

# The University of New Hampshire Law Review

---

Volume 15  
Number 2 *Symposium: A Celebration of the Life  
and Work of Calvin Massey*

---

Article 7

2-1-2017

## Calvin Massey: Gentleman and Scholar

Ashutosh Bhagwat  
*University of California, Davis School of Law*

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)



Part of the [Higher Education Commons](#), [Legal Biography Commons](#), [Legal Education Commons](#), [Legal Writing and Research Commons](#), and the [Other Legal Studies Commons](#)

---

### Repository Citation

Ashutosh Bhagwat, *Calvin Massey: Gentleman and Scholar*, 15 U.N.H. L. Rev. 265 (2017), available at [http://scholars.unh.edu/unh\\_lr/vol15/iss2/7](http://scholars.unh.edu/unh_lr/vol15/iss2/7)

This Essay is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [sue.zago@law.unh.edu](mailto:sue.zago@law.unh.edu).

# ESSAY

## Calvin Massey: Gentleman and Scholar

ASHUTOSH BHAGWAT\*

### ABSTRACT

*I first met Calvin Massey in person in 1994, when I joined the U.C. Hastings faculty. However, I knew of and admired Calvin's scholarship long before that. Six years earlier, I was a law student at the University of Chicago, and a student editor at the law review. In that role, I helped cite-check and edit a major article authored by Calvin, as well as a series of short responses by Calvin and other scholars, debating the meaning and scope of the Eleventh Amendment to the U.S. Constitution. I was struck then, and continue to be amazed, by the clarity, thoroughness, and intellectual rigor of this exchange, and especially Calvin's contributions to it. I truly believe that these papers provide a model for what engaged, respectful, and careful scholarly debate should look like. They certainly provided an inspiration to me as I began my scholarly career, just as Calvin provided crucial mentorship during my early years at Hastings. In this brief essay I summarize this intellectual exchange, and explain why I think it epitomizes Calvin's extraordinary strengths as a scholar, and as a gentleman.*

### CONTENTS

INTRODUCTION .....	266
I. THE UNIVERSITY OF CHICAGO .....	266
II. THE ELEVENTH AMENDMENT .....	267
III. CALVIN THE SCHOLAR .....	271

---

\* Martin Luther King, Jr. Professor of Law and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis School of Law. B.A. 1986 Yale University. J.D. 1990 The University of Chicago. Contact: aabhagwat@ucdavis.edu. Sincere thanks to Professors John Greabe and Alexandra Roberts, and the staff of the *University of New Hampshire Law Review*, for organizing this event and inviting me to participate.

## INTRODUCTION

Over 22 years ago, in the summer of 1994, I joined the faculty at U.C. Hastings College of the Law. I had essentially no scholarly or teaching experience, and had to wear a suit every day to make sure everyone knew I wasn't a student. I had also just moved to California from the East Coast, and my wife, Shannon, and I knew nobody. But that changed quickly. We were warmly welcomed into the Hastings community by many, many people, including many in this room today. I also quickly found scholarly mentors who helped me find my voice, and provided models for what it meant to be a rigorous, thoughtful, and engaged scholar. In all of these respects, no one was more important to me than Calvin Massey.

Calvin's warmth, kindness, and generosity are well-known to everyone in this room. I still have strong memories of a dinner party to which Calvin and Martha kindly invited Shannon and me during those early years, which gave us an object lesson in what graceful hospitality looks like. But what I want to talk about was Calvin's role as a scholarly mentor. Because the thing is, when I arrived at Hastings, I was already familiar with Calvin's work. Indeed, Calvin was the only member of the Hastings faculty whose scholarship I had previously been exposed to (not because of a lack of great scholars at Hastings, but because of my illiteracy), and an important factor drawing me to Hastings was the knowledge that Calvin was on that faculty. This is because although I'd never met him face-to-face, I also knew that the best I could hope to accomplish in my career was to try to emulate Calvin's intellectual rigor.

## I. THE UNIVERSITY OF CHICAGO

Six years before I arrived at Hastings, I was a second-year law student at the University of Chicago, and a student editor at the *University of Chicago Law Review*. That is when I was first exposed to Calvin the intellectual. Early in that year, the *Law Review* published an article titled "State Sovereignty and the Tenth and Eleventh Amendments," authored by (as you've probably guessed) then-Associate Professor Calvin Massey of Hastings.<sup>1</sup> One of my first jobs on the *Law Review* was to help cite-check that article—no small task as the article was 91 pages long and had over 400 footnotes!<sup>2</sup> But it was an intellectual tour de force. The subtlety and thoroughness of Calvin's historical analysis still strikes me as a model of how to approach a difficult, even intractable problem, and make the best possible case for your position, knowing that final resolution is impossible.

---

<sup>1</sup> Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61 n.† (1989).

<sup>2</sup> *Id.* at 150–51.

But the story does not end with Calvin's first piece. Early the next academic year, then-Professor (now Judge) William Fletcher published a shorter piece in the *Law Review*, "replying to critics" of Fletcher's position on this particular constitutional dispute<sup>3</sup>—"critics" referring to Calvin, as well as professors Lawrence Marshall (then at Northwestern, now at Stanford) and William Marshall (then at Case Western, now at the University of North Carolina), who had recently published articles on the same topic at Harvard.<sup>4</sup> To make matters worse, the articles all analyzed opinions by both John Marshall and Thurgood Marshall,<sup>5</sup> creating a thorough-going Marshallian confusion. I don't recall if I worked on Fletcher's article, but it was and is very impressive.

And the story still doesn't end. The year we published Judge Fletcher's piece, I was serving as one of the two Articles Editors at the *Law Review*. Someone—I believe it was Calvin, though don't quote me on that—came up with the idea of continuing the ongoing dialogue I just described via short letters. The result was a new (and unfortunately short-lived) section of the *Law Review* titled "Correspondence," in which we published letters by Calvin and Professors Lawrence and William Marshall responding to Fletcher, and a short rebuttal by Fletcher.<sup>6</sup>

I want to speak a little about the substance, and the style, of this scholarly back-and-forth for two reasons. First of all, the topic remains very much relevant and contested today. Second, I believe that Calvin's role in this debate illustrates everything that I so admired about Calvin as a scholar.

## II. THE ELEVENTH AMENDMENT

The basic subjects of Calvin's original article, and all the other scholarship I just described, were the proper interpretation of the Eleventh Amendment to the United States Constitution, and the related question of the scope of the sovereign immunity enjoyed by state governments in our federal system. The Eleventh Amendment reads:

---

<sup>3</sup> William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989).

<sup>4</sup> Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

<sup>5</sup> See, e.g., Massey, *supra* note 1, at 121–22 (discussing *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809) (Marshall, C.J.); *id.* at 126–28 (discussing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Marshall, C.J.); *id.* at 145–46 (discussing *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring)).

<sup>6</sup> Calvin R. Massey et al., *Correspondence*, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 117 (1990).

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>7</sup>

It was adopted in 1795, and its main purpose was to overturn the Supreme Court's 1793 decision in *Chisholm v. Georgia*,<sup>8</sup> which had permitted a lawsuit for breach of contract brought by a South Carolinian against the State of Georgia to proceed in federal court under the court's diversity jurisdiction, despite the State's claim of sovereign immunity.<sup>9</sup> The Eleventh Amendment undoubtedly reversed that result. The open question is what else it did.

There is a longstanding scholarly and legal dispute about the meaning of the Eleventh Amendment. The current position of the Supreme Court, which was first developed in 1890 in *Han v. Louisiana*,<sup>10</sup> is that the Eleventh Amendment merely meant to restate a preexisting understanding that the States enjoyed sovereign immunity against lawsuits to which they do not consent, and that the adoption of the Constitution did not change that fact.<sup>11</sup> As a consequence, in *Han* the Court held that the Eleventh Amendment barred lawsuits in federal court against a State by its own citizens, even though the text only mentions citizens of other states and foreign countries.<sup>12</sup> In recent years, the Court has built on *Han* to extend Eleventh Amendment immunity to lawsuits in state courts,<sup>13</sup> and before administrative agencies.<sup>14</sup> This position remains the law today.

The primary alternative reading of the Eleventh Amendment, what Calvin called the "revisionist" reading, was developed by a group of scholars including Fletcher, Martha Field, Judge John Gibbons, and of course Akhil Amar, in the decade prior to Calvin's article.<sup>15</sup> It argues, based on text and history, that the Eleventh Amendment was intended to divest federal courts only of diversity jurisdiction over cases between States and citizens of other states or of foreign nations. It had no impact on jurisdiction under other

---

<sup>7</sup> U.S. CONST. amend. XI.

<sup>8</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>9</sup> U.S. CONST. amend. XI; *Chisholm*, 2 U.S. (2 Dall.) at 472–79 (opinion of Jay, C.J.).

<sup>10</sup> 134 U.S. 1 (1890).

<sup>11</sup> *Id.* at 14–16.

<sup>12</sup> *Id.*

<sup>13</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>14</sup> *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002).

<sup>15</sup> See Massey, *supra* note 1, at 61–62 n.2 (summarizing scholarship).

Article III heads, including notably federal question and admiralty jurisdiction.<sup>16</sup>

Enter Calvin. It will not surprise you to learn that Calvin disagreed with *everybody*. He disagreed with the Court (and its supporters) that the Eleventh Amendment embodied any principle of sovereign immunity. Thus he agreed with Fletcher, Amar et al. that *Han* was incorrectly decided<sup>17</sup> (the decisions I described extending *Han* post-date this debate, but I'm sure Calvin found them dubious as well). On the other hand, he also did not buy the "diversity" reading of the Eleventh Amendment because, as Calvin correctly pointed out, this reading meant that state treasuries remained vulnerable to lawsuits brought under federal law, including the Treaty of Paris that protected British creditors as well as British and Loyalist landowners from expropriation, a result the states surely would not have been comfortable with.<sup>18</sup> Instead, Calvin read the Eleventh Amendment literally, as a party-based ouster of jurisdiction of the federal courts over *all* lawsuits brought against states by citizens of other states and of foreign nations, regardless of the subject matter of the lawsuit.<sup>19</sup> It did not touch lawsuits by citizens of the state being sued, because such suits were not really the "problem" that the states faced (which was refusing to honor their debts and legal obligations as against outsiders),<sup>20</sup> and while the particular compromise this created was not wholly logical, Calvin ably defended the view that the Eleventh Amendment was in fact an unprincipled political compromise between Federalists and Antifederalists<sup>21</sup> (who were gradually morphing into Democratic Republicans—but that is a different story).

What then of sovereign immunity? Calvin went on to argue that even though the Eleventh Amendment has nothing to do with sovereign immunity, some concept of state sovereign immunity almost certainly was implicit in the concept of residual state sovereignty—a concept, he noted, which was embodied (or perhaps reiterated) in the *Tenth* Amendment, not the Eleventh (hence his title).<sup>22</sup> This reading, however, has important consequences. First and foremost, the Tenth Amendment recognizes residual state sovereignty only to the extent that power has not been delegated to the national government.<sup>23</sup> That in turn means that when Congress does act pursuant to a legitimately delegated power (such as the Commerce Clause), it may lift state sovereign immunity, so long as it does so clearly.<sup>24</sup> As it happens, precisely

---

<sup>16</sup> *Id.* at 62–63.

<sup>17</sup> *Id.* at 148–49.

<sup>18</sup> *Id.* at 114–15, 119, 149.

<sup>19</sup> *Id.* at 65–66, 113–14.

<sup>20</sup> *Id.* at 117.

<sup>21</sup> *Id.* at 119–120.

<sup>22</sup> *Id.* at 66, 143–44.

<sup>23</sup> *Id.* at 84.

<sup>24</sup> *Id.* at 144.

this question (whether Congress could lift state sovereign immunity when acting under the Commerce Clause) was pending at the Supreme Court when Calvin wrote, in a case called *Pennsylvania v. Union Gas* (on which more later),<sup>25</sup> and Calvin's views on that case were complex (again on which more later).

Second, Calvin persuasively argued that whatever sovereign immunity states enjoyed was a matter of *state* constitutional law, not federal law, because state governments' immunity had to derive from the sovereignty delegated to them by their citizens.<sup>26</sup> As Calvin pointed out, there were profound differences even among the Framers on the proper scope of sovereign immunity.<sup>27</sup> Many people adhered to it, for reasons principled or unprincipled—as the passage of the Eleventh Amendment indicated. On the other hand, such eminent people as Attorney General Edmund Randolph, and Associate Justice (and Framer) James Wilson, believed that the very concept of sovereign immunity was incompatible with Republican forms of government.<sup>28</sup> So, positing a firmly held, universal view on this question during the Framing era was absurd, making it more dubious to think that the Constitution itself took an all-or-nothing approach to the question.

The ultimate implication of Calvin's position was intriguing and counterintuitive. It was that Congress could, pursuant to any of its enumerated powers, authorize lawsuits against states by their own citizens.<sup>29</sup> But (unlike Fletcher/Amar et al.), he concluded that it could NOT authorize suits in federal court at all by citizens of other states or of foreign nations.<sup>30</sup> Recognizing the unorthodox nature of his conclusions, Calvin's article examines the historical evidence exhaustively (hence the 400 plus footnotes), from views on sovereign immunity during the Framing era, to the legal disputes of the 1790s that triggered the Eleventh Amendment, to the Amendment's drafting history, to later treatments of the Eleventh Amendment in the pre-*Han* era, notably by Chief Justice John Marshall, to finally modern law (thus bringing in the fourth Marshall in our saga, Thurgood). He also provided elegant arguments about why the Court's modern view must be wrong—for example, pointing out that the Eleventh Amendment, by its terms, is a denial of jurisdiction to courts, yet under modern law states can “waive” their Eleventh Amendment immunity. That is entirely counter to the bedrock principle that jurisdictional barriers cannot be waived by the parties.<sup>31</sup> And so on—obviously I cannot here reiterate

---

<sup>25</sup> *Id.* at 147–50.

<sup>26</sup> *Id.* at 94–96.

<sup>27</sup> *Id.* at 87–97.

<sup>28</sup> *Id.* at 101–02, 90–93, 97.

<sup>29</sup> *Id.* at 145.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 141–42.

arguments spread across 91 pages of dense text, and I imagine you are grateful that I don't intend to try.

One of the notable aspects of the Massey/Fletcher debate was how much they agreed upon. Both agreed that *Han* was wrong. Both agreed that views on the scope of state sovereign immunity during the Framing era were unsettled. And in their last exchange, both conceded that there will always exist some uncertainty about the intended or best meaning of the Eleventh Amendment, because the historical record is so sparse and confused.<sup>32</sup> But, they also of course disagreed.

So what happened? In *Pennsylvania v. Union Gas*, the Court (by a bizarre 4-1-4 vote) upheld Congress's Commerce Clause authority to lift state sovereign immunity,<sup>33</sup> a result supported by Fletcher. Calvin's position was more subtle. He would have permitted this lawsuit in federal court if *Union Gas* was a Pennsylvania citizen, but *not* if it was a citizen of another state<sup>34</sup>—a fact which the Court ignored, because it only mattered under Calvin's approach. Regardless, seven years later in *Seminole Tribe of Florida v. Florida*,<sup>35</sup> the Court (with new membership) overruled *Union Gas*, and adopted the position (still good law today) that Congress may not abrogate Eleventh Amendment immunity pursuant to its Article I powers<sup>36</sup>—though it remains the law that Section 5 of the Fourteenth Amendment does authorize such abrogation.<sup>37</sup>

So who was right, Calvin or Fletcher? Honestly, I have no idea. Unlike Vik Amar and Evan Lee, I am no Federal Courts scholar, and I've avoided the Eleventh Amendment avidly in my own scholarship. I don't even teach it in Constitutional Law. Both positions are plausible, and both have both strengths and weaknesses. What I am confident about, however, is that Calvin and Fletcher were both undoubtedly correct that *Han v. Louisiana* is wrong. Yet almost thirty years after that debate, *Han* is still good law.

### III. CALVIN THE SCHOLAR

What are we to learn from this saga? First, how frustrating it is to be a law professor, to be right, and to be ignored by the courts. But seriously, I think this debate illustrates some very important points about Calvin's scholarship, and his broader intellectual legacy. The starting point, of course, is the care, thoroughness, and extraordinary rigor that went into all of his work. His 1989 article really is a prodigy—it struck me as such as a second

---

<sup>32</sup> Massey et al., *supra* note 6, at 118, 121–22, 139.

<sup>33</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

<sup>34</sup> Massey, *supra* note 1, at 149–50.

<sup>35</sup> 517 U.S. 44 (1996).

<sup>36</sup> *Id.* at 57–73.

<sup>37</sup> *Id.* at 65–66; *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).



year law student, and my view was reaffirmed when I reread the article this past summer.

The other noteworthy aspect of this sequence of events was that despite deep differences among the participants, they all treated one another with extraordinary respect and courtesy, and freely conceded that the people they disagreed with were not only not crazy, but indeed perfectly reasonable. Calvin thanks Fletcher as a friend in his first author's footnote.<sup>38</sup> Fletcher's reply thanks Calvin and both Professors Marshall, naming them as friends.<sup>39</sup> And in the final set of letters, everyone is willing to concede the strength of some of the opposing arguments, and some of the potential weaknesses of their position (though unsurprisingly no one retreated much). I believed in 1989–1990, and I continue to believe now, that this exchange provided a model of how scholarly debate is supposed to proceed.

Finally, something distinctly Calvin. In the Eleventh Amendment debate, the main positions have taken on a distinctly partisan aspect (as I guess has almost everything else in constitutional law these days, and in our society more broadly). “Liberals” favor the diversity thesis of Fletcher, Amar et al. “Conservatives” stick to *Han* and broad state sovereign immunity. *Han* remains the law, and indeed has been extended (and *Union Gas* overruled) because of a series of close, 5-4 votes along ideological lines. (As an aside, divides used to be ideological not partisan—Republican appointees like Souter, Stevens and Blackmun might be “liberal,” while Democratic appointees like White might be “conservative.” No longer.) Likewise, views on these issues in the academy also tend to match partisan preferences.

Not Calvin. His argument rejecting the diversity thesis was “conservative,” because it entirely forbade some federal question lawsuits in federal court against the states. On the other hand, his position on Congress's power to abrogate state sovereign immunity in cases not within the text of the Eleventh Amendment was “liberal,” because it empowered Congress vis à vis state governments. This is typical. Calvin is one of the very few constitutional scholars of whom I can honestly say that his scholarship reveals essentially nothing about his politics. His view (I remember him sharing it) was that scholarship was about thoroughness and intellectual rigor. If that took you to a liberal place, so be it. If it took you to a conservative place, so be it. Truth trumps politics. Calvin is sorely missed for so many reasons—it is hard to recount them all. But in 2016 his rigor, his rationality, and his commitment to the truth above all are in particularly short supply, and are particularly missed.

---

<sup>38</sup> Massey, *supra* note 1, at 61 n.†.

<sup>39</sup> Fletcher, *supra* note 3, at 1261 n.†.