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

NICHOLAS MIGNANELLI*

CONTENTS
Introduction........................................................................... 130
I.  The Judiciary.............................................................. 131
   A.  Federal Courts....................................................... 131
       1.  U.S. Supreme Court.............................. 131
       2.  U.S. Courts of Appeals ....................... 132
       3.  U.S. District Courts........................... 134
   B.  State Courts....................................................... 136
       1.  State Supreme Courts......................... 136
       2.  State Appellate Courts ..................... 138
II. The Academy........................................................... 139
   A.  Books ................................................................. 139
   B.  Articles............................................................. 143
Conclusion........................................................................... 150

“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

* Library Fellow, University of Arizona College of Law; J.D., University of New Hampshire School of Law. My thanks to Dr. Christian Hans for his encouragement and advice.
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.


57 IDEA 129 (2017)
I. **THE JUDICIARY**

A. **Federal Courts**

1. **U.S. Supreme Court**

*Seminole Tribe of Florida v. Florida*

In his dissent, Justice David Souter cites Professor Massey’s article, *State Sovereignty and the Tenth and Eleventh Amendments*, 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.”


Associate Justice Sandra Day O’Connor heavily relies upon Professor Massey’s article, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, to recount the genealogy of that clause, tracing it back to Medieval England. 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.”

---

5 *Seminole Tribe of Fla.*, 517 U.S. at 110 n.8 (Souter, J., dissenting).
9 Id. at 271 n.17.
2. U.S. Courts of Appeals

Washington Environmental Council v. Bellow

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. Levesque

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. Spencer


---

10 732 F.3d 1131 (9th Cir. 2013).
13 546 F.3d 78 (2008).
16 Levesque, 546 F.3d at 84.
17 160 F.3d 413, 414-15 (7th Cir. 1998).

57 IDEA 129 (2017)
Unenumerated Rights,\textsuperscript{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.”\textsuperscript{20} These views are contrary to the position the majority endorses in this case.\textsuperscript{21}

\textit{American Civil Liberties Union of New Jersey v. Schundler}\textsuperscript{22}

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

\textit{United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Ala.}\textsuperscript{26}

Relying on Professor Massey’s article, \textit{The Excessive Fines Clause and Punitive Damages: Some Lessons}

\textsuperscript{19} \textsc{Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution’s Unenumerated Rights} (1995).
\textsuperscript{20} \textsc{Spencer}, 160 F.3d at 414–15.
\textsuperscript{21} Id.
\textsuperscript{22} 104 F.3d 1435 (3rd Cir. 1997).
\textsuperscript{23} \textsc{Calvin R. Massey, Pure Symbols and the First Amendment}, 17 Hastings Const. L.Q. 369 (1990).
\textsuperscript{24} 492 U.S. 573 (1989).
\textsuperscript{25} \textsc{Schundler}, 104 F.3d at 1445 n.8.
\textsuperscript{26} 74 F.3d 1165 (11th Cir. 1996).
from History,\textsuperscript{27} Chief Judge Gerald Bard Tjoflat concludes that “the historical antecedents of our Excessive Fines Clause themselves required proportionality review.”\textsuperscript{28}

\textbf{New York v. United States}\textsuperscript{29}

Writing for the majority, Judge Joseph McLaughlin uses Professor Massey’s article, \textit{State Sovereignty and the Tenth and Eleventh Amendments},\textsuperscript{30} to explicate \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\textsuperscript{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.”\textsuperscript{32}

\section{3. U.S. District Courts}

\textbf{Kuch v. Rapelje}\textsuperscript{33}

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

\begin{itemize}
\item[27] Massey, \textit{supra} note 7.
\item[28] One Parcel Prop., 74 F.3d at 1171.
\item[29] 942 F.2d 114 (2nd Cir. 1991).
\item[31] 469 U.S. 528 (1985).
\item[32] New York, 942 F.2d at 119 (citing Massey, \textit{supra} note 4, at 72).
\item[34] Calvin Massey, \textit{The Constitution in a Postmodern Age}, 64 WASH. & LEE L. REV. 165 (2007).
\end{itemize}
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. Lungren\(^ {42}\)
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.”\(^ {44}\)

---


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


\(^ {41}\) *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)).


\(^ {44}\) *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. Neal*\(^{48}\)

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 Commission*\(^{51}\)

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 Board\textsuperscript{54}

In an analysis of the contours of sovereign immunity, Justice Richard Bosson quotes from Professor Massey’s article, Federalism in the Rehnquist Court.\textsuperscript{55}

Anderson v. Central Bering Sea Fishermen’s Association\textsuperscript{56}

In a \textit{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.”\textsuperscript{57} Professor Massey’s article, The Excessive Fines Clause and Punitive Damages: Some Lessons from History,\textsuperscript{58} is cited as an example of this trend.\textsuperscript{59}

Middleton v. Hartman\textsuperscript{60}

Recounting the adoption of the Eleventh Amendment, Justice Alex Martinez cites to Professor Massey’s article State Sovereignty and the Tenth and Eleventh Amendments.\textsuperscript{61}

\textsuperscript{54} 135 N.M. 472 (2004).
\textsuperscript{55} \textit{Id.} at 477 (quoting Calvin Massey, Federalism in the Rehnquist Court, \textit{53 Hastings L.J.} 431 (2002)).
\textsuperscript{56} 78 P.3d 710 (2003).
\textsuperscript{57} \textit{Id.} at 717.
\textsuperscript{58} Massey, \textit{supra} note 7.
\textsuperscript{59} Anderson, 78 P.3d at 717 n.36.
\textsuperscript{60} 45 P.3d 721 (Colo. 2002).
\textsuperscript{61} \textit{Id.} at 727 (citing Massey, \textit{supra} note 4).
Saldana v. Wyoming\textsuperscript{62}
In his dissent, Justice Walter Urbigkit includes Professor Massey’s article, \textit{Federalism and Fundamental Rights: The Ninth Amendment},\textsuperscript{63} to illustrate the vigorous discussion of the role of state constitutions taking place among scholars and jurists at that time.\textsuperscript{64}

Cooney v. Park County\textsuperscript{65}
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, \textit{The Jurisprudence of Poetic License}.\textsuperscript{66}

Hale v. Port of Portland\textsuperscript{67}
Citing to Professor Massey’s article, \textit{State Sovereignty and the Tenth and Eleventh Amendments},\textsuperscript{68} Justice W. Michael Gillette briefly touches upon the argument that sovereign immunity is incongruous with democracy.\textsuperscript{69}

2. State Appellate Courts

Arizona v. Wise\textsuperscript{70}
Citing to Professor Massey’s article, \textit{The Excessive Fines Clause and Punitive Damages: Some Lessons from History},\textsuperscript{71} Judge Thomas Kleinschmidt points

\textsuperscript{62} 846 P.2d 604 (Wyo. 1993).
\textsuperscript{63} Massey, \textit{supra} note 18.
\textsuperscript{64} Middleton, 846 P.2d at 664 (Urbigkit, J., dissenting).
\textsuperscript{65} 792 P.2d 1287 (Wyo. 1990).
\textsuperscript{66} Id. at 1301 n.5 (Urbigkit, J., dissenting) (citing Calvin R. Massey, \textit{The Jurisprudence of Poetic License}, 1989 DUKE L.J. 1047 (1989)).
\textsuperscript{67} 308 Or. 508 (1990).
\textsuperscript{68} Massey, \textit{supra} note 4.
\textsuperscript{69} Hale, 308 Or. at 509 n.3.
\textsuperscript{70} 164 Ariz. 574 (Ct. App. 1990).
\textsuperscript{71} Massey, \textit{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 LAW,73 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).
75 Massey, supra note 4.
76 ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW 172 n.231 (2015).
79 BHAGWAT, supra note 77, at 226.
Professor Kurt Lash of the University of Illinois College of Law highlights Professor Massey’s criticism of Justice Stanley Forman Reed’s treatment of the Ninth Amendment in United Public Workers v. Mitchell.

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

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

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

In his discussion of religious symbolism, Professor Frank Ravitch of the Michigan State University College of Law adapts the term “pure religious
objects” from Professor Massey’s article, *Pure Symbols and the First Amendment*.90


Professor Thomas McAftee 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

Laurence H. Tribe, **Comment in Antonin Scalia, A Matter of Interpretation**

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

**Clint Bolick, Grassroots Tyranny: The Limits of Federalism**

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

---


100 **Clint Bolick, Grassroots Tyranny: The Limits of Federalism** (1993).


JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE.\textsuperscript{103}

Joseph R. Grodin, an emeritus professor of law at the University of California, Hastings College of Law,\textsuperscript{104} cites Professor Massey’s article \textit{Federalism and Fundamental Rights: The Ninth Amendment},\textsuperscript{105} as an authoritative text on the “natural law background of the Ninth Amendment.”\textsuperscript{106}

\subsection*{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, \textit{When Can a State Sue the United States}\textsuperscript{107}

Professor Tara Leigh Grove of William & Mary Law School\textsuperscript{108} characterizes Professor Massey as a scholar who welcomes “state-led lawsuits [against the Federal Government] as a crucial check on the administrative state,”\textsuperscript{109} citing his article, \textit{State Standing after Massachusetts v. EPA}.\textsuperscript{110}

\begin{thebibliography}{99}
\bibitem{105} Massey, supra note 18.
\bibitem{106} Grodin, supra note 103, at 196.
\bibitem{107} Tara Leigh Grove, \textit{When Can a State Sue the United States}, 101 Cornell L. Rev. 851 (2016).
\bibitem{109} Grove, supra note 107, at 853 n.10.
\bibitem{110} Massey, supra note 11.
\end{thebibliography}
Jamal Greene, *The Anticanon*[^111]


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 Law[^122] states that Professor Massey “has written the most sustained discussion to date of potential Second Amendment standards...”[^123]

[^115]: Id.
[^116]: 60 U.S. 393 (1857).
[^117]: 163 US 537 (1896).
[^118]: 198 US 45 (1905).
[^119]: 323 U.S. 214 (1944).
[^123]: Winkler, *supra* note 120, at 692.

57 IDEA 129 (2017)
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 Preemption127 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

---

127 Massey, *supra* note 41.
examples of “constitutional-rights demands” made by voters.\textsuperscript{132}

Richard H. Fallon, Jr., \textit{Legitimacy and the Constitution}\textsuperscript{133}
Professor Richard Fallon of Harvard Law School\textsuperscript{134} cites Professor Massey’s article, \textit{The New Formalism: Requiem for Tiered Scrutiny?},\textsuperscript{135} to support the proposition that “If the Court did not base its decisions on legal principles, the public would lose respect for it.”\textsuperscript{136}

Erwin Chemerinsky, \textit{Against Sovereign Immunity}\textsuperscript{137}
Dean Erwin Chemerinsky of the University of California, Irvine School of Law\textsuperscript{138} quotes from Professor Massey’s article, \textit{State Sovereignty and the Tenth and Eleventh Amendments},\textsuperscript{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.”\textsuperscript{140}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{132} Pillard, \textit{supra} note 129, at 721 n.143.
\item \textsuperscript{133} Richard H. Fallon, Jr., \textit{Legitimacy and the Constitution}, 118 HARV. L. REV. 1787 (2005).
\item \textsuperscript{135} Massey, \textit{supra} note 38.
\item \textsuperscript{136} Fallon, \textit{supra} note 133, at 1841 n.242.
\item \textsuperscript{137} Erwin Chemerinsky, \textit{Against Sovereign Immunity}, 53 STAN. L. REV. 1201 (2001).
\item \textsuperscript{139} Massey, \textit{supra} note 4.
\item \textsuperscript{140} Chemerinsky, \textit{supra} note 137, at 1214.
\end{enumerate}
\end{footnotesize}

In a discussion of whether the Eleventh Amendment applies to treaties, Professor David Golove of the New York University School of Law\(^{142}\) 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 Center\(^{147}\) considers Professor Massey’s criticism of Eleventh Amendment diversity theory\(^{148}\) as articulated in *State


\(^{143}\) Massey, supra note 4.


\(^{145}\) Golove, supra note 141, at 1086 n.30.


\(^{148}\) Vazquez, supra note 146, at 1697 n.63.
Sovereignty and the Tenth and Eleventh Amendments.\textsuperscript{149}

Mark Tushnet, \textit{The Degradation of Constitutional Discourse}\textsuperscript{150}

Professor Mark Tushnet of Harvard Law School\textsuperscript{151} cites to Professor Massey’s article, \textit{The Jurisprudence of Poetic License},\textsuperscript{152} as a basis for his own criticism of Chief Justice William Rehnquist’s dissent in \textit{Texas v. Johnson}.\textsuperscript{153}

John Choon Yoo, \textit{Our Declaratory Ninth Amendment}\textsuperscript{154}

Professor John Yoo of the University of California, Berkeley, School of Law\textsuperscript{155} cites Professor Massey’s interpretation of the Ninth Amendment\textsuperscript{156} 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 . . . .”\textsuperscript{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

\textsuperscript{149} Massey, \textit{supra} note 4.
\textsuperscript{152} Massey, \textit{supra} note 66.
\textsuperscript{153} Tushnet, \textit{supra} note 150, at 302 n.227 (commenting on \textit{Texas v. Johnson}, 491 U.S. 422-28 (1989)).
\textsuperscript{156} Massey, \textit{supra} note 18.
\textsuperscript{157} Yoo, \textit{supra} note 154, at 975 n.37.

James A. Gardner, *The Failed Discourse of State Constitutionalism*\(^{159}\)

Interim Dean James Garner of the University at Buffalo Law School\(^{160}\) cites Professor Massey’s understanding of the Ninth Amendment as it relates to state constitutions\(^{161}\) in a discussion of the importance of “[a] strong, independent state constitutional jurisprudence” to “a healthy federalism.”\(^{162}\)

Thomas M. McAffee, *The Original Meaning of the Ninth Amendment*\(^{163}\)

In footnotes throughout this article, Professor Thomas McAffee of the University of Nevada Las Vegas William S. Boyd School of Law\(^{164}\) 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.
161 Massey, *supra* note 95.
162 Gardner, *supra* note 159, at 773 n.38.
164 McAffee, *supra* note 92.
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

---

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.