc.edu/sclr/vol26/iss3/7
property except in proportion to value.” The court noted: “It is a tax imposed on the road as property. It is not laid on its income, or any franchise or privilege, but measured solely by the ‘length of the main track and branches.’” The court thought its conclusion to be “so clear and undeniable that we shall content ourselves with a mere reference to the clauses of the constitution which forbid the levy of any tax on property except in proportion to its value.” The clauses cited by the court were article I, section 36 (all property to be taxed “in proportion to its value”); article II, section 33 (original 1865 actual value standard); article IX, section 1 (“uniform and equal rate” of taxation); and article IX, section 6 (legislature to provide for valuation of all lands). Consequently, in the first state tax case under the 1868 constitution, the court rejected a classified property tax on the ground that it was not based on the constitutionally created class, i.e., the actual value of all property.

Also in August of 1873 the court decided three other cases challenging the 1872 license law. All three held in favor of the taxpayers on technical grounds, but in the third, State v. Hayne, the court went on to render an elaborate opinion because of the “public importance” of the issue. The central issue presented to the court was whether or not the legislature could impose any tax except a property tax. This issue was controlling since the court and the parties agreed that the tax in question could not be sustained if it were characterized as a property tax. Section 10 of the 1872 license law required a payment of ten dollars from every person engaged in the profession or calling of attorney, physician, dentist, insurance agent or architect.

"Id. 4 S.C. at 377.
93. Id.
94. Id.
95. State v. Chapeau & Heffron, 4 S.C. 378 (1873); State v. Graham & Chapeau, 4 S.C. 380 (1873); and State v. Hayne, 4 S.C. 403 (1873).
96. 4 S.C. at 411.
97. The act itself did not describe the required payment as a “tax,” apparently on the theory that it might be upheld as a license “fee” where a tax would fail. The court, however, considered it as “in the nature of a tax.” Id. at 411.
98. No. 155, [1872] 15 S.C. Stat. at 200. This section also included an ungraded gross income tax as follows:

[Every person holding any office whatsoever, either elected or appointed, all officers of corporations and societies who receive a salary, shall be required to pay into the Treasury of the County in which such persons reside, for use of the State, on or before the first day of April, A.D. 1872, the sum of one dollar for every one hundred dollars’ salary receivable, or to be received, from such office.]

Id.
Hayne, a lawyer in Charleston, continued to practice law without making the payment. He was indicted, found guilty and fined twenty dollars. Hayne took the basic position that the detailed constitutional provisions dealing with the property tax were exhaustive and, by fair implication, prohibited the imposition of any other type of tax. The Court rejected this argument on the grounds that the constitution did not expressly prohibit the use of other taxes\(^99\) and that no implications should be read in limiting such an essential government power. Justice Willard, writing for the court, stated:

[W]e may safely affirm that when the constitution undertakes to regulate the exercise of the taxing powers, by prescribing the mode by which the revenues of the State shall be raised, in the absence of a clear intent to exclude other modes of raising revenue than that prescribed, such regulation must be construed, while imposing a political duty on the legislature, as not circumscripting its constitutional functions, so as to exclude it from authorizing a resort to such auxiliary means of raising revenue.\(^100\)

The court supported its conclusion by noting that the "taxing power must be regarded as the primary power of government."\(^101\)

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99. As previously mentioned, the Parker resolution presented to the 1868 Convention did contain an express prohibition, providing "that no other tax [than a property tax] shall be imposed upon the people of this State." 1868 CONVENTION at 69. The Hayne court did not refer to this history.

100. 4 S.C. at 413.

101. 4 S.C. at 412. More fully, the court stated:

The taxing power must be regarded as the primary power of government, as the maintenance of peace is its primary duty. This results from the fact that its end is the acquisition of means upon which the exercise of all the powers of the government practically depend. It is indispensable, because the validity of the government depends upon it. The inexorable necessity that is laid upon it is to get adequate revenue. Subject to its fitness to attain this end, it should be so shaped in its exercise as to distribute fairly the burden imposed on all that should contribute.

Id. at 412-13.

Later in the opinion Justice Willard re-emphasized this point in the following manner:

There are but two modes in which government can secure the means of maintaining itself in efficiency. One is by arbitrary seizure, taking, when and where it can most conveniently be found, that which may be deemed necessary to enable the government to perform its functions; the other is by systematic proceedings for the purpose of raising money, having regard to the principle that the burdens of supporting the government should be distributed fairly according to some equitable rule of contribution. That sovereign States will and must resort to extraordinary means of self-preservation in exigencies of peril, is settled by the experience and common judgment of all mankind. Any attempt in a
A limitation on such a power would have to be unmistakable. The court's determination that the constitution permitted taxes in addition to the property tax made further analysis necessary, the essential question becoming whether any constitutional limits applied to a non-property tax. The court first reviewed the restraints on property taxes. It discussed article II, section 33, the original actual value provision which provided that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxes," and noted:

There is no special grant of authority to levy taxes contained in this Article. The right to levy taxes is conferred under the grant of general legislative power. Section 33 assumes the existence of such power, and undertakes to prescribe the rule of its exercise where such exercise consists in the imposition of a tax of a particular description, namely, taxes upon property, real and personal.

The court then analyzed the issue of whether any constitutional limits applied to a non-property tax. The actual value standard of section 33 was inapplicable since it specifically referred to property taxes. The court concluded that the first clause of article IX, section 1, requiring a "uniform and equal rate of assessment and taxation," governed a non-property tax. This conclusion led to a curious situation and the court's reasoning is consequently given at some length:

Section 1, apart from its provisions in regard to exemptions, advances two ideas; first, equity in all taxation and assessment, and second, valuation, as the means of securing such equality, in the case of taxes on property. The first clause, namely, "the General Assembly shall provide by law for a uniform and equal

written Constitution to restrain the possible exercise of such power in emergen-
cies would not conform to the nature of government or the views that mankind
entertain of duty in cases of extraordinary peril, and would be likely to be
disregarded in such cases.

Id. at 415-16.

102. Plainly, had this decision gone differently and confined the legislature to a
property tax, the challenged act would have been invalid. The tax was levied at a flat rate
on certain people. It did not even purport to reach the constitutionally defined property
tax class, i.e., the actual value of all property. Of course, if Holzasser is correct, it is
immaterial whether or not the tax is a property tax; the only question is whether the
legislature has created a reasonable class. Obviously, the Hayne court was not of this view.

103. 4 S.C. at 421. The court observed that if the framers intended the property tax
to be exclusive they would probably have drafted section 33 as follows: "All taxes shall
be laid upon property, real and personal, according to the actual value of the property
taxed . . . ". Id.
rate of assessment and taxation," is not, by its terms, applicable alone as peculiar to taxes on property. It does not use the word value, which is significant of taxation as applied to property. That expression occurs in the second clause in connection with the subject to which it belongs, namely, taxation of property. These clauses are connected by the conjunction "and"; accordingly their grammatical relations admit of their bearing independent force and effect, if the nature of the subject-matter admits of it. It is clear that the first clause, establishing the rule of equality, must be regarded as affecting the poll tax, authorized by the second Section. The maximum of that tax is fixed at one dollar per poll, but there is nothing in the last named Section, standing by itself, that makes it necessary that all polls should be considered equally in regard to that tax. The first clause of Section 1 supplies this deficiency, and, we must conclude, was intended to supply it. It therefore follows that the first clause prescribing uniformity was intended to have and has an operation beyond the scope of the second clause, to the extent, at least, of regulating one form of tax not embraced in the second clause, namely, the poll tax, to which the principle of valuation is inapplicable. If, then, the first clause is not confined to its operation to the class of taxes mentioned in the second clause, as calling for valuation, it may be affirmed that the object and intent of the first clause was to introduce the principle of equality and uniformity into any and all classes of taxes that might be authorized by the Legislature, and that it was not intended as a means of ascertaining what taxes might and what might not be levied.\textsuperscript{104}

The court’s opinion that a non-property tax must be equal and uniform resulted in a return to what is called here the technical flaw of 1865. But the flaw was reversed in its new version. The 1865 constitution had established a class, the actual value of property. This defined the subject matter of the tax and the method of valuing it. That constitution, however, failed to specify that an equal rate be applied against the class. It was consequently at least theoretically possible that classification could be accomplished by the use of differing rates.\textsuperscript{105} This flaw was cured

\textsuperscript{104} Id. at 423-24. Strangely, many modern cases do not seem aware of this Hayne position. Both Gregg Dyeing Company v. Query, 166 S.C. 117, 133, 164 S.E. 588, 594 (1931), aff’d, 286 U.S. 472 (1931) and State ex rel. Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951) seem based on the idea that the uniform and equal test is applicable only to a property tax, not an excise.

\textsuperscript{105} See text accompanying note 66 supra. This actually occurred with respect to personal property. It is likely that a similar effort to classify real property would have failed in view of the clear intent of the 1865 convention to end such classification.
by article IX, section 1 of the 1868 constitution with its requirement of a "uniform and equal rate" of tax. Taken together, the 1865 and 1868 provisions form a clear pattern, i.e., the class is the value of property and the tax rate on all property must be equal. They seem clearly designed to operate together, but either provision by itself lacks half of the equation and results in uncertainty. Between 1865 and 1868 substantial questions existed as to the effect of the actual value class. Similar questions existed as to the effect of the equality and uniformity provision alone after the Hayne court separated it from a property tax context. The difficulty is that a requirement of a "uniform and equal rate" of taxation assumes that a relevant class will be supplied from another source.

With a property tax the constitution defines the class as the actual value of all property, but what is the class in the case of a non-property tax? Is the legislature free to determine what the class will be? The answer must be yes. The only limit on the legislative power would seem to be the equal protection clause or a similar kind of thinking which could be read into the phrase "uniform." Essentially, personal discrimination is prohibited but the legislature is otherwise free to classify. This will become clear in the discussion below of State v. City of Columbia, decided a year after Hayne. Consequently, Holzwasser, in its view that the equal protection clause is the only limit on the state's taxing power, is correct in the case of a non-property tax.

The Hayne court, in its analysis of the second clause of article IX, section 1, (the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal . . ."), gave a clear expression of the one-class rule:

[T]he second [clause] admits of no construction that can confer on it an import beyond that plainly signified by the terms employed, namely, that it should be the duty of the Legislature to provide the means of securing equal and just valuation on all property subject to taxation, the 36th Section of Article I, [all property to be taxed "in proportion to its value"] and the 33d Section of Article II, [original 1865 actual value standard] having already fixed upon the value as the means of distributing the

106. U.S. Const. amend. XIV, § 1. It is reported that "ratification was probably completed on July 9, 1868 when the legislature of the twenty-eighth state (South Carolina or Louisiana) approved the amendment . . . ." THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, S. Doc. No. 170, 82d Cong., 2d Sess. 45 (1952).

107. 6 S.C. 1 (1874).
burden that ought to be borne by property on all property that should contribute to bear it.108

The court concluded that it found "no ground in the Constitution for excluding the Legislature from resorting to a tax on occupation."109

If the constitution permits non-property taxes the question arises as to what kind of taxes will be included in that category. Hayne involved an occupation tax.110 An occupation tax is a type of excise tax. Judge Cooley's classic definition of excises is: "taxes levied upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."111 An excise tax is imposed upon a transaction (sale, gift or death) or an activity such as engaging in business. In contrast, a property tax is imposed simply on ownership. The proper characterization of the income tax, as an excise or a property tax, was to become a subject of great controversy later in the nineteenth century.112

Shortly after Hayne the court was called upon to rule on a City of Columbia ordinance imposing a license fee on various occupations. The state had specifically authorized the city to impose such fees by an 1871 statute.113 The city ordinance varied the fee depending on the occupation: it required an annual payment of $100 for astrologers, $25 for lawyers, $200 for banks and

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108. 4 S.C. at 424. The last phrase, "on all property that should contribute to bear it," is a reference to the fact that art. IX, § 1 specifically exempts property used for "municipal, educational, literary, scientific, religious or charitable purposes." The 1868 constitution contains an express exception for such property which would otherwise have come within the one-class rule.

109. Id. at 428.

110. Hayne made reference to another non-property tax, the poll or capitation tax. Article IX, § 2 of the 1868 constitution provided: "The General Assembly may provide annually for a poll tax, not to exceed one dollar on each poll, which shall be applied exclusively to the public school fund."

111. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 928 (8th ed. 1927). Cooley also used the following definition:

[A]n excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes and business taxes.


112. See text accompanying note 125 infra. The 1895 Convention specifically added a provision to the constitution permitting a graduated income tax. S.C. CONST. art. X, § 1 (1895).

113. No. 343, [1871] 14 S.C. Stat. 569. The same statute authorized the city to impose an unclassified property tax. Section 4 provided: "that all persons liable to taxation shall make discovery, upon oath or affirmation, of their taxable property within the said City of Columbia, and make payment of their taxes . . . ." Id. at 570.
bankers; and for billiard halls, $50 for the first table and $25 for each additional table. Some eighty additional occupations were further specified and the amount fixed for each class. Retail stores were classified by the amount of annual sales. This ordinance was challenged by several banks in State v. City of Columbia. Justice Willard again wrote the opinion for the court.

The taxing power was delegated to the city pursuant to article IX, section 8 of the 1868 constitution which provided:

The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. The language "uniform in respect to persons and property" is different from the language of article IX, section one, "a uniform and equal rate of assessment and taxation," but the court's interpretation of "uniform" under section 8 is a strong indication of its interpretation of "uniform" under section 1. What type of statute will be offensive to this constitutional limitation?

The banks argued that the charge imposed was improper since they were authorized to engage in business by legislative charter and had paid the state license fee under the controversial 1872 license law. The court traced the history of license fees which were traditionally based on the police power rather than the taxing power, and on the idea that certain businesses such as places of public entertainment "should contribute specially to the support of the government in excess of the burdens borne by the productive industries." It noted that the extension of license fees beyond those occupations properly within the police power, where circumstances of a peculiar nature rendered it requisite that each particular avocation should have its own rate of taxation, was natural where taxation had divided itself into two methods, the one embracing those subjects of taxation that are capable of being reached by means of an uniform rate, and the other such as could be treated in no other way than by subdivision into distinct classes and imposing a separate rate on each of such classes.

114. 6 S.C. 1 (1874).
115. This provision is presently found in art. X, § 5.
116. 6 S.C. at 6.
117. Id. (emphasis added).
The court thus took the view that there are two methods of taxation. The first method dealt with "those subjects of taxation that are capable of being reached by means of a uniform rate." This category, which would include a property tax, was not classifiable. The second method of taxation dealt with subjects which "could be treated in no other way than by subdivision into distinct classes and imposing a separate rate on each of such classes." This category, which would include license taxes, required classification.

Despite its historical discussion of license fees as related to the police power, the court held the challenged ordinance to be an exercise of the taxing power. The constitution required that delegated taxes be "uniform in respect of persons and property." The court, following Hayne, thought it clear that the limitations applied to "all kinds and modes of taxation." The court noted that the legislature had power to authorize the imposition of a tax on avocations and business by a municipal corporation, and to confer on such bodies power to fix a separate rate for each distinct class of the subjects of taxation embraced within it, unless the language of the constitution, quoted above, is to be construed as rendering it imperative that a single rate should be applied to all such subjects of taxation equally.

Or, put differently, reasonable classification was permissible unless the uniformity requirement was construed as creating a single class containing all "subjects of taxation." The court concluded that the uniformity provision was not to be so construed. It was evidently aware that the only constitutionally mandated single class was property. What, then, did the uniformity provision require? The court's response was to use the language of equal protection: "The true operation and effect, therefore, of the [uniformity] provision under examination is to prevent discrimination among individuals liable to taxation on personal grounds . . . ." To the same effect, the court spoke of "improper discrimination" as follows:

118. Id.
119. Id.
120. Id. at 8. The court noted: "If equality and uniformity as the rule of taxation are desirable in the case of a poll tax, or a tax on property as such, it is equally desirable that it should apply to taxation on avocations and business." Id.
121. Id. at 7-8 (emphasis added).
122. Id. at 8.
An improper discrimination as it regards the persons upon whom the tax is imposed, is one that does not arise from the nature of the subject matter in respect of which he is taxed but from something that characterizes the individual as such, apart from all consideration of the nature and situation of the thing in respect of which the taxation is imposed.123

The court found no improper discrimination or personal distinctions in the highly classified ordinance. In sum, the result of the Columbia case seems to be that when the 1868 uniformity provision is separated from the 1865 actual value for property standard, the legislature is free to classify limited only by equal protection considerations.

The billiard hall tax presented a separate question. This tax, $50 for the first table and $25 for each additional table, looked a great deal like a property tax. The court was clear that if the billiard hall tax were a property tax, it would have to be stricken since it was not based on actual value. The court concluded that the tax was not a property tax. Instead, the number of tables was simply used as a measure of the business done. The court noted: "The number of billiard tables employed is not an improper measure of this amount and value of this business done, and it cannot be regarded as virtually a tax on the tables considered as property."124

After Hayne and Columbia what kind of non-property tax was permissible? Obviously a flat amount on various occupations, differing widely from occupation to occupation, was permitted. Also, quite clearly, a fixed percentage could be applied against total sales or gross business income. But a percentage varying with the amount of sales or income, increasing as sales or income increased, raised more difficult questions. The rate, in this situation, was not the same on all sales or income. Did it lack uniformity? Certainly doubts existed as to the validity of a graduated income tax. This is clear since the 1895 Convention expressly added an exception authorizing such a tax. Article X, section 1 of the 1895 constitution included the following: "Provided, further, That the General Assembly may provide for a graduated

123. Id. at 9. Perhaps the draftsmen of the 1868 uniformity provision had in mind the English practice of grossly discriminatory laws. In 1691, the English imposed an income tax "which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate." Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 696, (1895), rehearing, 158 U.S. 601 (1895) (concurring opinion of Justice Field).

124. Id. at 16.
tax on incomes, and for a graduated license on occupations and
business."125 Also, academic discussion has to some extent cen-
tered upon the issue of "uniformity." For example, one recent
study states: "A graduated income tax by its very nature lacks
the uniformity of taxation typically required by the state consti-
tutional restrictions."126 But, in the authors' view, uniformity was
not the problem: the problem was the proper characterization of
the income tax — Was it a property or non-property tax? If an
excise, the tax would simply be tested against uniformity, but, as
interpreted by Columbia, uniformity would seem to bar a gradu-
ated tax. It is not based on "improper discrimination" or "per-
sonal" distinctions. Further, it does not seem unreasonable, in an
equal protection sense, to classify income depending on the
amount received during a particular period. To apply one rate to
the first $10,000 of income and a higher rate to the fifth or sixth
$10,000 received does not seem arbitrary. Consequently, an in-
come tax, if considered as an excise, would appear valid under the
1868 constitution.

But if the income tax is properly categorized as a property
tax it must fail. It must fail because it is not based on the actual
value of property as mandated by the constitution. Income de-

duced from capital or property might be a relevant factor in deter-

mining value, but it would not be decisive. An income tax on
income derived purely from labor seems clearly to be an excise
rather than a property tax. The license tax cases discussed above
indicate that such a levy would be upheld. A graduated income
tax, however, limited solely to the income of labor, appears logi-
cally and politically unpalatable.

During this period (1868-1895) several license tax cases arose
which resulted in reaffirming the principles of Hayne and
Columbia.127 In 1878 the legislature created the office of Railroad

125. Article X of the 1895 constitution was derived from art. IX of the 1868 consti-
tution.


127. (1) In Charleston v. Oliver, 18 S.C. 47 (1881), the General Assembly had passed
an act titled "An Act to Regulate the Assessment and Taxation of Personal Property in
the City of Charleston." No. 293, [1870] 14 S.C. Stat. 408. Article II, § 20 of the 1868
constitution required that "[E]very Act or resolution having the force of law shall relate
to but one subject, and that shall be expressed in the title." Section 7 of the act authorized
the city council of Charleston to impose a license tax. The court held the act unconstruc-
tional because a license tax was not a tax on personal property and therefore the act
related to a subject not expressed in its title. (2) Information against Oliver, 21 S.C. 318
(1844), held that a new act, No. 462, [1881] 17 S.C. Stat. 582, passed to allow Charle-
ston's city council to impose a license law, corrected the earlier defect and was constitu-

https://scholarcommons.sc.edu/sclr/vol26/iss3/7
Commissioner with certain regulatory powers over railroads doing business in the state.\textsuperscript{123} This act was later included in a general railroad law which provided that the expenses of the Commissioner and his office were to be borne by the railroads "according to their gross income."\textsuperscript{129} The statute did not characterize the railroads' payment as a tax, as a fee, or otherwise. In the first challenge to the acts, \textit{Columbia & Greenville R.R. v. Gibbes},\textsuperscript{130} the majority of the supreme court stated that "in the view which the court takes it will not be necessary to determine the precise character of the exaction assailed."\textsuperscript{131} This issue was avoided by an unusual interpretation of the nature of a corporate charter. According to the court, since the 1879 Railroad Commission Act preceded the plaintiff's charter, granted in 1880, it thereby "accepted the charter in full view of a public act of which all are bound to take notice, and it thereby became a condition of the charter."\textsuperscript{132} Mr. Justice McIver, who served as Chief Justice from 1891 to 1903, dissented but stated that the "pressure of other official duties" prevented him from writing an opinion at the time.\textsuperscript{133}

The next challenge to the act involved a railroad which had been chartered prior to 1879.\textsuperscript{134} The court's contract theory would apparently not hold. The railroad argued that the payment was in substance a property tax and invalid because not imposed on actual value and not imposed on all property.\textsuperscript{135} Again, however, the court submerged the basic issue presented to it. This was accomplished by unusual interpretations of the nature of corporations and the state constitution's anti-\textit{Dartmouth College} provision. Corporations, as viewed by the court, are creatures of government and have "life, if life at all as a matter of grace and may

\textsuperscript{123} Information against Jager, 29 S.C. 438 (1888), reaffirmed the \textit{State v. Hayne} series of cases to the effect that the General Assembly can give a city council the power to raise revenue by means of a license tax.


\textsuperscript{129} 17 S.C. at 817. More fully, § 41 directed the Comptroller General to "assess upon each of said corporations its just proportion of such expenses, in proportion to its said gross income for the current year . . . ." \textit{Id}. The payment was to be collected "in the manner provided by law for the collection of taxes." \textit{Id}.

\textsuperscript{130} 24 S.C. 60 (1885).

\textsuperscript{131} \textit{Id} at 72.

\textsuperscript{132} \textit{Id} at 73.

\textsuperscript{133} \textit{Id} at 75 (emphasis added).


\textsuperscript{135} \textit{Id} at 390.
demand nothing."

The court's theory of the anti-<i>Dartmouth College</i> provision was equally unusual. Such provisions were added to most state constitutions in the years following Justice Marshall's opinion. Their intent was to prevent a corporation from securing a vested right from one legislature which would be beyond the power of a subsequent legislature. The provision is normally viewed as reserving to the legislature powers which it otherwise possesses. The South Carolina court, however, viewed it as a separate grant of power. It returned to a contract theory by the following unusual path: The railroad accepted its charter with knowledge of the reserved power and therefore it waived the constitution and consented to any future amendment the legislature might make as a matter of contract. It stated:

[I]t can make no difference what it may be called—whether a tax for revenue, a police regulation, or license fee. Whatever it may be, the company contracted to pay it; and if it claims the privileges and rights of its charter it must take them with the burdens.

The court seemed to be going to extreme lengths to avoid the critical questions posed: What is the nature of the payment, and if it is a property tax, must it not fall? No doubt sensitive to this possible criticism, the court, in the last two paragraphs of its opinion, comes to the point. The tax is not a property tax. It is a license tax. It is "uniform" because it is imposed upon a reasonable class, all railroads.

Justice McIver again dissented but now wrote a substantial and thoughtful opinion. McIver disagreed with the majority's novel theories and its conclusion. The exaction was not "within the limitations of the taxing power as prescribed by the constitution."

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136. <i>Id.</i> at 395. The court continued on this theme:
It is emphatically clay in the hands of the potter, and must take its life at the will of the government, or not at all. "Hath not the potter power over the clay?"
Besides it can protect itself if it sees proper by simply refusing to enter into the contract proposed, or, if after having once accepted, by throwing up its charter if the subsequent burden imposed proves too onerous.

<i>Id.</i>

137. This provision originated in the 1888 constitution which read: "[C]orporations may be formed under general laws; but all such laws may from time to time be altered or repealed." Art. XII, § 1.


139. 27 S.C. at 393.

140. <i>Id.</i> at 398.
The majority's "clay in the potter's hands"\textsuperscript{141} theory was rejected by McIver, who considered it "singular" that such a doctrine had not even been advanced previously.\textsuperscript{142} Corporations were entitled to the protections of the constitution. He also rejected the majority's expansive interpretation of the anti-
\textit{Dartmouth College} provision. It was not a waiver of constitutional guarantees and consent to any amendment the legislature might want to make. The provision simply reserved to the legislature the power to make such laws "as it could make within the limitations prescribed by the constitution."\textsuperscript{143} The corporation could not assume "that the legislature would violate the law of its existence, and undertake to do that which the people, in their sovereign capacity, had forbidden them from doing."\textsuperscript{144} What had the people forbidden the legislature from doing? They had prohibited the imposition of a property tax which was not based on actual value.\textsuperscript{145} And they had prohibited the taxation of property at an unequal rate.\textsuperscript{146}

Before reaching this conclusion, McIver first analyzed the nature of the tax. Was it a license tax as the majority had found? A license tax is a tax on the privilege of exercising an avocation.\textsuperscript{147} McIver noted that the tax in question did not "even purport to be a license tax" and had none of the "characteristics of such a tax."\textsuperscript{148} A license tax necessarily involves the idea that if payment is not made it will be unlawful to carry on the business. But McIver saw nothing in the act to indicate that the legislature intended to impose such a sanction. The Justice concluded that the tax was not a license tax. However, assuming arguendo that it was a license tax, McIver had substantial doubts as to its validity. If it were a license tax it would, after Hayne, be required to meet the constitution's article IX, section one test of "uniform." As was seen in \textit{Columbia}, this test requires a reasonable class in an equal protection sense. McIver thought the statutory class, railroads, to be dubious.

[Although] a tax on professions or occupations is not forbidden by the constitution of the state, it does not by any means follow

\begin{itemize}
  \item \textsuperscript{141} See note 136 supra.
  \item \textsuperscript{142} 27 S.C. at 399.
  \item \textsuperscript{143} Id. at 407.
  \item \textsuperscript{144} Id. at 408.
  \item \textsuperscript{145} Id. at 403.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id. at 401-02.
  \item \textsuperscript{148} Id. at 402.
\end{itemize}
that the legislature has the right to single out one particular avocation, or rather, as in this case, one branch of an avocation. For the avocation of the plaintiff company is that of a common carrier, and the exaction is not required from all common carriers, leaving all other avocations and professions free from the burden of such exactions.\textsuperscript{149}

If the tax was to be considered a property tax, McIver believed it "quite clear" that it would violate the constitution.\textsuperscript{150} It was not laid upon actual value and, as a double tax, would result in an unequal rate of taxation. McIver wrote:

If, then, this exaction must be regarded as a tax upon the property of the plaintiff corporation, then it is quite clear that it is in violation of the provisions of the constitution for two reasons. 1st. Because it is not laid upon the value of the property, as ascertained by an appraisement made for the purpose (State v. Railroad Corporations, 4 S.C. 376)\textsuperscript{[article II, section 33]} and 2nd. It would be a double tax on the same property; for it must be assumed, in the absence of any evidence to the contrary, that the officers charged with the duty of collecting the ordinary taxes from this company have performed that duty, and hence to require such company to pay this additional tax upon its property would be so plainly in violation of the constitution as to need no further remark.\textsuperscript{151}

The Justice considered the tax to be a property tax since the measure of the tax, gross income, "is manifestly due to the tangible property used in producing such income."\textsuperscript{152}

Justice McIver then discussed the argument that the tax was not on the corporation's tangible property but on its franchises and that the value of the franchises "is measured by the income derived from the exercise of such franchises."\textsuperscript{153} McIver saw no reason why franchises, a form of intangible property, "may not be taxed like all other property, provided their actual value has been ascertained by an assessment made for that purpose, as

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 403.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 404. McIver did not exclude the possibility that the tax might be considered an income tax rather than a property tax. He stated:
If it should be said that this is a tax upon the income of railroad corporations, and not upon their property, either tangible or intangible, the proposition would be met by the same objection of want of uniformity, inasmuch as no other corporations or persons are subjected to such a tax.
\textsuperscript{153} Id. at 405.
required by the constitution."154 Of course, no assessment of the franchises had been made. Also, the act did not purport to impose a franchise tax. Gross income was not a reasonable measure of the value of the franchises since the income was produced by the tangible property as well as the franchises, "for it is quite certain that the franchises without the aid of the tangible property, which has already been taxed, would yield no income."155

Finally, McIver concluded that even if he were wrong in all his previous positions, the tax could not stand because the rate of tax on the franchises did not comply with article IX's requirement of an equal rate of tax on all property. The rate of the tax in question was determined by the expenses of the Railroad Commission, not the rate applied to all other property. All property was one class. McIver stated:

"But even regarding this as a tax upon the franchises of this corporation, as contra-distinguished from its tangible property, and that the value of such franchises can be properly measured, and were intended to be measured by the gross income of the company, then it could only be required to pay the same rate of taxation upon the value of such property as is imposed upon all other property, and not a proportionate part of the expenses of certain officers and agencies of the government."156

In sum, as a franchise tax, the tax violated both basic constitutional limits on property taxation. It was not laid upon actual value as determined by an assessment and would result in an unequal rate of taxation. Justice McIver's later tax opinions will be discussed below.

Article IX, section 8 of the 1868 constitution expressly authorized the legislature to delegate the taxing power to counties and municipal corporations. It further required that such taxes be "uniform in respect to persons and property within the jurisdiction of the body imposing the same." The provision read:

The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly

154. Id.
155. Id.
156. Id. Also, uniformity would be violated because "all other corporations are not taxed upon their franchises." Id. at 405.
shall require that all the property except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law.\footnote{157}

This provision, taken in conjunction with article II, section 33 and article IX, section 1, would seem to require a one-class system.\footnote{158} However, it appears that, in fact, classification into two classes, real property and personal property, existed between 1868 and 1895. An 1898 opinion by then Chief Justice McIver gives the following background:

It is well known, as a matter of legislative history, that prior to the passage of that [1897] act, some municipal corporations in this State were only invested with the power to impose taxes upon real property, while others were empowered to impose taxes upon personal as well as real property, and the sole object of that act was to bring about uniformity in the taxation of property, as required by sec. 6 of art. VIII. of the present Constitution [1895 version of article IX, section 8], and not to deal in any respect with taxation imposed upon persons.\footnote{159}

No case has been found challenging the classification into real and personal property referred to by McIver. Apparently, the issue would revolve around the second sentence of section 8, part of which is emphasized above. The second sentence, providing that “all” property shall be taxed for the “payment of debts” may contain a negative implication that all property need not be taxed if the payment of debts was not involved, i.e., if the revenue was to be raised for general corporate purposes. Chief Justice McIver indicated this interpretation in an 1892 opinion: “It will be observed that the language [of article IX, section 8] is not that all property, except that previously exempted, shall be taxed, but shall be taxed ‘for the payment of debts.’”\footnote{160}

\footnote{157. S.C. Constr. art. IX, § 8 (1868) (emphasis added).}
\footnote{158. This view is further supported by Act No. 295, [1870] 14 S.C. Stat. 410, which provided: That all municipal corporations created under or by the laws of this State, and vested with power to lay and collect taxes, are hereby authorized and required to assess all property, real and personal, within their corporate limits, at its actual value, and lay all taxes thereon at a uniform and equal rate. . . . This act was repealed in 1874. Its statutory history is given in Ross v. Kelly, 45 S.C. 457, 461, 23 S.E. 281, 282-83 (1895).}
\footnote{159. Florida Cent. & P.R.R. v. City of Columbia, 54 S.C. 266, 278, 32 S.E. 408, 413 (1898) (emphasis in original).}
\footnote{160. State ex rel. Bartless v. Beaufort, 39 S.C. 5, 13, 17 S.E. 355, 358 (1892) (emphasis}
The meaning of the second sentence, and consequently all of section 8, was therefore in some doubt during this period. The 1895 Convention acted to end any doubt. As noted above, it was "well known" at the time of the Convention that the legislature had authorized or permitted municipal corporations to divide property into two classes - real and personal. The Convention prohibited such classification in the future. The second sentence of old section 8 was altered to read:

[A]nd the General Assembly shall require that all the property, except that herein permitted to be exempted within the limits of municipal corporations, shall be taxed for corporate purposes and the payment of debts contracted under law.\(^{161}\)

The addition of the phrase "corporate purposes" made the sentence co-extensive with the municipality's taxation power. It eliminated the possibility of a negative implication which had existed under the earlier language. In 1897, two years after the constitution was ratified, the legislature implemented the one-class rule by statute.\(^{162}\)

The 1868 constitution authorized the legislature to delegate the taxing power to certain governmental bodies. Article IX, section 8, read in part: "The corporate authorities of counties, towns, school districts, cities, towns and villages may be vested

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SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, that from and after the passage of this Act all municipal taxes levied by cities and towns in this State shall be levied on all property, real and personal, not exempt by law from taxation, situate within the limits of said cities and towns, and in accordance with Section 6, Article VIII, of the Constitution of 1895.
SECTION 2. That the clauses of the charters of any towns or cities restricting taxation in said towns to real estate only are hereby repealed.
SECTION 3. That all Acts or parts of Acts inconsistent herewith are repealed.
with power to assess and collect taxes for corporate purposes; . . .” and the meaning of the term “corporate purposes” was litigated in several cases.\(^{163}\)

\(^{163}\) Two cases which may be noted are Floyd v. Perrin, 30 S.C. 1, 8 S.E. 14 (1888) and State ex rel. Dickinson v. Neely, 30 S.C. 587, 9 S.E. 664 (1889).

Floyd v. Perrin developed from an 1885 amendment to the charter of the Greenville and Port Royal Railroad Company. No. 130 [1885] S.C. Acts & Jt. Res. 237, amending No. 129, [1882] S.C. Acts & Jt. Res. 214. The 1882 act authorized cities, towns and counties “interested in the construction of said road” to purchase the capital stock of the railroad. The stock was to be paid for by exchanging the local government’s bonds for the stock. The railroad would then sell the bonds for cash. The local government would be required to levy taxes to pay the interest and principal on its bonds. The hope, rarely fulfilled, was that dividends on the railroad stock would be sufficient to meet debt service on the bonds without resort to taxation. In 1885 the railroad charter was amended by the legislature to add the following curious provision: that existing unincorporated towns “along the line of said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be, bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this act.” No. 130, [1885] S.C. Acts & Jt. Res. at 240. The only evident “necessary” power to carry out the purpose of the act was the issuance of town debt to pay for the railroad stock and the power to levy taxes to pay for the debt. The freshly-created town of Ninety-Six issued debt and purchased railroad stock. Subsequently, it levied taxes to meet the interest on the outstanding bonds. Taxpayers then brought an action to recover taxes paid on the ground that the state delegation of the taxing power did not comply with art. IX, § 8. The supreme court agreed with the taxpayers. The opinion of the court, by Chief Justice Simpson, noted that:

[T]hese incorporations are rather singular bodies. No machinery is provided for their organization; they have no officials, no perpetual succession, nothing, in fact, usually belonging and appertaining to corporate bodies, either public or private, municipal or otherwise.

30 S.C. at 12, 8 S.E. at 17. The court felt obliged to accept the legislative declaration that these entities were corporate bodies but considered what corporate purpose would be served by the purchase of the stock. Indeed, no corporate purposes of any kind were express. Counties, the court noted, may be authorized to purchase railroad stock because of their jurisdiction over highways, bridges and ferries. But this was not the case with a township, much less a township with no express purposes. The court held that the disputed provisions were in violation of the art. IX, § 8 requirement that the delegated taxing power must serve a corporate purpose. In a concurring opinion, Justice McIver wrote of the nature of the delegated power as follows:

The people in their sovereign capacity have, by their constitution, entrusted the taxing power to the general assembly, and, upon a familiar principle, this power thus delegated to that body cannot be delegated by it to any subordinate agency, except by express permission of the sovereign authority. The framers of the constitution, recognizing this doctrine, provided that this high power of taxation might be delegated to certain subordinate agencies for certain purposes, for we find it declared in section 8 of article IX: “The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, &c.” It is clear, therefore, that this provision is, as is said by Waite, C.J., in Weightman v. Clark, 103 U.S. 259, in speaking of a similar provision in the constitution of Illinois, “a limitation on the power of the legislature to authorize taxation by public corporations.”

Id. at 15, 8 S.E. at 18-19. Following the decision in Floyd v. Perrin the situation of those
An additional problem which arose with respect to the delegated taxing power was that of the multiple assessment. The 1868 constitution required that all taxes be laid upon actual value “as the same shall be ascertained by an assessment made for the purpose of laying such a tax.” Further, article IX, section one directed the legislature to provide for a “uniform and equal rate of assessment.” However, the 1868 constitution contained no express provision requiring all taxes, state, county, city, etc., to be levied on the basis of one assessment. Such a provision was added by the 1895 Convention. The framers of the 1868 constitution probably thought such a provision unnecessary since ac-

who had purchased the Ninety-Six bonds seemed perilous. The town had lost the power to tax. The legislature, however, rushed to the rescue. Floyd v. Perrin was handed down on November 30, 1888. One month later, on December 22, 1888, the legislature enacted a statute to bail out the bondholders. No. 10, [1888] S.C. Acts & Jt. Res. 12. The new statute declared the debt valid. Interest and principal was to be met “by the assessment, levying and collection of an annual tax upon the taxable property in said townships.” Id.

This act was upheld by the court in an opinion by Justice McIver. State ex rel. Dickinson v. Neely, 30 S.C. 587, 9 S.E. 664 (1889). The court took the view that here the legislature was acting directly in imposing the tax rather than delegating the power. Floyd v. Perrin “did not touch the question whether the legislature might not, by the exercise of its own power, impose a tax for the same purpose for which it had, without constitutional authority, attempted to delegate the power to certain townships.” 30 S.C. at 603, 9 S.E. at 665 (emphasis in original). The court noted:

As we understand it, the legislature has been invested with unlimited power of taxation, except as restrained by some constitutional provisions; and it has also been authorized by section 8, article IX, to delegate this high power of taxation to certain specified subordinate agencies, for certain specified purposes. It may, then, be said that, in respect to taxation, the legislature has been invested with two distinct classes of powers: one which it exercises at its own sovereign will; the other which it delegates to some subordinate agency, to be exercised by such agency at its will, within the prescribed limits. Now while there are limitations to both of these classes of powers, the limitations are not the same. In the former the only limitation is some constitutional provision, while in the latter there may be, and usually are, additional limitations prescribed in the act delegating the power. But the more material distinction between these two classes of powers is (so far as concerns the present discussion) that in the former the only limitation imposed by the constitution, so far as the purpose for which the tax is imposed is concerned, is that it shall be a public purpose, while in the latter the limitation is that it shall also be for a corporate purpose.

Id. at 603, 9 S.E. at 665 (emphasis in original).

Granting that the state is here exercising “its own” power and that the state may tax for any public purpose, the question remaining is whether the state can tax in this manner. The tax in question was to be laid upon actual value so no problem existed under art. II, § 33. But what of the art. IX, § 1 requirement of a “uniform and equal” rate of assessment and taxation? The tax was uniform and equal as to property within the township, which is apparently the relevant class in the case of a state tax levied for the benefit of a county or locality.

164. Art. II, § 33.

tual value was mandated and there can be only one actual value.

The case of *Ross v. Kelly*166 arose under the 1868 constitution. The taxpayer, a resident of Charleston, alleged that in 1893 her property had been assessed for state and county purposes at $87,790 while the city had assessed it at $141,085 for municipal purposes. The taxpayer argued that this was unconstitutional since it was not uniform or based upon actual value. Obviously, both assessments could not be a correct statement of actual value. The court held for the taxpayer but based its decision on narrow grounds. Article IX, section 8 provided that the corporate authorities of the specified localities “may be vested with power to assess and collect taxes.” But the court found that Charleston had not been so vested. Chief Justice McIver, in a concurring opinion, was willing to go much farther. He stated that:

[A]ny other conclusion would be subversive of the manifest object of the Constitution to secure uniformity in the assessment and taxation of all property. Section 33, of article II., expressly provides that all taxes shall be laid upon the actual value of such property as ascertained by an assessment made for that purpose. Section 1, of article IX., provides that the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and hence section 8 of that article, permitting the General Assembly to vest in municipal corporations the power to assess and collect taxes for corporate purposes, must be so construed as to conform to the manifest scheme of uniformity expressly required by the previous provisions of the Constitution.167

Two years later in *State ex rel. Southern Ry. v. Talley*,168 the court rejected McIver’s “manifest scheme” and upheld a multiple assessment where the delegation of authority had been properly made. The court, in an opinion by Justice Pope, upheld a separate, and higher, assessment made by the city of Columbia on certain railroad property. The majority did not meet, or even recognize, the Chief Justice’s argument. McIver dissented, stating that he was “entirely satisfied” that under the constitution “there can be but one lawful assessment of property for taxation.”169 The court’s decision may have been influenced by the

166. 45 S.C. 457, 23 S.E. 281 (1895).
167. Id. at 463, 23 S.E. at 283-84 (emphasis in original).
168. 50 S.C. 374, 27 S.E. 803 (1897).
169. Id. at 379, 27 S.E. at 805.
fact that the 1895 constitution had already mooted the question for future years.\textsuperscript{170}

Another critical aspect of a one-class system, the power to exempt, was scrutinized in the 1899 decision Garrison v. City of Laurens.\textsuperscript{171} The case involved the 1868 constitution although it was decided after the constitution had been replaced. The city of Laurens, in 1893, adopted a resolution exempting from municipal taxes for 12 years any cotton mills which would locate within the city. The Laurens Cotton Mill compiled with the resolution. A taxpayer brought an action against the city to require it to collect taxes from the mill. Justice Pope, for the court, gave a clear expression of the one-class rule as follows:

There was no power in the city council of Laurens, in the year 1893, to exempt, or to promise to exempt, factories from taxation upon their location in the city of Laurens. Such a step was a palpable violation of the Constitution adopted in 1868—for that instrument required all property, real and personal, to be assessed for taxation.\textsuperscript{172}

The 1895 constitution authorized localities to exempt new manufacturing establishments but required a local referendum and limited the exemption period to five years.\textsuperscript{173}

The state's interesting approach to the problem of exempting new industry, when that was prohibited by the constitution, arose indirectly in Germania Savings Bank v. Town of Darlington.\textsuperscript{174} The opinion was written by Chief Justice McIver, but the three other justices concurred in the result only. By an 1884 amendment to the constitution, a new section 17 was added to article IX. It read: "[A]ny bonded debt hereafter incurred by any

\textsuperscript{170} Art. X, § 13 of the 1895 constitution provided:

The General Assembly shall provide for the assessment of all property for taxation; and State, County, township, school, municipal and all other taxes shall be levied on the same assessment which shall be that made for State taxes; and the taxes for the sub-divisions of the State shall be levied and collected by the respective fiscal authorities thereof.

See text accompanying note 260 infra.

\textsuperscript{171} 54 S.C. 449, 32 S.E. 696 (1899).

\textsuperscript{172} Id. at 455, 32 S.E. at 699.

\textsuperscript{173} S.C. Constr. art. VIII, § 8 (1895). Justice Pope noted:

There never was any power in this State, after 1868, to release property from taxation until the Constitution of 1895 gave cities and towns such power for the limited period of five years and upon the matter being submitted to the voters of such city or town for their approval.

\textsuperscript{174} 50 S.C. 337, 27 S.E. 846 (1897).
County, municipal corporation, or political division of this State shall never exceed eight per centum of the assessed value of all the taxable property therein."175 The town of Darlington, in 1890, issued $73,000 of bonds in aid of the construction of a railroad.176 The town refused to pay interest on the bonds when due on the grounds that the bonds were "invalid, null and void"177 because the issuance violated the eight percent of assessed value limitations. Again, a question of multiple assessment was presented. For 1890, the assessment made of all taxable property in the town for the purposes of state and county taxation amounted to $831,265 (eight percent of which would be about $66,500).178 The assessment made by the town assessors for the purposes of municipal taxation amounted to $1,019,685 (eight percent of which would be about $81,575).179 The town took the position that the state assessment must control and consequently the eight percent limit was exceeded. Justice McIver, as noted above in the discussions of Ross v. Kelly, agreed with the view that there could not be two actual values.180 He held the state assessment to be decisive. Oddly, McIver makes no reference to Talley which held multiple assessments permissible over his dissent. Justice Jones, concurring, stated that Talley had already been decided although the opinion was not yet filed.181 In any case, having found the state assessment controlling, McIver concluded that the bonds were issued without constitutional authority.182 It would conse-

175. S.C. Const. art. IX, § 17 (1884).
176. The town agreed to convey to the railroad, upon completion of this work, town bonds in the amount of $2,000 per mile of completed road. The $73,000 of bonds were turned over to the railroad after the railroad commissioners certified that the roads were completed. 50 S.C. at 339-40, 27 S.E. at 847. The town already had $3,000 of debt outstanding. Id. at 342, 27 S.E. at 851.
177. Id., 27 S.E. at 850.
178. Id. at 363, 27 S.E. at 858.
179. Id.
180. See text accompanying note 167 infra. McIver, in referring to Ross v. Kelly, stated that he did there express the opinion, to which he still adheres, that, in accordance with the manifest scheme of the Constitution to secure uniformity, as well in the assessment as in the taxation of property, there could be but one lawful assessment of property, whether for State, county or municipal purposes, which must represent the actual value of the property; for otherwise the same property might be represented as having two actual values differing in amount—which, to use the mildest term, would be anomalous, if not absurd.
181. Id. at 369, 27 S.E. at 860.
182. Id. at 365, 27 S.E. at 858.
quently appear that the bondholders were about to take a loss. But McLver cited the maxim *communis error facit jus* (common error makes law) as applicable since town assessments had been widely used and sanctioned and the Kelly case, which would have put a prudent person on notice, was not decided until 1895.183

The town, however, had one further argument. Even if this maxim were applied and the town assessment used, the eight percent limit was still violated since the property of the Darlington Manufacturing Company should be deducted from the assessed value total as exempt property because of Act No. 422 of 1873.184 This act, entitled an “Act to Aid and Encourage Manufacturers” stated its purpose as “inducing the investment and employment of capital in the manufacture” of specified goods.185 Any individual or corporation investing his capital in such an enterprise was “entitled to receive from the Treasury of the State, annually, a sum equal to the aggregate of state taxes, less two mills, to be used for school purposes.”186 A similar provision required payment to the manufacturers from the county and municipal treasurers in an amount equal to taxes collected.187 The act provided that it shall not be “so construed as to exempt from taxation the land upon which said factories may be erected.”188 The benefits of the act terminated after ten years of business operation.189 This statute is certainly curious, since a normal means of accomplishing this end would be simply to exempt the new investment from taxes in whole or in part, for the specified period. The draftsmen of Act No. 422, however, were generally careful in avoiding the straightforward language of tax exemption. Instead, a circular procedure was established with the com-

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183. Concurring Justice Jones was highly critical of the use of the maxim. The Justice said he would not “resort to the exceptional and dangerous doctrine of *communis error facit jus*.” *Id.* at 373, 27 S.E. at 861. He continued as follows:

I would not favor the application of the above rarely needed doctrine, which makes error right because the error is common. Perhaps this exceptional doctrine may be properly applied to prevent wide-spread unsettling of real estate titles, as in *Herndon v. Moore*, but I do not think this case calls for its application. If the bonds are in excess of the constitutional limit, they are void, and [are] beyond the curative power of legislature or court.

*Id.*, 27 S.E. at 861-62.


185. The specified goods were “cotton, woolen and paper fabrics, iron, lime, and... agricultural implements.” *Id.* § 1.

186. *Id.*

187. *Id.* § 2.

188. *Id.* § 3.

189. *Id.* § 5.
pany paying its taxes in full and then receiving from the treasurer the payment of a sum equal to the taxes paid.\textsuperscript{190} Clearly, the draftsmen did not believe a partial tax exemption statute for manufacturers could be sustained.\textsuperscript{191} The draftsmen, writing five years after the 1868 constitution was ratified, would not have agreed with the \textit{Holzwasser} interpretation. According to \textit{Holzwasser} it would only be necessary to create a reasonable class, which new business would seem to be, and tax all within that class at a uniform rate.\textsuperscript{192} The draftsmen did not think that such a simple route was available to them; they felt bound to collect full taxes because the constitution established a one-class system for all property except the specified classes which might be exempted. Of course, the attempted avoidance of the constitutional mandate by Act No. 422 is crude. There is no substantive distinction between exemption and paying your taxes and then receiving them back. But the draftsmen felt obliged to make the effort and they apparently had a legal theory. The act is not a tax exemption statute; instead it provides for a bonus paid by the state for conduct it wishes to encourage.\textsuperscript{193} McIver commented:

[If the General Assembly had undertaken, in express terms, to exempt the property of that company from taxation, the effect would have been futile, because in plain violation of the provision of sec. 1 of art. 9, by which the General Assembly is required to provide by law for the assessment and taxation "of all property, real personal and possessory," except such classes of property, specifically mentioned, as may be exempted by law from taxation; and it certainly cannot be pretended that the property of the Darlington Manufacturing Company falls within any of those classes. But, in addition to this, the General Assembly has not undertaken to exempt any of the property of the company from taxation. . . . It is very manifest, therefore, that the section necessarily contemplated that such property should not only be assessed for taxation, but that taxes must be paid thereon, for otherwise the scheme of the statute could not possibly be carried out. The real and only purpose of this statutory provision was to give a \textit{bonus} to those who had invested their\footnote{190. Of course, the company did not receive from the treasurer taxes attributable to land or the state two mill school tax.}
\footnote{191. The constitution authorized tax exemptions only for property used for \textquoteright\textquoteright municip-
\textit{al, educational, literary, scientific, religious or charitable purposes.\textquoteright} S.C. \textit{Constr. art IX, 
\textsection{} 1 (1895); \textit{see also S.C. Constr. art. IX, \textsection{} 5 (1895).}
\footnote{192. There seems no reason under \textit{Holzwasser} why the uniform rate could not be zero.}
\footnote{193. The legality of the bonus was apparently not challenged.}
capital in manufacturing enterprises, for the purpose of encouraging such enterprises. \(^{194}\)

McIver, consequently, for purposes of the eight percent limit found the property to be taxable and properly included in the total assessed value. But it might be noted that he would have reached the same conclusion had he found the statute invalid. No case has been found on the point, but it might be questioned whether Act No. 422 could have withstood a direct challenge. \(^{195}\)

The other three Justices, as noted above, concurred in the result only. Justice Jones wrote a concurring opinion taking the position that multiple assessments were permissible. The town assessment was therefore valid and the bonds legal. Justice Pope, based on his opinion in *Talley*, probably took the same view. \(^{196}\)

194. 50 S.C. at 367-68, 27 S.E. at 589 (emphasis in original).


196. Two additional assessment cases arising under the 1868 constitution may be briefly noted.

In *Ex Parte Lynch*, 16 S.C. 32 (1881), the court was required to interpret art. IX, § 6 of the constitution which provided:

*The General Assembly shall provide for the valuation and assessment of all lands and the improvements thereon, prior to the assembling of the General Assembly of 1870, and thereafter on every fifth year.*

The legislature provided for an assessment in 1875 and again in 1879. Lynch failed to file a return required in connection with the 1879 assessment. As required by statute the auditor added a 50 percent penalty because of the failure to file. As a result, $5,100 was added to the normal assessed value of $10,200 giving a total value of $15,300. Lynch argued (1) that the act calling for the 1879 assessment was invalid because not "on every fifth year" as required by the constitution; and (2) the 50 percent penalty resulted in unequal taxation. The court supported the early assessment interpreting the constitutional language as mandating an assessment on every fifth year but permitting assessments at other times. Of course, the essential constitutional objection of actual value is more accurately achieved by more frequent assessments. Lynch's objection to the 50 percent penalty was rejected by the court on the ground that it was a legitimate tax collection regulation. In discussing the uniformity clause the court again viewed this provision in equal protection terms, noting that it "applies equally to all defaulters." *Id.* at 39.

In *Chamberlin v. Walters*, 60 F. 788 (C.C.D.S.C. 1894), the receiver of a railroad asserted that its property for 1891 had been assessed at 80 percent of actual value while other real and personal property in the state was "openly and notoriously assessed at 50 or 60 percent." *Id.* at 788, 793. The receiver maintained that that railroad had been denied equal protection in violation of the fourteenth amendment. The federal court took the position that it had limited power over the matter of state assessment of property. It could not review the assessment simply on the grounds that it was excessive. It could intervene if the system were designed to operate unequally, to put an undue burden of taxation on railroads. The court began with a statement of the constitutional one-class system as follows:

*The general assembly of South Carolina are instructed by the constitution to*
A special assessment for local improvements presents a difficult characterization question. If it is considered a tax it must conform to all constitutional limitations. It would necessarily seem destined to fail since it is not "uniform in respect to persons and property within the jurisdiction of the body imposing the same."\textsuperscript{107} If an assessment be considered not a tax it would seem to present no particular problem. Cooley reports that special assessments are generally not regarded as taxes: "ordinarily special assessments are not within the meaning of such words as used in the constitutions. . . ."\textsuperscript{108} However, in a series of cases the South Carolina Supreme Court viewed assessments as taxes.\textsuperscript{109}

Mr. Justice Pope struck down an assessment stating:

But, by the Constitutions of the years 1868 and 1895, very radical changes were made in the subject of taxation. It was no longer left to the General Assembly or its municipalities to tax as they pleased. All taxes were required to be levied according to the value of the property real and personal. All persons and property were required to be taxed uniformly. Whenever any property was exempted from taxation, it was specifically named in the Constitution itself. The assessments of the value of property for taxation were required to be made in anticipation of the laying of taxes. . . . but it is enough for our purpose to say that in our Constitution no power is given to the General Assembly to carve the territory of the State into special tax districts for

\begin{quote}
prescribe such regulations as will secure a just valuation of all property under a uniform and equal rate of assessment and taxation.  
\textit{Id.} at 790. The court believed that it had been established, however, that "real and personal property have been assessed for taxation below the real value in money." \textit{Id.} at 792. It also seemed satisfied that railroad property was assessed more heavily than other property. But it did not find the differential attributable to a design "to throw the burden on the railroads." \textit{Id.} at 793. Instead it noted the different methods of assessment used. Generally, assessments were made by local officials who would be expected to undervalue. As the court put it, "They have a direct personal interest in a low assessment, and their environment induces them to make it. When men deal with the interest of the government and of the citizen, all doubts are solved in favor of the citizen." \textit{Id.} at 792. Railroads, on the other hand, made return to the Comptroller General who was responsible for their assessment. The court concluded that no malicious design had been shown and instructed the receiver to pay the taxes.
\end{quote}

\textsuperscript{107} S.C. Const. art. IX, \S\ 8. In addition, assessments are generally based on benefit rather than value and would consequently also violate the actual value standard. \textit{See} Jackson v. Breesland, 103 S.C. 184, 88 S.E. 128 (1915).
\textsuperscript{108} 1 T. Cooley, \textit{The Law of Taxation} \S\ 31. (4th ed. 1924).

https://scholarcommons.sc.edu/sclr/vol26/iss3/7
State taxation except into counties, townships, school districts, cities, towns and villages . . . . Wherever there is a public or corporate purpose, the whole property of the city, town or village must be taxed to subserve such public or corporate purpose.\(^\text{200}\)

Later cases have veered away from this characterization of special assessments and the present law seems to consider an assessment as not a tax.\(^\text{201}\)

VI.

THE 1895 CONVENTION

The Constitutional Convention of 1895 met in Columbia, convening on September 10, and adjourning on December 4.\(^\text{202}\) Circumstances in the country had altered drastically since the 1868 Convention. For a basically agricultural society, a property tax seems a fair and simple means of collecting revenue. But as society became dissociated from the land by industrialization and urbanization the property tax became less easy to apply and less equitable.\(^\text{203}\) Government turned to an essentially untapped and expanding source of revenue, personal and corporate income.

A second important change since the 1868 Convention was the country's increasing experience with the federal equal protection clause as a limit on the power of state government.\(^\text{204}\) Only


\(^{202}\) A journal was kept of the Convention's actions. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 1895 (Calvo 1895) [hereinafter cited as 1895 JOURNAL]. However, no transcript of the debates was maintained. On September 18, 1895 a resolution to engage a stenographer to transcribe the proceedings was tabled after the following comments of Mr. W. D. Evans:

He facetiously remarked that there would be some of the members who would much prefer after the convention was all over that no record of it had even been kept . . . the newspapers and the journal will be depended upon for the records of the convention.

The News and Courier, Sept. 19, 1895, at 1, col. 2. See also The State, Sept. 19, 1895, at 3, col. 1. The State newspaper of Columbia and The News and Courier of Charleston reported the debates in substantial detail and reference will be made to these sources. It will be noted that the reports are in the third person rather than direct quotes.

\(^{203}\) Conceivably the property tax could have been adjusted to the changed circumstances but the portable nature of the new wealth, i.e., intangibles such as money, stocks and bonds, made this unlikely. The property tax is successful dealing with real property, less successful dealing with personal property and probably not appropriate in dealing with intangibles.

\(^{204}\) As noted above, the fourteenth amendment was ratified on July 9, 1868, after
two years before the 1895 Convention met, the United States Supreme Court had interpreted the equal protection clause with respect to taxation, stating that it was not intended "to prevent classification of property for taxation at different rates; or to prohibit legislation in that regard. . . It is enough that there is no discrimination in favor of one as against another of the same class." It does not seem to have been suggested, either during this period or later, that equal protection would prevent imposition of a graduated income tax. The classifications created by such a tax appear reasonable in an equal protection sense.

A third major influence on the 1895 Convention was the legal controversy surrounding the Federal Income Tax Act of 1894. This act, effective as of January 1, 1895, was the first effort by the federal government to impose an income tax since shortly after the Civil War. For individuals the first $4,000 of income was exempt; all income in excess was taxed at a flat two percent. Corporations paid a flat two percent rate on all income.

The Constitution grants Congress the power to "collect taxes, duties, imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States." The Constitution requires that a direct tax be "apportioned among the several states which may be included in this Union, according to their respective numbers." In other words, if the federal gov-

the 1868 constitution had been adopted. Of course, its terms were known and ratification expected as the 1868 Convention met.

205. Giozza v. Tieman, 148 U.S. 657, 662 (1893). The quoted language may be compared with the following essentially similar passage from Holzasser:

We find nothing in our Constitution that prohibits the General Assembly of this State from classifying property according to its use so long as such classification is reasonable and not arbitrary, and the tax imposed is uniform on the same class of property.


207. Id. at 553.

208. The last income tax act before that of 1894 was the Act of July 14, 1870, ch. 255, 16 Stat. 256.

209. Id. at § 27, 28 Stat. 553.

210. Id. at § 32, 28 Stat. 556.

211. U.S. Const. art. I, § 8 which provides:
Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

212. U.S. Const. art. I, § 2 which more fully provides:
Representatives and direct Taxes shall be apportioned among the several States
ernment needed $20,000,000 in direct taxes, it was required to divide that amount up among the various states according to the population of each. The wealth of a state was irrelevant. If population was in direct proportion to wealth this system was quite workable. But this was not the case. Joseph H. Choate, in his closing argument on behalf of the taxpayer in *Pollock v. Farmers’ Loan & Trust Co.*\(^{213}\) provided some interesting figures. If the income tax was valid, Choate argued, four states (New York, Pennsylvania, Massachusetts and New Jersey) would provide 90 percent of total collections.\(^{214}\) The same states had about 25 percent of the population and representation.\(^{215}\) A direct tax, on the other hand, would be relatively light on the major four states and heavy on the remaining states with 75 percent of the population but only ten percent of the wealth. For this reason, the federal government had imposed a direct property tax only in times of great stress. Federal property taxes were imposed (1) in 1798 when a war with France was thought imminent, (2) in 1813 and 1815 to meet expenses attributable to the War of 1812, and (3) during the Civil War.\(^{216}\) Consequently, a direct tax, requiring apportionment according to population, was not a practical or politically feasible means of raising revenue. An excise tax, however, had only to be “uniform.” Is an income tax properly characterized as a direct tax or an excise? This was the issue faced by the Supreme Court in *Pollock.*\(^{217}\)

The first decision focused on rental income derived from real

\(^{213}\) U.S. Const. art. I, § 9 provides in relevant part: No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

\(^{214}\) U.S. 429 (1895), rehearing, 158 U.S. 601 (1895).

\(^{215}\) Id. at 532-33.

\(^{216}\) Id. at 572-73. For example, the direct tax of 1798 was designed to raise $2,000,000. Act of July 14, 1798, ch. 75, 1 Stat. 597. Section one apportioned precise dollar amounts to the various states; South Carolina’s share was $112,997.73 and nine mills. Id. at 598. Section two imposed a rate of tax against dwelling houses which rate was graduated ranging from .2 percent on houses valued between $100 and $500 to 1.0 percent on houses valued above $30,000. Id. The same section imposed a tax of $.50 on every slave. The remainder of the state’s share was to be raised by a tax on land “at such rate per centum as will be sufficient to produce the said remainder.” Id.

\(^{217}\) Choate made some argument that the act could not be sustained even if an excise because of a lack of uniformity. He pointed to what he considered to be an irrational exemption for certain savings banks and insurance companies as well as the basic $4,000 exemption. But the essential argument was as stated in the text—Is it a direct tax or an excise?
property. It was generally agreed that a tax on real property was a direct tax. Was any distinction to be drawn between a tax on the land itself and one on the income derived from it? The Court, "unable to perceive any ground for the alleged distinction," stated: "The name of the tax is unimportant. . . . It is the substance and not the form which controls . . . ." The two dissenting Justices thought a valid distinction could be made. Consequently, as far as rental income was concerned, the Court held the income tax to be in substance and effect a property tax.

Initially, the Court evenly divided on the characterization of an income tax on income from personal property. This placed in doubt whether the act could validly reach all dividend and interest income. On rehearing, the Court, in a 5-4 decision, held the tax on the income derived from personal property to be a direct tax and invalid. The income tax on labor (professions, trades, employments) was sustained by the court as an excise. However, it struck down the act as a whole, reasoning that Congress would not have intended to tax labor if capital could not be taxed.

The Pollock decisions were undoubtedly studied by the members of the 1895 Convention who met in the fall of that year. In a state context, the Pollock issue is not concerned with direct taxes or apportionment. The issue is the proper characterization

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218. 157 U.S. at 581.
219. Id. at 680-81.
220. Justice White noted:
   It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response.

Id. at 645.
221. 168 U.S. 601 (1895).
222. Id. at 635. The Court stated:
   We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Id. at 635.
223. Id. at 637.
of an income tax: 224 Is it a property tax or an excise? If a property tax it would be subject to all the relevant constitutional limits. If an excise, according to Hayne, it need only be equal and uniform. As a property tax, the income tax would surely fail since, among other reasons, it is not based on the actual value of property as ascertained by an assessment. 225 As an excise, it would apparently succeed since classification is permitted and uniformity is necessary only within the class. 226 The delegates to the Convention had to consider it likely that the state supreme court would follow the approach of the U.S. Supreme Court and characterize the income tax as a property tax. The need for a specific constitutional provision authorizing such a tax was consequently

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224. The term "income tax" as used here means a tax on both capital and labor. The distinction has been drawn above between the income tax on capital which the Court held direct and the tax on labor which the Court sustained as an excise. Congress did not reenact the 1894 act, to apply only to labor, presumably on the grounds that such a tax would be a political disaster. The same consideration would influence a state legislature. To be practical, an income tax must reach both capital and labor.

225. Income might be a relevant factor in determining value but it would not be decisive. The Supreme Court of Illinois, in striking down a state income tax, analyzed the issue as follows:

As heretofore shown, the word "property" as used in our constitution includes income, and income is "property." Therefore it necessarily follows that under the constitution of this State all taxes must be levied on property by valuation, so that every person and corporation shall pay a tax in proportion to the valuation of his or its property. The 1932 Income Tax law is an attempt to levy a tax upon property (income) by means of a graduated scale that increases in rate as applied to increases from property and personal earnings. It therefore violates the constitutional provision that all taxes must be levied on property according to valuation.


226. The Georgia constitution provided that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property." In Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930) the Supreme Court of Georgia concludes that a "tax on income is not a tax upon property." Id. at 65. With this premise established, the court then tested the act against the uniformity clause. It held that the income tax act did not violate the uniformity provision. The court noted:

By this provision [quoted above] the makers of the Constitution put property in one class and clothed the Legislature with ample and full power to classify the subjects of taxation other than property. The Legislature cannot classify property and impose upon one species thereof a different tax from that imposed on other species. Property subject to be taxed is treated as one single class, and there can be levied but on rate on all species of it.

... This act is not lacking in uniformity because it provides for a graduated tax and makes certain exemptions from such tax. As we have seen, the Legislature can classify the subjects of taxation other than property. It can likewise subclassify them.

Id. at 65-66.
clear to them.\textsuperscript{227} But if Holzwasser is correct this is a complete misanalysis of the situation. At worst the income tax is a property tax and, according to Holzwasser, a property tax can be classified to the full extent of equal protection. Consequently, no special provision authorizing an income tax would be needed; the legislature was already fully empowered. Further, if equal protection is the only intended limit on the legislature's taxing power the constitution could be substantially simplified by the deletion of all the taxing restrictions. The fourteenth amendment would remain to assure that "classification is reasonable and not arbitrary, and the tax imposed is uniform on the same class of property."\textsuperscript{228} Plainly, the delegates did not view the issue this way.

On September 20, 1895, Mr. W. D. Evans, Chairman of the Committee on Finance and Taxation reported on article IX of the constitution.\textsuperscript{229} Section one of the proposed article was identical to old section one of the 1868 constitution with the addition of two proviso clauses.\textsuperscript{230} The first proviso clause authorized a capitation tax on domestic animals. The second proviso simply stated: "That the General Assembly may provide for a tax on incomes."\textsuperscript{231} This provision came before the Convention for debate on October 18, 1895.\textsuperscript{232}

Immediately, Mr. George Johnstone of Newberry moved to amend to add the language, "derived from investments that are not liable to taxation."\textsuperscript{233} The effect of this amendment would have been drastic. Under it, the income from property which is taxable - which is all property except certain exempt categories - would be free of the income tax. The only remaining tax base is income derived from exempt property. It is unrealistic to expect that the income from exempt property, municipal, religious, edu-

\textsuperscript{227} See text accompanying note 125 supra.
\textsuperscript{228} Holzwasser v. Brady, 205 S.E.2d 701, 704 (S.C. 1974).
\textsuperscript{229} 1895 Journal at 197.
\textsuperscript{230} Id. The proposed new material is italicized below:
Section 1. The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed; and also exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes: Provided, however, That the General Assembly may impose a capitation tax upon such domestic animals as, from their nature and habits, are destructive of other property: And provided, further, That the General Assembly may provide for a tax on incomes.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 359.
\textsuperscript{233} Id. at 359.
cational and charitable, would ever in fact be taxed. The clear purpose of the Johnstone amendment was to kill the income tax provision. Mr. W. J. Talbert of Edgefield made this point stating that it "would defeat the very object of an income tax." Johnstone replied that he only intended to avoid "double taxation." His response is reported as follows:

He urged that it was only to avoid double taxation. As the section now stood it would be likely to tax the agriculturist and those investing in active enterprises far more than dear capital, such as is invested in bonds exempted from taxation. In response to Mr. Talbert's inquiry, he thought it better not to leave the matter to the legislature. It was proper to lay down the principles of taxation. It was wrong to double tax the farmer by taxing his land and income or anyone in that class.  

Of course, any income tax would result in "double taxation" as Johnstone used the term. Mr. W. D. Evans, Chairman of the Committee on Finance and Taxation, moved to table the amendment. The Evans motion was passed by a vote of 63 to 34. The 34 votes against tabling indicate that a substantial minority of the Convention was opposed to the income tax.

The opponents of the tax next proposed a specific exemption for agricultural income. Mr. T. G. Barker of Charleston moved to amend by adding the phrase, "and except incomes from agricultural production." Mr. Barker noted that farmers already paid tax on all real and personal property and he "thought that was sufficient." The debate is reported as follows:

He [Barker] went on to argue that the agriculturist was taxed on his lands, on his stock, on his implements and on his personal property, and he thought that was sufficient. He did not think the proposition needed any elaborations, as he believed it to be so manifestly fair and equal.

Mr. Prince, of Anderson, [a member of the Finance and Taxation Committee], held that the same rule would apply to a manufactory and a mercantile business.

235. Id. The State, but not The News and Courier, reported, "Mr. Parrott made a reference to the United States Supreme Court, and Mr. Johnstone gave him a dignified but crushing reply." The State, Oct. 19, 1895, at 1, col. 2.
236. 1895 JOURNAL at 360.
238. 1895 JOURNAL at 360.
239. Id. at 22.
Mr. Barker said he was no advocate of the tax, but as it was up he wanted to exempt the agricultural interests from double taxes.

Mr. Prince held that the same argument would apply to all businesses except those of professional men. [Where capital is not a material income producing factor.]

Senator Tillman said that the farmer able to pay this income tax would pay it. They were willing to bear their share of the income tax if it came.

Chairman Evans said the farmers were asking for no special favors. All they wanted was to be put on the same plane as others. There were plenty of farmers here to look after their interests, and he felt there would always be in the Legislature. He said that there would be no telling where this exemption would end if once started.240

On motion by Mr. Prince, the Barker amendment was tabled by a 98 to 27 vote.241 This decisive vote ended opposition to the income tax proposal and it was adopted shortly thereafter.242 Prior to adoption, on motion by Mr. Meares, the word “graduated” was inserted before the phrase, “tax on incomes.”243 The following day, The State paper editorialized that it looked forward to a “fair trial” of this new tax which it supported “when locally applied.”244

241. 1895 JOURNAL at 360.
242. Id. at 363.
243. Id. at 361. Unfortunately, the newspapers did not report Mr. Meares’ explanation of his amendment. The State reported only: “This amendment prevailed after Mr. Meares [sic] had explained it.” The State, Oct. 19, 1895, at 2, col. 1.

Section one was also amended on the floor to include the language “and may provide for licenses on occupation and business.” 1895 JOURNAL at 360. The purpose of this amendment, proposed by Senator Benjamin R. Tillman, is unclear. The legislature had full power to provide for license taxes on occupations and business as had been held in Hayne. Perhaps Tillman thought that since the constitution was now to specify “income” taxes as permissible, it was prudent to specify “license” taxes as well to avoid any possible argument that income taxes were intended to pre-empt the field.

244. The editorial observed:
A graduated income tax being one of the prominent demands of the Alliance and “Reform” platforms, the convention was in consistency bound to provide for its imposition in this State, and it did so yesterday. We congratulate it upon its refusal to exempt farmers from the tax. Let us hope that it will be impartially levied and collected and that none but the very smallest incomes will be exempted. We would like to see a fair trial made of this tax and to mark whether the people relish it in practice as much as in theory. We have all advocated the imposition of the tax by the national government; and so we shall stand to its support when locally applied. Surely, however, that the graduation of it shall
The Convention then discussed the first proviso clause of section one authorizing the legislature to impose a capitation tax on certain domestic animals. A specific exception to the normal property tax limits was required since a capitation tax would not be imposed according to actual value. This was recognized by Chairman Evans of the Finance and Taxation Committee when he said, "that in the Legislature it was always argued against a capitation tax that it was unconstitutional." The capitation tax on animals became known as the "dog tax" since it was apparently designed to aid the sheep industry by discouraging the ownership of dogs. The provision was adopted as proposed after a good deal of humorous comment.

On September 20, 1895, the Committee on Municipal Corporation and Police Regulation reported a proposed new article. This article became article VIII of the 1895 constitution. Section 10 of the proposed new article provided:

Section 10. That cities and towns may be [sic] exempt from taxation except for school purposes, for five successive years manufactories established within their limits, after the adoption of this constitution, whose paid up capital is not less than $10,000.

The legal necessity for the section was clear to the Convention. Four years later, Justice Pope in Garrison v. City of Laurens struck down a manufacturer's exemption, calling it "a palpable violation of the Constitution, adopted in 1868—for that instrument required all property, real and personal, to be assessed for taxation." The Convention similarly understood that any exception to the state's basic one-class system required express constitutional authorization. Mr. H. J. Haynsworth, of Greenville, informed the Convention that the "city had for years an ordi-
nance exempting new manufacturers as proposed in this ordinance. The people knew it to be unconstitutional but acquiesced in it because it commended itself to their common sense and self-interest."

Section 10 was introduced for debate on September 26, 1895. Mr. Stanyarne Wilson, of Spartanburg, moved to strike the section. In his view it was offensive to the one-class system. He commented: "It was contrary to the whole scheme of the bill, the purpose of which was to make taxation uniform and equal on all classes of property. It proposed the exemption of a privileged class." A similar view was stated by Mr. W. H. Wilson, of York, who "opposed the exemption of factories, that it was wrong in principle; that if such a thing was permitted it might force every town in the State to exempt factories to be on the same footing." The proponents of the exemption did not dispute its inconsistency with the basic property tax system but argued for its material benefits:

Mr. Patton, [of Richland] said Columbia is now exempting manufacturers as proposed in this section and she is being built up under that system. It was her own money that she was surrendering. Her act did not hurt or affect anybody but herself. On the principle of local self-government she ought to be allowed to continue the exemptions if her people thought it was to their interest. Suppose nobody but the Columbia people chose to take advantage of the right to exempt? That would be all right and no harm would be done. It seemed to him gentlemen were trying to protect the people of the towns from themselves. As to poor people, they predominate, he said, in Columbia and they are the very people who are most eager for the exemption, because it does not hurt them and brings enterprises here to give them work. All Columbia people asked was to be left to run their own town and make money and build the capitol city up to be a glory to the State.

Mr. Efrid [of Lexington] enquired whether Columbia could not continue to grant the exemption if she preferred without the special authority given in this section.

That was very doubtful Mr. Patton replied. Men learned in the law advised him to the contrary. Certainly the attempt to exempt without constitutional authority would cause disastrous

252. The State, Sept. 27, 1895, at 5, col. 1.
253. 1895 JOURNAL at 248.
254. The State, Sept. 27, 1895, at 1, col. 3.
255. The State, Sept. 27, 1895, at 1, col. 4.
and expensive litigation. As a lawyer he favored litigation on general principles but as a representative of the people it was his duty to discourage it.256

The Convention was almost evenly divided on the proposition. A motion to postpone the Wilson motion to strike passed by a 75-74 vote. Another Wilson motion, this one to postpone indefinitely consideration of section 10, was defeated 74 to 73. The outcome of a vote on the merits seemed very much in question. However, at this point, the Convention recessed until the evening.257 During the recess, a compromise was apparently worked out. Shortly after the evening session began, Mr. Floyd moved to amend to add a referendum as a condition precedent to the grant of exemption in a city or town.258 This amendment was agreed to. Section 10 was then passed by an 80 to 65 vote.259

The Convention adopted several new provisions strengthening the actual value standard and the one-class system:

(1) One Assessment

It will be recalled that some question existed under the 1868 constitution as to whether the actual value standard would be violated if a city made a separate assessment for its taxing purposes. The 1895 Convention made clear that there could be no question about this in the future. It inserted a new provision, article X, section 13, reading:

Section 13. The General Assembly shall provide for the assessment of all property for taxation; and State, County, township, school, municipal and all other taxes shall be levied on the same assessment, which shall be that made for State taxes; and the taxes for the subdivisions of the State shall be levied and collected by the respective fiscal authorities thereof.260

256. The State, Sept. 27, 1895, at 1, col. 3 and at 5, col. 1.
257. 1895 JOURNAL at 251.
258. Id. at 257.
259. Id. In its final form § 10 became § 8 of art. VIII which provided:
SECTION 8. Cities and towns may exempt from taxation, by general or special ordinance, except for school purposes, manufactories established within their limits of five successive years from the time of the establishment of such manufactories: Provided, That such ordinance shall be first ratified by a majority of such qualified electors in such city or town as shall vote at an election held for that purpose.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA RATIFIED IN CONVENTION DECEMBER 4, 1895 at 39 (Calvo 1895).
260. Id. at 48.
(2) Delegated Taxing Power

It will be further recalled that prior to 1895 the legislature had authorized or permitted municipal corporations to use two classes—real and personal—for purposes of the delegated taxing power.261 The Convention acted to end such classification in the future. The Convention amended old article IX, section 8 to add the italicized language:

Section 5. The corporate authorities of Counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

... And the General Assembly shall require that all the property, except that herein permitted to be exempted within the limits of municipal corporations, shall be taxed for corporate purposes and for the payment of debts contracted under authority of law.262

Since a municipality can only tax for corporate purposes, the insertion of that phrase assured that all property would be taxed as one class.263

The Convention also made a change in the original 1865 actual value standard. The opening phrase, “All taxes upon property, real or personal” was changed to read, “All taxes upon property, real and personal.” As ratified by the Convention, article III, section 29 provides that: “All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax.”264 Research indicates that the change of “or” to “and” was not intended to have any substantive effect.265

262. (Emphasis added). This provision was art. X, § 5 of the new constitution.
263. See text accompanying note 157 supra.
265. The change from “or” to “and” is something of a mystery. On September 20, the Committee on the Legislative Department reported an article consisting of 37 sections. 1895 JOURNAL at 191. Section 30 of this article was the actual value standard in its old form with the phrase reading “real or personal.” Id. at 195. On September 28, § 19 of the article was stricken, which would seem ultimately to result in the renumbering of § 30 as § 29. Id. at 281. On October 2, § 30 was “adopted as reported.” Id. at 318. On November 21, the article was read the second time without amendment to § 30. Id. at 621. On November 26, the article was read the third time and adopted. Id. at 693. It was ordered
The Holzwater interpretation of the constitution could easily have been drafted by the 1895 Convention. It could have struck all existing restraints on the taxing power. This would return the constitution to its pre-1865 condition when the legislative power to tax was unlimited. One limitation would remain beyond the power of the Convention: the equal protection clause of the fourteenth amendment. It would prevent arbitrary classification and discrimination within a class.

The 1895 Convention, instead, worked to strengthen the one-class system. In certain cases, e.g., the income tax and the manufacturer’s exemption, the need for express exceptions to the basic rule was recognized and granted. In other cases, e.g., one assessment and municipal classification, the actual value standard was enhanced and the one-class system emphasized.

VII.

PROPOSED CONSTITUTIONAL AMENDMENT

Following the 1895 Convention the property tax rules were well established and understood. The questions which had arisen between 1868 and 1895 had been resolved by the 1895 Convention. In 1906 the attorney general ruled that a town tax of 1/8 percent on personal property and 1/4 percent on real property was in violation of the constitution.266 David Wallace, in his 1927 study, The Constitution of 1895, was equally clear that a classified property tax is prohibited by the constitution.267

referred to the Committee on Order, Style and Revision. *Id.* That committee reported back on December 3, recommending no amendment to § 30. *Id.* at 706, 709-10. The final ratification of the constitution occurred on December 4. *Id.* at 725. That evening President Evans announced that the constitution was “now ready for the delegates to attach their signatures thereto.” *Id.* at 727. The constitution, as signed, for the first time contained the word “and.” S.C. Const. art. III, § 29. See the original document, found in the South Carolina Department of Archives and History, at page 22.

266. 1906 Op. Att’y Gen. 169. In 1906 the attorney general took the same position, holding that “it is the opinion of this office that it is constitutionally impermissible for a municipality to apply different rates of assessment to properties for ad valorem tax purposes.” 1906 Op. Att’y Gen. 275, 276.

267. D. WALLACE, THE CONSTITUTION OF 1895 (1927). Wallace is critical of the one-class system, believing it to be unduly rigid and limiting on the legislature. But there was no question in his mind that classification is prohibited. He wrote:

[Franchise taxes on corporations] are merely extra property taxes which it is felt are just in view of the great wealth of most of such corporations, but which cannot under the existing law forbidding classification of property be taxed anything extra without some such device.

*Id.* at 105.

Another principle is that no system that rests on one kind of tax can possibly
On March 6, 1920, the legislature adopted a concurrent resolution directing the appointment of a committee for the purpose of "making a thorough investigation and study of the subject of taxation in South Carolina" and "recommending . . . changes in laws" for consideration of the legislature at its next session. On October 30, 1920, the committee submitted its report to the legislature. The report became popularly known as the Marion Report, taking this name from its chairman, Senator J. H. Marion of Chester. The Marion Report was a detailed and thoughtful study of the state's tax system including recommendations for changes. The report summarized the "salient requirements of the fundamental law" as follows:

(1) All property of every kind and description, except that specifically exempted in the Constitution itself, consisting of property used exclusively for public purposes, schools, colleges, charitable institutions, etc., is positively required to be assessed and taxed . . . .

(2) All property is required to be taxed at actual value . . . .

(3) All property is required to be both assessed and taxed at an equal and uniform rate. The language of Article X, Section 1, is, "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation;" in connection with which is to be read the provision of Section 6, of Article I, requiring taxation of property "in proportion to its value." By reason of these requirements, no classification of property for purposes of taxation is possible.

Chapter VIII of the Marion Report was entitled: Classification of Property for Purposes of Taxation, So As To Permit of Different...
tial Rates, or of Different Methods of Taxation for Different Classes of Property. The special committee was particularly concerned with the non-reporting of intangible personal property (money, stocks, bonds). It estimated the value of such property in the state to $300,000,000 while only $7,413,340 had been assessed in 1919. The non-reporting was attributed to the high rate of the general property tax. Reports received from states which had adopted a classified tax system indicated that intangible property could be induced onto the tax rolls if a special low rate of tax was applied to this class of property. For this reason, among others, the committee concluded that a classified system was desirable. It noted:

From this practical experience of other States, as well as from the reason of the thing, the Committee reached the conclusion that the principle of classification is sound and that the General Assembly ought to have the power to exercise a sound discretion as to the classification of property for purposes of taxation.

The committee recognized that such a change in existing law would require an amendment to the constitution. It stated:

Since this power of classification for the purpose of applying other methods than the ad valorem tax can only be secured by an amendment to the Constitution, it seemed proper and desirable to proceed with the consideration of other possible methods of relief.

The committee, after examination, found other methods of relief to be inadequate and concluded that the "amendment of the Constitution is the one big, vital factor in the situation." Reca-

273. Id. at 78.
274. Id. at 43. In 1919 the total value of all reported taxable property was $402,859,947. Id. at 44. Also, quite clearly, a good deal of tangible personal property was unreported. An examination of returns for the year 1919 showed three watches in Abbeville county and six watches in Clarendon county. Intangible property seemed even rarer—the returns showed that no one in Laurens County had any money or other credits. Id. at 33.
275. Id. at 40. The special committee noted:
The weak link of the general property tax is intangible property. If this link breaks what is the result? The minute intangible property goes off the tax rolls, then the rule of "what's sauce for the goose is sauce for gander" applies, and the process of undervaluation and evasion in respect of other classes of property begins, and in the end we have the chaos that reigns in South Carolina today.
Id. at 69.
276. Id. at 26-27.
277. Id. at 79-82.
278. Id. at 82.
279. Id.
ommended language for such an amendment was appended to the committee’s report:

ARTICLE III OF AMENDMENTS TO THE CONSTITUTION.

Subject only to the limitations contained in this Article the General Assembly shall have power to establish and maintain a just and equitable system for raising State and local revenues for public purposes. Taxes shall be levied on such subjects and in such manner as shall be prescribed by general laws, and all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All property used exclusively for State, county, municipal, educational, religious, benevolent and charitable purposes, and household goods to the amount of at least one hundred ($100.00) dollars for each family, shall be exempted from taxation.281

On January 20, 1921, Senators Marion and Christensen introduced the proposed amendment as S.79.282 The bill was referred to the Committee on Finance which reported favorably on it the following day.283 No further action was taken on the bill.284

At the 1922 session, S.79 was recommitted and again the subject of a favorable report by the Committee on Finance.285 On January 25, 1922, the Senate debated the measure.286 No further

moment.” Id. It recognized that amending the constitution would not be an “easy task” and would require a strong educational campaign to inform the people on the issue. Id. The committee observed that “the States that have succeeded in freeing themselves from constitutional limitations of this character have done so only after a period of several years agitation and public discussion.” Id. at 133.

281. Id. at 137.
282. 1921 JOURNAL OF THE SENATE 67. The bill was entitled: “A Joint Resolution proposing amendment to the Constitution by adding thereto an article conferring upon the General Assembly power to establish a just and equitable system of raising public revenues, to be known as Article III of amendments to the Constitution.”
283. Id. at 88.
284. The last reference to S. 79 is on February 2 when the bill was made a special order for the following day. Id. at 209.
285. 1922 JOURNAL OF THE SENATE 9, 63.
286. Id. at 153-54 and 167.

The News and Courier reported:

The purpose of the amendment, as stated by its proponent, is to permit the General Assembly to place a just and equitable tax on mortgages, money in banks, etc. It was brought out today that, while such a tax might be imposed now, it would under the ad valorem tax system of the State, be excessive and would drive business from the State. It is for reasons of public policy, as Senator Laney of Chesterfield, expressed it today, that real estate mortgages, money in banks, etc. are not required to be returned for taxation.

Senator Christensen in calling on the resolution for discussion said that this
resolution was part of the program for tax changes to be submitted to this General Assembly. He said this resolution had been drawn by the senate members of the committee appointed to study the tax situation of the State with a view to recommending remedial measures. He said the amendment would give the General Assembly power to tax bonds, mortgages, money in banks, etc.

Senator Ragsdale, of Fairfield, thought the measure a dangerous one and moved to strike out the resolving words of the resolution. He did not think the General Assembly should have the power to fix one rate of assessment on some property and a different rate on other property.

Senator McGhee, of Greenwood, spoke with vigor in favor of the amendment and [incidentally] touched upon general conditions in the course of his remarks. He said that he had felt for some time that a constitutional convention was necessary because of the tax situation in the State, but that it seemed impossible to get one. He expressed the hope that if one is ever held that there will be a provision in the Constitution that one must be held every ten years.

The Senate ought to get right down to rock bottom and settle the tax question once and for all, said the Greenwood Senator, "I do think that we ought to cut, and when we do cut, cut to the bone. I don't think there ought to be a mill tax placed on property. When we can go back and tell the people that there will be no tax on tangible property at all we will have accomplished something," said the Senator from Greenwood, who expressed the belief that the finance committee and the General Assembly can propose such measures as will eliminate the property tax.

Senator McGhee said that he believes in luxury taxes. He would impose a tax on rouge, paints, cosmetics, soft drinks, gasoline, etc. He said that South Carolina was not alone in its financial distress and the boll weevil was not the cause of all the trouble. The Middle West is in worse condition than South Carolina.

Senator Watkins, of Anderson, said that the report of the tax committee appointed by the General Assembly answered fully all objections that had been raised to the measure. He said he felt sure that in the event of the approval of the amendment by the people at the general election the General Assemblies of the future would not in any instance impose a tax that was confiscatory.

Senator McColl, of Marlboro, said he was in favor of the purposes of the bill, but thinks passage of such legislation at this time would be unhappy and possibly fraught with grave danger to the State.

Senator Pearce, of Richland, said that he had been in the Senate four years and every year the objection had been raised that it was not the proper time. He thought the bill a good one and looks to the protection of the man who owns his little home. He thought mortgages and money in the banks should be taxed. The resolution before the Senate only gives the people the right to say whether or not they wish the Constitution changed.

Senator Laney, of Chesterfield, pleaded for the passage of the resolution. He declared that millions of dollars in valuable taxes are escaping because of the present law, this being wealth represented by mortgages and cash. The money interests are against the bill, he said. When you touch the money interests you touch a tender spot. One of the main purposes of the bill is to relieve the property owners of the state, to relieve the tax upon John Smith and his little home and his ox cart and his buggy and to shift it upon wealth where it belongs.

The Senator from Chesterfield declared that under the ad valorem system provided by the Constitution the tax on mortgages would be too heavy now. If this resolution is passed by the people the next General Assembly would classify property so that a reasonable tax would be imposed on mortgages, cash, etc. Mortgages are not returned now because it would be against public policy.
action was taken in the Senate. On January 26, 1922, the amendment was introduced in the House; twelve days later, on

The amendment, Senator Laney declared, would enable the General Assembly to place its hands on millions of dollars worth of taxable property not paying a cent now. There are some people who are against it, as there are some who are opposed to any taxes. The moving picture people are protesting against the tax on moving picture films. “When the old income tax measure rolled into the Senate chamber from the House here comes a bunch of wealth to oppose,” he said. “Telegrams are [coming] from all over the State to touch wealth lightly. It all depends on whose ox is being gored. We have been goring the ox of the farmer for a long time. I hope and believe the present General Assembly will give him relief.”

Senator Bonham, of Greenville, began his argument against the amendment but was interrupted by adjournment for dinner. He approves of most of the remedial measures before the Senate but thinks there must be a safeguard somewhere. The greatest complaint today, he said, of the federal government is its tendency to get away from constitutional inhibition. The greatest danger that confronts the South today is centralization of power at Washington. He said he did not think it safe to take the bridle off entirely and leave it to the General Assembly to fix the proportionate amount of taxes to be paid by various classes of property, etc.

The debate on the amendment continued for more than two hours at the night session but again no vote was reached. Debate was adjourned until tomorrow morning. Senators Beasley, Hart and Christensen spoke in favor of the bill and Senators Wightman, Duncan, Baskin, and Williams spoke against it.

Senator Christensen announced that if the amendment was rejected he would introduce a resolution to instruct the tax commission to enforce Article 10, Section 1, of the Constitution, which requires all property to be assessed at a uniform and equal rate. He said that some of the Senators had urged in their speeches against the amendment that the Senate stand by the Constitution, while others had argued that there was no necessity for changing it. He wanted to place them on the record.

The News and Courier, Jan. 26, 1922, at 1, col. 3. See also The State, Jan. 26, 1922, at 7, col. 1.

287. On February 22, 1922, the News and Courier noted with regret the resignation of Senator Christensen as Chairman of the Senate Finance Committee. The News and Courier, Feb. 22, 1922, at 4, col. 1. The newspaper editorial referred to his “disappointment over the indisposition of the Senate to adopt the tax program in its entirety.” Id.

288. The amendment was introduced as H. 944 by Claud Sapp of Richland. 1922 Journal of the House 230. It was reported favorably by the Ways and Means Committee on January 27. Id. at 253. On February 2, it passed a second reading by a vote of 83-0. Id. at 334-46. It passed a third reading on February 3 by a 91-6 vote. Id. at 393-95.

The News and Courier reported on the House passage of the amendment as follows: An important part of the tax progress is the proposed constitutional amendment by which the legislature would have the right to classify various kinds of property. The idea is to have the General Assembly grade or classify property, in order that one basis of action may apply to one class and another basis to other classes. The idea is that bank deposits or credits might pay taxes on one basis, real estate on another, mortgage holdings on [another]. The General Assembly would be the judge. At present the theory of the constitution is that all taxable property should be taxed and classified on the same basis. The proposed constitutional amendment would have to be voted this fall. The resolution authorizing
February 7, 1922, it passed the House by a 91-6 vote.\textsuperscript{239}

In sum, the Senate, after serious consideration at two sessions, refused to submit the amendment to the people.

\section*{VIII.}

\section*{Later Judicial Construction}

Some of the major cases dealing with income taxes and excise taxes are discussed below.

\subsection*{A. Income Taxes}

In 1897, two years after the Convention had authorized "a graduated tax on incomes," the legislature enacted an income tax law.\textsuperscript{239} This concise statute, two and a half pages in length, imposed a tax upon all gains, profits or income from whatever source derived.\textsuperscript{231} The only deduction permitted was for "necessary expenses actually incurred in carrying on any business."\textsuperscript{232} The tax rate was as follows: 0 to $2,500 - exempt; $2,500 to $5,000 - 1%; $5,000 to $7,500 - 1.5%; $7,500 to $10,000 - 2%; $10,000 to $15,000 - 2.5%; and over $15,000 - 3%.\textsuperscript{233}

The legality of the act was tested in \textit{Alderman v. Wells}.\textsuperscript{234} Of course, in view of the special constitutional provision there was little question as to the act's validity under the state constitution. Alderman based his attack on the federal fourteenth amendment, particularly the equal protection clause. He asserted that the exemption of income under $2,500, the graduated rate scale, and the exemption of corporations all resulted in arbitrary and unreasonable classifications.\textsuperscript{235} The court rejected the argument citing the Supreme Court's 1890 decision in \textit{Bell's Gap R.R.}\textsuperscript{236} which stated that the equal protection clause "was not intended to com-
pel the States to adopt an iron rule of equal taxation." Only the most extreme proposal would bring the clause into play. The Supreme Court noted:

But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition.

The income tax was consequently upheld. This result is not surprising in view of Bell's Gap and other Supreme Court cases which had been decided prior to the 1895 Convention. Under the Holzwasser theory that equal protection is the sole limit on the taxing power, the legislature was fully empowered, prior to the specific 1895 provision, to enact an income tax law. The Alderman court did not, however, consider the case in this way. It relied upon the 1895 provision to justify the classification found in the income tax act. The court discussed Alderman's argument that the act violated the article X, section one requirement that the legislature provide for a "uniform and equal rate of assessment and taxation" and "prescribe regulations to secure a just valuation for taxation of all property" as follows:

The section, however, has this important proviso: "That the General Assembly may provide for a graduated tax on incomes." These provisions must be construed together, and, by the proviso, taxes on incomes are excepted from the requirement of a uniform and equal rate of assessment and taxation of all property; for it is impossible to conceive how a tax on income could be graduated, without exempting some incomes, or without making the tax higher on some than others.

Plainly, the court believed the special 1895 provision to be critical to its decision. The Alderman case thus settled the basic questions which might arise with an income tax.

In 1922 the legislature enacted a new income tax act covering both individuals and corporations. The interesting aspect of this act was its simplicity—it required payment to the state of one-third of the taxpayer's federal tax liability.

297. 134 U.S. at 237, quoted at 85 S.C. at 516, 67 S.E. at 784.
298. Id. at 237, quoted at 85 S.C. at 515, 67 S.E. at 784.
299. 85 S.C. at 517, 67 S.E. at 784.
301. Id. at § 3. This section required payment to the state of "a sum equal to thirty-
v. Query The taxpayer directed his attack against this incorporation by reference approach on the grounds that it was an unlawful delegation of the legislative power. The court held that incorporation of existing federal law was proper and construed the act as attempting nothing more. It strongly implied that it would hold invalid an act which purported to incorporate future federal law. Four years later, the legislature adopted the Income Tax Act of 1926 which, with amendments, remains the operative income tax statute.

In 1933, the legislature enacted a five percent tax, in addition to all other taxes, on dividends and interest received by individuals in excess of $100. In Marshall v. South Carolina Tax Comm'n a taxpayer argued that this tax was in substance a property tax and invalid since it was imposed only on a particular class of property. The court adopted the circuit judge's order which stated: "The tax in question is very clearly a tax upon income, which income is derived from certain intangible property. It is not a tax upon the intangible property itself." The taxpayer's secondary argument, that even if the tax was properly characterized as an income tax it violated equal protection, was also rejected.

B. Excise Taxes

The state's current sales tax was imposed as part of the General Appropriation Act of 1951. The act imposed a general three percent rate on retail sales. Specified exceptions from this rate were as follows: the maximum tax on an article sold at $1,500 or less was $25.00; on an article sold at between $1,500 and $3,000 the maximum tax was $40.00; and on an article sold at more than three and one-third (33 1/3%) of the amount required to be paid to the United States Government...

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303. Id. at 169-69, 115 S.E. at 205.
304. Id. The court noted that the state tax based on one-third of federal liability would become complicated as the federal law changed. In an understatement, the court said: "It is conceivable that changes in the Federal law occurring subsequent to the approval of the State Act might lead to complications in its enforcement." Id. at 169, 115 S.E. at 206.
308. Id. at 60, 182 S.E. at 97.
310. Id. at 685-89.
$3,000 the maximum tax was $75.00.311 This approach effected a reverse graduation with the tax rate decreasing as the value increased. In Roddey v. Byrnes312 the tax was upheld. The taxpayer maintained that the tax was a property tax and invalid since not in proportion to actual value. The court held the tax to be an excise rather than a property tax. It noted:

Relator complains and cites Sec. 6 of Article I of the Constitution as follows: "All property subject to taxation shall be taxed in proportion to its value." But this provision is inapplicable to license or excise taxes, which the sales tax is.313

Additionally the court made it clear that the property tax limitations were inapplicable. It stated:

In general, the sales tax is an imposition upon the privilege of the business of selling at retail and measured by the amount of business done, which is a clear case of an excise tax to which the constitutional provisions relating to property taxes are irrelevant.314

The statute contained over two pages of exemptions315 and this led the taxpayer to make an equal protection argument. The court quoted favorably from an earlier decision stating that a tax classification will be struck down only if it is shown that it "has its origin in nothing better than whim and fantasy and tyrannical exercise of arbitrary power . . . ."316 The court found that "whim and fantasy" had not been shown and upheld the act.

Gregg Dyeing Co. v. Query involved a six cents per gallon tax on gasoline purchased outside the state and used within the state.317 The taxpayer argued that the tax was a prop-

311. Id.
313. Id. at 513, 66 S.E.2d at 44-45.
314. Id. at 514, 66 S.E.2d at 45. The court cited to the 1931 decision in Gregg Dyeing Co.:

An excellent differentiation of these forms of taxes, supported by many citations, is found in our decision of Gregg Dyeing Co. v. Query, 166 S.C. 117, 164 S.E. 588 (1931), affirmed, 296 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A.L.R. 831, in which it was held by this court that a tax on the use and consumption of gasoline is an excise and not a property tax, and the levy was upheld by both courts after vigorous contest.

Id. at 514, 66 S.E.2d at 45.
property tax and invalid since it was not assessed according to value or otherwise within the terms of article X, section 1. The court believed the issue to be: "If the tax is a property tax, this section applies; if an excise, it is inapplicable." It will be recalled that this was not the approach of Hayne. Hayne was clear that all taxes must comply with the equality and uniformity provision of section one. This aspect of Hayne seems to have been silently overruled. Its loss is not material since the provision, standing alone, was duplicative of equal protection. Its critical significance is its relation to the actual value standard, supplying the requirement of equality of tax rate to be applied against the constitutionally established class, the actual value of all property.

The Gregg Dyeing court, after holding the tax to be an excise rather than a property tax, had no difficulty in upholding the statute. The court expressed its view that the legislature's power to impose excise taxes was unrestrained as follows:

In South Carolina, neither the Constitution of 1868 nor 1895 expressly or impliedly makes reference to excise taxes, though their existence must naturally be assumed to have been known to the framers of these instruments. The lack of restriction in them on the inherent power of the Legislature to impose such taxes affords ground for the conclusion that the power was purposely left unrestricted while the mode of exercising other taxing powers was provided for.

.......

Hence, there have been heretofore recognized in South Carolina, such excise taxes as those on inheritances, documentary stamps, corporate privileges and franchises, the sale of gasoline and the like.

We find no inhibition in our State Constitution and hold that the Legislature has the power to exact this tax.

In the above cases, and a number of others, the critical issue

318. 166 S.C. at 133, 164 S.E. at 594.
319. See text accompanying note 96 supra.
320. 166 S.C. at 136-37, 64 S.E. at 595.
321. (1) Thomas v. Town Council of Moultrieville, 52 S.C. 181, 184, 29 S.E. 647, 648 (1898) (a town tax of $8 on each lot for street work held valid since "not a tax upon property"); (2) State v. Tucker, 56 S.C. 516, 522, 35 S.E. 215, 218 (1900) (a statute requiring land owners in certain counties to remove trash, trees, etc. from running streams held invalid since not based on taxing power and alternatively, if considered a property tax it would violate the constitution "which provided that all property subject to taxation shall be taxed according to its actual value, as ascertained by an assessment made for the
was the characterization of the tax as a property or non-property tax. A non-property tax was certain to be upheld since the power was only limited by the faint restriction of equal protection. A property tax, on the other hand, had to comply with the one-class rule. Since 1868 it was express that an equal rate of taxation must

purpose”); (3) Hill v. City Council of Abbeville, 59 S.C. 396, 38 S.E. 11 (1900) (city license tax on certain occupations held valid since not a property tax); (4) Coward v. City Council of Greenville, 67 S.C. 55, 45 S.E. 122 (1903) (a town license tax upheld on authority of Abbeville); (5) Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811 (1907) (a state license tax on the basis of the capital of domestic corporations held valid as a tax on a privilege and not a tax on property); (6) Lillard v. Melton, 103 S.C. 10, 87 S.E. 421 (1915) (license fees on vehicles in Richland County held valid since not a property tax); (7) State v. Touchberry, 121 S.C. 5, 113 S.E. 345 (1922) (a license fee on vehicles in Clarendon County held permissible on the authority of Lillard); (8) Wingfield v. South Carolina Tax Comm’n, 147 S.C. 116, 134, 144 S.E. 846, 852 (1928) (state license tax on retailers of soft drinks held valid since constitutional provisions “applicable only to a property tax”); (9) Pickelsimer v. Pratt, 193 S.C. 225, 17 S.E.2d 524 (1941) (a state tax levied on employers under the Unemployment Compensation Act held valid since an excise tax and not an ad valorem property tax); (10) Anderson v. Page, 208 S.C. 146, 37 S.E.2d 289 (1946) (granted tax on personal property of estates in Spartanburg County held valid since not a property tax); (11) Distin v. Bolding, 240 S.C. 545, 553-54, 128 S.E.2d 649, 653 (1962) (an act creating a special sewer district in Richland County and providing for special assessment “measured by the benefit conferred” upheld since not “taxation within the provisions of the state constitution regulating or prescribing the manner of taxation”).

In Anderson the court quoted an earlier decision:

Such special forms of taxation (here graduated rates upon estates and there licenses upon vehicles - interpolated) are clearly not within constitutional limitations governing the imposition of taxes upon real and personal property.

208 S.C. at 152, 37 S.E.2d at 291.

Webster v. Williams, 183 S.C. 368, 377, 191 S.E. 51, 55 (1937), involved a state statute which imposed an additional payment of one percent per month on all delinquent taxes in Orangeburg County. The court held the act invalid as a penalty imposed by a special law and further discussed the validity of the act as an exercise of the taxing power as follows:

If the one per cent imposition were sustained as a tax on the suggested theory of a classification of taxpayers into those who are delinquent and those who are not delinquent, we would be confronted with the anomaly that real and personal property may be classified for taxation according to its ownership by those who are able to pay their taxes promptly and those who are not so able, rather than strictly according to the value of such property on an assessment basis. It has not been suggested by the respondents how, in such event, they could escape the constitutional rules upon which property shall be assessed and taxed in this State. See, for example, Article 10, § 1, requiring “a uniform and equal rate of assessment and taxation”; Article 10, § 3, providing that no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; Article 10, § 5, providing that County taxes shall be uniform in respect to persons and property within the jurisdiction of the County; Article 10, § 13, requiring that County taxes shall be based upon assessments, and shall be levied on the same assessment made for State taxes. Article 3, § 29, requiring that all property taxes shall be levied upon the actual value of the property taxes [sic], as ascertained by an assessment made for the purpose of laying such tax.

Id. at 376-77, 191 S.E. at 54-55.
be applied against a fixed class, the actual value of all property. All of these cases have missed the point if property can be freely classified.

IX.

Later Constitutional Amendment

The constitutional provisions authorizing the taxation of all property, of course, included intangible personal property within the class. For example, an 1874 statute provided that “all real and personal property . . . shall be subject to taxation.”

Personal property was defined as “all things, other than real estate, which have any pecuniary value, and moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise.”

This was also noted by the supreme court in a 1960 decision where it stated, “the code had [prior to 1932] included provisions with respect to taxation of intangible personal property along with other taxable property.”

In 1932, a constitutional amendment to article X, section 1 was ratified. The following new proviso clause was added:

Provided, Further, That the General Assembly may provide by law for the assessment of all intangible personal property, including moneys, credits, bank deposits, corporate stocks, and bonds, at its true value for taxation for State, County and Municipal purposes or either thereof: Provided, That the total rate of taxation imposed thereon shall never exceed one-half of one percentum of the actual value of such intangible property: Provided, Further, That such intangible personal property shall not be subject to the three mill levy provided by Section 10, Article 11, of this instrument or to any other general or special tax levy, except such as is especially provided by the General Assembly by the authority and within the limitation of this provision; nor shall such intangible personal property be considered a part of “taxable property” as such term is used in this instrument, of the State or any subdivision thereof.

In more simplified form the amendment provided for:

323. Id. at § 4.
(1) A General Prohibition—"intangible personal property shall not be subject to . . . any other general or special tax levy, except such as is . . . within the limitation of this amendment."

(2) Limitation—"That the total rate of taxation imposed thereon shall never exceed one-half of one percentum of actual value."

The amendment consequently created a sub-class of property which was to be taxed in a particular way.

There was no need for this amendment if Holzwasser is correct. Intangible personal property is certainly not an arbitrary classification. The legislature was consequently free, without constitutional amendment, to treat intangible property separately.

With a one-class system, however, no separate treatment could be provided for intangibles or any other kind of property. The rate must be equal against all property. The creation of a sub-class requires constitutional amendment. The 1932 amendment consequently establishes an express exception to the constitutional one-class rule.

X.

RECENT LITIGATION

In 1972, after over one hundred years of consistent judicial and legislative interpretation, the legislature enacted Act No. 1266.326 The act directed the South Carolina Tax Commission to assess the real and personal property of manufacturers "to arrive at a nine and one-half percent assessment ratio."327 The statute assured that manufacturers' property would be taxed at a different, and higher, rate than other property. Two classes of property were created.

The statutory phrase "assessment ratio" requires explana-


Section one of No. 1266, quoted in text, contained a proviso clause as follows: "Provided, further, the ratio of any existing manufacturer shall not be adjusted more than one percent per year while the present ratio is either above or below the nine and one-half percent ratio." The proviso clause became the subject of litigation in Nancy Fashions, Inc. v. Brady, (Seventh Judicial Circuit, Order of Judge Spruill dated August 2, 1974). See note 351 infra.
tion. Assume property X has an actual value of $100,000 and is subject to an assessment ratio of 4.5 percent. The computation is 4.5% of $100,000 = $4,500. This figure is called assessed value. The tax rate (assume 100 mills) is then applied against $4,500 to give a tax liability of $450. It is immediately apparent that the same result would be achieved if the millage were set at 4.5 and applied against the actual value of $100,000. For this reason, the use of assessment ratios at best involves an unnecessary step. They are apparently designed to mislead the people into thinking that they are underassessed since the tax rate is applied against a low figure.

Where different assessment ratios are used for different property, the purpose is to further confuse. Assume two pieces of property, A and B, each with an actual value of $100,000. If A is subject to an assessment ratio of ten percent and B is subject to a five percent ratio the computation would be for A - 10% of $100,000 = $10,000; for B - 5% of $100,000 = $5,000. The rate of tax (assume 100 mills) is then applied against the resulting figure, A - 100 mills x $10,000 = $1,000 of tax liability; B - 100 mills x $5,000 = $500 of tax liability. It is immediately apparent that the use of different assessment ratios is simply an indirect means of applying a different tax rate to property A and B. If manufacturers’ property is assessed on a 9.5 assessment ratio and the remaining property in the county is assessed at a 4.75 ratio, the effect is to double the tax rate on the manufacturers’ property. And yet, since 1868, the constitution has required an “equal rate of assessment and taxation.”

Assessment ratios are irrelevant to the constitutional pattern of taxation. The framers did not contemplate the use of such an intermediate step. The constitutional scheme is complete with the establishment of an equal rate of tax and the determination of the class, the actual value of all property.

In Newberry Mills v. Dawkins, the taxpayer filed its property tax return for the year 1970 reporting an actual value of about $4,800,000. The great bulk of this amount was attributable to personal property, $4,200,000. Real property amounted to about $600,000. The Tax Commission applied an assessment ratio in

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excess of ten percent and arrived at a total assessed value of about $508,000. Newberry Mills appealed to the Tax Board of Review arguing that an assessment ratio of five percent was proper. The county had recently completed a reassessment program for real property and it seemed agreed that a five percent assessment ratio was generally applied. The Board accepted Newberry's contention with respect to real property and ordered that the five percent figure be used. As to personal property, the Board upheld the Tax Commission. It found nothing in the record to show the assessment ratio used for personal property. It noted, however, that merchants' inventory was by statute to be assessed at ten percent and "assumed . . . that most of the personal property in Newberry County is assessed at the rate of ten (10%) percent." It consequently found that the ten percent ratio used for the personal property of Newberry Mills was the same rate applied to other personal property in the county. The Board, therefore, adopted a pure two-class theory: that all real property within the county must be taxed at the same rate and all personal property within the county must be taxed at the same rate. But these two rates need not be the same; a five percent assessment ratio could be used for real property and a ten percent ratio for personal property.

As a result of the Board's decision, Newberry Mills received some theoretical satisfaction but little economic gain.

The Board had affirmed the ten percent personal property assessment ratio and personal property was about 87.5 percent of Newberry Mill's tax base. Newberry Mills went to court to reverse the Board. The county might also have contested the Board's ruling since the Board reduced the real property assessment ratio from ten to five percent. The county failed to do so, however, and that issue would have to wait to be decided in Holzwasser.

Newberry Mills argued to the supreme court that the Board's two-class theory violated the state constitution and the fourteenth amendment's equal protection clause. In retrospect, it appears that the equal protection argument was very unfortun-

332. 259 S.C. at 11, 190 S.E.2d at 504-05.
334. Id. at 60.
335. Id. at 59.
336. Id.
337. Id. at 60.
338. This may be contrasted with the Holzwasser court's multi-class approach.
ate. The 1890 decision in Bell’s Gap had assured that the argument could not succeed. Further, the equal protection issue confused analysis by the parties and the court in both Newberry Mills and Holzwasser. The only serious issue in these cases was the proper interpretation of the state constitution. But attention to this issue was continuously deflected by consideration of equal protection. Evidence of the confusion caused by equal protection may be noted in the following quote from the court’s opinion:

We find no constitutional or statutory provision that prohibits the assessment of real property at a different rate from personal property. All that is required is “a uniform and equal rate of assessment and taxation.” This requirement has been interpreted as follows:

“Generally, within constitutional limitations, the state has power to classify persons or property for purposes of taxation, and the exercise of such power is not forbidden by the constitutional requirement that taxation be uniform and equal provided the tax is uniform on all members of the same class and provided the classification is reasonable and not arbitrary.” 84 C. J. S. Taxation § 36 p. 112.

Two separate ideas, (1) the meaning of the state constitution and (2) equal protection, have become confused. The court gave no textual or historical analysis of the state constitutional provisions.

341. 259 S.C. at 13, 190 S.E.2d at 506.
342. Justice Bussey, dissenting for himself and Justice Brailsford, thought that in view of the “clear language of our several constitutional provisions, it is to me quite understandable that this court has not heretofore been called upon to expressly decide the precise issue.” 259 S.C. at 19, 190 S.E.2d at 509. The dissenters found the state constitutional provisions clear and unambiguous. They noted:

In brief summary, it is my view that the language of our Constitution is clear, unambiguous and compelling that real and tangible personal property have to be treated equally and alike for the purpose of ad valorem property taxes. And, if there were any need for construction, there is a complete absence of any authority whatsoever from this or any other jurisdiction to support the conclusion reached below and sustained by the majority opinion, all authority being to the contrary.

Id. at 20, 190 S.E.2d at 509.

The dissenters made the further point that a number of the court’s earlier decisions only made sense on the premise that a property tax can not be classified. They stated:

There are, however, several cases, not directly in point, which throw at least some light upon the matter. See: Gregg Dyeing Co. v. Query, 166 S.C. 117, 164 S.E. 588, aff. 286 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A.L.R. 831; Thomas
Following Newberry Mills, two interpretations of the case seemed possible. One, based on the above quote, was that the court would uphold any classification "provided the classification is reasonable and not arbitrary." The second interpretation was that the court was upholding and adopting the Board’s two-class theory. Holzwasser would provide the answer.

Mary S. Holzwasser owned land and a building in Spartanburg County. The property was leased to Arrow Automotive Industries, Inc., a manufacturer engaged in rebuilding automotive electrical parts. No personal property was involved in the case since the lessee apparently owned all equipment and similar property. Mrs. Holzwasser’s real property for the year 1972 was assessed by the Tax Commission on the basis of a 9.5 percent assessment ratio. The Holzwasser property was found to have an actual value of $288,000. A tax rate of about 194 mills was then applied to the resulting figure. The following chart compares the different tax methods used for manufacturers and non-manufacturers:

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<th>Manufacturer’s Property</th>
<th>Non-Manufacturer’s Property</th>
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</thead>
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<tr>
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<td>$2,344.21</td>
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Mrs. Holzwasser asserted that she should pay only $2,344.21 since

v. Town Council of Moultrieville, 52 S.C. 181, 29 S.E. 647; State v. Tucker, 56 S.C. 516, 35 S.E. 215. In each of these cases the Court held that the particular statute involved imposed no ad valorem tax on property. The clear import or holding of each of those cases, however, was to the effect that had the particular statutes in fact imposed an ad valorem tax on property, such would have been unconstitutional under the ad valorem property tax provisions of our Constitution with which we are here concerned.

Id. at 19, 190 S.E.2d at 509.

343. This interpretation was based on the word “therefore” in the second sentence of the following quote:

The order of the Tax Board of Review requires the Commission to use the same ratios for manufacturers’ realty and personality as used by local authorities for realty and personality of other taxpayers. There is therefore equality and uniformity in the assessment as required by the constitutions and statutes.

Id. at 13-14, 190 S.E.2d at 506 (emphasis added).

344. 205 S.E.2d at 702.
346. 205 S.E.2d at 702.
347. Id.
348. Record at 9.
real property can not be classified. She was successful in the circuit court, but lost in the supreme court.

The court again gave no textual or historical analysis of the state constitutional provisions. It stated:

We find nothing in our Constitution that prohibits the General Assembly of this state from classifying property according to its use so long as such classification is reasonable and not arbitrary, and the tax imposed is uniform on the same class of property.

In substance, the state constitutional provisions were viewed as duplicative of the federal equal protection clause. They prohibit an unreasonable and arbitrary classification, but nothing more.

The Holzwasser result is incoherent in view of the state's constitutional history.

349. Id. at 8.
350. 205 S.E.2d at 704.
351. Id.; see text accompanying note 1 supra. A proviso to No. 1266 established a phase-in period during which the assessment ratio on a manufacturer's property would be lowered no more than one percent per year until the 9.5 percent figure was reached. Under this approach, if Plant A was subject to an assessment ratio of 15 percent in 1971, it would be reduced for 1972 to 14 percent.

Following Holzwasser, the phase-in proviso was held unconstitutional since it resulted in a tax which was not uniform on the same class of property. Nancy Fashions, Inc. v. Brady, (Seventh Judicial Circuit, Order of Judge Spruill dated Aug. 2, 1974). The decision was not appealed. On August 26, 1974, the Tax Commission announced that it would follow Nancy Fashions and assess all manufacturers' property on the basis of the 9.5 assessment ratio. The State, Aug. 27, 1974, at 1-B, col. 3.

352. The appropriate means of changing a constitution is by use of the amendment process. In 1920, as previously discussed, the central recommendation of the Marion Report was an amendment to the constitution which would have permitted classification. In 1969, the Study Committee on the South Carolina Constitution drafted language which would have accomplished the Holzwasser result. The proposed language provided:

The General Assembly shall provide for the assessment of taxable property at actual value or according to such classification as may be prescribed by general law.


The legislature at its recent session, considered, but did not act upon, several other versions of a proposed amendment. S.J. Res. 442, 100th Gen. Ass., 1st Sess. (1973). The history of this proposal is as follows: Senate Action: Introduced and referred to the Judiciary Committee—May 10, 1973. Committee Report with majority favorable, minority unfavorable—May 23, 1973; Recommended to the Judiciary Committee—January 10, 1974; committee report favorable, with amendment—June 6, 1974; second reading—June 20, 1974; Amended—June 25, 1974; Third reading—June 26, 1974; Nonconcurrence—July 2, 1974; Conference committee appointed—July 3, 1974.

House Action: Introduced and referred to the Judiciary Committee—June 27, 1974; Recalled—June 27, 1974; Amended and second reading—June 29, 1974; Rejected—July 1, 1974; Reconsidered and third reading—July 2, 1974; Conference Committee appointed—July 3, 1974.
CONCLUSION

In 1865, for the specific purpose of prohibiting legislative classification, the constitution established the actual value of all property as one class. The provision read:

All taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax. 353

In 1868, to assure that the same rate of tax would be applied against all property, the constitution was amended to require the legislature to provide for

a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property . . . 354

The two provisions form a complete constitutional pattern. The 1920 Marion Report and the 1969 Study Committee355 each drafted an amendment to the constitution which would have authorized classification. A constitutional change requires submission of the proposed amendment to the people and their approval of it.

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353. See note 7 supra.
354. See note 9 supra.
355. See note 331 supra.