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South Dakota Legisprudence: A Catalog and Analysis

Neil Fulton

SOUTH DAKOTA LEGISPRUDENCE: A CATALOG AND ANALYSIS

NEIL FULTON†

Statutes provide much of the modern legal body of law. It is necessary for any lawyer to have a good understanding of "legisprudence," the rules for enactment and interpretation of statutes. South Dakota has developed a useful body of legisprudence through both statutes and cases that provide direction about how statutes should be read. This article provides a descriptive collection and normative assessment of these interpretive rules.

I. INTRODUCTION

Unlike their common law predecessors, lawyers today live in a world of statutes.[1] Criminal law is almost entirely statutory.[2] Federal statutes heavily regulate industries like banking,[3] healthcare,[4] and transportation.[5] Traditional common-law topics like torts[6] and contracts[7] are often governed by statutes at the state level.

Lawyers spend significant time reading, applying, and interpreting statutes.[8] As a result, they must have facility with legisprudence,[9] the legal theory of statutory enactment and interpretation.[10] Unfortunately, systematic study and scholarship of statutory interpretation has long been an afterthought.[11] Law students too often can graduate with extensive exposure to common law analysis

† Neil Fulton is the 14th Dean of the University of South Dakota Knudson School of Law. The author wishes to thank Josey Blare, Aspen Bechen, Allison Sanner, and Jaquilyn Waddell Boie for excellent research assistance in producing this article.

1. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016).

2. *See, e.g.*, Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) (describing the modern expansion of criminal statutes, particularly the federal level).

3. National Bank Act, 12 U.S.C. §§ 1-5807 (1864); Banking Act, 12 U.S.C. § 24 (1933); Federal Reserve Act, 12 U.S.C. § 221 (1913); Federal Deposit Insurance Corporation, 12 U.S.C. §§ 265-66, 1811-1832 (1950).

4. Health Insurance Portability and Accountability Act, 110 Stat. 1936 (1996); Patient Protection and Affordable Care Act, 124 Stat. 119 (2010).

5. Highways, 23 U.S.C. §§ 10-611 (1958); Hazardous Materials Transportation Act, 49 U.S.C. §§ 101-5127 (1975).

6. SDCL § 20-9-1 (2016).

7. SDCL §§ 53-1-1 to -4 (2017).

8. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 5 (2d ed. 2006).

9. William N. Eskridge, Jr., *Willard Hurst, Master of the Legal Process*, 1997 WIS. L. REV. 1181, 1184 (1997) (citing Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950) as the first instance where "legisprudence" is used).

10. Irene Scharf, *The Problem of Appropriations Riders: The Bipartisan Budget Bill of 2013 as a Case Study*, 42 MITCHELL HAMLINE L. REV. 791, 845 n.323 (2016) (internal citations omitted).

11. ESKRIDGE ET AL., *supra* note 8, at 1-2.

but little, if any, experience analyzing statutes.[12] A reliable overview of the legisprudence within a jurisdiction is a real need. This article seeks to begin meeting that need in South Dakota.

The South Dakota Legislature has provided direction on several aspects of statutory interpretation.[13] The South Dakota Supreme Court has developed a large, although not exhaustive, body of cases interpreting statutes over time.[14] Collectively, those statutes and decisions comprise the body of legisprudence within South Dakota. This article provides a general catalog and analysis of that body. While legisprudence can analyze both the enactment and interpretation of statutes, this article will confine itself to the latter. It offers a starting point to consider questions of how South Dakota approaches statutory interpretation. Individual issues of interpretation merit deeper analysis; hopefully legisprudence questions in South Dakota can begin to be answered here, however.

II. THE INTERPRETIVE GOAL OF SOUTH DAKOTA'S LEGISPRUDENCE: IDENTIFYING THE INTENT OF THE LEGISLATURE

The first question of statutory interpretation is what interpretive goal is to be achieved. Asked another way, what is the interpreter trying to learn from the statute? The answers to that question are often referred to as "regimes" of interpretation.[15] The three dominant regimes of interpretation are textualism, intentionalism, and purposivism.[16] Textualism seeks to identify the ordinary meaning of the statutory language at the time it was adopted.[17] Intentionalism seeks to identify what the enacting legislature intended in the circumstances presented.[18] Purposivism seeks to identify the animating policy goal of the enacting legislature.[19] Another way to think of each of these interpretive goals is that textualism seeks to give effect to what the legislature said, intentionalism seeks to give effect to what the legislature meant, and purposivism seeks to give effect to what the legislature wanted to achieve.[20]

While each of these regimes has a different goal in interpreting statutes, they share some commonalities. The most important is that each is rooted in a vision

12. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 7 (2012).

13. *See* discussion *infra* Part III (exploring this further).

14. *See* discussion *infra* Part II-IV (exploring this further).

15. Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1912-13 (2005); ESKRIDGE ET AL., *supra* note 8, at 219. It is important to remember that these goals of interpretation are distinct from the tools of interpretation. ESKRIDGE ET AL., *supra* note 8, at 219. Individual interpretive regimes may emphasize or de-emphasize particular tools, but most do not entirely foreclose a particular interpretive tool. LINDA D. JELLUM, MASTERING LEGISLATION, REGULATION, AND STATUTORY INTERPRETATION 81 (3d ed. 2020).

16. JELLUM, *supra* note 15, at 82.

17. *Id.* at 85.

18. *Id.* at 94-95.

19. *Id.* at 99-100.

20. Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 747-48 (2019).

of the relationships between the legislature and the judiciary.[21] Although each regime sees judges as giving effect to some expression of legislative will, how that expression of will is identified and how much discretion the interpreter has in discharging it varies.[22] Ideally, the interpretive regime used is a shared assumption between the legislature enacting statutes and the entity interpreting them so that there is a shared purpose in how statutes are written and read.[23]

Assessing South Dakota's legisprudence must begin with identifying its interpretive regime and the tools used to effectuate it.

A. LEGISLATIVE INTENT IS THE GOAL OF INTERPRETATION IN SOUTH DAKOTA

South Dakota is an intentionalist jurisdiction.[24] The South Dakota Supreme Court has repeatedly stated that the goal of statutory interpretation is to identify and give effect to the intent of the legislature.[25]

South Dakota's search for legislative intent grows out of a vision of the relationship between the enacting legislature and the interpreter. The South Dakota Supreme Court has described the interpretive task as a "*duty* . . . to carry

21. *Id.* at 81; ESKRIDGE ET AL., *supra* note 8, at 5-7.

22. JELLUM, *supra* note 15, at 81-84; ESKRIDGE ET AL., *supra* note 8, at 17.

23. Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1981-82 (2005). This idea of interpretive regimes as shared rules between legislatures enacting statutes and those (primarily courts) applying and interpreting them has its foundation in the recognition that statutes are communicative acts. NORMAN J. SPRINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:1 (7th ed. 2021) (collecting materials on the communicative nature of statutes). By enacting a statute, a legislative body seeks to communicate something about how the public should act, either prescribing or prohibiting certain conduct in most instances, but always with the intent to "change the law" in some meaningful way conveyed through their statutory enactment. RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 211-12 (Timothy Endicott et al. eds., 2012). A statute must therefore be understood by the interpreter in a manner similar to how the enactor "spoke" it in order to be an effective act of communication. There must be a shared understanding, a "meeting of the minds," for the statute to be effective. The shared rules that govern this legal communicative act are aggregated into "regimes" of interpretation in which interpreters seek certain information in their reading of the statute (e.g., the ordinary meaning of the words at the time of enactment, the intent of the enacting legislature) and the enacting legislature seeks to communicate primarily that information to the interpreter. If there is not consistency of regime across time and between enactor and interpreter, there are costs to those "regime changes." *See* Frickey, *supra* note 23, at 1982-83.

24. State v. Armstrong, 2020 SD 6, ¶ 16, 939 N.W.2d 9, 13 (citing State v. Geise, 2002 SD 161, ¶ 10, 656 N.W.2d 30, 36).

25. *Id*.; Rhines v. S.D. Dep't of Corr., 2019 SD 59, ¶ 13, 935 N.W.2d 541, 545; Puetz Corp. v. S.D. Dep't of Revenue, 2015 SD 82, ¶ 16, 871 N.W.2d 632, 637; Hass v. Wentzlaff, 2012 SD 50, ¶ 12, 816 N.W.2d 96, 101; *In re* Estate of Hamilton, 2012 SD 34, ¶ 7, 814 N.W.2d 141, 143; State v. Schouten, 2005 SD 122, ¶ 9, 707 N.W.2d 820, 823 (citing State v. Myrl & Roy's Paving, Inc., 2004 SD 98, ¶ 6, 686 N.W.2d 651, 653; Martinmaas v. Engelmann, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611); Wildeboer v. S.D. Junior Chamber of Com., Inc., 1997 SD 33, ¶ 26, 561 N.W.2d 666, 671 (noting that "[o]ur cases are legion where we seek to interpret the intent of the Legislature") (citing Klinker v. Beach, 1996 SD 56, ¶ 10, 547 N.W.2d 572, 575); Delano v. Petteys, 520 N.W.2d 606, 609 (S.D. 1994); Sander v. Geib, Elston, Frost Prof. Ass'n, 506 N.W.2d 107 (S.D. 1993); State v. Big Head, 363 N.W.2d 556, 559 (S.D. 1985). The court seeks the intent of the legislature as a whole, not individual or isolated groups of legislators. *See, e.g.*, Eagleman v. Diocese of Rapid City, 2015 SD 22, ¶ 11, 862 N.W.2d 839, 845 (rejecting the motives of "a few legislators" as reflecting "legislative intent" as a whole). Additionally, evidence of legislative intent is better identified from legislators rather than non-legislators who support or oppose legislation. *Id.* ¶ 12.

out the intent of our legislature."[26] Three key assumptions underlie the framing of the interpretive search for intent as a "duty." First, it assumes legislative supremacy.[27] Framing the interpreter's task as a "duty" to identify and give effect to legislative intent subordinates the courts to the will of the legislature.[28] This ordering is rooted in the concepts of separation of powers and institutional competence.[29] Second, it assumes that courts act as "faithful agents" of the legislature when interpreting statutes.[30] This requires courts to effectuate the delegated will of the legislature, not act independently.[31] Third, because the interpreter is duty bound to identify and effectuate what the legislature meant, it may be necessary to look beyond what the legislature said. South Dakota therefore looks beyond the text to identify legislative intent in some circumstances.[32] The goal is to identify and give effect to the true intent of the legislature, not follow thoughtlessly what the legislature said.[33]

The interpretive goal will drive the interpretive means, dictating which interpretive tools are used and how. Within South Dakota, an interpreting court will select tools and use them in such a way as to identify what the enacting legislature was trying to communicate.

B. TOOLS TO IDENTIFY LEGISLATIVE INTENT

Text, statutory history, rules of grammar and syntax, statutory history, canons of construction, and other tools can be used in different ways within different interpretive regimes. South Dakota uses several tools to identify the intent of the enacting legislature.

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26. State v. One Black Toyota Pickup, VIN JTRN48S6D0065995, 415 N.W.2d 511, 512 (S.D. 1987) (emphasis added) (citing State v. Byrd, 398 N.W.2d 747 (S.D. 1986); *In re* Famous Brands, Inc., 347 N.W.2d 882 (S.D. 1984); *In re* Dwyer, 207 N.W. 210, 212 (1926).

27. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281, 283-84 (1989).

28. JELLUM, *supra* note 15, at 96. This commitment to legislative intent can raise questions about rejecting text. *See, e.g.*, Miranda Oshige McGowan, *Against Interpretation,* 42 SAN DIEGO L. REV. 711, 713-15 (2005) (describing interpretations of text that do anything except to identify the author's intent to be a "re-authoring" of the text itself).

29. Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 665 (1996); Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. L. REV. 1129, 1132-36 (1992); SPRINGER & SINGER, *supra* note 23, § 45:3.

30. Farber, *supra* note 27, at 284; James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L. REV. 975, 975-76 (2013).

31. Some scholars contend that courts should not be stripped of judgment and discretion within their agency, however. *See, e.g.*, Ofer Raban, *Is Textualism Required By Constitutional Separation of Powers?*, 49 LOY. L. REV. 421, 450-52 (2016) (arguing that textualism violates the constitutional directive of separation of powers by stripping courts of meaningful ability to "say what the law is" in the interpretation of statutes).

32. *See* discussion *infra* notes 110, 131, 236-237 (exploring this further).

33. Hass v. Wentzlaff, 2012 SD 50, ¶ 12, 816 N.W.2d 96, 101; *In re* Estate of Hamilton, 2012 SD 34, ¶ 7, 814 N.W.2d 141, 143.

1. Statutory Text

The interpretive starting point is always the language of the statute.[34] The South Dakota Supreme Court is constant in this approach.[35] The court has repeatedly said that the statutory text is the proper starting place of analysis.[36] It has further said that when the statutory text is unambiguous it is likewise the end point.[37] Interpreters cannot add to,[38] subtract from,[39] or amend the statutory language based on their preference.[40] The court has gone so far as to say that it will not "declare the intent of the statute based on what we thought the Legislature meant to say."[41] While that language suggests greater textual dominance than is actually the case in South Dakota, the underlying premise holds true that the interpreting court should not substitute its own intent for that of the enacting legislature.[42]

Although statutory text is the clear starting point of statutory interpretation in South Dakota, what constitutes clear text can be less clear. Ambiguity is present when a statute's text is "reasonably capable of being understood in more than one sense."[43] Words can take on "more than one sense" in a variety of ways.[44]

A first cause of ambiguity is the reality that language is unavoidably imperfect. Words lack inherent meaning.[45] Many have multiple accepted meanings which may be unclear from the bare statutory text.[46] Words change in

34. State v. Litschewski, 2011 SD 88, ¶ 5, 807 N.W.2d 230, 232 (internal citations omitted).

35. Hollingsworth v. Hollingsworth, 2008 SD 102, ¶ 11, 757 N.W.2d 422, 426; Johnson v. Light, 2006 SD 88, ¶ 10, 723 N.W.2d 125, 127.

36. *Hollingsworth*, 2008 SD 102, ¶ 11, 757 N.W.2d at 426; *Johnson*, 2006 SD 88, ¶ 10, 723 N.W.2d at 127.

37. Zoss v. Schaefers, 1999 SD 105, ¶ 6, 598 N.W.2d 550, 552; Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994) (citing *In re* Famous Brands, Inc., 347 N.W.2d 882, 884-85 (S.D. 1984)); Puetz Corp. v. S.D. Dep't of Revenue, , 2015 SD 82, ¶ 16, 871 N.W.2d 632, 637; Rhines v. S.D. Dep't of Corr., 2019 SD 59, ¶ 13, 935 N.W.2d 541, 545.

38. Olson v. Butte Cnty. Comm'n, 2019 SD 13, ¶ 10, 925 N.W.2d 463, 466; *In re* Marvin M. Schwan Charitable Found., 2016 SD 45, ¶ 23, 880 N.W.2d 88, 94; Rowley v. S.D. Bd. of Pardons and Paroles, 2013 SD 6, ¶ 12, 826 N.W.2d 360, 365.

39. Jensen v. Turner Cnty. Bd. of Adjustment, 2007 SD 28, ¶ 12, 730 N.W.2d 411, 415 (internal citations omitted). The refusal to read words out of a statute also provides guidance in resolving ambiguity through the rule against surplusage. *See* Huber v. Dep't of Pub. Safety, 2006 SD 96, ¶ 14, 724 N.W.2d 175, 179 (internal citations omitted).

40. *Delano*, 520 N.W.2d at 608 (quoting *In re Famous Brands*, 347 N.W.2d at 884-85); *In re* Estate of Flaws, 2016 SD 60, ¶ 44, 885 N.W.2d 336, 349.

41. *In re Marvin M. Schwan*, 2016 SD 45, ¶ 23, 880 N.W.2d at 94.

42. *In re Estate of Flaws*, 2016 SD 60, ¶ 44, 880 N.W.2d at 349.

43. Zoss v. Schaefers, 1999 SD 105, ¶ 6, 598 N.W.2d 550, 552 (internal citations omitted); Fluth v. Schoenfelder Constr., 2018 SD 65, ¶ 16, 917 N.W.2d 524, 529; Wheeler v. Cinna Bakers, LLC, 2015 SD 25, ¶ 6, 864 N.W.2d 17, 20. Formulating a clear definition of "ambiguity" is itself a challenge. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1607 n.294 (2000) (internal citations omitted) (noting the recurring need for, but absence of, a workable and consistent definition of ambiguity).

44. *Zoss*, 1999 SD 105, ¶ 6, 598 N.W.2d at 552 (citing *In re Famous Brands*, 347 N.W.2d at 886).

45. JELLUM, *supra* note 15, at 88-89 (citing State *ex rel.* Helman v. Gallegos, 871 P.2d 1352, 1359 (N.M. 1994)).

46. SCALIA & GARNER, *supra* note 12, at 70.

spelling and usage over time.[47] As used in statutes, many words create categories which can lead to uncertain or even unexpected results.[48] Ambiguity is a nearly unavoidable part of using language.

Second, words can have both common and technical meanings. Words used in statutes are presumptively given their ordinary, popular meaning.[49] This presumption is a statutory command in South Dakota.[50] The presumption of ordinary, popular meaning is overcome if a different definition is set by statute.[51] Ordinary meaning likewise gives way to context or other evidence of contrary legislative intent.[52] This is a very standard approach to the meaning of statutory text.[53] As far as it goes, it creates little practical difference between intentionalist South Dakota and jurisdictions committed to textualism as the interpretive regime.

Third, courts may reject the ordinary meaning of statutory language if it would produce an absurd result under the circumstances.[54] South Dakota's application of the absurdity doctrine is discussed in more detail later in this article.[55]

Fourth, words or numbers in a statute might not be read literally when they appear to be the sort of typographical mistakes commonly referred to as "scrivener's error."[56] In the face of such apparent drafting mistakes, courts will reject a literal reading in favor of one that more accurately captures the actual intent of the legislature.[57] South Dakota has not yet applied scrivener's error in a statutory interpretation case but has done so in cases regarding judicial orders and

47. Bryan Garner, *You Could Look It Up*, A.B.A. J., June–July 2022, at 20, 20-21. For this reason, interpreters who rely on text to the exclusion or diminution of other interpretive tools insist on identifying ordinary meaning at the time the statute was enacted. SCALIA & GARNER, *supra* note 12, at 78.

48. A classic hypothetical illustration is the lack of certainty of which items are "vehicles" for a restriction on vehicles in a city park. ESKRIDGE, *supra* note 1, at 3-5. Concrete illustrations have presented questions like whether a fish is a "tangible object," or a whether a bumblebee can be a "fish" for statutory purposes. Yates v. United States, 574 U.S. 528, 536-38 (2015); Almond All. of Cal. v. Fish & Game Comm'n, 299 Cal. Rptr. 3d 9 (Cal. App. 3d Dist. 2022), *rev. denied* (Sept. 21, 2022).

49. *In re* Wintersteen Revocable Tr. Agreement, 2018 SD 12, ¶ 12, 907 N.W.2d 785, 789 (internal citations omitted); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (citing SDCL § 2-14-1 (2021)). South Dakota will look to a dictionary to identify the "ordinary meaning" of a statutory term, but not to override the intent of the enacting legislature. Schlim v. Gau, 125 N.W.2d 174, 178 (S.D. 1963).

50. SDCL § 2-14-1; *see* discussion *infra* Part III.A (discussing the presumption of ordinary meaning).

51. SDCL § 2-14-4 (2021).

52. Indep. Cmty. Bankers Ass'n of S.D., Inc. v. State, 346 N.W.2d 737, 744 (S.D. 1984) (internal citations omitted). The South Dakota Supreme Court has not specifically addressed the issue yet, but it seems likely that terms of art within an industry will receive their technical meaning within statutes regulating that industry. *See, e.g.*, Verizon Wireless, LLC, v. Kolbeck, 529 F. Supp. 2d 1081, 1094 (D.S.D. 2007) (noting that certain phrases common to telecommunications should be read with the meanings ascribed to them within the industry when used in a state statute regulating certain telecommunication activity).

53. SCALIA & GARNER, *supra* note 12, at 69-77 (summarizing authority for use of ordinary meaning absent contrary context or recognized terms of art).

54. Reck v. S.D. Bd. of Pardons and Paroles, 2019 SD 42, ¶ 15, 932 N.W.2d 135, 140 (citing Farm Bureau Life Ins. Co. v. Dolly, 2018 SD 28, ¶ 9, 910 N.W.2d 196, 200).

55. *See* discussion *infra* Part IV.A.1.d (discussing absurd results in statutory interpretation).

56. JELLUM, *supra* note 15, at 162-63; ESKRIDGE, *supra* note 1, at 70.

57. Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 823-24 (2016).

other legal documents.[58] Given the court's acceptance of the idea that a drafting mistake should not frustrate the drafter's intent in these contexts, there seems little reason to think it would not extend the doctrine to statutory interpretation as well. The South Dakota Supreme Court is more committed to genuinely identifying and giving effect to legislative intent than statutory literalism.

Finally, particularly in the context of statutes that set litigation procedure, South Dakota courts may not hold the action in question to the strict reading of a statute if "substantial compliance" has been accomplished.[59] Substantial compliance will be found when the process dictated by statute has been followed sufficiently to "carry out the intent for which it was adopted."[60] It is not entirely surprising that an intentionalist jurisdiction will prefer substance over form in some instances.

2. Statutory Context

In addition to the text, interpreters in South Dakota should consider the context of a statute.[61] As an interpretive tool, "context" includes the entire statute, related enactments, the historic setting of enactment, and the purpose it was intended to accomplish.[62] Context is a common interpretive tool, with even the most committed textualist interpreters evaluating context as a guide to textual meaning.[63]

3. Legislative History

South Dakota will use legislative history in the face of an ambiguity or potentially absurd result to identify the intent of the legislature.[64] The South Dakota Supreme Court has disavowed the use of legislative history when the statutory text is clear.[65] This is more restrictive than the court's use of statutory context and structure, which is used in the initial assessment of the text itself.[66]

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58. *In re* J.J., 454 N.W.2d 317, 323 (S.D. 1990); Indep. Sch. Dist. of Brookings v. Flittie, 223 N.W. 728, 728-30 (S.D. 1929); *In re* Bickel, 2016 SD 28, ¶ 34, 879 N.W.2d 741, 751-52.

59. R.B.O. v. Congregation of Priests of the Sacred Heart, Inc., 2011 SD 87, ¶ 12, 806 N.W.2d 907, 911-12 (internal citations omitted).

60. *Id.*

61. State v. Clements, 2013 SD 43, ¶ 8, 832 N.W.2d 485, 487.

62. *Id.*; Fin-Ag, Inc., v. Cimpl's, Inc., 2008 SD 47, ¶ 20, 754 N.W.2d 1, 9 (citing Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1350 (Fed. Cir. 2006)).

63. SCALIA & GARNER, *supra* note 12, at 167-68.

64. Long v. State, 2017 SD 78, ¶ 15, 904 N.W.2d 358, 364 (citing Bertelsen v. Allstate Ins. Co., 2009 SD 21, ¶ 15, 764 N.W.2d 495, 500).

65. *In re* Pooled Advocate Tr., 2012 SD 24, ¶ 48, 813 N.W.2d 130, 146 (citing *Bertelsen*, 2009 SD 21, ¶ 15, 764 N.W.2d at 500).

66. *Id.* ¶ 32, 813 N.W.2d at 141 (citing State *ex rel.* Dep't of Transp. v. Clark, 2011 SD 20, ¶ 10, 798 N.W.2d 160, 163).

The use of legislative history is vigorously debated among scholars of statutory interpretation.[67] Using legislative history can present the practical questions of how to identify intent and whose intent is sought.[68] The South Dakota Supreme Court seeks the intent of the legislature as a whole, not individual participants in the legislative process.[69] Statements of drafters, individual legislators, and lobbyists may sometimes, but not always, provide insight as to legislative intent.[70] Similarly, "extrinsic" evidence of intent such as affidavits of individual legislators have been both accepted and rejected as a result.[71] It can also be a practical challenge to identify legislative history in light of the fact that South Dakota does not produce extensive legislative history.[72]

Finally, the South Dakota Supreme Court will consider the statutory history of an enactment.[73] For this purpose, "statutory history" is the course of changes to a bill by amendment and the subsequent amendment of enactments.[74] It is distinct from "legislative history," the common shorthand phrase for statements of individuals or groups of legislators in the enactment process.[75] As with most tools, amendments are instructive but not determinative evidence of legislative intent in South Dakota.[76]

Three observations stand out about how the South Dakota Supreme Court uses legislative history. First, the focus remains on the intent of the enacting legislature, not the intent of any individual or other group. This is very consistent with the court's fundamental commitment to the intentionalist regime. Second, the court's approach is nuanced. Legislative history is relied on to clarify, not create, ambiguity in the text; evidence of legislative history is weighed based on

67. SCALIA & GARNER, *supra* note 12, at 369-89; FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 58-64 (2009); ESKRIDGE, *supra* note 1, at 191. It should be noted that there is a significant difference between the debated use of legislative history, the statements and documents legislators produced considering legislation, and the universally accepted use of statutory history, which is the formal record of legislative action and the amendment history of an enactment. ESKRIDGE, *supra* note 1, at 204-05.

68. CROSS, *supra* note 67, at 63, 69; JELLUM, *supra* note 15, at 280.

69. Cummings v. Mickelson, 495 N.W.2d 493, 499 n.7 (S.D. 1993).

70. Hughbanks v. Dooley, 2016 SD 76, ¶ 20, 887 N.W.2d 319, 325 (citing Eagleman v. Diocese of Rapid City, 2015 SD 22, ¶ 11, 862 N.W.2d 839, 845).

71. *See Cummings*, 495 N.W.2d at 499. It is important to note that *Cummings* sought to distinguish the use of views of a drafting body to interpret ambiguous constitutional terms from the rejected use of statements of individual drafters or legislators to interpret statutes. *Id*. *See also* S.D. Educ. Ass'n/NEA By & Through Roberts v. Barnett, 1998 SD 84, ¶¶ 34-38, 582 N.W.2d 386, 394-95 (citing affidavits of legislators about intent to make enactment severable). Such materials are often created during litigation and thus suspect as more likely litigation tactics than actual indication of legislative intent or purpose. JELLUM, *supra* note 15, at 309.

72. *See generally* Candice Spurlin, *The Basics of Legislative History in South Dakota*, 56 S.D. L. REV. 114, 118-21 (2011) (outlining the "small number" of documents considered primary sources). This is certainly true in comparison to the comparatively rich legislative history of congressional enactments. *See id.* at 114.

73. Bernie v. Blue Cloud Abbey, 2012 SD 64, ¶ 17, 821 N.W.2d 224, 230 n.9 (citing Hot Springs Indep. Sch. Dist. No. 10 v. Fall River Landowners Ass'n, 262 N.W.2d 33, 38 (S.D. 1978)); *In re* Certification of a Question of L. from U.S. Dist. Court, D.S.D., S. Div., 2010 SD 16, ¶ 15, 779 N.W.2d 158, 163.

74. ESKRIDGE, *supra* note 1, at 204-05.

75. *Id.*

76. *Bernie*, 2012 SD 64, ¶ 17, 821 N.W.2d at 230 n.9.

how well it illustrates legislative intent behind the statute at hand, not categorically accepted or rejected. Third, this restricted use of legislative history and nuanced approach to identify the genuine intent of the legislature, not isolated legislators, ameliorates the common criticism of legislative history as merely an exercise in cherry picking the record to find evidence in support of a favored interpretation.[77]

4. Agency Interpretation

The question of under what circumstances and how much deference to give agency interpretations of a statute is a major question with congressional enactments.[78] In South Dakota, interpretations of statutes by the agency charged with administering them have been given "great weight."[79] That weight has been awarded only when the agency "is given express authority to interpret a statute . . . ."[80] An agency interpretation must not be inconsistent with plain language of the statute.[81]

Subsequently, the court has said that agency interpretations "must be upheld" so long as they are "reasonable" and did so without reference to the express delegation of interpretive authority.[82] In other words, the interpretation of the enforcing agency is determinative. This differing standard neither distinguished

77. SCALIA & GARNER, *supra* note 12, at 377 (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)) (noting a personal conversation where Judge Harold Leventhal likened the use of legislative history to attending a crowded cocktail party and looking over the heads of the guests to find your friends).

78. JELLUM, *supra* note 15, at 414-40 (describing various instances in which administrative agency interpretations of statutes are given differing levels of deference); *see* Tercel Maria G. Mercado-Gephart, *Deference in Wonderland: Into the Many Rabbit Holes of Chevron, Skidmore, and Auer Deference*, 42 OKLA. CITY. U.L. REV. 367, 367-68 (2017).

79. *In re* Famous Brands, Inc., 347 N.W.2d 882, 884 (S.D. 1984).

80. N. States Power Co. v. S.D. Dep't of Revenue, 1998 SD 57, ¶ 4, 578 N.W.2d 579, 580 (citing *In re Famous Brands*, 347 N.W.2d at 884); *In re* Change of Bed Category of Tieszen Memorial Home, Inc., Marion, 343 N.W.2d 97, 98 (S.D. 1984).

81. *See* Red Bear v. Cheyenne River Sioux Tribe, 336 N.W.2d 370, 371 (S.D. 1983).

82. Mulder v. S.D. Dep't of Soc. Servs., 2004 SD 10, ¶ 5, 675 N.W.2d 212, 213; *In re* Pooled Advocate Tr., 2012 SD ¶ 47, 813 N.W.2d 130, 146; *In re* GCC License Corp., 2001 SD 32, ¶ 19, 623 N.W.2d 474, 481-82. Additional confusion could come from a lack of careful reading of the court's approach to the standard of review in an administrative appeal of a tax statute. Midwest Railcar Repair, Inc., v. S.D. Dep't of Revenue, 2015 SD 92, ¶ 44, 872 N.W.2d 79, 90. In the court's consideration of the appeal of contested case hearing before the Department of Revenue, it said that whether a statute imposes a tax is a question of law and that "we give no deference to the circuit court or agency's interpretation." *Id.* Taken out of context, or without attention to the procedural posture of the appeal, that quote could mislead the careless reader to wrongly conclude that the court simply does not defer to agency interpretations in this context. The court itself has conflated the issue of deference to an agency interpretation of statute and the lack of deference to conclusions of law in a contested case hearing. *See, e.g.*, Permann S.D. Dep't of Lab., Unemployment Ins. Div., 411 N.W.2d 113, 117 n.2 (S.D. 1987) (demonstrating a conflation of those issues). Even more confusing, an earlier decision said deference should be granted to an agency interpretation in an administrative appeal. *In re* Aiken, 296 N.W.2d 538, 540 (S.D. 1980) (quoting Usery v. Godfrey Brake & Supply Serv., Inc., 545 F.2d 52, 55 (8th Cir. 1976)). To tie all the confusion back together, *Mulder* itself involves consideration of an independent agency interpretation within the context of an administrative appeal. *See Mulder*, 2004 SD 10, ¶¶ 15-16, 675 N.W.2d at 217-18.

nor overruled the prior cases or the different trigger for agency deference provided in those cases.

Two points stand out about the court's approach to agency interpretations of statutes. First, agency interpretations of the statutes they are tasked to enforce will receive some degree of deference in the face of an ambiguity.[83] Second, there is confusion as to how much deference the agency interpretation will receive.[84] While it is certain that the court will use agency interpretations, an opportunity exists to provide a clarifying ruling on exactly how.

5. Other Tools of Interpretation

The South Dakota Supreme Court determines legislative intent "primarily from the language of the statute itself, without resort to extraneous devices."[85] However, "other considerations may be included," such as the title of the act, enactment history, and state of the law on the subject prior to enactment may be considered based on the understanding that those items informed the legislature.[86] Rules of grammar provide guidance but must give way to contrary legislative intent.[87]

III. STATUTES DIRECTING HOW TO INTERPRET STATUTORY LANGUAGE

Interpretation of South Dakota statutes must begin with reference to several South Dakota statutes that provide rules of statutory interpretation.[88] South Dakota is not alone in laying out statutory direction about how to interpret its

83. *See Mulder*, 2004 SD 10, ¶¶ 15-16, 675 N.W.2d at 217-18.

84. Both standards are slightly modified versions of the *Chevron* standard of deference to agency interpretations. *Id.*

85. *In re* Sales Tax Refund Applications, 298 N.W.2d 799, 802 (S.D. 1980). This case resolved a dispute about the sales taxation on gross receipts on the sales of gas, electricity, water, and communication services. *Id.* at 800. The decision traced the history of codification and amendment of South Dakota's sales tax over the course of decades. *Id.* at 800-02. Specifically, it was necessary to determine whether utility services were subject to a tax rate of three percent of gross receipt of sales. *Id.* The South Dakota Supreme Court concluded that the long history of amendments, with no change to the section specifically setting the rate at three percent of gross receipts for utilities, indicated that the legislature's intent was to retain that rate. *Id.* at 803.

86. *Id.* at 802.

87. Fremont, E. & M.V. Ry. Co. v. Pennington Cnty., 105 N.W. 929, 930-31 (S.D. 1905). The court in *Fremont* was specifically referring to the last antecedent rule, discussed later in this article. *See* discussion *infra* IV.A.2.e (discussing the last antecedent rule).

88. *See* SDCL §§ 2-14-1 to -32 (2021) (collecting directives about statutory interpretation within the chapter heading "CONSTRUCTION AND EFFECT OF STATUTES").

statutes.[89] The United States Code begins with a dictionary act.[90] Such acts are common across jurisdictions.[91]

South Dakota Codified Law Chapter 2-14 includes thirty-two separate statutes setting out interpretive guidance for other statutes.[92] Most were enacted as part of the 1939 Code Commission project.[93] Many have never been amended.[94] Several have had only light amendments.[95] A few were added in later decades.[96] Overall, Chapter 2-14 has provided a steady set of rules for statutory interpretation in South Dakota.

A. ORDINARY MEANING OF WORDS EXCEPT AS OTHERWISE DEFINED IN CODE: SDCL §§ 2-14-2, 2-14-4

Except as defined in the Dictionary Act found at South Dakota Codified Law section 2-14-2, words in statutes are "to be understood in their ordinary sense . . . ."[97] Once a word is defined by "any statute," that definition "is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears."[98]

The power of the latter provision is underappreciated. In South Dakota, any defined term will apply throughout the code absent a contrary intention that "*plainly* appears."[99] Problems of unintended scope can be avoided by careful

89. *See, e.g.*, ALASKA STAT. § 01.10.040 (1949) (directing that statutory words be given common meaning in Alaska); MICH. COMP. LAWS §§ 8.3(a)-(w) (1959) (setting intentionalism as Michigan's interpretive regime and providing other interpretive guidelines); TEX. GOV'T CODE ANN. § 311.021 (West 1985) (defining background presumptions for operation of Texas statutes).

90. 1 U.S.C. § 1 (2012).

91. Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U.J. LEGIS. & PUB. POL'Y 1, 30 n.119 (1998) (noting common nature of dictionary acts). There is scholarly debate about how much statutes should provide interpretive direction. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2147-51 (2002) (proposing legislative direction of the means of statutory interpretation).

92. *See* SDCL §§ 2-14-1 to -32 (collecting directives about statutory interpretation within the chapter heading "CONSTRUCTION AND EFFECT OF STATUTES").

93. *See, e.g.*, SDCL § 2-14-1, Source Note (noting enactment date of 1939); *see also* Julie Bolding, *Savvy Lawyer Strove to Clarify Statutes*, *reprinted in* THE ARGUS LEADER SOUTH DAKOTA 99, 114 (Argus Leader ed., 1989) (describing the work of Sioux Falls Lawyer Holton Davenport in the Code Commission work of the 1930's which collected most statutes that had been enacted since early statehood days).

94. SDCL § 2-14-1; SDCL § 2-14-4; SDCL § 2-14-6 (2021); SDCL § 2-14-7 (2021); SDCL § 2-14-8 (2021); SDCL 2-14-9 (2021); SDCL § 2-14-10 (2021); SDCL § 2-14-11 (2021); SDCL § 2-14-12 (2021); SDCL § 2-14-13 (2021); SDCL § 2-14-14 (2021); SDCL § 2-14-15 (2021); SDCL § 2-14-16 (2021); SDCL § 2-14-17 (2021); SDCL § 2-14-18 (2021); SDCL § 2-14-19 (2021); SDCL § 2-14-21 (2021); SDCL § 2-14-23 (2021); SDCL § 2-14-24 (2021); SDCL § 2-14-25 (2021); SDCL § 2-14-26 (2021); SDCL § 2-14-27 (2021); SDCL § 2-14-28 (2021).

95. SDCL § 2-14-5 (2021); SDCL § 2-14-29 (2021); SDCL§ 2-14-30 (2021).

96. SDCL § 2-14-2.1 (2021) (defining "shall" in the 1997 enactment); SDCL § 2-14-3 (2021) (regarding printing and sealing of notes in the 1943 enactment); SDCL § 2-14-16.1 (2021) (clarifying reconciliation of multiple amendments enacted in one legislative session in 1976); 2-14-32 (2021) (applying chapter to South Dakota Codified Laws in 1970 enactment, with subsequent amendments).

97. SDCL § 2-14-1.

98. SDCL § 2-14-4.

99. *Id.* (emphasis added). The "plainly" requirement indicating a heightened clarity of intent that the dictionary definition should not apply.

drafting to clearly limit application of definitions to the title or chapter in which they are included.[100] Such problems of application have mostly been avoided.[101] In one case, however, the South Dakota Supreme Court failed to limit application of a defined term to those sections to which they were specifically tied.[102] Without careful drafting and interpretation, South Dakota Codified Law section 2-14-4 can present a trap for the unwary to miss the reach of applicable definitions or fail to properly constrain the scope of a statute's reach.

B. EFFECT OF MANDATORY AND DISCRETIONARY TERMS: SDCL § 2-14-2.1

South Dakota Codified Law section 2-14-2.1 provides that the term "shall" is a mandate without discretion in carrying out the action directed.[103] The South Dakota Supreme Court has not consistently followed this mandate, however. The court has often given "shall" the non-discretionary meaning called for by the statute.[104] Many jurisdictions also give this meaning to "shall."[105] South Dakota did so prior to enactment of South Dakota Codified Law section 2-14-2.1 in 1997.[106] Despite this statutory direction, commonality, and tradition, the South Dakota Supreme Court has stated that the "effect of the word 'shall' may be determined by the balance of the text" within the statute in which it used.[107]

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100. *See, e.g.*, SDCL § 22-1-2 (2017) (limiting application of definitions to Title 22); SDCL § 58-1-2 (2019) (limiting application of defined terms to Title 58); SDCL § 58-18B-1 (2019) (limiting application of definitions to Chapter 58-18B).

101. *See, e.g.*, 1989 S.D. Op. Att'y Gen. 89-03, 1989 WL 505643, at *1-2 (noting general application of statutory definitions not limited to particular portion of South Dakota Code); Mauch v. S.D. Dep't of Revenue & Regul., 2007 SD 90, ¶¶ 13-14, 738 N.W.2d 537, 541 (distinguishing similar, but not identical, defined terms in different chapters of code which were limited in application to their chapter); *In re* Certification of a Question of L. from U.S. Dist. Ct., D.S.D., S. Div., 2014 SD 57, ¶¶ 14-15, 851 N.W.2d 924, 929 (distinguishing separate definitions of "surety insurance" and "surety contract").

102. Taggart v. Ford Motor Credit Co., 462 N.W.2d 493, 500 (S.D. 1990). *Taggart* mistakenly extended the definition of "fiduciary" in SDCL § 55-7-2(2) to SDCL § 20-10-2 despite the former's explicit limitation to "§§ 55-7-2 to 55-7-15, inclusive . . . ." *Compare id.* (extending the definition of "fiduciary" from one title to another) *with* SDCL § 55-7-2 (2012) (limiting the application of the definition of "fiduciary" to the named statutes). A "contrary intention" than general application to the Code could not more "plainly" appear. The court simply made a mistake in application of SDCL § 2-14-4 and the substantive statutes. This mistake clearly demonstrates the need for care in interpretation.

103. SDCL § 2-14-2.1.

104. Fritz v. Howard Township, 1997 SD 122, ¶ 15, 570 N.W.2d 240, 242-43 (internal citations omitted); State v. Nelson, 1998 SD 124, ¶ 12, 587 N.W.2d 439, 444.

105. JABEZ GRIDLEY SUTHERLAND, 3 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 57:1 (Shambie Singer & Prof. Norman J. Singer eds., 8th ed. 2021); see generally, Dale E. Sutton, Use of "Shall" in Statutes, 4 J. MARSHALL L. Q. 204 (1938) (surveying state-by-state usage of the word "shall" in statutes).

106. 1997 S.D. Sess. Laws ch. 21 § 1, 1; *Fritz*, 1997 SD 122, ¶ 15, 570 N.W.2d at 242-43 (citing *In re* Groseth Int'l Inc., 442 N.W.2d 229, 231-32); see generally Tubbs v. Linn, 70 N.W.2d 372 (S.D. 1955) (rejecting "mandatory" definition of shall in the context of public officer actions).

107. *See* Discover Bank v. Stanley, 2008 SD 111, ¶ 21, 757 N.W.2d 756, 762-63 (citing *In re* Megan, 5 N.W.2d 729, 733 (S.D. 1942)). *Discover Bank*, in the course of one paragraph, notes that "shall" denotes a mandate, that SDCL § 2-14-2.1 mandates that interpretation, but then pivots to say that effect of the use of "shall" can be determined by the language of the statute. *Id. See generally* State v. Guerra, 2009 SD 74, 772 N.W.2d 907 (interpreting "shall" in the context of the statute's purpose, rather than as a mandate). *But see* Citibank, N.A. v. S.D. Dep't of Revenue, 2015 SD 67, ¶ 13, 868 N.W.2d 381, 387 (defining "shall" as a mandate).

While not defined by statute, "may" has been held to provide discretion in committing the designated action.[108] This presumed meaning of "may" can be overcome if "the context and subject matter indicate a different legislative intent."[109]

In determining whether "shall" is a mandate or if "may" is a grant of permission, the interpreter must look holistically at the text, context, subject matter, legislative intent, and even the "effects and consequences as well as the spirit and purpose of the statute."[110] Although contrary to the direction of South Dakota Codified Law section 2-14-2.1, using context to recognize an intent inconsistent with a strict reading of the text is consistent with the intentionalist approach of the South Dakota Supreme Court.[111] "Shall" is statutorily presumed to be a mandate, unless it appears the legislature intended otherwise.[112] "May" has no statutory presumption, so it is entirely context dependent.[113] The resulting ambiguity is a common interpretive problem.[114] South Dakota drafters and interpreters must be careful and thoughtful to avoid the issue whenever possible.[115]

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108. *Groseth*, 442 N.W.2d at 231-32.

109. Person v. Peterson, 296 N.W.2d 537, 538 (S.D. 1980) (citing Tubbs, 70 N.W.2d at 372); Rowenhorst v. Johnson, 204 N.W. 173, 173 (1925); Long v. South Dakota, 2017 SD 78, ¶ 16, 904 N.W.2d 358, 364-65 (quoting In re Estate of Flaws, 2012 SD 3, ¶ 18, 811 N.W.2d 749, 753) (the form of verb in a statute (e.g., "may," "must," or "shall") is the most important, but not only or controlling, factor in determining if the statute is mandatory or discretionary).

110. No exception for context or legislative intent appears in the statute itself. *See* SDCL § 2-14-2.1. The South Dakota Legislature has provided explicit exceptions for contrary intent elsewhere. *See* SDCL § 2-14-6. The court construed "may" to be presumptively permissive. *Long*, 2017 SD 78, ¶ 16, 904 N.W.2d at 364 (quoting Breck v. Janklow, 2001 SD 28, ¶ 11, 623 N.W.2d 449, 455). It has not limited itself to the text to determine if that presumption is overcome, however, looking as well to "context, subject matter, effects and consequences as well as the spirit and purpose of the statute." *Long*, 2017 SD 78, ¶ 16, 904 N.W.2d at 364 (internal citations omitted). The last tools noted, "effects and consequences as well as the spirit and purpose" of a statute more resemble purposivism than the typical intentionalism of the South Dakota Supreme Court. JELLUM, *supra* note 15, at 99-100. As in other instances where "spirit" or "purpose" creeps in, *see* SDCL § 2-14-8, this appears to be more an imprecise use of language than lack of commitment to the underlying interpretive regime.

111. State v. Armstrong, 2020 SD 6, ¶ 16, 939 N.W.2d 9, 13 (citing State v. Geise, 2002 SD 161, ¶ 10, 656 N.W.2d 30, 36).

112. *Long*, 2017 SD 78, ¶ 16, 904 N.W.2d at 364.

113. *Id.* (citing *Breck*, 2001 SD 28, ¶ 11, 623 N.W.2d at 455).

114. SCALIA & GARNER, *supra* note 12, at 112-15.

115. No less an authority than Bryan Garner suggests simply avoiding the problem by replacing "shall" with "must." BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING LEGISLATION 43-46 (2016). Other drafting experts disagree. *See* ARTHUR J. RYNEARSON, LEGISLATIVE DRAFTING STEP-BY-STEP 8-13 (2013) (describing "shall" as "required" in certain instances and "must" as a "disfavored" alternative). Perhaps as much as anything, this demonstrates that ambiguity arises in statutes despite best efforts, drafters and interpreters must be careful, and it may be possible to avoid issues by making sure those respective players in the process are on the same page as to usage and interpretation. This last hope may not match reality, however. *See* Abbe R. Gluck & Lisa Schulz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 938 (2013) (reporting empirical study of misalignment of interpretive tools such as dictionaries and drafting techniques and the actual considerations of Congressional staff members).

C. INTERCHANGEABILITY OF GENDER, SINGULAR OR PLURAL, AND VERB TENSE: SDCL §§ 2-14-5, 2-14-6, AND 2-14-7

South Dakota Codified Law section 2-14-5 provides that gendered terms include their opposite and the neuter.[116] The text makes no exception for a plainly contrary intent.[117] To date the South Dakota Supreme Court has not decided a case addressing whether context or other evidence of contrary legislative intent can override this statute.[118]

South Dakota Codified Law section 2-14-6 provides that the singular includes the plural and vice versa.[119] This statute does provide that the rule is inapplicable if a clearly contrary intent "plainly appears."[120]

South Dakota Codified Law section 2-14-7 provides that the present tense includes the future and present.[121] Like South Dakota Codified Law section 2-14-5, this section includes no exception for a plainly contrary intent.[122]

These and other statutes present the important and open question of what to do with inconsistent interpretive guidance by the South Dakota Legislature. In some instances, the legislature has authorized override of the interpretive direction based on contrary intent[123] or nonconformity with the "spirit and purpose" of the act.[124] In some instances the legislature has not done so.[125] South Dakota's general approach that the language of text cannot be modified by addition or subtraction[126] suggests that these statutory differences must be given effect so that those statutes with express exceptions can be overcome and those without cannot. Rejecting clear contrary intent would fly in the face of the consistent intentionalism of the South Dakota Supreme Court, however.[127] The court has not yet reconciled the conflict through decision nor has the legislature eliminated it through amendment. Giving effect to clear contrary intent seems probable and arguably preferable, but the question is open and debatable in South Dakota.

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116. SDCL § 2-14-5.

117. *Id. Contra* SDCL § 2-14-6 (setting out that singular includes plural and vice versa, "except where a contrary intention plainly appears"). Congress has likewise provided that use of masculine gender includes feminine but does specifically provide that this is "unless the context indicates otherwise." 1 U.S.C. § 1.

118. There is little reason to think not given the intentionalist orientation of the court, and the practice of doing so with other statutory directives lacking exceptions. *See* Discover Bank v. Stanley, 2008 SD 111, ¶ 21, 757 N.W.2d 756, 762-63.

119. SDCL § 2-14-6.

120. *Id*.

121. SDCL § 2-14-7.

122. *Id.* Also, like SDCL § 2-14-5, the South Dakota Supreme Court has not addressed whether evidence of contrary intent can overcome this directive, but there is little reason to think not. *Supra* note 118.

123. SDCL § 2-14-6.

124. SDCL § 2-14-8.

125. SDCL § 2-14-7.

126. *See supra* notes 38-40 and accompanying text (exploring this further).

127. *See generally supra* notes 25-26 and accompanying text (exploring this further).

D. PUNCTUATION NOT CONTROLLING: SDCL § 2-14-8

South Dakota Codified Law section 2-14-8 dictates that punctuation "shall not control or affect the construction" of a statute if the result "would not conform to the spirit and purpose of such provision."[128] The South Dakota Supreme Court has held that "punctuation" includes the omission of punctuation.[129]

South Dakota Codified Law section 2-14-8 is curious in that it directs that punctuation give way to the "spirit and purpose" of the statute.[130] Other statutes providing interpretive direction yield to contrary "intent."[131] The "purpose" and "intent" of a statute, although easily confused, are different things.[132] In this respect, South Dakota Codified Law section 2-14-8 is out of step with South Dakota's intentionalism. It provides greater latitude for interpreting courts to reject text not based on the intent of the legislature but the more general purpose behind the statute. Another way to think of the issue is that if "intent" exceptions allow the interpreter to override text based on what the enacting legislature meant, a purpose exception allows an override in advancement of what the legislature was trying to do.[133]

No explanation for the distinction has been provided. It is possible that it was simply a drafting mistake between two contemporaneously adopted statutes. South Dakota would not be alone in conflating "intent" and "purpose" as different words for the same thing, or at least related things.[134] Another reason may be that punctuation is not considered as weighty an interpretive guide and therefore more readily overcome.[135] Whatever the reason, both the legislative drafter and interpreter in South Dakota must be aware that punctuation will give way in the face of a reading that seems inconsistent with the underlying purpose of the statute pursuant to South Dakota Codified Law section 2-14-8.

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128. SDCL § 2-14-8. The South Dakota Supreme Court has agreed, noting that punctuation is a helpful interpretive tool but not determinative. Argus Leader Media v. Hogstad, 2017 SD 57, ¶ 9, 902 N.W.2d 778, 782.

129. *In re* Change of Bed Category of Tieszen Memorial Home, Inc., Marion, 343 N.W.2d 97, 98 (S.D. 1984) (citing Lewis v. Annie Creek Min. Co., 48 N.W.2d 815 (S.D. 1951)).

130. SDCL § 2-14-8.

131. SDCL §§ 2-14-4, -6.

132. JELLUM, *supra* note 15, at 82, 94, 99. Jellum discusses "specific" and "general" intent rather than simply intent and purpose. *Id.* at 94-95. It is more analytically clear to discuss "intent" as what the enacting legislature sought to communicate (the goal of intentionalism) and "purpose" as what the enacting legislature was trying to accomplish, and the means chosen to do so (the goal of purposivism). *Id.*

133. *See id.* at 99-101; ESKRIDGE, ET AL, *supra* note 8, at 229.

134. JELLUM, *supra* note 15, at 94, 99; ESKRIDGE, ET AL, *supra* note 8, at 222.

135. SCALIA & GARNER, *supra* note 12, at 161-64 (describing the more limited role of punctuation). This was particularly so in earlier years when punctuation was often left to the enacting clerk and was not a formal product of the enacting legislature. *Id.* at 161.

E. TITLES, SOURCE NOTES, AND CROSS-REFERENCES: SDCL §§ 2-14-9, 2-14-10

South Dakota Codified Law section 2-14-9 provides that source notes, cross-references, and titles should not be treated as part of any statute.[136] South Dakota Codified Law section 2-14-10 provides expressly that source notes are not an expression of legislative "purpose, reason, scope, or effect" for the section to which they relate.[137]

The South Dakota Supreme Court has stated that statutory interpretation can be informed by "the legislative history, title, and the total content of the legislation to ascertain the meaning."[138] Both a South Dakota Attorney General Opinion[139] and a decision by the United States District Court have rejected using titles to identify meaning.[140] Both simply cite South Dakota Codified Law section 2-14-9 for the proposition that titles cannot provide evidence of statutory intent.[141] Both place more weight on that section than it can bear. South Dakota Codified Law section 2-14-9 simply provides that titles are not part of a statute; it does not prohibit their use as external evidence of legislative intent.[142] That is exactly what South Dakota Codified Law section 2-14-10 provides about source notes by contrast, ruling them out as an expression of statutory "purpose, reason, scope, or effect."[143] In light of this contrast, the South Dakota Supreme Court has struck the right approach by including titles among the many items that can provide evidence (albeit weak perhaps) of legislative intent.[144]

F. ARRANGEMENT OF STATUTES WITHIN CODE: SDCL § 2-14-11

Arrangement and position of statutes within the code of laws can be considered to determine the "intended purpose and effect" of a statute.[145] Statutory placement makes sense as part of an expansive toolkit to identify legislative intent. Not all tools may be powerful, but within South Dakota's intentionalist regime, they can be helpful, nonetheless.

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136. SDCL § 2-14-9. In cases predating SDCL § 2-14-9, the court said that statutory headings are merely tools of convenience, not grounds to adjust the meaning of a statute. Olson v. City of Sioux Falls, 262 N.W. 85, 87 (1935) (citing Anderson v. Beadle Cnty., 211 N.W. 968 (S.D. 1927)). The basis for this exclusion was that headings are products of the Code Commission, not the South Dakota Legislature. *Id.*

137. SDCL § 2-14-10.

138. LaBore v. Muth, 473 N.W.2d 485, 488 (S.D. 1991) (citing *In re* Certification of Law, 402 N.W.2d 340 (S.D. 1987); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981); Elfring v. Paterson, 285 N.W. 443 (S.D. 1939)); *see also In re* Certification of a Question of L. from the U.S. Dist. Court, D.S.D., W. Div., 402 N.W.2d 340, 342-43 (S.D. 1987) (utilizing the legislative history and bill's title to determine the statute's meaning).

139. 1990 S.D. Op. Att'y Gen. 90-18, 1990 WL 596791, at *2 [hereinafter SD AG Opinion 90-18].

140. Brown v. Youth Servs. Int'l of S.D., Inc., 89 F. Supp. 2d 1095, 1101 (D.S.D. 2000).

141. SD AG Opinion 90-18, 1990 WL 596791, at *2; *Brown*, 89 F. Supp. 2d at 1101.

142. SDCL § 2-14-9.

143. SDCL § 2-14-10.

144. LaBore v. Muth, 473 N.W.2d 485, 488 (S.D. 1991) (citing *In re Certification of Law*, 402 N.W.2d 340 (S.D. 1987); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981); Elfring v. Paterson, 66 S.D. 458, 285 N.W. 443 (1939)).

145. SDCL § 2-14-11.

G. LIBERAL CONSTRUCTION OF STATUTES IN DEROGATION OF COMMON LAW: SDCL § 2-14-12

South Dakota specifically rejects strict construction of statutes in derogation of the common law.[146] South Dakota instead interprets such statutes liberally "with a view to effect its objects and to promote justice."[147]

The South Dakota Supreme Court has consistently complied with South Dakota Codified Law section 2-14-12. It was cited, but not dispositive, in addressing a bail bondsman's employee using force during an arrest while not otherwise meeting the statutory provisions to act as a bondsman.[148] It supported a holding that the physician/patient privilege had not been waived.[149] It was cited in support of a finding that a complaint challenging a municipal election contest was "duly verified" based on subsequently filed affidavits.[150]

Statutes dealing with some categories of substantive law have been held to receive broad or narrow readings in the face of ambiguity. Worker's compensation statutes, being remedial in nature, are interpreted liberally in favor of the worker.[151] Statutes imposing a tax are construed liberally in favor of the taxpayer.[152] On the other hand, tax exemptions are strictly construed in favor of the taxing entity.[153]

H. UNIFORM LAWS RECEIVE UNIFORM INTERPRETATION: SDCL § 2-14-13

Like most jurisdictions, South Dakota has adopted a variety of uniform laws that the Uniform Laws Commission has promulgated.[154] Some of these are

146. SDCL § 2-14-12; State v. Bowers, 87 N.W.2d 60, 63 (S.D. 1957) (citing SDC 65.0202(1), which preceded SDCL § 2-14-12). The longstanding approach to statutes in derogation of the common law has been to interpret them strictly. SPRINGER & SINGER, *supra* note 23, § 61:1. South Dakota stands with more than a dozen other states that have legislatively abrogated the strict-construction rule. *Id.* § 61:4.

147. SDCL § 2-14-12.

148. State v. Shadbolt, 1999 SD 15, ¶¶ 13-15, 590 N.W.2d 231, 233-34.

149. Shaffer v. Spicer, 215 N.W.2d 134, 136-37 (S.D. 1974).

150. *In re* Election Contest as to Watertown Special Referendum Election of Oct 26, 1999, 2000 SD 43, ¶ 9, 607 N.W.2d 920, 923.

151. Wheeler v. Cinna Bakers, LLC, 2015 SD 25, ¶ 6, 864 N.W.2d 17, 21-22.

152. N. Border Pipeline Co. v. S.D. Dep't of Revenue, 2015 SD 69, ¶ 9, 868 N.W.2d 580, 583; Puetz Corp. v. S.D. Dep't of Revenue, 2015 SD 82, ¶ 13, 871 N.W.2d 632, 636; *In re* Pirmantgen, 2008 SD 127, ¶ 11, 759 N.W.2d 291, 293. This is a generally accepted rule of statutory interpretation. SPRINGER & SINGER, *supra* note 23, § 66:1. South Dakota does consistently use language that words in a taxation statute should be given "a reasonable, natural, and practical meaning to effectuate the purpose of the statute." Robinson & Muenster Assocs. v. S.D. Dep't of Revenue, 1999 SD 132, ¶ 7, 601 N.W.2d 610, 612. This common formulation appears to be more incantation than actual substance, however. SPRINGER & SINGER, *supra* note 23, § 66:9. In actual operation, it largely seems to reflect the truism that unambiguous statutory language is given its plain meaning.

153. Mauch v. S.D. Dep't of Revenue & Regul., 2007 SD 90, ¶ 8, 738 N.W.2d 537, 540; Choice Hotels Intern., Inc. v. S.D. Dep't of Revenue & Regul., 2006 SD 25, ¶ 9, 711 N.W.2d 926, 928; *In re* Sales Tax Liab. of USA Tire Mgmt. Sys., Inc., 2016 SD 7, ¶ 4, 874 N.W.2d 510, 511-12.

154. *See Current Acts*, UNIF. LAW COMM'N, https://perma.cc/Q3GE-BXGL (last visited Oct. 25, 2022) (providing examples of the most widely adopted Uniform Acts).

ubiquitous, like the Uniform Commercial Code,[155] Uniform Probate Code,[156] and Uniform Partnership Act.[157] Some are less readily known, like the Uniform Athlete Agent Act.[158] Uniform acts present the legisprudence question of whether they are given uniform interpretation among jurisdictions.

155. SDCL §§ 57A-1-101 to -310 (2012).

156. SDCL §§ 29A-1-10 to -8-101 (2004). The Uniform Probate Code has several other uniform acts as constituent parts: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, SDCL §§ 29A-5A-101 to -503 (2004); Uniform Disclaimer of Property Interest Act, SDCL § 29A-2-801 (2004); Uniform Estate Tax Apportionment Act, SDCL § 29A-3-916 (2004); Uniform Real Property Transfer on Death Act, SDCL §§ 29A-6-401 to -435 (2004); Uniform Simultaneous Death Act, SDCL §§ 29A-1-107 (2004), 1-201, 2-104, 2-702 (2004); Uniform TOD Security Registration Act, SDCL §§ 29A-6-301 to -311 (2004).

157. SDCL §§ 48-7A-101 to -1208 (2004).

158. SDCL §§ 59-10-1 to -20 (2015). Although beyond the scope of this article to fully enumerate how South Dakota may have modified them, it appears that at the time of this article the following Uniform Acts have been adopted in substance if not completely or without modification: Uniform Acknowledgement and Proof of Instruments, SDCL §§ 18-4-6 to -9 (2016); Uniform Criminal Statistics Act, SDCL §§ 23-6-1 to -20 (2017); Uniform Enforcement of Arbitration Agreements, SDCL §§ 21-25A-1 to-38 (2004); Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act, SDCL §§ 25-10-12.1 to -12.3 (2013); Model Registered Agents Act, SDCL §§ 59-11-1 to -28; Revised Uniform Anatomical Gift Act, SDCL §§ 34-26-48 to -72 (2011); Revised Uniform Fiduciary Access to Digital Access Act, SDCL §§ 55-19-1 to -27 (2012); Revised Uniform Law on Notarial Acts, SDCL §§ 18-1-1 to -15 (2016); Revised Uniform Limited Liability Company Act, SDCL §§ 47-34A-101 to -1207 (2007); Revised Uniform Limited Partnership Act, SDCL §§ 48-7-101 to -1106 (2004); Revised Uniform Principal and Income Act, SDCL §§ 55-13-1 to -18 (2012); Secured Creditors' Claims in Liquidated Proceedings, SDCL §§ 54-10-1 to -14 (2017); Unauthorized Insurers, SDCL §§ 58-8-1 to -19 (2019); Uniform Acknowledgement Act, SDCL §§ 18-5-1 to -18 (2016); Uniform Act for the Simplification of Fiduciary Security Transfers Act, SDCL §§ 55-8-1 to -18 (2012); Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, SDCL §§ 23A-14-1 to -29 (2016); Uniform Alcoholism and Intoxication Treatment Act, SDCL §§ 34-20A-2 to -96 (2011); Uniform Certification of Questions of Law Act, SDCL §§ 15-24A-1 to -11 (2015); Uniform Child Abduction Prevention Act, SDCL §§ 26-18-1 to -12 (2016); Uniform Child-Custody Jurisdiction and Enforcement Act, SDCL §§ 26-5B-101 to -405 (2016); Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, SDCL §§ 21-67-1 to -9 (2004); Uniform Commercial Code, SDCL §§ 57A-1-101 to -11-108 (2012); Uniform Common Trust Fund Act, SDCL §§. 55-6-1 to -7 (2012); Uniform Controlled Substances Act, SDCL §§ 34-20B-1 to -117 (2011); Uniform Criminal Extradition Act, SDCL §§ 23-24-1 to -34 (2017); Uniform Declaratory Judgments Act, SDCL §§ 21-24-1 to -16 (2004); Uniform Deployed Parents Custody and Visitation Act, SDCL §§ 25-4B-101 to -503 (2013); Uniform Determination of Death Act, SDCL § 34-25-18.1 (2011); Uniform Electronic Transactions Act, SDCL §§ 53-12-1 to -50 (2017); Uniform Enforcement of Foreign Judgments Act, SDCL §§ 15-16A-1 to -10 (2015); Uniform Environmental Covenants Act, SDCL §§ 34A-17-1 to -14 (2013); Uniform Fiduciaries Act, SDCL §§ 55-7-1 to -15 (2012); Uniform Fraudulent Transfers Act, SDCL §§ 54-8A-1 to -12 (2017); Uniform Interstate Depositions and Discovery Act, SDCL §§ 15-6-28.1 to -28.6 (2015); Model State Administrative Procedure Act, SDCL §§ 1-26-1 to -41 (2021); Uniform Mediation Act, SDCL §§ 19-13A-1 to -15 (2016); Uniform Partnership Act, SDCL §§ 48-7A-101 to -1208 (2004); Uniform Photographic Copies of Business and Public Records as Evidence Act, SDCL § 19-7-12 (2016); Uniform Power of Attorney Act, SDCL §§ 59-12-1 to -43 (2015) (2015); Uniform Premarital Agreement Act, SDCL §§ 25-2-16 to -25 (2013); Uniform Principal and Income Act; SDCL §§ 55-13-1 to -18 (2012); Uniform Principal and Income Act; SDCL §§ 55-13A-101 to -602 (2012) (South Dakota has enacted SDCL §§ 55-13A-101 to -602 (2012) without repealing SDCL §§ 55-13-1 to -18 (2012)); Uniform Probate Code, SDCL §§ 29A-1-1 to -402 (2004); Uniform Prudent Investor Act, SDCL §§ 55-5-1, -6 to -17 (2012); Uniform Prudent Management of Institutional Funds Act, SDCL §§ 55-14A-1 to -10 (2012); Uniform Real Property Electronic Recording Act; SDCL Ch. 7-9A-1 to -10 (2004); Uniform Rendition of Accused Persons Act, SDCL §§ 23-26A-1 to -10 (2017); Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act, SDCL §§ 23A-14A-1 to -10 (2016); Uniform Securities Act; SDCL §§ 47-31B-101 to -703 (2007); Uniform State Code of Military Justice, SDCL Ch. 33-10-20 to -308 (2011); Uniform Trade Secrets Act, SDCL §§ 37-29-1 to -11 (2004); Uniform Transfers to Minors Act, SDCL §§ 55-10A-1 to -26 (2012); Uniform Trusts Act, SDCL §§ 55-4-1 to -58 (2012); Uniform Unclaimed Property Act, SDCL §§ 43-41B-1 to -44 (2004);

As a general matter, South Dakota has directed that uniform laws must be "interpreted and construed as to . . . make uniform the law of those states which enact it."[159] The South Dakota Supreme Court has expressly relied on this statute to adopt the reasoning of cases in other jurisdictions interpreting the Uniform Probate Code and Uniform Commercial Code.[160] It has been cited but not ultimately relied on in cases where South Dakota has enacted a modified version of a model act.[161] South Dakota Codified Law section 2-14-13 has been cited in support of reliance on comments to uniform acts that South Dakota has not formally adopted.[162] The rationale of uniformity behind it has been extended to the rules of civil procedure and evidence.[163] That rationale has also been applied to South Dakota statutes that appear to be derived from, if not formal enactments of, uniform acts.[164]

In addition to this general provision, many uniform acts themselves have provisions directing that they should be interpreted to advance uniformity.[165] The

Uniform Unsworn Domestic Declarations Act, SDCL §§ 18-7-1 to -8 (2016); Uniform Unsworn Foreign Declarations Act, SDCL §§ 18-6-1 to -6 (2016); Uniform Vendor and Purchaser Risk Act, SDCL §§ 43-26-5 to -8 (2004).

159. SDCL § 2-14-13.

160. *In re* Estate of Geier, 2012 SD 2, ¶¶ 12-15, 809 N.W.2d 355, 358-59 (UPC); *In re* Estate of Karnen, 2000 SD 32, ¶ 8, 607 N.W.2d 32, 35 (UPC); *In re* Estate of Jetter, 1997 SD 125, ¶ 11, 570 N.W.2d 26, 28 (UPC); Rushmore State Bank v. Kurylas, Inc, 424 N.W.2d 649, 653 (S.D. 1988) (UCC); Thomas v. McNeill, 448 N.W.2d 231, 237 (S.D. 1989) (UCC). SDCL § 2-14-13 has also been cited in support of uniform interpretation of the Uniform Narcotic Drug Act and Uniform Controlled Substances Act. State v. Barr, 237 N.W.2d 888, 891 (S.D. 1976). Decisions by Article III courts in South Dakota have applied the statute and the South Dakota Supreme Court's reliance on it to advance uniform interpretations of the Model Business Corporations Act. Cargill, Inc. v. Am. Pork Producers, Inc., 415 F. Supp. 876, 879 (D.S.D. 1976); Davis v. St. Paul Fire & Marine Ins. Co., 727 F. Supp. 549, 551 (D.S.D. 1989) (citing *Rushmore State Bank*, 424 N.W.2d at 653).

161. Winegeart v. Winegeart, 2018 SD 32, ¶¶ 10-12, 910 N.W.2d 906, 909-10 (distinguishing South Dakota amendments to Uniform Mediation Act).

162. Link v. L.S.I., Inc., 2010 SD 103, ¶ 19, 793 N.W.2d 44, 50 n.3. Comments once had an almost controlling role in interpreting a uniform act. Sean Michael Hannaway, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 967-68 (1990). Given that the legislature often does not enact comments, their force has eroded among many courts. *See id.* at 985. Considering the goal of uniformity and the inextricable connection of the comments, a strong argument can be made that the comments should be given near determinative effect. Gregory Elinson & Robert H. Stikoff, *When a Statute Comes with a User Manual: Reconciling Textualism and Uniform Acts* 1103 (Harv. Pub. L., Working Paper No. 22-10, 2021), https://perma.cc/VUC2-ZHBN.

163. *In re* S.D. Microsoft Antitrust Litig., 2003 SD 19, ¶ 8, 657 N.W.2d 668, 672 n.4 (civil procedure); State v. Wright, 1999 SD 50, ¶ 13, 593 N.W. 792, 798 n.4 (evidence); Miller v. Hernandez, 520 N.W.2d 266, 269 (civil procedure).

164. Delzer v. Penn, 534 N.W.2d 58, 62 (S.D. 1995); *In re* Elizabeth A. Briggs Revocable Living Tr., 2017 SD 40, ¶ 9, 898 N.W.2d 465, 469. SDCL § 2-14-13 itself indicates that "uniform law" status can be ascertained from "title, text, or source note" of any enactment. This specific direction seems to place identification of "uniform" status somewhat out of the larger issue of how titles and source notes are sometimes used despite statutory limitations on their status. *See supra* Part III.E and accompanying text (discussing whether titles, source notes, and cross-references should be used to determine legislative purpose).

165. SDCL § 7-9A-9 (2004); SDCL § 15-16A-9 (2015); SDCL § 15-24A-10 (2015); SDCL § 18-4-9 (2016); SDCL § 18-5-17 (2016); SDCL § 18-7-7 (2016); SDCL § 19-7-12; SDCL § 19-13A-13 (2016); SDCL § 21-25A-36 (2004); SDCL § 21-67-9 (2004); SDCL § 23-6-19 (2017); SDCL § 23-26A-8 (2017); SDCL § 23-24-37 (2017); SDCL § 23A-14A-9 (2016); SDCL § 25-2-24 (2013); SDCL § 25-4B-501 (2013); SDCL § 25-9C-901 (2013); SDCL § 26-5B-401 (2016); SDCL § 26-18-11 (2016); SDCL § 29A-1-102 (2004); SDCL § 29A-5A-501 (2004); SDCL § 29A-6-433 (2004); SDCL § 33-10-306 (2011);

substance of South Dakota Codified Law section 2-14-13 existed before these provisions, which now render it largely redundant.[166] Although both South Dakota Codified Law section 2-14-13 and the specific uniformity provisions encourage uniform interpretation, it is important to recognize that not all "uniform" acts are adopted without alteration.[167] Interpreters must carefully compare the state adopted version and the original "uniform" act when pursuing the general goal of uniform interpretation. State level variations would doubtless constitute legislative intent *not* to produce a uniform interpretation of the non-uniform provision.

Although not dictated by South Dakota Codified Law section 2-14-13, South Dakota similarly follows interpretations from the jurisdiction of an act upon which a South Dakota enactment is based.[168] Drafters should therefore take care in selecting their source materials (and possibly adopting unanticipated meanings) and interpreters to identify the source of any enactment.

I. COMPUTING TIME IN STATUTES: SDCL § 2-14-14

When statutes provide a time in which to perform an act, the computation of time excludes the first day and includes the last day, unless that final day is a holiday in which case it is excluded from the calculation.[169] In multi-day calculations, fractions of days are excluded.[170]

J. RECONCILING CONTEMPORANEOUS AMENDMENTS OR ENACTMENTS SDCL 2-14-16.1 AND 2-14-16.2

When multiple enactments are passed during the same legislative session that amend the same section of the code, each must be given effect regardless of effective dates.[171] However, if the "amendments conflict or a contrary intent plainly appears," that directive is overridden.[172]

SDCL § 34-26-71 (2011); SDCL § 34A-17-13 (2011); SDCL § 37-29-8 (2004); SDCL § 43-26-8 (2004); SDCL § 44-7-8.3 (2004); SDCL § 47-31B-608 (2007); SDCL § 47-34A-1201 (2007); SDCL § 48-7-1101 (2004); SDCL § 48A-7A-1201 (2004); SDCL § 53-12-50 (2017); SDCL § 54-8A-11 (2017); SDCL § 54-10-13 (2017); SDCL § 55-4-35 (2012); SDCL § 55-6-5 (2012); SDCL § 55-7-14 (2012); SDCL § 55-8-17 (2012); SDCL § 55-10A-2 (2012); SDCL § 55-13-15 (2012); SDCL § 55-13A-601 (2012); SDCL § 55-14A-10 (2012); SDCL § 57A-1-103 (2012); SDCL § 58-8-18 (2019); SDCL § 59-10-18 (2015); SDCL § 59-11-22 (2015).

166. SDCL § 2-14-13, Source note SDC 1939, § 65.0202 (2).

167. *See, e.g.*, George A. Hisert, *Uniform Commercial Code: Does One Size Fit All?*, 28 LOY. L.A. L. REV. 219, 220-22 (1994) (discussing grounds for state variations in adoption of Uniform Commercial Code).

168. Hughbanks v. Dooley, 2016 SD 76, ¶ 19, 887 N.W.2d 319, 325; Melby v. Anderson, 266 N.W. 135, 136 (S.D. 1936) (internal citations omitted).

169. SDCL § 2-14-14. The South Dakota Supreme Court has applied as written both the current statute and a similar predecessor. Sioux Valley Hosp. Ass'n v. Tripp Cnty., 404 N.W.2d 519, 520-21 (S.D. 1987); Althen v. City of Mt. Vernon, 42 N.W.2d 231, 232 (S.D. 1950).

170. SDCL § 2-14-14.

171. SDCL § 2-14-16.1.

172. *Id.*

A similar statute governs multiple initiated measures approved in the same election; both are given effect absent conflict or clearly contrary intent.[173] In the face of irreconcilable conflict the measure that received more affirmative votes in the election prevails.[174]

These statutes largely state a truism. Courts, including the South Dakota Supreme Court, typically seek to read statutes harmoniously.[175] Failing to "harmonize" statutes that plainly conflict simply gives effect to the statutory text—no interpretation needed.[176] Interpreting text to give effect to legislative intent that statutes co-exist simply restates the court's intentionalist approach.[177] These forestall the approach taken by other jurisdictions that when multiple enactments occur, only the last in time is given effect.[178]

K. REPEAL OF STATUTES LEGALIZING OR PENALIZING ACTIONS AND OF STATUTES REPEALING REPEALERS: SDCL §§ 2-14-17, 2-14-18, 2-14-19

If a statute that legalized or validated some action is repealed, the legality or validation is not affected.[179] Likewise, if a statute that created a penalty, forfeiture, or liability is repealed, it does not release any responsibility incurred prior to the time of repeal unless the repealer itself specifically provides that existing liability is extinguished.[180] Actions prosecuting such obligations may proceed as though the statute remains in effect.[181] The savings provision of South Dakota Codified Law section 2-14-18 is strictly limited to "any penalty, forfeiture, or liability."[182] It has sustained an action to revoke a professional license[183] and a criminal prosecution for rioting,[184] but not a claim of equitable adjustment in a civil action to enforce a contract for deed.[185] The presumption is that repeal of a statute eliminates the right to initiate an action grounded on that statute absent a

173. SDCL § 2-14-16.2 (2021).

174. *Id.*

175. *See* discussion *infra* notes 222-224 (exploring this further). Given that statutes are not written in a vacuum, interpretations which harmonize the cumulative body of statutory law are favored. SUTHERLAND, *supra* note 105, at § 53:1. Likewise, because legislatures presumptively act with the intent for their actions to have effect, readings which give effect to statutory language are likewise preferred. SCALIA & GARNER, *supra* note 12, at 63, 66-68, 180-83.

176. *See supra* note 37 and accompanying text (explaining this further).

177. *See supra* note 33 and accompanying text (addressing this further); *supra* note 110 and accompanying text (same); *supra* note 131 and accompanying text (same); discussion *infra* notes 235-236 (same).

178. SUTHERLAND, *supra* note 105, § 33:11 (providing examples of that principle).

179. SDCL § 2-14-17.

180. SDCL § 2-14-18.

181. *Id.*

182. *Id.*; Schultz v. Jibben, 513 N.W.2d 923, 925 (S.D. 1994).

183. *In re* Tinklenberg, 2006 SD 52, ¶ 15, 716 N.W.2d 798, 803 (rehearing denied) (citing State Highway Comm'n v. Wieczorek, 248 N.W.2d 369, 372 (S.D. 1976)).

184. State v. Means, 268 N.W.2d 802, 820 (S.D. 1978) (sustaining the riot prosecution of AIM activist Russell Means for disruption of a criminal trial and confrontation with law enforcement).

185. *Schultz*, 513 N.W.2d at 924-26.

savings clause in the repealing statute itself or a generally applicable savings statute.[186]

Repeal of an act that repealed a statute does not revive the earlier statute unless revival is expressly stated as the newest repealer.[187] In other words, to undo the effect of a repeal, the legislature must clearly express the intent to revive or re-enact the previously repealed provision.

L. CODE NOT RETROACTIVE: SDCL § 2-14-21

No enactment codified via South Dakota Codified Law section 2-16-13 applies retroactively unless that intention is plainly apparent.[188] This provision was enacted at the time of initial codification in South Dakota.[189] The South Dakota Supreme Court has consistently held to this rule.[190] It has noted that retroactive application is permissible for merely procedural changes.[191] The court has also noted the general rule that "curative legislation . . . always operates" retroactively without real guidance on what constitutes "curative legislation."[192] The presumption against retroactivity has since been applied in many settings, such as statutes of limitations,[193] definitions of terms,[194] and public easements.[195] While they exist, the instances in which statutes will be applied retroactively are rare and dependent on a clear expression of that intent.

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186. *Tinklenberg*, 2006 SD 52, ¶ 15, 716 N.W.2d at 803 (citing *Wieczorek*, 248 N.W.2d at 372).

187. SDCL § 2-14-19.

188. SDCL § 2-14-21. The South Dakota Legislature has delegated codification of its enactments to the South Dakota Code Commission. SDCL § 2-16-6 (2021). Beyond the work of arranging and publishing the Code, the Code Commission has the power "to correct apparent errors, to correlate and integrate all the laws to harmonize, to assign new title[s] and other designations, to eliminate or clarify obviously obsolete or ambiguous sections that exist, and to substitute terms and phraseology" when expressly or impliedly the intent to the legislature. SDCL § 2-16-9 (2021). The Code promulgated by the Code Commission becomes prima facie evidence of the law upon publication, SDCL § 2-16-12 (2021), and is subsequently approved by the legislature. SDCL § 2-16-13 (2021). New enactments control over the promulgated Code in the face of conflicts. SDCL § 2-16-16 (2021 & Supp. 2022).

189. SDC 1939, § 65.0202 (22).

190. *In re* Scott's Estate, 133 N.W.2d 1, 2-3 (S.D. 1965) (internal citations omitted); State v. Krause, 2017 SD 16, ¶ 18, 894 N.W.2d 382, 388; State *ex rel.* Strenge v. Westling, 130 N.W.2d 109, 111-12 (S.D. 1964).

191. *Krause*, 2017 SD 16, ¶ 16, 387 n.7 (citing West v. John Morrell & Co., 460 N.W.2d 745, 747 (S.D. 1990)); *In re* Engels, 2004 SD 97, ¶¶ 10-15, 687 N.W.2d 30, 33-34 (contrasting merely procedural amendments with substantive change to liquor licensing laws at hand).

192. *Strenge*, 130 N.W.2d at 111-12 (internal citations omitted). A "curative" statute is generally one "designed to remedy some legal defect in previous transactions." *Curative Statute*, BLACK'S LAW DICTIONARY (6th ed. 1990). Such statutes would align with SDCL § 2-14-21 by "plainly" demonstrating their retroactive application on their face.

193. Koenig v. Lambert, 527 N.W.2d 903, 904 (S.D. 1995); Dep't of Soc. Servs. *ex rel.* Dotson v. Serr, 506 N.W.2d 421, 423 (S.D. 1993); Minnesota *ex rel.* Hove v. Doese, 501 N.W.2d 366, 368 (S.D. 1993) (contrasting repealed statutory text that indicated intent for retroactive application with current version to reject retroactive application). The court has specifically rejected application of amended statutes of limitations or repose to pending actions. Eagleman v. Diocese of Rapid City, 2015 SD 22, ¶ 15, 862 N.W.2d 839, 846.

194. Erdahl v. Groff, 1998 SD 28, ¶¶ 17-19, 576 N.W.2d 15, 18-19; N. Star Mut. Ins. Co. v. Rasmussen, 2007 SD 55, ¶ 38, 734 N.W.2d 352, 361.

195. Cleveland v. Tinaglia, 1998 SD 91, ¶ 30, 582 N.W.2d 720, 726.

M. EFFECTS OF CODIFICATION: SDCL §§ 2-14-23 TO 2-14-30

Codification is the technical work of organizing enactments into a coherent, usable form, typically delegated to a commission and the legislature then ratified.[196] Codification of legislative enactments does not itself affect substantive legal change.[197] South Dakota has addressed several specific impacts, or lack thereof, of codification.

Codification supersedes statutes enacted prior to codification unless specifically provided otherwise.[198] The legal effect of prior enactments survives subsequent codification.[199] In other words, codification sets the terms of legal rights and obligations going forward, it does not alter what has accrued or occurred before.[200]

Likewise, civil and criminal actions commenced prior to codification are not subject to the substantive provisions of newly codified laws.[201] Newly codified procedural requirements are applicable, however.[202] Codification likewise does not alter any rights and obligations vested prior to codification.[203]

Any time that had run against a statute of limitations prior to codification is considered part of that limitations period.[204]

Public and private corporations formed prior to codification do not have their status changed, but these corporations must comply with newly codified requirements that apply.[205] Public officers in office prior to codification remain in office until expiration of the term to which they were elected or appointed.[206]

All local subdivision boundaries that predate codification remain in effect.[207] All ordinances, by-laws, rules, and regulations adopted by public entities prior to codification remain in effect until they are affirmatively repealed or amended.[208] All actions or proceedings properly pending before any public court, tribunal, board, commission, or officer at the time of codification are automatically transferred at codification if that public entity no longer has jurisdiction under the new code.[209]

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196. SUTHERLAND, *supra* note 105, § 28.5. South Dakota assigns this task to the South Dakota Code Commission. SDCL § 2-16-3 (2021); *supra* note 188 and accompanying text (discussing this further).

197. SUTHERLAND, *supra* note 105, § 28:8.

198. SDCL § 2-14-23.

199. *Id.*

200. Codification also cannot insulate a statute from actions challenging the validity of its enactment that are pending at the time of codification. SDCL § 2-16-15 (2021). Codification does forestall subsequent challenges to the process of enactment, however. State v. Barr, 232 N.W.2d 257, 259-60.

201. SDCL § 2-14-24.

202. *Id.* This is consistent with South Dakota's approach to retroactive application of enactments. *Supra* Part III.L (explaining retroactive application of enactments).

203. SDCL § 2-14-27.

204. SDCL § 2-14-25.

205. SDCL § 2-14-26.

206. SDCL § 2-14-28. Earlier removal pursuant to another law can occur, however. *Id.*

207. SDCL § 2-14-29.

208. SDCL § 2-14-30.

209. SDCL § 2-14-31 (2021).

The impact of codification is interconnected with the presumption against retroactive effect. In both instances, the overarching rules are that enactments are prospective in effect absent clear contrary legislative intent and the substantive rights and obligations in place at the time are not altered.

N. STARTING STATUTORY INTERPRETATION WITH THE STATUTES

It should be clear that in South Dakota interpretation of any statute must begin with the statutes about interpreting statutes. The South Dakota Legislature has provided a significant number of "rules of the road" on the operation of statutes. It is imperative that any drafter or interpreter of statutes familiarize themselves with and regularly consult South Dakota Codified Law sections 2-14-1 to 2-14-32.[210]

These rules provided by the South Dakota Legislature are extensive but not exhaustive, however. South Dakota's legisprudence also depends in large part on judicially created canons of interpretation.

IV. CANONS OF STATUTORY INERPRETATION

Judges make many of the rules of statutory interpretation. These rules are often referred to collectively as "canons."[211] Many of the canons are long-standing principles about how language is structured and used.[212] Others are substantive principles or presumptions of law.[213] Although an exhaustive list is impractical if not impossible,[214] many scholars have catalogued the canons to greater and lesser degrees.[215]

Debate about the use and propriety of canons is widespread.[216] Canonical use is as widespread as canonical debate, however. Like most jurisdictions, South Dakota uses judicially created guidelines of interpretation. The analysis below

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210. Drafters should also familiarize themselves with the South Dakota Legislative Research Council's drafting manual. S.D. LEGIS. RSCH. COUNCIL, GUIDE TO LEGISLATIVE DRAFTING (2021), https://perma.cc/Z4CR-RG6B. The drafting manual provides invaluable guidance about how to avoid ambiguity in drafting statutes in South Dakota.

211. Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 629-31 (2022). As Zoldan notes, the name given to an interpretive principle can be a proxy for the weight given that principle. *Id.* at 632-33. A "canon," based on historical reliance, pervasiveness, and other values is the most formidable interpretive principle. *Id.* at 638.

212. SCALIA & GARNER, *supra* note 12, at 51; ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-26 (Amy Gutmann ed., new ed. 2018); FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 85 (2009) (distinguishing "linguistic" and "substantive" canons).

213. ESKRIDGE, *supra* note 1, at 12-13. Justice Scalia famously referred to substantive canons as "dice-loading rules" created by judges that drove outcomes. SCALIA, *supra* note 212, at 28-29. Then-professor Amy Coney Barrett decried substantive canons as tools potentially violative of the judicial responsibility of faithful agency if used incorrectly. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 121-25 (2010).

214. Zoldan, *supra* note 211, at 624-25; CROSS, *supra* note 212, at 86.

215. ESKRIDGE, *supra* note 1, at 407-45; ESKRIDGE ET AL., *supra* note 8, at 389-97; SCALIA & GARNER, *supra* note 12, at 42.

216. Zoldan, *supra* note 211, at 636-38; Coney Barrett, *supra* note 213, at 121-25.

will focus on identifying and analyzing the tools South Dakota uses rather than attempting to differentiate presumptions, principles, maxims, and other descriptions.[217] The analysis will instead gather all these tools under the name "canons."

It can be noted at the outset that the South Dakota Supreme Court's use of canons is very mainstream and moderate. This is not surprising. Canon reliance is prominent among textualists.[218] As an intentionalist jurisdiction, South Dakota has somewhat less need to depend on them in the face of textual ambiguities. It is most accurate to describe canons in South Dakota as *a* tool, not *the* tool, of interpretation.

A. CANONS OF LANGUAGE USE

South Dakota engages the fundamental presumption that legislative language is intended to have effect. This presumption drives canons of efficacy. Each of them is a manifestation of the background assumption that legislatures enact statutory language with the intent that it have effect. Statutes are intended to be rules that guide or prohibit conduct. Several specific rules grow from this general canon of efficacy.

1. Presumptions of Statutory Efficacy and Harmony

Fundamental to South Dakota's legisprudence is the presumption that statutes have effect and meaning.[219] It is a fundamental assumption of legisprudence that legislatures seek to speak through their enactments and for those enactments to have effect.[220] Without this fundamental presumption, legisprudence would essentially collapse into irrationality or arbitrariness. Statutes would be but meaningless words.

The general presumption of efficacy gives rise to the further presumption that all the provisions of a statute are intended to have effect.[221] That itself manifests more specifically in canons like the rule against surplusage and *expressio unis est exclusio alterius*, which are discussed below.

217. *See* Zoldan, *supra* note 211, at 631-32.

218. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 383-86 (2005).

219. *See, e.g.*, Appeal of Real Estate Tax Exemption for Black Hills Legal Servs., Inc., 1997 SD 64, ¶ 12, 563 N.W.2d 429, 432 (citing Rapid City Educ. Ass'n v. Rapid City Sch. Dist., 522 N.W.2d 494, 498 (S.D. 1994)) (stating that South Dakota has an interpretive presumption against rendering statutes meaningless or ineffective).

220. SCALIA & GARNER, *supra* note 12, at 63-65; EKINS, *supra* note 23, at 11-13 (assuming the fundamental purpose of legislatures is to change the state of law in some fashion through their enactments).

221. State v. Roedder, 2019 SD 9, ¶ 42, 923 N.W.2d 537, 549; Steinmetz v. State, 2008 SD 87, ¶ 12, 756 N.W.2d 392, 397.

a. Harmonious reading of statutes

Given the presumptions of statutory validity and efficacy, it is not surprising that South Dakota seeks to read statutes harmoniously.[222] The court emphasizes this obligation with statutes that conflict, not simply with those that simply do not perfectly mesh.[223] Specific statutes will control over more general ones in the face of a conflict, however.[224]

This approach rests on a presumption that the South Dakota Legislature speaks through its enactments and intends its enactments to have effect. It thus prioritizes a presumed intention of the legislature, harmonious and effective enactments, over formalistic reading of conflicting language. This approach is, as with many aspects of South Dakota's legisprudence, dependent on the fundamental commitment to intentionalism as the interpretive regime.

b. Rule against surplusage

The South Dakota Supreme Court presumes that each word of a statute is intended to have effect.[225] This rule against surplusage treats each word as having independent meaning, not simply duplicative.[226]

The rule against surplusage can be given either a strict or more lenient form.[227] The strict form gives each word meaning distinct from every other word of the statute—no redundancy.[228] The more lenient approach only precludes interpretations that make words entirely pointless, not just redundant.[229] For an intentionalist court the strict version of the rule should, and likely would, give way to the intent of the legislature.

c. Repeals by implication

Repeals by implication are disfavored,[230] to be found only when there is such irreconcilability as to present "manifest and total repugnancy" between the

222. Jensen v. Kasik, 2008 SD 113, ¶ 8, 758 N.W.2d 87, 89 n.1 (internal citation omitted); State v. Clements, 2013 SD 43, ¶ 8, 832 N.W.2d 485, 487 (internal citations omitted).

223. *Clements*, 2013 SD 43, ¶ 8, 832 N.W.2d at 487; Argus Leader v. Hagen, 2007 SD 96, ¶ 25, 739 N.W.2d 475, 482; Goin v. Houdshelt, 2020 SD 32, ¶ 17, 945 N.W.2d 349, 354.

224. *Argus Leader*, 2007 SD 25, ¶ 21, 739 N.W.2d at 482; Citibank, N.A. v. S.D. Dep't. of Revenue, 2015 SD 67, ¶ 21, 868 N.W.2d 381, 391.

225. Huber v. Dep't of Pub. Safety, 2006 SD 96, ¶ 14, 724 N.W.2d 175, 179.

226. Jensen v. Turner Cnty. Bd. of Adjustment, 2007 SD 28, ¶ 12, 730 N.W.2d 411, 415.

227. SCALIA & GARNER, *supra* note 114, at 176-79.

228. *Id.*

229. *Id.* The reasons for harmless or even purposeful duplication can include lack of attention or abundance of caution by the drafter, political compromise, or simple linguistic habit (e.g., "peace and quiet"). *Id.* Those realities of language use and the political process make a strong case for the lenient approach to the rule against surplusage.

230. *In re* Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799, 803 (S.D. 1980) (citing *In re* Bode's Estate, 273 N.W.2d 180, 183 (S.D. 1979); Friessen Const. Co., Inc. v. Erickson, 238 N.W.2d 278, 280 (S.D. 1976)).

competing statutes.[231] South Dakota finds repeal by implication as a last resort, reconciling conflicting statutes if any reasonable construction will allow it.[232] South Dakota gives "reasonable construction" to both conflicting statutes[233] and give effect to all their provisions if possible, seeking a construction that allows both to co-exist harmoniously and workably.[234]

d. Absurd results

The South Dakota Supreme Court rejects interpretations of a statute that will produce "absurd" results.[235] This canon is rooted in the assumption the legislatures do not intend "absurd or unreasonable" results from their statutory enactments.[236] The absurdity canon has been long and widely utilized.[237]

A critical question is what constitutes an "absurd" result.[238] The South Dakota Supreme Court has not articulated any test or standard of absurdity. It has found absurd results in limited instances. Holding a pharmacy liable under the Drug Dealer Liability Act for a morphine overdose death arising from abuse of a legal prescription was rejected as absurd.[239] Entirely excluding counterclaims in civil actions from statutes of limitations was rejected as absurd.[240] The court likewise held that it would be an absurd result to read a statute that limited authority to stay an execution to the Governor to prevent a circuit court judge from entering a stay in order to conduct the judicial review of the death sentence required by another statute.[241]

It has been common to reject arguments that a particular interpretation is absurd. Applying the rape statute to adjudge a fourteen-year-old juvenile

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231. *Id.* (citing Dep't of Pub. Safety v. Cronin, 250 N.W.2d 690, 694 (S.D. 1977); Nw. Pub. Serv. Co. v. City of Aberdeen, 244 N.W.2d 544, 548 (S.D. 1976)).

232. *Id.* (citing State v. Myott, 246 N.W.2d 786, 789 (S.D. 1976)).

233. *Id.* (citing State v. Christian, 177 N.W.2d 271, 273 (S.D. 1970)).

234. *Id.* (citing *In re* Collins, 182 N.W.2d 335, 339 (S.D. 1970)).

235. Schafer v. Shopko Stores, Inc., 2007 SD 116, ¶ 7, 741 N.W.2d 758, 761 (internal citations omitted).

236. *Id.* (quoting Moeller v. Weber, 2004 SD 110, ¶ 46, 689 N.W.2d 1, 16).

237. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388-89 (2003). The trigger for application and exact formulation of the doctrine varies across jurisdictions. Michael D. Cicchini, *The New Absurdity Doctrine*, 125 PENN. ST. L. REV. 353, 356-57 (2021).

238. Cicchini, *supra* note 237, at 357-58. The spectrum of standards reaches from courts that reject results only if they are both absurd (in the sense of being highly unusual) and unjust, to courts that reject results that are merely "odd." *Id.* The line between legally "absurd" and merely odd or unexpected is blurry at best. *Id.*

239. *Schafer*, 2007 SD 116, ¶ 12, 741 N.W.2d at 763.

240. Murray v. Mansheim, 2010 SD 18, ¶ 7, 779 N.W.2d 379, 382. This was in the face of SDCL § 15-2-1, which restricted the time to "commence" an action through the service of a summons, which is inapplicable to counterclaims. *Id.* As a dissent noted, the competing readings resulted in very different policy choices. *Id.* ¶¶ 35-36, 779 N.W.2d at 392 (Severson, J., dissenting). An odd, unfair, or arguably harmful policy choice does not, of itself, become so "absurd" as to override otherwise clear statutory language. *Id.*

241. State v. Robert, 2012 SD 27, ¶ 10, 814 N.W.2d 122, 125. The court reached its conclusion by resolving a conflict between two statutes. *Id.* This was arguably more an application of the doctrines to avoid surplusage and for harmonious reading than the absurdity doctrine.

delinquent based on having consensual sex with his twelve-year-old girlfriend was not deemed absurd.[242] A statute that limited exclusions from insurance coverage for injury to family members in the insured's household was not found to be absurd.[243] Inconsistencies in identifying what constitutes absurdity demonstrate why the doctrine has often been criticized.[244]

The absurdity doctrine is readily criticized as being subject to judicial manipulation.[245] This criticism goes one step beyond simply inconsistent application to an assertion that judges will purposefully apply the doctrine to achieve their personal preferences.[246] Although South Dakota has produced inconsistent results in some cases, outright manipulation does not appear in the court's absurdity doctrine legisprudence. Within South Dakota's goal of identifying and giving effect to legislative intent and the underlying assumption that no legislature intends that its enactments be ineffectual or nonsensical, rejecting absurd results makes sense. South Dakota's use of the absurdity doctrine aligns with the court's interpretive regime.

2. Presumptions from Statutory Structure

In addition to presumptions about the intent that statutory language be effective, other canons provide guidance based on how statutes are structured. The norms of listed terms, statutes on related topics, and other structural aspects of statutes have begotten interpretive canons.

a. *Ejusdem generis*

The canon of *ejusdem generis* directs that when a list of terms ends with a "catch-all" term, the general term is limited to the class or character of the enumerated terms.[247] While they are related, *ejusdem generis* is distinct from the canon *noscitur a sociis*, which *clarifies* ambiguous terms through their common connection to the other terms within the list.[248] *Ejusdem generis* is limited to those instances in which a general term ends a list of terms.[249]

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242. People *ex rel.* J.L., 2011 SD 36, ¶ 12, 800 N.W.2d. 720, 724. In doing so, the court analyzed differing conclusions on similar statutes from other jurisdictions. *Id.* ¶¶ 5-8, 800 N.W.2d. at 722-23. The distinguishing principle identified was that a statute that allowed adjudicating both juveniles engaged in an underage sexual act ("both victim and perpetrator") to be delinquent was absurd while a statute applying to only one of the participants was not, highlights the blurry nature of the doctrine. *Id.* While either approach may be argued to be a good or bad policy outcome, it is unclear that either is truly "absurd."

243. MGA Ins. Co., Inc. v. Goodsell, 2005 SD 118, ¶ 20, 707 N.W.2d 483, 487.

244. *See, e.g.*, Hillel Y. Levin et al., *Beyond Absurd: Jim Thorpe and a Proposed Taxonomy for the Absurdity Doctrine*, 68 ADMIN. L. REV. 119, 132-33 (2016) (cataloguing scholarship analyzing divergent applications of absurdity doctrine).

245. ESKRIDGE ET AL., *supra* note 8, at 269 n.31; JELLUM, *supra* note 15, at 161; Dove, *supra* note 20, at 755-56.

246. CROSS, *supra* note 67, at 110.

247. SCALIA & GARNER, *supra* note 114, at 199-202.

248. *Id.* at 205.

249. *Id.*

The South Dakota Supreme Court accepts the *ejusdem generis* canon. It has applied the canon to reject extending immunity under South Dakota's equine activity immunity statute to AT&T for the installation of telephone cable.[250] *Ejusdem generis* limited the reach of "together with all other materials" to items arising during administrative hearings and the promulgation of administrative rules, not all documents generated by executive agencies in the course of their work.[251]

The court has erred in using *ejusdem generis* outside the context of a catch-all term at the end of a list.[252] The court mistakenly applied *ejusdem generis* to rely on an adjacent provision to conclude what a general right to recover court costs and expenses did "include."[253] An entirely separate sentence setting out what costs the general right of recovery did "include" would more correctly be considered as a non-exclusive limit of illustrative examples.[254] Similarly, the court mistakenly interpreted a list that "includes" sources of monthly income to determine child support through the lens of *ejusdem generis*.[255]

The South Dakota Supreme Court is not alone in sometimes confusing these related word canons.[256] However, it is a recurrent error that confuses the court's legisprudence. The confusion has had determinative effect on cases.[257] This mistake demonstrates the need to be careful and consistent in the use of interpretive tools—their selection may determine the outcome of close cases.[258]

b. *Noscitur a sociis*

Noscitur a sociis directs that within listed terms, ambiguity is resolved by reference to the character of associated terms. For example, the word "pike" will be interpreted as a fish when part of a list including "walleye, salmon, catfish,"

250. Nielson v. AT&T Corp., 1999 SD 99, ¶¶ 15-16, 597 N.W.2d 434, 439. The court concluded that the list of persons specifically engaged in equine activity limited the statute's inclusion of "any other person", and therefore did not extend to AT&T for trenching work that caused a horse accident and major injury. *Id.*

251. Argus Leader v. Hagen, 2007 SD 96, ¶¶ 17-19, 739 N.W.2d 475, 481. The context of this dispute was the demand by the Argus Leader newspaper for the invitation list from the Governor's Invitational Pheasant Hunt through a writ of mandamus application, not a contested case or rule promulgation. *Id.* ¶ 1, 739 N.W.2d at 477. The court also concluded that extending the catch-all language would constitute an absurd result under the circumstances. *Id.* ¶ 19, 739 N.W.2d at 481.

252. SCALIA & GARNER, *supra* note 12, at 205. *Ejusdem generis* is limited to the specific instance of a general term immediately following a list of specifics. *Id.* Other canons deal with other instances of adjacent words providing guidance to the meaning of another word. *Id.*

253. DeHaven v. Hall, 2008 SD 57, ¶ 51, 753 N.W.2d 429, 444-45.

254. SCALIA & GARNER, *supra* note 114, at 132-33.

255. Crawford v. Schulte, 2013 SD 28, ¶¶ 9-10, 829 N.W.2d 155, 158 (citing *DeHaven*, 2008 SD 57, ¶ 51, 753 N.W.2d at 444-45).

256. SCALIA & GARNER, *supra* note 114, at 205 (noting court confusion of *ejusdem generis* with *noscitur a sociis*).

257. *See supra* notes 253, 255 and accompanying text (explaining this further).

258. *See generally* Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1715-16 (2010) (describing the outcome determinative "tiebreaker" effect of certain tools of statutory interpretation).

but as a stabbing weapon when listed with "sword, knife, club."[259] Like *ejusdem generis*, *noscitur a sociis* arises from the presumption that words used together will have related or similar meanings.[260] While *ejusdem generis* says that general terms are limited to the character of the enumerated terms they appear with, *noscitur a sociis* says that ambiguous terms within a list are clarified by their list mates.[261]

South Dakota has long used the canon of *noscitur a sociis*.[262] Most significantly, the South Dakota Supreme Court consistently looks to associated text to understand the legislative intent of particular words.[263] Thus, both statutory drafters and interpreters must think carefully about not only individual word choices, but the aggregation of words in any statute, as each word will potentially impact the others.

c. *Expressio unis est exclusio alterius*

The general presumption that the South Dakota Legislature acts through its enactments drives both positive and negative inferences. The positive inference is that it intends each of the words it uses to have effect. The negative inference is that it intends efficacy for none of the words it omits. As discussed above, the rule against surplusage directs that each word of a statute should be given effect.[264] On the flip side, when a word is excluded from a statute, the South Dakota Supreme Court presumes that that omission is intentional and that the absent words should not be supplied.[265]

The negative inference commonly manifests around enumerated terms or lists in statutes through the canon of *expressio unis est exclusio alterius*.[266] The canon directs that when a term is omitted, the omission is purposeful and controlling.[267] The Latin translates roughly as, "the expression of one thing is the

259. SCALIA & GARNER, *supra* note 114, at 195-96.

260. SUTHERLAND, *supra* note 105, § 47:16. For *noscitur a sociis*, the Latin translates literally to "it is known from its associates." *Id.*

261. *Id.* While different canons, the two often produce similar results given their shared premise that ambiguous words can and should be known by their associated words. *Id.*

262. Elliott v. Chicago, Milwaukee & St. Paul Ry. Co., 150 N.W. 777, 779 (S.D. 1915); State v. Douglas, 16 N.W.2d 489, 494 (S.D. 1944); State v. Bosworth, 2017 SD 43, ¶ 23, 899 N.W.2d 691, 697-98. The court has applied both *noscitur a sociis* and *ejusdem generis* widely, extending their application to contract terms as well. Opperman v. Heritage Mut. Ins. Co., 1997 SD 85, ¶ 7, 566 N.W.2d 487, 490-91 (internal citations omitted).

263. *Douglas*, 16 N.W.2d at 494 (noting that when a meaning is "obscure or doubtful," the ambiguity may be removed by reference to related terms, including that "the meaning of a term may be enlarged or restrained by reference to the whole clause in which it is used"). *Id.* (citing Virginia v. Tennessee, 148 U.S. 503 (1893)).

264. *See supra* notes 225-226 and accompanying text (exploring this further).

265. *In re* Petition for Declaratory Rule re SDCL 62-1-1(6), 2016 SD 21, ¶ 9, 877 N.W.2d 340, 344-45; Trumm v. Cleaver, 2013 SD 85, ¶ 11, 841 N.W2d 22, 25; Magellan Pipeline Co., LP v. S.D. Dep't of Revenue & Regul., 2013 SD 68, ¶ 9, 837 N.W.2d 402, 404.

266. SUTHERLAND, *supra* note 105, § 47:23.

267. *Id.*

exclusion of other things."[268] The canon thus directs that when a word is omitted from a list, it cannot be read into the statute.[269]

This canon is not applied without limitation, however.[270] The South Dakota Supreme Court has described it as merely, "an auxiliary rule of statutory construction, to be applied with great caution[,]" because it may not always reflect legislative intent.[271] Legislative intent remains the touchstone in South Dakota; *expressio unis* is just a guideline for its discovery, not an ironclad rule.[272]

d. *In pari materia*

The canon of *in pari materia* directs that all statutes on a related subject should be read collectively and consistently, as though a single law.[273] South Dakota has consistently used this doctrine to interpret statutes through the lens of other statutes relating to the same topic.[274] This canon is rooted in the belief that various statutes on a similar topic are "governed by one spirit and policy" across the enactments.[275] In that respect, it is another means by which the court attempts to identify the true intent of the enacting legislature.[276]

The canon of *in pari materia* may sometimes be mistakenly treated as a consistent usage requirement.[277] It is not that. Instead, *in pari materia* limits its interpretive guidance to statutes on the same subject, not simply the occurrence of the same term regardless of context.[278] South Dakota's expressed motive for the rule, that there is a presumptively shared spirit or purpose among statutes on the same topic, would fall away without this limitation.

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268. Sacred Heart Health Servs., Inc. v. Yankton Cnty., 2020 SD 64, ¶ 16, 951 N.W.2d 544, 549-50 (internal citations omitted).

269. *In re* Estate of Flaws, 2012 SD 3, ¶ 19, 811 N.W.2d 749, 753-54; Aman v. Edmunds Cent. Sch. Dist. No. 22-5, 494 N.W.2d 198, 200 (S.D. 1992); Lee v. Mellette, 90 N.W. 855, 856 (S.D. 1902).

270. In addition to the limitations of legislative intent and context, the South Dakota Supreme Court has been reluctant to extend the canon to the interpretation of constitutional provisions. Kramar v. Bon Homme Cnty., 155 N.W.2d 777, 779 (S.D. 1968); Hofer v. Bd. of Cnty. Comm'rs of McCook Cnty., 334 N.W.2d 507, 509-10 (S.D. 1983).

271. State v. Armstrong, 2020 SD 6, ¶ 25, 939 N.W.2d 9, 15 (quoting Argo Oil Corp. v. Lathrop, 72 N.W.2d 431, 434 (S.D. 1955)). *See also* SCALIA & GARNER, *supra* note 114, at 107 (noting that application of the canon is context dependent); SUTHERLAND, *supra* note 105, § 47:23 (noting that the canon gives way to evidence of contrary legislative intent).

272. Rehurek v. Rapid City, 275 N.W. 859, 859 (S.D. 1937); Argo Oil Corp. v. Lathrop, 72 N.W.2d 431, 434 (S.D. 1955); Bahlkow v. Preston, 244 N.W.2d 93, 95 (S.D. 1932).

273. ESKRIDGE, *supra* note 1, at 121.

274. Olson v. Butte Cnty. Comm'n, 2019 SD 13, ¶ 12, 925 N.W.2d 463, 466 (related statutes on effective date of local government actions); *In re* PUC Docket HP 14-0001, 2018 SD 44, ¶ 16, 914 N.W.2d 550, 556 (related statutes on administrative appeal procedures); City of Rapid City v. Estes, 2011 SD 75, ¶¶ 12-13, 805 N.W.2d 714, 718-19 (related city ordinances on construction project sureties); Loesch v. City of Huron, 2006 SD 93, ¶¶ 8-9, 723 N.W.2d 694, 697 (related statutes on timing to commence civil action against municipality).

275. Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 SD 7, ¶ 15, 709 N.W.2d 824, 830-31 (internal citations omitted).

276. *Id.*

277. JELLUM, *supra* note 15, at 176-77.

278. *Id.*

In pari materia may also be mistaken for a general whole act or whole code provision.[279] The whole code rule is better seen as a call to read statutes in context and harmoniously than direction that all statutes can provide interpretive clarity for all others, regardless of shared purpose.[280]

e. Last antecedent rule

South Dakota has long applied the doctrine of last antecedent.[281] The last antecedent rule directs that a modifying clause is limited to the last antecedent term.[282] The rule can be overcome by "something in the subject matter or dominant purpose" that suggests otherwise.[283] Examples provide guidance on how that principle takes effect.

A statute about school closures limited closure of "such a school" to the immediately preceding sentence which exempted elementary schools whose closure would render a school ineligible for state aid.[284] The South Dakota Public Records Act provision that exempted from disclosure documents deemed confidential by "court order, contract, or stipulation of the parties" in a civil or criminal action did not limit "of the parties" to the word "stipulation" because doing so would frustrate the overriding purpose of openness for public records.[285] A property tax exemption for leases of three or more years by charitable institutions was held inapplicable because the purpose of the statute suggested it did not extend to property not owned by a legal services corporation.[286]

The last antecedent rule is a doctrine South Dakota accepts. It provides useful interpretive guidance in many instances. It appears readily overcome by statutory context, however. It is far more an interpretive guideline than rule in South Dakota.

C. SUBSTANTIVE CANONS

Language canons provide guidance about how statutory text is presumptively and traditionally structured.[287] They are neutral (at least ostensibly so) as to the substance of the law.

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279. *Id.* at 178-80; Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. Rev. 76, 90 (2021).

280. SCALIA & GARNER, *supra* note 12, at 167-69.

281. Kaberna v. Sch. Bd. of Lead-Deadwood Sch. Dist. 40-1, 438 N.W.2d 542, 543 (S.D. 1989) (citing Lewis v. Annie Creek Mining Co., 48 N.W.2d 815, 819 (S.D. 1951)) (noting adoption of last antecedent rule in Lewis).

282. *Id.*

283. *Id.*

284. *Id.* at 542-43.

285. Argus Leader Media v. Hogstad, 2017 SD 57, ¶¶ 6-12, 902 N.W.2d 778, 781-83.

286. Appeal of Real Estate Tax Exemption for Black Hills Legal Serv., Inc., 1997 SD 64, ¶¶ 8-10, 563 N.W.2d 429, 431-32.

287. CROSS, *supra* note 67, at 86-87.

Substantive canons on the other hand, implement substantive preferences about what the law should be.[288] They reflect some substantive value which they direct statutes be interpreted to advance. If language canons are "rules of the road" linguistically, substantive canons are one-way streets, or thumbs on the scale to mix metaphors.[289]

1. Constitutional Avoidance

South Dakota presumes that statutes are not intended to violate the constitutions of the United States or South Dakota.[290] The South Dakota Supreme Court will only invalidate a statute if its unconstitutional nature is demonstrated beyond a reasonable doubt.[291] The question of constitutionality will not even be taken up unless it is necessary to resolve the specific question presented; even then, the threshold question will be if there is any reasonable interpretation of the statute that does not render it unconstitutional.[292]

South Dakota's approach to constitutional issues is a manifestation of the canon of constitutional avoidance.[293] Application of the canon is debated and evolving.[294] It is not merely the presumption of constitutionality, itself a species of the general presumption of statutory efficacy.[295] The canon instead provides guidance about when a constitutional question should or should not be answered. That guidance has been muddled over time. One school of thought is that the canon simply directs that between two or more reasonable readings of a statute, the one that does not raise a constitutional question should be adopted.[296] The second approach is that the court must adopt any possible reading that avoids a constitutional question.[297] The latter approach is much less deferential to the enacting legislature, arguably empowering courts to rewrite statutes.[298] It may

288. *Id.* at 88-89.

289. *Id.*

290. State v. Piper, 2006 SD 1, ¶ 50, 709 N.W.2d 783, 804; Metro. Life Ins. Co. v. Kinsman, 2008 SD 24, ¶ 3, 747 N.W.2d 653, 655 n.1 (internal citations omitted).

291. State v. Rolfe, 2013 SD 2, ¶ 13, 825 N.W.2d 901, 905 (internal citations omitted).

292. *Id.*; State v. Orr, 2015 SD 89, ¶ 9, 871 N.W.2d 834, 837 (citing State v. Outka, 2014 SD 11, ¶ 24, 844 N.W.2d 598, 606); *Metro. Life Ins. Co.*, 2008 SD 24, ¶ 3, 747 N.W.2d at 655 n.1 (internal citations omitted).

293. SCALIA & GARNER, *supra* note 12, at 247-49; ESKRIDGE ET AL., *supra* note 8, at 360-61; JELLUM, *supra* note 15, at 317-20.

294. *See, e.g.*, Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 518-21 (assessing the Roberts Court's use of the canon); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1279-80, 1315 (defending "aggressive" use of the canon to serve as both an interpretive tool and remedial device); Charlotte Garden, *Avoidance Creep*, 168 U. PA. L. REV. 331, 335 (criticizing the negative effect of constitutional avoidance on the development of labor law).

295. SCALIA & GARNER, *supra* note 12, at 247-49.

296. JELLUM, *supra* note 15, at 319-20. This can also be referred to as the "classic" canon of constitutional avoidance. ESKRIDGE, *supra* note 1, at 309-12.

297. JELLUM, *supra* note 12, at 320. Some refer to this as the "modern" canon. ESKRIDGE, *supra* note 1, at 317-20. Even within the "modern" approach, there is divergence as to whether the canon is used to reject an actual unconstitutional option, *id.*, or to require courts to reject an interpretation that merely presents a constitutional question. JELLUM, *supra* note 12, at 320.

298. JELLUM, *supra* note 12, at 320; ESKRIDGE ET AL., *supra* note 8, at 363.

also prevent courts from addressing important constitutional questions.[299] While the canon is nominally ubiquitous, it is not entirely so in acceptance, application, or consistency.[300]

Two observations can be made about South Dakota's application of the canon of constitutional avoidance. First, South Dakota commonly makes the error that Antonin Scalia and Bryan Garner critique of formulating constitutional avoidance as a presumption of constitutionality.[301] Second, when limited to the analytic question of whether a constitutional question should be resolved, South Dakota occupies a somewhat muddled middle ground between the schools of thought that use that canon as a tiebreaker between two reasonable readings and the mandate to identify any possible constitutional reading to simply avoid the question. South Dakota first identifies if the statute can be "reasonably construed" to avoid a constitutional question, only taking the question up if not.[302] Another way to think of this is that South Dakota hews closer to those jurisdictions that first inquire if an ambiguity can be identified to avoid a constitutional question than those that, having first identified ambiguity, adopt the reading that avoids a constitutional issue.[303]

2. Rule of Lenity

The rule of lenity generally dictates that criminal statutes should be interpreted in favor of the defendant.[304] Jurisdictions take different approaches.

299. ESKRIDGE ET AL., *supra* note 8, at 363-67. The statute may also fail to comport with the reality of legislative intent. The canon presumes that legislatures enact statutes with the intent for them to be constitutional and even avoid constitutional questions. In fact, legislatures may enact statutes in some instances entirely for the purpose of raising a constitutional question in order to change the status quo. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088-89 (2018) (South Dakota sales tax statutory amendments that directly challenged the then-current law on taxation of remote sellers); Brendan F. Pons, Comment, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?*, 58 S.D. L. REV. 119, 132-38 (2013) (tracing the history of South Dakota enactments challenging the framework of *Roe v. Wade* in whole or part). Choosing the path that avoids the constitutional question may, in these instances, entirely disregard the intent of the enacting legislature. It would thus be inconsistent with the fundamental intentionalist purpose of statutory interpretation in South Dakota. *Supra* note 25.

300. SCALIA & GARNER, *supra* note 12, at 249.

301. *Id.* at 247-48; State v. Piper, 2006 SD 1, ¶ 50, 709 N.W.2d 783, 804; Metro. Life Ins. Co. v. Kinsman, 2008 SD 24, ¶ 3, 747 N.W.2d 653, 655 n.1 (internal citations omitted).

302. State v. Rolfe, 2013 SD 2, ¶ 13, 825 N.W.2d 901, 905 (internal citations omitted).

303. It is beyond the scope of this article to fully explore the critiques of this position, but they certainly exist. SCALIA & GARNER, *supra* note 12, at 249-50; JELLUM, *supra* note 12, at 319-20. The formulation is another instance of tension with the court's expressed guiding purpose to identify and give effect to the intent of the enacting legislature. *See supra* note 25 and accompanying text (exploring this further).

304. SUTHERLAND, *supra* note 105, § 59:4.

Some apply the rule only to resolve an ambiguity;[305] others apply it as a general norm of construction.[306]

South Dakota takes a more restrictive approach to the rule of lenity. A statute directs courts that the common law rule "that penal statutes are to be strictly construed has no application to this title."[307] Instead, "all penal statutes shall be construed according to the fair import of their terms, with a view to effect their objects and promote justice."[308] That statute has received no substantive amendment since its enactment in 1939.[309]

The South Dakota Supreme Court has decided few cases considering the rule of lenity or South Dakota Codified Law section 22-1-1. They add only so much to the terms of the statute and the rule themselves.

First, the South Dakota Supreme Court has decided one case that has directly dealt with South Dakota Codified Law section 22-1-1. In a challenge to convictions for criminal riot, the court dismissed strict construction of criminal statutes quickly at the outset of its opinion.[310] The opinion did not analyze the statute, simply noting it and its prohibition on strict construction of criminal statutes.[311]

Second, the rule of lenity has been considered in two cases. In the first case, *State v. Seidschlaw*,[312] the driver in a fatal car crash challenged their consecutive manslaughter sentences.[313] The South Dakota Supreme Court dismissed a rule of lenity argument in finding that the legislature had expressly authorized consecutive sentences.[314] In the second case, *Reck v. South Dakota Board of Pardons and Paroles*,[315] an inmate challenged their parole eligibility calculation.[316] The inmate argued that the applicable parole eligibility statutes

305. *Id.* nn.1 & 6. A historical drift from an expansive to restrictive application of the rule of lenity has been noted. *See e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1084-86 (2022) (Gorsuch, J., concurring) (noting that lenity was historically applied as a presumption that ambiguous statutes be interpreted strictly in favor of defendants but has erroneously been narrowed in application). The drift from rule of lenity as an interpretive presumption to mere tiebreaker (at best) is an example of the transactional cost of "interpretive-regime change" identified by Professor Phil Frickey. Frickey, *supra* note 23, at 1989-90. When the background assumptions and interpretive rules for reading statutes change, it presents uncertainty for both the legislatures enacting statutes and those seeking to interpret and apply them. *Id.* The lack of shared understanding between drafter and interpreter is particularly problematic in the context of criminal law and the potential for unintended or inconsistent incursions on the liberty of citizens. *Wooden*, 142 S. Ct. 1063 at 1087.

306. SUTHERLAND, *supra* note 105, §§ 59:4 n.1, 59:6.

307. SDCL § 22-1-1 (2017). Title 22 is South Dakota's criminal code. SDCL §§ 22-1-1 to -49-6 (2017).

308. SDCL § 22-1-1.

309. As part of a 2005 comprehensive criminal code revision, the second sentence was amended from saying that penal statues "are to" be construed to say that those statutes "shall" be so construed. 2005 S.D. Sess. Laws ch. 120 § 356.

310. State v. Bad Heart Bull, 257 N.W.2d 715, 719 (S.D. 1977).

311. *Id.*

312. State v. Seidschlaw, 304 N.W.2d 102 (S.D. 1981).

313. *Id.* at 107.

314. *Id*. (citing SDCL § 22-6-6.1 (2017)).

315. 2019 SD 42, ¶ 1, 932 N.W.2d 135.

316. *Id.* ¶ 1, 932 N.W.2d at 137.

were ambiguous and therefore must be interpreted in his favor under the rule of lenity.[317] The court rejected that argument, finding that no ambiguity existed.[318] *Reck* expressly noted that the rule of lenity applied only when "grievous ambiguity or uncertainty" existed after exhausting consideration of the statutory "text, structure, history, and purpose" to resolve it.[319]

Neither case discussed South Dakota Codified Law section 22-1-1.[320] Both entertained that the rule of lenity can apply (*Reck* expressly and *Seidschlaw* implicitly).[321] This suggests that the South Dakota Supreme Court reads South Dakota Codified Law section 22-1-1 simply to prohibit a presumptive rule of lenity applicable to all statutes, not the more conservative application in the face of an unresolved ambiguity in a criminal statute.[322] An alternate explanation is that the South Dakota Supreme Court has simply never considered the issue.

Third, in three cases the South Dakota Supreme Court has considered the rule of lenity in the context of double jeopardy.[323] In a challenge to convictions for both murder and commission of a felony while armed, the court noted only in passing that the rule of lenity could apply to double jeopardy analysis.[324] Another case involved convictions for both first degree rape and criminal pedophilia challenged on double jeopardy grounds.[325] The South Dakota Supreme Court held that it was not clear that the legislature intended to create cumulative punishments and, facing an ambiguous statute, explicitly invoked the rule of lenity to conclude that the statutes at issue constituted only a single offense.[326] The court rejected an argument to apply the rule of lenity to different criminal statutes, holding that they clearly provided for separate offenses.[327]

Lastly, the South Dakota Supreme Court has consistently called for strict construction of habitual offender statutes.[328] The court has concluded that the habitual offender act should be strictly construed because it is "highly penal" and because it is "a statute being in derogation of the common law" that should be

317. *Id.* ¶ 9, 932 N.W.2d at 139.

318. *Id.* ¶ 12, 932 N.W.2d at 139.

319. *Id.* ¶ 9, 932 N.W.2d at 139 (internal citations omitted).

320. *See* State v. Seidschlaw, 304 N.W.2d 102 (S.D. 1981); *Reck*, 2019 S.D. 42, ¶ 1, 932 N.W.2d 135.

321. *Seidschlaw*, 304 N.W.2d at 107 (S.D. 1981); *Reck*, 2019 S.D. 42, ¶ 9, 932 N.W.2d at 139.

322. Wooden v. United States, 142 S. Ct. 1063, 1084-86 (2022) (Gorsuch, J., concurring); *see also* The Supreme Court 2007 Term-Leading Cases, *Rule of Lenity*, 122 HARV. L. REV. 475, 475-76 (2008) (describing competing approaches to the scope of application for the rule of lenity).

323. State v. Simmons, 313 N.W.2d 465 (S.D. 1981); State v. Dillon, 2001 SD 97, ¶ 1, 632 N.W.2d 37; State v. McMillen, 2019 SD 40, ¶ 1, 931 N.W.2d 725.

324. *Simmons*, 313 N.W.2d at 467.

325. *Dillon*, 2001 SD 97, ¶ 21, 632 N.W.2d at 46.

326. *Id.* This express invocation of the rule of lenity further suggests that the South Dakota Supreme Court has purposefully drawn a distinction between the general background rule of strict construction prohibited by SDCL § 22-1-1 and the rule of lenity to be applied only in the case of an ambiguous statute.

327. *McMillen*, 2019 SD 40, ¶¶ 20-22, 931 N.W.2d at 732. This rationale is inconsistent with the direction that statutes in derogation of the common law be liberally interpreted. SDCL § 2-14-12.

328. *See* State v. Gehrke, 474 N.W.2d 722, 726 (S.D. 1991); State v. Grooms, 339 N.W.2d 318, 320 (S.D. 1983); State v. Alexander, 313 N.W.2d 33, 37 (S.D. 1981); Black v. Erickson, 191 N.W.2d 174, 176 (S.D. 1971); *In re* Abelt, 145 N.W.2d 435, 437 (S.D. 1966); State v. Jameson, 123 N.W.2d 300, 335 (S.D. 1963).

interpreted "in favor of life or liberty."[329] The court has made no reference to the predecessors of South Dakota Codified Law section 22-1-1 that preclude strict construction of all "criminal and penal provisions and all penal statutes" in that title,[330] which includes the habitual offender provision.[331] This has been the approach consistently taken in interpreting prior versions of the habitual offender statute.[332]

South Dakota has both statutes and caselaw which provides direction on the ideas behind the rule of lenity. The resulting rules are not perfectly clear and somewhat context dependent. Criminal statutes must be carefully evaluated to determine their application and the motivating intent of the enacting legislature.

V. ASSESSING SOUTH DAKOTA'S LEGISPRUDENCE

What conclusions can be drawn from this catalogue of South Dakota legisprudence? There are several themes that emerge that can be usefully considered.

First, South Dakota's approach to statutory interpretation is well-defined and consistent. The purpose of interpretation has been clearly and consistently articulated as identifying and giving effect to the intent of the legislature.[333] This purpose drives the balance of South Dakota's legisprudence. The clear commitment to legislative intent shapes how South Dakota approaches interpretive questions across the board.[334] The clarity and consistency of South Dakota's commitment to intentionalism makes the task of both the drafter and interpreter of legislation easier. Because South Dakota's approach is known and consistent, greater confidence exists in drafting statutes given that an interpreting court will not artificially rely on text alone, nor will they freelance based on a general sense of statutory purpose. It also makes interpretation more flexible in the use of interpretive tools and materials than a jurisdiction that has made a different or less clear choice of interpretive regime.[335] Generally, any tool that helps identify true legislative intent can be brought to bear in South Dakota.[336]

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329. *Gehrke*, 474 N.W.2d at 726 (internal citations omitted).

330. SDCL § 22-1-1 (provision guiding construction of penal statutes).

331. SDCL §§ 22-7-1 to -12 (2017) (habitual offender statutes). Nor did it note the general statutory directive that statutes in derogation of the common law should not be narrowly construed. SDCL § 2-14-12.

332. *Grooms*, 339 N.W.2d at 320; *Alexander*, 313 N.W.2d at 37; *Black*, 191 N.W.2d at 176; *In re Abelt*, 145 N.W.2d at 437; *Jameson*, 123 N.W.2d at 335.

333. *See supra* notes 24-25 and accompanying text (noting that South Dakota is an intentionalist jurisdiction).

334. For example, the court's heavy reliance on text as the starting point of interpretation is not inviolate, and intent continues to be the guiding star. *In re* Estate of Flaws, 2016 SD 60, ¶ 44, 885 N.W.2d 336, 349.

335. Frickey, *supra* note 23, at 1982, 1989-90 (noting the costs of changes or lack of clarity on interpretive regime); JELLUM, *supra* note 15, at 92-93 (noting that limits on interpretive tools by textualists can be perceived as somewhat arbitrary).

336. *See supra* notes 85-86 and accompanying text (discussing the use of other sources to determine legislative intent).

This clear focus on legislative intent, found through whatever means can help, significantly insulates interpretation from judicial manipulation through limits on the tools of interpretation.

Second, South Dakota has developed a robust rulebook for how to implement its clear interpretive purpose.[337] Statutes provide interpretive direction on many recurring issues of interpretation.[338] Judicially developed interpretive tools have also been articulated.[339] South Dakota has well-established rules of the interpretive road. Accidents happen however, and not all the interpretive rules are followed all the time.

Some of the statutory commands are ignored or contradicted at times.[340] Not all are consistent in their threshold of what evidence can be used to overcome them, typically citing legislative intent but sometimes legislative purpose or statutory spirit.[341] Some of the statutes setting interpretive rules are cited rarely or inconsistently, if at all.[342] Most have not been updated in decades.[343] A statutorily defined interpretive toolkit is useful. It ideally provides interpretive clarity and consistency. It also makes the interpretive process more transparent to those outside the judiciary. As helpful as South Dakota's statutory toolkit is, however, the instances when it is not relied on, or is applied inconsistently or flatly contradicted, confuses the interpretive process.[344] Providing more currency and consistency in these statutes is a place for the South Dakota Legislature to improve South Dakota's legisprudence. A very interesting question is whether there is a legislative drive to revisit, revise, or seek enforcement of the statutory rules.

Some of the judicially adopted doctrines are also confused at times.[345] This confusion is not widespread, but it exists. Another interesting question is whether the South Dakota Supreme Court seeks to clarify areas of interpretive confusion or inconsistency *sua sponte* or if litigants seek to present those conflicts to the court to do so.[346]

Third, South Dakota's legisprudential development has been devoid of battles over theory. Cases in South Dakota have focused much more on using accepted tools to interpret the statute at issue rather than arguments about the

337. *See supra* Part II and accompanying text (discussing South Dakota's statutory interpretation laws).

338. SDCL §§ 2-14-1 to -32.

339. *See supra* Part III and accompanying text (discussing South Dakota's use of canons of statutory interpretation).

340. *See supra* note 110 and accompanying text (exploring this further)

341. *See supra* notes 123-125 and accompanying text (exploring this further).

342. *See supra* notes 111-114, 118 and accompanying text (exploring this further).

343. *See supra* notes 93-95 and accompanying text (exploring this further).

344. *See supra* notes 340-341 and accompanying text (exploring this further).

345. *See supra* note 252 and accompanying text (exploring this further).

346. For example, it would be entirely possible for either the court or litigants to raise a question like the inconsistency of exceptions for contrary legislative intent in the interpretive statutes. *See supra* notes 121-122 and accompanying text (exploring this further). Instances of flat contradiction of an interpretive statute could also be revisited. *See supra* note 110 and accompanying text (exploring this further). This is not to argue that changing the current state of the law would improve South Dakota's legisprudence. It would not in some instances. But revisiting the questions through legislation or express decisions may provide more clarity.

appropriate interpretive tools or goals themselves. In other words, they have been battles of application, not theory. This is entirely unlike the United States Supreme Court where the battle has raged in recent decades about textualism versus other interpretive regimes and where the interpretive regime has changed drastically over time.[347]

This lack of theoretical wrangling cuts both ways. On the positive side, the absence of dispute about the interpretive regime has made statutory interpretation in South Dakota a stable, largely non-controversial enterprise. The focus remains on getting a particular interpretation right, not winning the theoretical war. That stability provides greater clarity and confidence to drafters and interpreters. The negative side can be that South Dakota's interpretive regime and tools are somewhat undertheorized. South Dakota is committed to intentionalism but has said little about why that regime is preferred. The South Dakota Supreme Court consistently seeks to be a faithful agent of the South Dakota Legislature but has not written extensively about why separation of powers, institutional competence, or other values make that so. It is not strictly necessary for the court to do so in its decisions or the legislature to do so in its statutes guiding interpretation. However, the failure to do so leaves South Dakota's legisprudence resting more on a foundation of assumptions, albeit widely shared ones, than on clearly articulated and debated premises. Lest that be dismissed as primarily the theoretical concern of law professors, express statements of the reasons statutes are interpreted in certain ways or by using only certain tools communicates importantly to drafters, other interpreters, and the general public about South Dakota's governmental structure, division of governmental powers, and governmental values.[348] Articulating legisprudential theory matters and South Dakota has not done so in a comprehensive or consistent fashion.

South Dakota's lack of extensive articulation of legisprudential theory is paired with the reality that it takes a very mainstream approach to the interpretation of statutes. Most of its rules of interpretation are common and applied in common fashion. South Dakota avoids extremes of interpretive regimes or tools. Instead, it is a very mainstream intentionalist court, focused on the mainstream task of giving effect to legislative will through the application of commonly used interpretive devices. This too provides important stability and clarity to South Dakota's legisprudence. A moderate and practical approach forestalls theoretical contention to a great degree.

Lastly, while South Dakota focuses on legislative intent, anyone drafting or interpreting statutes in South Dakota fails to pay close attention to text at their

347. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233, 237-39 (1997); Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y. SCH. L. REV. 149, 149-51 (2000); Abbe Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539, 543-44 (2011); Ellen P. Aprill & Nancy Staudt, *Theories of Statutory Interpretation (and Their Limits)*, 38 LOY. L.A. L. REV. 1899, 1901-03 (2005).

348. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 300-01 (2019).

peril. The South Dakota Supreme Court consistently starts its search for legislative intent with legislative text.[349] While legislative intent does prevail, the text of any statute has undeniable input on how it will be applied and interpreted. It is the first source of legislative intent and other sources, such as legislative history, are in short supply in South Dakota.[350] Therefore any interpreter or drafter must thoughtfully, carefully, and thoroughly assess with statutory text. While it is an overstatement to say that text is king in South Dakota's legisprudence, it is undeniably the most common and powerful tool of interpretation. Any statutory analysis, revision, or draft requires careful consideration of the text. It should not end there, but it must begin there.

VI. CONCLUSION

Statutes are central to the life of modern law. It is imperative that everyone who works with the law has a solid foundation in how statutes are enacted and interpreted. Additionally, it is important that jurisdictions develop a thoughtful and reasonably thorough body of legisprudence to guide those who write, apply, and interpret statutes.

South Dakota has developed a significant body of legisprudence. That body does not answer every question, nor are the answers clear or consistent in every instance. On balance it is a clear, rich, and workable body of law, however. Working from the foundational principle that the intent of the enacting legislature is always the guiding star, South Dakota has articulated significant interpretive guidance through statutes and caselaw. The drafter or interpreter of statutes who is familiar with these principles of legisprudence can be a reliable guide through South Dakota's codified laws. The catalogue of legisprudence in this article provides a starting point, but not an end point, for that journey.

349. *See supra* notes 34-35 and accompanying text (exploring this further).
350. *See supra* note 72 and accompanying text (exploring this further).