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JUSTICE JOHN PAUL STEVENS (Ret.)

UNIVERSITY OF TEXAS LAW REVIEW ASSOCIATION'S ANNUAL BANQUET

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This evening I plan to say a few words about four exceptionally fine lawyers with ties to both the University of Texas Law School and the Court of Appeals for the Seventh Circuit on which I served from 1970 until 1975. I plan also to make a brief comment on the scope of a common law rule that masquerades as an unwritten rule of constitutional law in the opinions of a number of creative Supreme Court Justices.

The first lawyer, Leon Green, was not only a Texas graduate but also taught a torts course at Texas at both the beginning and the end of his long career as a law professor. Leon Green was the Dean of the Northwestern School of Law when I was a member of the first post-World War II class of entering freshmen in the fall of 1945. He was both an intimidating and

inspiring teacher, who made his students stand when responding to his interrogation about assigned cases. His theory, I believe, was that if a student could not withstand the pressure of intense, hostile questioning on his feet in class, he would never survive in a courtroom. Under Dean Green's leadership, Northwestern provided its students with what I think of as a vertical rather than horizontal education, placing greater emphasis on procedure and the differing roles of judges and juries in different categories of cases than on the content of the black-letter rules that supposedly apply across the board in all types of cases. In my work as an appellate judge, I was repeatedly impressed by how often the outcome of a case depends on identifying the correct decision-maker rather than the correct rule of law. I am sure that there are countless Texas lawyers who share my admiration for Leon Green and for his writing about judges and juries.

A special target of both Dean Green's scholarly writing and his teaching in class was the doctrine of "proximate cause". Undue emphasis on that issue of causation tended to impede rather than to enhance the ability of judges and jurors to answer the more important question whether the defendant's wrongful conduct breached a duty owed to the plaintiff in a particular case. His criticism of that doctrine was a part of his larger view of legal education. Dean Green preferred the fact-specific approach that he associated with the law schools of Yale and Northwestern to the more rule-oriented approaches of Harvard and Michigan. A case decided by the Supreme Court earlier this year illustrates the difference between Dean Green's and Yale's approach to the law and Harvard's fondness for black-letter rules. Writing for the majority in *Pacific Operators Offshore, LLP* v. *Valladolid*, Justice Thomas—a Yale Law School graduate—interpreted the Outer Continental Shelf Lands Act to provide workers' compensation benefits for an employee who can

"establish a substantial nexus between the injury and extractive operations on the shelf".[1] Justice Thomas refused to endorse the separate writing of a Harvard graduate, Justice Scalia, who would have required that the worker's injury be "proximately caused by operations on the Outer Continental Shelf."[2] I am sure Leon Green would not have been persuaded by Justice Scalia's suggestion that introducing the doctrine of proximate cause into the analysis would have provided greater certainty to the law.

One of Dean Green's former students is the second Texan with a Seventh Circuit connection that I remember with special admiration: Justice Tom C. Clark. After Justice Clark retired from the Supreme Court, he continued to do judicial work in various parts of the country. He presided at a trial in San Francisco in which I represented Charles O. Finley, the owner of the Oakland Athletics' baseball team, in a controversy over the enforceability of a long-term concession contract

[1] No. 10-507, 565 U. S. ___ (2012).
[2] *Id.* (Scalia, J., concurring).

that Connie Mack had signed many years earlier when the team was located in Philadelphia. My adversary suggested that I was wearing a bow tie just to make a favorable impression on the judge, who had a reputation for having excellent taste in bow ties. The suggestion was inaccurate and unfair to both Tom and me, but our shared preference for bow ties did enhance our friendship when we later sat together on the Seventh Circuit Court of Appeals. For most of 1972 our court, which then included eight active judges, was effectively working at half-strength. Judges Fairchild, Cummings and Pell were occupied full-time with the notorious Chicago Seven conspiracy case, which involved charges related to protests during the 1968 Democratic National Convention,[3] and Judge Otto Kerner did not sit because he was under indictment.[4] We relied heavily on visiting judges to keep abreast of our work. Tom Clark was a frequent visitor, and also the most helpful. He insisted on writing the opinions in the

[3] *United States* v. *Dellinger*, 472 F. 2d 340 (CA7 1972).

[4] See *United States* v. *Isaacs*, 493 F. 2d 1124, 1131 (CA7 1974) (per curiam).

criminal cases with large and complicated records that raised the least interesting but most time-consuming issues, because that was how he could be most helpful to us. And he promptly responded to our circulating drafts with either a simple join or a constructive suggestion. He was the kind of congenial colleague that every appellate judge likes and admires. I especially cherished the friendship that we formed then and maintained thereafter.

You may find it surprising that the third Texas lawyer I shall mention, Doug Laycock, has a Seventh Circuit connection. Some of you may also question his qualification as a Texan because he left your faculty a few years ago and now teaches law at the University of Virginia, where his wife is the President of the University. In any event, after Doug graduated from the University of Chicago Law School in 1973, he clerked for Judge Walter Cummings on the Seventh Circuit. Walter was an exceptionally efficient judge, regularly completing his draft opinions more promptly

than anyone else on the court even though he hired only one law clerk. That year our court heard a number of cases in which conscientious objectors were prosecuted for refusing to report for induction into the armed services.[5] My clerk that year, Steve Goldman, felt so strongly about the underlying issue in those cases that I agreed to excuse him from working on them. Not only did I feel that I would be able to handle them without the assistance of a law clerk, but I also knew that Doug was available to lend me a hand if necessary. Although that need did not arise, Doug did work with me on two of my opinions that year. It was the quality of that help a good many years ago, rather than the fact that the brief he filed in the case challenging the constitutionality of school-sponsored prayer at Texas high school football games, and an amicus brief he filed in the case challenging the display of the Ten Commandments on the grounds of the Texas State Capitol, happened to support the views I expressed in my opinions in those cases, that accounts for his

[5] See, *e.g., United States* v. *Riely*, 484 F. 2d 661 (CA7 1973).

inclusion as one of my favorite Texas lawyers.[6] I have sometimes wondered, however, whether the conscientious objector cases that we heard during the year he clerked for Judge Cummings may have influenced the development of Doug's views about the religion clauses of the First Amendment of the Constitution.

It will not surprise you that the final Texas graduate I want to mention is Judge Diane Wood of the Seventh Circuit, but it may surprise you that it is her work on a sovereign immunity case, rather than the numerous other reasons why she is so widely and correctly recognized as a superb federal court of appeals judge, that I wish to discuss tonight. The case—*Board of Regents of the University of Wisconsin System v. Phoenix International Software*—arose out of a dispute between two owners of the same trademark.[7] In 1997, Phoenix International Software registered the

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[6] Compare *Santa Fe Independent Sch. Dist.* v. *Doe*, 530 U. S. 290 (2000), with Brief for Respondents, *Santa Fe Independent Sch. Dist.* v. *Doe* (No. 99-62); and compare *Van Orden* v. *Perry*, 545 U. S. 677, 707 (2005) (Stevens, J., dissenting), with Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner, *Van Orden* v. *Perry* (No. 03-1500).

[7] 653 F. 3d 448, 450 (CA7 2011).

name "CONDOR" as the mark identifying its software programs, and four years later, the University of Wisconsin registered the same mark to identify a different category of software.[8] In 2004, relying on a likelihood of confusion between the two marks, Phoenix persuaded the Trademark Trial and Appeal Board to cancel the University's mark.[9] The University challenged that cancellation decision, not by seeking direct review in the Court of Appeals for the Federal Circuit, but instead by filing a new action in federal district court in Wisconsin.[10] In response to the University's complaint, Phoenix both defended the agency's cancellation decision and asserted counterclaims against the University.[11] The district court granted summary judgment in favor of the University, ruling that there was no likelihood of confusion between the application of the same mark to the two different categories of software, and that

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[8] *Id.*, at 450-451.
[9] *Id.*, at 451.
[10] *Ibid.*
[11] *Ibid.*

Phoenix's counterclaims were barred by Wisconsin's state sovereign immunity under the Eleventh Amendment.[12]

On appeal to the Seventh Circuit, the panel unanimously agreed that it was error for the district court to grant summary judgment on the likelihood of confusion issue, and therefore a remand for trial of that issue was necessary.[13] On the sovereign immunity issue, over Judge Wood's dissent, the majority also ruled that the University should prevail.[14] Diane's 47-page dissent is remarkable, not only for its scholarship, but also because it must have played a role in persuading her colleagues to have the sovereign immunity issue reheard by the panel after re-argument. Upon rehearing, Diane wrote a 63-page opinion, but this time not a dissent. Judge Wood spoke for a unanimous panel, which agreed "[t]here is no apparent reason . . . why the University of Wisconsin should be immune from

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[12] *Ibid.*; *Bd. of Regents of Univ. of Wis. Sys.* v. *Phoenix Software Int'l, Inc.*, No. 07-cv-665, WL 495 0016 (WD Wis. Nov. 18, 2008); *Bd. of Regents of Univ. of Wis. Sys.* v. *Phoenix Software Int'l, Inc.*, 565 F. Supp. 2d 1007 (WD Wis. 2008).

[13] See *Bd. of Regents of the Univ. of Wis. Sys.* v. *Phoenix Int'l Software, Inc.*, No. 08-4164 (Dec. 28, 2010) (slip op. at 38).

[14] *Ibid.*; *id.*, at 39-40 (Wood, J., dissenting).

lawsuits that Marquette University, a Catholic Jesuit institution . . . , would have to defend."[15] Her opinion for the panel is remarkable because it makes two profoundly important points about the scope of sovereign immunity.

First, she explained, sovereign immunity is a defense that can be waived; it is not an invariable rule that was designed or should be permitted to provide governmental entities with tactical advantages when they initiate litigation or elect to move it to a federal forum.[16] Second, the defense protects the kind of conduct in which English sovereigns engaged in the seventeenth and eighteenth centuries.[17] In the 1950s, when Communist governments of foreign nations assumed control of commercial enterprises, Congress and the State Department responded by adopting the restrictive theory of foreign sovereign immunity that excludes commercial activities from the coverage of the

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[15] 653 F. 3d, at 477.
[16] *Id.*, at 458-467.
[17] *Id.*, at 471-473.

defense.[18] Judge Wood pointed out that the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other hand, has its roots in a Supreme Court opinion written by Chief Justice John Marshall in 1823.[19] Neither then, nor a few decades earlier when the Constitution was adopted, would there have been any reason to extend the doctrine to protect the commercial activities of state agencies. Thus, even if we assume (which I do not) that the plan of the Constitutional Convention encompassed protection for activities like buying military supplies—which gave rise to *Chisholm* v. *Georgia*[20]—or the compensation of government law enforcement officers—which gave rise to *Alden* v. *Maine*[21]—there is surely no reason to assume that the Framers were concerned about commercial matters such as protection of trademarks issued to the University of Wisconsin.

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[18] *Id.*, at 474-475.
[19] *Id.*, at 475 (quoting *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U. S. (9 Wheat) 904, 907 (1823)).
[20] 2 U. S. (2 Dall.) 419 (1793).
[21] 527 U. S. 706 (1999).

I remain convinced that the majority in *Chisholm* correctly identified a basic distinction between the interest in preserving the dignity of divinely chosen sovereigns, on the one hand, and respect for the elected representatives of a democratic community, on the other hand. But even if we are to assume that the plan of the Convention silently incorporated a remnant of a royal prerogative into our basic charter, surely there is no reason to assume that they would have expected its expansion to include protection of commercial activities that sovereigns had never performed. Indeed, since engaging in such trade activities was beneath the dignity of the English monarch, and since the Supreme Court's recent opinions make it clear that the sole justification for the rule is to protect the dignity of the sovereign, there is not even any arguably sensible basis for applying the rule to commercial activities.

Let me make just one more comment on the Court's sovereign immunity jurisprudence. What started out as

a repudiation of *Chisholm's* refusal to endorse a common law rule and a generous interpretation of the Eleventh Amendment has changed into a modern-day interpretation of the "plan of the Convention" that preceded both *Chisholm* and the Eleventh Amendment itself. This development is particularly ironic because it assumes that members of the present Court majority have a better understanding of the unwritten intent of the Framers than the Justices who decided *Chisholm* in 1793. Even if the reaction to their decision demonstrates that the contemporary lawmakers wanted to preserve a common law rule, there is a world of difference between that reaction and an assumption that anyone intended that rule to become a part of the Constitution with far broader application than the Eleventh Amendment's own text. Perhaps Diane's opinions will generate some fresh thinking about an unjust and anachronistic rule.

Thank you for your attention.