Homestead: A (New) Hope

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THOMAS E. SIMMONS†

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ABSTRACT

A finely-tuned balancing of the free functioning of private and commercial enterprise against a family’s interests in shelter and a home is at the heart of homestead exemption laws. In South Dakota’s history, this balancing act has been displayed over a 145-year history in the form of legislative enactments, judicial decisions, and referendums. This history illuminates the expression of values against the dynamics of rule-making. A previously published article in this review, Prequel to Homestead, outlined South Dakota’s homestead laws under the contemporary statutory framework and also considered the constitutional history of homestead laws leading up to South Dakota’s becoming a state in 1889. This article picks up where the prior article left off and presents judicial decisions dealing with the constitutional ambits of the homestead exemption beginning in 1889 and continuing through today. It concludes with an assessment of an unresolved homestead issue in the context of asset protection: whether a trust-owned or entity-owned home qualifies for homestead protection rights.

The policy of the law is to preserve a home for the family even at the sacrifice of just demands.1

I. INTRODUCTION

In 1946, the Dean of the University of South Dakota School of Law, Marshall McKusick, typed (or had typed for him) a monograph titled The Historical Evolution of the Homestead Exemption in South Dakota.2 I discovered a copy—perhaps the only copy—in the basement stacks of the McKusick Library at that same law school. The thirteen-page, typed monograph, as is stated on its cover page, was written “for teaching purposes.”3 If one counts back to the birth of Dakota Territory in 1861, Dean McKusick’s 1946 monograph covers eighty-five years of homestead law in South Dakota.4 The aim of this article is to update his monograph and include the last seventy-two years of South Dakota homestead law. In my previous article with this review, Prequel to Homestead, I unpacked the pre-statehood statutory history and constitutional debates leading up to 1889—

1. MARSHALL MCKUSICK, THE HISTORICAL DEVELOPMENT OF THE HOMESTEAD EXEMPTION IN SOUTH DAKOTA 1 (1946). Due to its limited public availability, Dean McKusick’s monograph will be published with this review after 2021.

2. MCKUSICK, supra note 1, cover page. Marshall McKusick joined the academy at the University of South Dakota School of Law in 1902. Id. He later became Dean of the institution (serving for forty years), and he continued to teach. Id. For other published scholarship on South Dakota’s homestead laws, see generally Thomas E. Simmons, Prequel to Homestead, 62 S.D. L. REV. 327 (2017) (exploring the history leading up to South Dakota’s homestead laws); 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 (2014) (explaining South Dakota’s property-exemption statutes, their history, and recent cases); Fred Winkler, Comment, Creditors And the South Dakota Homestead Exemption, 17 S.D. L. REV. 483 (1972) (studying the effect of South Dakota homestead exemption on the creditor).

3. MCKUSICK, supra note 1, at 1.

4. Id.
the year in which South Dakota became a state and enacted its constitutional homestead provision. Here, I aim to complete a historical assessment of South Dakota’s homestead exemption, focusing upon the state constitutional developments of the homestead right after 1889 in published decisions of the South Dakota Supreme Court.

Following a reconstruction of that narrative, this article assesses current homestead law. The homestead exemption protects shelter as a fundamental human need. It defines that protection in terms of a “family,” broadly conceived. While the basic requisites for shelter are unchanged since 1889 (advancements in engineering, technology, and design aside), the idea of a family has been more dynamic. The state constitutional framework for homestead laws, meanwhile, has remained static. The primary thrust of this article discusses the history, evolution, and scope of South Dakota’s homestead laws in a state constitutional context as interpreted by the South Dakota Supreme Court. It concludes with an assessment of layering asset protection strategies—a trust or a limited liability entity—with homestead protections.

II. DISCUSSION

A. SOME CONTEXT AND SOME DEFINITIONS

Homestead rights secure a family’s shelter against financial misfortune. The law achieves this aim, perfectly or imperfectly, in three primary ways; first, by suspending creditor remedies against the homestead res. The rights of a homeowner’s creditors are impaired so as to better secure the use of the home by its owner. There is an element of protectionism at work here, to be sure.

5. See generally Simmons, supra note 2 (discussing the history of South Dakota homestead laws).
6. See infra Part III (summarizing and analyzing homestead provision caselaw since 1889).
7. See S.D. CONST. art. XXI, § 4 (1889) (requiring homestead recognition “by law, to all heads of families”).
9. See infra Parts III.A-S (summarizing the history of homestead caselaw in South Dakota).
10. See infra Part IV (defining homestead “owner” in new contexts such as trusts and LLCs).
11. E.g., GMAC Mortgage, LLC v. Arrigo, 8 N.E.3d 621, 625 (Ill. Ct. App. 2014) (noting that the homestead exemption “secures to the homesteader ‘a shelter beyond the reach of his improvidence or financial misfortune’”) (citation omitted).
12. S.D.C.L. § 43-31-1 (Supp. 2017); see also In re Dependency of Schermer, 169 P.3d 452, 465 (Wash. 2007) (quoting Pinebrook Homeowners Assoc. v. Owen, 739 P.2d 110, 113 (Wash. Ct. App. 1987)) (“The homestead act implements the policy that each citizen have a home where the family may be sheltered and live beyond the reach of financial misfortune.”).
Otherwise rightful creditor rights give way in favor of securing an individual's or family's home against financial catastrophe.\(^\text{13}\)

Secondly, homestead rights aim to shelter the marital relationship by suspending unilateral alienation rights.\(^\text{14}\) One spouse, acting without the other, can neither mortgage nor convey the homestead.\(^\text{15}\) Both spouses must join the conveyance or mortgage in order for the act to be effective. The prohibition of unilateral spousal alienation rights ensures that spouses either act in concert with regards to their homestead or not at all.\(^\text{16}\) The prohibition advances the aim of providing stability to the marital relationship.\(^\text{17}\) This second aim overlaps with the first and is typically given less importance by courts and commentaries.\(^\text{18}\) Its application is more limited than the first because, while homestead creditor rules apply to any homeowner (including single persons), the marital-related protections only apply to a married owner.\(^\text{19}\)

Third, and decidedly least important (or at least less commonly litigated), homestead descent rights allow a surviving spouse and minor children to continue to reside in the family home following the owner's death, free from claims by other heirs or creditors.\(^\text{20}\) These survivorship rights help protect the family

\(^{13}\) See Russell v. Black, No. 992397, 2000 WL 1473468, at *3 (Mass. Sup. Aug. 1, 2000) (observing "that the very purpose of the homestead laws is to allow homeowners (and, in particular, elderly and disabled homeowners) to protect their homes from the reach of creditors").


\(^{15}\) S.D.C.L. § 43-31-17 (2004); Crawford v. Carter, 37 N.W.2d 241, 245 (S.D. 1949); see also McGhee v. Wilson, 20 So. 619, 621 (Ala. 1896) (holding a husband’s unilateral grant of an easement over the homestead was invalid without his wife’s consent).

\(^{16}\) See Brattleboro Savings & Loan Assn. v. Hardie, 94 A.3d 1132, 1140 (Vt. 2014) (Bent, J., concurring) (explaining “the prohibition against unilateral spousal alienation of the marital homestead [and] ‘the purpose of ‘joinder’ statutes such as this, which are part of virtually every state’s homestead laws, is not only to protect the financial interests of the family, but in particular to protect the nonsigning spouse from unilateral alienation of the homestead by the conveying spouse’”) (citations omitted).

\(^{17}\) Cf. Sawada v. Endo, 561 P.2d 1291, 1297 (Haw. 1977) (emphasizing, in holding that tenancy by the entirety property enjoys asset protection features as to the creditors of only one of the spouses, that “were we to select between a public policy favoring the creditors of one of the spouses and favoring the interests of the family unit, we would not hesitate to choose the latter”).

\(^{18}\) See also Robert B. Chapman, Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy, 76 AM. BANKR. L.J. 347, 429 n.439 (2002) (explaining: “A rule requiring spouses to bargain over—or even communicate about—intrafamily resource allocation would stand in interesting contrast to constitutional pronouncements about legal rules affecting the private ordering of interspousal communication”). For example, in Planned Parenthood v. Casey, “[a]lthough the Court acknowledged the need of minors for adult advice and the interests of parents in the welfare of their children, the Court rejected the argument that the state ‘has an interest in protecting the independent right of the parents’ to determine and strive for what they believe to be best for their children.”’ Id. quoting Planned Parenthood v. Casey, 505 U.S. 833, 895-98 (1992). Chapman continues: “One might try to distinguish cases of family and reproductive rights from cases involving economic or property rights.” Id. “But the two are related, as the Court observed in Casey, 505 U.S. at 893, and as indicated by bankruptcy decisions balancing economic rules against reproductive rights, the right to marry, and the discharge of parental responsibilities. Id. (citations and internal citations omitted).


homestead even after the chief breadwinner’s death.21 The aim with this third protection is clear: securing a surviving family’s continuing right to shelter.22 It overlaps to some degree with the first two aims.

Several related objectives are bundled in the justifications for the overall aims of homestead laws—securing a family’s shelter against financial misfortune.23 Homestead protections seek to ensure a basic human necessity: shelter from the elements; protection of life and safety.24 This aim is achieved largely by sheltering the home res from creditors. Because shelter is a fundamental human need, it might even be argued that homestead laws represent as a peculiar variety of human rights legislation.25 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 governments and communities caused by homelessness or excessive vacancies.26 The withholding of basic needs such as safety might lead to increased criminality and lawlessness, creating even more demands on government resources.27 Depending on the scope of exception creditors to the homestead, the exemption might also be characterized as a kind of consumer protection law, preventing the owner from overextending her credit since it deters


22. E.g., Chames v. DeMayo, 972 So.2d 850, 853-54 (Fla. 2007) (emphasizing: “The public policy furthered by a homestead exemption is to ‘promote the stability and welfare of the state by securing to the household a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.”) (citation omitted).

23. E.g., Engstrom’s of Alexandria, Inc. v. Vaughn, 138 So.2d 672, 600 (La. Ct. App. 1962) (noting that the object of a homestead exemption “is to secure a home beyond the reach of financial misfortune, around which gathers the affection of the family, the greatest incentive to virtue, to honor, and to industry” on the theory that the protection of the family is of at least as paramount importance to the state as the payment of debts”) (citation and internal citation omitted).

24. E.g., Kleinert v. Lefkowicz, 259 N.W. 871, 873 (Mich. 1935) (noting that Michigan’s constitutional homestead exemption “was to preserve the home for the family, even at the sacrifice of the just demands of creditors, for the reason the preservation of the home was regarded as of paramount importance”).

25. See Johnson v. Newberry, 267 S.W. 476, 481-82 (Tex. Ct. App. 1924) (reasoning that “if a home is not to be classed as a necessary, then we would be compelled to say that the Constitution has thrown greater safeguards around a thing unnecessary and inappropriate for a married man than it has about almost any other subject of human rights”).


27. Arguably, expansive homestead exemption protections would reduce homelessness caused by foreclosures so long as—as is generally the case—mortgagees qualify as exception creditors, so as to not deter the lending of money to purchase a home in the first place. See Hickman v. Long, 150 N.W. 298, 299 (S.D. 1914) (explaining a homestead exception for the purchase money mortgage). If homestead exemptions defeat the ability of a mortgagee to foreclose, home lending will be made less available to low-income households and the frequency of home ownership will be reduced. If homestead exemptions only defeat the ability of judgment lienholders to force a sale of the homestead, the availability of home loans will be unaffected but the likelihood of a forced sale of a home will be reduced. Thus, both home purchasing and home retention will be maximized. In fairness, the availability of unsecured consumer credit will be negatively impacted by exempting the homestead from judgment lienholders, but homestead law is focused on protecting a family’s shelter, not their big screen televisions.
creditors from relying on the ability to recover an unpaid debt from a homestead property. 28

The secondary aims of homestead laws sketched above—protecting spouses by rejecting unilateral alienation attempts and ensuring shelter in the form of occupation rights for a surviving spouse and minor children—coincide with the first aim, with the additional hoped-for benefit of helping ensure the integrity and cohesion of an owner’s family. 29 Interestingly, then, homestead laws are located at an intersection of typically conservative political values (protecting the traditional nuclear family and the sanctity of marriage) and traditionally liberal political values (governmental paternalism and consumer protection). 30 The debtor is in part protected from his own natural tendency to overspend, while at the same time, the solidity of his marital relationship and the sheltering of his offspring are reinforced by the state. 31 Homestead laws thus represent a unique combination of consumer protection and traditional family values legislation.

To match up with these aims, three varieties or subtypes of homestead laws must be recognized and labeled. First, the “homestead exemption” describes the inability of creditors to force a sale of one’s home. 32 Second, the requirement that both spouses join a conveyance of the homestead property I will label the “homestead veto.” 33 Third, the inheritance characteristics of a homestead


29. See In re Davis, 329 F.Supp. 1067, 1071 (E.D. Mich. 1971) (reasoning “that the overriding purpose of the homestead exemption is to protect the family as a whole rather than the separate members as individuals”).

30. See also Johnson v. Newberry, 267 S.W. 476, 481 (Tex. Ct. App. 1924) (reasoning that in acting homestead exemption laws “it must be assumed that the framers of the Constitution believed that the ownership of a home was not only reasonably appropriate for a married man but of value to the state as well”).

31. The pleas of John D. Pierce, a member of the 1850 Michigan Constitutional Convention combine the emphasis on traditional family values with consumer protection aims:

The homestead should be free, inviolate. No man-no woman-no child-no family should be driven from home, because the hand of adversity presses hard upon them. The measure is so accordant with the real spirit of progress, so just in itself, so wisely expedient in all exigencies to which families are liable, so alleviating when ill fortune bears them down, and so consonant with the popular sentiment and the principles of true Christian morality, that no power on earth can prevent its universal adoption, and they shall sit every man under his vine and fig tree. It is the high duty of the State to throw around every homestead, every fireside, every hearth-stone, the shield of its protection.

Kleinert v. Lefkowitz, 259 N.W. 871, 873 (Mich. 1935). “Substantially similar sentiments were expressed by other members of the Convention.” Id.


property when an owner is survived by a spouse or minor children—these inheritance or survivorship rights I will call the "homestead descent." 34

As the reader is now beginning to suspect, the term “homestead” in these various legal contexts can prove slippery. 35 Even more generally, when referring to this bundle of different characteristics of homestead rights, the use of the term can be troublesome. “Homestead” in a general sense typically refers to the extent and contours of the exemption from creditor claims or, alternatively, the characteristics of property itself which qualifies as a homestead. In these senses, the homestead means a privilege or bundle of defined rights and limitations in regards to certain realty. 36 Alternatively, the term can simply refer to that parcel of realty which may enjoy these characteristics. 37 Here, I will call the exemption and its characteristics the “homestead right” or “homestead privilege” and the res itself the “homestead property.” 38

B. OUR STORY SO FAR

The starting point for the legal history of South Dakota is April 19, 1858. 39 On that date, the federal government entered into a treaty with the Yankton Sioux tribe. 40 The Yankton Sioux agreed to withdraw to a 400,000 acre reservation tract in present-day Charles Mix County. 41 The tribe ceded an enormous, triangle-shaped swath of land in exchange for a fifty-year annuity of $1.6 million. 42 Later that same year, a convention resolved to elect a provisional body to petition

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34. See S.D.C.L. § 43-31-15 (2004) (outlining the homestead rights of surviving spouses and minor children). Dean McKusick called this third variety of homestead rules the "probate homestead." McKusick, supra note 1, at 11.

35. The terminology hazards connected with homestead discussions are articulated in Justice Clark’s dissent to the nineteenth century decision of Vanstory v. Thorton:

There is a distinction between the homestead and the homestead right. The former is the lot of land exempted from sale. The latter is the right to have it exempted; to use and occupy it free from molestation. The former the constitution permits to be conveyed, but only with the wife’s assent and privy examination. The latter cannot be conveyed to another. It does not pass by a conveyance of the land. It is not property, but a personal privilege, extending in certain cases to the minority of the children and the widow. An inadvertence of expression in some of the opinions as to this distinction has led to some confusion and misapprehension.

Vanstory v. Thorton, 17 S.E. 566, 569 (N.C. 1893) (Clark, J., dissenting). While the homestead descent is inalienable and nontransferable, this does not necessarily mean that a homestead is not "property." The rightful occupants enjoying a res pursuant to homestead descent rights have the right to eject trespassers and, in that sense, they have property rights in their homestead.

36. Wisner v. Pavlin, 2006 SD 64, ¶ 21, 719 N.W.2d 770, 779. 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 . . .").


38. I will use the terms “right” and “privilege” interchangeably.

39. Simmons, supra note 2, at 363.

40. Id.


42. Id. at 71. The enormous triangle of ceded land ran from Fort Pierre and Lake Kampeska to the Big Sioux and Missouri Rivers. Id.; see infra Part V.A (reprinting an 1862 map reflecting the same).
Congress to designate Dakota Territory; the process was repeated the next year. Following ratification of the Yankton treaty on February 17, 1859, and a brief dispute regarding the timeline for the Yankton tribe's withdrawal, the territory opened to white settlers in July. About 1,000 white settlers, who had camped along the territorial borders, quickly swarmed in. Those pioneers joined others already squatting on town sites, like Sioux Falls.

Dakota Territory officially became a territory in March of 1861. William Jayne, the first territorial governor, was a doctor from Abraham Lincoln's hometown of Springfield, Illinois. Jayne had been Lincoln's personal physician. The territorial government also consisted of three judges, a secretary, a few other minor officials, and a bicameral legislature. Governor Jayne promptly took a census, divided the area into districts, and scheduled a legislative election for that fall.

Following the fall elections, the first territorial legislature met in Yankton, which served as the territorial capital until it was moved to Bismarck. The first territorial legislature consisted of thirteen men in the lower house and nine in the council (the upper house). The twenty-two men met in private homes over a legislative session of sixty days. Their unruly antics included wine lunches, wine dinners, and wine quarrels. Governor Jayne's address to this first, rather rowdy Dakota Legislature, included an emphasis on the need for homestead laws. He recommended 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..."

44. *SCHELL*, *supra* note 41, at 71-72.
45. *Id.* at 71.
46. WAYNE FANE BUST, *OUTLAW DAKOTA: THE MURDEROUS TIMES AND CRIMINAL TRIALS OF FRONTIER JUDGE PETER C. SHANNON* 2-3 (2016). As early as 1858, speculators at Sioux Falls "set up a squatter government complete with a governor and legislature." *Id.* at 3.
47. Act of Mar. 2, 1861, ch. 86, § 1, 12 Stat. 239 (1861). This act was signed by President Buchanan. PATRICK M. GARRY, *THE SOUTH DAKOTA STATE CONSTITUTION* 3 (2014). Initially, Dakota Territory included areas of present-day Montana, Idaho, and North Dakota; by 1882, Dakota Territory represented the land mass today occupied by North Dakota and South Dakota. *Id.* at 4.
48. *SCHELL*, *supra* note 41, at 93. The first executive mansion was a log cabin. *Id.* at 94.
49. *FANE BUST*, *supra* note 46, at 5.
50. *SCHELL*, *supra* note 41, at 93.
51. *Id.* at 94.
Responsive to this plea, the 1862 territorial legislature enacted a homestead law. This first homestead exemption extended to the creditors of a decedent homestead owner's widow or minor children, but no particular homestead descent right was included. A homestead spousal veto right was enacted as to the effectiveness of a mortgage, but not as to conveyances. Initially, the homestead's size limit was set at eighty acres; one acre if within a municipality. Three exceptions were crafted: one for taxes, a second "from execution for clerks' laborers' or mechanics' wages," and a third for mortgages. As the Dakota Territory's twenty-eight year history (from 1861 until 1889) unfolded, the homestead exemption was never far from the legislators' minds. In 1877, the probate code was expanded to incorporate homestead provisions. A homestead descent right was also added.

Meanwhile, South Dakota's attempts to secure statehood were protracted and frustrating. The statehood story is one of "long persistency, loyal patience and repeated delay." The path can be traced by more than thirty congressional bills that failed to achieve their aim. By 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 accomplished, ten years later." Congressional reticence to statehood stemmed from a Democrat-majority Congress resistant to the admission of two new states and the

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56. 1 George W. Kingsbury, History of Dakota Territory 202 (George Martin Smith ed., 1915).
57. 1862 Dak. Sess. Laws ch. 37, 299-301. The first statutory form of homestead, therefore, preceded the later state constitutional homestead provision in 1889. Compare id. (enacting a statutory homestead exemption in 1862), with S.D. Const. art. XXI, § 4 (1889) (enacting a constitutional homestead exemption over three decades later).
58. 1862 Dak. Sess. Laws ch. 37, § 1, 299.
59. Id. § 2, at 299-300.
60. Id. § 1, at 299.
61. See id. §§ 2, 7, 9, at 299-301 (regarding mortgages, taxes, and mechanics', clerks', and laborers' wages, respectively).
62. See the Revised Codes of the Territory of Dakota §§ 128-36, at 664-66 (Geo. H. Hand, ed., 1877) (providing a chapter regarding the homestead and the allotment of personal property).
63. Id. § 15, at 184.
64. See generally Carrol Gardner Green, The Struggle of South Dakota to Become a State, in 12 South Dakota Historical Collections 503 (1924) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota) (accounting the struggle for statehood from its earliest desires to the constitution's adoption in 1889); Marie Louise Lotze, How South Dakota Became a State (1912) (unpublished M.A. thesis, University of South Dakota) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota) (tracing South Dakota political developments).
66. Id. In 1887, Dakota Territorial Governor Pierce 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.
resulting election of Republican congressmen. Prior to statehood, three constitutional conventions were held, beginning in 1883. Although each convention produced a draft state constitution, only the third produced a text that was officially adopted. Thus, the evolution of the State Constitution through these three successive conventions—those of 1883, 1885, and, finally, 1889—illuminates the final constitutional text.

The 1883 Constitution would have simply provided: "The Legislature shall pass liberal homestead and exemption laws." The 1883 convention, however, was unsuccessful. Congress rebuked the first organized attempt to secure statehood. Two years later, in 1885, the territorial legislature tried again and called for a second constitutional convention. The second constitutional convention is considered the most important of the three since the constitution it produced was, as a whole, largely identical to the official one endorsed by Congress in 1889. The delegates considered different equity limitations. They acknowledged that, while specifying an upper limit on the homestead exemption might be inappropriate in a constitutional sense, the final object of constitutional drafting "is to limit the legislature." In its final form as adopted by the second constitutional convention, no equity cap was included. Instead, the homestead provision set the upper limit (and perhaps the lower limit) of the exemption with the modifiers "wholesome," and "defined," and "limited." It 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.

68. JON K. LAUCK, PRAIRIE REPUBLIC: THE POLITICAL CULTURE OF DAKOTA TERRITORY, 1879-1889 95-96 (2010). Lauck clarifies:

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.

69. See Catherine Lucie Zumpano Chicoine & Patrick M. Garry, The 1883 and 1889 Constitutional Convention Debates, 59 S.D. L. REV. 179, 179 (2014) ("Each of the proposed constitutions produced by subsequent conventions built upon the work of previous conventions. Therefore, determining the intended meaning of provisions in the 1889 Constitution may require a consultation of debates related to similar provisions in previously proposed constitutions.").

70. DEBATES I, supra note 67, at 35.

71. LAUCK, supra note 68, at 122.

72. DEBATES I, supra note 67, at 45; LAUCK, supra note 68, at 122; see also 1885 Dak. Sess. Laws ch. 33, 51-55 (providing for a constitutional convention and formation of a state constitution).

73. GARRY, supra note 47, at 20.

74. DEBATES I, supra note 67, at 557.

75. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 73 (Sioux Falls, S.T. Clover 1885) (quoting S.D. CONST. art XXI, § 4 (1885)) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota). The 1885 provision was situated at article XXI, section 4. It would stay in that precise location within the 1889 South Dakota Constitution. S.D. CONST. art. XXI, § 4 (1889).
The convention unanimously adopted the 1885 constitution. The Congress, however, blocked the attempt. Statehood was denied again.

As Dakota Territory's population grew, calls for statehood intensified. In the November of 1888 national elections, Republicans swept the presidency, attained majorities in both houses of Congress, and thus politically cleared the way for statehood.

Grover Cleveland had been defeated by Benjamin Harrison for the presidency; President Cleveland signed the Omnibus Bill providing for statehood just before he left office.

The third state constitutional convention was the first one authorized by Congress. South Dakota could have either adopted the 1885 constitution with certain revisions or approved a new one; the former option was selected. The 1889 convention essentially re-adopted the 1885 constitution, with just a few amendments and changes.

At the convention, the exemption committee's report was adopted without debate. Article XXI, Section 4 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 property, the kind and value of which to be fixed by general laws.

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76. LAUCK, supra note 68, at 125 (citations omitted).
77. Id.
78. GARRY, supra note 47, at 6.
79. Id. at 26-27.
80. Id. Along with North Dakota and South Dakota, Washington and Montana were granted statehood.
81. GARRY, supra note 47, at 27.
82. Id. (citations omitted).
83. Blackburn, supra note 43, at 78; Lotze, supra note 64, at 8-9.
84. 2 SOUTH DAKOTA CONSTITUTIONAL CONVENTION: HELD AT SIOUX FALLS, JULY, 1889 178-79 (Doane Robinson ed., 1907).
85. S.D. CONST. art. XXI, § 4. This is the text as it is currently printed in the first volume of South Dakota Codified Laws, and it mirrors the 1885 constitution text. Compare id. (quoting the constitutional homestead provision), with supra text accompanying note 75 (stating an identical provision). The 1899 publication of the constitutional homestead provision by E.B. Myers & Company, however, contained a semicolon between the words "laws" and "exempting," thus:

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.

1 STATUTES OF THE STATE OF SOUTH DAKOTA 50 (Edwin L. Grantham, ed., 1899) (quoting S.D. CONST. art. XXI, § 4 (1889)). The semicolon also appears in the state constitution’s reprinting by the State Bindery Co. within the collection of session laws from the first state legislative session. LAWS PASSED AT THE FIRST SESSION OF THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA 14 (1890). Similarly, Dean McKusick includes the semicolon in the same location in his monograph. MCKUSICK supra note 1, at 1. By the time of the 1903 State Code being collected and the Constitution being reprinted, however, the semicolon had disappeared. The semicolon has remained absent ever since in subsequent reprinting. See Simmons, supra note 2, at 377 n.330 (noting the missing semicolon). Arguably, the omission of the semicolon could be more than simply stylistic:

Section XXI, section 4, of the South Dakota Constitution recognizes homestead and personal property exemptions. It was approved by the voters in 1889. Since then, it has
not been amended (although two proposed constitutional amendments failed). The provision originally 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 semicolon between the words "laws" and "exempting" is present in the 1889 "session laws" book where the constitution was proposed. The semicolon placement is repeated in the reprinted South Dakota Constitution in the 1890 "session laws" book. But in 1903, a new code was published—including the South Dakota Constitution—and in that printing the semicolon was omitted. Its omission carries forward to today . . . . That omission appears to be accidental.

The difference between a semicolon and no punctuation at all is significant. Without the semicolon (i.e., as the provision is currently printed) the sentence 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 property, the kind and value of which to be fixed by general laws."

The constitutional text requires two exemptions: the homestead, and personal property exemptions. The initial phrase mandating that laws be "wholesome" was clearly intended to modify both the homestead and the personal property exemptions. In other words, both the homestead and the personal property exemption laws must be "wholesome." Indeed, the South Dakota Supreme Court has construed the word "wholesome" in this constitutional context. The modifier limits the power of the legislature.

If the semicolon is dropped, however, it is much less clear whether "wholesome" modifies both the homestead and the personal property exemption. Grammatically, the omission of the semicolon means that "wholesome" might only modify the phrase immediately following it—the homestead phrase—and not the personal property phrase. Without the semicolon, one could argue that the legislature required homestead laws to be wholesome, but not personal property exemption legislation . . . .


The State’s Code Commission took up the issue at its meeting on June 21, 2017, based upon my suggestion that the omission of the semicolon could be considered substantive and that it appeared that its omission may have been inadvertent. Id. The Commission considered input from Thompson Reuters’ Lila Hambleton, who reasoned:

Perhaps the removal of the semicolon was not inadvertent but was done on purpose by the Commission appointed under SL 1901, ch 183. The Commission had broad revisor powers which it may have thought included getting rid of a semicolon in the Constitution that is not needed. Without doing a word for word, punctuation mark for punctuation mark comparison, we can’t see whether this was the only case of a punctuation change or whether there were other revisions made by the Commission. It could be that the Commission analyzed the sentence and concluded that the semicolon didn't add anything and its use was not grammatically correct because the phrase starting with "exempting" is not a clause that can stand on its own.

With or without the semicolon, it is clear that the thing that is doing the exempting is the word "laws" that precedes it. And the noun "laws" is modified by the adjective "wholesome." Grammatically, the word wholesome does not modify anything other than the word laws. To read it the way Prof. Simmons is reading it, something other than laws would have to be doing the exempting in the case of personal property.

To change it now comes down to the present Commission concluding that the 1901 Commission either failed to catch a mistake or exceeded its authority under SL 1901, ch 183.


Based on Ms. Hambleton’s convincing rationale and penetrating analysis, the Code Commission determined to leave the constitutional text as it currently reads in its contemporary sources—without the semicolon. See S.D. LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, MINUTES OF THE SOUTH DAKOTA CODE COMMISSION (June 21, 2017),
It was thus unaltered from the version enacted at the second convention. The sixty words of article XXI, section 4 remain unchanged today, although two unsuccessful attempts to revise it have been made. Following South Dakota's admission into the Union, the first state legislature reenacted the territorial statutory framework for homestead laws, setting the homestead exemption equity limit at a relatively modest $5,000. Unlike sister states' constitutional homestead provisions, which have undergone numerous amendments and changes over the years, South Dakota's homestead provision retains its original unaltered language.

http://www.sdlegislature.gov/docs/Interim/2017/minutes/MCOD06212017.pdf. The Commission's minutes explain:

Professor Tom Simmons of the University of South Dakota Law School has noted what appeared to be an error in the reprinting of the South Dakota Constitution in 1903 and asked the Code Commission to review what he'd found.

Article XXI, Section 4 of the South Dakota Constitution was approved by voters in 1889 and recognizes homestead and personal property exemptions. A semicolon was present between the words "laws" and "exempting" in the 1889 "Session Laws" book where the Constitution was proposed. The semicolon placement is repeated in the reprinted South Dakota Constitution in the 1890 "Session Laws" book. In 1903 a new code was published—including the South Dakota Constitution—and the semicolon was omitted in that printing; the omission carries forward to today.

In an email to Clair DeMersseman, Professor Simmons commented that the omission of the semicolon made a substantive difference in the text that the commission may need to address.

Additional research by Ms. Hambleton, a Thomas [sic] Reuters editor for the South Dakota Code, indicated the removal of the semicolon may not have been inadvertent but was done on purpose by the Commission appointed under SL 1901, ch 183. The Commission had broad revisor powers to include removing an unnecessary semicolon in the Constitution. Another explanation is that the 1901 Commission analyzed the sentence and concluded the semicolon did not add anything and its use was not grammatically correct because the phrase starting with "exempting" is not a clause that can stand on its own.

With or without the semicolon, it is clear that what is doing the exempting is the word "laws" that precedes "exempting." Hambleton also noted the noun "laws" is modified by the adjective "wholesome" which grammatically does not modify anything other than the word "laws." [sic] To read it the way Professor Simmons is reading it, something other than "laws" would have to be doing the exempting in the case of personal property.

The Code Commission reviewed and discussed the commentary from Professor Simmons and Ms. Hambleton regarding the missing semicolon. They generally agreed with Ms. Hambleton and took no action on the issue because there was not sufficient evidence to conclude that the 1901 Commission either failed to catch a mistake or exceeded its authority under SL 1901, ch 183.

Id.; see also S.D.C.L. § 2-14-8 (2012) ("Punctuation shall not control or affect any provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision.").

86. See Simmons, supra note 2, at 379 (narrating the two failed attempts at constitutional homestead revision in 1894 and again in 1975).


88. Texas, for example, has modified its state constitutional homestead exemption language over time, as has Florida. See Julie B. Schroeder, Comment, Perspectives on Urban Homestead Exemptions—Texas Amends Article XVI, Section 51, 15 ST. MARY'S L.J. 603 (1984) (describing a Texas constitutional amendment in 1983); TEX. CONST. art. XVI, § 51 (amended 1999) (providing that a rural homestead may exceed 200 hundred acres); Donna Litman Seiden, There's No Place Like Home(Stead) in Florida—Should it Stay that Way?, 18 NOVA L. REV. 801, 824-28 (1994) (tracing the numerous amendments to Florida's constitutional homestead exemption); see also State Homestead Exemption Laws, 46 YALE L.J. 1023, 1037 n.106 (1934) (noting failed homestead constitutional amendments).
III. JURISPRUDENCE POST-1889

With the state constitutional homestead provision in place, jurisprudence began to accumulate. This section provides summaries of eighteen cases which invoke, either in passing or directly, the constitutional limits and mandates of statutory homestead law. The cases begin six years following statehood with the 1895 decision of *Sundback v. Griffith*. The cases conclude—for the time being—with a 2006 decision, *Wisner v. Palvin*. Some of these decisions invoke homestead constitutional protections, others exempt personalty. Because of the linkage and proximity of constitutional homestead and personal property exemptions in the text of article XXI, section 4, both must be considered in tandem.

A. *SUNDBACK V. GRIFFITH (S.D. 1895)*

In *Sundback v. Griffith*, the South Dakota Supreme Court considered the effect of the constitutional exemptions provision on a pre-constitutional statute suspending exemptions in the case of a debt incurred under false pretenses. There, the defendant had misrepresented the extent and value of his property to obtain credit. The plaintiff obtained a money judgment for the sum of the debt obtained under false pretenses and levied on property which the defendant claimed as exempt. The nature of the property claimed as exempt is unidentified in the opinion. It may or may not have included the homestead exemption. It may have been exempt personalty.

The court considered the application of section 5139 of South Dakota law, which provided for the suspension of exemption protections “against an execution or other process issued upon a debt incurred for property obtained under false pretenses.” The plaintiff argued that the State Constitution had served to invalidate this exception to exemptions. Concerned that adopting this conclusion would serve to impair or even destroy preexisting contractual rights, the court reasoned that the constitution had not worked a repeal of the pre-

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89. 63 N.W. 544 (S.D. 1895).
90. 2006 SD 64, ¶ 5, 719 N.W.2d 770.
92. *Id.* More accurately, the defendant had defaulted on the plaintiff’s complaint alleging that the debt had been obtained because of misrepresentations. *Id.* The court denied the defendant’s motion for relief from the judgment, where he claimed that his representations had been truthful; this denial was affirmed on appeal. *Id.*
93. *Id.*
95. *Sundback*, 63 N.W. at 545-46.
constitutional statute, at least as to pre-constitutional contracts.96 The court left for another day “the question of its general effect upon such section.”97

B. SKINNER v. HOLT (S.D. 1896)

The next frontal state constitutional challenge to South Dakota exemptions expressly implicated the personal property exemptions. John Skinner had died without a will in 1893, survived by his wife Bertha and their two minor children.98 The wife and two children were the sole heirs in intestacy, and the only asset of the estate was a $2,000 policy of insurance on John Skinner’s life, payable to his estate.99 After the payment of certain preferred claims, there remained enough to pay his creditors $0.63 of each $1.00 owed; his estate was partially insolvent.100

The trial court had denied the creditors’ claim on account of a state statute which provided:

A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts.101

The South Dakota Supreme Court read this statute against article XXI, section 4, and rejected the statute as unconstitutional. The court found that “[a] law which exempts to the debtor or his family all the money obtained from the policies of all the life insurance companies in existence ... is manifestly unreasonable ...”102 It “is neither ‘wholesome’ in character nor ‘reasonable’ as to amount, and is far too generous to be just.”103 Although the Constitution

96. Id. at 546.
97. Id.
99. Id.
100. Id. at 596.
101. Compare id. (quoting 1890 S.D. Sess. Laws ch. 51, § 21, 130) (“A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts.”), with S.D.C.L. § 43-45-6 (Supp. 2017) (recognizing an exemption for up to $10,000 in life insurance proceeds payable to a decedent’s estate when survived by “a surviving widow, husband, or minor child or children”), and S.D.C.L. § 58-12-4 (2004) (exempting $20,000 of life insurance proceeds for a surviving spouse or children, protecting $20,000 “of an endowment policy, payable to the insured on attaining a certain age ... from the debts of such spouse or children,” as well as exempting “the avails of any life or health insurance or other sum of money not exceeding [$20,000] made payable by any mutual aid or benevolent society to any member or beneficiary spouse or children”), and S.D.C.L. § 54-9-6 (2017) (providing that “insurance upon the life of the assignor, to the extent of [$5000], does not pass to the assignee by a general assignment for the benefit of creditors”); see also S.D.C.L. § 58-12-6 (2004) (proclaiming a general exemption for annuity contracts, subject to certain exceptions).
103. Id. (citing How v. How, 61 N.W. 456 (Minn. 1894)). The How court reasoned that an unlimited life insurance exemption was unconstitutional under the Minnesota Constitution’s dictate that only a “reasonable” amount of personal property may be exempt. How, 61 N.W. at 457.
requires “reasonableness” as to the amount of exempt personal property, it lacks that same requirement as to the homestead. The requirement that exemptions be “wholesome” applies both to personal property exemptions and the homestead exemption. 104

*Skinner* demonstrates that there are constitutional constraints on exemptions which grant the debtor an “unwholesome” (i.e., excessive) degree of protection from creditors. An unlimited exemption, the court clarified, could not constitutionally qualify as wholesome. 105 This same reasoning would be resurrected 110 years later in the *Davis* decision. 106

**C. KARCHER V. GANS (S.D. 1900)**

In 1885, four years before South Dakota’s statehood, Frank Keys and his wife Hattie borrowed $800 from Sarah Karcher. 107 Frank and Hattie signed a promissory note and a mortgage to their Pierre home occupied as their homestead. 108 When Frank and Hattie defaulted, Sarah foreclosed on the mortgage; following a two-year period of redemption, a sheriff’s deed was issued to her. 109 Upon Sarah’s forcible entry and detainer action when Hattie refused to vacate the premises, Hattie answered that the homestead exemption barred the judicial sale of her home. 110

The South Dakota Supreme Court disagreed. It noted the constitutional language which exempts the debtor “from forced sale” of the homestead. 111 When the owner has authorized a lender, in the case of default, to sell the home, a sale conducted pursuant to the mortgage is not forced, but voluntary. 112 The court explained that “[w]hether the sale is voluntary or forced depends, not upon the mode of its execution, but upon the presence or absence of the consent of the owner.” 113 The owner has the right to mortgage her homestead; by doing so, the owner voluntarily consents to the homestead’s sale if she defaults. 114

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104. See S.D. Const. art. XXI, § 4 (mandating application of “wholesome laws exempting from forced sale a homestead . . . and a reasonable amount of personal property”).


106. See infra Part III.R (providing summary of *Davis* opinion).


108. Id. At some point, the couple divorced, as the opinion notes that Hattie Gans, “who was then [Frank Keys’] wife,” executed the mortgage and note with her husband. Id. (emphasis added).

109. Id. at 432. State statutes then provided for a one-year period of redemption with an additional year if interest was paid. Id.

110. Id.

111. Id. (emphasis added) (quoting S.D. Const. art. XXI, § 4).

112. Karcher, 83 N.W. at 432.

113. Id.

114. See id. (quoting SEYMOUR D. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS 395 (St. Louis, F.H. Thomas & Co. 1878)) (“The general rule is that statutes creating a homestead exemption do not operate to restrain in any particular the voluntary alienation or mortgage of the homestead . . . .”).
D. SOMERS v. SOMERS (S.D. 1914)

In three successive decisions, all captioned Somers v. Somers, the South Dakota Supreme Court construed the phrase “all heads of families” contained in article XXI, section 4.\textsuperscript{115} The legislature had defined the words “heads of families” expansively both before and after the adoption of the 1889 South Dakota Constitution.\textsuperscript{116} The definition included childless widows and widowers and even unmarried persons without children.\textsuperscript{117} It proclaimed that “[e]very family, whether consisting of one or more persons . . . shall be deemed and held to be a family” for purposes of the homestead exemption.\textsuperscript{118} The court declined to second-guess the legislature’s expansive definition of a family:

The homestead right . . . within constitutional limitations, is one clearly a matter of legislative discretion, and may be conferred upon any person or class of persons of its own choosing. Where the right is conferred upon the head of a family, it may declare who shall be considered the head of a family. Where it is conferred upon the family, it may declare of whom the family shall consist.\textsuperscript{119}

The court, however, found under the facts presented, that a married woman—estranged from her husband—did not qualify as the head of a family, despite the fact that she lived with her children.\textsuperscript{120}

Lafayette Somers homesteaded on a quarter section of land in Brule County, South Dakota in 1881, receiving a patent deed in 1883.\textsuperscript{121} In 1885, he conveyed the land, on which he lived with his spouse and young children, to his wife, Elizabeth Ann Somers.\textsuperscript{122} In 1883, following a violent quarrel, he abandoned her.\textsuperscript{123} Although they never reconciled, they remained married until Elizabeth’s death twenty-one years later.\textsuperscript{124}

By 1889, Elizabeth Somers’ children were older, and so she filed a homestead claim on another parcel of ground in an adjoining county.\textsuperscript{125} To do so, she crossed the Missouri River from Brule County (on the east bank) to Lyman County (on the west).\textsuperscript{126} After proving up on the claim, she moved back to the original

\textsuperscript{115.} Somers v. Somers, 131 N.W. 1091, 1093 (S.D. 1911) [hereinafter Somers I]; Somers v. Somers, 146 N.W. 716, 718 (S.D. 1914) [hereinafter Somers II], on rehearing 149 N.W. 558, 560 (S.D. 1914) [hereinafter Somers III].

\textsuperscript{116.} See Somers III, 149 N.W.2d at 560 (parsing the legislative changes with regards to its use of the terms “families” and “heads of families”).

\textsuperscript{117.} Id.

\textsuperscript{118.} Somers II, 146 N.W. at 718 (quoting S.D. Rev. Code Pol. § 3235 (1903)).

\textsuperscript{119.} Id.

\textsuperscript{120.} See Somers I, 131 N.W. at 1095 (“Who was the head or manager in the year 1908 at time [sic] the deed defendants was executed? Was it not Fred Somers rather than his mother?”).

\textsuperscript{121.} Somers II, 146 N.W. at 717; Somers I, 131 N.W. at 1092.

\textsuperscript{122.} Somers I, 131 N.W. at 1092.

\textsuperscript{123.} Somers II, 146 N.W. at 717; Somers I, 131 N.W. at 1092.

\textsuperscript{124.} Somers I, 131 N.W. at 1092.

\textsuperscript{125.} Id. at 1094-95.

\textsuperscript{126.} Id. Elizabeth Somers “had a house on that homestead and a little furniture . . . . She had a stove, bed, she slept there and lived there.” Id. at 1095.
homestead in Brule County. She lived on the original homestead with her unmarried son along with her married son and his wife. She remained there for the rest of her life.

In 1908, perhaps sensing her mortality, Elizabeth executed a deed of the original Brule County homestead property to her sons, Pooia and Fred, delivering the deed to a Chamberlain, South Dakota bank to be held in escrow until her death. The next year, she died and the deed was released and recorded. Lafayette Somers, the long absent husband, then appeared on the scene and brought a quiet title action against his sons, asserting a life estate in the original homestead property. He averred that the 1908 deed from Elizabeth to her two sons was void since he, as her husband, had not joined in the conveyance. Lafayette therefore claimed inheritance rights to the property (amounting then to one-third of Elizabeth's estate) in addition to a life estate of the homestead on account of his spousal homestead descent rights. The trial court found in his favor as to his assertion of intestate inheritance rights, but against his claim of a life estate by means of homestead descent. The South Dakota Supreme Court reversed.

When Elizabeth Somers had left her original Brule County homestead and moved onto the second parcel of land across the river for several years, "she of necessity abandoned her homestead rights in the land involved" in the husband's quiet title action. The question then became whether Elizabeth Somers had reacquired homestead rights in the first parcel when she returned to it; whether she could be properly characterized as the "head of the family." The Supreme Court remanded for a determination on this point. On remand, the trial court received additional testimony. It found that Elizabeth Somers, upon returning to her first home in 1906, had acquired a new homestead right. The trial court found that Elizabeth Somers had "resumed and exercised the same authority and control over [the land] as she had exercised at the time her husband left her in 1888 . . . ."

Although her sons were grown, she

127. Id. at 1092.
128. Somers II, 146 N.W. at 718.
129. Somers I, 131 N.W. at 1094.
130. Id. at 1092.
131. Id.
132. Id.
133. Id.
135. Somers I, 131 N.W. at 1092.
136. Id. at 1095.
137. Id. at 1094. On this point, the South Dakota Supreme Court reasoned, the trial court had erred. Id. Lafayette Somers, the court reasoned, had also lost his ability to claim homestead veto rights in the original homestead when he abandoned the land, his wife, and his young children without justification. Id.
138. Id.
139. Id. at 1095.
141. Id.
142. Id. at 718 (alteration in original).
still occupied the status of the head of the family. Therefore, her conveyance of that property—not having been joined by her estranged husband Lafayette—was void. 143 But once again, the South Dakota Supreme Court reversed in the second Somers decision. 144 The findings, the court concluded, were clearly against the evidence in the record.

The supreme court held that Elizabeth Somers was merely living with her adult sons, not acting as the head of a family. 145 The court suggested that income production and control of household decisions was the test for determining who was the family head: "The evidence conclusively shows that when she returned to the land in 1906, it was occupied by a married son and his wife, and another unmarried son, 27 years of age, living together as one family, and entirely self-supporting." 146 The court found that Elizabeth did not "assume the functions of head of the family then occupying the land." 147 Instead, Elizabeth’s two adult sons "exerted control, use, and management of the land . . . ." 148 Because Elizabeth had failed to "resume control of the land," she failed to qualify as a "head of family" and therefore failed to achieve homestead status. 149 The court reversed and remanded for yet another new trial. 150 As a result, Lafayette Somers’ attempt to invalidate his wife’s deed to her sons was defeated. 151

The Somers trio of decisions are frustrating in that they reveal a patriarchal view of Elizabeth Somers. Though the eventual outcome favored her property rights, it was reached only by a determination that the original homestead did not resume its homestead character. This determination thereby validated Elizabeth’s deed to her sons and freed her from the homestead veto constraints that would otherwise have been retained by her absent husband.

With grit and determination, Elizabeth ejected an abusive husband, raised small children on her own, and ventured out to secure additional property by proving upon an isolated parcel of ground, finally returning to her original home. Based simply on these facts, a picture of a woman of courage emerges. Despite what ought to be a deferential review of the factual findings of the lower court, the South Dakota Supreme Court felt compelled to reverse a finding that Elizabeth could have acted as the head of a household when she rejoined two of her sons in the original family home. Notably, the Supreme Court failed to cite any particular facts or aspects of the record to justify its reversal on this finding. 152 Instead, the

143. Id. at 717.
144. Id. at 719.
145. Id. at 718.
146. Id.
147. Id.
148. Id. at 719.
149. Somers III, 149 N.W. 558, 560 (S.D. 1914).
150. Somers II, 146 N.W. at 719.
151. In the third Somers decision, the court affirmed Somers II upon a motion for rehearing. Somers III, 149 N.W. at 560-61.
152. See Somers I, 131 N.W. 1091, 1094-95 (S.D. 1911) (recounting defendants' testimony but acknowledging that some evidence "might be construed as showing the mother to be the head of the family"). Indeed, Peolia Somers testified that, after his mother's return to her original home, she "lived on the old home the same as she did before she left . . . ." Id. at 1095.
court simply assumed that Elizabeth's older son must have acted as the "head" on account of his gender. 153

Possible patriarchal prejudices aside, the Somers decisions demonstrate two key points. The first point is the South Dakota Supreme Court's willingness to find that a spouse's homestead descent rights can be forfeited by a wrongful abandonment. "There is no question," the court intoned in Somers I, "but that the trial court rightly held [Lafayette Somers] had forfeited all homestead rights in and to the premises; but, to support such a holding, the court should have made a finding to the effect that the husband's abandonment was wrongful." 154 However, abandonment would not disturb intestacy rights. Thus, if Elizabeth—after herself abandoning the original homestead to prove up a new claim on the opposite side of the Missouri River—reacquired a homestead as the head of her family when she returned, then her unilateral conveyance of that property to her sons would be invalid, and a portion of it would pass to Lafayette by means of intestacy. 155 The court thus expressed a willingness to allow the loss of homestead descent rights through wrongful abandonment, but not homestead veto rights.

E. Hansen v. Hansen (S.D. 1918)

In the Hansen case, Bergetta Hansen's husband, Nils, had died. Nils was survived by a minor child, Melvin, Bergetta herself, and other heirs. 156 Bergetta petitioned the probate court to set aside 158.10 acres of her husband's property as a homestead for her lifetime use and also for Melvin's use, during his minority. 157 The other heirs objected, arguing that because the homestead exemption protections from creditors was extended (then) only to the extent of $5,000 in value, the widow and minor's homestead claim should be similarly capped, thereby reducing the acreage that could be claimed. 158

153. Somers III, 149 N.W. at 560. The court claimed that "[t]he preponderance of the evidence shows that [the mother] did not resume control of the land, nor did she become the head of the family .... She returned to and became a dependent upon her children ...." Id. For other case examples regarding state homestead provisions and gender-stereotyping, see Bessemer Props., Inc. v. Gamble, 27 So. 2d 832, 833 (Fla. 1946) (reasoning that a non-owner husband could claim homestead exemption status without holding title since he held an equitable interest by virtue of having contributed to his wife's ownership interest); Howard v. Marshall, 48 Tex. 471, 479-80 (Tex. 1878) (holding that a single man living with his former slaves does not constitute a "family" under Texas homestead law). Nineteenth century resistance to finding that a woman could function as a head of a family finds expression in other decisions summarized by Alison Morantz. Alison D. Morantz, There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America, 24 LAW & HIST. REV. 245, 260-62 (2006).

154. Somers I, 131 N.W. at 1093 (citations omitted).

155. See id. (explaining that "if the wife had died without conveying the lands in question by deed or will, [Lafayette Somers] would, in spite of all his wrongdoing, have succeeded" to a share of her estate in intestacy).

156. Hansen v. Hansen, 166 N.W. 427, 427 (S.D. 1918); see also Hansen v. Hansen, 161 N.W. 188, 188-89 (S.D. 1917) (denying motion to dismiss appeal on the ground that the notice of appeal was untimely).

157. Hansen, 166 N.W. at 427.

158. Id.
The court rejected this argument, holding that the $5,000 cap on homestead exemption protections from creditors "[did] not necessarily imply that the homestead can in no case exceed $5,000 in value, or that the heirs have the same right to the excess over $5,000 in value that is given to an execution creditor . . . ." 159 The heirs' misunderstanding, the court ventured, could be traced to the state constitutional provision admonishing the legislature to define and limit the homestead's extent. 160 Because the $5,000 limit was contained within a chapter titled "Exemptions," it applied to limit the value of exemption protections from creditors. 161 In contrast, the only limitation on homestead protections for surviving spouses and minor children were acreage limitations. 162 Justice McCoy penned a rather truculent dissent. 163

F. O'LEARY V. CROGHAN (S.D. 1919)

In 1911, the South Dakota Legislature enacted chapter 150, providing:

Nothing in this chapter shall be so construed as to exempt any personal property from mesne or final process for laborers' or mechanics' wages or physicians' bills, or for the necessaries of life, including only food, clothing and fuel, provided for the debtor or his family, except property absolutely exempt: *** Provided, that in case of physicians' bills or for necessaries of life, there shall also be exempt household and kitchen furniture, including stoves, of the debtor, to an amount in value not exceeding four hundred dollars, and also two cows; provided, however, that the collection of physicians' bills shall not be enforced by legal process in less than six months from the accruing thereof except when the debtor is about to remove from the state. 164

In September of 1917, James O'Leary commenced an action against Owen Croghan on the basis of a promissory note and obtained a judgment against him.

159. Id. at 428.
160. Id. (citing S.D. CONST. art. XXI, § 4).
161. Id. at 430.
162. Id.
163. See id. at 430-31 (McCoy, J., dissenting). Justice James McCoy reasoned that both the acreage limitation and the value limitation were coextensive. Id. at 431. He contended that, under the majority's reasoning, a decedent who had an heir 60 years of age by a former wife, and who left surviving him a second wife 30 years of age, and where the only estate left by the decedent was 160 acres of land, of the value of $1,000,000, outside the limits of a town plat, the 60 year old heir might be penniless, and might be thus deprived of his inheritance during his entire lifetime, by a holding that the surviving second wife could hold a homestead valued at $1,000,000 during her lifetime.

Id. Justice McCoy was "loath to believe that the legislative framers of our homestead and probate laws ever contemplated any such unjust, absurd, or ridiculous results." Id. McCoy's expatiation, however, has not found additional adherents.

in the amount of $552.49. Owen Croghan was the head of a household consisting of himself, his wife, and his minor children. The note had been given on account of groceries. All of Owen’s property, including “[t]hree small pigs,” he claimed as exempt. His creditor cited to the recently enacted chapter 150, suspending exemptions for creditors arising out of necessaries and food. Owen countered that the statute was invalid on account of the constitutional protections of a homestead and reasonable amounts of personalty. Owen also cited the 14th Amendment of the U.S. Constitution as well as the privileges and immunities clause of the South Dakota Constitution. “The constitution,” Owen asserted, “says the legislature shall pass laws exempting a reasonable amount of property from levy and sale. In the case of a grocery bill, as in this case, there are no exemption to Mr. Croghan.”

Agreeing with Owen, the court in O’Leary v. Croghan set aside chapter 15 as unconstitutional, explaining:

The size and value of the homestead and the kind and value of the personal property that shall be exempt is left entirely to the wisdom of the Legislature. Its judgment on these matters is final. But whatever the value of the homestead and whatever the kind and value of the personal property that is allowed as exempt must be allowed to all debtors alike. The discriminations that have been attempted by the Legislature may be wise and in the interest of the public at large, but until the Constitution has been changed the Legislature is without authority to make them.

The court was troubled that one class of creditors should have advantages over another class, and that the amount of exemption should depend upon the nature of the debt. None of the classifications—or “discriminations”—were authorized by article XXI, section 4, and they were expressly prohibited by the privileges and immunities clause of the South Dakota Constitution. Although the court spoke

166. Id. at 6-8.
167. Id. at 15-16.
168. Id. at 6-7. No homestead was involved. Id.
170. Appellant’s Brief, supra note 165, at 18-19 (quoting S.D. CONST. art. XXI, § 4 (1889)).
171. Id. at 18-19, 34 (citing U.S. CONST. amend XIV; S.D. CONST. art VI, § 18).
172. Id. at 27. Owen Croghan also cannily argued that legislative exceptions to personal property exemptions violated the state constitutional requirement that South Dakota’s legislature enact “wholesome” exemption laws. See id. at 33 (“Would the Court call a law ‘wholesome’ that by manipulation deprives the debtor of every dollar in the world?”).
174. See id. (recognizing Owen Croghan’s contention “that this law divides creditors into several classes”).
175. Id. (citing S.D. CONST. art VI, § 18, art XXI, § 4). Article VI, Section 18 of the South Dakota Constitution provides: “No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.” S.D. CONST. art VI, § 18.
of "discriminations" among debtors, the challenged legislation created classifications of creditors, not debtors. 176

The court also reasoned that if the legislature could graft exceptions to the exemption laws (such as "a debt due for 'necessaries'"), then "it could except any or all other debts . . . ." 177 In this way, the legislature would have the power to "deprive a debtor of all benefit of the Constitution on this subject." 178 The holding of O'Leary thus rested both on the privileges and immunities clause and the constitutional homestead protections.

Justice Smith authored a concurring opinion. 179 He also blended a privileges and immunities analysis with an article XXI, section 4 discussion. 180 With regards to the latter, he emphasized that "[g]ranting an exemption to a debtor, with a provision under which it may be immediately seized and sold for a debt or class of debts, is equivalent to denying any exemption to such person." 181 Justice Whiting, joined by Justice Gates, dissented in a lengthy opinion. 182 They opined that the legislature had plenary powers to define a reasonable amount of personalty entitled to exemption status as well as circumstances and conditions under which the exemption applied. 183

G. Swan v. Gunderson (S.D. 1927)

Swan merits brief mention here for its reference to the state constitutional homestead provision in making its point. 184 In Swan, Rasmus Peterson's will left a bequest of realty to his daughter, Ida Swan, among others, but purported to protect the bequest from the reach of any of her creditors. 185 The court rejected

176. See O'Leary, 173 N.W. at 846 (Smith, J., concurring) (emphasis added) ("The statute is a classification of debts and not of debtors.").
177. Id. at 846 (majority opinion) (citations omitted).
178. Id. (citations omitted).
179. Id. at 846 (Smith, J., concurring).
180. Id.
181. Id.
182. Id. (Whiting, J., dissenting).
183. Compare id. at 846-47 ("[T]he Legislature has plenary power to declare what to it seems "a reasonable amount of personal property" (section 4, art. 21, Const.) to be allowed as exempt upon certain "terms"—that is, under any certain named conditions, state, or circumstances—just so long as it applies to all persons alike when the conditions, state, or circumstances are the same.")., with S.D. A.G. Op. 85-01 (1985) (quoting 40 AM.JUR.2d Homestead § 7) ("Subject to constitutional limitations, the legislative branch of government has the plenary power to create rights of homestead."). The Attorney General Opinion's quoted language has been deleted in the current text of the encyclopedia which states: The legislature may, without violating constitutional rights of property take away a person's right to convey or encumber homestead property. A statute authorizing the forced sale of a homestead for a mortgage debt does not violate the state constitutional provision creating the homestead exemption, nor does it prevent debtors from enjoying the fruits of the federal bankruptcy law, and thus deprive them of their homestead property without due process.
185. Id. at 884-85. A codicil to the will stated: "I desire to go to each one respectively, as stated in the terms of the will, free and clear from any debts, or obligations for which any one of them might be
the effectiveness of the language, citing Article XXI, Section 4 of the South Dakota Constitution as it "impliedly contemplates that all property of a debtor, excepting the property exempted" such as a homestead, shall be subject to creditor claims against the debtor's property.186


The Halstead decision invokes exempt personalty. McClellan Halstead held a $3,000 benefit certificate in a fraternal society, the Modern Woodmen of America, on which he named his wife Hannah as beneficiary.187 After he died, the First National Bank attempted to garnish on the certificate in order to satisfy a $3,553.02 judgment against the widow.188 She claimed that the certificate was exempt.189 The bank asserted that the exemption was unconstitutional.190 The court disagreed.

Although the bank-creditor framed several arguments, the most germane of them was that because the exemption for fraternal benefits had no dollar cap, it violated the constitutional requirement that "the kind and value" of the personal property exemptions be "fixed" by statute.191 Although the exemption statute failed to place any limit on the amount of the benefit enjoying exempt status, the court took "judicial notice that in almost all fraternal associations the amount of the insurance or benefit is limited to a comparatively small amount . . . ."192 Moreover, the record disclosed that Modern Woodmen's articles limited insurance to $3,000.193

The court acknowledged the bank's argument that if this reasoning were accepted then "there is nothing to prevent one from joining a large number of fraternal benefit societies and procuring the maximum benefit in each, and thus claim as exempt twenty or thirty thousand dollars or more."194 Such facts, however, were not before the court. Constitutional questions, the court concluded, ought not to be determined upon suppositions.195 Halstead is difficult to reconcile

liable at the time of my death." Id. at 884. The court ventured that the language might simply be precatory. Id. at 885.

186. Id. The court declared "[i]t is elementary that no testator or other nonsovereign donor, by a condition or restriction in a devise or gift of the absolute legal title to real property, can take such property out from under the operation of these statutes and pro tanto repeal them." Id. (citing HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 592 (2d ed. 1920)).


188. Id.

189. Id. at 295-96 (citing 1919 S.D. Sess. Laws ch. 232, § 21, 247).

190. The bank also argued that the exemption for insurance from a fraternal organization violated Article III, Section 23 of the South Dakota Constitution and the Preamble to the U.S. Constitution. Id. at 296.

191. Id. at 296-97 (quoting S.D. CONST. art. XXI, § 4); see also supra text accompanying note 85 (discussing article XXI, section 4).

192. Halstead, 229 N.W. at 296.

193. Id. at 297.

194. Id.

195. See id. (citing Rowe v. Stanley Cty., 219 N.W. 122, 124 (S.D. 1928)) ("[C]onstitutional questions should not be determined upon supposititious cases.").
with the 1896 decision of *Skinner v. Holt*, unless *Halstead* simply rests on its factual record showing that as a practical matter the industry itself limited the value of the personality in question.\(^{196}\)

I. **SCHULER V. JOHNSON** (S.D. 1933)

*Schuler v. Johnson* also concerned a life insurance benefit.\(^{197}\) Following the South Dakota Supreme Court's decision in *Skinner v. Holt* declaring an unlimited exemption for life insurance proceeds unconstitutional, the legislature amended the statutory exemption and fixed the limit at $5,000.\(^{198}\) Catherine Schuler obtained a judgment against Ed Johnson in the amount of $1,712.50.\(^{199}\) Following a debtor's exam, it appeared that Ed's only property was a life insurance policy through Northwestern Mutual Life Insurance Company with a face value of $10,000 and a cash surrender value of $4,520.\(^{200}\) The current beneficiaries designated on the policy were Ed's children, his wife having recently passed on.\(^{201}\) The trial court ordered Ed to surrender the policy for its cash value in order to satisfy his debt to Catherine.\(^{202}\) The South Dakota Supreme Court reversed, upholding the constitutionality of the revised life insurance exemption statute and noting:

Within constitutional limitations the kind and amount of personal property that shall be exempt from the claims of creditors is a question of legislative policy. Section 4, art. 21, State Constitution, imposes the duty upon the Legislature of exempting from forced sale a reasonable amount of personal property, and of determining the kind and value of such property by law. Assuming without so determining, that the reasonableness of the action of the Legislature, when in the exercise of its judgment and discretion it has definitely fixed the maximum amount of a particular kind of personal property that may be exempted, is not final and conclusive, but is subject to judicial review, we are of the view that the amount fixed by the [statute] does not contravene the provisions of the Constitution.\(^{203}\)

Thus, Ed was allowed to retain the life insurance policy, despite the fact that he could freely change the beneficiary designation from his children to other

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197. *Schuler v. Johnson*, 246 N.W. 632 (S.D. 1933) [hereinafter *Schuler I*]; see also *Schuler v. Johnson*, 261 N.W. 905 (S.D. 1935) (constituting a second appeal concerning the ability of the creditor to recover from homestead property) [hereinafter *Schuler II*].

198. *Schuler I*, 246 N.W. at 633; see also *Skinner*, 69 N.W. at 596-97 (finding an unlimited exemption for life insurance to be "manifestly unreasonable").


200. Id.

201. *Schuler II*, 261 N.W. at 906; *Schuler I*, 246 N.W. at 633.


203. Id. at 634-35.
individuals. The creditor later attempted—again, unsuccessfully—to levy upon Ed's homestead. 204

J. IN RE CLOUSE'S ESTATE (S.D. 1934)

Although the two Clouse's Estate decisions contain only a single, oblique reference to the constitutional basis for South Dakota's homestead protections, they still merit mention here. 205 Joseph Clouse died in 1928, survived by two adult children and five grandchildren. 206 His estate consisted of six quarter sections of land in Hand County plus livestock, implements, grain, and so on. 207 One of these 160-acre quarter sections represented his homestead. 208 Its value did not exceed the $5,000 statutory dollar cap. 209

Prior to Joseph Clouse's death, he purchased materials to construct a barn on the homestead on credit from a local lumber company. 210 Shortly after his death, the lumber company filed a mechanic's lien on the homestead. 211 The effectiveness of a mechanic's lien is retroactive to the date the first material or labor is furnished on the premises. 212 In other words, a timely filed mechanic's lien is "only for the purpose of preserving a lien already created" and "the lien is created by the delivering of material or the furnishing of labor or skill ... " 213 Because no materials had been supplied after Joseph’s death, the lien could not have attached to his homestead, even though he left neither a widow nor a minor child. 214 Based on this reasoning, the court invalidated not only a creditor's attempt to force a sale of the homestead, but even the mere attachment of a lien to the homestead.

In the second Clouse's Estate decision, the lumber company again attempted to satisfy its claim against the homestead property, this time relying not on the existence of a mechanic's lien but simply as an unsecured creditor with a recorded judgment. 215 Although the estate was comprised of six quarter sections, five of them were encumbered—only the homestead quarter section appeared unencumbered by competing lienholders. 216 The court was called upon to construe the statute which provides: "If there be no husband or wife surviving, and

204. Schuler II, 261 N.W. at 907.
205. Botsford Lumber Co. v. Clouse, 251 N.W. 801 (S.D. 1933) [hereinafter Clouse I]; In re Clouse's Estate, 257 N.W. 106 (S.D. 1934) [hereinafter Clouse II].
207. Id.
208. Clouse I, 251 N.W. at 802.
209. Id.
210. Id.
211. Id.
212. Id. (citing S.D. Rev. Code § 1646 (1919)).
213. Id.
214. Id.; see also Fallissee v. Wittmayer, 70 N.W. 642, 644 (S.D. 1897) (construing the nineteenth-century statutory rubric and concluding that "the intention of the lawmaking power to deprive mechanics and material men of their liens against the homestead seems quite apparent").
216. Id. at 106.
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. 217

Although the decedent had been survived by adult children as well as grandchildren that might ordinarily qualify as "issue," the court concluded that the homestead descent protections should be "afforded to only the surviving spouse and children during minority." 218 Joseph Clouse did not leave a wife or surviving minor children; as a result, the lumber company-creditor prevailed. Its judgment lien had attached at a time when the property did not enjoy characterization as a homestead.

K. *STATE ex rel. BOTTUM v. KNUDTSON (S.D. 1937)*

*Bottum* was an original proceeding in the state supreme court wherein a writ of mandamus was sought against the county auditor of Minnehaha County. 219 At issue was a law levying a tax on the assessed value of all taxable property in the state other than the homestead. 220 The petitioner sought to compel the auditor to extend the levy against amounts in excess of the homestead value limitation of $5,000 as it was then defined. 221 One Ole Gunderson intervened through Sioux Falls attorney Holton Davenport. 222 Ole Gunderson asserted the writ should be denied; his own homestead was assessed at $9,300. 223

The court denied the writ. 224 First, as a matter of statutory construction, the court determined that the taxing statute contained no limitation on the value of the homestead, "although it is true that, if the homestead is worth more than $5,000, over and above incumbrances, such excess in value is not by law exempt from the claims of execution creditors, and may be reached by them." 225 Second, the court determined that the tax was constitutional. 226 The petitioner, citing *Skinner v. Holt*, argued that a tax exemption untethered by the $5,000 cap on homestead exemption protections would violate the South Dakota constitution's "wholesome" requirement. 227 The court dismissed the argument: "It is hardly

217. *Id.* at 107 (quoting S.D. Rev. Code § 468 (1919) (current version at S.D.C.L. § 43-31-16 (2004))).
218. *Id.*
220. *Id.*
221. *Id.*
223. *Bottum*, 276 N.W. at 151.
224. *Id.* at 153.
225. *Id.* at 152 (quoting *Peck v. Peck*, 212 N.W. 872, 875 (S.D. 1927)) (reasoning that a transfer of a homestead cannot constitute a fraudulent transfer regardless of the value of the homestead).
226. *Id.* at 153.
227. *Id.* (citing *Skinner v. Holt*, 69 N.W. 595 (S.D. 1896)); *see supra* Part III.B (discussing the *Skinner* opinion).
necessary to state that the limitation upon exemptions contained in the constitutional provisions relating to homesteads has no reference to taxation."

L. HOME LUMBER CO. V. HECKEL (S.D. 1940)

Heckel involved eighty acres on which Adolph Heckel and his wife Rose decided to build their home. They contracted with Home Lumber Company to construct a home on the land. When the company was not paid, it filed a mechanic’s lien against the property and commenced foreclosure. The trial court dismissed the complaint, reasoning that the homestead protections invalidated a statute permitting the forced sale of a homestead to satisfy a mechanic’s lien associated with the “original erection and construction of buildings thereon." The South Dakota Supreme Court agreed.

Quoting Article XXI, Section 4 of the South Dakota Constitution and citing O’Leary v. Croghan, the court emphasized that the legislature has the power to define the homestead, specify the property which a homestead may encompass, and limit the value that may be exempt, “but having specified the property and limited the amount, the power of the legislature ceases.” The court noted that a proposed constitutional amendment to create an exception for mechanic’s liens had been defeated by the voters in 1894. Minnesota, by contrast, had amended its constitution to acknowledge an exception for mechanic’s liens.

230. Id.
231. Id.
232. Id. (quoting S.D.C. § 51.1707 (1939)); see also S.D.C.L. § 43-45-8 (2004) (providing that “[n]o exemption shall be allowed . . . 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”).
234. Id.; see supra Part III.F (discussing the O’Leary opinion).
236. Id. (citing Coleman v. Ballandi, 22 Minn. 144 (Minn. 1875)).

No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

attorney's fees. The South Dakota Supreme Court affirmed. The majority reasoned that the two lots passed free of the undischarged claim for probate attorney's fees.

The court quoted the constitutional basis for homestead protections in South Dakota and reiterated the legislative role in homestead laws as originally emphasized in O'Leary v. Croghan: "[H]aving specified the property and limited the amount, the power of the Legislature ceased." Conceding "that the attorney's fees, expenses and costs of administration were brought about by the acts of the surviving wife," the court nevertheless concluded that it lacked the power to impress the homestead with that indebtedness. The homestead, in the circumstances of a surviving spouse or minor children occupying the property, should neither be inventoried as an asset of the estate nor administered. The sole function of the probate court "is to declare in whom title vests upon the death of the owner."

Nor would the court allow the costs and charges of estate administration to attach when the property had been conveyed to a grantee. The court reasoned that this would place "an indirect charge on the family because a prudent purchaser will adjust the price accordingly." An aspect of homestead protections, then, was viewed as enabling the surviving family to sell the homestead and retain exempt sale proceeds for purposes of relocation.

N. In re Schneider's Estate (S.D. 1948)

Charles Schneider lived on a homestead valued at less than the exemption value cap with his wife. Beginning in 1936, he began receiving old age assistance from the State. In 1937, the legislature authorized the filing of a lien to recover old age benefits paid out, and permitting the foreclosure of the lien after

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249. Id. at 10.
250. Id. at 13. Justice Herbert Rudolph dissented without a separate opinion. Id. (Rudolph, J., dissenting).
251. Id. at 11-12 (majority opinion).
252. Id. at 10.
253. Id.
254. Id. at 11.
255. Id. (citing S.D.C. § 35.1708 (1939)).
256. Id.
257. Id.
258. Id. The court explained:
   The widow and heirs could have claimed immediate partial distribution while they were in occupancy and then have sold it. The statutes do not seem at all clear and are somewhat ambiguous. We prefer an interpretation which will further the manifest legislative purpose to protect the family as exigencies of its situation may require sale and change of location. They should be permitted so to do without subjecting the homestead to costs and charges of administration . . . .
   Id.
260. Id.
the recipient's death. The same year, a lien was filed against the Schneider homestead. Charles Schneider died in 1946, survived by his wife Bertha, who continued to live in the home. The State's attempt to foreclose on its lien in Schneider's Estate was rebuffed by the trial court, and the South Dakota Supreme Court affirmed.

The court rejected the State's argument that Charles and Bertha Schneider had waived their right to homestead exemption protections by virtue of having signed an agreement to be bound by all the provisions of the 1937 law. The State then argued that the lien could be sustained based on its theory that the lien lay dormant until the character of the property as a homestead ceased. The court rejected this argument too, based on both a construction of the statute and the fact that "[t]hroughout the entire history of this court no inroads upon the homestead exemption have been recognized except such as were clearly in accord with the constitutional mandate . . . ."

O. In re Snyder's Estate (S.D. 1951)

Dorothy Snyder, of Martin, South Dakota, died intestate. She was survived by her husband, who was appointed as the estate's administrator. Dorothy Snyder's estate filed a state inheritance tax return reflecting her home's value at $8,320, but her executor claimed that the value should be reduced by $5,000, the homestead equity cap then in effect. The county court of Bennett County agreed; the circuit court affirmed, but the South Dakota Supreme Court disallowed the $5,000 deduction.

The administrator argued that the legislature lacked the power to impress any lien on a homestead for the inheritance tax, or to enforce it by means of a forced sale. The South Dakota Supreme Court assumed (without deciding) that these contentions were correct and that the constitution invalidated the attempt to impress an inheritance tax lien on a homestead property. Because the State was

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261. Id. at 263 (citing S.D.C. § 55.3618 (1939)). The statute provided that "foreclosure shall not be commenced until one year after the discontinuance of assistance during the lifetime of the recipient or until after the death of recipient." § 55.3618.

262. In re Schneider's Estate, 31 N.W. at 263.

263. Id. at 264.

264. Id. at 263-64.

265. Id. at 263.

266. Id. at 264. The court also noted that the states of Kansas, Minnesota, and Iowa had enacted laws allowing a lien for old age assistance, but that those statutes specifically provided that the lien could not be enforced during such time as the property remained a homestead. Id. at 263 (citations omitted).

267. In re Snyder's Estate, 48 N.W.2d at 238.

268. Id.

269. Id. at 239.

270. Id. at 238, 241.

271. Id. at 240; see In re Schneider's Estate, 31 N.W.2d 261, 264 (S.D. 1948) (invalidating homestead lien for old age assistance benefits); Ramsey v. Lake Cty, 14 N.W.2d 125, 126 (S.D. 1944) (holding that a county's personal property tax lien against a homestead is invalid); see also supra Part III.N (discussing In re Schneider's Estate).

272. In re Snyder's Estate, 48 N.W.2d at 246.
not attempting to foreclose on the lien, however, and because the lien provisions were severable from the disallowance of a deduction on account of homestead status, the court considered only whether the legislature could constitutionally forbid any inheritance tax deduction for homestead property.\textsuperscript{273}

The court noted that the state inheritance tax represented a tax on the privilege of inheriting property, not a tax on property \textit{per se}.\textsuperscript{274} The legislature had clearly specified that in measuring the inheritance tax to be imposed, "no deduction shall be made by reason of any part of the property being claimed, used, or occupied as the homestead ..."\textsuperscript{275} This manner of measuring the inheritance tax to be calculated on account of the homestead’s inclusion in an estate was held to be valid.\textsuperscript{276}

P. \textsc{Brodsky v. Maloney} (S.D. 1960)

As the initial sentence in \textit{Brodsky v. Maloney} reads, "This is another one of those cases in which the rights of a mechanics’ lien claimant collide with the assertion that the premises are exempt from such encumbrance under our homestead laws."\textsuperscript{277} Herbert and Maryan Maloney, then renting their premises, took title to a vacant lot on November 13, 1956; there they intended to build their home.\textsuperscript{278} Beginning three days later, building materials were delivered to the site.\textsuperscript{279} The Maloney’s moved into their new home in February the following year.\textsuperscript{280} When the materialmen went unpaid, mechanic’s liens were filed and foreclosure commenced.\textsuperscript{281}

The South Dakota Supreme Court emphasized that homestead realty “may be impressed with the homestead character” even prior to the completion or occupancy of the home.\textsuperscript{282} Thus, the premises were endowed with exemption

\textsuperscript{273.} \textit{Id.}

\textsuperscript{274.} \textit{See id. at 239} (quoting \textit{In re Jahn’s Estate}, 271 N.W. 903, 904 (S.D. 1937)) ("Since the value of the privilege depends directly upon the value of the property transmitted, the fact that the amount of the tax is determined by an appraisal of the property does not transform the tax into a tax on property."). Effective in 2001, the state inheritance tax was repealed. \textit{See S.D. Const. art. XI, § 15} ("No tax may be levied on any inheritance, and the Legislature may not enact any law imposing such a tax."). The disallowance of a homestead deduction from inheritance taxes remained on the books until the repeal of the tax. \textit{S.D.C.L. § 10-40-27} (2010) (repealed 2014).

\textsuperscript{275.} \textit{In re Soyder’s Estate}, 48 N.W.2d at 240.

\textsuperscript{276.} \textit{Id.} at 241.

\textsuperscript{277.} \textit{Brodsky v. Maloney}, 105 N.W.2d 911, 912 (S.D. 1960).

\textsuperscript{278.} \textit{Id.}

\textsuperscript{279.} \textit{Id.} at 913.

\textsuperscript{280.} \textit{Id.} at 912.

\textsuperscript{281.} \textit{Id.} at 913. The Lampert Lumber Company claimed a lien, as did Walton Sheet Metal; First Federal Savings and Loan Association also claimed a mortgage which had been recorded on November 14, two days prior to Lampert Lumber’s first delivery to the premises. \textit{Id.} at 912-13. Although the mortgage was of record before either Lampert or Walton furnished any materials or labor themselves, they nevertheless claimed that their liens were superior to the mortgagee’s because the mortgage had been recorded after the time when “actual and visible” improvements had commenced. \textit{Id.} at 913. Neither the trial court nor the supreme court reached this contention. \textit{Id.}

\textsuperscript{282.} \textit{Id.} The court noted that it “has consistently taken [this] view ...” \textit{Id.} (citations omitted). The supreme court also suggested that the Maloney’s had taken “\textit{possession} of \textit{the home} by applying
protections at the moment when the owners took title to their lot and prior to the retroactive attachment of mechanics' liens.\textsuperscript{283} The homestead exemption would therefore invalidate the liens but for a statute in the 1939 Code providing: "If the property is not marked off, platted, and recorded as hereinbefore provided it shall not have the character of exemption rights of a homestead unless it is actually occupied as such by the owner."\textsuperscript{284} The Maloney family had neither marked nor occupied it until after the attachment of the mechanics' liens.\textsuperscript{285} The lien claimants argued that the failure to mark or occupy the premises deprived the owners of homestead privileges.\textsuperscript{286} The Malones argued that it was unconstitutional for the legislature to precondition homestead privileges with platting and occupation requirements.\textsuperscript{287}

The court assumed arguendo that the legislature could require actual occupancy before homestead characterization would attach to property and limited its inquiry into the statute's second feature—the requirement that property also be formally selected by means of the owner having undertaken to mark, plat, and record a homestead declaration.\textsuperscript{288} The effect of the formal selection procedure, the court concluded, would be to permit those families whose owner adheres to the requirement to enjoy the protections of the homestead exemption, but not "those who neglect this precaution or are not aware of it."\textsuperscript{289} The court emphasized that these families were "those most in need of" the protections, "the families of the uninformed and indifferent."\textsuperscript{290}

It was this classification of debtors—the savvy in one class, the indifferent in another—which offended the constitutional homestead: "It is palpable that this discrimination defeats the purpose of the founding fathers and results in a situation that is not wholesome."\textsuperscript{291} The legislature's formal selection requirement was therefore invalid; it was constitutionally "unwholesome."\textsuperscript{292}

waterproofing material to the concrete basement" in November of 1956 even though they did not move in until February of the next year. \textit{Id.} at 912 (emphasis added).

283. \textit{Id.} at 912-13. It would seem that the homestead character of the property also predated the recording—if not the execution of the mortgage—since the deed was executed on November 13 and recorded November 14, while the mortgage was executed on November 10 and also recorded sometime on November 14. \textit{Id.}

284. \textit{Id.} at 913 (quoting S.D.C. § 51.1713 (1939)).

285. \textit{Id.}

286. \textit{Id.}

287. \textit{Id.}

288. \textit{Id.} at 914.

289. \textit{Id.}

290. \textit{Id.} at 914-15.

291. \textit{Id.} at 915; \textit{see also} S.D. CONST. art. XXI, § 4 (requiring debtor rights to "be recognized by wholesome laws exempting from forced sale a homestead") (emphasis added).

292. \textit{Brodsky}, 105 N.W.2d at 915. Justice Frank Biegelmeier registered a dissent. \textit{Id.} at 916 (Biegelmeier, J., dissenting). He felt that the mechanics' liens "became effective as of October 25, 1956," \textit{Id.} at 917. The materialmen, he emphasized, ought to be "entitled to some notice of a possible homestead claim." \textit{Id.} (citing Jensen v. Griffin, 144 N.W. 119, 122 (S.D. 1913)). To give effect to the owners' "secret intention to occupy the property, without having possession or occupancy," is a fraud, he reasoned. \textit{Id.}
this constitutional context meant not too much exemption being afforded to homeowners, but too little.\(^{293}\)

**Q. SCHUTTERLE v. SCHUTTERLE (S.D. 1977)**

The lengthy factual recitation provided by Justice Roger Wollman in *Schutterle v. Schutterle* paints an engaging picture of Ralph Schutterle, who died in 1972, survived by his second wife, Edna.\(^{294}\) Following the death of his first wife, Marie, in 1962, Ralph encountered Edna Engelson.\(^{295}\) In the spring of 1964, Ralph and Edna met with attorney Coe Frankhauser in Gettysburg, who drew up an antenuptial agreement providing, among other matters, that each party waived all homestead rights in the property owned by the other.\(^{296}\) After Ralph died in 1972, the district court initially decreed that 160 acres of the decedent’s property in Potter County should be set aside as Edna’s homestead.\(^{297}\) Ralph Schutterle’s homestead descent waiver was upheld.

The decedent’s minor granddaughter and sole heir, acting through her mother as guardian, commenced a quiet title action and prayed for specific performance of the antenuptial agreement.\(^{298}\) Although noting that other jurisdictions had held homestead waivers invalid, the court concluded “that the better rule is that homestead rights may be waived just as any other rights.”\(^{299}\) The homestead waiver language in the contract was clear.\(^{300}\) Under the circumstances, there was “no compelling argument that the intended waiver of homestead rights does violence to the public policy of this state as expressed in article XXI, section 4 of our state constitution that wholesome laws be enacted providing for homestead rights.”\(^{301}\) The 160-acre homestead would instead pass to the minor granddaughter.\(^{302}\)

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\(^{293}\) Id. at 914-15 (majority opinion); see also In re Estate of Darby, 2010-CA-00335-COA (¶ 18) (Miss. Ct. App. 2011) (holding that Medicaid estate recovery efforts fail against an exempt homestead); Hollman v. S.D. Dept’ of Soc. Servs., 2015 SD 21, ¶ 12, 862 N.W.2d 856, 860 (holding that a Medicaid lien filed after a benefit-recipient’s death could not attach to the recipient’s interest). But compare In re Estate of Darby, 2010-CA-00335-COA (¶ 15) (agreeing with prior state supreme court cases that “held exempt property is not part of the estate to be administered and descends directly by statute; and this is true whether the estate is solvent or insolvent”), with In re Wright’s Estate., 12 N.W.2d 9, 11 (S.D. 1943) (reasoning that “the Legislature did not intend that homestead property should be administered as a part of the estate and that the only function of the county court is to declare in whom title vests upon the death of the owner”); see also supra Part III.M (discussing In re Wright’s Estate).


\(^{295}\) Id. at 344-44.

\(^{296}\) Id. at 344-45. The antenuptial agreement provided that it would “be construed as a waiver of all homestead rights in the real property owned by the other party at the date of” the contract. Id. at 345 n.2.

\(^{297}\) Id. at 346.

\(^{298}\) Id.

\(^{299}\) Id. at 354 (citations omitted).

\(^{300}\) Id.

\(^{301}\) Id. The court refused to “speculate whether a waiver of homestead rights would be effective if a widow with minor children were otherwise unprovided for.” Id.

\(^{302}\) Id. at 355.
Dorothy Davis, a seventy-five-year-old resident of Sioux Falls, South Dakota, filed for bankruptcy and claimed her homestead as exempt. The exemption statute then in force provided a cap on the homestead value of $30,000 for owners seventy years of age or younger but an unlimited value for owners over age seventy (Davis’s homestead equity surpassed $30,000). The unlimited exemption for older owners had been enacted in 1980. The trustee objected to this unlimited exemption, relying on the state constitutional requirement that the homestead be “wholesome” as well as “limited and defined by law” by the legislature. District Court Chief Judge Lawrence Piersol certified the question to the South Dakota Supreme Court, which agreed with the trustee.

Dorothy argued that the legislature had limited and defined the homestead by defining the maximum acreage that a homestead may comprise. The court reviewed the 1885 constitutional debates over whether a monetary limit should be a matter of constitutional mandate or left to the legislature. Although the convention ultimately deferred the question to the legislature, “the debates leave no question that the delegates contemplated that the Legislature would place a monetary limit on the exemption.” The legislature had failed to enact a monetary limit for the homestead exemption for older owners. Thus, the unlimited exemption violated the constitutional requirement.

The court also reexamined its prior case law with regards to the privileges and immunities clause. O’Leary v. Croghan had invalidated a legislative attempt to classify certain varieties of creditors and permit them preferential treatment under the exemptions rubric based in part on the privileges and immunities clause of the South Dakota Constitution. Since the doctrines giving
effect to the privileges and immunities clause had, since O'Leary, become much more deferential to legislative classifications which were free from suspect classes or fundamental rights, the Davis court overruled O'Leary insofar as that decision had applied constitutionally heightened scrutiny to ordinary classifications such as those based on age.313

An aside here regarding the continuing precedential value of O'Leary is appropriate. O'Leary held that a statute which created an exception to the personal property exemptions for debts arising out of groceries was unconstitutional on account of the state constitutional privileges and immunities clause, but also because of article XXI, section 4's guarantee of wholesome laws exempting a homestead and reasonable personal property.314 Given that the holding rests on two independent grounds, the precedential value of O'Leary is unimpaired insofar as it reasoned that legislative exceptions to the homestead and personal property exemptions were invalid if they could leave a debtor without "a homestead, the value of which shall be limited and defined by law . . . and a reasonable amount of personal property."315 Legislative classification of debts which may avoid the homestead exemption, therefore, are constitutionally suspect not on account of the act of classification, as such, but rather on account of an erosion of the exemption.316 It is the creation of exceptions where none are permitted—and not the classification of certain exceptions—which is constitutionally problematic, and remains problematic, even after Davis.317

S. WISNER V. PALVIN (S.D. 2006)

Wisner v. Pavlin involved an unmarried couple, Ethel Pavlin and Francis Wisner, who purchased a Sioux Falls home in 1999, taking title as joint tenants with rights of survivorship.318 In 2002, Francis unilaterally and secretly quitclaimed (as a gift) his one-half undivided interest in the homestead to his son,

amicus curiae brief from AARP that the income of elderly individuals is significantly less than the general population. In re Davis, 2004 SD 70, ¶ 7, 681 N.W.2d at 455.

313. See In re Davis, 2004 SD 70, ¶ 9, 681 N.W.2d at 455 (citing City of Aberdeen v. Meidinger, 233 N.W.2d 331 (S.D. 1975)) ("While the Constitution has not changed, our test for deciding when a statute violates the 'Privileges and Immunities Clause' has.").

314. See infra Part II.C.6 (discussing O'Leary v. Croghan).

315. S.D. Const. art. XXI, § 4; see O'Leary v. Croghan, 173 N.W. 844, 846 (S.D. 1919) (Smith, J., concurring) (emphasizing that "the Legislature may [not] grant one person a reasonable exemption and deprive another of any exemption whatever"). "Granting an exemption to a debtor, with a provision under which it may be immediately seized and sold for a debt or class of debts, is equivalent to denying any exemption to such person." O'Leary, 173 N.W. at 846 (Smith, J., concurring).

316. See Thompson, supra note 114, at 23-24 ("So, if Constitution provided that the exemption should be good against all debts, the Legislature could not say that it should not be good as against a particular class of debts.").

317. See Keleher v. Technicolor Gov't Servs., Inc., 829 F.2d 691, 692-93 (8th Cir. 1987) (quoting In re Schneider's Estate, 31 N.W.2d 261, 264 (S.D. 1948)) (noting the South Dakota Supreme Court has stated that "[t]hroughout the entire history of this court no inroads upon the homestead exemption have been recognized except such as were clearly in accord with the constitutional mandate, Art. XXI, § 4, Constitution of South Dakota, and found clear expression by the legislature").

Dennis Pavlin. Two years later, Francis died, and Dennis brought an action against Ethel for partition.

Two issues were presented on appeal: first, whether Francis' unilateral conveyance was void because it had not been joined by Ethel; second, if it was not void, whether the scope of homestead protections from creditors precluded an action for partition brought by one cotenant (who did not enjoy homestead protections) against another (who did). No third-party creditors were involved. Before undertaking a review of the trial court's decision, which decided both questions in the negative, the South Dakota Supreme Court situated homestead laws in their constitutional framework and reiterated that it "jealously guards the homestead exemptions guaranteed in both our constitution and statutes."

The court noted that, generally, the unilateral transfer by one joint tenant holding title with rights of survivorship to a third party terminates the joint tenancy and converts it into a tenancy in common. Ethel claimed that the restriction on a spouse's unilateral conveyance of a homestead interest should also apply to unmarried homestead co-owners. The court rejected her argument, noting that the unilateral conveyance limitation only applies to an "owner, if married" pursuant to South Dakota Codified Laws section 43-31-17.

Next, the court considered whether partition was an available remedy to Dennis Pavlin, Francis' grantee. Here, Ethel elevated her argument to a constitutional level, noting that the South Dakota constitution commanded "wholesome laws exempting from forced sale at homestead ...." A partition proceeding results in either a division (or partition) of the property held by cotenants or, if "a partition cannot be made without great prejudice" then a sale of the premises. Ethel averred that a partition sale ordered by a court amounted
to a “forced sale” prohibited by the constitution. The court read the constitutional provision in its full context, the preamble of which proclaims the right underlying the homestead: “[t]he right of the debtor to enjoy the comforts and necessaries of life.” Since Ethel was asserting homestead rights against a co-owner, not a creditor, the court reasoned that constitutional protections were not implicated. Ethel’s homestead right consisted merely of her half undivided interest in the home, and the right to partition held by her cotenant could not be defeated by her homestead privilege. The court did not consider whether an award of owelty would be consistent with homestead rights.

IV. LOOKING FORWARD

At first glance, the basic societal values supporting the homestead exemption have remained relatively static since territorial times. Homestead protections themselves have remained static since 1889 in a constitutional sense; the two attempts to update and refresh the sixty words of the Article XXI, Section 4 of the South Dakota Constitution were both unsuccessful. To some, the nineteenth-century phrasings might seem like the quaint and outdated echoes of the same outmoded progressivism that resulted in a state-owned cement plant (also constitutionally enshrined) and protections against corporations. Constitutional protections from creditors, shielding the borrower from her own misjudgments, might seem old fashioned in a state which tends to favor economic

329. Wisner, 2006 SD 64, ¶ 12, 719 N.W.2d 770, 775.
330. Id. (emphasis in original) (quoting S.D. CONST. art. XXI, § 4).
331. Id.
332. Id. ¶ 16, 719 N.W.2d at 777; see also Johnson v. Hendrickson, 24 N.W.2d 914, 918 (S.D. 1946) (holding that partition by sale is permitted where co-tenant did not seek to avoid partition of the homestead, but argued that his homestead interest required an in-kind division). But see Pascall v. Smith, 588 S.W.2d 700, 700-01 (Ark. 1971) (holding that ex-wife could not partition homestead still occupied by ex-husband); Wells v. Sweeney, 94 N.W. 394, 395 (S.D. 1903) (holding that widower holding homestead with surviving minor children may not partition the property so long as it is occupied).
334. See supra note 85 (detailing failed attempts for constitutional reform).
335. See S.D. CONST. art. XIII, § 10 (amended 1918) (declaring the manufacture of cement to be a public necessity); S.D. CONST. art. XVII, § 5 (allowing cumulative voting for directors of corporations); see generally THE PLAINS POLITICAL TRADITION: ESSAYS ON SOUTH DAKOTA POLITICAL CULTURE (Jon Lauck, John E. Miller, & Donald C. Simmons, Jr., eds., 2011) (collecting essays detailing the state’s contrary, underlying political culture); R. ALTON LEE, PRINCIPLE OVER PARTY: THE FARMERS’ ALLIANCE AND POPULISM IN SOUTH DAKOTA, 1880-1900 (2011) (studying the anti-establishment Populist Party in South Dakota). The South Dakota Cement plant was sold in 2001 to Grupos Cementos de Chihuahua/GCC Dacotah, Inc. See Breck v. Janklow, 2001 SD 28, ¶ 5-6, 623 N.W.2d 449, 453 (describing the sale).
freedoms and the rights of individuals to control their own property and map their own fate.\textsuperscript{336}

Generally, the trend in South Dakota has been towards reduced governmental protections and greater free choice and individual autonomy, although exceptions can be noted.\textsuperscript{337} It might be expected that a state's governance would follow a trajectory similar to an individual's development, advancing from authoritarian paternalism to greater permissiveness, with the occasional reassertion of parental control.\textsuperscript{338} That same trend away from regulated protections and towards free choice and economic development might be discerned in the judicial gloss imprinted on the homestead laws in the past few decades. The first three constitutional homestead cases discussed above, however, were hostile to the homestead protections insofar as ruling in favor of a contracted scope of exemption protections.\textsuperscript{339} The last three reported constitutional homestead cases similarly favored limitations, not expansions, of homestead protections.\textsuperscript{340} The fact that the South Dakota constitutional homestead provision has remained unchanged—but certainly not neglected—suggests that the provision does merit continuing recognition in its original form until such time as it is amended.

A. NON-INDIVIDUAL HOMEOWNERS

Perhaps the next homestead exemption issue on South Dakota's horizon will be whether homestead protections are available when the home is owned via a revocable trust or a limited liability company.\textsuperscript{341} The revocable trust issue has

\textsuperscript{336} See, e.g., S.D.C.L. § 43-5-8 (2004) (abolishing the Rule Against Perpetuities); S.D.C.L. § 54-3-1.1 (2017) (abolishing usury laws); see also Steven Mercatante, The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt, 53 S.D. L. REV. 37, 51 (2008) (calling for the reenactment of usury laws for the "protection for individuals from being overwhelmed by imposed debts"). The abolishment of usury laws led to economic benefits to South Dakota when it attracted Citicorp. Mercatante, supra, at 41. The abolishment of the Rule Against Perpetuities resulted in significant economic development for the state in the form of trust business. See Robert H. Sitkoff & Max M. Schianzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356, 410-11 (2005) (determining that states that had repealed the Rule Against Perpetuities enjoyed $100 billion more growth in their trust businesses than states that had not).

\textsuperscript{337} See supra, 2014 S.D. Sess. Laws ch. 226, § 20, 434-56 (rewriting S.D.C.L. § 55-16-15 to require spousal notifications to precede the effectiveness of transfers to a self-settled trust against claims arising out of a divorce, division of spousal property, or alimony); Liz Farmer, Facing 652% Interest Rates, South Dakota Voters Regulate Payday Lending, GOVERNING (Nov. 9, 2016), http://www.governing.com/topics/elections/gov-south-dakota-payday-lending-ballot-measures.html (describing a 36% interest cap for payday lending approved in a statewide ballot initiative by a 3:1 margin). These two examples illustrate the countervailing contemporary push which favors protections over individual property rights and unregulated freedoms in the state.

\textsuperscript{338} Cf. David M. Rabban, The Historiography of the Common Law, 28 LAW & SOC. INQUIRY 1161, 1174 (2003) (noting O.W. Holmes' references "to the Roman and German 'parents' whose 'offspring' took root 'on English soil'").

\textsuperscript{339} See supra Part III.A-C (analyzing the first three constitutional homestead cases).

\textsuperscript{340} See supra Part III.Q-S (analyzing the last three constitutional homestead cases).

\textsuperscript{341} Another unresolved issue that might be projected to arise is whether, where the surviving spouse remarries, the new spouse is entitled to claim the probate homestead. See Tamborello, supra note 333, at 37-38 (explaining that under Texas law, "once the surviving spouse dies, the homestead does not extend to the spouse from the second marriage").
been litigated repeatedly in Florida, possibly on account of its large population of retirees utilizing revocable trusts as an estate planning tool. South Dakota law has wrestled with the application of exemptions to partnerships, but not with the application of exemptions when ownership is in a kind of "pass through" vehicle such as a revocable trust or single-member limited liability company ("LLC").

In resolving these questions, two concerns will be in opposition. The first is the statutory language which gives exemption treatment to the home's "owner." If an individual is not the owner, but her trust or company is, her trust or company would seem incapable of ever vesting the realty with homestead characterization. An artificial legal person cannot occupy a home, at least in the traditional sense. After all, if Elizabeth Somers could not qualify as the head of a family, how could an LLC or a trust?

Courts have reasoned that "a man cannot acquire a homestead right to land that he does not own ...." At the same time, courts have adopted liberal allowances for the property right which qualifies for exemption status, allowing life estates and even mere licenses or other rights to possession.

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342. BARRY A. NELSON, ASSET PROTECTION IN FLORIDA § 5.28 (2015).
343. See, e.g., In re I.S. Vickerman & Co., 199 P. 589, 591-92 (D.S.D. 1912) (reasoning that neither the firm nor its partners may claim exemptions); In re Abrams, 193 F. 271, 273 (D.S.D. 1912) (reasoning that partners in an insolvent partnership have no interests of their own individually which are entitled to exemptions). South Dakota Codified Laws once provided:

The incidents of a tenancy in partnership are such that a partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representative of a deceased partner, cannot claim any rights under the homestead or exemption laws.

S.D.C.L. § 48-4-14 (1967) (repealed 2001); compare S.D.C.L. § 48-4-22 (1967) (repealed 2001) (stating a partner retained the "right, if any, under the exemption laws, as regards his interest in the partnership"), with S.D.C.L. § 48-7A-504(d) (2004) ("This chapter does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership."). See also Corrigan v. Testa, 73 N.E.3d 381, 387 (Ohio, 2016) (recognizing an LLC which is "organized and treated as a pass-through entity for tax purposes").

344. See S.D.C.L. § 43-31-2 (Supp. 2017) (emphasis added) ("[The homestead embraces the house used as a home by the owner of it . . ."). But see S.D.C.L. § 43-31-1 (Supp. 2017) (emphasis added) ("[The homestead . . . of every family . . . is exempt . . ."); S.D.C.L. § 43-31-14 (2004) (defining the term "family" as "consisting of one or more persons in actual occupancy of a homestead").

345. But see Douglass v. Pac. Mail S.S. Co., 4 Cal. 304, 305 (Cal. 1854) ("A corporation, being an artificial person, for all legal purposes, occupies in principle, the same position as a natural person, with some qualifications."). The definition of "family" in the homestead chapter clearly contemplates individuals, but it uses the word "persons" rather than "individuals." S.D.C.L. § 43-31-14 (2004). It states:

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.

Id. A "person" includes LLCs and corporations. S.D.C.L. § 2-14-2(18) (2012).

346. See supra Part II.C.4 (discussing the Somers cases).
347. Smith v. Chenault, 48 Tex. 455, 462 (Tex. 1878).
348. See In re Wood, 8 B.R. 882, 886-87 (Bankr. D.S.D. 1981) (stating that a license in land qualifies for homestead exemption); Moncur v. Jones, 31 N.W.2d 759, 765 (S.D. 1948) (citations omitted) (holding "that a future estate will not support a claim of homestead exemption during the continuance of the prior estate"); see also 40 C.J.S. Homesteads § 40 (2017) (collecting cases holding that a homestead may attach
the focus is not upon what is owned, but who owns it. If an individual—other than the spouse or minor child of an owner—does not have some ownership rights to a homestead res, then no homestead exemption can be asserted. 349

349. See In re Arnhoelter, 431 B.R. 453, 454 (Bankr. B.D. Wis. 2010) (explaining that the "most basic requirement" for claiming a "homestead exemption is ownership of the property"). Bessener Properties, Inc. v. Gamble, 27 So. 2d 832, 833 (Fla. 1946) (holding that it was not necessary for husband to hold title to homestead since he held an equitable interest by contributing to his wife's ownership interest, even though she did not qualify as the head of the family); Denmon v. Atlas Leasing, L.L.C., 285 S.W.3d 591, 595 (Tex. Ct. App. 2009) (noting that possession of a homestead is not dependent on ownership in the case of a spouse's separate ownership). Not merely legal, but also equitable title, generally suffices. See, e.g., Kleinsorge v. Clark, 4 N.W.2d 433, 435 (Iowa 1942) (citations omitted) (reasoning that even after a sheriff's deed had been issued to a bank's receiver for security, the homeowner "remained the equitable owner" and "equitable ownership was sufficient upon which to predicate his right of homestead"); Gilpatrick v. Hatter, 258 F.3d 1200, 1203 (Okla. 2001) (noting that equitable rights to property will support a homestead if legal title was transferred "even when done with the purpose and intent to defraud creditors" so long as possession is retained); see also Roy v. Roy, 172 So. 253, 254 (Ala. 1937) (noting that equity of redemption left in mortgagee qualifies as homestead interest for purposes of homestead descent rights); Kitchens v. Jones, 113 S.W. 29, 30 (Ark. 1908) (construing the equity of redemption as realty and vesting the same with homestead rights).
The second rule in opposition to the first is the liberal construction that the homestead exemption enjoys and which is to be applied in order to advance the aims of the exemption: protecting the family home from the owner’s creditors and ensuring marital and family cohesion. Denying homestead exemption privileges because of technicalities—such as a narrow definition of “owner”—would defeat such aims. Moreover, sister jurisdictions do not typically require any particular form of title or right before homestead exemption privileges can attach.350 Insisting upon a narrow construction of “owner” is inconsistent with the liberal construction that must be afforded to homestead laws in order to accomplish their stated objectives and aims.351 The potential limitations on the construction of “owner” should give way to the general rule of liberal construction.

B. TRUSTS AS OWNERS

Revocable trusts are commonly utilized as will substitutes.352 Revocable trusts also boast incapacity-planning advantages compared to simplistic durable powers of attorney and expensive and intrusive conservatorships.353 The primary purpose of a revocable trust is to avoid probate as a procedure by which assets are marshalled, creditors discharged, and assets distributed to devisees after death, substituting therefore the procedure of trust administration. Revocable trusts are common estate planning devices.354

One would expect a great many homesteads in South Dakota are actually owned by the owners’ revocable trusts.355 Typically, the homeowner utilizing a

350. See, e.g., Bessemer Properties, Inc., 27 So. 2d at 833 (reasoning that it is not necessary for an individual to have legal title in order to claim homestead rights); see generally W. W. Allen, Annotation, Estate or interest in real property to which a homestead claim may attach, 74 A.L.R. 2d 1355 (1960) (collecting cases on the subject). Indeed:

Any interest which is of sufficient dignity to be assignable, or which is capable of being subjected to the payment of debts, is sufficient to support a claim of homestead. And in some of the decisions the courts have considered assignability or capability of subjection of levy to be a test by which it is to be determined whether a homestead claim may attach to the estate or interest in question.

In re Wood, 8 B.R. at 886-87 (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)).

351. See supra Part II.A (outlining the aims of homestead rights).


353. See David J. Feder & Robert H. Sitkoff, Revocable Trusts and Incapacity Planning: More than Just a Will Substitute, 24 ELDER L.J. 1, 4 (2016) (arguing that typically, the settlor of a funded revocable trust is aiming for not just a will substitute, but also for a trust which can substitute for a conservatorship proceeding upon the settlor’s incapacity).


355. In Texas, homestead protections are retained if ownership is transferred to a trust so long as the trust is a “qualifying trust.” TEX. PROP. CODE ANN. § 41.0021 (2016). A “qualifying trust” is one which:

(1) in which the instrument or court order creating the express trust provides that a settlor or beneficiary of the trust has the right to:

(A) revoke the trust without the consent of another person;
(B) exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption; or
revocable trust will be the grantor, the trustee, and the sole lifetime beneficiary of her trust, retaining the right to amend or simply revoke and undo the trust if she tires of it.356 The homeowner who places her home in a revocable trust as part of an estate plan utilizing the revocable trust technique expects to retain—and does, in fact retain—full control and enjoyment of the property during her life, no different than if she had retained ownership in her own individual name.

For income tax purposes, the revocable trust is a nullity; no separate tax return or tax identification number during the grantor’s lifetime is required.357 The taxpayer simply reports her income as if the revocable trust did not exist. There are no grantor asset protection advantages to titling property in a revocable trust; creditor rights are just as they would be if the owner retained individual ownership.358 Typically, after the grantor’s death, the trust becomes irrevocable, and creditors of the grantor may exercise the same rights as they might in a probate proceeding.359

With regards to a home owned in trust, the broad application as to the interests of the owner which are protected by the homestead exemption shield strongly suggests that the exemption would apply.360 One could simply conclude that, for purposes of determining whether the revocable trust grantor maintains “owner” status of her home for homestead purposes, the revocable trust does not

(C) use and occupy the residential property as the settlor’s or beneficiary’s principal residence at no cost to the settlor or beneficiary, other than payment of taxes and other costs and expenses specified in the instrument or court order:

(i) for the life of the settlor or beneficiary;

(ii) for the shorter of the life of the settlor or beneficiary or a term of years specified in the instrument or court order; or

(iii) until the date the trust is revoked or terminated by an instrument or court order recorded in the real property records of the county in which the property is located and that describes the property with sufficient certainty to identify the property; and

(2) the trustee of which acquires the property in an instrument of title or under a court order that:

(A) describes the property with sufficient certainty to identify the property and the interest acquired; and

(B) is recorded in the real property records of the county in which the property is located.

Id. at § 41.0021(a).

356. See Fogel, supra note 354, at 807 (“During the settlor’s life, the settlor is frequently the trustee (or at least a co-trustee) and a beneficiary of the revocable trust.”). The term “settlor” is synonymous with “grantor.” *Settlor*, BLACK’S LAW DICTIONARY 1373 (6th ed. 1990).


358. S.D.C.L. § 55-4-58(a) (2012); UNIF. TRUST CODE § 505(a)(1) (2001) (providing that “[d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors”); see also Sowers v. Luginbill, 889 N.E.2d 172, 178 (Ohio Ct. App. 2008) (allowing a tort claimant to pursue recovery from the assets of a revocable trust after the settlor’s death).


360. E.g., Jelinek v. Stepan, 43 N.W. 90, 90 (Minn. 1889) (reasoning that a trust beneficiary may claim homestead rights).
exist. The courts could “look through” the trust to determine its owner in fact, disregarding the revocable trust as insignificant.361

But what of an irrevocable trust? Let’s say that our homeowner has adopted an estate plan by which her home will be held for the benefit of her husband following her death. She dies, survived by her husband, and the home is now held by a local bank as trustee for the benefit of the widower as beneficiary. The trustee administers the home, along with certain other assets, for the man’s benefit. The trustee permits the widower to reside in the home, and he does so. If a creditor of the beneficiary obtains a judgment against him, may the creditor foreclose its lien against the homestead?

In many circumstances, the question will be moot on account of enforceable spendthrift provisions within the trust. Most irrevocable trusts contain spendthrift provisions which prohibit the voluntary or involuntary alienation of trust assets by a beneficiary and bar creditors of a beneficiary from satisfying any claims from the trust estate.362 The spendthrift protections are typically superior to the homestead exemption because they are not subject to any equity cap. Exception creditors are also less likely to be successful in challenging a spendthrift trust than they might be when challenging a homestead exemption.363 Thus, in most cases, the superior asset protection features of a spendthrift trust will render any comparison to homestead exemption status irrelevant.364

Assuming, however, that the trust lacks enforceable spendthrift protections, how would South Dakota courts construe the homestead exemption where the owner is a trustee and the individual residing in the home is a trust beneficiary?365

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361. See, e.g., In re Moffat, 107 B.R. 255, 259-60 (Bankr. C.D. Calif. 1989) (holding that debtor was entitled to claim a homestead exemption for dwelling transferred to revocable trust because bankruptcy estate held various legal interests in the dwelling).


363. S.D.C.L. § 55-1-34 (2012); accord UNIF. TRUST CODE § 502 (2001). Reformists occasionally suggest capping the amounts that can be protected by a spendthrift clause. E.g., Anne S. Emmanuel, Spendthrift Trusts: It’s Time to Codify a Compromise, 72 Neb. L. Rev. 179, 208 (1993) (proposing a statutory amendment to provide that a “spendthrift provision is not valid with reference to one-third of any distribution of principal or income to the beneficiary”); Justin W. Stark, Comment, Montana’s Spendthrift Trust Doctrine, 57 Mont. L. Rev. 211, 237 (1996) (proposing a statutory amendment to allow a spendthrift provision “valid as to [only] one-half of the beneficiary’s interest in income or principal”). These proposals do not appear to have been acted upon in any U.S. jurisdiction, however, and spendthrift protections, while facing a host of “exception creditors” in some states, have not been capped. See Stark, supra, 225-26 (identifying various spendthrift trust exception creditors); see also John K. Eason, Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege and Policy, 61 Wash. & Lee L. Rev. 159, 228 (2004) (noting that in enacting ERISA plans’ asset protection features “Congress therefore consciously rejected any ‘reasonably necessary’ cap on the amount to be protected from creditors under an exclusion that clearly embraced the wealth-driven traditional spendthrift trust under state law”) (emphasis in original).


365. See, e.g., Cutler v. Cutler, 994 So. 2d 341, 344 (Fla. Dist. Ct. App. 2008) (concluding that property held in an irrevocable trust may qualify for the homestead exemption). The Cutler court, however, went on to hold that the homestead exemption was waived by a provision in the testator’s will directing the payment of debts. Id. at 345-46 (citing Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, Annotation, 103 A.L.R. 257 (1936)). This line of authority is especially troubling given that a directive to pay just debts seems to be boiler plate in nearly...
The person occupying the home is technically not the owner.\textsuperscript{366} Rather, the occupant is a beneficiary who has an equitable interest in the home property.\textsuperscript{367} The actual owner is a trustee, but the trustee only has bare legal title.\textsuperscript{368} Thus, the trustee of a trust is said to be the legal owner, and the beneficiary is said to be the beneficial owner.\textsuperscript{369}

It is clear that where the home’s occupant is both trustee and beneficiary—both legal and equitable owner—homestead privileges ought not to be denied.\textsuperscript{370} It is less clear whether such privileges should be permitted in the instance of a trustee-owner and beneficiary-occupant. Because of the broad range of property interests that have been recognized as enjoying entitlement to the homestead exemption privilege, however, it can be predicted with some certainty that an equitable interest in the homestead would be deemed an interest which should enjoy the exemption’s protections.\textsuperscript{371}
C. LLCs as Owners

A homestead owned by an LLC presents a different analysis and background.372 A homeowner utilizing a revocable trust as part of an estate plan would not be personally seeking any asset protection benefits; assets in a revocable trust remain just as exposed to the owner’s creditors during lifetime or after death as assets titled individually.373 The objectives with a revocable trust are typically incapacity planning, family wealth transfer, and probate avoidance, not creditor avoidance.374 The objectives behind titling personal use assets such as one’s home in a business-planning entity such as an LLC may be less clear.375

Why would an individual place their home (or any personal use asset such as a car or a snowmobile) into a business entity? Very likely, it would seem, for asset protection purposes. An LLC is a limited liability entity.376 Creditors of the LLC may recover from LLC assets, but creditors of an LLC’s individual member may not (unless the separate existence of the entity can be set aside under an “alter ego” or “piercing of the corporate veil” argument).377 Creditors of an individual member may proceed against that member’s membership interest in a company, but here the creditors’ remedies are limited to a charging order.378

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373. See supra note 358 (citing South Dakota statutory section preserving creditor rights to assets titled in revocable trusts).


375. See J. William Callison, Nine Bean-Rows LLC: Using the Limited Liability Company to Hold Vacation Homes and Other Personal-Use Property, 38 WM. MITCHELL L. REV. 592, 593 (2012) (arguing that “placing personal-use property in an LLC allows families to establish a coherent system for managing and controlling the property, restricting the transferability of ownership interests, providing a buy-out mechanism in the event a family member desires to withdraw from ownership, preventing and resolving disputes among family members, and providing estate planning and gifting options that do not involve real estate transfers”).


377. See, e.g., Baatz v. Arrow Bar, Inc., 452 N.W.2d 138, 141 (S.D. 1990) (considering piercing a corporation’s veil of liability protections). There are no reported South Dakota Supreme Court decisions on piercing an LLC’s veil, but there are in other jurisdictions. See, e.g., In re Steffner, 479 B.R. 746, 755 (Bankr. E.D. Tenn. 2012) (citing Starnes Family Office, LLC v. McCullar, 765 F. Supp. 2d 1036, 1049 (W.D. Tenn. 2011)) (“Despite the inapplicability of the remedy’s name, the ‘corporate veil’ of a Tennessee limited liability company may also be pierced, utilizing the same standards.”); Martin v. Freeman, 2012 COA 21, ¶¶ 4-7 (disagreeing with defendants’ contention that lower court erred in piercing the “LLC veil”). Piercing might be more viable when an LLC holds personal use assets like a home. See Callison, supra note 377, at 596 (asserting “that some courts will be more likely to pierce in personal-use contexts”).

378. See S.D.C.L. § 47-34A-504(a)-(b) (Supp. 2017) (limiting a member’s creditors’ remedies to a charging order which represents only a lien on the debtor-member’s distributional interest); S.D.C.L. § 47-34A-801(a)(5) (2012) (allowing a transferee of a member’s interest to seek judicial winding up of the entity’s business only in limited circumstances); Phil Aurbach & Jonathan Lee, The Charging Order: Another Tool in the Post-Judgment Remedy Toolkit, 25 NEV. LAW. 8, 9 (2017) (observing the limited relief a creditor may enjoy with a charging order: “Even if the LLC has made distributions in the past, if the
Business entities like corporations and LLCs were not originally designed to hold personal use assets; they were designed for individuals having a business purpose in mind. An LLC is a kind of hybrid entity, halfway between a corporation and a partnership. Early South Dakota legislation and South Dakota Supreme Court decisions have considered the implications of partnership exemptions. Although there was considerable debate about whether a partnership represented an independent entity or merely an aggregate of its individual partners, a corporation has more consistently been considered a

LLC votes to stop future distributions, the judgment creditor has no power to force the entity to continue to make distributions.... [If the LLC is a single-member LLC and that single member is the judgment debtor, the single member will most likely discontinue any future distributions]; Herrick K. Lidstone, Jr., Single-Member LLCs and Asset Protection, 41 COLO. LAW. 39, 40 (2012) (“A charging order places the creditor at the risk of being allocated for tax purposes income or losses of the partnership or LLC, but with no right to receive any distributions.... [A] charging order does not ensure that there will be any distributions even if the LLC is operating profitably with surplus cash.”); see generally Jay D. Adkisson, Charging Orders: The Peculiar Mechanism, 61 S.D. L. REV. 440 (2016) (discussing charging orders); Thomas Earl Geu et al., To Be or Not to Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC, 9 DEPAUL BUS. & COM. L. J. 83 (2011) (assessing charging orders in the single member LLC context).


379. Gottsacker v. Monnier, 2005 WI 69, ¶ 14, 281 Wis. 2d 361, 697 N.W.2d 436. South Dakota law has spoken to the intersection of homesteads and partnerships. See supra note 343 and accompanying text (detailing state legal history of partnership exemptions); see also In re Novak, 150 F. 602, 603-04 (D.S.D. 1907) (construing a now repealed South Dakota statute and concluding that a partnership is limited to a single $750 exemption); 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”). The statute reviewed in In re Novak read:

Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons, namely: (1) To a corporation for profit. (2) To a non-resident. (3) To a debtor who is in the act of removing with his family from the state; or (4) who has absconded, taking with him his family. (5) A partnership firm can claim but one exemption of seven hundred and fifty dollars in value, or the alternative property, when so applicable, instead thereof, out of the partnership property, and not a several exemption for each partner.

In re Novak, 150 F. at 603 (quoting S.D. Rev. Code Civ. Proc. § 363 (1903)).

380. See, e.g., Ford v. Ford, 124 N.W. 1108, 1111 (S.D. 1910) (applying estoppel in a co-partnership settlement involving a homestead claim); Brady v. Kreuger, 66 N.W. 1083, 1084 (S.D. 1896) (“The real property in controversy being partnership property, no homestead therein could be acquired by Mr. and Mrs. Kipp, as against the co-partner.”); Betts v. Letcher, 46 N.W. 193, 199 (S.D. 1890) (considering the statutory $750 exemption granted to partnerships); see also In re Estate of Liike, 776 N.W.2d 436, 439 (Iowa Ct. App. 2009) (citations omitted) (“One partner cannot, as against his copartner, acquire a homestead interest in real property belonging to the partnership, whether the title to the property is in the name of one partner or the partnership.”); Annot., Right of individual owner to exemption in partnership property, 4 A.L.R. 300 (1919) (noting the majority rule “that an individual member of a partnership is not entitled to an exemption or a homestead out of the partnership property”); The reasoning which suspends exempt status to a partner as to partnership property is that no partner has rights to partnership property until creditors of the partnership are paid. State ex rel. Billingsley v. Spencer, 64 Mo. 355, 357 (Mo. 1877); see In re Novak, 150 F. at 603 (quoting S.D. Rev. Code Civ. Proc. § 363 (1903)) (reviewing an early entity exemption statute from South Dakota).
separate legal person.\textsuperscript{381} Additionally, although there may be no bona fide business purpose with an individual simply placing their own home in an LLC, South Dakota LLC statutes do not specifically require a business purpose.\textsuperscript{382} The use of an LLC to achieve greater asset protection features, therefore, ought to be acceptable even with regards to personal use assets like one’s primary personal residence, subject to any “piercing the corporate veil” or “fraudulent transfer” assertions of an aggrieved creditor.\textsuperscript{383}

A creditor is permitted to pierce the corporate veil when corporate formalities are disregarded.\textsuperscript{384} For this reason, the person placing her home in an LLC for purposes of asset protection would be advised to enter into an arm’s length lease agreement with the company if she intended to continue to live in and enjoy the possession of her home property. Other corporate formalities such as keeping minutes of meetings and honoring the terms of the lease would also be advisable.\textsuperscript{385}

Piercing possibilities aside, would South Dakota courts recognize homestead exemption treatment where the owner is an LLC? The IRS treats LLCs with only one member as “disregarded entities.”\textsuperscript{386} For income tax purposes, the LLC with a single member is ignored, and taxation is calculated as if the member is the

\textsuperscript{381} See Phillip I. Blumberg, The Corporate Entity in an Era of Multinational Corporations, 15 Del. J. Corp. L. 283, 286-87 (1990) (observing that under the “medieval notions of Roman law that underlie all Western legal systems, the corporation is conceptualized as a separate legal right-and-duty-bearing unit”). Indeed, separate personhood (or entity law) is necessary in order to ensure the limited liability characteristics of corporations and other limited liability entities: “Although entity law does not inevitably involve limited liability, limited liability cannot exist without acceptance of entity law.” Id. at 286. Much of business organizations law in the twentieth century questioned whether the prime structure for small businesses—the partnership—was a collection of partners or an independent actor. Aggregate or entity; that was the question. In the United States, the Commissioners on Uniform State Laws’ 1914 product—the Uniform Partnership Act (or UPA)—gave a mixed answer, suggesting that a partnership represented an independent “legal person” (an entity) but also that a partnership was an aggregate of flesh and blood persons oriented toward a shared aim. See Unif. P’Ship Act § 6(1) (Unif. Law Comm’n 1914) (defining a partnership as “an association of two or more persons”). Some speculated that the hybridization of aggregate and entity theories in the UPA could be traced to the untimely death of Dean Ames, a proponent of the entity theory, about halfway through the project. See Walter George Smith, Prefatory Note to Unif. P’Ship Act (Unif. Law Comm’n 1914) (narrating how the Dean of Harvard Law School had been secured in 1903 as the drafting committee’s reporter but that he had died in 1910, after which the “experts present recommended that the act be drawn on the aggregate or common law theory”). A partnership is now firmly declared to be an entity, not an aggregate, as are corporations. See S.D.C.L. § 47-1A-140(12) (2007) (defining corporations); S.D.C.L. § 48-7A-201(a) (2004) (defining partnerships); see also S.D.C.L. § 47-34A-201 (2007) (“A limited liability company is a legal entity distinct from its members.”).

\textsuperscript{382} See S.D.C.L. § 47-34A-112(a) (2007) (permitting the organization of an LLC “for any lawful purpose”).

\textsuperscript{383} Mark A. Sargent & Walter D. Schwidetzky, Limited Liability Company Handbook § 4.4 (2016). However, “judges may feel that a liability shield is only appropriate for a legitimate business and refuse to recognize the liability shield of an LLC to the extent that it holds personal-use assets.” Id. South Dakota’s fraudulent transfer statutes are codified at S.D.C.L. ch. 54-8A (2017).

\textsuperscript{384} See Jonathan Macey & Joshua Mitts, Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil, 100 Cornell L. Rev. 99, 152 (2014) (rejecting the generic justifications such as undercapitalization, failure to observe corporate formalities, and preventing injustice offered to justify piercing [as unpersuasive]).

\textsuperscript{385} The failure to observe corporate formalities is one factor in determining whether a court should pierce the corporate veil. Farmers Feed & Seed, Inc. v. Magnum Enters., Inc., 344 N.W.2d 699, 701 (S.D. 1984) (citations omitted).

\textsuperscript{386} 26 C.F.R. § 301.7701-3(b) (2006).
This treatment, if applied to a homestead analysis, would result in the original owner retaining homestead exemption benefits even after the title to the owner’s home had been transferred to an LLC; the entity would be disregarded, and ownership would be treated as if it resided in the LLC’s sole member.

In the absence of any legislative directive, there ought not to be any public policy objections to individuals who wish to “double dip” when it comes to asset protection features of the law. If the law recognizes limited liability entities and also recognizes homestead exemptions, purposefully availing oneself of both protections can find no real objection. The more difficult question is whether an LLC-owned home would qualify for homestead characterization since the LLC—an artificial legal person—cannot in any traditional way occupy or enjoy the property. An equitable ownership analysis such as was proposed for trust ownership is unavailable. The member of an LLC lacks any equitable ownership in the LLC’s corpus; the member’s ownership rights are akin to those of a shareholder in a corporation or a partner in a limited partnership. An LLC member owns units in a company as legal owner of personal property. An LLC member has no specific property interest in the property of the LLC (i.e., the homestead property). The LLC in this scenario would own the home; the LLC member would own only personalty: membership units. Recognition of a

387. *Id.*

388. *But see* Lidstone, Jr., *supra* note 378, at 39 (noting that, while other states have more generous asset protection benefits for single-member LLCs, Colorado does not).


391. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 4:1 (2016) (“All LLC statutes provide that a membership interest in a LLC is the member’s personal property, and members generally have been found to have no interest in the LLC’s assets; this includes, members who own all the interests in single member LLCs.”). An LLC “member is not a co-owner of, and has no transferable interest in, property of a limited liability company.” S.D.C.L. § 47-34A-501(a) (2007). Indiana specifically permits a homestead interest in the form of personalty. IND. CODE ANN. § 34-55-10-2(c)(1) (West 2017). Others reject homestead claims to personalty, such as a movable trailer, despite its function being essentially equivalent to that of a home. *See, e.g.*, Gann v. Montgomery, 210 S.W.2d 255, 260 (Tex. Civ. App. 1948) (“To hold that the homestead exemption applies to the trailer in the case before us would be to hold, as a practical matter, that it applies to almost every trailer which is occupied by the owners, if they constitute a family which does not own another home.”) *But see* S.D.C.L. § 43-31-2 (Supp. 2017) (outlining the availability of homestead exemption to mobile homes); Haskins, *supra* note 348, at 1295 (“It would seem, however, that if the function of homestead legislation is protection of the home, it should be immaterial whether the home is a mere chattel or has achieved the dignity of an estate in land or a chattel real.”).

392. *See In re Liber,* No. 08-37046, 2012 WL 1835164, at *10 (Bankr. N.D. Ohio May 18, 2012) (“A ‘membership interest’ in a limited liability company … does not confer upon the ‘member’ any specific interest in company property, whether personal property or real property. Such property is, instead, held and owed solely by the company.”).

393. Simply because an interest is personal rather than real, however, does not per se exclude it from homestead exemption treatment. *See, e.g.*, S.D.C.L. § 43-31-2 (Supp. 2017) (stating that a “homestead embraces the house used as a home by the owner of it, being either, real property or a mobile home”). A mobile home may include any vehicle without motive power which can provide adequate, comfortable, all season quarters” so long as it is “larger than two hundred forty square feet, measuring at the base of the vehicle.” *Id.*
homestead res is generally dependent upon characterizing the property as real and not personal. 394

Without any bifurcation of legal and equitable title, the owner who has conveyed all of her property interests—even if to an entity wholly controlled by her—would seem to have ceased to have any ownership interests in the home res which would entitle her, as its occupant, to claim a homestead. 395 The member’s argument would depend on showing that she retained such unfettered control over the assets of the LLC that it amounted to the same as outright ownership of those assets. She would argue that the separate existence of the LLC should be disregarded. 396 In most cases, it would seem, an LLC-owned home should not qualify for homestead protections. 397 It would, however, endow the member with asset protection benefits which may exceed the relatively limited equity protections afforded by the South Dakota homestead exemption. 398

394. See id. (emphasis added) ("The homestead embraces the house used as a home by the owner thereof, being either, real property or a mobile home . . . "). The statute suggests that if a homestead is not real property, then it may enjoy exemption status only if it is a qualifying mobile home. Id.

395. See In re Breece, 487 B.R. 599 (Table), No. 12-8018, 2013 WL 1973999, at *5 (B.A.P. 6th Cir. Jan. 18, 2013) (reasoning that a home occupant’s membership units in a sole member LLC do not vest her with an “interest” qualifying for homestead treatment); In re Stewart, No. 09-37257, 2010 Bankr. LEXIS 6517, at *12 (Bankr. N.D. Ohio Oct. 1, 2010) (holding that an LLC-owned home does not qualify as a homestead). But compare McKee v. Smith, 965 S.W.2d 52, 53 (Tex. App. 1998) (finding that the “business homestead exemption applies to real property titled to a family member but leased to a corporation wholly owned by a family member”), with Nash v. Conaster, 410 S.W.2d 512, 521-22 (Tex. Ct. App. 1966) (holding that a corporate-owned home does not qualify for the business homestead exemption even where the corporation is wholly owned by a family member occupant).

396. Litigation makes for strange doctrinal bedfellows. In In re Stewart, the debtors invoked the alter ego doctrine (which is similar to the piercing doctrine mentioned supra note 379) so as to disregard their business entity’s technical ownership of their home and vest them with ownership, thereby engaging the shield of the homestead privilege. In re Stewart, 2010 Bankr. LEXIS 6517, at *9. The Ohio Supreme Court rejected their argument. Id. at *26. In re Stewart explained that it respected “the fundamental distinction between a limited liability company and its members.” Id. at *12. Deploying the alter ego doctrine as a shield rather than a sword in the entity-owned homestead context, however, has succeeded. See In re Hecker, 414 B.R. 499, 504 (Bankr. D. Minn. 2009) (discussing the two Minnesota “reverse pierce homestead exemption cases” of Cargill v. Hedge, 375 N.W.2d 477 (Minn. 1985), and State Bank in Eden Valley v. Euerle Farms, Inc., 441 N.W.2d 121 (Minn. Ct. App. 1989)); see also Gregory S. Crespi, The Reverse Pierce Doctrine: Applying Appropriate Standards, 16 J. CORP. L. 33, 41-43 (1990) (reviewing the Hedge and Euerle Farms decisions).

397. See In re Arnhoeitler, 431 B.R. 453, 455 (Bankr. F.D. Wis. 2010) (rejecting claim that debtor’s LLC could assert a homestead exemption). But see In re Caldwell, 545 B.R. 605, 612 (B.A.P. 9th Cir. 2016) (reasoning that the transfer of a home from an LLC to a trust within 1215 days prior to the bankruptcy petition date did not constitute an “interest” that was “acquired” by the debtor within the meaning of the Bankruptcy Code’s limitations on recently acquired homesteads where debtor had occupied the home for twenty years). 398. See In re Kane, No. 10-18898-JNF, 2011 WL 2119015, at *7 (Bankr. D. Mass. May 23, 2011) (concluding that debtors were unable to claim a homestead exemption in their LLC-owned home, but also that “the Property is not property of the bankruptcy estate”). “Rather,” the court noted, “the Debtor’s membership interests in the LLC are personal property which is property of their bankruptcy estate.” Id. The equity limits of the South Dakota homestead exemption are generally $60,000. S.D.C.L. § 43-45-3 (Supp. 2017). The limits are $170,000 insofar as a homestead of “a person seventy years of age or older, and the unmarried surviving spouse of such a person . . . .” S.D.C.L. § 43-31-1 (Supp. 2017); S.D.C.L. § 43-45-3(2) (Supp. 2017).
V. CONCLUSION

As the late, great USD law school Dean Marshall McKusick once wrote in his South Dakota homestead primer: the homestead exemption exists “to preserve a home for the family even at the sacrifice of just demands.” The homestead privilege still echoes with the values with which it must have resonated in the era of the horseless carriage. The debtor—every debtor—has a constitutionally enshrined right “to enjoy the comforts and necessaries of life.” This right, the constitution ensures, “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 . . . .” 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. So defined, the exemption provides family refuge. Further definition has been added and subtracted over the decades with successions of legislation and judicial gloss, while the constitutional command has remained unmovable and seemingly unmovable. Under the South Dakota “Constitution and laws, the homestead right so firmly exists that nothing can deprive those entitled thereto of the right . . . .”

The term “asset protection” did not exist in the Jacksonian or antebellum eras. Today, it is ubiquitous. Moreover, asset protection is widely condemned. 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. It is difficult to find scholars defending the moral justifications of asset protection. Deep-seated public policy justifications for the homestead, however, are historical, although the homestead is not simply an 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.

VI. APPENDIX

A. TERRITORIAL TERRITORIES

These two maps show the contradiction of the area encompassed by Dakota Territory from its original organization in 1861 (when it included present day Montana) to 1868 (when it encompassed present day North and South Dakota only).

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ii. The Yankton Tribe's cession of land in the 1858 treaty can be seen here, along with the Yankton reservation and early Dakota Territory counties as they existed in 1862, such as Cole County (today, renamed Union County) and Jayne County (named after Territorial Governor Jayne; today, Turner County, in part).

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B. THE HOMES OF MS. DAVIS AND MS. WISNER (RESPECTIVELY)

i. This homestead, at issue in In re Davis, has a street address of 2800 South Willow, in Sioux Falls, South Dakota.

*Photograph by author.*

ii. This property, at issue in the case of Wisner v. Pavlin, has the street address of 2113 South Lyndale Avenue, in Sioux Falls, South Dakota.

*Photograph by author.*
This warranty deed from Elizabeth Somers to her two sons, Peolia and Fred, was signed in February of 1908, and recorded after Elizabeth's death, in March of 1909. Elizabeth's estranged husband, Lafayette Somers, did not join in the conveyance. The deed is handwritten, a copy made from the original instrument by the register of deeds, as was the practice at the time. The beginning of the next deed on the roll can also be seen.