

*The Death of Dower: Dower's Repeal in Michigan*  
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## Introduction

Dower is often a confusing topic for attorneys. Some attorneys believed it to be an ancient relic of the past and ignored it. Others were aware that it was still very much alive in Michigan and had to deal with what it meant in the modern age. According to Black's Law Dictionary, dower is defined as at common law, a widow's right, at her husband's death to a life estate in one-third of the land her husband had seisen (known as fee simple).<sup>1</sup> It is important to note that dower rights are only applicable to women. The rights a widower has in his wife's estate are known as curtesy.<sup>2</sup> Curtesy is defined as the right a husband has to occupy a life estate in his wife's property, assuming at least one child has been born alive to the couple.

Until very recently, dower was still alive in Michigan, though curtesy had been abolished.<sup>3</sup> In 2016, Governor Rick Snyder signed into law 2016 P.A. 489 which abolished dower effective on April 6, 2017.<sup>4</sup> This abolishment marks the end of a legal right that women have enjoyed in Michigan since it became a state, and have enjoyed in England for centuries.

This paper will begin with the history of dower in England. Then it will travel to America and Michigan where it was imported along with the rest of the common law from England. The paper will examine how dower has survived attacks based on the Equal Protection Clause of the Fourteenth Amendment, then how the Supreme Court decision in *Obergefell v. Hodges* impacted dower. Next, the paper will examine dower's repeal in Michigan and a possible claim against the state for inverse condemnation. Finally the paper will then present a case study about the effects of the repeal of dower.

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<sup>1</sup> Black's Law Dictionary 565 (9<sup>th</sup> ed. 2009).

<sup>2</sup> Black's Law Dictionary 440 (9<sup>th</sup> ed. 2009).

<sup>3</sup> Mich. Comp. Laws §557.214 (1947).

<sup>4</sup> 2016 Mich. Pub. Acts. 489.

## Dower in England

It is very difficult to trace the origin of dower to a starting point. As one scholar noted:

From very early times, English law assured to a wife certain rights in her husband's property if she survived him. For centuries those rights have been known as dower. Although the word itself is of French origin, the provision in English law long antedates the coming of the Normans, and its precise beginnings are lost in the dim antiquities of the Germanic law which prevailed in England before the Conquest. The origins of dower take us back to a period in Teutonic history when the bridegroom made a payment to the kinsmen of the bride, in return for the rights over her which he acquired by the marriage, and gave to her a morning [sic] gift for her support if she outlived him.<sup>5</sup>

The oldest reference to dower in a written statute is in the Magna Carta of 1225.<sup>6</sup> This historic agreement was between the nobility of England and King John. Its purpose was to limit the tyrannical powers of monarchs and provide some rights to the nation's people (as long as those people were noblemen). The Magna Carta stated: [L]et there be assigned to [the widow] for her dower a third part of all the land of her husband which was his in his life, unless she was endowed of less at the church door.<sup>7</sup>

The tradition of dower continued in England and became a part of England's common law. Once a woman married, her property became her husband's, and she and her husband were viewed as one legal entity. In addition, wives were not treated as heirs to their husbands under the laws of primogeniture.

There was five types of dower in the English Common Law. *Dower ad ostium ecclesiae* was the closest to modern meaning of dower. It was the property secured by law, in bride's

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<sup>5</sup> George L. Haskins, *The development of common law dower*, 62 Harv. L. R. 42, 42 (1948).

<sup>6</sup> Magna Carta of 1225, as quoted in *The ins and outs of the Alabama elective share*, 58 Ala L R 1161, 1162 (2007).

<sup>7</sup> *Id.*

name at the church porch (where marriages used to take place).<sup>8</sup> This was optional.<sup>9</sup> Dower wasn't the same as bride price; rather, it was legal assignment of movable or fixed property that became the bride's property.<sup>10</sup>

*Dower de la plus belle* was a hereditary conveyance of tenure by knight service. It was abolished in 1660.<sup>11</sup>

*Dower ex assensu patris* was the dower given to the bride by the father of the bridegroom.<sup>12</sup> This became obsolete long before it was formally abolished (by the Dower Act 1834).<sup>13</sup>

Dower at common law was of a very different nature. It was a legal declaration of a wife's right to property, while the husband lived, which he would manage; which would transfer to the wife's children when they were born; and which would secure her livelihood were she widowed.<sup>14</sup> A dower at common law was not liable for the husband's debts — which became controversial after many tried to use it to shield their property from the collection of debts.<sup>15</sup> The Dower Acts of 19th century abolished this.<sup>16</sup>

Dower by custom was an attempt to recognize the rules of dower customary at each manor and in each region.<sup>17</sup> Customary dowers were also abolished in the 19th century, and replaced with uniform inheritance laws.<sup>18</sup>

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<sup>8</sup> Black's Law Dictionary 565 (9<sup>th</sup> ed. 2009).

<sup>9</sup> 2 William Blackstone, Commentaries \*105-111.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Black's Law Dictionary 565 (9<sup>th</sup> ed. 2009).

<sup>13</sup> 2 William Blackstone, Commentaries \*105-111.

<sup>14</sup> Black's Law Dictionary 565 (9<sup>th</sup> ed. 2009).

<sup>15</sup> 2 William Blackstone, Commentaries \*105-111.

<sup>16</sup> The Dower Act, 1833, 3 & 4 Will. 4, c. 105 (Eng.).

<sup>17</sup> Black's Law Dictionary 565 (9<sup>th</sup> ed. 2009).

<sup>18</sup> Administration of Estates Act, 1925, 15 & 16 Geo. 5, c.23, §5, sch. 45 (Eng.).

It became a common practice for men to hold their lands in trust in order to prevent their wives from receiving their dower rights. It also allowed the husband to make land transfers without having to get a relinquishment of rights from his wife.<sup>19</sup> Accordingly, the English statute, the Fines and Recoveries Act 1833 was passed to impair the inviolability of dower by empowering husbands to cut off by deed or will their wives from dower.<sup>20</sup> Wives married before the Act still had to acknowledge the deed before a commissioner to bar their right to dower in property which their husband sold.<sup>21</sup> This was simpler than the previous procedure, which had required a fine to be levied in the Court of Common Pleas, a fictitious proceeding, by which she and her husband formally remitted their right to the property to the purchaser.<sup>22</sup>

Though America had fought a war against England to become an independent country, America retained the common law of England instead of a code based system like France. In fact, early American court opinions are full of references to English cases and statutes.

#### **Dower in the United States and in the State of Michigan**

Colonists from England brought the common law over the Atlantic Ocean in addition to their worldly goods. After the Revolutionary War was fought and won in 1789, some changes were made to the English version of dower.

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<sup>19</sup> 2 William Blackstone, Commentaries \*105-111.

<sup>20</sup> Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74, §27 (Eng.).

<sup>21</sup> Id.

<sup>22</sup> Id.

In addition to adopting the common law, many states codified the common law into statutes.<sup>23</sup> One significant difference between English law and American law was the lack of ecclesiastical courts in the fledging United States.<sup>24</sup> Ecclesiastical courts in England handled family matters such as marriage, custody, and inheritances.<sup>25</sup> To address this deficiency, legislatures enacted what we now recognize as probate courts to probate and administer wills and trusts as well as intestate shares.<sup>26</sup> In addition, most states enacted laws that allowed the executor of an estate to distribute cash sums to the widow instead of a life estate in her husband's real property.<sup>27</sup>

The oldest settlement in what is now Michigan is Sault Ste. Marie in the Upper Peninsula.<sup>28</sup> The third oldest European settlement west of the Appalachian Mountains, Sault Ste. Marie was founded on the banks of the St. Mary's Rapids as a permanent settlement for French missionaries and fur traders.<sup>29</sup>

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<sup>23</sup> Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times to the Present 35 (1987).

<sup>24</sup> *Id.* at 36

<sup>25</sup> Black's Law Dictionary 407 (9<sup>th</sup> ed. 2009).

<sup>26</sup> Black's Law Dictionary 410 (9<sup>th</sup> ed. 2009).

<sup>27</sup> A Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times to the Present PG (1987).

<sup>28</sup> *Sault Ste. Marie Entry*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Sault-Sainte-Marie-Michigan> (last visited April 3, 2017).

<sup>29</sup> *Michigan Entry*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Michigan> (last visited April 3, 2017).

After being conquered by first the British in the French and Indian War, and then the Americans in the War of 1812, what is now Michigan became the 26<sup>th</sup> state in the Union in 1837.<sup>30</sup> Michigan officially recognized the common law right of dower in *May v. Rumney*.<sup>31</sup>

Justice Wing stated:

I can see no reason why courts should not now, as formerly, look upon the claim of dower with great favor, and maintain the truth of what Lord Coke says was commonly said, that three things be favored in the law-*life, liberty and dower*.<sup>32</sup>

In 1846, the Michigan legislature codified dower in the Revised Statutes of 1846. MCL 558.1 stated:

The 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.<sup>33</sup>

The statute goes on to address various issues that occur when a widow claims her dower right. The first of these is when a property subject to dower is mortgaged. MCL 558.3-558.6 discusses a mortgage in combination with dower rights. First of all, a widow has dower rights in her husband's real property even if there is a mortgage on the property. If there is a mortgage on the property, the only individual with higher priority to rights in the property than the widow is the holder of the mortgage. MCL 558.5 and MCL 558.6 present the two options available to an executor of an estate that includes mortgaged property that a widow has dower rights in.

MCL 558.5

Where in either of the cases mentioned in the 2 last preceding sections, or in case of a mortgage in which she shall have joined with her husband, the mortgagee, or those claiming under him shall after the death of the husband cause the mortgaged

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<sup>30</sup> *Id.*

<sup>31</sup> *May v. Rumney*, 1 Mich. 1 (1847).

<sup>32</sup> *Id.*

<sup>33</sup> Mich. Comp. Laws §558.1 (1846).

premises to be sold by virtue of such mortgage, and any surplus shall remain after payment of the moneys due thereon and the costs and charges of the sale, such widow shall be entitled to the interest or income of 1/3 part of such surplus, for her life, as dower.<sup>34</sup>

MCL 558.6

If, in either of the cases above specified, the heir or other person claiming under the husband, shall pay and satisfy the mortgage, the amount so paid shall be deducted from the value of the land, and the widow shall have set out to her, for her dower in the mortgaged lands, the value of 1/3 of the residue after such deduction.<sup>35</sup>

Another issue that the statute addresses is in what form the widow may take her dower rights.

MCL 558.12 provides the executor with several options.

When a widow is entitled to dower in the lands of which her husband died seized, she may continue to occupy the same with the children or other heirs of the deceased, or may receive 1/3 part of the rents, issues and profits thereof, so long as the heirs or others interested do not object, without having the dower assigned.<sup>36</sup>

This statute mirrors the English practice of allowing the widow to live on the property during her lifetime to satisfy her dower rights.<sup>37</sup> The practice gave rise to the term “dower house”<sup>38</sup> and “dowager”<sup>39</sup>.

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<sup>34</sup> Mich. Comp. Laws §558.5 (1846).

<sup>35</sup> Mich. Comp. Laws §558.6 (1846).

<sup>36</sup> Mich. Comp. Laws §558.12 (1846).

<sup>37</sup> Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times to the Present PG (1987).

<sup>38</sup> *Dower House Definition*, DICTIONARY.COM, <http://www.dictionary.com/browse/dower-house?s=t> (Last visited April 3, 2017).

<sup>39</sup> Black’s Law Dictionary 565 (9<sup>th</sup> ed. 2009).



The statute then goes on to describe the circumstances which bar a widow from receiving her dower right. The first of these is if in a purchase or deed, the widow acknowledged a waiver of her dower right.<sup>40</sup>

The next circumstance is if the widow elects to receive a jointure from her husband in lieu of her dower.<sup>41</sup> A jointure is defined as a provision made by a husband for his wife by settling property on her at the time of marriage for her support after his death.<sup>42</sup> In Michigan, the jointure must consist of a life estate in the freehold property of her husband after his death.<sup>43</sup> A woman can consent to accepting her jointure in lieu of her dower rights if she is the age of legal majority or if she is not, her father or guardian can accept on her behalf.<sup>44</sup> This provision also applies to pre-nuptial agreements.<sup>45</sup> A widow does not waive her dower, if she ejected from the land assigned to her dower or she does not receive what she is entitled to under her jointure or pre-nuptial agreement.<sup>46</sup>

A woman cannot receive her dower if she is divorced from her husband.<sup>47</sup> A woman is not entitled to dower if her marriage is annulled because her marriage is deemed never to have existed.<sup>48</sup>

MCL 558.21 addresses the dower rights of non-citizens of the United States and non-residents of Michigan.

A woman being an alien, shall not on that account be barred of her dower, and any woman residing out of the state, shall be entitled to dower of the lands of her

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<sup>40</sup> Mich. Comp. Laws §558.13 (1846).

<sup>41</sup> Mich. Comp. Laws §558.14 (1846).

<sup>42</sup> Black's Law Dictionary 915 (9<sup>th</sup> ed. 2009).

<sup>43</sup> Mich. Comp. Laws §558.14 (1846)

<sup>44</sup> Mich. Comp. Laws §558.15 (1846)

<sup>45</sup> Mich. Comp. Laws §558.16 (1846)

<sup>46</sup> Mich. Comp. Laws §558.20 (1846)

<sup>47</sup> Mich. Comp. Laws §558.1 (1846)

<sup>48</sup> Mich. Comp. Laws §558.1 (1846)

deceased husband, lying in this state, of which her husband died seized, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death.<sup>49</sup>

MCL 558.22 discusses the responsibilities a woman occupying her dower rights. A widow in possession must not commit any waste or allow any waste.<sup>50</sup> There are four types of waste: active, permissive, ameliorative, and equitable.<sup>51</sup> Active waste is when someone acts in a way that strips the land of its value.<sup>52</sup> Permissive waste is when the person entitled to immediate possession does not maintain the property in good repair.<sup>53</sup> Ameliorative waste or legal waste is when the person entitled to immediate possession makes changes to the property.<sup>54</sup> An individual with a life estate is expected to pass on the property in the same condition that they received it in. Sometimes a grantor may grant themselves a life estate without impeachment for waste and the remainder to another. Stating “without impeachment for waste” allows the holder of the life estate to waste the property without the possibility of being sued.<sup>55</sup> Equitable waste is when the life estate holder commits wanton, willful, and reckless waste of the property for no reason or for malicious reasons.<sup>56</sup> Equitable waste allows the remainder man to recover against the life estate holder.<sup>57</sup>

MCL 558.22 states that the widow in occupying her dower land must keep it in good repair and prevent waste or she will be liable to the heir entitled to inherit the property after her death.<sup>58</sup>

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<sup>49</sup> Mich. Comp. Laws §558.21 (1846)

<sup>50</sup> Mich. Comp. Laws §558.22 (1846)

<sup>51</sup> Black’s Law Dictionary 1727 (9<sup>th</sup> ed. 2009).

<sup>52</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>53</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>54</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>55</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>56</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>57</sup> Black’s Law Dictionary 1728 (9<sup>th</sup> ed. 2009).

<sup>58</sup> Mich. Comp. Laws §558.24 (1846)

The statute also addresses the circumstances in which a widow is denied her dower rights.

If an executor or heir was found to deny a widow her lawful dower rights the damages are dictated in MCL 558.24-27.

MCL 558.24

Whenever in any action brought for the purpose, a widow shall recover her dower in lands of which her husband shall have died seized, she shall be entitled also to recover damages for the withholding of such dower.<sup>59</sup>

MCL 558.25

Such damages shall be 1/3 part of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated in a suit against the heirs of her husband, from the time of his death; and in suits against other persons from the time of her demanding her dower of such persons.<sup>60</sup>

MCL 558.26

Such damages shall not be estimated for the use of any permanent improvements made after the death of her husband by his heirs, or by any other person claiming title to such lands.<sup>61</sup>

MCL 558.27

When a widow shall recover her dower in any lands alienated by the heir of her husband, she shall be entitled to recover of such heir, in an action on the case, her damages for withholding such dower, from the time of the death of her husband to the time of the alienation by the heir not exceeding 6 years in the whole; and the amount which she shall be entitled to recover from such heir, shall be deducted from the amount she would otherwise be entitled to recover from such grantee, and any amount recovered as damages, from such grantee, shall be deducted from the sum she would otherwise be entitled to recover from such heir.<sup>62</sup>

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<sup>59</sup> Mich. Comp. Laws §558.24 (1846)

<sup>60</sup> Mich. Comp. Laws §558.25 (1846)

<sup>61</sup> Mich. Comp. Laws §558.26 (1846)

<sup>62</sup> Mich. Comp. Laws §558.27 (1846)

Though the law regarding dower has remained much the same since 1846, Michigan law makers have debated about the issue throughout Michigan's history. In 1961, Michigan was in the process of creating a new constitution.<sup>63</sup> During this time period, the necessity of including dower was debated heavily. A sample of the debate shows the differing views on the issue.

Bay County delegate Milton Higgs suggested that "dower in itself is not a valuable thing to the wife, in view of her other rights. She can elect to take against the will, she has rights that are superior to this, and as Mr. [Robert] Tubbs has said, it's merely a right to the income to 1/3 of the property for life. This is a cumbersome thing to handle in property law. [2 Official Record, Constitutional Convention 1961, p. 2445.]

Other delegates stated that they would not abolish dower precisely because it provides worthwhile minimum protection for women. Washtenaw County delegate Joseph Lawrence, Jr., observed that, for spouses who occupy traditional roles, dower

"mean[s] that a husband who normally takes care of things cannot get rid of all his property without his wife having to sign off." *Id.*

Perhaps most tellingly, Wayne County delegate Ann Donnelly argued that "[i]nchoate dower rights are of vital interest to the women" even before their husbands' deaths and protect "a married woman in the event of a divorce action." *Id.* She explained:

I, regrettably, have been involved in representing women in this situation and I know very well it is most vital that we have this signature and this dower clause to protect them in the even that they are having difficulties with their husbands. [The husband] may alienate this property-not only the homestead, but any other land. He may have \$1 million in stocks; but he may have it in apartments, he may have it in land, and the woman who maybe has helped him to acquire this will have no control and no strings whatsoever if they are having difficulty. Now, if there is no marital difficulty, the husband can readily get his wife's signature. If there is marital difficulty and the husband wishes to get rid of the wife and get rid of his property from her name and her control, it can be accomplished if you will adopt [the amendment abolishing dower.]<sup>64</sup>

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<sup>63</sup> Mich. Const. of 1963, art. X, §1

<sup>64</sup> *In re Estate of Miltenberger*, 482 Mich 901, 905 (2008).

The delegates ultimately decided the legislature was the best judge of whether dower was still needed and did not abolish it as they abolished coverture. Accordingly, although our 1963 constitution abolishes the disabilities associated with coverture, it does not abolish dower, but explicitly provides that “[d]ower may be relinquished or conveyed as provided by law.”<sup>65</sup>

The legislature examined the issue again in 1998 when it was adopting the Uniform Probate Code. Though the Uniform Probate Code expressly abolishes dower, the legislature decided to adopt it while keeping dower intact. Michigan would continue the tradition of allowing widows to elect dower.

#### **Fourteenth Amendment**

Dower in Michigan was most recently upheld against constitutional challenges in 2008. The Supreme Court of Michigan took the opportunity in *In re Estate of Miltenberger* to explain its rationale for upholding dower.<sup>66</sup>

The facts in this case are as follows: Sharon Miltenberger was married to James Miltenberger. She had filed for divorce in 2003 and moved out of the marital residence.<sup>67</sup> In November 2003, while the divorce proceedings were pending, James quitclaimed two pieces of land to his daughter Sandra Swartz.<sup>68</sup> Sandra was his daughter from a previous marriage.<sup>69</sup> James had been the legal titleholder of the two parcels, one of which had been used as his office buildings and the other as his home.<sup>70</sup> In January of 2004, James executed a will which devised

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<sup>65</sup> Mich. Const. of 1963, art. X, §1

<sup>66</sup> *In re Estate of Miltenberger*, 482 Mich 901, 927 (2008).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

all his property to Sandra.<sup>71</sup> The will made no provision for his other two children or his wife. James died on January 18, 2004 while he was still legally married to Sharon.<sup>72</sup>

Sandra petitioned the probate court to become personal representative of James' estate under nomination of his will. She filed an inventory that after costs had been subtracted had a value of \$8,823.06.<sup>73</sup> She did not include the two parcels of land on the inventory.<sup>74</sup>

Sharon filed a petition to elect to receive her dower rights and Sandra moved for summary judgment, seeking to dismiss the petition.<sup>75</sup> She sought to dismiss the petition on the basis that the dower statutes were unconstitutional as they violated the equal protection provisions of the United States and Michigan constitutions.<sup>76</sup> She also sought to dismiss the petition based on its untimeliness.<sup>77</sup> The probate court decided that the petition was neither untimely or unconstitutional and allowed Sharon to elect to receive her dower rights and denied Sandra's motion. The Circuit Court of Appeals upheld the probate court's decision.<sup>78</sup>

The court examined the statutes under the intermediate scrutiny test.<sup>79</sup> The intermediate scrutiny test was set out in *Craig v. Boren* by the United States Supreme Court.

To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.<sup>80</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 901.

<sup>80</sup> *Id.* at 901

The majority first set out to examine what the “important governmental objectives” were for the dower statutes. After examining the lengthy history of dower statutes, as well as case law from other jurisdictions, the majority determined what the government’s important objectives were in regards to dower statutes.

The dissent and I [ the majority] agree that dower is aimed at important governmental objectives, because it provides support for needy surviving spouses and a remedy for past economic discrimination and lower earnings of women, which contribute to the higher vulnerability of women to poverty or low income after the death of a spouse. See *post* at 246 (stating that dower protects needy spouses and serves “the related purpose of compensating women for past discrimination and lower earnings during marriage, which often left them more vulnerable than men following the death of a spouse”). “[A]ssisting needy spouses is a legitimate and important governmental objective.” *Orr v. Orr*, 440 U.S. 268, 280, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). “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.” *Califano v. Webster*, 430 U.S. 313, 317, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); see also *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (*VMI*), citing *Webster*.<sup>81</sup>

The majority noted the dissent’s argument that dower was outdated and no longer necessary, but disagreed. In addition to stating that the legislature was in the best position to determine if a particular statute was outdated, the majority thought that there was still a need for dower.<sup>82</sup> The majority noted that men still out-earn women, and in Michigan as well as eight other states, the average woman’s pay was 72% less than that of man’s pay which was below the national average of 77%.<sup>83</sup>

The court then went on to determine whether the statute was substantially related to the achievement of the legislature’s objective. The court noted that though the economic differences

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<sup>81</sup> *Id.* at 903.

<sup>82</sup> *Id.* at 905.

<sup>83</sup> *Id.* at 907.

between men and women were the broad issue to be addressed, the statute only applied to married couples and only to women.<sup>84</sup> Therefore the statute could only be applied to widows. The court found that the statute was substantially related to the legislature's objective for the following reasons:

I conclude that, although dower is both over inclusive and under inclusive in relation to the target classes of needy surviving spouses and widows who have suffered economic discrimination, it reflects genuine differences between men and women who have lost a spouse, including that (1) widows receive considerably less income than widowers, (2) women over the age of 65 are more likely to live in poverty than similarly aged men, (3) women have longer life expectancies and, therefore, need economic support for a longer period after the loss of a spouse's contributions to the family, (4) women have less overall earning power in Michigan, and (5) women-particularly those of past generations who may face widowhood in current times-may have relied on their inchoate dower rights during the course of their marriages. Because there are significant documented differences in the economic disadvantage among surviving spouses is substantially related to the goals of dower.<sup>85</sup>

The majority also noted that women have a longer life expectancy than men and including this fact in the analysis was not offensive to the intermediate scrutiny test.<sup>86</sup> The majority then goes on to cite several United States Supreme Court cases that found that gender based statutes which addressed the financial disparity between men and women were constitutional. These cases include retirement benefit laws that favored women (*Califano v. Webster*)<sup>87</sup> and a property tax exemption (*Kahn v. Shevin*).<sup>88</sup>

The majority acknowledges the dissent's argument that dower is both under-inclusive (it does not account for needy widowers and needy unmarried women) and over-inclusive (provides

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 908.

<sup>86</sup> *Id.* at 909.

<sup>87</sup> *Id.* at 910.

<sup>88</sup> *Id.* at 911.



for widows who do not have a financial need).<sup>89</sup> The majority concedes these defects. However it went on to make the point that a law does not have to be perfect in order to be constitutional.<sup>90</sup> In addition, though the circumstances in which the dower right can be claimed are limited, the dower right can make a significant difference in certain cases.<sup>91</sup> The dower right protects widows whose husbands may have tried to disinherit them through titling away stocks, bonds, and bank accounts.<sup>92</sup> Its purpose is to protect widows like Sharon whose husbands have purposely sought to disinherit them and left a small estate.<sup>93</sup>

The majority sums up their argument and also addresses the dissent's argument that Michigan cannot be the only state in the union that provides a dower right to women without a matching curtesy right to men:

In sum: Yes, Michigan may continue to confer a dower right on women even if it is the only state to do so. Although imperfect, the dower scheme is substantially related to the particular economic disadvantages suffered disproportionately by widows in Michigan. Its substantial relationship to these real-world differences between male and female surviving spouses confirms that dower is not merely rooted in archaic stereotypes. Finally, dower is distinguishable from the laws cited by the dissent because dower does not denigrate women or devalue their earnings. Moreover, no existing nondiscriminatory process can provide widows with similar protection. Accordingly, in my view, our Court would not be constitutionally justified in depriving the Legislature of dower as a unique tool providing a minimum level of security for widows.<sup>94</sup>

After this decision was handed down by the Michigan Supreme Court, it seemed that dower was immune against all constitutional challenges, despite Michigan being the only jurisdiction in the United States that allowed a widow to receive a life estate in one third of her

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<sup>89</sup> *Id.* at 908.

<sup>90</sup> *Id.* at 916.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 96.

husband's property without the accompanying right of widowers to receive something from their wife's estate.<sup>95</sup> This was to continue until the United States Supreme Court addressed a contentious political topic in 2015: gay marriage.

### **Obergefell v. Hodges**

*Obergefell v. Hodges* was a landmark Supreme Court decision, and its impact is still being felt. *Obergefell v. Hodges* is the recognition of same-sex marriage by the federal government. The issue in the case was whether states who did not allow same-sex marriage were required to recognize marriages performed in other states, and whether those states would have to allow marriages between same-sex couples to be performed in their state.<sup>96</sup>

The case was brought by fourteen different same-sex couples from several different states, each seeking the government to recognize their marriage. The facts are as follows: Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.<sup>97</sup>

The court held that the Equal Protection Clause of the Fourteenth Amendment required that same-sex marriage be recognized.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Bakery. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the

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<sup>95</sup> *Id.* at 926.

<sup>96</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>97</sup> *Id.* at 2588.

extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.<sup>98</sup>

The court in *Obergefell* recognized that states conferred various rights on married couples that were denied to same sex couples.

These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6 9; Brief for American Bar Association as *Amicus Curiae* 8 29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at \_\_\_\_ (slip op., at 15 16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.<sup>99</sup>

The Supreme Court held that states could not base eligibility for marriage on the applicant's gender or sex, but the court left open several areas of family law for the states to decide. These include the areas listed above such as what privileges a spouse has when it comes to property rights, tax benefits, and intestate succession.<sup>100</sup> The court also left questions about gender based statutes open to the states.<sup>101</sup> The decision in *Miltenberger* that the dower statutes did not violate the Fourteenth Amendment was decided when the law in Michigan defined marriage as between one man and one women.<sup>102</sup>

*Obergefell v. Hodges* raised two areas of concern in regards to the dower statutes. The first was practical. Now that a marriage could exist between two women or two men, it became

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<sup>98</sup> *Id.* at 2604.

<sup>99</sup> *Id.* at 2601.

<sup>100</sup> Thomas H. Anthony & Jill Lauderman, *The Demise of Dower*, Mich. B. J., Sept.2016 at 34, 34.

<sup>101</sup> *Id.* at 36.

<sup>102</sup> *Id.*

confusing for attorneys and judges to apply the dower statute.<sup>103</sup> The second was a matter of legal interpretation. When a statute rests its treatment of individuals on a class, the class distinction must be central to the purpose of the statute in order to pass muster. In the case of gender based statutes, the test is “intermediate scrutiny”<sup>104</sup> Do women still need the financial protection of dower in this day and age, and how can it be fairly applied in a same sex marriage?<sup>105</sup> These are the questions that confronted Michigan law makers and attorneys after the decision in *Obergefell v. Hodges*.

### Repeal

On October 13, 2015 the Bill 558 was introduced to repeal in the Michigan Senate by Senator Rick Jones.<sup>106</sup> The bill reads as follows:

October 13, 2015, Introduced by Senator JONES and referred to the Committee on Judiciary.

A bill to amend 1846 RS 66, entitled "Of estates in dower, by the curtesy, and general provisions concerning real estate," (MCL 558.1 to 558.29) by adding section 30; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT: 1 SEC. 30.

(1) NOTWITHSTANDING SECTIONS 1 TO 29, AND EXCEPT AS 2 OTHERWISE PROVIDED IN SUBSECTION (2), A WIFE'S DOWER RIGHT IS 3 ABOLISHED AND UNENFORCEABLE EITHER THROUGH STATUTE OR AT COMMON LAW.

(2) THIS SECTION DOES NOT APPLY TO EITHER OF THE FOLLOWING:

(A) A WIDOW'S DOWER ELECTED BY A WOMAN WHOSE HUSBAND DIED 7 BEFORE THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SECTION.

B) IF A WIDOW'S HUSBAND DIED BEFORE THE EFFECTIVE DATE OF THE 2 03432'15 Final Page DAW 1 AMENDATORY ACT THAT ADDED THIS SECTION, THE WIDOW'S RIGHT TO ELECT 2 DOWER UNDER

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<sup>103</sup> Id.

<sup>104</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>105</sup> Thomas H. Anthony & Jill Lauderman, *The Demise of Dower*, Mich. B. J., Sept.2016 at 34, 37.

<sup>106</sup> S. 2016, 1<sup>st</sup> Sess., at 1 (Mich. 2016).

SECTION 2202 OF THE ESTATES AND PROTECTED INDIVIDUALS 3  
CODE, 1998 PA 386, MCL 700.2202.

Enacting section 1. Sections 2931 and 2933 of the revised 5 judicature act of 1961, 1961 PA 236, MCL 600.2931 and 600.2933, are repealed.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 98th Legislature are enacted into law:

- (a) Senate Bill No. 559.
- b) Senate Bill No. 560.<sup>107</sup>

The bill quickly worked its way through committee and was received by the House on November 5, 2015.<sup>108</sup> The bill went through the House quickly and was returned the Senate on December 13, 2015.<sup>109</sup> After the bill was passed by both houses of the legislature, it was presented and signed by Governor Rick Snyder on December 28, 2015 and filed with the Secretary of State on December 30, 2015.<sup>110</sup> The final text of the Public Act reads:

AN ACT to amend 1846 RS 66, entitled “Of estates in dower, by the curtesy, and general provisions concerning real estate,” (MCL 558.1 to 558.29) by adding section 30; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

Sec. 30. (1) Notwithstanding sections 1 to 29, and except as otherwise provided in subsection (2), a wife’s dower right is abolished and unenforceable either through statute or at common law. (2) This section does not apply to either of the following: (a) a widow’s dower elected by a woman whose husband died before the effective date of the amendatory act that added this section. (b) If a widow’s husband died before the effective date of the amendatory act that added this section, the widow’s right to elect dower under section 2202 of the estates and protected individuals code, 1998 PA 386, MCL 700.2202.

Enacting section 1. Sections 2931 and 2933 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2931 and 600.2933, are repealed.

Enacting section 2. This amendatory act takes effect 90 days after the date it is enacted into law. (177) Act No. 489 Public Acts of 2016

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

Approved by the Governor January 5, 2017, Filed with the Secretary of State  
January 6, 2017

EFFECTIVE DATE: April 6, 2017 2 ESB 558

Enacting section 3. This amendatory act does not take effect unless all of the following bills of the 98th Legislature are enacted into law: (a) Senate Bill No. 560. (b) House Bill No. 5520.<sup>111</sup>

Senate Bill 560 eliminated a Probate Court's authority to bar an incapacitated or minor widow her dower rights, deleted the option of a widow to take her dower rights in the Estates and Protected Individuals Code, and deleted other miscellaneous references to dower with the Michigan Code.<sup>112</sup> Senate Bill 560 would take effect on April 6, 2017.<sup>113</sup>

House Bill 5520 amends Public Act 259 of 1909 which requirements judgments of divorce and separate maintenance to satisfy a wife's claims to her husband's property through dower and that those judgments include a provision that states that the wife has accepted the judgment in lieu of her dower. House Bill 5510 takes effect on March 22, 2017.<sup>114</sup>

#### **Eminent Domain**

One question that has not been addressed is whether the legislature's repeal of dower represents a taking by the government. Since married women presently have an inchoate dower right to their husband's property, does the legislature's repeal of dower without just compensation a governmental taking?

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<sup>111</sup> 2016 Mich. Pub. Acts. 489.

<sup>112</sup> S. 2016, 1<sup>st</sup> Sess., at 1 (Mich. 2016).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

Eminent domain is the government's power to take private property regardless of the owner's willingness to allow the taking.<sup>115</sup> The government may exercise the power of eminent domain against "private property of every kind."<sup>116</sup> Thus, the government may take real property, including varying interests in real property such as fee title, leases, or easements.<sup>117</sup> In turn, the Uniform Condemnation Procedures Act defines a property's *owner* as any person with an interest in a property.<sup>118</sup>

Inverse condemnation is when the government does not file a legal action to take property for public purposes but, through its actions, deprives the owner of the possession or use of its property to such an extent that the government must pay "just compensation."<sup>119</sup>

Though discussing the arguments in great would be beyond the scope of this paper, it is an important question to be answered.

### **Case Study**

An interesting case study at my job provided the inspiration for this paper and is a good example for explaining the impact of the repeal of dower. The facts have been altered to provide more detail about the impacts of the repeal.

In this case study, the decedent was John Smith, and his wife was Anna Smith. John Smith died on July 4, 2016. His estate was opened and his daughter, Gwen Smith was named as personal representative on December 1, 2016. On December 5, 2016 Anna was served with the Notice to Spouse of Rights of Election, Proof of Service, and Election form by the personal representative. This form allows the widow to choose to 1) accept whatever she may receive

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<sup>115</sup> *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373 (2003).

<sup>116</sup> *Petition of Mackie*, 2 Mich App 698, 702 (1966).

<sup>117</sup> *Lookholder v Ziegler*, 354 Mich 28, 36 (1958).

<sup>118</sup> Mich. Comp. Laws §213.55(1) (1980).

<sup>119</sup> *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 89 (1989).

under the decedent's will, 2) elect to take the intestate share of the husband's estate, or 3) elect to take her dower right. The widow is responsible to notifying the personal representative of her choice within 63 days of receiving the form or within 63 days of receiving the estate of the inventory, whichever is longer.<sup>120</sup> On January 20, 2017, Anna returned the form, electing to take her dower rights.

There were three items in John Smith's estate. One was a house (1001 John Street), valued at \$100,000 with a \$40,000 mortgage. The second was a rental property (1002 John Street) worth \$60,000 with no liens. The third was a bank account with \$20,000 in it. Anna Smith is currently 67 years old.

This case study presents several issues. The first is whether Anna Smith is entitled to dower at all, given that it was repealed in 2017. The second is if she is entitled to dower, what is she entitled to? Third, with what is in John Smith's estate, what options does the personal representative have to make sure Anna Smith receives what she is entitled to?

The first issue is easy to resolve. Under 2016 P.A. 489, Anna Smith is entitled to elect and receive her dower rights. The act applies to all husbands who die before April 6, 2017<sup>121</sup>. Since John Smith died on July 4, 2016, it does not matter that Anna Smith actually elected to take her dower after the bill had been signed. In fact, dower may be elected by a widow as long as the decedent died before April 6, 2017 and she elected her dower within the appropriate amount of time after the estate has been opened.

The second issue is what Anna Smith is entitled to from John's Smith's estate. Under MCL 558.1, Anna Smith is entitled a life estate in one third of the real property owned by John

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<sup>120</sup> Mich. Comp. Laws §700.2202 (1998).

<sup>121</sup> 2016 Mich. Pub. Acts. 489.



Smith at the time of his death. If the property is subject to the mortgage, Anna Smith's interest is second only to the mortgagee.<sup>122</sup> Looking at the inventory of John Smith's estate, Anna Smith is entitled to a life estate in one third of the 1001 John Street property, subject to the mortgage encumbering the property and Anna Smith is entitled to a life estate in one third of the 1002 John Street property. Anna Smith is not entitled to any amount from the bank account, as the bank account is not real property.

The third issue is what the personal representative can do to satisfy Anna Smith's dower rights. Since the 1001 John Street property is encumbered by a mortgage, there are several options for the personal representative. The mortgage, then Anna Smith's interest, then the interest of the heirs must be satisfied in that order. Under MCL 558.6, the personal representative could sell the property and deduct the amount owed from the profit.<sup>123</sup> The remainder should be invested, and Anna Smith would be entitled to one third of the interest or dividends accumulated during the year for the rest of her life. When Anna Smith dies, the funds would be distributed according to the terms of John Smith's will. This option satisfies all interests but it might not be palatable to the heirs as they must wait till Anna Smith dies to receive the full benefit of the property. Another option is that an heir may assume the mortgage under MCL 558.6.<sup>124</sup> If an heir assumes the mortgage, the personal representative has the option of allowing Anna Smith to live in the property for the remainder of her life, or to pay Anna Smith the value of her life estate interest in one third of the property.

The present value of her dower interest can be calculated by using some figures from the Internal Revenue Service ("IRS"). In order to make the calculation, the personal representative

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<sup>122</sup> Mich. Comp. Laws §558.5 (1846).

<sup>123</sup> Mich. Comp. Laws §558.5 (1846).

<sup>124</sup> Mich. Comp. Laws §558.6 (1846).

must determine what the appropriate interest rate is from the actuarial tables provided by the IRS. Next, the personal representative must determine what the value of the property is and divide it by three. A recent, independent appraisal is appropriate to use as the value of the property. The one third value of the property is multiplied by the appropriate figure from Table S from IRS publication 1457.<sup>125</sup> The resulting calculation will provide what the present value of Anna Smith's dower interest is worth. It may be worth it for the heirs and the personal representative to pay Anna Smith this figure in order to wrap up the estate.

The calculation for the 1001 John Street property is as follows:

Value of Property:	\$100,000
-	
Mortgage	<u>\$40,000</u>
	\$60,000
/	
	3
1/3 Interest in property	\$20,000
Appropriate Interest Rate	1.8%
Figure from Table S	0.24446
Present value of dower interest	\$488.92

The calculation for the 1002 John Street property is as follows:

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<sup>125</sup> Internal Revenue Service, Publication 1457, Actuarial Tables (1999).

Value of property:	\$60,000
/	3
1/3 Interest in property	\$20,000
Appropriate interest rate	1.8%
Figure from Table S	0.24446
Present Value of dower interest	\$488.92

The total value of Anna Smith's dower interest is \$977.84

### **Conclusion**

Dower is an ancient legal doctrine that provided protection to women who were especially disadvantaged throughout the history of Europe, the United States and Michigan. The fact cannot be avoided that throughout history women have been economically disadvantaged in comparison to men. Lawmakers from the Magna Carta onwards thought that it was necessary to provide some protection to widows.

Dower is a fascinating legal doctrine because of its history and its impact. Dower is mentioned throughout history, novels, and legal history. Michigan holds a special place in the history of dower because Michigan remained the only state in the United States that preserved dower in its original common law form throughout its formation as a state, constitutional conventions, and challenges from the Equal Protection Clause of the Fourteenth Amendment.

*Obergefell v. Hodges* holds a historic place, not only because of its recognition of same-sex marriage, but because it dealt a death blow to dower in its original form in the United States.

The case study I presented shows how dower operates in the shadows of its reign, and provides an interesting footnote in the long chapter of this legal doctrine in Michigan.

