Homestead and the Process of History: The Proposed Changes in Article X, Section 4

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HOMESTEAD AND THE PROCESS OF HISTORY: THE PROPOSED CHANGES IN ARTICLE X, SECTION 4

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I. INTRODUCTION

It has been said that the exemption from forced sale of a home and the land upon which it stands is a creature unique to the constitutions and statutes of the American states. It has also been said that the common law knew of only one exemption from execution and subsequent forced sale in order to satisfy one's debts: an exemption for the clothes on one's back. Both these statements are inac-

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1. A forced sale is "a sale made by virtue of a legal process," H. HERMAN, TREATISE ON THE LAW OF EXECUTIONS 86 (1876), without the consent of the owner. See Patterson v. Taylor, 15 Fla. 336, 341-44 (1875) (discussing various definitions of this term).


3. "Execution" is the procedure by which the sheriff or other officer empowered by law takes possession of the real or personal property of a person adjudged by a court to owe a debt which has not been paid. Execution occurs pursuant to a court order to execute or make good the order of repayment. See Davidson v. Seegar, 15 Fla. 671, 676, 678-79 (1876); Davidson v. Floyd, 15 Fla. 667, 670 (1876).

4. Levy is a term used to describe the action of the sheriff or other officer, in which the officer seizes the defendant's property, in effect causing the judgment to be "levied" or "placed upon" the property of the judgment debtor. The act of posting real property in order to give notice of an impending official auction furnishes a vivid illustration of one aspect of this official conduct. For discussion of various aspects of levy, execution, and forced sale, see Conard v. Atlantic Ins. Co., 26 U.S. 292, 336-37, 1 Pet. 386, 443 (1828); Moseley v. Edwards, 2 Fla. 429, 438 (1849); Gersten v. Bessemer, 352 So. 2d 68, 70 (Fla. 4th Dist. Ct. App. 1977); Comment, Homestead Exemption: What Protection for the Widow and Heirs?, 22 U. FLA. L. REV. 321, 322-23 (1969).

5. For example, Herman put it as follows: "The common law was very niggardly of these exemptions; it allowed only the necessary wearing apparel of the debtor, and if he had two gowns, the officer might seize and sell one." H. HERMAN, supra note 1, at 86; accord, C. CRANDALL, A TREATISE ON THE PRATICE IN ACTIONS AT LAW IN THE CIRCUIT COURTS AND SUPREME COURT OF FLORIDA 850 (1928); see Cooke v. Gibbs, 3 Mass. 193, 198 (1807) ("[A] fieri facias at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the debtor's wearing apparel from his body, he would be a
Accurate. This article will examine the changes to the homestead provisions of the Florida Constitution proposed by the Constitution Revision Commission, but only after an examination of the historical background. In this way, perhaps the current generation of judges, lawyers, and citizens might, when called upon to argue and vote about this state's homestead law, avoid the mistake of declaring wrong modern law on the basis of wrong ancient history.

The analysis begins with the treatment of executions upon persons and upon real and personal property in Roman law, then discusses the influence of Roman law on the laws of England and Spain, including an inquiry into the independently based law of those two jurisdictions. With this basis, the article examines the origins and development of homestead law in the United States. Against this historical background, the analysis concludes with a change-by-change inquiry into precisely what Floridians would be saying by adopting the homestead proposals made by the Constitution Revision Commission as part of Florida's fundamental law. For those impatient with history and with why things are as they are, this last section may be read alone.

II. THE TREATMENT OF DEBTORS UNDER ROMAN LAW

The law of the Romans, especially in the first centuries of the Republic, treated a debt as attaching to the person of the debtor.\(^5\) Trespasser, for such apparel, when worn, is not liable to the execution. Also, by the statute of 1805, c. 100, certain chattels therein described cannot be attached. \(\ldots\)\); Bowne v. Witt, 19 Wend. 475, 475-76, 13 N.Y.C.L. Rep. 676, 676 (Sup. Ct. 1838) (stating that since the defendant debtor was not a householder and therefore could not claim the protection of the statute, no remedy existed for seizure of his coat by a constable pursuant to court order); Schwanz v. Teper, 223 N.W.2d 896, 900 (Wis. 1974) (stating that "the right of a debtor to hold his property free from claims of creditors is not a common-law right"). At least one author has complained that such statements assert a rule which "is certainly neither to be tolerated by humanity or justified by law." Stonex, Common Law Exemptions, 9 CENT. L.J. 2, 3 (1879). He noted that he had found not a single reported case in which this proposition formed the basis of decision and that it was not supported by "the early authorities." Id.

5. FLA. CONST. art. X, § 4. The term "homestead" as used in this article refers to the provisions found in many state constitutions and in the statutes of most states exempting certain personal property, real property, and buildings from levy, execution, and forced sale in specified cases. The context will indicate when real or personal property is meant. There have been many attempts to define "homestead" and "exempt homestead," and the author is loath to add yet another definition to the list. For a sampling of the various definitions, see Oliver v. Snowden, 18 Fla. 823, 834-36 (1882); Solary v. Hewlett, 18 Fla. 756, 759 (1882); Schwanz v. Teper, 223 N.W.2d 896, 900 (Wis. 1974); Dame, The Homestead Exemption Amendment, 9 FLA. L.J. 399, 403 (1935); Note, Our Legal Chameleon is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution, 24 U. FLA. L. REV. 701, 702-03 & nn. 12-13 (1972); Comment, Homestead: Family Headship, 7 U. FLA. L. REV. 102, 103 (1954).

6. See Pollock, English Law Before the Norman Conquest, 14 L.Q. REV. 291, 291 (1898) ("wrong ancient history may lead to the declaration of wrong modern law").

7. J. HADLEY, INTRODUCTION TO ROMAN LAW 246 (1884).
The debtor pledged his body, not his property, as security for the debt. Thus, under the law of the Twelve Tables, the first codification of early Roman law, published in 451 and 450 B.C., if a debtor could not repay, he paid—literally—with his body.

It worked this way: after judicial determination that the debtor could not satisfy his creditors, he was declared an "infamous" person and was denied certain rights, much as convicted felons in Florida today lose certain rights. Absent a general agreement between the debtor and his creditors, the creditors could not reach the debtor's property. Instead, after the creditors had complied with the specified procedures, they could exercise one of two options. The first was to sell the debtor's body "beyond the Tiber"; that is, into slavery. The other option was to divide his body among all the creditors, the law providing that if one creditor hewed off a larger portion of the debtor's body than was due him, he should not be punished.

Both these options were removed from the law by statute in 313 B.C., apparently leaving creditors with only one option: imprison-

8. Id. at 247; see O.W. Holmes, The Common Law 14-15 (1881) (stating that the "quasi material conception of legal obligations as binding the offending body" was conceived in Roman law to very literally "inhere in or bind the body").

9. R. Sohm, The Institutes of Roman Law 24, 210-11 (4th ed. J. Ledlie trans. 1892); see Maitland, A Prologue to a History of English Law, 14 L.Q. Rev. 13, 14 (1898) (stating that this Roman law had held sway for upwards of four centuries prior to the Roman invasion of Britain in 55 B.C.).

10. Infamy is discussed in II C. Sherman, Roman Law in the Modern World 40-41 (1917). As to Florida's treatment of convicted felons with regard to the exercise of civil rights, see Fla. Const., art. VI, § 4, providing that no person convicted of a felony "shall be qualified to vote or hold office until restoration of civil rights," and 1978 Fla. Op. Atty Gen. 078-45, setting forth the Florida law regarding suspension of civil rights upon conviction of a felony.

11. J. Hadley, supra note 7, at 246.


13. J. Hadley, supra note 7, at 246; O.W. Holmes, supra note 8, at 14; II C. Sherman, supra note 10, at 280 n.1.

14. The sixth section of the Third Table provided as follows: "VI. Law. If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market-day. It may be cut into more or fewer pieces with impunity: Or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber." Fragments of the Twelve Tables, in The Institutes of Justinian 665 app. I (3d ed. T. Cooper trans. 1852) [hereinafter cited as Cooper] (emphasis in original). Whether or not this law was ever followed, and whether it was to be taken literally, was at one time a matter of some disagreement. For example, Thomas Cooper, one of the early English translators of the Justinian Code, took the position that "doubt yet remains whether the literal be not the true sense. Probably it was a law in terrorem only." Id. at 650. Montesquieu also took this position. I J. Kent, Commentaries on American Law *521 n.b. (13th ed. 1884). However, the great weight of historical authority today holds that this provision was taken quite literally. Id.; see O.W. Holmes, supra note 8, at 14. It appears that the severity of the Third Table "was designed to compel the debtor to redeem himself, or to enter into a nexum, by which he became liable to pay interest, and to work out his debt by labor." I J. Kent, supra at *521 n.b.
ment of the debtor. Some two centuries later, however, an alternative to the debtor’s prison was introduced in the form of involuntary bankruptcy. The debtor still suffered the penalties of infamy, but for the first time in Roman law, a creditor could enforce his judgment against the debtor by levying upon and forcing the sale of the debtor’s property, both real and personal. There were no exemptions from this new form of execution, and the debtor “was not released from the liability of having his after-acquired property seized and sold, until the old debts of his creditors were fully satisfied.”

Julius Caesar took this procedure one step farther during the Civil Wars, a period when credit was hard to get and debts went unpaid, by introducing the idea of voluntary bankruptcy. To encourage the use of voluntary bankruptcy in which the debtor voluntarily assigned all his real and personal property to his creditors, Roman law by 223 A.D. provided for exemptions from imprisonment and infamy for those debtors who used this procedure. More important for our purposes, later Roman law provided that a debtor entering into voluntary bankruptcy did not have to use all his after-acquired property to pay off his creditors, but could set aside a portion to provide for his own support.

This was the first instance of a property exemption of any type since the idea of levying executions upon a debtor’s property had been introduced into Roman law one century before Christ. It appears to have been a fairly successful means of satisfying judgment creditors, for less than a century after this property exemption had been fully enacted, imprisonment for debt was all but abolished by

15. R. Sohm, supra note 9, at 210; see II C. Sherman, supra note 10, at 280 & n.2. It should perhaps be remembered that detention in prison was humane in comparison with dismemberment of the body.
16. II C. Sherman, supra note 10, at 280 & n.3. The date appears to have been circa 105 B.C. Id.
17. Id. at 280-82.
18. Id. at 281-82. Still, it was better than prison.
19. See J. Caesar, The Civil War 106 (J. Mitchell trans. 1967); J. Caesar, The War Commentaries of Caesar 278 (R. Warner trans. 1960); II C. Sherman, supra note 10, at 284 & n.27. But see R. Sohm, supra note 9, at 211 (stating that the idea was “probably” introduced by Augustus Caesar). Caesar recounted two purposes for his action: he “thought it the most effective way to remove or lessen the fear of a total abolition of debts which usually accompanies wars or civil wars, and to preserve the credit of debtors.” J. Caesar, The Civil War, supra at 106.
20. R. Sohm, supra note 9, at 211; see II C. Sherman, supra note 10, at 284 & nn. 29-30.
21. II C. Sherman, supra note 10, at 284 & n.31; see Cooper, supra note 14, at 650 (comparing Roman law codified under Justinian with the English law forbidding “the tools and instruments of a man’s trade to be seized”).
Constantine the Great. This remained the law of the Romans until the end of the Empire, the time of Emperor Justinian, whose codification of Roman law forms the basis of the civil law.

Several points should be kept in mind as we turn to English common law. First, the idea of forcing the sale of a debtor's property to pay creditors was a reform, a humane alternative to imprisonment for debt, which in turn was a (comparatively) humane alternative to dismemberment of the debtor. Second, it was in Roman law that the idea of exempting a portion of the debtor's property from the creditor's reach first appeared, and then only to the extent permitted by the sovereign's written code of laws. Finally, this property exemption, which entered Roman law between 223 and 533 A.D., the latter being the year of publication of the Justinian Code, applied to all debtors without distinction.

III. THE TREATMENT OF DEBTORS UNDER ENGLISH COMMON LAW

The Romans first entered Britain, led by Julius Caesar, in 55 B.C. They, and their laws, remained in force in Britain until the middle of the fifth century, when the Saxons successfully invaded England. Roman law, together with the law of the Saxons, was the basis of the earliest English common law.

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22. I C. Sherman, supra note 10, at 280 & n.3. The year was 320 A.D. Imprisonment was still allowed for those debtors who were able to pay but refused to do so. Id.

23. See id. at 284. Book IV, Title VI, Chapter 40 of the Institutes of Justinian, translated in The Institutes of Justinian 541 (T. Sandars trans. 1876), provided as follows:

So, when a debtor who has made a cession of his goods to his creditors acquires a fortune which makes it worth their while, the creditors may compel him by action to pay as much as he is able, but no more, for it would be inhuman to condemn a man to pay the whole debt who has already been deprived of all his property.

24. See text accompanying notes 66-67 infra; J. White, Land Law in California, Oregon, Texas & c. ix (1839).

25. J. Hadley, supra note 7, at 17.

26. See note 23 supra.

27. I C. Sherman, supra note 10, at 345.

28. In I C. Sherman, supra note 10, at 347, it is stated that the Roman forces occupying Britain were withdrawn in 455 A.D. to protect Italy from Germanic invasions. In Lefroy, The Anglo-Saxon Period of English Law, 26 Yale L.J. 291, 291 (1917), the statement is made that the Roman occupation of Britain terminated in 410 A.D. Mr. Lefroy's work bears heavy indications of extensive plagiarizing of Pollock, supra note 6. Compare Lefroy, supra at 303, with Pollock, supra note 6, at 296. Interestingly enough, Lefroy did not cite to Pollock's article, written 19 years earlier, even once. Since the authenticity of scholarship in Mr. Lefroy's article is in doubt, the authority of his work is equally in doubt.

29. See I J. Kent, supra note 14, at *546 n.f. The well-known historical English aversion to foreign influence upon the common law for a long time prevented the recognition of Roman influences upon the English system of law. As stated by Kent in 1884, "[a] national prejudice was early formed against the civil law, and it was too much cultivated by English lawyers . . . . But the more liberal spirit of modern times has justly appreciated the intrinsic merit of the Roman system." Id. at *546. Thus, in 1845, England adopted a statute protecting the
The Saxons not only partially replaced the Roman law with their own, but also they replaced the Roman desire for discipline and codification with a strong spirit of independence. The Saxon courts could not compel the attendance of any defendant, let alone a judgment debtor. In order to force a defendant to come to court, the person who brought the suit had to resort to self-help by taking the defendant's personal property (usually cattle) until he came to court.\textsuperscript{30} If the defendant still refused to appear, he could be “outlawed” by the court,\textsuperscript{31} which involved consequences similar to that of the Roman practice of infamy.\textsuperscript{32} Since the court could not even compel a defendant’s attendance, it is no surprise that it also could not force a defendant to pay a debt.\textsuperscript{33}

The arrival of the Normans in 1066 did little to displace the Saxon laws, for the Normans arrived in Britain with little written law of their own.\textsuperscript{34} The Saxon method of civil procedure and the ideas behind it survived and formed the basis of later common law procedure.\textsuperscript{35} This is important because the Normans—who were aware of Roman law as set forth in the Justinian Code—did not attempt to replant the Roman law regarding creditor’s rights. Thus, while the early common law did develop methods of forcing the sale of a debtor’s personal property to satisfy the debt, there was, nevertheless, no means by which a creditor might levy upon the land of a debtor. While this was due primarily to the rigid system of feudal land ownership, it was due also, it is submitted, in part to the Saxon

\textsuperscript{30} Pollock, supra note 6, at 296. This was called “distress” or “distreint.” Id. Distress was also used—and regulated—under the early common law as a method of self-help by bringing pressure to bear upon a debtor to pay a debt: “The idea of distress (districcio) is that of bringing compulsion to bear upon a person who is thereby to be forced into doing something or leaving something undone; it is not a means whereby the distrainor can satisfy the debt that is due him.” I F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 353 (2d. ed. 1888) [hereinafter cited as POLLOCK & MAITLAND].

\textsuperscript{31} Pollock, supra note 6, at 296.

\textsuperscript{32} As to the Roman practice of infamy, see note 10 and accompanying text supra.

\textsuperscript{33} I POLLOCK & MAITLAND, supra note 30, at 355; see Pollock, supra note 6, at 303: There was not [under Saxon law] any law of contract at all, as we now understand it. . . . Apart from the general sanctions of the Church, and the king’s special authority where his peace had been declared, the only ways of adding any definite security to a promise were oath and giving of pledges.

\textsuperscript{34} I POLLOCK & MAITLAND, supra note 30, at 65. In the area of property rights and succession, however, the Normans did gradually replace the existing law—with laws designed in part for the peculiar situation of their British subjects, in part derived from the Justinian Code. Pollock, supra note 6, at 306.

\textsuperscript{35} Pollock, supra note 6, at 297.
concept of security within the boundaries of one's own land: "[e]very free man was entitled to peace in his own house, the sanctity of the homestead being one of the most ancient and general principles of Teutonic law." 36

At any rate, three ways were soon developed at common law by which a creditor could compel payment of a debt from a judgment debtor. 37 The first was by executing the debt upon the person of the debtor, by use of the writ of capias ad satisfaciendum. This writ directed the sheriff to bring the defendant into court, where he would be asked to pay the debt; if he did not or could not then do so, he would be kept in custody until he did. 38 This procedure could be used against any common man. 39

Subsequently, a statutory alternative analogous to the Roman procedure for voluntary bankruptcy was provided. 40 Provision was made for any judgment debtor owing less than one hundred pounds to avoid imprisonment by surrendering all his personal property to his creditors, with one exemption, and with his after-acquired prop-

36. Id. at 301; cf. I Pollock & Maitland, supra note 30, at 352-53, regarding the remedies available in the thirteenth century to a lord for his tenant's failure to render services: "Such then is our common law, and it is well worthy of remark; it does not turn out the tenant from the land because he can not or will not perform his services." (Emphasis added.) The idea that the homestead was a place to be protected from the outside world provided the foundation for what came to be called "the King's peace": order and the rule of law within the king's house and courts, upon the king's roads, and eventually throughout his entire kingdom. Id. at 45; Pollock, supra note 6, at 301. This idea also appears to have been one motivation for the homestead exemption in Florida. See Hill v. First Nat'l Bank, 84 So. 190, 192 (Fla. 1920): "The homestead right is not limited to a mere holding of the legal title to the exempt property 'from forced sale'; it contemplates and includes the beneficial, peaceful, and uninterrupted use and enjoyment of such property."

37. Three additional ways, given by statute, were by writ of extent or extendi facias upon a statute merchant, statute staple, or a recognizance in the nature of a statute staple. 2 W. Blackstone, Commentaries on the Laws of England 160 (Phila. 1771) (1st ed. London 1766) [hereinafter cited as Blackstone's Commentaries; volume 3 was first published in 1768, and volume 4 in 1769]; 3 id. at 420; M. Hale, An Analysis of the Civil Part of the Law 134-35 (5th ed. n.p.n.d.), reprinted in II M. Hale, The History of the Common Law (5th ed. London 1794). Each was a method by which the debtor effectively pledged his person, goods, and land to secure payment of the debt. Upon default, the debtor was liable to be imprisoned, and the creditor took the debtor's lands and chattels—but only until the debt was paid from the rents and profits of the lands and chattels, at which time the debtor was released and his property returned to him. The statute merchant and statute staple were available only to merchants, but the recognizance in the nature of a statute staple extended the availability of the above procedure to anyone, pursuant to the statute 23 Hen. VIII, c.6 (1531). See 2 Blackstone's Commentaries, supra at 160; 3 id. at 420.


39. The writ did not apply to privileged persons, peers, members of Parliament, executors, administrators, or to "such other persons as could not be originally held to bail." 3 Blackstone's Commentaries, supra note 37, at 414; see Smith, supra note 38, at 446.

40. 32 Geo. II, c. 28, §§ 13-26 (1758).
The one statutory exemption allowed the debtor to retain his clothing, bedding, and the tools of his trade, up to a value of ten pounds. If the creditor accepted this statutory alternative, the debtor could never be sent to prison. If he insisted that the debtor remain in custody, the debtor was to be allowed a specific sum for each day of the imprisonment until the debt was paid.

The second common law method of judicially compelling payment by a judgment debtor was execution upon his goods and chattels using the writ of *fieri facias*.

The third method of execution, by writ of *levari facias*, was similar to the writ of *fieri facias* in that it directed the sheriff "to levy the plaintiff's debt on the lands and goods of the defendant"; that is, to seize the defendant's goods and receive all rents and profits from his lands, but only until the defendant made satisfaction to the plaintiff. Unlike the writ of *fieri facias*, the debtor's goods could not be sold. Once the debt was satisfied, the debtor's goods and the rents and profits from his lands were returned to him.

These, then, were the three writs of execution available to judgment creditors under the early common law. None of these three writs allowed a creditor to attach the debtor's lands.

By a statute of Edward I in 1285, a judgment creditor could take possession of a "moiety," or one half, of the debtor's lands and tenements. This was done pursuant to a writ of *elegit* or "election," a statutorily afforded alternative to the three common law writs just described. However, this action could be taken only if the debtor's...
goods and chattels produced insufficient revenue to satisfy the debt, \(^5\) for "[t]o take away his land might deprive him of his means of livelihood; for chattels could not yield a permanent revenue."\(^5\) Further, the creditor's possession of both lands and chattels lasted only until the debt was repaid, at which time the debtor could retake possession of his property. Besides one half of the lands, the debtor's "oxen and beasts of the plough" were immune from this form of execution.\(^5\)

Several points about this elective method of execution should be kept in mind. This was the first time in English law that a judgment creditor could take possession of any part of his debtor's lands for even the slightest period of time, and it remained the law of England until the American Revolution:

[T]ill this statute, by the ancient common law, lands were not liable to be charged with, or seised for, debts; because by this means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services [due the lord] be transferred to be performed by a stranger; provided the tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distress upon for his services.\(^5\)

In addition, as will be noted from the preceding quotation, the reason only one half of the debtor's lands could be taken is traceable in part to the feudal system of landholding, in which all freeholders owed several duties or "services" to their lord.\(^5\)

Like the two last-mentioned writs, the purpose behind elegit seems not only to have been to help satisfy creditors, but to afford alternatives to the writ of capias ad satisfaciendum. Cf. Williams, Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights, 25 U. FLA. L. REV. 60, 62 (1972):

Whatever stigmas its detractors may now ascribe to prejudgment garnishment and attachment, the early use of the process in England, both before and after the abolishment of imprisonment for debt, compelled the appearance of the defendant by the attachment of his property in lieu of his body, and must necessarily be characterized as relatively benign.

52. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 418-19; SMITH, supra note 38, at 447-48.


54. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 418-19; SMITH, supra note 38, at 447-48.

55. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 419; see 4 id. at 419-20; Curry v. Lehman, 47 So. 18, 21 (Fla. 1908): "At common law a judgment was not a lien on real estate. The matter of creating and controlling the lien of judgments is entirely the creature of statute, and the extent and operation of the same are fixed by statute."

56. Services due to the lord were of three basic types: "fealty," or fidelity, to the lord;
feudal system required restrictions on involuntary as well as voluntary transfers of land in order to keep land in identifiable hands, so that the lord would not be deprived of the services which were rightfully his. Another contributing factor appears to have been the Saxon concept of the sanctity of the homestead, for the Saxons were practicing a primitive feudal system before the Normans brought their more refined views to English lands.

Despite such strong bases for restraints on alienation, whether voluntary or involuntary, by Edward's time the restraints had to be loosened to the extent that creditors could be paid, "for the benefit of trade and commerce . . . ." For the promulgation of this and similar statutes, which together molded the law of England down to the time of the American Revolution, Edward has been called an "English Justinian," after the great Roman lawgiver whose work Edward appears to have imitated to some degree.

Moreover, debts due the king had a greater claim of right to repayment pursuant to the writ of elegit than debts due to mere mortals, much as "the payment of taxes and assessments" on the Florida homestead cannot be defeated or delayed by a claim of homestead exemption. The Magna Carta allowed the king to take possession of all a debtor's lands under the writ, until the debt was paid.

"suit of court," involving such matters as availability for jury service on the lord's court; and rent. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 230.

57. Id. at 418-19; 2 id. at 161.
58. 2 id. at 90; I POLLOCK & MAITLAND, supra note 30, at 66-73.
59. 2 BLACKSTONE'S COMMENTARIES, supra note 37, at 161; see I M. HALE, supra note 37, at 275. The writs of statute merchant and statute staple were made available at the same time and for the same reasons. 2 BLACKSTONE'S COMMENTARIES, supra note 37, at 160; 4 id. at 419.
60. See 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 419; 4 id. at 420; I M. HALE, supra note 37, at 277.
61. 4 BLACKSTONE'S COMMENTARIES, supra note 37, at 418; I M. HALE, supra note 37, at 271.
62. There is at least one clear instance of Edward's acceptance of his Roman predecessor as a model. The writ of cessavit per biennium allowed the landlord to claim his tenant's land if the tenant fell into arrears in the payment of rent over a two-year period, exactly in accordance with the Roman procedure under the Justinian Code. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 232 & n.g; I POLLOCK & MAITLAND, supra note 30, at 353 & n.2.
63. FLA. CONST. art. X, § 4(a).
64. Chapter 9 of the Magna Carta provides: "Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt . . . ." W. McKECHNIE, supra note 53, at 221.
65. 3 BLACKSTONE'S COMMENTARIES, supra note 37, at 419. The idea was that the king could never be defrauded of the services due him, "when the ouster of the vassal proceeded from his own command." Id. But see W. McKECHNIE, supra note 53, at 222-23, where the author
Finally, the exemptions from execution under each of the various writs were available to all debtors. Nowhere in the English law of execution as it existed in 1776 does there appear a requirement that the judgment debtor be the head of a family in order to claim the available exemptions.

IV. THE TREATMENT OF DEBTORS UNDER SPANISH LAW UNTIL THE TIME OF THE TEXAS REPUBLIC

The Spanish law reflects an extension of the Justinian Code over the course of several centuries of experience. Broadly stated, Spanish law did not suffer the comparatively large break with Roman thought and tradition that English law did. In contrast to the English experience, Spanish law underwent a fresh transfusion of rediscovered Roman codifications in the thirteenth and fourteenth centuries. By the late eighteenth century, the Spanish Civil Code provided that the houses of knights (caballeros) and noblemen (hijosdalgos) could not be taken in execution except for the payment of debts owed to the king. Spanish law in general, and Spanish law relating to debtors’ rights in particular, has had a marked effect on the development of law in the United States. Indeed, the Spanish Civil Code was in effect in Florida until 1823, in California
until about 1850, and in Texas until 1840.

The most important effect of Spanish law on the American law of debtors’ rights is that the real and personal property exemption provisions of the civil code, noted in part above, contained no “head of family” requirement. For example, in Cobbs v. Coleman, in 1855, the Texas Supreme Court was called upon to apply a statute passed in 1839, still in force in Texas at the time of decision, which exempted certain personal property owned by every “citizen or head of family” from execution. The court held that the benefit of the statute was available to a single man, pointing to several of the specific exemptions previously available in Texas under the Spanish Civil Code. The court reasoned as follows:

It is very clear that no distinction, in this Act, is made between single men and heads of families. . . . It may be well to observe that at the passage of the Act of 1839, the laws of Spain were in force, and by these, there were many exemptions. . . . Nothing is said about single men or heads of families [in the Spanish Civil Code].

Similarly, the Republic of Texas in 1839 was the first “American” jurisdiction to provide for the protection of homestead realty. The Texas exemption contained the “head of a family” feature common to the contemporary personalty exemption laws of the northeastern states. However, like the personal property exemptions considered by the Cobbs court, the Texas exemption was also available to any

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pealed by these acts “were the laws of Spain that were continued in force in the Floridas by the proclamation and the ordinances promulgated in 1821 by Major General Andrew Jackson, governor of the provinces of the Floridas.” Whitfield, Whitfield’s Notes—Division 2, 211, 224, in III Fla. Stat. 1941 (1946). By the act of November 6, 1829, the English common and statutory law to July 4, 1776, of general—as opposed to local—nature were made effective throughout Florida, with the exception of such laws as were inconsistent with the Constitution and statutes of the United States and the acts of the Florida Legislature (variously referred to over time as the Florida Legislative Council and the Florida General Assembly). Id.; Thompson’s Digest of the Laws of Florida 21 (L. Thompson, Boston 1847). Despite these enactments, the influence of the Spanish Civil Code was still felt in Florida law. For example, by the terms of the Act of December 23, 1824, which was brought forward in unaltered form up to Fla. Stat. § 708.01 (1969), it was provided that since the law regarding married women’s property rights was in a state of disarray, the Spanish Civil Code was to be considered the law of Florida in this area. Thompson’s Digest of the Laws of Florida, supra at 220-21. This act was not repealed until October 1, 1970. Ch. 70-4, § 4, 1970 Fla. Laws 66.

73. Id. at 295 n.11.
74. 14 Tex. 594, 597 (1855).
75. Id. at 598.
76. R. Waples, A Treatise on Homestead and Exemption 221 (1893); Note, Principles for Modernizing the Connecticut Debtors’ Exemption Statute, 6 Conn. L. Rev. 142, 156 (1973).
other citizen of the Texas Republic, just as the Spanish Civil Code had exempted the houses of knights and noblemen without regard to familial status. In this sense, the Spanish Civil Code forms the basis of American homestead law.

It would seem that the revision commission's proposal to eliminate the "head of family" requirement for the homestead exemption in Florida is something of a return to the law which was in force when Florida was a Spanish possession. Whether the proposed changes are in line with the historical growth of American homestead law will be discussed after a consideration of the history of homestead exemptions in America.

V. THE TREATMENT OF DEBTORS IN AMERICAN HOMESTEAD LAW

The development of American homestead law is intimately connected with geography and economics. As a result, the most striking feature of the various state homestead exemptions—both real and personal—is their diversity. For example, regarding personal property, a nineteenth century Massachusetts statute exempting certain enumerated personal property was available to any debtor, while a similar New York statute, limited to property "owned by any

77. See note 125 infra.

78. See Rombauer, supra note 29, at 485, where it is stated, without citation of authority, that "[t]he Spanish code exemptions became the basis for all state exemptions." It is interesting to note, therefore, that while one of the major purposes of the American homestead laws has been the attraction of settlers, especially via the "head of a family" requirement, see text accompanying notes 102, 105 and 125-31 infra, Spain was somewhat reluctant to attract emigrants to its American colonies, or at least those types of emigrants whose loyalty to the Spanish crown would be doubtful. See II J. Whurr, supra note 24, at 365, for the tale of a scheme to attract Irish families to Florida in 1790, the scheme having gone awry when the Captain General of Cuba and the Floridas adhered strictly to the letter of the following royal edict: "[R]eceive only those strangers, who, of their own accord, shall present themselves to swear allegiance to his majesty, and to them concede and reserve lands gratis, in proportion to the workers in every family." (Emphasis added.) Needless to say, no true Irish man or woman would have forsworn liberty in exchange for land.

79. The federal statutes reflect this diversity. While the Consumer Credit Protection Act, 15 U.S.C. § 1673 (1976) (setting a maximum on allowable garnishment of the earnings of any "individual," plus establishing exceptions thereto), and the Social Security Act, 42 U.S.C. § 407 (1970) (exempting federal old age, survivors, and disability insurance benefits payments to "any person" from execution "or other legal process" and from "the operation of any bankruptcy or insolvency law"), are broad exemption laws because applicable to individual debtors, the federal law providing for an exemption from tax on the in-home production of wine is restricted to the "head of any family," 26 id. § 5042(a)(2), and has been administratively interpreted in a manner akin to the interpretation of "head of a family" under various state homestead laws. See 26 C.F.R. §§ 240.540-.543 (1977).

80. Cf. Cooke v. Gibbs, 3 Mass. 193, 198 (1807) (Parsons, C.J., stating that the statutory exemptions available to debtors, without qualification, did not have to be set forth in the writ of attachment).
person being a householder,” was early held to be unavailable to a single man who was not in charge of a family. Some states in the middle and latter parts of the nineteenth century exempted described personal property and no more, while other states provided a monetary maximum on their personal property exemptions and left the debtor to choose the property to be exempted.

Florida has done both. In 1843, the Territorial Legislative Council exempted “the necessary wearing apparel and bedding of every person,” and “one set of working tools or instruments of every mechanic, artist, dentist, artisan or tradesman, not exceeding in value one hundred dollars,” among other items. In 1866, the Florida General Assembly added “the professional books and libraries of all professional men, not exceeding three hundred dollars in value,” to the list of personal property which was exempted from forced sale. Two years later, the Florida Constitution for the first time set forth a homestead exemption, “supplant[ing] entirely all previous statutory exemptions.” This exemption provided in part that such personal property owned by the head of a family “as he or she may select, to the amount of one thousand dollars,” would be exempt from forced sale. The Constitution of 1868 [was] intended to enlarge the privilege of claiming exemptions. It has remained essentially the law of Florida until the present.

Given the diversity of homestead laws, including the changes made in a given state’s law from decade to decade or year to year, it might seem that very few generalizations could be made. But the

81. Bowne v. Witt, 19 Wend. 475, 475-76, 13 N.Y.C.L. Rep. 676 (Sup. Ct. 1838): The word “householder,” in this statute, means the head, master or person who has the charge of and provides for a family, and does not apply to the subordinate members or inmates of the household. Mrs. Bowne [plaintiff’s mother] was evidently the head of this family, and the plaintiff cannot maintain the exemption of his cloak on the ground that he was a householder. . . . The exemption cannot be extended to his clothing upon any ground which will not make the provision nearly or quite universal, for most persons live in some family.

82. See H. HERMAN, supra note 1, at 94-111 (reviewing the personal property exemptions of the various states as they stood in 1876).

83. Act No. LXV, § 1 (March 15, 1843).

84. Id. § 2.

85. Ch. 1481, § 2, 1866 Fla. Laws 44.

86. Miller v. Finegan, 7 So. 140, 141 (Fla. 1890).

87. FLA. CONST. of 1868, art. IX, § 2.


89. See FLA. CONST. art X, § 4. The Constitution Revision Commission has proposed that the limit on this exemption be raised to $3,000. See text accompanying notes 234-42 infra.

90. Cf. Smith v. Guckenheimer, 27 So. 900, 914 (Fla. 1900), in which the Florida Supreme
truth is that the history of American homestead law is part of an ever-expanding process of providing additional protection for debtors—a process which has continued since the Romans first decided to imprison debtors rather than dismember them.\(^{91}\) Admittedly, this protection has both expanded and contracted a bit since the law of the Twelve Tables was repealed. Nonetheless, debtor protection has on the whole been strengthened. And the Florida homestead has not been sheltered from this process.

Different regions of the nation have progressed at different rates, however. The northeastern states appear, as a general rule, to have afforded less protection over time than the states in the West and South,\(^{92}\) perhaps because of "the traditional pro-commerce, and hence pro-creditor, attitudes of that region."\(^{93}\) In addition, the northeastern states have always been densely populated relative to

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\(^{91}\) See R. Found, The Spirit of the Common Law 187-88 (1921) (stating that the American homestead exemptions restrict "the power of the creditor to secure satisfaction" in a fashion reminiscent of classical Roman law).

\(^{92}\) H. Herman, supra note 1, at 114-15; Vukowich, Debtors' Exemption Rights, 62 Geo. L.J. 779, 782-83 (1974); see R. Waples, supra note 76, at 231 (setting forth the differing monetary limitations on the homestead realty exemption); Haskins, supra note 2, at 1309 & nn.166-67 (urban states such as New York and New Jersey have generally not exempted crops raised on the homestead while comparatively agricultural states such as Georgia and Virginia have); cf. Williams, supra note 51, at 63, in which it is stated that the process of attachment and garnishment in American colonial times was extended in the New England colonies to tangible personality and real property in the defendant's possession and that other states adopted the New England example to suit their own peculiar conditions:

Of particular significance in the New England development of these provisional remedies was their eventual emergence as a collection remedy or judicially imposed security device whereby the attached property was not released upon the appearance of the defendant but would stand charged with any judgment that might be rendered against him. . . . Those inroads on the restrictions contained in the primordial process embodying direct attachment of the property in the debtor's possession as well as the continued availability of the property for satisfaction of any judgment obtained have found common acceptance in the jurisdictions of this country outside of New England. However, the other jurisdictions have generally limited both direct attachment and garnishment of property or credits in the hands of third parties to special grounds rejecting the reasoning that these extraordinary remedies should be available against all debtors generally.

\(^{93}\) Vukowich, supra note 92, at 782 n.15; see Note, Principles for Modernizing the Connecticut Debtors' Exemption Statute, 6 Conn. L. Rev. 142, 152 n.58 (1973).
other areas of the nation. It may be that personalty exemptions, for example, had to be restricted to the “necessaries” of life because of the sheer numbers of potential debtors.\(^9\) Comparatively restrictive exemptions from execution on land would appear to be a logical product of the fact that there simply was not that much land to be owned in the first place.\(^9\) In addition, in urban areas the homestead is frequently only a residence and not a means of producing income.\(^9\) This would also explain the differentiation between urban and rural landholdings in the homestead law of many other states, such as Florida,\(^9\) where the urban homestead is given far less protection than the rural homestead.\(^9\)

In contrast, the homestead protections afforded by the western states have been comparatively liberal. One reason is that debtor exemption laws in those states were enacted in response to hard times.\(^9\) Another is that urban creditors were less than welcome in the predominantly rural western states of the nineteenth century.\(^10\) And yet another reason can be found in the influence of the Spanish Civil Code on the law of some western states.\(^10\) However, it appears that the primary reason for liberal homestead protections in the West was the need to attract settlers.\(^10\)

\(94.\) See H. Herman, supra note 1, at 94-111 (reviewing the personalty exemptions available in the various states in 1876); Vukowich, supra note 92, at 782 (stating that the personalty exemptions available in the northeastern states parallel a (supposedly) “restrictive English exemption policy”).


\(96.\) Haskins, supra note 2, at 1309.

\(97.\) Fla. Const. art. X, § 4(a)(1) (if located within a municipality, one-half acre limited to the owner’s residence or his family’s; otherwise, 160 acres).

\(98.\) E.g., Ala. Const. art. X, § 205 (exemption of up to 80 acres outside a municipality and, by judicial construction, up to $2,000 in value; up to $2,000 if in a municipality); Kan. Const. art. 15, § 9 (exemption of 160 acres of “farming land”; one acre in a municipality). This rural-urban distinction has existed for some time. See R. Waples, supra note 76, at 221 n.1 (setting forth the laws of Florida, Kansas, Wisconsin, and Minnesota).

\(99.\) Vukowich, supra note 92, at 783 & nn.16-17.

\(100.\) Id. at 783 & n.19.

\(101.\) Id. at n.18; see Rombauer, supra note 29, at 485.

\(102.\) H. Herman, supra note 1, at 114-15, 120; Haskins, supra note 2, at 1289-90; Vukowich, supra note 92, at 783; see Rombauer, supra note 29, at 485-86 (the “extensive list of
After the Civil War, the southern states enacted homestead laws based on the liberal provisions in the west and for the same reasons. Besides the influence of the Spanish Civil Code and a dislike for urban creditors similar to that found in the western states, the primary reasons for liberalizing the homestead exemption in the south were tight credit, poverty, and a need to attract both investors and settlers in the aftermath of a war fought mainly on southern soil. As the Florida Supreme Court stated in 1875:

All the courts are constrained to sustain the exemption laws upon grounds of public policy and humanity. These considerations doubtless controlled in the framing of our Constitution [of 1868]. If there ever existed a people requiring protection of this character at the time of the adoption of that instrument, that people inhabited these Southern States, just emerged from a long and destructive war. Nearly all were poor—many entirely destitute—and many having only the soil of their former flourishing plantations and homes, without money, without farming implements or stock, and all practically at the mercy of creditors, whose demands probably exceeded the then cash value of the productive lands in these States. Capital had gone elsewhere, and but for the means brought from afar to aid them, our planters were utterly helpless. . . . The laboring classes were equally destitute and dependent upon the making of crops.

However, in order to limit the available exemptions to families, since families put down roots and contribute to local commerce, the western and southern states alike provided that the person claiming the exemption be the "head of a family" or a "house-
While this requirement appeared earlier in the debtor exemption statutes of some northeastern states, and for the same purpose, namely protection of the family, in those states it had the pronounced effect of narrowing the scope of the few exemptions that were available by limiting the number of persons who could claim their protection.

VI. THE DEVELOPMENT OF FLORIDA HOMESTEAD LAW

Florida provides a prime example of the trend toward liberalization of the homestead per se, or homestead realty, as well as the "homestead" personality exemption, coupled with an eventual limitation of these liberal benefits to the "head of a family." First, in 1822 and 1823, the Territorial Legislative Council replaced the Spanish Civil Code with "[t]he common law of England and the statutes in aid thereof," insofar as these were not inconsistent with the United States Constitution and statutes, nor with statutes enacted by the Territorial Legislative Council. Then, in 1828, the

108. See Haskins, supra note 2, at 1289 ("[t]he principal objective of the homestead laws is generally regarded as the security of the family"); Vukowich, supra note 92, at 784, 841.

109. For example, New York. See Bowne v. Witt, 19 Wend. 475, 475, 13 N.Y.C.L. Rep. 676, 676 (Sup. Ct. 1838); Woodward v. Murray, 18 Johns. 400, 401 n.1, 6 N.Y.C.L. Rep. 632, 632 n.1. (Sup. Ct. 1820). By 1876, only two states allowed the personal property exemption, for example, to be claimed by one not the head of a family: Texas (all persons) and Pennsylvania (bachelors). H. HERMAN, supra note 1, at 89.

110. For example, in Woodward v. Murray, 18 Johns. 400, 6 N.Y.C.L. Rep. 632 (Sup. Ct. 1820), the court construed a statute exempting certain enumerated personal property "owned by any person being a householder" as follows:

According to the lexicographers, household means "a family living together," and a "householder," "a master of a family." Sacred scripture, in the same sense, declares "he that provideth not for his own household, is worse than an infidel." I think it clear that the Legislature meant to confer this privilege on each of those little primary communities called families.

Id. at 402-03, 6 N.Y.C.L. Rep. at 632 (emphasis added); accord, Kneettle v. Newcomb, 22 N.Y. 249, 252 (1860); see Bowman v. Quackenboss, 3 Code Rep. 17, 17 (N.Y. Com. Pl. 1850): [A] woman who keeps a house of prostitution merely cannot be considered as a person having a family to provide for, within the meaning of the exemption law. When that is shown to be the case, with no other persons in her family to be provided for, she could not be entitled to the exemption. If she really had a family which she was bound to provide for, the fact of her improper mode of living would not deprive her of a right to which she was otherwise entitled. [Emphasis added.]

111. In Bowne v. Witt, 19 Wend. 475, 13 N.Y.C.L. Rep. 676 (Sup. Ct. 1838), for example, the plaintiff had sued in replevin to recover a cloak taken from him by the defendant Witt. The defendant replied that he had done so as a constable pursuant to a writ of execution. In affirming the trial court's entry of judgment upon a jury verdict in favor of the defendant Witt, the court declared that since the plaintiff was not a "householder," he could not claim the benefits of the exemption statute: "The exemption cannot be extended to his clothing upon any ground which will not make the provision nearly or quite universal, for most persons live in some family." Id. at 476, 13 N.Y.C.L. Rep. at 676.

112. Hart v. Bostwick, 14 Fla. 162, 173 (1872). The Acts of 1822 and 1823 introduced only so much of the English law as had developed down to the fourth year of the reign of James I;
writ of *capias ad satisfaciendum* was abolished by statute so that the debtor no longer had to answer for his debts with his body.113

Between 1822 and 1834, the writ of *elegit* was the only means of levying judgment upon a debtor's realty.114 In 1834, the Territorial Legislative Council provided that every judgment rendered by a Florida court would constitute a lien on all the defendant's real estate.115 This provision was reinforced in clear terms by an act passed in 1844: "Lands and tenements, goods and chattels, shall be subject to the payment of debts, and shall be liable to be taken in execution and sold."116

Thus, while the writ of *elegit* was in force, levy could be had only on half the debtor's lands, and the creditor could take possession of only that one-half of his debtor's realty until the debt was repaid. But, after 1834, all the debtor's realty—without exemption—was subject to forced sale to pay his debts. This retreat from the protections afforded debtors under the common law apparently did not go unnoticed. In 1845, the Territorial Legislative Council provided that "every farmer seized and possessed of forty acres of land in his or her own right in fee simple," at least ten acres of which were in cultivation, "shall hold the same free and exempt from
Execution[,] attachment or distress . . . [p]rovided the land and improvements does [sic] not exceed in value two hundred dollars . . . .”\textsuperscript{117} This exemption worked well enough that in 1851 the legislature of the by then State of Florida extended the Act of 1845 so as to grant a similar exemption, under the same restrictions, (except as to the requisition that he shall “actually have in cultivation at least ten acres” of land,) to every owner of a dwelling house and the lot on which the same stands, in any city, town or village of this State: Provided, Said owner shall actually reside in said house: And Provided, The value of said house and lot shall not exceed three hundred dollars.\textsuperscript{118}

The Florida Legislature continued its expansion of these protections in 1866 by increasing the monetary maximum on all homesteads to $1,000,\textsuperscript{119} continuing the “dwelling house” exemption and allowing the required occupancy to be that of “the owner or his family,”\textsuperscript{120} and amending the “forty acres” exemption so as to encompass forty acres of land seized and possessed of every farmer “in his own right in fee simple” when at least five acres were “in cultivation or productive use . . . .”\textsuperscript{121}

In 1868, a homestead provision was included in the Florida Constitution for the first time.\textsuperscript{122} This provision changed the limitation on the urban homestead from a monetary to an acreage limitation (one-half acre) and further limited the urban homestead to “the residence and business house of the owner.” The framers of the new constitution also increased the maximum acreage of rural homesteads to 160 acres, removed the “cultivation or productive use” restriction, and abolished the limitation of the rural homestead exemption to farmers. And, for the first time in Florida history, the

\textsuperscript{117.} Act of March 11, 1845, § 1, 1845 Fla. Laws 23. Note that the exemption was available to both sexes and was without apparent reference to familial status. This latter inference is buttressed by the fact that, although § 1 of the act provided that a portion of the land worth up to $200 be set aside and “exempted from sale and reserved for the use of said family” where the entire tract was valued at more than $200, § 2 provided that if the owner of such lands died leaving “no issue or widow then the same shall be subject to his or her debts.” Since one’s parents, for example, are not one’s “issue” but are still part of one’s “family,” it clearly appears that the intent of this act was not limited to the protection of families. It was primarily intended to protect the individual debtor.

\textsuperscript{118.} Ch. 376, § 1, 1851 Fla. Laws 125 (emphasis in original). It will be noted that there was still no requirement that the “owner” be male, female, or the head of a family.

\textsuperscript{119.} Ch. 1481, §§ 2, 4, 1866 Fla. Laws 44.

\textsuperscript{120.} Id. § 1 (emphasis added).

\textsuperscript{121.} Id. § 4. That the phrase “seized and possessed of forty acres of land in his own right” was not meant to exclude women nor to be limited to heads of families is shown by the fact that this exemption was available to “[e]very farmer.” Id.

\textsuperscript{122.} Crosby & Miller, supra note 2, at 14 & n.10.
The homestead exemption (rural and urban) was restricted to "the head of a family."

The minutes of the 1868 Constitutional Convention do not reflect the reasons for these changes, but the history of the times supplies some of the answers. The Congress of the Republic of Texas, in 1839—for the first time in any American jurisdiction—had "reserved to every citizen, or head of a family in this Republic, free and independent of the power of a writ of fieri facias or other execution," a homestead of fifty acres or one town lot, including certain personal property. In 1862, the United States Congress apparently took a leaf from the Texas book. The Homestead Act of 1862 provided that "any person who is the head of a family, or who has arrived at the age of twenty-one years," would be entitled to "enter one quarter section [160 acres] or a less quantity of unappropriated public lands..."

The purpose of the Homestead Act was to encourage the "actual settlement and cultivation" of lands in the federal public domain. Clearly borrowing from the federal example, the Constitutional Convention of 1868 authorized the Florida Legislature to "provide for the donation of the public lands to actual settlers," with a limitation of 160 acres to any one person. The desire to attract settlers

123. FLA. CONST. of 1868, art. IX, § 1. This section also exempted $1,000 worth of personal property, in addition to the $1,000 worth of personal property exempted under art. IX, § 2.

124. The four members of the Committee on Homestead delivered their report on the homestead article on Thursday, February 20, 1868. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA 91-92 (E. Cheney printer Tallahassee 1868). The article was adopted in substantially the same form on Friday, February 21, 1868, with no debate reflected in the Journal. Id. at 102. The article was enacted as FLA. CONST. of 1868, art. IX, with some minor changes—such as insertion of the adjective "incorporated" before the phrase "city or town"—indicating further consideration of the homestead article not reflected in the Journal.

125. DIGEST OF THE LAWS OF TEXAS app. VIII, at 280-81 (J. Dallam ed. 1845). This act was repealed and then reenacted in 1840. Id. at 281. The law had changed by 1876, however, for in that year the Texas Constitution limited the homestead realty exemption to heads of families. TEX. CONST. of 1876, art. XVI, § 50.

126. Act of May 20, 1862, ch. 75, § 1, 12 Stat. 392. It should be noted that the act exempted the entered lands only from debts "contracted prior to the issuing of the grant" for said lands. Id. § 4, at 393. The act is therefore to be distinguished from state homestead provisions, most of which provide an exemption against all debts, and all of which exempt the homestead from levy and execution on debts incurred subsequent to acquisition of the homestead. See Vukowich, supra note 92, at 803.

127. Lewton v. Hower, 18 Fla. 872, 878 (1882). Section 2 of the act required all applicants to execute an affidavit stating that their entry upon public lands was made for "actual settlement and cultivation," and the federal courts have noted that the purpose of the act was to encourage permanent settlement. E.g., Adams v. Church, 193 U.S. 510, 516 (1904); Anderson v. Carkins, 135 U.S. 483, 487 (1890).

128. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA 84 (E. Cheney printer Tallahassee 1868) (emphasis added). Two days after this measure was introduced, a motion was made to limit the acreage to 80 acres. The motion
seems to have entered into the new homestead article of 1868 as well, much as it had motivated the enactment of homestead exemptions in other states. In 1882, the Florida Supreme Court, noting that the purpose of the Federal Homestead Act was “actual settlement and cultivation” of land, stated that “[t]he act of Congress exempting from forced sale for debts certain lands granted as a homestead for the benefit of a family is in full harmony with our constitutional provisions . . . .”

Apparently because the economic conditions of Reconstruction were such that immigration was best limited to settlers with families—and because the balance in favor of debtors’ exemptions could not be weighted too heavily—the Florida homestead exemption was made available only to heads of families. Nevertheless, the availability of an exemption of up to 160 acres represented a fourfold increase in the maximum exemption under Florida law. Despite the fact that the need for family settlement has diminished, and the need for striking a new balance between creditors’ and debtors’ rights has long been apparent, the provisions of the 1868 constitution have remained the fundamental homestead law of Florida.

was defeated by a vote of 21-16, and the measure was adopted on the same day. Id. at 102. This provision became Fla. Const. of 1868, art. XVI, § 11. Clearly, the convention was determined to attract settlers to Florida. Note that “160 acres of land [was] the usual quantity for a farm in this country” in the latter part of the nineteenth century. Greeley v. Scott, 10 F. Cas. 1072, 1072 (C.C.N.D. Fla. 1875).

130. See R. Pound, supra note 91, at 201:

[If we ask how far we may trench upon the social interest in the security of transactions, a fundamental form of the general security in a commercial and industrial society based upon credit—if we ask how far we may impair this interest to secure the social interest in the individual life to the extent of preserving a minimum human life to the debtor, our question becomes one of a compromise that will secure as much as possible of each with the least sacrifice of either . . . .

See Crow, The Wisconsin Homestead Exemption Law, 20 Marq. L. Rev. 1, 1 (1935) (stating that “[i]t is better business, in time of stress, to protect the home than the creditors”); cf. Patterson v. Taylor, 15 Fla. 336, 346 (1875): “The basis of private pecuniary credit is security and confidence, and it could not be expected that the merchant would advance his money and his property with no security and no means of reimbursement.” (Emphasis added.)

131. Texas, for example, likewise limited the availability of its homestead realty exemption in the Reconstruction era. Tex. Const. of 1876, art. XVI, § 50.
132. See Williams, supra note 51, at 111:

If a realignment of debtor-creditor law requires that the debtor be protected against unscrupulous creditors, it conversely should require that creditor and public interests be protected against unscrupulous debtors. Consumerism must advance beyond the quixotic view so often taken by the media and aspiring politicians that equates any victory of any consumer over a business interest, regardless of how unfounded and undeserving, with furtherance of the public interest. The importance of credit to our over-all productivity is deserving of more than passing interest.

133. The constitution of 1885 differed substantially from that of 1868 only in that it lowered the personal property exemption to a maximum of $1,000 and provided that no
In different sections of the country, then, the requirement that a homestead claimant be the head of a family has operated to limit the availability of the exemption in order to serve different purposes. While the western and southern states sought to attract new families in order to stimulate their economies, the northeastern states sought to limit their comparatively meager exemptions to a class of debtors which would not be all-inclusive. Other historical purposes of the exemption laws—some of which entered into the proposals of the Constitution Revision Commission—include maintaining families in dwellings owned by them (given the lack of available rental space in the nineteenth century), and, concomitantly, avoiding an increase in the welfare rolls. The latter purpose and effect of exemption laws has repeatedly been referred to by the Florida courts. Still another goal of the homestead protections is the rehabilitation of debtors, the homestead laws having been

homestead could be reduced without the consent of the owner by reason of subsequent inclusion within the limits of an incorporated city or town. Compare Fla. Const. of 1885, art. X, §§ 1-7 with Fla. Const. of 1868, art. IX, §§ 1-3. The 1968 constitution eliminated the “business house” language of the 1885 constitution regarding the urban homestead and is otherwise in accord with its centennial predecessor. Compare Fla. Const. art. X, § 4 with Fla. Const. of 1868, art. IX, §§ 1-3.

134. Vukowich, supra note 92, at 805, 807; Note, Principles for Modernizing the Connecticut Debtors’ Exemption Statute, 6 Conn. L. Rev. 142, 156 (1973).

135. Caravaggio v. Retirement Bd., 329 N.E.2d 165, 171 (N.Y. 1975); Vukowich, supra note 92, at 786; see Haskins, supra note 2, at 1289 (by providing the family with security, homestead law “prevents pauperism”); Rombauer, supra note 29, at 486 (noting that “to the extent that a debtor provides for his family or himself, welfare and charitable funds may be relieved of that burden”). In Caravaggio, Chief Judge Breitel of the New York Court of Appeals noted that such a purpose exists in many areas of the law:

The policy of protecting an individual against the results of his own improvidence or misfortune is commonplace in the law. Spendthrift trusts, statutory limitations on and exemptions from execution, and the like, serve the common good by guarding against the impoverishment of those whose improvidence or misfortune might otherwise result in a burden upon society as a whole.
329 N.E.2d at 171 (citations omitted).

136. See, e.g., Slatcoff v. Dezen, 76 So. 2d 792, 794 (Fla. 1954); Patten Package Co. v. Houser, 136 So. 353, 355 (Fla. 1931); Maryl v. Hernandez, 254 So. 2d 47, 49 (Fla. 3d Dist. Ct. App.), cert. dismissed, 255 So. 2d 686 (Fla. 1971); First Prudential Bank v. Rolle, 45 Fla. Supp. 128, 133 (Fla. Palm Beach County Ct. Dec. 23, 1976); see Comment, Florida Homestead: Availability of Exemption After Divorce, 3 U. Fla. L. Rev. 242, 246 (1950) (stating that “the basic homestead policy is to minimize the number of public wards”).

137. Schoetz, Homestead Law in Wisconsin, 2 Marq. L. Rev. 19, 20 (1917-18); Vukowich, supra note 92, at 786-87, 826; see Rombauer, supra note 29, at 486-87 (one important result of “occupational personal property exemptions” is “the guarding of the productive ability of a debtor for the benefit of all his creditors”). As one court has put it in construing a statute which applied to “every householder having a family”: “This statute was designed for the benefit of the debtor, and should be liberally construed, so as to effect and not thwart its object and policy, and, being remedial in its nature and effect, must be so construed.” Feldes v. Duncan, 30 Ill. App. 469, 474 (Ill. App. Ct. 1888) (emphasis added); cf. Altman v. Schuneman, 273 P. 173, 175 (Wyo. 1929) (homestead protections are designed for the family as a whole, not for the head of the family alone).
passed at the same time and in the same humane spirit as the laws abolishing imprisonment for debt. Finally, the homestead laws also provide protection for the family from the improvidence of its head. And, not least, the homestead laws encourage home ownership.

From the beginning, though, homestead laws were not designed solely for the benefit and protection of the family unit. In jurisdictions where the exemption could be claimed only by the head of a family, or by a householder, this may have been the primary purpose, as has been frequently proclaimed, for example, by Florida courts. Even in such states, however, the courts have recognized

138. H. HERMAN, supra note 1, at 119-20; Crow, supra note 130, at 1; see II C. SHERMAN, supra note 10, at 283 (imprisonment for debt generally abolished in England and in the United States in the latter half of the nineteenth century); Schoetz, supra note 137, at 19 (noting that the first Wisconsin constitution contained successive provisions abolishing imprisonment for debt and enacting the homestead exemption). The same motivation was behind the early English common law when alternatives to the capias ad satisfaciendum were introduced. See Williams, supra note 51, at 62. But see R. WAPLES, supra note 76, at 3: "[H]omestead statutes are not poor laws made for the benefit of the impecunious only. They protect the family homes of all classes. . . . The charitable effects of homestead laws are merely incidental."

139. E.g., Kneettle v. Newcomb, 22 N.Y. 249, 252 (1860); H. HERMAN, supra note 1, at 86-87; Comment, Creation of the Homestead and Its Requirements, 26 CALIF. L. REV. 241 (1938).

140. Ford v. Security Nat'l Bank, 105 S.E.2d 421, 424 (N.C. 1958); R. WAPLES, supra note 76, at 29; see Sarahas v. Fenlon, 5 Kan. 360, 361 (1870) (stating that the homestead clause of the Kansas Constitution is "a provision intended to create inducements for the improvement and advancement of the home"). Waples stated his view of the general purpose behind the homestead exemption as follows:

The mischief to be met [by homestead laws] is not poverty in general, for the remedy is given only to holders of real estate who are heads of families, by most of the homestead statutes; it is not debt-paying, for the law favors the payment of debts, and the exemption provided is accorded to solvent as well as insolvent owners. The policy of the homestead laws is the conservation of homes for the good of the state; . . . the remedy provided is the exemption of occupied family homes from the hammer of the executioner.

R. WAPLES, supra at 29.

141. See Feldes v. Duncan, 30 Ill. App. 469, 474 (Ill. App. Ct. 1888), in which the court concluded that a homestead statute which made the exemption available to "every householder having a family" was "designed for the benefit of the debtor . . . ." (Emphasis added.) To like effect are Schwanz v. Teper, 223 N.W.2d 896, 900 (Wis. 1974), and Altman v. Schuneman, 273 P. 173, 175 (Wyo. 1929), in which the Wisconsin and Wyoming supreme courts, respectively, construed homestead laws available only to persons with families, and in which each court implicitly recognized that such laws serve to protect the one who claims the exemption in addition to and distinct from the other persons for whom he or she claims the exemption.

142. E.g., Tullis v. Tullis, 360 So. 2d 375, 377 (Fla. 1978); Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431, 432 (Fla. 1968); Carter's Adm'rs v. Carter, 20 Fla. 558, 562 (1884); White v. Posick, 150 So. 2d 263, 265 (Fla. 2d Dist. Ct. App. 1963); see Crosby & Miller, supra note 2, at 14-15 (citing various judicial statements of purpose). The Florida Legislature has also stated this as the primary purpose behind Florida's homestead exemption: "It is the
that protection of the individual debtor is one purpose behind all exemption laws.\textsuperscript{143} In any event, such an explanation of constitutional and statutory design does not explain the enactment of homestead laws which do \textit{not} require the person claiming the exemption to be the head of a family.\textsuperscript{144}

It is submitted that, whatever the wording of a given provision, the history of property exemption laws shows the plain purpose for their enactment. They are the product of a sometimes unarticulated but nevertheless considered policy determination, refined over the course of two dozen centuries, "to insist not that the debtor keep faith in all cases even if it ruin him and his family, but that the creditor must take a risk also—either along with or even in some cases instead of the debtor."\textsuperscript{145} Judges feel, or, what is better, know

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\textsuperscript{143} E.g., Patten Package Co. v. Houser, 136 So. 353, 355 (Fla. 1931); Vandiver v. Vincent, 139 So. 2d 704, 707-08 (Fla. 2d Dist. Ct. App. 1962); First Prudential Bank v. Rolle, 45 Fla. Supp. 128, 133 (Fla. Palm Beach County Ct. Dec. 23, 1976).

\textsuperscript{144} E.g., \textit{ALA. CONST.} art. X, §§ 204-205 (homestead personalty and realty exemptions available to "any resident"); \textit{N.C. CONST.} art. X, § 2(1) (homestead realty exemption open to one who is an "owner" and a "resident of the State"); \textit{TEX. CONST.} art. XVI, §§ 49-50 (legislature to exempt personal property owned by "all heads of families, and also of unmarried adults, male and female"); realty exemption protects the "homestead of a family, or of a single adult person").

\textsuperscript{145} R. Pound, supra note 91, at 188. As Dean Schoetz put it, referring to the Wisconsin Legislature's enactment of homestead protections:

The legislature did not intend to relieve debtors from the discharge of the duty to pay their debts or to interfere with the general power to compel its performance... [However,] it was considered better for society at large to withdraw from creditors so much of that coercive power which had theretofore remained in their hands, as was requisite to enable debtors, if they choose, by retaining these necessary comforts, to ameliorate their condition and relieve the public of an unwelcome burden. Individual happiness and public welfare demanded that forty acres in the country and one-fourth of an acre in the city be exempt from execution when used as a homestead.

Schoetz, supra note 137, at 20; see Patten Package Co. v. Houser, 136 So. 353, 355 (Fla. 1931) (stating that exemption laws should neither be construed so liberally as to apply them to those not within their purview, nor so strictly as to defeat the statutory object); Hill v. First Nat'l Bank, 84 So. 190, 192 (Fla. 1920) (stating that the policy of the law conferring the homestead exemption "is to preserve the home for the family even at the sacrifice of just demands"); Carter's Adm'rs v. Carter, 20 Fla. 558, 569-71 (1884); \textit{cf.} Miami Herald Publish-
this when they are called upon to interpret the language of particular homestead provisions. They know that constitutions and statutes should be read in the light of the common law, from which much of the American system of jurisprudence has evolved. Yet they also know—or should know—that land was not subject to forced sale to satisfy debts at common law, and that this right was given in America by statute. Because this statutory right of creditors confers a remedy which did not exist at common law, judges know that such a statute is “remedial” and so is to be construed liberally to give the remedy the statute was clearly designed to provide.

Yet judges know too that the homestead exemption is also remedial, for it confers a remedy in the form of an exemption from the gavel of the official auctioneer. Faced with this conflict between two rules demanding liberal interpretation, most courts appear to favor the homestead exemption. By stating that the homestead exemption did not exist at common law, and that the rights conferred thereby are wholly “statutory,” the courts have all but ignored the fact that the statute allowing a creditor’s judgment to be a lien on the debtor’s lands also confers a remedy unknown at common law. Since the judicial focus is on the rights of the debtor rather than on those of the creditor, this conflict is more easily resolved in the debtor’s favor.

This may reflect a change in legal thinking toward “social justice” and away from “individualist” or “legal justice,” so that the homestead and other exemption provisions may be viewed in part as the product of a rational determination to resolve the conflict between debtor and creditor in favor of the debtor’s interests. On the other
hand, it may also in part be a reflection of the judicial realization, consciously in those cases decided in the early years of the republic, but subconsciously and dimly perceived in most cases decided today, that the common law creditor could never obtain immediate title to the lands of his judgment debtor, but only the right of immediate possession and use—and then only of half the judgment debtor's lands until the debt was paid.

Whether and to what extent the homestead proposals of the Constitution Revision Commission reflect the continuing historical liberalization of exemption laws—and for what purposes—is the subject of the final section of this article.

VII. PROPOSED CHANGES IN ARTICLE X, SECTION 4

The proposed changes of the Constitution Revision Commission relating to homestead would be made in article X, section 4, subsection (a), parts (1) and (2) of the present constitution. In sum, in section 4(a)(1), (1) "the head of a family" would be replaced by "any natural person"; (2) the current 160-acre exemption for land "located outside a municipality" would be replaced by a reference merely to acreage "used for agricultural purposes"; (3) the limit of one-half acre for a homestead not used for agricultural purposes would be increased to one acre; and (4) a "mobile or modular home" would be treated as a homestead. In section 4(a)(2), the personal property exemption would be increased from $1,000 to $3,000. Each of these changes will be discussed in turn.

A. "Natural Person"

Commissioner Yvonne Burkholz proposed the elimination of the "head of a family" requirement to make the homestead exemption available to "any natural person." She explained her purpose in offering this amendment as follows:

151. The commission also proposes the elimination of the present § 1 of article X. If the voters approve, the present § 4 will be renumbered 3. For purposes of clarity, present § 4 will continue to be referred to herein as § 4.

152. See Appendix to this issue for the full text of the proposed changes.

153. There apparently is a great deal of interest in this phrase as employed throughout the entire proposed 1978 revision of the Florida Constitution. On April 7, 1978, for example, the author received a telephone inquiry from a woman who identified herself as a member of "Parents of Gays." She wanted to know whether the phrase "natural person" meant that the judiciary could find her homosexual son to be an "unnatural person" and therefore not entitled to the various constitutional protections in which the term "natural person(s)" is employed.

It should be noted that this change, as originally proposed, did not contain the modifying term "natural." See Fla. C.R.C., Proposal 196 (by Yvonne Burkholz); Transcript of Fla.
The current language requires that a person to be eligible for an exemption be the head of a family. And I guess it comes as no surprise that there are an enormous number of divorces in this state which create split households. And that particular number is on the increase.

There has been a great deal of litigation on whether or not the divorced person is, in fact, the head of a household. The requirements are varied, and many depend upon the age of the children. Therefore, in this era of attempting to deal with all persons equally and with the full recognition that the sociological foundations of society have changed, and that may be regrettable as it is and may be unfortunate, but what we are asking you to do here is deal with the facts of life.

There are many single women who are heads of households, although they may not qualify as such under the present constitutional construction and the statutes which flow from it.

The possibility that a single person might be entitled to the homestead exemption is not new in Florida. What has been required is that the person claiming the exemption be the head of a family.

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154. Transcript of Fla. C.R.C. proceedings 152-53 (Jan. 11, 1978). Commissioner Dempsey Barron, among others, was in substantial accord with the concept that the exemption should also be made available to persons other than heads of families. See Transcript of Fla. C.R.C. proceedings 239-40 (Dec. 9, 1977).

155. For whatever reason, the commission debate on this change at times reflects a lack of understanding of current homestead law. For example, Commissioners Yvonne Burkholz and Stella Thayer at one point agreed that Florida's current homestead protection "would not include a divorced mother and children," Transcript of Fla. C.R.C. proceedings 243 (Dec. 9, 1977); Commissioner John Ware appears to have believed that the homestead protection was originally designed only for families in law, and that extending the homestead exemption to one not the head of a family was "an entirely new concept that we haven't even thought about before," id. at 244. While the homestead article was being debated on the floor of the commission, Commissioner Ware was called upon to explain the present state of homestead law and accurately did so in admirably articulate fashion. Id. at 245.

156. In Dame, supra note 5, at 402, the author commented on the "head of a family" requirement set forth in the then recent constitutional amendment regarding partial exemption of the homestead from taxation (now Fla. Const. art. VII, § 6, which no longer has the "head of a family" language but says "[e]very person"), and offered the following definition derived from Florida case law on the forced sale exemption:

The head of a family is that person who maintains a home and has some person, as a member of the family living with him or her, who is to some extent dependent upon and recognizes the head of the family. One person is not a family; there must be at least two persons, of whom one must be recognized by the other as the head of the family.
whether of a family in law\textsuperscript{157} or of a family in fact.\textsuperscript{158} The essential criterion has been dependence on the person alleged to be the "head" by the "family" members.\textsuperscript{159} Examples of such dependence affording a single person the exemption include a divorced woman with a minor child,\textsuperscript{160} a widow with a dependent adult daughter,\textsuperscript{161} a single man living with a dependent mother and the children of his deceased sister,\textsuperscript{162} and a divorced man whose family resided in Massachusetts and who purchased the "homestead" after his divorce.\textsuperscript{163}

Thus, as has been stated in connection with the 1973 amendment of the Texas homestead realty exemption to include the homestead "of a single adult person,"\textsuperscript{164} "the drastic change brought about by the new law is not in the fact that single adults may now claim the homestead exemption, but that such persons need no longer be a head of a family or a surviving family member."\textsuperscript{165} It therefore can-

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\item \textsuperscript{157} A "family in law" is one in which the person claiming the exemption has a legal duty to maintain the other member(s) of the family arising out of the familial relation. See, e.g., Deem v. Shinn, 297 So. 2d 611, 613 (Fla. 4th Dist. Ct. App. 1974); In re Estate of Kionka, 113 So. 2d 603, 606-07 (Fla. 2d Dist. Ct. App. 1959), aff'd, 121 So. 2d 644 (Fla. 1960); Crosby & Miller, supra note 2, at 24.
\item \textsuperscript{158} A "family in fact" is one in which there is a continual communal living in a relation "in which an established and continuing personal authority, responsibility, and obligation actually rests upon one as 'the head of a family' for the welfare of the others," who, in fact, "recognize and observe a family relation to the one [claiming the exemption, or on whose behalf the exemption is claimed] as the 'head of a family.'" Johns v. Bowden, 66 So. 155, 159 (Fla. 1914); accord, Heard v. Mathis, 344 So. 2d 651, 654 (Fla. 1st Dist. Ct. App. 1977); Brown v. Hutch, 156 So. 2d 683, 684-85 (Fla. 2d Dist. Ct. App. 1963), cert. denied, 162 So. 2d 665 (Fla. 1964); see Dame, supra note 5, at 402 (family member(s) must be dependent upon and recognize the head of the family). Such a "family" must be one "in good faith." Adams v. Clark, 37 So. 734, 736 (Fla. 1904).
\item \textsuperscript{159} E.g., Vandiver v. Vincent, 139 So. 2d 704, 708-09 (Fla. 2d Dist. Ct. App. 1962); In re Estate of Kionka, 113 So. 2d 603, 606-07 (Fla. 2d Dist. Ct. App. 1959), aff'd, 121 So. 2d 644 (Fla. 1960); Dame, supra note 5, at 402-03; cf. Zimmerman v. Gardner, 355 So. 2d 157, 157 (Fla. 4th Dist. Ct. App. 1978) (homestead exemption denied where claimant cared for nonrelated but invalid person, since the claimant could "terminate the relationship at any time she desires"). Factual dependence has not, however, been the sole criterion. Id.; Crosby & Miller, supra note 2, at 26.
\item \textsuperscript{160} Anderson v. Anderson, 44 So. 2d 652, 654 (Fla. 1950); Vandiver v. Vincent, 139 So. 2d 704, 709-10 (Fla. 2d Dist. Ct. App. 1962).
\item \textsuperscript{161} Regero v. Daugherty, 69 So. 2d 178, 179-80 (Fla. 1953) (homestead for purposes of restraints on devise).
\item \textsuperscript{162} Hill v. First Nat'l Bank, 75 So. 614, 615, 617 (Fla. 1917).
\item \textsuperscript{163} Deem v. Shinn, 297 So. 2d 611, 612 (Fla. 4th Dist. Ct. App. 1974) (homestead for purposes of restraints on devise). For other examples of situations in which single persons—and particularly single women—have been declared the "head of a family," see Crosby & Miller, supra note 2, at 25-26.
\item \textsuperscript{164} TEX. CONST. art. XVI, § 50.
\item \textsuperscript{165} Note, Effects of Extending the Homestead Exemption to Single Adults, 26 BAYLOR L. REV. 658, 658 (1974) [hereinafter cited as Baylor Note].
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not be doubted that Commissioner Burkholz's concern that divorced women—and men—be entitled to the homestead exemption will be met by making the exemption available to "any natural person." With approval of the commission proposal, the balance between creditors' and debtors' rights would be struck in favor of all debtors\textsuperscript{166} who own "homes."

An interesting problem of construction would arise in the light of this change should the Florida courts be faced with making a homestead determination in the case of two "natural persons"—with two homesteads—who have married. Since a claimant can have only one residence and so only one homestead, whose will it be?\textsuperscript{167} The courts might, in such a case, turn to an examination of intent, but such an examination would not suffice in all cases.

As an example, consider the interplay between this proposed change and the commission's proposal to limit the 160-acre homestead to one "the acreage of which is used for agricultural purposes." Suppose a farmer, with an "agricultural" homestead of 160 acres, marries a teacher who resides on a one acre homestead, and both continue in their respective occupations, each contributing to the upkeep of the other's residence. Suppose further that this homestead couple lives in the teacher's home on weekdays during the school year and in the farmer's home on weekends and during school

\textsuperscript{166} See Transcript of Fla. C.R.C. proceedings 247 (Dec. 9, 1977) (exchange between Commissioners John Ware and Jon Moyle to the effect that the homestead exemption has now been made available to a new class of debtors). However, nothing is certain in homestead law except uncertainty. For example, the Vermont Supreme Court was confronted with a situation in which claimed homestead realty became the subject of an inter vivos transfer after that state's homestead law had been made available to "natural persons" as opposed to "heads of family." In its discussion of the rights of the owner's spouse in the subject land, the court all but ignored the recent legislative amendment: "The homestead right is a right to be set out of the estate of the husband or head of the family and is treated as an exemption of so much of his estate as is included within it, for the benefit of his widow after his decease." Cole v. Cole, 91 A.2d 819, 824 (Vt. 1952) (emphasis added).

\textsuperscript{167} See Transcript of Fla. C.R.C. proceedings 246 (Dec. 9, 1977) (remarks of Yvonne Burkholz to the effect that the purpose of the homestead is to "protect the home site" regardless of familial structure).

\textsuperscript{168} See, e.g., Sarahas v. Fenlon, 5 Kan. 360, 361 (1870); Crosby & Miller, supra note 2, at 30-31, 37.
vacation periods. To move to a consideration of which person in such a case is the "family manager" or the like, in order to determine which of the two homesteads is the homestead, would be to dress the "head of a family" concept in new clothes. Since the exemption is to be made available to any "natural person," it no longer matters whether the farmer or the teacher is the "head" of that family.

What does continue to matter is whether or not the claimed homestead has been employed as a home and residence with an "element of permanency." On the basis of these facts, either our farmer's farm or our teacher's house could be held to be the homestead of both persons, and whether the farmer or the teacher is the family head becomes irrelevant. The requisite use and ownership are all that must be established in order to claim either homestead realty exemption potentially available in this situation. Thus, should our married couple cease living together entirely and each return to his or her pre-matrimonial residence, or should each purchase and move into an entirely new home separate from the other, it would not matter whether one was factually or legally dependent on the other for purposes of the homestead exemption. The exemption will become available to either "natural person."

It is, after all, a fundamental doctrine of existing homestead law that the facts of each case are to be interpreted so as to carry out the purpose of the homestead exemption, so long as such an interpretation does not serve as the instrument of fraud.

169. This example is drawn from Baylor Note, supra note 165, at 668, raising a factual situation similar to that stated in the text and posing many other such questions in light of the 1973 amendment to the Texas Constitution which made the homestead exemption in that state available to "a single adult person" as well as to heads of families.

170. This has been posited as a "new legal preference" in Baylor Note, supra note 165, at 668.

171. E.g., Bigelow v. Dunphe, 197 So. 328, 330 (Fla. 1940); Oliver v. Snowden, 18 Fla. 823, 835-36 (1882); In re Estate of Van Meter, 214 So. 2d 639, 642 (Fla. 2d Dist. Ct. App. 1968), cert. discharged, 231 So. 2d 524 (Fla. 1970); see Smith v. Croom, 7 Fla. 81, 153 (1857) (stating, with regard to a choice of laws problem regarding intestate succession, that "[t]o speak of a permanent home is to perpetrate a tautology—to speak of a temporary home is to involve a contradiction of terms" (emphasis in original). The employment of this test is illustrated by the discussion in Crosby & Miller, supra note 2, at 40-47. Whether a claimed "agricultural" homestead will be found in a case where the owner's family resides thereon without the owner is open to question. See text accompanying notes 175-79 infra.

172. E.g., Bigelow v. Dunphe, 197 So. 328, 329-30 (Fla. 1940); Deem v. Shinn, 297 So. 2d 611, 613 (Fla. 4th Dist. Ct. App. 1974); Vandiver v. Vincent, 139 So. 2d 704, 708 (Fla. 2d Dist. Ct. App. 1962). Thus, in the case of Beensen v. Burgess, 218 So. 2d 517, 519-19 (Fla. 4th Dist. Ct. App. 1969), the court sustained a claim of homestead exemption for purposes of forced sale where a father (and head of a family) left his claimed homestead and moved in with his married daughter, whose husband was the head of that family, although the court noted that the exemption would have been denied had there been a factual determination that the
change from "head of a family" to "natural person" indicates that the purpose of the revised homestead exemption would be to protect the homesteads of all persons without regard to marital or familial status. In any case, creditors are presumed to be aware of the law setting forth the homestead exemption, and the burden is upon them to see that their interests are adequately secured.  

B. One-Hundred Sixty Acres, "the acreage of which is used for agricultural purposes," or "one acre, limited to the residence of the owner or his family"

This proposal is part of a broader change eliminating the rural-urban homestead distinction. So long as the acreage upon which the homestead rests (with a maximum of 160 acres) is used for "agricultural" purposes, "whether it is in the municipality or outside the municipality, . . . you are going to get 160 acres, one-quarter of a section." This proposal would alter the settled doctrine that the use to which a rural homestead is put is irrelevant to the availability of the exemption. In contrast, the proposal would retain the limitation "to the residence of the owner or his family" for what were "municipal" homesteads and are now "non-agricultural" ones, although the maximum protected acreage of such homesteads has doubled from one-half acre to one acre.

This proposed revision also contains a constructional ambiguity as to whether the owner is required to reside on the real property claimed as homestead, an ambiguity previously contained in the daughter's home had become the claimant's "permanent abode at the time he moved in . . . " Id. at 519.

173. As stated by the Florida Supreme Court in Patterson v. Taylor, 15 Fla. 336, 347 (1875):

It is a humane provision that men and families, through misfortune, shall not be stripped of the little property necessary to their comfort and subsistence, and when one gives credit by lending money or selling goods without security, he does so in view of the laws exempting certain property from forced sale, and the creditor cannot complain, for he extends credit with full knowledge of the rights of the debtor and his family, relying alone upon his remedy at law.

Accord, Bigelow v. Dunphe, 197 So. 328, 330 (Fla. 1940); see Reed v. Fain, 145 So. 2d 858, 864, 867 (Fla. 1962) (one can be an "innocent third party" in a transfer of homestead property "owned by the head of a family with a child or children then living" only by taking a deed or mortgage executed by both spouses in exchange for a valuable consideration or "by acquisition of a valid tax deed").


175. E.g., Fort v. Rigdon, 129 So. 847, 848 (Fla. 1930); McDougall v. Meginniss, 21 Fla. 362, 372 (1885); Estate of Thornton v. Bretan, 259 So. 2d 760, 761 & n.1 (Fla. 3d Dist. Ct. App. 1971).
1868, 1885 and 1968 Florida Constitutions. One commentator has noted with regard to the present Florida Constitution that

there is no express requirement that the homestead owner himself reside on the premises, it seemingly being sufficient that his family reside thereon. Nor is there an express provision that the homestead owner even make his residence in the state, it again seemingly being sufficient that his family reside on the Florida homestead. 

While no decision of the Florida courts has been found in which this question was considered or decided, it would appear that the homestead real property exemptions from forced sale granted by the 1868, 1885 and 1968 Florida Constitutions implicitly required that the owner of the claimed homestead reside on the premises. Presumably, this implicit requirement will continue should the proposal under consideration be adopted by the voters at the forthcoming election. How the phrase “the acreage of which is used for agricultural purposes” will be interpreted is another question.

A Wisconsin statute enacted in 1848 contained the phrase “used for agricultural purposes” in connection with the requirements for establishing a rural homestead in that state. However, as the Wisconsin Supreme Court noted in Binzel v. Grogan, the Wisconsin

176. The 1868 Florida Constitution expressly required that the owner reside on the premises if the exemption was claimed on property located in a city or town, Fla. Const. of 1868, art. IX, § 1, as did the 1885 Florida Constitution, Fla. Const. of 1885, art. X, § 1.


178. See 1 Florida Real Property Practice 541 (Fla. Bar 2d ed. 1971); Crosby & Miller, supra note 2, at 17-18, 23. It has been held, for example, that “[r]eal property . . . can only be homestead for the purpose of descent and distribution if it is owned by the head of a family residing on the property at the time of death.” Jablonski v. Caputo, 297 So. 2d 310, 311 (Fla. 2d Dist. Ct. App. 1974). Since it is the exemption from forced sale for debts of the deceased owner, as distinct from the realty, that descends under the constitutional homestead provisions, e.g., Wilson v. Fridenburg, 19 Fla. 461, 465-66 (1882); Crosby & Miller, supra note 2, at 54, by requiring that the deceased owner have resided on the property in order for the exemption to inure, the Florida courts have implicitly required the owner to reside on the property in order to claim the exemption for himself. If he does not reside on the property, no exemption can inure after death for the simple reason that no exemption existed during the owner’s lifetime. As was ably stated in an opinion by Justice James Diament Westcott, Jr., in which he reiterated on behalf of the court the homestead descent and distribution provisions of the 1868 Florida Constitution (provisions reenacted in different form in the 1885 and 1968 Florida Constitutions), “[t]he exemption shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption . . . .” Wilson v. Fridenburg, 19 Fla. 461, 465 (1882) (emphasis added.)

179. Crow, supra note 130, at 6; Schoetz, supra note 137, at 23. The phrase has since been deleted. See Wis. Stat. Ann. § 815.20(1) (West 1977).

180. 29 N.W. 895, 897-98 (Wis. 1886). The court’s decision comports with the weight of judicial authority to the effect that, where an exemption statute is made applicable to an
Constitution directed the state legislature to provide an exemption law for all debtors. On this ground, the court rejected the "agricultural use" limitation enacted by the legislature and construed the exemption law as applying to all debtors, regardless of the uses to which the homestead was put. However, before resting its decision on this basis, the court offered an interpretation of the law as it stood, implying that such an interpretation would be consonant with the liberal purposes of the exemption laws:

To ascertain the literal meaning of the words "agricultural purposes" resort must be had to the lexicons for definitions of "agriculture." Webster tells us (accurately enough, no doubt) that it is "the art or science of cultivating the ground, especially in fields or in large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live-stock; tillage, husbandry; farming." The defendant did none of these things on his Sullivan land, unless, perhaps, he kept and fed his horse there; and, if the literal construction of the statute prevails, he had no homestead rights in the property, unless the same were saved by the keeping and feeding of the horse on the premises. If that was one of the purposes for which he used the premises, it must be conceded, we think, that they were used for one "agricultural purpose," at least.

Since the Wisconsin Supreme Court's decision rested on a state constitutional provision having no analogue in the Florida Constitution, and although the court suggested that the offending clause "may have crept into the law of 1848 as a mode (although perhaps an awkward one) of expressing the distinction between city or village property . . . and agricultural or country property," it is doubtful that Florida courts could take any other course than to attempt to define this proposed new phrase. The change from past

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"owner" or to "any person," it may be invoked by any claimant "regardless of family status."

Haskins, supra note 2, at 1293.

181. 29 N.W. at 898:
All that is required is that it be his homestead, and the statute was intended to protect the owner in the enjoyment of it. The fisherman may build his home upon the barren beach, using his land only for the spreading of his nets and the mooring of his vessels; or the hunter may build his home in a forest, and make no use whatever of his land appurtenant to his dwelling except to pass over it; yet we entertain no doubt whatever that the legislature intended, by the enactment of section 2983, to protect these men by exempting their homesteads from seizure for debt. The same is true of the present case, where the debtor used his lands appurtenant to his residence exclusively in connection with his hotel business.

182. Id. at 897.
183. Id. at 899.
homestead law in Florida—in which the rural-urban homestead distinction was explicitly made and is now avoided—is simply too large to ignore.

The case law surrounding the homestead exemption in the Kansas Constitution may offer a clue to the approach the Florida courts might take in interpreting the change now under consideration. The Kansas homestead realty exemption extends to 160 acres of "farming land" on the one hand, or one acre in the city, so long as the land is "occupied as a residence by the family of the owner . . . ." The Kansas Supreme Court, in construing this provision, has developed a doctrine of "constructive use" of homestead land:

[S]o long as the whole tract is devoted to the purposes of a homestead, and not to any other purpose inconsistent with the owner's homestead interests, the whole of the tract, up to 160 acres of farming land, or one acre within the limits of an incorporated town or city, will be considered as a part of the owner's homestead, whether he actually uses every part and portion thereof or not. Under such circumstances all is constructively used.185

There is no reason not to import a constructive use doctrine into Florida's proposed new "agricultural" (as distinct from "rural" or "urban") homestead, so long as its application in a particular case does not become an instrument of fraud.186

If the Florida courts accepted and applied such a doctrine, the effect would be to allow the agricultural exemption to be claimed on a 160-acre homestead in its entirety, so long as some portion of the acreage was put to agricultural use. The language of the exemption, however, provides that it may be claimed on a homestead to the extent of 160 acres, so long as the acreage is used for agricultural purposes, implying that the framers envisioned an agricultural homestead coextensive with the acreage used for agricultural purposes, with a maximum of 160 acres.

Given the specific use limitation in the change under considera-

184. KAN. CONST. art. XV, § 9. That the case law construing this provision may provide a point of reference for interpretation of Florida's new "agricultural" homestead is illustrated by the language of the Kansas Supreme Court in the case of Sarahas v. Fenlon, 5 Kan. 360 (1870). The Sarahas court upheld a homestead claim as to the plaintiff's "farming land" and denied it as to that portion of plaintiff's property which was located inside a municipality, making reference at one point to "the unnecessary extension of city limits over lands which could more appropriately be used for agricultural purposes . . . ." Id. at 362 (emphasis added).

186. See note 172 supra.
tion, the Florida courts may choose to resurrect an 1875 federal circuit court decision by Justice Joseph Bradley. In *Greeley v. Scott*, Justice Bradley considered the meaning of the forced sale exemption in the 1868 Florida Constitution of "[a] homestead to the extent of one hundred and sixty acres of land . . . and the improvements on the real estate . . . ." The court considered this language as being intended to protect that quantity of real estate, up to 160 acres, which was needed to carry on the debtor's usual business or trade, and implied that this protection was written into law primarily for the benefit of farmers. Applying this reasoning to the facts of the case before it, wherein a judgment debtor had claimed the constitutional exemption upon a 40-acre tract, the *Greeley* court allowed the exemption only upon the debtor's house and a sawmill appurtenant thereto, the sawmill being the debtor's principal place of business and the basis of his usual trade or occupation.

The court declared in *Greeley* that to reach any other result would protect a constructive use of homestead realty unwarranted by the language of the exemption:

Otherwise, by multiplying his branches of business and trade, a man might have a large domain consisting of many establishments, and claim them all as incident to his homestead. This never could have been the intent of the constitution. It would be an unreasonable construction of its terms. Those terms must be fairly construed so as to fully carry out the policy of the constitution, and yet not to nullify all obligations of a debtor to pay his debts.

Ten years later, in *McDougall v. Meginniss*, the Florida Supreme Court rejected both the holding and the rationale of *Greeley* on the ground that the constitutional exemption in question contained no limitation on the use to be made of the realty, a position to which it has adhered since. The change at hand would create a use limitation on the maximum 160-acre forced sale exemption of a type

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187. 10 F. Cas. 1072 (C.C.N.D. Fla. 1875).
188. *Fla. Const.* of 1868, art. IX, § 1.
189. 10 F. Cas. at 1072-73. In construing the constitutional exemption, the court apparently had in mind the statutory exemptions from forced sale in existence in Florida from 1845, which provided a real property exemption available only to farmers. See text accompanying notes 117-21 supra. The court pointed out that "160 acres of land [was] the usual quantity for a farm in this country. . . ." 10 F. Cas. at 1072.
190. 10 F. Cas. at 1073.
191. 21 Fla. 362, 371-72 (1885).
192. *E.g.*, Armour & Co. v. Hulvey, 74 So. 212, 214 (Fla. 1917); Smith v. Guckenheimer, 27 So. 900, 904 (Fla. 1900).
envisioned by the Fifth Circuit in *Greeley*. Whether the Florida courts would approve the reasoning of the *Greeley* decision in the light of this change, or whether they would turn to decisions such as *Binzel v. Grogan* construing analogous provisions of other state constitutions is an open question.

Besides previously rejected federal case law, and decisions construing analogous provisions of other state constitutions, aids in construction of the phrase "the acreage of which is used for agricultural purposes" include definitions of the term "agriculture" employed in Florida case law, various statutory definitions of analogous terms, and the case law construing statutes employing such terms.

Finally, Florida courts are very likely to accept an interpretation of the Kansas Constitution, to the effect that growing crops are part of the homestead per se, and not homestead personal property. The Florida courts have come to the same conclusion under the present wording of the Florida Constitution, and it is unlikely that the change in wording would change this construction. However, it is noteworthy that the Kansas courts have included growing crops within the homestead realty exemption by explicit reference to the "farming land" language of that state's constitution, reasoning as follows:

The purpose of the homestead exemption is to provide a place in which a debtor and his family may live and to provide a place on which he can raise food for his family without interference by creditors. If crops sown by the occupant of a homestead be levied on and sold while they are growing, one of the purposes of the homestead exemption will be defeated.

Whether or not this explains the proposed change in Florida's constitution is unclear from the commission debate on the subject.
It appears that the move either to a maximum 160-acre homestead "the acreage of which is used for agricultural purposes" on the one hand, or to a maximum one-acre homestead on the other, was made primarily to eliminate the rural-urban homestead distinction. There is also some indication that it was done to "take care of the small farmer," although at least one commissioner pointed out that a person with a 160-acre farm within the limits of a municipality should not be diminutively characterized as a "small farmer." Since it was also pointed out that the rural-urban homestead distinction was originally made "when Florida was an agricultural state and it meant something," one wonders why this particular wording was chosen at all. Why, indeed, should a person who uses 160 acres of land surrounding his or her home for "agricultural purposes" be granted an exemption on the entire tract, while a person making use of far less acreage for other purposes—such as rental of dwelling units located on the premises—is effectively limited to one acre or "the residence of the owner or his family," whichever is less?

If the intent of this proposal is to allow a debtor to provide for self and family, why not continue to allow a similar exemption to those using one acre or more to care for self and family by means other than agricultural? In any event, are not 160 acres of farm land rather more than adequate for the task of providing for one’s family, let alone for oneself? Finally, what would the courts do, for example, with the case of someone who owns a 160-acre tract, lives on it alone, and profitably leases the acreage to a corporate orange juice processor which uses the acreage for the agricultural purpose of growing and processing oranges?

The truth of the matter is that this proposal makes no sense apart from an understanding both of the present constitution and of traditional politics. Under the present constitution, a 160-acre tract (or less) can be used for any purpose and receive the homestead exemption, so long as it is outside the limits of a municipality. If a homestead is located inside a municipality, then it is—and has been for some time—limited to the residence of the owner or his family, interference by his or her creditors. See C. CRANDALL, supra note 4, at 853; Crosby & Miller, supra note 2, at 43-45.

202. Id. at 158 (remarks of Jesse McCrary and Nat Reed).
203. Id. at 159 (remarks of Nat Reed).
204. Transcript of Fla. C.R.C. proceedings 240-41 (Dec. 9, 1977) (remarks of DuBose Ausley). It appears that the average size of a farm in the late nineteenth century was 160 acres. Greeley v. Scott, 10 F. Cas. 1072, 1072 (C.C.N.D. Fla. 1875).
with a current maximum limitation of one-half acre.\footnote{206} This rural-urban distinction is a rational one, on the theory that a person residing outside a municipality would use his acreage to support his family,\footnote{207} and that a person residing in a municipality would need only a place to live, since there is insufficient land within a municipality—and especially inside a contemporary metropolis—for any other purpose appropriate for the protection of the exemption laws.\footnote{208} The proposed revision would eliminate this distinction and the reasoning which supports it.

In the future, under the commission proposal, a claimed homestead of 160 acres would have to be an "agricultural" one in the sense that all 160 acres are used for agricultural purposes. If not, unless the Florida courts adopt the "constructive use" doctrine, only that portion judicially determined to be used for agricultural purposes would be exempt from execution and forced sale. Obviously, this change would place a more restrictive limitation on the availability of the homestead exemption in rural areas. But why, it may be asked once again, retain the 160-acre exemption in Florida at all, especially considering the fact that a Wisconsin farmer, for example, was considered capable of supporting his family on a maximum of \textit{forty} acres?\footnote{209}

The reason can be found in pragmatic politics. The commission has sought to reduce the availability of the 160-acre maximum exemption. Had it reduced the available acreage as well, the proposal might be defeated.\footnote{210} Given this, it follows that the "agricultural"

\footnote{206. Thus, in Weiss v. Stone, 220 So. 2d 403, 404-05 n.2, 406 (Fla. 3d Dist. Ct. App.), \textit{appeal dismissed}, 225 So. 2d 913 (Fla. 1969), the trial court's determination that a homestead existed in an apartment building located in a municipality—but only to the extent of the building owner's own apartment or "residence"—was upheld, the rest of the building being held subject to forced sale. Contrast this view with that recently taken by the Wisconsin Supreme Court that rental income from buildings located on an otherwise exempt homestead should be included within the homestead realty exemption, despite lack of constitutional or statutory authority therefor, because of the liberal purposes of the homestead laws and because "the exemption applies regardless of what uses to which [the judgment debtor] puts the land." \textit{Schwanz v. Teper}, 223 N.W.2d 896, 900-01 (Wis. 1974).

207. \textit{See C. CRANDALL, supra note 4, at 853, where it is stated that the exemption of both rural and urban homesteads under the 1885 constitution was intended "[t]o enable the defendant to be self-supporting and to prevent him and his family from becoming public charges . . . ." Although the rural homestead exemption has remained essentially the same since Professor Crandall made this statement, it should be noted that the 1885 constitution's exemption of "the residence or business house of the owner" in a municipality was revised in 1968 to provide a municipal homestead exemption only to the extent of "the residence of the owner or his family." \textit{Compare Fla. Const.} of 1885, art. X, § 1 \textit{with Fla. Const. art. X, § 4(a).}

208. \textit{See notes 96, 207 supra.}


210. The acrimonious and irrational debate which would have then taken place is re-
exemption should be given a literal interpretation, unhampered by reference to any purpose other than the protection of every "natural person" whose home happens to be located on a quarter section, "the acreage of which is used for agricultural purposes."

C. "Mobile or modular home maintained as the residence of the owner or his family"

Commissioner Yvonne Burkholz, the author of this proposal, explained that her intent was to extend the homestead realty exemption to a mobile or modular home which serves as "the permanent residence of the owner. . . ."211 In this sense, the phrase "maintained as the residence" may be used in contrast to a phrase such as "owned by the person claiming the exemption." This makes clear that the exemption is not limited to cases in which the mobile or modular home owner also has title to the underlying realty.212 The commission debate on this proposal clearly reflects that this exemption was included as part of the homestead realty provisions and not as part of the homestead personalty section.213 Given the expression of intent that "maintained as the residence of the owner or his family"214 means one's "permanent residence," it is likely that the

212. See id. at 169, where Commissioner Dempsey Barron responded to an amendment by Commissioner Jon Moyle that would have limited the exemption as indicated in the text: What we are attempting to reach is to say if someone gets a judgment against you, they cannot take your home. And if you adopt the amendment of Commissioner Moyle, then the law would be if you could not afford the lot that your mobile home was on, they could get a judgment and get your mobile home.

It's still your home. That would be a terrible thing to do. I don't think we really want to do that.

213. Commissioner John Ware pointed out that, as originally drafted, this proposal would have been included in the homestead personalty section, and so would be subject to the $1,000 (now $3,000, as proposed by the commission) monetary maximum set forth in that section. Id. at 74. Although Commissioner Yvonne Burkholz, id. at 72, and Commission Chairman Talbot D'Alemberte, id. at 75, were respectively of the view that inclusion in the homestead per se section rather than in the homestead personalty section "doesn't really matter" and would not be "rather controversial to the Commission," the change in the realty section was made.

214. How the phrase "or his family" came into this proposal, No. 150 on the commission docket, is a mystery. Commissioner Yvonne Burkholz noted that her original amendment, Amendment No. 1 to Proposal No. 150, did not contain this phrase, and she suggested that her revised amendment, Amendment No. 3 to Proposal No. 150, had been so altered by "staff." Transcript of Fla. C.R.C. proceedings 172 (Jan. 13, 1978). No action was taken to
Florida courts would interpret this phrase as they would for any other claimed homestead, just as other state courts have interpreted analogous revisions of their own homestead laws to require a permanent occupation of the premises in order to claim the exemption.215

This change is based on statutory exemptions from forced sale which have recently been amended to include mobile and modular homes.216 The Florida Legislature first interpreted the coverage of the corresponding constitutional exemptions in 1869, providing in part here pertinent for a declaration of homestead prior to levy;217 a declaration of homestead after levy has been made;218 an explicit extension of the above provisions to "[a]ny person owning and occupying any dwelling-house [on] land not his own," which house is rightfully possessed "by lease or otherwise" and is claimed as the owner's homestead;219 and a procedure for the inventory and appraisal of exempted personal property selected by the debtor.220 The provisions for a declaration of homestead and the protection of a "dwelling-house" located on land held "by lease or otherwise" pertained to interests in realty, and all of the provisions just discussed were brought forward in substantially unchanged form through 1976.221

In 1977, mobile and modular homes were added to the statutes providing for a declaration of homestead in realty.222 This 1977 statutory amendment thus constitutes a declaration by the Florida Legislature that the constitutional and statutory exemptions of realty from forced sale include mobile and modular homes. This raises a question of constitutionality, a question not yet considered or decided by the Florida courts, as to whether the legislature may delete this phrase on an apparently long, wearying afternoon, and so it now appears as part of the proposed Florida Constitution.

215. Thus, the Vermont Supreme Court noted that protection of a homestead "used or kept" by the head of a family was the same as one merely "used" by such a claimant prior to an amendment of the homestead statute inserting the words "or kept." The court stated that "kept" in this context meant "an actual keeping," i.e., "a keeping of the premises with a present right and purpose of using them as a family home." Keyes v. Bump, 9 A. 598, 599 (Vt. 1887). Although never revised in this regard, the Kansas Constitution has similarly required that the claimed homestead be "occupied as a residence by the owner," and the Kansas Supreme Court has interpreted this to mean that "it must appear from the circumstances that an absence, in fact, is genuinely temporary, or the homestead privilege is lost." Quinton v. Adams, 112 P. 95, 96 (Kan. 1910).


218. Id. § 2.

219. Id. § 5.

220. Id. §§ 7-8.

221. See Fla. Stat. §§ 222.01-.02, .05-.07 (1977). No amendments to these statutes were passed by the 1976 legislature.

222. Ch. 77-299, §§ 2-3, 1977 Fla. Laws 1305 (codified at Fla. Stat. §§ 222.01-.02 (1977)).
authoritatively declare that the constitutional exemption of realty from forced sale extends to property which is otherwise often considered personal in nature.\textsuperscript{223} This same question arises about the great majority of mobile and modular homes, those used as a residence by the owner on land not his or her own, for the 1977 Florida Legislature also declared that the exemption of a "dwelling house" located on land lawfully possessed "by lease or otherwise" would include "a mobile home used as a residence, or [a] modular home . . . ."\textsuperscript{224}

\textsuperscript{223} An analogous question arose in connection with the homestead tax exemption contained in Fla. Const. of 1885, art. X, § 7. This constitutional exemption was available "to every person who has the legal title or beneficial title in equity to real property in this State, under the conditions specified therein." Ammerman v. Markham, 222 So. 2d 423, 425 (Fla. 1969) (emphasis in original). By the terms of the 1967 Laws of Florida, ch. 67-339, the Florida Legislature declared that the homestead tax exemption was henceforth to be allowed on cooperative apartments and condominiums. Since cooperative apartments were not (and are not) otherwise considered interests in realty, it would at first glance appear that the legislature had effectively declared cooperative apartment ownership to be ownership of realty. However, while the exemption was to be "allowed on each apartment occupied by a tenant-stockholder or member of a cooperative apartment corporation," the legislature further provided that "[a] corporation leasing land for a term of ninety-eight (98) years or more for the purpose of maintaining and operating a cooperative apartment thereon shall be deemed the owner for purposes of this exemption." Ch. 67-339, § 1, 1967 Fla. Laws 1078 (emphasis added). The Supreme Court of Florida, without consideration of the above-quoted underscored language, declared that

The Legislature by enacting Ch. 67-339 intended to and did include cooperative and condominium apartments within the meaning of the terms "real property" and "dwelling house," as used in the Constitution.

This legislative approval of individual ownership of units in a multiple-dwelling structure bears a reasonable relationship to the purposes of Art. X, § 7, Fla. Const. 1885. Ch. 67-339 is a valid legislative definition of "real property" and "dwelling house," as used in the Constitution, so as to extend homestead tax exemption benefits to owners of condominium and cooperative apartments . . . . Ammerman v. Markham, 222 So. 2d at 426. In other words, the court viewed ch. 67-339 as a valid and express legislative definition of the terms "real property" and "dwelling house" within the meaning of Fla. Const. of 1885, art. X, § 7, and construed ch. 67-339 as extending the constitutional exemption to the individual owners of cooperative apartments. Ammerman formed the basis of the Florida Attorney General's subsequent opinion to the effect that the owner of a modular home which is located on land held under lease "would not have 'the legal or equitable title to real estate' under Florida law requiring such for homestead [tax] exemption," in the absence of either contrary judicial decision or "an express legislative definition . . . ." [1969-70] Fla. Op. Att'y Gen. 288, 289. While it might be contended that the 1977 amendments discussed in the text constitute an express legislative definition of "land," "improvements," and "residence" for the purposes of the forced sale exemptions found in Fla. Const. art. X, § 4(a)(1), whether Ammerman can be used as support for the validity thereof (assuming the Florida Supreme Court will continue to adhere to even its limited holding) remains to be seen.

\textsuperscript{224} Ch. 77-299, § 1, 1977 Fla. Laws 1305; see In re Estate of Wartels, 357 So. 2d 708, 710-11 (Fla. 1978), in which the court held that a cooperative apartment is not homestead property for purposes of statutes regulating devise and descent and distinguished Ammerman, see note 223 supra, on the ground that Ammerman "did not clothe the cooperative apartments with homestead status; it merely sustained the statutory implementation" of the
Answers to these questions will affect the more than 400,000 owners of mobile or modular homes in Florida. These answers need not be provided, however, if the proposal under consideration is adopted at the forthcoming election. The constitution would then explicitly provide that the constitutional exemptions of realty from forced sale are to include mobile and modular homes.

One interesting problem of construction might arise should a homestead claimant argue that his or her houseboat is a "mobile home." Although Commissioner Burkholz stated that the term "modular home" was inserted to conform her amendment to "the statute which refers to mobile and modular [homes]," she also stated that the amendment was offered in "recognition of the vast number of Florida residents whose homes are mobile and who should have that exemption granted if the exemption is granted to other citizens." Clearly, a houseboat or other watercraft used as a home is "a home which is mobile."

At least one court has stated that a houseboat is a "mobile home" for purposes of a homestead exemption containing that term, and constitutional homestead tax exemption. Regardless of the continued validity vel non of the Florida Supreme Court decision in Ammerman v. Markham, the courts of this state are unlikely to accept a legislative determination that personal property, of whatever type, should be added to the explicit protections afforded real property by the forced sale exemptions of the Florida Constitution. See State ex rel. West v. Butler, 69 So. 771, 777 (Fla. 1915):

Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments. A legislative construction of an ambiguous or uncertain provision of organic law may be persuasive; but constitutional provisions that are clear and explicit in terms or made so by the history of their adoption and by long-continued application and recognition in governmental proceedings cannot be given by legislation a meaning that conflicts with the terms of such clear and explicit provisions. Accord, State ex rel. Collier Land Inv. Corp. v. Dickinson, 188 So. 2d 781, 783 (Fla. 1966); [1976] FLA. OP. ATT'Y GEN. 198; [1973] FLA. OP. ATT'Y GEN. 217.

225. This figure is an estimate based on vehicle tag sales. FLORIDA DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES, TAGS AND REVENUE, July 1, 1976-June 30, 1977, at 63 (1977).

226. The 30-year-old conclusion of the Florida Attorney General's Office to the effect that a houseboat is not a "homestead" for purposes of exemption from taxation, [1947-48] FLA. OP. ATT'Y GEN. 195, is of no bearing on this question. That opinion relates to FLA. CONST. of 1885, art. X, § 7 (now FLA. CONST. art. VII, § 6), which explicitly exempts a certain amount in value of real property legally or equitably owned by the claimant. The change now under consideration in the text contains no such explicit requirement.

227. Transcript of Fla. C.R.C. proceedings 172 (Jan. 13, 1978). Commissioner Burkholz was apparently referring to FLA. STAT. §§ 222.01-.02, .05 (1977), providing, inter alia, an exemption from forced sale to the owner of a mobile or modular home whether or not the owner-claimant holds title to the underlying realty.


229. In re Bell, 181 F. Supp. 387 (D. Or. 1960). The court reached this conclusion as follows: "I am of the opinion that the houseboat is a mobile home as mentioned in ORS 23.164. Webster's New International Dictionary, 2nd Edition, defines mobile as, '1. capable of being moved; movable.'" Id. at 387. The Oregon Legislature has since accepted this
the California Assembly has extended its state's homestead laws to this effect. So long as the watercraft-home is owned and actually occupied as a residence, as is required of every other claimed homestead, there can be no basis in law or in logic to deny the claim. To construe the phrase "mobile home" as including waterborne homes would clearly serve the purposes of Florida's historically expanding homestead protection. As one California court has explained the similarly expanding development of homestead law in that state:

A historical look recalls that at the time of the original constitutional provision there were no mobile or transient "homes"; that a homestead was the real property and building upon it occupied by the family for its abode and residence.

Many years later families began occupying mobile homes as their places of residence and the need arose for protecting those families against execution sale of such structures. [The Legislature began in 1949 to create exemptions for house trailers (mobile homes); and from time to time increased the amount of exemptions thereon as they increased the exemptions under the Civil Code homestead provisions.

Given this historical development—and Florida's long coastline—the Florida courts need not and should not construe the term "mobile home" as being defined by the term "modular home" with which it is disjunctively linked, so that only mobile homes located on land would be within the exemption. Since homestead laws are meant to protect a debtor's actual home, and since the facts of each case should be construed in the light of this purpose, the homestead protection could be construed, should the commission proposal be adopted, as extending to homes located on water as well as on land without doing noticeable violence to rules of construction. At any decision by declaring that a "mobile home" for purposes of the Oregon homestead law "includes, but is not limited to, a houseboat." Or. Rev. Stat. § 23.164(9) (1977).

230. Cal. Civ. Proc. Code § 690.3(a) (West Supp. 1978), exempts, inter alia, a "houseboat, boat, or other waterborne vessel" in which the debtor or his family "actually resides" from execution and forced sale.


232. Such a construction not only would be in line with the liberal "legislative" developments in homestead law over time but also would be in accord with the recent trend on the part of Florida courts to consider condominiums as homesteads for purposes of the forced sale exemption. Although by no means fully developed, and not clearly stated as yet, this trend began with the recent decision of the Florida Supreme Court in Avila S. Condominium Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977). In that case, individual condominium unit owners alleged that the enforcement of liens on their respective units which secured payment of a recreational lease and were held by the association would violate the homestead provisions.
rate, if this change is adopted, Florida would be among a growing number of states allowing the homestead per se exemption to be claimed by the owner-occupant of a "mobile" home, and, further, would elevate this exemption from statutory to constitutional status.

D. "Three thousand dollars" of Personal Property

The final significant proposed change in Florida's homestead provision is a proposed $2,000 increase in the amount of exempt personal property. This change, like all constitutional exemptions of personal property from forced sale in Florida since 1868, and like the constitutional and statutory provisions of many other states, would allow the judgment debtor, subject to a monetary limitation, to select the personal property upon which to claim the exemption. Unlike the constitutional and statutory provisions of many other states, and unlike the statutory exemption available in Florida prior of the Florida Constitution. The court did not reject the plaintiff's constitutional claim but instead directed that these plaintiffs be given leave to amend this count of their complaint on remand, stating:

In order to avail himself of the homestead exemption, however, a debtor must establish the homestead character of his property as of the time the lien attaches. The complaint in the present case fails to allege facts that would qualify any unit as homestead property, as of the time of the creation of the liens. Id. at 605 (emphasis added). On the authority of Avila South, the Third District Court of Appeal subsequently remanded another case with leave to amend a similar complaint on this same issue. Point E. One Condominium Corp. v. Point E. Developers, Inc., 348 So. 2d 32, 36-37 (Fla. 3d Dist. Ct. App. 1977). Another case in this developing trend is that of In re Estate of Wartels, 357 So. 2d 708 (Fla. 1978), in which the Florida Supreme Court carefully distinguished condominium and cooperative apartment ownership in holding that a cooperative apartment is not a constitutional homestead for purposes of descent: "Unlike a condominium purchaser, a cooperative apartment unit purchaser does not receive title to the cooperative apartment unit, nor does he become entitled to ownership of any portion of the building or the land upon which the cooperative apartment unit is situated." Id. at 709. Although this recent trend on the part of Florida courts to consider condominiums as homesteads for purposes of the exemption from forced sale may be viewed as an application of the rule that exemption laws are to be construed "liberally," it should be noted that there is ample authority for considering condominium ownership as ownership of an interest in realty. E.g., [1963-64] FLA. ATT'Y GEN. 39; [1961-62] FLA. ATT'Y GEN. 319, see Gautier v. State ex rel. Safran, 127 So. 2d 683, 684-85 (Fla. 3d Dist. Ct. App.), appeal dismissed, 135 So. 2d 740 (Fla. 1961) (ownership of a dwelling unit within a multi-unit condominium held to be ownership of part of a "dwelling house" and so impliedly "legal title or beneficial title in equity to real property" within homestead tax exemption provision, FLA. CONST. of 1885, art. X, § 7); cf. Overstreet v. Tubin, 53 So. 2d 913, 915 (Fla. 1951) (same as to each unit in a duplex, ownership of entire structure being in two parties with each owning a divided one-half of structure in fee simple).

to the 1868 Florida Constitution,\textsuperscript{234} the judgment debtor would not be restricted to enumerated items. It appears that $3,000 was chosen as the new monetary maximum on this exemption in order to make the exemption "a little more equitable."\textsuperscript{235}

A proposal to raise the limitation to $5,000 was withdrawn without apparent debate,\textsuperscript{236} and another proposal to raise the exemption by only $1,500 was rejected.\textsuperscript{237} Beyond general expressions of doing equity,\textsuperscript{238} no reason appears why the exact figure of three thousand dollars was chosen. The commission could have keyed this figure to a consumer price index, but the availability of this option appears never to have been discussed. Had it adopted this device, so that the amount of the exemption would rise or fall with the rate of inflation, Florida would apparently have been the first state in the nation to do so.\textsuperscript{239}

The reason is a simple one: while eighteen of the thirty-seven commissioners were attorneys, none identified themselves as economists. They were chosen, in large part, to reflect the wishes of the people, and they have done so. Given the present vague feeling that the homestead personalty exemption of $1,000 should be changed and that a dollar is not worth what it was in 1885 when the $1,000 maximum first appeared, it is no wonder that the figure of $3,000 was chosen arbitrarily.\textsuperscript{240}

\textsuperscript{234} See text accompanying notes 80-85 supra.

\textsuperscript{235} Transcript of Fla. C.R.C. proceedings 234-35 (Dec. 9, 1977) (remarks of DuBose Ausley). Proposals to increase the present monetary limitation have an intriguing origin:

One of the things that brought this to our attention is the fact that Commissioner McCrary, who was familiar with the problem in Dade County where a child fell down a well on a farm and was killed, and a judgment was obtained; and they were unable to levy that judgment for the wrongful death of that child against the owner of that property because it was 160 acres and a homestead, even though it was worth thousands of dollars an acre.

What we have tried to do is eliminate the discrimination that exists between a city residence and a county [sic] residence, and also provide a higher exemption for the people who don't own any land.

Right now there is a thousand dollar exemption in the constitution. And the poor man living down here in the Jefferson Arms Apartments and has a car worth $2,000, is going to have that car levied on and sold at forced sale, even though the rich man living on 160 acres in the county [sic], you are not going to be able to touch him.

\textit{Id.} It apparently did not at all appeal to the commission to "make things a little more equitable" by reducing the exemptions available to everyone.

\textsuperscript{236} Fla. C.R.C., Proposal No. 80 (by Commissioner McCrary), withdrew, 25 Fla. C.R.C. Jour. 353 (Jan. 27, 1978).

\textsuperscript{237} Amendment No. 1 to Proposal No. 83, by the Committee on Finance and Taxation, failed viva voce. 15 Fla. C.R.C. Jour. 242 (Dec. 9, 1977).

\textsuperscript{238} See Transcript of Fla. C.R.C. proceedings 248 (Dec. 9, 1977) (remarks of Dempsey Barron).

\textsuperscript{239} See Vukowich, supra note 92, at 797.

\textsuperscript{240} The Florida Constitution of 1868, in which homestead exemptions were established.
It was this sort of continual casting and recasting of the mold of debtors' rights, reflecting the desires of a particular people at a particular time, that led a Roman emperor to introduce voluntary bankruptcy into Roman law\textsuperscript{241} and that led to the statutory introduction of the writ of \textit{elegit} into English law, to allow execution on only one-half of the judgment debtor's lands and only for possession.\textsuperscript{242} It is, in short, a part of the continuing historical expansion of debtors' rights resulting from a sometimes unarticulated societal determination that debtors deserve protection and that creditors must take a risk.

VIII. Conclusion

The homestead proposals of the 1978 Florida Constitution Revision Commission add yet another chapter to the historical process of balancing debtors' and creditors' rights. They at once restrict and expand the exemptions currently available. For example, the exemption of real property up to 160 acres has now been coupled with a restriction on protected land use. On the other hand, mobile and modular homes have been given the constitutional protections previously afforded to real property in this state.

Whether these proposals, taken as a whole, strike a desirable balance between the competing interests of judgment creditors and debtors depends as a practical matter on where one's sympathies lie. Fortunately or unfortunately, the apparent popular conception of a debtor hounded by rapacious creditors is not universally accurate. Many debtors seek to avoid the obligations resulting from financial transactions into which they have freely entered. Moreover, without the availability of security for the repayment of debts, the extension

\begin{footnotes}
\item for the first time as part of Florida's organic law, provided for a maximum exemption of $2,000 worth of personal property. This figure was reduced to $1,000 in the Florida Constitution of 1885 and remained at $1,000 in the 1968 Florida Constitution. \textit{Fla. Const.} art. X, § 4(a)(2); \textit{Fla. Const.} of 1885, art. X, § 1; \textit{Fla. Const.} of 1868, art. IX, §§ 1-2.
\item Much of the commission's work was undertaken, perhaps necessarily, in a fashion which was not calculated to please those who take the view that no portion of the constitution should be changed without an exacting and considered deliberation. The author had the privilege of observing the commission at work as an ad hoc member of its staff, on temporary leave from the Department of Legal Affairs throughout the period of October, 1977, to February, 1978, and as the representative of the attorney general of Florida at a meeting of the commission's Style and Drafting Committee on March 1, 1978. As a minor illustration of the above point, drawn from this experience, it was the author who suggested that if the title of article X, § 4 of the 1968 Florida Constitution were to be rephrased, that it might be rephrased as follows: "Homestead; forced sale exemptions; restraints on devise and alienation." The committee adopted this suggestion without question, and it was subsequently adopted by the full commission. 26 \textit{Fla. C.R.C. Jour.} 468 (Mar. 6, 1978). See also notes 155, 210, 213-14 \textit{supra}.
\item See note 19 and text accompanying notes 19-24 \textit{supra}.
\item See text accompanying notes 50-55 \textit{supra}.
\end{footnotes}
of credit which is at the heart of most commercial affairs becomes a risky and unappealing business.

Viewed objectively, the commission's work is incomplete and somewhat haphazard. Its proposals are in large part the product of feeling rather than reflection. On the whole, however, these proposals would extend the constitutional forced sale exemptions to persons who are in need of them and remove them from the grasp of those who perhaps do not need them. The voters of this state would do well to adopt the commission's proposals, secure in the knowledge that these changes are subject to the guiding influence and fair interpretation of the Florida courts.