



THE PRESIDENT AND THE BOARD OF TRUSTEES
OF
WILKES UNIVERSITY
CORDIALLY INVITE YOU AND YOUR GUEST TO ATTEND
THE TENTH ANNIVERSARY CELEBRATION OF
THE MAX ROSENN LECTURE SERIES
IN LAW AND HUMANITIES

TUESDAY, APRIL 30, 1991 — 8:00 P.M.
THE ARNAUD C. MARTS SPORTS AND CONFERENCE CENTER

GUEST SPEAKER
THE HONORABLE JOHN PAUL STEVENS
THE SUPREME COURT OF THE UNITED STATES

THE HONORABLE A. LEON HIGGINBOTHAM, JR.
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
WILL INTRODUCE JUSTICE STEVENS

A RECEPTION HONORING
JUSTICE STEVENS, JUDGE HIGGINBOTHAM, AND JUDGE ROSENN
WILL FOLLOW THE LECTURE — 9:15 P.M.

Please respond by April 22, 1991

JUSTICE JOHN PAUL STEVENS

A native of Chicago, Justice John Paul Stevens was nominated by President Nixon to the United States Court of Appeals for the Seventh Circuit. He was confirmed by the United States Senate in October and took the oath of office in November of 1970. President Gerald Ford nominated him as an Associate Justice of the United States Supreme Court in December 1975. Confirmation by the Senate followed and he took the oath of office on December 19, 1975.

A graduate of the University of Chicago Laboratory School, Justice Stevens earned his bachelor's degree in English Literature from the University of Chicago. He earned his law degree magna cum laude from Northwestern University and served as Co-editor of the Illinois Law Review.

In 1947 he began his law career as a clerk to the Honorable Wiley Rutledge, Associate Justice of the United States Supreme Court. Admitted to the Illinois Bar in 1949, Justice Stevens remained in Chicago until his appointment to the United States Court of Appeals, first as an Associate with Poppenhusen, Johnston, Thompson and Raymond and, two years later, as a Partner with Rothschild, Stevens, Barry and Myers.

Justice Stevens has served as a lecturer in Antitrust Law at the Law Schools of Northwestern University and the University of Chicago. He was also a member of the faculty for the Salsburg Seminar in American Studies in 1978, and for the Appellate Judges Seminar at the New York University School of Law in 1979.

Other prestigious assignments in his legal career have included: Associate Counsel to the Subcommittee on the Study of Monopoly Power Committee on the Judiciary of the House of Representatives, a member of the Attorney General's National Committee to Study the Antitrust Laws, and Chief Counsel to the Special Commission appointed by the Illinois Supreme Court to investigate integrity of the judgment of *People vs. Isaacs* in 1969.

Justice Stevens is a member of the Illinois Bar Association, Chicago Bar Association, Federal Bar Association, American Law Institute, and the American Judicature Society. Author of more than two dozen legal writings, he is the father of one son and three daughters.



***The Tenth Anniversary
Celebration
of the
Max Rosenn
Lecture Series
in
Law and Humanities***

Tuesday, April 30, 1991
8:00 p.m.

**WILKES UNIVERSITY
Arnaud C. Marts Center**

The Honorable Max Rosenn



**THE HONORABLE
MAX ROSENN**

Senior Judge

United States Court of Appeals

The Honorable Max Rosenn, Senior Judge of the United States Court of Appeals, Third Circuit, has made innumerable contributions to the enrichment of the region, to state government, and to the federal judiciary. In recognition of his exceptional contributions, the Judge's former law clerks, family, and friends established **The Max Rosenn Lecture Series in Law and Humanities** in November 1980.

Judge Rosenn and his wife Tillie, lifetime residents of the Wyoming Valley, have two sons, Reith and Daniel, and six grandchildren. After receiving his undergraduate degree from Cornell University and his LL.B. from the University of Pennsylvania, Judge Rosenn returned to the area to begin his legal career. Upon concluding military service in the South Pacific during World War II, he resumed the practice of law for another twenty-five years until his appointment to the Court of Appeals. President Nixon appointed him to the federal judiciary on October 7, 1970; last year marked Judge Rosenn's twentieth anniversary on the bench.

Throughout his career as a public servant, Judge Rosenn's contributions have spanned many fields, including law, government, public welfare, education, health, and religion.

The former Secretary of Public Welfare for the Commonwealth of Pennsylvania and Chairman of the Pennsylvania Human Relations Commission is a life member and trustee of the Jewish Community Center. Since 1970, Judge Rosenn has also served as a trustee of Wilkes University and, following the flood of 1972, aided his community as chairman of the Flood Recovery Task Force for Wyoming Valley.

Judge Rosenn is a member of the American, Federal, and Pennsylvania Bar Associations; a Fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers, a member of the American Judicature Society, and of the American Law Institute. He is a founding member of the Council of the American Society of Law and Medicine and was an associate editor of the American Journal of Law and Medicine. Judge Rosenn holds a number of honorary degrees and has received numerous public service awards.

The Guest Speaker



JUSTICE

JOHN PAUL STEVENS

United States Supreme Court

A native of Chicago, Justice John Paul Stevens was nominated by President Nixon to the United States Court of Appeals for the Seventh Circuit. He was confirmed by the United States Senate in October and took the oath of office in November 1970. President Ford nominated him as an Associate Justice of the United States Supreme Court in December 1975. Confirmation by the Senate followed and he took the oath of office on December 19, 1975.

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Author of many legal writings, he is a member of several Bar Associations, the American Law Institute, and the Judicature Society. Justice Stevens is the father of four children.

Guest Lecturers

Rosenn Lecture Series 1982-1991

Anthony Lewis

Columnist, New York Times

Edwin Newman

Correspondent, NBC News

Joseph J. Sisco

Former Undersecretary of State in Political Affairs

Richard Schifter

Former U.S. Ambassador to United Nations

Henry Steele Commager

Historian, Professor of Law, Amherst College

Bettina Gregory

Senior Correspondent, ABC

Malcolm Toon

Former U.S. Ambassador to the Soviet Union

Nina Totenberg

Legal Affairs Correspondent, National Public Radio

Ambler Moss

Dean, School of International Studies, University of Miami

John Paul Stevens

Justice, U.S. Supreme Court

*The Honorable A. Leon Higginbotham, Jr.,
Chief Judge, United States Court of Appeals
for the Third Circuit in Philadelphia,
will introduce Justice Stevens.*

The Max Rosenn Lecture Series was established in 1980 by the judge's former law clerks, friends and family in recognition of his tenth anniversary as a Judge of the United States Court of Appeals for the Third Circuit, and in appreciation for his many contributions to the field of law, to the United States judiciary system, and to the quality of life in the Commonwealth of Pennsylvania.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

A. LEON HIGGINBOTHAM, JR.

Circuit Judge

22613 United States Courthouse
Independence Mall
601 Market Street
Philadelphia, PA 19106-1792
(215) 597-9157

*Dear Chris,
I think that
you will enjoy this
reaction from a
"Pro" on the lecture.
Max.*

Honorable Max R
U.S. Circuit Juc
229 U.S. Courthe
197 South Main
Wilkes-Barre, P

Dear Max:

I have not attended a grander lecture, and in my view Justice Stevens' presentation was spectacular. I have always admired his extraordinary talent, and his presentation was one of the most refreshing I have heard.

I regret deeply that I could not stay for the reception and that Evelyn could not make it.

My fear is what can be done to come close to match the extraordinary 10th Lecture? The presence of so many citizens in the audience was a tribute to your extraordinary contributions over the years to improve the quality of life and justice, not only on the national scene, but, more important, also in your own community. I have always been more impressed by a person's standing in his or her local community, because I think that status is a candid reflection of the community's evaluation and esteem.

Again, with congratulations and warmest regards, I am

Sincerely,

Leon
A. Leon Higginbotham, Jr.

ALH/mcm

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UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

CHAMBERS OF
MAX ROSENN
JUDGE
UNITED STATES COURTHOUSE
WILKES-BARRE, PENNSYLVANIA 18701

May 2, 1991

Dear Chris,

I congratulate you again on the very successful lecture. Because of the nature of the subject and its uniqueness, I was somewhat apprehensive that the audience at large might be unable to appreciate and enjoy it. I am happy to say that from what I can gather, the audience was enthusiastic and those who had some difficulty with the subject matter, understood that it was because of their own shortcomings. Nonetheless, they realized they were a part of history and that it was an important hour in their lives.

The number of requests for a copy of the speech attests to the impression Justice Stevens made.

Thank you very much for the role you played in a memorable evening and for the usual élan and superb quality you gave it. I also thank you for the personal tribute you paid me.

I had a delightful time riding back with Justice and Mrs. Stevens and they apparently enjoyed driving to Wilkes-Barre with you.

Again, my deep appreciation for your continued support and leadership in the lecture series.

Sincerely,

Max

MAX ROSENN LECTURE—WILKES UNIVERSITY
THE SHAKESPEARE CANON OF STATUTORY CONSTRUCTION

By
JOHN PAUL STEVENS
ASSOCIATE JUSTICE
SUPREME COURT OF THE UNITED STATES

Wilkes-Barre, Pennsylvania
Tuesday, April 30, 1991

The Shakespeare Canon of Statutory Construction

The Duke of Gloucester, later King Richard the III, began his opening soliloquy with the famous line: "*Now* is the winter of our discontent . . ." The listener who at first assumes that the word "*now*" has reference to an unhappy winter soon learns that war-torn England has been "*made glorious by the sun of York.*" It is now summer not winter and "*grim visaged war has smoothed his wrinkled*" forehead. Words—even a simple word like "*now*"—may have a meaning that is not immediately apparent.

Like the seasons, periods of war and peace come and go. As times change there is also a fluctuation in perceptions about the importance of studying humanistic values and their relationship to rules of law. Nevertheless, a society that is determined and destined to remain free must find time to nourish those values. The plays and poems of William Shakespeare, sometimes collectively described as the "*Shakespeare Canon*" are, perhaps, the most stimulating and exciting works in the English language. Canons of statutory construction, in contrast, are probably the dullest materials that law students read. Judge Max Rosenn is a literate and just man, learned in both the dull and the fascinating aspects of the administration of justice. This School bears the name of an English politician who did not hesitate to challenge unorthodox views. For these reasons, I have decided that this lecture should include a mixture of comment on two apparently unrelated subjects: first, on the unorthodox view that Edward De Vere, the seventeenth Earl of Oxford, is the true author of the Shakespeare Canon and second, the utility of certain canons of statutory construction in the search for truth and justice. Because Shakespeare's plays are typically divided into five acts, I must, of course, discuss five canons of statutory construction.

ACT I

The First Canon of statutory construction is rather obvious: "*Read the statute.*" The Supreme Court has reminded us over and over again that when federal judges are required

to interpret acts of Congress, they must begin by reading the text of the statute. As one rather weary opinion writer explained: "If the intent of Congress is clear, that is the end of the matter, for the courts as well as the agency, must give effect to the unambiguously expressed intent of Congress." Although this proposition is universally accepted, debate often arises over the question whether there is ambiguity in the text, and if so, how far behind that text the judge may go in the quest for the author's intended meaning.

The text of the First Folio, published in 1623, seven years after William Shakespeare's death, unambiguously identifies him as the author of the Shakespeare Canon. Moreover, respected scholars are virtually unanimous in their conviction that the man from Stratford-on-Avon is the author of the masterpieces that are attributed to him. Nevertheless, questions that were raised by such skeptics as Mark Twain, Walt Whitman, Henry James, John Galsworthy, and Sigmund Freud still intrigue those mavericks who are persuaded that William Shakespeare is a pseudonym for an exceptionally well-educated person of noble birth who was close to the English throne. Edward DeVere, the seventeenth Earl of Oxford was such a person.

If we could find an original draft of one of Shakespeare's plays, or an excerpt in his own handwriting—or even a signed statement identifying himself as the author—we would have the kind of unambiguous evidence of authorship that would put an end to the matter. But the evidence of Shakespeare's handwriting that we do have is of an entirely different character. It consists of six signatures on legal documents, each suggesting that merely writing his name was a difficult task and, remarkably, that his name was Shaksper rather than Shakespeare.¹ Indeed, the references to the man from Stratford in legal documents usually spell

¹ See Ogburn, *The Mysterious William Shakespeare*, p. 120. Ogburn's comprehensive and interesting volume contains the primary current exposition of the arguments in favor the Earl of Oxford's authorship. He credits John Thomas Looney with the scholarship that identified DeVere's identity. See *id.*, at 145-146.

the first syllable of his name with only four letters—Shak—or sometimes Shag, or Shax—whereas the dramatist's name is consistently rendered with a long “a.” For that reason, the protagonists of the Earl of Oxford's cause make a point of distinguishing between Shaksper and Shakespeare. In this respect, they are, in effect, relying on the first canon of statutory construction. In response, the Stratfordians point out that signatures, like statutes, should be read in their contemporary context, that incorrect spelling was common in Elizabethan England, and that we should always be conscious of the possibility of a scrivener's error. This response, like the Oxfordian response to the text of the First Folio, indicates that this is a case in which we must go beyond the First Canon.

ACT II

The Second Canon of statutory construction is much like the first: “Read the *entire* statute.” Courts often tell us that the meaning of a particular statutory provision cannot be divined without reading the entire statute. Similarly, the more of Shakespeare's writing that we read, the more we learn about him. At least, that is the position that the Oxfordians advocate.

As evidence of the author's probable noble birth, they point out that all but one of his plays—*The Merry Wives of Windsor*—are about members of the nobility. The contrast between Shakespeare's characters and the commoners, such as the alchemist or the miser, about whom his contemporary Ben Jonson wrote, is striking. Even more striking is Shakespeare's repeated reference to nobility as the highest standard of excellence. The question that a lonely Hamlet asked himself was “whether it is nobler in the mind to suffer the slings and arrows of outrageous fortune, or take arms against the sea of troubles and by opposing end them.” In the first act of *Macbeth*, when Duncan proclaimed his succession, he noted that “signs of nobleness, like stars, shall shine on all deservers.”² When Mark Anthony wanted to explain to Ju-

² Act 1, Scene 4, line 41.

lius Caesar why there was no reason to fear Cassius, it was enough merely to state: "he is a noble Roman and well given."³ And after the conspirators had been defeated, Anthony gave Brutus the highest possible praise by referring to him as "the noblest Roman of them all."⁴

Shakespeare's account of the events that took place on the Ides of March may shed light on his views about the common man. When Julius Caesar walked through the streets of Rome, the crowds greeted him with unmixed enthusiasm—obviously in favor of offering him the crown. But when he was brutally murdered in full view of countless witnesses, a few well-chosen words from Brutus, the leader of the murderous gang, were sufficient to satisfy the crowd and earn their unquestioning support. Then a few minutes later Mark Anthony's marvelous address to his "friends, Romans, and countrymen" had the mob, once again, convinced that Caesar was their hero. Admittedly, it was a great speech, but how much respect for the common man does this sort of flip-flop describe? Perhaps the answer is found in Casca's description of the crowd's reaction when Caesar refused the crown for the third time:

"[A]s he refus'd it, the rabblement howted, and clapp'd their chopp'd hands and threw up their sweaty night-caps, and utter'd such a deal of stinking breath because Caesar refus'd the crown, that it had, almost, chok'd Caesar, for he swoounded, and fell down at it; and for mine own part, I durst not laugh, for fear of opening my lips and receiving the bad air."⁵

Of course, the author of such a comment need not be of noble birth, but it seems appropriate to pause to take note of the fact that Edward DeVere was not an ordinary nobleman. In her biography of Queen Elizabeth, Carolly Erickson, after relating contemporary gossip about the Queen's relationship with the Earl of Leicester, had this to say about DeVere:

³ Julius Caesar, Act 1, Scene 2, line 197.

⁴ Act 5, Scene 5, line 68.

⁵ Julius Caesar, Act 1, Scene 2, lines 245-352.

"But it was not only Leicester who was widening his circle of conquests. Elizabeth too, it was said, was seducing handsome young men and keeping them under surveillance by her well-paid spies when they were not in amorous attendance on her. Prominent among these favorites was Edward de Vere, earl of Oxford, a boyish, hazel-eyed young courtier whose expression combined poetic languor and aristocratic superciliousness. Oxford excelled at those courtly graces Elizabeth admired. He was athletic and acquitted himself brilliantly in the tilt-yard, dashing fearlessly, lance lowered, against any and all comers and retiring the victor despite his youth and slight build. He was an agile and energetic dancer, the ideal partner for the queen, and he had a refined ear for music and was a dextrous performer on the virginals. His poetry was unusually accomplished, and his education had given him a cultivated mind, at home with the antique authors Elizabeth knew so well." Erickson, *The First Elizabeth* (1983), p. 267.

When Edward DeVere was 11 years old, his father died and he became a royal ward in Sir William Cecil's household. Cecil, also known as Lord Burghley, was the Queen's principal adviser and a master of intrigue who controlled an elaborate network of spies. In Hamlet, the character Polonius, is unquestionably a caricature of Burghley.⁶ His position as

⁶"There is nothing original in pointing out that Polonius is clearly based on old Lord Burghley—merely in showing how close the resemblance is in detail. Lord Treasurer and the Queen's leading minister, he had been Southampton's guardian, whose granddaughter the young Earl would not marry and had been made to pay for it. All the Essex faction detested the politic old man, who was irremovable until his death in 1598; after that it was safe to portray him as Polonius.

Hamlet describes Polonius to his face: "old men have gray beards, their faces are wrinkles, their eyes purging thick amber and plumb tree gum . . . together with most weak hams." Those who are familiar with Burghley's letters in his last years well know that they are full of his querulous complaints about his health, the weakness of his limbs, his gout, his running eyes: "I am but as monocolus' (one-eyed), he writes.

advisor to the King, his physical appearance, his crafty use of Rosencrantz and Guildenstern to try to ascertain the cause of Hamlet's antic disposition, and his employment of Reynaldo to spy on his own son, Laertes, while away at school, are all characteristic of Burghley. One who had lived in his house, as DeVere did, and therefore had first-hand knowledge of Burghley's use of a spy to report on the activities of his oldest son, could well be responsible for the scene including Reynaldo—a scene that seems to have no purpose except to illuminate Polonius'—or Burghley's—character. The suspicion that there is an autobiographical element in Hamlet increases when one recognizes the parallel between Hamlet's relationship with the fair Ophelia—the daughter of Polonius—and the fact that at the age of 21 DeVere married Ann Cecil, the daughter of Lord Burghley.

These are, of course, only tiny fragments from the text of the Shakespeare Canon. They are sufficient, however, to lead us to the Third Canon of statutory construction.

ACT III

This Canon is much like the first and second, but it adds the requirement that the text be read in its contemporary context. In the case of *Cannon v. The University of Chicago* the Supreme Court tells us that "it is always appropriate to assume that our elected representatives, like other citizens, know the law [and that an] evaluation of congressional action [at a particular time] must take into account its contemporary legal context." 441 U. S. 677, 696-699. The Third Canon therefore tells us that we should direct our at-

One clue to Burghley's hold on power was his remarkable intelligence system. This is clearly rendered in Polonius' interview with Reynaldo, setting him to spy on his son's doing in Paris and report on them. Burghley's elder son, Thomas, had had an unsatisfactory record in France and been similarly reported. Burghley's famous Precepts, however, were for his clever younger son, Robert—Essex's enemy: Polonius has a similar set for his son, while his perpetual moralizing is Burghley all over—it drove the young men mad, all the more because the old man was all powerful and wise, though prosy and pedestrian." A. L. Drowse, *The Annotated Shakespeare* (1988 ed.), 1725-1726

tention to the 16th Century context that produced the genius who created the Shakespeare Canon.

In those days relatively few people could read and write the English language, and those who were familiar with the leading works of Latin and Greek literature were even more scarce. Edward De Vere was such a person. In Lord Burghley's home he received instruction from the most accomplished tutors in England and later received degrees at both Cambridge and Oxford and became a member of Gray's Inn. As a young man he earned a reputation as a gifted writer. To the extent that literary skill is a product of education and training, De Vere's academic credentials attest to his unique qualifications.

On the other hand, we know little about the education of William Shaksper, the man from Stratford-on-Avon. Both his father and his daughter, who was married to a physician, were apparently illiterate. William did not attend Oxford or Cambridge and, indeed, there is no record of his attendance at any school. It is the assumption that his formal education was much too limited for him to have acquired the largest vocabulary of any author who ever lived that has led other authors like Mark Twain and John Galsworthy to doubt his authorship of the Shakespeare Canon.

Knowledge of the contemporary context provides these possible answers to this concern. The illiteracy of his daughter is merely a reflection of the universal gender discrimination that permeated Sixteenth Century England; except for persons of noble birth, education was for males, not females. Even though his father may have been uneducated, he achieved success in business in Stratford and occupied an important public office. Moreover, the quality of the secondary education that was available to the sons of leading citizens in towns like Stratford-on-Avon was of a high quality. It is not unreasonable to assume that a good high school education is all that was needed to nurture the genius of Shakespeare to full flower.

The most telling contemporary argument, however, is found in Ben Jonson's tribute to Shakespeare in the introduc-

tion to the First Folio. Because Jonson must have been well acquainted with his leading competitor as a successful dramatist, these words take on special significance:

*"And, though thou hadst small Latin and less Greek,
From thence to honour thee I would not seek
For names; but call forth thundering Aeschylus,
Euripides, and Sophocles . . .
To life again, to hear thy Buskin tread
And shake a Stage; . . .*

The emphasis is, of course, on the words "though thou hadst small Latin and less Greek" as evidence that the author of the Shakespeare Canon was a man of limited formal education.

The Oxfordians, however, are not without a contemporary reply. They argue that the words "though thou hadst small Latin and less Greek" were ambiguous because the word "though" sometimes conveyed the meaning "even if." Thus, the use of this ambiguous term may have been a conspiratorial ploy to preserve the anonymity of the true author of the canon. If you find this rejoinder a little hard to swallow, perhaps you should reflect on the ambiguity in another equally famous line by Jonson—"drink to me only with thine eyes." Is this a plea for his lover's abstinence asking her not to drink to him with anything but her eyes? Or, more probably, is it a subtle invitation to drink only to Jonson—to save her inviting glances for him alone. Does the word "only" modify the noun "eyes" or the pronoun "me"?

ACT IV

Since ambiguity persists, we must turn to the fourth canon of statutory construction. If you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history.

The study of legislative history is itself a debatable and complex subject, including subtopics such as the respective importance of committee reports, debates on the floor of Congress, and the fact that a proposed bill that would have unambiguously resolved the point at issue was not enacted. It

also requires an ability to discount comments manufactured by staff members to appease lobbyists who were unable to persuade legislators to conform the statutory text to their clients' interests. As Chief Justice Rehnquist observed in a dissenting opinion a few years ago:

"The effort to determine congressional intent here might better be entrusted to a detective than to a judge. . . . While I agree with the Court that the phrase 'any other final action' may not by itself be 'ambiguous,' I think that what we know of the matter makes Congress' additions to § 307(b)(1) in the Clean Air Act Technical and Conforming Amendments of 1977 no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime."¹

For present purposes, I shall confine my analysis of the Fourth Canon to the Sherlock Holmes' principle that sometimes the fact that a watchdog did not bark may provide a significant clue about the identity of a murderous intruder. The Court is sometimes skeptical about the meaning of a statute that appears to make a major change in the law when the legislative history reveals a deafening silence about any such intent.

This concern directs our attention to three items of legislative history that arguably constitute significant silence. First, where is Shakespeare's library? He must have been a voracious reader and, at least after he achieved success, could certainly have afforded to have his own library. Of course, he may have had a large library that disappeared centuries ago, but it is nevertheless of interest that there is no mention of any library, or of any books at all, in his will, and no evidence that his house in Stratford ever contained a library. Second, his son-in-law's detailed medical journals describing his treatment of numerous patients can be examined today at one of the museums in Stratford-on-Avon. Those journals contain no mention of the doctor's illustrious father

¹ *Harrison v. PPG Industries, Inc.*, 446 U. S. 578, 595-596 (1980) (dissenting opinion).

in-law. Finally—and this is the fact that is most puzzling to me although it is discounted by historians far more learned than I—is the seven-year period of silence that followed Shakespeare's death in 1616. Until the First Folio was published in 1623, there seems to have been no public comment in any part of England on the passing of the greatest literary genius in the country's history. Perhaps he did not merit a crypt in Westminster Abbey, or a eulogy penned by King James, but it does seem odd that not even a cocker spaniel or a dachshund made any noise at all when he passed from the scene.

ACT V

The Fifth Canon of statutory construction requires judges to use a little common sense. This canon is expressed in various ways. An interpretation that would produce an absurd result is to be avoided because it is unreasonable to believe that a legislature could have intended such a result.⁶ Both the Oxfordians and the Stratfordians believe this canon provides the answer to the authorship question. The traditional scholars consider it absurd to assume that William Shakespeare, who is known to have made a fortune as an investor in the Elizabethan theatre, if not also as an actor and playwright, was just a front for a gifted author who, for reasons unknown, elected to conceal his true identity from posterity. They point out that at least one of Shakespeare's plays, the *Tempest*, is generally considered to have been written several years after De Vere's death, and that the explanations for his use of a pseudonym depend on highly improbable theories of conspiracy, for at least Ben Jonson and Lord Burghley would surely have known the true identity of the author of the Shakespeare Canon. Nothing short of a royal command could have induced the author to remain anonymous.

The Oxfordians respond to the argument that it is absurd to claim that De Vere authored a play that was first published several years after his death by pointing out that there is great uncertainty about the dates when the plays were actu-

⁶ See e. g., *Holy Trinity Church v. United States*, 143 U. S. 457, 459.

ally written. They also suggest that the possibility of a royal command may not be so absurd after all because Queen Elizabeth made an extraordinary grant to DeVere. Using a formula that was characteristic of special payments to members of the Secret Service, on June 26, 1586, she signed a privy seal warrant granting DeVere an annuity of 1,000 pounds per year for which no accounting was to be required. This was an unusually large amount at the time and the grant continued for the remaining 18 years of DeVere's life, it having been renewed by King James.⁹ The Queen, it appears, may have been a member of the imaginative conspiracy and for reasons of her own may have decided to patronize a gifted dramatist, who agreed to remain anonymous while he loyally rewrote much of the early history of Great Britain.

Whatever one may think of the Fifth Canon as a method of analyzing the authorship question, before I leave the subject I want to refer briefly to three cases that suggest that the Fifth Canon should tell us something about justice. Two of them are cases decided by William Shakespeare, whoever he may be, and the third was decided by the Supreme Court of the United States.

In the *Merchant of Venice*, as security for a loan of 3,000 ducats, Antonio promised that if he should default, Shylock could have a pound of his fair flesh "to be taken and cut off from whatever part of his body" might please Shylock. As might have been predicted, Antonio did default and Shylock demanded literal performance of the terms of the bargain. In the end, however, justice was served by Portia's even more literal interpretation of the bond:

"Tarry a little, there is something else. This bond doth give thee here no jot of blood;
The words expressly are 'a pound of flesh.'
Take then thy bond, take thou thy pound of flesh,
But in the cutting it, if though dost shed
One drop of Christian blood, thy lands and goods

⁹B. M. Ward, *The Seventeenth Earl of Oxford 1550-1604*, at 255-263 (1928).

Are by the laws of Venice confiscate
Unto the State of Venice."¹⁰

Although Portia's ruling may seem somewhat technical, she was actually making a just application of the Fifth Canon of statutory construction.

In *Measure for Measure*, Claudio was sentenced to death for the crime of fornication. Since Julietta was pregnant and hence there was no question about Claudio's guilt, and since the text of the law was perfectly clear, Angelo (who had been left in charge of law enforcement by the Duke) had no choice but to insist on literal application of the statute. Otherwise, as he explained, he would

"[M]ake a scarecrow of the law,
Setting it up to [frighten] the birds of prey,
And let it keep one shape, til custom make it
Their perch and not their terror."¹¹

Nothing, of course, could be more damaging to the fabric of society than allowing the law against fornication to deteriorate into a mere scarecrow. Accordingly, it was imperative that the death penalty be administered without delay.

Fortunately for Claudio, however, three Acts later, the all powerful Duke reappeared and pardoned him in the nick of time. Unlike the Merchant of Venice, in which justice was served by using one literal reading of the bond to trump another, in *Measure for Measure*, the Duke simply enforced the Fifth Canon without pausing to explain why any other result would have been unjust and absurd.

My final words are about a little known decision of the Supreme Court that averted the danger that a federal statute would turn into a toothless scarecrow. For background I must remind you that for a century and a half, the United States enjoyed the same sovereign immunity that Queen Elizabeth and King James possessed during Shakespeare's time. It was not until 1946, when Congress passed the Fed-

¹⁰The Merchant of Venice, Act IV, Scene I, lines 307-311.

¹¹Measure for Measure, Act II, Scene I, lines 1-5.

eral Tort Claims Act, waiving the defense of sovereign immunity, that the United States could be sued for damages caused by the negligence of Government employees.

Eighteen years earlier, Congress had enacted the Mississippi Flood Control Act of 1928 to authorize a major land acquisition and construction project to control overflow and damage along the banks of the Mississippi River where it was impracticable to construct levies. A section of that Act—I shall call it the “pound of flesh” provision—stated that “no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.”

In the ensuing decades Congress has authorized the expenditure of countless millions of dollars to construct additional flood control projects, many of which produce artificial lakes and recreational facilities. Unfortunately, a number of people have been killed or seriously injured in those facilities. The case of *United States v. James*, 478 U. S. 597 (1986), arose out of a tragic accident in the reservoir behind the Millwood dam in Arkansas. As the result of what the District Court found to be worse than gross negligence, enormous underwater portals were opened without adequate warning and water skiers were caught in the unforeseen swift current and hurled against the dam’s tainter gates. Some drowned and others suffered permanent injuries. As other innocent victims of the negligence of federal employees had in the past, representatives of the injured parties in the *James* case brought suit against the Federal Government under the Federal Tort Claims Act. The lower federal courts were divided on the question whether the pound of flesh provision enacted in 1928 in connection with the Mississippi River project should protect the United States from liability in such cases.

As you can see, the issue is much like the one that confronted Portia and the Italian Duke. For the Government based its defense on the plain language found in the text of the 1928 statute. The plaintiffs responded by arguing that the pound of flesh provision applied only to the Mississippi

project, that it had been impliedly repealed by the Federal Tort Claims Act which contained its own set of special defenses for the Government, and that in any event the use of the word "damage" rather than "damages" indicated that the statute did not apply to personal injury cases.

Although three dissenters including the Portia that now graces our Court, would have applied a modern version of Portia's jot of blood argument—using a narrow interpretation of the word "damage" to trump the majority's reliance on the First Canon of statutory construction—the majority ruled in the Government's favor. It relied, of course, on the First Canon of statutory construction, buttressed by the principles espoused by Angelo and Shylock. Sadly, there was no Italian duke to arrive on the scene in the nick of time and apply the Fifth Canon of statutory construction. Even more sadly, this is the kind of case—involving the average citizen rather than a nobleman who can command legions of well armed lobbyists—that is not apt to interest a busy Congress.

It is cases of this kind—and they appear in a variety of forms—that sometimes make me feel that now is a season of discontent. Judge Rosenn and I have lived long enough to learn, however, that like the seasons, judicial opinions about canons of statutory construction and the relationship between law and justice tend to come and go. The fear that a particular law may become a toothless scarecrow, and that if judges are ever allowed to extract a single tooth from any part of a venerable code of laws, the entire code may disintegrate, is a fear that experience teaches wise judges to discount in appropriate cases. Accordingly, no matter how unhappy a particular winter may be, in due course, it is sure to be followed by other seasons that will be "made glorious by the sun of York."

Thank you for inviting me to share this evening with you.