

SAMUEL A. MARCOSSON

PROFESSOR
LOUIS D. BRANDEIS SCHOOL OF LAW
UNIVERSITY OF LOUISVILLE

Current Courses:

Constitutional Law
Criminal Law

Sexual Orientation & the Law
Employment Discrimination

Scholarship: Current research focuses on sexual orientation and the law; equal protection and constitutional interpretation.

Service:

Associate Dean for Student Life (2004-2006)

Member, School of Law's Diversity Committee (1996-2004, 2008-Current; Co-Chair, 1998-99)
Faculty Sponsor

National Moot Court Team (1996-Current)

National Criminal Law Moot Court Team (1998-2004)

Faculty Advisor, Lambda Law Caucus (Gay & Lesbian student organization)
(1996-2000, 2003-Current)

Member, School of Law's Curriculum Committee (1998-2000)

Member, Decanal Search Committee (1999-2000)

Member, Legal Skills Faculty Search Committee (1999-2000)

Member, School of Law's Self-Study Committee (2003-04)

Member, Admissions Committee (2004-2012; Chair, 2005-12)

Member, University of Louisville Human Resources Advisory Committee (2010-11)

Executive Committee, University of Louisville Faculty & Staff for Human Rights (2007-11)

Program Co-Chair, National Lesbian & Gay Law Association 1998 Annual Conference

Planned and arranged over 50 panels for the NLGLA annual program held in October 1998, covering wide range of topics affecting the legal rights of lesbians and gay men and the issues affecting gay and lesbian attorneys.

Co-Chair, National Lesbian & Gay Law Association Amicus Committee (1998-2000)

Responsible for building a program under which the national bar association for lesbian, gay, bisexual and transgendered attorneys will participate as amicus curiae in a range of cases raising issues affecting the civil rights of sexual minorities. Charged with building a network of cooperating attorneys, regional bar associations, and law students (with supervision) who would identify cases and prepare and file the organization's briefs; and building relationships with organizations having similar or overlapping interests, whose briefs the NLGLA could consider joining in appropriate cases and who might be approached to join the NLGLA's briefs.

Practice: Represented numerous national women's organizations as amici curiae in Supreme Court cases:

Fisher v. Vassar College (in support of petition for *certiorari*, on issue of role of evidence of pretext in proving discrimination in sex discrimination challenge to denial of tenure)

Burlington Industries v. Ellerth (arguing that employer is liable for sexual harassment by supervisory personnel, even if a *quid pro quo* threat is not carried out)

Appeared as amicus curiae and authored brief in *Lofton v. Secretary of the Department of Children and Family Services* (11th Circuit) (constitutional challenge to Florida ban on adoption by gay men and lesbians; argued that "moral disapproval" should not be credited as justification for discriminatory policy)

PUBLICATIONS

BOOKS:

PHILADELPHIA 2.0: THE CONSTITUTIONAL REVOLUTION WE NEED, AND
THE 21ST CENTURY CONSTITUTIONAL CONVENTION THAT WILL BRING IT ABOUT

(In progress)

A proposal for a series of desperately needed constitutional amendments to completely transform our political system from the presidency to the Congress, and beyond, and to accomplish these changes by cutting Congress out of the process and forcing our first Constitutional Convention since 1787. The gridlock that makes it impossible for real progress to be made in Washington, and the ability of those with money and access to block reforms that are in the vital national interest, also make it impossible to bring about constitutional change by the methods that have previously been utilized under Article V of the Constitution. Only a Convention, called by States with a specific mandate for action, can bring about the change we require to re-energize our political system for the next century, and beyond. Philadelphia 2.0 presents a blueprint for the changes we require, including the system for electing members of Congress, the relationship between the House and Senate, and how we elect the President.

ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE
OF THE CONSTITUTIONAL CONSERVATIVES

(New York University Press 2002)

Explores the failure of the Supreme Court's self-styled "originalist" justices consistently to be bound by the original understanding of constitutional text. With particular focus on Justice Clarence Thomas' disturbing performance in applying the Equal Protection Clause of the Fourteenth Amendment, ORIGINAL SIN argues that the record of the current generation of originalists manifests broader, incurable defects in the method itself. Most importantly, originalism is an inadequate bridge to legitimacy because it addresses the wrong problem, the "counter-majoritarian difficulty" that has occupied constitutional theory for the past half-century. The greater threat to legitimacy is the undemocratic origins of the Constitution itself. This threat looms most dangerously when the undemocratic "dead hand" controls contemporary interpretation of the Constitution. In place of originalism, the Court should actively scrutinize constitutional provisions for their place in perpetuating the Constitution's undemocratic origins and interpret the text to minimize that effect.

ARTICLES:

The Special Status of Religion Under the First Amendment ... and What it Means For Gay Rights and Anti-Discrimination Laws in

MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD
(Book Chapter) (2009)

- U of L's Domestic Partner Benefits Do Not Violate the State Constitution's Marriage Amendment*
LOUISVILLE COURIER-JOURNAL, February 22, 2007 (Op-ed)
- Client Counseling as an Ethical Obligation: Advising Employers Before They Discriminate*
33 NORTHERN KENTUCKY LAW REVIEW 221 (2006)
- Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*
8 UNIV. OF IOWA JOURNAL OF GENDER, RACE & JUSTICE 361 (2004)
- Multiplicities of Subordination: The Challenge of Real Inter-Group Conflicts of Interest*
71 UNIVERSITY OF MISSOURI-KANSAS CITY LAW REVIEW 459 (2002)
- Constructive Immutability*
3 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 646 (2001)
- Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*
16 LAW & INEQUALITY 429 (1998)
- Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same-Sex Marriage Fight*
24 JOURNAL OF CONTEMPORARY LAW 217 (1998)
- The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense"*
35 JOURNAL OF FAMILY LAW 721 (1997)
- A Price Too High: The Policy on Gays and Lesbians in the Military and the Inevitability of Intrusiveness and Before We Change the Subject . . . A Reply to Mr. Young*
64 UMKC LAW REVIEW 59 and 117 (1995)
- The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*
9 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 137 (1995)
- Who is "Us" and Who is "Them" -- Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans with Disabilities Act*
44 AMERICAN UNIVERSITY LAW REVIEW 361 (1994)
- Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*
81 GEORGETOWN LAW JOURNAL 1 (1992)
- Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*
6 LABOR LAWYER 145 (1990) (co-authored)
- The Court At The Crossroads: Runyon, Section 1981, and The Meaning of Precedent*
37 EMORY LAW JOURNAL 949 (1988) (co-authored)

PRESENTATIONS

The Use of Race in Undergraduate Admissions Decisions

A Debate with Prof. James Blumstein on *Fisher v. University of Texas*
University of Louisville, Brandeis School of Law
November 8, 2012

The Beginning of the End of Affirmative Action?

A Panel on *Fisher v. University of Texas*
University of Kentucky College of Law
October 24, 2012

The Supreme Court and Healthcare: Possibilities and Implications

A Forum on the Affordable Care Act and the Decision in *Sebelius*
Louisville Metro Democratic Club
June 13, 2012

The 20-Year Legacy of Supreme Court Justice Clarence Thomas

A Debate with Professor Scott Gerber
Ohio Northern University Petit College of Law
February 23, 2012

Does the Patriot Act Draw the Right Balance Between Liberty and Security?

A Debate with Professor Nathan Sales
September 8, 2011

Christian Legal Society v. Martinez: Balancing Freedom of Religion and Discrimination

A Debate with Dr. Bruce Frohnen
September 16, 2010

I Was in the Right Case, But it Must Have Been The Wrong Time: The Ill-Timed Legal Challenge to California's Legal Ban on Same-Sex Marriages

Bradley University Current Issues Speakers Series
October 5, 2009

The Founders' Precedent: Constitutional Transformation

Constitution Day Speech to the Kentucky Chapters of the
Sons & Daughters of the American Revolution
September 19, 2009

Constitutional Issues Surrounding Same-Sex Marriage

A Debate with Prof. Paul Salamanca
Transylvania University
September 17, 2009

What We Did (and Didn't) Learn From the Sotomayor Hearings: Where Angels Fear to Tread

Bellarmino University Constitution Day Speech
September 17, 2009

Constitutional Interpretation: A Debate on Originalism

A Debate With Prof. John McGinnis
University of Louisville Brandeis School of Law
Federalist Society
September 1, 2009

The Constitution, Same-Sex Marriage, and the Modern Age

A Debate With Prof. John Baker on Same-Sex Marriage
University of Louisville Brandeis School of Law
Federalist Society
February 9, 2009

Extreme Makeover 2008: What the Selling of Sarah Palin Tells Us About . . . Us

Women's and Gender Studies Lecture Series
University of Louisville
October 29, 2008

Should George W. Bush Be Impeached?

Carl Braden Memorial Center
Louisville, Ky.
March 24, 2008

Phillip Morris v. Williams: A Brief History of Judicial Activism & Punitive Damages

University of Louisville Brandeis School of Law
Constitution Day Program Presentation
September 17, 2007
<http://www.law.louisville.edu/constitution-day>

Testimony on S.B. 152 (to bar public agencies from offering domestic partner health insurance benefits)

Kentucky General Assembly, House Committee on Health and Welfare
Frankfort, Kentucky
March 1, 2007 (http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+008113)
March 6, 2007 (http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+008123)

Client Counseling as an Ethical Obligation: Advising Employers Before They Discriminate

Symposium on Ethics in Employment Law
Northern Kentucky University
Salmon P. Chase College of Law
November 11, 2005

Testimony on the Workplace Religious Freedom Act

United States House of Representatives
Subcommittee on Employer-Employee Relations
Washington, D.C.
November 10, 2005

Should Clarence Thomas Be Chief Justice?

On-line debate with Professor Stephen Presser in *Legal Affairs*
http://www.legalaffairs.org/webexclusive/debateclub_Thomas0105.msp
January 3-7, 2005

The Murder of Matthew Shepard and the Enduring Specter of Hate

Yom HaShoah Remembrance
Jewish Community Center
Louisville, Kentucky
April 2004

Clinical and Legal Aspects of Gay Marriage and Parenting

Presentation on legal arguments regarding gay men and lesbians in parenting roles, at CLE program sponsored by ACLU of Kentucky
February 2004

I Do, I Don't: Should Kentucky Recognize Same-Sex Marriages

Debated legal and policy issues surrounding question of affording equal legal recognition to same-sex relationships.

January 2004

Has the Jury Reached a Verdict?

Panel discussion following mock trial presenting issue of accommodations for mental disabilities under the Americans with Disabilities Act

November 2003

Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans With Disabilities Act

University of Iowa College of Law Symposium: *Justice for All? Exploring Gender, Race and Sexual Orientation Within Disability Law*

October 2003

Gender, Sexuality, and the Law

Lecture delivered as part of University of Louisville lecture series, discussing role of gender stereotypes as the common thread linking important gender-related issues, including single-sex education and same-sex marriage.

October 2003

Same-Sex Sexual Harassment: An Update

National Lesbian and Gay Law Association Annual Conference

October 2002

Atomizing Equality: The American Experience with Domestic Partner Benefits

Paper presented at the International Lesbian and Gay Law Association conference:

Marriage, Partnerships and Parenting in the 21st Century

Turin, Italy

June 2002

The Meaning of "Disability" Under the ADA: The Supreme Court Speaks

Web-based CLE program addressing recent Supreme Court decisions defining the term "disability" within the meaning of the Americans with Disabilities Act

March 2002

First Amendment Considerations for Sexual and Gender Minorities after Dale

National Lesbian and Gay Law Association Annual Conference

October 2000

PRIOR EMPLOYMENT

JAN-MAY 1995

VISITING PROFESSOR

UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF LAW

Courses:

Constitutional Law I - Coverage included judicial review, due process, equal protection, free expression, and free exercise.

Current Issues in Discrimination Law - Covered two rapidly evolving areas of law involving application of antidiscrimination principles: disability law (focusing on the Americans with Disabilities Act), and sexual orientation law.

Academic Activities:

Proposed, organized, and co-moderated an academic Symposium entitled, "Don't Ask, Don't Tell: Implementation and Litigation," in which experts assessed the first year since adoption of the Clinton Administration's policy towards lesbians and gays in the military. The event produced a Symposium Issue in Volume 64 of the UMKC Law Review.

1988-1996

SENIOR ATTORNEY, OFFICE OF GENERAL COUNSEL
APPELLATE SERVICES DIVISION
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Responsible for EEOC litigation in the courts of appeals and the Supreme Court in actions enforcing federal laws barring employment discrimination. Representative cases include: *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (raising question of standard for "willfulness" under the ADEA); *EEOC v. Aramco*, 499 U.S. 244 (1991) (raising question whether Title VII applies abroad); *Carparts Distribution Center v. Automotive Wholesaler's*, 37 F.3d 12 (1st Cir. 1994) (trade association providing health coverage for members' employees is liable under ADA as "employer" for discriminatory cap on coverage for HIV and AIDS); *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir.) (private school may not discriminate on basis of religion in hiring teachers for secular courses), *cert. denied*, 114 S. Ct. 439 (1993); *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990), *aff'd*, 501 U.S. 452 (1991) (raising question whether ADEA bars mandatory retirement of state judges); *EEOC v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990) (to be "reasonable" under Title VII, union offer to accommodate a religious objection to dues requirement must eliminate the religious conflict).

1986-1988

LAW CLERK
HONORABLE GEORGE C. PRATT
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PROFESSIONAL

MEMBER:

DISTRICT OF COLUMBIA BAR
BAR OF THE SUPREME COURT OF THE UNITED STATES
NATIONAL LESBIAN & GAY LAW ASSOCIATION

EDUCATION

1983-1986

YALE LAW SCHOOL
J.D. 1986

1979-1983

BRADLEY UNIVERSITY
B.S., SUMMA CUM LAUDE, 1983

ACADEMIC HONORS

Professional:

DISTINGUISHED FACULTY AWARD FOR TEACHING
UNIVERSITY OF LOUISVILLE 2009

DISTINGUISHED ALUMNUS, COLLEGE OF LIBERAL ARTS & SCIENCES
BRADLEY UNIVERSITY 2002

Law School:

SENIOR EDITOR, YALE LAW JOURNAL

YALE MOOT COURT OF APPEALS
THURMAN ARNOLD PRIZE ARGUMENT FINALIST
FALL 1984

Undergraduate:

1983 NATIONAL PUBLIC SPEAKING CHAMPION
EXTEMPORANEOUS SPEAKING
IMPROMPTU SPEAKING
COMMUNICATION ANALYSIS
AMERICAN & NATIONAL FORENSICS ASSOCIATIONS

MEMBER, NATIONAL FORENSICS ASSOCIATION HALL OF FAME
INDUCTED APRIL 2000

ACTIVITIES

Community:

Fairness Campaign of Louisville
Member, Coordinating Committee Member 2008-Current

Access Center Partnership, Louisville, Ky.
Member, Attorney Advisory Committee 1997-2004

Whitman-Walker Clinic, Washington, D.C.
Volunteer "Buddy" for Person with AIDS, 1991-1996
Team Leader, 1993-1996

Big Brothers & Big Sisters of Nassau County
Volunteer Big Brother 1987-88

Law School: Yale Moot Court Board of Directors 1985-86
Yale Legal Services Organization
Child Advocacy Project Fall 1984

Undergraduate: Member, Bradley University Speech Team
1980-83 National Team Champions

Proctor, Independent Study Course
Introduction to American Government