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Why I So Enjoyed Learning With and From Calvin Massey

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ESSAY

Why I So Enjoyed Learning With and From Calvin Massey

VIKRAM DAVID AMAR*

I am pleased and proud to participate in this tribute to Calvin Massey, with whom I had the pleasure to work and play for about two decades. When I think of Calvin—and I think of him often—I think of a generous friend, a gregarious colleague and a genuinely good man. He possessed many admirable traits, but today I want to focus on three: (1) his breadth; (2) his independent mind; and (3) his thoughtfulness.

Calvin was someone who could talk or write on just about anything. I remember lively conversations about not just law, but also politics, history, sports, academic culture, technology, movies, books, etc. Importantly, his academic writings were equally capacious. This is a guy who authored two casebooks in fields as disparate as Constitutional Law (one of my own areas of specialization) and Wills and Trusts (something virtually no one could pay me enough to teach and write about). Within the field of Constitutional Law, he authored meaningful scholarship on, among others, the doctrine of standing (both in state and federal courts), the Voting Rights Act, Law & Religion, all major aspects of freedom of expression, including so-called hate speech, the Second Amendment, preemption, slavery reparations, the validity of curfews, the Takings Clause, the Ninth Amendment, the Eleventh Amendment, Supreme Court appointment processes, abstention doctrines, and excessive fines under the Eighth Amendment.

And when he did take up these wide-ranging topics, he did so with his own distinctive perspective and sense of timing. Calvin's writing was never trendy, in part because he often wrote about important topics *before* others realized their importance. He wrote about the Second Amendment before such articles were fashionable and commonplace. He wrote about culture wars and battlefields before most of the academy saw the bullets flying.

His independence of mind was also borne out by his bottom lines. His instincts were generally conservative, but not all of his conclusions ended up being conservative. You could never pigeonhole him, which is one reason for the high level of credibility he enjoyed in so many different quarters. He understood that political views influenced constitutional mindsets, but that

* Dean and Iwan Foundation Professor of Law, University of Illinois College of Law. This essay is a modified version of remarks delivered orally at the University of New Hampshire School of Law at an event honoring Professor Calvin Massey on September 24, 2016. I wish to express my thanks to the School of Law and to the editors of the *University of New Hampshire Law Review*.

constitutional law should aspire to rise above partisanship, not become beholden to it. We sorely miss that kind of perspective and gravitas in an election year like this past one, where all four of the major federal institutions were up for grabs.

The third trait I mentioned above was Calvin's thoughtfulness, in both common senses of that word. His writings were invariably creative, well-researched, elegantly presented and analytically nuanced. But they were also respectful, attentive to opposing viewpoints, empathetic, and free from ad hominem or overstatement. Whether he was explaining why society must tolerate hurtful speech, or why Hastings should not hire or promote someone on the faculty, Calvin was gentle, kind and measured.

None of this is to say I always agreed with him, about faculty governance or constitutional disputes. We saw eye-to-eye on many topics, but diverged on many others.

Yet I always learned from Calvin—I always understood how he got to where he rested, and I profited from following his intellectual journey even if I decided to make some different turns myself.

One example of this is a piece Calvin wrote near the end of his career, his Green Bag article *The Non-Delegation Doctrine and Private Parties*.¹ In this thought-provoking essay, Calvin (characteristically) takes up a question that is not commonly discussed—whether Congress ought to be able to delegate its regulatory powers to private parties, and, if not, whence does the prohibition come? Calvin rightly observes that one source might be democratic accountability and separation of powers (Congress ought not to be able to give to others powers that the people specifically conferred on it), and that another source might be due process protections for liberty and property (because private regulators may be self-motivated in a way that imposes unfair burdens on other private actors). Calvin keenly observes that if the source of any limitation is the former, then states (who are free to structure their own separation of powers regimes, subject only to the outer limits imposed by the Republican Guarantee Clause, an area Calvin doesn't touch on) would be free under the federal constitution to delegate regulatory authority to private entities provided their state constitutions so permit.

Calvin ultimately concludes—seemingly because he thinks the non-delegation principle derives largely if not entirely from “the Constitution's vesting [in Article I, section 1] of all legislative powers in Congress”² and because of Calvin's general vision of federalism that favors state autonomy—that the non-delegation doctrine imposes an absolute barrier to federal delegation of regulatory authority to private entities, but no barrier at all to states doing whatever they want in this realm.

My own sense is that Calvin is not fully right here—he overstates the limits on delegation of federal power to private actors, and he understates the

¹ 17 GREEN BAG 2D 157 (2014).

² *Id.* at 160.

constraints on states. I say this for two reasons. First, I think Calvin is wrong to think (as he does but never explains) why the choice between separation of powers and due process is an “either or” matter. I think delegations of lawmaking authority from legislatures to others (whether the recipients are private actors or executive or judicial agencies) raise concerns both of separation of powers *and* due process. So the fact that federal separation of powers principles do not bind state governments doesn’t fully address the individual liberty and property infringements that would often arise when states give some competitors the power to regulate others.

Second,³ and perhaps more fundamentally, as I have written extensively elsewhere,³ one cannot understand the separation of powers problems with broad delegations by legislatures without digging more deeply into what it means that all federal legislative power is “vested” in Congress. As I have explained:

The nondelegation doctrine is said to have both textual and theoretical underpinnings. Textually, Article I, section one of the Constitution provides that “*All* legislative Powers herein granted *shall* be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” The theoretical justifications of the nondelegation doctrine stem from “implicit constitutional requirements of consensual government under law.” As Professor Tribe has observed, American political theory finds legitimacy of government in the “supposed consent of the governed.” This notion of consent presupposes the possibility of tracing governmental exercise of power to a choice made by a “representative” branch that is “politically and legally responsible” to the People. Thus, the valid exercise of a congressionally created power depends upon the prior “adoption of a declared policy by Congress and its definition of the circumstances in which its command is to be effective”

Both the textual and theoretical justifications for a nondelegation principle are open to question. First, it is not clear why the term “vested” in Article I means nondelegable. After all, Article II provides that “[t]he executive Power shall be vested in a *President* of the United States of

³ See, e.g., Vikram David Amar, Essay, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process*, 41 WM. & MARY L. REV. 1037 (2000); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VANDERBILT L. REV. 1347 (1996) [hereinafter Amar, *Indirect Effects of Direct Election*].

America,” and yet no one doubts that the President may transfer executive authority to his underlings in the Executive Branch. This is true even as to presidential powers that the Constitution itself (as opposed to congressional legislation) assigns to the President.

Moving from text to theory, why does the “traceability” requirement foreclose delegation? Why can’t we “trace” congressional delegations to the President back to Congress and hold it accountable accordingly? After all, as I just observed, the President delegates executive authority to unelected underlings, and yet we seem to believe that *his* accountability suffices under American democratic theory. Nor did “accountability” prohibit the People of the United States from delegating some of their sovereign power of self-determination to the federal government by ratifying the Constitution. The fact that the People have given temporary authority to federal institutions to govern on their behalf does not, under American democratic theory, mean that sovereignty has been “divested” from the People and permissibly delegated to the government.

Some might respond to my analogies by pointing out that the People are free to reclaim the power they have given to federal institutions through constitutional amendment, and that the President is free to reclaim authority he has given to his underlings at will. This is all true enough, but it suggests that delegations of power are not problematic per se, but that what might be driving at least part of the nondelegation concern is the ability (or inability) to reclaim power once delegated. This possibility is supported by seminal work done at the beginning of this century by Professors Patrick W. Duff and Horace E. Whiteside. These scholars attempted to uncover the origins of the latin nondelegation maxim, “*delegata potestas non potest delegari*,” which most people understand to mean “delegated power may not be redelegated.” Their groundbreaking historical research established that the earliest forms of the common law agency nondelegation maxim—thought by many to explain much of the American constitutional nondelegation concern—were phrased somewhat differently: Delegated authority cannot “be so delegated, *that the primary (or regulating) power does not remain with the King himself*.” As Professors Duff and Whiteside conclude, the concern is that the “King’s power not be diminished by its delegation to others.” Professors Duff and Whiteside thought that their discovery

“annihilated” the nondelegation doctrine as currently understood. Whether or not this is an overstatement, Professors Duff and Whiteside’s suggested formulation does refocus attention on one key aspect of the delegation problem: that delegation is more problematic when it is harder to reclaim.⁴

Once we see that delegated power that cannot readily be reclaimed presents more problems than delegated power that can be retracted easily, we see that not all delegations should be thought of as equally constitutionally problematic, and Calvin’s assumption in his essay that “the limit [on Congress’ power to delegate to private entities] is identical to [that applicable to] delegations to agencies.”⁵ I submit that the two limits ought not be identical, in part because Congress may more readily reclaim delegations to private entities than to the executive branch because private entities don’t have the formal veto power that the President has with respect to subsequent legislative efforts to reclaim.⁶ (None of this is to say that some congressional delegations to private entities might not be *more* problematic, on balance, than some congressional delegations to the executive branch, because of due process concerns that may be particularly acute depending on the relationship between the private regulator and the entities or individuals being regulated.)

My big point here is that Calvin’s conclusion does not fully account of the functional reasons behind the non-delegation doctrine and thus he adopts some bright-line rules that don’t seem constitutionally defensible to me.

But let me close with an observation that I think Calvin would agree with, and that brings our two stances closer together. As noted earlier, I suspect one of the reasons Calvin reaches the conclusion he does is that a separation-of-powers-only approach to non-delegation leaves states more running room than would a due process approach, or a (my) hybrid approach. But my assertion that the ability to reclaim should (and does) drive at least some of non-delegation doctrine means that Congress should be more free to delegate power to states than it is to delegate power to the President (again, because—at least after the advent of direct election of U.S. Senators—states don’t have a veto over subsequent congressional reclamation efforts). And that fact (which seems to be borne out by doctrine)⁷ should make someone like Calvin—who (like me) believes in a robust role for states in our federal system—smile. I’d like to think he’s doing just that right now.

⁴ Amar, *Indirect Effects of Direct Election*, *supra* note 3, at 1376–78 (citations omitted).

⁵ Massey, *supra* note 1, at 159–60.

⁶ Amar, *Indirect Effects of Direct Election*, *supra* note 3, at 1383–86.

⁷ *Id.* at 1378–83.