

Legal Scholarship on Same-Sex Marriage
Update No. 41
August 1, 2009
Compiled By Michael Ginsborg, MLS

- I. Articles posted in 2009 on SSRN.com, BePress.com and other digital sources**
(updated)
- II. Legal scholarship and commentary published in 2009** **(updated)**
- III. Law review articles published in 2008** **(updated)**

I. Articles posted in 2009 on SSRN.com, BePress.com and other digital sources **Katharine K. Baker**

- **New:** Katharine K. Baker, [Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights](#), Social Science Research Network (July 30, 2009)
- **New:** Lynn D. Wardle, [Restructuring Democracy or Lawlessness? Critical Reflections on In re Marriage Cases](#), 14 NEXUSA JOURNAL OF OPINION 91 (2009) [Symposium]. (posted July 31, 2009)
- William C. Duncan, [Speaking Up For Marriage](#), 32 Harv. J. L. & Pub. Pol'y 915 (2009)
- Elizabeth Burleson, [From Nondiscrimination to Civil Marriage](#), Social Science Research Network (posted July 20, 2009)
- 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)
- 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)
- 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)
- 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
- 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 \(04/09/09\)](#)
- Thomas H. Burrell, [Judicial Regimes and Same-Sex Marriage: Enforcing Judicially Determined Personal Autonomy At the Expense of Majoritarian Democracy](#), 35 Ohio N. Univ. L. Rev. 619 (posted 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. Legal scholarship and commentary published in 2009

New: Kenneth McK Norrie, Recognition of Overseas Same-Sex Relationships in New Zealand, 23 New Zealand Univ. L. Rev. 339 (2009)

William C. Duncan, [Speaking Up For Marriage](#), 32 Harv. J. L. & Pub. Pol'y 915 (2009)

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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)

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)

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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)

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

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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 Rts. L. Rep. 255 (Winter 2009) ([abstract](#))

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].

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

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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](#))

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

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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)

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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).

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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: William B. Turner, The perils of marriage as transcendent ontology: National Pride at Work v. Governor of Michigan.(Ninth Symposium Issue of Gender and Sexuality Law), 9 Georgetown J. Gender and the Law 279 (2008)

New: Carlos A. Ball, Against neutrality in the legal recognition of intimate relationships.(Ninth Symposium Issue of Gender and Sexuality Law), 9 Georgetown J. Gender and the Law 321 (2008)

New: Rights & wrongs: morality in the gay marriage debate.(Ninth Symposium Issue of Gender and Sexuality Law)(Discussion), 9 Georgetown J. Gender and the Law 337 (2008)

New: Meghan Carr Horrigan, The state of marriage in Virginia history: a legislative means of identifying the cultural other.(Ninth Symposium Issue of Gender and Sexuality Law), 9 Georgetown J. Gender and the Law 379 (2008)

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)

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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 J. of Gender and the Law 1031 \(2008\)](#)

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