

HOW FEDERAL APPELLATE JUDGES AFFECT STATE LAW: JUDGE GOODWIN AND OREGON

STEPHEN L. WASBY*

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* B.A., Antioch College; M.A., Ph.D. (political science), University of Oregon. Professor Emeritus of Political Science, University at Albany-SUNY. Residing in Eastham, Mass. Contact: wash@albany.edu. In conducting research for this article, the author has, with the judge’s permission, made use of Judge Alfred T. Goodwin’s papers, which are held in the Alfred T. Goodwin Papers at the Oregon Historical Society, Portland, Oregon. The author has made every effort to ensure the accuracy of citations to, and quotations from, those documents in those papers on which he has drawn in this article. He notes that the editors of the *Willamette Law Review* have not had the opportunity to review the Goodwin Papers. They also have not had the opportunity to review the Ninth Circuit’s unpublished memorandum dispositions for 1971 through 1977, which the author examined in the San Francisco library of the U.S. Court of Appeals for the Ninth Circuit; the court’s “unpublished” memorandum dispositions from 1977 until they were reported in the *Federal Appendix* and for which the text is unavailable on Westlaw, which were made available to the author in the judge’s chambers; and transcripts of interviews and conversations and copies of letters and e-mails, which are on file with the author.

I. INTRODUCTION

In what ways do federal appellate judges influence state law or, more broadly, the broader environment in the state from which they come? If a federal judge has earlier been a state judge, influencing state law through his or her state court rulings, does the judge continue that influence once on the federal bench? Instead of focusing attention on the Supreme Court's limiting of national and state government powers, here, by contrast, attention is given to how state interests may be protected—certainly, affected—in the federal courts of appeals. This Article will attempt to gain insight into matters like these; into federal court—state court relations, and into how federal judges draw on state law in the cases before them. It is based on communications among the judges as they decided cases, from the case files of a senior federal appellate judge. The cases to be examined are those which came from the District of Oregon to the U.S. Court of Appeals for the Ninth Circuit, and in which Alfred T. Goodwin, a state judge-become-federal judge, participated and in which he wrote opinions, and it is his papers from which the cases are drawn. The cases in which Judge Goodwin did not write the opinion are included because an appellate judge, even when not the author, contributes through comments during conference and suggested revisions to another judge's proposed opinions.

Before joining the Ninth Circuit, Judge Goodwin served for four-plus years as a state circuit judge (in Lane County, Oregon); almost all of his rulings were affirmed on appeal. He then became a member of the Oregon Supreme Court for almost ten years.¹ He contributed to Oregon law not only during that service as an Oregon state judge, but also during his brief service (two years) as a federal district judge in the District of Oregon, where he decided issues affecting individuals and businesses within the state, but more importantly, acts of local and state government. After joining the U.S. Court of Appeals for the Ninth Circuit in 1971, he continued to rule on matters relevant to Oregon and to Oregon law, not only because he sat as a district judge in Oregon on some cases during that period, but also because, as a judge of the court of appeals, he heard cases that originated in Oregon—again involving individuals, businesses, and government entities—and those cases often implicated Oregon state law.

1. See Stephen L. Wasby, *Looking at a State High Court Judge's Work*, 12 LEWIS & CLARK L. REV. 1135 (2008); Stephen L. Wasby, *Two Justices at Issue: Goodwin and O'Connell*, 90 OR. L. REV. ONLINE 1 (2011), <http://law.uoregon.edu/org/olr/docs/wasby.pdf>.

The cases examined in this Article provide a look at the Ninth Circuit's *use* of Oregon cases and its *development* of Oregon law in them; the cases' possible effects on the state will also be explored. After introductory observations, there will be attention to whether a judge of the U.S. court of appeals represents the state from which the judge was chosen. The core of the Article is an exploration of federal appellate court treatment of state law. Examined are how federal and state law intersect; federal court habeas corpus petitions by convicted state defendants; cases in the federal courts' diversity-of-citizenship jurisdiction and the use of certification to state courts where state law is unclear; and federal court rulings' effects on state government. The last section of the Article deals with environmental law because of the great impact of the U.S. court of appeals' rulings in the Pacific Northwest. Included in this section, which focuses on Judge Goodwin's positions in these cases, are efforts to divide the Ninth Circuit itself; to the spotted owl cases; the relationship between federal and state law on this subject; and to the role of procedure in environmental rulings.

II. FEDERAL COURT RULINGS AND STATE LAW

Not all cases appealed from the federal district court in Oregon to the Ninth Circuit involve state law questions. Many are straightforward applications of federal criminal law or other federal statutory provisions, such as those involving maritime injuries² or immigration law.³ They might turn on aspects of federal procedure and be resolved on the basis of Ninth Circuit precedent and the rulings of the U.S. Supreme Court. Shifts in the topography of the law over the decades have meant that more cases that would otherwise have been resolved in state courts come instead to the federal courts. This may happen when federal constitutional questions arise in those cases; certainly the nationalization of constitutional criminal procedure rules (on confessions and search-and-seizure) makes it likely that a criminal defendant whose state conviction has been affirmed by the state courts will turn to the federal courts to file a habeas corpus petition raising those

2. *See, e.g.,* *Lasseigne & Sons, Inc. v. Bacon*, No. 87-4003, 855 F.2d 861 (9th Cir. 1988) (unpublished table decision) (Jones Act, Death on the High Seas Act, and general federal maritime law).

3. *See, e.g.,* *United States v. Ayala-Contrera*, No. 92-30117, 977 F.2d 591 (9th Cir. 1992) (unpublished table decision) (immigration law).

constitutional questions. And the increasing number of federal statutes, for example, concerning employment discrimination, means fewer lawsuits based on incidents in Oregon, draw on Oregon case law, or at least not exclusively so. When the federal courts face cases containing both federal law and state law claims, the judges must often determine which they should decide.

There are also many cases from Oregon in which the federal courts do not really contribute to the development of Oregon law. A case can be heavy on Oregon facts but no Oregon law may be involved, as in an appeal challenging a Seaman's Manslaughter sentence where the Ninth Circuit affirmed the conviction because the boat captain acted recklessly, but vacated the sentence as too high; the case had much discussion of the danger of entering the Umpqua River bar.⁴ There is also no contribution to Oregon law when the case happens to be brought in Oregon, because, say, a decedent's relatives are there, but the case is based on action (e.g., medical malpractice in the military) that occurred outside Oregon.⁵ Likewise, in a challenge to denial of benefits under an ERISA long-term disability insurance plan, where the court said the insurance company had not wrongfully terminated benefits, while the plaintiff and employing company were in Oregon, the case had no relation to Oregon law, which the court did not mention in its disposition, which also barely noted ERISA itself.⁶

At times, a case from federal court in Oregon may have a possible effect on Oregon, but the effect is at best oblique and speculative. An example is a ruling on Idaho's status as an intervener in a Columbia River fishing rights case.⁷ That ruling might affect Oregon to the extent that Idaho's presence and arguments might affect the outcome, but the case is clearly not one with a direct and immediate effect. Yet even when Oregon law is not directly at issue, rulings on events in Oregon help shape the state's economy, for example, cases on workers' injuries, or the environment, as the spotted owl cases and other cases on aspects of the timber industry did.

Almost any aspect of timber sales, whether in relation to

4. *United States v. Oba*, No. 07-30192, 317 F. App'x 698 (9th Cir. 2009).

5. *Estate of McAllister v. United States*, 942 F.2d 1473 (9th Cir. 1991).

6. *Dames v. Paul Revere Life Ins. Co.*, 12 F. App'x 505 (9th Cir. 2001).

7. *United States v. Oregon*, No. 85-3943, 796 F.2d 480 (9th Cir. 1986) (unpublished table decision).

environmental concerns or pricing, has a definite effect on the state. An example is a challenge to an alleged conspiracy by corporations and individuals to limit competition in bidding for timber in the Detroit Ranger District by allocating the bids,⁸ which the court found within federal jurisdiction because, while it took place in one state, it affected interstate commerce.⁹ Another was a suit against the government for timber destroyed by a fire said to originate on government land,¹⁰ in which the appeals court affirmed judgment for the government.¹¹ And there was a criminal appeal from convictions for harvesting and selling federal timber without authorization and damage to federal land (convictions affirmed).¹²

Cases on the arbitrability of a matter illustrate how a case might be decided under federal law but would affect the state—in this instance, the conduct of arbitration in Oregon.¹³ As cases involving the arbitrability of certain claims are often embedded in larger issues, the effect may, however, be greater. We see that in two cases in which the federal court found arbitration provisions to be unconscionable under state law. One case was a suit for discrimination against an injured worker and for violations of the Oregon Family Leave Act, in which the district judge compelled arbitration, but the Ninth Circuit reversed. The law clerk for one of the judges, drawing on an Oregon Court of Appeals ruling, wrote that the arbitration agreement was “both substantively and procedurally unconscionable” because of its cost-sharing provision.¹⁴ In the memorandum disposition Judge Goodwin wrote for the panel, citing the same case, he said that “Oregon courts have no bright-line formula for the unconscionability analysis,” although “[t]he primary focus . . . is on the ‘substantial disparity in bargaining power,

8. *United States v. Champion Int’l*, 557 F.2d 1270 (9th Cir. 1977).

9. *Id.*

10. *Colahan Enters. v. United States*, No. 72-1607 (9th Cir. Mar. 8, 1974) (no citation).

11. *Id.*

12. *United States v. Smith*, 61 F.3d 914 (9th Cir. 1995) (convictions affirmed).

13. *Hall Street Assocs. v. Mattel*, 196 F. App’x 476 (9th Cir. 2006). This reversal of the district judge’s non-enforcement of an arbitration agreement came after an earlier remand, 113 F. App’x 272 (9th Cir. 2004).

14. Memorandum from Stacy Anderson (law clerk) to Judge Stephen Reinhardt (July 3, 2008) (citing *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007) (unpublished table decision)) (discussing *Gray v. Rent-A-Ctr. W., Inc.*, No. 07-3585, 2008 WL 3890501 (9th Cir. 2008), *vacated*, 314 F. App’x 15 (9th Cir. 2008) (unpublished table decision)). Unless otherwise specified, all those named as senders or recipients of case-related memoranda are or were judges of the U.S. Court of Appeals for the Ninth Circuit.

combined with terms that are unreasonably favorable to the party with the greater power.”¹⁵ Noting that “[d]isparity in bargaining power is endemic on contracts between employees and employers,” the judge said that the plaintiff had no power when he signed the standard arbitration agreement and “no real opportunity to negotiate the terms.”¹⁶ Furthermore, requirements of cost-sharing or equal payments of costs would discourage workers. Continuing, he wrote, “[a] litigant is effectively denied access to the arbitral forum ‘when the cost of arbitration is large in absolute terms . . . [and] . . . th[e] cost is significantly larger than the cost of a trial.’”¹⁷

Likewise, in a suit over a false claim of “End of Late Fees,” where the arbitration clause in Blockbuster’s membership agreement had a class action waiver, the court, relying once again on *Vasquez-Lopez*, said such a waiver “in a consumer contract where plaintiff’s damages are likely to be small is substantially unconscionable under Oregon law,” with no requirement that the provision also be procedurally unconscionable.¹⁸

In other situations, the direct effect on Oregon law is minimal, but a series of cases may create a pattern that illuminates that law’s application. More particularly, when a case affects only a single individual, as in a disposition upholding or rejecting Social Security disability benefits,¹⁹ there may be an effect not only on the individual party but also on other individuals in the state, thus affecting Oregon’s workforce and thus the state’s economy. And such cases may touch on local matters, even if not points of state law, seen when a judge hearing an appeal in the Social Security disability case wrote, “I wanted to have oral argument, among other things, in order to question the parties about the conclusion of the vocational expert concerning the normal income for someone performing Williams’ type of work in Central Point, Oregon.”²⁰ Similarly, an employment

15. *Gray v. Rent-A-Ctr. W., Inc.*, No. 07-35185, 314 F. App’x 15, 15–16 (quoting *Vasquez-Lopez*, 152 P.3d at 947), *vacated*, 295 F. App’x 155 (9th Cir. 2008) (unpublished table decision).

16. *Gray*, 314 F. App’x at 16.

17. *Id.* (quoting *Vasquez-Lopez*, 152 P.3d at 952).

18. *Creighton v. Blockbuster, Inc.*, 321 F. App’x 637 (9th Cir. 2009) (citing *Vasquez-Lopez*, 152 P.3d at 949–50).

19. *See, e.g.*, *Fonsen v. Chater*, No. 94-36179, 87 F.3d 1318 (9th Cir. 1996) (unpublished table decision); *Gibson v. Chater*, No. 94-36133, 87 F.3d 1318 (9th Cir. 1996) (unpublished table decision) (denial of Social Security disability benefits); *Ortega v. Comm’r of Soc. Sec. Admin.*, 13 F. App’x 607 (9th Cir. 2001) (providing benefits).

20. Memorandum from William Fletcher to the Ninth Circuit panel (Aug. 30, 2000)

discrimination suit by a federal employee, say, someone working for the Bonneville Power Administration (BPA),²¹ affects federal workers in Oregon but not Oregon law. More generally, issues involving the BPA, although crucial to the state, will be matters of federal law, e.g., a challenge to the decision to sell power to certain customers²² or the rates BPA charged private industries for surplus power.²³

Likewise, the affirmance of a conviction for violating federal law in Oregon doesn't help develop state law; although, it may remove a ne'er-do-well from the streets, and affirming lengthy sentences affects how long they will be "put away";²⁴ denial of a habeas corpus petition may similarly continue the incarceration of a convicted defendant. In both instances, although the effect on Oregon law is often nil, the State is affected in that it will be paying for the convict's "room and board," thus affecting the public fisc. However, even in federal criminal cases, the federal courts can help set boundaries for the behavior of Oregon's law enforcement officers when the federal courts must rule on searches that produced the evidence needed to convict.²⁵

Federal criminal cases also do not affect Oregon law directly but do affect individuals in the state and, perhaps, to take but one example, have an effect on its drug trade.²⁶ Likewise, federal laws

(discussing *Williams v. Comm'r of Soc. Sec.*, No. 99-35291, 2000 WL 1028972 (9th Cir. July 26, 2000) (unpublished table decision), *superseded*, No. 99-35291, 243 F.3d 552 (9th Cir. 2000) (unpublished table decision)).

21. *See* *Robinson v. Abraham*, 111 F. App'x 897 (9th Cir. 2004).

22. *See, e.g.*, *Blachly-Lane Elec. Coop. Ass'n v. U.S. Dep't of Energy*, 79 F. App'x 975 (9th Cir. 2003).

23. *See, e.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843 (9th Cir. 2001) (affirming BPA's rate-setting).

24. *See, e.g.*, *United States v. Flack et al.*, No. 91-30246, 968 F.2d 1221 (9th Cir. 1992) (unpublished table decision) (affirming denial of motion to suppress in a drug manufacturing case); *United States v. Barker*, No. 91-30221, 972 F.2d 1343 (9th Cir. 1992) (unpublished table decision) (affirming 189-month sentence on a guilty plea to bank robbery); *United States v. Davis*, No. 91-30256, 963 F.2d 380 (9th Cir. 1992) (unpublished table decision) (affirming district court's inclusion of dead rootballs of marijuana plants in calculating offense level). *See also* *Sherman v. Reilly*, 361 F. App'x 827 (9th Cir. 2010) (affirming parole revocation); *United States v. Murphy-Ellis*, 47 F. App'x 488 (9th Cir. 2002) (interference with Forest Service officer).

25. *See* *United States v. Thompson*, 597 F.2d 187 (9th Cir. 1979) (suppressing stolen checks when officers examined the contents of an envelope without a warrant where the envelope itself was properly found under *Terry v. Ohio*, 392 U.S. 1 (1968) ("stop and frisk")).

26. *See, e.g.*, *United States v. Indo-Parra*, 47 F. App'x 805 (9th Cir. 2002) (methamphetamine).

against felons possessing firearms may affect the number of guns in the state, even where the case concerned federal law on whether a gun traveled in interstate commerce.²⁷ In criminal law, judges often have to turn to state law where there is a question of whether a prior conviction is a predicate offense for sentencing, for example, under the Armed Career Criminal Act. In such situations, the judges must examine the Oregon statute, but in ruling on whether the prior convictions fit as predicates, they are not affecting Oregon criminal law.²⁸

Cases brought to challenge aspects of state criminal convictions through federal habeas corpus are decided under federal statutes. For example, the Antiterrorism and Effective Death Penalty Act of 1996 contains a provision providing that a state court ruling cannot be set aside unless the federal habeas court finds an “unreasonable interpretation” of federal law on the basis of what the U.S. Supreme Court had decided. Further, federal habeas corpus deals with violations of the federal Constitution, and even though it is an Oregon prisoner who has brought the habeas petition, a federal court deciding a federal habeas case will often not cite state law.²⁹ However, with federal habeas, the relationship with state law is complex, because such cases are a way in which the federal bench indirectly oversees state trial courts, as the federal judges evaluate what state trial and appellate courts have done in criminal cases, despite the federal courts’ deference to the state courts in this setting.

III. AN “OREGON JUDGE”?

With the judges of the U.S. courts of appeals drawn from individual states, we would wish to know whether such judges, particularly if they had state judicial experience, protect the states or act like agents of the national government of which their courts are a part. It might be that after the judges have become socialized over time to their federal judicial position, they would be less state—and

27. In the consideration of *United States v. Wrenn*, 9 F. App’x 620 (9th Cir. 2001), which resulted in a brief disposition rejecting defendant’s claims on the basis of prior Ninth Circuit cases, a law clerk wrote to the panel that the government had presented sufficient evidence of the gun’s nexus to interstate commerce: “The gun traveled in interstate commerce to reach Oregon.” Memorandum from Caroline Davidson (law clerk to Judge Goodwin) to Ninth Circuit panel (Apr. 25, 2001).

28. *See, e.g.*, *United States v. Swift*, 138 F. App’x 985, *superseded*, 146 F. App’x 895 (9th Cir. 2005).

29. *See, e.g.*, *Terry v. Palmateer*, 74 F. App’x 753 (9th Cir. 2003).

more nationally—oriented. If the latter, one could see that officers of the national government, despite years of state government service, adopt a national perspective.

Judge Goodwin contributed to Oregon law not only during his service as an Oregon state judge, first, for four-plus years as a circuit judge whose rulings were affirmed on appeal or left intact without appeal, and second, as a member of the Oregon Supreme Court. The contributions continued during his (brief) service as a federal district judge in the District of Oregon, where he decided issues affecting individuals and businesses within the state, but more importantly, acts of local and state government. What is important for present purposes is that he continued to rule on matters relevant to Oregon and to Oregon law even after he joined the U.S. Court of Appeals for the Ninth Circuit in 1971. This was not only because he sat as a district judge in Oregon on some cases during that period, but also because, as a judge of the court of appeals, he heard cases that originated in Oregon, again involving individuals, businesses, and government entities, and those cases often implicated Oregon state law.

A U.S. court of appeals is supposed to be a regional court in a national system,³⁰ and it is understood that on occasion the circuits will differ in ruling on issues, with the U.S. Supreme Court at times ultimately resolving those intercircuit conflicts.³¹ The judges of a court of appeals are supposed to speak for the circuit as a whole, not for individual states. However, they come from—indeed, are *selected from*—those states, as court of appeals judgeships are allocated among the states, at least informally. The senators from each state, who make recommendations to the President as to who should be nominated to these judgeships, have jealously guarded those judgeships. Thus, in the Ninth Circuit, despite its size, California could not have all the court of appeals judgeships, and there has been thought to be an “Oregon seat,” the one held by Judge John Kilkenny from 1969–1971, before he took senior status and to which Judge Goodwin succeeded. That a court of appeals judge is selected in this manner may well send a message to the judge that the judge should (or at least might) look to that state as the judge’s “constituency,” or at least as one constituency to be considered.

30. See J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (Princeton Univ. Press ed., 1981).

31. See Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002).

A judge from a state, say Oregon, is not supposed to be a formal representative of that state while deciding cases, but that judge could not help but bring to the task the background of having lived in (and perhaps grown up in) the state, with his or her decisions reflecting the state's interests to some extent—and if not the state's interests as defined by state officials, then the judge's experience there. This can be seen in the knowledge of forests, rivers, and other topography of the state that Judge Goodwin brought to environmental cases.

One can also see it in smaller matters, such as the views he expressed to some fellow judges about Oregon making liquor available only through state liquor stores. When dealing with a case of state licensure of Indian traders, discussed *infra*, which the Supreme Court ultimately reversed,³² at the panel stage of the case he could not resist sending a note to another panel which had ruled in favor of the Indians to express his views, as a consumer in relation to Oregon's state liquor monopoly (state liquor stores), that the other panel “produces a result . . . that I, as a consumer, cannot fail to applaud.” He then said he hoped that the Warm Springs Indians would “choose to go into the liquor business by selling to non-Indians”; if so, he “will be at the front of the line to buy grog from them”; the price per bottle would be less there. In classic Goodwin style, he continued:

The line of cars in front of the reservation liquor stores on a busy weekend should reach only from the outskirts of Portland 75 miles to the entrance of the reservation. The traffic jam, especially from the fleets of trucks taking care of the restaurant trade, will be something of a deterrent [until profits were used to widen the road]. I firmly expect the Oregon drinking class to transfer most of its business from the state monopoly stores to the free market at Warm Springs. Through the innocent tool of *Muckleshoot*, free enterprise will return to the liquor traffic in Oregon, a consummation devoutly to be wished.³³

More seriously, Judge Goodwin also brought to the court of appeals familiarity with the operation of statutory arrangements implicated in Ninth Circuit cases, because he had encountered those

32. *Rice v. Rehner*, 463 U.S. 713 (1983).

33. Alfred T. Goodwin (hereafter: ATG) to various judges (June 3, 1981) (regarding *Rice v. Rehner*, 678 F.2d 1340 (9th Cir. 1982) (en banc), *rev'd*, 463 U.S. 713 (1983)) (*Muckleshoot* was a case consolidated with *Rice v. Rehner*).

statutes as an Oregon judge. An example is the state's system for compensation for workmen's injuries. Judge Goodwin described this system in a case in which a company settled personal injury claims with a contractor's employees and then successfully sued the contractor for indemnity in federal court, which the Ninth Circuit affirmed in a memorandum disposition he wrote. He began by stating that "[t]he rights of the parties are controlled by Oregon law," and, saying that this was another case in the system that had developed, he then described how "workmen injured on the job collect their workmen's compensation under the statutory formula, and then supplement that award whenever possible by suing the owner of the premises where the injury occurred."³⁴ While the workmen's compensation law was supposedly "an 'exclusive remedy' for on the job injuries," he said, these claims against non-employer defendants "frequently frustrated" that exclusivity. Moreover:

An elaborate system of legislative and judicial pronouncements . . . evolved . . . as plaintiffs' attorneys and the courts have devised new ways to reach a deeper pocket and the insurance carriers have redoubled their efforts through the legislative branch to make the 'exclusive' remedy of compensation as exclusive as possible.³⁵

The leading Oregon Supreme Court cases, "all well known to the experienced trial judge,"³⁶ dealt with when one defendant in such cases could obtain indemnity from another, and the trial judge had properly held the statute "was intended to restrict only traditional workers' compensation actions by employees against their employers," not other third party suits.³⁷

We do not know whether a federal judge who had served on his or her state's judiciary would want to continue to assist development of the law of that state. The judge's colleagues might turn to an "Oregon judge" for guidance when Oregon-related matters arose. Relying on an "Oregon judge" would be particularly true where the judge had served on Oregon's highest court and might have written some of the state law rulings that came into play in Ninth Circuit

34. *Diamond Fruit Growers, Inc. v. Lavaley Indus. Plastics, Inc.*, 817 F.2d 758 (9th Cir. 1987).

35. *Id.*

36. Then U.S. District Judge Edward Leavy, later to join Judge Goodwin on the Ninth Circuit.

37. *Diamond Fruit Growers, Inc.*, 817 F.2d at 758.

cases, although we do not see Judge Goodwin particularly assigning cases with Oregon law to himself. And it might be particularly true in a judge's early years on the court of appeals, because as time progressed, the judge might come to adopt a more broadly regional perspective, in Judge Goodwin's case, perhaps reinforced by his moving his chambers to southern California in the early 1980s.

We see a hint of court of appeals' colleagues turning to a judge from a state from which a case had come when a judge on a panel with Judge Goodwin wrote, "I know that Judge Goodwin feels an opinion may be of benefit as guidance to the Oregon bar."³⁸ That other judge, however, would decide the case by unpublished (non-precedential) disposition to "leave the refinement of Oregon law to the Oregon courts" rather than, as might happen in this case, "add[ing] more uncertainty to an already uncertain area."³⁹ And in another case, the only non-Oregon judge on a panel wrote to his colleagues about whether they should take a case that had come back to the court of appeals after their earlier remand, saying he would "not oppose [doing so] if Judges Goodwin and Graber want to hang on to it to keep Oregon law pure!"⁴⁰

Shortly after Judge Goodwin joined the Ninth Circuit, we can see his intense concern on behalf of matters of Oregon law. Less than a year after he joined the Ninth Circuit, he wrote to his fellow Oregon judge, Senior Judge John Kilkenny, about a Ninth Circuit panel's decision holding that there were no exigent circumstances excusing not procuring a warrant to obtain fingernail scrapings of someone who had come to a police station with his lawyer and was not under arrest.⁴¹ Goodwin raised the possibility of delaying the mandate in the case and perhaps seeking en banc rehearing rather than letting the mandate go down and have Oregon's attorney general seek certiorari.⁴² (The latter happened, and the Supreme Court granted

38. Memorandum from Robert McNichols (of the Eastern District of Washington, sitting by designation) to the Ninth Circuit panel (Feb. 9, 1982 and Feb. 26, 1982).

39. *Id.*; see generally *Gage v. Rinehart*, No. 80-3238, 676 F.2d 709 (9th Cir. 1982) (unpublished table decision) (reversing and remanding the case to the district court).

40. Memorandum from Raymond Fisher to John Kilkenny (July 8, 1972) (discussing *Jensen v. Lane Cnty.*, 312 F.3d 1145 (9th Cir. 2002) (affirming the district court's grant of summary judgment for the defendant on remand).

41. Memorandum from ATG to John Kilkenny (July 8, 1972) (discussing *Murphy v. Cupp*, 461 F.2d 1006, 1007 (9th Cir. 1972), *rev'd*, 412 U.S. 291 (1973)).

42. Memorandum from ATG to John Kilkenny (July 8, 1972) (discussing *Murphy*, 461 F.2d at 1007).

review and reversed.⁴³) In connection with raising the possibility of this within-court intervention, Goodwin observed:

I don't want my brethren on the court to think that I am common scold constantly yapping at their heels whenever a case affects Oregon, but I am, perhaps, more alert on Oregon cases and catch more of what I think are problem cases than I do for Arizona and California, etc.⁴⁴

That same year, Judge Goodwin, although acting somewhat behind the scenes, intervened directly over another Ninth Circuit panel's decision which had reversed a habeas denial on the basis of an Oregon instruction that a witness is presumed to tell the truth but the presumption can be overcome.⁴⁵ He sent the decision to his former Oregon Supreme Court colleague and then Chief Justice Kenneth O'Connell and to a friend serving as a judge on the Multnomah County Circuit Court, saying, "[p]lease do not get me personally involved in it, but urge the Attorney General [sic] to apply for a rehearing in banc."⁴⁶ Judge Goodwin said the U.S. Supreme Court's decision in *Apodaca v. Oregon*,⁴⁷ upholding a less-than-unanimous jury verdict, "looks like a return to federalism," so that "it may be a good time to point out that the Oregon statute, while it may have been criticized in federal cases, appears to have commended itself to Oregonians for over a hundred years and has never before been considered unconstitutional."⁴⁸ (Judge Kilkenny wrote to District Judge Gus Solomon, whose denial of habeas had been reversed, with copies to District Judge Robert Belloni and to Goodwin, suggesting the Oregon attorney general contact the attorneys general of the other Ninth Circuit states.⁴⁹) One result of this activity was a letter from the Chief Judge of the Oregon Court of Appeals to the Ninth Circuit's Chief Judge, with a copy to Chief Justice O'Connell (who agreed with

43. *Cupp*, 412 U.S. at 296.

44. Memorandum from ATG to John Kilkenny (July 8, 1972).

45. See generally *Naughton v. Cupp*, 476 F.2d 845, 847 (9th Cir. 1972), *rev'd*, 414 U.S. 141 (1973).

46. Memorandum from ATG to Kenneth O'Connell (June 1, 1972).

47. 406 U.S. 404 (1972).

48. Memorandum from ATG to Justice Kenneth O'Connell and Judge Charles Crookham (June 1, 1972).

49. Memorandum from John Kilkenny to Judge Gus Solomon (U.S. District Court, District of Or.) (June 5, 1972).

the letter), saying the way the case was “handled indicates a rather cavalier disregard for federalism,”⁵⁰ as the opinion did not mention that the instruction was of long standing or that the Oregon Supreme Court had recently upheld it.⁵¹

At this point, Goodwin wrote directly to the panel that decided the case and to Chief Judge Chambers and Judge Kilkenny. He said he had discussed the case informally with Judge Ely, the author of the panel’s opinion, “expressing my concern that the opinion perhaps goes too far in applying federal case law to state statutes,” and he noted that he and Judge Kilkenny “have been receiving some dysfunctional feedback from local judges who feel that the Ninth Circuit has exceeded the demands of the Fourteenth Amendment in making state statutes conform to accept federal doctrine for district courts in the matter of instructing juries.”⁵² He wrote that he believed that the author was “willing to make a slight modification in the opinion in order to allay some of the fears of the state courts in Oregon.”⁵³ After some communications within the court and a message from Chief Judge Chambers saying he didn’t see that the instruction could have been prejudicial and “I would not let this awful fellow go,”⁵⁴ the panel denied rehearing, a judge called for en banc rehearing, and the court divided 6-6, thus denying en banc rehearing.⁵⁵ (Here again the Supreme Court granted review and reversed.⁵⁶)

We see Judge Goodwin’s interest in Oregon law continuing late in his Ninth Circuit tenure. A question of state statutes of limitations arose late in a panel’s discussion of a case entailing a claim of racial discrimination against the Small Business Administration, and Goodwin wrote to judges who had recently handed down a decision that bore on the limitations question because of the decision’s “impact

50. Memorandum from Chief Judge Herbert Schwab (Oregon Court of Appeals) to Richard Chambers (June 12, 1972).

51. *State v. Kessler*, 458 P.2d 432, 434–35 (Or. 1969) (upholding the state statutory presumption that a witness is presumed to speak the truth).

52. Memorandum from ATG to the Ninth Circuit panel (Ely, Hufstедler, Jertberg), Richard Chambers, and John Kilkenny (June 28, 1972).

53. *Id.*

54. Memorandum from Richard Chambers to the Ninth Circuit panel, Kilkenny, and ATG (Aug. 18, 1972).

55. *See Naughten v. Cupp*, 476 F.2d 845, 847–48 (9th Cir. 1972) (amending the original opinion and denying rehearing on Jan. 18, 1973).

56. *Cupp v. Naughten*, 414 U.S. 141, 149–50 (1973).

on the work of the Oregon court.”⁵⁷ He believed that the decision’s “jumping the state [sic] of limitations from two to six years for § 1983 actions . . . will produce a lot more cases that have already been thrown out of court once on limitations.”⁵⁸ That, however, was not his principal concern, which he said “arises out of the fact that the state of Oregon itself considers § 1983 and similar actions to be essentially tort cases,” and after which he discussed Oregon statutes.⁵⁹ He said he was also concerned about the case before the panel on which he sat, which was “presently considering adopting a rule that would approve a 10-year statute of limitations in § 1981 actions in the District of Oregon.”⁶⁰ These rulings would be “opening up some rather lengthy periods of limitations for what are essentially tort type actions, rather than contract type cases.”⁶¹ Saying that “[p]erhaps this is a matter that should be addressed by the Oregon Attorney General [sic] and the state legislature,” he urged caution: “This may be what we want to do, but I think we should know what we are doing.”⁶²

Ten years later, almost ten years after he had taken senior status, we can see that Judge Goodwin’s interest in matters of Oregon law still continued. The case was a suit against Lane County, where Goodwin had served as a state trial judge, involving the question of qualified immunity of a doctor who had retained an individual for a psychological evaluation but then found no basis to hold him.⁶³ The presiding judge of the Ninth Circuit panel, Susan Graber, herself also a former Oregon Supreme Court justice, wrote in the court’s post-argument conference memo that Judge Goodwin believed there was “state action” in the case, “in particular because of the requirements of Oregon statutes for doctors to cooperate with the process,” with the statutes creating “a procedure that satisfies due process before depriving an allegedly mentally ill person of liberty.”⁶⁴ Shortly

57. Memorandum from ATG to Proctor Hug, Betty Fletcher, and James Fitzgerald (Aug. 4, 1990) (discussing *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980) and *Snyder v. Truett*, 78-3850, 623 F.2d 89 (9th Cir. 1980)) (holding that the “applicable period of limitations for these § 1983 actions is six years” under Oregon law).

58. *Id.*

59. *Id.*

60. *Id.* (discussing *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir. 1990)) (holding that the applicable statute of limitations in the state “catch-all” statute).

61. Memorandum from ATG, *supra* note 57.

62. Memorandum from Richard Chambers, *supra* note 54.

63. See *generally* *Jensen v. Lane Cnty.*, 222 F.3d 570, 572-74, 579 (9th Cir. 2000) (holding that qualified immunity was unavailable to the physician).

64. Conference Memorandum from Susan Graber to the Ninth Circuit panel (discussing

thereafter, Judge Goodwin wrote to his colleagues about his research on the qualified immunity matter, in which he said that “my research into the ‘firmly rooted tradition’ of immunity in Oregon uncovered ‘firm roots’ but little ‘tradition.’ The immunity provisions provided in the Oregon Statute date back to only 1987.”⁶⁵

IV. THE FEDERAL COURTS AND STATE LAW

Federal judges contribute to state law simply by using it. In some instances, they are simply engaged in its routine application, although even that serves to reinforce the state’s law. At other times, they serve to develop state law in applying it to new situations or particularly when interpreting it to resolve its ambiguities. This is true even when the state courts later interpret the relevant provisions in a different way, in effect wiping out the federal courts’ work. Generally, one finds that federal judges prefer to leave development of state law to the state courts, but, as they must decide the cases before them, they are in effect forced to engage in the interpretation in which the state courts have (yet) to engage. One sees this in their opinions in statements deferring to state courts, even though some of that deference may be required—in civil cases, by *Erie*’s requirement that federal courts use state common law,⁶⁶ and by congressional statutes requiring that federal habeas courts defer to state courts’ rulings.⁶⁷ One also sees it when federal judges, not being able to determine an answer to a state law question, ask state courts to do so by certifying a case to the state’s highest court. We will turn to that matter shortly, followed by a discussion of federal courts’ use of state law in cases falling in the federal courts’ diversity of citizenship jurisdiction. However, we first discuss some general aspects of the relations between federal courts and state courts.

Appeals to the Ninth Circuit from decisions in the District of Oregon vary in the extent to which the judges draw on Oregon law. In some cases, they do so explicitly, as when the case is based on federal diversity-of-citizenship jurisdiction or when federal law looks to state law as the basis for decision, as in cases brought under the

Snyder v. Truett, 78-3850, 623 F.2d 89 (9th Cir. 1980)).

65. Memorandum from ATG to panel (June 16, 2000) (regarding Snyder v. Truett, 78-3850, 623 F.2d 89 (9th Cir. 1980)).

66. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

67. See, e.g., 28 U.S.C. § 2254 (2012) (forbidding habeas corpus claims in federal court unless the state adjudication is clearly contrary to federal law or is “an unreasonable determination of the facts in light of the evidence presented in the state court proceeding”).

Federal Tort Claims Act (FTCA), where federal law requires judges to turn to state law. An example is an FTCA case in which a boat went over an unmarked dam spillway built by the federal government, which had known of the hazard and allowed it to continue. Judge Goodwin described the relevant Oregon statute on landowner immunity from liability, an exception to it, and what Oregon law required, and then he stated that the government's failure to install safety measures after learning of the problem "was reckless conduct which took the case out of the Oregon recreational use statute's immunity from liability for landowners."⁶⁸

Another instance is a disability discrimination case, which the Ninth Circuit decided under Oregon law—both statutory law as to when a person is considered "handicapped" and case law on incorrect jury instructions. On the former, the court said the plaintiff had to show he had been fired because the employer perceived plaintiff "had a 'handicap,' that is, physical impairment which substantially limited his ability to work as a marine engineer rather than merely limiting his ability to do the specific job from which he was fired."⁶⁹ While the jury had been misinstructed, the federal judges found the error harmless because "Oregon law states that 'cases should not be reversed upon instruction, despite technical imperfections, unless the appellate court can fairly say that the instruction probably created an erroneous impression of the law in the minds of the jurors which affected the outcome of the case.'"⁷⁰

A. Intersection of Federal and State Law

State law and federal law often intersect in federal court cases. Even before that can happen, however, there is the prior question: "Which court?" For example, when a landowner's inverse condemnation suit turned on whether the complaint should go to federal or state court, the court of appeals affirmed the federal magistrate judge's decision to dismiss.⁷¹ Before it did so, Judge Goodwin's law clerk told the judge that the statute seemed to provide

68. *Boswell v. United States*, 667 F.2d 1030, 1030–31 (9th Cir. 1981) (unpublished table decision).

69. *Hewes v. Keystone Shipping, Co.*, No. 97-35326, 152 F.3d 925 (9th Cir. 1998) (unreported table decision).

70. *Id.* (quoting *Waterway Terminals Co. v. P.S. Lord Mech. Contractors*, 474 P.2d 309, 313 (Or. 1970)) (Judge Goodwin did not write this decision).

71. *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 622 (9th Cir. 1992).

federal court jurisdiction over complaints against the Columbia River Gorge Commission, although perhaps it was better to say both courts could hear it.⁷² The federal magistrate judge had dismissed the case on the basis that the Act didn't give jurisdiction to the federal courts, and the Ninth Circuit affirmed.⁷³ The court's decision said that under the statute, "the state courts have exclusive jurisdiction over actions involving and appeals from the Commission, while the federal courts' jurisdiction is reserved for action involving and appeals from the Secretary."⁷⁴

If there is an initial choice of state or federal court, at times there is a question of whether a litigant, having been in one, could move to the other. Suits between citizens of different states may start in state court only to be removed to federal court under the latter's diversity-of-citizenship jurisdiction, discussed below.⁷⁵ Defendants convicted in state court, after failing in their state appeals, often turn to federal courts with habeas corpus petitions, also discussed below. In still other situations, parties attempt to relitigate in federal courts matters that state courts have resolved, but here the federal courts reinforce the state courts' authority by cutting off such efforts, as we see in a municipal licensing case. A city had made approval of a state wrecker's certificate contingent on compliance with local land use regulations, and there was a state court ruling against the plaintiff, who then filed a federal lawsuit.⁷⁶ The district court held that the enactment of a new local ordinance did not preclude plaintiffs from proceeding in federal court but that they were unsuccessful on the merits.⁷⁷ Reversing the allowance of the federal suit, the Ninth Circuit's ruling by Judge Robert Clifton was straightforward: "An adverse judgment in a prior state court action . . . bars relitigation of the issue of whether the City has discretion to condition approval of renewal applications on compliance with local . . . regulations We must accept the state court's determination that the city has discretion"⁷⁸ Thus, with the "key issue . . . litigated to finality in

72. Memorandum from law clerk to ATG (Aug. 24, 1992) (discussing *Broughton Lumber Co.*, 975 F.2d at 622).

73. *Broughton Lumber Co.*, 975 F.2d at 618, 622.

74. *Id.* at 621 (citing 16 U.S.C. § 544 (1988)).

75. *See* 28 U.S.C. § 1332 (2012) (granting original jurisdiction to federal courts under diversity of citizenship).

76. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1161–62 (9th Cir. 2005).

77. *Id.* at 1160.

78. *Id.*

the prior state court action” and “[h]aving lost there, the [plaintiffs] are not permitted to litigate the issue again here. . . . Because a prior Oregon judgment is asserted as having preclusive effect, Oregon issue preclusion law controls” and all elements of that law were satisfied.⁷⁹

In some cases, litigants bring both federal law and state law claims. If the relevant state law is similar to the federal law, federal judges are then likely to proceed on the basis of federal cases. In a retaliatory termination claim, the court briefly mentioned an Oregon statute⁸⁰ and cited a few Oregon cases, but the court stated: “Although Barnes sued under the Oregon anti-discrimination laws, those laws are, as the district court pointed out, ‘similarly in nearly all significant ways [to the federal statutes].’”⁸¹ In dealing with a hostile work environment claim, brought under Title VII and Or. Rev. Stat. § 659A.030, the Ninth Circuit pointed out, “Oregon state statutes prohibiting sexual harassment were modeled after Title VII, and thus ‘federal cases interpreting Title VII are instructive.’”⁸² In a sex discrimination case, the judges made no use of Oregon law except for noting the parallel with federal law, saying “[t]he Oregon state law counterpart [to Title VII], Or. Rev. Stat. § 659.030(1)(a)–(b), can be analyzed together with the federal claim,”⁸³ citing a federal case and a state one.⁸⁴

Bankruptcy law provides an example because the federal bankruptcy courts must apply federal law. When a state opted out of the federal scheme of exemptions, state law applied, and “Oregon has chosen to opt out of the federal bankruptcy exemption scheme and define its own exemptions from the bankruptcy estate.”⁸⁵ Thus, for example, the bankruptcy court had to determine whether “prepaid rent and security deposit were part of Oregon’s homestead exemption pursuant to Or. Rev. Stat. §§ 23.240 and 23.250.”⁸⁶ When the case came to the Ninth Circuit on appeal from the Bankruptcy Appellate

79. *Id.* at 1165–66.

80. OR. REV. STAT. § 659A.040 (2013) (forbidding discrimination against worker seeking workers’ compensation benefits).

81. *Barnes v. GE Sec., Inc.*, 342 F. App’x 259, 261–62 (9th Cir. 2009) (citing OR. REV. STAT. § 659A.139 (2009)).

82. *Fonseca v. Secor Int’l Inc.*, 247 F. App’x 53, 54–55 (9th Cir. 2007) (quoting *Harris v. Pameco Coop.*, 12 P.3d 524 (Or. Ct. App. 2000)).

83. *Margolis v. Tektronix, Inc.*, 44 F. App’x 138, 139 (9th Cir. 2002).

84. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1437 n.2 (9th Cir. 1993); *Winnett v. City of Portland*, 847 P.2d 902, 905 (Or. Ct. App. 1993).

85. *Sticka v. Casserino (In re Casserino)*, 379 F.3d 1069, 1072 (9th Cir. 2004).

86. *Id.* at 1071.

Panel, Judge Goodwin did not write for the panel even though the case fully involved Oregon law. However, Judge William Fletcher, in reaching the conclusion that both the bankrupt's leasehold interest, and the rent and security deposit fell within Oregon's statutory exemption, engaged in an extensive analysis of both Oregon statutory and case law in which he focused on the "current possessory interest" an individual had to show to obtain Oregon's homestead exemption.

The matter of estate taxes was another subject as to which both federal and state law applied and the federal court had to determine which controlled. As Judge Goodwin put it in his conference memo to the panel, he was to prepare a disposition "after reviewing the state law question and reexamining the question whether federal law, if different from state law, supersedes state law in this area."⁸⁷ The judge's law clerk indicated the sequence in which federal and state law operated: "On the state law questions, federal law still determines the ultimate treatment for estate tax purposes. State law kicks in only to the extent that the decedent . . . wished unequivocally and completely to partially disclaim the power of appointment."⁸⁸ However, in exploring these matters, we see that when federal judges wish to follow state law, they may have difficulty in finding material related to the state legislation to be interpreted. The law clerk's examination of the statute's legislative history did not reveal the reason why a particular reference had been omitted, with the clerk observing more generally that "legislative history is almost nil for Oregon, as no official records are kept," nor was there any Oregon case law interpreting the statute. Those observations led to Judge Goodwin's statement in the disposition of the case, "The regulation is silent as to whether it is possible to partially disclaim or renounce a power of appointment," and the statute was "in part inadequate for the purpose of determining whether the decedent's partial disclaimer was a complete and unqualified refusal to accept appointive powers under Treas. Reg. . . ."⁸⁹

An instance of claims brought under both federal and state law occurred in a case brought over a defective motor home under both the federal Magnuson-Moss Warranty Act and the Oregon Lemon

87. Memorandum from ATG to panel (Mar. 10, 1988) (discussing *Goudy v. United States*, No. 86-4402, 851 F.2d 360 (9th Cir. 1988) (unpublished table decision)).

88. Memorandum from Marilyn Barker (law clerk to Judge Goodwin) to ATG (May 9, 1988).

89. *Id.*

Law. Here the federal court's treatment of the federal statutory claims might eliminate the state claims, which the court said didn't have independent federal jurisdictional footing but only came into federal court as supplemental jurisdiction,⁹⁰ as one could see in Judge Goodwin's observation, "Without Magnuson-Moss Warranty Act claim, there would seem to be no federal jurisdiction regardless of whether the Kellys satisfied ORS 646.359(1) by seeking one of the remedies specified in ORS 646.335(1)."⁹¹ Judge Margaret McKeown, writing for the panel, commented in response that if the panel were to find that the Magnuson-Moss claims were not viable, "we avoid the problem that Judge Goodwin brings up—whether the state law claims should have been dismissed without prejudice for lack of jurisdiction, or whether the district court was correct to dismiss them with prejudice for failure to state a claim."⁹² And so the court held that "[w]ithout a proper jurisdictional basis for their federal claims, the Kellys' Oregon Lemon Law claims were not properly before the district court,"⁹³ although dismissal should have been without prejudice. Judge McKeown's initial opinion did, however, contain a "quick look at Oregon law"—at an Oregon statute—as to "the kind of damages that can stem from personal injury liability," as that related to the type of damages that could be recovered under Magnuson-Moss, and in the revised opinion, the opinion stated that relief for "loss of enjoyment of retirement" was available under state law but not under Magnuson-Moss.⁹⁴

Another case, involving claims under both federal law (the Truth in Lending Act) and state law (Oregon's civil racketeering statute) by purchasers of a mobile home had begun in state court but had been removed to federal court by the lender. A key issue was the question of attorney's fees on the lender's offer of judgment. While this was a federal case on attorney's fees, it helped set guidelines for later state cases.⁹⁵

Another instance of a case with a mix of federal and state law claims, as to whether an ESOP was exempt from registration, involved ERISA and the Oregon Blue Sky Law, in which the district

90. *Kelly v. Fleetwood Enters., Inc. (Kelly II)*, 377 F.3d 1034, 1040 (9th Cir. 2004).

91. Memorandum from ATG to panel (May 5, 2004) (discussing *Kelly v. Fleetwood Enters. (Kelly I)*, 369 F.3d 1102 (9th Cir. 2004), *amended*, 377 F.3d 1034 (9th Cir. 2004)).

92. Memorandum from M. Margaret McKeown to panel (May 18, 2004).

93. *Kelly II*, 377 F.3d at 1036.

94. *Id.* at 1039.

95. *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997).

judge decided for plaintiffs on the federal claim but for defendant on the state law claims. The court of appeals panel debated on how much to say about state law, with Judge Goodwin writing to his colleagues, “We will try to say as little as possible about the Oregon Blue Sky Law” except to respond to the parties’ points, but his conference memo noted that “Judge Ferguson does not believe the [law] applies and Judge Goodwin is in doubt.”⁹⁶ Here we see an instance of federal judges disagreeing as to the meaning (here: coverage) of state laws, with Judge Goodwin “believ[ing] that § 59.115(b) allows the imposition of liability upon the sellers of unregistered securities,” and arguing that the opinion author’s interpretation of the law would make “just about any act or failure to act . . . an investment decision, thereby rendering the requirement meaningless.”⁹⁷

In some instances, state statutes of limitations determine whether federal causes of action can be brought, and so federal judges pay close attention to them. Statute of limitations questions are often raised as a bar to claims brought under federal civil rights statutes. Thus the Ninth Circuit has applied the applicable Oregon statute of limitations to such claims in a disposition with no Oregon case citations.⁹⁸ If a statute of limitations question comes into play, it is important that the federal court chooses the correct statute. Thus, while affirming a dismissal for bringing a case outside the statutory limits, the Ninth Circuit said the district judge had incorrectly used the general tort statute of limitations, ORS 12.110(1), whereas the Ninth Circuit had only a short while before held that the Oregon Tort Claims Act statute of limitations, ORS 30.275(3), was the one applicable to federal § 1983 actions.⁹⁹

Statutes of limitations affect prisoners’ efforts to obtain release. Those seeking federal habeas corpus may run afoul of the limits in their state court filings, which then serves to preclude federal habeas. A defendant who had not timely filed his post-conviction petition in state court was held to have procedurally defaulted his federal habeas opportunity, with the timing error serving as an adequate and

96. Memorandum from ATG to panel (July 13, 1988) (discussing *Henry v. Frontier Indus. & Largent*, 863 F.2d 886 (9th Cir. 1988)).

97. Memorandum from ATG to panel (Sept. 23, 1988).

98. *Compton & Compton v. Or. State Highway Comm’n*, No. 75-1226, 566 F.2d 1180 (9th Cir. 1977) (unpublished table decision).

99. *Perry v. Multnomah Cnty.*, No. 80-3094, 663 F.3d 1079 (9th Cir. 1981) (citing *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981) (unpublished table decision)).

independent ground precluding habeas.¹⁰⁰ When an Oregon prisoner sued over whether he could refuse parole release, Judge Goodwin wrote for the court, “Under Oregon law, the statute of limitations for a personal injury action is two years,” but, he then said in a statement clearly showing the intersection of state and federal law, “Although state law determines the statute of limitations, federal law dictates when the claim accrues.”¹⁰¹

Another prisoner civil rights suit over parole came when a prisoner sought earlier release and a recalculation showed he should have been released, with the issue becoming whether his failing to file his federal suit within the limits period could be excused by mental illness. This led the Ninth Circuit panel to explore cases interpreting the Oregon statute excluding certain amounts of time from the limitations period during an individual’s institutionalization if they were “insane” within the meaning of the statute. The judges believed the district judge’s summary judgment for the state had to be reversed because a material fact existed as to insanity for purposes of ORS 12.160.¹⁰²

There are other instances in which discussion of federal and state law is intermixed. When a former city employee sued the city after he had released claims, had been reinstated, and then resigned, part of the Ninth Circuit’s opinion ruling, on whether the plaintiff had to refund the settlement amount before he could sue, turned on federal cases, but the next part, relating to contracts, was based on state law as to ambiguities in a contract. In affirming the district court’s ruling that the plaintiff’s agreement with the city was unambiguous,¹⁰³ the Ninth Circuit, through Judge Jerome Farris for a Ninth Circuit panel on which Judge Goodwin participated, drew on cases relating to contract ambiguity being a question of law, leading to de novo appellate review;¹⁰⁴ limiting the determination of ambiguity “to the four corners of contract,” so that the parties’ intent is not considered unless ambiguity is found;¹⁰⁵ and, centrally, whether there was

100. *Johnson v. Palmateer*, 9 F. App’x 631 (9th Cir. 2001).

101. *Bollinger v. Or. State Bd. of Parole & Post-Prison Supervision*, 86 F. App’x 259, 261 (9th Cir. 2003).

102. *Mattix v. Grill*, No. 97-35489, 152 F.3d 927 (9th Cir. 1998) (unpublished table decision).

103. *Botefur v. City of Eagle Point, Or.*, 7 F.3d 152, 157 (9th Cir. 1993).

104. *Or. Sch. Emps. Ass’n, Chapter 89 v. Rainer Sch. Dist. No. 13*, 808 P.2d 83 (Or. 1991).

105. *Edwards v. Times Mirror Co.*, 795 P.2d 564 (Or. Ct. App. 1990).

“accord and satisfaction”—which would extinguish the plaintiff’s claim—or only an “executory accord,” where the court distinguished Oregon Supreme Court cases holding contracts ambiguous because of the absence of one or another key provisions.¹⁰⁶

An instance of direct conflict between federal and state law—between regulations implementing the Longshore and Harbor Workers Compensation Act (LHWCA) and state contract law relating to settlements—arose as to the status of an unsigned settlement agreement in the face of LHWCA regulations requiring ‘a stipulation signed by all the parties’ before a settlement agreement could be enforced. The Ninth Circuit, through Judge Raymond Fisher for a panel including Judge Goodwin, after some discussion about Oregon settlement agreements and cases interpreting them,¹⁰⁷ found “the bright line requirement of the LHWCA’s implementing regulations controls, rather than the contract law principles that would normally govern the interpretation of unsigned settlement agreements in Oregon.”¹⁰⁸

The issue of whether federal law or state law applies—present in the case just discussed—provides federal judges an opportunity to contribute to state law by reinforcing the use of that law or, conversely, limiting its use. The question of federal “versus” state law arises in a wide variety of settings. One such case involved ownership of certain Oregon land, filled along the shoreline of a navigable river for a federal project. The U.S. Supreme Court, in a decision for which the Ninth Circuit panel (including Judge Goodwin) had deferred judgment, overruled an earlier case and held instead that Oregon law, not federal common law, applied. Here the panel sent the case back to District Judge Gus Solomon to apply the new Supreme Court ruling. A member of the panel observed, “Judge Solomon is wise in the matters of the river, and it may be a comfort to him to reach very different conclusions now that *Bonelli* has hit the Supreme Court dust.”¹⁰⁹

106. *Savelich Logging Co. v. Preston Mill Co.*, 509 P.2d 1179 (Or. 1973) (en banc); *Washington v. Heid*, 504 P.2d 745 (Or. 1972) (en banc.).

107. *E.g.*, *Kaiser Found. Health Plan of the Nw. v. Doe*, 903 P.2d 375 (Or. Ct. App. 1995), *opinion modified on reconsideration*, 908 P.2d 850 (Or. Ct. App. 1996).

108. *O’Neil v. Bunge Corp.*, 565 F.3d 820, 826 (9th Cir. 2004).

109. Memorandum from Shirley Hufstedler to panel (discussing *Port of St. Helens v. State of Or. By & Through State Land Bd.*, No. 75-3525, 551 F.2d 312 (9th Cir. 1977) (unpublished table decision)).

B. Habeas Corpus

An instance of particularly sensitive relations between federal courts and state courts has been federal habeas corpus cases. The tension began when, as the Warren Court announced new rules of criminal procedure and facilitated the bringing of federal habeas corpus petitions to challenge state convictions, a federal district judge would overturn an Oregon Supreme Court decision. However, after some years passed and the U.S. Supreme Court became “more receptive to arguments from prosecutors” and as the relationship created by federal habeas review of state convictions “has been going on for . . . years,” the tension became “much less” and the federal courts became more engaged in tidying up.¹¹⁰ Certainly as Congress, and the U.S. Supreme Court itself, enacted more constraints on federal habeas review, the tension, while remaining, would have decreased. There is also evidence that federal judges might have less leeway to intervene in state law in any event, shown in a comment by Judge Goodwin during a panel conference on a case requiring examination of a state statutory rape statute prohibiting sexual intercourse with a person “incapable of consent by reason of mental defect,” that “[o]ne concern is that, as this is a habeas case, we would not have the option to construe Oregon law to avoid some of the pitfalls” of Oregon law, with both the state’s post-conviction remedies statute and its statutory rape statute at issue.¹¹¹ (He wrote for the panel majority that the sex crimes law was not unconstitutionally vague, but Judge Berzon’s dissent about knowledge required of the defendant indicates that federal judges differ in interpreting the state law brought to them.)

The Ninth Circuit had mentioned the difficulties lawyers faced in post-conviction proceedings in Oregon in an earlier case involving a habeas petition from a state murder conviction. In the first opinion in a case, Judge Goodwin held that petitioner’s federal claims were not procedurally defaulted,¹¹² but, in a second opinion replacing the first, held that petitioner’s substantive claim was fairly presented to the state courts and the trial court had given petitioner a full opportunity

110. Judge Alfred T. Goodwin, Remarks at the Pacific Northwest Political Science Association, Eugene, Oregon (Oct. 16, 1999).

111. Conference Memorandum from Marsha Berzon to panel (July 10, 2003) (discussing *Anderson v. Morrow*, 371 F.3d 1027 (9th Cir. 2004)).

112. *Lounsbury v. Thompson*, 340 F.3d 998, 1001–02 (9th Cir. 2003), *opinion withdrawn and superseded*, 374 F.3d 785 (9th Cir. 2004).

to show his mental incompetence.¹¹³ What is relevant here is Judge Goodwin's discussion, in the second opinion, of "the dilemma Lounsbury's lawyer faced in framing the issues in the petition for review in Oregon Supreme Court," a dilemma created because "[c]riminal defense attorneys in Oregon are required to conform their arguments to two demands that are in some tension with each other."¹¹⁴ One was the U.S. Supreme Court's command, in *O'Sullivan v. Boerckel*,¹¹⁵ "that criminal defendants must seek discretionary review of all claims in order to meet the 28 U.S.C. § 2254 exhaustion requirement"; the other was the command of Oregon's Rules of Appellate Procedure "that each petition for review 'shall' contain a statement concerning why the petition raises issues which 'have importance beyond the particular case,'" which had to be something more than a bare statement of the allegedly erroneous grounds of an Oregon Court of Appeals decision.¹¹⁶

A further indication of federal-state court tension was Goodwin's observation that the Oregon Supreme Court had "expressed its frustration with the practice of raising claims in a petition for review merely to exhaust remedies for federal habeas corpus purposes," which the state court had called a "useless expenditure of the resources of the people of Oregon."¹¹⁷ Criminal defense attorneys were thus torn between saying too much or too little, and he noted that the U.S. Supreme Court, in dealing with problems faced by litigants seeking Oregon Supreme Court discretionary review, had been "particularly sensitive to the need to adopt federal exhaustion criteria that do not require state appellate judges to 'alter their ordinary review practices.'"¹¹⁸

Federal judges' insistence that habeas petitioners exhaust their state remedies before proceeding in federal court served to reinforce the authority of state courts to deal with matters related to the criminal process. Thus, a defendant who had not brought a collateral attack through post-conviction proceedings to either the Oregon Court of Appeals or the Oregon Supreme Court had not exhausted his remedies even though his counsel had advised him that going that route was

113. *Lounsbury v. Thompson*, 374 F.3d 785 (9th Cir. 2004).

114. *Id.* at 788.

115. *O'Sullivan v. Boerckel*, 526 U.S. 838, 862 (1999).

116. *Lounsbury*, 374 F.3d at 788–89.

117. *Id.* at 789 (quoting *State v. Nail*, 745 P. 2d 415, 416 (Or. 1987)).

118. *Id.* (reporting on *Baldwin v. Reese*, 541 U.S. 27 (2004)).

futile. Said Judge Goodwin, in a Ninth Circuit per curiam opinion, “Exhaustion of state remedies, as required by 28 U.S.C. § 2254(b), includes an application to the state’s highest court, even if in some cases the effort is futile.”¹¹⁹ In a case decided at the same time, Goodwin strengthened the exhaustion requirement by saying that it was not waivable: “Policy considerations which transcend the desire of either or both parties to get on with the case preclude agreements of stipulation of exhaustion.”¹²⁰ He explained that both exhaustion and state procedural default stemmed “from the basic principle of federalism that federal courts should accord due respect to the role of state courts in enforcing the prohibition against unconstitutional confinement embodied in the writ of habeas corpus.”¹²¹ Also reinforcing state courts’ authority in relation to the federal courts was that if there were an adequate and independent state ground for the state court’s ruling, habeas could not be brought. Thus, when a defendant absconded, Oregon’s “fugitive disentitlement” doctrine deprived that person of the right to federal habeas, as the doctrine provided such an adequate and independent state ground.¹²²

It should be noted that cases involving federal habeas corpus may serve to reinforce the authority of state courts. This is true when the federal courts find no constitutional error—or at least none warranting reversal—or when no other error is found. An example is a Ninth Circuit affirmance of a dismissal of habeas in which petitioner claimed there was insufficient evidence to submit a rape charge to the jury: “The evidence was more than sufficient to submit the case to the jury, and therefore, the district court correctly dismissed the action.”¹²³

However, reinforcement of the state courts is particularly clear when the federal court enforces that habeas petitioners must exhaust state remedies before pursuing an issue on habeas. Thus in one case where the failure to exhaust was quite obvious, Judge Goodwin wrote that defendant “not only failed to provide the Oregon Supreme Court with an opportunity to reach the merits of his federal claims, he did not appeal from the Marion County Circuit Court’s denial of post-

119. *Grubbs v. Cupp*, 693 F.2d 866 (9th Cir. 1982) (per curiam).

120. *Jackson v. Cupp*, 693 F.2d 867, 868 (9th Cir. 1982).

121. *Id.* at 868–69.

122. *Wood v. Hall*, 130 F.3d 373 (9th Cir. 1997).

123. *Link v. Cupp*, No. 80-3448, 661 F.2d 940 (9th Cir. 1981) (unpublished table decision).

conviction relief.” He added that if it turned out that no state remedy was available, then the federal “cause-and-prejudice” standard would be applied to the failure to use state procedures.¹²⁴

Judge Goodwin participated, but did not write the opinion in, another case relating to exhaustion of claims in habeas proceedings because the length of time taken by the Oregon courts to review appeals left habeas petitioners in the lurch. Here we see federal judges faced with a major issue of state criminal justice policy and their ultimate avoidance of intervention in it. The judges engaged in extended discussion of defects in the Oregon system as to public defenders bringing appeals, as to whether such defects would excuse exhaustion before a federal habeas petition could be considered. Conference notes for the case indicate that the presiding judge said, “The Oregon system really does seem seriously defective” although perhaps not “so systematically impaired as to support the kind of exhaustion and due process presumptions” another circuit had created.¹²⁵ She then reported that another member of the panel “would hate to say that the whole Oregon system is so screwed up that we have to reverse,” with the Oregon Court of Appeals having finally reached the case before prisoner’s consecutive sentence ran;¹²⁶ he later said of that court, “This is not great speed, but not enough to excuse exhaustion.”¹²⁷ Judge Goodwin was more skeptical, saying he was “not sure the Oregon system is anymore broke than any other,” nor did he “think this case a good vehicle for addressing the Oregon indigent appeals system overall.”¹²⁸

Judge Berzon continued to raise the question of whether:

[E]ven though the Oregon public defender did file a brief, the brief filed was constitutionally inadequate because of the structural defects in the Oregon system for representing indigent defendants—that is, because counsel had inadequate time and resources and was required by the court to file a brief despite those

124. *Watts v. Cupp*, No. 81-3130, 696 F.2d 1005 (9th Cir. 1982) (unpublished table decision).

125. Conference Memorandum from Marcia Berzon to panel (July 13, 2003) (discussing *Westfall v. Santo*, 93 F. App’x 176 (9th Cir. 2003)) (reporting her own views).

126. *Id.* (reporting views of Judge Procter Hug, Jr.).

127. Memorandum from Procter Hug, Jr. to panel (Aug. 29, 2003).

128. Memorandum from Marcia Berzon to panel (July 13, 2003) (reporting ATG views).

circumstances.¹²⁹

However, in the end, the panel's disposition avoided key matters, both the effects of delay and of a speed-up resulting from this very case, and was explicit about that avoidance:

Among the issues we do not decide is whether the apparently accelerated proceedings in Oregon's appellate courts subsequent to the filing of this appeal caused Westfall's counsel to fail to raise potentially meritorious claims before the Oregon Court of Appeals. Such failure, if proven in post-conviction proceedings, could constitute ineffective assistance of counsel

Similarly, we do not decide any other constitutional claims concerning the asserted delay in processing Westfall's state court appeal but leave such claims for consideration in post-conviction proceedings as well.¹³⁰

C. Diversity Cases

Cases in the federal courts' diversity-of-citizenship jurisdiction are the ones in which the federal courts draw most directly on Oregon law. In those cases, federal judges are in effect sitting as Oregon judges; if they have been state judges in Oregon, in effect they continue in their role as Oregon judges. When the federal courts do draw on, and interpret, state law, they really sit as extensions of state appellate courts. As the Ninth Circuit put it in one case, "In a diversity case, the district court's job is to predict how the forum state's highest court would interpret and apply the relevant state law."¹³¹ They are *applying*, even if not *making*, the law of the state, but such case-by-case application is part of the way in which the law develops. When federal appellate courts' opinions draw on, and engage in heavy reliance on, Oregon law—both statutory and case law—their rulings may sound quite like those of the Oregon Supreme Court.

There can also be diversity cases from other districts that draw on Oregon law, for example, an Alaska suit against a buyer's secured creditor removed from state court to federal court and decided on the

129. Memorandum from Marcia Berzon to panel (Aug. 25, 2003).

130. *Westfall*, 83 F. App'x at 177.

131. *Siskiyou Properties v. Bennett Holdings*, 13 F. App'x 553, 554 (9th Cir. 2001).

basis of Oregon law on the question of treating agreements as a single agreement.¹³² (Although Judge Goodwin was not the author, the panel's disposition cited an Oregon Supreme Court case in which then-Justice Goodwin had participated.¹³³) However, a diversity case brought in Oregon in which the federal court applies the law of another state, while affecting an Oregon resident, adds nothing to the corpus of Oregon law, as seen in a case appealed to the Ninth Circuit from the District of Oregon that was decided on Tennessee law.¹³⁴ Such cases serve to indicate that the federal court must determine initially which state's law to apply. The court observed in a diversity breach of contract case that the district court's use of Oregon rather than California law was not challenged on appeal, but because "it appears that the result would have been the same under the law of either state," use of Oregon law was acceptable.¹³⁵

In the considerable number of diversity cases the Ninth Circuit considered, it drew regularly on the law of the state from which the case came. The Ninth Circuit's application could be quite straightforward as when, in interpreting the "actual severance" of an accidental death and dismemberment policy in the context of an injury that had left someone a quadriplegic, the judges said, "We are persuaded by the reasoning of the Oregon Supreme Court . . . that a dismemberment policy clause providing for coverage for loss of hands and feet did not provide coverage for an insured who lost the use of both feet due to a severed spinal column" as the policy language was unambiguous.¹³⁶

Another instance of drawing on state law was a case of wrongful initiation of civil proceedings related to enforcement of a non-competition clause. The case turned on the meaning of Oregon law,

132. *Ketchikan Pulp Co. v. Foothill Capital Corp.*, 134 F. App'x 114 (9th Cir. 2005) ("Construing Oregon law, this court has stated that '[i]t is . . . a basic principle of contract law that two or more agreements executed at the same time by the same parties as a part of the same transaction should be construed together as one contract,' [and] Oregon courts apply the same principle.") (citing *Union Pac. R.R. Co. v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 549 F.2d 114, 117 (9th Cir. 1976)).

133. *Hays v. Hug*, 412 P.2d 373 (Or. 1966); *see also* *Snow Mountain Pine v. Tacton Laminates Corp.*, 869 P.2d 369 (Or. Ct. App. 1994); *Or. Trail Elec. Consumers Coop. v. C-Gen Co.*, 7 P.3d 594 (Or. Ct. App. 2000) (discussing state rules of contract interpretation).

134. *Curtis v. Ryder TRS Inc.*, 43 F. App'x 103 (9th Cir. 2002); *see also* *Valencia v. Crane Co.*, 132 F. App'x 171 (9th Cir. 2005) (applying Washington law).

135. *White v. White*, No. 88-3932, 880 F.2d 1324 (9th Cir. 1989) (unpublished table decision).

136. *Snell v. Am. Home Ins.*, 9 F. App'x 639, 640 (9th Cir. 2001).

and the question was whether the *Restatement of Torts* “correctly describes the law of Oregon” and whether Oregon had adopted the Restatement for cases of the type before the court.¹³⁷ Judge Goodwin told his colleagues that he had used the Restatement’s general definition of probable cause (to file a lawsuit) for three reasons:

(1) [N]o Oregon court has had the occasion to define what constitutes probable cause; (2) Oregon had adopted the Restatement on every occasion it has considered the civil malicious prosecution cause of action save one minor instance . . . ; and (3) both parties’ statement of the law of probable cause mirror that of the Restatement.”¹³⁸

In the court’s disposition, Goodwin turned to a 1963 Oregon Supreme Court ruling—one which he had written for the court—where the elements which make up the wrongful initiation of civil proceedings cause of action had been announced.¹³⁹ In doing so, the justices had relied in part on the Restatement, and as to the Restatement’s definition Judge Goodwin said in the Ninth Circuit case, “Neither party disputes that this describes the law of Oregon.”¹⁴⁰

In another Ninth Circuit case, where his colleagues deferred to him as the “expert on Oregon law,” he wrote to follow up another of his Oregon Supreme Court opinions. This, too, was an insurance case in which the insured and the excess insurer had sued the primary insurer for bad faith refusal to settle a personal injury claim within the policy limits. Initially, the Ninth Circuit panel, speaking through another judge,¹⁴¹ ruled that the primary insurer’s action was arbitrary and a breach of its duty.¹⁴² When the court was asked to award attorney’s fees for defending the primary insurer’s appeal, the court—this time with Judge Goodwin writing a per curiam opinion—said that Oregon law entitled the excess insurer to attorney’s fees. “The

137. Memorandum from J. Clifford Wallace to panel (Apr. 23, 1992) (discussing *Lloyd v. Premier Indus. Corp.*, No. 91-35079, 962 F.2d 14 (9th Cir. 1992) (unpublished table decision)).

138. Memorandum from ATG to panel (Apr. 27, 1992) (discussing *Lloyd v. Premier Indus. Corp.*, No. 91-35079, 962 F.2d 14 (9th Cir. 1992) (unpublished table decision)).

139. *Alvarez v. Retail Credit Ass’n of Portland, Or.*, 381 P.2d 499 (Or. 1963).

140. *Lloyd v. Premier Indus. Corp.*, No. 91-35079, 962 F.2d 14 (9th Cir. 1992) (unpublished table decision).

141. Then District Judge Cecil Poole (N.D. Cal.), sitting by designation. He later joined the Ninth Circuit.

142. *Portland Gen. Elec. Co. v. Pac. Indem.*, 574 F.2d 469 (9th Cir. 1978).

Oregon courts have not specifically held that ORS 743.114 covers this situation, but we believe Oregon precedent points more surely in favor of the plaintiffs than against them,” Goodwin wrote.¹⁴³ The case to which he looked, in which he had written the opinion for the court, had held the statute covered bad-faith failure to settle.¹⁴⁴

A number of the diversity cases from Oregon that required the federal judges to draw on state law involved contested insurance coverage; in helping interpret the state’s insurance law, the federal courts contributed to its development. Indeed, federal court rulings on Oregon insurance law help set the framework for coverage and recovery within the state; where a case raises a question of underlying statutory violations,¹⁴⁵ the federal court is most definitely helping develop the law of the state. Indeed, Judge Goodwin, in interpreting Oregon law in diversity cases like this, could sound as he did when he had written as a member of the Oregon Supreme Court—as a common law judge—and where the law continued to develop beyond the point at which it was when he left that court, he seemed to be writing almost as if he were still there.¹⁴⁶

One such case stemmed from a fatal accident, where the driver at fault had limited coverage, his father had more coverage, but there was an exclusion of coverage for the son.¹⁴⁷ The Ninth Circuit, citing and discussing a 1965 Oregon Supreme Court case on exclusionary provisions and waiver,¹⁴⁸ said plaintiff’s estoppel claim based on representations by the insurance company was rejected; the court said that two Oregon cases the plaintiff’s estate cited¹⁴⁹ were not helpful to its position, one because it “was written 38 years before *Schaffer*,”¹⁵⁰ and the other because it was consistent with *Schaffer* as to waiver.

143. *Portland Gen. Elec. Co. v. Pac. Indem.*, 579 F.2d 514, 515 (9th Cir. 1978) (per curiam).

144. *Groce v. Fidelity Gen. Ins. Co.*, 448 P.2d 554 (Or. 1968).

145. *See, e.g., Higgenbottom v. Noreen*, 586 F.2d 719 (9th Cir. 1978).

146. *Higgenbottom* provides an example. An insurance coverage case, involving estoppel based on an agent’s statements, from earlier in Judge Goodwin’s Ninth Circuit tenure—in which his opinion also reads like an Oregon Supreme Court opinion—is *Cornell, Howland, Hayes & Merryfield, Inc. v. Cont’l Cas. Co.*, 465 P.2d 22 (9th Cir. 1972), where two insurers were liable for coverage of a contractor’s claims in a City of Salem sewer project suing a consulting engineer firm which planned the project.

147. *Baton v. Transamerica Ins. Co.*, 584 F.2d 907 (9th Cir. 1978).

148. *Schaffer v. Mill Owners Mut. Ins. Co.*, 407 P.2d 614 (Or. 1965) (Judge Goodwin joined in Justice McAllister’s opinion for the court).

149. *Reserve Life Ins. Co. v. Howell*, 357 P.2d 400 (Or. 1960); *Jaloff v. United Auto Indem. Exch.*, 250 P.717 (Or. 1926).

150. *Baton*, 584 F.2d at 911.

The court concluded that as a result of *Schaffer*, “Oregon has chosen not to recognize this type of coverage by estoppel.”¹⁵¹ Further Oregon cases were cited as to an insurance company’s good faith and due care in defending, with the standard stated in one making the insurance company “liable for a failure to accept an unequivocal settlement demand within the policy limits where a judgment in excess of the policy limits is likely.”¹⁵²

Judge Goodwin also drew on Oregon law in answering the question of how to resolve overlapping insurance coverage for the same loss. He wrote that a 1994 Oregon Supreme Court ruling that might have been read to allow the use of extrinsic evidence in answering such a question “has not been expressly overruled,” but “later Oregon Supreme Court and Oregon Court of Appeals cases have not followed the implication that extrinsic evidence may be considered” as to whether an ambiguity existed as to policy coverage.¹⁵³ He concluded that “the consensus among Oregon courts is that they . . . are opposed to considering extrinsic evidence to determine the parties’ . . . intent unless an ambiguity is apparent from the four corners of the document.”¹⁵⁴

Another insurance case involved the insurer’s seeking to rescind a life insurance contract because an applicant misrepresented smoking. That diversity case required Judge Goodwin, for the Ninth Circuit, to examine what the insurer had to prove under Oregon law to rescind the policy; that included evidence of issuing the policy in reliance on the false statement; that the statements were material to the insurer’s decision, with the smoking of cigarettes a material fact under the law of the state; and that the person making the false statement had done so knowingly.¹⁵⁵ However, the further state rule that “[u]nder Oregon law, we interpret . . . ambiguity in favor of the applicant” led the court to reverse the district judge’s rescission of the policy.¹⁵⁶

151. *Id.*

152. *Eastham v. Or. Auto Ins. Co.*, 540 P.2d 364 (Or. 1975); *Radcliffe v. Franklin Nat’l Ins. Co.*, 298 P.2d 1002 (Or. 1956). The standard in *Baton* was drawn from *Eastham*.

153. *Webb v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 207 F.3d 579, 582 (9th Cir. 2000). The case was noted in *The National Law Journal* on April 10, 2000, at A21.

154. *Webb*, 207 F.3d at 582.

155. He drew on *Kentner v. Gulf Ins. Co.*, 686 P.2d 339, *reh’g*, 689 P.2d 955 (Or. 1984) for the basic rule, and on *Ives v. INA Life Ins. Co.*, 790 P.2d 1206 (Or. Ct. App. 1990) for smoking as material fact.

156. *McCullough v. Indianapolis Life Ins. Co.*, No. 96035582, 125 F.3d 716 (9th Cir. 1997) (citing *Hoffman Const. Co. v. Fred S. James & Co. of Or.*, 936 F.2d 703 (Or. 1992)

Another insurance case, *Eslamizar v. American States Insurance Co.*,¹⁵⁷ illustrates another role of the federal appellate courts in relation to state law, that of keeping federal trial judges on track in their application of state law. An insurer wanted to void a policy for the insured's misrepresentation of loss. Both the judges' discussion within the Ninth Circuit panel and the panel's memorandum disposition, which reversed trial court error, drew heavily on state law. The law clerk for the writing judge, in discussing the relevant Oregon Court of Appeals ruling,¹⁵⁸ said "[T]he proper interpretation of what constitutes 'reliance' in this context might be best left to the Oregon Supreme Court" because of the fact that "the Oregon courts' clearest analysis of the law" came only from its intermediate appellate court.¹⁵⁹ One of Judge Goodwin's law clerks then alerted the judge to the magistrate judge's "not account[ing] for the revisions to O.R.S. 746.208(3), which require an insurance company to 'show that the representations are material and that the insurer relied upon them.'"¹⁶⁰ Then the third judge on the panel, sending suggested changes in the author's proposed disposition, said, "I trust Magistrate Judge Jelderks to get it right once we tell him that *Eslamizar* is the controlling case."¹⁶¹ The court's memorandum disposition pointed out that the district court had relied on a 1993 Oregon Court of Appeals ruling in "error because [it] involved an automobile insurance policy" and that, as a result of *Eslamizar*, "a different rule has existed in Oregon for fire insurance policies," with "reliance . . . treated differently in cases brought under fire insurance policies." The court thus remanded for reconsideration in light of *Eslamizar*.¹⁶² (In another case, a judge who believed Magistrate Judge Jelderks' opinion was wrong and barred civil rights complaints objected to vacatur of the opinion upon the parties' settlement while the panel was considering the case, but he went along with the vacature on realizing the disposition would not be

(unpublished table decision)). On another point, about interpreting insurance applications as a whole, Judge Goodwin cited an Oregon Supreme Court opinion written by Justice O'Connell in a case in which he had participated. *Fisher v. Cal. Ins. Co.*, 388 P.2d 441 (Or. 1964).

157. 894 P.2d 1195 (Or. Ct. App. 1995).

158. *Id.*

159. Memorandum from Chris Norborg (law clerk to Judge Richard Tallman) to panel (July 6, 2004) (discussing *Allstate Ins. Co. v. Breeden*, 105 F. App'x 217 (9th Cir. 2004)).

160. Memorandum from Bill Narus (law clerk to Judge Goodwin) to ATG (July 8, 2004).

161. Memorandum from William Fletcher to panel (July 15, 2004).

162. Internal court correspondence in *Breeden*, 105 F. App'x at 219.

published.¹⁶³)

There are limits to the role of the courts of appeals in making state law in diversity-of-citizenship cases. We see that the Ninth Circuit regularly uses non-precedential memorandum dispositions when deciding matters of Oregon law in diversity jurisdiction cases, because anything the federal appellate court wrote could be erased by the state appellate courts' (re)interpretation of state law, resulting in the federal court "writing in disappearing ink." As Judge Goodwin himself noted, a case before him "involves a question of Oregon law on which our decision would not be precedent in any event, so there is no need to publish."¹⁶⁴ Or, as he observed in another case, "[a] *memodispo*, as opposed to an opinion, appears to be the correct method of disposition because we are creating new law, and an opinion would not be binding on the Oregon courts."¹⁶⁵ He also opined that a panel on which he sat "should refrain from expressing an opinion on the future law of Oregon in this field and affirm the trial court on the basis of the case law in effect at the time the case was tried."¹⁶⁶ However, in yet another case involving a state law question, one he found "somewhat novel," he suggested that "perhaps the panel might want to give thought to publishing an authored opinion in this case."¹⁶⁷ In connection with a diversity case in which Judge Goodwin participated in which the panel did designate its disposition for publication, one finds a strongly stated view of self-imposed limits in diversity cases. Said Judge Duniway:

I would object fairly strenuously to our stating or claiming any power to fashion substantive state law. We have to do the best we can to find it and if, in trying to find it, we accidentally get

163. *Fischer v. Ted-Ad Am.*, No. 96-36079, 1997 WL 771482 (9th Cir. 1997), *opinion withdrawn by* 139 F.3d 904 (9th Cir. 1998) (unpublished table decision).

164. Memorandum from ATG to panel (July 14, 1988) (discussing *Town Ctr. Motorcycles, Inc. v. Yamaha Motor Corp. U.S.A.*, 861 F.2d 268 (9th Cir. 1988)).

165. Memorandum from ATG to panel (July 24, 2008) (discussing *Gray v. Rent-a-Ctr. W.*, 314 F. App'x 15 (9th Cir. 2008)).

166. Memorandum from ATG to panel (Sept. 23 1987) (discussing *Runckel v. City of Portland*, No. 86-4114, 835 F.2d 1436 (9th Cir. 1987) (unpublished table decision)). After first having tried to avoid doing so, Judge Goodwin argued that in view of U.S. Supreme Court cases saying judges must apply the law in effect at the time of trial, "I now think it is probably necessary to address . . . directly" an Oregon case earlier avoided, *Donaca v. Curry Cnty.*, 734 P.2d 1339 (Or. 1987). *Id.*

167. Memorandum from ATG to panel (May 24, 2001) (discussing *Blair v. Toran*, 12 F. App'x 604 (9th Cir. 2001)). Interestingly, there is no Oregon law mentioned in the disposition.

creative, I don't suppose we can help that. But we certainly don't make state law and anything that we say will not be a precedent in California.¹⁶⁸

Even when the court of appeals' dispositions have been "not-for-publication" (even though now available in the *Federal Appendix*), as is true of a very high proportion of Ninth Circuit cases, they may still contribute to the development of state law, not least because the results in specific instances contribute to a *pattern* of decisions which help shape and define the state's law. And, although these memorandum dispositions are non-precedential, they may now have broader effect as a result of the revision of Federal Rules of Appellate Procedure Rule 35, which allows them to be cited in briefs and argument to the court of appeals. However, as non-precedential rulings, they may be given less attention by Oregon lawyers preparing cases based on Oregon law.

D. Uncertainty and Certification

Federal courts attempting to apply state law at times find that a state's highest court has made a clear statement on a particular point, and that applying the state court's rule is easy. At other times, state courts' interpretation is somewhat hazy and the federal judges interpret state law as best they can—including drawing inferences as to what the state courts would do in similar situations. This situation occurs with some regularity in many federal court diversity-of-jurisdiction cases.

Federal judges called on to apply Oregon law face a problem when the Oregon courts have not spoken to the issue before them. In some of these instances, the reason may be that there had been a recent change in the relevant statute. For example, in a case concerning the relocation of a motorcycle dealership, the Ninth Circuit observed in 1988, "This is the first case to interpret ORS 650.150 since its amendment in 1985 to add subsections," with the judges finding "[t]he guidance provided by these subsections . . . less than precise." (The judges also observed, "Unfortunately, the legislative history is also unclear."¹⁶⁹) Interestingly, after an Oregon

168. Memorandum from Ben C. Duniway to panel (discussing *Droeger v. Welsh Sporting Goods Corp.*, 541 F.2d 790 (9th Cir. 1976)).

169. *Town Ctr. Motorcycles v. Yamaha Motor Corp. U.S.A.*, No. 87-3906, 861 F.2d 268 (9th Cir. 1988) (unpublished table decision).

U.S. district judge's ruling on what could or could not be considered in such relocations, the legislature had amended the statute to require consideration of the effect of new dealerships on existing ones. And in another case, on evidence that could be used on an injured individual's loss of earning capacity, a member of the panel said "there is some confusion in Oregon" as to whether a case "changed the analysis of when a statute can be used as the basis of negligence as a matter of law instruction,"¹⁷⁰ and the panel's disposition likewise said, "[t]here is some confusion whether . . . language from *Shahtout* changed the analysis of when a regulation can be used as the basis of a negligence per se instruction in Oregon." The court went on to say the instruction was "properly proper under Oregon law" but, reflecting federal judges' hesitation to decide state law, said that it "need not decide the current state of Oregon law or its effect on whether the negligence per se instruction based on 49 C.F.R. § 391.12 was erroneously presented to the jury."¹⁷¹

A different problem was created for federal judges in another case, involving immunity for exercise of a discretionary function. The problem arose when the Oregon Supreme Court had decided a relevant case after the U.S. district court had used earlier Oregon cases to decide the present case. The court of appeals was supposed to apply the law in effect at the time of its decision, not the law in effect when the district court decided the case, but the newer state case did not directly address the key issue. With Judge Goodwin coming to agree that the panel could not avoid the new case, he suggested distinguishing that case for not having considered discretionary function immunity, and in a footnote the panel so distinguished the case, also saying that the judges were unwilling to assume that the new Oregon ruling had overruled previous cases and the statute *sub silentio*.¹⁷²

At times, federal appellate judges encounter a situation in which they cannot fathom what the state courts have done or would do and the point is central to the case at hand. At that point, the federal court of appeals will consider certifying the question of law to the state's

170. Memorandum from Melvin Brunetti to panel (July 9, 1998) (discussing *Barrows v. Schneider Nat'l Carriers*, No. 97-35585, 156 F.3d 1235 (9th Cir. 1998) (unpublished table decision) (discussing *Shahtout v. Emco Garbage Co., Inc.*, 695 P.2d 897 (Or. 1985))).

171. *Barrows v. Schneider Nat'l Carriers*, No. 97-35585, 156 F.3d 1235 (9th Cir. 1998) (unpublished table decision).

172. *Runckel v. City of Portland*, No. 86-4114, 835 F.2d 1436 (9th Cir. 1987) (unpublished table decision).

highest court, as provided for in state law. This action respects the state courts' development of its own jurisdiction's law. On receiving the state court's answer to the certification, the court of appeals then incorporates the state court's ruling.

Two cases from Oregon illustrate the process. One, in which Judge Goodwin wrote the panel's per curiam opinion, involved a challenge to the denial of tenure to a university professor because the denial had not been signed by the university president, as was alleged to be required. From the beginning, Judge Goodwin thought certification a proper disposition; he suggested:

[T]hat the parties come to oral argument prepared to discuss the feasibility of certifying the following question to the Oregon Supreme Court: 'Whether, under Oregon law, the University Provost has the authority to make final determinations regarding the denial of indefinite tenure, without the involvement of the University President, and without explicit statutory or regulatory delegation of that responsibility to a designee of the President.'¹⁷³

He also indicated to his colleagues some choices the panel had with the merits of the case, one of which was to look "to the purposes and policies behind the statutory scheme," distinguish an Oregon appellate opinion, "chalk the 'designee' problem up to inartful drafting, and defer to the established practice of the University as set forth in its faculty handbook," and another was to "leave this issue, which seems to sit at the crossroads of Oregon law and Oregon policy, up to the Oregon Supreme Court by certifying the question."¹⁷⁴ The panel took the last option:

We all agreed that the main issues are questions of state law, that the controlling statute is ambiguous, that existing Oregon case law does not answer the precise questions presented, and that the answers to the questions are sensitive policy matters for state determination. We therefore agreed to certify questions to the Oregon Supreme Court.¹⁷⁵

173. Memorandum from ATG to panel (June 30, 2000) (discussing *Matthews v. Or State Bd. of Higher Educ.*, 220 F.3d 1165 (9th Cir. 2000) (per curiam)) (certified to Oregon Supreme Court).

174. *Id.*

175. Conference Memorandum from Susan Graber to panel.

Judge Goodwin was quite conscious of the fact that in this case, two former members of the Oregon Supreme Court—himself and Judge Susan Graber—were on the Ninth Circuit panel. As he wrote to the panel:

[A]n interesting if obvious wrinkle occurred to me: the certifying panel has two former Justices of the Oregon Supreme Court. I conjecture that that is a rare event, and I suppose we can only speculate about how it will play. Perhaps the current Justices will appreciate our deference to their judgment and accept the certification, perhaps they will punish our exits from the Court by rejecting the certification, or perhaps they will have faith in our grounding in Oregon law and leave the work to us by denying the certification. Or perhaps it won't matter at all.¹⁷⁶

Judge Graber, who said she “would love to be a fly on the wall in our FORMER conference when this arrives,” suggested revisions in Goodwin’s proposed certification order “that will, perhaps, help to avoid irritation on the part of the recipients” because Goodwin’s language “hints that this court could bind the Oregon Supreme Court if only it wished to. This hint will annoy some.” However, she suggested that a footnote “could be read to say (to the possible dismay of our former colleagues) that we could ‘prevent’ the Supreme Court from considering a question of law answer, if we wanted to.”¹⁷⁷ On another point, Graber said “there may be sensitivity if we sound like noblesse oblige.” (Once the Oregon Supreme Court said that the University President could delegate informally the determinations of tenure denial,¹⁷⁸ the Ninth Circuit panel promptly decided the case in a brief per curiam opinion.¹⁷⁹)

Another case, which the Ninth Circuit certified to the Oregon Supreme Court, concerned complex court rules related to federal habeas corpus, and the exhaustion of state remedies required of federal habeas petitioners.¹⁸⁰ The Ninth Circuit had to decide whether a habeas petitioner’s claim had been “fairly presented” to the Oregon

176. Memorandum from ATG to panel (July 31, 2000).

177. Memorandum from Susan Graber to panel (Aug. 2, 2000). To this author, that does not sound particularly different from what Judge Goodwin proposed.

178. *Matthews v. Or. State Bd. of Higher Educ.*, 22 P.3d 754 (Or. 2001) (en banc).

179. *Matthews v. Or. State Bd. of Higher Educ.*, 249 F.3d 1085 (9th Cir. 2001) (per curiam).

180. *Farmer v. Baldwin*, 497 F.3d 1050, 1053 (9th Cir. 2007).

courts (thus satisfying exhaustion) when the requirements for a “no-merits”¹⁸¹ brief, as specified in an Oregon court ruling,¹⁸² had technically not been met but the petitioner’s claims were in documents attached to the documents filed. The question may seem narrow and technical but asking the state court to resolve it goes to the sensitive nature of relations between federal and state courts, and the Oregon Supreme Court’s response indicates some unhappiness with an earlier Ninth Circuit action.

Speaking to why it was certifying the question, Judge Reinhardt, for the Ninth Circuit panel, which included Judge Goodwin, wrote:

This inquiry turns directly on the construction and application of several Oregon Rules of Appellate Procedure, as well as on the practice followed by the Oregon Supreme Court, and presents questions of Oregon law for which we have found no guidance in the case law from either the Oregon Court of Appeals or the Oregon Supreme Court.¹⁸³

The federal judges knew that the petition for Oregon Supreme Court review “did not comply with the state’s appellate rules generally governing such petitions,” so that they had “no trouble concluding that Oregon Supreme Court would find Farmer’s petition lacking under a straightforward application” of the relevant rule, but they also believed the lower pleading standard from the earlier Oregon case, and codified in the Oregon Rules of Appellate Procedure, applied.¹⁸⁴ That led to the panel’s concern, stated as follows: “We are simply unaware of the extent to which the Oregon Supreme Court may be flexible in applying that rule, particularly with respect to a petitioner’s referring the Court to a statement of claims set forth in a *Balfour* brief filed in the Court of Appeals.”¹⁸⁵ The Ninth Circuit said that Oregon Supreme Court’s practice of considering court of appeals’ briefs in granting review, said the federal court, “presents a substantial argument that Farmer ‘fairly presented’ his federal claims to the Oregon Supreme Court.” And as “Oregon law has not yet addressed that issue, and we do not think it

181. *Id.* at 1052–53.

182. *State v. Balfour*, 814 P.2d 1069, 1079–80 (Or. 1991).

183. *Farmer*, 497 F.3d at 1053.

184. *Id.* at 1053–54.

185. *Id.* at 1054.

appropriate to substitute our judgment for that of the Oregon Supreme Court regarding the interpretation of Oregon’s appellate procedures and practice,” the Oregon Supreme Court should be the first to answer the question.¹⁸⁶

The Oregon Supreme Court did respond to the certification. Being careful not to decide the federal law question of whether habeas review “is ‘unavailable’—or, for that matter, ‘available’—for post-conviction petitioners, *Balfour* litigants, litigants with fact-based questions, or litigants of any other description . . . [as] the Ninth Circuit is the appropriate forum for argument as to whether a given Oregon procedure is ‘available,’”¹⁸⁷ the Oregon justices said that their court could consider “an imperfectly drafted petition as a candidate for review,” with “[t]he ultimate question whether a litigant has raised a claim for review by this court . . . a matter committed to this court’s discretion.”¹⁸⁸ While criticizing the way in which this petitioner had presented materials, and being clear they did not think it was “*effective* appellate advocacy,” the justices were willing to accept the materials presented to the court as they had been.¹⁸⁹ (With that response in hand, the Ninth Circuit panel, for whom Judge Goodwin wrote a brief opinion, reversed the district court’s dismissal of the petition, saying that petitioner had exhausted his state remedies.¹⁹⁰)

As noted, the Oregon Supreme Court took its opinion as an opportunity to take a swat at an earlier Ninth Circuit ruling. The justices pointed out that prior to 1982, there was a “tacit agreement” between the Office of the Oregon Public Defender and the Oregon Attorney General in which “the Public Defender would not seek discretionary review [in the Oregon Supreme Court] after the Oregon Court of Appeals ruled against a petitioner in a collateral criminal appeal” that is, a post-conviction proceeding, and “[t]he Attorney General, in turn, would not argue in federal habeas cases that the petition had failed to exhaust state remedies by failing to present his claims to the Oregon Supreme Court.”¹⁹¹ However, in *Batchelor v. Cupp*,¹⁹² the Ninth Circuit had ruled that to have a habeas corpus petition reviewed in state court, a petitioner had to file a post-

186. *Id.* at 1055.

187. *Farmer v. Baldwin*, 205 P.3d 871, 886 (Or. 2009).

188. *Id.* at 877–78.

189. *Id.*

190. *Farmer v. Baldwin*, 563 F.3d 1042 (9th Cir. 2009).

191. *Farmer*, 205 P.3d at 884–85.

192. 693 F.2d 859 (9th Cir. 1982).

conviction review petition with the Oregon Supreme Court.¹⁹³ As the Oregon justices put it, “the Ninth Circuit chose to strike down that agreement as inconsistent with federal law.”¹⁹⁴ The implication was clear: had the Ninth Circuit not interfered with the informal agreement, the present difficulty would not have arisen.

E. Effects on Government

Some Ninth Circuit Oregon cases concerned aspects of government agencies’ authority. One involved elections, in particular the Secretary of State’s determination of the adequate number of signatures for a referendum, which put the federal court into a dispute over a major issue of state policy.¹⁹⁵ After the Oregon legislature adopted same-sex domestic partnerships, an effort was made to overturn them, but the Secretary of State, using a statistical sampling method as required by statute, disqualified the proposed referendum as having an inadequate number of signatures.¹⁹⁶ The Ninth Circuit, for which Judge Goodwin spoke, upheld the Secretary of State’s actions, finding the state’s “signature verification standards [] uniform and specific enough to ensure equal treatment of voters.”¹⁹⁷ In upholding what he said was “this minimal burden on the right to vote,” Goodwin spoke of the task faced by election officials who “may process more than 100,000 sampled initiative and referendum signatures within the thirty-day period required by state law,” with “ten or more proposed initiative and referendum measures that require signature verification.”¹⁹⁸ This carried an “administrative burden . . . significantly greater than the burden associated with verifying a vote-by-mail election ballot measure” because the latter required only a simple barcode scan while “verification of each referendum petition signature takes several minutes because elections officials must identify the signer, find the corresponding voter registration card, determine whether the signer is an active, registered voter, and then compare the signatures.”¹⁹⁹ Thus, additional procedures, such as those plaintiffs had suggested, would create “administrative burden”

193. *Id.*

194. *Farmer*, 205 P.3d at 885.

195. *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008).

196. *Id.* at 1100.

197. *Id.* at 1102.

198. *Id.* at 1104.

199. *Id.*

that “outweighs any marginal benefit that would result.”²⁰⁰

Also related to elections, although somewhat obliquely, was a federal Freedom of Information Act case related to a dispute over the accuracy of the decennial census, which could affect both redistricting as well as moneys received through grant formulae.²⁰¹ When state legislators sought statistically adjusted data for the 2000 Census, Judge Goodwin ruled for them, saying that the material sought was not pre-decisional and not deliberative (which would have exempted them from release).²⁰²

Other cases also put federal judges into the middle of major policy issues. One was a challenge to the state’s Death With Dignity Act, faced by the Ninth Circuit after the district court had issued an injunction against it. Relying largely on the U.S. Supreme Court’s cases on standing to sue, the Ninth Circuit vacated and remanded on the basis that those challenging the statute lacked standing.²⁰³ Another case concerned what the state had to pay workers on publicly-funded projects, specifically a state law requiring contractors on public projects to pay time-and-a-half for work over eight hours unless the workers were covered by a collective bargaining agreement.²⁰⁴ There a Ninth Circuit panel ruled that the statute was not preempted by federal law, but not before two panel members, Judge Goodwin being one of them, stated they “were troubled by the fact that the . . . practical effect of the statute in this day and age is to make it more expensive for non-union contractors in Oregon to work on public projects” because unions under collective bargaining agreements have four ten-hour days under flex time while non-union employees usually worked five eight-hour days.²⁰⁵

In the complex area of relations between the federal government, Native American tribes, and the state, the state’s authority to act was upheld in a case deriving from both California and Washington, not Oregon, but Judge Goodwin noted the implications for Oregon. At issue was whether the state could require a federally licensed Indian trader to have a state license for the sale of liquor. Before the Ninth Circuit heard the case en banc, Judge Goodwin had initially written an

200. *Id.* at 1105.

201. *Carter v. U.S. Dep’t of Commerce*, 307 F.2d 1084 (9th Cir. 2002).

202. *Id.* at 1092.

203. *Lee v. State of Or.*, 107 F.3d 1382 (9th Cir. 1997).

204. *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993).

205. Conference Memorandum from Mary Schroeder to panel (Oct. 8, 1992) (discussing *Babler Bros., Inc.*, 995 F.2d at 911).

opinion for the panel to the effect that requiring such licensing was improper. However, a judge who had joined the panel as a replacement objected and wrote an opinion going the other way, which Goodwin joined. Another panel had ruled in favor of the Indians, and the two cases were combined for rehearing en banc. The en banc panel ruled that Indian tribes, not the states, had exclusive licensing and distribution jurisdiction over liquor transactions in Indian country,²⁰⁶ but that en banc ruling was in turn reversed by the U.S. Supreme Court, which upheld the state licensing requirements.²⁰⁷

That ruling had favored the state, but quite different was Justice Goodwin's Ninth Circuit opinion in consolidated cases on Native Americans' fishing rights—also related to the environment (discussed *infra*)—in which the State of Washington and fishing groups had resisted federal court orders.²⁰⁸ Indeed, Judge Goodwin, in language quoted in Justice Stevens' opinion for the U.S. Supreme Court,²⁰⁹ said that, except for some school desegregation cases—naming Boston specifically—“the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”²¹⁰

Although most people associate the case with Judge George Boldt of the Western District of Washington, a district court ruling concerning rights in the Columbia River had been issued by Judge Robert Belloni in the District of Oregon case.²¹¹ Most of Judge Goodwin's Ninth Circuit opinion was about Washington, not Oregon, but he spoke of the Columbia River case as “retain[ing] minor problems of enforcement.”²¹² Supporting the district court's ruling, he noted that the jurisdiction of the District of Oregon “extends to the entire Columbia River, not simply to the Oregon side.”²¹³ Stating that both states held “that fish within their borders, so far as title can be asserted, belong to the state in its sovereign capacity in trust for its

206. *Rehner v. Rice*, 678 F.2d 1340 (9th Cir. 1982).

207. *Rice v. Rehner*, 463 U.S. 713 (1983).

208. *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for W. Dist. Of Wash.*, 573 F.2d 1123 (9th Cir. 1978).

209. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979).

210. *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1126.

211. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

212. *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1126.

213. *Id.* at 1133.

people,”²¹⁴ cited Oregon cases going as far back as 1917.²¹⁵ The U.S. Supreme Court, basically upholding the Ninth Circuit on Indian treaty rights while vacating some of its ruling, devoted attention primarily to fishing rights, but Justice Stevens adverted to “the widespread defiance of the District Court’s orders”²¹⁶ and returned to the matter to declare, “State-law prohibitions against compliance with the District Court’s decree cannot survive the command of the Supreme Court.”²¹⁷ This case, especially the Ninth Circuit’s ruling, has been said to have prompted Washington’s then Attorney General, Slade Gorton, when he became U.S. senator, to campaign to divide the Ninth Circuit (discussed *infra*).

The same complex interrelations of authority appeared concerning a tribe’s application for off-reservation gambling.²¹⁸ The Secretary of Interior had made a positive decision on an application, but Oregon’s governor disagreed, so the Secretary denied the application on that basis. The case turned on whether the “contingent legislation” (involving the governor’s veto) was valid and whether there was a violation of the U.S. Constitution’s appointments clause (because the Oregon governor was obviously not a federal official).²¹⁹ The Ninth Circuit’s ruling upholding the denial was important both for Indian gaming and casinos and the development of Oregon state law.²²⁰

Another case also served to reinforce the state’s authority, when, in response to a suit against officials over traffic laws, the Ninth Circuit ruled that “[f]ederal courts have no jurisdiction to enjoin the enforcement of state traffic laws.”²²¹ Yet even when a case deals with a government entity’s authority, the ruling may say little about state law, as when, in a suit against a city for interference with a business owner’s rights, the Ninth Circuit affirmed a judgment for the city, on

214. *Id.* at 1132.

215. *See* Antony v. Veatch, 220 P.2d 493, *reh’g denied*, 221 P.2d 575 (Or. 1950); Columbia River Fishermen’s Protective Union v. City of St. Helens, 87 P.2d 195 (Or. 1939); Monroe v. Withycombe, 165 P. 227 (Or. 1917).

216. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 679 (1979).

217. *Id.* at 691.

218. Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688 (9th Cir. 1997).

219. *Id.* at 695–98.

220. *Confederated Tribes of Siletz Indians of Or.*, 110 F.3d at 698–99.

221. Nickel v. Reed, No. 86-4189, 852 F.2d 572 (9th Cir. 1988) (unpublished table decision).

the basis that there was no showing of an “official policy or custom” to violate those rights. An Oregon case and statute were cited, but only as to the limitations period for bringing some of the claims.²²²

In another case, the structure of government agencies was at the core of an employment discrimination case, because whether the agency could be sued for violation of Sec. 504 of the federal Rehabilitation Act depended on whether it was a “program or activity receiving Federal financial assistance.” Although the Ninth Circuit said the question was one of federal law, it was a question that “can be answered only after considering the provisions of state law that define the agency’s character.”²²³ The agency in question was the Oregon Office of Public Defender Services (OPDS), created as the administrative arm of the Public Defense Services Commission and at the relevant time within the state’s judicial branch. The court said that the Commission (and thus OPDS) was separate from the state’s Judicial Department or “predominant administrative agency within the judicial branch.”²²⁴ While the latter received federal funding, the Commission, which was independent of the Judicial Department, did not, and thus it was not “a program or activity receiving Federal financial assistance.”²²⁵ Because the primary issue was the predicate one of the agency’s status, the employment discrimination issue was not reached.

The federal courts might also have to determine if an entity within the state was sufficiently connected with the State so that its actions were “state action” for federal statutory purposes. Such was the situation when the Oregon State Bar was sued over its requirement that all active Oregon-based attorneys purchase primary malpractice insurance from the Bar. If the bar’s action were ruled to be “state action,” the Bar would be exempt from the requirements of the Sherman Anti-Trust Act. Saying that the insurance requirement falls within the Sherman Act’s state action exemption, the Ninth Circuit panel majority (Judges Alarcon and Goodwin) declared, “The bar is a public corporation and an instrumentality of the judicial department of the government of the State of Oregon”,²²⁶ moreover, the state legislature had given the Bar’s Board of Governors the

222. *Wilke v. City of Burns*, 205 F. App’x 634, 635 (9th Cir. 2006).

223. *Sharer v. State of Or.*, 581 F.3d 1176, 1178 (9th Cir. 2009).

224. *Id.* at 1179.

225. *Id.* at 1178.

226. *Hass v. Or. State Bar*, 883 F.2d 1453, 1455 (9th Cir. 1989).

authority to require professional liability insurance and to own and sponsor an insurance organization. While the insurance requirement in question “was not imposed directly by either the Oregon legislature or the Oregon Supreme Court acting in a legislative capacity,” further examination showed that what the Bar did was contemplated “pursuant to a ‘clearly articulated and affirmatively expressed state policy.’”²²⁷ Although the Bar was an agent of the Oregon Supreme Court for some purposes, here it could be seen as an agent for the legislature, even if there was no “active supervision” by the State.²²⁸

Other cases concerned the authority of other officials of other governmental units in the state. For example, decisions on challenges to conditions at county jails affect sheriffs’ authority.²²⁹ Another case involved the question of whether a sheriff could agree to provide additional security for a private company. After the Klamath County Board of Commissioners and the Klamath County Sheriff’s Office, together and then the latter alone, had agreed with the Weyerhaeuser lumber company to provide security for the company’s land, an individual claiming to have been mistreated in connection with an investigation, and criminally prosecuted for alleged theft of timber on that land, sued the county. The Ninth Circuit panel, on which Judge Goodwin sat, said that the county could provide additional security for other units of government but had no authority to make private security services agreements.²³⁰ The commissioners lacked the authority to enter into such an agreement and could not support an agreement reached by the sheriff alone. In its opinion, the court made heavy use of, and relied heavily on, both old (1901 and 1926) and recent cases from the Oregon Supreme Court and the Oregon Court of Appeals.²³¹

Also affecting the personnel authority of sheriffs was a case in which a sheriff had terminated an employee for supporting the losing candidate in the election for sheriff. The case turned on the federal

227. *Id.* at 1456, 1459.

228. *Id.* at 1461.

229. *See, e.g.,* *Tyson v. Guisto*, 360 F. App’x 900 (9th Cir. 2009) (challenge under RLUIPA over participation in Jum’ah prayers and non-halal meals at the Multnomah County jail, in which summary judgment for the defendant officials was reversed as to the first and affirmed as to the latter).

230. *Weyerhaeuser Co. v. Klamath Cnty.*, 151 F.3d 996, 1001–02 (9th Cir. 1998).

231. *Anderson v. Public Emp. Ret. Bd.*, 895 P.2d 1377 (Or. 1995); *Warren v. Marion Cnty.*, 353 P.2d 257 (Or. 1960); *Fales v. Multnomah Cnty.*, 248 P. 151 (Or. 1926); *Steiner v. Polk Cnty.*, 66 P. 77 (Or. 1901).

law question of whether the position was one of “policy making,” but Oregon law was also involved. The judges agreed that one of them was to “review the statutes giving the sheriff authority to fire his employees” and an Oregon case interpreting the statutes.²³² The judge’s “close look at the relevant Oregon law” found the state law “statutory default rule [to make] sheriff’s deputies ‘at will’ employees,” but the state case “recognizes the authority of counties to confer ‘just cause’ protection on those same sheriff’s deputies.”²³³ The court concluded that the deputies were indeed “at will” employees, at least in the absence of “a statute, rule, regulation, or contractual term to the contrary,” and recognized the Oregon Supreme Court’s decision that “‘at will’ status can be modified by counties by the adoption of personnel rules creating due process or ‘just cause’ requirements.”²³⁴ Nonetheless, the court affirmed the district court’s grant of summary judgment to the sheriff. And certainly decisions on challenges to conditions at county jails affect sheriffs’ authority.²³⁵

That ruling obviously limited what a government entity could do. So did another case, which cut off efforts by existing governments to undercut new organizations’ involvement in the “War on Poverty.” Seven counties, a public agency, and two non-profit agencies challenged the award to Oregon Rural Opportunities (formerly the Valley Migrant League) under a program to aid migrant workers. The Ninth Circuit resolved the matter on the basis of the plaintiff entities’ lack of standing, knocking down all the bases for standing that were suggested.²³⁶

V. ENVIRONMENTAL LAW

Since the passage of the National Environmental Protection Act (NEPA) in 1970 and companion statutes, environmental law has been largely federal law, and federal courts’ rulings on those federal statutes, and their implementing regulations, do not much affect state *law*. There is, however, no doubt that those rulings affect the state’s *economy*, particularly in Oregon where “the Ninth Circuit was

232. Memorandum from A. Wallace Tashima to panel (July 16, 1999) (discussing *Hailey v. Hand*, 210 F.3d 383 (9th Cir. 2000) (unpublished table decision)).

233. Memorandum from Betty B. Fletcher to panel (Sept. 1, 1999) (discussing *Graves v. Arnado*, 768 P.2d 910 (Or. 1989)).

234. *Hailey*, 210 F.3d at 383.

235. *See, e.g.*, *Tyson v. Guisto*, 360 F. App’x 900 (9th Cir. 2009).

236. *Hood River Cnty. v. United States*, 532 F.2d 1236 (9th Cir. 1976) (per curiam).

credited with shutting down the logging industry in western Oregon.”²³⁷ That leads to a look at Ninth Circuit rulings in environmental cases in which Judge Goodwin participated. He is reputed to be favorable to environmental interests, perhaps a result of his opinion in the Oregon beaches case for the Oregon Supreme Court²³⁸ and his participation on the Ninth Circuit’s “spotted owl” panel, the set of three judges that, in a series of challenges to timber sales because of their effect on that bird’s habitat, were largely decided against government agencies. Moreover, his background makes him seem like the environmental “Marlboro man,” as he grew up as the son of a minister who served logging communities like Chehalis and Ryderwood, Washington, and worked in the woods with the loggers; the future judge then worked on a ranch while in high school and in a Springfield, Oregon, lumber mill while in college.

Judge Goodwin has regularly talked about the “extractive economy” of the Pacific Northwest states, dependent on the lumber and fishing industries, and has not always done so positively. Thus, in 1992 when a Seattle woman had written to him, likely because of the spotted owl cases, “concerning the impact of the environmental laws upon the economies of the small sawmill towns in the Pacific Northwest,” he spoke of his background and of “[t]he days of profligate logging” which were “long gone” and the “[r]esource exploitation” which he said was “now moving overseas.”²³⁹ Although he said in 1988, a few days before argument in a spotted owl case, that “[w]hen it comes to environmental regulations, the 9th Circuit Court of Appeals simply interprets federal law. It doesn’t make it,”²⁴⁰ he also observed, as to judges having to apply the environmental statutes, “Sometimes we judges get pressure from congressmen who disagree with their own statutes and then blame us for enforcing the laws that an earlier Congress has written.”²⁴¹ “But

237. Telephone Interview with ATG (Jan. 5, 2013).

238. *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

239. Letter from Alfred T. Goodwin to Susan Calvert, Seattle, Wash. (Nov. 17, 1992).

240. Robert Sterling, *Critics assail appeals court*, MEDFORD MAIL TRIBUNE (OR.), July 17, 1988, at 1A, 4A.

241. Letter from Alfred T. Goodwin to Susan Calvert, Seattle, Wash. (Nov. 17, 1992). Judge Goodwin was gentle in suggesting that the woman should not write to judges about pending cases, but he did not respond to her before administering a gentle chiding: “Judges are not supposed to comment about specific cases nor are they supposed to receive communications from individuals discussing pending cases. I know that your intentions are honorable, and I won’t scold you for writing your letter,” and he then said it would be more effective if she wrote to members of Congress.

that's not the court's concern," he had said, adding that the members of Congress "either don't remember what the law says or they don't like the heat."²⁴²

Recognizing that NEPA "has had some downside effects on the economy," Judge Goodwin's view was that "[i]f Congress wants to pass a law that has some damaging effects on local interests, that's none of our business."²⁴³ In a letter to a friend, he observed that "[t]he spotted owls are an interesting symptom of the tension between the nationwide environmental movement and the pressure on local politicians to keep the lunch pails full," a tension which was not limited to Washington and Oregon: "In the Pacific Northwest it is timber, in West Virginia and Kentucky it is strip mining, in Oklahoma and Texas it is natural gas and oil" In all these, "everywhere people are using up the environment faster than it can replace itself. The courts are in the unhappy position of having to referee a lot of these disputes."²⁴⁴ In connection with those efforts to divide the circuit, Judge Goodwin observed that "the senators from Alaska and Idaho who get their campaign funds from extractive industries think I'm a tree hugger, but I have two operative chain saws."²⁴⁵

The judge has also said that he is "not as much of a Sierra Club fan as some of my published rulings might [make it] appear."²⁴⁶ Yet one could see that at times he did lean toward environmental interests. One of his concerns was that the timber industry would overwhelm those representing environmental interests, a concern evident as to connection with whether agency consideration of environmental issues was evaluated on a site-specific basis or for cumulative effects. In one such case, the Oregon National Resources Council challenged the Bureau of Land Management's (BLM) Coos Bay Resource Management Plan, with specific attention to the Port Orford cedars, and timber companies intervened.²⁴⁷ Judge Goodwin told his panel colleagues that if the court approached these matters only on a site-specific basis, industry would win all the time. The court, through Judge William Fletcher (and over the partial dissent of Judge Graber) then held that the challenge to the EIS ripe and that the EIS itself

242. Sterling, *supra* note 240.

243. *Id.*

244. Letter from Alfred T. Goodwin to James Martin, Washington, D.C. (Feb. 3, 1992).

245. Interview with Alfred T. Goodwin in Bend, Or. (Oct. 16, 1999).

246. Interview with Alfred T. Goodwin in Pasadena, Ca. (Jan. 16, 2002).

247. Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002).

inadequate under NEPA for summary judgment in favor of the challengers.²⁴⁸

If Judge Goodwin could speak up for the environmentalists, he could also speak up for others, as he did in a case which touched only tangentially on environmental matters. There he commented within the panel on behalf of homeowners concerned about effects on their immediate surroundings. An irrigation district had asked to convert an open canal into a pipeline, and the Ninth Circuit affirmed summary judgment for defendant district. Goodwin agreed, but in conference, he did “offer, on behalf of the owners, the observation they bought their properties with the ambience of a ditch running through their property for the attraction it has for bird and animal life so to a certain extent they are thinking this is a taking going on.”²⁴⁹

However, Judge Goodwin’s rulings, and others in which he joined, make clear that he was not an automatic vote to support a challenge to agency action (or inaction). He joined some results not favored by environmental groups, and some of his language suggests a less than favorable view of environmental litigation. For example, in a case on regulation of off-road vehicles in the Siskiyou National Forest and a wet-season road closure—a challenge held not ripe for judicial review—he observed that “these cases looked like the environmentalists were trying to micromanage the Forest Service.”²⁵⁰

Perhaps the judge’s skeptical view is even clearer in a separate concurrence in a case which posed the question of one group’s ability to proceed in court against Forest Service timber sales after other groups had litigated the matter and whose case had been dismissed with prejudice. The panel majority (Judges Goodwin and Procter Hug, Jr.), over Judge Berzon’s dissent, sustained the district court’s dismissal with prejudice of the present challenge on *res judicata* grounds. When an off-panel judge, Susan Graber (also from Oregon), called for en banc rehearing, the panel issued a new opinion requiring a full adversary hearing and record development.”²⁵¹ Judge Goodwin wrote separately “to remind the district court on remand that if the factual record developed after remand shows that a party or counsel

248. *Kern*, 284 F.3d at 1079.

249. *Swalley Irrigation Dist. v. Alvis*, 326 F. App’x 995 (9th Cir. 2009).

250. Conference Memorandum from Richard to panel (July 15, 1999) (reporting Judge Goodwin’s views) (discussing *Friends of the Kalmiopsis v. U.S. Forest Serv.*, No. 98-35793, 193 F.3d 253 (9th Cir. 1999) (unpublished table decision)).

251. *Headwaters, Inc. v. U.S. Forest Serv.*, 382 F.3d 1025 (9th Cir. 2004), *withdrawn and superseded*, 399 F.3d 1047 (9th Cir. 2005).

were, as suspected by the district court, in fact gaming the system to prolong unnecessary litigation, the court has discretionary remedies in the nature of costs and fees to protect the court from imposition.”²⁵²

The environmental cases in which the judge participated, most particularly the spotted owl cases, but any rulings restricting the sale of timber in the Pacific Northwest, became a key part of the continuing controversy over whether the Ninth Circuit should be split into a northern circuit containing Alaska, Washington, Oregon, Idaho, and Montana, and a southern circuit of the remaining districts—those in California, Arizona, Nevada, Hawaii, Guam, and the Northern Marianas. Some advocating the split spoke in terms of judicial efficiency—alleging that a court with that many judges couldn’t function effectively—but the underlying reason for the proposal was unhappiness with the effect of the court’s rulings on the states’ economies. It was thought that if there could be a separate northern (“icebox”) circuit, those in the Pacific Northwest would not have to contend with liberal California judges who allegedly imposed their environmental concerns on the Northwest.

In connection with the circuit-splitting argument, one might ask whether Judge Goodwin was acting as an Oregon judge, because of his background, or a California judge because his chambers had been in Pasadena since the early 1980s. His knowledge of the terrain and weather of the Pacific Northwest certainly came into play in his consideration of these cases. One could see this when the Forest Service wanted to take out dead trees as fire protection. The court, finding no irretrievable commitment of resources, upheld the Forest Service on issues of public collaboration and soil disturbance concerns and affirmed the denial of a preliminary injunction against it. Judge Goodwin, arguing that immediate determination was not necessary, told his colleagues that “at this time of year, preparatory work on the hazardous fuel reduction will not irreparably harm any interest the plaintiffs may have in maintaining the status quo until the panel can hear arguments.”²⁵³

Somewhat counter to the view that the Ninth Circuit is environmentally friendly, not all results in contests between environmentalists and agencies or businesses have favored environmentalists. A simple instance is the court’s upholding

252. *Headwaters, Inc.*, 399 F.3d at 1057 (Goodwin, J., concurring specially).

253. *ATG to panel* (Nov. 2, 2006) (discussing *Wild W. Inst. v. Bull*, 472 F.3d 587 (9th Cir. 2008)).

summary judgment for the Forest Service in a challenge to grazing: the grazing was “established” on ranch land as per the Wilderness Act and the agency had taken the required “hard look” under NEPA.²⁵⁴ Another was the affirmance of the denial of a preliminary injunction sought to force consideration of alternatives with respect to relocation of wolves.²⁵⁵ Still another was the denial of a preliminary injunction and the grant of summary judgment to the government over claimed failure to comply with NEPA and the National Forest Management Act with respect to construction of Gulch Lift at Mt. Hood. In a disposition joined by Judge Goodwin, the court said that the Forest Service had carefully examined the impact on vegetation nor was there a need for a new EIS to address possible alterations.²⁵⁶

Because not all cases pitted environmentalists against the government, not all decisions favoring an agency were defeats for environmentalists, as the court at times allowed a government agency to serve as steward for the environment. Mining cases, where those seeking to extract materials were the government’s adversaries, provide an example. In a pair of cases, Judge Goodwin joined the court in deciding for the government. In one, the court ruled that unpatented mining claims were subject to the Surface Resources Act, and in the other, mixing mining with timber, the court upheld the U.S. Forest Service’s right to manage non-mineral surface resources (timber) over unpatented mining claims within the Siskiyou National Forest, as no valid discovery of valuable mineral deposits had been made before the Act was enacted.²⁵⁷

A. *The Northern Spotted Owl*

The set of environmental cases for which Judge Goodwin is best known—and those with perhaps the most obvious impact on Oregon’s economy—involved challenges by environmental groups to logging of old-growth timber, which they argued would have a deleterious effect on the habitat of the northern spotted owl. A series

254. *Ventana Wilderness Alliance v. Bradford*, 313 F. App’x 944, 946–47 (9th Cir. 2009).

255. *In Def. of Endangered Species v. Ridenour*, No. 92-36777, 19 F.3d 27 (9th Cir. 1994) (unpublished table decision).

256. *1000 Friends of Or. v. U.S. Forest Serv.*, No. 92-35501 (9th Cir. Sept. 23, 1993) (no cite).

257. *Ramsey & Ramsey v. Sec’y of the Interior*, No. 75-2782, 556 F.2d 588 (9th Cir. 1977) (unpublished table decision); *Mineral Ventures Ltd. v. Sec’y of the Interior*, No. 75-3062, 554 F.2d 1069 (9th Cir. 1977) (unpublished table decision).

of those cases went to the panel of Judges Harry Pregerson, Mary Schroeder, and then Chief Judge Goodwin under the court's practice, in which further appeals of a case came back to the same panel; or a panel had ordered that it retain jurisdiction over subsequent appeals. In referring a later appeal to that panel, a Clerk's office attorney commented, "This is the same *Portland Audubon* case the panel has dealt with on numerous occasions in the past, and the one in which there is an order automatically referring any subsequent appeals to you."²⁵⁸ Only major elements of these cases will be noted here. On basic issues Judge Goodwin, who joined the other judges' opinions when he himself was not writing for the panel, did not cast a single anti-environmentalist vote. That he was certainly not merely "going along for the ride" is evident from his particularly strong opinion criticizing the BLM.

A signal element in the most important of these cases was Congress' adoption of language affecting the litigation, which produced a major separation-of-powers dispute. In one of the first cases, environmental groups obtained an emergency temporary injunction, barring some timber sales with others allowed to continue. In a continuing budget resolution, Congress had withdrawn the district court's jurisdiction over these cases but a savings clause required the district court to apply law to particular sales. Chief Judge Goodwin wrote for the panel to say that the statutory provision barred judicial review when the only basis claimed for review was that the forest management plan did not include newly-discovered and not-earlier-available information, with the district court having to decide if the challenge was to the plan or to particular activities. The court vacated the temporary injunction but said the organizations could seek relief on a site-specific basis. The district court was also held to have properly denied logging companies' intervention.²⁵⁹

Later in the year, as the litigation continued, Chief Judge Goodwin suggested mediation. Environmental groups had lost a bid in the district court to stop logging of old-growth timber on BLM lands in Oregon but obtained an injunction until the court of appeals could hear the case. During argument in August 1989, Goodwin asked, "Are there settlement possibilities to permit some partial lifting of the injunction?" and said, "Maybe some sales could be released

258. Memorandum from Molly Dwyer (Senior Motions Attorney) to panel (Aug. 12, 1992) (discussing *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993)).

259. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir. 1989).

from the injunction.” Neither side had earlier initiated settlement talks but Judge Edward Leavy was “willing to sit down with the parties to discuss that possibility.”²⁶⁰ However, the mediation was unsuccessful.

The next important iteration of the spotted owl litigation brought greater focus on Congressional action when the panel, in consolidated appeals from Oregon and the Western District of Washington, ruled on the effect of P.L. 101-121, the so-called Northwest Timber Compromise, in the Department of Interior and Related Agencies Appropriations Act of 1990. The Compromise provided a comprehensive set of rules for harvesting timber in forests with no spotted owls. In opaque language, the Compromise stated that Congress determined and directed that management of forests according to a statutory subsection prohibiting harvesting altogether in designated areas was adequate consideration to meet the statutory requirements for certain specifically-identified lawsuits. The defendant officials sought to dismiss the cases on the grounds the Compromise superseded the statutory sections on which the cases were based.

Judge Harry Pregerson spoke for the panel and drew on a Civil War-era Supreme Court case to say the statutory intervention violated the separation of powers by directing the outcome in pending litigation without making a change in the underlying law.²⁶¹ However, the U.S. Supreme Court reversed, reaching the conclusion that subsection (b)(6)(A) compelled changes in law, not findings or results under the old law, which would have been improper.²⁶² However, that ruling hardly ended the litigation, as the panel then subsequently said through Judge Schroeder that the Compromise’s restriction on challenging forest plans did not survive the fiscal year to which it applied and upheld the ban imposed by Judge William Dwyer (W.D. Wash.) on old-growth timber sales in seventeen national forests in the Pacific Northwest. The court said further that designation of the northern spotted owl as an endangered species did not excuse the U.S. Forest Service from its obligation to maintain a viable population of the species under the National Forest Management Act, although the court also said that the Migratory Bird

260. John Painter, Jr., *Both sides OK talks on logging*, THE OREGONIAN, Aug. 18, 1989, at B4M.

261. *Seattle Audubon Soc’y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

262. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1990).

Treaty Act (prohibiting harm to birds) did not preclude timber harvest within areas of suitable habitat for the owl.²⁶³

After the U.S. Supreme Court's separation-of-powers ruling, Judge Helen Frye in the U.S. District Court in Oregon granted an injunction against the government and summary judgment for plaintiffs. She ordered the BLM to produce a supplementary EIS about logging's effect on owls, with no sales or logging to proceed if not awarded prior to 1992. The Ninth Circuit affirmed, with Judge Goodwin, whose notes said, "Injunction stands on good facts," joining Judge Mary Schroeder's strong opinion supporting those who challenged the timber sales.²⁶⁴ The opinion immediately disposed of procedural matters, ruling that the plaintiffs had standing²⁶⁵ and that, because Timber Management Plans predetermine sales, there was final action making the case ripe for review. Further, as the court noted previously, agency action would be reviewed because Congress' limits on judicial review had expired. On the merits, the agency's decision not to supplement the EIS was arbitrary and capricious, with the record "amply support[ing] the district court's conclusion" on that point,²⁶⁶ especially as the Secretary had available scientific evidence that "raised significant new information relevant to environmental concerns . . . bearing on the impacts arising from the on-going implementation of the land use decisions driven by the original TMPs."²⁶⁷ Requiring a supplemental EIS was appropriate despite the argument new Resources Management Plans would address the relevant information. In a particular slap at the agency, the court said that if logging were allowed under the old plans until new Resources Management Plans were finalized, "we would sanction the BLM's deliberate, protracted refusal to comply with applicable environmental laws, and countenance irreparable harm to plaintiffs."²⁶⁸

Judge Goodwin noted that "a substantial quantity" of the

263. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991). See Bob Egelko, *9th Circuit Upholds Logging Ban To Protect Northern Spotted Owl*, DAILY JOURNAL (L.A.), Dec. 24, 1991, at 4 (on file with the author).

264. ATG Case Calendar Sheet, *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) (No. 92-36666).

265. *Babbitt*, 998 F.2d at 707 (explaining that the argument against standing was "no stronger in this case than in" the related case of *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993)).

266. *Babbitt*, 998 F.2d at 708.

267. *Id.*

268. *Id.* at 710.

proposed timber sales were in owl habitat, and he said that BLM had admitted that further loss of such habitat “could severely compromise the ability of the owl to survive as a species.”²⁶⁹ This led him to conclude that “the continued logging of old-growth forest on BLM land in the absence of NEPA compliance will cause harm to the owls and to plaintiffs who will no longer be able to observe and study them,” yet “[t]he old plans never complied with NEPA and the new plans have not yet been prepared,” with the TMP’s “control[ling] myriad land decisions.”²⁷⁰ The O&C (Oregon & California) Lands Act did not preclude an injunction and “has not deprived the BLM of all discretion for either the volume requirements of the Act or the management of the lands entrusted to its care.”²⁷¹

A case from over a dozen years later illustrates both that the spotted owl controversy would not go away and that Judge Goodwin continued to join decisions favoring the environmental challengers. When the Fish & Wildlife Service had withdrawn a Biological Opinion but not the Incidental Take Statement (allowing taking of “all” northern spotted owls affected by the timber harvest), the Ninth Circuit, in an opinion by Judge Tashima that Goodwin joined, said the Take Statement couldn’t stand because it was without a factual predicate and provided no numbers, nor was re-initiation of consultation among agencies possible.²⁷²

B. Other Environmental Cases

The spotted owl cases were far from the only environmental cases in which Judge Goodwin participated, although the other cases were hardly as newsworthy as those involving spotted owls, and some seemed rather peripheral. The Ninth Circuit decided quite a number of these cases through “unpublished” non-precedential memorandum dispositions rather than published opinions, which constitute circuit precedent. In addition, environmental cases originating outside Oregon generally had a less direct impact on Oregon, particularly if they involved interpretation of statutes aimed at areas outside the state,²⁷³ precedential rulings in such “out-of-state” cases would affect

269. *Id.* at 708.

270. *Id.* at 708–09.

271. *Id.* at 709.

272. *Or. Natural Res. Council v. Allen*, 476 F.3d 1031 (9th Cir. 2007).

273. *See Tribal Vill. of Akutan v. Hodel*, 86-3512/85-3514/85-3517, *initially issued as a memorandum disposition*, 792 F.2d 1376 (9th Cir. 1976) (unpublished table decision),

the rules and procedures that would apply to environmental challenges in Oregon as well as elsewhere in the circuit. An example of a case, the decision in which clearly established a rule applicable to similar environmental challenges elsewhere in the circuit, including Oregon, is a Clean Air Act Amendments case on the air quality plan for Clark County, Nevada (Las Vegas), in which the court, although otherwise upholding plan revisions, ruled that the EPA didn't meet its duties in approving solely on the basis that the plan didn't relax the State Implementation Plan.²⁷⁴

Birds in timber were far from the Ninth Circuit's only concern. Indeed, the spotted owl cases were hardly the only timber cases the court heard. One case involving contracts to purchase Forest Service timber produced mixed outcomes. Judge Goodwin wrote for a panel to hold that the companies could not rely on a voided injunction to validate the late filing of plans, but that it was not arbitrary for the government to accept late filings from members of a class who had settled claims but not from others who had not.²⁷⁵ Another action, under the Endangered Species Act, involved the "God Squad,"—the statutorily-established Endangered Species Committee that determined which animals were to be saved—which had exempted the BLM from requirements as to 13 of 44 timber sales, and an environmental group which had sought discovery as to *ex parte* contacts with the committee in violation of the Administrative Procedure Act (APA). The Ninth Circuit panel ruled that the APA ban applied to the Committee and sent the case back for a hearing before the administrative law judge on this matter and also held the President subject to the APA requirement; Judge Goodwin, concurring separately, disagreed on the last point.²⁷⁶

Cases also involved other birds and other animals including fish. In a ruling discussing the uniqueness of the western squirrel's North Cascades habitat, Judge Goodwin upheld the denial of listing that squirrel as endangered; the court gave *Chevron* deference to the

designated for publication and published, 792 F.2d 1376 (9th Cir. 1986), *cert. granted, vacated, and remanded sub nom.* Hodel v. Tribal Village, 480 U.S. 943 (1987). On remand, the Ninth Circuit's ruling was 816 F.2d 685 (9th Cir. 1987) (unpublished table decision).

274. Hall v. EPA, 263 F.3d 926 (9th Cir. 2001), *amended*, 273 F.3d 1146 (9th Cir. 2001).

275. Hampton Tree Farms, Inc. v. Yeutter, 956 F.2d 869 (9th Cir. 1992). *See also* Suintip Co. v. Yeutter, No. 87-1360 (D. Or. May 10, 1990).

276. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1551 (9th Cir. 1993) (Goodwin, J., concurring).

agency's determination of a "distinct population segment."²⁷⁷

Among other subjects were mining, grazing, land development, off-road vehicles, railroads, hazardous waste, asbestos, and Superfund cleanup. One case concerned the district court's interpretation of consent decrees among the Port of Portland, the Army Corps of Engineers, and an individual to allow the Port to fill in an area where fill washed out after Bybee Lake overflowed the bank separating it from Columbia Slough.²⁷⁸ Another case on aspects of a consent decree came when the Sierra Club and a company reached agreement over the latter's Clean Water Act violations, providing for compliance with the law and the company's donation to an environmental organization of \$45,000 (to be more for further violations). The district court upset this applearct by saying the funds were civil penalties, which cannot go to private organizations. The Ninth Circuit reversed, with Judge Goodwin saying that without a finding of liability, the monies were not civil penalties (which could go only to the U.S. government) and thus could go to the organization.²⁷⁹

There were also cases about railroads, which thus involved not the "usual suspect" federal agencies challenged in environmental cases from Oregon, but instead the Surface Transportation Board (STB)—sometimes known as the "Surf Board"—the successor to the Interstate Commerce Commission. A case about the BNSF Railway's reacquisition of the Stampede Pass route was about a location in Washington State, not Oregon, but the case was not without Oregon impact because of its potential effect on major railroad traffic throughout the Pacific Northwest. The court's ruling was mostly about federal preemption, but it also included an issue as to the STB's environmental assessment, which the court found had received the "hard look" required of federal agencies nor had the STB abused its discretion in its EA, and affected cities had had proper opportunity to raise environmental concerns. However, in another case, the court approved the agency on the need for rail lines, but said the agency's decision on the connection between the new line with other lines was arbitrary and capricious, nor had the STB given the NEPA-required "hard look."²⁸⁰

277. *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136 (9th Cir. 2007).

278. *Jones v. Thorne*, 132 F. App'x 150 (9th Cir. 2005).

279. *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

280. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1087 (9th Cir. 2011).

C. Federal and State Law

While most environmental cases focused almost entirely on federal law, some concerned the role of the federal court vis-à-vis local regulations, including those the state developed under federal statutory provisions. Judge Goodwin's views that federal courts were not the be-all-and-end-all, and thus should not overstep their authority, are clear in his statement in a non-Oregon case affecting local government action. The district court had stayed a city administrative abatement order and its attempt at wastewater monitoring. While ruling that the district court's action was within its discretion, Judge Goodwin said the court:

[C]aution[s] that in its continuing oversight role, the court remain sensitive to the limits of its jurisdiction over the many fundamentally local matters that may yet be touched by this litigation, particularly where the relevant environmental regulations provide to the City remedial avenues that do not run through federal court.²⁸¹

In another such case, the challenge was to the Environmental Protection Agency's refusal to object to a county agency's issuance of an operating permit to Pacific Coast Building Products, with compliance and post-construction monitoring at issue in the case. Judge Goodwin said that while the Clean Air Act says that Best Available Control Technology must be used, that "does not mean the most sophisticated technology that can be found" without regard for other factors.²⁸² The federal courts could also fault the state for not meeting its own responsibilities under environmental rules. Thus, after comparing federal and state legal provisions, the court held that the state had not carried out diligent prosecution under its comparable state law as the Clear Water Act required, and the judges also found a violation of a permit issued under the National Pollution Discharge Elimination System.²⁸³

Another element of federal-state-local government interaction was whether certain federal statutes and regulations preempted state and local efforts. For example, the Ninth Circuit held that efforts

281. *California v. M&P Inves.*, 46 F. App'x 876, 879 (9th Cir. 2002).

282. *Hall v. EPA*, 33 F. App'x 297, 299 (9th Cir. 2002).

283. *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514 (9th Cir. 1996), *initially a memorandum disposition*, 91 F.3d 152 (9th Cir. 1996) (unpublished table decision).

within a state—enacted by initiative measure—to ban traps and the selling of fur were preempted by both the Endangered Species Act and the National Wildlife Refuge System Improvement Act. This case also illustrates that while procedural prerequisites often serve to stop or at least delay a case, courts can and do sweep them all aside and proceed to the merits of the challenges. In order to reach the merits in this case, the Ninth Circuit allowed a suit against the director of a state fish and game agency to proceed despite the Eleventh Amendment, saying that the organizations challenging a ban on traps and selling of fur had standing, and held that the case was ripe.²⁸⁴

D. Procedure

Procedure was at the heart of a large number of environmental cases because, to ensure that environmental concerns had been considered and given proper weight, federal environmental statutes often focused on procedures that government agencies were to follow. Thus, there were many claims that, in the course of developing plans or before taking actions, an agency had failed to undertake required environmental assessments. There were also many procedural elements of administrative law on which these cases turned—whether the parties challenging agency action had standing, whether those other than the principal parties could intervene, and whether the challenges were premature (not ripe) or had become moot.²⁸⁵

One case the court said was not ready to be heard involved a three-cornered dispute between Native American tribes, state governments, and the federal government over the tribes' fishing rights on the Columbia River. The district court had approved salmon management plans and denied Idaho's request for a hearing; the Ninth Circuit dismissed the appeal for lack of a case or controversy as the matter was still before the district court.²⁸⁶ In a case not from Oregon but affecting it, Judge Goodwin also joined a per curiam opinion that reversed a district court's dismissal, on grounds that an Indian tribe was a necessary party, of a suit against the Secretary of the Interior

284. Nat'l Audubon Soc'y v. Davis, 307 F.3d 835 (9th Cir. 2002), *amended*, 312 F.2d 416 (9th Cir. 2002).

285. See *Ctr. for Biological Diversity v. Delgado*, 61 F. App'x 381 (9th Cir. 2003) (affirming denial of intervention as to U.S. Forest Service actions in the North Fork of the Eel River, authored by Judge Goodwin) (Brown, applicant in intervention).

286. *United States v. Oregon*, No. 85-3943, 796 F.2d 480 (9th Cir. 1986) (unpublished table decision).

about overuse of capacity behind a dam as affecting endangered species and violating NEPA.²⁸⁷

A straightforward ripeness issue occurred in a challenge to regulation of off-road vehicles (ORVs) in the Siskiyou National Forest and a wet-season road closure. As the court observed in finding the case not ripe for judicial review, “Although we find the Forest Service’s lax monitoring unlikely to expose potential problems caused by ORVs, we do not find a complete failure to perform a legally required duty that would trigger review”²⁸⁸

Related to ripeness is whether an agency had taken final action that could be challenged. An example was the BLM’s refusal to impose a moratorium pending completion of an EIS, with the court, in an opinion Judge Goodwin joined, also holding that NEPA did not stop the BLM from actions it proposed, nor did the Federal Land Policy Management Act require the BLM to update and monitor land-use plans so as to cause activities the environmental groups were challenging.²⁸⁹

A typical case of mootness occurred with respect to a challenge—based on NEPA, the National Forest Management Act, and Oregon water quality standards—to the Forest Service’s proposed Auger Timber sale in the Fremont National Forest in south central Oregon. The district court dismissed the case as moot when the regional forestry official halted sales and directed preparation of an EIS, and Judge Goodwin joined in the appeals court’s affirmance.²⁹⁰ Another suit that became moot was one to limit the expansion of the Portland airport, mooted when the expansion plan was withdrawn.²⁹¹ However, as to the “Mr. Wilson” logging project in the BLM’s Medford district, Judge Goodwin said that mitigation issues kept the case alive even though the cutting was complete.²⁹²

The effect of the government’s ceasing the action being challenged, related to mootness, arose in the context of eligibility for

287. *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (per curiam).

288. *Friends of the Kalmiopsis v. U.S. Forest Serv.*, No. 98-35793, 198 F.3d 253 (9th Cir. 1999) (unpublished table decision).

289. *Or. Nat’l Res. Council Action v. Bureau of Land Mgmt.*, 150 F.3d 1132 (9th Cir. 1998).

290. *Or. Nat’l Res. Council, Inc. v. Grossarth*, 979 F.2d 1377 (9th Cir. 1992).

291. *Citizens Comm. for the Columbia River v. Callaway*, 494 F.2d 124 (9th Cir. 1974).

292. *Or. Nat’l Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818 (9th Cir. 2006).

attorney's fees in a dispute over cattle grazing in the Hart Mountain Refuge. The Fish & Wildlife Service had not filed an EIS or a compatibility determination, but the government entered into a stipulation after an environmental group had filed suit. Over a dissent, Judge Goodwin ruled that the environmental group was entitled to attorney's fees because the government's stipulation was a change of position prompted by the lawsuit.²⁹³

VI. CONCLUSION

This Article has examined the ways in which judges of the U.S. courts of appeals can affect the states from which they were selected—both the laws of those states and their economy. The state of Oregon is the prism through which to conduct that examination, using the work of Judge Alfred T. Goodwin and the judges with whom he sat on the U.S. Court of Appeals for the Ninth Circuit. Part of what is seen is that Judge Goodwin, whose papers provided the material for this Article, is an “Oregon judge” with concerns, continuing over time, about maintaining the state's law, to which he had earlier contributed through his extended service as a state judge.

The Article's primary concern has been to portray the various ways in which state law is affected by federal judges' rulings and the ways in which federal and state law intersect or actually mesh. Special attention is given to federal habeas corpus petitions challenging state convictions and to diversity-of-citizenship cases, in which federal courts draw upon state law. Beyond looking at the ways in which the judges' rulings affect the state, their effect on the state's government, economy, and especially its environment have been explored; in Oregon's case, the Ninth Circuit's rulings on environmental matters have been particularly significant. This explanation has made it clear that federal appellate courts do indeed have a considerable effect on the law of the state and on the state itself.

293. *Wilderness Soc'y v. Babbitt*, 5 F.3d 383 (9th Cir. 1993).