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Perspectives on Urban Homestead Exemptions - Texas Amends Articles XVI, Section 51 Symposium - Selected Topics on Land Use Law - Comment.

Julie B. Schroeder

Perspectives on Urban Homestead Exemptions—Texas Amends Article XVI, Section 51

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I. INTRODUCTION

On November 8, 1983, Texas voters cast their ballots in favor of a new amendment to article XVI, section 51 of the Texas Constitution.[1] The im-

1. *See* TEX. CONST. art. XVI, § 51. This section provides:
[T]he homestead in a city, town or village, shall consist of lot or lots amounting to not more than one acre of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant. . . .

mediate effect of this vote was to change the urban homestead exemption from a value limitation of $10,000[2] to an area limitation of one acre.[3] In addition to this anticipated result, the new amendment may give rise to problems not anticipated by the Texas Legislature or the Texas voters. In lay terms the word "homestead" generally refers to one's residence or home place.[4] In a legal sense, however, the term also relates to a type of exemption[5] which, for the purposes of this comment, is one that protects a debtor's homestead from forced sale by creditors.[6]

In Texas, the homestead exemption provided for in the Constitution[7] and by statute[8] refers specifically to the land upon which one's residence stands.[9] Once it is established that a particular lot is exempt, the improvements thereon will also be exempt.[10] Historically, Texas had placed a dollar limitation upon the value of the land that a homesteader could declare

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Id.; see also Tex. H.R.J. Res. 105, 68th Leg., 1983 TEX. GEN. LAWS 6724 (complete wording of proposed amendment). *See generally* HOUSE COMM. ON JUDICIARY, Tex. H.R.J. Res. 105, 68th Leg. (March 30,1983) (tape available at St. Mary's Law Journal Office, San Antonio, Texas). The amendment was sponsored by Representative Charles Evans in the House of Representatives and Senator Kent Caperton in the Senate. *See id.*

2. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1983). This section provides: "[T]he homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars. . . ." *Id.*

3. *See* TEX. CONST. art. XVI, § 51.

4. *See, e.g.,* Cullers v. James, 66 Tex. 494, 498, 1 S.W. 314, 315 (1886) (house is implied in word homestead); Franklin v. Coffee, 18 Tex. 413, 417 (1857) (homestead includes idea of home); Anderson v. Bundick, 245 S.W.2d 318, 324 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.) (homestead is land occupied by family as home).

5. *Compare* Wallingford v. Bowen, 104 S.W.2d 188, 190 (Tex. Civ. App.—Amarillo 1937, no writ) (homestead is where family lives) *with* Brannon v. Bohannon, 96 S.W.2d 1036, 1037 (Ky. 1936) (homestead is right to exempt property from forced sale).

6. *Cf.* TEX. TAX CODE ANN. § 11.13 (Vernon 1982) (allows for dollar exemption from taxation of homestead). The homestead exemption from forced sale as discussed in this comment should not be confused with the homestead exemption for tax purposes. *See id.*

7. *See* TEX. CONST. art. XVI, § 51. This section provides: "[T]he homestead in a city, town or village, shall consist of *lot, or lots. . . .*" *Id.* (emphasis added).

8. *See* Act of May 24, 1983, ch. 576, § 41.001 (to be codified as TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1984-1985)).

9. *See* Cullers v. James, 66 Tex. 494, 498, 1 S.W. 314, 315 (1886) (exemption refers to land); Kelly v. Nowlin, 227 S.W. 373, 375 (Tex. Civ. App.—Texarkana 1921, no writ) (claimant not restricted to rooms occupied since homestead entails lot upon which building stands).

10. *See, e.g., In re* Bobbitt, 3 Bankr. 373, 373-74 (Bankr. N.D. Tex. 1976) (bankrupt entitled to exemption for land up to constitutional limit plus value of all improvements); Clement v. First Nat'l Bank, 115 Tex. 342, 351, 282 S.W. 558, 561 (1926) (homesteader entitled to proceeds for value of all improvements on land); Inge v. Cain, 65 Tex. 75, 78 (1885) (under 1869 Constitution, homestead consists of lots not exceeding $5000, not including improvements); *see also* TEX. CONST. art. XVI, § 51 (urban homestead consists of not more than one acre and improvements therein).

as exempt.[11] Under this method, a homesteader often found himself with property valued in excess of the limitation,[12] with the result that a creditor could have the homestead sold for satisfaction of his claim.[13] Although the value limitation was amended from time to time,[14] the figure never stayed abreast of inflation or reflected a realistic market price for urban lots.[15] Rather than continuing to amend the value periodically, the legislature decided to change to an area limitation.[16]

Since Texas has always had an acreage exemption for rural homesteads,[17] many of the laws developed for rural homestead designation will likely become applicable to the urban homestead. The implementation of the new law, however, will not be as simple as applying rural homestead principles to the urban homestead. Difficulties will likely arise largely due to the retroactivity of the amendment. The new acreage exemption applies to all urban homesteads in Texas and not simply to the homesteads desig-

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11. *See, e.g.,* TEX. CONST. art. XVI, § 51 (1876, amended 1970) ($10,000); TEX. CONST. art. XVI, § 51 (1876) ($5000); TEX. CONST. art. VII, § 22 (1845) ($2000).

12. *See, e.g.,* Valley Bank v. Skeen, 401 F. Supp. 139, 139 (N.D. Tex. 1975) (homestead at time of designation $8000 in excess), *aff'd*, 532 F.2d 185 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976); Clement v. First Nat'l Bank, 115 Tex. 342, 349, 282 S.W. 558, 559 (1926) (homestead when designated was $1,470 in excess of $5,000 limitation); Hoffman v. Love, 494 S.W.2d 591, 595 (Tex. Civ. App.—Dallas) (homestead purchased for $12,250 when exemption limit was $5,000), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

13. *See* Clement v. First Nat'l Bank, 115 Tex. 342, 351, 282 S.W. 558, 561 (1926) (proper means of reaching excess is sale of homestead); Paschal v. Cushman, 26 Tex. 74, 75 (1861) (decree subjecting homestead to sale was appropriate); *see also* Bush & Proctor, *Piercing the Homestead: The Trial of an Excess Value Case,* 34 BAYLOR L. REV. 387, 391-92 (1982) (discussion of how creditors can reach excess above homestead exemption amounts).

14. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1970) (increasing value to $10,000); TEX. CONST. art. XVI, § 51 (1876) (increasing limit to $5000); TEX. CONST.art. VII, § 22 (1845) (increasing exemption to $2000); Law of Jan. 26, 1839, Act of the Republic of Texas, 2 H. GAMMEL, LAWS OF TEXAS 125-26 (1898) (establishing first Texas exemption of $500). *See generally* TEX. CONST. art. XVI, § 50, interp. commentary (Vernon 1955) (discussing history of homestead exemption).

15. *See* HOUSE COMM. ON JUDICIARY, Tex. H.R.J. Res. 105, 68th Leg. (March 30, 1983) (tape available at St. Mary's Law Journal Office, San Antonio, Texas). Professor Joseph McKnight, in testifying on behalf of the adoption of the amendment before the Judiciary Committee, indicated that the value limitation was originally to have provided protection for a residence and a place of business. Today, he explained, the value is "grossly inadequate in most communities to cover even the land value of the home." *Id.*

16. *See* Debate on Tex. H.R.J. Res. 105 on the Floor of the House, 68th Leg. (April 14, 1983) (second reading and adoption) (tape available at St. Mary's Law Journal Office). Representative Evans explained that the purpose of the amendment was essentially to eliminate the ability of creditors to force a sale of urban homesteads in Texas as was being done under the $10,000 limitation. *See id.*

17. *See* TEX. CONST. art. XVI, § 51. The applicable language provides: "The homestead, *not* in a town or city, shall consist of not more than *two hundred acres of land. . . .*" (emphasis added) *Id.*

nated after the enactment of the amendment.[18] Consequently, the retroactivity of the amendment creates questions concerning the rights of creditors and debtors who might deem it more advantageous to rely on the former exemption law.

The objective of this comment is first to explore the policy considerations behind the existence of a homestead exemption, for only by understanding the purposes of such a law and its effects upon society may it be determined whether Texas' new homestead exemption will achieve desirable results. Second, this comment will attempt to predict some of the problems that may arise in implementing the change in the law. Particular attention will be paid to the new law's retroactivity which the legislature has expressly established for the first time in the history of the exemption limitation.[19]

II. BACKGROUND ON HOMESTEAD EXEMPTIONS

A. *Historical Considerations*

Homestead rights are rooted in statutes and did not exist in early common law.[20] There were provisions in English law enabling a debtor to maintain his clothing and tools of trade, but otherwise the debtor reaped little sympathy.[21] The Spanish civil law, on the other hand, had exemptions for the homes of the favored classes but only under rare circumstances.[22] The homestead exemption is consequently an American

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18. *See* TEX. CONST. art. XVI, § 51; *see also* Tex. H.R.J. Res. 105, 68th Leg., 1983 TEX. GEN. LAWS 6724. Section 2 of this law provides: "This amendment applies to all homesteads in this state, including homesteads acquired before the adoption of this amendment." *Id.*

19. *See, e.g.,* Linch v. Broad, 70 Tex. 92, 96, 6 S.W. 751, 755 (1888) (no retroactive treatment of 1876 exemption); McLane v. Paschal, 62 Tex. 102, 106 (1884) (1866 provision not retroactive); Paschal v. Cushman, 26 Tex. 74, 75 (1861) (new $2,000 exemption not retroactive).

20. *See, e.g.,* Weller v. City of Phoenix, 4 P.2d 665, 666 (Ariz. 1931) (homesteads are creatures of statutory law, not common law); Kleinert v. Lefkowitz, 259 N.W. 871, 873 (Mich. 1935) (at common law, creditor could not sell debtor's land); Wyatt v. Bauer, 332 S.W.2d 301, 304 (Mo. App. 1960) (homestead right not from common law); *see also* S. THOMPSON, A TREATISE ON HOMESTEADS AND EXEMPTION LAWS 3 (1878) (right of homestead is statutory).

21. *See, e.g.,* Glenn, *Property Exempt From Creditors' Rights of Realization,* 26 VA. L. REV. 127, 128 (1939) (only enough clothing to protect debtor exempt); Rombauer, *Debtors' Exemption Statutes — Revision Ideas,* 36 WASH. L. REV. 484, 485 (1961) (clothing, tools, and animals exempt at common law); Wall, *Homestead and the Process of History: The Proposed Changes in Article X, Section 4,* 6 FLA. ST. U.L. REV. 878, 885 (1977) (necessary wearing apparel was exempt).

22. *See* McKnight, *Protection of the Family Home From Seizure by Creditors: The Sources and Evolution of a Legal Principle,* 86 SW. HIST. QUART. 369, 373 (1983) (homes of nobility and gentry protected except for debts to crown); Wall, *Homestead and the Process of*

innovation, fostered by the philosophy and circumstances that existed during the early history of this country.[23] The principle reason behind its enactment in the states was to provide for the debtor and, more importantly, for his family, an asylum from creditors in the wake of the financial turmoil of the 1830's.[24] It was simultaneously perceived that the enactment of such a law might attract settlors to newer and less developed territories.[25] Not surprisingly, the Rebublic of Texas was the first region to enact a homestead exemption law in 1839.[26] In the early Texas case of *Franklin v. Coffee,*[27] Chief Justice Hemphill wrote:

> That the homestead exemption was founded upon principles of the soundest policy cannot be questioned. Its design was not only to protect citizens and their families, from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions.[28]

Thus, the notion of insuring to an individual his own piece of land also harmonized with the anti-feudalistic attitude that motivated the development of this country.[29]

History: The Proposed Changes in Article X, Section 4, 6 FLA. ST. U.L. REV. 887, 888 (1977) (houses of knights and noblemen exempt from execution).

23. *See* 1018-3rd Street v. State, 331 S.W.2d 450, 453 (Tex. Civ. App.—Amarillo 1959, no writ) (homestead law direct result of Panic of 1837); *see also* C. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 252-53 (2d ed. 1949) (discussion of the financial troubles in 1830's and subsequent National Homestead Act Legislation); Comment, *State Homestead Exemption Laws,* 46 YALE L.J. 1023, 1024 (1937) (discussion of historical conditions giving rise to exemption law).

24. *See* 1018-3rd Street v. State, 331 S.W.2d 450, 453 (Tex. Civ. App.—Amarillo 1959, no writ). This case offers an excellent discussion of the policy reasons behind enactment of the homestead exemption in Texas and lists the following purposes: (1) to maintain the unity of the family and encourage homesteading; (2) to provide the family as well as the debtor with a home and a means of support; (3) to establish in the individual a sense of freedom and independence. *See id.* at 453.

25. *See* 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1919: THE AUSTIN PAPERS 996-97 (E. Barker ed. 1924) (letter written by Stephen Austin advocating enactment of exemption law in Texas to encourage colonization); Comment, *State Homestead Exemption Laws,* 46 YALE L.J. 1023, 1025 (1937) (immigration of debtors to Texas to escape creditors).

26. *See* Law of Jan. 26, 1839, Laws of the Republic of Texas, 2 H. GAMMEL, LAWS OF TEXAS 125-26 (1898); *see also* TEX. CONST. art. XVI, § 50, interp. commentary (Vernon 1955) (history of Texas homestead exemption).

27. 18 Tex. 413 (1857).

28. *Id.* at 416.

29. *See* S. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS 2 (1878). The author stated:

> The late Senator Benton, advocating in the United States Senate the adoption of a general homestead policy, said: "Tenantry is unfavorable to freedom. It lays the foun-

B. *Contemporary Considerations*

1. General Reasons for Exemptions

In addition to the historic considerations, there have been other suggested policy reasons for enacting a homestead exemption. First, such exemptions ease the burden of debtors on the rest of society by lessening the need for welfare payments if the debtor is rendered homeless.[30] Exemptions also help to rehabilitate the debtor by enabling him to retain a reasonable amount of assets to rebuild his estate and eventually pay off his debts.[31] Finally, homestead exemptions help to keep the family together by providing it with a base and by relieving it of some of the psychological pressures of indebtedness that typically lead to divorce.[32] Consequently, forty-three states now have a homestead exemption in either constitutional[33] or statutory form.[34] The only general statement that can be made

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dation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. . . . The freeholder, on the contrary, is the natural supporter of a free government. . . ."

Id. (citing Thirty Years in the Senate 103, 104).

30. *See, e.g.,* Hollywood Credit Clothing Co. v. Jones, 117 A.2d 226, 227 (D.C. 1955) (exemption law is to protect community at large); Slatcoff v. Dezen, 76 So. 2d 792, 794 (Fla. 1954) (exemption laws prevent debtors from becoming public charges); Young v. Geter, 170 So. 240, 241-42 (La. 1936) (exemptions prevent debtors from burdening society); *see also* W. NUNN, A STUDY OF THE TEXAS HOMESTEAD AND OTHER EXEMPTIONS 2 (1931) (homestead laws benefit society).

31. *See* Ulrich, *Virginia's Exemption Statutes — The Need for Reform and a Proposed Revision,* 37 WASH. & LEE L. REV. 127, 129-30 (1980) (allowing debtor to retain property leads to rehabilitation); *cf.* Burlington v. Crouse, 228 U.S. 459, 473 (1913) (purpose of Bankruptcy Act exemptions to give bankrupt enough property to make fresh start); Maschke v. O'Brien, 17 A.2d 923, 924 (Pa. 1941) (purpose of Exemption Act to allow debtor enough money to tide him over to better days).

32. *See* Williams v. Williams, 569 S.W.2d 867, 873-74 (Tex. 1978) (homestead laws protect the family); Woods v. Alvarado State Bank, 118 Tex. 586, 595, 19 S.W.2d 35, 38 (1929) (purpose of homestead provision to protect family); Allison v. Shilling, 27 Tex. 450, 455 (1864) (object of homestead exemption is to provide family with home); Trawick v. Harris, 8 Tex. 312, 314 (1852) (law is to protect wife and children); *see also* R. WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 4 (1893) (when home is taken away family unit is endangered); Vukowich, *Debtors' Exemption Rights,* 62 GEO. L.J. 779, 784-85 (1974) (protection of homestead lessens strain on family).

33. *See, e.g.,* ARK. CONST. art. IX, § 5 (urban homestead not exceeding one acre of land nor exceeding $2500 dollars in value); FLA. CONST. art. X, § 4 (urban homestead of one-half acre); W. VA. CONST. art. VI, § 48 (homestead of $5000 exempt from forced sale). Some of the provisions of the state constitutions are self-executing, meaning that their provisions may take effect without the necessity of implementing legislation. *Compare* ALA. CONST.art. X, § 205 ("Every homestead not exceeding eighty acres") *and* TEX. CONST. art. XVI, § 51 ("homestead, not in a town or city, shall consist of not more than two hundred acres of land") *with* MD. CONST. art. III, § 44 ("Laws shall be passed . . . to protect from execution a reasonable amount of property of the debtor.") *and* NEV. CONST.art. IV, § 30 ("homestead, as provided by law shall be exempt").

about these exemptions, however, is that they vary enormously in their particular limitations.[35] Most of the states place a value limitation on the homestead,[36] with only seven states applying a strict area limitation.[37] Some of the exemption laws combine both an area and a value limitation,[38] while only one state establishes a limit based upon the number of members in a household.[39]

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34. *See, e.g.,* ALASKA STAT. § 09.38.010 (1962) (Alaska exemptions act); ARIZ. REV. STAT. ANN. § 33-1101 (1956) (homestead definition and exemption); HAWAII REV. STAT. § 651-92 (Supp. 1982) (real property exemption).

35. *See, e.g.,* KAN. CIV. PROC. CODE ANN. § 60-2301 (Vernon 1982) (1 acre homestead limitation); N.C. CONST. art. X, § 2 (homestead limitation of $1000); N.D. CENT. CODE § 47-18-01 (Supp. 1983) (exemption limitation of $80,000); *see also* R. WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 208-23 (1893) (discussion of different limitations upon homestead used).

36. *See* ALA. CONST. art. X, § 205 ($2,000); ALASKA STAT. § 09.38.015 (1962) ($27,000); ARIZ. REV. STAT. ANN. § 33-1101 (Supp. 1983-1984) ($50,000); COLO. REV. STAT.§ 38-41-201 (1973) ($20,000); GA. CODE ANN. § 51-101 (1979) ($5,000); HAWAII REV. STAT. § 651-92 (Supp. 1982) ($30,000 for head of family or person over 65 years, $20,000 for single adult); IDAHO CODE § 55-1201 (Supp. 1983) ($25,000 for head of family, $12,000 for single adult); ILL. ANN. STAT. ch. 110, § 12-901 (Smith-Hurd 1983) ($7,500); IND. CODE ANN. § 34-2-28-1 (Burns Supp. 1983) ($7,500); KY. REV. STAT. ANN. § 427.080 (Bobbs-Merrill Supp. 1982) ($5,000); LA. CONST. art. XII, § 9 ($15,000) ME. REV. STAT. ANN. tit. 14, § 4422 (Supp. 1983-1984) ($7,500); MASS. ANN. LAWS ch. 188, § 1 (Michie/Law. Co-Op. 1981) ($50,000); MICH. STAT. ANN. § 27A.6023 (Callaghan 1977) ($3,500); MO. ANN. STAT. § 513.475 (Vernon Supp. 1984) ($8,000); NEB. REV. STAT. § 40-101 (Supp. 1982) ($6,500); NEV. REV. STAT. § 115.010 (1981) ($75,000); N.H. REV. STAT. ANN. § 480:1 (Supp. 1981) ($5,000); N.M. STAT. ANN. § 42-10-9 (Supp. 1983) ($20,000): N.Y. CIV. PRAC. LAW § 5206 (McKinney Supp. 1983-84) ($10,000); N.C. CONST. art. X, § 2 ($1,000); N.D. CENT. CODE § 47-18-01 (Supp. 1983) ($80,000); OHIO REV. CODE ANN. § 2329.73 (Baldwin 1983) ($1,000); OR. REV. STAT. § 23.240 (1981) ($15,000 when 2 or more members of household are debtors, otherwise $20,000); S.C. CODE ANN. § 15-41-200 (Law. Co-Op. Supp. 1983) ($10,000); TENN. CODE ANN. § 26-2-301 (1980) ($5,000 for individual, $7,500 aggregate if more than one debtor per household); VT. STAT. ANN. tit. 27, § 101 (Supp. 1973) ($30,000); VA. CODE § 34-4 (Supp. 1983) ($5,000); WASH. REV. CODE ANN. § 6.12.050 (Supp. 1983-84) ($20,000); W. VA. CODE § 38-901 (Supp. 1983) ($5,000); WIS. STAT. ANN. § 815.20 (West 1977) ($25,000); WYO. STAT. § 2-7-508 (1977) ($30,000).

37. *See* FLA. CONST. art. X, § 4 (1/2 acre); IOWA CODE ANN. § 561.2 (West 1946) (1/2 acre); KAN. CIV. PROC. CODE ANN. § 60-2301 (1976) (1 acre); MINN. STAT. ANN. § 510.02 (West Supp. 1984) (1/2 acre); S.D. CODIFIED LAWS ANN. § 43-31-4 (1983) (1 acre); TEX. CONST. art. XVI, § 51 (1 acre).

38. *See* ARK. STAT. ANN. § 30-224 (Supp. 1983) (urban homestead not to exceed one acre and $2500, but not to be reduced to less than one-quarter acre); MISS. CODE ANN. § 85-3-21 (Supp. 1983) (homestead not to exceed one hundred sixty acres nor $30,000 in value); MONT. CODE ANN. § 70-32-104 (1983) (urban homestead of 1/4 acre but not to exceed $40,000); OKLA. CONST. art. XII, § 1 (homestead not to exceed one acre nor $5000 in value, but not to be reduced to less than one-quarter acre).

39. *See* UTAH CODE ANN. § 78-23-3 (Supp. 1983). This section provides: "(1) A homestead consisting of property in this state shall be exempt in an amount not exceeding

2. Value Limitation Exemptions

The arguments for or against a particular type of exemption vary as widely as the exemptions themselves. Most critics of the value limitations agree that the fixed dollar amounts have tended to be unrealistic figures in relation to the current market prices of urban lots.[40] As early as 1857 Chief Justice Hemphill foresaw the flaws in a value limitation which he expressed in the Texas case of *Wood v. Wheeler*[41] when he wrote:

> It is, in my view, to be regretted that any limitation, as to value, was placed on the homestead exemption. Property, in value, is subject to great mutation . . . It is impossible, without great injustice, to fix any arbitrary value on a homestead, even if the price of property was altogether stationary. A house wholly unsuitable for a large family might be comfortable and convenient for man and wife alone.[42]

The states relying upon a value limitation have generally been criticized for being too slow in altering their exemptions to reflect the modern costs of realty,[43] although recently many of the states have responded by increasing their value limitations.[44] On the positive side, value limitations provide the states more flexibility in altering the exemption to fit the needs of the urban community.[45] Use of a dollar value can also balance the rights of creditors by not allowing too many assets to be shielded from

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$8,000 in value for a head of family, $2,000 in value for a spouse, and $500 in value for each other dependent." *Id.*

40. *See* Countryman, *For a New Exemption Policy in Bankruptcy,* 14 RUTGERS L. REV. 678, 683 (1960) (obsolete value limits evident in homestead exemption statutes); Haskins, *Homestead Exemptions,* 63 HARV. L. REV. 1289, 1293 (1950) (value limit should not remain fixed, in light of economic and social changes); Joslin, *Debtors' Exemption Laws: Time for Modernization,* 34 IND. L.J. 355, 356 (1959) (fixed dollar limitation cannot adjust itself to and will be obsolete most of time); Karlen, *Exemptions from Execution,* 22 BUS. LAW. 1167, 1167 (1967) (fixed dollar value amounts likely unrealistic in light of today's costs).

41. 7 Tex. 13 (1851).

42. *Id.* at 22-23.

43. *See* Unif. Exemption Act, 13 U.L.A. 365 (1980) (Prefatory Note) (state exemption laws archaic); Countryman, *For a New Exemption Policy in Bankruptcy,* 14 RUTGERS L. REV. 678, 683 (1960) (homestead exemption values obsolete); Karlen, *Exemptions from Execution,* 22 BUS. LAW. 1167, 1167 (1967) (homestead values unrealistic); *see also* MO. ANN. STAT. § 513.475 (Vernon 1949) ($3,000 limit had not been revised since 1929); N.C. CONST. art. X, § 2 ($1,000 limit has never been changed); TEX. CONST. art. XVI, § 51 (1876, amended 1970) (1876 limit of $5,000 not increased until 1970).

44. *See, e.g.,* KY. REV. STAT. ANN. § 427.080 (Bobbs-Merrill Supp. 1980) (amended from $1,000 to $5,000 in 1980); MISS. CODE ANN. § 85-3-21 (Supp. 1983) (amended from $15,000 to $30,000 in 1979); N.H. REV. STAT. ANN. § 480:1 (Supp. 1981) (amended 1981 from $2,500 to $5,000).

45. *Cf.* UNIF. EXEMPTION ACT, 13 U.L.A. 367 (1980) (Contents of the Act) (variable value limitation). To prevent exemption legislation from becoming archaic due to economic and social changes, the National Conference of Commissioners on Uniform State Laws

claims.[46]

3. Area Limitation Exemptions

An area limitation has been criticized as much as the fixed value limitation. Despite the overwhelmingly pro-debtor stance taken by the majority of the states,[47] the counterbalancing need for fairness to the creditor should still be considered.[48] First, it is argued that the area limitation provides the debtor with unnecessary protection and an easier means with which to defraud his creditors.[49] While policy dictates that the debtor and his family be provided with sufficient assets for subsistence, equity does not require a creditor to subsidize an improvident debtor's lavishing of his homestead property with unlimited improvements.[50] Second, with more money to expend on improvements, the wealthier debtor is favored by the area limitation.[51] The lower income debtor, on the other hand, is

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drafted a homestead exemption limited in value but subject to adjustment using a price index. *See id.* §§ 2, 4.

46. *See* Haskins, *Homestead Exemptions,* 63 HARV. L. REV. 1290, 1293 (1950) (writer advocates a variable value limitation).

47. *See* Garrard v. Henderson, 209 S.W.2d 225, 229 (Tex. Civ. App.—Dallas 1948, no writ) (homestead should be upheld even if dishonesty perpetrated on creditor); *see also* McPherson v. Everett, 172 So. 2d 784, 786 (Ala. 1965) (homestead should be liberally construed); Rowe v. Gose, 401 S.W.2d 745, 746 (Ark. 1966) (homestead exemption should be construed to favor debtor); *In re* Estate of Bowman, 609 P.2d 663, 667 (Idaho 1980) (debtor should be favored by liberally applied exemption statute); Woods v. Alvarado State Bank, 118 Tex. 586, 600, 19 S.W.2d 35, 40 (1929) (homestead exemption should be liberally construed in favor of debtor).

48. *Cf. In re* Reed, 700 F.2d 986, 988 (5th Cir. 1983). The court in this case held that a debtor who, prior to declaring bankruptcy, sold a large amount of non-exempt property to pay off the mortgage on his homestead in an attempt to defraud his creditors, would be denied discharge in bankruptcy and thereby effectively eliminated his exemption. *See id.* at 988.

49. *See* Title Ins. Co. v. Agora Leases, Inc., 320 N.W.2d 884, 885 (Minn. 1982) (court advocates change in limitation); O'Brien v. Johnson, 148 N.W.2d 357, 360 (Minn. 1967) (court urges value limitation); *see also* Haskins, *Homestead Exemptions,* 63 HARV. L. REV. 1289, 1292 (1950) ("where there is no statutory restriction except in terms of area . . . the exemption becomes a tempting vehicle for fraud"); Joslin, *Debtors' Exemption Laws: Time for Modernization,* 34 IND. L.J. 356, 365 (1959) ("some dollar value limitation is necessary"); Vukowich, *Debtors' Exemption Rights,* 62 GEO. L.J. 779, 802 (1974) ("Exemptions of one-half acre and one-quarter acre of urban property, without a value limitation cannot be defended.").

50. *See* Ulrich, *Virginia's Exemption Statutes — The Need for Reform and a Proposed Revision,* 37 WASH. & LEE L. REV. 127, 130-31 (1980) (creditors should not have to subsidize debtor's purchase of home).

51. *See* Cole, *The Homestead Provisions in the Texas Constitution,* 3 TEXAS L. REV. 217, 222 (1925) ("the wealthy family is to have a large allowance and the poor family a small one"); Davis, *Letting Affected Parties Communicate Standards — Exempt Property,* 53 IOWA L. REV. 366, 373 (1967) (homestead exemption is favoritism to upper and middle classes).

financially constrained from transforming nonexempt property into part of the exempt homestead, and he thereby receives a smaller exemption allowance.[52]

The Minnesota Supreme Court has expressed its disapproval of its state's area limitation.[53] In *O'Brien v. Johnson,*[54] the court found the possibilities of fraud too great under Minnesota's law.[55] While an appeal from an unfavorable judgment was pending, the judgment debtors in this case sold their $13,000 homestead and moved into an apartment located on land they owned which was worth over $100,000.[56] According to Minnesota law, the new $100,000 homestead, the $13,000 proceeds from the sale of the former homestead, and the $1,600 a month income from the stores and apartments on the new homestead property were all exempt from the judgment.[57] The court held that the O'Brien's had a legal right to protect their assets in such a way, but it strongly encouraged the legislature to enact a value limitation to prevent such injustices to creditors in the future.[58]

Despite disfavor among some critics, the area limitation can better preserve the homestead which is the fundamental purpose of a homestead exemption.[59] The area limitation also requires little or no attention once it

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52. *Cf.* Davis, *Letting Affected Parties Communicate Standards — Exempt Property,* 53 IOWA L. REV. 366, 373 (1967) (homestead is self-limiting in value due to maintenance costs).

53. *See* Title Ins. Co. v. Agora Leases, Inc., 320 N.W.2d 884, 885 (Minn. 1982) (in suit brought by judgment debtor to remove lien from homestead, court recommended legislature impose ceiling on value of homestead); O'Brien v. Johnson, 148 N.W.2d 357, 358 (Minn. 1967) (suit by tortfeasor against judgment creditor to set aside property as homestead).

54. 148 N.W.2d 357 (Minn. 1967).

55. *See id.* at 361; *see also* MINN. STAT. ANN. § 510.02 (West 1945). The applicable urban homestead provision read as follows: "If it [the homestead] be within the laid out or platted portion of such incorporated place having 5,000 inhabitants, or over, its areas shall not exceed one-third of an acre. . . ." *Id.*

56. *See* O'Brien v. Johnson, 148 N.W.2d 357, 358-60 (Minn. 1967).

57. *See id.* at 360-61.

58. *See id.* at 360-61. Subsequent to the *O'Brien* decision the Minnesota legislature did change the exemption limitation by increasing the acreage limit to one-half acre. *See* MINN. STAT. ANN. § 510.02 (amended 1969) (West Supp. 1984).

59. *See* Frase v. Branch, 362 So. 2d 317, 318 (Fla. Dist. Ct. App. 1978) (purpose of homestead law to protect home), *appeal dismissed,* 368 So. 2d 1362 (Fla. 1979); Magel v. Hunt, 265 N.W. 119, 121 (Iowa 1936) (homestead protection superior to payment of debts); Engstrom's of Alexandria, Inc. v. Vaughn, 138 So. 2d 672, 674 (La. Ct. App. 1962) (policy of homestead law to protect home); First Nat'l Bank v. Tiffany, 242 P.2d 169, 173-74 (Wash. 1952) (homestead laws favored in law). In Texas, the homestead right is of such a superior nature to other rights that it is upheld even when creditors have been defrauded. *See, e.g.,* Crosswhite v. Moore, 248 S.W.2d 520, 524 (Tex. Civ. App.—Austin 1952, writ ref'd) (homestead upheld notwithstanding wrongdoing by debtor); Long Bell Lumber Co. v. Miller, 240 S.W.2d 405, 406, 408 (Tex. Civ. App.— Amarillo 1951, no writ) (business homestead exemption enforced despite fraudulent creation); Garrard v. Henderson, 209 S.W.2d 225, 229 (Tex.

has been enacted, and therefore enables the state legislatures to spend their time on other pending matters.[60]

4. Arguments Against Homestead Exemptions

At least one writer has advocated doing away with homestead exemptions altogether because of the changed social conditions since homestead exemptions were first enacted.[61] Today, there are alternative modes of housing in the form of apartments which, it is argued, eliminate the need for debtors to own a homestead.[62] Other critics of the exemption point to the deleterious effects such a law has on the growth of capital in the community by preventing the use of innovative financing by more prudent homeowners in states where the exemption cannot be voluntarily waived.[63] Although protecting the homesteader from overburdening his land is a reasonable policy consideration, the counter-productive effect of such an approach should be noted. For many people, the homestead is their largest or only asset.[64] If a financial emergency were to arise, the homesteader might be forced, on his own, to sell the homestead to raise the needed capital due to the inability to borrow on the equity established in his home.[65] This possibility is clearly not in accord with the objective of securing the family with a home place. Nevertheless, in spite of the adverse

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Civ. App.—Dallas 1948, no writ) (homestead laws enforced even if they assist dishonest debtor).

60. *See* FLA. CONST. art. X, § 4 (one-half acre urban homestead since 1868); *see also* Maines & Maines, *Our Legal Chameleon Revisted: Florida's Homestead Exemption,* 30 U. FLA. L. REV. 227, 229 (1978) (Florida has had one-half acre urban homestead exemption since 1868).

61. *See* Vukowich, *Debtors' Exemption Rights,* 62 GEO. L.J. 779, 805 (1974) (discussing historical and contemporary policy considerations behind homestead exemptions); *see also* Comment, *Principles for Modernizing the Connecticut Debtors' Exemption,* 6 CONN. L. REV. 142, 157 (1973) (in defense of Connecticut's repeal of homestead statute writer argues original justifications for exemption no longer exist).

62. *See* Vukowich, *Debtors' Exemption Rights,* 62 GEO. L.J. 779, 805 (1974) (families today can conveniently live in central units).

63. *See* Davis, *New Money for Old Homesteads,* 35 TEX. B.J. 39, 39-48 (1972) (discussion of limitations on Texas homesteaders in creating capital from homestead); Ulrich, *Virginia's Exemption Statutes — The Need for Reform and a Proposed Revision,* 37 WASH. & LEE L. REV. 127, 130 (1980) (too many debtor assets free from legal seizure increase risk of lending and retard granting of credit); Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision,* 35 TEXAS L. REV. 1047, 1047 (1957) (homesteads prevent use of innovative financing).

64. *See In re* Bobbitt, 3 Bankr. 372, 373 (Bankr. N.D. Tex. 1976) (principal asset of bankrupt was homestead).

65. *See* Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision,* 35 TEXAS L. REV. 1047, 1047 (1957). The author further notes that, due to the emergency of the conditions, the homesteader would likely have to sell at a less desirable price. *See id.* at 1047.

effects, most critics advocate some form of homestead exemption.[66]

III. Elements of Texas Urban Homestead Exemption

A. *Historical Background*

Provisions for a homestead exemption appear in Texas history as early as 1829.[67] The governing bodies of Coahuila and Texas enacted a decree in that year exempting the land of colonists from foreign creditors.[68] The act was shortly thereafter repealed but then revived in an 1839 statute enacted by the Republic of Texas.[69] The provision of 1839 exempted from all creditors "fifty acres of land or one town lot" but placed a dollar ceiling of $500 on improvements.[70] This law was also repealed,[71] but the Texas constitutional congress, recognizing the significance of such a law, reinstated a homestead exemption and drafted it into the Texas Constitution of 1845.[72] For the first time, this provision made a distinction between a rural and an urban homestead and placed a value limitation upon the latter of $2,000.[73] The language of the provision was unclear, however, as to

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66. *See* S. Enzer, R. Brigard, F. Lazak, Some Considerations Concerning Bankruptcy Reform 272 (1973). In this study, a panel of various creditors, bankruptcy experts, judges, lawyers, and others were polled and the majority advocated the desirability of a homestead. *See id.* at 272.

67. *See* E. Barker, The Life of Stephen F. Austin 221-27 (1925) (discusses important role Austin played in enactment of Texas homestead provision); McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle,* 37 Sw. Hist. Quart. 369, 369-83 (1983). Professor McKnight reveals the history behind Texas' early reputation in the United States as a debtor's haven. *See id.* at 375.

68. *See* Decree No. 70 of Jan. 13, 1929, Laws and Decrees of Coahuila and Texas, 1 H. Gammel, Laws of Texas 220 (1898). This law provided: "Art. 1. The lands acquired by virtue of colonization law . . . shall not be subject to the payment of debts contracted previous to the acquisition of said lands, from whatever source the said debts originate or proceed." *Id.; see also* McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle,* 37 Sw. Hist. Quart. 369, 388 (1983) (act did not refer specifically to foreign creditors but most debts owed by Texas colonists were to foreigners).

69. *See* Act of Jan. 26, 1839, Laws of the Republic of Texas, 2 H. Gammel, Laws of Texas 125-26 (1898).

70. *See id.* The law provided: "[T]here shall be reserved to every citizen or head of a family in this Republic . . . fifty acres of land of one town lot, including his or her homestead, and all improvements not exceeding five hundred dollars in value. . . ." *See id.*

71. *See* Tex. Const. art. XVI, § 50, interp. commentary (Vernon 1955) (fourth Congress of Republic of Texas annulled 1839 law).

72. *See* Woods v. Alvarado State Bank, 118 Tex. 586, 591, 19 S.W.2d 35, 36 (1929) (first constitutional provision in 1845); *see also* Tex. Const. art. XVI, § 50, interp. commentary (Vernon 1955) (law of 1839) (unexplainably repealed but revived in 1845 Constitution).

73. *See* Wilson v. Cochran, 31 Tex. 677, 678 (1869) (Constitutions of 1845 and 1866 established value of $2,000); Tex. Const. art. VII, § 22 (1845). This article provided: "The homestead of a family not to exceed two hundred acres of land, (not included in a town or

what property was to be included in the value limitation of the urban homestead.[74] Chief Justice Hemphill, in *Wood v. Wheeler,*[75] interpreted the ambiguous language of the provision to mean that improvements were to be included in the valuation.[76]

The constitution of 1869 enlarged the homestead exemption to $5,000 and clarified the Legislature's intention that only the value of the land was to come under the exemption limitation; all improvements, regardless of value, fixed upon exempt land would also be exempt.[77] The constitution of 1869 also imposed the still current exceptions to the exemption for debts arising from the advancement of the purchase money for the land and for taxes and improvements thereon.[78]

The homestead provisions in the constitution of 1876 were basically the same as those in the constitution of 1869 except that all mortgages, deeds of trust, and other liens upon the homestead that were not for the purposes of purchase money, improvements, and taxes were made invalid.[79] Under the prior law, liens upon the homestead were valid, although they did not attach until the homestead character subsided,[80] but under the new provision such liens would be totally void.[81] Another unique feature of the 1876 constitution provided for the right to include a place of business as

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city) or any town or city lot or lots, in value not to exceed two thousand dollars, shall not be subject to forced sale . . . ." *Id.*

74. *See* Inge v. Cain, 65 Tex. 75, 78 (1888) (1845 exemption not to exceed $2000 with improvement thereon). *See generally* TEX. CONST. art. XVI, § 51, interp. commentary (Vernon 1955) (explaining that Texas Supreme Court in 1851 construed limitation to include improvements).

75. 7 Tex. 13 (1851).

76. *See id.* at 25 (1851); *see also* Williams v. Jenkins, 25 Tex. 279, 307 (1860) (value of lot refers to improvements thereon).

77. *See* Inge v. Cain, 65 Tex. 75, 78 (1885) (gives early history of changes to exemption provision and notes change in 1869 Constitution to exclude improvements from valuation); *see also* TEX. CONST. art. XII, § 15 (1869) ("homestead . . . not to exceed five thousand dollars in value . . . without reference to the value of any improvements . . . .").

78. *See* TEX. CONST. art. XII, § 15 (1869). This article provided: "[T]he homestead . . . shall not be subject to forced sale for debts, except they be for the purchase thereof, for the taxes assessed thereon, or for labor and materials expended thereon . . . ." *Id.*

79. *See* TEX. CONST. art. XVI, § 50. The provision reads: "No mortgage, trust deed, or other lien on the homestead shall ever be valid . . . ." *Id.*

80. *See* Duke v. Reed, 64 Tex. 705, 715 (1885) (under prior law mortgage could attach to land when homesteader died leaving no family).

81. *See* Inge v. Cain, 65 Tex. 75, 80 (1885) (deed of trust declared void in light of proof of homestead character); *see also* McDonald v. Clark, 19 S.W. 1023, 1025 (Tex. 1892) (trust deed upon homestead void ab initio); Hays v. Hays, 66 Tex. 606, 608, 1 S.W. 895, 897 (1886) (deed in reality mortgage on homestead and therefore void); Woeltz v. Woeltz, 57 S.W. 905, 906 (Tex. Civ. App. 1900) (abandonment of business homestead did not revive void mortgage), *rev'd on other grounds,* 94 Tex. 148, 58 S.W. 943 (1900).

part of the urban homestead.[82] It is likely that the Legislature enacted such a provision to place the urban homesteader on a more equal footing with the rural homesteader who was generally able to protect his principle means of support within his 200 acre rural homestead exemption.[83] The homestead provisions remained unaltered from their 1876 form until the early 1970's when two additional changes were made. In 1970 the value limitation on the urban homestead exemption was once again increased, this time to $10,000.[84] Then, in 1973 article XVI, section 50 was amended to enable single adults to claim homestead rights.[85] Thus, these changes in the Texas homestead exemption evidence a continual move towards increased protection for the debtor-homesteader.[86]

B. *The Texas Urban Exemption*

1. In General

A homestead in Texas is considered an "estate,"[87] meaning that the homestead right must attach to some possessory interest in land.[88] For the

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82. *See, e.g.,* Wright v. Straub, 64 Tex. 64, 65-66 (1885) (place of business became homestead); Shryock v. Latimer, 57 Tex. 674, 677 (1882) (place of business as well as residence can be homestead); Miller v. Menke, 56 Tex. 539, 549 (1882) (urban homestead can be business place); *see also* TEX. CONST. art. XVI, § 51 (homestead to be used as home or place of business).

83. *See* Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption,* 30 U. FLA. L. REV. 227, 259 (1978) (business homestead created more equality between rural and urban homesteaders). This article also notes that Florida abolished its business homestead due to the obsolescence of the idea. *See id.* at 259.

84. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1970).

85. *Compare* TEX. CONST. art. XVI, § 50 (1876) (homestead of a family) *with* TEX. CONST. art. XVI, § 50 (1876, amended 1973) (homestead of a family, or of a single adult person). Before the amendment, the homestead exemption extended to the family, to the single adult who was also the head of a family, or to a single adult continuing a previously established homestead claim of a spouse or parent. *See generally* Note, *Effects of Extending the Homestead Exemption to Single Adults,* 26 BAYLOR L. REV. 658, 658 (1974) (homestead previously limited to family or single adult acting as head of family or survivor).

86. *Cf.* Carson v. McFarland, 206 S.W.2d 130, 132 (Tex. Civ. App.—San Antonio 1947, writ ref'd) (homestead exemption laws should not be restricted so as to minimize their purpose).

87. *See* Cocke v. Conquest, 120 Tex. 43, 52, 35 S.W.2d 673, 678 (1931) (right of homestead is an estate); Woods v. Alvarado State Bank, 118 Tex. 586, 594, 19 S.W.2d 35, 38 (1929) (homestead is an estate); Hargadene v. Whitfield, 71 Tex. 482, 488, 9 S.W. 475, 478 (1888) (homestead right is an estate); Garrard v. Henderson, 209 S.W.2d 225, 229 (Tex. Civ. App.—Dallas 1948, no writ) (homestead is estate); Travelers Ins. Co. v. Nauert, 200 S.W.2d 661, 664 (Tex. Civ. App.—El Paso 1942, no writ) (homestead right is an estate in land); *see also* W. NUNN, A STUDY OF THE TEXAS HOMESTEAD AND OTHER EXEMPTIONS 14 (1931) (homestead right is estate in land).

88. *See, e.g.,* Sayers v. Pyland, 139 Tex. 57, 64, 161 S.W.2d 769, 773 (1942) (co-tenant can assert no greater right in homestead than other co-tenants); Gann v. Montgomery, 210

right to arise, the claimant must manifest an intention to occupy the land as such followed by physical acts of occupancy.[89] By definition, the urban homestead may consist of one or more lots within the prescribed limitation.[90] If there is more than one lot they need not be connected but rather may be detached.[91] An interesting feature of the Texas urban homestead is that it may include a residence and/or a place of business[92] as long as they are in close proximity to one another.[93] If the homestead consists of both, they are still considered as one unit, since the law provides that there can be but one homestead.[94] By statute,[95] the homesteader may sell his

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S.W.2d 255, 258 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.) (absent possessory interest in land, homestead right could not attach to trailer on the land); Kelly v. Nowlin, 227 S.W. 373, 374 (Tex. Civ. App.—Texarkana 1921, no writ) (homestead right attached to apartment building upon land).

89. *See, e.g.,* Cheswick v. Freeman, 155 Tex. 372, 376, 287 S.W.2d 171, 173 (1956) (claim of homestead not supported by evidence of overt acts; intent alone is insufficient); Gilmore v. Dennison, 131 Tex. 398, 400, 115 S.W.2d 902, 902 (1938) (lack of overt act manifesting intention to occupy prevented homestead claim); Clark v. Salinas, 626 S.W.2d 118, 120 (Tex. Civ. App.—Corpus Christi 1981) (preparation to occupy property constituted sufficient overt act), *writ ref'd n.r.e. per curiam,* 628 S.W. 2d 51 (Tex. 1982).

90. *See, e.g.,* Rancho Oil Co. v. Powell, 142 Tex. 63, 68, 175 S.W.2d 960, 963 (1943) (homestead may be more than one parcel); Achilles v. Willis, 81 Tex. 169, 171, 16 S.W. 746, 746 (1891) (claimant entitled to one homestead which may consist of more than one detached lot); Ragland v. Rogers, 34 Tex. 617, 619 (1870) (homestead may consist of several lots).

91. *See, e.g.,* Hayes v. First Trust Joint Stock Land Bank, 111 S.W.2d 1172, 1175 (Tex. Civ. App.—Fort Worth 1937, writ dism'd) (separate tract used for grazing part of homestead); Engbrock v. Haidusek, 95 S.W.2d 520, 521 (Tex. Civ. App.—Austin 1936, writ ref'd) (lot on different block from homestead but used for growing crops part of homestead); Panhandle Constr. Co. v. Flesher, 87 S.W.2d 273, 274 (Tex. Civ. App.—Amarillo 1935, writ dism'd) (lot across alley used as playground part of homestead).

92. *See* Rock Island Plow Co. v. Alten, 102 Tex. 366, 368, 116 S.W. 1144, 1145 (1909) (homestead may consist of residence and business place); City of El Paso v. Long, 209 S.W.2d 950, 954 (Tex. Civ. App.—El Paso 1947, writ ref'd n.r.e.) (residence may exist without business place and business homestead may exist without residence).

93. *See* Rockett v. Williams, 78 S.W.2d 1077, 1078 (Tex. Civ. App.—Dallas 1935, writ dism'd) (place of business in Ferris, Texas could not be part of homestead when residence was Waxahachie, Texas); Purdy v. Grove, 35 S.W.2d 1078, 1082 (Tex. Civ. App.—Eastland 1931, writ ref'd) (family residence in Dallas and business place in Highland Park constituted one homestead).

94. *See* O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112, 114 (Tex. 1976) (business and residence constitute one homestead); Rock Island Plow Co. v. Alten, 102 Tex. 366, 367, 116 S.W. 1144, 1145 (1909) (residence and place of business are one homestead); Scarborough v. Home Owners' Loan Corp., 161 S.W.2d 886, 892 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (business and residence are one unit); Rockett v. Williams, 78 S.W.2d 1077, 1078 (Tex. Civ. App.—Dallas 1935, writ dism'd) (business place is part of urban homestead); Purdy v. Grove, 35 S.W.2d 1078, 1081 (Tex. Civ. App.—Eastland 1931, writ ref'd) (business place is part of urban homestead).

95. *See* Act of May 24, 1983, ch. 576, § 41.002(b) (to be codified as TEX. PROP. CODE

homestead and will have six months to reinvest in a new one without the proceeds being subject to the claims of his creditors.[96] Thus, the homestead right can continue to exist until the homesteader abandons it.[97]

2. Determining the Value Under Prior Law

The limitation on the exemption set out by the Texas Constitution does not enter into the definition of a homestead.[98] The homestead is defined in one section of the constitution[99] and the value limitation is provided for in a subsequent section.[100] Consequently, under the former law, when the homestead exceeded the value limitation, it did not cease to be a homestead, but that portion in excess of the limit was non-exempt property and unprotected from creditors.[101] According to Texas case law, when a creditor recovered a judgment against the debtor, he could levy upon any non-exempt property the debtor had which included any portion of land in excess of the constitutional value limitation.[102] If the homestead could not

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ANN. § 41.002(b) (Vernon Supp. 1984-1985)). The statute provides: "The proceeds of a voluntary sale of a homestead are not subject to garnishment or forced sale before six months after the date of the sale." *Id.*

96. *See, e.g.,* Watkins v. Davis, 61 Tex. 414, 416 (1884) (when old homestead sold with intention of reinvesting in new homestead, proceeds are protected); Jones v. Maroney, 619 S.W.2d 296, 297 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (proceeds from sale of homestead exempt from garnishment for six months); Witt v. Teat, 167 S.W. 302, 303 (Tex. Civ. App.—San Antonio 1914, writ ref'd) (proceeds from voluntary sale of homestead exempt for six months); *cf.* Simmons-Newsome Co. v. Malin, 196 S.W. 281, 282-83 (Tex. Civ. App.—Amarillo 1917, no writ) (proceeds from voluntary sale of homestead transferred to third person without reinvestment in new homestead, may be garnished by creditors after six months).

97. *See* Fiew v. Qualtrough, 624 S.W.2d 335, 337 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (homestead character lost by abandonment); Franklin v. Woods, 598 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1980, no writ) (cessation of use with intent to abandon terminates homestead); Long Bell Lumber Co. v. Miller, 240 S.W.2d 405, 406 (Tex. Civ. App.—Amarillo 1951, no writ) (homestead lost by abandonment); Garrard v. Henderson, 209 S.W.2d 225, 229 (Tex. Civ. App.—Dallas 1948, no writ) (property loses its homestead character when abandoned).

98. *See* O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112, 114 (Tex. 1976) (quantity and value form no part of homestead definition); Hargadene v. Whitfield, 71 Tex. 482, 491, 9 S.W. 475, 479 (1888) (value limitation forms no part of definition).

99. *See* TEX. CONST. art. XVI, § 50.

100. *See* TEX. CONST. art. XVI, § 51.

101. *See* O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112, 114 (Tex. 1976) (creditor may recover from excess homestead if he proves excess); Clement v. First Nat'l Bank, 115 Tex. 342, 350, 282 S.W. 558, 561 (1926) (excess in homestead may be subjected to creditors' claims); Whitemen v. Burkey, 286 S.W. 350, 351 (Tex. Civ. App.—Galveston 1926, no writ) (excess can be subjected to claims of creditors); Panhandle Lumber Co. v. Fairey, 3 S.W.2d 941, 945 (Tex. Civ. App.—Amarillo 1928, no writ) (excess is non-exempt property).

102. *See, e.g., In re* Dawkins, 11 Bankr. 213, 216 (Bankr. N.D. Tex. 1981) (creditor's judgment lien effective against subsequent homestead claim); Hargadene v. Whitfield, 71

be partitioned to separate the exempt from the non-exempt portions, the creditor could force a sale of the homestead.[103] The debtor first received from the proceeds that portion constituting the value of the exempt land plus the value of the improvements thereon.[104] The creditor would then be entitled to the remainder of the proceeds up to the amount of his judgment.[105]

The constitution and statutory law provided that the value of any homestead properties was to be determined "at the time of their designation as the homestead."[106] This languge was interpreted to mean that "the homestead exemption should not be reduced by inflation of land values."[107] Thus, under the former law, if at the time of purchase the homestead did not exceed the dollar value limit, any subsequent appreciation in the value of the property would remain exempt.[108] If the property exceeded the limitation, however, this situation would entail a proration of the increase between the exempt and non-exempt property upon a forced sale of the

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Tex. 482, 491, 9 S.W. 475, 479 (1888) (sale of homestead is means of appropriating excess); Harrison v. First Nat'l Bank, 238 S.W. 209, 212 (Tex. Comm'n App. 1922, judgmt. adopted) (judgment lien attached to excess homestead).

103. *See, e.g.,* Valley Bank v. Skeen, 401 F. Supp. 139, 140 (N.D. Tex. 1975) (court can order sale of entire homestead), *aff'd,* 532 F.2d 185 (5th Cir.), *cert. denied,* 429 U.S. 834 (1976); Clement v. First Nat'l Bank, 115 Tex. 342, 350, 282 S.W. 558, 561 (1926) (sale of homestead proper means of reaching excess); Hoffman v. Love, 494 S.W.2d 591, 596 (Tex. Civ. App.—Dallas) (exempt property may be sold to reach excess), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

104. *See, e.g.,* Clement v. First Nat'l Bank, 115 Tex. 342, 351, 282 S.W. 558, 561 (1926) (homestead claimant receives value of improvements and homestead exemption from proceeds first); Paschal v. Cushman, 26 Tex. 74, 75 (1861) (payment of judgment from proceeds subject to allowance for exempt portion); Wood v. Wheeler, 7 Tex. 13, 26 (1851) (homesteader receives from proceeds value of lot first).

105. *See* Paschal v. Cushman, 26 Tex. 74, 75 (1861) (property should be sold for payment of judgment subject to exemption allowance). *But see* Whiteman v. Burkey, 115 Tex. 400, 404, 282 S.W. 788, 789 (1926) (if property does not bring more than homestead claimant's exempt share at judicial sale, no sale of that homestead can take place then or in future).

106. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1970) (homestead not to exceed value at time of designation); *see also* Act of May 24, 1983, ch. 576 § 41.001(a)(2) (to be codified as TEX. PROP. CODE ANN. § 41.001(a)(2) (Vernon Supp. 1984-1985)) (homestead not to exceed value at time of designation as homestead).

107. *See* Hoffman v. Love, 494 S.W.2d 591, 595 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

108. *See, e.g.,* O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832, 838 (Tex. Civ. App.—El Paso 1975) (lot purchased at or below limitation remains exempt despite appreciation over limitation), *rev'd on other grounds,* 542 S.W.2d 112 (Tex. 1976); Hoffman v. Love, 494 S.W.2d 591, 596 (Tex. Civ. App.—Dallas) (totally exempt homestead remains exempt no matter how much value increases), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973); Lake v. Boulware, 35 S.W. 24, 25 (Tex. Civ. App. 1896, writ ref'd) (exempt property that increases in value remains exempt).

homestead.[109] The 1973 case of *Hoffman v. Love*[110] has served as the guide for the technique used. In *Hoffman,* at a time when the exemption limit was $5,000, a lot was purchased for $12,250, and subsequently sold for $36,750.[111] In determining the amount of exemption to which the debtor was entitled, the court found that the lot would be exempt according to the proportion $5,000 bore to $12,250.[112] Therefore, 20/49 of the lot was exempt and 29/49 was non-exempt so that, upon the sale of the homestead, the debtor was entitled to exempt 20/49 of the $36,750, or $15,000 of the proceeds.[113] The *Hoffman* formula, however, is now meaningless and inapplicable to the urban homestead since value no longer forms a part of the current one acre exemption.[114]

3. Implementation of the New Exemption

Since the legislature has not yet enacted any provisions outlining the implementation of the new urban exemption,[115] one can only assume that a combination of the principles of both the urban and the rural homestead will apply. The rural homestead may consist of 200 acres for a family or 100 acres for a single adult and may entail one or more parcels of land.[116]

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109. *See* Valley Bank v. Skeen, 401 F. Supp. 139, 139 (N.D. Tex. 1975) (excess amount "divided by value at time property was designated" multiplied by property's present value), *aff'd,* 532 F.2d 185 (5th Cir.), *cert. denied,* 429 U.S. 834 (1976); Steenland v. Texas Commerce Bank Nat'l Assoc., 648 S.W.2d 387, 390 n.4 (Tex. App.—Tyler 1983, no writ) (exemption determined by ratio between exemption limit when property was designated and value of lot at acquisition); Hoffman v. Love, 494 S.W.2d 591, 595 (Tex. Civ. App.—Dallas) (lot exempt in proportion that original limitation bore to purchase price of lot), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

110. 494 S.W.2d 591 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

111. *See id.* at 595.

112. *See id.* at 595.

113. *See id.* at 595. *See generally* Bush & Proctor, *Piercing the Homestead: The Trial of an Excess Value Case,* 34 BAYLOR L. REV. 387, 390-91 (1982) (use of *Hoffman* method for determining excess value).

114. *See* TEX. CONST. art. XVI, § 51.

115. *See* HOUSE COMM. ON JUDICIARY, Tex. H.R.J. Res. 105, 68th Leg. (March 30, 1983) (tape available at St. Mary's Law Journal Office, San Antonio, Texas). In discussing the amendment, Representative Evans mentioned that he was working on implementation legislation, but as of the date of this comment no legislation has been published. *See id.*

116. *See, e.g.,* Houston & Great N.R.R. Co. v. Winter, 44 Tex. 597, 610 (1876) (rural homestead may be 200 acres); Johnson v. Conger, 166 S.W. 405, 407 (Tex. Civ. App.—Fort Worth 1914, no writ) (owner can exempt 200 of his 320 acres); Carroll v. Jeffries, 87 S.W. 1050, 1050 (Tex. Civ. App. 1905, writ ref'd) (owner could exempt 200 acres out of 400 acre tract); *see also* TEX. CONST. art. XVI, § 51 (homestead not in city consists of not more than 200 acres of land); Act of May 24, 1983, ch. 576, § 41.001(a)(1) (to be codified as TEX. PROP. CODE ANN. § 41.001(a)(1) (Vernon Supp. 1984-1985)) (homestead consists of not more than 200 acres for family and 100 acres for single adults).

The homestead claimant may voluntarily designate the tracts of land that will compose the acreage limitation,[117] but within those designated tracts the residence must be included.[118] The purpose of designating the homestead out of land in excess of the area limitation is to enable the homesteader to choose which tracts he wishes to exempt from creditors and separate that land from the non-exempt portions.[119] To designate a homestead, the claimant must execute and have recorded a written instrument containing "(1) a description sufficient to identify the property designated; (2) a statement by the person who executed the instrument that the property is designated as a homestead of the person's family; (3) the name of the original grantee of the property; and (4) the number of acres designated. . . ."[120] If the claimant does not voluntarily designate his homestead area, any judgment creditor of the homesteader may request that the homesteader designate such within eleven days or the property may be designated as a matter of law.[121] The property not included in the

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117. *See* Radford v. Lyon, 65 Tex. 471, 476 (1886) (exempt portion may be designated); Ratcliff v. Smith, 178 S.W.2d 138, 140 (Tex. Civ. App.—El Paso 1943, writ ref'd) (homestead right initiated by designation); *see also* Act of May 24, 1983, ch. 576, § 41.022(a) (to be codified as TEX. PROP. CODE ANN. § 41.022(a) (Vernon Supp. 1984-1985)) This section provides: "If a family homestead that is not in a town or city is part of one or more tracts containing a total of more than 200 acres, the head of the family may voluntarily designate not more than 200 acres of the property as the homestead." *Id. Contra* Coates v. Caldwell, 71 Tex. 19, 21, 8 S.W. 922, 923 (1888) (where homestead consists of less than 200 acres no designation needed).

118. *See* Hughes v. Hughes, 170 S.W. 847, 848 (Tex. Civ. App.—Amarillo 1914, no writ) (residence must be included in designated tracts); Morris v. Pratt, 116 S.W. 646, 647 (Tex. Civ. App. 1909, no writ) (only limitation on designation is that residence must not be excluded); McGaughey v. American Nat'l Bank, 92 S.W. 1003, 1007 (Tex. Civ. App. 1905, writ ref'd) (homesteader cannot exclude mansion house from exemption); Cervenka v. Dyches, 32 S.W. 316, 321 (Tex. Civ. App. 1895, writ ref'd) (homesteaders cannot disclaim residence and farm as homestead).

119. *See, e.g.,* Affleck v. Wangermann, 93 Tex. 351, 354, 55 S.W. 312, 313 (1900) (purpose is to rid excess property of constitutional inhibition of encumbering); Blake v. Fuller, 184 S.W.2d 148, 151 (Tex. Civ. App.—Dallas 1944, no writ) (purpose of designation is to exclude excess from operation of homestead law); Smith v. Van Slyke, 139 S.W. 619, 621 (Tex. Civ. App.—Texarkana 1911, writ dism'd judgmt. cor.) (purpose of designation is to fix homestead).

120. Act of May 24, 1983, ch. 576, § 41.022(a) (to be codified as TEX. PROP. CODE ANN. § 41.022 (a) (Vernon Supp. 1984-1985).

121. *See* White v. Glenn, 138 S.W.2d 914, 919 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgmt cor.) (if owner does not designate, creditor may do so); Smith v. Van Slyke, 139 S.W. 619, 621 (Tex. Civ. App.—Texarkana 1911, no writ) (if claimant does not set aside excess, it could be set aside by operation of law); Act of May 24, 1983, ch. 576, § 41.023(a) (to be codified as TEX. PROP. CODE ANN. § 41.023(a) (Vernon Supp. 1984-1985)). This section provides:

> If an execution is issued against an owner of a homestead that is eligible for voluntary designation but that has not been designated, the officer holding the execution may, and

designation may thereafter be sold to satisfy the creditor's claim.[122]

Ultimately, the ability to designate the homestead property under the new urban acreage limitation should provide the homesteader with more protection due to the increased exemption and also due to the ability to partition the excess land from the exempt portions so that the entire homestead need not be sold for creditors to reach the excess.[123] There is, however, still the possibility that the homestead can be sold. If the excess cannot be separated from the exempt portions, such as when the improvements encompass the entire tract of land owned by the homesteader, the creditor is entitled to have the homestead sold.[124] The court usually grants the creditor an undivided interest to the extent of the excess, whereupon he becomes a co-tenant with the homesteader and may then choose whether to execute his judgment and foreclose upon the property to recover the non-exempt proceeds.[125]

4. Analysis of New Exemption

The decision to change the urban homestead exemption in Texas to an acreage limitation ultimately encompasses positive as well as negative aspects. The inherent flaws of a value limitation as expressed by Chief Justice Hemphill over a century ago in *Wood v. Wheeler*[126] were major factors in motivating the Texas Legislature to change the state's exemption to an

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shall at the request of the plaintiff in execution . . . notify the defendant that if the defendant fails to designate a homestead before the 11th day after the date the notice is delivered, the officer will have the designation made as provided by law.

Id.

122. *See* Whiteman v. Burkey, 115 Tex. 400, 403, 282 S.W. 788, 789 (1926) (court cannot protect excess above 200 acres); Clement v. First Nat'l Bank, 115 Tex. 342, 350, 282 S.W. 558, 561 (1926) (excess over 200 acres not protected); Blake v. Fuller, 184 S.W.2d 148, 152 (Tex. Civ. App.—Dallas 1944, no writ) (91 acre excess sold to satisfy creditor's claim); Henkel v. Bohenke, 26 S.W. 645, 646 (Tex. Civ. App. 1894, no writ) (excess sold first to satisfy creditor); *cf.* Booth v. H.P. Drought & Co., 89 S.W.2d 432, 433, 435 (Tex. Civ. App.—Waco 1935, writ dism'd) (owner could mortgage land in excess of 200 acres).

123. *See* Blake v. Fuller, 184 S.W.2d 148, 151 (Tex. Civ. App.—Dallas 1944, no writ) (homestead rights not affected by sale of excess); Ratliff v. Smith, 178 S.W.2d 138, 141 (Tex. Civ. App.—El Paso 1943, writ ref'd) (sale of excess does not affect right in homestead).

124. *See* Clement v. First Nat'l Bank, 115 Tex. 342, 350, 282 S.W. 558, 561 (1926) (creditor could have property sold to reach excess); General Bonding & Casualty Ins. Co. v. Trabue, 174 S.W. 689, 691-92 (Tex. Civ. App.—Texarkana 1915, no writ) (creditor may foreclose on property and receive undivided interest therein to extent of excess).

125. *See* General Bonding & Casualty Ins. Co. v. Trabue, 174 S.W. 689, 691-92 (Tex. Civ. App.—Texarkana 1915, no writ). In *Trabue,* the court held that a creditor having an undivided interest to the extent of the excess, became a co-tenant to the extent of his interest in the property. *See id.* at 692.

126. 7 Tex. 13 (1851).

area limitation.[127] The former value limitation exemption was arguably too low for many homeowners in light of current land prices.[128] As a consequence, the debtor's homestead was more susceptible to forced sale by creditors.[129] Furthermore, while a debtor would be entitled to receive an exempted portion of the proceeds from a forced sale with which to invest in a new homestead, the proceeds might be insufficient to purchase a new home due to inflated realty prices.[130] Consequently, the debtor could lose his excess proceeds to creditors as well, due to an inability to reinvest.[131] In order to stay abreast of inflation under the former scheme, the exemption provision would have required constant amendment.[132] The acreage limitation, therefore, will likely eliminate the need to increase the urban homestead exemption again in the future and will provide more protection to the homestead.

The arguments against such a large exemption however, are persuasive when the possibilities for fraud upon creditors are considered.[133] With the ability to claim both a residence and a business place as a homestead within the one acre limitation, the capacity for placing improvements

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127. *See* Debate on Tex. H.R.J. Res. 105 on the Floor of the House (second reading and adoption), 68th Leg. (April 14, 1983) (tape available in office of St. Mary's Law Journal, San Antonio, Texas). Representative Evans in presenting the resolution to the house, explained that its purpose was to prevent forced sale of the homestead in Texas. *See id.*

128. *See* HOUSE COMM. ON JUDICIARY, Tex. H.R.J. Res. 105, 68th Leg. (March 30, 1983) (discussion by Professor J. McKnight on ineffectiveness of value limitation).

129. *See, e.g.,* Valley Bank v. Skeen, 401 F. Supp. 139, 140 (N.D. Tex. 1975) (homestead purchased under $5,000 limitation subject to sale), *aff'd,* 532 F.2d 185 (5th Cir.), *cert. denied,* 429 U.S. 834 (1976); Clement v. First Nat'l Bank, 115 Tex. 342, 351, 282 S.W. 558, 561 (1926) (homestead subject to sale); Hoffman v. Love, 494 S.W.2d 591, 596 (Tex. Civ. App.—Dallas) (homestead could be sold to reach excess), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).

130. *Cf.* Simmons-Newsome Co. v. Malin, 196 S.W. 281, 282 (Tex. Civ. App.—Amarillo 1917, no writ) (proceeds from voluntary sale may be garnished after six months).

131. *See* Vukowich, *Debtors' Exemption Rights,* 62 GEO. L.J. 779, 793-94 (1974) (law should enable debtor to sell homestead and reinvest in new one by providing sufficient exemption limitation).

132. *Cf.* Cole, *The Homestead Provisions in the Texas Constitution,* 3 TEXAS L. REV. 217, 217 (1925). In this article, the writer criticizes the incorporation of the homestead exemption in the Texas Constitution, arguing that a Constitution is not the appropriate instrument of law to be used in setting forth a provision which requires constant change to keep up with social developments. *See id.* at 217.

133. *See* O'Brien v. Johnson, 148 N.W.2d 357, 358 (Minn. 1967) (owners sold homestead to reinvest in new home worth ten times as much to avoid creditor's claim); Bush v. Gaffney, 84 S.W.2d 759, 761 (Tex. Civ. App.—San Antonio 1935, no writ) (owner swindled creditor out of money which he used on improvements to homestead); *see also* Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Non-Exempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy,* 31 RUTGERS L. REV. 615, 628 (1978) (open-ended exemptions unjustifiably keep assets from creditors).

thereon is enormous.[134] The potential for such a result clearly makes the state's exemption overbroad in light of the previously mentioned policy objectives of maintaining a homestead exemption. Furthermore, it is questionable whether urban homeowners in Texas had actually expressed a great demand or need for an increased exemption, despite the amendment's enactment by popular vote.[135] The one acre limitation may increase protection for imprudent debtors, but it also increases the restrictions on raising capital for the more prudent homesteader.[136] Perhaps justice would have been better served for both the debtor and the creditor by increasing the value once again and providing a means of automatically increasing the limit over time to keep up with inflation.[137] The value exemption could have also included improvements in its limitation, thereby reducing the potential for fraud upon creditors.[138] Alternatively, a limitation scheme employing a more rational relation to the debtors financial circumstances, such as the method used in Utah, could have been adopted.[139]

Irrespective of all of the features that were not incorporated into the Texas urban homestead exemption, there is one unique provision in the new amendment that has yet to be considered. The retroactivity of the

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134. *See* Steenland v. Texas Commerce Bank Nat'l Assoc., 648 S.W.2d 387, 390 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) ($25,000 homestead improved to $800,000); *cf.* Comment, *Bankruptcy Exemptions: A Full Circle Back to the Act of 1800?* 53 CORNELL L. REV. 663, 664-65 (1968). In this article, the author tells of a story from the New York Times about a Texas couple who induced creditors to loan them over two million dollars. Upon bankruptcy, the Medders were able to exempt their homestead with a house worth $250,000 and a barn worth $175,000 thereon. *See id.* at 665 (*citing* N.Y. Times, May 25, 1967 at 41, col. 3; N.Y. Times, May 26, 1967, at 25, col. 1; N.Y. Times, May 27, 1967, at 28, col. 2.).

135. *See* HOUSE COMM. ON JUDICIARY, Tex. H.R.J. Res. 105, 68th Leg. (March 30, 1983) (tape available in Law Journal Office of St. Mary's University Law School, San Antonio, Texas). When asked whether there had been a "ground swell" of activity in forcibly selling homesteads, Professor McKnight answered that there was not a great deal of effort to do so, but that there was some. *See id.*

136. *See* Davis, *New Money for Old Homesteads,* 35 TEX. B.J. 39, 40 (1972) (difficulty of refinancing the homestead); Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision,* 35 TEXAS L. REV. 1047, 1047 (1957) (homestead provision prevents use of innovative financing).

137. *See* UNIF. EXEMPTION ACT §§ 2, 4, 13 U.L.A. 365-379 (1980). Section 2 of the Act provides for dollar increases according to the Consumer Price Index for urban wage earners and clerical workers. Section 4 provides for a value limitation on the homestead exemption. *See id.* at 374, 377.

138. *See, e.g.,* MASS. ANN. LAWS ch. 188, § 1 (Michie/Law Co-op. 1981) (homestead of $50,000 in land and buildings); NEB. REV. STAT. § 40-101 (Supp. 1982) (homestead consisting of house, appurtenances, and land, not exceeding $6,500); N.D. CENT. CODE § 47-18-01 (Supp. 1983) (homestead, consisting of land, house, all improvements not to exceed $80,000).

139. *See* UTAH CODE ANN. § 78-23-3 (Supp. 1983) ($8,000 for head of family, $2,000 for spouse, $500 each for other dependents).

new exemption also requires analysis as to its fairness to both debtors and creditors in Texas.

IV. RETROACTIVITY OF THE NEW AMENDMENT

A. *Retroactivity in General*

Historically, retroactive legislation has been looked upon with suspicion.[140] The common view has been that people form expectations about the law's application and pattern their behavior accordingly, so that when the legislature enacts retroactive changes these expectations are disturbed.[141] The legislative act "violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance."[142] Why, then, would the Texas Legislature propose an amendment to the constitution which will have retroactive effect? Two considerations will perhaps shed light on this question. First, the common view has recently been criticized for its generalization that all retroactive laws are unjust.[143] Second, even within the context of the common view there have been noted exceptions to the rule.[144] For example, when a law is enacted "to bring legal rights and relationships into conformity with what people thought they were and intended them to be," retroactive application is justified.[145] Another often cited exception is that retroactive laws are valid as long as the vested rights of individuals are not impaired.[146] These considerations, therefore, will be

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140. *See, e.g.,* Combs v. United States, 98 F. Supp. 749, 754 (D. Vt. 1951) (retroactive laws not favored); State v. Martin, 130 P.2d 48, 51 (Ariz. 1942) (retrospective laws not favored); Goldston v. Karukas, 23 A.2d 691, 694 (Md. 1942) (law does not favor retroactivity); *see also* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.02 (4th ed. 1973) (retroactive application of laws potentially unfair); Smith, *Retroactive Laws and Vested Rights,* 5 TEXAS L. REV. 231, 234 (1927) (retrospective laws are under suspicion).

141. *See* Munzer, *A Theory of Retroactive Legislation,* 61 TEXAS L. REV. 425, 426 (1982).

142. *Id.* at 427.

143. *See id.* at 427, n.6. Munzer's article proposes a different approach to analyzing retroactive legislation, by considering whether the expectations disrupted were "rational and legitimate." *See id.* at 432.

144. *See, e.g.,* Cochran v. City of Thomasville, 146 S.E. 462, 466 (Ga. 1928) (retroactive act authorizing bonds for street improvement not unconstitutional); Van Derzee v. City of Long Beach, 39 N.Y.S.2d 401, 402 (App. Div. 1943) (retroactive law affecting a remedy not unconstitutional); Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S.W.2d 372, 375 (1936) (retroactive law requiring commissioners to fix title insurance rates held not unconstitutional).

145. *See* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.05 (4th ed. 1973) (analysis of criteria for determining valid retroactive legislation).

146. *See, e.g.,* Vail v. Denver Bldg. & Constr. Trades Council, 115 P.2d 389, 393 (Col. 1941) (prohibition of retroactive law applies only to impairment of vested right); McCord v. Smith, 43 So. 2d 704, 708-09 (Fla. 1949) (retrospective law only invalid if disturbs vested

explored in determining whether application of Texas' new urban homestead exemption will have unfair effects upon creditors and debtors.

B. *Early Texas View of Retroactivity*

The retroactivity of the 1983 amendment to article XVI, section 51 of the Texas Constitution[147] raises several questions regarding its effect on the rights of creditors and pre-established homesteaders. Early Texas cases indicated that the previous value limitation amendments were not applied retroactively.[148] The general consensus of opinion at that time was that to apply the law in such a way would result in an unconstitutional impairment of contractual obligations.[149] This view originated in the United States Supreme Court[150] which had held that state homestead exemption amendments applied retrospectively were in derogation of article 1, section 10 of the United States Constitution.[151] In the 1872 case of *Gunn v. Barry,*[152] the Court addressed Georgia's redraft of its constitution en-

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right); Haas v. Haas, 162 So. 5, 6 (La. 1935) (retrospective laws do not violate constitution unless vested right is divested); *see also* Grigsby v. Peak, 57 Tex. 142, 146 (1882) (laws may be applied retrospectively when vested right not disturbed).

147. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1983). The retroactive provision of the bill proposing a change to the urban homestead exemption was sponsored by Representative Terral Smith. The provision was introduced as an amendment to H.R.J. Res. 105 just before the House of Representatives voted to adopt the joint resolution and the retroactive application amendment. *See* Debate on Tex. H.R.J. Res. 105 on the Floor of the House, 68th Leg. (April 14, 1983) (second reading and adoption) (tape available from House Committee Representative, P.O. Box 2910, Austin, Texas, 78769 and St. Mary's University Law School, Law Journal Office, San Antonio, Texas).

148. *See* Linch v. Broad, 70 Tex. 92, 96, 6 S.W. 751, 755 (1888) (disallowing retroactivity of 1876 exemption); Wright v. Straub, 64 Tex. 64, 66 (1885) (disallowing retroactivity of 1876 provision making place of business an urban homestead); McLane v. Paschal, 62 Tex. 102, 106-07 (1884) (provision in 1866 exemption making value exclusive of improvements not retroactive); Paschal v. Cushman, 26 Tex. 74, 75 (1861) (new exemption of $2,000 not applied retroactively).

149. *See* Wright v. Straub, 64 Tex. 64, 66 (1885) (constitutional convention did not intend to interfere with previously existing rights in enacting exemption); McLane v. Paschal, 62 Tex. 102, 106 (1884) (retroactive application would impair contractual obligations).

150. *See* Edwards v. Kearzey, 96 U.S. 595, 598, 601 (1877) (holding unconstitutional the retroactive application of North Carolina constitutional provision increasing homestead exemption); Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623-24 (1872) (holding invalid Georgia constitutional provision increasing homestead exemption retroactivity); *see also* S. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS § 12 at 16-19 (1878) (declaring exemption laws unconstitutional).

151. *See* U.S. CONST. art. I, § 10. This article provides: "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ." *Id.*

152. 82 U.S. (15 Wall.) 610 (1872).

larging the homestead exemption.[153] The Georgia courts had allowed the new law to apply retroactively, effectively exempting land that would have been subjected to pre-existing money judgments.[154] The United States Supreme Court found the Georgia provision, inasmuch as the law was to apply retroactively, an unconstitutional impairment of contractual obligations.[155] The Court declared:

> The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy . . . It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation.[156]

Reliance of the Texas courts on *Gunn* was reinforced by the provision in the Texas Constitution that prohibits retroactive application of any laws.[157] Despite its stringent wording, however, the Texas courts have interpreted the prohibition as only encompassing retroactive laws that disturb an individual's vested rights.[158] The most difficult task, therefore, in analyzing the effects of a retroactive law is determining whether a vested

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153. *See id.* at 621. The previous Georgia law exempted from execution 50 acres of land and improvements thereon not to exceed $200. The new constitutional provision exempted the homestead realty up to $2,000. *See id.* at 622.

154. *See id.* at 621-22. The homesteader's land was worth $1,300 but far exceeded the 50 acre exemption limitation under the earlier law. The effect of the new constitution, applied retroactively, exempted the entire 272 acre homestead from the creditor's judgment. *See id.* at 621-22.

155. *See id.* at 622-24.

156. *Id.* at 622-23. The Court, in stating that the constitutional provision impaired the obligation of a contract found that "[t]he legal remedies for the enforcement of a contract . . . are a part of its obligation." *Id.* at 623; *see also* Edwards v. Kearzey, 96 U.S. 595, 607 (1877) ("The remedy . . . is part of its obligation."). *But see* Smith, *Retroactive Laws and Vested Rights,* 5 TEXAS L. REV. 231, 241 n.70 (1927) (citing cases supporting proposition that no one has vested right to remedy).

157. *See* TEX. CONST. art. I, § 16. The article provides that: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." *Id.*

158. *See, e.g.,* McGinley v. McGinley, 295 S.W.2d 913, 914, 916 (Tex. Civ. App.—Galveston 1956, no writ) (no vested rights involved in retroactive application of statute reducing required number of years of separation before divorce); Purser v. Pool, 145 S.W.2d 942, 943 (Tex. Civ. App.—Eastland 1940, no writ) (statute barring recovery of real estate sales commission if dealer not licensed cannot be applied retroactively since vested contract right involved); City of Fort Worth v. Morrow, 284 S.W. 275, 276 (Tex. Civ. App.—Fort Worth 1926, writ ref'd) (retroactivity of statutory right to appeal from order granting new trial disallowed); *see also* TEX. CONST. art. I, § 16, interp. commentary (Vernon 1955) (explaining court interpretation of retroactive prohibition).

right is affected.[159]

C. *Retroactivity and Its Effects on Creditors*

1. Texas Law

In Texas, when a creditor is awarded a judgment by the court he must comply with the statutory requirements of recording and indexing the judgment before a lien will attach to the debtor's non-exempt property.[160] Case law has held that the effect of abstracting the judgment is to bestow upon the creditor a vested right to a lien upon the debtor's non-exempt realty[161] which cannot be divested by a change in the exemption laws[162] or a subsequent homestead designation by the debtor.[163] Consequently, a creditor who has already recovered a lien upon what was excess value in

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159. *See, e.g.,* Bender v. Crawford, 33 Tex. 745, 760 (1871) (no vested right in limitation laws of state); DuPre v. DuPre, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ) (father did not have vested right in continuing child support payments under previous law after retroactive statute increased minority age to eighteen); McCutcheon v. Smith, 194 S.W. 831, 833 (Tex. Civ. App.—Dallas) (purchasers of realty did not have vested right in previous statute of limitation), *aff'd,* 242 S.W. 454 (Tex. 1922); *see also* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 438 (6th ed. 1890) (explains vested right). Cooley wrote:

> [A] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general law: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Id. at 438. *But see* Smith, *Retroactive Laws and Vested Rights,* 5 TEXAS L. REV. 231, 231 (1927) (defining a "vested right" is impossible).

160. *See, e.g.,* Askey v. Power, 36 S.W.2d 446, 447 (Tex. Comm'n App. 1931, holding approved) (no judgment lien attaches until abstract recorded and indexed); TPEA No. 5 Credit Union v. Solis, 605 S.W.2d 381, 383 (Tex. Civ. App.—Waco 1980, no writ) (recording and indexing judgment creates lien on non-exempt property); R.B. Spencer & Co. v. Green, 203 S.W.2d 957, 960 (Tex. Civ. App.—El Paso 1947, no writ) (in order for abstract of judgment to create lien, statutory requirements must be followed); *see also* Act of May 24, 1983, ch. 576, § 52.001 (to be codified as TEX. PROP. CODE ANN. § 52.001 (Vernon Supp. 1984-1985)) (when judgment is recorded and indexed it operates as lien upon all real property of defendant). *See generally* Hudspeth, *Judgment Liens and Abstracts of Judgment in Texas,* 32 TEX. B.J. 520, 520 (1969) (creation of judgment lien depends on compliance with statutes).

161. *See* Gage v. Neblett, 57 Tex. 374, 374 (1882). This case concluded: "[A] judgment lien creates such vested right as will be protected by section 10, article 1 . . . ." *Id.*

162. *See, e.g.,* Wright v. Straub, 64 Tex. 64, 66-67 (1885) (judgment lien could not be divested by change in exemption provision to include place of business); Paschal v. Cushman, 26 Tex. 74, 75-76 (1861) (judgment lien could not be divested by increase of exemption to $2000); First Realty Bank & Trust v. Youngkin, 568 S.W.2d 428, 429-30 (Tex. Civ. App.—Eastland 1978, no writ) (new law giving homestead to single adult could not defeat creditor's judgment lien).

163. *See In re* Dawkins, 11 Bankr. 213, 216 (Bankr. N.D. Tex. 1981) (abstracted judgment enforceable against subsequently claimed homestead); Minnehoma Fin. Co. v. Ditto,

the homestead prior to the 1983 amendment could argue under *Gunn v. Barry* and Texas case law that the judgment debtor should not be entitled to the larger exemption so as to divest the creditor of his lien.[164] On the other hand, a judgment claimant who had not abstracted his judgment prior to the implementation of the current amendment would have difficulty arguing under Texas law that he has a vested right in what was the debtor's non-exempt property under the previous constitutional provision.[165] The Texas statute clearly states that a lien does not attach to the debtor's realty until a judgment is recorded.[166] While a creditor may have a vested right to a pre-established lien, he does not have a vested right in a prior exemption law and may not rely on its continuation.[167]

2. Alternative Approach

Since the Texas Legislature has never before indicated an intention to apply exemption amendments retroactively, there are no Texas cases directly on point as to whether a creditor may have an inviolable right to what was previously excess homestead property for satisfaction of his claim. There are two applicable Louisiana cases, however, that have dealt with this issue.[168] In both of these cases,[169] the courts based their opinions

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566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (failure of both spouses to sign readjustment contract did not defeat puchase money lien).

164. *See, e.g.,* Gunn v. Barry, 82 U.S. (15 Wall.) 610, 622-24 (1872) (exemption law could not be increased to defeat contract rights of creditors); Valley Bank v. Skeen, 401 F. Supp. 139, 140 (N.D. Tex. 1975) (court disallowed homesteader to claim higher exemption), *aff'd,* 532 F.2d 185 (5th Cir.), *cert. denied,* 429 U.S. 834 (1976); *In re* Bobbit, 3 Bankr. 372, 373 (Bankr. N.D. Tex. 1976) (court applied lower exemption value to debtor's homestead).

165. *See, e.g.,* Day v. Day, 610 S.W.2d 195, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (had judgment lien been at issue, homestead designation by ex-husband before wife had abstracted her judgment would have defeated her lien); Wisdom v. Wisdom, 575 S.W.2d 124, 126 (Tex. Civ. App.—Fort Worth 1978, writ dism'd) (judgment in personam rendered in divorce proceeding must be abstracted before lien may attach); Burton Lingo Co. v. Warren, 45 S.W.2d 750, 752 (Tex. Civ. App.—Eastland 1931, writ ref'd) (judgment does not create lien until abstracted).

166. *See* Act of May 24, 1983, ch. 576, § 52.001 (to be codified as TEX. PROP. CODE ANN. § 52.001 (Vernon Supp. 1984-1985)).

167. *See* Lyon & Matthews Co. v. Modern Order of Praetorians, 142 S.W. 29, 30 (Tex. Civ. App.—Fort Worth 1911, no writ) (exemptions do not create vested rights).

168. *See* United States v. Smith, 486 F. Supp. 76, 77 (E.D. La. 1980) (suit brought on behalf of Small Business Administration to foreclose on collateral mortgage executed by Smith); Ouachita Nat'l Bank v. Rowan, 345 So. 2d 1014, 1015 (La. Ct. App. 1977) (bank sought to enforce prior homestead limitation in collateral mortgage agreement executed under prior law), *cert. denied,* 434 U.S. 1065 (1978).

169. *See* United States v. Smith, 486 F. Supp. 76, 78 (E.D. La. 1980) (obligation of contract not violated by application of new exemption); Ouachita Nat'l Bank v. Rowan, 345 So. 2d 1014, 1016-17 (La. Ct. App. 1977) (new exemption did not impair contract obligations), *cert. denied,* 434 U.S. 1065 (1978).

upon what is considered the "new view" of the contract clause.[170] This view originated in the United States Supreme Court decision of *Home Building & Loan Association v. Blaisdell,*[171] in which the Court held that the prohibition against the impairment of contractual obligations "is not an absolute one and is not to be read with literal exactness like a mathematical formula."[172] The Court found that the contract clause is not only "qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people."[173] Consequently, when Louisiana amended its own urban homestead exemption in 1974,[174] the courts applied a liberal interpretation of the contract clause to favor the homesteader.[175]

In the first Louisiana case, *Ouachita National Bank v. Rowan,*[176] the bank had entered into a mortgage agreement with a homestead claimant who subsequently sought to exempt a larger portion of his property under an amendment to the Louisiana constitution which increased the homestead to $15,000.[177] The court held that "[t]he Bank had no vested interest in the homestead of its debtor at least until it obtained its judgment and recorded it in the mortgage records. . . ."[178] In response to the bank's argument that such a decision was a retroactive application of the exemption in derogation of the Louisiana constitution,[179] the court held that the

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170. *See, e.g.,* El Paso v. Simmons, 379 U.S. 497, 499-501 (1964) (amendment of Texas law providing for termination contract and forfeiture of land held not to impair obligation of contracts); Hooter v. Wilson, 273 So. 2d. 516, 520 (La. 1973) (increased exemption in Louisiana garnishment statute to be applied retroactively did not violate contract clause); Macumber v. Shafer, 637 P.2d 645, 647 (Wash. 1981) (increase in homestead exemption applied retroactively not unconstitutional impairment of contract obligation).

171. 290 U.S. 398 (1933). The Supreme Court held that emergency Minnesota legislation extending the time allowed for redeeming property from foreclosure was not an unconstitutional impairment of contractual obligations. *See id.* at 444.

172. *Id.* at 428.

173. *Id.* at 434.

174. *See* LA. CONST. art. XII, § 9 (providing for at least a $15,000 exemption limit on value of homestead).

175. *See, e.g.,* United States v. Smith, 486 F. Supp. 76, 78 (E.D. La. 1980) (increased exemption implied in pre-existing contract); Credit Serv. Corp. v. Bagley, 364 So. 2d 624, 627 (La. Ct. App. 1978) (lien established four months prior to petition in bankruptcy could be cancelled by court); Ouachita Nat'l Bank v. Rowan, 345 So. 2d 1014, 1018 (La. Ct. App. 1977) (homesteader entitled to increased exemption despite pre-existing contract), *cert. denied,* 434 U.S. 1065 (1978); *see also* Macumber v. Shafer, 637 P.2d 645, 647 (Wash. 1981) (retroactive homestead statute increasing exemption not violation of contract clause).

176. 345 So. 2d 1014 (La. Ct. App. 1977), *cert. denied,* 434 U.S. 1065 (1978).

177. *See id.* at 1015.

178. *See id.* at 1017.

179. *See* LA. CONST. art. XIV, § 26. This section provides: "[T]his Constitution shall not be retroactive and shall not create any right or liability which did not exist under the constitution of 1921 . . . ." *Id.*

amendment was merely a modification of the previous exemption and as such did not impair the contractual obligation at issue.[180] The court, however, expressed in dicta that the result of the case might have been different had the bank recorded its judgment before the exemption was increased.[181]

In a subsequent case, *United States v. Smith,*[182] the debtors had executed a collateral mortgage when the Louisiana homestead exemption was $4,000.[183] The exemption was subsequently increased, and the debtors claimed they were entitled to the higher exemption.[184] The court cited *Ouachita* to support its finding that the debtors were entitled to the increased exemption value and held that "[a]lthough the homestead exemption as it existed was 'read into' the collateral mortgage on the Smith's home, the right of the state to increase the amount of the exemption was impliedly reserved."[185] In dicta, the court also addressed the *Ouachita* court's reservations in applying this rule to creditors who had previously abstracted their judgments when the exemption was increased.[186] An earlier Louisiana case, *Daniel v. Thigpen*[187] had held that a debtor was not entitled to an increased exemption when the amendment was subsequent to the execution of the mortgage contract and the rendition of a judgment in favor of the creditor.[188] The court in *Smith,* however, dismissed the decision in *Daniel* as one decided "before the 'new' approach to the contract clause" and therefore inapplicable today.[189] The *Smith* case therefore suggests that no creditor has a vested right in non-exempt homestead property which is subsequently rendered exempt by a constitutional amendment.[190] Thus, if Texas were to apply the principles in *Smith,* even creditors who had abstracted their judgments before the 1983 amendment would be susceptible to the higher exemption.

D. *Retroactivity and Its Effects on Homesteaders*

Another hypothetical problem arising from the retroactivity of the new

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180. *See* Ouachita Nat'l Bank v. Rowan, 345 So. 2d 1014, 1018 (La. Ct. App. 1977), *cert. denied,* 434 U.S. 1065 (1978).

181. *See id.* at 1017.

182. 486 F. Supp. 76 (E.D. La. 1980).

183. *See id.* at 77.

184. *See id.* at 77.

185. *See id.* at 78.

186. *See id.* at 79 n.4.

187. 194 So. 6 (La. 1940). In *Thigpin,* the sheriff was ordered to sell Daniel's property under execution of a judgment recovered by First National Bank of Arcadia. Daniel sought to enjoin the sale of property he claimed as his homestead. *See id.* at 6.

188. *See id.* at 7.

189. *See* United States v. Smith, 486 F. Supp. 76, 79 (E.D. La. 1980).

190. *Cf. id.* at 79.

amendment is as follows: If a homesteader has purchased an acre and a half of urban land after 1970 for $10,000, his entire homestead has been exempt from the claims of creditors.[191] The effect of the retroactive amendment, however, would be to make unexempt and subject to creditors one-half acre of the homesteader's property.[192] The issue, therefore, becomes whether the homesteader has a constitutional right to maintain a totally exempt homestead. In other words, is he entitled to apply the prior exemption to his property despite the retroactivity of the amendment? The occurrence of this situation was clearly not intended by the Legislature,[193] and despite its improbable nature, its possibility raises interesting constitutional questions. The considerations are largely the same as those discussed with regard to the rights of creditors, namely, whether there is a vested right in a particular exemption law. In an early case, the Supreme Court of Tennessee held that the legislature could retroactively reduce the amount of the homestead exemption without violating any constitutional rights of a debtor.[194] In another case, an Illinois appellate court held that the plaintiff did not have a right to a homestead exemption in property he co-owned prior to enactment of a statute prohibiting a homestead exemption between co-tenants.[195] Both of these holdings would support the view that a homesteader does not have a vested right in a prior exemption law.[196] Although Texas does not have any case law similar to the Tennessee or Illinois decisions, a similar conclusion can be drawn from Texas cases concerning other issues.[197]

In his early treatise on homesteads, Thompson addressed the question of

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191. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1970).

192. *See* TEX. CONST. art. XVI, § 51.

193. *See* Debate on Tex. H.R.J. Res. 105 on the Floor of the House (second reading and adoption), 68th Leg. (April 14, 1983) (tape available at St. Mary's Law Journal Office). The purpose of the retroactivity was to increase the protection to all urban homeowners. *See id.*

194. *See* Walkup v. Covington, 114 S.W.2d 45, 47 (Tenn. 1938). The court distinguished this case from one in which the legislature attempted to increase a debtor's exemption subsequent to the creation of the debt, the latter case being an unconstitutional impairment of contractual obligations. *See id.* at 47.

195. *See* Petrulionis v. Dudek, 252 N.E.2d 23, 24-25 (Ill. App. Ct. 1969) (suit brought by co-tenant against other owners to have homestead estate set apart to himself).

196. *See* Petrulionis v. Dudek, 252 N.E.2d 23, 25 (Ill. App. Ct. 1969) (homesteader did not have right to prior exemption); Walkup v. Covington, 114 S.W.2d 45, 47 (Tenn. 1938) (homestead exemption not vested right); *see also* Taylor v. Madigan, 126 Cal. Rptr. 376, 391 (1975) (homestead exemption not a vested right); Wyoming County Bank & Trust Co. v. Kiley, 430 N.Y.S.2d 900, 902 (App. Div. 1980) (exemption law does not create vested right).

197. *Cf.* Commerce Farm Credit Co. v. Sales, 288 S.W. 802, 804-05 (Tex. Comm'n App. 1926, holding approved) (rural homestead became urban whereupon homesteader lost rural exemption); Lewis v. Brown, 321 S.W.2d 313, 318 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.) (extension of city changed rural homestead); Ayres v. Patton, 111 S.W. 1079,

a debtor's constitutional right to a prior exemption by using the example of a rural homesteader who suddenly finds himself within the city limits.[198] This occurrence raises the issue of whether the homesteader can maintain his rural exemption although the city has been extended to meet his rural land, or whether he must now apply the urban limitation to his property. The law in Texas is clear on this point that the mere fact that a city's corporate boundaries are extended to embrace a rural homestead does not by itself destroy the homestead's rural character.[199] But, if the city begins to build up around what was originally rural land, regardless of whether the corporate lines are actually extended, the homestead character must change with its surrounding conditions.[200] Consequently, a homestead that was completely exempt under its rural character can lose part of its exemption when it forcibly becomes urban land.[201] In the case of *Lauchheimer & Sons v. Saunders,*[202] the Texas Supreme Court held: "The Constitution exempts homesteads, whether urban or rural, when it is established, but it does not guarantee that the character impressed upon the property at one time shall continue for the future."[203] This principle, applied to the problem of a totally exempt homestead, which becomes only partially exempt with the enactment of the area limitation, seems to indi-

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1082 (Tex. Civ. App. 1908, no writ) (extension of city prevented homesteader from claiming rural exemption).

198. *See* S. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS §§ 13-14 (1878). Many of the early cases cited by Thompson held that debtors did not have a vested right in previous exemptions. *See id.* § 13.

199. *See* Posey v. Bass, 77 Tex. 512, 514, 14 S.W. 156, 157 (1890) (extension of town limits to include rural land did not of itself change land to urban homestead); Nolan v. Reed, 38 Tex. 425, 428 (1873) (rural homestead did not lose its character by extension of town boundary); Bassett v. Messner, 30 Tex. 604, 613 (1868) (subsequent incorporation of town did not turn rural homestead into town homestead); Taylor v. Boulware, 17 Tex. 74, 80 (1856) (extension of town limits did not immediately make homestead a town homestead).

200. *See, e.g.,* Commerce Farm Credit Co. v. Sales, 288 S.W. 802, 804 (Tex. Comm'n App. 1926, holding approved) (growth of city could change homestead into urban dwelling); Jones v. First Nat'l Bank, 259 S.W. 157, 159 (Tex. Comm'n App. 1924, judgmt adopted) (city may grow beyond corporate limits to embrace and change rural homestead); Ayres v. Patton, 111 S.W. 1079, 1081 (Tex. Civ. App. 1908, no writ) (growth of town changed rural homestead to urban); *see also* Urech, *The Changing Homestead: When the City Meets the Farm,* 18 S. TEX. L.J. 145, 145 (1976) (rural homestead may become urban by growth of city).

201. *See* Lanchheimer & Sons v. Saunders, 97 Tex. 137, 142, 76 S.W. 750, 752 (1903) (former rural homestead subject to creditors' claims); Waggoner v. Haskell, 35 S.W. 711, 712 (Tex. Civ. App. 1896, no writ) (owner whose rural homestead is brought into city limits and subdivided only entitled to urban exemption).

202. 97 Tex. 137, 76 S.W. 750 (1903) (action to enjoin execution sale of 100 acres formerly rural homestead).

203. *See id.* at 140, 76 S.W. at 751.

cate that the homesteader does not have a vested right to the prior exemption.

V. CONCLUSION

Exemption of the homestead from forced sale can aid society in attaining worthwhile objectives such as protection against creditors of the family's or single adult's home as well as rehabilitation of the debtor. Exemptions can, however, have overreaching effects if they are not also attuned to the needs and circumstances of debtors, creditors, and society. Texas has responded to a change in economic and social conditions by increasing its urban homestead exemption from $10,000 in value to one acre of land and by applying these changes retroactively. It is questionable, however, whether the amendment to the urban homestead exemption achieves the proper balance. The effects of the new exemption have yet to manifest themselves within the state, but one can estimate that such an exemption will lead to unfair and unanticipated consequences for some creditors and homesteaders in Texas.