

Legal Scholarship on Same-Sex Marriage

Update No. 21

June 15, 2009

[I. Articles posted in 2009 on SSRN.com and BePress.com \(updated\)](#)

[II. Law review and legal newspaper articles published in 2009 \(updated\)](#)

[III. Law review articles published in 2008](#)

[I. Articles posted in 2009 on SSRN.com and BePress.com](#)

- **New:** [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](#)
- **New:** [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. 101 (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 \(03/22/09\)](#)
- [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 and legal newspaper articles published in 2009

New: [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](#)

New: 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)

[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](#) (May 22, 2009). *Rutgers Law Review*, Vol. 61, p. 101, 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 Ernede. **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

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).

Washington & Lee Law School
Current Law Journal Content
an index to legal periodicals

Tennessee Journal of Law & Policy

Volume 5, Number 1, Fall 2008

DUE PROCESS AND EQUAL PROTECTION: A CONSTITUTIONAL APPROACH TO SAME-SEX MARRIAGE

Ashley Musselman

South Texas Law Review

Volume 50, Number 1, Fall 2008

[homepage](#)  [WL](#)  [other issues](#)

- SYMPOSIUM: GAY MARRIAGE IN THE CONSERVATIVE MOVEMENT

- ARTICLES

- **NOT WHETHER BUT HOW: GAY MARRIAGE AND THE REVIVAL OF BURKEAN CONSERVATISM**

Jonathan Rauch

p.1

[+cite](#)



- **CAN THE GOVERNMENT PROHIBIT GAY MARRIAGE?**

Jesse H. Choper & John C. Yoo

p.15

[+cite](#)



- **MARRIAGE AND PRACTICAL KNOWLEDGE**

Robert F. Nagel

p.37

[+cite](#)



- **THREE LIBERAL—BUT MISTAKEN—ARGUMENTS FOR SAME-SEX MARRIAGE**

Gerard V. Bradley

p.45

[+cite](#)



- **LOVE HAS NOTHING TO DO WITH IT**

Charles Murray

p.77

[+cite](#)



- **SAME-SEX MARRIAGE: UNCONSERVATIVE IN PURPOSE, IN APPLICATION, AND IN RESULT**

David Frum

p.85

[+cite](#)



- TRANSCRIPTS

- **A TRADITIONALIST CASE FOR GAY MARRIAGE**

Dale Carpenter

p.93

[+cite](#)



- SYMPOSIUM QUESTION AND ANSWER
p.105

[+cite](#)



Washington & Lee Law School
Current Law Journal Content
an index to legal periodicals

Brigham Young University Journal of Public Law

Volume 23, Number 1, 2008

[homepage](#)   [other issues](#)

- ARTICLES
- **The Search for Moral Neutrality in Same-Sex Marriage Decisions**
Adam J. MacLeod
p.1