

**Legal Scholarship on Same-Sex Marriage**  
**Update No. 38**  
**July 21, 2009**  
**Compiled By Michael Ginsborg, MLS**

- [I. Articles posted in 2009 on SSRN.com, BePress.com and other digital sources \(updated\)](#)
- [II. Law review, legal newspaper, and other scholarly articles published in 2009 \(updated\)](#)
- [III. Law review articles published in 2008](#)

## I. Articles posted in 2009 on SSRN.com, BePress.com and other digital sources

- **New:** Joanna Grossman and Edward Stein, [The State of the Same-Sex Union](#), Findlaw Forum (parts I and II posted July 14, 2009, and July 21, 2009)
- **New:** Robert J. Hume, [Understanding the Impact of State Supreme Courts: An Event History Analysis of Same-Sex Marriage Amendments](#). Social Science Research Network (July 15, 2009)
- **New:** Vivia Chen, [The marriage broker: the fight for gay marriage in Iowa changed the nation's legal landscape - and one lawyer's worldview](#), 31 American Lawyer No. 7, 67 (July 2009)
- **New:** Rachel M. Zahorsky, [Doing "work necessary to win": Lambda Legal lawyer led fight for gay marriage in Iowa](#), 95 ABA Journal No. 7, 36 (July 2009)
- Mark Strasser, [A Little Older, a Little Wiser, and Still Committed](#), 61 Rutgers L. Rev. 507 (posted July 9, 2009)
- [Joanna Grossman](#) and Edward Stein, [The State of the Same-Sex Union: Part One in a Three-Part Series](#), Findlaw.com (July 12, 2009)
- Martha Nussbaum, [A Right to Marry? Same-Sex Marriage and Constitutional Law](#), 56 Dissent Magazine No.3, 43-55 (Summer 2009)
- Kerry Abrams and Peter Brooks, [Marriage As a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation](#), 21 Yale J. Law & the Humanities 1 (2009)
- [John G. Culhane](#), [Marriage Equality? First, Justify Marriage \(If You Can\)](#), 1 Drexel L.R. 485 (posted 07/03/09)
- [Courtney G. Joslin](#), [Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond](#), 70 Ohio State L.J. 563 (2009) / UC Davis Legal Studies Research Paper No. 178 (posted 06/23/09)
- [Report and Recommendation to NY State Bar Association on Marriage Rights for Same-Sex Couples \(05/04/09\)](#)
- Marc R. Poirer, [Name Calling: Identifying Stigma and the 'Civil Union'/'Marriage' Distinction](#), 41 Conn. L.. Rev. 63 (July 2009)
- [Deb Wald](#), [Shannon Minter](#), and [Courtney Joslin](#), [Recognition of marriages between same-sex couples performed outside of California prior to November 5, 2008](#) (posted 06/22/09; referenced [here](#))
- David Novak, [Why We Should Oppose Same-Sex Marriage](#) (posted 6/19/09) [based on a publication forthcoming 98 Cal L. Rev. (2010); commented on [here](#).]
- Lois A. Weithorn, [CAN A SUBSEQUENT CHANGE IN LAW VOID A MARRIAGE THAT WAS VALID AT ITS INCEPTION? CONSIDERING THE LEGAL EFFECT OF PROPOSITION 8 ON CALIFORNIA'S EXISTING SAME-SEX MARRIAGES](#), 60 Hastings L.J. 1063 (May 2009)
- [Kerry Abrams](#) and [Peter Brooks](#), [Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation](#), [Yale Journal of Law and the Humanities](#), Vol. 21, No. 1, 2009 (commented on [here](#))

- Elizabeth R. Sheyn, [The Shot Heard Around the LGBT World: Bowers v. Hardwick as a Mobilizing Force for the National Gay and Lesbian Task Force](#) (posted June 12, 2009). 4 Touro Law Center Journal of Race, Gender, and Ethnicity 2 (May 2009).
- [Jeff Redding, Proposition 8 and the Future of American Same-Sex Marriage Activism](#), 14 Nexus 113 (2009) (posted 06/05/09)
- [Tanya Washington, Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans](#), forthcoming in 6 Hastings Race and Pov. L.J.
- [Gregory N. Johnson, We've Heard this Before: The Legacy of Interracial Marriage Bans and the Implications for Today's Marriage Equality Debates](#), forthcoming in Vermont L.Rev. (Fall 2009)
- Nancy D. Polikoff, [Equality and Justice for Lesbian and Gay Families and Relationships](#), 61 Rutgers L.Rev. 529 (posted 5/23/09)
- [Further Thoughts on Proposition 8 and Retroactivity: A Response to Choper](#)
- [Marriage Rights and Parental Rights: Parents, the State, and Proposition 8 \(04/16/09\)](#)
- ['Activist Courts,' Misleading Wedge Politics and the Tragedy of Proposition 8 \(04/09/09\)](#)
- [Judicial Regimes and Same-Sex Marriage: Enforcing Judicially Determined Personal Autonomy at the Expense of Majoritarian Democracy \(04/07/09\)](#)
- [Can a Subsequent Change in Law Void a Marriage that Was Valid at its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages \(03/17/09\)](#)
- [DOMA and the Internal Revenue Code \(03/22/09\)](#)
- Marisa Silenzi Cianciarulo, [SAME-SEX COUPLES AND THE RIGHT TO MARRY IN CALIFORNIA](#), NEXUS : A JOURNAL OF OPINION (posted 02/17/09) (citation not yet available?)
- [Justice Grodin: On Amending and Revising the Constitution: The Issues behind the Challenge to Proposition 8](#)
- [Jesse Choper: Should Proposition 8 Be Held to be Retroactive?](#)
- [Fourteen Words that Devastate the Fourteenth Amendment and Equal Protection: Proposition 8 and the Future of Equality](#)
- [Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages](#)

## II. Law review, legal newspaper and other scholarly articles published in 2009

**New:** Vivian Chen, [The marriage broker: the fight for gay marriage in Iowa changed the nation's legal landscape - and one lawyer's worldview](#), 31 American Lawyer No. 7, 67 (July 2009)

**New:** Rachel M. Zahorsky, [Doing "work necessary to win": Lambda Legal lawyer led fight for gay marriage in Iowa](#), 95 ABA Journal No. 7, 36 (July 2009)

William C. Duncan, Marriage On Trial [Symposium Article: As Iowas Goes, So Goes the Nation: Varnum v. Brien And Its Impact On Marriage Rights For Same Sex Couples], 12 J. Gender, Race & Just. 493 (2009)

Julia Halloran McLaughlin, DOMA and the Constitutional Coming Out of Same-Sex Marriage, 12 Wisc. J. L., Gender & Society 145 (2009)

Mark Strasser, [A Little Older, a Little Wiser, and Still Committed](#), 61 Rutgers L. Rev. 507 (2009)

Gabe Vick, The Defense of Marriage Act: The Crossroad of Love and Legislation, 22 J. Am. Acad. Matrim. Law. 105 (2009) (summary [here](#))

Martha Nussbaum, [A Right to Marry? Same-Sex Marriage and Constitutional Law](#), 56 Dissent Magazine No.3, 43-55 (Summer 2009)

Kerry Abrams and Peter Brooks, [Marriage As a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation](#), 21 Yale J. Law & the Humanities 1 (2009)

[John G. Culhane](#), [Marriage Equality? First, Justify Marriage \(If You Can\)](#), 1 Drexel L.R. 485 (2009)

Michele Reichlin, Civil unions under the Maryland era: how the illusion of equality is an equal rights avoidance, 38 University of Baltimore Law Review 305 (2009)

[Courtney G. Joslin](#), [Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond](#), 70 Ohio State L.J. 563 (2009) / UC Davis Legal Studies Research Paper No. 178

Aisling O'Sullivan, Same-sex marriage and the Irish Constitution, 13 Internat'l J. Human Rights 477 (2009)

Marc R. Poirer, [Name Calling: Identifying Stigma and the 'Civil Union'/'Marriage' Distinction](#), 41 Conn. L.. Rev. 63 (July 2009)

Edward Stein, MARRIAGE OR LIBERATION?: REFLECTIONS ON TWO STRATEGIES IN THE STRUGGLE FOR LESBIAN AND GAY RIGHTS AND RELATIONSHIP

RECOGNITION [SYMPOSIUM: UPDATING THE LGBT INTRACOMMUNITY DEBATE OVER SAME-SEX MARRIAGE] 61 Rutgers L. Rev. 567 (Spring 2009)

Mark Strasser, A LITTLE OLDER, A LITTLE WISER, AND STILL COMMITTED [SYMPOSIUM: UPDATING THE LGBT INTRACOMMUNITY DEBATE OVER SAME-SEX MARRIAGE] 61 Rutgers L. Rev. 507 (Spring 2009)

Carlos A. Ball, INTRODUCTION TO SYMPOSIUM: UPDATING THE LGBT INTRACOMMUNITY DEBATE OVER SAME-SEX MARRIAGE, 61 Rutgers L. Rev. 493 (Spring 2009)

Judith E. Koons, Engaging the Odd Couple: Same-Sex Marriage and Evangelicalism in the Public Square, 30 Women's Law Repr. 255 (Winter 2009)

Lois A. Weithorn, [CAN A SUBSEQUENT CHANGE IN LAW VOID A MARRIAGE THAT WAS VALID AT ITS INCEPTION? CONSIDERING THE LEGAL EFFECT OF PROPOSITION 8 ON CALIFORNIA'S EXISTING SAME-SEX MARRIAGES](#), 60 Hastings L.J. 1063 (May 2009)

Tun Ying, Crying Wolf?: In re Marriage Cases and Charges of Judicial Activism, 14 [NEXUS A JOURNAL OF OPINION](#) 45 (2009) [Symposium].

M. Katherine Baird Darmer, "Activist" Courts, Misleading Wedge Politics and the Tragedy of Proposition 8, 14 [NEXUS A JOURNAL OF OPINION](#) 69 (2009) [Symposium].

Ronald Steiner, Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny, 14 [NEXUS A JOURNAL OF OPINION](#) 81 (2009) [Symposium].

Lynn D. Wardle, Restructuring Democracy or Lawlessness? Critical Reflections on In re Marriage Cases, 14 [NEXUS A JOURNAL OF OPINION](#) 91 (2009) [Symposium].

Robin Fretwell Wilson, Same-Sex Marriage and Religious Liberty: Life After Prop 8, 14 [NEXUS A JOURNAL OF OPINION](#) 101 (2009) [Symposium].

Jeffrey A. Redding, [Proposition 8 and the Future of American Same-Sex Marriage Activism](#), 14 [NEXUS A JOURNAL OF OPINION](#) 113 (2009) [Symposium].

[Kerry Abrams and Peter Brooks, Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation, Yale Journal of Law and the Humanities, Vol. 21, No. 1, 2009](#)

Elizabeth R. Sheyn, [The Shot Heard Around the LGBT World: Bowers v. Hardwick as a Mobilizing Force for the National Gay and Lesbian Task Force](#) (posted June 12, 2009). 4 Touro Law Center Journal of Race, Gender, and Ethnicity 2 (May 2009).

[Jeff Redding, Proposition 8 and the Future of American Same-Sex Marriage Activism](#), 14 Nexus 113 (2009) (posted 06/05/09)

[Lesbian Lawyers on the Front](#), 19 Curve Magazine No. 5, 49 (Jun. 2009) (profiling lesbian lawyers Jenny Pizer and Kate Kendell) (online text not available as of 6/4/09)

Russell S. Roeca, California's step back.(Proposition 8, a roadblock in the path to equality)(Editorial), The Los Angeles Daily Journal (May 27, 2009): 6(1)

Laura Ernde and John Roemer, Proposition 8 upheld: experts say same-sex marriage decision could let voters remove rights from other groups, The Los Angeles Daily Journal (May 27, 2009): p1(2)

[Tanya Washington, Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans](#), forthcoming in 6 Hastings Race and Poverty Law Journal

[Richard Salas, In re Marriage Cases: the fundamental right to marry and equal protection under the California Constitution and the effects of Proposition 8](#), 36 Hast. Const. L.Q. 545

Same-sex Divorce and Wisconsin Courts: Imperfect Harmony? Louis Thorson, 92 Marq. L. Rev. 617 (2009) ([abstract](#))

Andrew L. Weinstein, The Crossroads of a Legal Fiction and the Reality of Families, 61 Me. L. Rev. 319 (2009) ([abstract](#))

Catherine Smith and Jennifer Holladay, [A Cautionary Tale: The Obama Coalition, Anti-subordination Principles and Prop 8](#), 89 Denver Univ. L. Rev. 819 (2009)

Catherine Jean Archibald, De-Clothing Sex-Based Classifications — Same-Sex Marriage is Just the Beginning: Achieving Formal Sex Equality in the Modern Era, 36 **Northern Kentucky L. Rev.** 1 (2009)

Nancy D. Polikoff, [Equality and Justice for Lesbian and Gay Families and Relationships](#), 61 [Rutgers L. Rev.](#) 529 (2009); American University, WCL Research Paper No. 2009-17.

Laura Reidel, Religious Opposition to Same-Sex Marriage in Canada: Limits to Multiculturalism, 10 **Human Rights Review** 261 (June 2009)

Richard Salas, [In re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under The California Constitution and The Effects of Proposition 8](#), 36 Hastings Const. L.Q. 545 (2009)

[Beyond \(Straight and Gay\) Marriage: Valuing All Families Under the Law.\(Book review\)](#). Amy L. Wax. *Michigan Law Review* 107.6 (April 09): p999(19).

Should California exit the marriage business? As the high court grapples with Prop 8, some wonder if government should stop uniting everyone. Laura Ernde. **The Los Angeles Daily Journal** 122.59 (March 31, 2009): p1(2).

What's love got to do with it? A proposal for elevating the status of marriage by narrowing its definition, while universally extending the rights and benefits enjoyed by married couples. James L. Musselman. *Duke Journal of Gender Law & Policy* 16.1 (Jan 2009): p37(51).

State constitutional law - California Supreme Court declares prohibition of same-sex marriages unconstitutional. *Harvard Law Review* 122.5 (March 2009): p1557(8).

Intimate discrimination: the state's role in the accidents of sex and love. Elizabeth F. Emens. *Harvard Law Review* 122.5 (March 2009): p1307(93).

[Laycock, Douglas, Anthony R. Picarello, Jr., and Robin Fretwell Wilson \(eds\). Same-Sex Marriage and Religious Liberty: Emerging Conflicts. Reviewed by Emily R. Gill. \*Law & Politics Book Review\* Volume 19, Number 2, February 2009 p.162-166](#)

What's sex got to do with it? A cinematic critique on the arguments against same-sex marriage. Scott Norton. **Hastings Communications and Entertainment Law Journal (COMMENT)** 31.2 (Wntr 2009): p321-338.

Nancy Ver Steegh, Annual Survey of Periodical Literature - Bibliography, 42 Family Law Quarterly 877 (2009) (includes section for "Same-Sex Marriage Issues" for the period between November 2007 and October 2008)

Linda D. Elrod and Robert G. Spector, A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue, 42 Family Law Quarterly 713 (2009) (includes overview of case law for same-sex marriages)

### III. Law review articles published in 2008

**New:** Salvador Pérez Álvarez, Same-Sex Couples Marriage in Spain: Conscientious Objection of Judges and Mayors, 20 Sri Lanka J. Internat'l L. (2008)

Judith A. Young, Same-Sex Marriage In California: After Proposition 8 Passed and Before the California Supreme Court Decision on the Challenge to Proposition 8, 36 Lincoln L. Rev. 131 (2008-09)

Marc R. Poirier, [Gender, Place, Discursive Space: Where is Same-Sex Marriage?](#), 3 Fl.Internat'l Univ. L. Rev.307 (2008)

Matthew W. Clark, [The Gospel according to the state: an analysis of Massachusetts adoption laws and the closing of Catholic Charities adoption services](#) (NOTES), 41 Suffolk Univ. L. Rev. 871 (Fall 2008)

Stephen T. Black, [Same-sex marriage and taxes](#). 22 BYU J. Pub. L. 327-357 (2008)

Adam J. MacLeod, [The search for moral neutrality in same-sex marriage decisions](#), 23 J. Pub. L. 1 (2008)

[Marc R. Poirier, MICROPERFORMANCES OF IDENTITY: VISIBLE SAME-SEX COUPLES AND THE MARRIAGE CONTROVERSY](#), 15 Wash. & Lee J. Civ. Rights & Soc. Justice 3 (2008) (See also [this newsletter](#) for other 2008 articles by Marc Poirier about same-sex marriage and the law.)

[M.V. Lee Badgett, THE DOUBLE-EDGED SWORD IN GAY ECONOMIC LIFE? MARRIAGE AND THE MARKET](#), 15 Wash. & Lee J. Civ. Rights & Soc. Justice 109 (2008)

[Linda C. McClain, Red Versus Blue \(and Purple\) States and the Same-Sex Marriage Debate: From Values Polarization to Common Ground?](#) 77 **University of Missouri-Kansas City Law Review** 416 (2008)

Brandon Burkart & Kay Rousslang, Recognition of Same-Sex Marriage (Ninth Annual Review), [9 Georgetown Journal of Gender and the Law](#) 1031 (2008)

Equality opportunity: marriage litigation and Iowa's equal protection law. Suzanne B. Goldberg, Sarah Hinger and Keren Zwick. *Journal of Gender, Race and Justice* 12.1 (Fall 2008): p107(20).

From slavery to same-sex marriage: comity versus public policy in inter-jurisdictional recognition of controversial domestic relations.Lynn D. Wardle. *Brigham Young University Law Review* 2008.6 (Dec 2008): p1855-1920.



Gambling, greyhounds, and gay marriage: how the Iowa Supreme Court can use the rational-basis test to address *Varnum v. Brien*. Steven P. Wieland. *Iowa Law Review* 94.1 (Nov 2008): p413(36).

Interstate pluralism: the role of federalism in the same-sex marriage debate. Jeffrey L. Rensberger. *Brigham Young University Law Review* 2008.6 (Dec 2008): p1703-1807.

It's about time, or is it? Iowa District Court's invalidation of Iowa's mini-DOMA. (Defense of Marriage Act). Jacob Larson. *Journal of Gender, Race and Justice* 12.1 (Fall 2008): p153(32).

State constitutional law - same-sex relations - Supreme Court of Michigan holds that public employers may not provide healthcare benefits to same-sex domestic partners of employees. *Harvard Law Review* 122.4 (Feb 2009): p1263(8).

The coming collision: Romer and and state defense of marriage acts. Patrick J. Borchers. *Brigham Young University Law Review* 2008.6 (Dec 2008): p1635-1649.

The cultural property claim within the same-sex marriage controversy. Marc R. Poirier. *Columbia Journal of Gender and Law* 17.3 (Fall 2008): p343(76).

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## Tennessee Journal of Law & Policy

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