

SAMUEL A. MARCOSSON

PROFESSOR
LOUIS D. BRANDEIS SCHOOL OF LAW
UNIVERSITY OF LOUISVILLE

Current Courses:

Constitutional Law
Criminal Law

Sexual Orientation & the Law
Constitutional Practice

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

Service:

Associate Dean for Student Life (2004-2006)

Member, Kentucky State Advisory Committee, United States Commission on Civil Rights (2013-2019)

Member, School of Law's Diversity Committee (1996-2004, 2008-2017; Co-Chair, 1998-99, Chair 2016-17)

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, 2003-2018)

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

Member, Decanal Search Committee (1999-2000, 2013-14, 2016-17)

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

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

Member, Admissions Committee (2004-2012, 2013-2015; Chair, 2005-12, 2013-2015)

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

Member & Chair, School of Law's Probation & Reinstatement Committee (2017-18)

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

BOOK:

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:

*Masterpiece Cakeshop and Tolerance as a Constitutional Mandate:
Strategic Compromise in the Enactment of Civil Rights Laws*

15 DUKE JOURNAL OF CONSTITUTIONAL LAW & PUBLIC POLICY ____ (2020) (forthcoming)

Fixing Congress

33 BYU JOURNAL OF PUBLIC LAW 227 (2019)

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

Masterpiece Cakeshop & Tolerance as a Constitutional Mandate

Article Presentation

Duke Journal of Constitutional Law & Public Policy

Duke University School of Law

Durham, N.C.

February 19, 2020

I Beg Your Pardon: A Discussion About the Recent Gubernatorial Pardons

The Louisville Forum (Panel)

Louisville, KY

January 8, 2020

Roundtable: Pertinent Aspects of the Masterpiece Cakeshop Decision

Midwest Political Science Association

Chicago, IL

April 5, 2019

Masterpiece Cakeshop & Tolerance as a Constitutional Mandate

Faculty Workshop
Northern Kentucky University
Salmon P. Chase College of Law
March 20, 2019

From Lochner to Lawrence: Should Judges Secure Unenumerated Rights?

A Debate With Dr. Roger Pilon
Brandeis School of Law
Louisville, KY
October 4, 2018

Judicial Selection & Judicial Independence

A Panel on the Legal and Constitutional Issues
The Kentucky Bar Association Convention
Lexington, KY
June 14, 2018

The Constitution, Courts, and The Free Press

Louisville Bar Association Summer Law Institute
The Brandeis School of Law
Louisville, KY
June 11, 2018

Teaching Religion in the Public Schools: A Panel Addressing KY Senate Bill 138

Louisville Salaam Network
April 18, 2017

The Supreme Court Confirmation Process: How We Got Into This Fine Mess and How We Get Out of It

Louisville Bar Association Summer Law Institute
The Brandeis School of Law
Louisville, KY
June 13, 2016

Getting Inside Obergefell: Marriage Equality's Implications for Kentucky Law

A Workshop on How the Legalization of Same-Sex Marriage Will Affect Kentucky Law
The Brandeis School of Law
Louisville, KY
April 16, 2016

Achieving Racially Diverse Juries in Jefferson County

Panel discussion on the limits of judicial discretion to act to achieve racial diversity in jury venires
The Louisville Forum
December 2015

Accommodating Transgender Students in Public Schools

A Panel on the Legal and Constitutional Issues
The Kentucky Bar Association Convention
Lexington, KY
June 17, 2015

Anticipating Obergefell: What the Supreme Court May Do and the Likely Aftermath for Kentucky

Continuing Legal Education Program

Louisville Bar Association Human Rights
Louisville, KY
June 3, 2015

***Liberty & Justice For All? Views of Religious Liberty in
Our National Landscape***

A Panel on the State of Religious Liberty & Extremism
Highland Baptist Church
Louisville, KY
July 6, 2014

The Defense of Marriage Act & The Supreme Court

Continuing Legal Education Program
Louisville Bar Association
November 8, 2013

Prevention v. Prosecution: HIV is Not a Crime

A Panel on the Criminalization of HIV
Louisville Metro Department of Health & Wellness
October 2, 2013

The Decision in Fisher: The Affirmative Action Status Quo Holds

Presentation to the Kentucky State Government Bar Association
Frankfort, Kentucky
June 25, 2013

The Marriage Cases: The Fate of DOMA and Prop 8

A Panel on the Supreme Court Term
The Kentucky Bar Association Convention
June 20, 2013

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***

Bellarmine 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
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 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: *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 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

EDUCATION

1983-1986

YALE LAW SCHOOL
J.D. 1986

1979-1983

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

ACADEMIC HONORS

Professional: LGBT ALLY AWARD FOR COMMUNITY SERVICE
UNIVERSITY OF LOUISVILLE LGBT CENTER 2015

EXCELLENCE IN TEACHING AWARD
BRANDEIS SCHOOL OF LAW ALUMNI ASSOCIATION
2013-2014

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 2008-2014, 2017-Current
Executive Committee, 2018-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