Essay

Property as a Legitimating Right

Duncan Hosie†

INTRODUCTION

The Roberts Court is breathing new life into property rights. This past term, the Court bolstered property rights in two major cases. In *Sackett v. EPA*, five conservative justices curbed the Environmental Protection Agency's authority to regulate wetlands under the Clean Water Act, rolling back the agency's presence on millions of acres of private property.[1] And in *Tyler v. Hennepin County*, a unanimous Court ruled that the Takings Clause prohibits states from keeping surplus proceeds above the tax debt when they seize and sell private property to collect unpaid taxes.[2] These cases, which delighted conservative and libertarian legal advocates,[3] come in the wake of other decisions from the Roberts Court significantly strengthening property

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1. 143 S. Ct. 1322 (2023).

2. 143 S. Ct. 1369 (2023).

3. *See, e.g.*, Bonner R. Cohen, Sackett v. EPA *is a Victory for Property Rights*, HILL (June 1, 2023), https://thehill.com/opinion/energy-environment/4029113-sackett-v-epa-is-a-victory-for-property-rights/#:~:text=By%20narrowing%20the%20scope%20of,%2C%20Idaho%2C%20for%2016%20years [https://perma.cc/JY5H-7JU5] (discussing *Sackett v. EPA*); Ilya Somin, *Supreme Court Strengthens Federal Protections for Property Rights*, BRENNAN CTR. FOR JUSTICE (May 30, 2023), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-strengthens-federal-protections-property-rights [https://perma.cc/RC5L-7ZTP] (discussing *Tyler v. Hennepin County*); Thomas Jipping & Nick Clifford, *Roberts Leads Supreme Court in Slapping Down Local Governments That Trample Property Rights*, HERITAGE FOUNDATION (June 15, 2023), https://www.heritage.org/courts/commentary/roberts-leads-supreme-court-slapping-down-local-governments-trample-property [https://perma.cc/8HZK-WSBP] (discussing the term in relation to the Roberts Court's overall jurisprudence).

rights, often at the expense of liberal policies and goals like unionization and environmental protection.[4] They also suggest that future decisions are likely to reinforce and expand property rights.

Progressive commentators[5] and even liberal Supreme Court justices[6] have reacted to the conservative Court's vitalization of property rights with alarm, even if some of these rulings do not have a clear ideological valence.[7] This Essay revisits an earlier moment in state constitutional history to show, counterintuitively, that there can also be opportunity for progressive litigators in an era of heightened judicial protection for and attention to property rights. It documents how early legal advocates for marriage equality emphasized property rights at all stages of litigation in *Goodridge v. Department of Public Health*, a landmark case that made Massachusetts the first state to recognize a right to same-sex marriage.[8] The 2003 decision galvanized LGBTQ rights activists and their opponents, fundamentally reshaping the contours of the policy and legal debate over same-sex marriage.[9]

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4. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that a California regulation granting labor organizations a right to access an agricultural employer's property to solicit support for unionization constitutes a per se physical taking under the Fifth Amendment's Takings Clause). For a more general overview, see John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1 (2016).

5. *See, e.g.*, Jamelle Bouie, *There Is One Group the Roberts Court Really Doesn't Like*, N.Y. TIMES (June 6, 2023), https://www.nytimes.com/2023/06/06/opinion/roberts-court-glacier-labor-workers.html [https://perma.cc/MLM4-26F6] (arguing that "the Supreme Court is first and foremost the leading defender of property within our political order" and objecting to the Court's recent decisions, especially concerning labor unions).

6. Knick v. Township of Scott, 139 S. Ct. 2162, 2181 (2019) (Kagan, J., dissenting) (criticizing the Court's willingness to overturn "an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s").

7. The plaintiff in *Hennepin County* garnered significant cross-ideological support. *See generally* Ilya Somin, *Unusual Cross-Ideological Agreement in* Tyler v. Hennepin County, REASON (Apr. 26, 2023), https://reason.com/volokh/2023/04/26/unusual-cross-ideological-agreement-in-tyler-v-hennepin-county [https://perma.cc/E8RX-JGLB].

8. 798 N.E.2d 941 (Mass. 2003).

9. *See, e.g.*, William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 288, 309–23 (2013) (arguing *Goodridge* put same-sex marriage on "the nation's map" and helped change public understanding of LGBTQ people); Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L.

This strategic focus on property allowed the *Goodridge* litigators to legitimize novel rights claims. Invocation of property anchored new claims in a deeply-rooted framework with a firm textual basis in the U.S. and Massachusetts constitutions and potency in our political and legal culture. In the Anglo-American legal tradition, Professor Carol Rose notes, the right to property is often understood as "the most important right in a liberal constitutional order" and holds an enormous "political centrality."[10] This property posture also enabled the litigators to frame the stakes of a groundbreaking legal question in terms accessible to the seven-member Massachusetts Supreme Judicial Court (SJC), none of whom were gay but all of whom owned property, at a time when many Americans did not have close relationships with openly LGBTQ people.[11]

There are analogues to this strategy in constitutional history. In the 1970s, Ruth Bader Ginsburg revolutionized equal protection law through an unlikely vehicle. As the director of the ACLU's Women's Rights Project, she brought cases challenging sex discrimination on behalf of male plaintiffs.[12] This tactic provoked fierce criticism from some feminist thinkers[13] and sharply deviated from the existing legal strategy of women's rights

REV. DISCOURSE 184, 196 (2013) (arguing *Goodridge* provided resources for LGBT activists to push their "constitutional vision" and framed marriage equality nationally); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 460–66 (2005) (arguing *Goodridge* generated political backlash); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1748 (2017) (observing that *Goodridge* "allowed the nation to learn about the consequences of same-sex marriage").

10. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 239, 362 (1996).

11. Frank Newport, *Homosexuality*, GALLUP (Sept. 11, 2002), https://news.gallup.com/poll/9916/homosexuality.aspx [https://perma.cc/7ND7-CHSW] (describing a January 2000 poll in which less than half of respondents said they currently "have contact" with a person who is "gay or lesbian").

12. *See* Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. F. 227, 228 (2013) (describing the "highly consequential, nonobvious choice" to "challenge the constitutionality of sex discrimination in cases with male plaintiffs"); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 775 (2010) (accord).

13. *See, e.g.,* Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 201-02 (1987).

litigators.[14] Yet Ginsburg's "genius" move helped "br[ing] the all-male Supreme Court" to accept new, unfamiliar understandings of equal protection.[15] In the words of Professor Deborah Rhode, her "wisdom to represent male as well as female plaintiffs . . . helped an all-male court understand the injustice of laws based on archaic gender stereotypes that restricted the roles of both sexes."[16]

Ginsburg's use of male plaintiffs was not just strategic; it was motivated by a substantive theory of sex equality.[17] But her successful strategy highlights a key insight about litigating for constitutional change. Movement lawyers can lead courts to extend constitutional rights to the ignored and excluded through creative, shrewd advocacy that anticipates the sympathies of judges and responds to the traditional norms and values of the legal system.[18] The justices of the Roberts Court have repeatedly demonstrated a strong affinity for property rights arguments. Movement lawyers should think creatively about how to capitalize on this wellspring of support, just as Ginsburg and the *Goodridge* litigators did in relation to the conservative judges before whom they argued.

This Essay makes contributions to the academic debate surrounding *Goodridge*'s litigation and its legacy. Legal historians and constitutional scholars credit two forces for the *Goodridge*

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14. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 84 (2010) ("Prior to 1970, only women had brought sex discrimination claims under the Fourteenth Amendment.").

15. Melissa Block, *Pathmarking The Way: Ruth Bader Ginsburg's Lifelong Fight For Gender Equality*, NPR (Sept. 24, 2020), https://www.npr.org/2020/09/24/916377135/pathmarking-the-way-ruth-bader-ginsburgs-lifelong-fight-for-gender-equality [https://perma.cc/6UE7-4FLB] (quoting Professor Amanda Tyler, who clerked for Justice Ginsburg from 1999–2000).

16. Deborah L. Rhode*, She Overcame Discrimination—And Helped Others Do the Same*, POLITICO MAG. (Sept. 18, 2020), https://www.politico.com/news/magazine/2020/09/18/ruth-bader-ginsburg-legacy-418191[https://perma.cc/6K44-KKH5].

17. Franklin, *supra* note 14, at 85 (arguing Ginsburg's "decision to press the claims of male plaintiffs was grounded [in a] theory of equal protection involving constitutional limitations on the state's power to enforce sex-role stereotypes"); *see also* Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 46–47 (2013) (accord).

18. This type of advocacy often targets a single judge. *See, e.g.*, Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 PENN. L. REV. 119, 123 (1989) (directing arguments at Justice O'Connor in abortion rights litigation).

decision: the growing acceptance of gay rights[19] and astute litigators, who made discerning plaintiff and jurisdictional selections[20] and paired litigation with public education and advocacy.[21] This Essay, while not disagreeing with this broad thesis, argues that existing literature overlooks a key element of this savvy movement lawyering. These lawyers succeeded not just based on *where* and for *whom* they brought claims, but also based on *how* they presented their claims to judges. Property was an essential part of this playbook.

This Essay also contributes to literature on the dynamic process of recognizing new constitutional rights, intervening at a moment when conservative federal courts are hostile to rights claims from the left.[22] In the early stage of social movements, rights claims need legitimation and communicability in accessible terms. Invoking property rights allowed advocates in *Goodridge* to ground novel claims for rights recognition in a cognizable, textual, and familiar framework with deep and exalted roots in the Anglo-American legal tradition. This precedent suggests modern advocates should moor new rights claims in foundational principles, especially at germinal moments of

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19. *See, e.g.*, Edward Stein, *The Story of* Goodridge v. Department of Public Health*: The Bumpy Road to Marriage for Same-Sex Couples*, *in* FAMILY L. STORIES 28 (Carol Sanger ed., Foundation Press 2008) (asserting the "social, political and legal activities of LGBT people and egalitarian developments in family law" made *Goodridge* possible); Mary L. Bonauto, Goodridge *in Context,* 40 HARV. C.R.-C.L. L. REV. 1, 8 (2005) (documenting the "several decades of growing recognition of equality in the [Massachusetts] legislature as well as in the courts" that led to *Goodridge*).

20. Stein, *supra* note 19, at 28 ("A more proximate cause of the result in *Goodridge* [than societal change] was a carefully planned litigation strategy."); John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUSTICE (Sept. 29, 2015), https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality [https://perma.cc/68Z4-7FJ3] (documenting that marriage equality litigators recognized that "the constitutions of New England states could not be amended through voter initiatives" and that the region's politics would facilitate organizing and education); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 79 (2015) (citing the "strategic sense" of *Goodridge* litigators in plaintiff selections).

21. Bonauto, *supra* note 19, 30–31 (2005) ("*Goodridge* would not have occurred but for litigation and legislative activity working in tandem with public education for many years.").

22. *See, e.g.*, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2246–48 (2022) (outlining a framework to determine whether the Due Process Clause protects a substantive right that forecloses many rights claims).

constitutional litigation, even when advocates find other frames more just and intuitive.

The Essay proceeds in five parts. First, it briefly surveys the pre-*Goodridge* context, outlining the challenges faced by marriage equality litigators at the turn of the century. Second, it examines legal filings by the plaintiffs in *Goodridge*, focusing on their skillful use of property to concretize the harms to same-sex couples from marriage exclusion and legitimate their rights claim. Third, it illustrates how amici amplified the plaintiffs' property rights framing. Fourth, it analyzes the SJC's opinion in *Goodridge*, tracing the influence of the parties' property discourse. Fifth, the Essay concludes by discussing the implications of the *Goodridge* litigation's property focus in light of the conservative direction of the Supreme Court and lower federal courts.

Constitutional discourse is fluid. In our current moment, legal commentators largely understand property rights as a conservative frame.[23] This Essay illustrates that property rights, like any other vehicle for constitutional argument, are not inexorably a weapon in the arsenal of conservatives. They have an underappreciated versatility, a lesson appreciated by New Left thinkers,[24] but one lost on many modern progressives. This historical lesson may be especially important today, with the Supreme Court expanding property rights and progressive litigators turning to state courts to introduce novel constitutional claims in response to the changed composition of federal courts.

I. THE PRE-*GOODRIDGE* CONTEXT

The *Goodridge* litigants faced a monumental task: how to legitimate groundbreaking, even implausible claims that called for reform of the bedrock institution of American family law. These advocates had to do more than craft a legal argument; they had to shift the Overton window to make that legal argument credible. *Goodridge* made Massachusetts not only the first

23. *See, e.g.*, Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Legal Order*, NATION (Dec. 2, 2020), https://www.thenation.com/article/society/supreme-court-labor-unions [https://perma.cc/FMT5-UDSU].

24. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (conceptualizing government benefits as property deserving of the same legal protection as traditional property forms). Reich's article would have a direct impact on Supreme Court doctrine. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

state in the United States to wed same-sex partners, but also the fifth jurisdiction in the entire world to do so.

Before the 1990s, judges sneered at the parties who argued for gay marriage. Judges responded to early litigators for marriage equality not just with rejection but "derision."[25] In *Baker v. Nelson*, a 1971 case brought by the ACLU on behalf of the first gay couple to apply for a marriage license, "[o]ne Minnesota justice literally turned his back on the lawyer arguing the case, just as the notoriously racist U.S. Supreme Court justice James McReynolds had turned his on prominent black lawyer Charles Hamilton Houston."[26]

This deep skepticism and hostility of same-sex marriage claims permeated the academy. In 1983, a third-year Harvard Law student named Evan Wolfson wrote a 140-page thesis calling for constitutional recognition of a marriage equality right. At the time, the paper was "more unusual than controversial."[27] When Wolfson wrote his tome, which would become a blueprint for the movement, "few if any reputable legal scholars or gay rights activists thought or cared a great deal about marriage."[28] Academics viewed the idea as outlandish, if they considered it at all.[29]

Gay rights advocates were divided over whether to pursue same-sex marriage in the two decades before *Goodridge*. This debate had ideological and practical dimensions. Some LGBTQ activists, especially those with liberationist and anti-capitalist politics, opposed same-sex marriage, calling instead for new social arrangements disconnected from religious, heteronormative, and patriarchal doctrines.[30] Others were personally supportive

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25. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 19 (2012).

26. *Id*.

27. Josh Zeitz, *The Making of the Marriage Equality Revolution*, POLITICO MAG. (Apr. 28, 2015), https://www.politico.com/magazine/story/2015/04/gay-marriage-revolution-evan-wolfson-117412 [https://perma.cc/2QAE-BZDC].

28. *Id*.

29. DAVID D. COLE, ENGINES OF LIBERTY 1 (2016) ("Harvard's constitutional law professors at the time viewed [Wolfson's] proposed topic—whether the Constitution guarantees same-sex couples the right to marry—as so far-fetched that he could not find a supervisor.").

30. Michael Boucai, *supra* note 20, at 27 YALE J.L. & HUMAN. 1, 15–16 (2015) (noting opposition to legal marriage's "conflation of people and property" which often trapped couples in "loveless marriages" through "legal and economic pressures").

of same-sex marriage, but worried about the functional costs of pursuing a seemingly quixotic effort that could distract from other priorities. Most Americans found the prospect of a legal entitlement to same-sex marriage implausible in the 1990s.[31]

The *Goodridge* plaintiffs faced federal constitutional headwinds in the two decades before their win. In 1986, the Supreme Court rejected a gay man's claim that he had a constitutional right to engage in consensual sex in the home. The Court's decision in *Bowers v. Hardwick* became "infamous" because Justice White "went out of his way to focus on and disrespect" homosexuality in his majority opinion.[32] Justice White labeled the claim that gay people had a "right to engage" in homosexual sodomy "at best, facetious," citing the "ancient roots" of prohibitions on gay sex.[33] In a concurring opinion, Chief Justice Burger cited "Judeao-Christian moral and ethical standards" and "millennia of moral teaching" to dismiss the claim that gay people had a fundamental right to engage in consensual sex.[34]

The Court overturned *Bowers* in the 2003 case of *Lawrence v. Texas*, issued just months before the Supreme Judicial Court issued its decision in *Goodridge*. While *Lawrence* was a decisive victory for LGBTQ advocates, the case did not herald a right to gay marriage.[35] It was Justice Scalia in a bitter dissent, not the majority, who reasoned that *Lawrence* could eventually lead to marriage equality (among other horribles, like legalized bestiality and bigamy).[36]

State litigation asserting a constitutional right to same-sex marriage in the 1990s foreshadowed the *Goodridge* litigants' claims, but also underscored the gravity of their challenge. In 1993, the Hawaii Supreme Court held that the state's

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31. In 1992, only 27% of Americans supported legalizing marriage equality, let alone constitutionally protecting it. PAUL RYAN BREWER, VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS 24 (2007).

32. William N. Eskridge, Jr., Hardwick *and Historiography*, 2 U. ILL. L. REV. 631, 632 (1999).

33. Bowers v. Hardwick, 478 U.S. 186, 194, 196 (1986).

34. *Id*. at 196–97 (Burger, C.J., concurring).

35. *See, e.g*., Jane S. Schacter, *Splitting the Difference: Reflections on* Perry v. Brown, 125 HARV. L. REV. F. 72, 76 (2012) (noting that Justice Kennedy disclaimed that the *Lawrence* opinion implicated marriage). *See also* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (noting that *Lawrence* should not be read to threaten "the traditional institution of marriage").

36. *Lawrence,* 539 U.S. at 590 (Scalia, J., dissenting).

prohibition of same-sex marriage was discriminatory.[37] But the Court stopped short of issuing licenses to same-sex couples and would later uphold the state's ban on gay marriage in 1999. In 1997, the Vermont Supreme Court ordered the legislature to give same-sex partners the same benefits afforded to opposite-sex couples but blessed the creation of "parallel" institutions to achieve this end.[38]

II. *GOODRIDGE* PLAINTIFFS' CLAIMS

Lawyers are not always on the vanguard of social movements. In the movement for marriage equality, however, they were. Professor Douglas NeJaime has illustrated that "[i]n the LGBT movement, lawyers, to a large extent, lead the movement," playing "prominent roles in formulating and executing movement strategy."[39] This "movement strategy" in *Goodridge* invoked property rights to advance the plaintiffs' claims.

A. COMPLAINT

In April 2001, seven same-sex couples who had been denied marriage licenses sued, arguing that the state violated their rights under Massachusetts's constitution.[40] Their complaint does not use the words "dignity" or "equality," terms frequently deployed in complaints by later marriage equality plaintiffs and by Justice Kennedy in *Obergefell*. Instead, the complaint stresses the concrete financial harms to gay couples excluded from marriage. This focus on property rights may not have been soaring, transcendent rhetoric about "equal dignity under law" and "a love that may endure even past death."[41] It did, however, give the plaintiffs an accessible, concrete channel to illustrate dignitary harms before skeptical judges and bolstered their legal and figurative standing.

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37. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

38. Baker v. Vermont, 744 A.2d 864, 868 (1999).

39. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 678 (2012).

40. This state constitution, whose "lead draftsman" had been John Adams, influenced the federal constitution and those of other states. See AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 163 (2012). *See also* S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 TEMP. L. REV. 883, 885–87 (1997) (detailing the drafting of Adams and the Massachusetts Constitution's influence).

41. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

The complaint introduces the court to the gay couples by describing their property ownership. In the second paragraph presenting the eponymic plaintiffs, Hillary and Julie Goodridge, the complaint stresses they "first lived together in 1988 in a residence owned by Julie, and then jointly purchased a home in Boston in 1993."[42] This reference to property is more than descriptive. It testifies to the Goodridges' mutual commitment and the stability of their relationship. The complaint later states that the Goodridges decided to "jointly purchas[e] an apartment for her in 1999" because they were "[c]oncerned for the well-being of Hillary's mother."[43] In this example, the Goodridges' exertion of their property rights was more than transactional. It tangibly embodied the love, care, and "[c]oncer[n]" they had for their partner and their shared family.[44]

Ditto for the other plaintiffs, who are similarly introduced to the judiciary by reference to their shared property. David Wilson and Robert Compton "jointly purchased a home in Boston in August, 1998;" Michael Horgan and Edward Balmelli "jointly purchased a home in Boston in 1998;" Maureen Brodoff and Ellen Wade "purchased a home in Newton in 1993;" Heidi Norton and Gina Smith "jointly purchased a home in Northampton in 1995;" and Gloria Bailey and Linda Davies "jointly purchased a vacation home in Brewster in 1976" and "jointly purchased a year-round residence in Orleans in 1985."[45] These purchases presented powerful evidence of the joint nature of the gay couples' lives, subtly debunking widespread stereotypes about gay promiscuity and relational transience without explicitly raising the stereotypes. And they connect the pioneering demands of the gay couples to their status as homeowners, whose rights from state interference have long been venerated in Anglo-American jurisprudence and acknowledged by judges recognizing new rights.[46]

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42. Verified Complaint ¶ 15, Goodridge v. Dep't of Pub. Health, No. 01-1647-A (Mass. Super. Ct. April 7, 2001) [hereinafter *Goodridge* Complaint].

43. *Id.* ¶ 26.

44. *Id.*

45. *Id.* ¶¶ 33, 47, 58, 94, 110.

46. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) (asserting that "the sanctity of property rights" contributes to the constitutional "safeguarding of the home"); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("In our tradition the State is not omnipresent in the home."); McDonald v. City of Chicago, 561 U.S. 742, 886 (2010) (Stevens, J., dissenting) ("[O]ur law has

These descriptions of the couples' property ownership speak to the savvy plaintiff selection by Mary Bonauto, the lead counsel in the *Goodridge*.[47] But this savvy extended to structure of the complaint. By invoking property immediately after introducing the plaintiffs, Bonauto and the other authors of the complaint frame the plaintiffs and their demands in terms relatable to a bench of affluent judges. In 2000, individual justices on the Massachusetts' highest court were paid $126,943 annually,[48] placing them at the top of the income distribution in a state with a median household income of $50,502.[49] Most of the justices had worked in private practice before joining the Supreme Judicial Court, including at some of Boston's most elite, white-shoe law firms.[50] Like many Americans at the time, the judges may not have understood same-sex attraction or even known many openly gay people. But they all understood property ownership and wealth, which the complaint foregrounded while presenting each plaintiff. And all the judges had been socialized in a legal and political system that valorized property rights.

The complaint marshals other "sticks" of property rights to concretize the harm to the plaintiffs, all of whom are described as having "merged" finances and "joint" personal property.[51] In sometimes granular detail, the complaint details the financial assets and goals of the couples, including their home equity, wills to transfer property, life and disability insurance, loans and shared debt, pensions, tax planning, power of attorney

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long recognized that the home provides a kind of special sanctuary in modern life.").

47. Boucai, *supra* note 20, at 79 (citing Bonauto's "strategic sense" in plaintiff selection).

48. *See Judicial Salaries in Massachusetts*, BOSTON BAR ASS'N AD HOC COMM. ON JUDICIAL COMPENSATION (July 2000), https://bostonbar.org/prs/reports/judsalaries0700.pdf [https://perma.cc/M3V3-PVP9]. This salary is over $190,000 in inflation adjusted terms.

49. U.S. Census Bureau, *United States Summary: 2000*, U.S. DEP'T OF COM. (July 2003), https://www.census.gov/content/dam/Census/library/publications/2003/dec/phc-2-1-pt1.pdf [https://perma.cc/EB6J-2XA7] (detailing income distribution in Massachusetts in 2000).

50. Chief Justice Marshall had been a partner at Choate, Hall & Stewart. Justice Cordy had been a partner at McDermott, Will & Emery. Justice Sosman had been an associate at Foley, Hoag & Eliot.

51. *See, e.g., Goodridge* Complaint, *supra* note 42, ¶ 26 ("Hillary and Julie [Goodridge] have merged their finances and intend to continue doing so in the future. They own the bulk of their personal property jointly, and share a joint checking account."). The complaint used similar phrasing for all other plaintiffs.

arrangements, and retirement, checking, savings, and investment accounts. Massachusetts's prohibition on same-sex marriage, per the complaint, frustrates the couples in fully exercising the rights implicated by these forms of property. Michael Horgan and Edward Balmelli, for example:

> were not able to obtain a policy of umbrella liability insurance for their home and cars because they both individually owned cars prior to their relationship. They were informed that they would have to transfer partial ownership of their cars to each other, pay the appropriate gift taxes for a transfer to a non-spouse, and then they would be able to obtain coverage.[52]

Gary Chambers, for his part, wanted the "same range of options in providing for his [pension plan] beneficiary that a married spouse" would have.[53] Gloria Bailey and Linda Davies "were unable to obtain financing for their first home from many banks because they were not 'related.'"[54] Massachusetts's exclusion of same-sex couples from marriage nearly blocked Bailey and Davies from creating the so-called "castle" deeply venerated under common law and American constitutional law.[55] Few "civil rights" are "clearer" and "more vital" than "the right to buy a home and live in it."[56]

While the complaint never explicitly refers to "dignity," these property infringements intimated the interplay between material and dignitary harms. For each of the seven plaintiffs, the complaint stated that the couple was denied the "legal and social status of a marital relationship, as well as the protections, benefits and obligations—financial, legal, emotional and others—afforded to married couples."[57] The practical and financial harms compounded on each other.

B. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs skillfully deployed property rights in their motion for summary judgment before the Superior Court. Property

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52. *Id.* ¶ 53.

53. *Id.* ¶ 89.

54. *Id.* ¶ 117.

55. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390 (1914) (discussing the influential "maxim" that "a man's house was his castle"); Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting) (noting the "the Supreme Judicial Court of Massachusetts" recognized this "maxim").

56. Hurd v. Hodge, 162 F.2d 233, 241 (D.C. Cir. 1947) (Edgerton, J., dissenting).

57. *Goodridge* Complaint, *supra* note 42, ¶¶ 30, 44, 55, 74, 90, 106, 120.

rights made their novel claims seem less radical and threatening. Rather than endangering existing social structures—a charge lobbied by opponents of marriage equality—property rights allowed the plaintiffs to wrap their demands in the mantle of tradition.

To show that access to marriage is a fundamental right, the motion recounts early Massachusetts constitutional history. Drawing on early sources, the motion contends that the Massachusetts Constitution protects "decisions and activities that may be deemed basic, or essential, to their identity and well-being."[58] The motion then cites the acquisition and use of property as one of these "basic" activities. Quoting Professor Gordon Wood, the motion declares "[a]cquiring, possessing and protecting property" as a core "component" of "individual rights."[59] "At the time the [Massachusetts] Constitution was approved," the motion states, "property rights were part of individual rights."[60]

In asking for a new individual right, the plaintiffs also asked for one of the oldest ones: the right to own and use property. Although an originalist reading of either the Massachusetts or United States Constitution would not support a right to marriage equality,[61] this invocation of property rights grounded the plaintiffs' demand in a rich historical tradition and offered a textual basis for their claims.[62] This rhetoric gave credibility to their demands and inoculated marriage equality opponents from the attacks that their claims had no basis in America's constitutional history. If there is a trump card in debates over the founding era, it may be Gordon Wood.

After establishing this history, the motion then pivots to modern infringements on property rights created by Massachusetts's law. The motion contends that "[m]arriage provides the married couple with access to a broad array of legislatively granted protections" because the law "recognizes that most couples are an economically integrated unit."[63] In its first example

58. Plaintiffs' Motion for Summary Judgment at *10, Goodridge v. Dep't of Pub. Health, No. 01-1647-A (Mass. Super. Ct. Aug. 20, 2001) [hereinafter Plaintiffs' Motion].

59. *Id.*

60. *Id.* at *10 n.17.

61. *But see* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016).

62. *See, e.g.*, MASS. CONST. pt. 1, art. X.

63. Plaintiffs' Motion, *supra* note 58, at *18.

to support this proposition, the motion turns to property. "Married couples," it says, "may own property as tenants by the entirety, a form of ownership providing maximum protection to the couple against creditors and allowing the automatic descent of the property to the surviving spouse without probate."[64] It then discusses six different state laws on inheritance, demonstrating how marriage allows married couples to secure their real estate and other financial assets. It describes other property-related privileges under state law, like the division of marital property in divorce, joint income tax returns, tax advantages, and access to pension plans.

The motion subsequently analyzes the particular financial circumstances of the plaintiffs. In a manner similar to that of the complaint, it uses property as a tool to show their commitments, sacrifices, and normalcy. Exclusion from marriage threatened their home ownership and assets; it risked generating liens on particular properties.[65] In a representative example, the motion considered Heidi Norton and Gina Smith's retirement assets, noting the differential likelihood of estate taxes and 401(k) beneficiary status relative to opposite-sex couples.[66]

The motion observes that marriage is "far more than the sum of its legal parts," and "not having access to marriage casts a badge of inferiority on those who are denied access to its wide welcome."[67] Here and elsewhere, property vivified this "badge of inferiority," presenting the "[r]eal harms [that] befall the [p]laintiffs from their inability to marry" in accessible terms.[68] And this discussion of property did not detract from the larger point about the interchange between the "legal obligations" and privileges of marriage and the more nebulous social status it confers.

III. *GOODRIDGE* AMICI

According to Mary Bonauto, amicus briefs played a significant role in *Goodridge*, showing that the "Massachusetts

64. *Id*. at *18–19.

65. *Id*. at *26 (noting marital tax deductions, estate taxes, transfer of assets, and protection of property from liens).

66. *Id*.

67. *Id*. at *19.

68. *Id*.

mainstream was with the plaintiffs."[69] Notably, these mainstream briefs echoed the plaintiffs' framing on property rights and complemented it with additional history.

Some of the amici repeated the core arguments regarding property, placing their institutional imprimatur on the plaintiffs' groundbreaking arguments. The Boston Bar Association, for example, detailed the "striking" compendium of "core rights and protections, which are automatically granted to married couples."[70] Concentrating on the "benefits and burdens of Massachusetts laws that treat married couples as economically-interdependent units," the brief lists a range of property rights associated with marriage that were denied to same-sex couples.[71] They also supplemented the plaintiffs' briefs by listing other property-related considerations that stem from marriage, like the homestead protection.[72]

Other amici added history to bolster the plaintiffs' claims. The Religious Coalition for the Freedom to Marry submitted an amicus brief that invoked property rights to connect the plaintiffs' arguments to a larger historical narrative. "The Pilgrims who founded the Plymouth Colony," their brief asserts, "viewed marriage as a civil institution embodying important principles of property ownership, rather than as a religious rite."[73] The brief then quotes William Bradford, an English Puritan separatist who served as Governor of the Plymouth Colony for during the mid-1600s. "Marriage," the brief quotes Bradford as saying, is a "civil thing" that "most thought requisite to be performed by the magistrate."[74] According to Bradford, "many questions about inheritances" depend on marriage.[75]

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69. Bonauto, *supra* note 19, at 34, 37.

70. Brief of Amici Curiae Boston Bar Association in Support of Goodridge at *13, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) (No. SJC-08860).

71. *See, e.g.*, *id.* at **13–14 (describing tenancy by the entirety).

72. *Id.* at 14.

73. Brief of Religious Coalition for the Freedom to Marry in Support of Goodridge at *12, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) (No. SJC-08860).

74. *Id.*

75. *Id.*

IV. PROPERTY AND THE *GOODRIDGE* DECISION

In November 2003, the SJC ruled in favor of the plaintiffs in a narrow four-three decision. These four justices were not firebrand liberals. Three of the four justices who voted in the majority, including the Chief Justice, had been appointed by Republican governors.[76]

A careful reading of the decision reveals the traces of the plaintiffs' arguments. Consider how Chief Justice Marshall framed the central issue of the case in her opening paragraph. "The question before us," she wrote, "is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[77] Justice Marshall framed the central "question" around tangible dimensions of marriage, eschewing approaches focused on equality values, even if those values were a core component of the opinion. Through property considerations, the plaintiffs had demonstrated the concrete "protections, benefits and obligations" conferred by civil marriage they sought to access, and the SJC internalized this formulation.

Justice Marshall begins by describing the plaintiffs. She states, "The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer."[78] Chief Justice Marshall's synopsis was selective, highlighting affluent, professional backgrounds among the plaintiffs.[79] These plaintiffs, per Chief Justice Marshall, "have employed such legal means as are available to them—for example, joint adoption, powers of attorney, and joint ownership of real property—to secure aspects of their relationships."[80] While the focus in plaintiffs' filings on "legal means" may have seemed

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76. At the time of *Goodridge*, "Massachusetts was a very Catholic state with a conservative religious hierarchy." GEORGE CHAUNCEY, WHY MARRIAGE: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 130 (2009). Even today, the state's politics are complicated. The state, for example, has had five Republican governors and two Democratic governors since 1991. *Former Governors – Massachusetts,* NAT'L GOVERNORS ASS'N, https://www.nga.org/former-governors/massachusetts [https://perma.cc/K64D-AD3T].

77. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)

78. *Id.* at 949.

79. For example, Justice Marshall left out student, part-time nursing instructor, and nonprofit administrator. *Id.*

80. *Goodridge*, 798 N.E.2d at 949.

plodding, the plaintiffs' professions and possessions became the starting point of the opinion.

The first example Justice Marshall provides of the "[t]angible as well as intangible benefits [that] flow from marriage" is that "[t]he marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities."[81] Her recognition that property rights are "valuable" speaks to the resonant power these rights hold in the Anglo-American legal tradition. And her comment on the potentiality of "a *burdensome* degree of government regulation of their activities" also reveals the broad, unspoken legal conventions under which the litigants operated.[82] Against this normative backdrop, property rights have purchase.

This interplay between property rights and legal norms extends to other parts of the opinion. Justice Marshall asserts:

> [Marriage] is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds . . . .[83]

Reasonable people will disagree whether maximizing private provision of social services for dependents should be a "central" governmental goal. But this contestable commitment is part of the ethos of American political culture.[84] The plaintiffs could have called for sweeping reform of this culture, as many early advocates for gay liberation had.[85] Instead, they framed their demand for marriage equality in a discourse that appealed to those who believed in a small welfare state. Rather than threaten existing social structures, the plaintiffs asked to access an institution that facilitates the "orderly distribution of property" and bolsters the prevailing economic system.

Property rights offered Chief Justice Marshall concrete precedents to apply in addition to an overarching narrative. She contends, for example:

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81. *Id*. at 955.

82. *Id*. (emphasis added).

83. *Id*. at 954.

84. *See generally* JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES (2002).

85. *See* Boucai, *supra* note 20.

> The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." *Wilcox v. Trautz*. *See Collins v. Guggenheim* (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant).[86]

Wilcox[87] and *Collins*[88] have little to do substantively with marriage equality. But through the mediating frame of property rights, they became credible and relevant precedents that supported recognizing a new right.

Like later marriage equality cases, Chief Justice Marshall's opinion has sweeping language in parts. But it is distinctive for its detailed treatment of Massachusetts property law. To concretize the "enormous" benefits "accessible only by way of a marriage license," the Chief Justice lists "some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property."[89] By "some," she means "many." In this section, she surveys twenty-one provisions of the General Laws of Massachusetts that protect property rights. Observing her discussion is "not comprehensive," she touches on a range of issues related to property rights: tenancy by entirety, homestead protection benefits, joint income tax filing, rights to inherit property of a deceased spouse, the rights of elective share and of dower, wage entitlements, business inheritances, access to a spouse's medical and retirement plans, access to healthcare coverage, preferential benefits under the Commonwealth's pension plan and MassHealth (the state's Medicaid and CHIP programs), alimony rights, asset protections in divorce, and the right to bring certain legal claims in loss of consortium and a wide range of tort actions.[90] Chief Justice Marshall places this discussion in the main text, methodically moving from provision to provision, not in a lengthy footnote.

Children may not own significant amount of property, but the Chief Justice Marshall reflects on how the denial of parental property rights threatens their interests. "While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage," she writes, "same-sex couples who dissolve their

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86. *Id.* at 955 (internal citations simplified).
87. Wilcox v. Trautz, 427 Mass. 326 (1998).
88. Collins v. Guggenheim, 417 Mass. 615 (1994).
89. Boucai, *supra* note 20.
90. *Id.* at 955–56.

relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction."[91] Twelve years later, the interests of children would shape the *Obergefell* decision, and Chief Justice Marshall anticipates it in her decision through a property-related lens.[92]

Throughout the opinion, Justice Marshall resists the to urge to dichotomize between the visible and dignitary benefits of marriage. She observes, "For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits."[93] These benefits are interlinking and cannot be delineated into a neat list. "Barr[ing] access to the protections, benefits, and obligations of civil marriage" is "incompatible with the constitutional principles of respect for individual autonomy and equality under law."[94]

V. IMPLICATIONS

For better or worse, property rights occupy a privileged position in the pantheon of American constitutional rights, a preeminent status that the Roberts Court is cementing. The United States "[C]onstitution encircles, and renders [property rights] [a] holy thing."[95] Commentators call the right to property the keystone right not necessarily because of a particular fondness for it, but because of its consequence in our constitutional tradition. The *Goodridge* litigators skillfully deployed this aspect of this constitutional tradition to change it. To legitimize novel claims that challenged deeply-rooted understandings in American family law, they leveraged a deeply-rooted right. By doing so, they generated credibility for their claims and helped centrist and conservative judges understand their arguments.

To fully understand *Goodridge*'s legacy, property should be part of legal scholarship's understanding of how advocates presented their claims. One of the few scholars who has analyzed the *Goodridge* litigants closely has argued that the *Goodridge* lawyers "fra[m]ed the plaintiff couples as hetero-normative," therefore "stressing the similarities between gays and

91. *Id*. at 965.
92. Obergefell v. Hodges, 576 U.S. 644, 646 (2015).
93. *Goodridge*, 798 N.E.2d at 948.
94. *Id*. at 949.
95. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 311 (C.C.D. Pa. 1795).

straights."[96] This Essay argues they also framed the plaintiffs through capital, emphasizing similarities between gays and straights through economic positionality and philosophy. While some have suggested that discourse invoking "the purely functional advantages of marriage" should be understood as separate from the process of normalizing gay couples before judges, this Essay sees property as a mediating vehicle for normalization.[97] Heteronormative arguments may have helped centrist judges find sympathy for the plaintiffs and their novel arguments, but so did proprietary ones.

Just as Ginsburg's strategic use of male plaintiffs corresponded to a substantive vision of sex equality, the *Goodridge* lawyers' reliance on property rights reflected more than purely tactical maneuvering. They recognized that the tangible, functional benefits of marriage—in areas like property rights—help create the intangible, dignitary benefits of marriage. Their theory resisted dichotomizing between the concrete privileges and the more amorphous, social status affirmations that emanate from marital rights. It allowed plaintiffs to ask for relief beyond civil unions, which the neighboring state of Vermont had recently approved, while still wielding the denial of marriage's palpable privileges in litigation. And it would influence the equal protection jurisprudence to come. Most notably, Justice Kennedy's opinion in *Obergefell* recognizes that same-sex marriage bans "harm and humiliate" through interconnected "material" and "stigma"-generating pathways.[98]

For many LGBTQ couples, the proprietary benefits of marriage may not have been particularly important. They sought to marry to become equal citizens and access the dignitary benefits of marriage. Yet the *Goodridge* lawyers recognized the strategic benefits of emphasizing property concerns and the dynamic interplay between the tangible, functional benefits of marriage and the more symbolic ones.

This story has contemporary applications. Modern environmental lawyers are deploying property rights to legitimate new

96. Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 515 (2003).

97. *Id.* (contrasting rhetoric focused on "similarities" between LGBT couples and heterosexual couples with rhetoric "emphasiz[ing] the purely functional advantages of marriage").

98. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

rights claims and legal theories in cutting-edge climate change litigation, as they seek constitutional recognition of the right to a livable planet and other new entitlements.[99] Civil rights lawyers are deploying property rights to argue for reparations for Black Americans.[100] Cross-ideological movements are drawing on property rights to challenge zoning policies that are wielded against shelters, tiny homes, and other housing policies aimed at unhoused people.[101] Property rights are not driving the moral and ideological projects behind the movements for climate change, reparations, or a right to shelter for homeless people. *Goodridge*, however, vindicates these activists' approaches of incorporating property rights into their lexicon as they navigate existing legal systems and paradigms.

History shows that property rights can be wielded to deny civil rights. But this Essay highlights that property rights can do the converse. As the Roberts Court expands property rights, this lesson should be on the forefront of the minds of litigators' who seek to extend rights to the ignored and excluded.

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99. *See*, *e.g.*, First Amended Complaint for Declaratory and Injunctive Relief at 96, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. Sept. 10, 2015) (No. 6:15-cv-1517) (using property rights to legitimate claims about a right to a "livable future"). *See generally* Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 SOC. POL'Y & PHIL. 2 (2009) (proposing an "approach to climate change policy" grounded in "a normative commitment to property rights").

100. *See, e.g.*, Jordan Brewington, Note, *Dismantling the Master's House: Reparations on the American Plantation*, 130 YALE L.J. 2160, 2197–205 (2021) (discussion of using eminent domain to implement local reparations).

101. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 5, 17, 19, Decker v. City of Meridian, CV01-22-11962 (Idaho D. Aug. 15, 2022).