PREQUEL TO HOMESTEAD

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ABSTRACT

Homestead laws reflect value judgments which balance the free functioning of commercial enterprise and business transactions against a family’s interests in shelter and a home. In South Dakota’s history, this tension has been displayed in legislative enactments, judicial reasoning, and even statewide referendums. An examination of the significant events at two ends of this chronology reveals the expression of societal values in law and the dynamics of the pre-statehood origins of homestead laws in the context of competing policies and interests. This article proceeds by outlining the general purposes and sources for homestead laws, followed by a sketch of existing homestead laws under the contemporary statutory framework. Next, the history leading up to the enactment of constitutional homestead protections in South Dakota’s 1889 Constitution is considered.

“The State ought to see to it that every family may be covered by a roof . . . .”

I. INTRODUCTION

South Dakota’s homestead laws have long been a lively topic of litigation. Dozens of South Dakota Supreme Court and pre-statehood Dakota Territory Supreme Court decisions touch on our homestead laws in some substantive way. One may add to this a significant assortment of federal decisions.


2. See Scherer v. Scherer, 2015 SD 32, ¶ 6, 864 N.W.2d 490, 493 (noting that other than in the context of divorce or support obligations, “marriage does not vest in one spouse an interest in the other’s separate property[,]” except for the homestead); Niesche v. Wilkinson, 2013 SD 90, ¶ 25, 841 N.W.2d 250, 257 (acknowledging that spouses often join deeds even when the property is not homestead property in order “to preempt a cloud on title arising from” any potential homestead rights); Johnson v. Sellers, 2011 SD 24, ¶ 4, 798 N.W.2d 690, 692 n.2 (noting the requirement that both spouses join a homestead deed); Wisner v. Palvin, 2006 SD 64, ¶ 9, 719 N.W.2d 770, 774 (validating an attempt by one of two unmarried joint tenants of homestead property to destroy the joint tenancy by unilateral conveyance); In re Davis, 2004 SD 70, ¶ 21, 681 N.W.2d 452, 460 (declaring a “statute unconstitutional insofar as it purports to confer an unlimited homestead exemption for those over seventy years of age”); Osloond v. Farrier, 2003 SD 28, ¶ 13, 659 N.W.2d 20, 24 (affirming that, per statute, a homestead of a person age seventy or older is exempt from sale for taxes); Beck v. Lapsley, 1999 SD 49, ¶ 10, 593 N.W.2d 410, 413 (reasoning that the unlimited homestead exemption for those over age seventy shifts to a $30,000 exemption for the proceeds for one year following a sale of the homestead); In re Estate of Perry, 1998 SD 85, ¶ 33, 582 N.W.2d 29, 35 (holding that “the use of an invalid power of attorney to sell the Texas homestead of [a wife], cannot, in equity, be used to prevent her from acquiring a homestead interest in the [South Dakota] home purchased with the proceeds from that wrongful sale[,]” even where the wife never resided in the purchased home); Gunn v. Gunn, 505 N.W.2d 772, 775 (S.D. 1993) (concluding that “[a] divorce court, being a court of equity, possesses the power to impose a lien upon a homestead for purposes of spousal or child support”); Gross v. Gross, 491 N.W.2d 751, 753-54 (S.D. 1992) (finding that where, prior to marriage, property was sold by the future
husband “at fair market value to his son and daughter-in-law” but “[l]ater, as husband and wife, [the couple] continued to live on this property, although neither had ownership interests in it, the wife had no homestead rights to assert); In re Estate of Mathison, 468 N.W.2d 406, 403 (S.D. 1991) (quoting In re Clouse’s Estate, 257 N.W. 106 (S.D. 1934)) (distinguishing homestead rights from intestate rights); A.L.S. Props., Silver Glen v. Green, 465 N.W.2d 783, 786 (S.D. 1991) (quoting Hickman v. Long, 150 N.W. 298, 299 (S.D. 1914)) (holding a homestead may be the subject to judicial sale for recovery of debts “contracted for the purchase price”); St. Paul Fire and Marine Ins. Co. v. Kaarup, 420 N.W.2d 364, 366 (S.D. 1988) (holding that husband is not estopped from denying validity of mortgage where mortgage which was signed only by wife, absent claim that mortgagee was misled into believing that wife was unmarried); Home Fed. Savings & Loan Ass’n of Sioux Falls v. First Nat’l Bank in Sioux Falls, 405 N.W.2d 655, 658-59 (S.D. 1987) (holding foreclosure on homestead permitted where mortgage signed by wife and the executor of the husband’s estate); In re Estate of Smith, 401 N.W.2d 736, 739-40 (S.D. 1987) (considering homestead rights in connection with elective share rights); State v. Pettis, 333 N.W.2d 717, 720-21 (S.D. 1983) (reasoning that a condition of probation which provided option to liquidate homestead property because of failure of optionor’s wife to sign the option disappeared upon the wife’s death); Hanson v. Hanson, 318 N.W.2d 355, 357 (S.D. 1982) (holding that a divorce court may order the sale of a couple’s homestead); In re Estate of Kranig, 291 N.W.2d 781, 784 (S.D. 1980) (affirming determination that survivor lacked homestead rights to decedent’s home where marriage was never formalized); Schutterle v. Schutterle, 260 N.W.2d 341, 354 (S.D. 1977) (rejecting argument that waiver of homestead rights via antenuptial agreement is against public policy); Christiansen v. United Nat’l Bank of Vermillion, 176 N.W.2d 65, 67 (S.D. 1970) (holding that where wife did not join mortgage, she enjoyed continuing exemption of sale proceeds); Stearns v. Stearns, 126 N.W.2d 124, 127-28 (S.D. 1964) (reversing award of sale proceeds from homestead to wife when she remarried or when minor children attained their majority on account of a mortgage owed by husband); In re Estate of Swanson, 107 N.W.2d 256, 259 (S.D. 1961) (holding that widow is entitled to homestead rights in addition to intestacy rights); Brodsky v. Maloney, 105 N.W.2d 911, 914-15 (S.D. 1960) (setting aside as unconstitutional a statute requiring a homestead to be marked off, platted, and recorded before exemption status would attach); In re Estate of Vetter, 66 N.W.2d 519, 520-21 (S.D. 1954) (holding that homestead and intestacy laws displaced common law dower); Sidle v. Cheney, 56 N.W.2d 86, 88 (S.D. 1952) (holding that waiver of homestead rights does not re-order lien priorities); Kerr v. Kerr, 54 N.W.2d 357, 359-60 (S.D. 1952) (allowing lien against homestead to secure alimony obligations); Crawford v. Carter, 52 N.W.2d 302, 323-24 (S.D. 1952) (holding that homeowner who acquiesced to verbal contract, intended to abandon her homestead rights, and encouraged the improvements is estopped from asserting homestead rights); In re Snyder’s Estate, 48 N.W.2d 238, 241 (S.D. 1951) (considering homestead exemption rights in the context of the state inheritance tax); Seeman v. Seeman, 39 N.W.2d 879, 880 (S.D. 1950) (per curiam) (upholding a homestead lien to secure divorce property division award); Crawford v. Carter, 37 N.W.2d 241, 244-45 (S.D. 1949) (dismissing claim for specific performance to enforce purchase agreement of homestead signed only by husband and holding that neither spouse may unilaterally abandon the homestead); Knittel v. G. Somers & Co., 28 N.W.2d 878, 878-79 (S.D. 1947) (affirming sufficiency of evidence to show temporary absence from homestead was not an abandonment); Moore v. Conn. Gen. Life Ins. Co., 26 N.W.2d 691, 694 (S.D. 1947) (considering rights of minors’ homestead rights in a foreclosure action); Johnson v. Hendrickson, 24 N.W.2d 914, 918 (S.D. 1946) (allowing partition of property held by tenants in common subject to homestead rights); Grand Lodge A. O. U. W. v. Fischer, 21 N.W.2d 213, 217 (S.D. 1945) (questioning validity of deed recorded thirty years past lacking an indication of the marital status of grantor or homestead status of property).

3. See James A. Craig, A “Rogue’s Paradise?”: A Review of South Dakota’s Property Exemptions and a Call for Change, 59 S.D. L. REV. 257, 284-94 (2014) (summarizing bankruptcy court decisions dealing with the South Dakota homestead exemption); see also In re Paul, 739 F.3d 1132, 1135-36 (8th Cir. 2015) (denying homestead status to a homeowner who rented out his home despite his professed intent to return). See generally MARSHALL MCKUSICK, THE HISTORICAL DEVELOPMENT OF
The homestead exemption protects shelter as a fundamental human need, but it also defines that protection in terms of a “family,” broadly conceived. The basic requisites for shelter are unchanged since 1862 (conceding advancements in engineering and design), but the evolution of the idea of a family has been more dynamic. The state constitutional framework for homestead laws, meanwhile, has remained static. The 1889 state constitutional homestead provision reads today just as it did when it was enacted upon South Dakota’s statehood. My aims in this article are to situate that provision in its historical context and to outline the contemporary statutory framework which defines and limits the application of the homestead exemption, along with two additional homestead characteristics dealing with inheritance and spousal conveyances.

First, however, a few preliminaries. The term “homestead” in a legal context can prove slippery. It typically refers to the extent and contours of the exemption from creditor claims that state law defines, alongside the two additional characteristics just mentioned. The term “homestead” can also refer to the parcel of realty which enjoys the exemption; this second definition overlaps to a large degree with the popular meaning of the term—that place...
where the home is.\textsuperscript{11} Homestead in the exemption sense of the word is a privilege or bundle of defined rights and limitations in regards to certain realty.\textsuperscript{12} When the context is otherwise unavailing, I will endeavor to call the exemption the homestead right or privilege and the \textit{res} "homestead property."\textsuperscript{13} The term can be used to describe the requirement that both spouses join a conveyance of the homestead property—what I will label the "homestead veto."\textsuperscript{14} Finally, the homestead enjoys certain inheritance characteristics which I will call the "homestead descent."\textsuperscript{15}

The term homestead in regards to real property tax assessments is outside the scope of this article, as is the term homestead in connection with "homesteaders;" settlers and pioneers who satisfied the federal requisites of "proving up a claim."\textsuperscript{16}

This article discusses the history and scope of South Dakota’s homestead laws in a state constitutional context alongside an exploration of current statutory protections for a family’s dwelling. Personal property exemptions will not be considered, except to the extent necessary to situate and explicate the contours of homestead protections.\textsuperscript{17} Bankruptcy and its particulars fall outside the scope of this article. Real property tax discounts for an owner-occupied property—sometimes referred to as a homestead—will similarly be ignored.\textsuperscript{18}

\begin{itemize}
  \item 11. Alan J. Jacobs, \textit{40 AM. JUR. 2D Homestead \S 1} (2017).
  \item 12. Wisner v. Pavlin, 2006 SD 64, ¶ 21, 719 N.W.2d 770, 779. \textit{But see} Bullene v. Hiatt, 12 Kan. 98, 99 (Kan. 1873) ("The homestead exemption is not a personal privilege, to be claimed by the debtor, but an absolute right . . .").
  \item 13. I typically use the terms "right" and "privilege" interchangeably here although, strictly speaking, the homestead exemptions and related characteristics of homestead law are better termed privileges (or perhaps limitations) because the existence of a right implies the existence of a duty, and there does not seem to be any corresponding homestead duty. See generally Wesley Newcomb Hohfeld, \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 23 YALE L.J. 16, 30 (1913) ("[T]he term "rights tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense . . ."); Wesley Newcomb Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 26 YALE L.J. 710 (1917) (explicating rights versus duties, etc.); \textit{see also} John E. Cribbet, \textit{Property Lost: Property Regained}, 23 PAC. L.J. 93, 101 (1991) ("If we view property as primarily a matter of private rights . . . we have forgotten the lessons of the past.").
  \item 14. Jacobs, \textit{supra} note 11, at 382; \textit{see also infra} Part II.C.4.a (discussing the “homestead veto” characteristics of homestead property).
  \item 15. \textit{See infra} Part II.C.4.b (discussing the “homestead descent” aspects of homestead property).
  \item 16. As to homestead tax assessment rules, \textit{see} S.D.C.L. §§ 43-31-32 to -41 (2004) (providing tax relief for low income households); Reints v. Pennington Co., 2015 SD 74, ¶ 8, 869 N.W.2d 466, 468-69 (discussing same); \textit{see also} S.D.C.L. ch. 10-6A (2004) (allowing a property tax assessment freeze on dwellings of disabled and older home owners); S.D.C.L. § 10-4-24 (2004) (exempting homesteads from "any tax imposed by the Legislature to defray the expenses of the state" but not municipal or county taxes). As for the federal Homestead Act, \textit{see} Roger D. Billings, \textit{The Homestead Act, Pacific Railroad Act, and Morrill Act}, 39 N. KY. L. REV. 699, 711-26 (2012). Interestingly, the first homestead filing "in South Dakota was by Mahlon Gore, instantly upon the stroke of 12, morning of January 1, 1863 at Vermillion." \textit{DOANE ROBINSON, 1 HISTORY OF SOUTH DAKOTA} 308 (B. F. Bowen 1930). "This was also the first homestead in the United States." \textit{Id}.
  \item 17. \textit{See infra} Part II.C.3 (discussing classifications of personal property exemptions).
\end{itemize}
In the discussion which follows, I first provide an outline of contemporary homestead laws’ purposes and aims. A history of homestead laws as a lens for examining other societal trends (such as consumer protection laws) would be a worthy endeavor. History gives context. Moreover, the South Dakota Supreme Court has been particularly sensitive to historical context in construing the extent of constitutional homestead protections. In particular, the two unsuccessful attempts to modify our State Constitutional homestead law (in 1893 and 1975; rejected by the voters, respectively, in 1894 and 1976) could no doubt be unearthed by scholars and make use of a wide array of primary source material. While a historical component of the discussion which follows is necessary, I have elected to narrow the focus of this inquiry to the constitutional birth of homestead law contrasted against current homestead rules. Historical developments will be considered to the extent necessary to accomplish that aim. In sum, after outlining the underlying aims and origins of homestead laws, I will present two capsules: the first, an examination of contemporary homestead protections; and the second, a roughly thirty-year legislative chronology leading up to the enactment of the 1889 South Dakota Constitutional provision recognizing homestead exemption rights. Finally, in a to-be-published continuation of this article, I intend to undertake a summary of South Dakota constitutional homestead jurisprudence from 1889 onwards.

II. DISCUSSION

A. THE PURPOSE AND OBJECTIVES OF THE RIGHT

The basic thrust of homestead rights is to secure a family’s shelter against financial misfortune. This aim is achieved by suspending otherwise available creditor remedies against the home. Furthermore, homestead laws try to provide some degree of protection to the marital relationship. This goal is advanced by retracting the right of unilateral alienation.

Several related objectives are bundled in the justification for the former aspect of homestead laws; protecting the family’s home. First, homestead protections seek to ensure a basic human necessity—shelter against the elements.

19. See infra Part II.A.
20. See In re Davis, 2004 SD 70, ¶ 18, 681 N.W.2d 452, 459 (examining the 1885 South Dakota Constitutional debates regarding the homestead provision which was ultimately adopted in 1889).
21. See infra Part II.D.2.d (detailing the two failed attempts at constitutional homestead revision).
22. See infra Part II.D.2 (describing the historical narrative leading up to and surrounding the 1889 constitutional homestead enactment).
23. See In re Dependency of Schermer, 169 P.3d 452, 465 (Wash. 2007) (en banc) (explaining that the homestead exemption “implements the policy that each citizen have a home where [the] family may be sheltered and live beyond the reach of financial misfortune”) (alteration in original) (citation omitted).
Abraham Maslow identified safety as a basic human requirement for survival.\textsuperscript{24} Maslow’s point was not that individuals can die from exposure, but rather that the most basic human needs motivate and explain human behavior. His hierarchy also categorized needs that motivate behavior only after more basic needs are fulfilled.\textsuperscript{25} Shelter is one of the more fundamental needs. Homestead, in this context, can be construed almost as a kind of human rights legislation. To the extent that families are saved from having their home sold by their creditors, the homestead exemption also serves to lessen the burdens on government and communities caused by homelessness.\textsuperscript{26} Widespread property vacancies which result from excessive foreclosures can strain government services such as law enforcement.\textsuperscript{27} The thwarting of basic needs like safety and shelter may lead to increased criminality.\textsuperscript{28}

More than merely shelter, however, the term “homestead,” in a popular sense, resonates with additional values. The maxim, “one’s home is one’s castle” comes to mind.\textsuperscript{29} The aim of protecting a family’s home is broader than merely the necessity of shelter. As Maslow recognized, humans prefer “some kind of undisrupted routine or rhythm.”\textsuperscript{30} They need “a predictable, orderly world.” Routine and predictability are advanced with homestead protections, and so is the privacy that comes with home ownership. A “homestead” imparts a greater sum than merely “shelter.” This greater sum, which imparts both

\begin{itemize}
\item \textsuperscript{24} A.H. Maslow, \textit{A Theory of Human Motivation}, 50 PSYCHOL. REV. 370, 376 (1943). “Practically everything looks less important than safety, (even sometimes the physiological needs which being satisfied, are now underestimated).” \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 375-76.
\item \textsuperscript{26} \textit{See} Scholtec v. Estate of Reeves, 490 S.E.2d 603, 607 (S.C. Ct. App. 1997) (emphasizing that the homestead exemption prevents citizens from becoming dependent on government support).
\item \textsuperscript{27} \textit{See} City of Miami v. Bank of Am., 800 F.3d 1262, 1269 (11th Cir. 2015), \textit{cert. granted}, 136 S.Ct. 2544 (2016) (linking disproportionate foreclosure rates to reduced property tax revenues and increased strain on municipal resources such as firefighters and police).
\item \textsuperscript{28} \textit{See} Maslow, \textit{supra} note 24, at 395 (asserting that the “thwarting or possibility of thwarting of these basic human goals, or danger to the defenses which protect them, or to the conditions upon which they rest, is considered to be a psychological threat”).
\item \textsuperscript{29} \textit{See} Meisner v. Hill, 138 N.W. 583, 584 (Neb. 1912) (observing that the term “homestead” in Nebraska “was used in its general acceptance—the home of the family, the common-law castle of the citizen”); \textit{In re Carothers’ Estate}, 167 P.2d 899, 915 (Okla. 1946) (Riley, J., dissenting) (arguing that “[i]t matters not whether the homestead to house the family be a hovel or the shack of a squatter, or the shelter of a cottonwood tree” or “[t]he homestead may be the castle vested by title of the sovereign”); Jonathan L. Hafetz, “A Man’s Home is His Castle? : Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 180 (2002) (observing that “[t]he maxim that ‘a man’s home is his castle’ has deep roots in the Anglo-American legal tradition”); \textit{see also} State Homestead Exemption Laws, 46 YALE L.J. 1023, 1032 (1937) [hereinafter \textit{Homestead}] (citations omitted) (claiming that judicial opinions romanticize the homestead exemption with expressions like “family hearth” and “Home Sweet Home”). One Nevada constitutional delegate called homestead laws “one of the sublimest ideas of our age.” \textit{OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA, ASSEMBLED AT CARSON CITY, JULY 4, 1864, TO FORM A CONSTITUTION AND STATE GOVERNMENT 287 (1864). “It is a principle which has sought form and shape, and come like an angel of mercy to hover over and bless the families of our nation.” \textit{Id.}
\item \textsuperscript{30} Maslow, \textit{supra} note 24, at 377.
\item \textsuperscript{31} \textit{Id.}
\end{itemize}
security and the autonomy that comes from the reservation of a personal space, finds protection in the law from interference from creditors in homestead laws. Earlier in history, full participation in political life was reserved to men who owned property (typically their home); a requirement which might suggest a thinking that the level of self-realization required for responsible decision making often accompanied the ownership of one’s home.\textsuperscript{32}

This expansive and varied set of values that can be discerned in the justifications for homestead laws also finds expression in protecting the personal space of a home from government intrusions in the Fourth Amendment and from private intrusions in burglary law and self-defense recognitions.\textsuperscript{33} Burglary criminalizes not just theft from a dwelling, but nonconsensual intrusion into it.\textsuperscript{34} The right to repel home intruders even with the use of deadly force further cements the walls of one’s castle.

More basically, homestead exemption laws protect a family’s home from creditors. The exemption effectively bars a creditor’s right to a forced sale of the homestead property.\textsuperscript{35} As a consequence (or perhaps an additional aim), the availability of “easy credit” is reduced.\textsuperscript{36} Indirectly, homestead laws serve other

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\item \textsuperscript{32} Gregory S. Alexander, \textit{Time and Property in the AmericanRepublican Legal Culture}, 66 N.Y.U. L. Rev. 273, 286 (1991); see also Christopher J. Tyson, \textit{Municipal Identity as Property}, 118 Penn St. L. Rev. 647, 673 n.106 (2014) (noting that in the early years of America’s history “the right to vote and hold elected office were tied to property ownership”).
\item \textsuperscript{34} See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Liebson, J., dissenting in part, concurring in part) (“Historically, burglary was born into the common law as a separate substantive offense out of a desire to protect persons in the sanctity of the home.”).
\item \textsuperscript{35} C. S. Wheatley, Jr., \textit{Annot., Estate of Interest in Real Property to Which a Homestead Claim May Attach}, 89 A.L.R. 511, 520 (1934) (explaining “that a homestead right is not an estate in the land but a mere privilege of exemption from execution of such estate as the holder has”). The equitable right of redemption in a foreclosure context has the same underlying aim; debtor protections against otherwise available creditor remedies in the property of a home, and is as equally culturally situated. See, e.g., Humble Oil & Ref. Co. v. Deerr, 303 A.2d 898, 907-08 (N.J. Super. Ct. Ch. Div. 1973) (emphasizing the protections that courts of equity grant to a debtor’s right of redemption); see also Taisu Zhang, \textit{Cultural Paradigms in Property Institutions}, 41 YALE J. INT’L L. 347, 351 (2016) (noting that “Chinese norms were almost unreasonably pro-debtor and pro-smallholder, allowing debtors to retain valid redemption rights for eternity—at virtually no interest . . . .”). Contemporary landlord-tenant legal reform is also aimed at consumer protection in the leasehold context. 4 HERBERT THORNDIKE TIFFANY, TIFFANY REAL PROPERTY § 986.20 (3d ed.), Westlaw (database updated Sept. 2016).
\item \textsuperscript{36} \textit{Homestead, supra} note 29, at 1031. By limiting the ability of unsecured creditors to recover unpaid debts from the homestead, the owner’s home is protected from forced sale as the availability of unsecured consumer credit is curtailed. The homestead exemption has the effect of protecting the home and, at the same time, discouraging the availability of consumer credit, at least to the extent that overextension might otherwise result in the loss of the borrower’s home. The homestead, therefore, might be seen as introducing a bit of restraint into homeowner-consumers’ debt loads since lenders are
societal utilities as well. By providing creditor protections as an incident to home ownership, home ownership is encouraged. Increasing the incidence of home ownership relative to leaseholds is incentivized by means of attractive asset protection features associated with one’s personal residence, though one doubts that any empirical evidence would necessarily demonstrate a causative relationship between the two. Nevertheless, one stated justification for homestead exemptions is to encourage home ownership and, thereby, the benefits which accrue from a higher incidence of owners rather than renters. Another justification cited by the courts is that by sheltering certain particular assets from creditors, dependency on state welfare (given that welfare as we know it did not exist in antebellum America) or reliance on one’s neighbors is reduced. Yet another goal of homestead laws seems to have been to attract settlers and immigrants.

Homestead laws also protect the family as an institution and thereby advance societal goals of stability and cohesion. Homestead rights are a way of promoting the family unit in various forms and customs presumably at the core of “family values” which underlie a stable republic. “The mischief which the law meets is family disintegration,” claimed nineteenth century homestead scholar Rufus Waples. The purpose of homestead laws is to provide asset protection for families with regards to a particular asset—their primary discouraged from relying on a borrower’s homestead equity as collateral. At the same time, the modest equity cap of homestead protections ($60,000) encourages re-mortgaging in order to stay within the window of protections. This technique of equity stripping aims to keep a home’s equity within the safe harbor of the $60,000 equity cap. For example, a homeowner who has paid down her mortgage over the years and now enjoys $100,000 in home equity ought to consider re-mortgaging her home to reduce her equity below $60,000. Thus, the homestead exemption pulls in two directions at once, discouraging but also encouraging consumer debt, once the homestead’s equity reaches the limits of the exemption.

38. See Bigelow v. Dunphe, 197 So. 328, 330 (Fla. 1940) (“Homestead laws are founded upon considerations of public policy, their purpose being to promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen . . . .”) (citation omitted).
39. See Geoffrey D. Korff, Reviving the Forgotten American Dream, 113 PENN ST. L. REV. 417, 433-39 (2008) (explicating how the 1862 Homestead Act and the National Housing Act of 1934 were designed and functioned to spur home ownership for the national good); see also Homestead, supra note 29, at 1030-31 (arguing that one aim of homestead laws is to encourage home ownership, not only as a stimulus to diligence and high morals, but also as a means of enlisting the individual’s self-interest in the preservation of established rights . . . ).
40. See Pierce v. Wash. Mut. Bank, 226 S.W.3d 711, 714 (Tex. Ct. App. 2007) (citing Estate of Johnson v. Comm’r, 718 F.2d 1303, 1307 (5th Cir. 1983)) (explaining that “[t]he broad purpose of these laws was to protect the family from dependence and pauperism”).
41. See Richard M. Hynes, Anup Malani, & Eric A. Posner, The Political Economy of Property Exemption Laws, 47 J. L. & ECON. 19, 19 (2004) (claiming that Texas’ property exemptions were “designed, it was said at the time, to draw settlers from other states”).
42. See RUFUS WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 21 (1893) (observing “[t]he family is the object of homestead legislation in the interest of society and the state”); Allan J. Berke, What Does Love Have to Do With It?, 69 N.Y. ST. B. J. 4, 8 (1997) (asserting that any “society regulated by laws bereft of family values is a recreant society”).
43. WAPLES, supra note 42, at 21. “The policy of the state is to foster families as the factors of society, and thus promote the general welfare.” Id. at 3.
residence. Yet at their core, homestead laws seek to preserve the family, not realty. As the South Dakota Supreme Court has noted, "[t]he object of all homestead legislation is to protect the home, to furnish shelter for the family, and to promote the interest and welfare of society and the state by restricting, in consideration of the benefits conferred, alienation or encumbrance by the owner's sole act and deed." The protections ensured by virtue of homestead laws thus even indirectly support the state itself.

Homestead laws—like bankruptcy protection—are also designed to allow a debtor a second chance following a financial catastrophe. The protections in this sense relate only indirectly or not at all to ensuring shelter as a fundamental human need for survival against the elements. Instead, the protections are in the form of a certain "fresh start" degree of wealth protection in the event of total

44. Nineteenth century scholar Rufus Waples (1825-1902) explained:

   The conservation of family homes is the purpose of homestead legislation. The policy of
   the state is to foster families as the factors of society, and thus promote the general
   welfare. To save them from disintegration and secure their permanency, the legislator
   seeks to protect their homes from forced sales so far as it can be done without injustice to
   others . . . . Families are the units of society, indispensable factors of civilization, the
   bases of the commonwealth. Upon their permanency, in any community, depends the
   success of schools, churches, public libraries, and good institutions of every kind. The
   sentiments of patriotism and independence, the spirit of free citizenship, the feeling of
   interest in public affairs, are cultivated and fostered more readily when the citizen lives
   permanently in his own castle with a sense of its protection and durability.

45. Beck v. Lapsley, 1999 SD 49, ¶ 7, 593 N.W.2d 410, 413 (quoting Gross v. Gross, 491 N.W.2d
   751, 753 (S.D. 1992)). Beck held that a creditor claim cannot attach to a nondebtor's interest in property
   owned jointly with the debtor. Id.

   Riley wrote:

   In monarchial government, where it is not the policy but a necessity to increase tenancies
   and dependencies in order to maintain supremacy of the sovereign [sic] and give stability
   to the empire, there is reason for restriction of the homestead right. But in democracies
   like ours, where tenantry is unfavorable to freedom and independence of the people,
   where ownership of the freehold is essential to the highest development of the citizen
   and to patriotism, the homestead is important and necessary and as an interest in land the
   public policy is fixed by constitution and statute, evidencing an obvious intent to secure
   to every householder a home where the family may be sheltered and live beyond the
   reach of misfortune such as the death of the head of a family or of financial distress.

47. The "fresh start" objective is often recited in connection with federal bankruptcy law. "The
   purpose of bankruptcy is to afford the honest but unfortunate debtor a 'fresh start' in his economic
   journey through life." In re Galvin, 158 B.R. 806, 808 (Bankr. W.D. Mo. 1993) (citation omitted)
   (holding that Missouri law recognizes a homestead right held pursuant to a contract for deed); see also In
   re Kolich, 328 F.3d 406, 410 (8th Cir. 2003) (referring to the underlying policy of section 522(f) of the
   Bankruptcy Code as "permit[ting] the avoidance of judicial liens that can interfere with the debtor's post-
   petition fresh start").
insolvency. In this regard, the personal property exemption for a worker’s tools functions in a comparable way, permitting the retention of certain minimal means to recover and start afresh. Additional but related values seemingly explain the “homestead veto” and “homestead descent” characteristics of homestead property. Whereas the homestead exemption is aimed at suspending creditor rights so as to preserve shelter for a family, the homestead veto and homestead descent characteristics of the homestead res are aimed at protecting the family from the owner’s ability to convey or encumber the home. The homestead veto and homestead descent characteristics of homestead realty accomplish this aim by suspending and limiting not creditor rights against the homeowner, but ownership rights of the homeowner himself. Homestead rights generally have a two-pronged aim: “to protect the family from the hazards of circumstance or from the improvidence of its head.”

B. THE ORIGINS, NATURE, AND CONSTRUCTION OF THE RIGHT

Initially, homestead laws were peculiar to America. Scholars typically identify the first homestead law as those enacted by the independent Republic of Texas. Others trace them to Biblical times. Homestead’s ancient origins

48. See DEBATES I, supra note 1, at 556 (quoting a constitutional delegate as emphasizing that “it is necessary that a certain proportion of the lands be preserved for the family, that cannot be taken by creditors; it is necessary if they work the land, that they have a team; some measure of personal property so they can go on, must be allowed them”).

49. See Neilsen v. Oium, 114 N.W. 691, 693 (S.D. 1908) (proclaiming, “[w]e think the team of every teamster, and of every other man, when it is necessary to his use, is exempt, although the owner may be worth thousands of dollars”); see also Craig, supra note 3, at 265 (noting that the original South Dakota personalty exemptions “permitted the debtor to keep property necessary to get back on his feet, including tools and a mode of transportation in all seasons”). The Maryland Court of Appeals has explained:

We are satisfied that this view of the law is in accord with the letter of the “tool” exemption statute, complies with the constitutional dictate, and fulfills the legislative intent. The debtor would not be forced to give up his trade or profession by lack of necessary tools. He would be able to make a fresh start toward earning a fair living. Of course, he may not be fully restored by the exemptions granted to the position he enjoyed before his difficulties. His operations may well be substantially curtailed, and rightfully so, in the interest of his creditors. The objectives of the “tool” exemption do not reach beyond making it possible for him to start from scratch by not stripping him of all of his property and tools of his trade or profession. In any event, he is not forced to disassociate himself from his chosen career. By being able to continue it, he is not deprived of the opportunity to make a fair living in his trade or profession.

In re Taylor, 537 A.2d 1179, 1185-86 (Md. 1988).

50. See infra Part II.C.4.a (discussing the homestead veto); Part II.C.4.b (discussing homestead descent).

51. Homestead, supra note 29, at 1030.

52. Keyes v. Cyrus, 34 P. 722, 723 (Cal. 1893). “The term [homestead] is nearly as old as the English language, but its use in legislation is quite modern, and is peculiarly American.” Id.

may lay in civil law. Because they are unknown in England and did not exist at common law, the construction of homestead protections depends entirely upon statutory analysis or, when homestead protections are constitutionally mandated, upon a reading of a state constitution’s provisions. Although it is often emphasized that homestead rights are a creation of state constitutions and statutes not dependent on the common law, they can be characterized as a partial restoration of an ancient common law rule exempting one’s own land from liability for debts. The extent and contours of the homestead exemptions vary tremendously state by state. Careful attention to text is essential. Some confusion can be seen in the courts’ attempts to properly characterize homestead laws and their effect. Occasionally, courts will speak of the homestead as an estate in land. The better thinking is that no estate is created by virtue of the homestead exemption protections. Tiffany reasons, “It is difficult to understand how the right of an owner of particular land to hold such creditors’ claims lands received from the sovereign as well as certain movable property...” [But] that act was repealed in 1831...”). This 1829 law exempted “lands acquired by virtue of the colonization laws” for twelve years as “to the payment of debts contracted previous to their acquisition.” Homestead, supra note 29, at 1025.

54. Hynes et al., supra note 41, at 22.

55. ALOYSIUS A. LEOPOLD, 39 TEXAS PRACTICE, MARITAL PROPERTY AND HOMESTEADS § 23.1 (2016). The “exemption for antecedent debts against the property of the colonists and empresarios under the laws of Coahuila” may represent the prototype for homestead laws. Id. But see Homestead, supra note 29, at 1024 claiming that “laws dealing with chattel exemptions appear to be the true forerunner of homestead legislation”.

56. E.g., Towle v. Towle, 107 P. 228, 230 (Kan. 1910) (“Our homestead laws, although founded upon section 9 of article 15 of the Constitution, embrace not only that provision of the Constitution, but the statutes enacted by the Legislature for the purpose of carrying the Constitution into effect.”); Panagopolos v. Manning, 69 P.2d 614, 620 (Utah 1937) (“Be it noted that neither the Constitution nor the statute prescribes or defines or limits any title or estate which may be claimed as a homestead.”).

57. See 2 WILLIAM BLACKSTONE, COMMENTARIES *418 (noting that unavailability of land to satisfy creditors “was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering of the fief with the debts of the owner.”); accord TIFFANY, supra note 35, § 1332 n.84; see also Brady Cole, The Homestead Provisions in the Texas Constitution, 3 TEX. L. REV. 217, 233 n.74 (1925) (noting that “at early common law... and... in the colonies, no real estate of any sort could be subjected to execution in satisfaction of debt”). Although “third Great Charter (1217)” expressed in principle that “‘[n]o Freeman henceforward shall give or sell so much of his land that the residue shall be insufficient to support the service due in respect thereof to the Lord of the fee’” this was probably unenforceable until the Statute Quia Emptores (1290) when subinfeudation “was absolutely forbidden in the case of fee simple...” THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 483 (2d ed. 1936).

58. See TIFFANY, supra note 35, § 1332 (describing the homestead exemption variations as “exceedingly diverse in character”).

59. See Somers v. Somers, 146 N.W. 716, 718 (S.D. 1914) (quoting WAPLES, supra note 42, at 98) (proclaiming, with regards to construing the extent of homestead rights, “The true rule is, Follow the statute”).

60. E.g., Morris Inv. Co. v. Skeldon, 78 N.E.2d 504, 506 (Ill. 1948) (contrasting a homestead right with a homestead estate, “A homestead right is the claim to exemption out of a larger mass” while “[a] homestead estate is one which is entirely exempt”); Poe v. Hardie, 65 N.C. 447, 449 (N.C. 1871) (characterizing the homestead as a determinable fee); see also City of Algona v. Sharp, 638 P.2d 627, 630 (Wash. App. 1982) (characterizing the homestead as neither lien or encumbrance, but a “species of land tenure exempt from execution”).
land exempt from liability for debts can be in any sense an 'estate' . . . ."61 The South Dakota Supreme Court has routinely observed that homestead rights do not create an estate.62 Rather, the homestead is a privilege.63 Indeed, the United States Supreme Court (in construing the Illinois homestead) also agrees:

In order to reach a proper conclusion in this case, it is necessary to understand what is the nature of the homestead right. It cannot in an absolute sense be said to be an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead character exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release on the part of both, of the benefits of the law. The purpose of the legislature was to secure a homestead for the family, and the disposition of the property either by judicial sale or voluntary conveyance, was left unaffected except so far as was necessary to accomplish this object.64

Courts must grant to homestead statutes a liberal construction in favor of advancing their chief aim—protecting a home for its occupants.65 The homestead privilege is jealously guarded by the judiciary.66 At the same time,

61. TIFFANY, supra note 35, § 1332.
62. E.g., Schutterle v. Schutterle, 260 N.W.2d 341, 354 (S.D. 1977) (citing In re Clouse's Estate, 257 N.W. 106 (S.D. 1934)). "The right of homestead is not, under the laws of this state, an estate in land, but is a mere privilege granted by the Legislature in fulfilling the constitutional mandate of section 4, art. 21, and consists of the right of occupancy given to the surviving spouse and minor children ...." Clouse's Estate, 257 N.W. at 108; see also Myrick v. Bill, 17 N.W. 268, 271 (Dakota 1883) (insisting, "There can be no homestead right in a building alone, apart from the land on which it stands"). In Myrick, a building claimed as a homestead had been severed from the realty, but the court acknowledged that "while a very limited estate in the land, perhaps a mere leasehold interest, may be sufficient to support a claim of homestead, some estate in the land is essential." Id.
63. Speck v. Anderson, 318 N.W.2d 339, 344 (S.D. 1982) (quoting Clouse's Estate, 257 N.W. at 108). Because the homestead rights are a privilege, they are only available to residents of the state. See S.D.C.L. § 43-31-1 (2004 & Supp. 2016) (exempting one "homestead of every family, resident in this state"); Clark v. Evans, 60 N.W. 862, 865 (S.D. 1894) (declining to reach the question of whether a spouse was a resident of Dakota Territory when the "premises were never impressed with the stamp of a homestead" in the first place).
64. Black v. Curran, 81 U.S. 463, 469 (1871).
65. Keim v. Rand, 158 N.W. 904, 905 (S.D. 1916); see also Jensen v. Griffin, 144 N.W. 119, 122 (S.D. 1913) (noting that homestead enactments "should be given a liberal construction in favor of the homestead right"); Aisenbrey v. Hensley, 17 N.W.2d 267, 269 (S.D. 1945) (stating the rule that the "debtor in the absence of any expression of a contrary intention should be presumed to intend no further peril to his homestead right than the necessity demanded"). Of course, liberality has its limits. The Jensen case cautioned, "No such liberality of construction of the homestead law is permissible as will entitle the party to two homesteads at the same time, the one actual and the other potential." Jensen, 144 N.W. at 123 (quoting McMonegal v. Wilson, 61 N.W. 495, 496 (Mich. 1894)).
66. See Krueger v. Cent. Lumber Co., 230 N.W. 243, 246 (S.D. 1930) (describing the homestead law as "a right jealously guarded by the law for the protection, not only of the debtor, but of his family").
the courts grant deference to the legislature in defining the scope and application of the homestead within state constitutional limits. The statutory construction rule of liberality finds its origins in public policy which favors creditor exemptions and the protections they offer to individuals. When in doubt, a court should accord a statutory interpretation that advances the aims of homestead laws, conserving the homes of debtors, whether insolvent or not, for the good of family cohesion by avoiding the mischief that arises from breaking up a home or a family. As remedial statutes, homestead laws merit a liberal interpretation. The remedy to be achieved by the homestead privilege is “the exemption of occupied family homes from the hammer of the executioner.” By impairing creditor remedies against the homestead, a family’s home might be preserved. As the Eighth Circuit Court of Appeals has intoned, no other “exemption is more central to the legitimate aims of state lawmakers than a homestead exemption.”

C. HOMESTEAD: A CONTEMPORARY STATUTORY OVERVIEW

Before turning back the clock for a detailed historical narrative of constitutional homestead origins, it may be helpful to pause and consider the contemporary form of statutory homestead rights in South Dakota. We have seen that the two primary aims of the homestead are providing comfort for a family and implementing a kind of dower or curtsey with regards to a defined

“To guard the homestead right jealously in order to vindicate and effectuate the purposes of the constitutional and statutory expression of our citizens’ concern for the security of the family is certainly a task that the judiciary should not shirk.” Speck v. Anderson, 318 N.W.2d 339, 344 (S.D. 1982).

67. In re Davis, 2004 SD 70, ¶ 22, 681 N.W.2d 452, 460. The liberality granted to the legislature is also not without limit. See id. (noting that “the Legislature has broad and liberal discretion of setting the exemption limit. However, that discretion is not boundless”). Davis held that a legislative attempt to grant unlimited equity homestead protections for older homeowners was unconstitutional. Id. ¶ 21, 681 N.W.2d at 460.

68. Noyes v. Belding, 59 N.W. 1069, 1073 (S.D. 1894). The court explained:

Laws which exempt property to the debtor and his family are based upon considerations of sound public policy, and are designed to protect and to shield the helpless and dependent poor. In ascertaining the extent to which the legislature intended to promote the well-being of the unfortunate or improvident debtor and his dependencies, a liberal construction should be placed upon the terms of the statute creating the exemption right; and, although the common law appears to have offered no favors to the debtor or his family, a liberal rule of construction has been applied quite uniformly to the exemption laws, and seems to prevail in the states requiring statutes in derogation of the common law to be strictly construed.

Id. The Noyes court also quoted the original Sutherland statutory construction text: “Mr. Sutherland says that there are in the purpose and policy of exemption and homestead statutes considerations which make them remedial, and which neutralize the principles of strict construction.” Id. (quoting JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 474 (1st ed. 1891)).

69. WAPLES, supra note 42, at 29.

70. In re Johnson, 880 F.2d 78, 83 (8th Cir. 1989) (citing Keleher v. Technicolor Gov’t Servs., Inc., 829 F.2d 691 (8th Cir. 1987)).

71. WAPLES, supra note 42, at 29.

72. Johnson, 880 F.2d at 83.
realty; that is, protections from creditors and protections from one’s spouse or parent. How are these aims achieved? South Dakota’s contemporary homestead laws, which implement the two principal aims of the exemption, can be indexed into three primary categories: creditor exemptions, probate protections, and spousal rights. The creditor exemptions provisions of homestead law are contained within forty-one statutes codified in South Dakota Codified Laws chapter 43-31 and a couple sections of chapter 43-45. Homestead probate rights (herein, the “descent homestead”) are described in the probate code. Spousal rights to homestead property (herein, the “homestead veto”) are mapped out both within chapter 43-31 and in certain title standards. In the sections that follow, I will unpack the current statutory framework for homestead laws, beginning with the definition of the homestead res.

1. Protected Property

What is the property that may qualify as a South Dakota homestead? “The homestead embraces the house used as a home by the owner . . . .” A mobile home qualifies as a house. Within a town, the homestead may not exceed one acre in size. A rural homestead may not exceed 160 acres except where the land is derived from mineral lands, in which case the limit is forty acres (or five acres if acquired as a lode mining claim).

Other buildings situated on the property are excluded from homestead characterization unless they are either “properly appurtenant to the homestead as such” or “really used or occupied by the owner in the prosecution of his ordinary business . . . .” Generally, the term appurtenant is taken to mean annexed to

77. Id. “A mobile home may include any vehicle without motive power which can provide adequate, comfortable, all season quarters for the purpose of making it a residence and which vehicle is larger than two hundred forty square feet . . . .” S.D.C.L. § 43-31-2 (2004 & Supp. 2016). It “must be registered in South Dakota at least six months” before qualifying as a homestead. Id. But see Brodsky v. Maloney, 105 N.W.2d 911, 914-15 (S.D. 1960) (setting aside as unconstitutional a statute requiring a homestead to be recorded before exemption status would attach).
79. Id. A homestead cannot be claimed on lode mining claim property if it embraces an actual mine, smelter, or ore reduction machinery. S.D.C.L. § 43-31-5 (2004).
land. It may also mean, rather broadly, "incident to" or "necessarily connected with the use and enjoyment" of the land. Thus, detached garages and storage sheds containing lawnmowers and gardening implements would qualify for homestead characterization. A workshop utilized by the homeowner for home-related projects would qualify as appurtenant. A workshop utilized by the homeowner for business-related efforts would also qualify for homestead treatment by reason of being used "by the owner in the prosecution of his ordinary business." A workshop separate from the dwelling house leased to a neighbor for the neighbor's business endeavors, however, would fall outside the definition of a homestead.

The homestead property—within these limits—may constitute more than one lot or tract. Several lots may qualify as a homestead when they all comprise part of the primary homestead property. Contiguous lots or tracts qualify, so long as the acreage limitations are not exceeded. Non-contiguous lots may also qualify if "they are habitually and in good faith used as part of the same homestead." An owner may only enjoy one homestead at any given time, but serial homesteads are permitted. Marking off, platting, or formally declaring property to be one's homestead is optional. Owning the property in fee or otherwise is not determinative; even a mere license may qualify as a homestead interest.

Thus, the homestead is defined descriptively. It is spatially limited in terms of acreage. It is also limited in terms of value, at least in regards to the homestead exemption. The homestead is, the statutes proclaim, "absolutely exempt," but in the event it is sold—either voluntarily by the owner or involuntarily but permissibly, pursuant to South Dakota Codified Law chapter 21-19—proceeds of up to $60,000 remain exempt for one year following the

81. Appurtenant, BLACK'S LAW DICTIONARY (10th ed. 2014). For a use of the term appurtenant in a different context, see S.D.C.L. § 43-1-5 (2004) (proclaiming that something is either "incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat, from or across the land of another").

82. Appurtenant, BLACK'S LAW DICTIONARY (6th ed. 1990). "A thing is 'appurtenant' to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter." Id.

83. S.D.C.L. § 43-31-2.
85. Id.
86. Id.
87. Id.
88. See S.D.C.L. § 43-31-2 (explaining that "if he or she has two or more houses or mobile homes thus used at different times and places, such owner may select which he or she will retain as a homestead"); S.D.C.L. § 43-31-9 (2004 & Supp. 2016) (noting that "[t]he owner may from time to time change...[the homestead] entirely").
90. In re Wood, 8 B.R. 882, 886-87 (Bankr. D. S.D. 1981) (quoting C. S. Wheatley, Jr., Annotation, Estate or Interest in Real Property to Which a Homestead Claim may Attach, 89 A.L.R. 511 (1934)). The Wood court, in dicta, noted other property interests that could qualify for homestead status as well: "Those are: (1) contract of purchase; (2) adverse possession; (3) life estate; (4) equity of redemption; (5) equitable titles; [and] (6) leasehold interest." Id. at 887 (internal citations omitted).
owner's receipt of the same.\textsuperscript{91} Where the owner is seventy years of age or older, the exemption amount is $170,000.\textsuperscript{92} This same higher equity protection applies to the unremarried spouse of an individual who was age seventy or more at his or her death. These exemption amounts allow lienholders to enforce their liens only to the extent that the property value is in excess of the exemption.\textsuperscript{93}

2. Protected Persons

The South Dakota Constitution directs the enactment of homestead legislation in order to allow "the debtor" to enjoy certain necessities and comforts by means of exempting the homestead, as limited and defined by statute, "to all heads of families ...."\textsuperscript{94} As a practical matter, homestead exemption protections can only directly benefit the owner or owners since what the homestead exemption does is exempt the property from forced sale.\textsuperscript{95} Since a creditor could not seek to foreclose on property not owned by the debtor, other members of the owner's family, while the owner is living, do not enjoy—nor need—homestead exemption protections since the homestead is not at risk of forced sale on account of their creditors (unless they have an ownership interest in the homestead property).

Parenthetically, we might note here that in support relationships, the support-related contractual debts of one person can become the debts of another. So, for example, a wife can be liable for her husband's medical bills.\textsuperscript{96} A parent may be liable for his son's medical bills.\textsuperscript{97} And a son may be liable for his father's medical bills.\textsuperscript{98} In these instances, the law creates a kind of joint liability for certain debts which can be collected from the debtor and also from a person standing in a support relationship with that debtor, at least as to debts

\begin{itemize}
  \item \textsuperscript{92} S.D.C.L. § 43-45-3(2); \textit{see also In re Davis}, 2004 SD 70, ¶ 21, 681 N.W.2d 452, 460 (voiding on constitutional grounds a legislative attempt to provide for an unlimited homestead exemption for homeowners age seventy and above).
  \item \textsuperscript{94} S.D. CONST. art. XXI, § 4 (1889).
  \item \textsuperscript{95} \textit{See id.} (requiring legislation which "exempt[s] from forced sale a homestead").
  \item \textsuperscript{96} S.D.C.L. § 25-2-11 (2013); \textit{see also Accounts Mgmt., Inc. v. Litchfield}, 1998 SD 24 ¶ 10, ¶ 10, 576 N.W.2d 223, 236 (concluding that "a spouse's duty to pay for necessaries inescapably includes medical care and treatment"). \textit{But see Michael J. Fitzmaurice S.D. Veterans Home v. Estate of Hammer}, 2010 S.D. 21, ¶ 11, 779 N.W.2d 392, 396 (concluding that recovery from spouse's estate for care-related claims of husband are barred when the spouse was disinherit pursuant to South Dakota Codified Law section 33-18-16).
  \item \textsuperscript{98} S.D.C.L. § 25-7-27 (2013); \textit{see also Americana Healthcare Ctr. v. Randall}, 513 N.W.2d 566, 571 (S.D. 1994) (imposing father's medical debts on son).
\end{itemize}
incurred for necessities. Alternatively, someone may be jointly liable for a debt as a guarantor or on account of joint tortfeasor status. Alternatively, someone may be jointly liable for a debt as a guarantor or on account of joint tortfeasor status.99 In these instances, the homestead exemption will protect a home from forced sale where the debtor—whether the original debtor or a jointly liable debtor—would otherwise face a foreclosure. The homestead exemption in the context of support-related claims is particularly noteworthy since those persons standing in support relationships to one another (parent-child, spouse-spouse) often share a roof.100

The phrase “heads of families” does suggest that the debtor who can claim homestead protections is only a debtor who herself qualifies as one heading a family. The Somers v. Somers trio of cases wrestled with this idea.101 But even prior to the 1889 constitutional enactment, homestead protections were liberalized in the 1875 enactment of territorial legislation. An expansive definition of “family” provided, “[a] widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife.”102 The current statute retains this original sentence with a slight alteration; it replaces the period with a comma and adds an additional phrase, further expanding the scope of homestead coverage:

A widow or widower, though without children, while continuing to occupy the homestead used as such at the time of the death of the husband or wife, or any family, whether consisting of one or more persons in actual occupancy of a homestead as defined in this code, shall be deemed and held to be a family within the meaning of the laws of this state relating to homesteads.103

Thus, the homestead protections now extend to any homeowner, at least insofar as the owner is a natural person. “Family” thereby has been endowed with an expansive definition.


100. See Homestead, supra note 29, at 1028 (explaining that the homestead privilege extends to “any person who as the result of close kinship is under the moral obligation of supporting those living with him under the same roof”).

101. Somers v. Somers, 131 N.W. 1091, 1094-95 (S.D. 1911); Somers v. Somers, 146 N.W. 716, 717-18 (S.D. 1914),reh'g granted, 149 N.W. 558 (S.D. 1914); see also In re Lentz, 97 F. 486, 488 (D. S.D. 1899) (construing South Dakota homestead protections which “mentioned to two classes of persons; not to a debtor generally, as the old law read, but to the head of a family, and to a single person not the head of a family [which] certainly excludes a partnership firm, and is absolutely inconsistent and in conflict with any law that would allow an exemption to a partnership firm”); In re Novak, 150 F. 602, 603-04 (D. S.D. 1907) (construing statutory amendments and reaching the same conclusion as Lentz except as to a statutory $750 exemption).

102. THE REVISED CODE OF THE TERRITORY OF DAKOTA, Political Code, ch. 38, § 2 (1877) [hereinafter 1877 DAKOTA REVISED CODE].

103. S.D.C.L. § 43-31-14 (2004). In a few other states, by contrast, the homestead vests in survivors absolutely. Homestead, supra note 29, at 1029.

104. See Hesnard v. Plunkett, 60 N.W. 159, 160 (S.D. 1894) (construing the application of the homestead exemption). “The plaintiff is a widower, without children. He is one person. But the
3. Exemption Exception Creditors

Two varieties of exemption creditors can be identified; particular types of creditors for whom the homestead exemption does not apply. These are: (1) claims arising out of certain unpaid taxes and (2) alimony and child support claims. The former is recognized by statute; the second by case law and statute. \(^{105}\) In addition, some claims escape homestead exemption protections because they do not violate the exemption prohibition against involuntary sales or because the lien predates the homestead. \(^{106}\) We should begin with taxes.

a. Local and Federal Taxes

The first category of recognized exception creditors to the homestead privilege are certain types of taxes. By statute, local government claims, including property taxes and county poor liens, attach to homestead property and may be foreclosed upon. \(^{107}\) The homestead is subject to claims for local taxes like property taxes, but it remains exempt from state taxes (arising, for example, out of delinquent sales tax liabilities). \(^{108}\) An exception for property tax claims is common among other states’ homestead protections. \(^{109}\) Federal tax liens, under the supremacy clause, are similarly unaffected by the homestead exemptions. \(^{110}\)
One might view it as less correct to label the treatment of tax debts in connection with the homestead exemption as a variety of exception creditor than simply "the exercise of a sovereign prerogative...." Indeed, if a tax debt escapes homestead protections because of the sovereign source of the debt, it would stand to reason that the South Dakota Legislature could, as a matter of state constitutional law, also except state taxes from the exemption if it chose to do so. This thinking is consistent with dicta from the 1951 Snyder's Estate decision involving the state inheritance tax.

b. Support Claims

Second, the South Dakota Supreme Court has recognized an equitable exception for an unpaid alimony award or child support, which, when reduced to judgment, may result in a foreclosure and forced sale of the homestead. Other states' courts have reached the same conclusion. That conclusion, however, is


112. See, e.g., Rodgers, 461 U.S. at 715 n.3 (quipping, "to put it more simply, the tax collector stands in the shoes of the taxpayer when reaching the taxpayer's property") (citations omitted).

113. In re Snyder's Estate, 48 N.W.2d 238, 240 (1951). The court there reasoned:
Here the contention is that the legislature lacks power to impress a lien on the homestead for an inheritance tax, or to provide for the enforcement of such a claim by forced sale of the homestead, and the further claim that these provisions are void because discriminatory. The views we hold render a decision of these contentions unnecessary...

If, without so deciding, we were to assume the validity of these contentions of the administrator and hence that the constitution invalidates the provision for a lien on the homestead and the enforced sale thereof as a means of collecting the inheritance tax of the state, it would not follow that the county court should be affirmed. The state's need for revenue, and the probability that the inheritance tax would be collectible from property other than the homestead, or from the heirs and devisees, induces the conviction that the legislature would have enacted the act without the provisions the administrator assails if it had deemed them repugnant to the constitution. Therefore, under the familiar principles of the doctrine of separability we would be bound to save and uphold the remainder of the act. The act directs that in measuring the amount of an inheritance tax for the privilege of inheriting or succeeding to property that no deductions shall be made by reason of any part of the property being claimed, used or occupied as the homestead. This provision is presumed to be valid. The only contentions the administrator makes are directed toward separable provisions of the act. Those contentions must await decision until an attempt is made to enforce a claim of the state for inheritance tax against homestead property. The county court was concerned only with the true amount of this privilege tax. In measuring the tax it was bound to follow the statute.

Id. (citations omitted).

114. Gunn v. Gunn, 505 N.W.2d 772, 776 (S.D. 1993); Harding v. Harding, 92 N.W. 1080, 1082 (S.D. 1902); see also In re Dependency of Schermer, 169 P.3d 452, 466 (Wash. 2007) (en banc) (explaining that the homestead exception for child support obligations "is aimed at scofflaw parents who evade court-ordered child support obligations").

115. See, e.g., Burrows v. Burrows, 886 P.2d 984, 991-92 (Okla. 1994) (finding that a "father's attempt to convey property subject to a homestead exemption to avoid payment of past-due support alimony and child support may be fraudulent"); Felder v. Felder's Estate, 13 So.2d 823, 828 (Miss.
not entirely uniform.\textsuperscript{116} Proceedings involving the homestead have been characterized as equitable in nature.\textsuperscript{117} Since the primary purpose of the homestead exemption is to protect the family, claims for support ought not to be thwarted by the exemption whose design is to protect the claimants.\textsuperscript{118} Equity, in a sense, overrides the homestead.\textsuperscript{119} Equity will not permit the homestead exemption to "be used to harm the ones it is designed to protect."\textsuperscript{120} For this reason, child support and alimony claimants may pursue recovery from the homestead.

c. Preexisting Liens and Voluntary Sales

Preexisting liens are also not subject to the homestead exemption.\textsuperscript{121} This is more of an observation than a category of exception creditors. Absurd results would follow were it otherwise. Thus, for example, an individual who purchases a homestead subject to liens or judgments simply takes the property subject to these liens and claims and the homestead exemption will not bar a preexisting lien claimant from pursuing foreclosure remedies. Liens which have attached prior to a particular property becoming the owner's homestead are undisturbed by a property later being purchased as a homestead.\textsuperscript{122}

\textsuperscript{116.} See, e.g., Putz v. Putz, 572 P.2d 970, 971-72 (Okla. 1978) (reasoning that "an after-acquired homestead purchased by the husband and second wife" is not subject to an alimony award claim by the first wife). \textit{But see} Breedlove v. Breedlove, 691 P.2d 426, 428 (Nev. 1984) ("Clearly it cannot be said that the homestead laws were designed to protect an otherwise financially solvent former spouse . . . who has defaulted on his support payments to his own children . . .").

\textsuperscript{117.} See Somers v. Somers, 149 N.W. 558, 559 (S.D. 1914) ("This is an equity case . . ."). \textit{But see} Bigelow v. Dunphe, 197 So. 328, 330 (Fla. 1940) (asserting that homestead "laws are not based upon the principles of equity; nor do they in any way yield thereto; their purpose is to secure the home to the family even at the sacrifice of just demands, the preservation of the home being deemed of paramount importance") (citation omitted).

\textsuperscript{118.} The Nebraska Supreme Court reasoned in 1914, in the light of the cases cited it would seem that the same reasons which allow the homestead exemption to be sold for the support of the family should apply. The duty of the defendant to comply with the decree to the extent of $15 per month is as strong as the duty which binds him to the [new] wife in Omaha. A consideration of [Nebraska statutes] relating to exemptions, shows that the protection of the family, and not the husband, is the object of the statute. It could never have been designed to allow a man to escape his obligations to his family. Why, then, should it not protect the family against him, as well as protect it against a creditor?

Winter v. Winter, 145 N.W. 709, 711-12 (Neb. 1914).

\textsuperscript{119.} \textit{See} Gunn v. Gunn, 505 N.W.2d 772, 775 (S.D. 1993) (quoting In re Application of Jensen, 414 N.W.2d 742, 746 (Minn. Ct. App. 1987)) ("The court's equitable powers override the application of the homestead exemption."); \textit{see also} Harding v. Harding, 92 N.W. 1080, 1082 (S.D. 1902) (same).

\textsuperscript{120.} Jensen, 414 N.W.2d at 746.

\textsuperscript{121.} TIFFANY, supra note 35, § 1336. "Liens which have attached to the land before its purchase, or before it acquired its homestead character, can be enforced against it." \textit{Id.}

\textsuperscript{122.} Bullene v. Hiatt, 12 Kan. 98, 101 (Kan. 1873).
Following this thread, there are two other varieties of liens which represent exceptions to the homestead exemption: vendor’s liens and mortgages. Purchase money debts associated with the original acquisition of a homestead give rise to a vendor’s lien which is excepted from the homestead exemption. A vendor’s lien, a “creature of equity” with origins—like the homestead—traceable to civil law, “is exceptional in character . . . .” A vendor’s lien is implied by law and is not dependent on an express agreement. Where a vendee has received property for which she has not yet paid the full consideration, a vendor’s lien arises. As South Dakota Codified Law phrases it, “One who sells real property has a special or vendor’s lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.” In theory, the vendor’s lien enjoys its special status relative to homestead exemptions for the same reason that preexisting liens do—the vendor’s lien precedes the homestead. This is because “until the purchase money is paid the vendee has not such an interest in the land as will support a homestead right as against the vendor to whom such money is due.” As with much in debtor-creditor law, timing is everything. Other states’ treatment of vendors’ liens vis-à-vis the homestead are in accord: a vendor’s lien is superior to the homestead exemption.

124. Vendor’s Lien, BLACK’S LAW DICTIONARY (6th ed. 1990). The vendor’s lien “found its recognition through courts of chancery, on the equitable principle that the person who had secured the estate of another ought not in conscience to be allowed to keep it and not pay full consideration . . . .” Id.
125. Id. (citing Causor v. Wilmoth, 142 S.W.2d 777, 779 (Mo. App. 1940)).
127. Tiffany’s treatise explains:
The existence of the homestead exemption has the effect, generally, of relieving the property from liability for the debts of the owner, but the statute frequently makes exceptions in favor of certain classes of creditors. The statute in almost all the states provides in express terms that the exemption of the land from liability for debts shall not extend to a debt to the vendor for the purchase price, and, apart from any such express provision, the land would usually be regarded as liable for such a debt, either on the ground of the existence of a vendor’s lien, or by the construction placed upon the statute. But the exemption has been held to extend to a claim for money borrowed to pay the purchase price, this not being within the statutory exception in favor of purchase-money claims, though in some cases the view is taken that, if it is understood between the purchaser and the lender that the loan shall be used in paying the purchase price, the lender may enforce his claim against the homestead.
Tiffany, supra note 35, § 1336.
129. See, e.g., Gregory v. Ward, 285 S.W. 935, 938 (Tex. Ct. App. 1926) (emphasizing that “[p]рактически неисчислимые авторитетные сочинения могли бы быть приведены в поддержку этого заключения” that a “vendor’s lien is superior to any claim of homestead in land, and it cannot be deferred or in any manner prejudiced by the fact that the land conveyed had become stamped with the homestead character . . . .”); see also James R. Norvell, The Vendor’s Lien and Reservation of the Paramount Legal Title—The Rights of Vendors, Vendees, and Subvendees, 44 TEX. L. REV. 22, 23-25 (1965) (contrasting equitable and express vendor’s
Foreclosure on a homestead by a mortgagee is also permitted, either under the rationale that a mortgage foreclosure is not truly a "forced sale" or simply on account of a waiver of homestead provision within the mortgage instrument. The homestead right can be waived in connection with a secured transaction, and of course the home can always be sold voluntarily by its owners. Mortgages typically contain a waiver of homestead rights provision. Yet even without an express waiver of the homestead protections, a mortgage instrument functions to convey to the mortgagee the restricted power to sell the property subject to the mortgage upon default by means of a foreclosure by action or by advertisement. A mortgage under South Dakota law does not function to extend an unrestrained power of sale, but rather consent to foreclosure proceedings. Yet, arguably, the forced judicial sale of a homestead on
account of mortgage foreclosure does not violate the homestead exemption because on account of the mortgage, a sheriff’s sale is not involuntary. Under this rationale, the homeowner consents to the sale when she delivers a mortgage to her lender. The sheriff’s sale is premised on the owner’s voluntary conveyance of a power of sale, although foreclosure by action or advertisement is still required.

Thus, except as to the two specific exceptions enumerated above (that is, child/spousal support and local government claims), the homestead is absolutely exempt from involuntary sale when the property’s equity falls within the limits of statute. The homestead is exempt even from criminal restitution, except in some cases in relation to determining conditions of probation. Even post-sale—whether voluntary or involuntary—the cash proceeds remain exempt for a period of one year from the date of the owner’s receipt of them. The post-sale proceeds exemption allows the debtor to make a fresh start following a financial catastrophe.

d. Other Non-Applicable Exceptions in Context

There are additional exception creditors and circumstances described in South Dakota Codified Law, though none apply to the homestead. To understand the statutory arrangement of these additional exception creditors in the code, one must first classify the exemptions. Historically, it has been recognized that South Dakota’s exemptions fall into three categories: absolute exemptions, additional exemptions, and special alternative exemptions. Other specific exemptions can also be identified. Each is discussed briefly below in order to better contextualize the non-homestead exemptions.

Id. at 230; see also Male v. Longstaff, 69 N.W. 577, 577 (S.D. 1896) (endorsing a foreclosure by advertisement where the mortgagor agreed to “a power of sale sufficient to warrant a foreclosure by advertisement”).


136. See THOMPSON, supra note 44 at 396 (“A power to sell the homestead in a prescribed manner includes the power to mortgage it; for a mortgage is a conditional sale.”).

137. Gunn v. Gunn, 505 N.W.2d 772, 776 (S.D. 1993) (Sabers, J., concurring in part and dissenting in part).

138. S.D.C.L. § 43-45-10 (2004); see also State v. Pettis, 333 N.W.2d 717, 721 (S.D. 1983) (holding that a court’s conditioning of probation with an optional liquidation of assets including a homestead in order to pay child support arrearages does not violate the homestead exemption laws).


140. Longley v. Daly, 46 N.W. 247, 249 (S.D. 1890); see also S.D.C.L. § 21-19-1(1), (2) (2004) (defining absolute and additional exemptions). Except to the extent that an exemption applies, all of a debtor’s property is subject to the claims of her creditors. Mohawk Rubber Co. of N.Y., Inc., v. Cronin, 252 N.W. 642, 643 (S.D. 1934) (citations omitted).

141. See infra note 154 (outlining life insurance, annuities, and other exemptions under South Dakota law as well as some federal exemptions).
The "absolute exemptions" include both the homestead itself as well as the proceeds from a voluntary or involuntary sale of the homestead (i.e., to the extent that the home's equity exceeds either $60,000 or, in the case of a homeowner aged seventy or older, $170,000). The exemption for cash proceeds from a homestead's sale is valid for one year after the receipt of the sale proceeds. In theory, during that one year's time, the debtor could reinvest the proceeds in a replacement homestead, ensuring continuing exemption to that amount of personal wealth. The other property which is deemed absolutely exempt includes personalty such as family pictures, a pew, a burial lot, the family bible, wearing apparel, health aids, and fuel and provisions for one year. As the South Dakota Supreme Court has noted, "The absolute exemptions are without any condition or incumbrance. They are unmixed and unconnected with any peculiarities or qualifications; complete and perfect in themselves."

Second, the "additional exemptions" are comprised of any personalty selected by the debtor, assuming she is not the head of a family, in the aggregate

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142. S.D.C.L. § 43-45-3 (2004). The higher equity protections for homeowners age seventy or above also apply to "the unremarried surviving spouse of such person ...." S.D.C.L. § 43-45-3(2) (2004 & Supp. 2016); see also In re Hughes, 244 B.R. 448, 450 (Bankr. D. S.D. 1999) (rejecting debtors' attempt to exempt more than the then-applicable $30,000 equity cap for homestead sale proceeds as additional personal property exemptions).

143. S.D.C.L. § 43-45-3(2). Whether sold voluntarily or by judicial sale, "the proceeds of such sale, not exceeding the sum of sixty thousand dollars, is absolutely exempt for a period of one year after the receipt of such proceeds by the owner." Id.

144. S.D.C.L. § 43-45-2 (2004 & Supp. 2016). Specifically, the statute provides that the following property is absolutely exempt:
   (1) All family pictures;
   (2) A pew or other sitting in any house of worship;
   (3) A lot or lots in any burial ground;
   (4) The family Bible and all schoolbooks used by the family, and all other books used as a part of the family library, not exceeding in value two hundred dollars;
   (5) All wearing apparel and clothing of the debtor and his family;
   (6) The provisions for the debtor and his family necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year;
   (7) All property in this state of the judgment debtor if the judgment is in favor of any state for failure to pay that state's income tax on benefits received from a pension or other retirement plan while the judgment debtor was a resident of this state;
   (8) Any health aids professionally prescribed to the debtor or to a dependant of the debtor;
   (9) Any court ordered domestic support award of alimony, maintenance, or support of the debtor which is not a gross or lump sum and does not exceed seven hundred fifty dollars per month.

Id.; see also In re Hogg, 76 B.R. 735, 745 (Bankr. D. S.D. 1989) (rejecting a debtor's attempt to exempt $5,000 in cash as exempt as monies to purchase one year's provisions of fuel); In re Steen, No. BR. 10-10206, 2012 WL 1252668 at *5 (Bankr. D. S.D. Apr. 13, 2012) (recognizing alimony as property of the bankrupt's estate and that debtor must exempt it to keep it); Van Dyke vs. Choi, 2016 SD 91, ¶ 13, 888 N.W.2d 557, 564 (finding that monthly alimony payments for a fixed term with contingencies is not permanent alimony and therefore not an unmodifiable lump sum distribution payable in installments).

145. Longley, 46 N.W. at 249.
sum of $5,000 in value.\textsuperscript{146} If the debtor is the head of a family, the aggregate sum cap for additional exemptions is increased to $7,000.\textsuperscript{147} Joint debtors are therefore entitled to a total of $12,000 in additional exemptions. The additional exemptions may include merchandise, chattels, goods, or cash.\textsuperscript{148} They may include equity in an automobile, a boat, a motorcycle, electronics, tax refunds, a stamp collection, or accrued vacation time.\textsuperscript{149} But if a creditor attempts to seize such property, an affirmative act of selection by the debtor in the form of a claim of exemptions is necessary in order to claim the privilege of the additional exemptions.\textsuperscript{150} Otherwise, the additional exemptions may be waived.\textsuperscript{151}

The third classification of exemptions are the “special alternative exemptions.” Now repealed, special alternative exemptions were once available to debtors as an alternative to the additional exemptions.\textsuperscript{152} The former statute was codified at South Dakota Codified Law section 43-45-5.\textsuperscript{153} Thus, under the

\textsuperscript{147} S.D.C.L. § 43-45-4. These sums were increased (i.e., from $6,000 and $4,000) in 2013. 2013 S.D. Sess. Laws ch. 224 § 2, 458.
\textsuperscript{148} S.D.C.L. § 43-45-4; Nessan v. Lovald, No. 12-17332012, 2012 WL 6029124 at *2 (8th Cir. 2012); see also, e.g., Anderson v. Bruflat, 167 N.W. 397, 398 (S.D. 1918) (affirming mandamus against sheriff for the return of exempt household goods and kitchen furniture).
\textsuperscript{149} E.g., In re Willman, No. 11-40709, 2012 WL 639007 at *1-3 (Bankr. D. S.D. Feb. 16, 2012) (addressing exemption of vacation time).
\textsuperscript{150} Longley v. Daly, 46 N.W. 247, 249 (S.D. 1890); Pirie v. Harkness, 52 N.W. 581, 582-83 (S.D. 1892). But see Noyes v. Belding, 59 N.W. 1069 (S.D. 1894) (allowing a reasonable time in which to claim exempt property).
\textsuperscript{151} Longley, 46 N.W. at 249.
\textsuperscript{152} Id. "The special alternative exemptions may be substituted for the additional, but the debtor must select and choose the property he wishes to be exempted." Id.
\textsuperscript{153} S.D.C.L. § 43-45-5 (1997), repealed by 1998 S.D. Sess. Laws ch. 265 § 2, 351. The statute once provided:

Instead of the exemptions of personal property granted in § 43-45-4, the debtor, if the head of a family, may select and choose the following property, which shall then be exempt, namely:

1. All miscellaneous books and musical instruments for the use of the family, not exceeding two hundred dollars in value;
2. All household and kitchen furniture, including beds, bedsteads, and bedding used by the debtor and his family, not exceeding two hundred dollars in value; but in case the debtor shall own more than two hundred dollars worth of such property, he must select therefrom such articles to the value of two hundred dollars, leaving the remainder subject to legal process;
3. Two cows, five swine, two yoke of oxen, or one span or horses or mules, twenty-five sheep and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned for one year, either provided or growing, or both, as the debtor may choose; also one wagon, one sleigh, two plows, one harrow, and farming machinery and utensils, including tackle for teams, not exceeding twelve hundred fifty dollars in value;
4. The tools and implements of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding two hundred dollars in value;
5. The library and instruments of any professional person, not exceeding three hundred dollars in value.

S.D.C.L. § 43-45-5.
current state of the law, it is generally sufficient to classify the primary exemptions into two types: absolute exemptions (including the homestead) and additional exemptions (commonly called personal property exemptions). In addition, there are a few “oddball exemptions.”154 Then, there are exceptions to the exemptions. There are, in other words, exception creditors as to the exemptions (other than the absolute exemptions). South Dakota Codified Law section 43-45-7 provides:

Except those made absolute, the exemptions provided by this chapter do not apply to the following persons:

(1) To a nonresident;
(2) To a debtor who is in the act of removing his family from the state;
(3) To a debtor who has absconded, taking with him his family;

154. South Dakota's statutes also describe some exemptions which are neither labeled absolute nor additional. Some are contained within chapter 43-45, some are not. For example, life insurance payable to the insured's estate is exempt to the extent of $10,000 when the deceased is survived by a spouse or minor children. S.D.C.L. § 43-45-6 (2004 & Supp. 2016); see also Jacobs v. Jacobs, 4 N.W.2d 809, 810 (S.D. 1942) (applying the exemption in favor of a surviving widow). If one looks to title 58 of the South Dakota Codified Law, one sees that life insurance to the extent of $20,000 is also exempt when payable to a surviving spouse or children. S.D.C.L. § 58-12-4 (2004 & Supp. 2016); see also In re Bowen, 80 B.R. 1012, 1019 (Bankr. D. S.D. 1987) (construing South Dakota Codified Law section 58-12-4). In addition, “the proceeds of an endowment policy, payable to the insured on attaining a certain age, to the extent of twenty thousand dollars shall at all times be exempted from the debts of such spouse or children of the insured ...” S.D.C.L. § 58-12-4; see also In re James, 31 B.R. 67, 69-70 (Bankr. D. S.D. 1983) (construing South Dakota Codified Law section 58-12-4). Further compounding the matter, the exception creditors described by South Dakota Codified Law section 43-45-7 (such as to claims for child support) apply to “the exemptions provided by this chapter” (i.e., South Dakota Codified Law chapter 43-45). S.D.C.L. § 43-45-7 (2004) (emphasis added). Since the second exemption for life insurance is not contained within chapter 43-45, the exception creditors listed in section 43-45-7 may be unsuccessful in recovering against an asset made exempt outside the context of chapter 43-45. S.D.C.L. § 43-45-7; see also S.D.C.L. § 58-12-6 (2004 & Supp. 2016) (exempting—again—within the context of title 58, annuities); S.D.C.L. §§ 21-18-51, 21-18-52 (2004 & Supp. 2016) (exempting certain earnings); S.D.C.L. § 61-6-48 (2015) (exemption for unemployment compensation benefits); S.D.C.L. § 62-4-42 (2015) (exemption for workers' compensation benefits); S.D.C.L. §§ 43-45-1, 43-45-17 (2004 & Supp. 2016); S.D.C.L. § 3-12-115 (2013) (South Dakota retirement system exemption); S.D.C.L. § 9-16-47 (2004) (exempting retirement funds and contributions of municipal employees). Thus, a full taxonomy of exemptions would encompass four varieties: absolute exemptions, additional exemptions, non-absolute exemptions provided by chapter 43-45, and additional “oddball” non-absolute exemptions not provided by chapter 43-45. I must credit attorney Robert Hayes for the suggested oddball terminology for non-absolute, non-chapter 43-45 exemptions. I do think that “oddball exemptions” better encapsulates this category. A brief mention might be made here of federal exemptions as well. See 38 U.S.C. §5301(a) (2012) (exempting payments of benefits due or to become due under any law administered by the Secretary); 10 U.S.C. §1440 (2012) (exempting veteran’s benefits); 42 U.S.C. § 407 (2012) (exempting social security or disability benefits, including back pay); 29 U.S.C. § 1056(d)(1) (2012) (ERISA exemption). But see Michael P. Dunn and Jane M. Knasinski, Bankruptcy Debtors: ERISA's Impact on Pension and Retirement Benefits, 63 Wis. Law. 20, 20 (July, 2000) (discussing the unavailability of ERISA exemption protections in bankruptcy).
(4) To a debtor for the necessaries of life, including only food, clothing, and fuel, provided for the debtor or his family;

(5) To a debtor for assistance or services furnished by the state to or on behalf of his children or spouse, by virtue of assignment of support rights to the state;

(6) To a debtor for child and spousal support obligations; or

(7) To a debtor for assistance or services furnished to the debtor by or through the Department of Social Services.\(^{155}\)

Other exception creditors include judgments for fines or costs of criminal prosecutions and debts incurred for property that was obtained under false pretenses.\(^{156}\) These exception creditors and circumstances, however, do not apply to the homestead or other absolute exemptions.\(^{157}\) The homestead is "absolutely exempt" (aside from alimony, child support, and certain tax claims).\(^{158}\) The statutory exceptions for debtors who abscond, who are subject to a Medicaid debt, and so on, do not apply to a homestead.\(^{159}\)

e. Mechanics' Liens

Two statutes relative to mechanics' liens must now be considered. A mechanic's lien is a statutory lien, whereby a person who has carried out improvements on real property, by means of materials or labor, may secure her right to payment against the property.\(^{160}\) In some jurisdictions, the term "construction lien" is preferred.\(^{161}\) In South Dakota, the lien attaches both to structures and the underlying realty.\(^{162}\) The first relevant statute, contained within the statutory chapter for mechanics' and materialmen's liens, provides, "[t]he lien shall not extend to nor affect any rights in any homestead so far as the

\(^{155}\) S.D.C.L. § 43-45-7.


\(^{157}\) See Keleher v. Technicolor Gov't Servs., Inc., 829 F.2d 691, 692 n.1 (8th Cir. 1987) (emphasizing that the homestead exemption is an absolute exemption).

\(^{158}\) S.D.C.L. § 43-45-3 (2004 & Supp. 2016); see also S.D.C.L. § 43-45-10 (characterizing the homestead as an exemption, among others, "made absolute").

\(^{159}\) See In re Volk, 26 B.R. 457, 460 (Bankr. D. S.D. 1983) (noting that South Dakota Codified Law section 43-45-7(1) does not apply to the homestead exemption although the residency requirement of section 43-31-1 does). The homestead of a "family, resident in this state" is exempt. S.D.C.L. § 43-31-1 (2004 & Supp. 2016). Moreover, child and spousal support exemption creditors (recited in South Dakota Codified Law section 43-45-7(5)) are also independently recognized in connection with the homestead exemption under principles of equity. See supra Part II.C.3.b.

\(^{160}\) 53 AM. JUR. 2D Mechanics' Liens § 1 (2016).

\(^{161}\) Id. § 2.

same is exempt from levy and sale on execution.”163 The second, contained within the exemptions chapter, states:

No exemption shall be allowed any person against an attachment or execution issued for the purchase money of property or for the agreed or reasonable cost of the material furnished or labor performed in the original erection and construction of buildings thereon, claimed to be exempt, and on which such attachment or execution is levied.164

The two statutes at first blush may appear in conflict. The first provides that the homestead exemption prevails against a mechanic’s lien.165 The second provides that no exemption—presumably, whether absolute or additional—may impair two varieties of creditors: (1) creditors whose claim arises out of “the purchase money of property” and (2) creditors owed “for the agreed or reasonable cost of the material furnished or labor performed in the original erection and construction of buildings . . . .”166 This first classification of creditors was discussed above; the purchase money creditor is, in fact, the vendor’s lien claimant who is always entitled to foreclose on a homestead since the security interest arises prior in time to the ownership of the homestead.167 The second, however, purports to except from homestead exemption status mechanic’s liens arising from “the original erection and construction” of the homestead.168 It attempts an exception to the homestead protections for mechanic’s liens relating to the initial construction of the homestead.169 Applying a commonly utilized canon of statutory construction, this specific treatment of mechanic’s liens related to original construction would prevail against the more general rule that mechanic’s liens are no more valid against a homestead than any other lien.170 In other words, reading these two statutes in concert, the homestead right precludes foreclosure by a mechanic’s lien claimant generally, but permits foreclosure by a mechanic’s lien claimant which furnished materials or labor for the homestead’s original construction.

165. S.D.C.L. § 44-9-5.
166. S.D.C.L. § 43-45-8.
167. See supra Part II.C.3.c.
170. See, e.g., Moss v. Gutierrez, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17 (citing United States W. Commc’ns, Inc. v. Pub. Utils. Comm’n of the State of South Dakota, 505 N.W.2d 115, 123 (S.D. 1993)) (reciting that if “two enactments the legislature [are] intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute”).
A monograph by University of South Dakota School of Law Dean Marshall McKusick, composed in the year after the end of World War II, concluded that this mechanic's lien exception for original construction costs was unconstitutional. 171 As far back as 1862, a homestead exemption exception for mechanics wages was codified. 172 By 1887, a revision confirmed an exception for "mechanics' for work, labor or material done or furnished exclusively for the improvement of" a homestead. 173 Following statehood in 1889, the reference to mechanics' liens was deleted. 174 Then in 1927, the current exception for mechanics' liens was added back again. It remains there today, re-codified and coupled with the vendors' lien exception. 175 In the case of Home Lumber Co. v. Heckel, 176 the South Dakota Supreme Court reasoned that a legislative exception for mechanics' liens against the homestead exemption was invalid. 177 That decision has never been overturned, although some aspects of its reasoning have been called into question. Heckel's holding rested partly on an outmoded view of the privileges and immunities clause. 178 Its status, therefore, should be characterized as unclear. 179 An undisturbed aspect of Heckel rests on sound

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171. McKUSICK, supra note 3, at 7.
172. 1862 Dak. Sess. Laws ch. 37 § 9, 301; see infra Part IV.A (reprinting the 1862 Territorial Homestead Statutes).
173. COMPILED LAWS OF THE TERRITORY OF DAKOTA, Political Code, ch. 23, § 2452 (1887) [hereinafter, 1887 DAKOTA LAWS]. The full text of this section read:
   The homestead shall be liable for taxes accruing thereon, and if certified and recorded as hereinafter directed shall be liable only for such taxes, and shall be subject to mechanics’ lien for work, labor or material done or furnished exclusively for the improvement of the same, and the whole or a sufficient portion thereof may be sold to pay the same.

Id.
174. THE REVISED CODES OF THE STATE OF SOUTH DAKOTA § 3220 at 583 (1903) (current version at S.D.C.L § 43-31-29 (2004)).
176. 293 N.W. 549 (S.D. 1940).
177. Id. at 550; accord Fallihee v. Wittmayer, 70 N.W. 642, 644 (S.D. 1897); Morgan v. Beuthein, 75 N.W. 204, 205 (S.D. 1898).
178. See In re Davis, 2004 SD 70, ¶ 9, 681 N.W.2d 452, 455 (“While the Constitution has not changed, our test for deciding when a statute violates the ‘Privileges and Immunities Clause’ has.”). Heckel did not specifically invoke a privileges and immunities analysis, but it did cite to O’Leary v. Croghan which had cited to the Croghan decision. Heckel, 293 N.W. at 550 (citing O’Leary v. Croghan, 173 N.W. 844, 845-46 (S.D. 1910)).
179. In Stephenson, the Bankruptcy Court mentioned the original construction mechanic’s lien exception to homestead exemption protections without considering Heckel’s holding. Stephenson v. State (In re Stephenson), 35 B.R. 69, 71 (Bankr. D. S.D. 1983). One possible analysis would suspend constitutional homestead protections as to any mechanic’s lien which precedes the acquisition of the homestead property. The effective date of a mechanic’s lien relates back to the date when material or labor was first furnished. S.D.C.L. § 44-9-7 (2004); Craig v. Swann (In re Swann), 141 B.R. 678, 683-84 (Bankr. D. S.D. 1992). Thus, a retroactive mechanic’s lien could, in the right circumstances, arise simultaneously or prior to the acquisition of property which qualifies as a homestead. A mechanic’s lien, in other words, could predate the homestead. Allowing a mechanic’s lien which predates the homestead to qualify as a homestead exception creditor would follow the same reasoning as the exception for a vendor’s lien. Where a mechanic’s lien—like a vendor’s lien—predates the homestead,
constitutional construction and a sensitivity to the history of the South Dakota homestead exemption.180

4. Married with Children Rights

The creditor exemption aspects of homestead rights operate to shield the property from involuntary sale on account of creditors of the owner. Thus, as articulated above, the homestead privilege is enjoyed by the owner alone.181 No homestead privilege against creditor claims is necessary with regards to non-owners since no creditor could pursue foreclosure of property not owned by the debtor, with the possible exception of spousal and filial support obligations.182 To be sure, the family members of the debtor-owner benefit indirectly from the creditor exemption protections of a homestead. This is one of the deep-seated societal goals of the privilege, avoiding the possibility of family disintegration which might result due to otherwise available creditor remedies. The integrity and security of the family are protected and shielded from displacement by reason of the unavailability of the creditor remedy of forced sale of the homestead res. By suspending creditor rights against the debtor’s homestead

then and only then should it qualify as an exception to the homestead exemption. See Craig, supra note 3, at 495 ("It is contradictory at best to allow the vendor’s lien by holding that the lien attaches by contract prior to the homestead interest... while the materialman’s lien, which also results from a contract [frequently] signed and legally effective before the homestead interest attaches, is unconstitutional."). Under this reasoning, the timing of the origin of the lien would be key to the enforceability of a mechanics’ lien against a homestead pursuant to South Dakota Codified Law section 43-45-8. This reasoning, however, is difficult to square with case law which recognizes the status of homestead property when the lot is vacant even prior to construction of a home. See, e.g., Morgan v. Beuthein, 75 N.W. 204, 204 (S.D. 1898) (refusing to concur in the view “that the homestead is a personal privilege that continues only so long as the property is used and occupied as a homestead, and that when the party disposes of his homestead the lien may be enforced”). Morgan did cite and rely, in part, on a statute which provided “that no judgment shall be a lien upon the homestead.”

180. See Heckel, 293 N.W. at 550 (noting “that as early as 1893 the legislature submitted to the people of this state a proposed [state constitutional] amendment... by which it was provided that mechanics’ liens could be enforced against the homestead, but which proposed amendment was defeated by the people in the 1894 election”); see also infra Part II.D.2.d (discussing the failed 1894 constitutional amendment). The Heckel court also noted that Minnesota amended its constitution to allow for forced sale by mechanics’ lienholders after the Minnesota Supreme Court had ruled that its constitution did not permit it, but South Dakota, by contrast, had not. Heckel, 293 N.W. at 550; see also Aguirre v. Fullerton Lumber Co., Inc. (In re Aguirre), No. 01-40161, 2007 WL 601541, at *3 (Bankr. D. S.D. 2007) (discussing a mechanics’ lien against a homestead).

181. See supra Part II.C.2 (discussing protected people).

182. See S.D.C.L. § 25-7-27 (2013) (imposing a duty on adult children to support their parents); Prairie Lakes Healthcare Sys. v. Wookay, 1998 SD 99, ¶¶ 33-35, 583 N.W.2d 405, 418-19 (applying the filial duty of support statute); S.D.C.L. § 25-2-11 (2013) (imposing a spousal duty of support); Accounts Mgmt., Inc. v. Litchfield, 1998 SD 24, ¶ 10, 576 N.W.2d 233, 236 (holding surviving spouse liable for decedent spouse’s separate medical debts). But see S.D.C.L. § 25-2-6 (2013) (providing that in non-support contexts, the separate property of one spouse is not liable for the debts of the other). “Neither husband nor wife has any interest in the property of the other, excepting their respective rights for support as specifically provided by law, and except that neither can be excluded from the other’s dwelling.” S.D.C.L. § 25-2-4 (2013 & Supp. 2016).
property, her family is indirectly benefitted and her shelter; her family's shelter is, in some measure, fortified.

Two additional subsidiary aspects of homestead laws must now be considered. The first represents the protection of a spouse from voluntary conveyances or encumbrances of the homestead by the other spouse—which I will term the "homestead veto." The second represents survivorship rights upon the homestead owner's death—which I will term "homestead descent." Each is discussed below in seriatim.

a. Homestead Veto

As a consequence of the homestead veto, both spouses must join a conveyance (a deed) or an encumbrance (e.g., a mortgage) of the homestead in order for the conveyance to be effective. The failure of one spouse to join the

183. See Ward v. Ward, 517 So. 2d 571, 572 (Miss. 1987) (noting that although the homestead "does not give the wife any property right or ownership, it does give her at least a veto power"). Vermont's Justice Munson explained the nature of the homestead conveyance condition, assuming that legal title had vested in the husband:

The homestead is an estate or interest created by statute in the property of the husband for the protection of the family. It cannot be conveyed by the husband, "the owner thereof," unless the wife joins in the execution and acknowledgment of the deed. It can be charged with the payment of the husband's indebtedness only by a conveyance so executed. The wife is thus invested with the right to bar the husband from selling or incumbering. Her interest springs from the husband's title, but is adverse to his right of transfer. The joint deed, as to her, is not a conveyance of the title, but a mere release or waiver. In the case of a mortgage her concurrence in the execution is no more than a legal and binding consent to the incumbrance. She retains her entire homestead interest subject to that incumbrance, and that interest is paramount to any lien which the husband can place upon the property.


184. See Somers v. Somers, 131 N.W. 1091, 1093 (S.D. 1911) (explaining that the statute "requiring the spouse to join in the execution of a deed to a homestead, does not in any manner confer upon such spouse any estate in said land, but simply burdens this tract of land with a quality or condition by virtue of which it is impossible for the owner to make a valid deed without the spouse joining in the execution thereof").
instrument results in the instrument being void and without effect. One spouse acting alone cannot convey the homestead nor any interest in it. The effect of this law is to burden the realty with a condition, a condition of spousal joinder otherwise rendering it impossible to convey or encumber the property. A unilateral conveyance of homestead property by a married person simply renders the conveyance without effect. Unilateral encumbrances follow the same rule. There are exceptions which address when the spouse is not a resident of the state, is incompetent, or is a member of the armed services and missing in action. These statutory exceptions are straightforward.

The homestead veto retains one characteristic of dower which elective share rights for surviving spouses has lost—a “claw-back” functionality. The elective share essentially creates spousal forced share inheritance rights based upon a snapshot of the decedent spouse’s wealth at the moment of his death.

Although the augmented estate on which the elective share calculation is based does include aggregate gifts of greater than $10,000 in the two years prior to the

185. S.D.C.L. § 43-31-17 (2004 & Supp. 2016); see also O’Neill v. Bennett, 207 N.W. 543, 546 (S.D. 1926) (holding unilateral spousal conveyance of homestead invalid without regards to the value of the property). But see Speck v. Anderson, 318 N.W.2d 339, 343 (S.D. 1982) (reasoning that enforcement of an option granted by one spouse was appropriate after the death of the non-consenting spouse); Twp. of Centerville v. Jenter, 126 N.W. 575, 576 (S.D. 1910) (wife deemed to have consented to dedication of homestead property where she observed public expenditures being made on the land); Nw. Loan & Banking Co. v. Jonasen, 79 N.W. 840, 843 (S.D. 1899) (although “conceding for the present purpose only that Mrs. Jonasen, as she testified, ‘did not take hold of the pen’ or ‘ask any one to sign her name,’ her unimpeached acknowledgment gave to the mortgage the full force of her signature.”).

186. See State v. Tooney, 129 N.W. 563, 565 (S.D. 1911). The court explained:

It seems very clear to us that the statute in no manner changes or lessens the title held by the so termed “owner,” but simply imposes upon the property a charge or trust, analogous to an incumbrance, imposed for the benefit of the spouse and conditioned upon the existence of certain facts, such as that the spouse is a resident of the state; that, to protect and secure this charge or trust, the statute affects the homestead property with a quality different and distinct from other property, in that it is rendered exempt from execution or other process for payment of debts of owner, and cannot be sold, under ordinary circumstances, without the spouse joining in conveyance.

Id.

187. Sidle v. Cheney, 56 N.W.2d 86, 87-88 (S.D. 1952); see also Crawford v. Carter, 37 N.W.2d 241, 245 (S.D. 1949) (holding that neither spouse may unilaterally abandon the homestead so as to diminish the homestead veto rights of the other); Norwest Bank Sioux Falls v. Lemme, 41 B.R. 829, 831 (Bankr. D. S.D. 1984) (sustaining unilateral spousal encumbrance where couple lacked intent to use property as homestead); see also S.D.C.L. § 43-28-19 (2004 & Supp. 2016) (giving effect to recitals as to the marital status of parties to a deed or mortgage); S.D.C.L. ch. 43-30 app. § 5-03 (2004) (“If a deed fails to recite the marital status of the grantor or if a married grantor’s spouse fails to join in the conveyance, then the deed is defective unless it is possible to determine from the record that the property is not the homestead of the grantor.”).

188. But see Speck v. Anderson, 318 N.W.2d 339, 343 (S.D. 1982) (reasoning that “given the circumstances of the case at bar an ab initio voiding of the otherwise arguably valid option would extend the protection of the homestead exemption to a class of persons needing no such protection”) (citations omitted); accord Johnson v. Sellers, 2011 S.D. 24, ¶ 4 n.2, 798 N.W.2d 690, 692.

189. See S.D.C.L. § 43-31-17 (2004) (detailing the armed services exception and restricting joint spousal conveyance requirement to where “both husband and wife are residents of this state”); S.D.C.L. §§ 43-31-18 to -26 (2004) (incapacitated spouse exception).

decedent’s death, the augmented estate is in other respects simply a snapshot of marital wealth at the date of the death of decedent spouse. Elective share rights, therefore, can be thwarted by inter vivos gifts so long as the donor-spouse survives at least two years after his gifts are completed. Dower, by contrast, attached to all freehold real property acquired in fee during marriage, whether in fee simple or in fee tail. It provided the surviving spouse a life estate in one-third of such property held anytime during the marriage. Curtsey was the parallel inheritance right for a surviving husband.

Unless the wife joined the conveyance, dower rights were unaffected by the husband’s unilateral inter vivos conveyance of land during marriage, even to a third party purchaser. Thus, the surviving widow of a husband who had engaged in frequent exchanges, sales, and purchases of land could theoretically enjoy a windfall when, upon his death, she was suddenly vested with a life estate in one-third of all of the realty he had held at any time during their marriage. Purchasers acquiring realty from a married man essentially had constructive notice of the wife’s preexisting property interest that vested on account of marriage. Third party purchasers for value would be displeased—but not necessarily surprised—by suddenly being divested of a life estate to one-third of the properties purchased from the now deceased husband and would have originally discounted their purchase price when it was revealed that the wife would not be consenting to the sale. Alternatively, a savvy purchaser would require a warranty from the seller and could seek recovery from a breach from the grantor’s heir (i.e., his son).

Thus, dower provided an efficient economic

193. HOVENKAMP ET AL., supra note 192 at 197.
194. Id. "Unlike dower, curtsey had an additional requirement: the husband and wife must have had a child born alive during the marriage capable of inheriting the land from its mother." Id.
196. See Thomas Lund, Some Interesting Medieval Dower Cases, 37 U. TOL. L. REV. 659, 661-62 (2006) (“Unless the husband could find the means to eliminate his wife’s potential claim, his marriage would reduce the selling price of his land by the buyer’s actuarial prediction as to whether the husband would predecease his wife, and leave his heir assets insufficient to pay off his widow’s dower interest.”). Thus, dower, although typically seen as a right arising only upon the husband’s death, also functioned to grant wives economic leverage within the marriage while the husband was still alive. See Joslyn R. Muller, Comment, Haven’t Women Obtained Equality? An Analysis of the Constitutionality of Dower in Michigan, 87 U. DET. MERCY L. REV. 533, 534 (2010) (citations omitted) (“Not only does dower entitle a widow to a fixed portion of her deceased husband’s estate, it also gives married women a present inchoate right to prevent their husbands from transferring a fee simple in real property without consent.”).
197. Lund, supra note 196, at 661. A warranty in this context was termed a “voucher.” Id. “Typically, therefore, the husband’s heir bears the expense of the widow’s dower.” Id. (citing SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 662 (2d ed. 1968)).
protection for the widow, as curtsey did for the widower. It also served to inject her participation into the economic affairs of the marriage. The elective share lacks this protective mechanism because the law acknowledges a loophole as to inter vivos transfers outside of the two year period prior to death. In addition to partaking of dower and curtsey mechanics, the homestead veto shares similarities to the tenancy by the entirety estate.

The homestead veto in one sense imposes certain tenancy by the entirety characteristics on the homestead property. Tenancy by the entirety, where it is recognized, is a species of joint tenancy available only to spouses. In most states where tenancy by the entirety concurrent ownership is recognized, neither spouse may unilaterally dispose of any interest in the estate. Without the concurrence of both spouses, any attempted transfer or encumbrance is simply ineffectual. Similarly, a creditor of one spouse may not levy against the estate. For these reasons, tenancies by the entirety are valued for their asset protection features. Tenancies by the entirety are not recognized in South Dakota. The homestead veto, however, coupled with the homestead descent and the homestead exemption, largely achieves the same treatment.
One seemingly unresolved issue in connection with the homestead veto is whether the conveyance by one spouse of homestead property titled as joint tenants with rights of survivorship can—despite its invalidity—effect a severance of jointly title property and convert it into a tenancy in common estate. 208 Owners desiring to “convert” property titled jointly with rights of survivorship into tenancy in common who lack or do not wish to pursue the joinder of their co-tenant(s) will typically utilize a “straw man” transaction on account of the possibility that simply quitclaiming an interest to oneself will not achieve a severance and therefore accomplish the aim of achieving tenancy in common status. 209 Other variations on the severance event will work a transformation of joint tenancies to tenancies in common as well. 210 An owner of jointly titled property has the right to unilaterally terminate a joint tenancy in favor of a tenancy in common. 211 But, the homestead conveyance condition renders any unilateral attempt to transfer or encumber homestead property void if the grantor is married. The homestead conveyance condition likely renders any attempt to convert jointly titled homestead property void even if the

alienability, no creditor of only one spouse can attach property held by both spouses as tenants by the entirety.” Evans, 772 S.E.2d at 579 (citations omitted).

207. See Johnson v. Sellers, 2011 SD 24, ¶ 4 n.2, 798 N.W.2d 690, 692 n.2 (“Homestead rights protect a spouse’s residential property by requiring both husband and wife to join in a conveyance of their homestead.”); McCarthy, supra note 37, at 12 (citing MASS. GEN. LAWS ch. 209, § 1A (West. 2017)) (“For a married couple owning their home as tenants by the entirety, homestead protection is duplicative to the extent that the nature of their tenancy already protects that couple against the creditors of either of them alone.”).

208. See, e.g., Schimke, 208 N.W.2d at 711-12 (recognizing that when wife conveyed non-homestead jointly titled property to her children and later died that the conveyance effected to convert her joint tenancy interest into a tenancy in common interest, defeating her surviving husband/joint tenant’s claim of survivorship rights).

209. For example, in Estate of Hoffman, during a pending divorce, the terminally ill wife transferred non-homestead jointly titled joint marital property to her father, who then transferred it back to her in order to convert the jointly titled property into tenancy in common property. In re Estate of Hoffman, 2002 SD 129, ¶ 3, 653 N.W.2d 94, 96. The technique worked, and the court held that the straw man transfer did not violate the statutory restraining order in effect during a divorce. Id., 2002 SD 94, ¶ 12, 653 N.W.2d at 99.

210. See, e.g., Riddle v. Harmon, 162 Cal. App. 524, 530 (Cal. Ct. App. 1980) (recognizing severance when one co-owner to jointly titled survivorship property simply conveys her interest to herself); Kettler v. Sec. Nat’l Bank of Sioux City, 805 N.W.2d 817, 824-25 (Iowa Ct. App. 2011) (observing the rule that a joint tenancy may be severed by the acts of one of the owners); Newton v. Newton, 365 S.W.3d 565, 569-70 (Ky. Ct. App. 2011) (explaining that “if one joint tenant decides to convey his or her interest ... the joint tenancy is destroyed”); Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 285 P.3d 656, 664 (N.M. 2012) (holding that a conveyance of property to a third party terminates a joint tenancy); Marchel v. Estate of Marchel, 838 N.W.2d 97, 103 (Wis. Ct. App. 2013) (“A conveyance by one party to a joint tenancy of their interest in the property automatically severs the joint tenancy.”); see also Zulk v. Zulk, 502 N.W.2d 116, 119-20 (S.D. 1993) (reasoning that a divorce property settlement may convert joint tenancy into tenancy in common); In re Estate of Steffen, 467 N.W.2d 490, 493 (S.D. 1991) (holding that the parties intended to terminate joint tenancy in a property settlement). Jointly held accounts may be similarly terminated. In re Estate of Ashe, 753 P.2d 281, 285 (Idaho Ct. App. 1988), aff’d, 787 P.2d 252 (Idaho 1990). However, attempting to dispose of jointly held property via a will does not unilaterally terminate a joint tenancy. Nicholas v. Nicholas, 83 P.3d 214, 224 (Kan. 2004).

conveyance is simply back to the grantor.212 Given the liberal construction granted to homestead laws, spousal protections ought to prevail.213

b. Homestead Descent

The second variety of non-exemption homestead privileges targeted for discussion here is what I have termed the “homestead descent.” The homestead descent privilege represents a kind of inheritance right which is unaffected by either testacy or intestacy.214 Homestead descent rights are governed primarily by two statutes, one in the probate code and another in the property code. South Dakota’s version of the Uniform Probate Code provides:

(a) A decedent’s surviving spouse or minor children are entitled to a homestead allowance as provided in chapter 43-31. In addition to the homestead allowance, the decedent’s surviving spouse is entitled to the property and cash described as exempt property in chapter 43-45. If there is no surviving spouse, the decedent’s children are entitled jointly to the exempt property.

(b) Exempt property and homestead allowance are in addition to any share passing to the surviving spouse or children by the decedent’s will, by intestate succession, or by way of elective share. Exempt property and homestead allowance have priority over all claims against the estate.

(c) Property that is specifically devised may not be used to satisfy rights to homestead allowance or exempt property to the extent there is other property of the estate available to satisfy such rights.215

212. See Szawicki v. Swawicki, 772 N.W.2d 110, 115 (Neb. 2009) (holding that a conveyance of the homestead father-and-son joint tenants to themselves and the father’s new wife was effective even though the new wife did not join the conveyance). But see Knoche v. Morgan, 664 P.2d 258, 259 (Colo. App. 1983) (reasoning that a unilateral spousal conveyance of homestead property is ineffective to convert jointly titled property to a tenancy in common). Compare id., with Radtke v. Radtke, 19 N.W.2d 169, 170 (Wis. 1945) (holding that one spouse’s conveyance to his children of his interest in property held jointly with his spouse severed the tenancy where the property had been the family homestead but he had abandoned the homestead).


214. Indeed, a now repealed probate statute situated homestead in the context of testamentary capacity; i.e., that a testator lacks capacity to alter homestead descent rights. See In re Nelson’s Estate, 330 N.W.2d 151, 155 (S.D. 1983) (quoting S.D.C.L. § 29-2-3 (repealed 1995)) (“Subject to right of occupancy of a homestead, every person over the age of eighteen years, of sound mind, may execute a will, and may thereby dispose of all or any part of his estate, real or personal.”).

The property code provides:

Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age.\(^\text{216}\)

The age of majority in South Dakota is eighteen.\(^\text{217}\) The homestead descent has no equity cap or dollar limit.\(^\text{218}\) The equity cap relative to homestead rights only has application to the homestead exemption.\(^\text{219}\) Thus, the homestead descent

\(^{216}\) S.D.C.L. § 43-31-13 (2004); see also S.D.C.L. § 43-31-15 (2004) (providing that upon the homestead owner’s death, the property “shall be held exempt from any antecedent debt of the parent, and if it descends to the issue of either husband or wife it shall be held by such issue exempt from debts of such husband or wife, except as may be otherwise provided by law”); S.D.C.L. § 43-31-16 (2004) (confirming that if the homeowner is survived by neither a spouse nor issue, “the homestead shall be liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead”).

\(^{217}\) S.D.C.L. § 26-1-1 (2016).

\(^{218}\) Hansen v. Hansen, 166 N.W. 427, 429 (S.D. 1918). The court explained:

In all cases where there is a limitation in our law on the homestead exemption, it is against the creditors, and not against the heirs; and, from the fact that the Legislature nowhere made an exception in favor of the heirs of the deceased homesteader and against the surviving widow, it may fairly be inferred that it was not the intention of the Legislature to make any such exception.

\(^{219}\) Cf. UNIF. PROBATE CODE § 2-402 (2010). That section provides:

A decedent’s surviving spouse is entitled to a homestead allowance of [\$22,500]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$22,500] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

\(^{Id.}\); see also UNIF. PROBATE CODE § 2-402A (West 2017) (an optional section for states with state constitutional homestead protections which was not adopted in South Dakota). When the Uniform Probate Code was first approved in 1969, the suggested bracketed dollar amount for the descent homestead was [\$5,000]. UNIF. PROBATE CODE § 2-402 cmt. (West 2017). One reason for the equity cap was suggested by the concern that the homestead descent prefers minor or dependent children over other children, which may be inconsistent with the decedent’s intent. Id. Unlike the Uniform Probate Code, the South Dakota statutes speak in terms of minor children but not dependent children. S.D.C.L. § 29A-2-402(a) (2004); S.D.C.L. § 43-31-13 (2004). Disabled adult children, therefore, do not enjoy homestead descent protections.
can represent a significant inheritance right for surviving spouses and minor children.

D. A HOMESTEAD HISTORY: A LOOK BACK

Despite their lengthy history in South Dakota, homestead laws generally are of a relatively recent origin. Homestead protections were unknown at common law.220 It has been said that homestead laws are not themselves in derogation of the common law, however, although their limits and exclusion are.221 The first homestead law in the United States was not in statutory form, but constitutional. Texas adopted homestead protections in its state constitution in 1845,222 Vermont followed in 1849.223 So did California in the same year.224 Later, laws which closely resemble American-style homestead exemptions were enacted in Canadian provinces, New Zealand, Brazil, Egypt, and several European countries.225

1. Pre-Constitutional Legislative History (1861-1889)

A convenient starting point for the legal history of South Dakota generally can be marked by the April 19, 1858 treaty with the Yankton Sioux tribe whereby the Yankton Sioux agreed to withdraw to a 400,000 acre reservation tract in present day Charles Mix County.226 They ceded an enormous triangle-

220. See In re Trepp's Estate, 227 P. 1005, 1005 (Mon. 1924); In re Carother's Estate, 167 P.2d 899, 908 (Okla. 1946) (citations omitted). "The family home is one of the evidence of civilization." Carother's Estate, 167 P.2d at 908. "It is recognized among the earliest institutions of common law." Id.

221. McKUSICK, supra note 3, at 1 (quoting Riggs v. Sterling, 27 N.W. 705, 707 (Mich. 1886)). Riggs explained:

   The individual or family home is one of the evidences of modern civilization. It is recognized among the earliest institutions of the common law. A man's dwelling-place, with his interest in the land lying about and contiguous to it, was always inalienable and indefeasible, except when required by the sovereign, or for the defense of the state . . . .

Riggs, 27 N.W. at 707.

222. TEX. CONST. art. VII, § 22 (1845). Technically, it may be more accurate to say that Texas' homestead laws and constitutional homestead protections came into effect simultaneously upon admission to the Union, as they did in South Dakota. See TREATY OF ANNEXATION BETWEEN THE U.S. AND TEXAS, Art. VII (1844) (providing that all existing Texas laws would remain in force post-annexation).


226. HERBERT S. SCHELL, HISTORY OF SOUTH DAKOTA 70-71 (2d ed. 1968).
shaped swath of land in exchange for a $1.6 million fifty-year annuity.227 That same year, a convention resolved to elect a provisional body to petition Congress to designate Dakota Territory; the process was repeated the next year.228 Following ratification of the treaty on February 17, 1859, and a brief interpretative dispute regarding the timeline for the Indians' withdrawal, the territory opened to white settlers in July.229 Nearly a thousand prospective settlers, who had camped along the Iowa and Nebraska borders waiting for this moment, swarmed in.230 They joined others who had illegally squatted on town sites already, anticipating the official opening of the territory.231

South Dakota's Western legal history quasi-independent of a federal sovereign is typically seen as commencing with that of Dakota Territory in March of 1861.232 The first official territorial governor, William Jayne, was a doctor from Abraham Lincoln's hometown of Springfield, Illinois.233 Jayne, in fact, had been mayor of Springfield and Lincoln's personal physician.234 The remainder of the territorial government would consist of three judges, a secretary, a few other minor officials, and two legislative chambers (a council and a house of representatives), with all salaries and expenses paid by the federal government.235 Governor Jayne took a census, divided the area into districts, and scheduled a legislative election for September 16, 1861.236

Following the election, the first territorial legislature met in Yankton in March.237 The first territorial legislature consisted of thirteen men in the lower house and another nine in the council.238 Because of its small size, it was

227. Id. at 71. The ceded land ran from Fort Pierre and Lake Kaneska to the Big Sioux and Missouri rivers. Id.
228. William Maxwell Blackburn, A History of North and South Dakota, in 1 SOUTH DAKOTA HISTORICAL COLLECTIONS 48 (News Printing Co. 1902).
229. SCHELL, supra note 226 at 71-72.
230. Id. at 71.
231. WAYNE FANE BUST, OUTLAW DAKOTA: THE MURDEROUS TIMES AND CRIMINAL TRIALS OF FRONTIER JUDGE PETER C. SHANNON 2-3 (2016). In 1858, speculators at Sioux Falls had even "set up a squatter government complete with a governor and legislature." Id. at 3; see also generally, HOWARD ROBERTS LAMAR, DAKOTA TERRITORY, 1861-1889; A STUDY IN FRONTIER POLITICS (1956) (analyzing Dakota Territory politics); Brad Tennant, Becoming Dakota Territory: The 1861 Organic Act and the Struggle for Territorial Status, 43 S.D. HIST. 118, 134 (2013) (considering South Dakota's and North Dakota's path to statehood).
232. Act of Mar. 2, 1861, ch. 86, § 1, 12 Stat. 239 (1861). The act was signed by President Buchanan. PATRICK M. GARRY, THE SOUTH DAKOTA STATE CONSTITUTION 3 (2014). It took eleven days for the news of the act to reach Yankton. Blackburn, supra note 228, at 49. Dakota Territory initially included areas of present Montana, Idaho, and North Dakota, but by 1882 Dakota Territory represented the land mass currently occupied by North Dakota and South Dakota. GARRY, supra, at 4.
233. SCHELL, supra note 226, at 93. The first executive mansion was a log cabin. Id. at 94. The first unofficial governor was Henry Master, elected by the provisional legislature in 1858, despite the fact that "[a] provisional legislature could not legislate . . . ." Blackburn, supra note 228, at 48.
234. FANE BUST, supra note 231, at 5.
235. SCHELL, supra note 226, at 93.
236. Id. at 94.
237. Blackburn, supra note 228, at 50.
238. SCHELL, supra note 226, at 94; BLACKBURN, supra note 228, at 50.
referred to as the “Pony Congress.” 239 It was composed of twenty-two men who met in private homes over a sixty-day session. 240 The men’s unrefined antics included wine lunches, wine dinners, “wine quarrels, and the hurling of bottles and glasses across tables at the bleeding heads of belligerent councilmen.” 241 One of the more contentious issues was a “capital fight” with Yankton, the winner, besting its contenders, Sioux Falls (the oldest city) and Vermillion (the largest city). 242 Governor Jayne’s address to the first, rather unruly Dakota Legislature on March 17, 1862, included an emphasis on the need for homestead laws:

I would recommend to you that a law be passed securing to every family freedom from execution and sale of their homestead; if resident in the country, a house and so many acres as your wisdom may determine. I believe that such a law is eminently just and proper. I would have every man know, and especially every wife and child feel, that there was one spot on earth that they could call home; one place that the cruel and remorseless creditor could not tread upon; that one fireside was sacred, and that one roof should shelter the innocent and unfortunate. I hope never in Dakota to see the harsh creditor darken the door and drive from the home the wife, or it might be the widow and her children, because, forsooth, he could, in his wily brain and bloodless heart, overreach in trade the honest but improvident husband and father. 243

Responsive to their governor’s wishes, a homestead law was enacted by the Pony Congress. 244 The 1862 statute, in its entirety, is reprinted in the appendix to this article. 245 Not thirty-six months after the first wave of European settlers had legally crossed into Dakota Territory, a homestead exemption law had been added to the code. 246 The 1862 statute, and its development as traced below, helps illuminate the constitutional text recognizing homestead protections that was ultimately approved upon statehood. The territorial statutes governing homestead rights, as they evolved, demonstrate lawmakers’ experience with

239. FANE BUST, supra note 231, at 10; SCHELL, supra note 226, at 94.
240. Blackburn, supra note 228, at 50.
242. Blackburn, supra note 228, at 50.
243. 1 GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY 197, 202 (George Martin Smith ed., 1915).
244. 1862 Dak. Sess. Laws ch. 37 §§ 1-10, 299-301. The first statutory form of homestead therefore preceded the later state constitutional homestead provision.
245. See infra Part IV.A (reprinting the 1862 Territorial homestead statutes).
246. See 1862 Dak. Sess. Laws ch. 37 § 1, 299 (providing “[t]hat a homestead . . . shall not be subject to attachment or mesne process . . .”). Congress retained the power to repeal any territorial legislation, but it left the law undisturbed. See Nat’l Bank v. City of Yankton, 101 U.S. 129, 132-33 (1879) (noting that “Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate”).
homestead legislation which surely informed the constitutional protection of the homestead which took shape in 1889. As Justice Charles Whiting has emphasized: "It is interesting, and we believe entitled to great weight in construing our Constitution, to note the legislation of the first state Legislature, composed, in large part, of men who had been members of the constitutional conventions." 247

There were no specific provisions relative to homestead laws in the probate sections of the 1862 code save a reference that only property "not exempt from execution by law" should be liable for a decedent’s debts and estate expenses. 248 The exemption also extended to the creditors of a decedent homestead owner’s "widow or minor child or children" but no particular homestead descent right was included. 249 A homestead spousal veto right was enacted in 1862 as to the effectiveness of a mortgage, but not as to conveyances generally. 250 The homestead’s size limit was initially set at eighty acres; one acre if within a city, town, or village. 251 Three exceptions were provided: for taxes, "from execution for clerks’ laborers’, or mechanics’ wages”, and for mortgages. 252 These first codified laws were typically borrowed freely from other states. 253 The next year, a justice code was enacted in Dakota Territory. 254

As Dakota’s twenty-eight-year history (from March, 1861 until November, 1889) unfolded, creditor exemption rules seem to have never been far from the legislators’ minds. The laws would be tweaked repeatedly. By 1875, a total revision of the code seemed necessary. As historian Herbert Schell explains: "[a]n attempt in 1875 to prepare a complete revision finally yielded the so-called

248. See 1862 Dak. Sess. Laws ch. 90 § 30, 490 (stating the session laws’ requirements for wills).
249. 1862 Dak. Sess. Laws ch. 37 § 1, 299.
250. Id. § 2, 300.
251. Id. § 1, 299.
252. See id. § 7, 301 (taxes), § 9, 301 (mechanics’, clerks’, and laborers’ wages), § 2, 299-300 (mortgages).
253. SCHELL, supra note 226, at 96.
254. Id.; see Hon. Robert Vogel, Looking Back on a Century of Complete Codification of the Law, 53 N.D. L. REV. 225, 225 (1976) (noting that Dakota Territory—along with Georgia—were the first English-speaking jurisdictions in the world “to codify their entire body of law”). The significance may have been overlooked at the time since when the first of the codes was adopted in 1862, the non-Indian population of the entire territory was only 2,402. Id. at 228. By 1870, the non-Indian population was still only 14,181, of which only 2,405 lived in the northern half. Id. Vogel suggests that several reasons explain Dakota’s codification including a need for laws at once and a distrust of judge-made law. Id.; see also generally William B. Fisch, Civil Code: Notes for an Uncelebrated Centennial, 43 N.D. L. REV. 485 (1967) (explaining the historical background of the code); William B. Fisch, The Dakota Civil Code: More Notes for an Uncelebrated Centennial, 45 N.D. L. REV. 9 (1968) [hereinafter, Fisch II] (discussing the history the code after its codification). “[T]he last healthy breath of the codification movement in New York” took place in 1886 at the American Bar Association’s ninth annual meeting, when Dudley Field introduced a resolution that the law should be reduced in most cases to the form of a statute; the resolution passed fairly narrowly after two days of debate. Fisch II, supra, at 24. Thereafter, the codification movement rerenched and reformed with the organization of the National Conference of Commissioners on Uniform State Laws in 1891 and the American Law Institute in 1925. Id. at 24-25.
Revision of 1877. The Revision of 1877 territorial homestead laws are reprinted in this article's appendix. The personal property exemptions were relocated to a different chapter under the revised code. The probate code was expanded to incorporate specific homestead provisions. A homestead descent right was also included.

With the 1877 revision, the legislature refined the spatial limits of a homestead, increasing rural homestead acreage caps from eighty to 160. The homestead veto for spousal conveyances now took shape. An exception was added for a vendor's lien. No longer would the homestead be exempt from "attachment" yet it remained immune to "judicial sale, from judgment lien, and from all mesne or final process issued from any court." Also significantly, the legislature confirmed that while the homestead protections were intended to help preserve the integrity of a "family," a "family" was expansively defined as including "[e]very family, whether consisting of one or more persons . . . ."

Later still, the 1887 Code re-enacted the 1877 Homestead Act, with a mild clarification as to the definition of homestead property relative to mining claims: "This chapter shall not be deemed or construed to include any gold or silver mine, or gold or silver mill, or any mill, smelter, or machinery intended or used for the reduction or milling of gold or silver ores." The homestead descent provisions were unchanged. The spousal veto was untouched.

255. SChELL, supra note 226, at 96.
256. See infra Part IV.B. (reprinting the 1877 territorial homestead laws).
257. 1877 DAKOTA REVISED CODE, supra note 102, Probate Code, ch. 5, §§ 128-35.
258. See infra Part IV.C. (reprinting the 1877 territorial homestead descent provisions).
259. 1877 DAKOTA REVISED CODE, supra note 102, Political Code, ch. 38, § 15. The homestead descent right provided that the widow or widower may possess and occupy the homestead and, upon the death of them, "the children may continue to possess and occupy the whole homestead until the youngest child becomes of age." Id.
260. Id. § 8. The new spatial limits were still one acre within town, but otherwise 160 acres, as they are today. Id.; S.D.C.L. § 43-31-4 (2004).
261. 1877 DAKOTA REVISED CODE, supra note 102, Political Code, ch. 38, § 3.
262. See id. § 5 (providing that a "homestead may be sold for any debt created for the purchase thereof").
263. Compare 1862 Dak. Sess. Laws ch. 37 § 1, 299 (exempting the homestead from, inter alia, "attachment"), with 1877 DAKOTA REVISED CODE, supra note 102, Political Code, ch. 37, § 1 (omitting the word "attachment"). Mesne (pronounced "mean") means intermediate. BLACK'S LAW DICTIONARY (6th ed. 1990). Thus, a mesne process "signifies any writ or process issued between the commencement of the action and the suing out of execution." Id. at 1205. The constitutional homestead provision, by contrast, would ultimately only bar the homestead from "forced sale." S.D. CONST. art. XXI, § 4 (1889). Yet the statutory homestead protection still extends, identically, to the phrase from the 1877 Revised Code. See S.D.C.L. § 43-31-1 (2004 & Supp. 2016) (exempting the homestead "from judicial sale, from judgment lien, and from all mesne or final process from any court, to the extent provided by statute").
264. 1877 DAKOTA REVISED CODE, supra note 102, Political Code, ch. 37, § 19. The 1862 laws had omitted the term "family" and simply extended homestead protections to "any man or woman resident in this territory . . . ." 1862 Dak. Sess. Laws ch. 37 § 1, 299. The 1877 Code re-targeted protections from individuals to "every family resident in this territory . . . ." 1877 DAKOTA REVISED CODE, supra note 102, Political Code, ch. 37, § 1. Yet it defined "family" as including single persons. Id. § 19.
265. 1887 DAKOTA LAWS, supra note 173, Political Code, ch. 23, § 2468.
266. Id. §§ 5778, 5781.
exceptions for taxes, the vendor's lien, and mechanic's liens, carried forward.\textsuperscript{268} In large measure, the 1877 Homestead Act was unaltered in 1887 and, indeed, remains unaltered today.\textsuperscript{269} Soon, Dakota Territory would be divided along its northern border and South Dakota would enter statehood. North Dakota would be carved off and enter statehood as well, enacting its own homestead protections into its constitution.\textsuperscript{270} The narrative behind the constitutional text which arose out of our statehood struggles is recounted below.

2. Constitutional History (1883-1889)

South Dakota's attempts to secure statehood were protracted.\textsuperscript{271} It is a story of "long persistency, loyal patience and repeated delay."\textsuperscript{272} It can be traced through annual addresses of five territorial governors, pleadings from five successive (nonvoting) delegates to congress, and more than thirty failed congressional bills.\textsuperscript{273} Beginning in 1879, "a genuine and forceful division propaganda was inaugurated which did not abate its efforts until division [into North Dakota and South Dakota along the forty-sixth parallel] was

\textsuperscript{267} Id. § 2451.
\textsuperscript{268} See id. §§ 2452 (taxes and mechanics' liens), 2453 ("any debt created for the purchase thereof").
\textsuperscript{270} North Dakota still retains a constitutional homestead. It reads:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law; and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law.

N.D. CONST. art. XI, § 22; see also Blaine T. Johnson, Iceberg, Right Ahead! A Compendium of Title Issues in North Dakota, 90 N.D. L. REV. 337, 370-81 (2014) (tracing the history of North Dakota homestead law). North Dakota has articulated the public policy justifications for homestead exemption as:

The object of the homestead exemption law is the protection of the family to afford an asylum for the protection and support of the family in order that such family and children may be protected from the enervating effects of poverty, which to a large degree is the recruiting ground of disease and crime, and to provide an opportunity whereby such children may be properly developed physically, morally, and intellectually to assume and perform the true and proper duties of citizenship, and thus strengthening the state.

\textsuperscript{272} Blackburn, supra note 228, at 77.
\textsuperscript{273} Id. Territorial Governor Gilbert Pierce in 1887 noted the ironic contrast between the protracted failed statehood efforts and the fresh memories of the Civil War: "We have seen people fighting to get out of the union amid the protests of the national government; it is a novel sight to see 500,000 people struggling to get into the union without being heeded or recognized." Id.
accomplished, ten years later." Congessional unresponsiveness to statehood pleas stemmed from a Democrat-majority Congress which feared the admission of two new states would mean the election of Republican congressmen (which, ultimately, it did) as well as vacillation between a single-state plan versus the two-state plan (which was eventually approved). Prior to statehood, three constitutional conventions were held, the first in 1883, the second in 1885, and the third in 1889. Each produced a state constitution. Although only the third convention was technically legal and only the third text officially adopted, the evolution of the South Dakota State Constitution through the three successive conventions—those of the years 1883, 1885, and 1889—illuminates the final text.

a. The 1883 Constitutional Convention

The statehood movement had its original inception at a small gathering at Reverend Stewart Sheldon's home on Thanksgiving evening, 1879. As a result of the meeting, the attendees resolved to pursue dividing Dakota Territory east-to-west along the 46th parallel and admitting the south half as a state (i.e., South Dakota), leaving the north half as a territory. Following the Black Hills gold rush, sufficient numbers had immigrated to meet the population requirement of 60,000. The statehood idea gathered steam until a delegate convention was called in Canton, South Dakota on June 21, 1882. The convention's product was a bill which was shepherded through the territorial legislature, but then vetoed by the already unpopular Territorial Governor.

274. DEBATES I, supra note 1, at 5.


Between 1881 and 1883, the Republicans held the presidency and both houses of Congress and thus had the opportunity to approve statehood for the Dakotas, but Senator Eugene Hale of Maine objected because of the failure of the city of Yankton to pay off certain railroad bonds (some of the bondholders were in Maine). During the six years following the 1882 elections, the federal government was divided along partisan lines, and thus the Democrats could block statehood for the Dakotas.

LAUCK, supra note 275, at 95-96 (citations omitted).

276. See Catherine Lucie Zumpano Chicoine & Patrick M. Garry, The 1885 and 1889 Constitutional Convention Debates, 59 S.D. L. REV. 179, 179 (2014) (noting that since "[e]ach of the proposed constitutions produced by subsequent conventions built upon the work of previous conventions[,]" deciphering "the intended meaning of provisions in the 1889 Constitution may require a consultation of debates related to similar provisions in previously proposed constitutions").

277. DEBATES I, supra note 1, at 5.

278. Id.

279. GARRY, supra note 232, at 5. In the 1880s, the territory of Dakota "had twice the population of Iowa and Wisconsin when they were admitted to the Union, three times the population of Michigan and California, four times the population of Missouri and Colorado, five times the population of Ohio and Illinois, and six times the population of Indiana and Nevada." LAUCK, supra note 275, at 95.

280. DEBATES I, supra note 1, at 6.
Nehemiah Ordway. The Governor was an “all territory” man and would not support the admission of only the southern half of the territory as a state. Moreover, Ordway’s friendlessness was cemented by his lack of ethics. He was not above bribing legislators or even moving the territorial capital from Yankton to Bismarck as a means to profit from his real estate speculation there. He opposed statehood because it would end his governorship and opportunities for graft. Ordway went so far as to organize a counter-convention in Fargo to delegitimize the genuine convention.

Governor Ordway’s veto “set the prairies aflame” and at town hall meetings across the territory, citizens expressed their indignation. Encouraged by popular sentiment, the executive committee of the statehood movement, known as “The Dakota Citizens’ League,” met in Huron, South Dakota in June of 1883 and called for a constitutional convention for the formation of a state constitution in Sioux Falls in September of that same year. The Huron meeting took place without territorial legislative authorization. One hundred and fifty delegates would be chosen by an August election. The convention convened in Germania Hall in Sioux Falls and was in session for fourteen days. Its product was the Constitution of 1883. Ten thousand copies were printed and distributed to the electorate, including one thousand printed in Norwegian and

281. Id.
282. 1 KINGSBURY, supra note 243, at 1165. “[H]e felt that . . . admission of the whole as one state promised the best and only solution [to the] problem.” Id.
283. LAUCK, supra note 275, at 94. Governor Ordway also “compelled settlers seeking county seats to give him land, [and] installed his son as territorial auditor in order to control finances . . . .” Id.
284. Id. at 96; see also ROBINSON, supra note 16, at 308 (1930) (explaining that as counties were organized and county seats designated during Ordway’s administration, “scarcely one of these escaped a county seat scandal in which the name of the governor, his son or his reputed agents were involved”); Robert E. Reedy, The Administration of Nehemiah G. Ordway, Governor of Dakota Territory 1880-1884 75-78 (Jul. 1935) (unpublished M.A. thesis, University of South Dakota) (on file with the I.D. Weeks Library, University of South Dakota) (noting that for alleged bribery connected to the organization of Faulk County, Ordway was indicted by a Yankton grand jury, but that the indictment was quashed on a technicality). But see Dr. De Lorme W. Robinson, Editorial Notes on Historical Sketch of North and South Dakota, in 1 SOUTH DAKOTA HISTORICAL COLLECTIONS 85, 158 (News Printing Co. 1902) (dissenting that “the governor was accused of using his official power for the purposes of personal gain, but in light of subsequent knowledge it does not seem that these charges were well founded”). “Graft” means “an advantage gained by unscrupulous means.” THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993). Clearly, a significant population of Dakota Territory considered Governor Ordway unscrupulous.
285. LAUCK, supra note 275, at 97. “Less than 50 of the 109 delegates attended the counter-convention, and there were doubts about the credentials of some of the delegates who did appear.” Id. Some even angered Governor Ordway by expressing support for statehood. Id.
286. DEBATES I, supra note 1, at 6. “By bringing together the anti-Ordway and statehood forces, the Ordway veto effectively intensified the statehood movement.” GARRY, supra note 232, at 13.
287. LAUCK, supra note 275, at 111.
289. DEBATES I, supra note 1, at 6.
290. LAUCK, supra note 275, at 112; DEBATES I, supra note 1, at 8. The convention elected Bartlett Tripp, a Democrat, underscoring the nonpartisan efforts of the Republican-dominated group. LAUCK, supra note 275, at 112.
another thousand in German.\(^{291}\) The constitution was submitted to a popular vote in November, 1883, and was approved 12,336 votes to 6,814.\(^{292}\) Article XIV of the 1883 Constitution would have simply provided: "The Legislature shall pass liberal homestead and exemption laws."\(^{293}\) In its final form, the constitutional homestead provision would ultimately find a more detailed and specific expression of the exemption.

b. The 1885 Constitutional Convention

The 1883 convention was unsuccessful in its aims; Congress rebuked the first organized attempt to secure statehood.\(^{294}\) Meanwhile, settlers continued to stream in.\(^{295}\) By 1885, Ordway was gone, replaced by Governor Gilbert Pierce, and the territorial legislature called for a second constitutional convention.\(^{296}\) This time, the idea was for the territory to enter the union as two states, Dakota (the southern half) and Lincoln, or perhaps Pembina (the northern half).\(^{297}\) The second constitutional convention is considered the most important of the three constitutional conventions since the constitution that it produced was largely identical to the one ultimately re-authorized and endorsed by Congress in 1889.\(^{298}\) The second constitution, in turn, relied heavily on the first.\(^{299}\) Delegates to the second convention were elected in June 1885.\(^{300}\) A convention again convened in Sioux Falls’ Germania Hall.\(^{301}\) The convention’s debates were published and although much of the nitty-gritty of drafting occurred at the committee level, the transcribed debates in regards to homestead laws are worthwhile reading.\(^{302}\)

On the sixteenth day of the second convention, the exemption’s committee’s majority and minority reports were introduced.\(^{303}\) The majority report framed a proposed constitutional article based on the Wisconsin

\(^{291}\) LAUCK, supra note 275, at 121.

\(^{292}\) DEBATES I, supra note 1, at 44.

\(^{293}\) Id. at 35.

\(^{294}\) LAUCK, supra note 275, at 122.

\(^{295}\) Id.

\(^{296}\) LAWS OF DAKOTA, ch. 33 (1885); DEBATES I, supra note 1, at 45; LAUCK, supra note 275, at 122.

\(^{297}\) 2 GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY 1724-25 (George Martin Smith ed., 1915). Other suggested names for what became North Dakota included Garfield, Ogalallah, and Isabella. Id. at 1724.

\(^{298}\) GARRY, supra note 232, at 20.

\(^{299}\) See LAUCK, supra note 275, at 122 (noting that many of the articles from the 1883 document were transplanted into the 1885 document).

\(^{300}\) Id.

\(^{301}\) GARRY, supra note 232, at 20; LAUCK, supra note 275, at 122.

\(^{302}\) See Chicoine & Garry, supra note 276, at 180 (noting that "much of the details of the various constitutional provisions were obviously ironed out in the committees, and the Convention delegates as a whole gave great deference to the work of the committees"). A nine member standing committee was devoted to exemptions, real and personal. DEBATES I, supra note 1, at 65.

\(^{303}\) DEBATES I, supra note 1, at 551.
Constitution, exempting the homestead and leaving the legislature to determine a value limitation. Wisconsin’s Constitution provides:

The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted.

Turner County’s delegate explained that “it was thought better to leave this matter entirely to the legislature and let them fix the amount of the exemptions, real and personal, as they think the people demand.” The minority report would have fixed the maximum equity that the Legislature could protect under homestead law at $2,000. Different equity limitations were batted about, from $1,000 to $5,000. One delegate quipped, “I dislike to have the homestead limited to two-thousand dollars first because it might catch me . . . .” A homestead with no upper equity limitation received some support. One delegate claimed that lenders extended mortgage credit at six percent in Illinois and twelve percent in Kansas on account of Kansas’s homestead laws where a home “may be a million dollars and still exempt.” Liberality in homestead exemptions (such as suggested by the text of the first convention) could, in other words, leave citizens with only the option of unsecured loan terms. The delegates acknowledged that, while specifying an upper limit on the homestead exemption might be more in manner of legislating, the object of constitutional drafting “is to limit the legislature.”

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304. Id. at 555.
305. WIS. CONST. art. 1, § 17 (1848) (Wis. Hist. Soc’y 2007).
306. DEBATES I, supra note 1, at 555.
307. See id. at 552 (debating the provision in the minority report regarding limitation on homestead).
308. Id.
309. Id. at 554. Kansas’ constitutional homestead provision read:

A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of any incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of both husband and wife when that relation exists, but no property shall be exempted from sale for taxes or for the payment of obligations contracted for the purchase of said premises or for the erection of improvements thereon, Provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife.

Cusic v. Douglas, 3 Kan. 123, 129-30 (1865) (quoting K.S.A. CONST. art. 15, § 9 (1859)); see also DEBATES I, supra note 1, at 560 (“I believe large exemptions are detrimental to a poor man instead of money loaners.”).

310. DEBATES I, supra note 1, at 557; see also id. at 554-55 (“[I]t is my opinion at least that this body has the power to throw restrictions around the legislature to prevent them from legislating anything which we may regard inimicable [sic] to the credit of the country.”).
The delegates also debated whether homestead protections should be limited to "heads of families." One delegate claimed, "[T]he man who has no wife is to be pitied, and he is entitled to the sympathy of the State. A man that has a wife is worth $1,000 without any other property, and every child about $500..." Another delegate answered, "I am a poor man, and am trying to accumulate some property to get married." A third delegate asked, "[I]n providing for exemptions for heads of families, does it by implication, so far as the right of the Legislature to deny the right to anybody else, so that the poor single wretch might be deprived of his goods[?]" To this, another delegate replied, "It is not meant by this that a man must marry as soon as the sign runs out."

In its final form as adopted by the second constitutional convention, the homestead provision read:

The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws.

The convention adopted the 1885 constitution unanimously. The voters approved it 25,226 to 6,565. Although a state government-in-waiting convened early in December in Huron, the temporary capital, it adjourned without taking any legislative action. Once again, Congress blocked the attempt at statehood.

None of the published debates questioned the scope or availability of descent homestead, nor homestead veto protections. All the debates—and the final text—relate to the homestead exemption (though no delegates seem to have questioned the wisdom of some level of exemption privilege). From this, one might be tempted to draw a conclusion that neither homestead descent nor

311. Id. at 559.
312. Id. at 560.
313. Id.
314. Id.
315. Id.
316. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 73 (1885). The provision was situated at Article XXI, section 4, where it would remain and find permanency in the 1889 Constitution. Of course, homestead protections were not the only policy debate. "Perhaps the most potentially divisive issues arising during the 1885 convention were prohibition and women's suffrage." GARRY, supra note 232, at 23.
317. LAUCK, supra note 275, at 125 (citations omitted). There were no abstentions. Id.
318. Id.
319. Id.
320. Id.
homestead veto rights merit constitutional preservation, but the pre-constitutional history of these protections suggests otherwise. The delegates were familiar with homestead veto and homestead descent rights being statutorily embedded with the homestead exemption privilege.

Reprinted courtesy of the South Dakota Historical Society. William Jayne (Dakota Territorial Governor 1861-63).
Nehemiah Ordway (Dakota Territorial Governor, 1880-1884).

Reprinted courtesy of the South Dakota Historical Society.
Germania Hall (located in downtown Sioux Falls, South Dakota; now demolished).

*Reprinted courtesy of the Minnehaha County Historical Society.*

Delegates to the 1885 Constitutional Convention (standing in the balcony and in front of Germania Hall, along with two boys).

*Reprinted courtesy of the Minnehaha County Historical Society.*
c. The 1889 Constitutional Convention

Between 1878 and 1887, Dakota Territory’s population increased significantly, further intensifying the calls for statehood. In November of 1888, Republicans won the presidency and majorities in Congress, removing the stumbling block that the two previous attempts at statehood had encountered—concern from the ruling Democrats that if two new red states entered the union, they would likely elect Republican representatives to Congress. Benjamin Harrison had defeated Grover Cleveland for the presidency, and Cleveland signed the Omnibus Bill providing for statehood just before leaving office. Along with North Dakota and South Dakota, Washington and Montana were granted statehood. The third Dakota constitutional convention was the first which was actually authorized by Congress. Congress allowed South Dakota to either adopt the 1885 constitution with certain revisions or adopt a new one; the former option was selected. The state essentially re-adopted the 1885 constitution, with just a few amendments. It did not re-make, but simply “patched” a constitution.

With the third constitutional convention, the exemption committee’s report was adopted without additional debate. Section 4 of Article 21 (“Miscellaneous”) of the South Dakota Constitution in its final form reads:

The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal

321. GARRY, supra note 232, at 6.
322. Id. at 26-27; Green, supra note 282, at 532-33.
323. GARRY, supra note 232, at 26-27.
324. LAUCK, supra note 275, at 126. Acting before the new Congress was sworn in, the Democrat-controlled outgoing Congress passed a bill authorizing statehood for Washington, Montana, North Dakota, South Dakota, and New Mexico. Id. After the Republican Senate recognized that the House had slipped in Democratic New Mexico, the House revised the bill to remove New Mexico and the Omnibus Bill passed. Id.
325. GARRY, supra note 232, at 27.
326. Id. (citations omitted); see also DAILY ARGUS-LEADER 1 (Jul. 11, 1889) (explaining that “the delegates to the convention were elected not to make, but to patch a constitution”).
327. Blackburn, supra note 228, at 78; Lotze, supra note 271, at 9. Doane Robinson explains, “The old constitution [(i.e., the 1885 constitution)] was ratified and so when the delegates met in Sioux Falls they had no other business than the division of assets and debts of the territory and to arrange the schedule and ordinance to accompany the constitution.” ROBINSON, supra note 16, at 315.
328. LAUCK, supra note 275, at 127 (quoting To Overstep Limitations, DAILY ARGUS-LEADER 1 (July 11, 1889)). But see Chicoine & Garry, supra note 276, at 189 (quoting Vermillion, (South) Dakota delegate, lawyer, and schoolteacher John L. Jolley who argued for limited deference to the 1885 document in drafting the 1889 constitution by saying, “I do not see for the life of me, why there is to be any value attached to this document, the Constitution of the Convention of 1885, outside of the fact that they did their work and signed it”).
329. 2 SOUTH DAKOTA CONSTITUTIONAL CONVENTION: HELD AT SIOUX FALLS, JULY, 1889 178-79 (Doane Robinson ed., 1907) [hereinafter, DEBATES II].
property, the kind and value of which to be fixed by general laws.\textsuperscript{330}

It was thus unaltered from the version enacted at the second convention. It remains unaltered today. The third convention’s president remarked, at the close of the convention,

I do believe that we can present to the people of South Dakota, when we go home, the best Constitution that was ever submitted to any people. I believe that they will be satisfied with our work, for in every single particular, from the Preamble to the closing sections of the Schedule, the rights and interest of the people have been sacredly guarded . . . . We have guarded their rights so that the Legislature cannot encroach upon them, and it has been the constant effort of every member of the Constitutional Convention to so frame a Constitution that the poorest man in the commonwealth will be equal to the richest, so far as the protection of his rights before the Courts is concerned.\textsuperscript{331}

The seventy-five delegates, gathered in Sioux Falls’ Germania Hall which was festooned with red, white, and blue bunting, adjourned.\textsuperscript{332} Following the third convention’s thirty-three days of debate and drafting, the proposed constitution

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{330} S.D. CONST. art. XXI, § 4 (1889). This is the text as it is currently printed in the first volume of South Dakota Codified Laws, and as it has been printed in numerous editions of the same. It mirrors the 1885 constitution text. See supra, text accompanying note 327. However, the first publication of it by E.B. Myers & Company in 1899 contained a semicolon between the words “laws” and “exempting,” thus:

\begin{quote}
The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws; exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general law.
\end{quote}

S.D. CONST. art. XXI, § 4 (1889), in 1 STATUTES OF THE STATE OF SOUTH DAKOTA 50 (E.B. Myers & Co. 1899). The semicolon also appears in the State Constitution’s reprinting by Pierre, South Dakota’s State Bindery Company within the collection of session laws from the first state legislative session. S.D. CONST. art. XXI, § 4 (1889), in 1890 S.D. Sess. Laws art. XXI § 4, xlv. By the time of the 1903 State Code being collected and the Constitution being reprinted again (this time by the State Publishing Company of Pierre—perhaps the same outfit as the State Bindery Company), the semicolon had disappeared and it has remained absent ever since in subsequent printings of the State Constitution. Compare S.D. CONST. art. XXI, § 4 (1889), in THE REVISED CODES 1903 STATE OF SOUTH DAKOTA 24 (St. Pub. Co. 1903) (displaying no semicolon in 1903), with S.D. CONST. art. XXI, § 4 (1889), in 1 SOUTH DAKOTA CODIFIED LAWS: CONSTITUTIONS HISTORICAL DOCUMENTS 754 (West 2004). Based on this trajectory, it seems reasonable to conclude that the semicolon was dropped inadvertently from the original constitutional text and it ought to be re-inserted. Its omission is not insignificant. Its inclusion clarifies that the preamble phrase (“The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws”) modifies not just the legislative parameters for the homestead exemption, but also the legislative limits of personal property exemptions.

\item \textsuperscript{331} DEBATES II, supra note 329, at 537.
\item \textsuperscript{332} LAUCK, supra note 275, at 87.
\end{itemize}
\end{footnotesize}
was put to the voters for ratification.\textsuperscript{333} On October 1, 1889, the South Dakota Constitution was approved overwhelmingly by a vote of 70,131 to 3,267.\textsuperscript{334} Statehood followed on November 2, with a proclamation signed by President Harrison.\textsuperscript{335} Although there had once been some thought given to whether South Dakota could retain the name “Dakota” and leave North Dakota with a different name (Isabella, perhaps!) in the end both states were allowed to retain the “Dakota” designation.\textsuperscript{336} Arthur Mellette became South Dakota’s first governor.\textsuperscript{337} The sixty words of Article 21, section 4 remain unchanged to this day, although two attempts to revise it were to be made.\textsuperscript{338} Following South Dakota’s admission into the Union as a state, the 1890 legislature reenacted the Territorial statutory framework for homestead laws and pegged the homestead exemption equity limit at a relatively modest $5,000.\textsuperscript{339}

d. Two Failed Attempts at Constitutional Homestead Revision

The first attempt to amend the constitutional homestead provision was undertaken in 1893, when the ink on the original 1889 constitution was hardly even dry. In 1894, a statewide election was held on the question of homestead law contraction. The proposed amendment read:

The legislature shall by general law limit and define the value and size of a homestead of each head of a family which shall be exempt from attachment or mesne process and from levy and sale on execution, and from any other final process issued from any court,

\textsuperscript{333} GARRY, supra note 232, at 29; Chicoine & Garry, supra note 276, at 200; see also Lotze, supra note 271, at 9 (clarifying that the third convention examined the 1885 constitution from July 13 to July 26 and few changes were made except for phraseology which was necessary to conform to the federal Enabling Act).

\textsuperscript{334} GARRY, supra note 232, at 29-30. Two proposed amendments to the constitution were submitted for a separate vote—prohibition and minority representation in the legislature; the first was successful, the second was not. \textit{Id.} at 30.

\textsuperscript{335} \textit{Id.} at 29.

\textsuperscript{336} Green, supra note 282, at 504, 530; 2 KINGSBURY, supra note 308, at 1724. There were, at some point, discussions about carving off a third state for the Black Hills area in Western South Dakota following the 24th meridian west from Washington. Green, supra note 282, at 509. The areas of Northern Dakota, Southern Dakota, and the Black Hills represented “three communities [that] were not connected by settlement, by good wagon-roads, or by railroads.” \textit{Id.} at 505. The northern and southern parts of the territory “soon came to be commonly designated as North and South Dakota . . . .” \textit{Id.} “For many years, residents of southern Dakota had to go to Minneapolis, in order to reach Northern Dakota, and vice versa.” \textit{Id.} “The Black Hills, from the first, had generally acted as a unit.” \textit{Id.} at 506. Its population was composed chiefly of miners “and formed a somewhat shifting population.” \textit{Id.} at 505.

\textsuperscript{337} GARRY, supra note 234, at 29. Governor Mellette would later reflect on the founding principles of statehood, encapsulating nicely the tension inherent homestead protections between paternalism and freedom of choice: “While civil government was instituted to protect the weak against the strong, the shiftless and simple-minded from the avaricious and cunning, it was not intended to defeat God’s first law, that man should live to labor.” \textit{Id.} (quoting Blackburn, supra note 228, at 79-80).

\textsuperscript{338} See supra Part II.D.2.d (discussing two failed attempts at constitutional homestead revision).

\textsuperscript{339} 2 STATUTES OF THE STATE OF SOUTH DAKOTA ch. 86, § 6345 (1899) (in force June 5, 1890).
except upon the foreclosure of a mortgage, or vendor’s lien or liens
for labor done or things furnished in the construction or repair of
any building, erection or other improvement thereon; and shall also
provide for such exemption of a reasonable amount of personal
property. 340

The amendment would have made the exemption ineffective against mortgages,
vendor’s liens, and any mechanic’s lien. 341 The voters rejected the idea in
November, 1894. Eighty-two years later, a proposed constitutional amendment
would have replaced the original homestead provision with a more streamlined
text:

No person shall be imprisoned for debt. The right of the debtor to
enjoy the comforts and necessities of life shall be recognized by
laws exempting homesteads and a reasonable amount of personal
property from forced sale. 342

The amendment would have deleted from the Constitution the words
“wholesome laws” as well as the phrase “the value of which shall be limited and
defined by law to all heads of families.” 343 It was one of a series of state
constitutional amendments, some of which were successful, and others which
were not. 344 State constitutional updates and reforms were common across the
country in the 1970s. 345 One change, approved in 1972, simplified the judiciary
with the creation of the unified judicial system. 346 The homestead proposal,
however, failed, 179,936 voting against and 77,771 voting for the amendment in
1975. 347 Thus, unlike sister states’ constitutional homestead provisions, which
have undergone numerous amendments and changes over the years, South
Dakota retains its original unaltered language from 1889.

340. 1893 S.D. Sess. Laws ch. 39 § 1, 59 (amending, in proposed language, exemptions under
Section 4 of Article 21 of the South Dakota Constitution).
341. See generally R.P.D., Annot., Mechanic’s or materialman’s lien on homestead, 65 A.L.R.
1192 (1930); J.E.K., Annot., Who are within constitutional or statutory provisions subjecting homestead
to claims of laborers, servants, or the like, 114 A.L.R. 767 (1938). In Texas, a mechanic’s lien against
the homestead is valid only if the owner (or both spouses, if the owner is married) signs a written and
recorded instrument prior to any work being done. JOE F. CANTERBURY, JR. AND ROBERT J. SHAPIRO,
342. 1975 S.D. Sess. Laws ch. 3 § 18, 25. The proposal was the product of a Constitutional
Revision Commission created by the South Dakota Legislature in 1969 with the aims of simplifying and
improving the constitution. GARRY, supra note 232, at 34.
343. 1975 S.D. Sess. Law ch. 3 § 18, 25.
344. GARRY, supra note 232, at 34-39.
345. Id. at 37. “[A]s of 1970, the South Dakota Constitution was the thirteenth longest of the state
constitutions.” Id. at 35.
III. CONCLUSION

The constitutional homestead echoes with the same values which resonated in an era of telegraphs and steam engines, perhaps suggestive of Jacksonian democracy. The debtor—every debtor—has been given a right "to enjoy the comforts and necessaries of life." This right, the constitution ensures, must be codified in the form of wholesome laws which exempt homesteads from involuntary sale. Enacted by the popular vote of the eligible electorate in 1889 following twenty-seven years of experience with homestead exemption protections in territorial statute form, it represented majoritarian preferences then and limits the power of the legislature today. The country then "was new and raw, and in the process of settlement by homesteaders." Presumably, those preferences are essentially unabated today. The homestead takes shape as an exemption defined with reference to both acreage and equity, a veto power against unilateral spousal alienation, and a descent right to spouses and minor children. Further definition has been added and subtracted over the decades with successions of legislation and judicial gloss, while the constitutional command has remained unmoved and seemingly unmovable.

The two-word term "asset protection" did not exist in the era in which the South Dakota homestead first took shape. Today, it is ubiquitous. Moreover, asset protection is today often condemned, at least by scholars. It is seen as


350. Id.

351. This effect in popular democracy where the sovereign people (in the form of an eligible and participating electorate) bind not only themselves but future generations to their will is highlighted by Neal Curtis:

[T]his is akin to a central problem with the constitution of democratic sovereignty which must appeal to a specific demos—a particular people, living in a particular historical moment, who determine the nature of the law based on what they feel is right and best preserves what they feel is good—and yet at the same time it must claim a connection to a deeper sense of legitimacy, rooting those laws in a more substantial foundation that exceeds them.

NEAL CURTIS, SOVEREIGNTY AND SUPERHEROES 13 (2016).


“hiding assets” or “playing games.” 355 The homestead is not a typical or common variety of asset protection planning. 356 South Dakota is often seen as one of the states at the vanguard of asset protection permissiveness, a policy that is justified by virtue of supporting its trust industry. 357 Indeed, South Dakota is arguably enacting cutting edge asset protection legislation for the same reason Texas originally enacted homestead exemptions—to attract individuals and their wealth and industry to their state. 358 It is difficult to find scholars defending the moral justifications of asset protection. 359 Those justifications for the

355. Randall H. Borkus & Barry L. Kohler, Asset Protection Planning, J. RETIREMENT PLAN. 13, 13 (Jan.-Feb., 2010); see also John K. Eason, Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection, 27 CARDOZO L. REV. 2621, 2682 (Apr. 2006) (describing “an environment where ‘gaming the system’ through asset divestment or other means of preserving wealth . . . ” has become the norm); Anup Malani, Valuing Laws as Local Amenities, 121 HARV. L. REV. 1273, 1294 (Mar. 2008) (asserting that “a more liberal homestead exemption may cause residents to hide more of their worth in homes to protect that worth from creditors”); Robert H. Sitkoff & Max M. Schanzhenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356, 384 (Nov. 2005) (taking note of “anecdotal evidence that, in the face of rising premiums, some doctors have opted to drop their malpractice insurance altogether in favor of moving their assets into [asset protection trusts]”); Barry A. Nelson & Kevin E. Packman, Florida’s Unlimited Homestead Exemption Does Have Some Limits, 77 FLA. B. J. 60, 60 (Jan. 2003) (explaining that detractors of Florida’s unlimited homestead exemption view it as a “legal loophole”); Stewart E. Sterk, Asset Protection Trusts: Trust Law’s Race to the Bottom?, 85 CORNELL L. REV. 1035, 1117 (May 2000) (arguing that, if the growth of states allowing asset protection trusts continues, “incarceration may well be the only available brake any individual government has on trust law’s international race for the bottom”). Indeed, some critics view asset protection trusts as “sleazy.” “What has occurred in our society to move asset-protection trusts out of the world of sleazy devices for cheating one’s creditors and into the world of seemingly legitimate planning devices that bear the innocuous label ‘asset-protection?’” Karen Gebbia-Pinetti, As Certain as Debt and Taxes: Estate Planning, Asset-Protection Trusts, and Conflicting State Law, 85 ADVANCED ESTATE PLANNING TECHNIQUES, ALI-ABA Course of Study, WL SC60 ALI-ABA Course of Study, WL SC60 ALI-ABA Course (Feb. 19, 1998). Borkus and Kohler explain that asset protection “is planning designed to protect some portion of the client’s nest egg in the event of an unforeseen disaster, usually a legal disaster.” Borkus & Kohler, supra note 355, at 13. “The amount to be protected is typically between 20-30 percent of total net worth; a sufficient amount of money to start over or to assure a sound retirement.” Id.

356. See JAY D. ADKISSON & CHRISTOPHER M. RISER, ASSET PROTECTION: CONCEPTS & STRATEGIES FOR PROTECTING YOUR WEALTH 96 (2004) (stating that “the homestead exemption in many states is so small as to be useless for asset protection planning . . . ”). Adkisson and Riser continue by recommending that “if the value of the home exceeds the exemption amount, the equity in the home should be stripped out by encumbering the home with an additional bank or finance company mortgage (or perhaps with a private mortgage from a client’s business entity, preferably a protected entity, such as an asset leasing company).” Id. at 97. In South Dakota, the strategy of equity stripping by use of a mortgage held by a business entity is unavailable unless formal licensing is obtained. See S.D.C.L. § 54-14-25 (Supp. 2016) (explaining an individual who engages as a mortgage consultant without a license is guilty of a misdemeanor).

357. See Robert T. Danforth, Rethinking the Law of Creditors’ Rights in Trusts, 53 HASTINGS L.J. 287, 287 (2002) (noting that “several states, most notably Alaska and Delaware, have enacted legislation to facilitate the creation of so-called asset protection trusts (APT’s), which allow trust setters to shelter their assets from the claims of most creditors”); Joseph M. Dylla, A Case for the Adoption of the Revised Uniform Limited Liability Company Act in South Dakota, 56 S.D. L. REV. 285, 313 (2011) (“South Dakota is already one of the leading asset protection jurisdictions in the United States.”).

358. See Korff, supra note 39, at 443-39 (explaining how homestead protections functioned as a marketing tool to attract settlers). Texas paid for “advertisements targeted toward settlers, and these advertisements drew attention to its exemption laws.” Hynes et al., supra note 41, at 23.

359. But see John E. Sullivan III, Future Creditors and Fraudulent Transfers: When a Claimant Doesn’t Have a Claim, When a Transfer Isn’t a Transfer, When Fraud Doesn’t Stay Fraudulent, and
homestead, however, are deeply historical, even though it leaves the debtor with control and enjoyment of an asset which is exempt from creditor claims. The relatively conservative equity protection accorded by the South Dakota homestead exemption concededly impairs the full functionality of its aims, but that, too, is consistent with historical precedent. South Dakota has typically taken a modest approach to homestead exemption equity caps. Conceding, further, that exemptions deprive or diminish a property owner’s right to encumber their home and thereby impair the availability of credit, this may not be entirely a bad thing. Some constrains on a freewheeling consumer credit market are not necessarily harmful.

The homestead privilege is more than historical artifact. It finds current policy support, bracketed as it now is by other varieties of asset protection with regards to retirement savings, business entities, and trusts. The aim of security for citizens is no less compelling today than it was when individuals of European ancestry began to pour across the Big Sioux and Missouri Rivers into Dakota Territory in 1859. Protecting the sanctity of the family and its bonds has not grown old-fashioned. Cushioning the citizen against destitution has not yet become outmoded. The homestead was, and is, “wholesome.” The South Dakota Constitution both confirms it—and requires it. In a forthcoming

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Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner, 22 DEL. J. CORP. L. 955, 1049 (1997) (“Asset protection planning is not inherently fraudulent . . .”).

360. Just why the ability of a debtor to enjoy or control property which is exempt from forced sale is unclear, but it seems to resonate with critics of asset protection. See Lischer, supra note 354, at 536 (asserting that “the APT is objectionable because it would encourage the establishment of a trust for the purpose of avoiding the payment of lawful debts of the very person who established the trust and who has a continuing beneficial interest in, or control over, the trust property”). See generally, Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 WASH. U. L.Q. 1 (1995) (exploring public policy issues inherent in asset protection).

361. Allen Wilson explains:

[A] person’s home is often the biggest asset a consumer purchases during her life. It often contains a significant portion of the consumer’s savings. Using home equity to provide access to those savings is a very justifiable goal. But, short-sighted consumer and lender speculation can have very serious consequences. The Texas homestead scheme served the regulatory function of helping to prevent a significant amount of consumer and lender speculation. This helped insulate the Texas residential real estate market from the rise and collapse of home values and the wave of residential foreclosures, which many other jurisdictions experienced.

Allen Wilson, Note, More Than Just a Boon to Wealthy Debtors: How Texas Homestead Law Helped Insulate Texas From the Foreclosure Typhoon, 64 BAYLOR L. REV. 999, 1041-42 (2012). “The possible difficulty in collecting on the claim might cause prospective creditors to exercise greater prudence in evaluating the credit risk associated with a prospective debtor.” Lischer, supra note 354, at 534. “Given the relatively cavalier manner in which some unsecured consumer credit is extended, greater prudence in extending credit may inure to the public good by reducing credit losses.” Id.

362. S.D. CONST. art. XXI § 4 (1889); see also, e.g., Law v. Siegel, 134 S.Ct. 1188, 1197-98 (2014) (holding that a debtor’s misconduct is not grounds for disallowing a debtor his exemptions even when it places a heavy burden on creditors).

extension of this article, I intend to summarize the judicial interpretations of South Dakota’s constitutional command of wholesome homestead laws.364

IV. APPENDIX

A. 1862 TERRITORIAL HOMESTEAD STATUTES

AN ACT EXEMPTING PROPERTY FROM EXECUTION, WRIT OF ATTACHMENT, OR ANY OTHER FINAL PROCESS OF A COURT.

Be it enacted by the Legislative Assembly of the Territory of Dakota:

SECTION 1. That a homestead, belonging to any man or woman resident in this territory, consisting of not more than eighty acres of land, and the dwelling-house and other improvements and appurtenances situated thereon convenient for a homestead, to be selected by the owner thereof, and not included within any incorporated city or village, or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one acre, being within an incorporated city, town, or village, and the dwelling-house thereon and its appurtenances, shall not be subject to attachment or mesne processes, or [levy], or sale upon execution, or any other process issuing from any court within this territory. This section shall be construed to exempt such homestead in the manner aforesaid, during the time it shall be owned or occupied by the widow or minor child or children of any deceased person, who was, when living, entitled to the benefit of this act.

SECT. 2. Such exemption shall not extend to any mortgage thereon, but such mortgage of said homestead or any part thereof by the owner if he be a married man, shall not be valid unless the wife join in said conveyance.

SECT. 3. Whenever any levy shall be made upon the lands or tenements of a householder whose homestead has not been selected out or set apart by metes and bounds, such householder may notify the officer at the time of making such levy of what he regards as his homestead, with a description thereof, within the limits above

364. That article is tentatively titled Homestead: A (New) Hope and is tentatively slated for publication in the next volume of the South Dakota Law Review.
described, and the remainder alone shall be subject to sale under such levy.

SECT. 4. If the plaintiff in execution be dissatisfied with the quantity of land selected and set apart as aforesaid, the officer making the levy shall cause the land to be surveyed, beginning at a point to be designated by the owner, and set apart in compact form, including house and other buildings and improvements, to the amount specified in the first section of this act. The expense of said survey shall be paid by said plaintiff.

SECT. 5. After the survey shall have been made, the officer making the levy, may sell the property levied upon, and not included within the set-off, in the same manner as is provided by law in other cases for the sale of real estate in execution; and in giving a deed he shall describe the same fully by metes and bounds.

SECT. 6. Any person owning several houses situated upon the same or different lots of land within this territory, may select either one of said houses and lots as a homestead, that he may see fit, and the same shall be exempt as aforesaid, and every person occupying a home not his own, and owning a homestead as hereinbefore described, shall be entitled to the exemption aforesaid.

SECT. 7. Nothing in this act shall exempt any real estate from sale in payment for taxes.

SECT. 8. All property hereinafter mentioned shall be exempt from attachment or mense process, or levy of execution, or any other final process issued from any court.

1. All family pictures.
2. All miscellaneous books and musical instruments for use of family not exceeding five hundred dollars in value.
3. A seat or pew in any house of worship.
4. A lot or lots in any burial-ground.
5. All wearing apparel suitable to the condition of the debtor and his family.
6. All household furniture used by the debtor and his family, not exceeding five hundred dollars in value, and in case the debtor shall own more than five hundred dollars’ worth of furniture, he shall select such as may be deemed most useful to himself and family, leaving the balances subject to legal process.
7. Three cows, ten swine, one yoke of oxen, or two yoke of oxen or a span of horses or mules, one hundred sheep and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned, for one year’s support either provided or growing, or both as the debtor may choose; also one wagon, one sleigh, two ploughs, one harrow, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

8. The provisions for the debtor and his family, necessary for one year’s support, either provided or growing or both, and fuel necessary for one year.

9. The tools and instruments of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding two hundred dollars in value. The library and implements of any professional man, not exceeding six hundred dollars in value, all of which articles hereinbefore exempt shall be chosen by the debtor, his agent or legal representatives, and whenever the articles are limited in value, they shall be [appraised] at the usual price of such articles at sheriff sale as near as can be.

SECT. 9. Nothing in this act shall be so construed as to exempt any property in this territory from execution for clerks’, laborers’, or mechanics’ wages.

SECT. 10. This act shall take effect from and after its passage.

Approved May 12, 1862.

W. JAYNE,
Governor.

B. 1877 TERRITORIAL HOMESTEAD STATUTES

HOMESTEAD AND THE CONVEYANCE THEREOF

§ 1. EXEMPT FROM JUDICIAL SALE OR JUDGMENT.] The homestead of every family resident in this territory, as hereinafter defined, whether such homestead be owned by the husband or wife, so long as it continues to possess the character of a homestead, shall be exempt from judicial sale, from judgment lien, and from all mesne or final process issued from any court.

365. 1862 Dak. Sess. Laws ch. 37 §§ 1-10, 299-301 (bracketed additions in original).
§ 2. FAMILY DEFINED.] A widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife.

§ 3. CONVEYANCE OF, LIMITED.] A conveyance or incumbrance by the owner of such homestead, shall be of no validity unless the husband and wife, if the owner is married and both husband and wife are residents of the territory, concur in and sign the same joint instrument.

§ 4. LIABLE FOR ITS TAXES ONLY.] The homestead shall be liable for taxes accruing thereon, and if certified and recorded as hereinafter directed, shall be liable only for such taxes, and shall be subject to mechanics’ lien for work, labor or material done or furnished exclusively for the improvement of the same, and the whole or a sufficient portion thereof may be sold to pay the same.

§ 5. LIABLE FOR PURCHASE MONEY.] The homestead may be sold for any debt created for the purchase thereof.

§ 6. MUST EMBRACE RESIDENCE.] The homestead must embrace the house used as a home by the owner thereof, and if he or she has two or more houses thus used at different times and places, such owner may select which he or she will retain as a homestead.

§ 7. EMBRACE ONLY CONTIGUOUS TRACTS.] It may contain one or more lots or tracts of land with the buildings thereon and other appurtenances, subject to the limitations contained in the next section, but must in no case embrace different lots and tracts unless they are contiguous, or unless they are habitually and in good faith used as part of the same homestead.

§ 8. AREA EMBRACED.] If within a town plat it must not exceed one acre in extent, and if not within a town plat it must not embrace in the aggregate more than one hundred sixty acres.

§ 9. BUILDINGS EMBRACED—DEFINED.] It must not embrace more than one dwelling house or any other buildings except such as are properly appurtenant to the homestead as such, but a shop, store or other buildings situated thereon and really used and occupied by the owner in the prosecution of his own ordinary business, may be deemed appurtenant to such homestead.
§ 10. SELECTION AND MARKING. The owner, or the husband or wife may select the homestead, and cause it to be marked out, and platted and recorded as provided in the next section. A failure in this respect shall not leave the homestead liable, but the officer having the execution against the property of such a defendant may cause the homestead to be marked off, platted and recorded and may add the expense thence arising to the amount embraced in his execution.

§ 11. HOW MARKED AND DESCRIBED. The homestead shall be marked off by fixed and visible monuments, unless the same shall embrace the whole of a subdivision or lot, and in giving the description thereof when marked off as aforesaid, the direction and distance of the starting point from some corner of the dwelling house shall be stated. The description of the homestead, certified and acknowledged by the owner, shall be recorded by the register of deeds of the property county in a book to be called the "homestead book," which shall be provided with a proper index.

§ 12. CHANGE OF HOMESTEAD—LIMITATIONS. The owner may from time to time change the limits of the homestead by changing the metes and bounds as well as the record of the description or may change it entirely; but such changes shall not prejudice conveyances or liens made or created previously thereto; and no such change of the entire homestead made without the concurrence of the husband or wife, shall affect his or her rights or those of the children.

§ 13. NEW HOMESTEAD EXEMPT. The new homestead shall in all cases be exempt to the same extent and in the same manner as the old or former homestead was exempt.

§ 14. DISPUTED HOMESTEAD. When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, it shall be competent for the district court, in any proper case, to determine such question, and all questions relating thereto.

§ 15. ORDER OF SUCCESSION THERETO. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead, until it is otherwise disposed of according to law; and, upon the death of both husband and wife, the children
may continue to possess and occupy the whole homestead until the youngest child becomes of age.

§ 16. DESCENDS FREE OF DEBT.] Such homestead shall descend according to the law of succession as provided in the civil code, unless otherwise directed or disposed of by will, and shall be held exempt from any antecedent debt of the parent, and, if it descend to the issue of either husband or wife, it shall be held by such issue exempt from debts of such husband or wife, except as in the following section provided.

§ 17. IF NO SURVIVOR, LIABLE FOR DEBT.] And if there be no husband or wife surviving, and no issue, the homestead shall be liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.

§ 18. LIMITATIONS ON DEVISE.] Subject to the rights of the surviving husband or wife, as declared by law, the homestead may be devised like other real property of the testator.

§ 19. FAMILY FURTHER DEFINED.] Every family, whether consisting of one or more persons, in actual occupancy of a homestead, as defined in this chapter, shall be deemed and held to be a family within the meaning of this chapter.366

C. 1877 TERRITORIAL HOMESTEAD PROBATE PROVISIONS

Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age.367

The homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the law relating to homesteads.368

367. Id. Probate Code ch. 5, § 128.
368. Id. § 131.