

**THE INFLUENCE OF
PROFESSOR CALVIN R. MASSEY:
A SELECT ANNOTATED BIBLIOGRAPHY**

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“I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for . . . there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and

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politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.”¹

INTRODUCTION

In writing a bibliography of Professor Massey’s scholarly works, I sought to demonstrate the breadth of his corpus and to make the case that his ideas are more relevant now than ever.² While annotating each work, I came across a multitude of instances in which he was cited by courts and prominent legal scholars. While I desired to include this information in the initial bibliography, doing so proved too tedious given the time constraints. Now, however, I have had the opportunity to compile and annotate the most prominent cases and publications in which he has been cited as an authority. What follows is the result of this effort.

While Professor Massey was not a scholar of intellectual property, his areas of expertise—constitutional law and property—serve as the basis for this well established and still growing field of practice and scholarship. Indeed, one might say that constitutional law and property serve as the foundations of intellectual property in the same way that intellectual property serves as the foundation of the law school that houses this publication. Indeed, it is most fitting that a bibliography assessing the legacy of one of the University of New Hampshire School of Law’s most revered faculty members is published in the school’s preeminent journal.

¹ JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 171 (Edison Martin Imprint 2013) (1936).

² Nicholas Mignanelli, *The Life and Legacy of Professor Calvin R. Massey: A Select Annotated Bibliography*, 68 *HASTINGS L.J.* (forthcoming 2017).

I. THE JUDICIARY

A. Federal Courts

1. U.S. Supreme Court

*Seminole Tribe of Florida v. Florida*³

In his dissent, Justice David Souter cites Professor Massey's article, *State Sovereignty and the Tenth and Eleventh Amendments*,⁴ as representative of the minority view that the Eleventh Amendment "strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit."⁵

*Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁶

Associate Justice Sandra Day O'Connor heavily relies upon Professor Massey's article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*,⁷ to recount the genealogy of that clause, tracing it back to Medieval England.⁸ Writing for the majority, Associate Justice Harry Blackmun cites the same work as an article that finds in "history a basis for concluding that the Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages."⁹

³ 517 U.S. 44, 110 n.8 (1996).

⁴ Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

⁵ *Seminole Tribe of Fla.*, 517 U.S. at 110 n.8 (Souter, J., dissenting).

⁶ 492 U.S. 257 (1989).

⁷ Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987).

⁸ *Industries of Vermont, Inc.*, 492 U.S. at 287-292 (O'Connor, J., concurring-in-part and dissenting-in-part).

⁹ *Id.* at 271 n.17.

2. U.S. Courts of Appeals

Washington Environmental Council v. Bellow¹⁰

Judge Milan Smith cites Professor Massey’s article, *State Standing after Massachusetts v. EPA*,¹¹ to support the proposition that the plaintiff cannot rest its claim upon the precedent in *Massachusetts* because that case applies only to “state litigants . . . prosecut[ing] claims that would not be cognizable by individual plaintiffs.”¹²

United States v. Levesque¹³

Taking her cue from Associate Justice O’Connor’s opinion in *Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,¹⁴ Chief Judge Sandra Lynch cites to Professor Massey’s article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*¹⁵ in a discussion of that clause’s history.¹⁶

United States v. Spencer¹⁷

Chief Judge Richard Posner cites Professor Massey’s article, *Federalism and Fundamental Rights: The Ninth Amendment*,¹⁸ and his book, *Silent Rights: The Ninth Amendment and the Constitution’s*

¹⁰ 732 F.3d 1131 (9th Cir. 2013).

¹¹ Calvin Massey, *State Standing after Massachusetts v. EPA*, 61 FLORIDA L. REV. 249 (2009).

¹² *Wash. Envtl. Council*, 732 F.3d at 1145.

¹³ 546 F.3d 78 (2008).

¹⁴ *Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 n.17 (1989).

¹⁵ Massey, *supra* note 4.

¹⁶ Levesque, 546 F.3d at 84.

¹⁷ 160 F.3d 413, 414-15 (7th Cir. 1998).

¹⁸ Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987).

Unenumerated Rights,¹⁹ as works representative of the view that (1) “the Ninth Amendment authorizes federal courts to . . . [protect] against federal encroachment [upon] certain rights possessed by citizens of the states before they entered the Union” and (2) “that the Ninth Amendment does . . . empower the states, by creating *new* state constitutional rights, to truncate the power of Congress under Article I by preempting federal legislation.”²⁰ These views are contrary to the position the majority endorses in this case.²¹

American Civil Liberties Union of New Jersey v. Schundler²²

Judge Timothy K. Lewis cites Professor Massey’s article, *Pure Symbols and the First Amendment*,²³ to suggest that the Supreme Court’s decision in *County of Allegheny v. ACLU*²⁴ “are guided by their view of the messages conveyed by particular religious symbols and whether these symbols are ‘pure’ or ‘ambiguous.’”²⁵

United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Ala.²⁶

Relying on Professor Massey’s article, *The Excessive Fines Clause and Punitive Damages: Some Lessons*

¹⁹ CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* (1995).

²⁰ *Spencer*, 160 F.3d at 414–15.

²¹ *Id.*

²² 104 F.3d 1435 (3rd Cir. 1997).

²³ Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 HASTINGS CONST. L.Q. 369 (1990).

²⁴ 492 U.S. 573 (1989).

²⁵ *Schundler*, 104 F.3d at 1445 n.8.

²⁶ 74 F.3d 1165 (11th Cir. 1996).

from History,²⁷ Chief Judge Gerald Bard Tjoflat concludes that “the historical antecedents of our Excessive Fines Clause themselves required proportionality review.”²⁸

New York v. United States²⁹

Writing for the majority, Judge Joseph McLaughlin uses Professor Massey’s article, *State Sovereignty and the Tenth and Eleventh Amendments*,³⁰ to explicate *Garcia v. San Antonio Metropolitan Transit Authority*.³¹ To wit, “[i]n *Garcia*, five justices joined in a majority opinion that, in effect, concluded that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and not to the courts.”³²

3. U.S. District Courts

Kuch v. Rapelje³³

Magistrate Judge Paul J. Komives cites Professor Massey’s article, *The Constitution in a Postmodern Age*,³⁴ to conclude that laws against bestiality are still valid on utilitarian grounds, even if *Lawrence v. Texas*³⁵ has brought disrepute to morality-based legislation.³⁶

²⁷ Massey, *supra* note 7.

²⁸ *One Parcel Prop.*, 74 F.3d at 1171.

²⁹ 942 F.2d 114 (2nd Cir. 1991).

³⁰ Massey, *supra* note 4.

³¹ 469 U.S. 528 (1985).

³² *New York*, 942 F.2d at 119 (citing Massey, *supra* note 4, at 72).

³³ No. 2:09—CV—12872, 2010 WL 3419823 (E.D. Mich. June 30, 2010).

³⁴ Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165 (2007).

³⁵ 539 U.S. 558 (2003).

³⁶ *Kuch*, 2010 WL 3419823, at *10.

United States v. Extreme Associates, Inc.³⁷

Judge Gary Lancaster cites Professor Massey's article, *The New Formalism: Requiem for Tiered Scrutiny?*³⁸ to support the claim "that the nation's obscenity laws cannot stand in light of *Lawrence* [*v. Texas*]." ³⁹

Alshrafi v. American Airlines, Inc.⁴⁰

In a footnote describing the modern jurisprudence surrounding the issue of federal preemption, Chief Judge William Young cites to Professor Massey's article, "*Joltin' Joe Has Left and Gone Away*": *The Vanishing Presumption Against Preemption*.⁴¹

California Democratic Party v. Lungren⁴²

Judge William Orrick III cites Professor Massey's article, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*,⁴³ in support of the principle that the polling place ought to be a "private, protected sphere."⁴⁴

³⁷ 352 F. Supp. 2d 578 (W.D. Penn. 2005).

³⁸ Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

³⁹ *Extreme Assoc., Inc.*, F. Supp. 2d at 590–91 (referencing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

⁴⁰ 321 F. Supp. 2d 150 (D. Mass. 2004).

⁴¹ *Id.* at 156 n.7 (citing Calvin Massey, "*Joltin' Joe Has Left and Gone Away*": *The Vanishing Presumption Against Preemption*, 66 ALBANY L. REV. 759 (2003)).

⁴² 919 F. Supp. 1397 (N.D. Cal. 1996).

⁴³ Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992).

⁴⁴ *Calif. Democratic Party*, 919 F. Supp. at 1404 n.5.

B. State Courts

1. State Supreme Courts

Burns Church, Inc. v. Alabama District Council of the Assemblies of God, Inc.⁴⁵

In his dissent, Chief Justice Roy Moore borrows a passage from Professor Massey’s article, *Church Schisms, Church Property, and Civil Authority*,⁴⁶ to describe the ecclesiastical polity of the Assemblies of God.⁴⁷

Kemp v. Neal⁴⁸

Chief Justice George Carley quotes from, *Church Schisms, Church Property, and Civil Authority*,⁴⁹ regarding the consequences of the propensity to favor national church organizations in modern jurisprudence.⁵⁰

Barrett v. Tennessee Occupational Safety and Health Review Commission⁵¹

Chief Justice Janice Holder relies upon Professor Massey’s article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*,⁵² to trace the origins of the clause back to the expansive power that English judges possessed in the tumultuous seventeenth century.⁵³

⁴⁵ 168 So.3d 1188 (Ala. 2014).

⁴⁶ Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 ST. JOHN’S L. REV. 23 (2010).

⁴⁷ *Burns Church, Inc.*, 168 So.3d at 1192 (Moore, C.J., dissenting).

⁴⁸ 288 Ga. 324 (2010).

⁴⁹ Massey, *supra* note 46.

⁵⁰ *Kemp*, 288 Ga. at 332–33 (Carley, C.J., concurring in part and dissenting in part).

⁵¹ 284 S.W.3d 784 (Tenn. 2009).

⁵² Massey, *supra* note 7.

⁵³ *Barrett*, 284 S.W.3d at 787 (Tenn. 2009).

Gill v. Public Employee Retirement Board⁵⁴

In an analysis of the contours of sovereign immunity, Justice Richard Bosson quotes from Professor Massey's article, *Federalism in the Rehnquist Court*.⁵⁵

Anderson v. Central Bering Sea Fishermen's Association⁵⁶

In a *per curiam* opinion, the Supreme Court of Alaska discusses how "[a] number of judges and commentators have suggested over the years that punitive damages should be paid to a public entity because they have the same purposes as criminal fines, these purposes are inherently public in nature, and the individual plaintiff has by definition already been made whole by compensatory damages."⁵⁷

Professor Massey's article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*,⁵⁸ is cited as an example of this trend.⁵⁹

Middleton v. Hartman⁶⁰

Recounting the adoption of the Eleventh Amendment, Justice Alex Martinez cites to Professor Massey's article *State Sovereignty and the Tenth and Eleventh Amendments*.⁶¹

⁵⁴ 135 N.M. 472 (2004).

⁵⁵ *Id.* at 477 (quoting Calvin Massey, *Federalism in the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002)).

⁵⁶ 78 P.3d 710 (2003).

⁵⁷ *Id.* at 717.

⁵⁸ Massey, *supra* note 7.

⁵⁹ *Anderson*, 78 P.3d at 717 n.36.

⁶⁰ 45 P.3d 721 (Colo. 2002).

⁶¹ *Id.* at 727 (citing Massey, *supra* note 4).

Saldana v. Wyoming⁶²

In his dissent, Justice Walter Urbigkit includes Professor Massey’s article, *Federalism and Fundamental Rights: The Ninth Amendment*,⁶³ to illustrate the vigorous discussion of the role of state constitutions taking place among scholars and jurists at that time.⁶⁴

Cooney v. Park County⁶⁵

In his dissent, Justice Walter Urbigkit concludes a footnote rejecting the majority’s use of “historical analysis” with a citation to Professor Massey’s article, *The Jurisprudence of Poetic License*.⁶⁶

Hale v. Port of Portland⁶⁷

Citing to Professor Massey’s article, *State Sovereignty and the Tenth and Eleventh Amendments*,⁶⁸ Justice W. Michael Gillette briefly touches upon the argument that sovereign immunity is incongruous with democracy.⁶⁹

2. State Appellate Courts

Arizona v. Wise⁷⁰

Citing to Professor Massey’s article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*,⁷¹ Judge Thomas Kleinschmidt points

⁶² 846 P.2d 604 (Wyo. 1993).

⁶³ Massey, *supra* note 18.

⁶⁴ *Middleton*, 846 P.2d at 664 (Urbigkit, J., dissenting).

⁶⁵ 792 P.2d 1287 (Wyo. 1990).

⁶⁶ *Id.* at 1301 n.5 (Urbigkit, J., dissenting) (citing Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047 (1989)).

⁶⁷ 308 Or. 508 (1990).

⁶⁸ Massey, *supra* note 4.

⁶⁹ *Hale*, 308 Or. at 509 n.3.

⁷⁰ 164 Ariz. 574 (Ct. App. 1990).

⁷¹ Massey, *supra* note 7.

out that the excessive fines clause is often conflated with the cruel and unusual clause.⁷²

II. THE ACADEMY

A. Books

ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW⁷³

Elke Cloots of the Faculty of Law at KU Leuven⁷⁴ cites Professor Massey's article, *State Sovereignty and the Tenth and Eleventh Amendments*,⁷⁵ to support the proposition that the U.S. Supreme Court has safeguarded state sovereignty using the Tenth Amendment.⁷⁶

ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS⁷⁷

Professor Ashutosh Bhagwat of the University of California, Davis School of Law⁷⁸ names Professor Massey as a scholar who has "thoroughly debunked" efforts to "avoid the plain and obvious meaning of the Ninth Amendment."⁷⁹

KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT⁸⁰

⁷² *Wise*, 164 Ariz. at 575.

⁷³ ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW (2015).

⁷⁴ *Curriculum Vitae Professor Elke Cloots*, KU LEUVEN, <https://www.law.kuleuven.be/eur/en/curricula/elkecloots> [https://perma.cc/D26N-C75W] (last visited Jan. 11, 2017).

⁷⁵ Massey, *supra* note 4.

⁷⁶ ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW 172 n.231 (2015).

⁷⁷ ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS (2010).

⁷⁸ *Ashutosh Bhagwat*, UC DAVIS SCHOOL OF LAW, <https://law.ucdavis.edu/faculty/bhagwat/> [https://perma.cc/W9NE-4C5B] (last visited Jan. 11, 2017).

⁷⁹ BHAGWAT, *supra* note 77, at 226.

⁸⁰ KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009).

Professor Kurt Lash of the University of Illinois College of Law⁸¹ highlights Professor Massey’s criticism⁸² of Justice Stanley Forman Reed’s treatment of the Ninth Amendment in *United Public Workers v. Mitchell*⁸³

TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES⁸⁴

Professor Timothy Zick of William & Mary Law School⁸⁵ cites Professor Massey’s article, *Public Fora, Neutral Governments, and the Prism of Property*,⁸⁶ as a basis for criticism of the public forum doctrine.⁸⁷

FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES⁸⁸

In his discussion of religious symbolism, Professor Frank Ravitch of the Michigan State University College of Law⁸⁹ adapts the term “pure religious

⁸¹ *Kurt T. Lash*, UNIV. OF ILL. COLLEGE OF LAW, <https://www.law.illinois.edu/faculty/profile/kurtlash> [<https://perma.cc/P7BA-C25C>] (last visited Jan. 11, 2017).

⁸² MASSEY, *supra* note 19.

⁸³ LASH, *supra* note 80 at 305 (commenting on *United Public Workers v. Mitchell*, 330 U.S. 75 (1947)).

⁸⁴ TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009).

⁸⁵ *Timothy Zick*, WILLIAM & MARY LAW SCHOOL, <http://law2.wm.edu/faculty/bios/fulltime/tzick.php> [<https://perma.cc/ZW6V-AF6V>] (last visited Jan. 11, 2017).

⁸⁶ Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999).

⁸⁷ ZICK, *supra* note 84 at 168 n.69.

⁸⁸ FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* (2007).

⁸⁹ *Frank S. Ravitch: Faculty Profile*, MICH. ST. UNIV. COLLEGE OF LAW, http://www.law.msu.edu/faculty_staff/profile.php?prof=238 [<https://perma.cc/N4X8-MUDF>] (last visited Jan. 11, 2017).

objects” from Professor Massey’s article, *Pure Symbols and the First Amendment*.⁹⁰

THOMAS B. MCAFFEE, JAY S. BYBEE, & A. CHRISTOPHER BRYANT, **POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS**⁹¹

Professor Thomas McAfee of the University of Nevada Las Vegas William S. Boyd School of Law,⁹² Judge Jay Bybee of the U.S. Court of Appeals for the Ninth Circuit,⁹³ and Professor Christopher Bryant of the University of Cincinnati College of Law⁹⁴ discuss Professor Massey’s view that the Ninth Amendment should be construed to work as a “Reverse Preemption Clause.”⁹⁵

⁹⁰ RAVITCH, *supra* note 88, at 222 n.95 (citing Massey, *supra* note 23).

⁹¹ THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, **POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS** 233 (2006).

⁹² *Thomas V. McAfee*, UNLV – William S. Boyd School of Law, <https://www.law.unlv.edu/faculty/thomas-mcafee> [<https://perma.cc/P7K9-ELDB>] (last visited Jan. 11, 2017).

⁹³ *Biography: Honorable Jay S. Bybee*, D. N. MAR. I., <http://www.nmid.uscourts.gov/documents/districtconference/2016/bios/jbybee.pdf> [<https://perma.cc/53SM-6TVU>] (last visited Jan. 11, 2017).

⁹⁴ *A. Christopher Bryant*, UNIV. CINCINNATI COLLEGE OF LAW, <https://www.law.uc.edu/faculty-staff/faculty/christopher-bryant> [<https://perma.cc/CTS5-V7G7>] (last visited Jan. 11, 2017).

⁹⁵ MCAFFEE, BYBEE & BRYANT, *supra* note 91, at 233 (citing Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229 (1990)).

Laurence H. Tribe, **Comment in ANTONIN SCALIA, A MATTER OF INTERPRETATION**⁹⁶

In his response to Justice Scalia’s popular essay, Professor Laurence Tribe of Harvard Law School⁹⁷ cites Professor Massey’s article, *Federalism and Fundamental Rights: The Ninth Amendment*,⁹⁸ as being representative of Justice Scalia’s view that “the Ninth Amendment refers only to rights that are created and enforced by the states.”⁹⁹

CLINT BOLICK, **GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM**¹⁰⁰

In characterizing the outcome of properly applying the principles of federalism, Associate Justice Clint Bolick of the Arizona Supreme Court¹⁰¹ quotes from Professor Massey’s article, *Federalism and Fundamental Rights: The Ninth Amendment*.¹⁰²

⁹⁶ Laurence H. Tribe, *Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION* (Amy Gutmann, ed., 1998).

⁹⁷ *Laurence H. Tribe*, HARVARD LAW SCHOOL, <http://hls.harvard.edu/faculty/directory/10899/Tribe> [<https://perma.cc/DTS9-S33N>] (last visited Jan. 11, 2017).

⁹⁸ Massey, *supra* note 18.

⁹⁹ Tribe, *supra* note 96, at 79 n.26.

¹⁰⁰ CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1993).

¹⁰¹ *Justice Clint Bolick*, ARIZONA JUDICIAL BRANCH, <https://www.azcourts.gov/meetthejustices/Justice-Clint-Bolick> [<https://perma.cc/7Y9M-4U3V>] (last visited Jan. 11, 2017).

¹⁰² BOLICK, *supra* note 100, at 186 (citing Massey, *supra* note 18).

JOSEPH R. GRODIN, **IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE**¹⁰³

Joseph R. Grodin, an emeritus professor of law at the University of California, Hastings College of Law,¹⁰⁴ cites Professor Massey's article *Federalism and Fundamental Rights: The Ninth Amendment*,¹⁰⁵ as an authoritative text on the "natural law background of the Ninth Amendment."¹⁰⁶

B. Articles

Note: Professor Massey's scholarship has been cited in hundreds of articles. What follows is merely a selection of the most influential and interesting.

Tara Leigh Grove, *When Can a State Sue the United States*¹⁰⁷

Professor Tara Leigh Grove of William & Mary Law School¹⁰⁸ characterizes Professor Massey as a scholar who welcomes "state-led lawsuits [against the Federal Government] as a crucial check on the administrative state,"¹⁰⁹ citing his article, *State Standing after Massachusetts v. EPA*.¹¹⁰

¹⁰³ JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1991).

¹⁰⁴ *Joseph Grodin*, UC HASTINGS COLLEGE OF LAW, <http://www.uchastings.edu/faculty/grodin/index.php> [<https://perma.cc/VB6T-3LDL>] (last visited Jan. 11, 2017).

¹⁰⁵ Massey, *supra* note 18.

¹⁰⁶ GRODIN, *supra* note 103, at 196.

¹⁰⁷ Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851 (2016).

¹⁰⁸ *Tara Leigh Grove*, WILLIAM & MARY LAW SCHOOL, <http://law2.wm.edu/faculty/bios/fulltime/tlgrove.php> [<https://perma.cc/UC2H-BPXQ>] (last visited Jan. 11, 2017).

¹⁰⁹ Grove, *supra* note 107, at 853 n.10.

¹¹⁰ Massey, *supra* note 11.

Jamal Greene, *The Anticannon*¹¹¹

Professor Jamal Greene of Columbia Law School¹¹² evaluates Professor Massey’s constitutional law casebook¹¹³ for inclusion of the so-called “anticannon,” *i.e.*, “the set of cases whose central propositions all legitimate decisions must refute.”¹¹⁴ According to Greene,¹¹⁵ these cases are *Dred Scott v. Sanford*,¹¹⁶ *Plessy v. Ferguson*,¹¹⁷ *Lochner v. New York*,¹¹⁸ and *Korematsu v. United States*.¹¹⁹

Adam Winkler, *Scrutinizing the Second Amendment*¹²⁰

Citing *Guns, Extremists, and the Constitution*,¹²¹ Professor Adam Winkler of the University of California, Los Angeles School of Law¹²² states that Professor Massey “has written the most sustained discussion to date of potential Second Amendment standards”¹²³

¹¹¹ Jamal Greene, *The Anticannon*, 125 HARV. L. REV. 379 (2011).

¹¹² *Jamal Greene*, COLUMBIA LAW SCHOOL, <http://web.law.columbia.edu/faculty/jamal-greene> [<https://perma.cc/4B3X-GVR9>] (last visited Jan. 11, 2017).

¹¹³ CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* (3d ed. 2009).

¹¹⁴ Greene, *supra* note 111, at 395.

¹¹⁵ *Id.*

¹¹⁶ 60 U.S. 393 (1857).

¹¹⁷ 163 US 537 (1896).

¹¹⁸ 198 US 45 (1905).

¹¹⁹ 323 U.S. 214 (1944).

¹²⁰ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

¹²¹ Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095 (2000).

¹²² *Adam Winkler*, UCLA LAW, <https://law.ucla.edu/faculty/faculty-profiles/adam-winkler/> [<https://perma.cc/5WLT-HJMR>] (last visited Jan. 11, 2017).

¹²³ Winkler, *supra* note 120, at 692.

Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*¹²⁴

Professor Samuel Issacharoff¹²⁵ and Professor Catherine Sharkey¹²⁶ of the New York University School of Law cite Professor Massey's article "Joltin' Joe Has Left and Gone Away": *The Vanishing Presumption Against Preemption*¹²⁷ to suggest that the presumption against preemption was essentially eradicated in *Geier v. American Honda Motor Company*.¹²⁸

Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*¹²⁹

Judge Cornelia Pillard of the U.S. Court of Appeals for the District of Columbia Circuit¹³⁰ cites Professor Massey's article, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*,¹³¹ to support the inclusion of the "right to bear arms" in a list of

¹²⁴ Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

¹²⁵ Samuel Issacharoff, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=23845> [https://perma.cc/HM5E-V5VW] (last visited Jan. 11, 2017).

¹²⁶ Catherine M. Sharkey, NYU LAW, <http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=26965> [https://perma.cc/8PVB-N6GJ] (last visited Jan. 11, 2017).

¹²⁷ Massey, *supra* note 41.

¹²⁸ Issacharoff & Sharkey, *supra* note 124, at 1391 n.45 (commenting on *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

¹²⁹ Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005).

¹³⁰ Cornelia T.L. Pillard, U.S. COURT OF APPEALS, D.C. CIRCUIT, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+NP> [https://perma.cc/F2W6-TUU4] (last visited Jan. 11, 2017).

¹³¹ Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 Fordham L. Rev. 573 (2004).

examples of “constitutional-rights demands” made by voters.¹³²

Richard H. Fallon, Jr., *Legitimacy and the Constitution*¹³³
Professor Richard Fallon of Harvard Law School¹³⁴ cites Professor Massey’s article, *The New Formalism: Requiem for Tiered Scrutiny?*,¹³⁵ to support the proposition that “If the Court did not base its decisions on legal principles, the public would lose respect for it.”¹³⁶

Erwin Chemerinsky, *Against Sovereign Immunity*¹³⁷
Dean Erwin Chemerinsky of the University of California, Irvine School of Law¹³⁸ quotes from Professor Massey’s article, *State Sovereignty and the Tenth and Eleventh Amendments*,¹³⁹ to demonstrate that American sovereign immunity is based upon the underlying principle of sovereign immunity in English law: “the King can do no wrong.”¹⁴⁰

¹³² Pillard, *supra* note 129, at 721 n.143.

¹³³ Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

¹³⁴ Richard H. Fallon, Jr., HARVARD LAW SCHOOL, <http://hls.harvard.edu/faculty/directory/10247/Fallon/publications> [<https://perma.cc/7CTP-FUJ4>] (last visited Jan. 11, 2017).

¹³⁵ Massey, *supra* note 38.

¹³⁶ Fallon, *supra* note 133, at 1841 n.242.

¹³⁷ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

¹³⁸ Erwin Chemerinsky, UNIV. OF CALIF., IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/faculty/full-time/chemerinsky/> [<https://perma.cc/AF4W-EZAY>] (last visited Jan. 11, 2017).

¹³⁹ Massey, *supra* note 4.

¹⁴⁰ Chemerinsky, *supra* note 137, at 1214.

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*¹⁴¹

In a discussion of whether the Eleventh Amendment applies to treaties, Professor David Golove of the New York University School of Law¹⁴² cites Professor Massey's articles, *State Sovereignty and the Tenth and Eleventh Amendments*¹⁴³ and *Correspondence: Exchange on the Eleventh Amendment*,¹⁴⁴ as being representative of the view that the Eleventh Amendment was intended to protect states from suits brought under Article III to enforce treaties.¹⁴⁵

Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity*¹⁴⁶

In footnotes throughout this article, Professor Carlos Vazquez of Georgetown Law Center¹⁴⁷ considers Professor Massey's criticism of Eleventh Amendment diversity theory¹⁴⁸ as articulated in *State*

¹⁴¹ David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

¹⁴² David Golove, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19954> [<https://perma.cc/2LVL-GJ93>] (last visited Jan. 11, 2017).

¹⁴³ Massey, *supra* note 4.

¹⁴⁴ Calvin R. Massey, Correspondence, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 118 (1990).

¹⁴⁵ Golove, *supra* note 141, at 1086 n.30.

¹⁴⁶ Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity*, 106 YALE L.J. 1683 (1996).

¹⁴⁷ Carlos Manuel Vazquez, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/vazquez-carlos-manuel.cfm> [<https://perma.cc/7RYP-UTGE>] (last visited Jan. 11, 2017).

¹⁴⁸ Vazquez, *supra* note 146, at 1697 n.63.

*Sovereignty and the Tenth and Eleventh Amendments.*¹⁴⁹

Mark Tushnet, *The Degradation of Constitutional Discourse*¹⁵⁰

Professor Mark Tushnet of Harvard Law School¹⁵¹ cites to Professor Massey's article, *The Jurisprudence of Poetic License*,¹⁵² as a basis for his own criticism of Chief Justice William Rehnquist's dissent in *Texas v. Johnson*.¹⁵³

John Choon Yoo, *Our Declaratory Ninth Amendment*¹⁵⁴

Professor John Yoo of the University of California, Berkeley, School of Law¹⁵⁵ cites Professor Massey's interpretation of the Ninth Amendment¹⁵⁶ as a partial basis for the view that “[e]xamining what the state constitutions included as rights of the people can provide clues as to what rights the Framers of the Ninth Amendment had in mind”¹⁵⁷ A personalized copy of the offprint to this article was found in the ephemera donated to the UNH Law Library by Professor Massey's family; the

¹⁴⁹ Massey, *supra* note 4.

¹⁵⁰ Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 302 n.227 (1992).

¹⁵¹ Mark Tushnet, HARVARD LAW SCHOOL, <http://hls.harvard.edu/faculty/directory/10906/Tushnet> [<https://perma.cc/VJ2W-SMF2>] (last visited Jan. 11, 2017).

¹⁵² Massey, *supra* note 66.

¹⁵³ Tushnet, *supra* note 150, at 302 n.227 (commenting on *Texas v. Johnson*, 491 U.S. 422-28 (1989)).

¹⁵⁴ John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

¹⁵⁵ John Yoo, UNIVERSITY OF CALIFORNIA – BERKELEY LAW, <https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/> [<https://perma.cc/8JUH-GYE3>] (last visited Jan. 11, 2017).

¹⁵⁶ Massey, *supra* note 18.

¹⁵⁷ Yoo, *supra* note 154, at 975 n.37.

inscription reads: “To Prof. Massey, With best wishes. John Yoo.”¹⁵⁸

James A. Gardner, *The Failed Discourse of State Constitutionalism*¹⁵⁹

Interim Dean James Garner of the University at Buffalo Law School¹⁶⁰ cites Professor Massey’s understanding of the Ninth Amendment as it relates to state constitutions¹⁶¹ in a discussion of the importance of “[a] strong, independent state constitutional jurisprudence” to “a healthy federalism.”¹⁶²

Thomas M. McAfee, *The Original Meaning of the Ninth Amendment*¹⁶³

In footnotes throughout this article, Professor Thomas McAfee of the University of Nevada Las Vegas William S. Boyd School of Law¹⁶⁴ addresses Professor Massey’s interpretation of the Ninth Amendment.¹⁶⁵

¹⁵⁸ The personalized offprint from John Choon Yoo is on file with Dr. Christian Hans, Editor-in-Chief of IDEA Vol. 57.

¹⁵⁹ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1991).

¹⁶⁰ *James A. Gardner*, UNIV. BUFFALO SCHOOL OF LAW, <http://www.law.buffalo.edu/faculty/facultyDirectory/GardnerJames.html> [<https://perma.cc/HU4P-TY9R>] (last visited Jan. 11, 2017).

¹⁶¹ Massey, *supra* note 95.

¹⁶² Gardner, *supra* note 159, at 773 n.38.

¹⁶³ Thomas M. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

¹⁶⁴ *McAfee*, *supra* note 92.

¹⁶⁵ McAfee, *supra* note 163, at 1217 n.12 (citing Massey, *supra* note 18).

Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*¹⁶⁶

Professor Akhil Reed Amar of Yale Law School¹⁶⁷ grapples with Professor Massey's view of the Eleventh Amendment¹⁶⁸ as articulated in *State Sovereignty and the Tenth and Eleventh Amendments*.¹⁶⁹

Randy E. Barnett, *Reconceiving the Ninth Amendment*¹⁷⁰

Professor Randy Barnett of Georgetown Law Center¹⁷¹ relies on Professor Massey's article, *Federalism and Fundamental Rights: The Ninth Amendment*,¹⁷² to make the case that the Ninth Amendment should be interpreted to protect the unenumerated rights of the people.¹⁷³

CONCLUSION

As Lord Keynes suggests in the epigraph above,¹⁷⁴ the influence of a thinker cannot be immediately ascertained. Rather, we can only truly know the extent of his impact after a generation has passed. That said, this bibliography has endeavored to survey the influence Professor Massey had

¹⁶⁶ Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989).

¹⁶⁷ Akhil Reed Amar, YALE LAW SCHOOL, <https://www.law.yale.edu/akhil-reed-amar> [<https://perma.cc/2TBX-BMRZ>] (last visited Jan. 11, 2017).

¹⁶⁸ Amar, *supra* note 166, at 498 n.247.

¹⁶⁹ Massey, *supra* note 4.

¹⁷⁰ Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

¹⁷¹ Randy E. Barnett, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/barnett-randy-e.cfm> [<https://perma.cc/F94Q-5AWR>] (last visited Jan. 11, 2017).

¹⁷² Massey, *supra* note 18.

¹⁷³ Barnett, *supra* note 170, at 1 n.5.

¹⁷⁴ See *supra* note 1 and accompanying text.

during his life. Some years from now, a subsequent bibliography will be necessary to definitively evaluate how his writings have impacted the direction of the law and legal scholarship.