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MARRIAGE AND LAW REFORM: LESSONS FROM THE NINETEENTH-CENTURY MICHIGAN MARRIED WOMEN’S PROPERTY ACTS

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Today, news about family law reform most often concerns marital rights for same-sex couples. While the legal part of that campaign is mainly waged in state and local courts and legislatures,¹ the most important battleground may be public opinion. Indeed, personal assertions of legal rights that have not yet been established and personal experience with same-sex relationships seem to be leading to gradual public acceptance. Consider an excerpt from a recent radio interview by reporter Tovia Smith of Marty Rouse, a Human Rights Campaign strategist, and Michael Gronstal, the Iowa Senate Majority Leader:

Mr. Rouse: The writing is on the wall that the states and neighboring states are seeing what's happening, seeing that the sky is not falling down, the milk still comes out white from the cow, and this is happening very, very quickly.

Smith: Indeed, polls show a significant jump in support for gay marriage. Opponents still outnumber supporters by about 55 to 45, but younger voters are overwhelmingly supportive. That generation gap was cited by Iowa Senate Majority Leader Michael Gronstal last week, when the Democrat who has opposed gay marriage in the past, announced he would not help efforts to ban gay marriage now.

State Senator Michael Gronstal (Democrat, Majority Leader, Iowa Senate): My daughter, Kate, said that you guys don't understand. You've already lost. My generation doesn't care. I think I learned something from my daughter that day.²

But change is uneven. Human and legal relationships do not obey the laws of physics.

Indeed, this is neither the first nor, likely, the last battle for legal change in individual and social rights. The right to marry a person of a different race was part of the larger struggle for civil rights in the twentieth century.³ This Article describes just one part of the early nineteenth century struggle for women's equality, a struggle that was waged mainly through a state-by-state campaign that included reshaping fundamental

1. For an overview of laws on the state and local levels, see Nancy J. Knauer, Property, Identity, and Same-Sex Marriage (Nov. 21, 2009) (unpublished manuscript) (on file with author); Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 401 (2008).

2. *All Things Considered: What's Next In The Gay Marriage Debate?* (National Public Radio broadcast Apr. 16, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=103183534>.

3. In 1967, the Supreme Court struck down laws barring marriage between people of different races as violations of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, despite a long history of enforcing those laws in the United States. See *Loving v. Virginia*, 388 U.S. 1 (1967).

relations and rights of married couples.⁴ That battle provides useful perspective and information as to which rights are regarded as legitimate and on how complex legal, social, and personal issues play out.

This article uses data from nineteenth-century deeds to test various theories as to (1) why Michigan gave married women rights to property beginning in 1844 and (2) how those rights were exercised.

I. INTRODUCTION

For most Americans, the rich story of nineteenth-century women's rights reform has been narrowed to only the right to vote. Perhaps, the degree of change from that period to today can best be captured by the rules on women's clothing. Women were required to be "modest," to cover their heads, and to wear confining, hot, and unhygienic dresses that swept the floor. Reformers, such as Amelia Bloomer,⁵ were shunned and ridiculed for being "loose" women because they promoted lighter, less restrictive clothing—clothing that literally did not weigh women down.

Women's education was neglected, and college education and most jobs were not open to them. When they married, women in the common law states entered a legal status called "coverture," which was referred to as "civil death," because the doctrine of marital unity, as an aspect of marriage, made women one person with their husbands and that one person was the husband.⁶ Under the marital unity legal regime, upon marrying, a woman lost control and, effectively, ownership of her personal and real property to a husband or to a guardian if one was appointed for a woman before her marriage.⁷

One consequence of this concept of marital unity was a significant limitation on the right of a wife to own or manage the property that she brought to the marriage by gift, inheritance, or her own labor. Tangible personal property, such as furniture and

4. The standard starting point for this history is *HISTORY OF WOMAN SUFFRAGE* (Elizabeth Cady Stanton et al. eds., 1922). The six volumes are a collection of sources, including contemporaneous reports of events, for the years 1848 through 1920. Scanned volumes may be found at <http://onlinebooks.library.upenn.edu/>.

5. For a drawing of the sort of dress reform promoted, see Lithograph by James Queen, reproduced in Matthias Keller, *The New Costume Polka* (1851) (sheet music), <http://www.library.upenn.edu/collections/rbm/keffer/scenes-lee.html>.

6. See Joan Hoff, *American Women and the Lingering Implications of Coverture*, 44 *SOC. SCI. J.* 41, 44, 49 (2007); Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?* in 2 *WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE* 69, 69, 79 (D. Kelly Weisberg ed., 1982).

7. Nancy Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *AM. HIST. REV.* 1440, 1452-54 (1998). For a table of characteristic common law rights, duties, and disabilities at this period, see NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 54-55 (1982).

money, belonged to her husband absolutely and could be reached by his creditors. Choses in action when reduced to the husband's possession also became his property. The disposition of real property was more complicated. Title to land remained in the wife, but the husband was entitled to manage or rent her land during the marriage and could retain any profits. This interest lasted only during the wife's life unless there was issue of the marriage born alive, in which event the husband's interest extended during his life under the doctrine of courtesy. The husband could alienate and his creditors reach his wife's land to the extent of his interest. Moreover, married women could not make independent contracts and had severely limited testamentary capacity. . . . The net effect of the common law . . . "reduced the wife to complete economic dependent and legal invisibility."⁸

Coverture was justified as fulfilling the punishment of Adam and Eve—that husbands should rule over their wives.⁹ By depriving women of the capacity to manage their property by the simple act of marriage, coverture deprived women of the status, livelihood, self-protection, and self-respect linked to property-holding. Thus, it is not surprising that both feminists¹⁰ and scholarly works, such as Kent's Commentaries,¹¹ regarded the Married Women's Property Acts as bold innovations in women's legal status.¹²

What then seemed the natural order of things is no more. Women's suffrage mattered, but it was only one of many women's rights battles. Ironically, not only have we lost that larger history, but, although women

8. James W. Ely, Jr., *Recent Book: Book Review*, 31 UCLA L. REV. 294, 295-96 (1983) (reviewing NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982)). For an overview of the challenges coverture created for married women entrepreneurs, see David Stewart, *Married Women Traders*, 33 AM. L. REG. 353 (1885); John W. Johnson, *Married Women's Contracts*, 4 VA. L. REG. 711 (1899).

9. See *Genesis* 3:16.

10. See, e.g., CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT* 21 (1923); CAROLINE H. DALL, *THE COLLEGE, THE MARKET, AND THE COURT* 348-49 (mem'l ed., Rumford Press 1914) (1867).

11. See generally 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 114-17 n.1 (10th ed. 1860). Even the acts' enemies regarded them as legislation which could and would cause significant changes. See also Elizabeth Gaspar Brown, Comment, *Husband and Wife—Memorandum of the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110, 1114 (1944).

12. See Brown, *supra* note 11 at 1114.; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (finding that MWPA's did not alter one important aspect of marital property—earnings from the joint labors of the entire family, including the wife, accrued only to the husband); see also Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2250 (1994).

won the right to vote, those who opposed them won the naming rights. The supporters of women's suffrage called themselves "suffragists"—those who work for the right of suffrage—while their enemies belittled them and their cause by using the diminutive "suffragettes." Indeed, the most visible symbol and goal in that early period was not votes but, rather, the enactment of Married Women's Property Acts (MWPA), legislation that gave married women the rights of ownership and control over their real and personal property. In the nineteenth-century MWPA's were fought for, opposed, and regarded as creating fundamental change in the status of women,¹³ rights we now take for granted.

Michigan passed its first MWPA in 1844,¹⁴ just seven years after becoming a state on January 26, 1837. It is somewhat surprising that the less urbanized states of Mississippi (1839),¹⁵ Michigan (1844),¹⁶ and Maine (1844)¹⁷ enacted Married Women's Property Acts a few years before more populous states actively engaged in law reform, such as New York¹⁸ and Massachusetts,¹⁹ both in 1848. Indeed, many states and territories, in addition to Mississippi, Maine, and Michigan, had also enacted some form of married women's property reform by 1848, including the southern states of Maryland in 1843, Arkansas in 1846 (the same year it became a state), Texas in 1840 (before it became a state in 1845), Alabama (1848), and Kentucky (1846); all New England states, including Connecticut (1845 and 1849), Massachusetts (1845), New Hampshire (1846), Vermont (1847), and Rhode Island (1841 and 1844); and the Northwestern states and territories, including Iowa (1847), Indiana (1847), and Ohio (1845).²⁰ It would be decades more before Michigan's more urban neighbor to the south, Ohio, enacted its own MWPA.²¹ Michigan

13. See, e.g., Peggy A. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts*, 24 BUFF. L. REV. 683, 686 (1975).

14. An Act to Define and Protect the Rights of Married Women, No. 66, 1844 Mich. Pub. Acts 77-78.

15. Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72; see Brown, *supra* note 11.

16. An Act to Define and Protect the Rights of Married Women, No. 66, 1844 Mich. Pub. Acts 77-78.

17. An Act to Secure to Married Women Their Rights in Property, ch. 117, 1844 Me. Laws 104-05.

18. New York's law was passed in 1848. For a detailed history of that law, see BASCH, *supra* note 7.

19. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398, 1399 n.209 (1983). Apparently, early expansion of married women's rights was more likely to be found on the frontier than in the original colonies. The Arkansas Territory passed a Married Women's Property Act in 1835. Michael B. Dougan, *The Arkansas Married Woman's Property Law*, 46 ARK. HIST. Q. 3 (1987).

20. Elizabeth Bowles Warbasse, *The Changing Legal Rights of Married Women 1800-1861* 155-64, 169-173, 189-201, 202-05 (1987).

21. See Sarah Miller Little, *A Woman of Property: From Being It to Controlling It. A*

revised and enlarged the rights it conferred in statutes passed in 1846²² and 1855²³ and made women's property rights part of the state constitution in 1850.²⁴ According to Richard Chused:

In fact, the acts were passed in at least three waves, beginning in 1835, and each wave arose for somewhat different reasons. The first group of statutes, passed almost entirely in the 1840's, dealt primarily with freeing married women's estates from the debts of their husbands. By and large these statutes left untouched the traditional marital estate and coverture rules. The second wave of legislation, the most frequently discussed, established separate estates for married women. These statutes appeared over a long period of time beginning in the 1840's and ending after the Civil War. The third set of statutes took the important step of protecting women's earnings from the institution of coverture. These laws generally did not appear until after the Civil War, although Massachusetts enacted an early statute in 1855.²⁵

This legislation took place amidst a century of struggle for women's rights that first became visible in 1848:

In July of 1848 the Seneca Falls Conference adopted a Declaration of Sentiments and Resolutions protesting the inequalities of American women. Among other grievances, the delegates singled out the legal disability of married women to own and manage their own property: "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns."²⁶

Early—and largely overlooked—legislative successes in a few common law states preceded the Seneca Falls Conference by several years.²⁷ Although Mississippi, Michigan, and Maine's statutes were enacted within just a few years of one another, the language of the Michigan statute differs significantly from that of Maine and Mississippi:

Bicentennial Perspective on Women and Ohio Property Law, 1803 to 2003, 16 HASTINGS WOMEN'S L.J. 177, 185-87 (2005); see also Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580, 590-98 (2009). Richard Chused, however, places Ohio's first MWPA as early as 1846. Chused, *supra* note 19, at 1359, 1399 n.209.

22. General Provisions Concerning Husband and Wife, ch. 85, § 25, 1846 MICH. REV. STAT.340..

23. Married Women's Property Act of Feb. 13, 1855, § 1, Mich. Act.

24. MICH. CONST. of 1850, art. XVI, § 5.

25. Richard H. Chused, *supra* note 19, at 1398.

26. Ely, *supra* note 8, at 294; see also Linda K. Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848*, 6 HUM. RTS. 115 (1976-1977).

27. Married Women's Property Acts took many forms and provided greater or lesser rights. Chused, *supra* note 25, at 1398-1400.

Section 1 of Mississippi's 1839 act provided that married women become "seized and possessed of any property, real or personal, . . . in her own name, and as of her own property." Maine's 1844 statute mirrors the Mississippi language. Michigan's 1844 statute provides that after marriage, property shall be the "estate of such female after marriage to the same extent as before marriage."²⁸

Mississippi may have been influenced to give married women rights to their property by its neighbor, Louisiana, a civil law jurisdiction²⁹ "that adhered to the civil law concept of community property under which a wife's separate property was free from any claim by her husband."³⁰ Michigan's MWPA may also have been influenced by the French who had settled the state and whose history and culture continued to be important well into the nineteenth century.³¹

However, there is a strong claim that demand for the change in Mississippi law was based on an 1837 lawsuit concerning debt; because the wife was a member of the Chickasaw Tribe and the family resided on Chickasaw land, it was argued that

contrary to American and Mississippi law, usage and customs of the Chickasaw Indians were such that a husband and wife held property separate and that each contracted debts on their own. Among many American Indian tribes in the southeast, including the Chickasaws and Choctaws of Mississippi, a woman retained ownership of all property that she brought into a marriage, whether it was land, slaves, or personal items, and each spouse entered into business contracts and debts on their own.³²

The MWPA's of Mississippi, Maine, and Michigan were apparently overlooked by those who gathered at Seneca Falls as well as by many historians in the decades that followed.³³ As Professor Richard Chused puts it:

1848 is commonly thought of as the year the women's rights movement began. That year witnessed both the Seneca Falls

28. Chused, *supra* note 25, at 1411 n.269.

29. Brown, *supra* note 11, at 1117; WARBASSE, *supra* note 20, at 138-46.

30. Ely, *supra* note 8, at 294 n.2; *see also* BASCH, *supra* note 7. One legacy of the Mexican War (1846-1848) was to increase the number of civil law jurisdictions in the United States after 1848: include Arizona, California, Nevada, New Mexico, and Texas.

31. *See* C. A. Kent, *James Valentine Campbell*, 5 MICH. L. REV. 161, 163, 169 (1907).

32. LeAnne Howe, *Betsy Love and the Mississippi Married Women's Property Act of 1839*, MISSISSIPPI HISTORY NOW (Sept. 2005), <http://mshistory.k12.ms.us/index.php?id=6>.

33. *See Married Women's Property Laws*, LAW LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html; Kerber, *supra* note 26, at 119. Norma Basch's detailed study of the origins of New York's enactment of its MWPA in 1848 does not discuss Michigan's law, suggesting that she was not aware of it. *See* BASCH, *supra* note 7.

Convention and the adoption of the well-known New York married women's act. The dearth of literature on women's law in the 1800-1850 period has made it all too easy for the legal community and the modern feminist movement to label 1848 as the pivotal year.³⁴

Seneca Falls was important for focusing attention and enlisting support for women's equality, including the vote and married women's property rights—campaigns that would take many more decades of struggle.³⁵

Given the difficulty of that struggle, why did a frontier state like Michigan enact its MWPA, what effect did its enactment have on women's rights, and what does it tell us about the process of law reform of marital relations? Even though fought for as restoring to married women the property rights they had as single women, the early Married Women's Property Acts more accurately created only incremental change that can be described as "a new era of quasi coverture".³⁶ But if the laws did not give married women the rights of all free men and free single women, then why were they enacted?

The two most common theories into the late 1970's was that they were enacted as (1) women's rights or protective legislation³⁷ or (2) debtor relief, allowing an indebted husband to place his property beyond the reach of his creditors by conveying it to his wife.³⁸ Later, twentieth-century empirical research tested these theories by examining legal documents, such as wills and trust deeds,³⁹ and proceedings, such as bankruptcy filings by married women,⁴⁰ and found a reality more complex than those theories. This Article tries to shed some light on the subject through an empirical study of the conveyancing patterns in Michigan deeds.

34. Chused, *supra* note 25, at 1359.

35. *Id.*

36. See Debra A. Viles, *Disabilities of Marriage: Gender and Law in Antebellum Michigan*, 28 MICH. HIST. REV. 1, 2 (2002).

37. See, e.g., Chused, *supra* note 25, at 1404-14.

38. See, e.g., *id.*; see also Viles, *supra* note **Error! Bookmark not defined.**, at 4-5; Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385-389 (1994).

39. See Chused, *supra* note 25 at 1364; Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346 (1979).

40. See Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 LAW & SOC. INQUIRY 265 (2009).

II. THE STUDY

A. *The Motivation for the Study*

This is the first empirical study to examine Michigan's Married Women's Property Acts. It attempts to shed light on the nature and effects of the Michigan MWPA by examining Washtenaw County, Michigan deeds from 1840 through 1865, a period that begins four years before the first Michigan MWPA was enacted and extends through the Civil War years. The original purpose of the study was to test whether the law was feminist legislation or debtor protection. If the Act was feminist legislation, then conveyances to and from married women should be found after the MWPA was passed, but not before. If the MWPA was debtor relief, then not only should the number of married women grantees rise, but there should also be conveyances from husbands to wives in order to place property out of the reach of creditors, potentially including deeds with nominal consideration.

As it turned out and, as discussed in more detail below, those predictions were far from the mark: (1) Married women appeared as grantors throughout the years examined in the study sample. Married women were even included in the years before they had a legal right to own or convey property. (2) Despite the large percentage of married woman grantors, there were virtually no women grantees—married or single—until the very last years of the study. (3) There were no conveyances from husbands to wives in the sample. (4) Finally, there were but minor changes in conveyancing patterns as to married women over the decades studied.

Knowing what a law does not do, however, does not explain why it was enacted. We can say with certainty that a law that changes fundamental relationships and rights is unlikely to be enacted without support and effort. It may be that the Michigan MWPA was intended to be debtor legislation even though it was not used for that purpose. It may be that the best explanation is that any law that affects fundamental rights is the product of many motives. We should also not discount the effect judicial interpretation can have on laws, even, at times, wholly transforming the law in the process of adjudication. This was certainly the true of married women's property rights.⁴¹

41. WARBASSE, *supra* note 20 (discussing throughout the role of courts in furthering or hindering women's rights). *See also*, Joan Hoff, *supra* note 6, at 49. This problem is not unique to women's rights. Workplace rights have been a fertile field for "judicial amendments" of statutes. Ellen Dannin, *Hoffman Plastics as Labor Law – Equality at Last for Immigrant Workers?*, 44 U. S.F. L. REV. 393 (2009).

B. *Theories to be Tested*

This Article uses data from the sample of deeds to test five theories as to why the Michigan Married Women's Property Act was enacted. The study results and the theories are also examined against relevant law. The first two theories are traditional explanations for the enactment of married women's property acts: (1) Debtor relief and (2) Women's rights legislation. Three other viable theories tested are that the Michigan MWPA was (3) progressive legislation enacted by a politically progressive state, (4) the fruit of already existing gender equality, and (5) affected by other contemporaneous law.

Each theory ought to predict a specific pattern to be found in the deeds.

1. *Debtor relief*: Before the MWPA was enacted no married women should appear in the deeds as grantors or grantees. Under the law at the time, the only role a married woman could have when property is transferred is to release her dower rights. After the MWPA's enactment, women's numbers as grantees should rise as their husbands transfer property to their wives to place the property out of the reach of the husband's creditors. In addition, the same results may be achieved of a "sale" from husband to wife, though the use of a "straw man" to disguise a fraudulent transaction. Increasingly larger numbers of women grantees should be found in periods of economic difficulty, and there may be evidence of economic difficulty at the time of its enactment.

2. *Women's rights legislation*: Before the MWPA was enacted there should be no married women grantors or grantees. After its enactment, married women should be present as grantors and grantees, and the number of married women in both capacities should increase over time as the law takes hold. There should be evidence of contemporaneous activism in support of women's rights.

3. *Progressive legislation enacted by a politically progressive state*: There should be evidence of progressive political action in addition to support for women's rights. The deeds might show patterns similar to those related to debtor relief and women's rights in the sense that more women—single and married—would be found in the deeds over time.

4. *The law embodied existing gender equality*: This motive would reflect family dynamics built on greater gender equality than was commonly believed. Michigan was then a frontier state, and its citizens might have led to an acceptance of women and men as equals.

5. *Conveyancing patterns found are affected by contemporaneous law other than or in addition to the MWPA*: This theory depends on finding some law or laws that permitted or even promoted the patterns of property

conveyance seen in the deeds. There should be a congruence between the law and the patterns seen in the forms and wording of the deeds.

C. Background Information on the Deeds Examined

In order to test these theories, samples of conveyancing records from Washtenaw County, Michigan were studied.

From 1840 until 1865, all recorded deeds were copied by hand into bound deed books. Late in 1865, miscellaneous deeds from preceding years were recorded in an additional book in which most portions of the instrument were preprinted. Thus, after 1865, the form of deeds became fairly standard, except for the description of the land being conveyed and the names of the parties. The 1865 sample did not include deeds in this additional book. Even before 1865, the deeds, including those from out of state, fell into a few standard forms. Indeed, the handwriting of the various clerks over the years shows far more variation than that in the wording of the deeds. As part of this study, an attempt was made to trace the wording of the deeds to a contemporary form book. An initial search failed to find any source for the wording of the deeds, although it seems likely forms existed, if only in attorneys' offices. However, as will be discussed below, a more recent search found one form book that was published during the middle of the period examined that included key features of the Michigan deeds. Thus, although the form book could not have been the source of the Washtenaw County deeds' wording, it does suggest that there was some degree of standardization of deeds throughout the country.

For the first study, twenty-five deeds, evenly distributed in each of the years 1840, 1845, 1850, 1855, 1860, and 1865, were selected. Information collected in this first study included the genders and names of the grantors and grantees; their relationship, if any was stated; the general features of each deed; and the value of the property. A second, larger set of deeds was studied for only the bookend years of 1840 and 1865. One-third of deeds recorded in each of these years was examined. In this group, only the existence of women on the deeds and their status was noted. The study's reliance on deeds from only one county means that the range of practices may not be applicable to the state as a whole.

D. Data From the First Deeds Study

Table 1: Summary Information on Deeds for Each Year Sampled

Year	Number	Price Ranges of Property Conveyed
1840	810	\$200 - 11,562
1845	710	\$50 – 1500
1850	1330	\$12 – 1800
1855	1250	\$1 – 3300
1860	1150	N/A
1865	700	N/A

The total number of deeds recorded in each of years 1840, 1845, 1850, 1860, and 1865 varied from a low of 700 to a high of 1330, so the number in this study is a small percentage of the total number of each year's deeds. The price of the property sold is not directly relevant to the issues being examined but is, nevertheless, included. The lower range of the prices declined over time. These declines may reflect the effect of economic conditions or land speculation around the time Michigan became a state.⁴² The prices may also reflect the size of tracts being conveyed as a frontier state becomes urbanized and large tracts are subdivided.

The grantors and grantees were divided into three groups: individual men, individual women, married couples, and others, which included organizations, entities, or groups of people outside the focus of this examination of the Michigan Married Women's Property Act

The first surprise was the presence of many wives as grantors, even in 1840, four years before the enactment of the first Michigan MWPA. Their presence as grantors raises the question: If married women could be grantors without the MWPA, why was it enacted? Table 2-1 shows that in each sample year, husbands and wives were the largest number of grantors, while sole women or wives alone were not found. Over time, the numbers of husband and wife grantors trended upward, as the number of grantor men appearing alone (at least some of whom were known to be married) declined slightly. The deeds also show that not all wives joined in their

42. JAMES V. CAMPBELL, OUTLINES OF THE POLITICAL HISTORY OF MICHIGAN 485-86, 493 (1876), available at <http://www.archive.org/details/outlinesofpoliti00camp>; Viles, *supra* note 36, at 5-6.

husband's deeds as grantors, suggesting that it was not mandatory that married couples do so. At this time, as discussed below, because a wife had to release her dower rights in her husband's property, it was possible to know that a grantor man was married even when his wife was not included as a grantor.

Table 2-1: Grantors (sample of 25 deeds in each year)

Year	Men	Women	H/W	Other⁴³
1840	10 (3 married)	0	11	4
1845	8 (3 married)	1	9	7
1850	10 (2 married)	0	12	3
1855	8	1	12	4
1860	8	1	15	1
1865	4	3	16	2

One might think that the pattern for grantees would be similar to that of grantors; however, in each sample year, about four-fifths of the grantees were men, and an average of only three conveyances a year were to women.

43. "Other" includes sales of property other than those between people. Examples include sheriff's sales, property transfers through a divorce decree, trusteeships, guardianships, and purchases from the US government.

Table 2-2: Grantees (sample of 25 deeds in each year)

Year	Men	Women	H/W	Other ⁴⁴
1840	22 (1 married)	2	0	1
1845	22 (1 married)	1	0	2
1850	16	7 (1 married/ 1 divorced)	1	1
1855	21	3 (1 married)	0	1
1860	19	4	2	0
1865	22	2	0	1

* "Other" includes sales of property other than those between people. Examples include sheriff's sales, property transfers through a divorce decree, trusteeships, guardianships, and purchases from the US government.

Table 2-2 shows that the pattern for grantees is relatively consistent over time, except for the year 1850 when there were fewer men and more women than in the other years. Deaths and injuries from the Mexican War, 1846-1848 may partially explain the 1850 data. Although overshadowed by the Civil War, the Mexican War saw 13,283 American soldiers killed (of which 1,733 were in battle and 11,550 from other causes, including disease). In addition, 4152 were wounded.⁴⁵

The number of Michigan men on active duty in the Mexican War exceeded its commitment in previous wars. With approximately 350,000 citizens, Michigan sent over 1,500 to war—more than many other states, including New York, which had nine times more people than Michigan. The war also left more Michigianians dead than in all previous wars combined.⁴⁶

The dead and injured may explain the dip in men grantees and the increase

44. "Other" includes sales of property other than those between people. Examples include sheriff's sales, property transfers through a divorce decree, trusteeships, guardianships, and purchases from the US government.

45. ANNE LELAND & MARI-JANA OBOROCEANU, CONG. RESEARCH SERV., RL 32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2 (2010), available at <http://www.fas.org/sgp/crs/natsec/RL32492.pdf>.

46. LEROY BARNETT & ROGER ROSENTERER, MICHIGAN'S EARLY MILITARY FORCES: A ROSTER AND HISTORY OF TROOPS ACTIVATED PRIOR TO THE AMERICAN CIVIL WAR 341, 344-46 (2003) (showing the number of Michigan soldiers by roster, largely mustered from southern and southeastern Michigan).

of women grantees (at least one of whom was married), some of whom may have been widowed or caring for an injured veteran and receiving pensions.

The prices shown in **Table 1** suggest that by 1850 Michigan was emerging from the effects of the Panic of 1837. One might have expected that, six years after the first MWPA was enacted and in the year it was amended and included in the Michigan constitution there would have been some increase in the number of wives and husbands buying property jointly. (see **Table 2-2** above) However, there is only one such purchase, perhaps the result of the husband's injuries in the Mexican war. The only years in which the number of husband-wife grantees is not zero are 1850 and 1860, both perhaps connected to war.

If the law had such a small effect on landowning patterns, why was there support for its enactment? It is important to keep in mind how difficult it is to get basic information about the parties to these deeds, let alone details about how their relationships functioned. For example, we cannot know how many of the male grantees were married. Although some deeds stated that the male grantee was a married man, there was no requirement that he list his marital status. It is almost certain that many of the men were married. We know more about the grantors, because when land was sold, a purchaser would demand that a wife give up her dower right. As a result, even if the wife did not join as a grantor, information about a male grantor's marital status was easier to find. If a woman was a grantor, her husband would have corresponding rights of curtesy, curtsy, or curtesy to release in order to pass a clear title.⁴⁷ None of these doctrines would impel including a grantee's marital status in the deed.

One especially striking feature of the deeds is the large disparity in the genders of sellers and buyers in all periods. One would expect at least a rough equivalence between the genders of those buying and selling land. The best explanation for the data is that, as a matter of course, a man bought land by himself but then joined with his wife, most often naming her as co-grantor, when he sold it. When the chain of title was traced to check this theory in a sample of cases, the records included men who conveyed—with their wives as a grantor—land he had bought solely in his name that very day. The frequency with which this practice occurred makes it clear that a marriage was unlikely to have taken place in the interim.

Whether or not the man was married before he became seized of the land is irrelevant. In neither case could the wife have been an owner. Even rights such as dower did not entitle her to be a grantor of her husband's

47. For an overview of dower and curtsy rights, see Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U.L. REV. 519, 526-30 (2003).

land. In addition, joining in the husband's deed as grantor was not regarded as the proper legal means of releasing dower. Dower was to be released expressly in a separate dower release clause and there was to be a process of a separate examination to ensure that the wife's dower rights were protected.⁴⁸ Here is an example of a dower release clause of the sort found in the study:

No. 66.—Release of Dower. To all to whom these presents shall come, Susan Doe, of the city of Pittsburgh, in the county of Alleghany, and state of Pennsylvania, widow and relict of John Doe, late of the same place, deceased, sends greeting: Know Ye, that the said Susan Doe, the party of the first part to these presents, for and in consideration of the sum of five hundred dollars, lawful money of the United States, to her in hand paid at or before the ensealing and delivery of these presents, by Richard Doe, of the city of Wheeling, in the county of Ohio, and state of Virginia, of the second part, the receipt whereof is hereby acknowledged, hath granted, remised, released, and for ever quit-claimed, and by these presents doth grant, remise, release and for ever quit-claim, unto the said party of the second part, his heirs and assigns for ever, all the dower and thirds, right and title of dower and thirds, and all other right, title, interest, property, claim, and demand whatsoever, in law and equity, of her, the said party of the first part, of, in, and to all that certain piece or parcel of land, &c. [here describe the premises]; so that she, the said party of the first part, her heirs, executors, administrators, or assigns, nor any other person or persons, for her, them, or any of them, shall not have, claim, challenge, or demand, or pretend to have, claim, challenge, or demand, any dower or thirds, or any other right, title, claim, or demand whatsoever, of, in, and to the same, or any part or parcel thereof, in whosoever hands, seisin, or possession, the same may or can be, and thereof and therefrom shall be utterly barred and excluded for ever by these presents.

In witness whereof, the said party of the first part to these presents hath hereunto set her hand and seal, the first day of November, in the year of our Lord one thousand eight hundred and fifty.⁴⁹

Throughout the period of this study, the most common conveyancing patterns based on gender and marital status were individual men as grantees without designation of marital status, married couples as grantors, and grantor wives in covenant clauses. Examining covenant clauses often is the sole source of information as to whether a grantor man is married. For

48. See *infra* text accompanying note 165.

49. DELOS W. BEADLE, *THE AMERICAN LAWYER, AND BUSINESS-MAN'S FORM-BOOK; CONTAINING FORMS AND INSTRUCTIONS* 84 (rev. ed. 1851).

example, **Table 2-1** shows in the 1840 sample there were ten grantor men, no grantor women, and eleven grantor husbands and wives. It was possible to infer that three of the ten grantor men were married because their wives were included in the deed's covenant clause

Covenant clauses appeared in half to two-thirds of deeds. As **Table 2-3** shows, the presence and patterns of grantor wives included and / or named in covenant clauses changed over time. Over time, wives were less likely to be named in the covenant clause, but the absence of her name in that clause could actually accord her the same status as her husband by naming both as grantors and, thus, not needing to name them in the covenant clause.

Table 2-3: Wife Included in Covenant Clause?

Date	Yes		No	No Covenant Clause in Deed	Total Deeds
	Wife Named	Wife Not Named			
1840	8	2	4	0	14
1845	5	3	4	4	12
1850	3	1	6	3	14
1855	2	4	3	3	12
1860	3	7	4	2	16
1865	3	8	2	3	16

What is intriguing is that the pattern seen in **Table 2-3** is hard to square with the law of the time. Property could not be warranted by a nonowner, yet we know from the conveyancing patterns that most of the wives could not have been owners of the property being conveyed, because very few women were grantees. Furthermore, at common law, a woman could not be party to a contract after her marriage, since she was unable to pay debts while her husband lived.⁵⁰ This inability to contract was carried

50. *Allen v. Williams* (1824), 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1814-1824, at 31 (W. Blume, ed. 1938) (holding that "[I]t appears by the very inception of the contratt [sic] that she the Said Clairette Allen is a married Woman, and therefore is not liable to pay any debt during the life of her husband."); *see also*

over into the law of deeds. The passage of the Married Women's Property Acts before 1855 did not change the law that a wife could not be bound by her covenants even for land she owned.⁵¹

The Michigan Married Women's Property Act of 1855 altered this situation, by allowing a wife to contract with regard to her own property.⁵² Even decades after Michigan's 1855 MWPA and those of other states had been enacted, treatise writers attempted to limit women's rights by saying that the Act gave only those new powers necessary for the protection of the wife's estate.⁵³

Wives as warrantors present a second example of women included in deeds in capacities with no obvious legal justification. This is equally true of their inclusion as grantors, although not as obvious. The law did not bar their presence as warrantors, but their inclusion seemed to have no purpose. However, the situation was worse from the buyer's point of view, because the state of the law as to a grantor's warrants was muddled, and uncertainty in the law breeds litigation and worse. As late as 1873, treatise writer Joel Prentiss Bishop insisted:

[A] covenant of warranty is not an essential part of a deed conveying lands. The title will pass just as effectually without it. Therefore, though the wife execute a deed with covenants, she is not bound by them. The estate simply flows from her—no more.⁵⁴

Some courts created work-arounds for this situation. Although the wife may not have been liable for her covenants, she may have been estopped by them, even before the first Married Women's Property Act. In *Colcord v. Swan*, an 1811 Massachusetts case, the court held that the wife's "executing the deed operates the conveyance of the land; but although she is estopped by her covenants, she is not answerable in damages for any

BARON AND FEME: A TREATISE OF LAW AND EQUITY, CONCERNING HUSBANDS AND WIVES 219, 332 (3d ed. 1738) (binding only the husband on a joint covenant); *but see id.* at 174-75 (finding action lies against the wife for her warranty in the fine). By the early nineteenth century, although at common law a wife could execute a conveyance with her husband, she was unable to join in the covenants. *See Aldridge v. Burlinson*, 3 Blackf. 201 (Ind. 1833).

51. Of Alienation by Deed, and the Proof and Recording of Conveyances, and the Canceling of Mortgages (Alienation by Deed), ch. 65, § 2, 1846 MICH. REV. STAT. 262; *see also* BEADLE, *supra* note 49, at 300.

52. Married Women's Property Act of Feb. 13, 1855, § 1, Mich. Act; *see also* Note, *The Impact of Michigan's Common-Law Disabilities of Coverture on Married Women's Access to Credit*, 74 MICH. L. REV. 76 (1975) (discussing the 1855 MWPA and its continuing effects).

53. 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN § 232 (1875).

54. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN § 603 (1873).

breach of them. The husband alone is liable.”⁵⁵

While this form of law might fit well with the status of wives, it is unlikely that a purchaser of land would be happy buying land whose warranty provisions could only be enforced through a complex chain of responsibility. Considering how most families’ finances operate, this may have been a distinction with little practical difference, but legal complexity in enforcing one’s rights creates opportunities for fraud. By the 1880s at least one treatise writer concluded that a married woman could be liable for a promise concerning her separate estate.⁵⁶

As discussed earlier, treatise writers said that dower rights were supposed to be released in a separate clause. However, as **Table 2-4** shows, the deeds tell a different story.

Table 2-4: Methods Used to Release Dower Rights

Date	Wife Named as Grantor?		Dower Released?		Method of Release		Number of Deeds
	Yes	No	Yes	No	Separate Clause	In Premises	
1840	11	3	5	9	5	0	14
1845	9	3	9	3	6	3	12
1850	12	2	6	8	3	3	14
1855	12	0	9	3	0	9	15
1860	16	0	6	10	0	6	16
1865	16	0	4	12	1	3	16

The data show that dower was not always expressly released nor released in the separate clause. The deeds show that wives who were not named as grantors invariably released dower in a separate clause that recited consideration for the release. Wives named as grantors either released dower in a separate clause, as did wives not named as grantors, or

55. *Colcord v. Swan*, 7 Mass. 291, 291 (Mass. 1811); *see also* *Fowler v. Shearer*, 7 Mass. 14, 21 (Mass. 1810).

56. GEORGE E. HARRIS, *A TREATISE ON THE LAW OF CONTRACTS BY MARRIED WOMEN: THEIR CAPACITY TO CONTRACT IN RELATION TO THEIR SEPARATE STATUTORY LEGAL ESTATES, UNDER AMERICAN STATUTES* § 57 (1887).

joined as grantors in deeds, some of which did not specifically mention dower or any other interest peculiar to the wife. Thus, the inclusion of a wife as a grantor was apparently not necessarily considered to be the equivalent of a separate release, since some found it necessary to do both. However, some apparently thought that including the wife as a grantor was sufficient to release all rights, including dower. It is also, of course, possible that the failure to include dower rights was a legal error and oversight.

The data in **Table 2-4** also show that methods for expressly releasing dower rights underwent an interesting change over time. In 1840, all wives who expressly released dower, whether named as a grantor or not, did so in a separate clause that recited the receipt of specific consideration for the release. However, only five of the fourteen wives released dower through a separate clause. Nine of the fourteen deeds did nothing more to release the wife's property rights than including the wife as a grantor, and, as discussed earlier, this was not the proper method.⁵⁷

By 1845, a shift had begun toward releasing dower in the premises, rather than in a separate clause. This method was only possible--although not necessarily legal--if the wife was included as a grantor. After 1855, no wives released dower who were not also named as grantors, and only 25% of wives released dower expressly. Whatever the cause, dower seems to have become merely one of miscellaneous rights and interests jointly conveyed with no specific link to the wife.

Thus, the data in **Table 2-4** may explain the gender disparity between grantor and grantee sexes shown in Tables 2-1 and 2-4. In other words, the disparity may mean that wives were included as grantors solely to bar their dower rights. This practice, which appears to place the spouses on an equal footing, may appeal to the modern sense of gender equality. However, in the legal and practical context of the time, releasing dower rights in this way may actually have harmed the wife.

Dower could ensure that a widow was not left penniless by giving her a life interest in a percentage of her husband's property when he died. If a wife did not transfer her dower rights when her husband conveyed his property, the property would be encumbered for the lifetime of the wife.⁵⁸ Few grantees would want to buy encumbered property, so the seller had to choose between lowering the price of property encumbered in this way or enticing the wife to bar her dower. Put another way, "[t]he most significant bargaining tool after marriage consisted in a wife's refusal to give up dower in realty that her husband wanted to sell."⁵⁹ However, when a woman's dower rights could be released by simply including in the deed a

57. See *supra* text accompanying notes 52-53.

58. See *May v. Rumney*, 1 Mich. 1 (Mich. 1847).

59. BASCH, *supra* note 7, at 88.

very long paragraph full of legal terminology, a wife might not realize she was giving up important rights. Thus, the shift from releasing dower rights in a separate clause could have removed important protections the law gave to wives.

E. Data From the Second Deeds Study

To answer questions left unanswered by the first sample of deeds, a second study examined a sample of one-third of the deeds in the two bookend years 1840 and 1865. (**Tables 3-1 and 3-2**)

In 1840, 65% of the grantor deeds involved husband–wife grantors; however, who was named as a grantor and in what part of the deed a grantor appeared fell into two categories. Sixty-six percent of the deeds named husbands and wives as grantors, while 34% named only the husband, but both husband and wife signed the deed. Twenty-five years later, in 1865, 59% of grantors were husbands and wives and all but two wives were named as grantors. Thus, this larger sample affirmed the earlier results that in all years, even before the first Michigan MWPA, wives were frequently named as grantors and/or present in a grantor-related role.

Table 3-1: Deeds with Women as Grantors

	1840 332 deeds of 810	1865 356 deeds of 700
Husband/Wife grantor	143	210
Wife signs as grantor, but wife not named in body of deed	74	2
Wife selling own land	0	3
Miscellaneous women	6	53
<u>Total Women Grantors on deeds</u>	<u>226 = 68%</u>	<u>268 = 75%</u>

In both 1840 and 1865, more than two-thirds of grantors included wives. Over that same period, the number of women named as sole grantors, most of whom had no designation as to their marital roles, increased nearly nine-fold from six in 1840 to fifty-six in 1865. At least part of the increase in sole women grantors in this second sample may be

explained by the death and prolonged absence of men for extended periods of time during two major wars, the Mexican War (1846–1848) and the Civil War (1860–1865). Although not included in these tables because they are not the focus of this study, many more of the 1865 conveyances than the 1840 conveyances involved heirs, particularly minor heirs under guardianship.

In this second sample, we also see large numbers of husband–wife grantors even before the Act’s passage. Indeed, the overwhelming number of deeds in both 1840 and 1865 involve husband and wife grantors. In 1840, 68% of the deeds included grantors who were women, and in 1865, 75% included women grantors. These results show an increase in “joint management by husbands and wives” coupled with increased egalitarianism and greater control by women, a feature found in other studies.⁶⁰

The greatest change in this period is the increase in the number of sole women grantees from 4% in 1840 to 17% of grantees in 1865. As with the first study, the second study also found a large disparity between the number of women as grantors compared with women grantees.

Table 3-2: Deeds with Women as Grantees

	1840 332 deeds of 810	1865 356 deeds of 700
Woman	6	52
Married woman	0	2
Husband/Wife	7	8
<u>Total Women</u> <u>Grantees on deeds</u>	<u>13 = 3.9%</u>	<u>62 = 17.4%</u>

By 1865, when the percentage of women grantors had risen to 75% and women grantees constituted 17.4% of all grantees, it is difficult to sort out what effects should be attributed to war, the Michigan Married Women’s Property Act, changed views as to women, or other forces.

III. DO THE RESULTS FIT WITH THEORIES AS TO WHY THE MICHIGAN MWPA WAS ENACTED?

How well do the patterns we see in these deeds fit with predictions as

60. Chused, *supra* note 25, at 1382-84.

to the effects of the theories articulated to explain the enactment of the Michigan Women's Property Act? What other information can be used in interpreting the data? It is important to take a cautious approach, but also to recognize the challenges of explaining the motivations that led to the enactment and re-enactment of the Michigan MWPA. The Michigan legislature thought well enough of this law that it expanded the rights afforded by the MWPA several times, suggesting that it approved of the law, and perhaps tweaked the law to make it more effective.

A. *Debtor Relief*

The first theory is that the Michigan MWPA was enacted as debtor relief. The basic support for the debtor relief theory is that the MWPA allowed a husband to convey property to his wife and, thus, put it out of reach of the husband's creditors.⁶¹ Indeed, one Mississippi state senator predicted that all marital property in Mississippi would be in the hands of wives within six months of passing the Mississippi MWPA.⁶² The first question is whether the deeds provide evidence for or against this theory. To answer that question means identifying the conveyancing patterns that demonstrate that intent.

Evidence supporting that motive would be that before the MWPA was enacted there would be no married women grantors or grantees. Married woman should appear on deeds only to release their dower rights. After its enactment, the numbers of women grantees should rise. Women may also appear in "sales" from husband to wife, although use of a "straw man" may have disguised fraudulent transactions. In addition, increasingly larger numbers of women grantees should be found in periods of economic difficulty, and there may be evidence of economic difficulty at the time of its enactment.

Support for the debtor relief theory has some support in the language of the 1855 Michigan statute:

That the real and personal estate of every female acquired before marriage and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, *and shall not be liable for the debts, obligations, and engagements of her husband*, and may be contracted, sold, transferred, mortgaged, conveyed, devised, bequeathed by her in

61. See, e.g., BASCH, *supra* note 7; Kay E. Thurman, *The Married Women's Property Acts 15-16, 25* (Jan. 6, 1966) (unpublished manuscript available through Hein's Legal Theses and Dissertations).

62. Brown, *supra* note 11, at 1114.

the same manner and with like effect as if she were unmarried.⁶³

The language of the MWPA in the 1850 Michigan Constitution also suggests that it was intended to provide debtor relief :

The real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance, or devise, shall be and remain her estate and property of such female, and shall not be liable for the debts of her husband, and may be devised or bequeathed by her as if she were unmarried.⁶⁴

However, it may be that this sort of language protecting the wife's property from her husband's creditors would be necessary in order to make the MWPA meaningful, even if debtor relief—or defrauding the husband's creditors—was not the motive.

Of course, what many creditors see as fraud may be a noble effort to protect a family during hard times. The Oregon Territory's nonvoting delegate to Congress from 1849 to 1851 wrote his constituents that the wife's land would serve as the homestead exemption to the family.⁶⁵ Concern for protecting Michigan debtors existed in this period, and there is also a close temporal and philosophical relationship between the Michigan MWPA and the obvious debtor relief provided by the early Michigan Homestead Acts.⁶⁶ Homestead Acts allowed a debtor to keep some possessions from creditors—usually tools, land, or a limited amount of money—and made homestead property up to a certain acre limit inalienable without the wife's written assent.⁶⁷

Debtor relief must have been a concern given the desperate economic conditions in Michigan—and the rest of the country—at this time.⁶⁸ In 1844, when Michigan's first married women's property act was passed, the state's early prosperity had vanished in the general financial ruin following the Panic of 1837.⁶⁹ In Michigan, depressed conditions “lasted from 1837 until the early 1840s,”⁷⁰ and Michigan “was so crushed by debt in the early

63. Married Women's Property Act of Feb. 13, 1855, § 1, Mich. Acts (emphasis added).

64. MICH. CONST. of 1850, art. XVI, § 5. The Texas Constitution of 1845 contains a provision with almost identical language. See TEX. CONST. of 1845, art. VII, § 19.

65. Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 7 (1985).

66. See *id.* at 4 n.3.

67. Act of March 25, 1848, No. 109, §§ 1-2, 1848 Mich. Acts 124-25.

68. See CAMPBELL, *supra* note 42, at 493. There is evidence that the 1837 Panic was among the motivations for the passage of the Mississippi MWPA in 1839. See WARBASSE, *supra* note 20, 146-150 (1987).

69. *Id.*

70. Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 250 (1995).

1840s that it repudiated part of the principle of its debt.”⁷¹

The best improved property in the best towns shrunk to less than half, and sometimes less than a fourth of its previously estimated value, while unimproved property not paid for bankrupted its luckless mortgagor and if paid for was often too burdensome to support its quota of taxes.⁷²

However, if the MWPA's were intended to allow this sort of legal fraud, it is not captured in the deeds, as shown in Tables 2-2 and 3-2. The low percentage and absolute number of married women grantees show that Michigan debtors missed an important tool for protecting their families from ruin or defrauding their creditors. The virtual absence of women grantees also means that there were few, if any, fraudulent transfers of property through straw men. The percentage of married women grantees remained tiny even as late as 1865, and there was no up-tick in married women grantees after the 1844 law was enacted. In comparison, the percentage of sole women grantees increased from 4% of the sample in 1840 to 17% in 1865, but that increase may have been due more to the aftermath of war. Finally, although not conclusive, the price recorded as paid by women grantees was similar to that paid by men grantees. Sale prices ranged from a low of \$70 to a high of \$4010, with most transactions over \$500.

However, even though the deeds studies do not show a pattern associated with debtor relief in practice, evidence from the Michigan MWPA's language and contemporaneous economic conditions suggest that it still may have been a motive for the law's enactment.⁷³ New York, for example, responded to the Panic of 1837 by enacting a law that gave married women an interest in lands sold under judgment, as did other states.⁷⁴ In short, debtor relief as a force behind the enactment of the Michigan MWPA is not ruled out, but the deeds show no support for it in practice.

B. *Women's Rights Legislation*

If the Michigan MWPA was enacted as women's rights legislation,

71. Susan P. Fino, *A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 975 (2003); see also Viles, *supra* note 36, at 5-6.

72. CAMPBELL, *supra* note 42, at 493. At least some of those hapless mortgage holders would have been women. See Charles F. Heller, Jr. & John T. Houdek, *Women Lenders as Sources of Land Credit in Nineteenth-Century Michigan*, 35 J. INTERDISC. HIST. 37 (2004).

73. Richard Chused, for example, sees the poor economic conditions as playing an important role in the legislation's enactment and for its impetus to have been debtor relief. Chused, *supra* note 19, at 1361.

74. BASCH, *supra* note 7, at 124; Chused, *supra* note 20, at 1400-04.

before the date of the MWPA's enactment, there should be no married women grantors or grantees, because they had no legal right to own property. After its enactment, married women should be present as grantors and grantees, and the number of married women in both capacities should increase over time as the law takes hold. There should also be evidence of contemporaneous activism in support of women's rights, especially married women's right to own property..

Professor Richard Chused, one of the foremost researchers of Married Women's Property Acts, observed:

While the connection between the first wave of married women's acts and the Panic of 1837 is impossible to dismiss, other factors also must have been at work. The country had seen bad economic times before 1840, while married women's acts were a new legislative response. The fact that many of the acts had general statements adopting the notion of a separate estate for married women's property also suggests a broader purpose. The acts must therefore have been part of a larger evolution in the treatment of women by the law.⁷⁵

The very name—Married Women's Property Acts—suggests, at first blush, that the laws were women's rights legislation, and equality in property ownership is an essential element of equality. Michigan's repeated re-enactment and expansion of these laws suggest they must have been important. Before their enactment, marriage deprived a woman, but not the man she married, of the legal ability to own and manage property, including property she brought into the marriage. A married couple was theoretically and legally one person—the husband—under the doctrine of “marital unity,” and the husband had the sole legal right to act in all matters affecting the couple.

While the theory of marital unity⁷⁶ may have been attractive, in practice it created problems that required elaborate work-arounds. Karen Pearlston observed, “Exceptions to coverture enabled a system in which married women could fulfill their necessary economic roles, something that would not have been achievable had they been literally unable to exercise any legal personality. Without its exceptions, coverture would have collapsed much sooner than it did.”⁷⁷ However, as Debra Viles explained,

75. Chused, *supra* note 19, at 1403-04. There is evidence of support for women's rights during the period in which Mississippi enacted its MWPA. WARBASSE, *supra* note 20, at 152-55.

76. Basch, *supra* note 39.

77. Pearlston, *supra* note 40, at 266. Pearlston observes that:

[C]overture should have precluded married women from becoming bankrupt. Bankruptcy was restricted to persons who made their living by buying and selling and who could be held legally liable for the debts they incurred. A

maintaining the system of coverture required constant reinforcement of its legal infrastructure. “Michigan had a separate court of chancery from 1836 to 1846. A review of its decisions reveals the complexity of equity rules for separate estates and the virtually complete dependence of married women upon judges and husbands.”⁷⁸ While there were cracks and exceptions in this doctrine, it had not yet collapsed when the first MWPAs were enacted. Thus, the MWPAs were more like work-arounds than laws that set women on an equal footing with men.

In fact, the nineteenth-century women’s rights movement regarded coverture’s loss of legal personhood as a far more immediate problem than women’s suffrage. Feminists regularly attacked laws that enabled a husband to “control the wife’s property, collect and use her wages, [and] select the food and clothing for herself and children.”⁷⁹

That Michigan’s MWPAs were enacted as women’s rights laws can be inferred from contemporaneous agitation for women’s rights, in particular in the push for reform of coverture both in the state and throughout the nation. Indeed, there was sufficient support for women’s rights by 1848 to hold a convention at Seneca Falls, New York, an event generally regarded as the beginning of the movement for American women’s rights.⁸⁰ The key document that emerged from the Seneca Falls Conference, the “Declaration of Sentiments,” included taking “from her all right in property, even to the wages she earns” among the wrongs committed against women.⁸¹

Two years before the Seneca Falls Conference, Ernestine L. Rose, an early reformer, addressed the Michigan Legislature concerning women’s rights and in 1849 introduced a resolution for women’s suffrage.⁸² An example of the importance of property rights to these early feminists is

married woman could not incur liability for a debt. In consequence, she could not be a bankrupt. Yet a few married women traded on their own account and some of them tried to take advantage of the bankruptcy regime.

Id.

78. Viles, *supra* note 36, at 8; see also Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 26-27 (1952).

79. CATT & SHULER, *supra* note 10, at 6; Sarah Grimké, *Letters on the Equality of the Sexes and the Condition of Woman*, in THE ROOTS OF AMERICAN FEMINIST THOUGHT 65, 77-80 (James L. Cooper & Sheila McIsaac Cooper eds., 1973); THE RIGHTS OF WOMEN: A COMPARISON OF THE RELATIVE LEGAL STATUS OF THE SEXES IN THE CHIEF COUNTRIES OF WESTERN CIVILISATION 211 (Tubner & Co. 1875). Contemporary scholars have also taken the position that the Married Women’s Property Acts caused a substantial change in the status and rights of women. See, e.g., LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 40 (1969). It has also been suggested that the acts were passed in order to induce women to settle in the West. See Thurman, *supra* note 61, at 14.

80. Chused, *supra* note 19, at 1359; see also Basch, *supra* note 39, at 349-50.

81. ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE 70-71 (Fowler & Wells 1889) (1881), available at <http://www.fordham.edu/halsall/mod/senecafalls.html>. See also Basch, *supra* note 39, at 354.

82. See 1 WILLIS FREDERICK DUNBAR, MICHIGAN THROUGH THE CENTURIES 272 (1955).

found in a speech by Rose in 1851:

Let married women have the same right to property that their husbands have; for whatever the difference in their respective occupations, the duties of the wife are as indispensable and far more arduous than her husband's. Why then, should the wife, at the death of her husband, not be his heir to the same extent that he is heir to her? In this inequality there is involved another wrong. When the wife dies, the husband is left in the undisturbed possession of [what] there is, and the children are left with him; no change is made, no stranger intrudes on his home and his affliction. But when the husband dies, the widow at best receives a mere pittance, while strangers assume authority denied to the wife. The sanctuary of affliction must be desecrated by executors; everything must be ransacked and assessed, lest she should steal something out of her own house: and to cap the climax, the children must be placed under guardians. When the husband dies poor, to be sure no guardian is required, and the children are left for the mother to care and toil for, as best she may. But when anything is left for their maintenance, then it must be placed in the hands of strangers for safekeeping! The bringing up and safety of the children are left with the mother, and safe they are in her hands. But a few hundred or thousand dollars can not be intrusted with her!⁸³

This and other speeches show that women's property rights were an issue of public concern at and near the time of the enactment of the first and subsequent Michigan MWPA. Law reform may result from rational⁸⁴ or irrational⁸⁵ impulses for change. The enactment—and re-enactment—of Michigan MWPA's during a time when women's rights were being discussed seems to be simply too great a change from the traditional understanding of formal legal rights for its passage to have been mere happenstance.

But do the deeds fit with evidence of national and local pressures for gender equality support a conclusion that women's rights was a basis for enacting the Michigan MWPA's? As discussed earlier, the number of women as parties to the deeds does increase over time. However, the change is slow and in some cases can be attributed to other causes, such as the effects of war. The patterns in the deeds from the start show that

83. Ernestine Rose, Remarks at the Women's Rights Convention, Worcester, Mass. (Oct. 15, 1851), available at <http://www.womeninworldhistory.com/WR-09.html>.

84. See Brown, *supra* note 11, at 1117; Pearlston, *supra* note 40, at 293-95 (arguing that British coverture law collapsed under the weight of its own irrationality).

85. See Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 60 (1979) (arguing that adoption of community property laws in some western states during the nineteenth century may not reflect the social or institutional values of those states).

married women are often included as grantors, suggesting, perhaps, some sense of folk equality even before Michigan's first MWPA was enacted. Indeed, studies of other states' laws using legal archival records (such as wills), case law, legislative sources, historical literature, and law as understood by the general population suggest that there was more equality in practice than the law allowed.⁸⁶

In other words, the MWPA's and legal developments in other states suggest that law may be less a force changing family and property relationships than "a derivative phenomenon reflecting widespread social and economic changes."⁸⁷ But if that optimistic scenario is correct, if equality had been achieved, why re-enact the Michigan MWPA several times? The continual amendments suggest that problems persisted. In addition, we know that all or most of the married women grantors in the study (wives) did not own the land being conveyed. Thus, the evidence from the deeds shows, at best, only weak support for the women's rights theory.

C. Progressive Legislation Enacted By a Politically Progressive State

If the Michigan MWPA's were enacted as progressive legislation, there should be evidence of progressive political action in addition to women's rights. It is hard to predict how this motive would affect the inclusion of parties on the deeds. The deeds might show patterns similar to those related to debtor relief and women's rights in the sense that more women—single and married—would be found in the deeds over time.

A third explanation is that MWPA rights may have grown out of general interest in reform. According to William Graham Sumner, "Legislation . . . has to seek standing ground on the existing mores, and . . . legislation, to be strong, must be consistent with the mores."⁸⁸ This general observation about the relationship between a society and its laws requires looking for evidence about the society in which the MWPA's operated. Richard Chused observed that changes made by the various states' married women's property acts were enmeshed in the "general package of reform

86. See, e.g., Chused, *supra* note 19, 1359; Basch, *supra* note 39, at 346; see also *Primary Documents in American History*, THE LIBRARY OF CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (last visited Jan. 3, 2010) for links and documents relevant to the Northwest Ordinance.

87. Basch, *supra* note 39, at 347. Indeed, if we consider the women in Shakespeare's plays, we would conclude that women in the 16th and 17th centuries were largely autonomous beings and powerful beings.

88. WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* 55 (Arno Press 1979) (1906); see also Harry V. Ball et al., *Law and Social Change: Sumner Reconsidered*, 67 AM. J. SOC. 532, 538 (1962).

movements in the first half of the nineteenth century.”⁸⁹ Even before it became a state, Michigan law was established on a different foundation than that of the original thirteen states: “The Northwest Ordinance provided for transfer of property by deed, free of the technical constraints of English common law.”⁹⁰ Michigan’s first constitution, written in 1835, two years before it became a state, was a “minimalist constitution that speaks only to fundamentals, such as the rights of the people and the structure of government.”⁹¹ This is not to say the minimalist constitution was without faults. For example, it was criticized for failing to include “provisions for coping with private corporations.”⁹²

The devastation left by the Panic of 1837 had a positive aspect as a spur to legal innovation in Michigan.

An amendment to the constitution was proposed in 1843—and approved by the people in 1844—that required a public referendum on every law authorizing government borrowing or the issuance of state stock This limited provision for direct democracy predates the Progressive Era reforms of the initiative and referendum by over sixty years. Complete renovation of Michigan’s financial house came in the Constitution of 1850.⁹³

That constitution included a revised married women’s property act.

The reform process was, however, apparently a mixed bag. In 1844, the year the first Michigan MWPA was enacted, Sanford M. Green was appointed to consolidate and revise the body of Michigan laws.⁹⁴ However, James V. Campbell, then a justice of the Supreme Court of Michigan and a Marshall Professor of Law at the University of Michigan,⁹⁵ wrote that, while Green had “incorporated all the important amendatory legislation, and introduced some valuable new features tending towards liberality,” when his work was reported to the legislature in 1846, it was “somewhat mangled by the zeal of certain so-called reformers, whose impartial

89. See Chused, *supra* note 19, at 1370-71. Mississippi may also have been motivated by its strong progressive climate. Its 1832 constitution abolished property qualifications for suffrage and officeholding; all of its civil and military officers and judges were popularly elected; and it was strongly influenced by the codification movement. WARBASSE, *supra* note 20, at 151-52.

90. *Id.* at 1392.

91. Fino, *supra* note 71, at 974.

92. *Id.*

93. *Id.* at 975-76.

94. CAMPBELL, *supra* note 42, at 510. Green moved to Michigan in 1837, was elected to the State Senate in 1842, and as a member of the Senate Judiciary Committee “was instrumental in revising the Statutes of the State that were adopted in 1847.” *Sanford Green*, MICHIGAN SUPREME COURT HISTORICAL SOCIETY, <http://www.micourthistory.org/bios.php?id=19> (last visited Oct. 8, 2010); *Political Biography of Sanford M. Green*, BAY-JOURNAL, <http://www.bjmi.us/bay/lhe/writings/mibio-green-sanford-m.html> (last visited Jan. 3, 2010).

95. See Kent, *supra* note 31.

ignorance enabled them to proceed with a degree of confidence not usually shown by competent legislators.”⁹⁶ Although some might have considered the Married Women’s Property Act to be a step in the wrong direction, it was not included by Justice Campbell as a reform he regarded negatively.⁹⁷

Michigan enacted other important and progressive legislation in this period.⁹⁸ For example, in 1846, it became the first English speaking government to abolish capital punishment.⁹⁹ Slavery had been outlawed in Michigan in 1787 under the Northwest Ordinance,¹⁰⁰ and Michigan prohibited slavery in its 1835 constitution.¹⁰¹ The anti-slavery movement was active in the state, and Michigan’s proximity to Canada made it an important route on the Underground Railway.¹⁰² Among abolitionist actions taking place in this period, in 1832, the first anti-slavery society was organized in Michigan;¹⁰³ and anti-slavery societies were organized in Detroit in 1834, in Ann Arbor in 1836,¹⁰⁴ and in Marshall.¹⁰⁵ In 1854, anti-war sentiment and opposition to slavery led to heightened political activity.

The Mexican War generated more opposition in Michigan than any other previous war. This opposition continued to grow after the war ended and – coupled with the concern over the extension of slavery into newly acquired territory – precipitated the

96. CAMPBELL, *supra* note 42, at 510.

97. *See id.* at 520.

98. For an overview of Michigan’s legal progress from its formation as a territory to its move toward statehood, *see* Elizabeth Gaspar Brown, *Frontier Justice: Wayne County 1796-1836*, 16 AM. J. LEG. HIST. 126 (1972).

99. CAMPBELL, *supra* note 42, at 524-25. *See also*, Marietta Jaeger-Lane, *Michigan’s Death Penalty History*, CITIZENS UNITED FOR ALTS. TO THE DEATH PENALTY, <http://www.cuadp.org/michhist.pdf> (finding that “March 1, International Death Penalty Abolition Day, marks the anniversary of the date in 1847 in which the State of Michigan officially became the first English-speaking territory in the world to abolish capital punishment.” The CUPD history notes that “the first official act of the [Michigan] legislature was to constitutionally abolish the death penalty. The constitutional language was approved in the Spring of 1846, and became official on March 1st, 1847.”) (last visited Oct. 15, 2010).

100. *Slavery and Freedom in Michigan: A Mini-Time Line*, MICH. TIME TRAVELER, <http://www.hal.state.mi.us/mhc/timetraveler/ugrr/timeline.html> (last visited Oct. 15, 2010)

101. *Slavery, Resistance and the Underground Railroad in Michigan*, MICH. DEPT. OF NATURAL RES. & ENV’T, http://www.michigan.gov/dnr/0,1607,7-153-54463_18670_44390-158647--,00.html (last updated Aug. 25, 2010).

102. *Timeline of the Anti-Slavery Movement in Michigan*, DETROIT OPERA HOUSE, http://www.michiganopera.org/mg_ed/educational/Timeline.html (last visited Sept. 29, 2010).

103. *Id.*

104. *Id.*

105. *Timeline of Slavery, Resistance, and Freedom (1837-1893)*, MICH. DEPT. OF NATURAL RES. & ENV’T, http://www.michigan.gov/dnr/0,1607,7-153-54463_18670_44390-158720--,00.html#1840s (last visited Oct. 15, 2010).

sectional conflict that in 1854 led to the formation of the Republican party in Jackson, Michigan.¹⁰⁶

On the other hand, people in Michigan also kept slaves, despite slavery's being forbidden under the Michigan Constitution, returned runaway slaves to their masters—something required by federal law at that time—and otherwise supported slaveholders.¹⁰⁷

Progressive actions and movements for personal freedom certainly existed in Michigan, and it seem likely they signaled a political climate that would support laws that protected both debtors and women. However, as Richard Chused observed, “the story of women’s property acts is much more complex than a simple tale about progressive ideals winning out over blind forces of reaction.”¹⁰⁸ Furthermore, while it is difficult to predict how a progressive climate might affect the form of deeds, it might explain the presence of so many married women as grantors. Perhaps, married women were included as a personal statement of equality in form if not in law. If true, though, why were married women so absent as grantees, a status that would have given them far greater security? Why were married women not present as co-owner grantors in their own right? In short, while there is no evidence that would positively rule this theory out, there is no evidence that suggests progressive politics explains the patterns seen in the deeds.. A study of nineteenth-century patents provides an interesting insight into the effects of a progressive legislative ecosystem. It finds that the number of women patent holders was higher in those areas of the country where there were more liberal laws concerning women's status, especially where married women's property rights legislation had been enacted.¹⁰⁹

D. *The Law Embodied Existing Gender Equality*

At the time Michigan enacted its first MWPA, it was a frontier state. Could frontier experiences, which might demand that people not be restricted by traditional roles in order to meet the challenges they face, affect views as to women’s and men’s equality and rights, and would those views affect how property was held? If so, we would expect to find

106. BARNETT & ROSENTERER, *supra* note 46.

107. See Bill McGraw, *Slavery Is a Quiet Part of City's Past: Prominent Historical Figures Played Key Role in Complex, Painful Era*, DETROIT FREE PRESS (February 22, 2001), available at http://www.freep.com/news/locway/slave22_20010222.htm; Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997) (discussing property rights in slaves through the intersection of race, class, gender, and enslavement).

108. Chused, *supra* note 19, at 1423.

109. B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790-1895*, 56 J. Econ Hist. 356 (1996).

support for this theory through evidence of equality between men and women in the deeds.

If this theory is correct, we would also expect to find evidence of gender equality in addition to the enactment and re-enactment of the Michigan MWPA's and more than merely expanding property rights for married women. It theorizes that there would be evidence of attitudes which had already changed¹¹⁰ beyond those related to changes in women's owning property.

Indeed, within and without Michigan there were extant egalitarian models of marital relationships in the system of equity and in the decisions of Michigan's courts of chancery,¹¹¹ as well as in other states' property laws, such as the civil law system's community property doctrine.¹¹² Research shows evidence of joint husband-wife property management, for example, in South Carolina from 1730-1830: "Authority . . . moved . . . toward joint management by husbands and wives," and that research roughly fits with research in other geographic areas.¹¹³ In addition, pressure from changing demographics, urbanization, and a highly mobile population left many women without male support.

During the first third of the nineteenth century, abandoned and widowed women were more likely to be isolated from extended families or friends than in the previous century. The growth of industrial cities and the opening of the Western territories provided ample occasion for husbands to leave their families or for widows to find themselves without means of support.¹¹⁴

Thus, settlement patterns and reactions to them created the conditions for new views of families and women and may have actually changed norms about power and decision-making structure and process within families. This theory is a good fit with and brings together as influences on the Michigan MWPA feminist sentiments, contemporaneous progressive views, and gender equality based on the experience of husbands and wives working together as equals on the frontier.

It is also possible that the inclusion of women as grantors of their

110. This conclusion is supported by other research projects. See Chused, *supra* note 19, at 1371. Peggy Rabkin observed: "The equitable doctrine of a married woman's separate estate was developed to correct the injustice and mitigate the hardship incident to the common-law merger of the legal beings of husband and wife." Rabkin, *supra* note 13, at 692.

111. See Viles, *supra* note 36, at 7; Ely, *supra* note 8, at 296-97.

112. See Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 699 (1990) (finding that "[m]any commentators have praised community property states for recognizing husbands and wives as equal partners in marriage.").

113. Chused, *supra* note 19, at 1382-84.

114. *Id.* at 1407.

husbands' property—regardless of the initial motivation—may have promoted a folk sense of equality. Indeed, in the early period of the deeds study, some of the property with husband-and-wife grantors may have been property the wife brought into the marriage but which effectively became the husband's property under the law of coverture. Even if the wife was included solely to release dower or some other right in her husband's property, her name next to her husband's in jointly conveying rights and interests may have promoted a sense of equality greater than provided by the law.

Unfortunately, while plausible, it is difficult to test this theory against the general deed patterns as to grantors and grantees. Moreover, the deeds' dearth of woman grantees and single woman grantors throughout most of this period undermines any claims of increasing gender equality. Furthermore, the most progressive laws among the states still left men in control of women's property. For example, the 1840 Texas marital property statute recognized a married woman's right to own property, but her husband had exclusive control over it.¹¹⁵ Richard Chused observes: “[R]eforms in trust law, which made the establishment of married women's estates more difficult,” may say more about “the early nineteenth-century movement to merge law and equity and reform pleading practices”¹¹⁶ than about women's equality.

Michigan was not the only state in which the MWPA's were uncontroversial. As Kay Thurman observed in 1966:

The history of the Married Women's Property Acts, however shows no feature more striking than the lack of sustained, sharp controversy. This picture is in sharp contrast with the struggle over women's suffrage; there is no evidence of an organized women's lobby supporting the property measures. The significance of the absence of high controversy seems to be that, at most, these more clearly defined and ratified, rather than created the values they embodied. Indeed, regarded as a whole, the statutes seem to have been of little innovative force, rather they seem to have given more definite form to practices and institutions already well established in the culture.¹¹⁷

In fact, there were a number of ways that law allowed women to act on behalf of the couple. Immigrant woman laws and other laws that created

115. Smith, *supra* note 113, at 698.

116. See Chused, *supra* note 19, at 1371; see also BASCH, *supra* note 7, at 74-75, 79; see also Rabkin, *supra* note 13, at 694 (noting New York's enactment of its MWPA essentially codified existing law developed through equity).

117. Thurman, *supra* note 61, at 7; but see KANOWITZ, *supra* note 79, at 40.

powers that allowed a wife to manage the family's property while her husband traveled to scout out new land or take care of other business¹¹⁸ allowed husbands and wives to act as partners and to trust that they would jointly prosper through equality and autonomy. Again, while these ideas are plausible, there is nothing in the deeds that supports this theory.

E. The Effects of Other Contemporaneous Law

The failure to find a tight fit between the theories proposed and patterns seen in the deeds so far may suggest that the best theory is that the MWPA's were passed inadvertently by the Michigan legislature. However, laws are not enacted for no reason, and that is certainly true in the case of laws that involve fundamental structures in society, such as marriage and property ownership. This theory suggests that the MWPA's cannot be understood as stand-alone legislation without attention to the larger ecosystem of other laws and practices. It depends on finding some law or laws that permit and promote the patterns seen in the deeds. In addition, there should be a congruence between these other laws and patterns seen in the deeds.

Although the MWPA's had supporters, they also had detractors. The judiciary was unenthusiastic,¹¹⁹ and treatise writers tended to interpret the new rights as narrowly as possible, even long after the MWPA was law in Michigan and elsewhere.¹²⁰ For example, in 1873, Joel Prentiss Bishop took the position that the MWPA's were limited to the rights and powers necessary to protect a married woman's private estate,¹²¹ and in 1887, George E. Harris contended that the power and dominion of the MWPA's was actually limited and restricted by the terms of its enabling statute.¹²² Actions by influential people and groups may have limited the effects of

118. Warbasse, *supra* note 20, at 75-76. See *infra* text at note 179-84.

119. See, e.g., *Brown v. Fifield*, 4 Mich. 322, 322 (Mich. 1856) (holding that, although the state constitution permitted married women to own property, a woman nevertheless could not sell her own property without the consent of her husband). Similar conservative judicial activism has been seen in other areas of law, in particular in relation to the National Labor Relations Act. See generally, JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006); CHARLES O. GREGORY, *LABOR AND THE LAW* (2d rev. ed. 1961); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977-1978); see also Dannin, *supra* note 41.

120. Brown, *supra* note 98, at 145-51 (study of legal practice in territorial Wayne County, Michigan showing that treatises were an important part of lawyers' libraries and that many of those treatises were ancient even then).

121. See BISHOP, *supra* note 53, at § 312.

122. See HARRIS, *supra* note 56, at § 50; but see *Starkweather v. Smith*, 7 Mich 377 (1859).

the MWPAs.

This section describes the larger ecosystem of property and other laws. In fact, the MWPAs cannot be understood outside the ecosystem that included other laws and practices related to conveying property, including debtor legislation. The MWPAs and other laws governing property owned by couples could be used to protect debtors from creditors but could also be used to defraud creditors by transferring the husband's property to his wife. The Michigan courts prided themselves on their willingness to see through such fraudulent transactions and defeat and discourage them;¹²³ however, there would be no record of those they failed to detect. In addition, if the MWPAs could be used to defraud a creditor, so too could the disabilities of married women. Various methods—in addition to directly conveying property from a husband to a wife to put the property out of creditors' reach—were used to achieve the same result. For example, an 1851 form book and legal treatise advised:

If a husband wishes to convey property to a wife, he can do so by conveying to some friend in trust for her benefit. Such a conveyance would be set aside on the application of creditors whose rights were prejudiced by it, but they will secure the property to the wife against everybody else.¹²⁴

Beach v. White,¹²⁵ a Michigan Chancery case, involved an attempt to defraud a creditor by using a married woman's disabilities under coverture, an attempt that was not successful.¹²⁶ In *Beach*, the court held that while "[a]ll postnuptial contracts are not necessarily void as to creditors," in this case the hallmarks of fraud were too obvious to permit the court to uphold the transaction.¹²⁷ The decision's dependence on hallmarks of fraud to set a transaction aside suggests that it was possible to successfully defraud creditors by using structures created to deal with married women's legal disabilities by exercising greater care to hide evidence of fraud.

Indeed, creditors' concerns may explain the presence of so many married women on the deeds as grantors both before and after the enactment of Michigan's first Married Women's Property Act. This

123. See, e.g., *Herschfeldt v. George*, 6 Mich. 456, 465 (Mich. 1859) (finding fraudulent and voiding a transfer from a husband to his wife made to deceive creditors).

124. BEADLE, *supra* note 49, at 82.

125. *Beach v. White*, in MICHIGAN CHANCERY REPORTS, 1842–1845, 496 (2d ed. 1878).

126. *Id.* at 500. See also *Goff v. Thompson*, in MICHIGAN CHANCERY REPORTS, 1836 – 1842 60 (2d ed. 1872), and the case of *Schwarz v. Wendell* as discussed in Viles, *supra* note 36, at 8–11.

127. *Beach*, *supra* note 126, at 500. Another researcher found similar results and concluded: *Beach v. White* was “the only case charging fraud against a creditor by means of a separate estate. The lack of additional cases may reflect the high cost of litigation; more likely, it means that separate estates were not widely used in Michigan or were not perceived as a problem by creditors.” See Viles, *supra* note 36, at 8 n.18.

concern may go a long way toward explaining the presence of so many husband-wife grantors even though the wives did not own the property. Indeed, for a practice to be so common suggests it had legal significance. Wives' inclusion as grantors solely to release dower rights seems unnecessary, especially in the cases where married women had expressly released their dower rights in a dower release clause in the deed. This practice suggests that grantees were concerned about rights other than dower. For the price of writing out a longer legal document, a purchaser—including creditors—could have greater assurances that they had clean title and that there would be no remaining grantor property rights and, thus, no legal disputes.¹²⁸

There were a number of property rights based on status, in addition to dower and curtesy, that could interfere with receiving all rights in property. For example, tenancy by the entirety, a form of ownership limited to property owned by a married couple, created rights that continued even after property was sold, unless special efforts were made to extinguish them.¹²⁹ Michigan courts held that the MWPA did not in any way affect the tenancy by the entirety.¹³⁰

The issue of greatest concern seems to have been the exposure of entireties property to claims of creditors of either spouse individually. Some states held that each spouse was entitled to possession of one-half of the property and one-half of the income; their individual creditors were permitted to attach these interests. Other states held that neither party had the exclusive right to possession or income, and therefore did not permit creditors of either spouse alone to levy on entireties property so long as both were alive.¹³¹

Thus, the concern may have been not just dower rights but “that contracts for the sale of entireties property signed only by the husband are not binding on the wife. This holding is consistent with the common law, of

128. See Chused, *supra* note 65, at 5 (noting that creditors' rights played an important role in the development of Oregon's Married Women's Property Act).

129. See Douglas A. Kahn, *Joint Tenancies and Tenancies by the Entirety in Michigan: Federal Gift Tax Considerations*, 66 MICH. L. REV. 431, 443-44 (1967-1968).

130. John D. Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1084 n.229 (1972); Phipps, *supra* note 78, at 28-31; John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 48 (1997) (describing the history of legal developments affecting the tenancy by the entirety and observing that it had managed to survive “the earthquake of the married women's property acts” and would probably continue to do so). The Michigan courts' view the majority view. See Note, *Effect of the Married Women's Property Acts upon Estates by the Entirety*, 37 HARV. L. REV. 616 (1924).

131. Johnston, *supra* note 131, at 1085-86 (emphasis omitted).

course, since the husband cannot convey the wife's survivorship rights."¹³²

Consent to the termination of an estate by the entirety, along with "payment of consideration, delivery and recording of the deed constitute such joint action and mutual assent as are required by our cases to destroy the entirety."¹³³ The wife's failure to join in the conveyance would allow the wife's survivorship rights to continue to exist.¹³⁴ To be safe, both spouses needed to be included, regardless of which actually owned the property. Economic reality as to property ownership meant that most often it would be the wife joining her husband's conveyance of his property, but it might apply to a husband's interests in his wife's property if she had any to convey.¹³⁵

Michigan courts interpreted Michigan law to require that both the wife and husband joined in a transfer of property. A "levy by the husband's creditors upon 'his interest in' an estate by the entireties will reach nothing"¹³⁶ Perhaps the reason that release of dower and tenancy by the entirety do not offer a completely satisfactory explanation for the presence of wives as grantors of their husbands' property is that other laws of the time also made the wife's inclusion expedient. Michigan's Homestead Act¹³⁷ reinforced the impression that the wife was a co-grantor by requiring that she give consent to a sale of marital property. In addition, the Homestead Act, incorporated into the state constitution of 1850,¹³⁸ created and supported conditions of equality for husbands and wives, as well as protecting the rights of creditors and grantees in general through its exemptions of real property from alienation and encumbrance unless both husband and wife joined in the transaction.¹³⁹

Of course, Michigan courts varied in the liberality with which they interpreted the law. Some held that a married man could not consent to a sale or waiver without the wife's assent.¹⁴⁰ Other actions allowed creditors more rights under the law by interpreting the wife's rights more narrowly. For example, the court in *People v. Plumstead*, held that the husband could designate homestead property from among his lands and sell that which he had decided was not in the homestead.¹⁴¹ However, other courts narrowed protections to debtors by holding that there must be occupation of the land

132. *Id.* at 1087.

133. Phipps, *supra* note 78, at 36 n. 34 (quoting *Runco v. Ostroski*, 361 Pa. 593 (1949)).

134. *Id.*

135. *See, e.g., id.*

136. *Id.* (citing *Lewis v. Pate*, 212 N.C. 253 (1937)).

137. Act of March 25, 1848, No. 109, §§ 1-2, 1848 Mich. Acts 124-25.

138. MICH. CONST. of 1850, art. XVI, § 2.

139. Phipps, *supra* note 78, at 42.

140. *See King v. Moore*, 10 Mich. 538 (Mich. 1862); *Beecher v. Baldy*, 7 Mich. 488 (Mich. 1859).

141. *People v. Plumsted*, 2 Mich. 465 (Mich. 1853).

before any part of it would be exempt under the homestead acts.¹⁴² In any case, the natural effect of such legislation would have been to encourage grantees and creditors to require grantors' wives to signify their acquiescence in any sale of land. A simple way to demonstrate such intent would be by joining fully in the husband's deed.

There are other connections between the Homestead Act and the Married Women's Property Act that may have affected the deeds. Both are in close physical proximity in Article Sixteen of the Constitution of 1850; both deal with rights in land of two generally less favored classes—women and debtors; and both potentially gave wives greater property rights. In 1855, further revisions of the Married Women's Property Act created a greater entanglement between the two by providing that a "wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property" in order to protect homestead property.¹⁴³ That act also allowed wives to sell their own property without their husbands' joining in the deed;¹⁴⁴ however, as a practical matter, it may not have been possible to convey clear title without a husband's also conveying his interests, such as curtesy. Joining in his wife's deed would have been a simple way to do this.

Thus, the general practice as to married women revealed in these deeds was not one that made property inaccessible to purchasers and, potentially, creditors. Rather, it assured purchasers that they were entering into a bona fide transaction.

Where law bettered the condition of women, the record was not always clear as to the force impelling change; there is some reason to believe that the married women's property acts were prompted as much by concern to help creditors attain the security of the wife's signature on her husband's note as to advance the woman's capacity to be a free trader for herself.¹⁴⁵

Protection of creditors' rights would seem to explain the pattern seen in the deeds, but does it? A convenient way to convey any property—and to ensure that a clean title was passed—was to join as a grantor to convey any interest in the property a spouse had or might have along with the property's owner, the practice that we see in many of the Michigan deeds. This is such a tidy way of explaining the data—even though it does little to explain the effects and purpose of the Michigan MWPA—that, it would

142. *See, e.g.*, *Chamberlain v. Lyell*, 3 Mich. 448 (Mich. 1855); *Wisner v. Farnham*, 2 Mich. 472 (Mich. 1852).

143. Married Women's Property Act of Feb. 13, 1855, § 3, Mich. Act..

144. Married Women's Property Act of Feb. 13, 1855, § 1, Mich. Act. A connection between the two acts has been noted in the laws of states other than Michigan. *See Thurman, supra* note 61, at 61 n.32.

145. JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 66 (1977).

seem, no more need be said. But though convenient, it does not answer the question: Was it legal under Michigan law to convey property in this way?

The convenience of including a wife as a grantor in order to convey all her interests in a property seems interesting but not irregular until the contemporary law is explored. Elizabeth Gaspar Brown's study of the sources of law relied on by lawyers in Wayne County, Michigan (the county just east of Washtenaw County) in the period just preceding this study found that even at that early time, they relied on the same sources of law as those in the large cities in the East:

The cumulative impact of these books demonstrates that the practicing lawyer in Wayne County did not find his sources of law in theoretical abstractions of justice or local conceptions of right and wrong. Rather, he possessed and used the same sources of law as his contemporaries in Philadelphia or New York. Excluding the purely American materials, he drew his water from the same well used by his British counterpart.¹⁴⁶

What these practitioners would have found was that deeds that included wives only as grantors—as some of these deeds did—were technically insufficient to pass an unclouded title. Great pains were taken—at least on the books—to protect women by making it difficult to lose dower rights. Thus, throughout this period and even as late as 1881, treatise writers took the position that dower rights could only be released expressly and through a separate dower release clause.¹⁴⁷ A wife who merely joined in a deed that conveyed her husband's land was not bound thereby in any way.¹⁴⁸ It nevertheless appears—and certainly is the case with the Michigan deeds—that married women commonly joined in the whole deed to bar their dower rights, rather than by the "fine" of the

146. Brown, *supra* note 98, at 152.

147. See, e.g., ASA AIKENS, PRACTICAL FORMS 68-71 (2d ed. 1836); GEORGE TICKNOR CURTIS, THE AMERICAN CONVEYANCER 72 (1856); BENJAMIN LYNDE OLIVER, PRACTICAL CONVEYANCING: A SELECTION OF FORMS OF GENERAL UTILITY, WITH NOTES INTERSPERSED 197-98 (4th ed. 1881). Michigan territorial laws allowed a dower right to prevail even over the husband's will. See Act of July 27, 1818, § 8, in 1 LAWS OF THE TERRITORY OF MICHIGAN, 1805-1822 347 (1871). In special circumstances, when the husband was under guardianship, the wife's dower rights in property sold were given special statutory protection.

In case of any such release by the wife of her right of dower, or of any such conveyance of her own estate, the proceeds of the sale may be so invested and disposed of, as to secure her right, use, and benefit of the principal sum and the income thereof, that she would have had in such real estate and the income thereof if it had not been sold.

Alienation by Deed, ch. 65, § 16, 1846 MICH. REV. STAT. 264. Cf. *Wood v. Savage*, in MICHIGAN CHANCERY REPORTS, 1842-1845 426 (2d ed. 1878).

148. E.g., BARON AND FEME: A TREATISE OF LAW AND EQUITY, CONCERNING HUSBANDS AND WIVES, *supra* note 50, at 219; BISHOP, *supra* note 53, at § 448.

common law¹⁴⁹ or by a separate clause. A study of married property law from 1800–1850 found the same dynamic:

The use of a fine and recovery to convey a married woman's interest in her husband's land gave way to joint conveyance accomplished by signature. Even though many Colonies, states, and territories retained the English practice of approving a land sale only after a married woman was separately examined before a judge or magistrate, the general liberalizing of conveyancing practices had substantial impact. While in hindsight the ease with which a wife's dower or other interest in real property could be transferred may be viewed as a double-edged sword, there is little doubt of its importance in early American women's law.¹⁵⁰

The practice seen in the Michigan deeds, was, however, considered a highly irregular practice by treatise writers.¹⁵¹ Although the law apparently did not require an exact formula of words,¹⁵² it did require an express intention to release dower and other rights.¹⁵³ Dower rights could only be released as part of the transfer of the property as to which the dower rights existed: "A release of dower can operate only as a release, it must accompany the conveyance of another, and ceases to operate with that; it cannot operate as the transfer of an independent estate."¹⁵⁴ But even though these rights were to be conveyed in the same document, treatise writers and form books said the husband alone was to be named as the grantor of his land and the wife was to bar her dower in a separate clause within that same document.¹⁵⁵

In short, we seem to have had a treatise writer's view of the law that differed from the law as commonly practiced—and not only in Michigan. A New Hampshire case provides an example of a practice we see in some

149. See, e.g., BISHOP, *supra* note 53, at § 449; KENT, *supra* note 11, at 65; HARRIS, *supra* note 56, at § 423; *Catlin v. Ware*, 9 Mass. 218, 219-20 (Mass. 1812); see also Rabkin, *supra* note 13, at 704; but see CHARLES WATKINS, *PRINCIPLES OF CONVEYANCING* 41 (1st Am. ed. 1838).

150. Chused, *supra* note 19, at 1393.

151. See, e.g., PEREGRINE BINGHAM, *THE LAW OF INFANCY AND COVERTURE* 326 n.2 (1st Am. ed. 1824); OLIVER, *supra* note 148, at 210.

152. See e.g., *Dundas v. Hitchcock*, 53 U.S. (12 How.) 256 (1851); *Stearns v. Swift*, 25 Mass. 532, 536 (Mass. 1829) (finding that release operates by estoppel and not by grant). That case is cited by Rev. Stat. 1846, ch.66, § 13 of Michigan laws; BENJAMIN LYNDE OLIVER, *PRACTICAL CONVEYANCING: A SELECTION OF FORMS OF GENERAL UTILITY, WITH NOTES INTERSPERSED* 234 (3d ed. 1853).

153. See notes 54-55__ and accompanying text *supra*.

154. PEREGRINE BINGHAM, *THE LAW OF INFANCY AND COVERTURE* 328 n.2 (2d Am. ed. 1849). However, at least one treatise writer said that a prior conveyance evidently could be consideration for the separate release. See BENJAMIN LYNDE OLIVER, *PRACTICAL CONVEYANCING: A SELECTION OF FORMS OF GENERAL UTILITY, WITH NOTES INTERSPERSED* 210 (2d ed.1827).

155. See, e.g., OLIVER, *supra* note 153, at 210; see also *Fowler*, 7 Mass. at 20.

of the deeds in the study where the wife is not named in the deed but signs her husband's deed to bar her dower:

In New Hampshire it was much later before the courts were composed of educated lawyers, or were materially aided by an educated bar, and it is probably owing to this circumstance that the custom became established here that the wife may release her dower by her signature and seal at the foot of her husband's deed, without her name being in any other way mentioned or alluded to in the instrument.¹⁵⁶

It is easy to see the attraction of the form of deed that named both husband and wife and included a release of all conceivable rights either or both might have. It was more convenient for grantors, grantees, lawyers in practice, and the attorneys' clerks who handwrote the documents. It was also certainly simpler—and thus easier to avoid errors—to have one form used for most transactions. That goal could be achieved by naming both husband and wife as grantors—as they were, but as to different rights—and to list all rights they each or both could be conveying, even if only one was conveying some of these rights:

In the United States, the middle-class family was part and participant in the working legal system. English land-law practices were too cumbersome, technical, and expensive for this class to bear. Moreover (and this was critical), the tangle of rules and practices was potentially an impediment to the speed and efficiency of the land market.¹⁵⁷

Thus, the general practice was not English land-law practices, but the form books and treatises discussed here were American documents that embodied law descended from England.

By the mid-nineteenth century, however, a split developed among the states as to how dower could be barred,¹⁵⁸ either expressly in a separate

156. *Burge v. Smith*, 27 N.H. 332, 337-38 (N.H. 1853).

157. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 186 (1973).

158. *See, e.g.*, BISHOP, *supra* note 53, at § 449; *Hall v. Savage*, 11 F. Cas. 252 (C.C.D. Mass. 1826) (construes doubtful words in favor of the wife); *Cox v. Wells*, 17 Blackf. 410, 411 (Ind. 1845) (name not in body of deed); *Lothrop v. Foster*, 51 Me. 367 (Me. 1863); *Stevens v. Owen*, 25 Me. 94, 98-99 (Me. 1845) (no inference permitted); *Leavitt v. Lamprey*, 30 Mass. (13 Pick.) 382, 383-384 (Mass. 1832) (estoppel does not affect when no express release); *Catlin*, 9 Mass. at 220; *M'Farland v. Febigier's Heirs*, 7 Ohio (Hamm.) 337, 338 (1833) (wife's joining in is only as witness to her husband's conveyance). *See also Burge*, 27 N.H. at 337. Other courts held that the deed should be construed most strongly against the grantor and inferred a release from the wife's otherwise anomalous grant. *See, e.g.*, *Schaffner v. Grutzmacher*, 6 Iowa 144, 151 (Iowa 1858) (though dower may have been mentioned in deed); *Burge*, 27 N.H. (7 Fost.) at 337-38; *Sprague v. Converse*, 1 Ohio Dec. Reprint 405 (Ohio 1851); *Smith v. Handy*, 16 Ohio 191, 232 (Ohio 1847); *Brown v. Farron*, 3 Ohio 140 (Ohio 1827).

clause or by joining in the whole deed. Unfortunately, for finding a simple answer but fortunately for this article, the state of Michigan's law on this issue was uncertain. By statute, conveyances of land in Michigan had to comply with formal requirements that they be by deed, signed and sealed "by the person from whom the estate is intended to pass" or his agent or attorney.¹⁵⁹ However, the legislation did not state whether the release of dower was to be express or not, and another statute seems to permit joining in the deed to bar dower rights:

A married woman residing within this state may bar her right of dower in any estate conveyed by her husband or by his guardian if he be under guardianship, by joining in the deed of conveyance, and acknowledging the same as prescribed in the preceding chapter, or by joining with her husband in a subsequent deed, acknowledged.¹⁶⁰

Although this statute appears to provide the entire answer for the behavior of the Washtenaw County grantor couples, the history of the Act suggests otherwise. This provision was borrowed in 1837¹⁶¹ almost verbatim from a Massachusetts law of 1836,¹⁶² along with much of the rest of the Massachusetts code of 1836. The Massachusetts statute book from which this provision was almost certainly taken cites *Fowler v. Shearer*,¹⁶³ a well known case of the time, as do later versions of the Michigan statute.¹⁶⁴ That case held that, to be effective, a release of dower must be express.¹⁶⁵ In other words, Michigan may also have required an express

159. Alienation by Deed, ch. 65, § 1, 1846 MICH. REV. STAT. 262.

160. Alienation by Deed, ch. 66, § 13, 1846 MICH. REV. STAT. 263.

161. Alienation by Deed, pt.2d, tit. 1, ch. 2, § 7, 1837 MICH. REV. STAT. 258. This provision appears to be unique to Michigan and to have had its origin in these revised statutes. The Massachusetts law revision commissioners, whose report was adopted very nearly as written, at least in this part, gave as the origin a law of 1824. However, that law is substantively very different. See REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH: PART II. 125, § 12 (1835); An Act Authorizing Femmes Covert to Join with Guardians of their Husbands in the Sale of Real Estate, MASS. GEN. LAWS ch. 146, § 1 (1822-27).. Prior to this law was one enacted in 1783. See Law of 1783, ch.37, § 5, 1783 Mass. Acts 111.

From an inspection of various states' laws at that time, it appears very likely that the Massachusetts statute, but not the Commissioners' Report, was the source of the Michigan law. Vermont, Virginia, New York, Ohio, and Indiana did not have any provision which even remotely resembled the Michigan law.

162. MASS. REV. STAT. 1836, pt.2, tit.1, ch. 60, § 7 (1836).

163. *Fowler*, 7 Mass. 14.

164. See Alienation by Deed, ch. 66, § 13, 1846 MICH. REV. STAT. 263.

165. *Fowler*, 7 Mass. at 20. Michigan's early dower laws were adopted from those of Massachusetts, Virginia, and Vermont. Act of July 27, 1818 §§ 1-4 in 1 LAWS OF THE TERRITORY OF MICHIGAN 356-68 (W.S. George & Co. 1871). An inspection of Virginia

release, despite the wording of the statute.

Some cases and treatises suggest that, even when dower was not released expressly, other required parts of the deed could be manipulated in order to achieve the ends of justice and bar dower. For example, language stating that there had been a separate examination of the wife—a provision in every deed in the study that included a married woman—was originally intended as an important protection for the woman when conveying her own property.¹⁶⁶ There is only one deed with a married woman without such a clause. Since most of the deeds which do not expressly release dower state generally that they are conveying all of the parties' legal and equitable interests, it is not unreasonable to conclude that this includes dower, despite the requirement that such a release be express. The legal requirement of a separate examination and other measures may have provided some protections to the wife by potentially giving her leverage over a husband who wanted or needed to convey property. However, equally important in estopping a wife from later asserting her dower or other rights were the interests of the purchaser in receiving a clear title.

It seems likely that most of the grantor wives genuinely intended the transaction to end their interest in the land. Certainly, the deed's premises appear to be the appropriate place to include dower, as one more thing the co-grantors are conveying. The separate examination would then operate as a sworn statement that the intent to convey on the part of the wife was real. There may have been some wives who revealed during a separate examination that her will had been overborne, but one wonders what would have happened then, especially when cases and treatises make it clear that the husband exercises all rights within the relationship. In any case, we live now more than a century after anyone who could explain what actual practices and motives were. The best we can say is that no Michigan court then construed Michigan law in any way other than to require that wives must release dower expressly.

common law to 1818 did not yield any other cases on point.

166. See *Langhorne v. Hobson*, 31 Va. (4 Leigh.) 224, 224-26 (Va. 1833). See also BINGHAM, *supra* note 152, at 326 n.4; Stacy Lorraine Braukman & Michael A. Ross, *Married Women's Property and Male Coercion: United States' Courts and the Privy Examination, 1864-1887*, 12 J. WOMEN'S HIST. 1042 (2000).. Several forms of the separate examination existed from quite early times in the territorial history. See Act of Aug. 29, 1805, § 2, in 1 LAWS OF THE TERRITORY OF MICHIGAN 518 (W.S. George & Co. 1871); Act of Mar. 27, 1820, § 4 in 1 LAWS OF THE TERRITORY OF MICHIGAN, 1805-1822, at 518; Alienation by Deed, ch. 65, § 21, 1846 MICH. REV. STAT. 264; BISHOP, *supra* note 53, at § 448. The 1805 act states that it was adopted from the law of Virginia. The Virginia court, in construing the original statute, found that the law gave women substantial protection. See *Langhorne*, 31 Va. (4 Leigh.) 224. Of course, whether this was true in fact is an open question.

V. MICHIGAN LAW AND GENDER EQUALITY?

Although the Married Women's Property Act, which was the initial impetus for this study, did not affect deeds as anticipated, it may have shaped them in an entirely unexpected manner. The Act provided, prior to 1855¹⁶⁷ and including the constitutional provision of 1850,¹⁶⁸ that the husband was required to join in the wife's deed.¹⁶⁹ This can be viewed in three very different ways: as evidence of the married woman's inferior status, as a sort of quid pro quo for the laws that required the wife to join in her husband's deed, or in recognition of the need to bar rights the husband had in his wife's property, such as curtesy. That requirement that spouses be party to sales of the other's property may have greater than legal significance. It is plausible that laypeople, who may have been aware that in order to sell property either a husband or a wife had to get the other's written consent, may have equated that with a certain degree of gender equality.

It would be a mistake to regard these effects of dower, curtesy, tenancy by the entirety, the Homestead Act, and the Married Women's Property Act as merely tenuous signals of equality based on mere speculation and wishful thinking. When those acts are further considered within the context of other laws of nineteenth-century Michigan, it is obvious that this was not a society dedicated to women's absolute inferiority. Other laws allowed women more than the right to own their land and convey it, protected by the separate examination and the requirement that the husband join in the wife's deed. They gave a wife, for example, the ability to deal with her property and business affairs as the equal of men by conferring powers of attorney on her. Michigan law at this time had a number of statutes concerning married women and powers,¹⁷⁰ some of which merely allowed a wife to deal with her own property without seeking her husband's consent.¹⁷¹ A woman could also be given a more general power.

A married woman may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her during the marriage is expressly or impliedly

167. General Provisions Concerning Husband and Wife, ch. 85, § 25, 1846 MICH. REV. STAT. 340. See Alienation by Deed, ch. 65, 1846 MICH. REV. STAT. 262.

168. See MICH. CONST. of 1850, art. XVI.

169. See generally *Farr v. Sherman*, 11 Mich. 33 (Mich. 1862); *Durfee v. McClurg*, 6 Mich. 223 (Mich. 1859).

170. English common law courts in earlier periods had given married women the ability to enter into contracts and to act as their husband's agents. Basch, *supra* note 39, at 348.

171. See *Of Powers*, ch. 64, §§ 8, 15, and 57, 1846 MICH. REV. STAT. 257, 258, 261-62.

prohibited¹⁷²

Apparently other states also found it useful that married women have such powers. The Massachusetts court said:

[A]s his attorney she may execute a deed in his name, and may put his seal to it, and may before a magistrate acknowledge it to be her husband's deed. And he shall be bound by it as effectually as by a deed executed personally by himself.¹⁷³

In other words, the law saw both the necessity for and the ability of women to play an unhindered role in the world and provided the means for them to do so. For example, Michigan law provided that a woman who had preceded her husband to the state could carry on family legal affairs by herself.

[S]he may transact business, make contracts, and commence, prosecute, and defend suits in her own name, and dispose of her property which may be found in this state, or which she may acquire in like manner, in all respects as if she were not married.¹⁷⁴

These immigrant woman laws reflect a practical response to necessity. If a family migrated piecemeal, someone must be empowered to take legal action other than the husband. In addition, such a situation meant there could be no problem of causing dissension in the household over acts taken to protect the family's holdings, since there was no one there with whom to disagree. These temporary breakups of families and this method of providing for their legal affairs may have led to the idea that it was possible to let the law reflect the reality of the two individuals who made up the basic unit. This may explain the passage of the Married Women's Property Acts with so little stir in Michigan. Lawrence Friedman observed:

The married women's property acts, therefore, did not signal a revolution in the status of women; rather, they *ratified* and adjusted a silent revolution. A curious fact provides striking though indirect confirmation of this point; passage of these laws seemed to effect an enormous, radical change, in that most basic of institutions, the family; yet the laws were hardly debated or

172. Of Powers, ch. 64, § 38, 1846 MICH. REV. STAT.260..

173. See *Fowler*, 7 Mass. at 19.

174. General Provisions Concerning Husband and Wife, ch. 85, § 20, 1846 MICH. REV. STAT. 339. Cf. ch. 85, § 21, 1846 MICH. REV. STAT. 339 (contract rights). For cases which are cited by the annotation, see generally *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89 (Mass. 1827); *Gregory v. Paul*, 15 Mass. 31 (Mass. 1818). Nineteenth century treatise writer Tapping Reeve supported women's rights on a number of bases, including wives' need to enter into contracts when their husbands were away. See *Basch*, *supra* note 39, at 351-52; see also *BASCH*, *supra* note 7, at 43-44, 57-60.

discussed at the time.¹⁷⁵

To the extent that Friedman's conclusion is correct, it did not apply to all states. In Oregon, for example, debates on giving married women homestead rights were rancorous and went to the core of contemporary understandings of family roles. The debates on the Oregon Donation Act were based on the premise "that the family was the core of American culture, that families needed a central male figure to survive, and that wives would vie for family leadership if they gained some economic independence from their husbands... [fearing] that a husband would become 'simply a boarder at his wife's establishment'"¹⁷⁶ Others argued that honest creditors would be cheated by the enactment of these property protections.¹⁷⁷

VI. CONCLUSION

This study was begun with the assumption that evidence of conveyancing practices would provide a means for testing theories and extant legal doctrines against those practices. The deeds in this study are from a period of transition from traditional English property law to a more inclusive legal regime. It was taking steps away from the English landholding system that "exhibited a great drive toward unifying control in one person,"¹⁷⁸ who was typically the husband and father. By the mid-nineteenth century the trend was toward lodging control in an individual, without regard to that person's status. That trend can be seen in laws in addition to the Married Women's Property Acts, such as the immigrant women's acts discussed earlier. That said, even though successive amendments to the Michigan MWPA's expanded women's rights to control their property, efforts to trace reasons for enacting the Michigan Married Women's Property Act and its effects on practice do not find a simple explanation.

While the results cannot afford the satisfaction of simplicity, the more complex explanations for its passage and operation are actually better. They fit with what we know about the messiness of our own era. Laws which affect women are among those that require especially careful analysis, since these laws have historically embodied more than is strictly necessary to accommodate innate and relevant differences between men and women. So before leaving this exploration of women's property rights in nineteenth-century Michigan, it is worthwhile to revisit briefly some of

175. FRIEDMAN, *supra* note 158, at 186.

176. Chused, *supra* note 65, at 17.

177. *Id.* at 17-18.

178. Donahue, *supra* note 85, at 81.

the explanations explored in this Article.

Take, for example, the deeds' failure to conform to the wording set out by learned treatise writers and judges. Of far greater importance to the deeds' wording may have been the desires of grantees and creditors to get clear title and the usefulness of the lowly legal form book. It may be that Michigan owes its conveyancing practices most of all to a Canadian, recently graduated from Yale—Delos W. Beadle, the author of *The American Lawyer, and Business-Man's Form-Book; Containing Forms and Instructions*.¹⁷⁹ Beadle was born in Ontario, Canada and returned to Canada after graduating from Yale in 1844, the year in which the first Michigan Married Women's Property Act was enacted.

After graduation he studied law in the office of Strachan & Cameron in Toronto and in the University of Toronto, from which he also received the degree of Bachelor of Arts in 1846. He completed his law studies in Harvard Law School and received the degree of Bachelor of Laws in 1847. In the autumn of 1848 he entered the law office of William C Noyes, Esq, in New York City, and after a short period of general practice, confined himself to real estate law [sic] In 1852 he compiled "The American Lawyer and Business Man's Form Book," which was published in English and German.¹⁸⁰

There was probably little original in that book, but, for this turbulent period in American history, it was likely to be particularly useful. As with other books of its kind,¹⁸¹ Beadle's form book made useful legal information accessible for a populace moving into areas where there would be few lawyers. His book appeared during a "down with lawyers" period in American history, and included a promise that people could order their affairs without recourse to lawyers, as long as they had his form book.¹⁸²

Beadle appears to have had a talent for self-promotion. The front pages of the book tout the book as valuable to all:

TO THE PURCHASER.

This book which we now offer you is emphatically a manual for the guidance of any and every man in business transactions, in a manner prescribed by law and the usages of trade. But in addition to this, it embodies an array of practical information which makes it a most valuable reference-book to the business

179. BEADLE, *supra* note 49.

180. *Obituary Record of Graduates of Yale University Deceased During: the Academical Year Ending in June 1906* 535-36, http://mssa.library.yale.edu/obituary_record/1859_1924/1905-06.pdf.

181. See Lawrence M. Friedman, *Some Thoughts about Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1157-58 (2009).

182. John D. Donnell, *Business Law Textbooks: A Retrospective Exploration*, 22 AM. BUS. L.J. 264, 267-68 (1984).

man; and we assume that the world is not in possession of its equal in point of FULLNESS and CORRECTNESS. It has been prepared by a lawyer of high character and standing in the city of New York, whose professional reputation is a sufficient guaranty for its accuracy, assisted by a business-man well acquainted with the wants of the community, which this work is intended to supply. . . .

IT WILL PAY EVERY MAN.

Look at the array of subjects already mentioned, besides Forms for holding Property in Trust, Promissory Notes, Compounding with Creditors, Landlord and Tenant's, Agreements, Rights of Married Women, Dower, Rights to Military Bounty Land, Interest Tables, &c., together with another item giving great interest to this work, being a well-delineated.

MAP OF EACH STATE IN THE UNION, AND A MAP OF THE U. S. which Maps alone are worth three times what is asked for the whole work.

The special State Laws have been compiled at great labor and expense, from the latest statutes of the various States, so far as they could be reached, and will be found more complete and reliable than anything now before the public.

If we have now made it plain that it will be a valuable book to you, we ask you to buy it, not simply to promote our interest, but because we give you in return that information which every man ought to have at his command.¹⁸³

Thus, a young man just a few years out of law school with scant experience with American legal practice may, nonetheless, have promoted the widespread—and extra-legal—use of deeds that suggested greater women's equality than actually existed.

Agitation for women's rights has already been explored above. However, there are other interesting elements to that story in terms of the process of doing historical work on legislative change. The most important of these is the influence of the multi-volume history of the women's rights movement originally produced by Elizabeth Cady Stanton and Susan B. Anthony—*History of Woman Suffrage*. Volume I covered the period 1848-1861, beginning several years after the first MWPAs were enacted.¹⁸⁴ The books are useful because they are not histories in the usual sense. They include documents from many decades, such as letters, speeches, petitions, and news stories that would otherwise be difficult to access. That quality and the quantity of material included have given them a large influence on

183. BEADLE, *supra* note 49, at unpaginated front matter.

184. 1 ELIZABETH CADY STANTON ET AL., *HISTORY OF WOMAN SUFFRAGE* (1881).

how the history of the women's rights movement is understood. However, accepting that history and viewpoint is not without problems.¹⁸⁵

Their *History* begins after the Civil War and after the women's rights movement had split over the question of universal suffrage in Kansas. Stanton and Anthony played an important role in causing and perpetuating that decades-long rift. As a result, their viewpoint must be borne in mind when reading their *History*. The most important point where caution is necessary concerns the women's rights split that grew out of the 1867 Kansas ballot issues for woman suffrage and for African-American suffrage. Stanton and Anthony left behind the women's rights movement's traditional alliance with abolitionists in order to oppose male-only African-American suffrage in order to promote women's suffrage. Other long time proponents of women's rights, including the Rev. Olympia Brown, Lucy Stone, and Henry Blackwell, went to Kansas to campaign for universal suffrage. As part of their campaign, Stanton and Anthony called themselves radical suffragists and their opponents conservatives, labels that are puzzling, given the facts of the situation, but which have, nonetheless, been widely accepted.¹⁸⁶ That split continued for many decades¹⁸⁷ and may even have prolonged the struggle for woman suffrage. In short, the history of this history shows the quirky process by which we understand our past.

Another challenge for understanding the process of historical law reform is the absence of information. Most past events leave no evidence. Missing from the deeds will be those segments of the Michigan population who could not buy or afford to buy property. Not all of them were women, but we know that before the Civil War, "women held a negligible amount of property."¹⁸⁸

[I]n the latter nineteenth century, directly after the passage of the married women's property acts or the adoption of a community property system, the situation changed markedly. Propertied and wage-earning women did not take their places along with men in running American business, but they were at least in a position to make some decisions about their and their family's own consumption, investments, and wealth

185. See Ellen Dannin, *Woman's Rights to Woman Suffrage* (Apr. 1975) (unpublished B.A. Honors Thesis, University of Michigan) (on file with author). What follows *infra* is drawn from my research connected with that thesis.

186. See, e.g., Martha Kelly, *A Little History of The History of Woman Suffrage*, IOBA, <http://www.ioba.org/newsletter/archive/v15/kelly.php>; Dannin, *supra* note 186. This labeling remains to this day and can be seen by examining relevant Wikipedia entries.

187. See, e.g., Kelly, *supra* note 187; Dannin, *supra* note 186.

188. Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9, 23 (1994).

transmission. Wealthy women and wives whose husbands failed to support them and their children benefitted the most.¹⁸⁹

Richard Chused observed:

One of the more interesting phenomena in the history of women's private law status is the slow process by which regulation of women moved from special treatment towards equality. While there is still much debate about the extent to which this has occurred, . . . there are a number of examples which suggest the validity of the notion. Protective labor legislation is a nice example, as is voting, ability to sue, access to damages for loss of consortium and a number of others. Some areas were equalized, at least in legal theory, before others. Women's property law happens to be one of the earliest to change, leaving women with access to the same sorts of property as men long before other aspects of society were prepared to let them fully use their economic rights. Perhaps this occurred because the debtor protection aspects of married women's property law created legislative coalitions that otherwise may not have existed.¹⁹⁰

In other words, change in this area of the law was not linear, and the sources of change were many and even, at times unexpected. Consider, for example, the very different pictures of the law, its causes, and its effects from the deeds versus court opinions and the views of most treatise writers.

These messy interactions of law, practicalities, personal needs, and social mores—and how they play out—may shed light on the great family innovation of our time—social acceptance of same-sex families and legal recognition of same-sex marriage. As with the Married Women's Property Acts, they are undergoing state-by-state uneven development.¹⁹¹ And just as we do not fully know how property and decisions about property were handled within nineteenth-century families, and, with the passage of time, have lost the capacity to find out directly, so too, we are largely ignorant about current actions and values that will affect the outcome of this struggle.

If Michigan deeds and laws suggest that nineteenth-century women were not as unequal as has been thought and, in fact, may have had significant involvement with property, how does that evidence fit with the

189. *Id.*

190. Chused, *supra* note 65, at 25 n.77.

191. See, e.g., Jean C. Love, *The Synergistic Evolution of Liberty and Equality in the Marriage Cases Brought by Same-sex Couples in State Courts*, 13 J. GENDER RACE & JUST. 275 (2010).

nature of the campaigns fought for their enactment? If, on the other hand, married women had only the veneer of equality but not its substance, how was greater equality achieved? Was the law on the books or social acceptance of gender equality most important? Or do we do a disservice to understanding by insisting that there is a dichotomy? Public acceptance of women's property rights should make law reform easier. And laws that mandate equality are easier to enforce when supported by public morés.¹⁹²

The attempt to explain the enactment and effect of the Michigan Married Women's Property Act involves more than just legal support for women's rights. Laws that incrementally gave wives and women equality and legal rights could not effect a complete break with the past. The MWPA's were simply impotent to transform women in poverty, as a result of past discrimination, into women property owners. In addition, the struggle's outcomes reflect assumptions about women. To be comprehensive and accurate, we must, then, interrogate laws closely identified with families because they may conflate assumptions about the family as a component of society with the realities of individual family members. For example, laws which, on their face, appear to demean women may in fact be directed to some other objective of that era's ideal. The effect on women may be indistinguishable, but the distinction must be made in order to identify and comprehend the processes at work.

Married Women's Property Acts were enacted within a society struggling with the nature of democracy, economic disasters, the struggle to free slaves, the founding of the Equal Rights Association, which evolved into the abolitionist and women's rights movements (both with substantial involvement of women in leadership roles),¹⁹³ the Civil War which left many families bereft of their men, and the transformation from an agrarian into an industrialized society. These and other changes affected what families did and who within the family played specific roles. In that period, the ideal family began to change from a unit that must be obedient to a single head or risk anarchy and dissolution to one in which relationships were more flexible and individualized. Social upheaval and political and economic challenges still affect the process and possibility of law reform today.

While it would be lovely if law reform had the neat cause and effect trajectory of a bullet from a smoking gun, we know that life and law are far

192. For example, a study of women's suffrage laws found that the laws were more likely to be enacted in states that had already enacted progressive legislation. The only eastern states that had women's suffrage by the time the federal amendment gave women the right to vote were Michigan and New York. Holly J. McCammon & Karen E. Campbell, *Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866-1919*, 15 GENDER & SOC'Y, 55 (2001)

193. See Cott, *supra* note 7, at 1450-52.

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messier—and more interesting. A search for *the* impetus for enacting the 1844 Michigan Married Women’s Property Act and its later versions makes that complexity plain. This study affirms that the reality of law reform involving a fundamental social institution, such as marriage, is rich and multifaceted.