

# WESTERN LEGAL HISTORY

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*Cover Photograph:* Big Sky, Montana, was the site of the 2001 Ninth Circuit Judicial Conference. (Courtesy of Big Sky Resort)

# ROMANCING THE WEST

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HONORABLE M. MARGARET McKEOWN

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"What's past is prologue."

—William Shakespeare

**S**hakespeare's oft-quoted perspective of history—his shrewd observation in *The Tempest* that we should learn about history to understand and appreciate the present and forecast the future—regularly generates paraphrases by historians and philosophers, perhaps most famously by George Santayana, who decreed that "those who cannot remember the past are condemned to repeat it."<sup>1</sup> Unfortunately, this admonition only irregularly stirs us to recognize why some forces remain constant and others change as a result of historical development. With this perspective in mind, and as the Ninth Circuit enters its second century of existence, the executive committee of the Ninth Circuit Judicial Conference chose to focus our 2001 gathering in Big Sky, Montana, on how history has shaped the circuit—in terms of its legal landscape, its physical environment, and its population.

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The Honorable M. Margaret McKeown is a judge on the United States Court of Appeals for the Ninth Circuit. She served as the chair of the 2001 Ninth Circuit Judicial Conference. Judge McKeown extends special thanks to the Honorable Michael Hogan (District of Oregon), who chaired the program committee of the conference; Renee Lorda, assistant circuit executive, who coordinated the conference; and her 2001–2002 law clerks for their assistance in editing this volume: Maia Goodell, Ellis Johnston, David Schlesinger, and Nirej Sekhon.

<sup>1</sup>George Santayana, *The Life of Reason, Introduction and Reason in Common Sense* (New York, 1905), 284.

We began the conference with a dramatic presentation by Meriwether Lewis,<sup>2</sup> whose expedition with William Clark was pivotal in the westward expansion. An overview of the expansion would be incomplete without reference to Native Americans. Rennard Strickland, dean and Phillip H. Knight Professor of Law at the University of Oregon Law School, provided a unique pictorial critique of the depiction of the American Indian in the cinema.<sup>3</sup> Then Patricia Limerick, professor of American studies at the University of Colorado at Boulder, offered a historian's perspective on the development of the West. These presenters were followed by several panels of historians, legal scholars, lawyers, and scientists addressing such issues as immigration, fishing rights, and the environment. The transcripts that follow, which are excerpted from the presentations, illustrate the range of views on these topics. Before proceeding to an overview of these panels, we might find it useful to consider the Ninth Circuit's evolution as an institution that, while adapting to the legal and technological landscapes of the twenty-first century, nevertheless retains many of the traditions and practices of its early days.

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### NINTH CIRCUIT EVOLUTION

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When it was created in 1891, the Ninth Circuit was, as it is today, headquartered in San Francisco. Its jurisdiction encompassed virtually all of the states and territories (or their predecessors) that comprise the modern circuit—the exceptions being Guam (acquired from Spain in 1898) and the Northern Mariana Islands (seized from Japan in 1944).<sup>4</sup> At the outset, the circuit was composed of only seven judicial districts. The Ninth Circuit of the twenty-first century exercises appellate jurisdiction over cases originating from fifteen judicial dis-

<sup>2</sup>Meriwether Lewis was portrayed by Clay Jenkinson, a professor of history and literature at the University of Nevada, who graciously submitted to cross-examination by Stephen Dow Beckham, Pamplin Professor of History at Lewis & Clark University.

<sup>3</sup>Dean Strickland is the author of *Tonto's Revenge* (Albuquerque, 1997).

<sup>4</sup>Arizona, Alaska, and Hawaii did not become states until years later, but the Ninth Circuit nevertheless had appellate jurisdiction over many cases that originated in those territories' federal courts. The Ninth Circuit also had jurisdiction over courts that no longer exist, including the United States Court for China. See David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley, Calif., 1994), 3, fn. 6 [hereinafter cited as Frederick, *Rugged Justice*].

tricts that encompass an amazing amalgam of states and territories, extending latitudinally from the southernmost point in Hawaii's tropical paradise to the northernmost part of Alaska's frozen tundra, and longitudinally from the western Pacific isolation of Guam and the Northern Mariana Islands to the rolling hills of eastern Montana.

Congress initially appropriated funds for two active circuit judges. Although these judges were constrained by the relative difficulties railroad travelers of their time faced, they nevertheless elected to maintain chambers in their adopted hometowns and journey periodically to San Francisco to hear arguments.<sup>5</sup> By maintaining their ties to their adopted communities, these circuit-riding judges developed ties throughout the circuit's territorial jurisdiction.

Today, even in the wake of the tragic events of September 11, 2001, jet travel is considerably easier than travel on the coal-fired trains of the late nineteenth century. Thus the Ninth Circuit judges are able to continue "riding the circuit." The court sits regularly in San Francisco, Pasadena, and Seattle (and regularly, but less frequently, in Portland, Anchorage, and Honolulu) to hear argument calendars. Although the Ninth Circuit still maintains its headquarters (which was constructed in 1905 and has survived two of the largest earthquakes ever recorded in the continental United States) at the corner of Seventh and Mission Streets in San Francisco, all but two of its current twenty-four active judges<sup>6</sup> maintain their permanent chambers elsewhere. The advent of modern technologies such as the internet, e-mail, video conferencing, and facsimile machines makes communication far easier today than for the judicial pioneers.

As the circuit's population has grown, the court's docket has expanded exponentially. In 1897, the Ninth Circuit was burdened with the prospect of deciding approximately seventy-two cases per year.<sup>7</sup> Of course, the judges of the Ninth Circuit today would have unmitigated joy if they were responsible for adjudicating so few cases, but one must consider that circuit judges at that time wrote their opinions in longhand, had scant chambers staffs and other institutional resources to assist them, and could not possibly have conceived that their distant successors would someday be able to research case law transmitted to them electronically at the speed of light. By

<sup>5</sup>Frederick, *Rugged Justice*, supra note 4 at 19-23, 86-87.

<sup>6</sup>Congress has authorized twenty-eight judgeships for the Ninth Circuit.

<sup>7</sup>That number represents the total number of appeals filed in 1897. Frederick, *Rugged Justice*, supra note 4 at 123 and fn.3.

1939, the docket had expanded more than fivefold, with 347 filings that year and seven active judges.<sup>8</sup> Today the annual filings in the Ninth Circuit have grown to a level that would have been unfathomable to the court's earlier judges—more than ten thousand.<sup>9</sup>

Throughout Ninth Circuit history, the backgrounds of its judges have essentially mirrored the vast migration and population growth experienced throughout its territorial jurisdiction. Until 1933, all of the judges appointed to the circuit had been born outside of its boundaries.<sup>10</sup> Early circuit judges had traveled west for various reasons, such as the thrill of participating in what some nineteenth-century policy-makers called America's "manifest destiny," or simply the desire to mold a new life on the frontier.<sup>11</sup> Even today, more than 150 years after Horace Greeley implored easterners to "go west,"<sup>12</sup> fifteen of the circuit's twenty-four active judges were born outside its jurisdiction, a statistic that perhaps in some ways dovetails with the explosive population growth witnessed by many of the circuit's constituent states in recent years.

To place the circuit's population growth in perspective, consider the following: In the 1892 presidential election, states located within the circuit totaled only twenty-six electoral votes, a mere 5.6 percent of the overall total of 444; by the time of the 2000 presidential election, however, the states within the Ninth Circuit comprised an aggregate of ninety-eight electoral votes, 18.2 percent of the overall total of 538.<sup>13</sup> In more absolute terms, the circuit's population has proliferated since the court's inception. In 1890, the population of the circuit's constituent states totaled about 2.1 million; in 2000, it reached just over 45 million, approximately 16 percent of the nation's overall population.<sup>14</sup>

<sup>8</sup>Frederick, *Rugged Justice*, supra note 4 at 227.

<sup>9</sup>Available at <http://www.uscourts.gov/cgi-bin/cmsa.2001.pl>.

<sup>10</sup>Frederick, *Rugged Justice*, supra note 4 at 175.

<sup>11</sup>See, e.g., Frederick, *Rugged Justice*, supra note 4 at 19, 21.

<sup>12</sup>There is some dispute as to whether Greeley actually uttered the famous saying. One website notes that he merely amplified an earlier statement by a journalist in Indiana. See biography of Horace Greeley available at <http://elections.harpweek.com>.

<sup>13</sup>Available at <http://www.nara.gov/fedreg/elctcoll>.

<sup>14</sup>The statistics are available at <http://quickfacts.census.gov> (Census 2000) and <http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=890> (Census 1890).

The circuit's racial and ethnic composition has also changed dramatically. In 1890, African-Americans comprised less than 1 percent of the population of every constituent state except for Montana (1.1 percent). By 2000, many states in the circuit had African-American populations that were at least 3 percent of their overall populations.<sup>15</sup> Millions of Latinos also now live in the circuit; the 1890 census did not even survey Latinos as a discrete racial group. The percentage of Asian-Americans in the circuit, however, does not appear to have increased as significantly, although the absolute number of Asian-Americans has increased dramatically.<sup>16</sup>

Although the Ninth Circuit has evolved and adapted to changing practices, technologies, and case loads, many of the categories of cases have remained constant throughout its history. The panelists at the Big Sky conference discussed several of those areas, including immigration, fishing rights, and the environment.

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## IMMIGRATION

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As a circuit that borders large swaths of Mexico and Canada and contains numerous coastal points of entry, the Ninth Circuit throughout its history has had to confront difficult questions related to federal immigration policies. Each year, the Ninth Circuit hears more than half of the immigration appeals filed in the federal courts of appeal. Of course, immigration issues also factor into criminal matters, constitutional challenges to various statutes, and a host of other types of cases. Given the dominance of these issues on the dockets of both the district and the circuit courts, two of our panelists, David Frederick, formerly of the Department of Justice's Office of the Solicitor General and author of the history of the Ninth Circuit cited in this introduction, and Doris Meissner, a former director of the Immigration and Naturalization Service, offered their perspectives on historical and current trends in immigration.

<sup>15</sup>The exceptions are Hawaii, Idaho, Montana, and Oregon.

<sup>16</sup>For example, between 1890 and 2000, Idaho, Montana, and Nevada all experienced decreases in the percentage of Asian-American residents. California and Washington have recorded increases, while Oregon has remained somewhat static. It should be noted that the 1890 figures were determined by aggregating the totals of Japanese and Chinese residents—the only Asian countries of origin that the 1890 census surveyed. Also, the comparison excludes Hawaii, which, the 2000 census notes, has hundreds of thousands of Asian-American residents.

In its early years, the court was called upon to interpret and define the contours of what would now be regarded as repressive exclusionary statutes directed toward immigrants from China who had, among other things, helped to construct the transcontinental railroad and had developed thriving small businesses throughout the western United States.<sup>17</sup> During World War II, the courts once again faced the legal consequences of the country's immigration policy, specifically the efforts to single out people of Japanese descent for internment.<sup>18</sup> Although the Ninth Circuit in 1943 upheld a conviction of a Japanese-American who failed to follow curfew, a decision that was later affirmed by the United States Supreme Court, the conviction was vacated on a writ of *coram nobis* in the late 1980s.<sup>19</sup>

As Congress later developed more generalized caps on yearly immigration and, through the 1996 enactment of the Antiterrorism and Effective Death Penalty Act<sup>20</sup> and the Illegal Immigration Reform and Responsibility Act,<sup>21</sup> placed multiple restrictions on aliens, courts were once again placed at the forefront of delineating the contours between Congress' plenary authority over immigration matters and aliens' due process rights.<sup>22</sup>

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### FISHING RIGHTS

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As Charles Wilkinson, the Moses Lasky Professor of Law at the University of Colorado School of Law, amply detailed during his presentation at the conference, few areas of the law

<sup>17</sup>See, e.g., *Lee Kan v. United States*, 62 F. 914 (9th Cir. 1894) (holding that a Chinese alien need not establish a sole proprietorship to qualify as a "merchant" for purposes of immigration statute); *United States v. Mock Chew*, 54 F. 490 (9th Cir. 1893) (holding that statute requiring certification from Chinese government was to be strictly construed).

<sup>18</sup>See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming conviction for being present in area off limits to persons of Japanese descent).

<sup>19</sup>See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (affirming conviction for, among other things, failing to follow curfew imposed on persons of Japanese descent), *error coram nobis granted*, 828 F. 2d 591 (9th Cir. 1987).

<sup>20</sup>Public Law 104-132, 110 Stat. 1214 (1996).

<sup>21</sup>Public Law 104-208, 110 Stat. 3009 (1996).

<sup>22</sup>See, e.g., *Ma v. Reno*, 208 F. 3d 815 (9th Cir. 2000) (holding that INS lacks statutory authority to detain certain classes of aliens indefinitely), affirmed in pertinent part by *Zadvydas v. Davis*, 533 U.S. 678 (2001).



involve such a complicated intersection of competing private, state, federal, and Native American interests as does the judicial adjudication of fishing rights. During its drive westward, the United States government, in exchange for obtaining legal title to vast swaths of areas that now fall within the Ninth Circuit's jurisdiction, often entered into treaties with Native American tribes that guaranteed them residual fishing rights on tribal lands. Occasionally, however, some of the treaties also granted tribes certain rights to fish off of their reservations. As states were constituted and settlers began to inhabit off-reservation lands, conflicts between the groups' putative fishing interests reached the point where ultimately the Ninth Circuit, in reviewing voluminous district court opinions, was often required to interpret the treaties and their complex interplay with the laws of multiple jurisdictions. Perhaps the most famous decision, authored by Judge George Boldt of the Western District of Washington in 1974, still dominates discussion in this area.<sup>23</sup>

Our panelists underscored that contemporary fishing issues in the West often relate to the preservation of various species of salmon, a fish that has deep spiritual significance to many Native American tribes in the Pacific Northwest and economic value to contemporary commercial fishing interests. As with the treaty rights cases, these fishing disputes similarly involve competing policy and environmental concerns complicated by intersections of federal statutory and regulatory regimes that require the courts to consider competing environmental concerns.<sup>24</sup>

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## THE ENVIRONMENT

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During its first decades of existence, the Ninth Circuit adjudicated many cases that, while perhaps not specifically styled as such, had vast environmental implications. These included disputes over the mining of natural resources, such as gold and copper, timber cutting on lands owned by the federal government, and pollution emanating from industrial plants. Because there were few federal statutes during that

<sup>23</sup>*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F. 2d 676 (9th Cir. 1975).

<sup>24</sup>See, e.g., *Pacific Coast Fed'n of Fishermen's Ass'n v. National Marine Fisheries Serv.*, 265 F. 3d 1028 (9th Cir. 2001) (discussing interplay between salmon protected by the Endangered Species Act and logging interests).

early era that conferred rights of action on either the federal government or private citizens in the environmental context, plaintiffs often attempted to assert common law theories (such as nuisance in the context of industrial pollution) in an effort to protect property interests.

As environmental consciousness increased during the 1960s and 1970s, Congress enacted a series of statutes that conferred greater power on the federal government and citizens to protect the environment. For example, the Environmental Protection Agency was entrusted with broad regulatory authority over such matters as asbestos removal, cleanups of toxic waste sites, and air and water pollution.<sup>25</sup> This statutory proliferation also led to an increase in environmental litigation. The long-standing issues, such as timber and mining, did not disappear; they were simply joined by new issues and a far more complex statutory and regulatory environment.<sup>26</sup> Given the intrinsic complexity of many of those statutory regimes, judges today often face conundrums similar to those adjudicated by their predecessors. As with the other areas explored at the conference, the speakers on our environmental panel, "Balance and Conflict: Environmental Challenges Facing the Western United States," underscored the complexity and difficulty of identifying and reconciling the competing interests in the environmental arena.

As the speakers at the conference illustrated, many of the issues and forces that historically shaped the Ninth Circuit remain with us today. Just as the issues often defy easy definition, there are few categorical answers. Our charge is to use history as a reminder and a tool for the future as we face the challenges of the twenty-first century.

<sup>25</sup>See, generally, Barry Groveman, "Environmental Law," *Los Angeles Lawyer* (March 2002), 44, 46–48.

<sup>26</sup>See, e.g., *In re The Exxon Valdez*, 270 F. 3d 1215 (9th Cir. 2001) (adjudicating various issues arising out of damages to commercial fishing interests caused by massive oil spill); *Seattle Audubon Society v. Moseley*, 80 F. 3d 1401 (9th Cir. 1996) (discussing the federal government's plan to preserve the endangered spotted owl's habitat).

# JUDGING WESTERN HISTORY: FROM THE BATTLEFIELD TO THE COURTROOM

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PATRICIA N. LIMERICK

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**T**hank you so much for your company. It could be that as a historian of the American West, I have a pent-up desire to direct settlement processes, and I cannot help noticing that judges are like students and leave areas of unfilled seating in the front of the room. It is almost as if there might be a known contagion in front of the room. For those of you on the edges, there are more seats up here in the front, if you would like to perform an immigration, which is central to Western history. We can call it a kind of historical reenactment, if you want.

I am, I think, a close-to-founding member of the Ninth Judicial Circuit Historical Society, but to my sorrow, when I was looking over my back issues, I fear I have let my membership lapse in the last year or so. In looking over the journal *Western Legal History*, I noted that it has a heartwarming tradition, which is not followed by every academic journal, of citing my own work quite generously and kindly. So I want to re-subscribe.

I would like to begin with a story that I wish Justice O'Connor were here to respond to. I would be fascinated to know if this incident ever came to her attention. It is one of my favorite stories of the Indian stereotype image. I was living in Boston when Justice O'Connor was up for the confirmation hearings. I am an early-morning riser, and I went out and got the newspaper. The *Boston Globe*, front page, first paragraph, first line, said, describing the confirmation hearings, that Justice O'Connor sat erect before her questioners, like an American Indian. Well, at 6 in the morning not a lot of things

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make sense, and you think, What was she doing? And then as the day went on, I started to think how entirely impossible the notion of any other ethnic reference would have been there. Imagine if the writer had said, "Justice O'Connor sat before her questioners like an American Black," or "Justice O'Connor sat before her questioners like an American Jew," or "Justice O'Connor sat before her questioners like a white Anglo-Saxon Protestant." But what was so obvious was that in that one sentence, the *Boston Globe* editors and reporters betrayed the fact that they saw Indian people as not entirely real; rather they saw the image of the stoic, unflinching, unflappable cigar-store figure. So I would just love to know if Justice O'Connor saw that press clipping and what she thought when she saw it. I have always thought of that piece as a great example of the stereotyping of Indians. But now in this company, the light comes on for me, and I realize it is also a story about the stereotyping of judges, as if they, too, were stoic, unfeeling, unflinching, and unflappable, which leads me to a confession and to put on record an interesting impression I have lately come to have of judges. First the impression, and then I will explain how I acquired it.

Judges are, in my judgment, people who are required by society to maintain a solemn demeanor on public occasions, but that solemnity narrowly conceals a vital, merry, and altogether remarkable sense of humor. How did I come up with this idea? I have actually acquired an abundance of evidence.

The Center of the American West, Charles Wilkinson's and my organization at the University of Colorado, has a public program that explores the tensions between the urban West and the rural West. Rather than do a lecture on those tensions, we do it as a kind of morality play or role play. I play Urbana Asphalt West. A friend plays Sandy Greenhills West. A student plays Suburbia Greenlawns West. In rather informal and eccentric proceedings, Sandy asks for a divorce from Urbana, going over all the usual rural complaints against the city: theft of natural resources, especially water; imposition of unjust restrictions on his land use; corrupting of his children by mass media, etc. Urbana responds, pleading with the court to get Sandy into counseling, so that he will face up to his own role in creating these problems and stop blaming the city for everything. Meanwhile, the child of the marriage, Suburbia, talks on her cell phone, listens to her CD player, plans her next SUV purchase, and drinks up all the water in sight, including, of course, the pitcher that once belonged to Sandy.

Now here is the point. We have presented this program more than forty times all around the West, and, whenever



Patricia Nelson Limerick addresses the conference.  
(Courtesy of Ninth Circuit Public Information Office)

possible, we have a real judge play the part of the judge. I know this is getting very post-modern—sort of an echo with echoes. So we have had some very distinguished jurists preside over the struggle between Sandy and Urbana. Now I am going to make every effort to be discreet and not use names, but repeatedly these judges have astonished me with what we might call their playfulness or maybe even madcap humor. In our urban/rural divorce, the usual constraints for these judges are suspended; the requirement for solemnity is withdrawn; and the results are quite remarkable. One very distinguished judge in our performance seemed to be omitting the swearing-in ritual, so one of the witnesses said to him, "Don't you want me to swear to tell the truth?" "No point in that," the judge said. "I wouldn't believe you if you did." Another very high-ranking judge did not omit the swearing-in ceremony, but he had witnesses taking interesting and distinctive oaths, different for each witness, on the order of, "Do you swear to speak with more emotion than reason and to leave the jury even

more befuddled than they already are?" And then there was the judge who found various imaginative and interesting ways to put the metaphor of Viagra to use as a solution to the conflict between the urban and rural West.

I hope this explains where I got my impression of narrowly suppressed judicial hilarity. The urban/rural divorce has been quite successful in fostering thoughtful conversations about the changing West. I have to admit that the greatest satisfaction of the program is the chance to watch judges go wild. Anybody who envies this opportunity should know that the urban/rural divorce is very adaptable to travel and in fact is relevant all over the West. So feel free to invite us.

My one appearance in a real courtroom was an occasion, I think, that tested the capacity of the judge to look solemn. Twenty years ago, while my husband and I were in Massachusetts, we took a driving trip. A friend of ours was in the passenger seat, and my husband was in the driver's seat. We saw a car collide with a parked car, and then the driver headed away. We wrote down the license number and left a note. My husband very cleverly made sure that my name was the signature name on the note. So guess who got the invitation to spend some time in the Middlesex County Courthouse waiting in the Victim and Witness Room, which I must say is a fascinating place. If you as judges do not get to be there, just know you can make some interesting friends in that room. As it turned out, the man who had been driving the car was an immigrant who did not speak much English but who nonetheless chose to represent himself. And thus, with me on the witness stand, we had this memorable dialogue:

The Defendant: When you honk horn?

The Professor: Well, actually, I didn't honk the horn. It was my husband who was driving, and he honked the horn.

The Defendant (*more insistent*): But when you honk horn?

The Professor: Well, as I say, it wasn't me who honked the horn, because I was in the back seat and a friend was in the front passenger seat, but in terms of when the horn was honked, well, Jeff honked the horn just as it was clear that the car was going to drive away.

The Defendant (*looking like Perry Mason at the moment of asking the question that will turn the case*): Why you not honk horn before accident?

The Professor (*professors feel they have to answer every question*): "I guess we're not prophets. I mean, we'd like to be able to see the future and intervene before crashes happen, you know, but I don't see how we could."

The Judge: You don't need to answer that.

The fact is, as a historian I would like to "honk horn" before accident. Knowing too much about historical injustices and injuries, I would like to have been there, laying on the horn, honking loudly and insistently before the crashes of the past, at least giving the occupants of the vehicles a chance brace themselves and, ideally, preventing the crash.

The vividness and immediacy of many episodes of conflict in Western history make it hard to keep from imagining that you could have gotten in there, "honked horn," and prevented the crash. The dream—you might even say the romance—that history can be helpful, history can perform some sort of act on the order of honking the horn in coping with current dilemmas, that dream has been one of the driving motives behind the school of history writing that has picked up the label of "New Western History." And since that phrase appears in your program in the description section, I will briefly explain the school of thought that now carries that title, "New Western History." It will be brief, indeed, because in fact *People* magazine did a profile of me responding to Kevin Costner's *Dances with Wolves*. And for that interview in *People*, I took my 350-page book, *The Legacy of Conquest*, and contracted it into four words beginning with "C," which is certainly an unparalleled achievement in professorial brevity. And then, unnervingly, a number of Western historians told me, "Now, that's the best statement of your position I've ever seen." Soon it will be down to a couple of grunts.

In the meantime, it can best be described as follows: The project of the New Western History was to shift the paradigm from very standard ways of thinking about the West. Shifting the paradigm, of course, is a term that may be outliving its usefulness. Ten years ago, one of my students made an unforgettable remark on the subject of paradigm shifting, a remark I have quoted a lot: "When shifting paradigms, it's important to remember to put in the clutch." When you think about

unsuccessful efforts, you can see what people forgot in that stage. For many years, I have quoted that line, but I have begun to have concern about how few people, how very few people, drive stick shifts anymore. And this spring, it finally happened. The *New York Times* carried a story about how very few American young people know what a clutch is anymore. So there we have it. A paradigm shift in automotive design is starting to disable one of my favorite metaphors.

But back to the paradigm shift and the four Cs. First, convergence. Instead of the old model in which we thought of the West as primarily having a story of white people moving from East to West, we would see the West for what it really was: a meeting ground of the planet. A place where people from the eastern United States met people from Mexico and Latin America and people from Asia; a place where French people came from the north; and, of course, we cannot forget the Indian people who had a prior presence. So rather than the westward-moving dominance story, we would see the West as a place of convergence.

That brings me to the second "C," continuity. The dominant school of Western history twenty years ago focused on the end of the frontier. Frederick Jackson Turner and others told us that somewhere around 1890, the frontier had closed one phase of history; it was settled, put to rest, over. For the New Western History, however, continuity is the governing idea. Issues that preoccupied and divided nineteenth-century Westerners still are very much unsettled in our own times. And the best place to go for evidence of that is today's Western courtrooms: Indian rights; land; water; religious freedom; public lands management; private industry's access to public lands; natural resource allocation in general, especially water; relations with Mexico and Mexican immigrants. All of these issues, essential ones for the nineteenth century, are essential in the twenty-first century. This is the sort of "honk horn" component for the public audiences. I do not think there is a single federal judge who does not know all this from daily practice. But for the general audience that still follows the notion that the Old West was entirely different, this is the alarm or the warning that says that two centuries of accidents have occurred around those issues, and we cannot be surprised when we have collisions on those topics; today and in the future it is from these collisions that we can anticipate change.

Now for the third "C," conquest. The dominant word was frontier. National self-understanding in that regard was not great. For example, to many Americans, South Africa had an invasion and a conquest and very difficult race relations as a consequence. But where South Africa, in most Americans'



thinking, had a "conquest," the United States had a "frontier zone" of expanding democracy, opportunity, and equality. Now, there is something a little bit wrong with that picture—a failure of self-knowledge. It was my hope to recognize the way in which the United States is itself a product of the worldwide expansion of Europeans, a process of invasion and conquest that went on all over the planet: South Africa, Australia, many parts of Asia, many parts of the Middle East, and so on.

The fourth "C" is complexity. Human nature has been just as complex in the West as in any other part of the planet. Maybe this was perfectly self-evident; but the notion of complexity goes directly up against "the Dream" that the West is the place where good guys and bad guys are clearly labeled. Complexity is, in some ways, the hardest concept to get across. There is, again, this persistent public dream that Western history should be easy to judge. It should be easy to know when to cheer and when to boo, but it is not, or at least it is not easier to appraise than the history of any other part of the planet that was transformed in the last five hundred years by this worldwide process of European expansion. In this sense, reckoning with Western history means reckoning with the history of colonialism and imperialism. Even the charming Meriwether Lewis was fundamentally an agent of empire, an agent of imperial expansion, very close kin to explorers in Australia, Africa, Asia, and the Middle East. This is a hard point for many Americans to accept.

At the University of Colorado, I teach a class that includes the Middle Eastern story and the African story, comparing colonialism and imperialism and their *situs* with the American West. A few students go through that class insisting that the United States does not belong in that course. They have odd and interesting ways of phrasing their dissent. The U.S. settlers were innocent, they say, unlike the settlers in Kenya or South Africa. The U.S. settlers were just pursuing their dreams. In truth, a lot of dreams were pursued in Kenya and South Africa, which makes those stories just as painful and poignant as ours. The most interesting phrase, the one with which my colleagues in world history have been very taken, is the one that posits the United States as having been entirely different: the United States was conquering itself. Now, that is sort of like a bad auto-immune disease. Consider whether the Blackfeet people and the Modocs and the Pueblos saw this as a process of being incorporated by their own unit. I do not think that was their experience. But it is a quite interesting and touching thing to see the students trying to protest this larger world picture.

The United States actually did conquer other people: the Indian tribes, parts of Mexico. Perhaps there is some comfort

in observing that the other imperial powers really are not doing a conspicuously better job of reckoning with the complexity of their own histories. I want to use just one quotable example, which again should help us understand that this is a struggle to deal with history that we share with many on the planet. In 1997, Queen Elizabeth traveled to India in what the *Times* called an act of contrition for Britain's colonial past. The Queen laid a wreath at a memorial on a site where British soldiers had fired on a crowd of nearly ten thousand, leaving the number of dead at close to a thousand. At a banquet the night before, the Queen had offered her own not exactly searching appraisal of colonial history and its legacies: "It is no secret that there have been some difficult episodes in our past, but history cannot be rewritten, however much we might sometimes wish otherwise. It has its moments of sadness, as well as gladness. We must learn from the sadness and build on the gladness." The sadness and gladness. The Queen has been under the influence of Dr. Seuss, it would seem.

Western history certainly has its elements of sadness and gladness. And the crummy part is that they are all tangled up together. For instance, white people's opportunities have been very directly connected to Indian people's dispossession. With the glad and the sad in such a tangle, judgment is very difficult indeed.

I would like to close with some of the useful perspectives that come from attending to this history of conflict, and the lessons that we can draw from them. For instance, if you consider the lamentations frequently heard today about the decline of civility in public discourse, if you are concerned about those things, reading Western history is virtually aspirin written for that kind of affliction or headache.

Consider any of the recent jeremiads about the personal and petty transactions in public disagreement that characterize our times, and then spend an hour or two reading over the journal *Western Legal History*. You will find a number of articles that make it hard to see this dilemma as having a recent onset. To take just one example, consider an article by Monique Lillard on the appointment of James Beatty as Idaho's first federal district court judge. Beatty had a rival for this job named John Harris. As Lillard writes, "The nineteenth-century law of libel and slander evidently gave these men no pause as they pursued their political vendettas." Here is how one of Beatty's supporters and friends described his rival, Harris: "He is the laziest man"—this is from a public document—"and spends much of his time frequenting saloons. He drinks, plays cards, is noisy, turbulent, swears, is an infidel, and one of the most thoroughly unpopular men in the city of Boise. I regard him as

an unreliable man. I think that out of the entire bar of Idaho Territory, the selection of John H. Harris for this office would be the worst that could be made."

People who are determined to hold onto nostalgia for a more pleasant past, a past in which public discourse took place in a framework of civility and good manners, would be well advised to avoid reading articles like this one, articles that provide the more-or-less comforting news that the people of the Western past could be just as crabby, petty, and intractable as their present-day successors. As Lillard sums up in her article, "The political combatants of the late nineteenth century pulled no punches, but could not be called honest fighters either, for they engaged in hyperbole, selective truth, and certainly on some occasions, outright falsehoods." And yet, with hundreds of episodes like the Beatty appointment fight on the historical record, we can still find thousands of lamentations, written or spoken, over the last ten or fifteen years about this ostensible decline in or loss of civility. Usually, before you claim you have suffered a loss, you have to prove that you once had the thing you now claim to have lost.

Returning to my opening story about honking horns, maybe historical awareness also sometimes offers the chance for us to honk horns in celebration, in the manner of wedding parties. It is very common today to hear critics declare that we have become a far too litigious society, always suing each other, always rushing to the courts at the slightest injury. For Western historians who have spent too much time reading about the brutal realities of the Indian wars, about the coerced expulsion of Chinese and Mexican men from mining camps, about the violence of Western labor conflicts at the turn of the century, about the sort of legitimized everyday injuries created by unsafe workplaces in Western mines, timber camps, canneries and ranches; for historians of the West who know too much about the material injuries of the past, when someone says, "People today are litigating too much," our response is, "Thank heaven."

Struggles in courtrooms are to be infinitely preferred over struggles on battlefields. Yes, some courts are overburdened. Yes, some people sue before they have thought through their best strategy for a remedy. But still, thank heaven that the devices of combat have shifted so decisively from bullets to oral arguments and briefs. Thank heaven we have shifted from outcomes determined by the number of bodies found on the field at Wounded Knee or the Ludlow Massacre to outcomes determined by judicial opinions and decrees. In other words, hurrah for the courts as sites for the nonviolent airing and resolution of conflict.

A few years ago I spent a couple of months writing an essay on the brutal realities of the Indian wars; from that experience, the charms of adversarial litigation and argumentation became very evident to me. One of the oddest outcomes of current intellectual practices is that they prevent us from celebrating "progress" when examples of it come before us. The science writer Timothy Ferris has pointed out that few academics today will have anything to do with the word "progress." All they want to do to the idea of progress—central, of course, to a lot of us writing about Western history—is analyze it, dismantle it, discount it, dismiss it, and reveal its flaws. Most academics have denied themselves the right to speak of upward trajectories in human affairs. And yet, as Timothy Ferris points out, the same academics who will not say "progress" are quick to talk about decline and declension, the downward trajectory of the environment and the failures of justice. So, having been stunned by Ferris's criticism of people like me, and having once been stung by his criticisms directly in front of an audience, I take this opportunity as a certified sixties-generation tenured radical to use the word "progress" in public and to say that one very concrete manifestation of progress is the fact that fundamental Western conflicts are no longer resolved on the battlefields but, instead, are piling up in your caseloads. One particular definition of progress is the development of nonviolent ways to address conflict. Your professional lives are themselves the evidence that this particular dream has real substance.

# THE NORTHWEST INDIAN FISHING DECISIONS: LUMINOUS EVENTS IN NINTH CIRCUIT HISTORY

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CHARLES WILKINSON

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A good many cases involving Indian fishing rights have been filed over the last twenty years, and a good many are pending today, but I'll not address pending litigation. Instead, what I would like to do is to take up two major events in the history of the American West that we now realize are connected. The first is Isaac Stevens's treaties with tribes of the mid-nineteenth century that opened the Pacific Northwest, including the ground we meet on today, for settlement by non-Indians. And the second is a series of decisions of Ninth Circuit appellate and district court judges that construed the key provisions of those treaties in modern times and against the backdrop of extraordinary contentiousness. A number of complex cases are involved, but, of course, I will summarize them and try to set out the spine of the judicial work.

Isaac Stevens graduated first in his class at West Point and in 1853 secured the job of first territorial governor of the territory of Washington. Basically, the United States had a problem there, which was that it could not open up the Northwest for homesteading because the tribes, under recognized federal law, had a property interest in their aboriginal land that was shared with the United States. So the objective of the federal government was, in effect, to remove that cloud on the federal title, negotiate treaties with tribes, reduce the land holding of tribes, and then open the remaining land for homesteading.

Stevens was able, ambitious, and aggressive—his biography is entitled *A Young Man in a Hurry*—and he set out to negoti-

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ate treaties with the tribes. He often pushed too hard. He collected disparate groups of Indian people together, often dictated treaty provisions to them in advance, and sometimes relegated them to parcels that were unreasonably small. This led to disturbances that affected his administration and later administrators.

But Stevens was successful. In the beginning, at the south end of Puget Sound on Christmas Eve, Christmas Day, and the day after, in 1854, he negotiated eleven major treaties across Puget Sound, down through the Columbia, across the Continental Divide to this country—present-day Montana—negotiating treaties with the Flathead and the Blackfeet.

Stevens was successful in cutting back tribal ownership, but he knew that he had to make one major concession, and in each of the treaties, he did. Normally, tribal rights do not apply outside of reservation boundaries, but the tribes in the Northwest insisted on off-reservation fishing rights. So each of those treaties read that tribes would be guaranteed the right to fish at their usual and accustomed grounds and stations in common with the citizens of the territory.

In the late nineteenth century, the states denied the tribes those off-reservation rights. One case, the *Winans* case, went to the U.S. Supreme Court in 1905.<sup>1</sup> The Court upheld the treaties and allowed Indian fishing at a usual and accustomed off-reservation place that was on fee-patented land; the Court found that the patents that went out—that is the deeds from the United States—carried with them an encumbrance, even though not expressed, in the patents for Indian fishing rights. The Court also said that the treaties should be read in favor of the tribes, because they weren't written in the tribal language and the United States had a military advantage. The Court was satisfied with the priority that the tribes placed on their fishing rights, the Court saying that to the Indians of the Pacific Northwest, the right to take fish is not much less important than the air they breathe.

Things accelerated after World War II in the buildup of the American West that we are all familiar with. The West's population has quadrupled over the past two generations, and that also was the case in the Pacific Northwest. More people came in, and there was pressure on the fish runs from the new populations, sports fishers, and new commercial fishing boats. The dams that went in mostly in the post-war era also reduced the runs. The Pacific Northwest states—Oregon, Washington, Idaho, and Montana—began cracking down, and related

<sup>1</sup>*United States v. Winans*, 198 U.S. 371 (1905).



Isaac Stevens negotiated treaties with Northwest tribes that preserved off-reservation fishing rights. (Courtesy of MSCUA, University of Washington, UW 3435)

incidents were occurring in California and the Great Lakes area. Nowhere was it more pointed, though, than in Washington, where there was a steady stream of arrests, sometimes beatings and use of tear gas, against tribal fishermen, and resulting arrests and confiscations. The position of the states was that the off-reservation rights were subject to state law and not protected by the treaties.

In 1968, the United States filed *United States v. Oregon*.<sup>2</sup> Stemming from some early John Marshall decisions, the United States is a trustee for tribes and can bring litigation on their behalf. The case was assigned to Judge Robert Belloni, whom we lost a couple of years ago. It was the most controversial case, people will tell you today, on the docket at that time in Portland. Judge Belloni finally issued a ruling that upheld the treaties and also found that the tribes had a right to an apportionment to a specific share of the treaty. But by not trying to reach a percentage or specific share, he came down with a ruling that I think was good judging. He wanted to leave that to negotiations among the parties, tense though the situation was. So Judge Belloni found that the tribes were entitled to a fair share of the fishery. The question lay across the Northwest, though, how much was a fair share?

In 1970, the United States filed, again as trustee, in *United States v. Washington*.<sup>3</sup> The tribes all intervened. The case was assigned to Judge George Boldt in Tacoma. Boldt was a tough law-and-order judge. He had handed down stiff sentences to Dave Beck, the teamster leader, and Frankie Carbo, the underworld boxing figure, and he handled the Seattle Seven trial. And in doing so, he reached deep into the tool box that all of you judges carry; deeper even, I think, than, "Counsel, I may be in error, but I am not in doubt"; or that Friday declaration just before lunch, "We'll be holding court tomorrow unless you settle the case today." For example, what Judge Boldt did in the Seattle Seven trial, which the defendants had turned into a circus, was to declare a mistrial, find them in contempt, and sentence them to six months.

The tribes were apprehensive about Judge Boldt trying their historic rights, but as Judge Boldt's research assistant recalls, one day he called him into his office and said, "Look, I have had no experience in Indian law. Bring me everything on the subject." The stories are legion of how much time Judge Boldt spent reading those materials and how deeply he immersed himself in the case. And the case went to trial; the parties couldn't settle it.

During that time, Judge Boldt became deeply satisfied that the tribal negotiators were intelligent and skillful and knowledgeable people who knew what they were reserving. On February 12, 1974, he handed down the Boldt Decision. The off-reservation rights were valid, he found, which meant the right, after you allow for a statement of conservation of the

<sup>2</sup>*United States v. Oregon*, 302 F. Supp. 899 (D.Or. 1969).

<sup>3</sup>*United States v. Washington*, 384 F. Supp 312 (W.D. Wa. 1974).



species, to take up to 50 percent of the fish passing the tribes' off-reservation sites. He found that the tribes, as governments, are self-regulated, and he took continuing jurisdiction. The opinion in its typed form was 203 pages long.



District Judge George Boldt's 1974 decision upholding off-reservation fishing rights may have been the most sweeping and complex decree ever handed down by an American judge. (Courtesy of *Seattle Post-Intelligencer* Collection, Museum of History & Industry, 86.5.53109)

It was a breathtaking decision. There was tremendous anger. Judge Boldt was hung in effigy. There were demonstrations outside the courthouse with every subsequent hearing, bumper stickers saying, among other things, "Slice Belloni, screw Boldt." The non-Indians continued fishing anyway, and with support from state officials. You can understand the situation of all sides. The tribes had their historic equities, and in modern times, the salmon were the center of their culture. They used and ate salmon extensively for subsistence, and it was almost the only commercial asset that they had at the time. The same was true with the non-Indians. This meant that some commercial boats were going to go out of business, and it meant that sports fishers who had worked for decades to obtain a ban against netting of steelhead in the Northwest might see the netting of that sport fish.

The case went to the Ninth Circuit, which affirmed, in 1975, in an opinion by Judges Choy, Goodwin, and Burns.<sup>4</sup> Judge Burns wrote an especially interesting opinion, I think, in concurrence. Judge Boldt's injunction may have been the most sweeping and complex decree ever handed down by an American judge. You have the case coverage, which encompassed two to three dozen major rivers, depending on how you count, and each had major tributaries. Each of those rivers had runs of between three and six of the salmon species and the steelhead. One species, the Chinook, would head all the way up to the Gulf of Alaska and return as adults to be harvested. Some of the Columbia River salmon on the headwaters just west of Big Sky, Montana, have a life journey of ten thousand miles. The tribes would be entitled to up to 50 percent of each run of each species at the different usual and accustomed places.

The task was, when the adult fish were still at sea, to try to figure out how many fish there were, because the non-Indian commercial fishers had first crack at them. And so there were repeated court hearings. Judge Boldt handled it efficiently. He appointed as a court scientific adviser Richard Whitman, eminent biologist at the University of Washington, and many disputes were resolved that way.

Judge Burns wrote in his concurring opinion, with which I think all of us can sympathize:

I concur, but I want to add a brief comment from the viewpoint of a district judge. As was suggested at oral argument, any decision by us to affirm also involves ratification of the district judge as a 'perpetual fishmaster.'

<sup>4</sup>*United States v. Washington*, 520 F. 2d 676 (9<sup>th</sup> Cir. 1975).

Although I recognize that district judges cannot escape their constitutional responsibilities, . . . I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case [and others, however,] make it crystal clear that it is necessary here.<sup>5</sup>

The U.S. Supreme Court then denied certiorari in 1976. The violations of Judge Boldt's orders actually accelerated at that point. They were fishing anyway, and the state judges were refusing to find any violations, and the governor and the attorney general were not taking action to support the court opinion. The rallying cry became, "We can't accept this unless the United States Supreme Court speaks directly to the issue."

It is worth mentioning that at this point Oregon took a different course and was able to settle rather than litigate disputes regarding the Columbia River. One part of that settlement, a realistic settlement that looked to the needs of the parties, called for no netting of steelhead, but assured a substantial return of salmon to the tribes. Everybody I have talked to in those negotiations, and I think I've talked to most of them, agree that that settlement was fundamentally due to the leadership, good sense, and ability of Owen Panner, who was later to join this circuit as a district judge.

*Puget Sound Gillnetters*, one of many cases, came up to the Ninth Circuit in 1978 because the furor continued.<sup>6</sup> Judges Goodwin, Wallace, and Kennedy wrote this—and I think every judge here can imagine a statement of conscience like this, the kind you write maybe once in a career. Those judges wrote,

The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate the decree of a federal court witnessed in this century.<sup>7</sup>

The case then did go to the United States Supreme Court a year later, 1979, and the Court took an appeal from a collateral

<sup>5</sup>Ibid. at 693.

<sup>6</sup>*Puget Sound Gillnetters Ass'n v. U.S. D.Ct.*, 573 F.2d 1123 (9th Cir. 1978).

<sup>7</sup>Ibid. at 1126.

case and affirmed the Boldt decision. In so doing, the Court quoted the words I just read from Judges Goodwin, Kennedy, and Wallace.<sup>8</sup>

There has been an interesting development since the Boldt decision, and that is tribal management. The Columbia Intertribal Fish Commission on the Columbia River is a consortium of four tribes, and in Olympia, Washington, the Puget Sound tribes have the Northwest Indian Fisheries Commission. The tribes have become deeply embedded in the sacred struggle to restore the salmon runs. They play a role as co-manager, and I think nearly everyone agrees it is enormously constructive.

Just to give you an idea of the tribal commitment to this issue, in Washington the Northwest Indian Fisheries Commission has about fifty fisheries biologists. Each tribe also has its own on-reservation fisheries office. In Washington, about two hundred fisheries biologists are employed by the tribes. That is slightly less than the number of fisheries biologists employed by the United States but slightly more than the number of biologists employed by the state. In an effort to save the salmon, the tribes are contributing about one-third of all the fisheries biologists.

Let me finish by saying this: For twenty years, in thinking through this situation, I have always focused on the 1979 Supreme Court opinion as the key decision. As lawyers, we think of law that way. But in retrospect, it is clear to me that the key decisions were by Judge Belloni, and most particularly by Judge Boldt. The man had his integrity, and his decision had the integrity of fairness of fact and fairness of law. Although the route to reaching a final judicial determination would be circuitous and time consuming, I have come to think that it was inevitable after the moral and legal weight of the opinion by Judge George Hugo Boldt.

I have called these cases "luminous events in the history of the Ninth Circuit." I say that because of the personal courage, professionalism, and wisdom of the judges involved and also because these cases say so much about the courts as an institution, as the last resort for the least among us. Billy Frank, the Nisqually Indian leader who suffered more than fifty arrests and confiscation of gear, his canoes and salmon, and who is today a leading spokesman on behalf of the salmon, said this about Judge Boldt:

<sup>8</sup>*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979).

That judge listened to all of us. He let us tell our stories, right there in federal court. He made a decision, he interpreted the treaty, and he gave us a tool to save the salmon. That judge went through a lot. I know him personally, his wife, his family. That judge was—I don't know the word. His own society didn't want to have anything to do with him; the clubs, the golfing places. The bumper stickers said "Can Judge Boldt." They ridiculed him. But he made a decision, and it's intact today. He gave us the opportunity to make our own regulations and management systems. We have to think about what he did for us. That's a responsibility we have. We can't ever forget that responsibility.<sup>9</sup>

Sometimes the independent judiciary institution fails or comes up short. All institutions do. But mark down the Indian fishing cases in this circuit as a monument to the kind of justice that can be handed down only by independent judges.

<sup>9</sup>Quoted in Charles Wilkinson, *Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way* (Seattle, 2000).



# HOW IMMIGRATION AND THE NINTH CIRCUIT GREW THE WEST: A HISTORICAL PERSPECTIVE

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DAVID C. FREDERICK

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**T**oday I will discuss the historical precursors of the immigration issues currently confronting the Ninth Circuit, with a focus on the striking parallels between contemporary and historical issues in the area of immigration law.

Economic pressures brought Chinese to the West in the mid-nineteenth century. In 1848, the first three Chinese immigrants arrived in the United States. Within two years, the 1850 census recorded a thousand Chinese, mostly in California. Within ten years, the number had swelled to thirty-five thousand. By 1880, the census recorded one hundred thousand Chinese, virtually all of them in California, Oregon, and Washington.

By the 1860s, nearly two-thirds of the Chinese resided in the mining camps of the Sierra Nevadas, where they competed with immigrants from Ireland and Germany, as well as with Americans from the eastern United States. Mining camps were rough-hewn social organizations that tolerated, if not promoted, racism at all levels. They restricted the jobs Chinese could perform, limited the mining claims Chinese could make, and imposed a whole series of other racist restrictions that the Chinese, it must be said, tolerated with a certain grace. The incidents of physical violence, however, were quite infrequent. Because the Chinese were willing to perform even the most menial assignments, it was economically untenable to exclude them entirely.

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By the 1860s, as low-grade mines in the Sierra Nevadas began to peter out, the Chinese found economic opportunity in the construction of the transcontinental railroad. The Central Pacific hired thousands of Chinese to lay track and tunnel through mountains. In the 1870s, Collis Huntington, one of the "Big Four" railroad operators, used Chinese workers to construct the southern portion of the transcontinental railroad through Arizona. The economic downturn of the 1870s created great tensions between whites and Chinese, both of whom were seeking economic livelihood throughout the West. There were widespread complaints among whites that Chinese were taking jobs from them. By 1879, whites in California went so far as to pass a state referendum prohibiting Chinese immigration. Already during the 1870s, many Chinese had returned to China. In fact, so many left between 1877 and 1880 that as many Chinese departed the United States as arrived.

Congress took umbrage at California's attempt to regulate immigration. This quickly led to the negotiation of a treaty between the United States and China regulating immigration to the United States. The treaty conferred on the United States government broad authority to regulate, limit, or suspend Chinese immigration. It was one of the very first treaties that prevented people from a particular country from coming to the United States. On the heels of the treaty's passage, Congress passed a bill that fully prohibited Chinese immigration. President Chester Arthur soon vetoed the bill on the grounds that it exceeded the terms of the treaty.

In 1882, Congress enacted the first Chinese Exclusion Act, which suspended the immigration of Chinese laborers for ten years and prohibited federal and state courts from allowing Chinese persons to become naturalized citizens of the United States. The 1882 act permitted Chinese then in the United States to obtain certificates at ports of departure that entitled them, in theory, to return to the United States after having visited China. There were many complaints that the 1882 act did not go far enough. Two years later, Congress amended the Chinese Exclusion Act by imposing greater restrictions on Chinese immigration. The 1884 act added skilled miners and workers to the list of those barred from entering the United States.

Continuing economic difficulties led to vigilantism against Chinese throughout the West. By the mid-1880s, nearly every major city in the West had experienced an anti-Chinese mass demonstration. In 1886, California held a state convention in which a petition was passed requesting that Congress prohibit Chinese immigration completely. Congress did not accept that petition. In 1888, however, Congress did further tighten Chinese immigration by passing the third Chinese Exclusion



Act, which precluded all Chinese from entering the United States except those deemed to be in certain privileged classes, such as officials, teachers, merchants, or travelers. The 1888 act also required that persons attempting to enter under a privileged category obtain a certificate from the Chinese government attesting to their status.

Ultimately, courts became involved in the construction of these various acts. Prior to the creation of the circuit courts of appeal in 1891, western federal courts had many occasions to handle Chinese exclusion issues. District Judge Ogden Hoffman of San Francisco, for example, heard more than seven thousand Chinese habeas corpus cases between 1882 and 1890. (I would add parenthetically that he did so without a law clerk.) To this day, habeas corpus remains important in deciding immigration cases; the Supreme Court recently reaffirmed the important role of habeas corpus in immigration cases in *I.N.S. v. St. Cyr*,<sup>1</sup> which, by a five-to-four vote, held that federal courts have jurisdiction under 28 U.S.C. § 2241 to decide pure legal questions and to consider habeas petitions filed to challenge the restrictions imposed under the 1996 Antiterrorism and Effective Death Penalty Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). There are very striking parallels between the kinds of judicial issues that the courts faced in the 1880s and 1890s and what the Ninth Circuit and the Supreme Court have confronted in recent times.

In one of their circuit court decisions, Judges Hoffman and Lorenzo Sawyer held that the 1882 act restricted only unskilled Chinese workers. They looked broadly to the purposes behind the 1882 act, which was to remedy the influx of laborers. The Oregon district judge, Matthew Deady, also issued a number of decisions in the 1880s that were generally favorable to the Chinese. These decisions increasingly brought Judges Sawyer, Hoffman, and Deady into conflict with Supreme Court Justice Stephen Field, who still rode circuit in California in the 1880s. Field's presence caused a number of problems. I am constrained by my service over the last five years in the solicitor general's office from giving a full and unvarnished opinion of the problems Field caused. Let me just say that he was a person of supreme self-confidence. Under the 1802 Midnight Judges Act, his vote counted more heavily than those of the other judges. Thus, even when Justice Field sat on a panel and was outvoted by other panel members, his decision controlled. This created particular problems in an 1884

<sup>1</sup>533 U.S. 289 (2001).

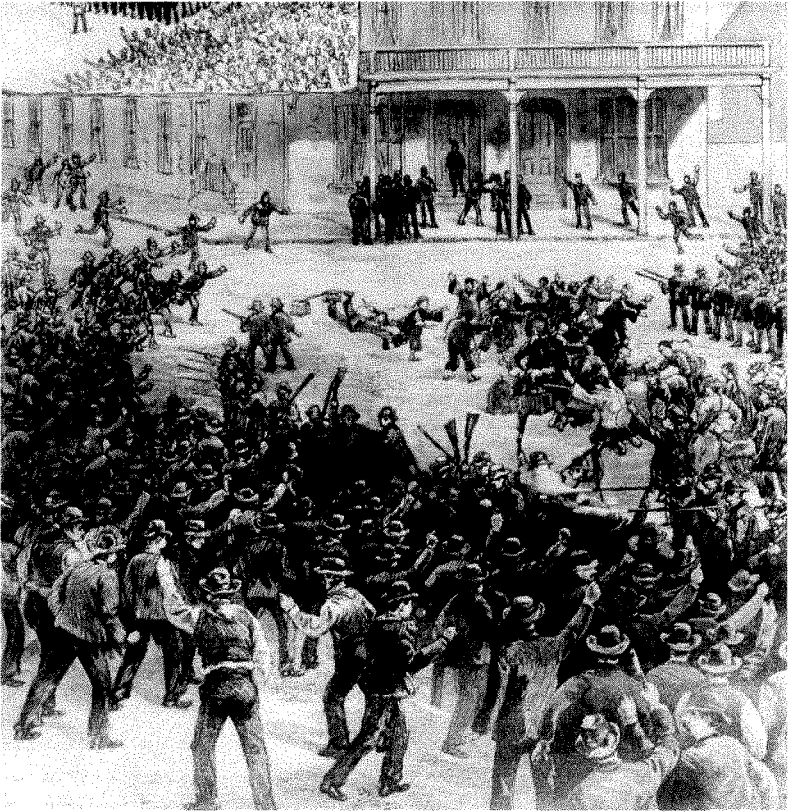
case in which he was outvoted by Judge Sawyer and Nevada District Judge George Sabin on the question of whether the 1882 act should be applied retroactively. Justice Field's decision held that it should be applied retroactively, which would have excluded returning Chinese who had lawfully been in the United States and had obtained the necessary papers to secure their return but had left the United States for China prior to passage of the 1882 act.

The Supreme Court ultimately affirmed the opinions of Sabin and Sawyer, overruling Field in a seven-to-two vote, holding that the 1882 act did not apply retroactively. This decision is echoed by the recent *St. Cyr* decision in which the Supreme Court held that IIRIRA should not be applied retroactively to divest the attorney general of discretion to waive deportation of resident aliens.

The 1888 act rendered the rule that Sawyer had sought to announce inapplicable, because it imposed a tighter restriction, excluding Chinese who had left the United States lawfully with official return certificates and, under the 1882 act, would have had the opportunity to return to the United States. Thirty thousand Chinese immigrants who had left the United States with the proper documentation were whipsawed by the 1888 Chinese Exclusion Act.

I would like to turn to how the Ninth Circuit judges who served in the 1890s should be perceived in their adjudication of cases involving the Chinese. Hoffman, Sawyer, and Deady have been viewed by historians as more sympathetic to the Chinese in the 1880s than judges who served later. I would submit, however, that the normal historical treatment is somewhat unfair to the later judges, because those judges were required to construe statutes that became ever more restrictive. A careful reading of the cases would lead one to conclude that the 1890s judges were simply construing the statutes as Congress had written them rather than acting on their own biases. That having been said, two Ninth Circuit judges, William Morrow and Joseph McKenna, in fact helped write the 1888 Chinese Exclusion Act as members of Congress. What we see in the 1890s is the interesting situation of judges who had helped to write the act sitting as judges to construe that statute. It is therefore not surprising that, by the 1890s, the decisions of the Ninth Circuit with respect to the Chinese were quite restrictive.

A third Ninth Circuit judge, Erskine Ross, also played an important role in deciding Chinese immigration cases. He served as district judge in Los Angeles from 1886 to 1895, when he was elevated to the Ninth Circuit, where he served for the next thirty years. As a district judge in 1892, however,



This depiction of the anti-Chinese riots in Seattle on February 8, 1886 was originally printed in *Harper's Weekly*. (Courtesy of MSCUA, University of Washington, UW 527)

Ross got into a very public spat with the attorney general of the United States, Richard Olney, over interpreting the 1892 Geary Act, which was the next in the series of exclusion acts. The Geary Act required Chinese laborers to register with the local Internal Revenue Service collector for a resident's certificate within one year of the law's effective date, May 5, 1892. That act provoked the ire of the Chinese government, which had become increasingly upset with the United States over its passage of these exclusion statutes.

The Chinese government arranged to retain the most prominent lawyers in San Francisco to challenge the constitutionality of the 1892 act. It also obtained the agreement of the attorney general to expedite a test case so that the Supreme

Court could decide whether the requirement of having resident certificates was in fact constitutional. I think the Chinese government may have miscalculated to some degree, because the Supreme Court upheld the constitutionality of the resident certificate requirement, ultimately leaving thousands of Chinese in violation of the law. The tiff between the two nations arose because Judge Ross insisted that the attorney general immediately effectuate removal procedures for the thousands of Chinese who were in violation of the Geary Act and who should have been deported. In a filing in district court, the attorney general essentially said, "I don't have the funds to do that." In a very public gesture, which would be shocking by today's standards, Judge Ross sent an open letter to President Cleveland complaining about the attorney general's refusal to comply with his order to remove thousands of Chinese who were in violation of the law. Not only did Judge Ross send the letter to the president, he also sent it to the Los Angeles newspapers, which gave it prominent feature.

The attorney general's decision, in effect, said, "I have the authority as the attorney general simply to detain these Chinese until such time as I have the funds to deport them," which has a certain resonance with the Supreme Court's recent decision in *Zadvydas v. Davis*.<sup>2</sup> In *Zadvydas*, the Supreme Court held that six months is the presumptive time within which removal of an alien has to be effectuated. *Zadvydas* overturned the assumption that postremoval detention may be indefinite. Attorney General Olney operated on that very assumption one hundred nine years ago.

Now I would like to turn to how the Ninth Circuit as a court treated the Chinese after 1891, when the Court of Appeals was created by the Evarts Act. I will focus on three distinct classes of cases. The first are the entry cases—i.e., cases deciding whether Chinese could lawfully be allowed to enter the United States. The Chinese Exclusion Acts themselves set down reasonably clear standards: If you were an unskilled laborer, you were not allowed to enter; if you were a merchant, you were. One of the first questions that arose was whether a certificate issued by a consul of the Chinese government was sufficient evidence of a person's status. In a decision for the Ninth Circuit, Judges Morrow and McKenna held that it was not; only a decision by a higher official of Chinese government would be regarded as sufficient evidence for Chinese to enter.

<sup>2</sup>533 U.S. 678 (2001).

What you start to see in the cases of the 1890s is use of evidentiary burdens and standards of review to give the restrictions more teeth, whereas in the 1880s, Judges Hoffman and Sawyer were certainly more willing to construe the laws in a somewhat more liberal fashion to allow Chinese to stay. By the 1890s, the Ninth Circuit was much more restrictive in imposing certain burdens of proof on Chinese.

The second class I would like to discuss is the merchant cases. These yielded an interesting anomaly. Under the prevailing statutes, an exception had always existed for Chinese merchants. And this may well harken to the notion that a good capitalist will always be welcome in the United States. The merchants from China had to show that they were, in fact, engaged in business in the United States. One of the surprising decisions from Judge McKenna, who was perhaps the least sympathetic judge to the Chinese, upheld the right of a Chinese merchant to demonstrate his merchant status, notwithstanding the fact that his name was not part of the partnership signage. The rationale was rather simple. A partnership may be composed of so many partners that when it holds itself out to the public, it cannot use the names of all the partners. I think, as with large law firms, the notion of having a partnership signage consisting of forty or fifty partners' names would strike everyone as completely absurd. Judge McKenna recognized that and decided that a Chinese merchant simply had to show proof that he was a partner regardless of whether his name appeared on the exterior signage. The merchant exception, interestingly, was the single most important avenue for Chinese to obtain entry and stay in the United States.

Lastly, I want to focus on cases pertaining to the question of citizenship, because it gives rise to some rather interesting parallels to the present day as well. The cases that arose in the 1890s concerned whether a person of Chinese parentage born in the United States was a U.S. citizen. Under the Fourteenth Amendment, one would have thought this question to be perfectly clear. The Fourteenth Amendment clearly says that all persons born or naturalized in the United States are citizens of the United States. Nonetheless, litigation arose over whether persons born to Chinese parents in the United States were in fact citizens. Four years before the Supreme Court's landmark decision in *United States v. Wong Kim Ark*,<sup>3</sup> the Ninth Circuit held that persons born in the United States were

<sup>3</sup>169 U.S. 649 [1898].

citizens, regardless of whom their parents were. The Chinese, of course, viewed this as an important victory. But what ended up happening was that the litigation focus shifted to the evidentiary burdens and standards that Chinese had to meet in order to establish having been born in the United States.

One of the evidentiary requirements became that a non-Chinese person had to be present at the child's birth to attest to the fact that the child had been born in the United States; the testimony of a Chinese person on that issue was deemed inadequate. The court also applied a much higher standard of deference to district court decisions that ran against claims of citizenship than the court applied in reviewing decisions involving the merchant exception, thus giving further proof to the notion that it is better to do business than to be born.

I found quite striking the Supreme Court's most recent decision involving equal protection in the immigration area, *Tuan Anh Nguyen v. I.N.S.*,<sup>4</sup> 533 U.S. 53 (2001). In that case, the Court rejected an equal protection challenge to a rule requiring a child born out of wedlock to a U.S. citizen father to meet higher evidentiary standards than a child born out of wedlock overseas to a United States citizen mother. *Tuan Anh Nguyen* echoes the evidentiary standards that the courts applied in the 1890s.

I would like to conclude by reflecting on a few of the trends that were salient in the immigration decisions of the late nineteenth century. Habeas corpus was the predominant vehicle through which immigration law was formed. The Chinese experienced highly restrictive congressional statutes that the courts were forced to construe based on the language of those statutes, with little latitude to provide individual justice. Finally, evidentiary barriers and standards of review played a critical part in determining whether immigrants were allowed to stay in the United States or whether they would be deported.

<sup>4</sup>533 U.S. 53 (2001).

# HOW IMMIGRATION AND THE NINTH CIRCUIT GREW THE WEST: A CONTEMPORARY PERSPECTIVE

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DORIS MEISSNER

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I would like to discuss some of the key immigration events of recent years and speculate a bit about where those events might be taking us in the years ahead. It is certainly true that the topic sentence here could be that the more things change, the more they stay the same. Many of the themes discussed by Mr. Frederick have very strong parallels today. Current issues in exclusion are a vivid case in point.

In 1996, Congress enacted three critical sets of changes in our approach to immigration; two of these changes involved immigration law, and the third, welfare law. This legislation has had profound effects on immigrants and on immigration, both legal and illegal, although the changes were targeted primarily at illegal immigration. The changes were in response to strong public sentiment during the mid-1990s against immigration and immigrants. That sentiment crystallized in California during the reelection campaign of Governor Pete Wilson in 1994 and with Proposition 187, the ballot initiative that sought to restrict undocumented immigrants' access to most public services, including education. Proposition 187 reverberated nationally and yielded a mirror image at the federal level, i.e., the 1996 immigration reforms. Congress was concerned with what it saw as lax law enforcement in the immigration area and a widespread sense of unease and vulnerability that the nation lacked effective control of its borders, in the Southwest and elsewhere. The lack of control was,

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at the time, evidenced by a succession of landings of Haitians, Cubans, and Chinese on our shores seeking asylum.

As suggested, in 1996 Congress took action in the form of the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA). Although Congress did not take action in the form of nationality-specific legislation as it had done in the nineteenth century, it did create a new mechanism called "expedited removal." This mechanism confers summary authority on I.N.S. officers to refuse entry to arriving immigrants without any right of judicial review. The 1996 reforms, then, returned us to where we were in the late nineteenth century. The only way to obtain judicial review is through a habeas petition. This represents a very dramatic change in practice from the period prior to 1996. The 1996 reforms introduced similarly dramatic and often very harsh provisions in other areas, particularly with regard to the rights of criminal aliens and deportation practices.

The 1996 reforms reflected a very deep sense of worry and fear among Americans over the loss of our identity as we had understood it for at least the previous half-century. Now that the 2000 census has been released, we have a clearer picture of what our worries were about. Given the nature of the demographic changes reflected in the 2000 census, it is not so surprising that the political system reacted in the way that it did.

The 1990s accounted for the immigration of more than ten million immigrants to the United States. That makes the decade between 1990 and 2000 the largest single decade for immigration in the country's entire history. It surpasses the largest previous decade, between 1901 and 1910, by approximately 1.2 million immigrants. The decade between 1901 and 1910, however, accounted for a larger percentage of new immigrants, relative to the United States' population at the time, than during the decade between 1990 and 2000. The United States was, of course, a smaller country at the turn of the century.

Nonetheless, the 1990s, with its influx of ten million immigrants, was a period that witnessed significant and rapid change in the definition of who we are. The change, however, manifested differently in different parts of the country. California, our most populous state, enjoys that status largely because of immigration. California is also the first state in the nation where a majority of the population is non-white. In other words, it is a majority minority state; this phenomenon is also largely due to immigration. California is a harbinger of things that will occur in many other states, but primarily those that are the most populous, such as Florida, Texas, and New York.





In 1992, public pressure in favor of stricter immigration controls led to Congress's passage of the Illegal Immigration Reform and Individual Responsibility Act ("Border Opinions," copyright by Don Bartletti, used by permission)

In addition, nearly half of the one hundred largest cities in the United States have already arrived at the point where a majority of their populations are non-white, again largely due to the immigration of the last decade. What has happened to the United States in the last decade is a modern manifestation of one of this nation's oldest stories: the story of immigration. This story girds one of our favorite myths: that we are a nation of immigrants. It is a living myth. It is a true myth.

Even though immigration is an enduring theme of our national life, it has occurred very unevenly throughout our history. It has occurred in a number of very distinct waves followed by periods of great quiet. We have had three major waves of immigration preceding the present wave. The first, of course, was the peopling of the country, the settling of the colonies in the 1600s, including the forced migration of tens of thousands of slaves. The second wave of immigration occurred in the mid-nineteenth century and accounted for the expansion of the West, opening the country and pressing the frontier to the Pacific. The third wave occurred in the 1890s, ended with World War I, and, of course, included the decade from 1901 to 1910. This third wave ended with the imposition of national origin quotas in 1924. It was this third wave that

fueled the industrialization of the economy by providing necessary labor. It also broadened the United States's ethnicity to include large numbers of southern and eastern Europeans and a broader range of religious groups.

We are now in the midst of a fourth wave. The fourth wave really began in earnest in the 1980s and continues today. It was generated largely by changes in our immigration statutes in 1965, combined with the information revolution and cheap international travel. The fourth wave not only continues currently, it shows no sign of abating, largely because of the contributions that immigrants make to an advanced industrial society like the United States.

There are major differences between today's immigration and the three waves that preceded it. The earlier waves were at least 80 percent European. That has entirely flipped today, when less than 15 percent of immigrants to the United States come from Europe. More than 80 percent of immigrants today come, roughly in equal portions, from Asia and Latin America. Our top five immigration countries are Mexico, the Philippines, China, Vietnam, and India. Prior waves of immigration have arrived through gateways in the Northeast of the country, such as New York, Boston, and Philadelphia. Although the Northeast remains a significant gateway, the Southwest, and increasingly the South, are also major immigration gateways. About a third of all immigrants settle in one state, California. Nonetheless, immigrants are far more widespread throughout the country than they have been in the past.

The new immigration patterns lead us to very critical and profound questions as to where we are headed as a nation. We have experienced truly seismic shifts in recent years. It is an enormous challenge for a society to change as quickly as ours has, and such change raises a number of serious issues.

The most obvious issue is the question of acculturation—i.e., the national project that is required to incorporate so many newcomers from such diverse backgrounds as full members and participants in our society. The most acute needs where acculturation is concerned reside in our education system, because education has always been the institution, the mechanism, that we rely on to incorporate newcomers and allow them to be successful in our society. As we all know, our public school systems are in an acute state of crisis, heightened by the demands that immigrants place on public schools. Most public schools, certainly those in large cities, are dealing with many young people from diverse language backgrounds who know little or no English.

The need for education has never been greater. In the past, a high school education or less could secure one a footing in the

middle class. Jobs in the industrial sector did not require a high school education. That is no longer the case. We now have a highly bifurcated labor market—strong concentrations at the bottom, strong requirements for highly skilled workers at the top, and weak linkages between the two. For most people, at least a bachelor's degree is necessary in order to become part of the middle class. For this reason, the crisis in our education systems is a major challenge. Immigration is one reason among many why education needs to be at the top of our public agenda.

The next issue that I would like to discuss has to do with our attitudes toward immigration. Our attitudes are very heavily influenced by the economy, just as was the case a hundred years ago. When we have a downturn in the economy, public receptivity to immigrants evaporates very quickly. When the economy is good, we find it much easier to be generous. That has been demonstrated vividly in the last four or five years. We went through a very harsh rhetorical period during the mid-1990s, which resulted in the 1996 laws that I have discussed. In the last two or three years, the harsh rhetoric has faded, due in large part to a robust economy. We feel much more comfortable about immigration. It is not at the top of the public list of issues that are debated daily. The shift has, by and large, brought with it a level of comfort with the contributions that immigrants make as compared to the costs that they pose. That equilibrium, however, can change very quickly as we go through shifts in the business cycle.

The truth is that we as a country, even with our rich history of immigration and the success and contributions that immigrants have made, are very ambivalent about immigration, and most likely will remain so. We want the prosperity and the growth that immigrant labor provides. We are far less accepting of immigration when it requires welcoming immigrants as new neighbors in our communities, schools, and daily life. The tension between the economic contributions of immigrants and the social and cultural change that they represent is always very close to the surface; as a result, we are subject to wild swings in our outlook toward immigration, and those swings can occur in short periods of time. The swings make it difficult to achieve the kind of stability that is needed to administer our immigration laws effectively and to bring about the kind of acculturation that is necessary.

In the final analysis, I would argue that large-scale immigration is here to stay. The fact is that the United States, and other industrial societies, are aging societies. They are societies where native-born fertility is no longer at replacement level. We need immigration over the long term in order to

retain our competitiveness in the global marketplace, and in order to support our social security system. The United States is much better positioned, with its tradition of immigration, to deal with that reality than are the countries of Western Europe or Japan. But even though we have experience, faith, and a positive outlook toward immigration, it nonetheless remains one of the most difficult issues for our society. Getting it right in the future will take the best efforts of many institutions and segments of society. In that process, our legal system will be faced with many novel complex issues. More than half of all of the immigration cases that come before the federal courts are heard by the Ninth Circuit. How judges and law enforcement professionals respond to these cases is going to play a critical role in defining the new America that we are becoming and in characterizing the next chapter in our nation-building.

# BALANCE AND CONFLICT: ENVIRONMENTAL CHALLENGES FACING THE WESTERN UNITED STATES

*Editor's note:* The following is an edited transcript of a panel discussion presided over by the Honorable Raymond C. Fisher, U.S. Circuit Judge. The moderator is James Fallows, economist and journalist. Panelists are John A. Baden, Foundation for Research on Economics and the Environment; Joel E. Cohen, Rockefeller University; Eric Redman, Heller, Ehrman, White & McAuliffe; Barbara Reeves, Southern California Edison Company; Lois C. Schiffer, Georgetown University Law Center; Barton H. Thompson, Jr., Stanford University School of Law.

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## INTRODUCTION

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**Judge Fisher:** It is my honor and privilege to preside over a very interesting program about the environment: "Balance and Conflict: Environmental Challenges Facing the Western United States." When we put this program together, we tried to give some meaning to the concept of "the environment." "Environment" is an overly broad and overly inclusive term with different meanings to different people. In late 2000, I had the temerity to suggest that by the time of this conference, perhaps we would want to talk about global warming and the energy crisis. And everybody said, "Oh, global warming, that's old news, and the energy crisis will all be taken care of by the summer of 2001." So with that great prescience, we set about to assemble a highly expert group of people who really know what the environmental issues are. Because this is a technical and all-encompassing subject, we are going to start the program with a panel discussion, which includes people from different disciplines with different perspectives on what is subsumed under the generalized heading of "environment."

To understand how pressing this subject is, you need only look at the newspapers to see stories nearly every day about some aspect of the environment. What we hope to do today is identify some of those issues that are not quite so obvious, that do not quite so readily come to mind.

I would like to thank my co-chair Jeff Willis, who is a lawyer representative and a partner in Snell & Wilmer in Tucson, Arizona, for his great help in putting this program together.

And with that, I am going to turn the program over to Jim Fallows.

**Mr. Fallows:** Thank you very much, Judge Fisher. Thank you all for coming this morning. I think this can be an exciting next few minutes we have ahead.

I would like to set up for a moment the terms of our discussion for our panel. Thirty years ago during the time of the first Earth Day celebration, we were reminded time and again that the environment involves everything. Everything is connected to it. I submit to you that for no group of people will that truism be more practically real or have more impact on their work than those in the political and legal system of the United States in the generation ahead, as they try to reckon with all these tangled issues involving environmental policy.

There are plenty of difficult non-environmental issues that the judiciary deals with. We might think, for example, of the death penalty cases, emerging stem cell issues, political redistricting fights, and other political fights. Those involve deeply held divisions of opinion. They involve complicated questions of fact, but, in most of the cases, the number of participants and the number of various views is finite or at least comprehensible.

By contrast, when it comes to environmental issues, the range of conflicting factual areas to be explored concerning different stakeholders and different long-term policies is much larger, much more complicated. And your role in trying to find peaceful ways to adjudicate disputes that otherwise might lead to violence will be more severely tested in this realm than in many others.

Let me make a few procedural points. First, although this is the rubric for the entire conference, I should say if you ever find yourself thinking that we are talking about a specific case, you are wrong. We're not. We're just a speaking panel. We're talking about issues that you might think are touching on a case, but they're not. Our goal, in fact, is not only to convey some specific information that may be useful as a backdrop to environmental issues, but also to expose different ways of thinking about the issues. We have at least five or six different schools of thought represented here. We'll try to explore the tensions among them.

First, I'm going to spend a few minutes setting up a kind of thought experiment, an environmental challenge that I think

brings together almost all of the complicated issues that we can find in any environmental case. Next I'm going to ask each of our panelists to talk about that question. And then I will ask the panel to draw implications so that we might learn how to deal with other environmental issues. The thought experiment I have in mind here is the case of the salmon of the Pacific Northwest, a situation that may be familiar to many of you. Let's think about it for a moment a little more systematically, because I think it is the paradigmatic environmental case for our time. At a surface level, this might seem to be a fairly straightforward issue. We have increasing numbers of people in the Pacific Northwest, and we have decreasing numbers of fish. The fish are important to the people of that region in a variety of ways. They have aesthetic importance to the Pacific Northwest. They have recreational value to people who like to fish for them. They have important commercial value to the fishing industry. They have a legal and heritage value to the Native American tribes in the Pacific Northwest. And, of course, they also have legal protection, much of which flows through the Endangered Species Act.

There has been ongoing discussion for decades, especially in the last couple of years, about ways to keep the declining numbers of fish from declining any further so there are more salmon for people to enjoy in these various ways. There has been an ongoing controversy about the dams on the Columbia and Snake Rivers, controversies about farmers and grazing and how they can better protect these spawning areas. There have been certain kinds of reductions on fishing, but only within certain limits.

Other subjects have not really been addressed. For example, on certain mornings you can open up the Seattle papers and hear about the latest controversy over this or that endangered salmon species, and then you can go buy specimens of that same salmon at the Pike Street Market for very little money. And so there is a loggerhead where the argument is becoming increasingly polarized without much apparent effect, even though in the last year or two, salmon runs have been increasing.

What makes the issue worth deeper study is that, in the following ways, it really is connected to all the big environmental issues we have to deal with. I'm going to tick off briefly a number of deeper themes you can draw from the salmon case. First, it's connected to some of the deepest natural trends of the non-human world: the salmon, the changeability of the natural role. The salmon, after all, have not been coming to the Pacific Northwest for millions of years, but rather for somewhere between seven and ten thousand years. Before that, the ice age blocked the streams, and

the glacial sedimentation made it too milky for them to spawn there. Even now, variations in ocean temperature over a decade of cycles seem to be the main determinant in their abundance in the north-south range. There is even a kind of program variability within the salmon that transcends human intervention, in which most salmon, as we know, are programmed to come back to the same stream where they spawned, but a certain small fraction of them is programmed to go someplace else. That is why salmon are able to pioneer new areas, fostering deep natural trends.

Second, we have long trends in the human impact on the earth that involve the salmon. The Native American role in the Pacific Northwest seemed to really kick in about five thousand years ago, about the time the salmon were returning. And from that time until about five hundred years ago, there was quite a significant human taking of the salmon population in certain areas, although it was sustainable overall. But then, starting about five hundred years ago, until 150 years ago, the human presence in the Pacific Northwest diminished mainly because of diseases introduced by white settlers. When Lewis and Clark came to the Pacific Northwest, the salmon runs they saw were probably the largest that had ever existed in natural history because the human impact had been waning as a result of disease and other factors. Then, of course, in the last 150 years, the rise of human impact in the Northwest had another effect. Many fish scientists claim that the crucial technical development in the history of the salmon was not the dam but, rather, the tin can. Industrial salmon farming kicked in when salmon were able to be canned and shipped around the world.

Third, we have the recent history of man's impact on the Pacific Northwest: that is, the last 150 years of extractive industry; logging; the last one hundred years of grazing; and the last eighty years of development as it was considered by senators like Warren Magnuson, including the dams of the Columbia and Snake Rivers that opened up the interior of the Northwest to industry.

Fourth, we have a number of ongoing and potentially irresolvable economic and rights issues. We have a certain finite amount of water which has to be used for many diverse purposes. The salmon want it to breed and spawn. The farmers want it to irrigate. The power companies want it to run their generators. Recreational users want it for recreation. They can't all have as much as they want. Somehow, these conflicts have to be resolved. The fish themselves are a kind of scarce resource. The fisheries operators want them for commerce, and the preservationists want them to exist for their natural abundance.



Fifth, we have some conflicting and quasi-absolute legal guidelines. The Endangered Species Act, subject only to the interventions of the God Squad, has certain absolutist-type rules about what must be done to protect endangered species. At the same time, there are treaty obligations to the Native American tribes of the Northwest guaranteeing them certain absolute-style rights, including the right to take a certain number of fish. To the best of my knowledge, there has never been a judicial determination as to which of those two sources of federal law would prevail in the event of a conflict.

Sixth, we have scientific uncertainty and polarization. Scientists complain if they are placed in one camp or another, and there's no common ground about even a seemingly simple question, such as "What is a species of salmon?"

And finally, seventh, we have a kind of ongoing political incoherence to this issue that makes it very difficult to determine how to resolve it.

If I can just give you one little data point here. I was living in Seattle two or three years ago when there was a ballot initiative about eliminating or restricting gill net fishing. The alliance that defeated that ballot initiative consisted of the commercial fishermen, as you would expect, and the preservationist groups, as you would not expect, because they both thought, for various reasons, that this would diminish the pressure for other changes.

So this is the constellation of issues involved in the salmon controversy, which I contend can be linked to almost any other big environmental challenge we will face. To talk about what is most significant and the main implications that can be drawn for our dealings with environmental questions in general, each of our panelists will give a *précis* of what he or she thinks is the most important lesson. I don't mean to overdetermine what the panelists will say, but this is my ulterior hope about what they will say.

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## PART I

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First, we're going to hear from Joel Cohen, who is going to give us his scientific big picture. Then Eric Redman is going to talk about this political incoherence I mentioned. Next, Lois Schiffer will address some of the legal enforcement questions from her experience. There are more panelists, but I am going to leave them in suspense about the order in which they are going to be called.

**Mr. Cohen:** I'd like to show you some family snapshots, three of them. It's the history of the United States as seen through the eyes of the United States Census Bureau. I think it bears on the questions that Jim has raised. In 1790, the U.S. counted 3.9 million people, roughly the population of Kentucky today. By 2000, the U.S. count grew 72-fold to about 281 million people. The first reported count for the region known as the West was in 1850, and there was then about one-fifth of a million people. Today, there are 63.2 million people here. That is an increase of 316-fold, between 1850 and 2000.

The two numbers I'd like you to put in your head, please, are these: the U.S., over 210 years, grew 72-fold; the West, in 150 years, grew 316-fold. On this graph (Figure 1), each horizontal line represents an equal increment of 50 million people.

Now I will plot exactly the same data—these are census data—on another slide (Figure 2), but, instead of making it show equal increments of numbers of people, it's going to show equal multiples. On this slide, with the same data, each line represents a 10-fold increase from one hundred thousand people to a million; from 1 million to 10 million; 10 million to 100 million; 100 million to, God forbid, a billion.

The nice thing about that kind of a plot—it's called a logarithmic scale—is that if a population grows at a constant rate, like an interest-bearing account with a fixed interest rate, you get a straight line. You can see here that not one of these

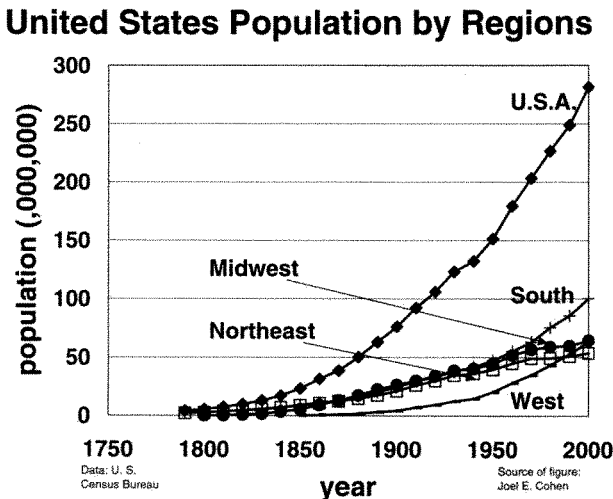


Figure 1

## United States Population by Regions

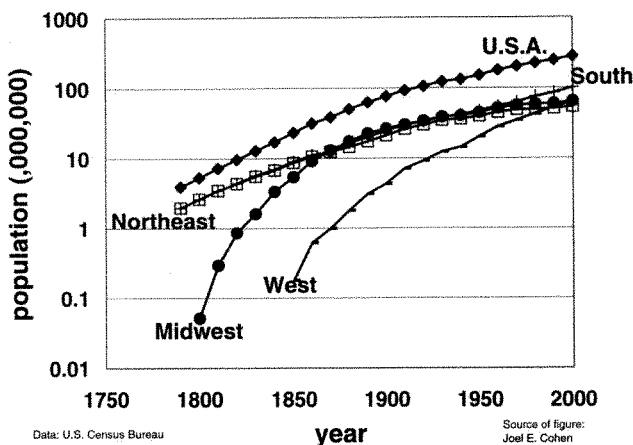


Figure 2

lines is straight. The United States has been growing at a decreasing rate since it was founded. That means that the percent increase per year has been decreasing as the population has gotten bigger. By looking at the data this way, you can better separate the four regions of the United States. When the Constitution was written, the U.S. population was equally divided between the Northeast and the South. The Northeast and the South continued growing in concert until about the end of World War II, when the South started growing faster than the Northeast.

The Midwest was largely empty of Europeans at the birth of the Republic, and began to be settled around 1800. The first census reports from the Midwest were taken in 1800, and the growth rate was much, much faster than that of the Northeast. Eventually, the Midwest caught up and then slowed down and started growing at about the same rate as the Northeast. The news relevant to this meeting is that the West, which was not counted until 1850, has grown and continues to grow faster than any of the other regions of the United States. In the last fifty years, the U.S. population increased by 86 percent. The Northeast population increased by 36 percent; the Midwest, 45 percent; the South, 112 percent. Now 112 percent means a doubling and a little more. The West grew 213 percent—that means tripling—to 63 million. So the absolute numbers have grown.

In addition, population has been increasingly concentrated in cities. It is increasingly difficult to move away when you see the smoke from your neighbor's house. Side effects of human activity, what economists call externalities, become harder to avoid when you have 316 times as many people living in the same space. The recent changes in population have been most rapid in the West, and the institutions, laws, and human behavior have not yet adapted to those changes. That is what I see as a basic aspect, not the whole problem, but a basic aspect of the problem.

Now what about solutions? It's my conviction that solutions come from enlightened action by people, and I hope this next slide (Figure 3) shocks you because it certainly shocked me. I did not anticipate it. This is a graph of high school dropouts among 18- to 24-year-olds in the United States. It shows the United States' dropout rate in 1970 dropping steadily from 17 percent down to around 12 or 13 percent. The South dropped much more dramatically. The Northeast dropped. The Midwest dropped. The bad news is that, in the West, there has been a steady, three-decades-long rise in the percentage of our youth who are not graduating from high school.

Who is going to solve the problems of the environment?

### High school dropouts among U. S. 18-24 year olds

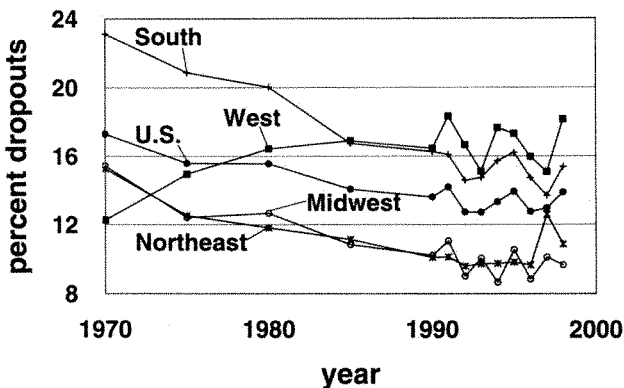


Figure 3

**Mr. Fallows:** We would like to use Joel's question as a segue to Eric Redman's talk. Joel has talked about these continuing demographic pressures which require, and call for, some political solution. He will tell us about the politics and the way we address those issues in public.

**Mr. Redman:** First, let me say, it's a great joy and pleasure to be here, not as the lawyer representative but as a speaker. I was delighted to be invited and see my former law partners, Ray Fisher and Betty Fletcher, but what is most exciting for me is seeing my camp counselor from the 1950s, H. Russel Holland, sitting right here in the front row. That was at Hidden Valley Camp, Boys' Tent Five, and I want you to know that I am the only person who represented clients on the Exxon-Valdez case who was not permitted to take part in the litigation because Russ was afraid I would reveal what the "H" stands for, so I won't.

I have a couple of general observations to make before getting to some specifics. The salmon in the Pacific Northwest is a great public policy issue. I think it's *the* great public policy issue in the Pacific Northwest, and what makes it a good one for study is that, like so many public policy issues in this era, it seems to me that it suffers terribly from a lack of a starting point, a lack of an agreed objective, a lack of even a declared objective. If you think about it, it's impossible to manage any effort except toward the accomplishment of some objective. There is no such thing as a strategy except how to achieve an objective. And what we really have in the Northwest is hundreds and hundreds of measures that are being proposed, but they're all in search of a defined objective. It's confused thinking. It's a little bit as if someone were running around saying, "Let's build a space vehicle." But there is no agreement on where the space vehicle is supposed to go, whether it's supposed to be manned or unmanned, and so forth. My good friend Jim Litchfield says, "If you want to put a man on the moon, you need to design the effort like a NASA effort. If you want to build a quilt, make a quilt, then you design the effort like a quilting bee—that is how you get a quilt." In the Northwest we're really trying to restore an endangered species. What we're really trying to save is fish. It really is more like the moon shot, a NASA moon shot, but the way we are organized is like a quilting bee.

The salmon, on one level, are like so many other fish. If you look around the world there are no fish that have been commercially fished for and have become depleted that have ever recovered without stopping commercial fishing. Not one. And

conversely, there has never been one that was depleted commercially that, where you stopped the commercial fishing, it hasn't recovered. As it happens, most fish are commercially depleted right now, as we all know. In the case of the salmon, half of the decline of the salmon in the Northwest preceded the construction of the first dams. Ninety percent of the salmon rivers and streams in the Pacific Northwest do not have dams. Their decline curves are just the same. Dams are definitely not good for the fish, but there is a bigger problem at work here. The first conference on the decline of the Columbia River salmon was held in Portland in the 1860s, and the first book about it was published in 1885. The first dam was built in 1936.

Pacific salmon are unlike other fish in a way we forget about, and I think it completely confuses our public policy; that is, they only get to spawn once and they die as soon as they spawn. So the salmon that any of you ate last night or the salmon you are going to eat today never had a chance to reproduce. You don't know that when you eat a piece of halibut, you don't know that when you eat a piece of venison, but you know it when you eat a piece of salmon. So if they are wild animals and we are really trying to recover them as wild animals, we have to admit right off the bat that killing them before they reproduce is not consistent with recovering them. They are also unlike all the other species protected by the Endangered Species Act, I think, and those animals that we often hear about, because we have for many, many decades enhanced them with hatchery-produced fish, unnaturally produced fish, to augment them as a resource.

So there is this fundamental confusion. Is this fish a wild animal that is to be protected from humans so that it can live out its natural life cycle unmolested by man? Is it a baby harp seal which, in a 1980s analogy, got me into so much trouble? Or is it a resource that is to be harvested? Are we to turn our rivers into meat production factories or save this wild fish? The two are not necessarily consistent. In fact, they are probably inconsistent.

We have, in the environmental movement in the Northwest, people who are really active in trying to help the salmon. There are, however, some environmental groups that oppose the net ban. That issue was an initiative in Washington State last year. You have different points of view or different interests being pursued. Some people generally want to protect the fish as a wild animal; I put myself in that category. It's somewhat like the bald eagle. You know, many people believe it is a magnificent animal and should not be killed. Some people want to use the fish in the way that the spotted owl

was used as a means of controlling development, perhaps even turning back development in some respects to control environmental protection in the Northwest and only incidentally protect any endangered species that is useful for that effort.

Then, finally, when some people speak of protecting the fish, they are really talking about protecting the fishery. How do we keep on fishing? You will note that in no other part of the country are the environmental groups and the fishermen on the same side—only in the Northwest, because when we talk about “save the salmon,” it can mean so many different things to different people. My suggestion is to go with the bumper sticker that says, “Save the salmon. Don’t eat it.”

**Mr. Fallows:** Thank you, Eric. We will turn a couple of these questions to Lois Schiffer. Joel Cohen highlighted the background human pressures, and there was a recent, very dramatic report by Robert Ladke of the Environmental Protection Agency essentially saying that efforts to restore salmon runs were pointless as long as there are upward population trends in the Pacific Northwest. Eric Redman is saying that, given the incoherence of today’s goals, the laws we have enforced are not even sensible. Through the Justice Department, you have been enforcing these laws over the last several years, so give us your perspective on whether that effort was worthwhile and how we should think about this issue.

**Ms. Schiffer:** I am not only going to talk about enforcing the laws, but also about implementing them because, in many cases, the government was the defendant—not the person actually bringing the enforcement action.

I want to start, though, with one other point, and that is we always thought that the salmon issue in the Pacific Northwest was the most difficult environmental issue. People should not come away thinking all solutions to all of our environmental problems are hopeless. Many of them really can be solved and are not quite as complicated. A case in point: Lisa Abbotts, one of the mediators who is part of the Ninth Circuit mediation office, has just resolved a major environmental matter. That approach really shows that you should not go away thinking that every environmental matter is so impossible that nothing can be solved.

But what we really looked at is the following: What is the set of laws that comes into play, and can they be made to work together? Some of this was accomplished by enforcement and some by decisions of government agencies at the federal and state levels. And how could they get cooperation among themselves to come up with decisions? I might add that, at the

Justice Department, we represented all federal agencies. We had many within-the-government discussions among federal agencies that didn't see eye to eye, but by the time we got to court, we had to have a single position.

The set of laws at stake is vast. For example, the Endangered Species Act has been mentioned. I think of this protection partly as a decision that we have already made as a country—namely, that we want to protect endangered species, including the salmon and the bald eagles. And, at least for now, that is not a decision that we are going to revisit.

There are also many implementation issues. We have the National Environmental Policy Act, a very good and longstanding environmental statute that requires the federal government to gather environmental information and to look at impacts that an action might have, to look at the alternatives to the action, and to look at what socioeconomic elements might come out of a decision. The real core of the National Environmental Policy Act process is to look at implications and alternatives that involve the public in the process so that we have a real vehicle for ensuring that the many competing interests are taken into account before a decision is made.

There are significant Indian treaty rights in the West. We heard a very eloquent discussion from Professor Wilkinson about some of the cases stemming from the treaties, including the Boldt decision and its progeny, which continue to be implemented and raise complicated questions and which are very much at stake in decisions made about salmon. The fish are important to the Indians to carry out their treaty rights, not only as a religious and symbolic matter, but also as a commercial matter. The Indian tribes in the Pacific Northwest have said they are also interested in restoring what they viewed as a commercial operation of catching fish. I should add that I don't feel comfortable speaking for the tribes—but what I can do is give you what I understand their point of view to be. I think they speak very eloquently for themselves.

Then there are enormous legal issues related to management of the public lands in the West, and they are vast. Just focus on national forests. The concern has been that by cutting down trees in the forest, particularly near rivers and streams, we have taken away some of the shade that protects the spawning areas for salmon. If you cut them down, two things happen. First, you change the temperature of the water so it is less attractive for the salmon to come, and they are less likely to have successful procreation and reproduction. Second, because a lot of silt and other runoff runs into the water, you're changing the environmental conditions in the water. So





Columbia River area Native Americans fish for salmon with spears at Celilo Falls, Oregon, ca. 1910. (MSCUA, University of Washington, NA 745)

how the forests are managed and planned for throughout the Pacific Northwest, particularly the public forests, comes into play in decisions about what we are going to do about salmon.

But that is only the forest lands. There are also other public lands, including lands managed by the Bureau of Land Management; those lands have a different set of authorities for how they are managed and a different planning process.

There are also serious questions related to the Clean Water Act. The Clean Water Act requires that wetlands get a certain degree of protection. The act contains requirements about water quality, and some of those requirements about water quality are not only federal questions, but also questions of how the states implement the water quality standards. And a lot of those issues are just at the beginning stages of being worked out. They have not really been resolved yet because of the history of the Clean Water Act. So we are operating in a situation where every time a decision is made about what you are going to do about salmon, there are questions of water quality, particularly related to temperature and the silt that comes into the water.

There are also water allocation rules that we all know are complicated in the West; that's the simplest version I can give

of it. In general, it is a state-by-state matter. In the West it turns on "first in time, first in right." That means that farmers have a lot of claims to use of water. There have been questions of whether they have met their rights and their obligations for using that water. We had enforcement cases brought by the federal government where we thought that farmers were improperly diverting water and using more than they were entitled to or, at times, that they were not entitled to.

In any event, there remains a question of how you are going to implement the water rights that come into play. Then we have to consider whether this is the water allocation we really want to have. Do we want to have people being able to buy water? And if we are going to have people buy water from other people and, in particular, the federal government, how do we need to change the laws to be sure that those uses can stick? Not every state's laws permit water to be used in an effective way.

Next, consider the laws that relate to power and dam operations. There is a wonderful chart that shows all the dams throughout these states. There are at least 150 of them. We focus on the big ones, but there are many. They are managed by the Bonneville Power Administration, the Army Corps of Engineers, or the Bureau of Reclamation. They have different requirements, so that brings another complicated layer of legal requirements to bear in this field.

As we were thinking about enforcement, we also thought about the fact that when federal agencies make decisions—and this is likely true of the state agencies, too—those decisions might be challenged on the basis that they are arbitrary and capricious. So an additional set of legal standards comes to light.

Finally, I will mention that because a lot of the controversy arises in a context where people do or do not like the outcomes in important issues, there is the important question of whether courts are going to look at whether preliminary injunctive relief is appropriate.

So a very complicated legal structure comes into play here. I may have left out some piece of it, but there is enough for everyone to see that the legal structure has a lot to say about resolutions of these disputes. As a country, we have made a lot of decisions in the environmental arena; that is, we have an Endangered Species Act and we have the Clean Water Act, but how those decisions are implemented is not so easy.

A final piece I would add is that, at the moment, all of this is being played out in a context of enormous distrust by everyone: distrust of agencies toward each other; distrust of states toward the federal government; distrust of the tribes; distrust of the industrial groups; and distrust by the environmental groups.

**Mr. Fallows:** Thank you. We have, I think, an enhanced appreciation of the complexity of the legal structure that goes with the underlying economic and political structure.

One question that is on the table, which we'll come back to later on, is this: As you have pointed out, we have decided to protect the salmon under the Endangered Species Act, but there are other things we are deciding to do, too, that are in conflict with that approach, including the treaty rights. So we will see about how those conflicts are resolved.

I'd like to turn now to John Baden. He's been a pioneer in the application of free-market economic analysis to the legal and scientific issues that we have been discussing so far. What we are discussing are things of economic value and other kinds of value to different participants: water rights, commercial rights to fish, the economic value of non-commercial rights to fish. I'd love to hear Mr. Baden's perspective of how the way to value things differently might be clarified.

**Mr. Baden:** Thanks so much. Let me just make a few general comments. For those of you who have not been here before, let me tell you just how much fun it is to be an adult here. It's just wonderful. I live on a ranch that's roughly an hour toward Bozeman from here. You almost surely went by it driving from the airport to Big Sky. Driving up here this morning was really such a treat. I used to log up the Gallatin thirty years ago. I made that same drive daily, and it was great fun to do that today with my laptop rather than a chainsaw. Again, this is just a great place to be, especially when it's not forty below zero.

When we talk about salmon, one of the things that becomes just crashingly obvious is that it illustrates, probably as well as anything else, a central feature of every environmental issue that I have ever looked at, and I've been doing this for more than thirty years. Every single environmental issue has two characteristics: first, it's going to be scientifically, technically complex; and second, every environmental issue I've ever looked at—be it wolf reintroduction or management of wild horses and burros, salmon, logging, everything—carries very, very heavy emotional baggage. So when you have the conjunction of scientific complexity and scientific uncertainty plus high emotional loadings, we have the ingredients for error, acrimony, and political posturing. This conjunction is inherent to the topic.

Let me make sort of an aside comment. I have lived here since the late '60s, but I have taught at other places, such as the University of Washington, where I was a founder of the Environmental Management MBA Program. My family has been in agriculture for a very long time; perhaps it is a genetic

defect. Even though I was living in the great city of Seattle, I had to get back to the land. So I went out into the Yakima Valley and bought a dairy farm. Now, if I had my choices of running a dairy farm or being in a federal pen, I would consider it very carefully, but I would probably opt for the pen. I did not want to own a dairy farm. I wanted to convert it into an orchard, which I did. I had the following situation:

We have a ranch in Montana where we have water rights dating to 1866. We have an orchard in the Yakima Valley where we have water rights dating to 1892. Both were privately developed. The dam that diverts water to our ranch is only four feet high. I've taken a canoe over it. The dam on the Sunny Side Ditch—which comes out of the Yakima River—is slightly higher. I don't think you could take a canoe over it. The point is, this irrigation was developed only if it made sense to develop it.

It wasn't until 1902, when the federal government became involved through the creation of the Bureau of Reclamation, that this mischief with the salmon really started to get serious, because only with the creation of federal dams, beginning in 1905—with one in each congressional district—did we start this assault on the habitat of the salmon. So there is a really important lesson here: Government is used very clearly as an engine to generate resources and transfer resources from one group to another, and, very often, these governmental actions have terribly adverse environmental and ecological consequences.

If you look at logging on U.S. Forest Service land in the Rocky Mountain states from 1970 to about 1985, the U.S. Treasury recouped about seventeen-and-a-half cents for every dollar it spent in administration. This was, basically, a welfare and a jobs program. It was politically driven. Government was used as an engine to plunder—not only to plunder the tax base, but also to destroy some very important ecological resources. At any rate, there is a very important public choice lesson there. The take-home lesson from all of this is simple: When someone essentially asserts that there should be a governmental program to foster economic development, look very, very carefully at the downstream negative ecological consequences of those proposals.

One of the things that we find is that as education increases and as wealth increases, people become green. What we are seeing in this region is a transformation of activities. Essentially, this entire region used to be populated by people who earned their living by moving stuff: wheat, minerals, wood, and commodities. That transfer is now toward people who manipulate symbols. And as we move the economy forward, as it becomes ever more technologically sophisticated, we

have a shift of power and wealth from those who move stuff to those who move symbols. And those who move symbols, of course, are going to be far more environmentally conscious, more environmentally sensitive. So we have a cultural conflict going on throughout the region, and this can get very, very nasty.

**Mr. Fallows:** Can you give me one sentence in response to this difficult question: Given that public development programs like the dams already exist, would a different pricing system be useful, in addition to enforcement, to abate the harm to the salmon? One sentence.

**Mr. Baden:** Yes.

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## PART II

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**Mr. Fallows:** All right. We go now to Buzz Thompson, our next speaker. We've heard from Joel Cohen about the long-term human pressures. We've heard from Eric Redman about the incoherent political perspective. We've heard from Lois Schiffer about the complexities of the legal situation. We've heard from John Baden about some of the acrimony and the cultural shifts. He also alluded to the uncertainty of some of the actual science. For example, there's a tremendous battle about what is a species of salmon. Now the Chinook salmon, as a species, is not endangered, but specific runs are. Buzz Thompson, you have done a tremendous amount of work in terms of interaction of legal and economic and governmental thinking for resolving these sorts of issues. What answer, what hope can you give us as we think about giving more coherence to this whole situation?

**Mr. Thompson:** One of the things that makes the Pacific Northwest salmon dispute such an interesting case example is that it really illustrates, I think, the difficulty that the next generation of environmental issues is going to pose. We are moving from a period of preservation, where the environmental movement was really focused on trying to preserve what resources we still had, into an era of restoration, where we are trying to take resources that we have overused or overdeveloped, like the Columbia River system, like the lower Colorado River, like the Sacramento-San Joaquin Delta in Northern California, and move backwards to try to restore something of the natural ecosystem that once existed. And these are going

to be extremely difficult problems to resolve. One of the reasons that they are going to be difficult to resolve is that our current laws are really not totally up to the task.

First of all, our laws are, in many ways, very unrealistic. I think the Endangered Species Act is an example of a relatively unrealistic law. On the surface, what the Endangered Species Act tells us is that we are supposed to preserve "species," whatever they may be—and I'll come back to that concept in a moment—no matter what the cost. That is what, as the Supreme Court told us in *TVA v. Hill*, the Endangered Species Act is all about; but the truth of the matter is we have never been prepared to ignore cost.

The Pacific Northwest is an excellent example of that. If we really want to make sure we are preserving the salmon of the Pacific Northwest, we would not permit any fishing of those particular salmon. We would remove, at a minimum, the lower four dams on the Snake River. We are not willing, though, to make those types of investments. The cost inevitably is going to come into play. So, although our laws tell us that we are doing one thing, our actions tell a totally different story.

Second, our laws act as if science is clearer than it actually is and assume that there is something known as a species, a subspecies, or a distinct population of a species, that allow us to determine when a particular species is jeopardized or not. The truth of the matter is that those legal concepts do not translate well to the language that scientists like Joel Cohen speak.

A third problem with our laws is that there are politically driven gaps in our major laws. For example, the Clean Water Act speaks quite clearly to point sources of pollution. When you get to non-point sources of pollution, such as those involved in the Columbia River basin, agricultural runoff—which today is the major source of pollution of our rivers in the western United States—the Clean Water Act takes a step back and does not provide the same type of teeth that it does with respect to point pollution. That's because Congress has always been afraid to take on the agricultural lobby in the area of environmental laws.

So, again, our laws are unrealistic. They do not take into account realistic science. They have politically driven gaps. All of that means that the laws don't work very well. A second possibility for restoring our ecosystems is the economics that John Baden talks about. Economics has a role to play here, but the truth of the matter is we're not going to be able to solve these problems purely through economic systems. Non-profit organizations do not have the money to go in and buy back the amount of water that we need to restore those ecosystems, and I do not think that Congress has the

will to appropriate the funds that would be necessary to go in and deal with these issues from a purely economic standpoint. So what are we left with? We are left with a major negotiation that is comparable to the most difficult international negotiations that exist, and the only way we're going to be able to solve those problems is to sit down and talk about them and try and work them out. They are hard, but, over time, we can do it.

**Mr. Fallows:** On that encouraging note, let me turn now to Barbara Reeves. Buzz Thompson was talking about how to think about the environmental problems of the future. One of those problems is the power issue in the West. It is related to the salmon issue because it involves crucial water rights and other environmental issues, too. I wonder if Barbara Reeves from Southern California Edison could tell us what lessons—useful, otherwise, things to do, things not to do—we can gain for the power controversy and the environmental issues of the future from these ongoing salmon and water controversies.

**Ms. Reeves:** The first problem we have to recognize is that preserving all these critters and plants is very nice, but who's going to do it and at what cost? And what do we do about keeping the lights on? For example, many of you may not know that a utility has what is called a universal duty to serve. When you are a utility, you must serve all customers in your area. Earlier this year, for example, as the utilities in California needed more electricity, they turned to the Bonneville Power Administration and sought to purchase more electricity from Bonneville. To accomplish this, Bonneville released water to generate more hydro power earlier than usual in the season. At the time, this was fine for the people who needed the electricity, but what is it going to do to the salmon later in the season when the water levels are lower than usual and when the water, depending on the runoff, may not be adequate? This was also a year, you may recall, in which the snowpack in the Sierras and in much of the Pacific Northwest was 40 percent less than normal, and there is not much anybody can do about that; but what it means is that we have less water sitting there ready to be used to generate power.

Now we run into this on a collision course when people want their electricity and, as Buzz said, we have to determine how to pay for it. At present, we hear the cry of "not in my back yard." It is also accompanied by, "Just don't increase taxes or rates while you're increasing this electric power." So how do we reconcile it?

The U.S. Fish and Wildlife Service has decided that one way to reconcile the issue is to recognize we may not get the

money from legislatures, but rather from private industry. Southern California Edison has, in the last two years, encountered the following scenario: A town like Big Sky decides that its 33 kv line needs to be upgraded to 115 kv. To do that, a utility comes along and upgrades this line, so we have new infrastructure. In the process of doing that, the U.S. Fish and Wildlife Service will require environmental impact statements. One of the areas they require you to cover is growth-inducing impacts. If you build this line, will it encourage more growth, more human growth and population growth? If so, says Fish and Wildlife, then the utility is responsible for that.

You can draw these questions from the range of the probable. Obviously, if Big Sky's population is not growing solely because it does not have reliable electric power, then improving that power or improving a water supply or any other infrastructure could, most likely, result in increased population.

On the other hand, it could be that it is more speculative; perhaps the population will not come just because the power is improved. It may be that the population has already come. And what impact will those indirect effects have? Will it injure the salmon? Because the more people who come, the more power they need and the faster you release the water out of the dams in the Northwest.

Therefore, a project in Southern California or Montana is suddenly looking to the impact it may have on the rivers of the Pacific Northwest if they, in fact, are purchasing their power from that area.

The issue really comes down to who is going to pay? In recent years, with the reluctance of both state and federal governments to appropriate the money, citizens have turned to utilities with the *Field of Dreams* slogan, "If you build it, they will come." Therefore, you as the utility are responsible not only for assessing it, but also for trying to take these losses into account.

Finally, I will throw out a statistic because I cannot let the professor here be the only one to do so. In California, we have at present 565 state and federally listed species that are protected under the Endangered Species Act or a state equivalent of that. Only 10 percent of those species have protected habitat at this point, and we live at a time when there is an increasing desire by people to protect the habitat of these species, both plant and animal. Yet at the same time we live with people who want reliable power. In our company's case, the lines cover thousands of miles of desert, mountains, and forest where these critters and plants are happily living and going to be impacted. How we go forward and resolve that dilemma is another issue.



**Mr. Fallows:** That leads nicely to a question I want to ask. Before I give you a chance to respond to each other, I have a context I am going to propose for you six panelists, reviving those old competitive juices from the law school days and applying for law review, etc. Let's take an example we've been using: the problem with the drought in the Pacific Northwest this year. There is an absolute conflict about how to use those resources with less water. Bonneville needs to spill some of it to generate power that California wants and the Northwest wants. The farmers want it during a drought year for irrigation. The fish need it for spawning. The Endangered Species Act says the salmon have to have the waters because they must be protected. And the Indians, by treaty, have a right to this water and to the fish it sustains. They can't all have their way. At least one, probably several of them, have to lose.

Stipulating that we are not talking about any specific case, what way can you suggest to the judges gathered here to be able to think about these conflicts? Who has the best concise, unified field theory that can allow judges to say, "Okay. We have these absolute conflicts. Somebody has to lose. How will we resolve it?"

**Ms. Schiffer:** Apply the law.

**Mr. Fallows:** Who thinks that will solve the problem?

**Mr. Cohen:** Well, like most absolute conflicts, this one is specious. The farmers are the principal diverters of water. What happens to that water? Most of it goes into an open canal, and a significant percentage of it evaporates before it gets to the farmer's field. A great deal of it is sprinkled in open-air sprinklers on the farmer's field. It does the plant no good. The fraction of water that gets to the root of the plant at the time when the plant needs it is less than 1 percent. So the question is as follows: Is there an inalienable right to use a technology that makes sense at a time of abundance of water and information poverty?

In a new situation, when we have high information about when the plant needs water, we have computers to control it, and we have other people making demands on the water. None of these demands should be viewed as non-negotiable because there are alternatives for many of them. The same thing goes with the power. We do not use the water for power very efficiently. There are alternatives that can be considered. There is wind, there is sun, there is geothermal. Why are we hooked into thinking that the way it's done today is the only way?

**Mr. Fallows:** To push here, in practical terms then, your guidance to judges is to master the scientific aspects of each one of these issues that comes up as a conflict? Would that be your guidance to the judges?

**Mr. Cohen:** Judges should not take as a given the position given by any advocate for their solution.

**Mr. Thompson:** I want to respond to Joel by saying that I am a very strong supporter of conservation, but I think there is a mistake that is frequently made: the assumption that the water that is not actually used by the crops, by our farmers, is lost entirely to use.

The truth of the matter is, other than the amount of water that is lost to evaporation, that turns out to be a very small percentage in the western United States. Most of that water is either going to find its way back into a river system, or it is going to find its way to a ground water aquifer where it is then used by other farmers or others. So I think we overstate sometimes how much opportunity there actually is for conservation.

**Mr. Cohen:** If it finds its way back enriched with nitrogen, phosphorous, potassium from fertilizers? Let's get serious.

**Mr. Fallows:** This illustrates some of the difficulty judges will have in using this as a standard.

**Mr. Thompson:** In terms of how to solve the allocation of water, the first question that the legal system really should be thinking about is that initial allocation of water. What you start out doing is figuring out what the environment needs, which is obviously a very, very difficult question. And then after that, you use those systems that exist, such as the prior appropriation system, to allocate the remaining water. Then you permit the market to reallocate the water over time. I think we spend too much time trying to figure out exactly what the relevant economic values of the water and various uses are. We can, if we just allocate the water initially, then let the market reallocate it.

**Mr. Fallows:** Allocate to whom initially?

**Mr. Thompson:** You have a prior appropriation system which is set up to solve the question of that initial allocation of water among the hydroelectric facilities, among the farmers, and among other users. The one type of use you have to recognize and protect at the very outset is the environment,

because you don't have environmental users out there who can go and effectively utilize the market.

**Mr. Fallows:** Barbara? So you have a candidate, then, for us?

**Ms. Reeves:** Economics. Let's talk about economics for a minute. We hear discussions about the alternative sources of electricity and renewable sources, which are fine. The question is what are we willing to pay for? Wind, solar, and geothermal, given today's technology, are not always as inexpensive as we would like, or as reliable. There are days when the wind doesn't blow. There are hours when the sun doesn't shine, so you can't rely on the source. The state of technology is such that they are still relatively expensive sources of power. Nuclear power and coal, unfortunately for people interested in the environment, happen to be much less expensive—very inexpensive, in fact.

What are we willing to pay for, and who decides that? Is that going to be a legislative issue or is it going to be an issue that will somehow come up in the courts because a law is being interpreted? What do we do with those issues that can't be placed into monetary terms? In other words, what do we do to protect an endangered species that has no economic value but has some sort of other value that we cannot put a dollar on?

**Mr. Fallows:** Are you entering a contestant in the contest of how judges should resolve these problems, these perhaps inconsistent claims?

**Ms. Reeves:** I think they should look to market economics.

**Ms. Schiffer:** It does seem to me that one thing we are conflating here is the long term and the short term. And when you are talking about what a judge is going to have to decide, in certain ways the judge really has to look at the short term. The kinds of suggestions that Joel is making, which are very thoughtful, are much more in the vein of long-term solutions. You really cannot go to a judge and say, "Actually, the current water allocation system makes no sense, and so, Judge, could you please reinvent it?"

On the other hand, it certainly is subtle. We're very inefficient in the way that we use water. But those are the kinds of topics that, if you're looking at long-term solutions, we can be talking about and looking at. And that goes for sources of power, as well. So, as you move through this contest, you might want to note that it is really a short-term contest—a part of this solution here is likely to be a more long-term solution.

**Mr. Fallows:** Very long-term . . . yes.

**Ms. Reeves:** Market economics certainly should inform the decision; but, from a judge's point of view, I would look to due process, which is what I think I was trying to discuss—namely, who decides and how do you decide? And has that process been followed properly? The legislature needs to have spoken, and all the interests—economic and non-economic interests—have to honor the appropriate process so that they are all protected. That is what I believe the courts need to be looking at.

**Mr. Fallows:** Any other entries in the contest? None? Let's shift now to the long-run question. I would like to ask Joel Cohen about the sort of unexpected note of Pollyannaism in your presentation; that is, you showed your discussion about demographic pressures. You were suggesting that high school dropouts were essentially the problem. If we could keep people in high school, everything would be okay. And connected to that, to all the other panelists, was a sense that our institutions—economic, legal, judicial—are just not well set up to handle the increasing pressure of human beings on these scarce resources.

Would you want to amend any impression of Pollyannaism I may have taken from your presentation and discuss what institutions you think might have to change? Then we will have responses from some of your legal colleagues. Joel's middle name is, in fact, Pollyanna.

**Mr. Cohen:** I presented those statistics on high school dropouts as an indicator of our investment in the human infrastructure of the next generation. I think we are significantly under-invested and that undermines all of our efforts to deal with these economic, legal, political, social, and cultural problems. I don't think it's just high school dropouts. I think we are under-investing at every level.

**Mr. Fallows:** And that is clear to you?

**Mr. Cohen:** To amend my Pollyanna position, I'd like to lay out some issues that need to be considered when we advocate free-market solutions to these environmental problems. I will name four assumptions.

First is the assumption of perfect information about the true costs of destroying species and habitat. We are assuming that the private land owner who put in those small dams that John Baden can take his canoe over really knew what the impact was going to be on the fish in that stream, and that

every decision we are making now is perfectly informed so that the prices in our markets are correct. Second, we are assuming that all the interested parties currently alive are parties to the transaction that markets price. Third, we are assuming that the values that would be held by future generations are fully reflected by the willingness of today's parties to pay. And fourth, we are assuming that there is no intrinsic value of non-human organisms or natural habitats. I am not an advocate for or against these assumptions, but I invite you to think seriously about how realistic they are.

**Mr. Fallows:** Who would like to reply to that?

**Mr. Baden:** Well, no reasonable economist would ever make those assumptions. When these dams were built, America, by today's standards, would be considered a Third-World country. And, quite frankly, we were interested mainly in production and subsistence. Environmental values, as we view them today, simply were not taken into account by the people who were doing this work.

The demand for environmentalism is very much like the demand for BMWs, foreign travel, and gourmet coffees. It is a highly superior good. As people become more wealthy, their demand for these goods goes up dramatically. And the people who built these dams simply were not concerned with that at all. Today we do not expect Third-World nations or people in Third-World nations to take these non-material, non-marketized values into account.

**Mr. Fallows:** But to interrupt if I might, isn't Joel talking about decisions made from this point forward, whether there are assumptions that would apply to them?

**Mr. Thompson:** I think Joel was absolutely right, and I believe that deciding, for example, how much water needs to remain in our rivers for environmental purposes is not a purely economic decision. Various points Joel made demonstrate how difficult it would be to try to determine on a purely economic basis how much water we need to retain in our rivers.

Having said that, however, if there were one major policy change that could be made in the natural resources area it would be convincing the Western population that the resources of the western United States are limited and that we, therefore, have to start recognizing the limited nature of them and pay the opportunity cost of those resources. Right now, none of us is willing to pay the full cost of the water that is delivered to us. When California faces an energy crisis, the one



Fish ladders help salmon bypass a dam on the Columbia River.  
(Courtesy of Bonneville Power Administration Archives)

thing that is off the table is the notion that California consumers should pay more for their energy. If we simply started charging people the full cost of delivering these resources to them, we would have made a long step in the correct direction.

**Mr. Cohen:** I agree with that.

**Ms. Schiffer:** Just a couple of additions. I agree with Joel's list, too, and I also would add, as sort of an embroidery on it, that when you are talking about having the interests of all the parties being taken into account, you also have to look at whether they have been given equal voice. Because, as we all know, when you are weighing interests, some interests sometimes speak more loudly than others or have more influence than others. Being sure that you are giving voice to the less loud interest is sometimes not so easy to do.

The other piece that I think is implicit in Joel's viewpoint is that it is not only the people of the Pacific Northwest who have an interest in these issues. Those of us who live in other parts of the country care about what is going on and have an interest in what is going on here. And, while that is an additional complexity, it is one that sometimes people of the Pacific Northwest think should not be taken into account, but it does need to be taken into account.

**Mr. Redman:** The flip side of that issue is that these problems are made immensely more complicated by the fact that we have a totally closed system. The one party that is protected in the whole situation is the federal treasury. Bonneville generates a lot of extra power and sends it to California. The reservoirs are depleted. The rates have to be higher because Bonneville's rate payers have to pay 100 percent of the costs of Bonneville to make timely payment to the Treasury.

To the extent it's driven by the Endangered Species Act, you see what's happened. More money has been spent on the Pacific salmon, by the Endangered Species Act, by factors of many orders of magnitude, than on all the other Endangered Species Act-listed species in the country, for a very good reason. It is being paid for by rate payers. It is not coming out of the Treasury.

That is one of the principal reasons why we go on without facing up to this issue. If you are going to treat this fish as an endangered wild animal to be saved, you cannot come up with a justification for deliberately killing it. What we are doing is spending hundreds of millions of dollars to reduce accidental killings of an animal that we intend to go on killing intentionally. This creates a contradiction in the policies that make the costs that have to be incurred much higher than they would otherwise be.

If we looked at it purely in economic terms, leaving aside the tribes which I have to for this point, and focused just on the fact that there are so many non-tribal fishermen killing salmon as we speak today, and said to everyone who is killing a wild animal, "We will buy your right to kill that wild animal until it has recovered to a level where it can be killed again," it would be much more inexpensive for us than everything else that we are doing to try to sustain a stock of combined wild and non-wild animals for people to go on killing.

The classic number is not an exaggerated number. The wild salmon that return to the Columbia River are costing the rate payers about \$300,000 a fish, and, as you know, this year they are being caught in enormous numbers commercially and being sold. The fishermen are getting about fifty cents a pound for these fish, and that is not an economist's solution to the problem. It is not a problem that couldn't have a better economic win-win solution for everybody involved.

**Mr. Fallows:** I'm going to interrupt the salmon discussion arbitrarily at this moment to shift to one final area where I would like you to give some advice to the audience. Again, we are here with a number of jurists before us, and we have to think about these long-term issues.

You all talked about the incoherence of our legal and political structure in giving us long-term economic and scientific issues. How should judges think about these long-term pressures? Should they assume that they are a lagging indicator or is there some leading indicator role they can play in giving more coherence to how we think about this? Who would like to volunteer how judges can be forward looking and think about the environmental issues?

**Mr. Baden:** It seems to me that the most basic and fundamental fact is that across time and across culture, as people become more educated and wealthier, they become more environmentally conscious. So that implies that ecological issues and ecological quality and ecological restoration will increase in importance—that I think addresses some of Joel's points on what the future will want. We cannot anticipate that with any clarity, but that is your best single bet.

**Ms. Reeves:** The judges also need to recognize that the legislatures have been very reluctant to act in these areas, in part because it is politically unpopular to raise rates or to pay money to protect species. Anything that requires raising taxes or raising rates is so politically unpopular that legislatures, as we have seen in California, have been frozen and unable to deal with issues.

That may mean we have to turn to the courts to see if there is room within existing law for the courts to give a nudge to the legislature or agencies to take steps that need to be taken. We need a forum where the different parties can come together and jawbone at each other and trade with each other, and I'm not sure whether that's a creative activity that judges undertake: the design of ways to bring people together.

Maybe it's through the mediation service. Maybe there is some other kind of institution. We need to bring together the farmers, the downstream users, the tribal fishers, and the power suppliers, and let them trade in some way so that we get a decision that is more economically, socially, and environmentally rational. Whether judges are the people to create these things I don't know, but maybe they could find opportunities in the cases that come before them.

**Ms. Schiffer:** I love judges, and certainly in this room I would say I love judges, no matter what. I think they serve a very important function, as does, I think, the legal structure in helping to move us forward in solving this problem. But it is not the only tool. If judges are cognizant that we need to have other institutions that have an active involvement in this



arena as well, we will probably help them address this problem and move forward.

**Mr. Thompson:** The reason why these disputes are ending up in the courts is that the legislatures are not able to deal with them directly. And so I think the courts can play an extremely important role in helping to drive solutions here.

As I also mentioned earlier, however, the laws are really not designed to come up with final solutions to these various problems. That can only occur through complex negotiations. So, although the courts need to be driving this process, one of the things that would be very valuable is to drive it in the direction of negotiation to get the parties to sit down and come up with solutions of their own.

**Mr. Redman:** I would suggest two things that I think judges could do that are very helpful. The first is to recognize, especially on issues such as the ones we have talked about, how narrow the information presented to the court is in relation to the total situation. It seems to me it has to be the judges' job to push for more information than what the parties have presented so as to try to put the situation in a broader context and understand it.

The second is to recognize, and this is much more controversial, that in a time when there is so little consensus and such inability to deal with issues when the parties are split in the Congress—this has essentially paralyzed legislation compared to in the days when I worked there. There is so little new legislation coming out in such a definitive fashion, that one thing that is going to be coming before the courts more and more is agencies that feel themselves compelled to, in effect, start making laws through their policy interpretations of existing law because there has not been sufficient political consensus to result in new law. So the agency does its best, and courts, I think, need to do their very best to be very alert. Rules we used to follow twenty years ago on agency interpretations and how courts looked at the agency for interpretation of the statutes, I would suggest to you, are like an endangered species, and they should be because the premises twenty years ago of what the agency acted on or what Congress told them about how to deliberate compared to what's going on today, which is much more of a free-for-all, make the role of judicial review of the agency much more difficult and not subject to the mechanical rules that were once followed.

**Mr. Fallows:** Here's one last question: If we assume that the big environmental challenge of the future—the salmon issue

of the future if you will—will involve greenhouse gases, global warming, etc., is there anything we have learned from these last imbroglios which will make it easier and saner to sort that one out? Who has any hope to offer here? Pollyanna?

We may leave that issue hanging for another day.

## ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

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