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The Life and Legacy of Professor Calvin R. Massey: A Select Annotated Bibliography

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The Life and Legacy of Professor Calvin R. Massey: A Select Annotated Bibliography

NICHOLAS MIGNANELLI*

Professor Calvin R. Massey served on the faculty of the University of California, Hastings College of the Law from 1987 until 2012. From 2012 until his death in 2015, he served as the inaugural Daniel Webster Distinguished Professor of Law on the faculty of the University of New Hampshire School of Law. A noted constitutional law and property scholar, Professor Massey wrote two textbooks, published dozens of articles, and gave countless presentations over the course of his three decades in legal academia. While his scholarly interests were many and varied, he might be best known for his writings on the Ninth Amendment and unenumerated rights, a subject about which he wrote four law review articles and a monograph.

What follows is an annotated bibliography that attempts to collect and describe Professor Massey's body of work. This bibliography begins with a short biography. Next, Professor Massey's works are listed and annotated according to the category in which they fall: books; articles, essays, and book reviews; or audio and video recordings. Finally this Article concludes with a brief reflection on the significance of the recorded knowledge Professor Massey left behind.

This bibliography is select because juvenilia, supplements, study aids, superseded works, and unrecorded public appearances have been excluded. While the Author attempted to take a descriptive approach to annotating the works found in this Article, there are instances in which the Author's enthusiasm may have driven him into the realm of evaluation.

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INTRODUCTION: A VERY BRIEF BIOGRAPHY

Often his name was in a generation or two, forgotten. It was from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing Republic stands as a monument for the little known and unremembered as well as for the famous men of our profession.

—Robert H. Jackson¹

Professor Calvin Randolph Massey was born in Walla Walla, Washington, on July 22, 1949.² He was educated at Whitman College where he was elected to Phi Beta Kappa in his junior year and graduated, *summa cum laude*, in 1969 with Bachelors of Arts in English and Economics.³ He received his M.B.A. from Harvard University Business School in 1971 where he concentrated in finance and wrote a thesis on corporate financial management.⁴ He then went on to earn his J.D. from Columbia University Law School in 1974 where he served as the Managing Editor of the *Columbia Law Review* and as a teaching fellow in Civil Procedure.⁵

Professor Massey was admitted to the State Bar of California in 1974 and spent several years practicing law in San Francisco, where he specialized in business and commercial litigation.⁶ He was an associate with Morrison and Foerster from 1974 to 1976 and with Shartsis, Friese, and Ginsburg from 1976 until 1978.⁷ In 1978 he co-founded Niesar,

1. Robert H. Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A. J. 136, 139 (1944). This passage encapsulates both Professor Massey's commitment to the legal profession and his admiration for the life of Justice Jackson. However, it is in writing this bibliography that I hope to demonstrate that Professor Massey is neither "little known" nor "unremembered." Indeed, I believe that the value of his works will only appreciate with the passage of time. For more on the reach of Professor Massey's scholarship during his lifetime, see Nicholas Mignanelli, *The Influence of Professor Calvin R. Massey: A Select Annotated Bibliography*, 57 IDEA 129 (2017).

2. *Calvin Randolph Massey (1949-2015)*, CONCORD MONITOR (Sept. 26 2015), <http://www.legacy.com/obituaries/concordmonitor/obituary.aspx?pid=175930375>; *Calvin Massey (1949-2015)*, SFGATE, <http://www.legacy.com/obituaries/sfgate/obituary.aspx?pid=175931847> (last visited Apr. 23, 2017).

3. Curriculum Vitae of Calvin Massey (on file with Author).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Moody, Hill, Massey, and Kregstein, and served as a partner with that firm until 1983.⁸ He worked as a self-employed civil litigator from 1983 until 1987 and served as “of counsel” to Nielsen, Merksamer, Hodgson, Parrinello, and Mueller from 1987 until 1991.⁹

In 1987, Professor Massey joined the faculty at the University of California, Hastings College of the Law in San Francisco.¹⁰ There he taught Constitutional Law, Property, Wills, and Corporations for a quarter century and was twice elected “Outstanding Professor” by the graduating class.¹¹ During his tenure at Hastings, Professor Massey also served as a Visiting Professor at Leiden University in the Netherlands, Boston College Law School, Boston University Law School, and Washington and Lee University School of Law.¹² He also taught courses at Lewis and Clark College, Northwestern School of Law, the University of California, Berkeley School of Law, and Stanford University Law School.¹³

In 2012, he was named Emeritus Professor of Law at Hastings and then moved to the University of New Hampshire School of Law where he served as the inaugural Daniel Webster Distinguished Professor of Law¹⁴ until his death on September 23, 2015.¹⁵ He is survived by his wife Martha, his daughter Ellen, his son-in-law Seth Leonard, and his sister Alice Tonn.¹⁶

I. BOOKS

American Constitutional Law: Powers and Liberties (2016)¹⁷

Of the vast corpus that composes Professor Massey’s written work, this constitutional law casebook might endure the longest.¹⁸ Concise and highly readable, Professor Alan Brophy of the University of North Carolina School of Law noted its wide adoption in a blog post to *The Faculty Lounge* reflecting on Professor Massey’s life.¹⁹ Revised and updated in the months before his death, the fifth edition was published in January 2016.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Calvin Randolph Massey (1949–2015)*, *supra* note 2.

16. *Id.*

17. CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* (5th ed. 2016).

18. *Id.*

19. Alfred Brophy, *Calvin Massey*, *THE FACULTY LOUNGE* (Sept. 24, 2015, 1:37 PM), <http://www.thefacultyounge.org/2015/09/calvin-massey.html>.

***Property Law: Principles, Problems, and Cases* (2012)²⁰**

Modeled after his constitutional law casebook, Professor Massey wrote a property textbook that grounds students in the underlying principles of the law and eases the difficulty of property concepts through the use of peculiar cases and engaging hypotheticals.²¹ What he does not do is sacrifice nuance to the pursuit of clarity.

***Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights* (1995)²²**

In this monograph Professor Massey expounds upon a thesis he previously developed in several articles: that the Ninth Amendment to the U.S. Constitution was designed to foster and protect the unenumerated rights of the individual.²³ After laying out the historical argument for this conviction, Professor Massey boldly recommends a process for determining which asserted unenumerated rights warrant enforcement under the Ninth Amendment.²⁴

II. ARTICLES, ESSAYS, & BOOK REVIEWS

***Standing in State Courts, State Law, and Federal Review* (2015)²⁵**

In this last article, published just months before his death, Professor Massey discusses what happens when a party seeks to appeal a decision by a state high court, but lacks standing under federal law to do so. He attributes this problem to the asymmetrical relationship which exists between state and federal standing.²⁶ States might avoid the problematic consequences of this state of affairs by either (1) adhering to Article III standing where federal law is implicated or (2) by replicating the standards of Article III that expand standing where procedural rights are invoked.²⁷ Professor Massey concludes that these options demonstrate the difficult policy choices that face a state seeking to remedy asymmetrical standing.²⁸

20. CALVIN MASSEY, *PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES* (1st 2012).

21. *Id.*

22. CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* (1995) [hereinafter MASSEY, *SILENT RIGHTS*].

23. *Id.*; see, e.g., Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992) [hereinafter Massey, *The Natural Law Component*]; Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229 [hereinafter Massey, *The Anti-Federalist Ninth Amendment*]; Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987 (1988) [hereinafter Massey, *Antifederalism and the Ninth Amendment*]; Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987) [hereinafter Massey, *Federalism and Fundamental Rights*].

24. *Id.*

25. Calvin Massey, *Standing in State Courts, State Law, and Federal Review*, 53 DUQ. L. REV. 401 (2015).

26. *Id.* at 401.

27. *Id.* at 407.

28. *Id.* at 411.

Why New Hampshire Should Permit Married Couples to Choose Community Property (2015)²⁹

Professor Massey proposes that the State of New Hampshire offer married couples the ability to opt out of separate property and choose community property. The benefits of such a law include tax and estate advantages, equal economic partnership within the confines of the marriage, and geographic mobility.³⁰ Addressing objections to the proposed change, Professor Massey concludes that such a law would be consistent with New Hampshire's civic ethos in that it would maximize individual choice and foster freedom.³¹

The Non-Delegation Doctrine and Private Parties (2014)³²

What are the limits of the nondelegation doctrine? May Congress confer regulatory authority upon private entities? How does such a scheme affect the due process rights of individuals? Professor Massey attempts to answer these questions and, in doing so, conceptualizes a mechanism that would provide private citizens with the ability to challenge the risk to public accountability and fairness that regulation by private entities represents.³³

The Effect of Shelby County on Enforcement of the Reconstruction Amendments (2014)³⁴

Professor Massey examines the implications of the Court's decision to limit Congressional power to enforce the Fourteenth and Fifteenth Amendments³⁵—culminating in *Shelby County v. Holder*.³⁶ In doing so, he ponders whether congressional power to enforce the Fifteenth Amendment is identical to the power Congress has to enforce the Fourteenth Amendment, the implications that *Shelby County* has for the Voting Rights Act, particularly whether it has called into question the constitutionality of other provisions therein, and whether the congruence and proportionality test articulated by the Court in *City of Boerne v. Flores*³⁷ will be imported to the Fifteenth Amendment.³⁸

29. Calvin Massey, *Why New Hampshire Should Permit Married Couples to Choose Community Property*, 13 U. N.H. L. REV. 35 (2015).

30. *Id.* at 36–38.

31. *Id.* at 47.

32. Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157 (2014), http://www.greennbag.org/v17n2/v17n2_articles_massey.pdf.

33. *Id.*

34. Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397 (2014) [hereinafter Massey, *The Effect of Shelby County*].

35. *Id.*

36. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

37. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

38. Massey, *The Effect of Shelby County*, *supra* note 34.

Uncensored Discourse Is Not Just for Politics (2012)³⁹

Professor Massey explicates *Sorrell v. IMS Health Inc.*, in which the Court struck down a Vermont law prohibiting the commercial use of records detailing the prescription practices of doctors.⁴⁰ Rejecting Vermont's contention that the law was merely a commercial regulation, the Court found that the law was an impermissible violation of the First Amendment.⁴¹ Professor Massey agrees with the Court's conclusion, but proposes that the Court more decisively hold that regulations upon truthful commercial speech are subject to the same principle which guides the entirety of free speech law. That is to say, the government may not use speech restrictions to influence public discourse to the benefit of its preferred message.⁴²

M.B.Z. v. Clinton: Whither Jerusalem? (2011)⁴³

Writing a year before the controversy was decided, Professor Massey considers how the Court should approach a law stipulating that Americans born in Jerusalem have Israel listed under place of birth on their passports. He discusses at length the justiciability of the issue under the political question doctrine and whether Congress may direct the President to recognize Jerusalem as part of Israel.⁴⁴

Public Opinion, Cultural Change, and Constitutional Adjudication (2010)⁴⁵

Writing three years before *United States v. Windsor*⁴⁶ and six years before *Obergefell v. Hodges*,⁴⁷ Professor Massey evaluates the proper role of public opinion in Supreme Court decisions. After surveying the history of the use of public opinion in constitutional jurisprudence, Professor Massey concludes that public opinion is a legitimate consideration whenever a case threatens to alter or contradict cultural norms.⁴⁸ In light of this, he discusses how public opinion might influence how the Court treats same-sex marriage.

39. Calvin Massey, *Uncensored Discourse Is Not Just for Politics*, 36 VT. L. REV. 845 (2012) [hereinafter Massey, *Uncensored Discourse*].

40. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

41. *Id.* at 555.

42. Massey, *Uncensored Discourse*, *supra* note 39, at 851.

43. Calvin Massey, *M.B.Z. v. Clinton: Whither Jerusalem?*, 6 CHARLESTON L. REV. 87 (2011).

44. *Id.* at 91.

45. Calvin Massey, *Public Opinion, Cultural Change, and Constitutional Adjudication*, 61 HASTINGS L.J. 1437 (2010) [hereinafter Massey, *Public Opinion*].

46. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

47. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

48. Massey, *Public Opinion*, *supra* note 45, at 1451–52.

Church Schisms, Church Property, and Civil Authority (2010)⁴⁹

In the wake of intradenominational strife stemming from social change, Professor Massey explores the constitutional boundaries involved whenever a civil court attempts to settle the affairs of a religious organization that finds itself in a state of dispute. After considering the variety of religious organizations, the evolution of constitutional doctrine dealing with the matter, and the state of the law, Professor Massey identifies at which point a court's reliance on a church's internal rules of governance violates the Constitution's clauses regarding religion. Examining the constitutional principles that should guide the decision of a court in a church property dispute, Professor Massey urges that the impetus be upon local control.⁵⁰

State Standing After Massachusetts v. EPA (2009)⁵¹

Professor Massey ponders the consequences of the relaxation of standing requirements in *Massachusetts v. EPA*, where the Court found that, while individuals are subject to the rigorous requirements of injury in fact, causation, and redressability, states merely need assert public rights in their roles as *parentes patriarum*.⁵² After explicating the Court's decision, Professor Massey searches for a justification for the decision beyond the ephemeral purpose of advancing an ideological agenda. He concludes that such a basis exists in the confines of federalism.⁵³ This article was excerpted in *Administrative and Regulatory Law News*.⁵⁴

Second Amendment Decision Rules (2009)⁵⁵

In the aftermath of *District of Columbia v. Heller*,⁵⁶ Professor Massey evaluates the forthcoming doctrinal consequences of the decision, including its effects on: (1) the precise definition of the constitutional right identified by the Court; (2) which individuals are entitled to assert that identified right; (3) the special situations in which that right is qualified; (4) what sort of burden constitutes a presumptive infringement upon that right; and (5) the utility of the phrase used to define the level of scrutiny invoked. Having discussed these matters, Professor Massey concludes

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

50. *Id.* at 24.

51. Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249 (2009) [hereinafter Massey, *State Standing After Massachusetts v. EPA*].

52. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

53. Massey, *State Standing After Massachusetts v. EPA*, *supra* note 51, at 283–84.

54. Calvin Massey, *State Standing After Massachusetts v. EPA*, 34 ADMIN. & REG. LAW NEWS 7 (2009).

55. Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431 (2009) [hereinafter Massey, *Second Amendment Decision Rules*].

56. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

that the Court's approach in developing these doctrinal details will determine the forcefulness of the right articulated in *Heller*.⁵⁷

Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power (2007)⁵⁸

What is the scope of Congress's power to enforce substantive provisions of the Fourteenth Amendment? In this article, Professor Massey lends clarity to this question by conceptualizing two zones of prophylaxis: an inner zone and an outer zone. Adherence to judicial scrutiny related to Fourteenth Amendment claims is strict in the inner zone, whereas Congress is granted broad discretion in the outer zone.⁵⁹ For the sake of federalism, the abrogation of sovereign immunity largely determines where congressional action falls.⁶⁰

The Role of Governmental Purpose in Constitutional Judicial Review (2007)⁶¹

In this article, Professor Massey attempts to make sense of the Court's use of governmental purpose in constitutional adjudication. Finding its multifaceted use to be inconsistent, he attempts to identify some overarching principles. With these in mind, he considers two overarching questions: (1) when governmental purpose should be relevant to the determination of the constitutional validity of government action, and (2) what the proper method of ascertaining purpose should be when it is relevant. Having reflected upon these questions, he concludes that a number of constitutional doctrines may have been made in error and warrant reconsideration or abandonment.⁶²

The Constitution in a Postmodern Age (2007)⁶³

Professor Massey explores the ways in which postmodern discourse has adversely impacted American jurisprudence. Examples of this trend include the Court's decision to illegitimate morality in *Lawrence v. Texas*,⁶⁴ to commodify all things in *Gonzales v. Raich*,⁶⁵ and to more widely apply the totality of the circumstances test in the face of hopeless

57. Massey, *Second Amendment Decision Rules*, *supra* note 55, at 1444.

58. Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1 (2007).

59. *Id.* at 3.

60. *Id.* at 4-5.

61. Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007).

62. *Id.* at 59.

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

64. *Lawrence v. Texas*, 539 U.S. 558 (2003).

65. *Gonzales v. Raich*, 545 U.S. 1 (2005).

indeterminacy in such cases as *Morrison v. Olson*⁶⁶ and *Mistretta v. United States*.⁶⁷ The end result of this trend, Professor Massey believes, is the instability of legal doctrine, the birth of unapologetic legislators in robes, and the further politicization of the judiciary.⁶⁸

The Political Marketplace of Religion (2005)⁶⁹

Explicating the four patterns that underlie the jurisprudence of the religion clauses, Professor Massey concludes that the *en vogue* pattern is what he calls “legislative primacy.”⁷⁰ In this pattern, the courts leave to the legislature’s discretion whether and how many exemptions will be granted to religious adherents, as well as whether and how much assistance government will provide to religious institutions in pursuit of secular objectives.⁷¹ The legislature of course must not discriminate against religion, treat religion unlike secular interests, or treat religious groups differently from one another.⁷² While this caveat has lent the legislative primacy approach a self-constraining quality, Professor Massey worries that this approach—when combined with the collapse of the de facto Protestant establishment and the multiplicity of religious conduct in a postmodern age—will create a political marketplace of religion where religious and secular actors play the part of rent seekers demanding government benefits for religious organizations.⁷³

The New Formalism: Requiem for Tiered Scrutiny? (2004)⁷⁴

Analyzing the unintended consequences of *Lawrence v. Texas*⁷⁵ and *Grutter v. Bollinger*,⁷⁶ Professor Massey concludes that the Court has retained the form and abandoned the substance of tiered scrutiny.⁷⁷ After tracing the history of the tests and examining the destabilizing influence of the aforementioned cases, Professor Massey wonders whether this development represents the collapse of the tiers or the arrival of a new methodology for balancing government power with individual liberty.⁷⁸

66. *Morrison v. Olson*, 487 U.S. 654 (1988).

67. *Mistretta v. United States*, 488 U.S. 361 (1989).

68. Massey, *The Constitution in a Postmodern Age*, *supra* note 63, at 226–29.

69. Calvin Massey, *The Political Marketplace of Religion*, 57 *HASTINGS L.J.* 1 (2005).

70. *Id.* at 3.

71. *Id.* at 18.

72. *Id.* at 19.

73. *Id.* at 10.

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

75. See *Lawrence v. Texas*, 529 U.S. 558, 558 (2003).

76. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

77. Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, *supra* note 74, at 946–47.

78. *Id.* at 996–97.

Elites, Identity Politics, Guns, and the Manufacture of Legal Rights (2004)⁷⁹

In this response to Michael C. Dorf's *Identity Politics and the Second Amendment*,⁸⁰ Professor Massey critiques Dorf's claim that "[t]here is a substantial mismatch between . . . the constitutional arguments for an individual right to own and possess firearms and, . . . the identity politics movement that underwrites those arguments."⁸¹ Professor Massey contends that gun owners constitute a much more diverse group than Dorf has led his readers to believe.⁸² However, conceding that white men from rural areas are disproportionately represented in this demographic, Professor Massey wonders why it is that such an identity group is precluded from having an impact on legal doctrine.⁸³ He concludes that there is an unspoken caveat to Dorf's thesis that the existence of an identity movement is a substantial aid to the legal advancement of that identity group, such as African Americans, women, and homosexuals. That caveat is that the movement in question must resonate with the values of the elite class from which we draw members of the judiciary.⁸⁴ In the second part of this article, Professor Massey argues that a constitutional *cy pres* doctrine should be used to give the Second Amendment a contemporary meaning that comes as close as possible to its intended purpose.⁸⁵

Some Thoughts on the Law and Politics of Reparations for Slavery (2004)⁸⁶

Contending with renewed calls for the U.S. government to pay reparations for slavery, Professor Massey lends this issue the seriousness it deserves while being forthright about the flaws of such a plan. Treating legal and political approaches separately, he wonders how a potential claimant would begin to prove duty, causation, and damages while

79. Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 *FORDHAM L. REV.* (SYMP. ISSUE) 573 (2004) [hereinafter Massey, *Manufacture of Legal Rights*].

80. Michael C. Dorf, *Legal Perspectives: Identity Politics and the Second Amendment*, 73 *FORDHAM L. REV.* 549 (2004).

81. *Id.* at 552.

82. Massey, *Manufacture of Legal Rights*, *supra* note 79.

83. *Id.*

84. *Id.* at 571–72.

85. *Id.* at 553–64.

The legal doctrine of *Cy Pres* is a French term meaning "as close as possible." When a gift is made by will or trust and it is no longer possible to follow the instructions of the donor, a judge, estate, or trustee may apply the *Cy Pres* doctrine to fulfill the donor's wishes as nearly as possible.

Cy Pres Doctrine Law and Legal Definition, USLEGAL.COM, <https://definitions.uslegal.com/cy-pres-doctrine/> (last visited Apr. 23, 2017).

86. Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 *B.C. THIRD WORLD L.J.* 157 (2004).

overcoming statutory and equitable bars.⁸⁷ Alternatively, he discusses the difficulty in ascertaining who should pay and who should receive reparations, as well as the adverse impact such a policy might have on race relations, which would seem to make a political approach inadvisable.⁸⁸

Designation of Heirs: A Modest Proposal to Diminish Will Contests (2003)⁸⁹

Professor Massey proposes that states should amend their intestacy laws to allow citizens to simply designate their heirs in order to reduce the number of costly and time-consuming probate contests. He expounds upon the implications of such a device and explores the complications that might arise there from.⁹⁰

Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism" (2002)⁹¹

In this article, written in anticipation of the Court's decision in *Nevada Department of Human Resources v. Hibbs*,⁹² Professor Massey assesses how the Rehnquist Court's "New Federalism" has impacted Congress's ability to remedy or prevent the states from taking unconstitutional action.⁹³ More specifically, Professor Massey discusses how the Court's new views of commerce, state sovereign immunity, and enforcement powers might affect Congress's ability to regulate sex discrimination at the hands of states via the Family and Medical Leave Act of 1993 ("FMLA").⁹⁴

"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption (2003)⁹⁵

In this short essay, Professor Massey speculates about the decline of the presumption against preemption—the doctrine that says Congress

87. *Id.*

88. *Id.*

89. Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577 (2003).

90. *Id.* at 583.

91. Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism,"* 55 M.L. L. REV. 63 (2002) [hereinafter Massey, *Congressional Power to Regulate Sex Discrimination*].

92. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

93. Massey, *Congressional Power to Regulate Sex Discrimination*, *supra* note 91, at 65. For further information on the meaning of "new federalism" according to Massey, see *id.* (discussing what Massey viewed to be the three essential pieces of "new federalism").

94. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1993).

95. Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759 (2003) [hereinafter Massey, *The Vanishing Presumption Against Preemption*].

may only preempt state law where it does so expressly.⁹⁶ He sees this doctrine as a necessary tool for protecting the powers of the states and fostering federalism.⁹⁷ While there is no clear reason for this doctrine's demise, its loss is deeply felt by proponents of federalism.⁹⁸

Federalism and the Rehnquist Court (2002)⁹⁹

Contesting the verdict rendered by legal academia by and large, Professor Massey applauds and explicates the revival of federalism in the years following William Rehnquist's ascension to the post of Chief Justice. In doing so, he presents the arguments for the value of federalism, examines the brand of federalism advanced by the Rehnquist Court, and speculates about the consequences of what the Court has done and failed to do in reshaping doctrine.¹⁰⁰

Civic Discourse amid Cultural Transformation (2000)¹⁰¹

Professor Massey laments the ways technology has transformed American culture, adversely impacting civic discourse. He identifies and describes three manifestations of this cultural transformation: (1) printed word to graphic image, (2) popular culture to mass culture, and (3) real experience to faux experience.¹⁰² This, he believes, has degraded and decontextualized American civic discourse. He concludes with the hope that the Internet might salvage print culture and serve as the catalyst for an information revolution that will create a post-graphic society. Perhaps this would permit the revival of civic discourse.¹⁰³

Guns, Extremists, and the Constitution (2000)¹⁰⁴

This article is divided into two parts. In the first half, Professor Massey explores the history of the Second Amendment and pragmatically concludes that its primary purpose is to ensure citizens' right to self-defense. In the second half, he proposes a basis for determining the constitutionality of regulating firearms and other weapons.¹⁰⁵ He posits that the Court should evaluate such laws on the basis of whether they materially infringe upon the individual's right to self-defense, weighing

96. AM. BAR ASS'N, THE BASICS ON PREEMPTION, http://apps.americanbar.org/abastore/products/books/abstracts/5010047samplechp_abs.pdf (last visited Apr. 23, 2017).

97. Massey, *The Vanishing Presumption Against Preemption*, *supra* note 95, at 763.

98. *Id.* at 763-64.

99. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002).

100. *Id.*

101. Calvin Massey, *Civic Discourse amid Cultural Transformation*, 12 CARDOZO STUD. L. & LITERATURE 193 (2000).

102. *Id.*

103. *Id.* at 213.

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

105. *Id.* at 1115.

effective utility in the pursuit thereof against the risk of collateral damage.¹⁰⁶ Next, he develops a “semi-strict” standard to which gun regulations that materially infringe upon the individual right to self-defense should be subject.¹⁰⁷ He concludes by arguing that the Second Amendment should be incorporated into the Fourteenth Amendment’s Due Process Clause, anticipating the subsequent case of *District of Columbia v. Heller*.¹⁰⁸

Juvenile Curfews and Fundamental Rights Methodology (2000)¹⁰⁹

Professor Massey charts the various judicial approaches to juvenile curfews instituted by municipalities in this article. While a couple of circuits have found that juvenile curfews implicate a substantive due process right to rear one’s children that triggers strict scrutiny, other circuits have merely applied minimal scrutiny.¹¹⁰ Professor Massey evaluates these competing precedents and uses the opportunity to discuss judicial enforcement of unenumerated rights.¹¹¹

Public Fora, Neutral Governments, and the Prism of Property (1999)¹¹²

Professor Massey illustrates the history of the public forum doctrine, criticizing it for its byzantine attributes. After briefly defending the Court’s rejection of the ad hoc balancing approach, he recommends that the Court improve the doctrine by supplementing its focus on the character of public property with an analogy to the common law doctrine of nuisance.¹¹³

The Tao of Federalism (1997)¹¹⁴

Using the Taoist worldview as a metaphor, Professor Massey critiques the Court’s inconsistency, poor methodology, and inability to change course when dealing with matters of federalism. What he advocates is a Tao of federalism that recognizes two independent and coequal governments with different but complementary powers.¹¹⁵ Whereas modern jurisprudence has primarily sought to understand federalism through the limits of federal power (the “yin”), Professor Massey calls

106. *Id.*

107. *Id.* at 1133.

108. *Id.* at 1134; *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

109. Calvin Massey, *Juvenile Curfews and Fundamental Rights Methodology*, 27 *HASTINGS CONST. L.Q.* 775 (2000).

110. *Id.*

111. *Id.*

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

113. *Id.* at 330.

114. Calvin R. Massey, Essay, *The Tao of Federalism*, 20 *HARV. J.L. & PUB. POL’Y* 887 (1997).

115. *Id.* at 888–89.

for an approach that places equal stock in comprehending the powers of the states (the “yang”).¹¹⁶ For the system of federalism is governed—as Taoists believe the cosmos is governed—by the principle of harmony.¹¹⁷

Takings and Progressive Rate Taxation (1996)¹¹⁸

Using Richard Epstein’s *Takings: Private Property and the Power of Eminent Domain*¹¹⁹ as his basis, Professor Massey explores the practical implications of the belief that progressive rate income and estate taxation violate the Takings Clause. In the process of doing so, he examines the fine line between tax and taking, and applies the modern regulatory takings doctrine to the progressive income tax structure.¹²⁰

Etiquette Tips: Some Implications of “Process Federalism” (1994)¹²¹

In his first of three articles published in the *Harvard Journal of Law and Public Policy*, Professor Massey speculates about the demise of legally enforceable federalism, the adoption of politically enforceable federalism, and the subsequent creation of “process federalism.” He describes process federalism as a jurisprudence that permits “Congress [to] impose its will upon the states so long as that imposition is performed in a procedurally restrained fashion.”¹²² In the second part of this article, Professor Massey articulates three ways in which process federalism might lead to limitations upon the scope of Congress’s power to regulate the states.¹²³ The most striking of these is his anticipation of *United States v. Lopez*¹²⁴ in a section entitled “Tinkering with Deference to Congress Under the Commerce Power.”¹²⁵

116. *Id.*

117. *Id.* “The ‘Tao’ (or the ‘way,’ as it is usually translated) is a philosophic world-view that originated some 2500 years ago in China.” *Id.* at 888. The “essence of Taoism” is “the idea that an implicit harmony exists in all relationships.” *Id.*

118. Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL’Y 85 (1996) [hereinafter Massey, *Takings and Progressive Rate Taxation*].

119. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that progressive rate income taxation is a regulatory taking).

120. Massey, *Takings and Progressive Rate Taxation*, *supra* note 118, at 85–88.

121. Calvin R. Massey, *Etiquette Tips: Some Implications of “Process Federalism,”* 18 HARV. J.L. & PUB. POL’Y 175 (1994) [hereinafter Massey, *Etiquette Tips*].

122. *Id.* at 177.

123. *Id.* at 211.

124. *United States v. Lopez*, 514 U.S. 549 (1995).

125. Massey, *Etiquette Tips*, *supra* note 121, at 216.

Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression (1992)¹²⁶

Long before bias response protocol was a fixture of university policy, Professor Massey penned this article examining the different philosophical approaches to hate speech, how they have shaped constitutional law, and the advent of speech restrictions on the American college campus.¹²⁷

This article's *pièce de résistance* is an assessment of whether a jurisprudence that only permits content-based restrictions upon speech where those restrictions are "narrowly tailored" to serve a "compelling interest" could ever accommodate the desires of those who wish to infringe upon free expression in order to suppress hate speech.¹²⁸ Parts of this article were reprinted in *Speaking Freely: The Case Against Speech Codes*.¹²⁹

The Natural Law Component of the Ninth Amendment (1992)¹³⁰

Professor Massey vigorously defends the contention that our nation's founding documents are grounded in the natural law tradition and "that the Ninth Amendment is natural law's logical textual home within the Constitution."¹³¹ He argues that, even if the Ninth Amendment were merely a rule of construction designed to limit the implied powers of Congress, this function can only be fulfilled today if the Amendment is treated as a source of individual rights judicially enforceable against the federal government.¹³² Professor Massey concludes by proposing a method by which the Court might evaluate an asserted unenumerated natural right by determining whether it is consistent with the Constitution's enumerated rights. Where the asserted unenumerated right is consistent with the enumerated rights, the burden would rest on the government to overcome a presumption of validity by demonstrating the existence of a superseding governmental interest.¹³³

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

127. *Id.* at 104.

128. *Id.* at 104.

129. *SPEAKING FREELY: THE CASE AGAINST SPEECH CODES* 45 (Henry Mark Holzer ed., 1994).

130. Massey, *The Natural Law Component*, *supra* note 23.

131. *Id.* at 50.

132. *Id.* at 52.

133. *Id.* at 103–05.

***The Faith Healers* (1992)¹³⁴**

This counterpunch to Critical Legal Studies (“CLS”)—the proponents of which are called “Crits”—scholar Richard Michael Fischl’s article *The Question That Killed Critical Legal Studies*¹³⁵ reads like a one-two knockout. Ignoring Fischl’s ad hominem attacks on his character and intellect, Professor Massey responds by exposing Fischl’s failure to refute his criticism and explaining how CLS invited the question that killed it.¹³⁶ Professor Massey first posed the question that killed CLS in his article *Law’s Inferno* (see below), in which he inquires what the Crits would have us replace the status quo with. Arguing from this standpoint, Professor Massey insists that the real fundamentalists are not the so-called “prisoners” of liberal thought structures who defend the established legal order, but the Crits who demand that we abandon this order and embrace a radical transformation—the end results of which are unknown even to them.¹³⁷ But they have faith!

***Devolution or Disunion: The Constitution After Meech Lake* (1991)¹³⁸**

In his second article dealing with Canadian constitutional law, Professor Massey lays out a set of proposals designed to reform and revitalize Canadian federalism in the wake of the failure of the Meech Lake Accord.¹³⁹ These proposals include concurrent federal and provincial authority, a newly empowered Senate with provincial and territorial representation, and an alternative formula for amending the constitution that encourages wider participation.¹⁴⁰

***Abstention and the Constitutional Limits of the Judicial Power of the United States* (1991)¹⁴¹**

Professor Massey makes an idiosyncratic argument in defense of the abstention doctrine, insisting that the structure of the Constitution implicitly supports the use of doctrines generally and the abstention doctrine in particular.¹⁴² This is especially true when, as in the case of abstention, the Court promulgates doctrine in order to monitor the limits

134. Calvin R. Massey, Review Commentary, *The Faith Healers*, 17 LAW & SOC. INQUIRY 821 (1992) [hereinafter Massey, *The Faith Healers*].

135. Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

136. Massey, *The Faith Healers*, *supra* note 134, at 821–22.

137. *Id.* at 821.

138. Calvin Massey, *Devolution or Disunion: The Constitution After Meech Lake*, 29 OSGOODE HALL L.J. 791 (1991).

139. *Id.*

140. *Id.*

141. Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811.

142. *Id.* at 812–13.

of federal judicial power and Congress's power to vest the federal courts with jurisdiction.¹⁴³

The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States (1990)¹⁴⁴

Professor Massey compares the legislative override—a provision of the Canadian Constitution embodied in the Notwithstanding Clause, which permits Parliament and provincial legislatures to enact legislation that supersedes guarantees enshrined in the Charter of Rights and Freedoms—with John C. Calhoun's principles of federal union.¹⁴⁵ Following a discussion of Canadian Constitutional history and Calhoun's political theory, he highlights American analogues to the Notwithstanding Clause.¹⁴⁶ Finally, based upon the principles embodied in these institutions, Professor Massey makes a series of normative recommendations for the future of federalism and judicial review in the United States.¹⁴⁷

The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law (1990)¹⁴⁸

Professor Massey expounds upon his thesis that the Ninth Amendment contains unenumerated substantive constitutional rights in this article. After laying out the historical evidence for this view and discussing its modern application, he articulates a test for determining what these rights are and how to enforce them. The approach he proposes is a middle way in which the Court would recognize only positive rights that preserve fundamental liberties without impeding upon the legitimate exercise of federal power to accomplish national policy.¹⁴⁹

American Fiduciary Duty in an Age of Narcissism (1990)¹⁵⁰

Professor Massey believes the extension of fiduciary obligations by courts through analogy—resulting in what he calls “omnipresent fiduciary obligation”—has been disastrous in an age governed not by duty or contract, but by narcissism.¹⁵¹ Indeed, he insists that, given the state of law and society, individuals now seek out the protection of beneficiary status and avoid ever serving in a fiduciary role. He concludes that this

143. *Id.*

144. Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229.

145. *Id.* at 1255–72.

146. *Id.* at 1272–85.

147. *Id.* at 1298–1309.

148. Massey, *The Anti-Federalist Ninth Amendment*, *supra* note 23.

149. *Id.* at 1232–33.

150. Calvin Massey, *American Fiduciary Duty in an Age of Narcissism*, 54 SASK. L. REV. 101 (1990).

151. *Id.* at 103.

phenomenon's underlying cause is the ideological struggle between Lockians, those disciples of the seventeenth century philosopher John Locke, who preached individual liberty and responsibility, and collectivists, who privilege the interests of groups above the interests of the individual.¹⁵² He suggests that two possible remedies to the excesses of this trend are (1) to use other areas of law like torts to accomplish what some courts are eager to use fiduciary obligations to achieve, and (2) to be mindful of the fact that the roots of fiduciary obligation lie in the soil of equity.¹⁵³

Pure Symbols and the First Amendment (1990)¹⁵⁴

In this evaluation of the symbol as speech in constitutional jurisprudence, Professor Massey points out the inconsistency displayed by the Supreme Court in the cases of *Texas v. Johnson*¹⁵⁵ and *County of Allegheny v. ACLU*.¹⁵⁶ In considering the coherence of symbolism jurisprudence, he discusses the distinction between a symbol's utility and its message, the absurdity of using the dilution of a religious symbol's purity as a judicial metric, and his disappointment with the Court's failure to examine a symbol's purpose or intention in tandem with its effect. Above all, Professor Massey prefers the toleration of symbols—whether displayed or destroyed—as articulated in *Johnson*. He wishes that the Court had consistently applied this principle to the symbols at issue in *County of Allegheny*.¹⁵⁷ This article was reprinted in *The Constitution and the Flag, Vol. II: The Flag Burning Cases*.¹⁵⁸

The Jurisprudence of Poetic License (1989)¹⁵⁹

In this six-page tour de force through the shortcomings of Chief Justice William Rehnquist's dissent in *Johnson*,¹⁶⁰ Professor Massey attacks the uncritical use of history as a basis for jurisprudence. He observes that history is too subjective and easily misused to serve as the primary basis for adjudicating legal disputes and creating precedent.¹⁶¹ Upon this premise, Professor Massey takes the Chief Justice to task for including in his dissent a fanciful—however beautiful and patriotic—poem

152. *Id.* at 117–19.

153. *Id.*

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

155. *Texas v. Johnson*, 491 U.S. 397 (1989).

156. *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

157. Massey, *Pure Symbols and the First Amendment*, *supra* note 154, at 381–82.

158. 2 THE CONSTITUTION AND THE FLAG: THE FLAG BURNING CASES (Michael Kent Curtis ed., 1993).

159. Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047 [hereinafter Massey, *The Jurisprudence of Poetic License*].

160. *Johnson*, 491 U.S. at 397.

161. Massey, *The Jurisprudence of Poetic License*, *supra* note 159, at 1047–48.

by John Greenleaf Whittier entitled “Barbara Frietchie.”¹⁶² Thus, Professor Massey concludes that, to resolve the issue of whether the desecration of the American flag is protected speech “by resort to emotion laden poetic fantasy . . . debases historical coin, cheapens the process of constitutional adjudication, and even embarrasses the poet.”¹⁶³

State Sovereignty and the Tenth and Eleventh Amendments (1989)¹⁶⁴

Professor Massey attempts to resolve the dispute between those who hold a conventional view of the Eleventh Amendment—namely that states are immune from private suits in federal court—and revisionists, who hold that the Amendment merely places a narrow limitation upon the State-Citizen Diversity Clause found in Article III. Professor Massey proposes that the Eleventh Amendment be viewed as a jurisdictional bar, anchored in the Tenth Amendment, which sweeps across Article III.¹⁶⁵ After establishing the historical foundation for this thesis, Professor Massey attempts to reinvent state sovereign immunity on Tenth Amendment grounds.¹⁶⁶ He then demonstrates the practical implications of his proposal utilizing *Pennsylvania v. Union Gas Co.*¹⁶⁷

Antifederalism and the Ninth Amendment (1988)¹⁶⁸

In this article, Professor Massey first lays out his theory that the Bill of Rights implicitly contains a hitherto ignored and unenumerated Anti-Federalist Constitution, which advances both the rights of the individual and the sovereignty of the several states. This would be accomplished through the federal recognition of state constitutional rights via the Ninth Amendment.¹⁶⁹ In this scenario, Congress would be barred from using its delegated powers to contravene rights that the citizens of a particular state have been guaranteed by the constitution of that state.¹⁷⁰ This article was reprinted in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*.¹⁷¹

162. John Greenleaf Whittier, *Barbara Frietchie*, POETRY FOUND., <https://www.poetryfoundation.org/poems-and-poets/poems/detail/45483> (last visited Apr. 23, 2017).

163. Massey, *The Jurisprudence of Poetic License*, *supra* note 159, at 1052.

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

165. *Id.* at 62–67.

166. *Id.* at 72.

167. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); Massey, *State Sovereignty*, *supra* note 164, at 71.

168. Massey, *Antifederalism and the Ninth Amendment*, *supra* note 23.

169. *Id.*

170. *Id.* at 988.

171. 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 267 (Randy E. Barnett ed., 1989) [hereinafter THE RIGHTS RETAINED BY THE PEOPLE].

Law's Inferno (1988)¹⁷²

This book review was the first strike in a heated dispute with the Crits spanning several years. In this critique of Stanford Law Professor Mark Kelman's survey of Critical Legal Studies—a guide that Professor Massey compares to Dante's journey through hell sans the poetic brilliance—Professor Massey calls into question the very viability of the movement.¹⁷³ He argues that the Crits have failed to offer a persuasive rationale for abandoning the current legal order.¹⁷⁴ He further argues that, even if they had provided one, they also fail to offer a coherent alternative to the status quo, preferring instead to endlessly wander the circles of hell that they have created for themselves.¹⁷⁵

The Excessive Fines Clause and Punitive Damages: Some Lessons from History (1987)¹⁷⁶

Professor Massey argues that the Eighth Amendment's Cruel and Unusual Punishment Clause has overshadowed the Excessive Fines Clause. This has led the Court to incorrectly apply the latter clause only in criminal cases.¹⁷⁷ Professor Massey recounts how, in Old England, the forerunner of the punitive damages (the amercement) was paid to the crown and subject to the protections against excessive fines which serve as the basis for the Excessive Fines Clause.¹⁷⁸ Today's punitive damages are essentially private fines levied by civil courts to punish tortfeasors. Thus, because punitive damages constitute a privatization of the type of fines the Framers sought to protect defendants against, the Excessive Fines Clause ought to apply.¹⁷⁹

Federalism and Fundamental Rights: The Ninth Amendment (1987)¹⁸⁰

This is the earliest of Professor Massey's works dealing with the Ninth Amendment. He briefly evaluates competing views of the Ninth Amendment and concludes that none properly reflect the intent of the Framers. Arguing from history, he concludes that the Court should apply the Ninth Amendment—not the Fourteenth Amendment's Due Process Clause—to protect the unenumerated rights of the people.¹⁸¹ He believes

172. Calvin R. Massey, Book Review, *Law's Inferno*, 39 HASTINGS L.J. 1269 (1988) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

173. *Id.* at 1269.

174. *Id.* at 1270–71.

175. *Id.*

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

177. *Id.* at 1234.

178. *Id.* at 1243.

179. *Id.* at 1269–74.

180. Massey, *Federalism and Fundamental Rights*, *supra* note 23.

181. *Id.* at 343–44.

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that these unenumerated rights consist of natural rights guided by John Locke's conceptualization and, more concretely, those rights enshrined in state common, constitutional, and statutory law prior to 1788.¹⁸² This article was reprinted in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*.¹⁸³

III. AUDIO & VIDEO RECORDINGS

The Exchange: The Impact of "Citizens United" on the 2012 Elections (2012)¹⁸⁴

Professor Massey appears on the popular New Hampshire Public Radio program "The Exchange" in order to discuss *Citizens United v. FEC*¹⁸⁵ alongside Americans for Campaign Reform President Lawrence M. Noble. Professor Massey passionately defends the decision and maintains that—whatever the unintended consequences—it is far better that government refrains from regulating the free speech of its citizens.¹⁸⁶

Constitutionally Speaking: Federalism (2012)¹⁸⁷

This is a lecture that Professor Massey gave at a conference entitled "How Does the Constitution Keep Up with the Times?" He points to the Ninth and Tenth Amendments as guardians of individual liberty in the original conception of the Constitution and explains how judicial review supplanted their usefulness.¹⁸⁸ However, beginning in the 1920s, the Court gave much more deference to Congress in defining the scope of congressional power. After reviewing the adverse impacts of unlimited congressional authority and the advantages of local decisionmaking, he calls upon citizens to recognize that "the federal government is given enough [enumerated] power . . . to make the mechanism work, but it's not given enough power to . . . extinguish its makers and make them its servants. We the people are the makers of that machine, but we are not its servants."¹⁸⁹

182. *Id.*

183. *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 171, at 267.

184. *The Exchange: The Impact of "Citizens United" on the 2012 Elections*, NEW HAMPSHIRE PUB. RADIO (BROADCAST) (Nov. 24, 2012), <http://nhpr.org/post/impact-citizens-united-2012-elections>.

185. *Citizens United v. FEC*, 558 U.S. 310 (2010).

186. *The Exchange: The Impact of "Citizens United" on the 2012 Elections*, *supra* note 184.

187. UNHLAW, *Constitutionally Speaking - Calvin Massey*, YOUTUBE (Nov. 21, 2012), <https://www.youtube.com/watch?v=JzRno1Bhx0M>.

188. *Id.*

189. *Id.*

Legally Speaking: Antonin Scalia (2011)¹⁹⁰

As part of the Legally Speaking series organized by UC Hastings College of the Law and *California Lawyer*, Professor Massey interviews Associate Justice Antonin Scalia for approximately one hour and twenty minutes. Their discussion touches upon a wide array of topics including many of Professor Massey's scholarly interests.¹⁹¹

Snyder v. Phelps – Post-Decision SCOTUScast (2011)¹⁹²

In this short podcast, Professor Massey reviews the Court's ruling in *Snyder v. Phelps*.¹⁹³ He reflects on the fact that even vicious public discourse directed at private individuals is protected by the First Amendment, regardless of the damage it inflicts. He concludes that this is the price of free speech and that the Westboro Baptist Church has shown us how high that price may climb.¹⁹⁴

CONCLUSION

In writing this bibliography I have taken comfort—as I hope those who read it will—in the knowledge that Professor Massey's wit and wisdom have outlived him. Indeed, his insights are available now and always to law students, attorneys, and judges who seek it in the confines of repositories and in the stacks of law libraries. For this and for the countless hours Professor Massey sacrificed to research and writing in order to ensure it, we can be most grateful.

190. University of California Television (UCTV), *Legally Speaking: Antonin Scalia*, YOUTUBE (Mar. 17, 2011), <https://www.youtube.com/watch?v=KvttIukZEM>.

191. *Id.*

192. *Snyder v. Phelps - Post-Decision SCOTUScast*, THE FEDERALIST SOCIETY FOR L. & PUB. POL'Y STUD. (Mar. 4, 2011), <http://www.fed-soc.org/multimedia/detail/snyder-v-phelps-post-decision-scotuscast>.

193. *Id.*; *Snyder v. Phelps*, 562 U.S. 443 (2011).

194. *Snyder v. Phelps Post-Decision SCOTUScast*, *supra* note 192.