Dower: Reigniting Equal Protection Claims in Response to the Legalization of Same-Sex Marriage and the Resulting Changes to Property Rights

by

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"Dower: An ancient, archaic, common-law interest created to protect helpless women."[1]

INTRODUCTION

The United States was founded on the premise that all men are created equal.[2] Yet the English common law adopted by the colonies maintained numerous inequalities. The common-law systems of dower—where a widow would be granted a one-third life estate in her deceased husband's property—and curtesy—where a widower would be granted full ownership in his deceased wife's property—exemplifies just one of the systems that exacerbated the inequality between men and women.

Women's rights advocates began arguing against common-law dower in the nineteenth century. Suffragettes maintained their arguments on two fronts. First, they claimed that dower was an assault on the private family, noting that because of dower a widow not only lost her husband but her home as well.[3] Second, they decried the inequalities between dower and curtesy and called for gender equality in inheritance law.[4] Later, women's rights advocates attacked the ease by which husbands could exploit dower to leave widows destitute.[5] Modern critics of dower attack the system based on its gender-based distinctions and claim the system is an unconstitutional violation of the Equal Protection Clause.

Most states today have, either judicially or statutorily, abolished common-law dower and curtesy. However, the doctrines remain in a small minority of jurisdictions. Although Michigan has constitutionally abolished curtesy,[6] the state statutorily maintains the doctrine of dower, providing a widow the option of taking a one-third life estate in her deceased husband's property

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[1] Professor Clark-Johnson (Apr. 2, 2015).
[2] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)
[3] Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1674 (2003).
[4] *Id*. at 1676.
[5] *Id.* a t 1692.
[6] MICH. CONST. art. X, § 1 (1963).

if she was not devised the property in his will.[7] Dower rights also allow a wife to prevent the transfer or encumbrance of the property during her husband's life.[8] This doctrine has been attacked on constitutional grounds with its critics arguing that the statute violates the Equal Protection Clause by granting this right solely to women.[9]

Although dower is not a hotly debated issue—due to the implementation of other inheritance schemes like intestacy succession and elective share statutes that are gender-neutral and provide a surviving spouse with the ability to acquire property from a deceased spouse—dower still has relevancy with the limitations placed on a husband's ability to transfer property. Further, this doctrine may become a more pressing issue in light of the changing social constructs of marriage.[10] The Supreme Court is hearing arguments in April 2015 and will make rulings on whether states must recognize same-sex marriages conducted in other states and whether a state limiting marriage to one man and one woman is a violation of the Equal Protection Clauses of the Fifth and Fourteenth Amendments.[11] If the Court rules affirmatively on either of these questions property rights based on marriage will be severely affected. Among those, the rights that accompany dower laws could operate to invalidate previous property transfers. Further, by only recognizing dower for widows, dower would be limited to one-man-one-woman couples and female same-sex couples thereby discriminating against male same-sex couples and creating another Equal Protection claim within the state of Michigan.[12]

This paper argues that an affirmative ruling will result in dower creating a more evident equal protection violation of the Fifth and Fourteenth amendments of the Constitution. Part I

[7] MICH. COMP. LAWS § 558.1.
[8] *See infra* Section II.B. (discussing the application of Michigan's dower statute).
[9] *See, e.g.*, In re Miltenberger Estate, 737 N.W.2d 513, 515 (Mich. App. 2007).
[10] *See infra* Section IV.B.
[11] *See* Bourke v. Beshear, No. 14-574, 2015 WL 213651 (2015).
[12] *See infra* Section IV.B.

provides a historical analysis of marital-property rights. Specifically, this section will discuss the historical timeline beginning with the common-law rule of dower, the feminist arguments against the doctrine, and the development of the elective share. Part II looks at the present status of dower. First, the part discusses the shift away from reliance on this marital property distribution system by the majority of jurisdictions. Second, a discussion of the application of gender-neutral dower systems is provided to compare with the gendered system of dower in Michigan. Part III provides an overview of the changes to gay rights whereby in a relatively short period of time same-sex marriage that was banned nationally is, as of the date of this writing, permitted in thirty states.[13] The Supreme Court has taken up the Sixth Circuit case of *DeBoer v. Snyder*[14] and an opinion regarding whether denial of same-sex marriage is an Equal Protection violation will be given this session. Part IV discusses whether the legalization of same-sex marriage has nullified the policy justifications supporting dower resulting in the statute failing the intermediate scrutiny test routinely applied by the courts. Finally, Part V provides solutions that Michigan can take in remedying the problems that the state will face as a result of its dower statute. Specifically, if the Supreme Court determines that the Fourteenth Amendment requires states to recognize same-sex marriage then Michigan's dower structure, which only gives dower rights to the widow of a spousal relationship, will create equal-protection violations. To avoid these constitutional claims and an adverse impact on the mortgage industry, Michigan's legislature should preemptively act to repeal its dower statute and rely on its gender-neutral forced share distribution provision.

[13] *Map: Same-Sex Marriage in the United States*, CNN (Apr. 3, 2015, at 12:51 PM), http://www.cnn.com/interactive/us/map-same-sex-marriage/. The remaining twenty states all have constitutional provisions prohibiting same-sex marriage. *Id.*

[14] 772 F.3d 388 (6th Cir. 2014)

I. A HISTORICAL REVIEW OF THE LAWS GOVERNING MARITAL PROPERTY DISTRIBUTION

The testamentary right of one to devise his property at death to whomever he wishes has been historically limited by various legal principles.[15] One limiting principle is dower. Dower is "[a]n entitlement guaranteeing a widow 'a life estate in one-third of the land that her husband owned in fee.'"[16] Further, dower "gives women a present inchoate right to prevent their husbands from transferring a fee simple in real property without consent."[17]

A. The Development of Dower

The concept of dower has ancient roots.[18] In England there was no testamentary freedom. Rather, land, which was the equivalent of an individual's wealth, passed along blood lines and not to surviving spouses.[19] Dower and curtesy were developed as a way to protect the spouse of a decedent. Dower, specifically, became a means of compensating a widow who would have relinquished control of her property acquired before or during the marriage to her husband.[20] Further, dower economically provided for a widow after her husband's property passed to his legal heirs.[21]

Dower was adopted by the American colonies.[22] While application varied from state to state,[23] the statutes generally provided that "a widow who was not satisfied with the portion her

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[15] Terry L. Turnipseed, *Why Shouldn't I be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 737-38 (2006).
[16] Joslyn R. Muller, Comment, *Haven't Women Obtained Equality? An Analysis of the Constitutionality of Dower in Michigan*, 87 U. DET. MERCY L. REV. 533, 533 n.1 (2010) (quoting BLACK'S LAW DICTIONARY).
[17] *Id.*; *see also* Turnipseed, *supra* note 15, at 738 (explaining that once dower attached to the land at marriage it could not be terminated by a husband's attempt to unilaterally transfer the property but instead required the wife agree to the property transfer and be evidenced by her signing the deed).
[18] *See* Turnipseed, *supra* note 15, at 738, 742 n.33.
[19] *Id.* at 743.
[20] *Id.* at 744. "Once married . . . a wife's tangible personal property became the property of her husband. If the husband predeceased his wife, however, the widow's tangible persona property that was hers before her marriage was 'kindly' returned to her, but only if the decedent husband had not alienated the items before death." *Id.*
[21] *Id.* at 743.
[22] Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1660 (2003). Canada also adopted a dower system based on the English law. W.G. DRAPER; A HANDY-BOOK OF THE LAW OF DOWER; WITH STATUTES, FORMS, PLEADINGS, &C. 1-2 (1863) ("Dower by

husband gave her in his will, could seek a write of dower *unde nihil habiut* against the tenant of the freehold." [24] Dower often was applicable when the husband either died intestate or failed to provide for his wife in his will.[25] The intent was to compensate women for the loss of control of their assets when they were married and to provide for the widow after the death of her husband.[26] This system worked well when wealth was based on land ownership.[27]

Despite the intent to ensure economic provision of widows, this was not always achieved and some widows dealt with the tragedy of losing "both her husband and her home."[28] After the death of the husband the widow was only granted quarantine rights while the estate was assessed.[29] This quarantine right allowed her to remain in the husband's home for forty days.[30] If the forty days passed prior to being assigned her dower interest she could be evicted from the

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the [Canadian] common law is defined to be an estate for life to which the wife is entitled, after the decease of her husband, in the third part of the lands and tenements of which her husband was seised, either in deed or in law, at any time during the coverture, to have and to hold to her in severalty by metes and bounds for the term of her life, whether she has had issue by her husband or not, and provided she be past the age of nine years at the time of her husband's death.").

[23] Dubler, *supra* note 22, at 1660.

[24] Aaron Schwabach, *The Specter of Civil Law Clawback Actions Haunting U.S. and UK Charitable Giving*, 26 PROBATE & PROP. 60, 62 (2012) (quoting Hall v. McBride, 416 So. 2d 986 (Ala. 1982)); W.G. DRAPER; A HANDY-BOOK OF THE LAW OF DOWER; WITH STATUTES, FORMS, PLEADINGS, &C. 1-2 (1863) ("Dower by the [Canadian] common law [was] defined to be an estate for life to which the wife is entitled, after the decease of her husband, in the third part of the lands and tenements of which her husband was seised, either in deed or in law, at any time during the coverture, to have and to hold to her in severalty by metes and bounds for the term of her life, whether she has had issue by her husband or not, and provided she be past the age of nine years at the time of her husband's death.").

[25] Dubler, *supra* note 22, at 1663.

[26] Muller, supra note 16, at 534. A husband not only had the right to control the wife's person and earnings, but by marriage he became the owner of her personal estate and all that she acquired. *Id.* Despite the intent to provide for the wife after dower, this was often a failed goal. *See* Dubler, *supra* note 22, at 1641. Dower rights were often ignored by husbands who would transfer land, without the consent of their wives, and search for legal loopholes after the fact. *Id.* As a result, the death of a husband often resulted in economic deprivation for a widow regardless of her common-law dower protections. *Id.*

[27] Turnipseed, *supa* note 15, at 746.

[28] Dubler, *supra* note 22, at 1660 n.41; *see also* Turnipseed, *supra* note 15, at 747 (arguing that in a system based on intangible wealth dower offers "little or no support at all").

[29] Turnipseed, *supra* note 15, at 747.

[30] *Id.*

home by her husband's legal heirs because she held no right of entry or ownership interest over the lands.[31]

Three significant economic impacts resulted from the existence of dower. First, dower affected the value of land making it less attractive for sale.[32] Second, the husband's testamentary freedoms were limited.[33] Third, dower extended coverture to widows—women who were no longer married.[34] Finally, the widow received her dower benefits before her deceased husband's creditors were paid from the estate.[35]

Recognizing the inefficiencies of dower to protect widows and the growing opposition to the regime, states began moving away from dower and chose to implement an elective, or forced, share system in its stead.[36] As a result, "in jurisdictions where common law dower and a statutory elective share exist together, one of dower's only real practical applications is to force the owner-spouse of real property to obtain, in certain situations, the signature of the non-owner-spouse to sell or encumber the land."[37] Today, dower only exists in Arkansas,[38] Kentucky,[39] Michigan,[40] and Ohio.[41]

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[31] *Id.*
[32] Dubler, *supra* note 22, at 1641.
[33] *Id.* at 1641.
[34] *Id.*; Coverture is defined as "the condition of being married." BLACK'S LAW DICTIONARY (10th ed. 2014).
[35] Turnipseed, *supra* note 15, at 741.
[36] *See id.* at 747.
[37] *Id.* at 738.
[38] ARK. CODE. ANN. § 28-11-301(a) ("If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be endowed of the third part of all the lands for life whereof his or her spouse was seized, of an estate of inheritance, at any time during the marriage, unless the endowment shall have been relinquished in legal form.").
[39] KY. REV. STAT. ANN. § 392.020 ("After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (½) of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third (⅓) of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished.").
[40] MICH. COMP. LAWS § 558.1; *see* SectionII.B (discussing dower in Michigan).
[41] OHIO REV. CODE ANN. § 2103.02 (West) ("A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage.").

B. Curtesy

Similar to dower rights, at common law a widower possessed a right of curtesy.[42] Through marriage the husband was granted a life estate to the entirety of his wife's property, including any rents or profits.[43] A child, capable of inheriting, borne from the marriage expanded his rights, granting him curtesy—"an inheritable life estate in his wife's land."[44] The requirement of a male heir—one capable of inheriting—has been suggested as a reason for the anxiousness with which men awaited the birth of an heir.[45] England abolished both dower and curtesy in 1833.[46]

C. The Elective, Yet Forced, Share

Nearly every separate-property state in the United States allows for the possibility of a surviving spouse to choose to elect against the deceased spouse's will.[47] Community property states, in contrast, do not have an elective share—also called a forced share—because, "viewing marriage as an economic partnership," each spouse owns all property acquired during the marriage "in equal, undivided shares."[48] In the separate-property states that still have dower, the surviving spouse must either choose between the elective or dower share.[49] However, because the surviving spouse is entitled to a greater share of property under the elective share, dower is rendered useless as an inheritance option in states that still offer both options.[50]

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[42] Dubler, *supra* note 22, at 1661.
[43] *Id.* at 1661; Turnipseed, *supra* note 15, at 742.
[44] Dubler, *supra* note 22, at 1661.
[45] Turnipseed, *supra* note 15, at 745.
[46] *Id.* at 746.
[47] *Id.* at 748. Georgia is the sole jurisdiction that does not provide an elective share but allows for a decedent to completely disinherit his or her spouse. *See* O.C.G.A. § 53-4-1 ("A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants.").
[48] JESSE DUKEMINER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 511 (9th ed. 2013). Only nine states are community property states, while two additional states are separate-property states with a community-property option. *Id.* at 512-13 & fig. 8.1.
[49] Turnipseed, *supra* note 15, at 747
[50] *Id.*

The elective share is still based on the desire to protect a spouse from disinheritance.[51] There is debate regarding whether this protection should be based on a theory of a support obligation or a partnership theory. Primarily, the partnership theory, which says that a surviving spouse should be able to elect to receive a portion of the deceased spouse's estate because the surviving spouse contributed to the estate, is considered the strongest justification.[52] This is similar to the community property regime where each spouse has ownership of the assets that were acquired during the marriage.[53]

The shift from reliance on dower, which is based on the support obligation theory, to the elective share began in the 1930s.[54] New York was the first state to make this change in 1929 with the passage of the Fearon Bill. [55] The bill modified the state's inheritance system and abolished statutory dower and curtesy.[56] In their stead, the state implemented a modern inheritance regime that was gender-neutral and allowed for an elective, or forced, share.[57] This forced share provision allowed for the continued provision of a spouse who had been inadequately provided for by will and chose to "elect" to take a fixed portion of the estate similar to intestacy.[58] Further, the statute increased the intestacy shares for widows and provided her with an estate in fee as opposed to a life estate in her deceased husband's real and personal

[51] DUKEMINIER, *supra* note 48, at 511.
[52] *Id.* at 514.
[53] *Id.* at 516.
[54] *See* Turnipseed, *supra* note 15, at 748.
[55] Dubler, *supra* note 22, at 1672.
[56] *Id.* This legislative reform was the result of an investigation into the realities of the estate statutes in force in the state. *Id.* at 1684-85. The reviewing commission found that dower was ineffective. *Id.* at 1685. Widows were left with insufficient means of economic support. *Id.* In reality, dower acted as a method of placating the widow without providing any actual support. *Id.* A significant number of men, the commission found, disinherited their wives, necessitating reform of inheritance statutes. *Id.* Their findings were inconsistent with their understanding of marriage, which requires a husband to support his wife even after his death. *Id.* Dower, giving a husband a means that would leave his wife penniless, was an affront to marriage and needed to be reformed. *Id.*
[57] *Id.* at 1672. The proposed legislation, however, required that the wife be faithful and not have abandoned her husband in order to elect. *Id.* at 1686. Similarly, the husband was required to have faithfully supported his wife or he would have lost his right to elect. *Id.*
[58] *Id.* at 1672.

property.[59] Although New York was not the first state to abolish dower, it was the first to consider widows and widowers equally.[60]

Initially, the elective-share provision only allowed a surviving spouse to elect to a share of the deceased spouse's probate property.[61] Unfortunately, this system was easily avoided through making non-probate transfers.[62] "[B]eginning in the 1960s, states moved to the concept of the augmented estate as a solution to the problem of inter vivos transfers."[63] The actual function of the elective share and augmented estate varies greatly between jurisdictions.[64]

The Uniform Probate Code's elective-share provision is based on the partnership theory of marriage and is an attempt to replicate the division of property that occurs in community-property jurisdictions.[65] The augmented estate under the UPC includes both probate and non-probate assets and is intended to "prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the rights of the surviving spouse to a share."[66] The UPC calculation of the augmented estate is the "sum of the decedent's net probate estate (§2-204), plus the decedent's nonprobate transfers to others (§2-205), plus the decedent's nonprobate transfers to the surviving spouse (§2-206), plus the

[59] *Id.* This system would, as a result, ensure that the commission's concept of marriage was supported and that traditional gender roles were reaffirmed—specifically that the husband operated as the provider and the wife was dependent on the husband. *Id.* at 1686.
[60] *Id.* at 1683. The gender-neutral statute was criticized as being disadvantageous to widows because it "ignor[ed] the ways in which women were positioned differently than men . . . inside and outside of marriage." *Id.* at 1689. Specifically, "the law should recognize that women were generally socially and legally disadvantaged within the family and thus should not be compelled to provide for their husbands" especially when the laws of New York at the time did not allow a wife to divorce a husband who had failed to provide for her during marriage. *Id.*
[61] Turnipseed, *supra* note 15, at 748.
[62] *Id.* Additionally, the probate only regime did not take into consideration a "surviving spouse's actual need, the contribution the survivor may have made to the estate, and the reason why the testator, who presumably knew his family situatin as well as anyone, preferred his particular depository plan." *Id.* at 749 (quoting Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 682 (1966)).
[63] Dubler, *supra* note 22, at 1709.
[64] Turnipseed, *supra* note 15, at 749.
[65] *Id.* at 750. Around a dozen states have adopted the UPC's version of the elective share. DUKEMINIER, *supra* note 15, at 536.
[66] DUKEMINIER, *supra* note 15, at 532-33 (internal quotations omitted).

surviving spouse's property and nonprobate transfers to others (§2-207)."[67] The augmented estate is then multiplied by a percentage determined by the length of the marriage to calculate the marital-property portion of the augmented estate.[68] Finally, the marital-property portion is divided by two to determine the value of the elective share.[69]

Although the drafters of the UPC intended the elective share statute to closely mirror the distribution of property in community property states there is an important difference. The elective share calculation includes all property of both spouses, where community property states only include property acquired during the marriage.[70]

II. THE PRESENT STATUS OF DOWER

Today, most states have abolished dower either, judicially or statutorily, and rely on the elective share. This shift away from the English tradition has resulted from a changing understanding of real property within the expanding national economy.[71] For example, in the eighteenth and nineteenth centuries various state courts began limiting a widow's dower rights by holding that she did not have any right to the profits acquired from any improvements a developer made to the land.[72] New York abolished dower statutorily in 1929.[73] Today, only four states maintain dower—Arkansas, Kentucky, Ohio, and Michigan. Michigan is unique in that it has maintained a gender-specific dower system. [74]

A. Gender-Neutral Dower Statutes

Most states have recognized the limited impact that dower can have in providing economic stability for a surviving widow. In its stead, these states have chosen to rely on the

[67] *Id.* at 535.
[68] *Id.* The percentages are given in UPC §2-203(b).
[69] DUKEMINIER, *supra* note 15, at 535.
[70] *Id.* at 536.
[71] *Id.* at 1650.
[72] MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 58 (1977).
[73] Dubler, *supra*, note 22, at 1649.
[74] Muller, *supra* note 16, at 533.

elective share to support surviving spouses.[75] Arkansas, Kentucky, Ohio, and Michigan, however, have held fast to their statutory dower schemes. With the exception of Michigan, these states have chosen to modify the common-law notion of dower, providing for a surviving widow, and have adopted gender-neutral statues that allow for a surviving spouse to take a portion of the deceased spouses' estate.

These dower statutes do not give rise to equal protection claims because they are gender neutral. Ohio recognizes dower in "[a] spouse who has not relinquished or been barred from it" and grants a one-third interest in the property seized during the marriage.[76] Arkansas recognizes dower when "a person dies leaving a surviving spouse and a child or children," and also grants that surviving spouse a one-third interest in the seized property. [77] Finally, Kentucky recognizes an interest in the survivor of either a wife or husband of a spouse who dies intestate.[78] Conversely, Michigan's gendered statute[79] gives rise to equal protection violation arguments.[80]

B. Michigan's Gender-Specific Dower Statute

The State Constitution of Michigan allows dower to be continued or abolished by operation of the state legislature;[81] common-law curtesy, however, has been constitutionally

[75] *See supra* Section I.C.
[76] OHIO REV. CODE ANN. § 2103.02 (West).
[77] ARK. CODE. ANN. § 28-11-301(a).
[78] KY. REV. STAT. ANN. § 392.020.
[79] An argument can be raised that due to the ambiguous nature of the Michigan statute that a court should read the language to be gender neutral. Specifically, the language reads that a *widow* of a *person* is entitled to dower rights of the lands in which her *husband* was seized. § 558.1 This ambiguity will require the court to determine who is entitled to dower rights—a widow of a male-husband; a widow of any person, whether that person be male or female; or whether the entire statute is gender neutral allowing a widow or widower of a husband or wife.
[80] Due to the gender neutral status of the Arkansas and Kentucky statutes they will not be discussed in terms of equal protection violations.
[81] MICH. CONST. art. X, § 1 (1963). The 1908 Constitution made no mention of either dower or curtesy. MICH. CONST. (1908). The delegates to the 1963 Constitutional Convention debated the necessity of dower. *See In re* Estate of Miltinberger, 753 N.W.2d 219, 223 (Mich. 2008) (Corrigan, J., concurring) (citing 2 Official Record, Constitutional Convention 1961, p. 2445). Arguments against dower included that dower is no longer a valuable option for a widow, that an elective share provides a superior alternative, and that it is too burdensome on property law. *Id.* Others rebuffed these arguments, indicating that dower still provided some "minimum protections" for women—especially those "who occupy traditional roles." *Id.* Delegate Ann Donnelly of Wayne County specifically noted the importance of allowing a wife to prevent her husband from transferring land without her signature. *Id*. The

abolished.[82] Acting on this constitutional authorization, the Michigan State Legislature has statutorily recognized dower.[83] The Michigan statute provides that "[t]he *widow* of every deceased *person*, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her *husband* was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof."[84] Unlike the state's elective share provision—which only operates after a spouse's death—dower gives a wife rights in her husband's property during his lifetime while he is seized[85] of the estate.

Upon marriage, a wife's inchoate dower rights immediately attach to any land her husband owned before marriage as well as to lands he acquires during the marriage.[86] The estate must be one "of inheritance," thus held either in fee simple or fee tail.[87] As such, these rights do not attach to personal property, an outstanding life estate, land that the husband held in fee but at all times was a land contract vendor, or held as a land contract vendee.[88]

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delegates to the convention determined that the ultimate decision was best left in the hands of the legislature to determine whether dower is needed as society changes over time. *Id.* at 223-24. Judge Corrigan noted in her concurrence that since the 1963 Convention the state legislature retained dower when it enacted EPIC in 1998 and refused to abolish dower statutorily in 2007. *Id.* at 224.

[82] MICH. CONST. art. X, § 1. In 1866 the Michigan Supreme Court recognized the inequitable property rights between husbands and wives. *See* Tonga v. Marvin, 15 Mich. 60, 66 (1866). Interpreting Act of March 11, 1844, the court reasoned that a husband had no interest in a wife's property that she acquired "either by her own personal industry, or by inheritance, gift, grant or devise, or to which she may at any time hereafter be entitled by inheritance, gift, grant or devise." *Id.* His right to control her person, however, was not affected. *Id.* Section 27 of the act stated that "if any married woman shall die without disposing of any such real estate, the husband surviving her shall have a life estate therein by the curtesy." *Id.* at 68. The state constitution of 1855 expanded the wife's property rights and gave her "full and absolute control of her real and personal estate, with power to contract, sell, transfer, mortgage, convey, devise and bequeath the same in the same manner and with the like effect as if she were unmarried." *Id.* at 69. This language, the court held, was incongruous with common law dower, and thus, abolished dower judicially. *Id.* at 70.

[83] MICH. COMP. LAWS § 558.1

[84] *Id.* (emphasis added).

[85] Sesin is defined as "[p]ossession of a freehold estate in land; ownership." BLACK'S LAW DICTIONARY (10th ed. 2014).

[86] 1 JOHN G. CAMERON, JR., MICHIGAN REAL PROPERTY LAW: PRINCIPLES AND COMMENTARY § 8.3, at 287 (3d ed. 2005)

[87] § 558.1; CAMERON, *supra* note 86, § 8.2, at 286-87.

[88] *Id.* § 8.4, at 288; MICHIGAN LAND TITLE STANDARDS § 4.1 (6th ed.), *available at* https://higherlogicdownload.s3.amazonaws.com/MICHBAR/a3e3ec65-50c1-474f-a532-30197d2d7171/UploadedImages/pdf/Chapter4.pdf ("Other interests in real property to which dower will not attach . . . are tenancies by the entireties; joint tenancies; estates in partnership; vendor's interests in land contracts; vendee's

Dower rights are expectation rights until the death of a husband.[89] Regardless, a wife is able to protect her interest. Although a purchase money mortgage or mortgage executed before the marriage have priority over a wife's dower claim,[90] any mortgage executed after the marriage is subject to the wife's dower interest.[91] This priority entitles the wife to any proceeds from the sale of the property, surplus from a foreclosure sale, and gives her a right to redeem in the event of a foreclosure on the property.[92] More importantly, "during the period of the marriage when a wife's right to dower is inchoate . . . a husband cannot convey perfect title to his real property unless his Michigan-resident wife bars her dower."[93] If an attempt to convey or encumber the property is made without the wife signing the agreement—or barring her dower—that agreement is unenforceable under the statute of frauds[94] and the wife would have twenty-five years from the date of conveyance or disposition to file a claim of dower in the county register of deeds where the land is located.[95]

There are a variety of methods that a wife can employ to bar her dower and allow her husband to convey title to his real property. First, she could sign on her husband's deed and acknowledge the signature was an attempt to bar her dower rights.[96] She could also execute her own deed to the party who acquired her husband's property.[97] Dower may be waived through

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interests in land contracts; and oil and gas leasehold interests. A wife is not entitled to dower in real property to which her husband held title in a fiduciary capacity.") (internal citations omitted).

[89] CAMERON, *supra* note 86, § 8.3 at 287.

[90] MICHIGAN LAND TITLE STANDARDS, *supra* note 88, § 4.5 ("A mortgage is a purchase money mortgage if the mortgage proceeds are applied on the purchase price."). Because a purchase money mortgage is considered the same transaction as the acquisition of the property itself the mortgage takes priority to the wife's dower interest. CAMERON, *supra* note 86, § 8.5 at 290.

[91] CAMERON, *supra* note 86, § 8.5 at 290.

[92] *Id.*

[93] *Id.*

[94] *Id.* § 8.2, at 287.

[95] *Id.* § 8.9, at 296; MICH. COMP. LAWS § 558.91 ("[A] claim of dower under oath setting forth the name and address of the persons claiming such dower and the name of the person who is or was her husband and through whom she claims to have obtained dower in such lands and a description of the lands in which dower is claimed.").

[96] CAMERON, *supra* note 86, § 8.6 at 291.

[97] *Id.* Consideration is not required in exchange for barring dower. *Id.*

either a pre- or post-nuptial written agreement stating the intent to relinquish dower.[98] Finally, a divorce decree or judgment may include a maintenance provision in lieu of dower that would bar the divorced wife from dower in the husband's property.[99] All methods of barring dower are required to be "unambiguous in intent" and would be invalidated if executed as the result of fraud or coercion.[100]

Michigan's Estates and Protected Individuals Code (EPIC) requires that a widow make a selection between abiding by the terms of her deceased husband's will, take an elective share, or take her dower right.[101] Unlike dower, the elective share provision, which operates to protect spouses from being disinherited from their partner's estate, is gender neutral and does not give any rights until the death of a spouse.[102] The elective share provides the surviving spouse "1/2 of the sum or share that would have passed to the *spouse* had the testator died intestate, reduced by 1/2 of the value of all property derived by the *spouse* from the decedent by any means other than testate or intestate succession upon the decedent's death."[103] Therefore, while the dower statute presents equal protection violation claims, the elective share being gender-neutral would be able to effectively provide for a deceased spouse without making constitutionally suspect gender-based distinctions. These constitutional claims against dower will be amplified if the Supreme Court legalizes same-sex marriage this term thereby resulting in sexual-orientation and gender discrimination arguments.

[98] MICH. COMP. LAWS § 700.2205.
[99] MICH. COMP. LAWS § 552.101.
[100] CAMERON, *supra* note 86 § 8.6 at 293.
[101] MICH. COMP. LAWS § 700.2202.
[102] MICH. COMP. LAWS § 700.2202(2)(B)
[103] *Id.* (emphasis added).

III. THE CHANGING LEGAL STATUS OF SAME-SEX MARRIAGE

From the mid-twentieth century to the present there has been a dramatic shift in public sentiment and legal rights for the LGBT community. The gay-rights movement began in New York's Greenwich Village after police raided, and then harassed the patrons of, an unlicensed gay bar.[104] Despite advocating for equal rights, the public was not receptive to gay rights in the twentieth century.

Several national decisions were made that limited the rights of the gay community. First, the Supreme Court held in *Bowers v. Hardwick*,[105] that the Equal Protection Clause of the Constitution did not protect homosexuals who engaged in acts of sodomy, even if they engaged in the acts within the privacy of their homes.[106] In making this decision, the Court stated that there is no fundamental right to engage in homosexual activity.[107] Rather, the Court held that the statute prohibiting sodomy was based on moral grounds and that notions of morality are sufficient to support the rational basis test.[108] Then, in 1993, Congress codified the ban preventing homosexuals from serving in the military.[109] Finally, in 1996 the Defense of Marriage Act was passed barring the government from recognizing the same-sex marriages.[110]

The Supreme Court reversed its stance on sodomy laws in 2003. In *Lawrence v. Texas*,[111] the Court held that a state could not demean the existence of homosexuals by criminalizing their

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[104] *Gay Rights Timeline: Key Dates in the Fight for Equality*, NBC NEWS (Mar. 23, 2013 2:23 AM), http://usnews.nbcnews.com/_news/2013/03/23/17418872-gay-rights-timeline-key-dates-in-the-fight-for-equality.
[105] 478 U.S. 186 (1986).
[106] *Id.*
[107] *Id.* at 191-93.
[108] *Id.* at 196. The rational basis test requires the contesting party prove there is no permissible interest to which the government action is rationally related.
[109] *Legislative History of the Law Regarding Homosexuals in the Military*, CENTER FOR MIL. READINESS, http://cmrlink.org/content/article/34488 (last visited Apr. 24, 2015); 10 U.S.C. § 654, *repealed by* Pub.L. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010).
[110] *Gay Rights Timeline: Key Dates in the Fight for Equality, supra* note 104.
[111] 539 U.S. 558 (2003).

private sexual conduct.[112] Recognizing that other nations did not adhere to the principals espoused in *Bowers* and state court decisions had eroded its application, the Court held that the statute had no rational relation to a legitimate governmental purpose.[113] Rather, it was drawn out of animosity toward a particular group[114] and cannot satisfy the rational basis standard.[115]

Ten years later the Court issued its decision in *United States v. Windsor*,[116] holding that Section three of the Defensive of Marriage Act was an unconstitutional denial of Equal Protection rights.[117] The Court concluded that DOMA violated the Fifth Amendment because it "single[d] out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty" and "impose[d] a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper."[118] After the Court's ruling in *Windsor*, some appellate courts interpreted the holding to require a heightened level of scrutiny when reviewing discrimination based on sexual orientation.[119] The opinion of *Windsor* itself did not specifically indicate what standard the Court applied. Same-sex marriage has been legalized by federal judicial order in a number of jurisdictions since the *Windsor* decision.[120]

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[112] *Id.*
[113] *Id.* at 574.
[114] *Id.*
[115] *See* Romer v. Evans, 517 U.S. 620 (1996) (holding that an ordinance based on the dislike for a particular group cannot meet the rational basis standard).
[116] 133 S. Ct. 2675 (2013).
[117] *Id.*
[118] *Id.* at 2695-96. The State of New York had recognized the same-sex marriages but same-sex couples were not permitted to claim federal tax exemptions for estate taxes due to DOMA. *Id*.
[119] SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).
[120] Alaska, *Hamby v. Parnell*, Arizona, *Connolly v. Jeanes*, California, *Perry v. Schwarzenegger* (finding Proposition 8 unconstitutional), Colorado, *Burns v. Hickenlooper*, Idaho, *Latta v. Otter*, Montana, *Rolando v. Fox*, Nevada, *Sevcik v. Sandoval*, North Carolina, *General Synod of the United Church of Christ v. Cooper*, Oklahoma, *Bishop v. Smith*, Oregon, *Geiger v. Kitzhaber*, Pennsylvania, *Whitehood v. Wolf*, South Carolina, *Condon v. Haley*, Utah, *Kitchen v. Herbert*, Virginia, *Bostic v. Rainey*, West Virginia, *McGee v. Cole*, Wisconsin, *Wolf v. Walker*, and Wyoming, *Guzzo v. Mead*.

In 2014, the Sixth Circuit heard the case of *DeBoer v. Snyder*.[121] The case challenged a Michigan law that limited marriage to couples constituting one man and one woman, which thereby limits same-sex couples from jointly adopting children because second-parent adoptions are limited to married couples.[122] A Federal District Court in the Eastern District of Michigan held that Michigan's ban on same-sex marriage is an unconstitutional violation of the Equal Protection Clause.[123]

The State of Michigan appealed the decision to the Sixth Circuit, which issued a stay on the District Court decision.[124] *DeBoer* was one of three cases consolidated by the Sixth Circuit that involved marriage equality.[125] The Sixth Circuit held that: (1) states' decisions to limit marriage to one man and one woman did not violate same-sex couples' due process and equal protection rights; and (2) states' refusal to recognize same-sex marriages conducted in other states did not violate the Due Process and Equal Protection Clauses.[126] This holding resulted in a circuit split because the Sixth Circuit was the first federal appeals court to rule against same-sex marriage rights.[127]

The *DeBoer* decision was, not surprisingly, appealed and on January 16, 2015, the Supreme Court granted a writ of certiorari to answer two limited questions.[128] First, "does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?"[129] Second, "does the Fourteenth Amendment require a state to recognize a marriage

[121] 772 F.3d 388 (6th Cir. 2014)
[122] *Id.*
[123] DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014).
[124] DeBoer v. Snyder, No. 14-1341, 2014 U.S. App. LEXIS 7259 (6th Cir. 2014).
[125] The other two cases were *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), and *Tanco v. Haslam*, 7 F. Supp. 759 (S.D. Ohio 2014).
[126] 772 F.3d 388
[127] DeBoer v. Snyder *(6th cir.)*, CONSTITUTIONAL ACCOUNTABILITY CENTER, http://theusconstitution.org/cases/deboer-v-snyder (last visited Apr. 7, 2015).
[128] Bourke v. Beshear, No. 14-574, 2015 WL 213651 (2015).
[129] *Id.*

between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?"[130] An affirmative answer by the Court to either of these questions will have a dramatic impact on a wide array of rights that are defined on the basis of marital status.[131]

IV. WILL DOWER CREATE AN EQUAL PROTECTION ISSUE?

A. Intermediate Scrutiny Test for Gender-Based Distinctions

When reviewing the constitutionality of dower, it must pass the intermediate scrutiny test because the Court has recognized gender as a suspect class.[132] This test requires that a gender-based classification meet a two-pronged test.[133] First, the classification must further an important governmental objective.[134] Second, the classification must be substantially related to the achievement of those objectives.[135] Traditionally, dower has been found to satisfy the intermediate scrutiny test.[136]

Dower has been upheld due to the continued notion that a woman is financially dependent on her husband and, therefore, requires greater protection after his death.[137] As recently as 2007 the Michigan Court of Appeals upheld dower on this justification.[138] The appellate court rejected the plaintiff's claim that by favoring women over men Michigan's dower

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[130] *Id.*
[131] These issues include, but are not limited to, joint tenancy by the entireties property, bankruptcy, and creditor's rights. Although these issues are not discussed within the bounds of this paper, they, among numerous others, are areas that should be examined to determine how best to redefine marital rights after the legalization of same-sex marriage.
[132] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that a statute that has gender-based classifications, here allowing sale of 3.2% beer to eighteen-year-old women but not until men were twenty-one years old, must serve an "important governmental objectives and must be substantially related to [the] achievement of those objectives"); *In re* Estate of Miltenberger, 737 N.W.2d 513 (Mich. App. 2007). The Court's analysis of gender-based discrimination under the intermediate test is inconsistent. Muller, *supra* note 16, at 539.
[133] *Craig*, 429 U.S. at 197.
[134] *Id.*
[135] *Id.*
[136] *See Miltenberger*, 737 N.W.2d at 519.
[137] *See* Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a tax exemption provided solely to widows based on Florida's attempt to balance the income disparity between men and women).
[138] *Miltenberger*, 737 N.W.2d at 519 (relying on the decision in *Kahn* to justify the holding that dower serves an important governmental objective); *see also*, Emily S. Horvath & Daniel W. Matthews, *Trust and Estates*, 54 WAYNE L. REV. 467, 471 (2008).

regime violated the Equal Protection guarantee of the Constitution.[139] Applying the intermediate scrutiny test—upholding the law only if was substantially related to an important governmental interest—the court determined that dower's protection of widows was an important governmental objective as evidenced by its specific mention in the Michigan Constitution.[140] The presence of dower in the Constitution, the court argued, indicated that the drafters intended to recognize dower as a legitimate property interest.[141] Further, cushioning a widow from experiencing a severe economic burden after the death of her husband is an important governmental interest.[142] Therefore, Michigan's dower statute did not violate the Equal Protection Clause.[143]

Critics have argued that it is not a valid governmental interest to maintain the notion that women are economically dependent on their husbands. "The extension of a right to widows, but not widowers, is permissible if its purpose is to 'cushion the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,' but it is impermissible when it is based on 'archaic and overbroad' generalizations that men are the bread-winners and their families depend on their earnings."[144] Although disparity in earnings between men and women remains,[145] the notion that women are helpless and entirely financially dependent on their husband's estate is antiquated.

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[139] *Miltenberger*, 737 N.W.2d. at 517.
[140] *Id.* at 517-19.
[141] *Id.* However, it should be noted that Michigan's Constitution grants the legislature the power to legislate regarding dower interests, including the opportunity to abolish dower. MICH. CONST. art. X, § 1 (1963).
[142] *Miltenberger*, 737 N.W.2d at 516; *see also* Orr v. Orr. 440 U.S. 268, 280 (1979) ("[A]ssisting needy spouses is a legitimate and important governmental objective."); Califano v. Webster, 430 U.S. 313, 317 (1977) ("Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has also been recognized as an important governmental objective.'') (internal quotations omitted).
[143] *Miltenberger*, 737 N.W.2d at 516.
[144] Muller, *supra* note 16, at 538.
[145] "In 2013, female full-time workers made only 78 cents for every dollar earned by men, a gender wage gap of 22 percent. Women, on average, earn less than men in virtually every single occupation for which there is sufficient earnings data for both men and women to calculate an earnings ratio." *Pay and Equity Discrimination*, INSTITUTE

B. Intermediate Scrutiny Test as Applied After the Legalization of Same-Sex Marriage

Legalization of same-sex marriage will present new obstacles for the maintenance of dower as a constitutionally permissible statute. Dower will not only be able to be challenged on gender-discrimination grounds but will also be able to be challenged on the basis of sexual orientation, whereby only awarding dower to a widow prevents spouses in male couples from benefitting from the protection.[146] Further, even as applied to women, same-sex marriage severely diminishes the notion that dower advances the interest of preserving the economic status of widows when they are no longer the economically dependent spouse.[147]

Critics of dower have already argued that dower is under and over inclusive,[148] these claims will be heightened by the legalization of same-sex marriage. Dower's protection of only women results in granting financial protection to women who are economically self-reliant.[149] Meanwhile, dower ignores the plight of men who have no economic self-reliance but are supported by their wife's financial assets.[150] The recognition of the legality of female marriages will create a new spin to this argument. First, it will destroy the analysis that dower is in place to protect the economically dependent spouse from poverty because in a two-woman marriage both parties are from the economically dependent class. If these women are able to support

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FOR WOMEN'S POLICY RESEARCH, http://www.iwpr.org/initiatives/pay-equity-and-discrimination (last visited Apr. 6, 2015).

[146] Male couples will not only not benefit from the economic protections on death of the spouse but will also not be able to protect their interest in having unencumbered property because they have no right to prevent the transfer or mortgaging of the land during their spouse's lifetime without having an inchoate dower right.

[147] An additional argument could be raised that due to the language of Michigan's dower statute—where one portion references a widow's spouse and then her husband—that lesbian couples would not be able to benefit from dower. *See supra* note 79. Such a reading of the statute would further strengthen the sexual-orientation discrimination argument.

[148] *See In re* Estate of Miltinberger, 753 N.W.2d 219, 225 (Mich. 2008) (Corrigan, J., concurring).

[149] For example, in 2011 Ronda Stryker was named one of the ten wealthiest people in Michigan with an estimated net worth of $2.6 billion. Yet, if she were married she would have dower interest in real property owned by her husband. *See* Jeffrey Buck, *Michigan's Wealthiest Residents*, WOODWARD SPINE (Mar. 16, 2011 11:26 AM), http://woodwardspine.com/2011/03/16/michigans-wealthiest-residents .

[150] *See* Muller, *supra* note 16, at 552-53 (arguing that a needs-based dower system would more adequately meet the state's interest in providing for economically disadvantaged surviving spouses).

themselves without the economic support of a man the reality is that the traditional arguments supporting dower are severely diminished. Further, the regime can be drastically over-inclusive in the cases where a marriage is comprised of two successful women.

Even the traditional argument in support of dower—that it needs to remain to protect women—becomes less persuasive as women are becoming more economically equivalent to men and, as a result, should not need to be concerned with being disinherited. Studies show that today it is far more likely for men to be disinherited than women.[151] Sources argue that disinheritance has been ineffective dating back to the founding of the United States.[152] In 2000, one study examining more than 2,500 wills found that not one of those wills were contested based on disinheritance and only nine wills total were contested by the surviving spouse.[153] Therefore, the claim in support of dower that it is necessary to prevent a widow from being disinherited should not weigh heavily in the intermediate scrutiny analysis.

In light of the changing economics and changing legal status of same-sex marriage,[154] the constitutional analysis of dower will have to change from its traditional reliance on the notion that it is an important governmental interest to protect the economic stability of widows. Instead, the courts will have to recognize that the economic dynamics of marriage have changed whereby a wife may be economically independent and not rely on her husband. Further, as same-sex marriages are legalized and two women can support a marriage on their own, without the economic backing of a man, the economic reality should prove to the court that the archaic notion of women as helpless and dependent needs to be stricken from the court's rationale.[155]

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[151] Turnipseed, *supra* note 15, at 777 (citing a study that stated "men were disinherited at a rate of 25.6 percent versus 14.3 percent"); *see also* Muller, *supra* note 16, at 536 (arguing there is no need for dower because the conditions that necessitated its existence have eroded),

[152] Turnipseed, *supra* note 15, at 772.

[153] *Id.* at 771-72.

[154] *See supra* Part III.

[155] *See supra* Section I.A. (discussing the development of dower to economically protect widows).

Therefore, dower, already constitutionally suspect[156], should be found to be unconstitutional after the legalization of same-sex marriage.

V. HOW SHOULD MICHIGAN PROCEED?

Michigan is one of the few states that maintain a dower regime[157] and will be dramatically affected by the Supreme Court legalizing same-sex marriages. Because Michigan only offers dower rights and has constitutionally abolished its curtesy counterpart,[158] the dower scheme will face a stronger constitutional challenge and be found an equal protection violation.[159] Recognizing this impending action, Michigan should act to modify its inheritance statutes, either proactively or judicially. Thus, the state legislature can choose from various options.[160] First, it could do nothing but let the Michigan judicial system determine that dower is unconstitutional and the legislature can act in response to that ruling. For various reasons discussed below, this is the least appealing of the options. Second, the state could reinstitute curtesy, thereby affording both men and women property rights in their spouse's property upon marriage. Finally, and most appealingly, the state could repeal dower entirely and rely solely on the elective-share statute already in place.

A. Do nothing

The state may choose to refrain from action. If this is the state's chosen alternative it would refrain from legislating on the issue of dower and instead wait for a court ruling confirming that, in light of the legalization of same-sex marriage, dower has become an

[156] *See supra* Section IV.A.
[157] *See supra* Section II.B.
[158] MICH. CONST. art. X, § 1.
[159] *See supra* Section IV.B.
[160] While a judicial decision may find dower unconstitutional, it is unlikely that the court will establish a regime to fill the void that judicially abolishing dower would create. *See In re* Estate of Miltenberger, 275 Mich. App. 47 (2007) ("[I]f an alternative to dower exists that is more desirable as a matter of policy, the Legislature, not the judiciary, must so decide.").

unconstitutional violation of the Equal Protection Clause. This action could be brought immediately or at some point in the unpredictable future.

Michigan should refrain from waiting for a judicial ruling that dower is unconstitutional[161] before reforming the state's inheritance regime. To do so would be very problematic for the mortgage and title insurance industries.[162] Without statutory guidance from the legislature these industries will not be able to anticipate the ramifications that they may experience as a result of later judicial rulings.

Consider the following hypothetical. In June of 2004 Jill and Jane were married in Massachusetts[163] but lived in Michigan. Jill had owned property in Michigan in fee simple prior to the marriage. If this were a heterosexual couple, and Jill were actually male, Jane's dower interest in the property would have attached at the time of marriage.[164] Because Michigan does not recognize same-sex marriage,[165] however, the dower interest did not attach at the time of the couple's marriage in Massachusetts. In 2013 Jill and Jane chose to sell their home. Jill alone signed the purchase contract and deed conveying the property at the time of sale. Then, in 2015, the Supreme Court rules that states are required to recognize same-sex marriages performed in other states.[166] If this ruling has retroactive effect, in other words, if Michigan were to have been required to recognize Jill and Jane's wedding since it occurred in 2004, Jane's dower interest would have attached to the property at the time of the marriage in 2004.[167] As a result, the conveyance from Jill without Jane signing the contract or deed to bar her dower interest would

[161] In addition to the Constitutional concerns, the court will be forced to make an attempt to interpret the language of the statute that will have an unpredictable outcome. *See supra* note 79.
[162] *See supra* notes 86 - 100 and accompanying text (discussing the ability of a wife to use her dower rights to prevent her husband from conveying the property).
[163] Massachusetts became the first state to legalize same-sex marriage by judicial ruling. *See* Goodridge v. Dep't of Public Health, 798 N.E. 2d 941 (Mass. 2003).
[164] *See* CAMERON, *supra* note 86, § 8.3, at 287.
[165] *See supra* text accompanying notes 121 - 123.
[166] *See supra* text accompanying notes 128 - 130.
[167] *See* CAMERON, *supra* note 86, § 8.3, at 287 (stating dower attaches at the instant of marriage).

be an invalid transaction in violation of the statute of frauds.[168] Jane would have twenty-five years from the time the property transferred to contest the property transfer as a violation of her dower interest, should Jill predecease her within that twenty-five year period.[169]

This hypothetical exemplifies the concerns that face the title and mortgage industries if the state legislature does not act to preemptively redefine the dower regime. First, any non-purchase money mortgage given by one-spouse without the consent of her partner could be deemed an invalid mortgage because it was created without the wife's approval to encumber the property.[170] Second, title insurance companies would be responsible to insure or defend both owners and mortgage holders for wives in same-sex couples coming forward and asserting their dower interests in an effort to invalidate both mortgages and deed transfers that did not contain their signatures.[171]

The state may consider a second option, where it does not change the dower system but rather recognizes dower rights for same-sex couples beginning at a specified date. This in itself will raise new Equal Protection issues if the Court determines that marriages should have been recognized from the time they were created because it will limit the rights of those wives discussed above to bring their dower claims. Inevitably, this option would merely operate as a patchwork fix. It would not relieve any of the underlying issues of dower and should be avoided.

B. Adopt a Constitutional Amendment to Reinstate Curtesy

A second option that the legislature could consider would be to reinstate dower's counter-part—curtesy.[172] Curtesy would alleviate the Equal Protection arguments because it would grant

[168] *Id.* § 8.5, at 287, 290.
[169] MICH. COMP. LAWS § 558.91.
[170] *See* CAMERON, *supra* note 86, § 8.5, at 287, 290.
[171] *Why You Need Title Insurance*, Am. Land Title Ass'n, http://www.homeclosing101.org/whyneed.cfm (last visited Apr. 25, 2015) (explaining that title companies defend owners of title policies in the event a covered claim arises).
[172] *See supra* Section I.B. (discussing common-law curtesy).

men additional property-rights protections[173] and, as such, would no longer discriminate on the basis of gender. Further, the ability for a claim of discrimination on the basis of sexual-orientation would be avoided because men in same-sex marriages would be protected by curtesy. Reestablishing curtesy, however, is not the ideal solution it seems at first glance. First, it would require a constitutional amendment because curtesy was constitutionally abolished in Michigan.[174] Second, curtesy would not solve the problems the mortgage industry will face if same-sex marriage is legalized.[175]

The most significant problem with this option is that the legislature could not enact a curtesy statute to complement the current dower system. Instead, the state constitution would need to be amended. The Michigan Constitution provides three methods for amendment:[176] (1) through a legislatively-referred constitutional amendment could be proposed by either chamber of the state legislature and would need to be approved by 2/3 of the members of each house;[177] (2) through the initiative process;[178] or (3) through a constitutional convention.[179] Of these options, only a legislatively-referred constitutional amendment would be a plausible option for dower and curtesy reform. These are such limited areas of the law that garnering enough public support to engage in a successful initiative process would be unlikely.

A similar option would be to amend the current dower statute to make it gender-neutral like the statutes in Arkansas, Kentucky, and Ohio.[180] This option would be in opposition to the intent of abolishing curtesy because the delegates found that men did not need economic support

[173] Such as an estate in the entirety of his wife's property. *See supra* text accompanying note 44.
[174] MICH. CONST. art. X, § 1.
[175] *See supra* notes 170-171 and accompanying text.
[176] MICH. CONST. art. XII.
[177] MICH. CONST. art. XII, § 1.
[178] MICH. CONST. art. XII, § 2.
[179] MICH. CONST. art. XII, § 3.
[180] *See supra* Section II.A.

from the estate of their deceased wives.[181] Furthermore, it would present the same issues as implementing a statute that set an effective date for dower to become gender neutral. However, this would again not alleviate the constitutional claims that could arise from male couples who were not able to access the dower during the years that they were married yet not legally recognized in Michigan.

Although amending the constitution to allow a curtesy law would alleviate the Equal Protection issue within the state, concerns surrounding invalidating transfers and encumbrances that occurred when the state did not recognize the legality of the marriage would remain. Further, amending the statute to be gender neutral would neither alleviate the constitutional concerns nor remedy the concerns of invalid transfers. Recognizing the serious limitations of these options, the legislature should choose to refrain from the task of creating a gender-neutral dower system and instead look to abolishing dower entirely.

C. Abolish Dower and Rely on the Gender-Neutral Elective Share.

The Michigan legislature needs an option that will remedy the constitutional issues presented by gender-specific dower while also preventing the upheaval of the mortgage industry. Preemptively repealing the dower statute and abolishing common-law dower is the best, and most practical, option available. By taking legislative action the state legislature would be able to provide opportune notice to the mortgage industry of the impending change to the dower statute. Specifically, the legislature would be able to set an effective date for the legislation that would provide guidance as to when mortgage and title companies would no longer be concerned with ensuring a wife has barred her dower when her spouse is encumbering or conveying property.

Additionally, the long-standing concerns over disinheritance would not be left without a remedy. The elective-share statute is already in place that provides protection to a spouse,

[181] *See In re* Estate of Miltinberger, 753 N.W.2d 219, 223 (Mich. 2008) (Corrigan, J., concurring).

regardless of gender, from disinheritance.[182] Therefore, the desire to ensure a less-fortunate partner would be provided for after the death of the providing spouse would be fulfilled through the elective share provision.[183] By abolishing dower and relying on this elective share provision the Michigan legislature would be able to effectively evade an equal protection battle over the archaic dower rights statutes.

CONCLUSION

The Supreme Court's decision in *Bourke v. Beshear*[184] this term carries with it the potential to cause an upheaval in property law. An affirmative decision on either of the issues before the Court will redefine who holds property rights in systems that depend on marital status—such as joint tenancy and dower.[185] As a result, the equal protection arguments against dower will be strengthened.[186] The notion that women need to be protected and provided for by their more economically viable spouse will carry little weight with lesbian couples who are on equal economic footing. Further, recognizing these dower rights only in women presents a new equal protection issue where neither spouse in a male couple is granted the right, yet a widow in both lesbian and heterosexual couples would be afforded dower protections. Therefore, dower would be an unconstitutional violation of the Equal Protection Clause because it discriminates both on the basis of gender and sexual orientation. [187]

Recognizing the likelihood of having an unconstitutional property-rights regime, the Michigan legislature should act proactively to change the state's inheritance system.[188] In order to avoid a judicial decision that invalidates dower as being unconstitutional—which would result

[182] MICH. COMP. LAWS § 700.2202.
[183] *Id.* § 700.2202(2)(B).
[184] No. 14-574, 2015 WL 213651 (2015).
[185] *See supra* note 131 and accompanying text.
[186] *See supra* Section IV.B.
[187] *See supra* Section IV.B.
[188] *See supra* Section V.C.

in upheaval to the mortgage industry and the possibility of numerous title insurance claims[189]—the legislature should repeal the state statutes recognizing dower rights in a widow and abolish common-law dower. In its stead, the legislature should rely on the current gender-neutral elective-share system that affords adequate protection to a spouse who was disinherited from a deceased spouse's estate plan.[190]

[189] *See supra* Section V.A.
[190] *See supra* Section V.C.; MICH. COMP. LAWS § 700.2202(2)(B).