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Deanell Reece Tacha

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The Federal Courts in the 21st Century

*Deanell Reece Tacha**

Good evening. It is a pleasure to be with you at this lively, relatively new law school. I want you to know that it is truly an honor to serve as the inaugural Chapman University School of Law Jurist in Residence. I share your enthusiasm for the potential that inherently resides in a new law school. Although you face all the challenges of a new endeavor, you have the great strength of a fresh beginning. Most law schools throughout this country are strengthened by their history and traditions, but they are also hampered by the same. They find it difficult to break from old ways of doing things, established teaching methods and the long ingrained norms of the profession. The Chapman University School of Law, on the other hand, has begun its *own* traditions with a focused eye to the future. A simple look through your course book, a scan of the faculty profiles, and a quick glance at your student body are enough to get a strong sense of your commitment to educating for a stronger legal profession in the future. I applaud you and I thank you for this opportunity to be with you.

I assume that it is because of this eye toward the future that you have asked me to address tonight the federal courts in the next century. Over the coming year, almost everyone will be, in one forum or another, pulling out their crystal balls and making predictions about just what it will be like in the next century and indeed in the new millennium. Now, I need to say that I have noticed two kinds of people in this millennial furor. The one kind are those that made reservations months ago for Rio or London or Times Square to ensure they are very much a part of the history-making change of the millennium—thus, seeing the occasion in millennial terms. The other kind recognizes that it is but a one-minute change in the hourglass of time, and that grand efforts to philosophize, theorize, and predict are no more than speculation indulging the ongoing curiosity of the human race. I fall in the first category, and my husband is in the latter. I am in what I call the "cataclysm class"—that is, those who cannot resist the urge to feel like the turn of this century is an extraordinary moment in history in which I am so lucky to participate. My husband, on the

* Circuit Judge, United States Court of Appeals for the 10th Circuit. B.A., University of Kansas, 1968; J.D., University of Michigan, 1971.

other hand, is in quite the other category. He refuses to make reservations anywhere and would prefer to be at home with our children, worrying whether they are driving appropriately and doing all of the other rather tradition-laden things that have been a part of our household every New Year's Eve. As I reflect on these two classes of people, I realize that, in some ways, we both reflect what it will take to go bravely into the new century. So it is with the legal profession. This rather stark contrast in the millennial moods has caused me to reflect somewhat more seriously on how the legal profession should approach the next century. I have come to understand that we must see it both as a rare opportunity—an important moment in history—and as a tiny point in an ever-evolving history and tradition that we must preserve. To see the turn of the century, for the law and for the courts, exclusively as a cataclysmic event or exclusively as a nonevent, is a mistake. Instead, it is, just as in my household, a time to reflect on the importance of both perspectives. For, after all, is that not the heart and soul of the common law—gradual change that sometimes has cataclysmic effects? If I were to put my predictions about the future of the federal courts into one phrase, it would be that: gradual change, sometimes with cataclysmic effects.

You have asked me to look into a magic mirror of sorts and consider what the federal courts might be like in the next century: with what cases they will deal, how they will function, and who will constitute the judges, lawyers, and litigants. I wish I had that all-knowing magic mirror that would reflect back to me some images from the future. I do not have such a valuable object. I have only law books of the past, a constitutional republic that has lasted over 200 years, and the bright hopes of new generations of Americans. *That* is the future of the federal courts. For as you look in the Federal Reporters 1st, 2d, and 3d, you see a reflection of that history and those hopes. It will be no different in the next century. Although, I daresay, it will not be in books. It will instead be in a far smaller reporting system.

Thus, tonight, instead of trying to look into some magic mirror, I would like to identify what I consider some predictors of the next century for the federal courts, and talk about how those predictors may give us a glimpse of the substance of the federal courts' work in the next century and how we will conduct that work. Envisioning where the courts will be in the 21st century necessarily entails looking at the past and the present, and then gauging the future by examining current demographic trends. I'll address each in turn.

For my first predictor of the future, I look back. The federal courts, along with the other two branches of the federal government and their counterparts in the several states, have stood the

test of time as the institutional guardians of our constitutional system. Little could those men in Philadelphia in 1787 have known of the challenges that this system of government would confront and survive. When I reflect upon the dynamics that are so much a part of the Constitution and our system of government as it is lived out at the turn of this century, I stand in awe of the idealism, sheer patriotism, and faith in the people of this nation that must have pervaded that Constitutional Convention. That idealism, patriotism, and faith in the people must persist and guide us—their millennial counterparts. Whether one reads the notes from the Constitutional Convention, or any of the historical materials of that day, one is reminded of the robust debate about forms of government and about protection of freedoms. We can be no less robust in our own consideration. Thus, as a predictor of the federal courts in the 21st century, I think we must begin with "first principles." The Chief Justice recently reminded us, in his opinion in *United States v. Lopez*,[1] that we base our entire scheme of government on a set of first principles. They are simple in the saying and enormously complex in the carrying out. They are those basic principles upon which this government was founded.

First and foremost, the sovereignty that is not specifically given to governments resides in the people.[2] Those resounding words that introduce the Constitution, "We the People . . . ," cannot become the hollow beginnings to a historical document. They must instead continue to underlie every action that every branch of government at the federal level and in all the states takes. We must continue to give them meaning in a society where it would be so easy to succumb to the rhetoric that individuals make very little difference. Individual sovereignty is not just an appealing phrase; it is the bedrock of our system of government and a weighty responsibility of the federal courts. It is one of those first principles that we cannot ignore, and one deserving re-emphasis in the clamor and bustle of a technological world.

Another first principle that will play a part in the federal courts is the careful protection of a federalist system[3]—a system where the sovereign states have vibrant, important roles to play in this republic: a place where the demarcations between state and federal action are clearer than I think they are today; a place where we understand that though regionalism may not be a necessity in the modern world, federalism is. Never, in my judgment, has it been more important for some part of government to be close to the people. Much of our population feels disenfranchised, anonymous, and certainly distanced from seats of power. In the

1 United States v. Lopez, 514 U.S. 549, 557 (1995).
2 *See id.* at 552.
3 *See id.*

face of these fears and perceptions, it would be exactly the wrong direction to retreat from the principles of federalism that were so carefully crafted by the Framers of the Constitution. It is no less true today than it was 200 years ago that some things are best done by the federal government and some are best reserved to the states. I worry that we have lost our collective understanding of what falls into which category.

The third first principle that will require vigilant attention is maintaining carefully the boundary lines among legislative, executive, and judicial powers.[4] In those carefully constructed first three articles of the Constitution lie a strength that no other nation in the world enjoys. By making the conscious choice to reject a parliamentary form of government, the Founders of this Constitution somehow had the prescience to know that an independent judiciary was necessary to an ordered government where the individual enjoys many of the accoutrements of sovereignty. I do not here exaggerate the role of the federal courts. Instead, I ask that each of the branches of government understand and carefully protect those time-tested limitations on each other's powers. As Congress has moved into more and more complex legislation-setting policy, it has become very difficult to legislate with precision on everything that is the subject matter of federal statutes. I think the same is true in the states. The result is that much is delegated to the executive branch, and the interstices are filled by the courts. The courts cannot fill those interstices unless there exists a case or controversy.[5] Agencies cannot act within statutes unless there is some directive.[6] Ascribing the best motives to executive agencies, they, along with the courts, inevitably become policy-makers. Somehow, the next century will require that we take a hard look at that first principle of the limitations on the powers of each of the three branches of government.

I add another first principle to this constitutionally based list. I add an educated citizenry—knowledgeable to undertake their citizenship responsibilities—to my list of first principles. I cannot help but think that the men in Philadelphia who crafted this government premised the entire government on what was then, and is now, a very idealistic belief that the citizenry would be both equipped to govern themselves and educated to govern themselves wisely. The anecdotal evidence that Americans are ill-informed, do not understand the courts or any other branch of government,

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4 *See id.*

5 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'").

6 *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREASTISE § 3.1 (1994) ("Every agency decision must be anchored in the language of one or more statutes the agency is charged to implement.").

and, worst of all, do not care, deeply troubles me. You all know of current examples—I will not recite them. In an information age, however, when those same voters will see only snippets and sound bytes of their government at work, I think we in the courts, and all of us as citizens, bear a special responsibility to reassert a first principle that the responsibilities of an educated citizenry are the responsibilities of each of us. We cannot hope to have respect for the courts, the rule of law, or government itself, if the people do not understand it nor participate in it. Thus, undergirding the constitutional principles is the guiding belief that the people are their own masters and the government will be only as vigorous as the level of education, interest, and commitment of the citizenry allows.

Let's look now at how these principles might impact the federal courts in the 21st century. The notion of individual sovereignty will be tested sorely in a highly populated and evermore complex society in the 21st century. The effort, for example, to meet the important needs of law enforcement in a sophisticated criminal culture, in which technology makes possible a host of investigative techniques, without trammeling the Fourth Amendment rights of individuals, will result in a challenge of the first order for the courts. Already, in the war against drugs, guns, terrorists, and other organized criminal activity, the federal courts struggle mightily with protecting those important interests of being safe in our homes and also free from unreasonable governmental intrusions. As you look through the Federal Reporters, you will see literally thousands of pages of federal judges struggling with the factual questions that try to draw these important lines between appropriate government activity and protection of individual rights.

In another arena, the glut of information made possible by the communication and technology age will require the courts to try to understand the freedoms of speech, press, and assembly protected in the First Amendment without totally obfuscating the individual sovereignty that resides in the people of this nation. More information means less privacy, which inevitably results in some circumscription of lawful individual activity. "We the People" is both a collective and an individual concept. It will no doubt be left to the courts to try to guard vigilantly that which is reserved individually to each of us as a sovereign person and those activities which are collectively within the realm of lawful federal or state government activity.

I also predict that the federal courts in the 21st century will engage in a century-long debate regarding the proper role of states in a mobile society, in which our economic life knows no state boundaries. Many scholarly debates have occurred in this century

over whether states are an anachronism. I think not. In my judgment, the Founders got it just right. Political subdivisions, in our case states, form the mainstay of a stable national government. To the extent that the activities of the national government render impotent the work of state governments, we will have removed some of the vibrancy from our system of government. I think, therefore, that states, the courts, and the federal government will look increasingly at rational ways to refocus on the role of the states in a federal system and to draw more clearly the lines between the reserved powers of the states and enumerated powers of the federal government.

From the beginning of the administrative state during the New Deal era, through the rest of this century with an ever-expanding reliance upon the Commerce Clause as a vehicle for federal action,[7] the federal government has moved in unprecedented ways in areas that were once understood to be within the reserved powers of the states. Let me give you an example from the criminal law. Until the past few decades, there were relatively few federal crimes on the books. As we developed a *USA Today* and *CNN* mentality that let us know instantly the crimes occurring across the nation, Congress began to make criminal, as a matter of federal law, many things that prior to that time had been matters of state law. There are now over 3000 federal crimes, many of which were added in the last two decades.[8]

The most distinctive feature of recent crime legislation is that the new federal crimes duplicate, to a large extent, offenses already illegal under state and local statutes. Some of that is appropriate. I remind you that, even at the time of the republic's founding, such things as treason on the high seas, piracy, and crimes against national security were matters of federal criminal law.[9] Perhaps large scale trafficking in guns and drugs are their contemporary analogue. The Constitution, however, very specifically reserves the police powers, the public health, safety, and welfare, to the states.[10] With the emerging concurrent jurisdiction of

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7 *See generally* 1 DAVIS & PIERCE, *supra* note 6, §§ 1.4-.7 (tracing the development of federal agencies).

8 *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 44 (1996); *see also* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 7 n.9 (James A. Strazzella rep., 1998) (stating that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970," and more than a quarter of such enactments have occurred since 1980).

9 *See* THE FEDERALIST No. 42 (James Madison) (articulating his view that the federal government should handle only such limited classes of crimes where state laws were impracticable).

10 *See* U.S. CONST. amend. X ("The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* U.S. CONST. art. I, § 8 (enumerating the powers of Congress).

the federal government, particularly in the area of drug enforcement, the role of the states is little different from the role of the federal government. Both the federal and state governments have statutes that allow prosecution of exactly the same defendants for exactly the same crimes in many cases, inevitably obfuscating the lines between those powers reserved to the states and those appropriately enumerated as federal powers. It is time to take a hard look at drawing rather clear lines between what is federal responsibility and what is state responsibility in law enforcement and criminal prosecution.

Both philosophically and pragmatically this line drawing is essential. The federal courts simply cannot adjudicate, nor can the federal criminal justice system handle, the escalating number of federal defendants and prisoners. That is the pragmatic problem. The more important philosophical issue, however, is that local law enforcement is often far more knowledgeable, more efficient, and better equipped to handle local criminal activity. Low level possession of drugs, petty crimes of all kinds, and even violence related to children are often far better handled in local settings by local professionals than when jettisoned to a faraway sovereign.

We have begun in the latter part of this century to witness a renewed focus on the role of states. In the *Lopez* decision, it appears that there may, in fact, be limits to the reach of the Commerce Clause as a threshold for federal activity.[11] Additionally, a recent series of Supreme Court decisions, including *New York v. United States*,[12] *Printz v. United States*,[13] *Seminole Tribe of Florida v. Florida*,[14] and *Idaho v. Coeur d'Alene Tribe of Idaho*,[15] shows renewed attention to the Tenth and Eleventh Amendments. Further, the vibrancy of state constitutions has become a source of considerable scholarly interest in the law.[16] Many state constitu-

11 *See* Unites States v. Lopez, 514 U.S. 549, 567-68 (1995) (striking down federal statute making it illegal to possess a firearm in a school zone because it exceeded Congress' power under the Commerce Clause).

12 New York v. United States, 505 U.S. 144, 177-88 (1992) (invalidating a provision of federal statute requiring states to "take title" to low level radioactive waste or regulate according to Congress' instructions because that provision went outside Congress' enumerated powers and was inconsistent with the Tenth Amendment).

13 Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (finding the Brady Act's interim provision commanding local enforcement officers to conduct background checks on prospective handgun purchasers unconstitutional).

14 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (holding that Eleventh Amendment prevents Congress from authorizing suits against States by Indian tribes to enforce legislation promulgated under the Indian Commerce Clause).

15 Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2043 (1997) (holding, in a highly fractured decision, that an action that was the functional equivalent of a quiet title action did not come within the *Ex Parte Young* doctrine and was barred by the Eleventh Amendment).

16 *See, e.g.*, Nina Morrison, Note, *Curing "Constitutional Amnesia": Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. REV. 880 (1998); Neil Coleman McCabe, *State*

tions provide protections that are not found within the federal constitution,[17] which was exactly the plan of the Founding Fathers. We should allow it to flourish, and we should encourage the laboratories of state governments as variations on the theme of federalism. Even in political rhetoric, we are hearing much about the vitality of state governments and their experiments that inform many public policy issues. No doubt, therefore, the federal courts in the next century will continue to scrutinize carefully the relationships among the various reservation clauses in the Constitution, the Bill of Rights, and the enumerated powers of the federal government.

The offspring of *Marbury v. Madison*[18] constitute one of the first principles that will spawn a constant stream of litigation in the next century, requiring the federal courts to police the boundaries among the three branches of government. Complex society means complex legislation. Complex legislation means much delegation and much court interpretation. There is evidence today that the courts are beginning to ask whether we have effectively carried out our role in the area of agency review. *Chevron*[19] analysis, which, even to the least knowledgeable attorney, is known as a moniker for deference to agency interpretation, has governed the last decade and a half. For all the right reasons, *Chevron* requires that courts defer to agency interpretation when a statute is ambiguous, or does not give specific mandates and leaves to agency discretion the carrying out of the legislative directive.[20] Since the demise of the old nondelegation doctrine[21] and the rise of the deference doctrine, few have questioned how far is too far in deferring to agency expertise. In the last decade, one sporadically sees Supreme Court and other federal court decisions that pay particular attention to the precise statutory language and require agency constraints that are faithful to that basic statutory language.[22] Sometimes the courts have proved the maxim that one judge's certainty is the next judge's ambiguity. Inherent in this

Constitutions and Substantive Criminal Law, 71 TEMP. L. REV. 521 (1998); G. Alan Tarr and Robert F. Williams, *Foreword: Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191 (1998).

17 *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

18 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

19 Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

20 *See id.* at 842-43; *see also, e.g.*, 1 DAVIS & PIERCE, *supra* note 6, § 1.7.

21 *See generally* 1 DAVIS & PEIRCE, supra note 6, § 2.6 (discussing the history of the nondelegation doctrine).

22 *See, e.g.*, City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 334, 339 (1994) (finding municipal solid waste incinerator facility was excluded from hazardous waste regulations, but ash generated by facility was not); Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 170-72 (1989) (rejecting agency interpretation of term in Age Discrimination in Employment Act because the interpretation conflicted with term's plain meaning).

renewed attention to agency review lies the question of what is really a subject of agency expertise and what is simply statutory language of common understanding. Recently I have been embroiled in a collegial battle over two different statutes, one of which requires defining "grazing"[23] and one of which requires defining "coal."[24] Both of them, I argue in written opinions, are terms very common to any elected legislator and, therefore, not the kind of term Congress intended to leave to agency definition.[25] Those cases are simply in the "stay tuned" category, but they presage a concern that I see woven through many recent cases about clarifying the breadth of the *Chevron* doctrine. I think this whole area of judicial review of agency action will, no doubt, constitute a lively source of litigation in the next century, as agencies become more and more specialized on more and more technical topics.

A constraint on the federal courts in this area will be their sheer capacity to understand and effectively review some of the issues that come before them. Appropriately, the federal courts have been courts of generalist judges. I firmly believe they should remain so. We have rarely, until very recently, even used special masters or magistrates to try to sort out complex issues. In agency review, as well as in complex civil litigation, the highly technical nature of the issues that judges must decide will present a special challenge to the federal courts. We began to feel these problems in the latter half of this century, as we confronted the effects of asbestos,[26] the ravages of tobacco,[27] and the pricing mechanisms in the deregulation of the energy industry.[28] Those problems will look like very simple fact patterns when compared with the ever-increasing sophistication of the technology that will come to us in the 21st century. For example, Judge Thomas Penfield Jackson, who is hearing the Microsoft antitrust case in the District of Columbia, has had to learn volumes about computer operating systems and software programming and development. That case is just a beginning. Somehow, the federal courts

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23 *See* Public Lands Council v. Babbitt, ___ F.3d ___, 1999 WL 64802 (10th Cir. Feb. 8, 1999).

24 *See* Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251 (10th Cir. 1998), *rev'd*, ___ U.S. ___, 191 S. Ct. 1719 (1999).

25 *See Public Lands Council*, 1999 WL 64802, at *24, 31-33 (Tacha, J., dissenting); *Southern Ute Indian Tribe*, 151 F.3d at 1267 (en banc) (Tacha, J., dissenting).

26 *See, e.g.*, Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997), *aff'g* 83 F.3d 610 (3d Cir. 1996).

27 *See generally* Jamey Pregon, *Casualties of the War on Tobacco: Can Farmers Survive the Anti-Tobacco Onslaught?*, 3 DRAKE J. AGRIC. L. 465 (1998) (summarizing the history of tobacco litigation); Richard A. Daynard & Graham E. Kelder, Jr., *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 34.

28 *See* Robert J. Michaels & Arthur S. DeVany, *Market-Based Rates for Interstate Gas Pipelines: The Relevant Market and the Real Market*, 16 ENERGY L.J. 299 (1995).

will have to be equipped to review very complex cases in a meaningful and constitutionally appropriate way.

My final constitutionally based principle is that of an educated citizenry capable of governing itself. Here, although all of us have a role to play, I believe that the courts, and judges particularly, have an especially important one. Although I have not been, and still am not, an advocate of allowing cameras in federal courtrooms, I am a zealot for judges and lawyers taking on a renewed role as advocates for the rule of law. In my view, in the last century, lawyers, for important and correct reasons, became so preoccupied with the financial imperatives of the profession that, to some extent, we retreated from the public lives of our communities. At the turn of this century, and up until World War II, lawyers dotted school boards, city councils, and civic groups of all kinds. It is my belief that, since that time, the numbers of lawyers in active volunteer and elected public service has plummeted. The profession is simply not as active in the civic life of our communities, nor in the lives of our young people, as we once were. Judges share the blame. In the crush of ever-increasing caseloads, and out of a concern for conflicts of interest or appearances of impropriety, we judges have retreated into our courtrooms, and off the highways and byways of the nation. Who better than the lawyers and the judges, who are trained in the law, to begin to re-infuse into the national conscience both an understanding of and a respect for this rule of law and this system of government that has served us so well? We are the best equipped for this public education process. Indeed, many of the Constitution's Framers and first advocates were themselves lawyers,[29] and they made their case for the Constitution in a public manner, through the publication of the *Federalist Papers*. We each must be a millennial Publius.

We need to get back in the schools, back in the Boy Scout and Girl Scout Troops, at the Boys' Clubs and Girls' Clubs, in the Rotary Clubs—everywhere we can be—articulating the basic principles that underlie the important guardians of our system. How many of you have been at cocktail parties or other adult gatherings in which someone voiced the popular view, "How can they let the criminals go?" How many of you articulated the basic principles that underlie Fourth Amendment protections or Sixth Amendment protections or the myriad of constitutional protections that are so important to our freedoms, and yet often entirely unknown or misunderstood by the general population? Similarly, in the wake of highly celebrated trials during which commentators

29 Over 30 of the 55 participants at the Constitutional Convention were lawyers. *See* Irah Donner, *The Copyright Clause of the U.S. Constitution: Why did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 374 (1992); FORREST MCDONALD, NOVUS ORDO SECLORUM 220 (1985).

questioned the jury system, how many of us have been in the civic clubs and in the classrooms describing why we have a jury system and what its values are? Our jury system was designed to help guard individual sovereignty. As a nation, we cannot afford to forget the checks and balances built into our system. An educated citizenry has little to do with individual cases, but everything to do with whether the courts and the rule of law can persist through the 21st century. We must see ourselves as civic educators. I say we have a massive undertaking on our hands.[30]

Those first principles were a set of heady historical and constitutional predictors. My next set of predictors derives from the nature of the courts themselves. Courts move at a slow and deliberate pace. Cataclysmic change is rare in the third branch of government. Instead, on a case by case, statute by statute, litigant by litigant basis, the courts have moved the law forward in a gradual, ever-evolving way. Once in a long while this gradual evolution results in cataclysmic change. To get from *Plessy v. Ferguson*[31] to *Brown v. Board of Education*[32] took more than a half a century. We cannot know today precisely what opinions of the latter 20th century will form the beginning steps in an inexorable march to some similar monumental change in our understanding of the law. I am certain, however, that the deliberative pace of change in the judicial branch will not alter greatly in the next century. The work of the courts inevitably follows the work of the other two branches of government, and continues to play out many years after the executive or legislative branches have acted. The 21st century will be no different. Similarly, the personnel in the executive and legislative branches changes rather dramatically every four or eight years. Not so in the courts, for within the judicial branch of the federal government is a check and balance system of its own. Due to lifetime appointments and the political forces in the appointment process, courts are composed of judges appointed by several administrations and confirmed by several different Senate majorities. Often, the leadership in the judiciary was appointed by a President of a different political party than the one currently occupying the office. Thus, a part of the largely invisible vitality of the judiciary is the interplay among different kinds of individuals with different backgrounds who continue to interact in the judicial branch long after those who put them there have disappeared from the political scene—in a sense, keeping the leaders of the recent past in constant, robust conversation with those of the present.

30 *See generally* Deanell Reece Tacha, *Renewing Our Civic Commitment: Lawyers and Judges as Painters of the the "Big Picture,"* 41 U. KAN. L. REV. 481 (1993).

31 Plessy v. Ferguson, 163 U.S. 537 (1896).

32 Brown v. Board of Educ., 347 U.S. 483 (1954).

Although this situation is a result of politics, it is also a counterbalance against prevailing political pressures, and one of the hidden geniuses behind our system of government. The long tenure of most federal judges, particularly as we live longer and longer, gives a continuity and a balance to the third branch of government that rarely moves far off a gradual centrist approach to decisionmaking. Another way of saying it is that the judiciary, by its very nature, is a correction built into the system to calm political winds that might otherwise develop into destructive storms. Some describe the courts as an anchor. De Tocqueville noted that lawyers in the common law system tend to be a stabilizing force;[33] the judiciary serves a similar function for our government. I see no evidence that there is likely to be any change in the basic structure of our judicial branch of government. Thus, we can continue to expect, just as we have for 200 years, that the federal courts will, in their plodding, deliberative way, keep on the same path that was begun with the Constitution and the Judiciary Act of 1789.[34]

Courts will continue to change at a very gradual pace, but we *will* change. Here I look at the way that we do business. I do not have to tell you that the caseload in the federal courts, and in every state court in this nation, is escalating at an almost astonishing rate, without a concomitant rise in the numbers of judges. The political, and even fiscal, ability of the federal Congress and the state legislatures will never be able to add judges, courtrooms, and staff on any formula that is consistent with the growth of the caseload into the next century. Although there will be a gradual increase, as public budgets allow, of these emblems of the judicial branch, the caseload will continue to escalate at an ever-increasing pace, requiring dramatic changes in our methods of operating. Some attempts have been made in this century to begin to address this explosion of litigation. In 1938, reforms in the Federal Rules of Civil Procedure encouraged open communication of evidence and early settlement based on better predictability of trials.[35] The notion of judicial case management began to emerge around 1970.[36] The whole explosion in privatized case management, mediation, arbitration, and alternative dispute resolution of the latter part of this century has been a response to delay and heavy caseloads. Congress passed the Civil Justice Reform Act in 1990

33 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 267-70 (J.P. Mayer ed. & George Lawrence trans., Harper & Row, 1st Perennial Library ed. 1988).

34 Act of Sept. 24, 1789, 1 Stat. 73 (1789).

35 *See* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1518 (1998).

36 *See id.* at 1519.

in an attempt to address the problems of delay in civil litigation.[37] Videotaped depositions began to be used in federal court in 1993.[38]

Just this last year, my court, the Tenth Circuit, began to experiment with videotaped oral arguments. In a recent law review article, Professor Paul Carrington of the Duke Law School talks about "virtual civil litigation," and speculates that there may come a time when both trial and appellate courts are "virtual courtrooms," where everyone is electronically connected and very little is done on a face-to-face, personal basis.[39] I have great respect for Professor Carrington, but I do not think that our justice system will ever go that far. I know that we will increasingly use technology to try to cut delays, speed the caseload, and minimize costs. After just a few opportunities to be involved in videotaped arguments, I am absolutely certain that the entirely electronic courtroom, where no one actually appears in person, will not be the prevailing model, even throughout the 21st century. That model will, of course, have its place. Videotapes will be commonplace. Faxed and electronically transmitted information, filings, and documents will be the norm. Good litigation skills will be defined quite differently in the 21st century than they are today. In place of the archetypal vigorous advocate before a jury, or analytical and thoughtful argument in an appellate court, the premium will be on precise and focused communication, facility with electronic devices of all kinds, and the use of technology as an advocacy and analytical tool. I am skeptical, however, that technology can ever adequately replace face-to-face contact with juries and judges, for it is in the nature of credibility that we be there at the trial. It is in the nature of an appellate argument that we converse with each other. We can do some of that with videotape. My experience thus far is that videotape is not as informative for the judge, nor as effective for the advocate, as an oral argument presented personally. I also worry about the collegial relationships among appellate judges who are distanced and connected only by three or nine video hookups. In my opinion, collegiality is also an important qualitative factor in our work.

Focusing specifically on appellate courts for a moment, you are no doubt aware that the Commission on Structural Alternatives for the Federal Courts of Appeals, which was appointed by Congress a couple of years ago, and chaired by Justice White, re-

37 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994)) (requiring each federal district court to develop and implement a civil justice expense and delay reduction plan for the purposes of improving case management, reducing litigation costs, and promoting efficiency).

38 *See* Carrington, *supra* note 35, at 1521.

39 *See generally id.* at 1524-37.

cently submitted its report.[40] Concerns about the size of the Ninth Circuit spurred much of this report, but the Commission studied all of the circuit courts in the nation. The recommendations contained in that report underscore my gradual change theory. The Commission recommends no specific changes in the geographic boundaries of circuits,[41] thus confirming my predictor that change in the federal courts will take place gradually. The Commission does, however, recommend that the circuit courts look at new ways of handling en banc proceedings and summary dispositions.[42] All of the recommendations go to more flexibility and more capacity in the federal courts of appeals, without losing the qualitative benefits of collegial courts.

My final set of predictors is much more demographic, much more obvious, and no less compelling. They relate to who we are and how we will live in the 21st century. I have said that the Federal Reporters are filled with the history of the people of this nation, and if one looks carefully at the stories in those cases, one sees a mirror image of life on the highways and byways of America. So we need to look as a predictor at those highways and byways of America in the 21st century. What will we be like? I will not bore you with all the statistics, but I will tell you what you already know. The first is that we will live closer and closer together. It is estimated that by the year 2025, 59% of the world's population will live in urban areas compared with 32% in 1955.[43] The number of mega-cities, that is, populations exceeding 10 million, will increase from one in 1955, to 20 or 30 within the next 15 years.[44] In my part of the country, the number of farms is decreasing at an ever more rapid rate. Thus, we'll rub elbows and shoulders, be in traffic, confront the sanitation problems, and suffer the effects of a growing world population in ways unknown in the 20th century. This forecast has implications for immigration, employment, schools, every aspect of our economy, and how we live together.

Second, information and communication technology will give us the increasing ability to do technologically those things that were unimaginable in this century. That technology will have its extraordinary positive effects and its debilitating negative effects. Federal courts will have to be right there with that development of technology—a challenge we have only begun to face.

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40 COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (1998).

41 *See id.* at 59-62.

42 *See id.* at 62-64.

43 *See* World Health Organization, *Health Futures: Creating a Healthier Future Now*, FUTURIST, Jan. 1999, at 64.

44 *See id.*

The health issues of this population will change enormously. For example, the World Health Organization expects that tobacco will kill 10 million per year by the year 2025.[45] In industrialized countries, heart disease, stroke, and cancer will remain the leading causes of death, although the long-term total deaths from heart disease and stroke will decline while deaths from some cancers, no doubt spurred by carcinogens, will increase. The growing threat of emerging infectious diseases, such as HIV, AIDS, and Hepatitis C, likely will continue to escalate because of antibiotic resistence and changes in human behavior. Technology will dramatically affect issues relating to life's beginning and life's end. Additionally, environmental issues, some of which are known and many of which are not known, will emerge as critical policymaking issues for the future. The continuing deterioration of the environment, along with a lack of adequate water for the world's population and a lack of renewable energy resources, will increasingly drive foreign policy and public decisionmaking generally.

In each of these demographic facts lie legal dilemmas that will be foisted upon the federal courts. The boundaries between ethical choices and scientific decisionmaking will become more and more blurred with the resulting ambiguities in our understanding of that which is right and that which is destructive. Thus, courts will be thrust into the chasm of those ambiguities to try to help society make some of its most difficult decisions.

The inescapable demographic fact is that we will be very diverse. Now, here in Southern California diversity may be the norm already, but in most of the nation and, I think it is true, in many of the power bases of the nation, diversity has not become a reality. Learning to live and govern together in such a heterogeneous society may constitute the greatest challenge of the next century, and we'll see its reflections in the courts. Just as *Brown v. Board of Education* changed the landscape in this century, there will be decisions in the not so distant future that will have a similar millennial cataclysmic effect on the way we live out our national ideals together.

Finally, the days of nations that live their economic lives within their boundaries are over for good. The 20th century has taught us that we could not live within our boundaries in carrying out our relationships with the rest of the world. Instead, we engaged in two world wars, the Korean war, the Vietnam conflict, and hundreds of unnamed skirmishes in the name of freedom and national integrity. Freedom and national integrity will be no less important in the next century, but we will be forced to seek new

45 *See* Lucien J. Dhooge, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 358 (1998).

ways to relate with each other in an international economic and social culture, while still preserving the integrity of our national systems of government. It is clear from current world events that this will be a challenge indeed. Again, the courts of this nation will feel the effects. Today, in the onslaught of immigration and political asylum cases, we are increasingly feeling the reverberations of unstable economies and governments around the world.

Now let me speculate a bit on what effects these demographic factors will have on the federal courts. Some are so obvious as to seem elementary. We will live in a very crowded society. The effects of crowding alone will have a massive impact on the federal courts. In a crowded society, crime is more prevalent, particularly when that society has an ever-increasing gap between the haves and have nots. Thus, I see no evidence that there will be a tailing off in the 21st century of attention to law enforcement and the consequent adjudication of criminal cases. Today, approximately a quarter of the federal court caseload is devoted to criminal cases and cases brought by prisoners.[46] The proportion of the load of the federal courts devoted to these cases has increased dramatically during the last 20 years. That trend shows no sign of abating significantly.

The effects of crowding are far more expansive than criminal activity. Individuals will seek to vindicate their rights against the government and against each other at an ever-increasing rate. In the last decades of this century, actions are being brought under 42 U.S.C. § 1983 for violations of constitutional rights at an unprecedented rate.[47] In these cases, citizens are alleging that the government, in a myriad of ways, is trampling upon their individual sovereignty. They are claiming constitutional rights, some meritorious and some not, but almost all the result of closer proximity.

We will also be brought closer together with people very different from ourselves, with the resultant ugly side of discrimination, harassment, and intolerance. Through federal antidiscrimination laws, beginning with those famous Reconstruction-era civil rights acts[48] and continuing through the Civil Rights Act

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46 *See Nature and Number of Civil Suits Filed in the Federal Courts in 1995* (chart), NAT'L L.J., Aug. 26, 1996, at A5 (reporting 63,550 prisoner petitions out of 248,335 civil actions filed in federal courts in 1995); *see also* Daniel J. Juceam, *Privatizing Section 1983 Immunity: The Prison Guard's Dilemma After* Richardson v. McKnight, 117 S. Ct. 2100 (1997), 21 HARV. J.L. & PUB. POL'Y 251, 264 n.85 (1997) (noting that in some U.S. district courts, up to 34% of the caseload consists of prisoner lawsuits).

47 Indeed, in 1966, the number of prisoner cases filed was only 218, see William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 611 (1979) (noting that federal courts did not report this statistic until 1966), compared with 63,550 in 1995, see *supra* note 46, a 2910% increase.

48 *See* The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982, 1987-1989 (1994)); The Enforcement Act of 1870, ch. 114, 16 Stat.

of 1964[49] and the Americans With Disabilities Act of 1990,[50] Congress has been active in trying to provide redress for acts of discrimination and harassment. No doubt those statutes and others will continue to be central in the litigation of the federal courts in the next century as we live and work more and more closely with people who are evermore different from each other in language, ethnicity, and personal characteristics.

Perhaps nothing will affect the federal courts more than the explosion of the technological age and the specialization it spawns. From patent and trademark to antitrust, and from securities transactions to tax questions, technology will bring into the courtroom and into appellate records complex factual considerations that will tax the abilities of the federal courts to continue to make informed decisions. The use of experts has become commonplace and will increasingly be a staple of the 21st century courtroom. Drawing lines between the appropriate and inappropriate use of experts, and, at the same time, minimizing the costs of litigation, will be challenges of their own. The Supreme Court's *Daubert*[51] case, which most recently addressed the gatekeeper function of the federal courts in qualifying experts, forms just the beginning of a long and torturous process of attempting to ensure that the decisionmakers receive adequate information for fair and impartial decisionmaking, without escalating the cost and complexity of litigation beyond the capacity of litigants, judges, and juries.[52] Again, the lawyer of the future will necessarily have a new set of skills. She will be one who can simplify explanations, diagram problems, and clarify complex fact situations. For legal education, this new model of the successful lawyer suggests very new educational approaches.

There is a bright light in all of this. One of the reasons I love being a judge, and the reason I hear cited most often by my colleagues, is that we never get bored. Well, the 21st century will present us with such new concepts, facts, and legal situations that it is quite clear that we will never get bored. I think the federal

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140 (1870) (repealed 1894); The Civil Rights Acts of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985-1986 (1994)); and The Civil Rights Acts of 1875, ch. 114, 18 Stat. 335 (1875) (declared unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883)).

49 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 5 U.S.C., 28 U.S.C. & 42 U.S.C.).

50 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12189, 12201-12213 (1994)).

51 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

52 The Supreme Court recently held that the gatekeeping function served by the trial judge under Fed. R. Evid. 702 applies to testimony based on technical and other specialized knowledge as well as scientific knowledge. *See* Kumho Tire Co. v. Carmichael, ___ U.S. ___, 1999 WL 152455 (Mar. 23, 1999). Thus, trial judges have the discretion to consider one or more of the *Daubert* factors, and any other appropriate considerations, in determining the reliability of expert testimony.

judiciary is up to the challenge, but it will be a challenge indeed to keep up with subject matter of litigation.

Similar to technological challenges, the health issues of the 21st century will have a predominant place in litigation in the federal courts. We have, in this century, been intimately involved with every development in medical science and research. From reviewing approval procedures in agencies, to determining disabilities, to valuing the catastrophic effects of new procedures gone wrong, the federal courts have been thrust into the middle of the medical and health advances of this century. That trend will only escalate in the 21st century. The spread of new infectious diseases will raise the specter of the injection of government and government agencies into more and more regulation, sanitation, and environmental factor cases.

This century, we dealt with all of the CERCLA[53] and environmental clean-up issues that were the result of our lack of knowledge about the potent dangers of dumping various hazardous substances. The environmental challenges of the next century will make CERCLA cases look easy. The threat of ozone deterioration, climate change, lack of water, loss of species, and rampant carcinogens will be at the forefront of federal court litigation in the next century.

Also related to the health issues will be the inevitable human decisions stemming from advances in technology. Federal courts in this century were the cauldrons in which the questions of abortion[54] and right-to-die boiled.[55] In the next century, those will be but a few of the volumes of new decisions that must be made. Who gets organ transplants, who will make the decisions with respect to genetic selection, what rights does the government have in making choices about drugs, therapies, technologies, and the like will all have to be decided. The implications of cloning and genetic engineering are only beginning to infuse our consciousness. Those decisions will no doubt pervade the lives of the federal courts over the next century. Within the last year, major national conferences were held that brought together scientists from the Human Genome Project and federal and state judges to try to begin to think about the legal principles that might help us to guide the law and the courts into this new world of medical and scientific breakthroughs.[56] At the end of those conferences, I wish you could have

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53 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994).

54 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

55 *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990); Washington v. Glucksberg, 521 U.S. 702 (1997).

56 These conferences include: *The Human Genome Project: Science, Law, and Social Change in the Twenty-first Century*, held on April 23, 1998, in Cambridge, Massachusetts,

seen both the excitement and the sheer terror of both the judges and the scientists as they thought of the implications for humane society that the decisions in this area will have. Indeed, just as science threatens to outrun our ethics, it threatens to outrun the law.

The globalization of the world economy means the 21st century will be the century in which the federal courts finally have to learn international law. As you are no doubt aware, the United States has not been a signatory to many of the major international compacts. Even where we were signatories, these international compacts barely affected the work of the federal courts. Once in a while, we have seen a forum non conveniens case or an international contract. Rarely have we seen the principles of international law, and even more rarely have we applied them. In my view, it is inevitable that just as the Euro has burst upon the European market, international law will burst upon the world. Companies have become multinational and business is globalizing. Though I doubt that we will ever transform totally toward a civil law model, we have gradually done so over this century, moving more and more towards statutory causes of actions and away from the common law model. The infusion of international compacts, treaties, and agreements will no doubt move us even further in that direction. For example, the Vienna Sales Convention of 1980,[57] which the United States has signed, replaces the Uniform Commercial Code in many international business transactions. Whether or not the United States becomes signatory to additional significant international compacts, there is absolutely no doubt that regulatory issues, contracts, and technological exchange will propel even the federal courts of the United States into the world market of ideas and legal principles.

The Internet is a powerful reminder of the international significance of legal principles uniquely national in character. The Internet knows no national boundaries and renders everyone with net access a speaker and a publisher. The leafleting of the constitutional era are the web pages of today. The application of the First Amendment, so sacrosanct in American history, will necessarily impinge upon the people and sovereign powers of nations far beyond our borders. The values related to respect for national integrity will be challenged mightily by the worldwide flow of information.

Finally, to *how* the federal courts will do this work! One prediction I feel reasonably safe in making is that the first few years

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and *Courts and the Challenge of Genetic Testing*, held on Oct. 21-24, 1998, in Snowbird, Utah.

57 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex I, *reprinted in* 19 I.L.M. 668.

of the 21st century, and perhaps the entire century, will be consumed in large measure with trying to promulgate and adopt new rules for electronic courtrooms, virtual trials, and all of the ramifications of technology for the operation of the courts. I am also reasonably certain that, just as the need for big libraries with books will be gone, so will the need for big courtrooms and courthouses. But what a treasure civilization will have lost if we allow ourselves to be captured wholesale by the enticements of a complete transformation to a technological way of doing things. Just as the rare scrolls of long ago have been so important in informing us, so will our books and courtrooms be emblems of this century, of the achievements of civilized society for the future. The courts, I suspect, as they always have been, will be foot draggers—ploddingly, glacially moving into the 21st century in a way that does not produce many cataclysms, but allows the hours to tick forward case-by-case, building upon 200 years of history. That is how we have operated; that is how I predict we will operate. We will, in some ways, be an appropriate drag on the system as we attempt to balance our reliance upon the past with the protection of the dreams of the future.

So who will we be, the judges, the lawyers, and the litigants of the 21st century? We will be the people that Thomas Jefferson, Benjamin Franklin, John Adams, and Abigail Adams, placed their faith in over 200 years ago. We will be the millennial patriots. We will need to recognize that the millennium represents two equally important points in time: the cataclysmic change of a thousand years and the single tick of a minute. The federal courts will be there doing both.

I leave you with an important admonition: we in the federal courts will be able to carry out our historic function only if you will join with us in a profession-wide effort to reinvigorate our national understanding of the "first principles" that have preserved the legacy of freedom that has been ours to enjoy in this century. Some years ago I wrote a poor imitation of a Dr. Seuss poem about the legal profession. In that poem, after reflecting on the evolution of his legal career, the wise old senior partner of a prosperous large law firm flings open the door of his office and regales the young associate with the admonition that I leave you with tonight to take us into the 21st century:

> You lawyers are the keepers of the dreams of the world
> You've watched as repressions and dictators swirled
> You know that the freedoms that served you so well
> Are the words of the story that you now must tell.[58]

58 *See* Deanell Reece Tacha, *The Tale of Widget and P: A Story of the Legal Profession*, KAN. J.L. & PUB. POL'Y, Spring 1993, at 127, 130 (1993).