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University of Wisconsin Law School
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EMPLOYMENT

- Aug. 1999 – present **FOLEY & LARDNER-BASCOM PROFESSOR OF LAW**, University of Wisconsin Law School, Madison, WI. Subjects: Civil Procedure, Evidence, Constitutional Law. Assistant Professor, Aug. 1999-July 2005; Associate Professor with tenure, July 2005-Aug. 2008; Professor of Law, Aug. 25, 2008-June 2013; Foley & Lardner-Bascom Professor, July 2013-present.
- Sep. 1996 – June 1999 **SENIOR STAFF ATTORNEY**, American Civil Liberties Union Foundation of Southern California, Los Angeles. Conducted broad range of civil rights litigation, in state and federal trial and appellate courts.
- Sep. 1986 – July 1996 **ATTORNEY**, private practice, San Francisco. Lucas Law Firm (1993-1996), representing plaintiffs in employment litigation. Henry G. Wykowski & Associates (1989-1993), civil litigation and criminal appeals. Heller, Ehrman, White & McAuliffe (1986-87), civil litigation.
- Sep. 1987 – Sep. 1988 **JUDICIAL LAW CLERK, The Honorable Betty B. Fletcher**, U.S. Court of Appeals for the Ninth Circuit, Seattle, Washington.

EDUCATION

- 1982-86 **Yale Law School, J.D., 1986.**
Articles Editor, Yale Law Journal.
- 1983-86 **Yale University, M.A., 1986,** Political Science.
- 1977-81 **Yale University, B.A., 1981,** Economics & Political Science.
Magna cum laude, Distinction in the Major.

TEACHING INTERESTS

Current teaching program: Civil Procedure, Evidence, Constitutional Law; seminar: “The Constitution in the American Civil War.” *Have also taught:* Civil Rights Litigation, Employment Law, Employment Discrimination Law, Remedies, Legal Research and Writing, Conflict of Laws, Trial Advocacy.

SCHOLARLY PUBLICATIONS

An Excess of Discretion? “Thayer’s Triumph” and the Uncodified Exclusion of Speculative Evidence, 105 California Law Review __ (forthcoming April 2017)

CONSTITUTIONAL LAW: A CONTEXT AND PRACTICE CASEBOOK (with Lori A. Ringhand) (Carolina Academic Press, 2d. ed., forthcoming, spring 2017); (1st ed. 2013)

Justice Scalia's Jiggery-Pokery in Federal Arbitration Law, 101 Minnesota Law Review Headnotes 75 (2016)

Disfavored Treatment of Third Party Guilt Evidence (with Chelsey Metcalf), 2016 Wisconsin Law Review 337 (2016)

EVIDENCE: TEXT, PROBLEMS & CASES (6th ed. 2016) (with Allen, Swift, Pardo and Stein); (5th ed. 2011) (with Allen, Kuhns, Swift, and Pardo); (4th ed. 2006) (with Allen, Kuhns and Swift)

Misreading McCulloch v. Maryland, 18 U. Penn. J. Con. L. 1 (2015)

Presidential Politics as a Safeguard of Federalism, 62 Buffalo Law Review 599 (2014)

High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States, 35 Cardozo Law Review 567 (2013)

Reply to Professor Rothstein, 100 Geo. L. J. Online 16 (2012)
<http://georgetownlawjournal.org/ipsa-loquitur/reply-to-professor-rothstein/>

Claim-Suppressing Arbitration, 87 Indiana Law Journal 239 (2012)

A Foundation Theory of Evidence, 100 Georgetown Law Journal 95 (2011)

Mandatory Arbitration and Fairness, 84 Notre Dame Law Review 1247 (2009)

If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration," 8 Nevada Law Review 400 (2007)

The Federal Arbitration Act and the Power of Congress Over State Courts, 83 Oregon Law Review 541 (2005)

State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law, 16 Washington University J. Law & Pol. 129 (2004)

Correcting Federalism Mistakes in Statutory Interpretation: the Supreme Court and the Federal Arbitration Act, 67 Law & Contemporary Problems 5 (2004)

Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability and Preclusion Principles, 38 U.S.F. Law Review 49 (2003)

When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law, 150 University of Pennsylvania Law Review 1697 (2002); [same], *excerpted in* John J. Donohue III, *Foundations of Employment Discrimination Law* (2d. Ed. 2003)

The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action and Racial Balancing, 2000 Wisconsin Law Review 657 (May 2000)

Choice of Forum by Contract: Compelled Arbitration, (book chapter), in Kent Spriggs et al., *Representing Plaintiffs in Title VII Litigation* (2d Ed. 1998, Aspen Law Publishers; rev. eds. 1999, 2001)

Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wisconsin Law Review 33 (May 1997)

The Amoralty of Consent, 74 California Law Review 2143 (Dec. 1986)

Note, *Making Intramilitary Tort Law More Civil*, 95 Yale Law Journal 995 (1986)

WORKS IN PROGRESS

Reconstructing John Marshall: *McCulloch v. Maryland* and the Making of American Constitutional Law (forthcoming, Oxford University Press, 2018)

A Question Perpetually Arising: Implied Powers, Capable Federalism and the Limits of Enumerationism

The Conjunction Problem and the Logic of Jury Findings

VISITING AND ADJUNCT PROFESSORSHIPS

Visiting Professor of Law, Denver University, Sturm College of Law, Spring 2012, Spring 2011. Subjects: Constitutional Law, Advanced Topics in Constitutional Law

Visiting Professor, Justus-Liebig-Universität Giessen, Germany, summer program, 2005, 2013, 2015. Designed and taught 3-week course on The American Jury Trial System.

Visiting Professor of Law, UCLA School of Law, Fall 2003. Subjects: Evidence, Remedies

Adjunct Professor of Law, University of Southern California Law School, Fall 1997; Spring 1999. Subject: Remedies.

HONORS AND AWARDS

Classroom Teacher of the Year Award, University of Wisconsin Law Alumni, 2012

Teacher of the Year Award, University of Wisconsin Law Alumni, 2004

Nominated for University of Wisconsin Distinguished Teaching Award, 2002

RECENT PRESENTATIONS AND OTHER PROFESSIONAL PUBLICATIONS

“2016 as a Constitutionally Transformative Presidential Election,” presented at Symposium: The Presidential Election of 2016: Campaign and Results, at the Interdisciplinary Center (IDC) Herzliya, Lauder School of Government, Diplomacy and Strategy (Herzliya, Israel, Jan. 8-9, 2017)

“The Red State / Blue State Republic: *McCulloch v. Maryland* and the Making of American Constitutional Law,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Sep. 30-Oct. 1, 2016)

“Reconstituting *McCulloch v. Maryland*: an Intellectual History,” presented paper on panel, “Reconstructing the Framers’ Constitution,” at “American Society for Legal History Annual Meeting, Washington, DC (Oct. 30, 2015).

“Is Separation of Powers” Justiciable?”, Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 2-3, 2015)

“Misreading *McCulloch v. Maryland*,” presented at NYU Colloquium on Legal History (April 8, 2015); also presented at American Bar Foundation, Chicago Legal History Workshop (April 22, 2015).

“Assessing the Rehnquist Court’s Federalism,” presented at conference: The Rehnquist Court: Ten Years Later, hosted by The William H. Rehnquist Center on the Constitutional Structures of Government, University of Arizona James E. Rogers College of Law (Feb. 6, 2015)

“Judicial Supremacy in Race Policy: the Strange Career of Strict Scrutiny,” 2014 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 21-22, 2014)

“Presidential Politics as a Safeguard of Federalism,” 2013 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 1-2, 2013)

“Political Safeguards of Federalism, Revisited: the Case of Marijuana Legalization,” presented at Symposium: The Presidential Election of 2012: Campaign and Results, at the Interdisciplinary Center (IDC) Herzliya, Lauder School of Government, Diplomacy and Strategy (Herzliya, Israel, Jan. 6-7, 2013)

“‘Faithful Execution’: the Scope of Executive Discretion to Enforce the Controlled Substances Act Against Medical Marijuana,” presented at Symposium: Marijuana at the Crossroads, University of Denver, Sturm College of Law (January 27, 2012)

“The ‘Conjunction Problem’: Its Cause and Cure,” AALS Evidence Section Newsletter (Fall/Winter 2011)

Community discussion, *Crawford v. Washington*, SCOTUS Blog (Dec. 13, 2011)
<http://www.scotusblog.com/2011/12/today-in-the-community-december-13-2011/>

“Do-it-yourself tort reform: How the Supreme Court quietly killed the class action,” SCOTUS Blog (Sep. 16, 2011) <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/>

“ ‘The Literature of Constitutional Law’: an Intellectual History of *McCulloch v. Maryland*,” 2011 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 4-5, 2011)

“Claim-suppressing Arbitration,” Symposium: Labor and Employment Law Under the Obama Administration: a Time for Hope and Change?, Indiana University, Maurer School of Law, (Bloomington, IN, November 12-13, 2010)

SIGNIFICANT LITIGATION AND PUBLIC SERVICE

Seventh Circuit Advisory Committee on Circuit Rules, August 2014-present.

Drafted 14-page opinion letter at request of Governor James Doyle concluding that Wisconsin domestic partnership provisions in 2009 state budget are constitutional under federal and state constitutions (June 4, 2009)

Consulted in drafting H.R. 3010, S. 1782, Fair Arbitration Act of 2007 (reintroduced as the Arbitration Fairness Act of 2009, H.R. 1020, S. 931)

Congressional testimony: "Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform," written and oral testimony presented to the at the hearing on "Mandatory Binding Arbitration Agreements: Are They Fair For Consumers?" before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (June 12, 2007)

Wisconsin Auto Title Loans v. Jones, 2006 Wis. LEXIS 344 (Wis. Sup. Ct. 2006), author of U.W. Law Professors' amicus brief in support of consumer in predatory lending case, filed in Wisconsin Supreme Court, December 7, 2005

Buckeye Check Cashing v. Cardegna, 126 S. Ct. 1204 (2006). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to the states.

Anheuser-Busch, Inc. v. Melena, 2006 Ill. LEXIS 329 (Ill. Sup. Ct. 2006), author of amicus brief in support of consumer in employee rights/ arbitration case filed in April, 2005.

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to the states. Organized amicus group of 25 law professors nationwide.

Eastman v. Conseco Financial Servicing Corp., author of U.W. Law Professors' amicus brief filed in Wisconsin Supreme Court, December 18, 2002.

EEOC v. Luce Forward Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (en banc). Author of amicus curiae brief on behalf of 14 members of the U.S. House of Representatives, filed in U.S. Court of Appeals for the Ninth Circuit, December 13, 2002.

Circuit City Stores v. Adams, 532 U.S. 105 (2001). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to employment disputes. Organized amicus group of 15 law professors nationwide.

Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1991), aff'g *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998), aff'g 966 F. Supp. 977 (E.D. Cal. 1997). Prepared papers and appeal brief in winning preliminary injunction against unconstitutional welfare penalty on new state residents; assisted in Supreme Court briefing.

In re Pratt, 69 Cal. App. 4th 1294 (1999). Wrote respondent's brief winning affirmance against district attorney's appeal from order overturning 1972 first degree murder conviction of former

Black Panther Geronimo Pratt, on habeas corpus. Co-counsel included Professors Anthony Amsterdam (NYU), Robert Weisberg (Stanford), and James Liebman (Columbia).

Lagatree v. Luce, Forward, Hamilton & Scripps; Lagatree v. Keesal, Young & Logan, 74 Cal. App. 4th 1105 (1999), review denied (2000). Unsuccessful, first-of-its-kind wrongful discharge lawsuit on behalf of a legal secretary fired from two successive jobs due to his refusal to sign arbitration agreement.

Wright v. Universal Maritime Service Corp., 525 U. S. 70 (1998). Co-authored ACLU amicus brief successfully urging reversal of Fourth Circuit decision compelling arbitration of employment discrimination claims pursuant to an arbitration clause in a collective bargaining agreement.

Bureerong v. Uvawas, 959 F. Supp. 1231 (C. D. Cal. 1997). Litigated precedent-setting damages action against manufacturers and retailers on behalf of formerly enslaved Thai garment workers. Briefed and argued motion in which court held for first time that manufacturers could be liable for full tort damages for buying or selling sweatshop-produced goods on negligence per se theory based on Fair Labor Standards Act.

McDougal v. Ramon, (C. D. Cal. CV 97-5331-R(E) (1997)). Wrote successful habeas corpus petition on behalf of “Whitewater” witness Susan McDougal. McDougal had been held illegally in L.A. County jail under maximum security conditions for eight months. Habeas petition sought transfer to minimum security federal facility. Federal respondents gave all relief sought without filing opposition.

Stirlen v. Supercuts, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997). Briefed and argued successful challenge to unconscionable employee arbitration agreement. *Stirlen* has become one of the leading cases on the application of unconscionability doctrine to arbitration agreements.

Nordlin v. Kmart, (Cal. Super. Ct., Tuolumne Co., No. 35243 (1996)). Won \$1.5 million verdict as lead counsel in 5-week sexual harassment jury trial against national retail chain, Mar.-Apr. 1996 (1st ever sexual harassment verdict in Tuolumne County).

Perry v. PG&E, (S.F. Superior Ct. No. 948562 (1995)). Co-counselled jury trial in disability discrimination case, won verdict of \$800,000 plus punitive damages and attorneys fees, Aug.-Sep. 1995. Liability was established on the novel issue that subtle personality changes due to brain condition met the statutory standard for a disability.

BAR MEMBERSHIPS

State Bar of California; U.S. Courts of Appeals for the Sixth and Ninth Circuits; U.S. District Courts for the Northern, Eastern and Central Districts of California, the Northern District of Ohio and the Western District of Wisconsin; and the Supreme Court of the United States.