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A TRIBUTE TO THE HONORABLE ALFRED T. GOODWIN

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Cover Photograph: This special issue commemorates the remarkable career of Judge Alfred T. Goodwin, a man equally at home on horseback or on the bench. (Photo by Bates Littlehales, National Geographic Society, 1969. Used by permission.)

Introduction

Gersham Goldstein, Esq.

This issue of *Western Legal History* commemorates Alfred T. Goodwin's nearly fifty years on the bench. As a friend of almost forty of those years, I am honored to be the guest editor of this volume.

It was 1963, and I had never been west of Bucks County, Pennsylvania. I met Ted Goodwin through the friendliness of his brother-in-law, Stan Urbigkeit, and the graciousness of his sister, Miriam, known to everyone as Mimi. Mimi told me that her brother might be able to help me get a job in Oregon. Sure enough I was offered and accepted a position as law clerk to the judge of the Oregon Tax Court. At that time Ted was a justice of the Oregon Supreme Court. Those who knew him, who didn't call him "Your Honor," generally called him Ted. In fact, when I met him, if you would call the house and ask for Alfred, the kids would say, "It's another insurance salesman, Dad."

I learned a lot in the year 1963–64 from Ted and Mary Goodwin and their kids, Karl, Meg, Sarah, and Jim. Among the things I learned from Ted was that judges sometimes cheer for football officials rather than the teams. From Mary I learned that hoboes make signs indicating kitchens where they can get a bowl of hot soup and some bread. The Goodwins' kitchen was such a place. And from the kids I learned that you can't go to church on Sunday morning without money for the collection plate. Ted reported to me with glee that the neighbors had mentioned that they had seen me providing the money for the collection plate when I brought the kids to church on a Sunday morning when Ted and Mary were out of town.

But it was from Ted that I learned the most. Ted was and is a voracious reader and intellect. During that time, besides briefs, he read everything from Jessica Mitford's *The American Way of*

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Death to Paul Krassner's *The Realist*. (*The Realist*'s notice for renewal stated that if you did not resubscribe they would turn your name in to the FBI.) Ted wanted to learn Yiddish, and there were some words that he was really attracted to. One was *chutzpah* and the other was *bubkes*. For some people, his homespun style obscures his intellect.

From my roommate, Edward J. Wynne, Jr., who was Ted's law clerk, I learned how hard Ted worked as a judge. He wrote with ease, but worked very, very hard at judging cases. I would see him reading stacks of briefs while propped on the couch. I know he worked hard at judging because Ed reported his prodigious output.

Through Ted I met his extended family: his Mom and Dad, brothers and sisters. All the Goodwins were good friends to a kid from Brooklyn who had very few friends in Oregon.

It's been almost forty years now that I have known Ted and Mary Goodwin and the Goodwin kids. And they have known me and my family, my Mom, my Dad, and my brother Joel. They've attended important events in my life; Ted, his brother-in-law, Stan Urbigkeit, and his brother Sam drove from Oregon to San Francisco to attend our wedding. Pauline and I will never, ever forget that. We've kept track of each other through various means. We've been the joint owners of books. We've shared books—most recently Isaac Bashevis Singer's *More Stories from My Father's Court*. I've been privileged to read the various dispatches from the courts on which Ted has served. These autopsy reports are written in Ted's own inimitable style. Sometimes you can even tell which per curiums are his.

This issue contains pieces by people who, in various capacities, have also known Ted Goodwin. The dedication is by the Honorable Mark O. Hatfield, who, as governor of Oregon and United States senator, had something to do with three of Ted's four appointments to the bench. We have a tribute to Ted by the chief judge of the Ninth Circuit Court of Appeals, the Honorable Mary M. Schroeder. That is followed by a splendid overview of Judge Goodwin's judicial career by Stephen L. Wasby, a special friend of Ted's and all the Goodwins. We have pieces written by two of Ted's former law clerks, Jennifer J. Johnson and John A. Bogdanski. Jennifer teaches securities law at Northwestern College of Law, Lewis & Clark College, and has written about Judge Goodwin's contributions to federal securities laws. Jack Bogdanski, who teaches tax law at Lewis & Clark, has written about Judge Goodwin and the federal tax laws.

When Ted was sworn in as United States district judge, Senator Hatfield referred to him as "the wisest man in the state of Oregon." He was then, he is now. It's an honor for me to edit this special issue, Ted.

Dedication

The Honorable Mark O. Hatfield

Honoring Ted Goodwin with a special issue of *Western Legal History* that reviews his career and his important opinions is a splendid idea. I thank Gersham Goldstein and everyone else who has worked to make this special issue a success.

I am flattered to be asked to write this issue's dedication. All non-lawyers probably agree that writing for a law publication could be intimidating—but not so when Ted Goodwin is the subject matter.

Reflecting on my long involvement with both state and federal judicial appointments reminds me of how unique our state of Oregon is—and how fortunate we are to have a tradition of men and women of such high caliber on our bench. In nearly every case, they are and have been very talented people committed to public service and to their profession.

A researcher could tell me the precise number of judicial nominations where I was privileged to play a role as governor and senator. Names and faces of many of these fine men and women—and I was proud to appoint the first female Oregon Circuit Court judge, Jean Lewis, when I was governor—came to mind as I reflected on how Ted Goodwin stood out among this distinguished group.

Judge Goodwin's name did not miraculously appear on my governor's desk when it was time to appoint a successor to Justice Hall Lusk on the Oregon Supreme Court. My wife, Antoinette, knew Ted and his wife, Mary, from their University of Oregon days. As a result, I already knew of the outstanding reputation Judge Goodwin was gaining as a young trial judge in Eugene. As a former journalist, he already was a clear writer, making his opinions easy to understand, even with very complex legal issues.

The Honorable Mark O. Hatfield was a member of the United States Senate representing Oregon from 1966 to 1997.

In 1960, I appointed Oregon Supreme Court Justice Hall Lusk to complete the unexpired U.S. Senate term of the late Richard Neuberger. Replacing the highly respected Justice Lusk with an equally talented jurist was important to me. Appointing Ted Goodwin to the Oregon Supreme Court was one of the best appointments I made as governor in *any* capacity.

Thereafter, my lawyer friends kept me informed as Judge Goodwin's Oregon Supreme Court opinions began appearing in law school casebooks, explaining important principles in clear, understandable language. He set high standards that most writers should emulate.

In 1969, Oregon Federal District Court Judge John Kilkenny was elevated to the Ninth Circuit Court of Appeals. Senator Bob Packwood, Congressmen Wendell Wyatt and John Dellenback (all lawyers), and I asked a respected group of former Oregon State Bar Association presidents to provide us with the names of the best Oregonians to recommend to President Nixon for this Oregon District Court opening. They endorsed Ted Goodwin unanimously and enthusiastically.

What Judge Goodwin did not know then was that I already had spoken to President Nixon during his first few months in office to recommend that he appoint Goodwin to the U.S. Supreme Court, to succeed Justice Abe Fortas, who had resigned. Somewhere in the Nixon presidential papers (and in my papers at Willamette University) is my letter to him urging Ted Goodwin's appointment to the U.S. Supreme Court. Given the fights over President Nixon's first two nominees to fill that post, Judges Clement Haynsworth and Harold Carswell, I often thought later how different the Senate atmosphere would have been if President Nixon had nominated Judge Goodwin instead.

Judge Goodwin probably remembers his confirmation hearing as a federal district judge as well as I do. It was the most remarkable judicial nomination hearing of all those during the thirty years when I introduced Oregon nominees. As fate had it, Judge Goodwin's was the first hearing for any federal court nominee after the grueling Supreme Court confirmation fights over Judges Haynsworth and Carswell. Senator Packwood and I both opposed those nominations. As a result, the senior Republican on the Senate Judiciary Committee felt entitled to ask pointedly how Oregonian Ted Goodwin measured up under the new tougher standards enunciated during the debate over Haynsworth and Carswell.

Personally, I could not have been happier at this line of questioning. As a career judge, Ted Goodwin joined the bench in his early thirties, before accumulating many assets as a lawyer, so his financial resources were limited. He passed this

new "outside financial interests" test with flying colors. I recall describing to the committee a fractional interest in some family property outside Prineville left by his minister father, but not much more. When asked about Judge Goodwin's legal skills (a competency standard that was expressed during the Carswell debate in different ways), I cited the judge's numerous opinions reprinted in law school casebooks and those praised in prestigious law journals. Again, it was a homerun for Ted Goodwin. He sailed through the confirmation process.

His nomination to the Ninth Circuit Court of Appeals was less exciting, since his record as a federal trial court judge won him acclaim from his jurist colleagues, from the federal bar, and from those following judicial administration matters. I also recall that Judge Goodwin's name appeared as a "finalist" for the U.S. Supreme Court in news stories before Justice John Paul Stevens was named to the Supreme Court.

As a former journalist, Judge Goodwin also played an important continuing role in various professional groups examining the relationship between the courts and the press. Over the years, I heard reports about how his contributions on respected panels and committees provided clear insights into the tough issues at hand. He always has understood the balance that exists between our courts and a free press, and how overzealous excesses in either direction can upset—and even threaten—the appropriate balance at the core of our American system.

The civility with which Ted Goodwin treated all people with whom he dealt should be a model for all jurists. Court personnel, courthouse workers, lawyers, and defendants—he respected all of them in his courtroom and in the community.

Judge Goodwin's life can serve as an example for young lawyers. The superior legal quality of his opinions, the clarity with which he expressed his views, and the high professional and personal standards he brought with him to all aspects of his judicial career stamp him as a remarkable person. As someone who has read a great deal of Oregon history, and who has been active in public life in Oregon for more than fifty years, I believe Ted Goodwin always will rank as one of the outstanding jurists of the West.

A Tribute to the Honorable Alfred T. Goodwin

The Honorable Mary M. Schroeder

Although I have always thought that the creative forces broke the mold after creating Ted Goodwin, Ted has so many brothers and sisters and collateral relations that I can never be quite sure. I am sure, however, that there is no other colleague quite like him.

One of my earliest memories of Ted comes from the first Ninth Circuit Judicial Conference I ever attended. As a very young judge, I participated in a small group breakout session with Ted Goodwin and a dozen or so lawyers. All of the lawyers listened to Ted's words with rapt attention and paid no attention whatsoever to one thing that I had to say. I did not understand at the time why that was. I learned fast.

Perhaps the easiest way to explain it in a nutshell is to tell the story of the time I introduced my good friend and mentor, John Frank, to the opinions of Judge Goodwin. John and I were on the same plane to attend a bar meeting on the East Coast. John had forgotten to bring anything to read, and I had my usual stack of approximately 150 opinions of the Ninth Circuit. Grateful for the opportunity to read the *New York Times* instead of slip opinions, I handed the opinions to John to read during the flight. When we got off the plane, he said to me in an awed tone, "You know, this job is just plain easier for Judge Goodwin than it is for anyone else." To put it a little differently, Ted is the "natural" of the judiciary.

This ease with the job shows during oral argument, when all the lawyers await his questions eagerly, because Ted's questions are usually entertaining as well as to the point. The lawyers probably should do a little more worrying about their

The Honorable Mary M. Schroeder is chief judge of the U.S. Courts for the Ninth Circuit.

answers, since Ted's questions are always insightful, even when disguised as homey inquiries that put everyone off guard.

While Ted passes himself off as a humble man of rural origins from Prineville, Oregon, he is, in fact, a man of great sophistication who enjoys good food, good wine, and good travels about the globe. Most of all, he genuinely likes being a judge. When Ted took senior status after a few years serving as chief judge of our circuit, his last official act as chief judge was to put himself on the committee that oversees our circuit's continuing role in the Pacific Islands. Ted has continued to hear cases in Guam and Saipan on a regular basis.

He remains true to his Oregon roots and his Oregon friends even though he now maintains his principal office in Pasadena, California. I often think Ted sees himself as a kind of guardian or perhaps mascot of Interstate 5. His goal, I think, is to prevent any of his colleagues from ever knowing exactly where he is at any given time so he can protect himself from all court controversies and concentrate on his judging.

If Ted had not been a judge, he would have been a journalist. He has immense talent as a writer. Recently, he contributed a memo to an internal court debate on a high-profile case that we were considering taking en banc. I assigned a clerk to read all the memos. She came into my office with eyes shining a few hours later, clutching Judge Goodwin's memo, and declared, "This is the best memo I ever read."

In many ways, Ted is what we all look for in colleagues on a collegial court. He doesn't lose his temper; he has a terrific sense of humor; he is never irrelevant. Most importantly, Ted is always willing to fill in for a colleague who can't cope, because Ted always can.

Alfred T. Goodwin: A Special Judicial Career

Stephen L. Wasby

It only *seems* that Judge Alfred T. Goodwin, now senior judge of the U.S. Court of Appeals for the Ninth Circuit, became a judge out of the cradle. Yet it is true that, after only a few years of general law practice, including courtroom work, "Ted" Goodwin became a state judge at thirty-two. Perhaps because he began his judicial career early, Judge Goodwin has accomplished something no one else in the nation's judicial history has done: he has held full-time active-duty positions as a state trial and appellate judge and a federal trial and appellate judge.[1] He also served as his circuit's chief judge and was seriously considered for the U.S. Supreme Court. The following essay is an attempt to present an overview of Judge Goodwin's judicial career. That career is particularly important because, as more judgeships are being filled by those who are already judges, some patterns by which judges advance in the judiciary are becoming clear, particularly the movement to the U.S. Supreme Court from the courts of appeals. Thus Judge Goodwin's path through the judiciary has much to tell us.

Stephen L. Wasby is professor emeritus of political science at the State University of New York, Albany. He also is a member of our editorial board. For sources and acknowledgments, see "Author's Note" at end.

[1]Some may have served in all four positions through service in one or more courts on a pro-tem basis or "by designation," but none has been an official full-time occupant of each of the four. In writing to Judge Edward Leavy when the latter joined the Ninth Circuit, Judge Goodwin noted that if Judge Leavy could get on the Supreme Court, "you will be able to say that you did it all!" He noted that Leavy, who had been a state trial judge, U.S. magistrate judge, and U.S. district judge, "sat with the [Oregon] Supreme Court at least once that I know of" but stayed on the state trial court rather than accept an Oregon Supreme Court position.

Before that illustrious career in the judiciary began, Ted Goodwin had shifted from a likely career in journalism to one in law.[2] His undergraduate education at the University of Oregon had been interrupted by military service. On his return to the university from the military, he continued his education and training in journalism. He received a bachelor's degree in that field and obtained experience by writing for the University of Oregon *Daily Emerald* and the Eugene *Register-Guard*. That experience was particularly important for his later career, as Oregon editors openly supported his reaching the bench and staying there, and his judicial colleagues recognized his clear writing, under pressure, as a prime skill.

Goodwin did not, however, remain in journalism, but entered law school at the University of Oregon, where he graduated first in a class of only twenty-five of the more than 120 who had entered three years earlier. He edited the law review and was a member of the Order of the Coif.[3] Then began a relatively short period of law practice. Despite its brevity, Goodwin's practice of law gave him considerable courtroom exposure. On graduation from law school, he joined a two-person law firm, Darling & Vonderheit, which "was essentially a small-town general practice" emphasizing taxation and estate planning, where he became a partner a year later. The firm's litigation work included both state and federal tax and land condemnation work, along with general tort and contract litigation. The senior partner tried the more important cases in both federal and state court. Goodwin served as his associate counsel in condemnation cases and in federal court work, which occupied only perhaps 5 percent of Goodwin's time. However, Goodwin did handle most of the firm's routine trial work. In doing so, he primarily represented small businesses, although he also took court appointments to represent criminal defendants; criminal matters occupied roughly one-fourth of his time. In addition to his trial work, he helped create a number of entities, including the Lane Teach-

[2]His life off the bench is discussed fleetingly by Gersham Goldstein elsewhere in this issue.

[3]As a law student, he wrote an article and several student notes for the *Oregon Law Review:* "How the Adoption of the Uniform Commercial Code Would Affect the Law of Sales in Oregon," *Oregon Law Review* 30 (February 1951): 139–63; (April 1951): 215–37; (June 1951): 330–58; Note, "Assault and Battery - Trespasser - Unreasonable Force - Punitive Damages," *Oregon Law Review* 29 (February 1950): 150–51; Note, "Constitutional Law - Freedom of the Press - Punishment for Contempt," *Oregon Law Review* 29 (April 1950): 230–33; Note, "Municipal Corporations - Election Notice - Substantial Compliance," *Oregon Law Review* 29 (December 1949): 53–55.

Goodwin's undergraduate education at the University of Oregon was interrupted by military service.

ers Credit Union and the Willamette Valley Company, later sold to Diamond Match. During this time, Goodwin also taught the course in equity at the University of Oregon Law School, as a result of an unexpected vacancy that the dean asked him to fill.

THE JUDICIARY I: STATE CIRCUIT COURT

In 1955, when Goodwin was only thirty-two, Governor Paul Patterson appointed him to the circuit court in Lane County after the local bar divided over which of the more senior lawyers to recommend. Subsequently elected to a regular term, Goodwin was to serve on the Oregon trial court for just short of five years. He has said that, at his appointment, "I didn't know enough about the judiciary to have an agenda." While on the circuit court, he tried more than four hundred cases, covering a wide range of topics, from contract disputes to domestic matters to torts and criminal cases.

Under the court's operating procedures, once assigned a civil case or a criminal case in which a not-guilty plea was entered, a judge retained that case pretty much through to the

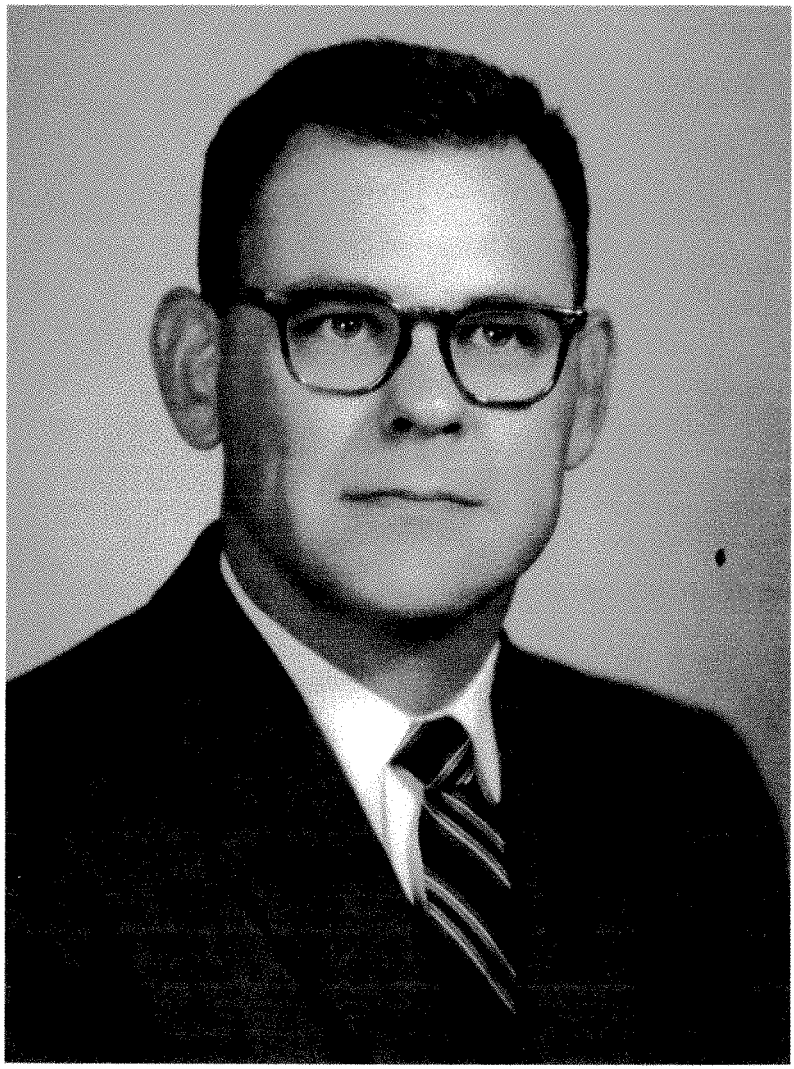
end, including presiding at trial if the matter was not otherwise resolved. Like most state trial judges, much of his work involved recording results—putting the finishing touches on default divorces, and accepting guilty pleas in criminal cases and settlements in civil cases—and supervising the stages of the trial process.

One of Goodwin's most significant state trial court cases was not tried to a verdict. Booth Kelly Lumber sued Georgia Pacific Corp. over their partnership in a Springfield, Oregon, plywood mill, where a disagreement over operation of the mill had developed when Booth Kelly felt Georgia Pacific was cheating it on logs. Judge Goodwin tried the case without a jury. Illustrating the point that he became involved in trials and took a particularly active role in bench trials, an observer commented that Judge Goodwin "was on top of the case, even with all the attorneys raising hell"; "he enjoyed it." The judge later told a friend that having worked on a green chain in a sawmill helped him conduct the trial, as he understood the lingo. After the case had proceeded for some time, Goodwin, without letting on that he had worked in a sawmill, "suggested walking through the plants 'so we'd all be on the same page of music.'" The case settled when Georgia Pacific paid $96 million to buy Booth Kelly's stock, but Goodwin's "conduct enhanced his reputation immensely."

In addition to his duties in Eugene, Judge Goodwin often sat elsewhere on assignment, as he was willing to travel to help out where a judge was needed. Sitting in twelve of Oregon's thirty-six counties, he came to know his judicial colleagues throughout the state; he tried cases ranging from timber disputes to those in Curry County involving oyster beds and crab pots, to irrigation matters in eastern Oregon. The exposure to his circuit court colleagues from his having sat throughout the state led them to support his elevation to the Oregon Supreme Court.

In these days before the changes in criminal procedure brought about by the Warren Court, there was little constitutional law for a general jurisdiction state trial judge to decide, but the *Jackson* case,[4] which Judge Goodwin decided shortly before leaving the trial court, was important. When a news dealer was arrested for selling an obscene magazine, his lawyer challenged the validity of the state obscenity statute. Operating in the context of the U.S. Supreme Court's *Roth* and *Alberts* decisions, in which the majority had struck down the

[4]For citations to cases named in the text, see the Table of Cases following the last article in this special issue.



Before becoming a judge, Goodwin (above, 1954) practiced law from 1951 to 1955 in Eugene, Oregon.

federal obscenity statute and indicated that state constitutions might demand even more as to state laws, Judge Goodwin struck down Oregon's law as violating the state constitution for being too broad because it lacked a definition. Although his Oregon Supreme Court colleagues were to reverse his decision

on narrow grounds by writing a new definition into the law, the case helped give him a reputation as a "free speech liberal." He believes the *Jackson* case and another obscenity case, involving Sabre Publications and argued by Los Angeles attorney Stanley Fleishman, were the most important cases he decided while he was a state trial judge.

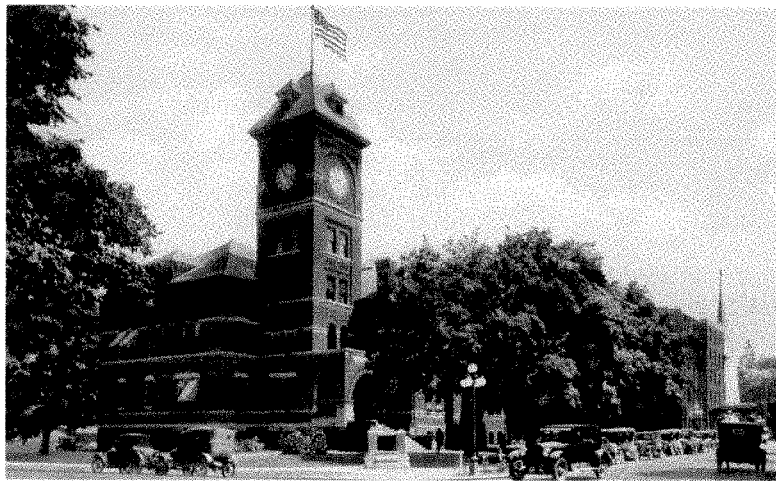
Through the appeal of some twenty-eight of Judge Goodwin's cases, the justices of the Oregon Supreme Court had the opportunity to view his work. They affirmed his decisions in all but *Jackson* and two other cases. Because the state high court was behind in its work, none of the reversals came until after he had joined it.

If his judicial superiors approved of Judge Goodwin's work, so did the people with whom he most immediately came in contact. The lawyers who appeared in his courtroom felt that they and their clients would get a fair shake, and they wouldn't have to worry about the possibility that the problems of a controversial judge would affect how their own trial was handled.[5] Goodwin is also said to have been very good with juries; jurors enjoyed cases and received a better image of the law when Goodwin presided, and some even asked to serve again in his court. While he was cordial in court, Judge Goodwin was also decisive, without appearing dictatorial. He worked lawyers hard, enforcing the rules on both sides, and was said to be good for those who came to court prepared. He was willing to be tough with lawyers and to hold their feet to the fire. His success as a young trial judge is said to have paved the way for others to be named to the state courts at a younger age rather than at a much later stage in their careers. Many of the judges came to see that younger judges like Goodwin were more vigorous and produced more work.

THE JUDICIARY II: OREGON SUPREME COURT

As with his initial judicial appointment, because of his youth, Judge Goodwin's move to the Oregon Supreme Court in 1960 from the circuit court came as somewhat of a surprise. However, he already had several years' experience on the trial bench; he worked hard, helped in other counties, and lawyers and others who knew of his work thought well of him. His elevation also had roots in his involvement in

[5]The other circuit judge in Eugene during Goodwin's time there was in some difficulty.



Early in his career, Goodwin worked as an attorney and then as a circuit court judge in the Lane County Courthouse, Eugene, Oregon.

Young Republican politics, where he had come to know Mark Hatfield, who was to become governor.[6]

The transition to service on the Oregon Supreme Court was easy for Justice Goodwin; his writing skills meant he was well equipped for the writing work in which appellate judges engage. As he had with the trial court, he entered the higher court without an agenda, other than perhaps not to embarrass his colleagues. During the almost ten years he served on the Oregon Supreme Court, including a term to which he was elected, Justice Goodwin wrote the opinion of the court in more than 350 cases and also wrote thirty other concurring or dissenting opinions. He's been called "the most prolific opinion-writer" on the court. Although a few other members of the court over time were "perhaps smarter," said an observer, "[n]one could write better than Goodwin." Another person commented that Goodwin is "unobtrusively smart, smart in a way that doesn't make people uncomfortable." Those who appeared before the court were also impressed, saying he was close to being the best-prepared judge there; he knew the case and asked questions not just to learn about the case but to determine the basis of the lawyer's position. His way of handling himself on the court and in his opinions led circuit court judges whose opinions he reviewed to say he was

[6]Goodwin's wife, Mary, had been a sorority sister of Hatfield's wife.

"impeccable in every way" in how he treated them as he "graded their papers," and that, even when the outcome was a reversal, "You can't get mad at Ted Goodwin."

At that time, the Oregon Supreme Court was not considered a leader among state high courts; in fact, it was relatively ordinary. However, with the appointments of University of Oregon law professor Kenneth O'Connell, who had taught Goodwin; Goodwin himself; and a few others, the court developed a good mix of people. It also was a stable court, as few new appointments were made over the next several years. Some have said it developed into the strongest supreme court the state has had.

Oregon did not yet have an intermediate appellate court, so the supreme court had to deal with all the cases brought to it. It was also still largely a common law court. Many of the issues with which Justice Goodwin dealt were common law matters such as torts, where the issues included contributory negligence, the assumption of risk, and whether violation of a statute was negligence per se; immunity for charitable hospitals, which the court overturned, with Goodwin writing;[7] and extrahazardous activity, where a case involving crop spraying was really an early environmental case.[8] There were also cases that would now be thought of as involving noise pollution which were disposed of on the basis of common law concepts—one on abatement of airplane noise as a nuisance and a related case in which the plaintiff claimed inverse condemnation resulting from airport noise.[9] Indicative of the court's work is that Goodwin considers that among his more important opinions was one of his relatively few dissents, on the question of whether the law on spendthrift trusts applies even to out-of-state creditors.[10]

Reflecting the court's role as a common law court was the fact that much of the real debate then concerned liability for torts. Justice Goodwin, usually writing for the court, and Justice O'Connell, often in dissent, were actively engaged in debate. Both wrote extremely well-reasoned opinions, said an observer, but they were "diametrically opposed," with O'Connell more theoretical and Goodwin taking a more

[7]*Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 394 P.2d 1009 (1963).

[8]*Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961).

[9]*Atkinson v. Bernard, Inc.*, 355 P.2d 229 (Or. 1960); *Thornburg v. Port of Portland*, 376 P.2d 100 (Or. 1962).

[10]*Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964)(Goodwin, J., dissenting).

practical bent.[11] They could, however, also agree on important tort law issues. After Justice Goodwin raised questions in the *Stoneburner* case about the standard jury instruction on proximate cause, in which he cited Professor Leon Green and suggested that the instructions be rewritten, he joined in a long, scholarly, concurring opinion by Justice O'Connell in *Dewey v. Klaveness & Co.*, proposing a new formulation so that causation and liability issues would not be conflated.[12] The two also disagreed on topics other than tort, such as criminal procedure, where O'Connell adopted a more liberal position; unemployment compensation for striking employees; a matter of civil procedure;[13] and who should define the unauthorized practice of law.

Additional topics on which Justice Goodwin wrote the opinion for the court were timber taxation, important in a state with an extractive economy; cattle theft, where he could bring to bear his personal knowledge of ranching; workmen's compensation, involving review of agency determinations; election issues; and adoption and custody. The court also dealt with matters of statutory interpretation, and, while constitutional law did not constitute a large portion of its work, a number of issues involved or came close to constitutional questions, such as limits on advertising of drugs and of professions like dentistry.

There were a number of criminal procedure issues, first under the state's own constitution and statutes and increasingly under the commands of the U.S. Constitution as the Warren Court interpreted it, with the Oregon justices applying rulings like *Miranda* and *Gault* as they became part of its legal environment. Among Justice Goodwin's criminal procedure rulings, his opinion in the *Krogness* case, upholding a warrantless search of an automobile on the basis that there had been

[11]One of these cases that has been reprinted in some torts casebooks is *Atkinson v. Bernard*, 355 P.2d 229 (Or. 1960), involving airplane noise and the choice between theories of nuisance and trespass. Another case with a Goodwin majority opinion and O'Connell dissent that was "a mainstay in civil procedure casebooks" was on personal jurisdiction. See *State ex rel. White Lumber Co. v. Sulmonetti*, 448 P.2d 571 (Or. 1968).

[12]In this case, the court asked for assistance in the form of amicus briefs on the question, in a long formulation specifically citing to Leon Green.

[13]*State ex rel. Kalich v. Bryson*, 453 P.2d 659 (Or. 1968), on whether service of summons creates jurisdiction, where O'Connell, for the court, adopted a more flexible position, and Goodwin, joined by two other justices, thought that the purposes of statutes of limitations were not being met. See Frank R. Lacy, "Chief Justice O'Connell's Contributions to the Law of Civil Procedure," *Oregon Law Review* 56 (1977): 191–218.

probable cause to believe it was being used to transport contraband game, received a de facto reversal when the federal district court invalidated the search and granted habeas relief.[14]

Important Cases

The topics of some cases in which Justice Goodwin participated and some opinions he wrote for the Oregon Supreme Court were thought to be particularly important. One of the more important for him was free speech, not least because he came to the court after having struck down the state's obscenity statute. It is an area in which Goodwin has had a reputation as a "Justice Douglas free-speech liberal," and he himself has said, "I'm a Black and Douglas fundamentalist." Freedom of speech, he has said, is the one area where he "may have an agenda" and "may even ask for such cases." He explained, "If I have a weakness, it is lack of passion" on issues before the court, adding, "I don't get passionate about much except the First Amendment."

Justice Goodwin was to write opinions in several cases on aspects of this subject, including movie censorship and nude dancing. Yet some of his free-speech rulings raise questions about his reputation on that subject. Most obvious from his Oregon Supreme Court tenure was the *Buchanan* decision. An editor of the University of Oregon *Daily Emerald,* which Goodwin had once edited, had refused to tell a grand jury the names of pot-smoking students who had been interviewed for a story in the paper; the editor had been held in contempt for her refusal. Upholding the contempt, Justice Goodwin wrote for the court to reject a journalist's privilege to withhold source names in connection with criminal matters. Exhibiting characteristic judicial self-restraint—which here conflicted with free-speech notions—he said that if the legislature wanted to create a different statute, it could do so, and it then did. Goodwin has said that he was assigned the case not simply because he had been a reporter, but also because in conference he expressed strong views with which Chief Justice McAllister agreed. While some say *Buchanan* was not his best day as a judge, others believe the ruling showed he could put aside his likely journalistic predilections.

[14]*State v. Krogness,* 388 P.2d 120 (Or. 1964); *United States ex rel. Krogness v. Gladden,* 242 F.Supp. 499 (D.Or. 1965). The district court ruling was by Judge East, a Goodwin predecessor on the circuit court for Lane County.

Judge Goodwin wrote some important opinions for the Oregon Supreme Court.

Two important matters with which Justice Goodwin dealt on the Oregon Supreme Court stand out in people's comments. One is the case of the Eugene cross, a challenge to the placing of the Christian religious symbol on a hill overlooking the city. Goodwin was initially in dissent, but when the case was reheard, he created a majority to hold that the presence of the cross on public land was a constitutional violation because the city's issuance of permits was sponsorship of religious activity. The city's real purpose, he said, was to conform to the majority view as to placement of the majority's preferred religious symbol.[15]

The other consequential matter was the last case he wrote before leaving for the U.S. district court: the Oregon beach decision, *State of Oregon ex rel. Thornton v. Hay* (1969), which the court wanted him to write "because I expressed a more organized position" in conference. It is the one that he and many others think is his most important ruling. That decision protected the public's access to Oregon's beaches by making the dry sand up to the vegetation line open to the public and preventing landowners from excluding the public

[15]*Eugene Sand & Gravel v. Lowe*, 451 P.2d 117 (Or. 1969) (in which Judge Goodwin dissented); on rehearing, 459 P.2d 222 (Or. 1969), appeal dismissed, 397 U.S. 591 (1970); *Lowe v. City of Eugene*, 463 P.2d 360 (Or. 1969), cert. denied, 347 U.S. 1042 (1970).

from that space. Working in the absence of cases involving beaches, Justice Goodwin had "evolved a public use theory that was unique for the time." This ruling has been called "one of the great opinions in state judicial history." One of his colleagues has said that in the opinion, Goodwin "did something that had to be done, about the sand area between vegetation and mean high tide, because of the tradition of public use." Calling his ruling "a pragmatic decision, acceptable to the people because the land was not yet developed," Justice Goodwin himself has said this was "the most important case I ever wrote," and the one which "I'm most proud of as having done something for posterity." The ruling's importance may be seen from its running counter to the U.S. Supreme Court's more recent Takings Clause jurisprudence; twenty-five years after the ruling was issued, Justice Scalia made a point of criticizing it.[16]

THE JUDICIARY III: U.S. DISTRICT COURT

In 1969, upon recommendation by Senator Hatfield, Goodwin was appointed to the U.S. District Court to fill a position created by the elevation of Judge John Kilkenny to the U.S. Court of Appeals. The selection of Goodwin, said one observer, was consistent with the state's having two relatively moderate Republican senators. Certainly as a Republican, Goodwin would not have been considered for a federal judgeship until after Richard Nixon's victory in 1968, and Hatfield's role was to be crucial. The senator had established a bipartisan screening committee with Rep. Wendell Wyatt, the state's senior House member, and Senator Robert Packwood was also involved. After completing its screening, the committee sent three names to the White House, with a recommendation for the appointment of Goodwin.[17]

Goodwin faced little difficulty during the confirmation process, although Senator Roman Hruska (R-Neb.), who chaired the subcommittee hearing on the nomination, pressed Senator Hatfield a bit. Hruska used language that indicated he was getting back at Hatfield for the latter's vote against the Supreme Court nomination of Clement Haynsworth. Hatfield reports

[16]See *Stevens v. City of Cannon Beach*, cert. denied, 510 U.S. 1207 (1994) (Scalia, J., dissent from denial of certiorari).

[17]One of the others considered for the position was long-time state judge Robert Jones, who later became a district judge.

telling Attorney General John Mitchell that Goodwin "belies categorization—call him a pragmatist" and was someone who "won't see the judiciary as reforming all aspects of life."

Goodwin's friends thought he enjoyed getting back to the "active arena of the trial." His presence in the courtroom was said to be a pleasant contrast to District of Oregon judges who had been more autocratic in the courtroom, including his predecessors Judges Fee and Kilkenny and perhaps most noticeably Judge Gus Solomon, then the chief judge. Lawyers appearing before Goodwin said he was a "quick study" and was able to keep control, although, more than other judges, he appeared to tolerate some who would frazzle the patience, nor would he "come down" on them as fast. One who knew him said Goodwin had sufficient inner security and comfort with himself so that, although he could recognize his own mistakes, he was still able to go home at the end of the day and forget about the day's work; he did not need to go around to others seeking assurance that he had done right.

Goodwin served with Judges Gus Solomon and Robert Belloni. Goodwin and Belloni had been fellow members of the law review in law school and they had served on the state circuit court at the same time; Belloni, who was appointed to the district court first, helped persuade Goodwin to move from the Oregon Supreme Court to the federal district court. As chief judge, Solomon was the court's leader; using a modified master calendar, he handled all cases at their origination but then assigned them to other judges. He turned cases over to Belloni and Goodwin earlier than is true in some other master calendar jurisdictions. Solomon also initiated a custom in which the district judges would meet over lunch. They would dispose of court business, and then, often with guests present, would talk about some topic of interest. One subject in particular discussed by this "collegial district court" were the judges' sentences. In an early version of a sentencing council, each judge, before imposing sentence, would discuss his case and recommended sentence and his colleagues would provide their reactions.

During his time on the district court, Goodwin sat in a number of other districts in the Ninth Circuit, including the Eastern and Western Districts of Washington and the Central, Eastern, and Southern Districts of California, in part under Chief Judge Richard Chambers' theory that it was good to expose new judges to more experienced district judges. As a result of Judge Solomon's membership on the federal courts' intercircuit assignment committee, Judge Goodwin went to Huntington, West Virginia, to hear a case from which local judges had recused. In this criminal case, lawyers were charged

with fraud after an accountant had constructed a scheme to use insurance company funds to make some money, but the company had gone into bankruptcy. Despite the accountant's immunized testimony, the jury acquitted the lawyers who had bought into the scheme. Since Judge Goodwin completed the case much more rapidly than expected, he stayed on to help local district judges dispose of much of their caseload.

During this time, Goodwin also began his interactions with the Ninth Circuit when his rulings in the district court were reviewed by the court of appeals, where he was affirmed in roughly three-fourths of the fifty or so of his decisions that resulted in Ninth Circuit rulings. He also sat with the court of appeals by designation; as a result, when he became a member of that court, its judges already knew him.

Judge Goodwin also participated in a number of three-judge district courts, both as a district judge and later while on the court of appeals. These courts were convened to review the constitutionality of challenged state statutes and, at the time, to review certain Interstate Commerce Commission (ICC) orders. As a district judge, he wrote opinions for three-judge district courts in an ICC matter, an obscenity case, and several welfare regulations cases. Of particular importance was a challenge to the procedure and bond-on-appeal provisions of Oregon's Forcible Entry and Detainer Act, where Judge Goodwin wrote for a three-judge district court in *Lindsey v. Normet* in finding no defects in the statute. The Supreme Court, affirming in part and reversing in part, agreed as to the statute's limits on what could be challenged in court and on the quick time in which a challenge must be brought, but disagreed on the bond requirement, instead finding a constitutional violation.

The core of the subject matter with which Goodwin dealt as a judge changed when he went to the federal district court; statutory and constitutional matters bulked far larger in the overall mix of cases than had been true in the state courts. For example, federal environmental law had just been enacted, and he heard an important environmental case involving a proposed freeway from Fremont to St. Helens.[18] There were antitrust and securities cases (see below) and civil rights claims, including one in which the Portland police were sued by a civil rights activist they had roughed up. In a bench trial, Judge Goodwin found that the officers had used excessive force, and he imposed a $10,000 punitive damages judgment

[18]*Willamette Heights Neighborhood Association v. Volpe*, No. Civ. 71-641, 334 F.Supp. 990 (D.Or. 1971).

which he ordered be paid by the officers personally. Of course, there were cases involving federal crimes. In one of the more major such cases, a Japanese-American young man, the son of a career military officer, was charged in connection with protest bombings in Eugene.[19]

Despite the new issues with which Judge Goodwin had to deal, his involvement with the common law, and especially Oregon common law, never stopped because of the federal court's diversity-of-citizenship jurisdiction and because certain federal statutes, such as the Federal Tort Claims Act, required basing decisions on state law. These cases raised the same sorts of questions with which he had dealt on the Oregon Supreme Court, and he was comfortable dealing with those issues.

Important Cases

Judge Goodwin's time on the district court was too short for many major rulings, but there were some of note, most of which involved business matters. In particular, he presided over the lengthy *Mt. Hood Stages* antitrust case, which later went to the Supreme Court. Mt. Hood Stages sued Greyhound, and was successful in showing antitrust violations that were not exempted by the Interstate Commerce Act; this resulted in a multi-million-dollar damage award, with another $1.4 million in attorneys' fees at issue. The length and complexity of this case, which involved "45 days in the courtroom plus about three or four years of discovery," is indicated by the fact that the transcript of court proceedings fills *fifty* binders.

Goodwin also presided over the *Hilton Hotels* criminal antitrust case, resulting in conviction of hotels for an arrangement in which the hotels ran a convention promotion organization, financed by contributions sought from their suppliers, who apparently were cut off if they did not contribute. He also found violations of banking regulations in the large *First National Bank of Oregon* class action suit in which a group of depositors challenged the banks' computation of interest on a 360-day year, thus allowing the banks to use their customers' money interest-free for five days each year.

The case against the "Dare to Be Great" self-improvement plan being sold by entrepreneur Glenn Turner also came before him. A plaintiff challenged Turner's activities as involving sale of a security under federal securities law and as violating rules as to the accuracy of his statements about the plan. Judge

[19]The principal criminal case from the bombings was *United States v. Armsbury*, No. 70-47 (D.Or.), aff'd, 443 F.2d 74 (9th Cir. 1971) (per curiam).

Goodwin "stretched the boundaries of the securities laws a little bit" and found the plan a security.[20] After he enjoined the sale of any more plans within the District of Oregon, "other courts then picked it up and enjoined him nationwide and [Turner] went broke."

Judge Goodwin obviously enjoyed his service as a district judge. When he stepped down as chief judge of the Ninth Circuit, he said, "As a former trial judge I always looked forward to the occasions when I could get together with the trial judges and keep myself informed about the problems in the trenches."[21] More important, his work as a trial judge affected his appellate judging. He has said that his service on the federal trial bench did not prevent him from reversing a district judge, but it did make him appreciate more the decisions district judges had to make and the situation in which they had to make them. Indeed, he thought it was helpful if each court of appeals contained a former district judge.

THE JUDICIARY IV: THE NINTH CIRCUIT

At the time of Goodwin's district court appointment, it was understood that Judge John Kilkenny would, after only two years on the Ninth Circuit, take the senior status to which he was entitled, thus creating an "Oregon vacancy" on the Ninth Circuit, which, if all went well, would go to Goodwin. However, Goodwin has called this only a "scenario," not a fixed thing; he says that the possibility of going on to the Ninth Circuit was not part of the inducement to him to take a position on the district court. In any event, in 1971, again on Senator Hatfield's recommendation, Goodwin was nominated to the court of appeals and was confirmed without a hitch. Thus began his service as a judge of the Ninth Circuit Court of Appeals, which continues to this day, covering thirty years (and counting).

[20]*Hurst v. Dare To Be Great*, No. Civ. 71-160 (D.Or. 1973), vacated as to damages, remanded with instructions, otherwise aff'd, 474 F.2d 483 (9th Cir. 1973).

[21]Chief Judge Alfred T. Goodwin to Chief Judge Robert Coyle (E.D.Cal.), February 9, 1991, Alfred T. Goodwin Papers, Oregon Historical Society, Portland (hereinafter referred to as Goodwin Papers).

The Move to Pasadena

When appointed to the Ninth Circuit, Goodwin at first remained in Portland. However, in 1981 he moved his duty station to Pasadena, California. Because he had been a lifelong Oregonian, people wondered why he had done so. Although no one reason predominates, some were personal, while others related to his judicial position, and he has said that the move was "50 percent personal and 50 percent institutional." The former included his growing weariness of Oregon's nearly-continuous rain (he speaks of being tired of having to have "windshield wipers on his eyeglasses") and the fact that several of his children were by then living in Southern California.

Part of the institutional aspect was that former Chief Judge Richard Chambers[22] needed a certain number of judges willing to move their offices to a new Pasadena courthouse before he could get final approval of that project, and some Southern California judges were resisting a move from the federal courthouse in Los Angeles. Judge Goodwin was willing to help his former chief judge, whom he respected. Less openly discussed was that, because of his relatively hands-off administrative style, some judges wished him to be the chief administrative judge of the Ninth Circuit's Southern Unit—a position that helped lighten the chief judge's workload and made him an ex officio member of the court's Executive Committee, although Judge Goodwin has said the position was "only meaningful in the symbolic sense."

After his elevation to the Ninth Circuit, Goodwin still interacted regularly with his Oregon district court colleagues, particularly during the period when his chambers were still located in the district court building. He also continued to handle some complex cases, particularly *Mt. Hood Stages*, because his familiarity with the case made it more efficient for him to continue than for a new judge to learn the record from scratch. Although the contacts with the district court continued even after the Pioneer Courthouse in Portland was refurbished for the Ninth Circuit's use, he did see somewhat less of them, and even less when he moved to Pasadena. Once he took senior status in 1991, he continued to hear cases in the district court, coming "over the mountain" from Sisters, where he lived half the year, to try matters at the federal courthouse in Eugene. (Nor did his move from the state judiciary to the federal courts eliminate the contact he had

[22]Chief Judge Browning had put his predecessor in charge of buildings in the circuit, and the Pasadena courthouse was one of Chambers' pet projects.

with Oregon state judges, both through bar association activities and, starting in 1971, through service on Oregon's State-Federal Judicial Council.)

Even without service as a district judge, and although most of Goodwin's career has been spent on appellate courts, his time on the trial court was sufficiently lengthy to affect the way he views matters as an appellate judge. This is particularly true of the way he views trial judges' handling of cases "because he's been there." Likewise, having been a state judge affects his view of cases that have a state law basis, including federal habeas corpus challenges to state convictions.

The cases in which Judge Goodwin participated ranged from large ones of considerable complexity to many that were routine "slam dunk" appeals resolved in short, unpublished memorandum dispositions. His rulings on the Ninth Circuit covered all sorts of topics, including administrative law, criminal law and procedure, questions of constitutional law, and, through federal court diversity of citizenship jurisdiction, commercial and other more mundane matters of the common law sort with which he had dealt on the state court. And there was, of course, the full range of federal statutory matters such as bankruptcy, employment discrimination, immigration, and securities. One of the areas of federal law with which he came to be associated was environmental law, in part because he served on the panel that dealt with the "spotted owl" cases involving challenges to timber sales and the plans for such sales.[23] (He says, however, that he is "not as much of a Sierra Club fan as some of my published rulings might [make it] appear," probably a result of his strong commitment to enforcing statutes that Congress has passed, regardless of his own view of those laws.)

Important Cases

In Judge Goodwin's view, an important case is "one that becomes precedent and clarifies the law as applied to an important social question." Among these he would include "cases involving separation of church and state, freedom of speech, some prison-reform questions, some questions about the civil rights of individuals against government units." He

[23]See *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), rev'd and remanded sub nom. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). One was the important separation of powers case of *Seattle Audubon v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), rev'd and remanded, 503 U.S. 429 (1992).

feels these "are important cases because they redress imbalance of power between the individual and the government, and they reflect our social agenda . . . or our political commitment to certain values that seem to be permanent and yet are constantly being challenged one way or another."[24] He also distinguishes between attention-getting cases and important ones, asking, "That case got a lot of attention: is that an important case?"

In these terms, his opinion invalidating "one Nation under God" in the Pledge of Allegiance as a violation of the First Amendment's Establishment Clause[25] was both important and attention getting, prompting as it did congressional resolutions opposing it and much other hostile comment, and it certainly served to bring Judge Goodwin to the nation's attention. (In addition to being firmly based in Supreme Court precedent, the *Newdow* ruling was no "sport," reflecting as it did an earlier Oregon Supreme Court church-state decision by the judge and his long-held concerns about the place of religion in America, which derived from his background as a preacher's son and participation in Presbyterian Church activities.)

What were other Judge Goodwin's court of appeals opinions that either he or others consider important? Two came in the field of commercial speech. One was the Vanna White case, *White v. Samsung*, important for what it said about commercial attributes of celebrity status. Here Goodwin ruled that Samsung Electronics may have violated White's publicity rights by using a robot dressed like White in the "Wheel of Fortune" setting with which people associated her. It is interesting that Judge Goodwin has "had some second thoughts" about the case, in part because of the "persuasive" dissent Judge Arthur Alarcon wrote.[26]

Also important was the *U.S. Olympic Committee* case, which arose when the committee refused use of the "Olympic" name to the organizers of the "Gay Olympics" in San Francisco. In ruling for the USOC, Judge Goodwin saw the case, which he didn't think at the time was one of his more important cases, as "an exclusive franchise case" with Congress' intent clear in issuing the USOC's charter. He has conceded, however, that he "took a parsimonious view of the

[24]"Judge Alfred T. Goodwin: An Oral History," *Western Legal History* 4 (Winter/Spring 1991): 30.

[25]*Newdow v. U.S. Congress*, 292 F. 3d 597 (9th Circ. 2002); amended on denial of rehearing en banc, 321 F.3d 772 (9th Cir. 2003).

[26]The case appears in law books because of the competing positions Judges Goodwin and Alarcon present.

First Amendment," which Judge Kozinski, dissenting from the Ninth Circuit's denial of rehearing en banc, strongly argued had been violated.[27] In an indication of his view that it is not his role to challenge Congress' actions, he has said of the case, "The arrogance of the Olympic Committee people was not lost on me, but I'm not a member of Congress."

And the Supreme Court

Some cases are thought important in part because they went to the Supreme Court. In twenty-one cases, he was the author of a panel opinion resulting in a Supreme Court ruling; in five of these, the Supreme Court affirmed his majority opinion. He had dissented in two other panel dispositions reviewed by the justices, in both of which they upheld his position.[28] There were also nine Ninth Circuit en banc rulings heard by the Supreme Court, in which Goodwin had written opinions, five for the majority.

In addition to the U.S. Olympic Committee trademark case, the justices affirmed Judge Goodwin's panel opinions in a securities case,[29] a case on the reach of the Federal Tort Claims Act (not applicable in Antarctica),[30] and the *Wheat* case on whether a criminal defendant could waive the right to conflict-free counsel. They affirmed in part and reversed in part in five other cases, including a major fishing rights case[31] and the *Norris* gender discrimination pension case. Most recently, in the *James Daniel Good* case on due process for those whose properties were to be seized for having been used in drug matters, they adopted Judge Goodwin's view that a hearing was required before the government could dispose of a house it had seized for drug use.

[27]*U.S. Olympic Committee v. San Francisco Arts & Athletics*, 789 F.2d 1319 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc).

[28]*Olin v. Wakinekona*, 664 F.2d 708 (9th Cir. 1981), rev'd, 461 U.S. 239 (1983); *United States v. Watson*, 504 F.2d 849 (9th Cir. 1974), rev'd 423 U.S. 411 (1976). In six other cases in which Judge Goodwin had written the Ninth Circuit opinion, the justices granted certiorari, vacated the Ninth Circuit ruling, and remanded for reconsideration in light of an intervening case (GVR).

[29]*Musick, Peeler & Garrett v. Employees Insurance of Wausau*, 954 F.2d 575 (9th Cir. 1992), aff'd, 508 U.S. 286 (1993) (allowing company to seek contribution under SEC Rule 10b-5).

[30]*Smith v. United States*, 953 F.2d 1116 (9th Cir. 1991), aff'd, 507 U.S. 197 (1992) (FTCA does not apply in Antarctica).

[31]*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 573 F.2d 1123 (9th Cir. 1978), aff'd in part, rev'd in part, and remanded, 443 U.S. 658 (1979).

In the remaining twelve cases, the justices overturned Goodwin's position. These rulings included the *MacCollum* prisoners' rights case; standing to challenge for police chokeholds;[32] and a decision about whether members of the armed services could complain about treatment in the service. In the last, the Supreme Court's conservative view displaced Goodwin's more liberal stance.[33] An instance of the reverse shift, in which the justices took a stance more liberal than had Judge Goodwin, was *Brower v. County of Inyo*, in which he had said an illegal roadblock resulting in death was not an unreasonable seizure by deadly force, but the Supreme Court ruled that plaintiff's claim properly stated a "seizure." Other instances of Supreme Court reversal of his rulings in key cases are the *Alvarez-Machain* case, part of the continuing dispute as to whether U.S. law enforcement officers could bring someone to this country for trial by kidnapping, and the major *Varig Airlines* ruling on the federal government's liability for damages under the Federal Tort Claims Act for accidents arising out of negligent Federal Aviation Administration inspection, which the justices held fell under the FTCA's "discretionary function exception."

Among Judge Goodwin's en banc opinions reviewed by the Supreme Court was *Rice v. Rehner*, in which he had written for the panel and then dissented to the en banc decision; there the justices upheld his position requiring an Indian trader to obtain a state liquor license. When the Supreme Court said in the *Wang* case that lower courts should not second-guess INS deportation orders, they upheld Judge Goodwin's dissent to an en banc disposition on whether an immigrant had shown the necessary "hardship" from deportation to remain in the country. Judge Goodwin has said he wrote "a perfunctory opinion" in that case as he found "no reason to reverse the INS deportation order" because the difference in the standard of living between the United States and Korea was not enough to show hardship. He says his colleagues "don't use" the Supreme Court opinion based on his position, "because they don't like it."

Of particular significance was Supreme Court disposition of Judge Goodwin's en banc majority opinions in three 1974 Ninth Circuit rulings concerning the legality of various types

[32]*City of Los Angeles v. Lyons*, 656 F.2d 417 (9th Cir. 1980)(per curiam), rev'd, 461 U.S. 95 (1983).

[33]*Brown v. Glines*, 586 F.2d 675 (9th Cir. 1978), rev'd, 444 U.S. 348 (1979). In another military case, in which Goodwin wrote for an en banc court to allow U.S. Navy enlisted men to bring a *Bivens* suit based on claimed racial discrimination, the justices also reversed. *Chappell v. Wallace*, 661 F.2d 729 (9th Cir. 1981) (en banc), rev'd and remanded, 462 U.S. 296 (1983).

of border searches. His *Peltier* opinion was reversed, with the justices holding against retroactivity of the seminal *Almeida-Sanchez* case, but the justices affirmed him in the *Brignoni-Ponce* case, striking down roving border patrol stops and questioning of car occupants on the basis of Mexican appearance. However, in the *Bowen* case, although his view on the applicability of *Almeida-Sanchez* to fixed checkpoints was upheld, the justices did not accept his view as to *Almeida-Sanchez*'s retroactivity, on which he had dissented.

Consideration for Supreme Court

Although Judge Goodwin's opinions were reviewed by the justices, he never became one of their number. Yet more than once he was considered for appointment to the U.S. Supreme Court. Senator Hatfield had hoped that Goodwin's appointment to the U.S. district court at a young age would create a possibility that an Oregonian would be selected for the Supreme Court, particularly if Hatfield himself was in the Senate long enough. And Hatfield did speak to Chief Justice Warren Burger about Goodwin. The first time was when President Nixon sought to fill the position ultimately held by Justice Harry Blackmun. The mention that Goodwin was on various short lists then may have been done to taunt his patron for the latter's votes against the nomination of Clement Haynsworth and G. Harrold Carswell.

The more recent time came when Justice Douglas' departure created a vacancy, which ultimately went to John Paul Stevens. Although Goodwin himself feels that his chances diminished when Attorney General Mitchell and President Nixon left office in disgrace, this latter consideration appears to have been serious. Judge Goodwin was interviewed and was present at what he calls the "beauty contest," a White House dinner prompted by Chief Justice Burger that related to the Bicentennial. However, he does not believe his candidacy was taken seriously. In any event, he has accepted his not being chosen with typical equanimity.

Becoming Chief Judge

Starting in the 1980s, Judge Goodwin became the court's en banc coordinator, doing so at the request of Chief Judge James Browning, who saw it as a training exercise should Judge Goodwin become chief judge. In this role, he supervised the process by which judges called for rehearing en banc and voted on whether to have such hearings. He continued in the posi-

tion until his successor as chief judge was able to arrange for another en banc coordinator.

Most important, he was the chief judge of the circuit from 1989 into 1991. That Judge Goodwin would become chief judge was not foreordained. Under the statutory regime in place when he joined the federal bench, there were no eligibility requirements except seniority and the rule that one had to leave the position at age seventy; under those provisions, he would have succeeded Chief Judge James Browning when the latter reached the statutory maximum age. However, the statute was amended so that no one could succeed to a chief judgeship on reaching his or her sixty-fifth birthday, a date Judge Goodwin would have passed had Chief Judge Browning served until his seventieth birthday. However, Browning decided to relinquish his position several months early, before Goodwin turned sixty-five, so Judge Goodwin did in fact become chief judge.[34]

It has been suggested that Chief Judge Chambers wanted Goodwin located in the southern part of the circuit so that if the circuit were divided, Goodwin would become chief judge of that portion. More important, however, a number of judges wanted him to be chief judge, in part because they thought he deserved a chance to do so after Chief Judge Browning's long tenure, but also because they preferred his more relaxed style to that of the judge next in line for the position, who was thought to be a more "hands-on" administrator; these judges wanted a "hands-off management type" for a couple of years.

The transition to chief judge was not difficult for Goodwin. He had been "nanny" for the clerk's office and was the court's en banc coordinator. He had also been quietly observing Chief Judge Browning, and, as the senior active judge, had presided over court meetings in Browning's absence. Being chief judge involved presiding over the court of appeals' executive committee and the circuit council, keeping tabs on arrangements for the circuit judicial conference, and dealing with many types of judicial officers. It also required much more interaction with the circuit executive's office, so he had to learn to delegate to that staff. There was also more mail than he had anticipated; he was a target when someone wanted to complain about a judge and a "lightning rod for kooks." Continuing Chief Judge Browning's advocacy of the virtues of a large circuit, he argued strongly and successfully against efforts to split the circuit.

[34]For an overview of Judge Goodwin's work as chief judge, see Stephen L. Wasby, "The Work of a Circuit's Chief Judge," *Justice System Journal* 24 (2003): 63–90.

Circuit chief judges are members of the U.S. Judicial Conference. Chief Judge Goodwin took considerable interest in, and enjoyed, that part of his service, particularly the interaction with other chief judges, including the "frank and unfettered discussion" without much intervention from Chief Justice Rehnquist. However, he also participated in a mini-rebellion against Rehnquist over the Powell Committee's recommendations concerning federal habeas corpus in capital cases; he and several other judges both wanted more moderate proposals and, particularly, wished to be consulted adequately before recommendations were sent to Congress.[35]

In carrying out his tasks, Chief Judge Goodwin was "low-key, with not a lot of fol-de-rol." He was said to have taken the position in stride, as "something to go through in his career, with no particular emphasis," and he has been called "commendable" because "he did not take himself too seriously" in the position. Chief Judge Goodwin seemed to wish to return to the situation when he first was a federal judge under Chief Judge Richard Chambers, with relatively little administering from the center. His view of court governance can be seen in his comments that he "tolerated" his service on court committees "because someone had to do them" but tried to minimize the time spent on them. He saw "a fine line between tending to business and being a busybody," and he would define the role of the chief judge "on the side of tending to business without getting too busy." He viewed the court as overadministered, and, in part in reaction to his predecessor's having democratized matters by creating many committees on which judges were to serve, he wanted to pull judges away from spending so much time on court administration. Thus he tended to deal with problems as they were called to his attention instead of regularly holding formal court meetings.

That he did not enjoy working with court bureaucracy explains in part why he chose to remain in Pasadena as chief judge rather than relocate to circuit headquarters in San Francisco, although there was also precedent for the circuit chief judge to stay at his regular duty station. Ironically, much of the time during his chief judgeship was consumed by the aftermath of the October 1989 Loma Prieta earthquake, which severely damaged the Ninth Circuit's San Francisco courthouse at Seventh and Mission Streets, forcing relocation of staff and judges.[36] It was

[35]See Wasby, "The Revolt of the Chief Judges," *Criminal Law Bulletin* 37 (September–October 2001): 445–74.

[36]See Wasby, "The Loma Prieta Earthquake and the Ninth Circuit Court of Appeals," *Western Legal History* 11 (1999): 41–69.

only in connection with the earthquake that he has expressed some regret for not being based there.

Judge Goodwin also tried to resist the growth of bureaucracy within the circuit, and this view contributed to the departure of one circuit executive. His dislike for judicial bureaucracy also encompassed the far-off Administrative Office of the U.S. Courts (A.O.), which he saw as making work for itself and others rather than helping judges or simply implementing their policies.[37] As he has said, "One of my personal agenda items was to try to slow down the growth of the bureaucracy, both at the Washington end and at this end."[38] He objected to a situation in which judicial administration "has evolved bureaucratically to the point that Washington controls the local courthouse," and said specifically that the A.O. "should not create more administrative work for chief justices and their administrative staffs than it takes off their desks."[39] He was a strong proponent of localized court administration, speaking against "the inefficiency of the micromanagement of personnel and procurement by the A.O." and saying, "Circuit Councils, properly guided by [Judicial] Conference guidelines, can bring about needed remedial action more quickly and more acceptably than orders by centralized management from Washington."[40]

Goodwin held the chief judge's position for only half the time that would have been possible for him. Thus, although he was an effective holder of the position, in a way he was a caretaker or interim chief judge. His preference for writing opinions rather than dealing with bureaucratic minutiae or focusing on details helps explain why he was not comfortable being chief judge. It also helps clarify why he was quite happy to turn the position over to someone else after only two-and-one-half years, so he could be a senior judge with a life of his own "while I could still carry my baggage." As a friend observed, Goodwin was "happy to have the headaches of administrative work behind him."

[37]His views may have been shaped by his service on the U.S. Judicial Conference's Committee on Court Administration; he had served from 1977 to 1983.

[38]Oral history of Judge Alfred T. Goodwin, conducted by Carole Hicke for the Ninth Judicial Circuit Historical Society, September 18–19, 1991, p. 35 of transcript.

[39]Chief Judge Alfred T. Goodwin to Chief Justice Keith M. Callow (Washington Supreme Court), March 17, 1989, Goodwin Papers.

[40]Chief Judge Alfred T. Goodwin to Magistrate Judge Michael R. Hogan (D.Ore.), January 23, 1990; Goodwin to Judges Sarah Evans Barker (S.D.Ind.) and Joseph Weis (3d Cir.), January 17, 1991, Goodwin Papers.

The comments made when Goodwin stepped down as chief judge are indicative of the type of chief judge some had thought him to be. A district court chief judge spoke of Chief Judge Goodwin's "fine stewardship of the Circuit," which he had "guided . . . with a temperate and understanding hand." Said one court of appeals colleague, the chief judge's job had not been an easy one: "This is not an easy court to manage" and was "a more contentious body than it was when you and I first came on board"; moreover, "all the usual problems to which appellate courts are inclined are raised to a second or third power here." Nonetheless, as chief judge, Goodwin had dealt with this successfully; when on the losing side, this colleague "did not feel demeaned, humiliated or angry as a consequence." Moreover, he said Chief Judge Goodwin had met the earthquake, his "most severe challenge" as chief judge, "with aplomb, skill, and, when required, strong words and deeds." In particular, he pointed to Chief Judge Goodwin's "firmness in dealing with [GSA] officials," which "gave us hope in an otherwise dismal time."

Senior Status

When he stepped down as chief judge in 1991, after twenty years on the Ninth Circuit, Judge Goodwin took senior status. Yet, while dividing his time between Pasadena and Sisters, Oregon, he has remained very active. This is not surprising, because he gave up the chief judgeship so he could do what he really wanted to do—decide cases. He also continued to be involved in the work of the circuit, serving a term in the senior judge position on the Circuit Council and in the identical position on the court of appeals' Executive Committee.

In addition to his continuing to sit on cases in the Ninth Circuit as well as the Fifth, Seventh, Eighth, and Eleventh Circuits, returning several times to the Eleventh, Judge Goodwin has undertaken considerable work in the South Pacific. As chief judge, he "had to cajole district judges" to sit in the federal courts there, and his curiosity led him to become chair of the court's Pacific Territories Committee; he has served on it with only a brief interruption since 1991. Having sent others out to the islands, he "thought I should go and see what was happening." As a result, he sat in the districts of Guam and the Northern Marianas, as well as in other Pacific locations by invitation, so that he has "written opinions for foreign nations." His interest has also led him to seek Article III status for the Guam and Saipan courts.

EXTRAJUDICIAL ACTIVITY

Partly as a result of his capacity for work, Judge Goodwin has always been engaged in extrajudicial activity, with much if not all of it related to the law, the more so as time passed. While he was a state trial judge in Eugene, he served on the board of directors of the Eugene YMCA. After he moved to Salem, during the time he served on the Oregon Supreme Court, he was involved in the activities of the Salem Human Relations Commission. In the military reserves, he was attached to area headquarters of a civil affairs unit, and retired as a reserve Lt. Col., JGAC, when he took his position on the U.S. district court. He withdrew from community activities when he went on the federal bench and gave up extrajudicial participation when he became chief judge of the Ninth Circuit.

Perhaps his most important early extrajudicial service related to the law was his membership, shortly after he joined the Oregon Supreme Court, on Oregon's Constitutional Revision Commission, which proposed new provisions for the state's constitution.[41] More recently, he was a member of the Permanent Judicial Commission of the United Presbyterian Church of the United States, including service as its moderator (the equivalent of chief judge); he also provided legal advice during the merger of two branches of the denomination.

Even before he became a state judge, Goodwin was quite active in Oregon Bar activities, chairing its Committee on Uniform State Laws in 1954. While he was a judge, in 1962 and 1963 he chaired the State Bar Joint Committee with Press and Broadcasters, returning to it in 1975 while on the federal bench. He spoke to groups involved in the education of lawyers, including a talk to the American Academy of Judicial Education on the rule of law, and also assisted in teaching lawyers in continuing education courses sponsored by the bar. As a member of the continuing legal education faculty of the Oregon State Bar, he regularly taught evidence—in which he had a particular interest—to lawyers, and he prepared material for the Practicing Law Institute. Another aspect of Judge Goodwin's teaching was his serving in 1986 as a resident jurist at Indiana University and at the University of Pittsburgh, where he taught classes, gave lectures, and met with faculty and students.

[41]The state senate failed by one vote to give the two-thirds majority necessary to submit the document to a referendum. The irony is that those in the senate who brought about the defeat did so because they wished one person-one vote reapportionment, which the U.S. Supreme Court was shortly to require.

Judge Goodwin's interest in educating both lawyers and the general public is also apparent in the many speeches he has presented to groups such as the Oregon Civil Liberties Union (on church-state relations) and at Reed College, but primarily to legal organizations, including Federal Bar Association chapters, judges and administrative law judges, bar examiners, appellate court clerks, and law school students and faculty, particularly those at his alma mater, where he has been a commencement speaker. Many of these speeches, which touch on a wide variety of topics, are on aspects of the judiciary,[42] with the relationship between the courts and the media also a recurrent topic[43]; as Ninth Circuit chief judge, he presented numerous speeches about the "State of the Circuit."[44]

Goodwin's extensive involvement in the American Bar Association was in aid of two matters: legal education and fair trial-free press concerns. The latter continued his work on the same topic in Oregon. There, in addition to involvement in the state bar, he and a publisher, out of concern about prejudicial pretrial publicity, initiated efforts to bring together bench, bar, and press to develop guidelines on the subject. From 1976 to 1979 he was chair of the ABA's Advisory Committee on Fair Trial and Free Press and the Task Force on Fair Trial and Free Press of the Standing Committee on Association Standards for Criminal Justice.

Goodwin also devoted many years to the Section of Legal Education and Admissions to the Bar, where he started out on the library committee. After chairing the Committee on Resources for Legal Education in 1975–76, he served on the section's Accreditation Committee, service that included many site visits to law schools. He became chair of the section in 1985–86 and then was its delegate to the ABA House of Delegates. Generally the section's work was limited to communication from James P. White, the ABA's consultant on

[42]For example, "Congressional Attack on the Jurisdiction of the Federal Courts," University of Santa Clara Law Society, 1983; "Checks, Balances and the Jurisdiction of the Federal Courts," University of Puget Sound Law School, 1982; "Giantism and Other Problems in Large Courts of Appeals," October 1988.

[43]For example, "The Judicial Branch and the Media: Fear and Loathing at the Courthouse," Reed College, October 13 1994; "The Press—Free and Uneasy," Conference for Newspaper in Education Development Program (n.d.).

[44]Some of Goodwin's speeches have subsequently been published. This was the case with his April 1996 talk to the University of Oregon Law School, "How the Supreme Court Employs Inferior Judges as Messengers," *Oregon Law Review* 75 (1997): 699–707, and a 1979 talk to the Associated Press Managing Editors, "Press-Court Relations: Can They Be Improved?" *Hastings Constitutional Law Quarterly* 7 (Spring 1980): 633–42.

legal education and principal conduit between the section, the Accreditation Committee, and individual law schools, about developments. However, Goodwin was drawn into a controversy concerning Howard University Law School, where the new dean had complained about a *Washington Post* article covering an investigation of allegations that Howard's president had allowed law students to graduate before they completed degree requirements.

During Goodwin's tenure, most reaccreditation reviews were routine, but he had to contend with two matters of particular controversy, both of which involved the transfer of a law school's accreditation from one university to another. The accreditation of Antioch School of Law in Washington, D.C., had been called into question because of poor facilities and its graduates' low bar examination "pass rate." When Antioch University decided to divest itself of the law school for financial reasons, transferring the school's accreditation became an issue. Goodwin also became involved because of a letter in the *Post* attacking the newspaper for its coverage and ABA committee members for bias against the law school. ABA staff prepared a response for Goodwin, who also drafted a response to use should the ABA be charged with bringing on the law school's demise; he emphasized that the law school could still present its case for continued accreditation to the ABA committee, and that the case would be strengthened by continuing progress on weak points.

The case of the Oral Roberts University Law School was quite different. There the law school was transferred without advance approval against a background of controversy concerning the ABA's initial grant of accreditation. Acting on the basis of the ABA's Standards for Approval of Law Schools, the Accreditation Committee initially denied accreditation for several reasons, the most significant being the school's requirement that the law faculty adhere to Christian beliefs. When the law school sued the ABA for its action, Judge Goodwin's affidavit testimony was that he had sought to grant the law school provisional accreditation, because to deny it under the ABA rules for religious practice "raised a grave problem under the First Amendment."[45] After accreditation was granted and a transfer of the accreditation was attempted to Regent University, another religion-based institution, Goodwin warned both Oral Roberts and M.G. "Pat" Robertson, head of the transferee institution, that ABA ap-

[45]Affidavit of Alfred T. Goodwin, *Oral Roberts University v. American Bar Association*, Civ. No. 81-C-3171 (N.D.Ill.), June 15, 1981.

proval was required prior to transfer of accreditation or the law school would be treated as a new institution, leading to more onerous requirements for (re)accreditation.

ASPECTS OF THE JUDGE

His Writing

Initially, Judge Goodwin wrote opinions on an old Royal typewriter, and then on a Selectric, but he always also has written much material in longhand, even when he learned, and became adept in the use of, word processing on the computer. When people speak of Judge Goodwin, they most often comment on his writing. Observations about the high quality of his opinions started in a time when he had only one clerk and one secretary, but the comments extend throughout his career. Even when he faced a heavier caseload and had more clerks, who therefore did more drafting of dispositions, his fine editorial hand could be seen cutting and clarifying their drafts, either in longhand or, with the coming of changes in technology, "on the screen," even when he was in Oregon and his clerks were in Pasadena.

"What he's good at [is] writing opinions," observers say. Judge Goodwin has been called a superb writer, an "absolute magical wordsmith," with a "wonderfully lucid way of writing." His "terrific command of the English language" is seen as "his outstanding point." He has a "straightforward" writing style and "doesn't waste words"; he "writes so laymen won't be confused; he is able to strip and away and get to the bones," and he has "an absolute capacity to write and talk in down-to-earth analogies."

His opinions are brief—several people have commented specifically on their brevity—and to the point. He doesn't ramble, but "gets to the issues" so that he can get in and out of a case in three to four pages. His brother Jim, who was an established Oregon City attorney who often appeared before the state courts, reported, "People thought Ted wrote shorter, more lucid opinions" than his Oregon Supreme Court predecessors. This should not be a surprise, since Judge Goodwin is critical of the extended nature of clerks' bench memos, too many of which, he believes, are transformed without much change into opinions for publication. However, although people praise the quality of his writing, some question the underlying analysis. Observers say that Judge Goodwin skips over issues gracefully from time to time, and that in such

situations it might be difficult to find a principle. Some have made this criticism in relation to the Oregon beach case.[46]

Also relevant to Goodwin's ability as a judge is his easygoing personality, which helps him get along with many people; he easily serves as a bridge between often contentious colleagues of opposing persuasions. For example, he could serve effectively as en banc coordinator because he was "amiable enough to get along with everyone but firm enough to keep it from falling down."

Working Style

On the Oregon Supreme Court, Judge Goodwin began with one secretary and one clerk; after he had served for some time on the Ninth Circuit, his chambers included two secretaries and three law clerks. In senior status, he had only one secretary, but this resulted from clerks' word processing ability. He involves his secretaries in his work, so they have been more like administrative assistants. He was away from his court of appeals chambers a significant portion of the time because of court sittings and his penchant for travel, which earned him the nickname of "Big Bird," so the secretaries had to assume major responsibility for the flow of business in chambers if consistency was to be maintained. Judge Goodwin has delegated much to his secretaries because he "didn't want to be bogged down with busywork," but this allows them "to work under [their] own steam."

Clerks have enjoyed working for him, at the same time wishing he were in chambers more. He enjoys having bright young people from leading law schools, and he feels he has learned from them. However, he has left "personnel matters" to the secretaries, so they, not he, handled any problems with clerks. Some say that "no one is less authoritarian" than Judge Goodwin, but the result is reported to be a sometime reluctance to deal with difficult situations.

Judge Goodwin's promptness with his work is frequently noted, as has been his desire that judges get their opinions out promptly. After dispatching his own business quickly, he assists others. Part of this comes from his considerable capacity for work, both court business and extrajudicial work. "He'll kill you off if you're willing to do all he wants you to do," said someone who worked with him. One reason he can

[46]In possible confirmation that the judge himself was aware of this problem in that case, he is said to have remarked to a later member of the court who had written a much tighter opinion in a later case involving some of the same issues, "You saved me" [by providing analysis to support the result I reached].

perform so much is that he "can carry more stuff in his head than some people can write down in a book."

The Judge's Qualities

In addition to comments already recorded about his service as a state and federal trial judge and on the Oregon Supreme Court, it is important to note that Goodwin has always been well thought of as a judge; he has been called "an absolutely outstanding judge, at both the trial and appellate level." He had a "judicial temperament" from the beginning, not requiring a start-up period to develop it, perhaps because he was "a natural" as a judge.[47] His brother Jim observed that Ted "had enough natural grace, enough humility, to treat people fairly well, whether they were litigants or lawyers" and could "deal with less-well prepared and less-talented attorneys in a way that didn't hurt their feelings." These kinds of views were reported in the 1996 *Almanac of the Federal Judiciary,* where "experienced appellate lawyers" said that "appearing before him is a pleasant experience." One said, "He is cordial to counsel," while another observed, "He is very pleasant. You feel like he's your best friend's father." This did not, however, mean he was a pushover, as is evident in the comment, "He is pleasant to counsel, but he will ask you the tough questions." He was thought to "take in good stride" the deference lawyers show a judge, nor did he change as a result of the publicity surrounding his selection to various judgeships or as a result of being a judge. It is also important to note that he believed in the courts on which he served. He felt strongly that he and his colleagues could "get it right," that they could run their court effectively without intervention by outside hands.

What about his stance as a judge on the issues that come before him? Often he is called a "conservative" because of the president who nominated him, as in "Nixon-appointed conservative." However, this simplistic label is erroneous because his outlook, both when he was appointed and subsequently, comes closer to the moderate-to-liberal stance of his patron, Mark Hatfield. In today's political spectrum, Judge Goodwin certainly is not a typical "conservative" in the sense of contemporary dominant Republicanism, with which he parts company on many matters, particularly as to the First Amendment.

[47]A close friend has, however, observed that, from having known Goodwin in college, to think of him on the U.S. Court of Appeals "is a juxtaposition that one wouldn't look for."

If there is agreement that Judge Goodwin is moderate, what does that mean? Primarily, that he is pragmatic and not ideologically rigid, without a particular "agenda," and he is willing to compromise and adapt. On the matter of agendas, he expresses displeasure with judges who appear to have them and seek to implement them while deciding cases. He is fond of saying that if he had an agenda, he should have run for the legislature.

Perhaps his views are best captured in some remarks he made at the University of Oregon in 1987:

> When, in the name of due process, judges do something the commentator does not like, the result is called activism; when judges fail to do something the commentator wants them to do, the refusal is called reactionary, or insensitive; and when the judges make some law that judges should not make, but which pleases the majority of commentators, it is called judicial statesmanship. Neutral principles that are entirely oblivious of the results in a given case are not always easy to find.[48]

Yet he does have views on a wide variety of issues. The point is that he does not see it as part of his role as a judge to write those views into the law.

CONCLUSION: THE JUDGE AS A PERSON

Thus far, little has been said here about Judge Alfred Goodwin as a person. But there is little difference between Judge Alfred T. Goodwin and "Ted" Goodwin off the bench. Some of what Ted Goodwin is as a person can be seen in the comments about him as a judge. He is not someone who puts on a completely different face as a public official from the one that he reveals off the bench. One thing that comes through is that Goodwin is a warm man. As one person observed; "No one would call Ted Goodwin a cold fish." He is affable and enjoys talking about a wide range of subjects; indeed, one of his brothers said he "loves to pontificate" but he did that before becoming a judge. However, he does not become defensive if engaged about what he has said. This man is "easygoing, but with a serious side."

[48]Alfred T. Goodwin, remarks to Symposium on Constitutional Reform, University of Oregon Law School, September 26, 1987.

He has a "country boy" approach that perhaps fits his college nickname of "Tex." The nickname is not an affectation; as a teenager he worked on a ranch, something he says was a formative experience. He still rides horses, going on a week-long riding trek each year, and he did not reduce his riding in his 70s even after an ornery horse rolled on him, breaking his shoulder. (The horse, as they say, went to the glue factory, so it suffered a worse fate.) Judge Goodwin enjoys using a chainsaw to clean up his rural property. He also does not like to spend money on creature comforts. Perhaps because he never had the salary of a senior private practitioner, he continues to drive inexpensive, unimpressive cars. He is also quite satisfied with plain, simple chambers.

Judge Goodwin is an exemplar of a number of important characteristics. He personifies the judge who does not let his position go to his head but remains relatively unaffected as a person by the status his position as judge carries. His writing is exemplary, and he has provided readable legal prose and helped improve the clarity of others' writing. He has been a public servant who not only has contributed through performance of his assigned job but who has also given substantially to his profession through activity off the bench. In addition to having decided many important cases, through his opinions he has shown how one whose position is pragmatic, moderate, and accommodating can facilitate development of the law. Through the range of subjects he has addressed as a judge, we can see the scope of American state and federal law.

Perhaps most important, Judge Goodwin has shown us how one person can contribute through a career in the judiciary on both trial and appellate, state and federal, courts. It is important for judges of the courts of appeals to be familiar with district court practice, but also, because of the state law questions that come to them in federal habeas corpus and diversity of citizenship cases, with state court law and practice. One of Judge Goodwin's most important attributes has been his ability to understand these areas of law and practice. Perhaps the judicial system would be better off were those who screen judges for nomination to look at the characteristics and the sort of career Ted Goodwin typifies. As a possible exemplar of future judicial careers, he has marked the path well.

* * *

Author's Note: For this overview of Judge Goodwin's career, sources of comments from interviews conducted in person and by telephone with people who know Judge Goodwin are not identified. In addition, I have drawn extensively from my own

interviews with him, primarily in Pasadena in January 1996, supplemented by those of October 1994 and January 2000, and on the extended oral history of Judge Goodwin that Rick Harmon conducted in 1985 and 1986 for the Oregon Historical Society. I also acknowledge use of the oral history of Judge Goodwin conducted by Carole Hicke on September 18–19, 1991, for the Ninth Judicial Circuit Historical Society. I wish to thank those who gave of their time to share their thoughts about Judge Goodwin. I also wish to state my appreciation for the substantive comments and editorial suggestions of several people—Susan Daly, Roger Hartley, Arthur Hellman, and Todd Lochner—who read an earlier version of the manuscript. They helped make this a better essay. Remaining infelicities, of course, remain my responsibility.

Earthworms and Pyramid Schemes: Judge Goodwin's Contributions to the Federal Securities Laws

Jennifer J. Johnson

As part of this special issue honoring Judge Alfred T. Goodwin, I have been asked to write about Judge Goodwin's opinions involving the federal securities laws. During the summer of 2002, both Judge Goodwin and the securities laws enjoyed increased public notoriety. As allegations of widespread securities fraud rocked Wall Street, the securities statutes were suddenly in the public limelight, garnering the attention of the administration, members of Congress, the lay public, and the popular press. Against this backdrop, Judge Goodwin provided the headline writers with one of the few diversions from tales of corporate fraud when he authored the now infamous opinion declaring the Pledge of Allegiance unconstitutional.[1] While Judge Goodwin's securities opinions may not garner similar headlines, they have had significant influence on securities law jurisprudence.

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[1]*Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). In *Newdow*, Judge Goodwin found unconstitutional the California policy that required teachers to lead school children in the current version of the "Pledge of Allegiance" containing the words "under God." Condemnation by both houses of Congress before sunset on the day the opinion was released must constitute a new world record of which the judge is no doubt very proud. This decision quickly drew the ire of the vast majority of American citizens and provided plentiful fodder for local and national radio and television talk shows as well as countless newspaper and magazine articles and commentaries. Judge Goodwin's judicial slight to the Pledge of Allegiance will forever dissipate whatever chance he may have possessed to quietly ride off into the sunset of retirement.

In his nearly fifty years on the bench, Judge Goodwin presided in or sat on the panels of more than fifty cases where the issue concerned the federal securities laws.[2] In many of these cases, Judge Goodwin authored the opinion,[3] attesting both to his keen interest in securities cases and his colleagues' respect for his lucid reasoning and writing ability.

The federal securities laws are primarily contained in the Securities Act of 1933[4] and the Securities and Exchange Act of 1934.[5] These complex statutes mandate disclosure regimens and contain strict antifraud rules. Violations of these statutes and corresponding regulations can lead to criminal prosecutions, administrative sanctions and fines, and private civil liability. The demise of the Arthur Andersen accounting firm and the recent scandals surrounding Enron, WorldCom, Global Crossings, and many other large American corporations have brought the importance of these statutes into the popular realm in a way unparalleled in recent times. Indeed, one cannot read a daily newspaper today without running across both the latest securities law indiscretions concerning corporate America and governmental attempts to curb such behavior.[6]

Judge Goodwin has participated in cases involving many aspects of the securities laws, with the majority of them involving allegations of fraud. Choosing a few of his noteworthy securities opinions for comment is a difficult task. Most securities scholars would probably single out Judge Goodwin's opinion in *Byrd v. Dean Witter Reynolds*,[7] which ironically set the stage for the arbitration of claims under the 1934 Act.[8] I believe, however, that his greatest contribu-

[2]Westlaw Key Number Search (Securities Law) All State and Federal Cases (allfeds [Jan. 22, 2003]) (PA[GOODWIN]) (retrieving 53 cases).

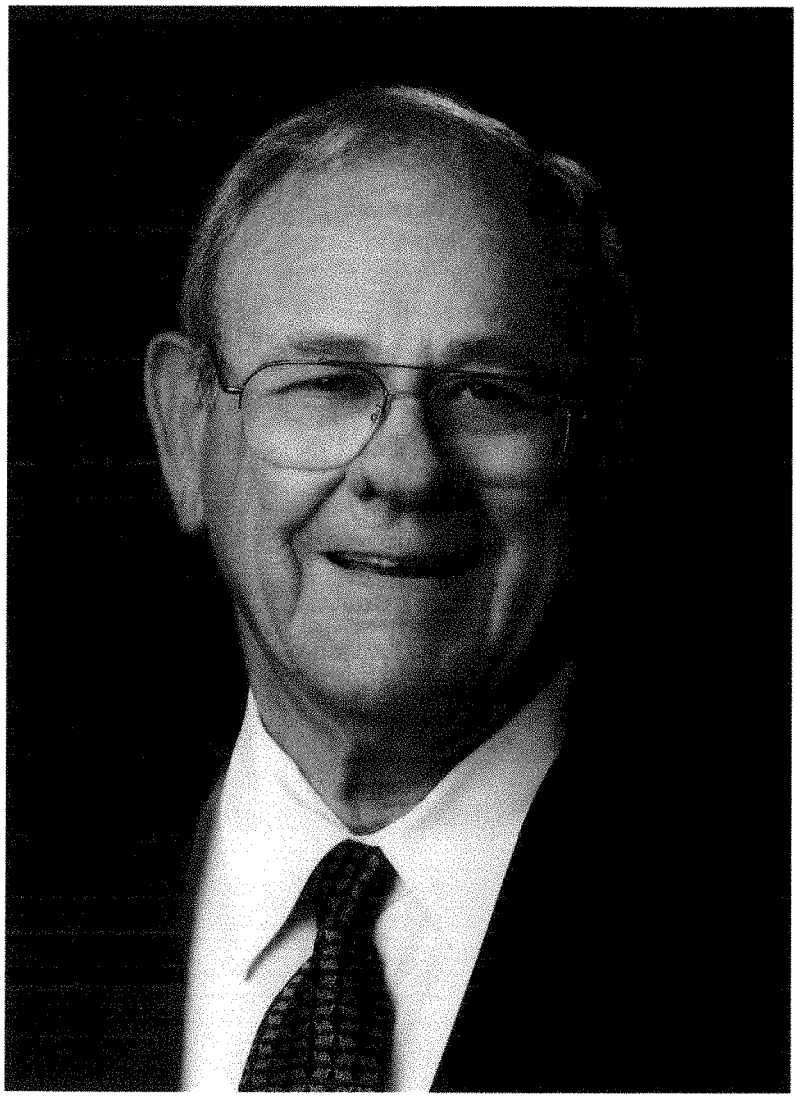
[3]Ibid. (allfeds [Jan. 22, 2003]) (JU [GOODWIN]) (retrieving 17 cases).

[4]15 U.S.C. §§ 77a–77bbbb (2000).

[5]15 U.S.C. §§ 78a–78mm (2000). States have securities statutes that largely parallel those of the federal government.

[6]For example, the popular press closely followed the enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), designed by its own terms to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."

[7]726 F.2d 552 (9th Cir. 1984), rev'd, 470 U.S. 213 (1985). *The Almanac of the Federal Judiciary*, vol. 2, 2002, lists *Byrd* among Judge Goodwin's "Noteworthy Rulings."



Judge Goodwin (above circa 2001) has participated in numerous securities law cases, the majority of which involved allegations of fraud.

tion to securities law lies in the area of defining a security. In reviewing the judge's securities opinions in preparation for this article, I was pleasantly surprised to discover that Judge Goodwin participated in several watershed cases defining the parameters of a security. This article will focus on three of the judge's cases that constitute mandatory reading for all securities students: one involving the marketing of a purported self-improvement program, one concerning earthworms, and one dealing with Hawaiian condominiums.

The securities laws apply only to statutorily defined "securities."[9] Although corporate stocks and bonds are the paradigm securities that are regulated by the federal statutes, the securities laws cast a wide net and apply to a vast array of promotional schemes under which members of the unsuspecting

[8]In Byrd, Judge Goodwin affirmed the lower court's decision refusing to compel arbitration of pendant state law claims that were interwoven with federal securities claims that neither side claimed were subject to arbitration. The Supreme Court reversed the Ninth Circuit, holding that the United States Arbitration Act, 9 U.S.C. §§ 1–14, compelled arbitration of the state claims. In its opinion, the Supreme Court cast doubt on the commonly held belief that the federal securities claims themselves were not subject to arbitration. Three years later, in *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court held that 1934 Act claims were in fact subject to arbitration under Section 3 of the United States Arbitration Act.

[9]Section 2(1) of the 1933 Act defines a security as follows:

The term "security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §77 (b)(1)(2000)

Section 3(a)(10) of the 1934 Act provides a similar definition except that it excludes commercial paper from the definition of a security. 15 U.S.C. § 78(c)(10) (2000). Although the definitions vary slightly between the two statutes, they are considered to be "virtually identical," and the coverage of the two acts may be regarded as the same. See, for example, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n.1(1985); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975); *Tcherepnin v. Knight*, 389 U.S. 332, 342 (1967); *Great Rivers Coop. of Southeastern Iowa v. Farmland Indus. Inc.*, 198 F.3d 685, 698 (8th Cir. 1999).

public are deprived of their money. The most elastic definition of the term "security" in the securities acts is that of "investment contract." In 1946, the United States Supreme Court defined the term "investment contract" in *SEC v. W.J. Howey Co.*[10] Under the *Howey* definition, a transaction involves an investment contract and thus a security if the investor makes (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) to come solely from the efforts of others. The *Howey* case itself involved a Florida company that sold narrow strips of orange trees to out-of-state investors at a uniform price per acre, according to the age of the trees. Most of the investors were doctors and other professionals who were guests at the promoter-owned resort hotel that was located adjacent to the orange groves. A large majority of the investors also purchased a service contract whereby the promoter agreed to cultivate and market the orange crop and to distribute profits to the investors. As a practical matter, given the lack of farming expertise of the investors and the configuration of the rows of orange trees, the service contract was a necessary and integral part of the sale of the trees. The Supreme Court held that while the sale of the real estate alone would not constitute a securities transaction, the offer and sale of the orange trees coupled with the service contract was an offer and sale of securities that were unregistered, in violation of Section 5 of the 1933 Act.[11]

Following the *Howey* decision, many promotional schemes were brought within the ambit of the securities laws because they were deemed to constitute investment contracts. Most of the promotions clearly met two prongs of the *Howey* test: investors usually invested money in a scheme and they certainly expected profits. The remaining *Howey* elements, however, "solely from efforts of others" and "common enterprise," proved to be more controversial. Judge Goodwin was intimately involved in the judicial development of these components of the investment contract definition.

As a federal district judge, Judge Goodwin participated in the decision by the Oregon District Court that a multilevel marketing scheme promoted by Glenn W. Turner constituted a security under the *Howey* test. In *Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc.*,[12] the Or-

[10]328 U.S. 293 (1946).

[11]Section 5 of the 1933 Act, 15 U.S.C. § 77(e) (2000), requires that securities be registered with the SEC before they are sold to the public. This intricate registration process involves disclosure of financial and other information regarding the issuer of the securities.

[12]348 F. Supp. 766 (D. Or. 1972), aff'd, 474 F.2d 476 (9th Cir. 1973), cert. denied, 414 U.S. 821 (1973).

egon court evaluated a promotion called "Dare to Be Great" that was being marketed to Oregon residents. In Judge Goodwin's chambers it was nicknamed "Dare to Be Greedy."[13]

Dare to Be Great was one of many such marketing schemes that Glenn Turner promoted throughout the country. Turner, who has been described as the "granddaddy of motivational speakers" once captivated audiences of more than fifty thousand people.[14] The son of a sharecropper and grade school dropout, he toured the country promoting motivational books and tapes that carried his message that anyone can become rich. By the late 1960s, Turner had personally made millions of dollars. He owned a fleet of Lear jets and luxury cars and built a massive marble castle in Florida.[15] Judge Goodwin recalled, "Turner was living very well and flying around in his Lear jet and wearing his $1,000 cowboy boots and holding meetings where he'd pump up the enthusiasm of people who he wanted to be equally greedy and energetic in selling this plan."[16] As a man who proudly wore real cowboy boots encrusted with Oregon dust, the judge was understandably irritated by Turner's ostentatious display of wealth and was singularly unimpressed with his boots.[17]

The Dare to Be Great promotion involved a scheme that encouraged people to invest money in the Dare to Be Great organization owned and operated by Glenn W. Turner Enterprises, a holding company controlled by Glenn Turner. Dare to Be Great was ostensibly a self-improvement program consisting of tapes and books that were designed to help people build their self-confidence. In addition to purchasing the books and tapes, however, investors were encouraged to bring their friends to so-

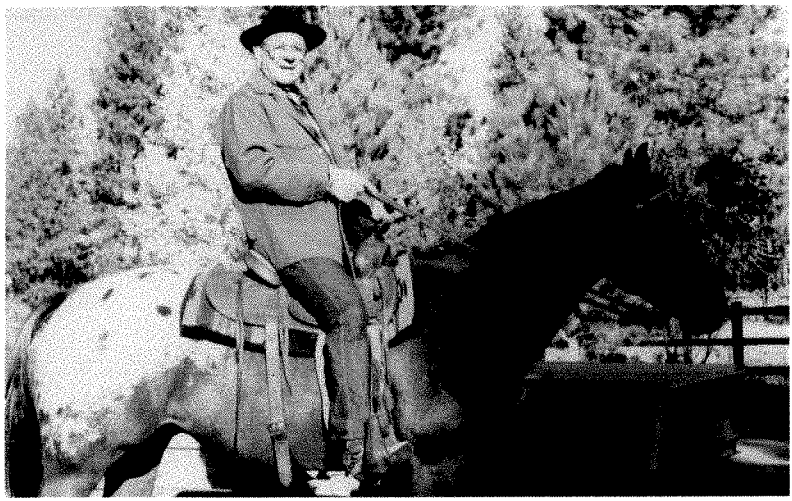
[13]Recorded interview with Judge Goodwin by Rick Harmon, tape 17, side 1 (pp. 425–26 of transcript) (August 14, 1986). Oral history tape available at Oregon Historical Society (hereinafter referred to as Harmon-Goodwin interview).

[14]Barbara Walsh, "Speaker Returns With Less Flamboyance," *Sun-Sentinel*, Oct. 10, 1993.

[15]Ibid.; *Turner v. Turner*, no. 79-186-Orl-Civ-Y, 1983 WL 1680, at *2 (M.D. Fla).

[16]Harmon-Goodwin interview, 425.

[17]Judge Goodwin once described himself as "an old Crook County cowboy who went off to the state university, and that probably ruined me." Ashbel S. Green, "Former Crook County Journalist Writes Opinion," *The Oregonian*, June 27, 2002, p. 107. My own first encounter with Judge Goodwin in the summer of 1974 was at a cattle-branding in Prineville, Oregon, where he appeared as a towering figure astride a large horse. When the cowboy, complete with the appropriate hat, was introduced to me as a Ninth Circuit judge, I was immediately smitten. With his law clerks in tow for the branding, the judge was an impressive sight indeed.



As a man who proudly wore real cowboy boots encrusted with Oregon dust, Judge Goodwin (above) was understandably irritated by Glenn Turner's ostentatious display of wealth and was singularly unimpressed with his boots.

called opportunity meetings run by employees of the Turner organization. The Turner representatives made sales pitches at these emotionally charged meetings that were characterized by chanting, cheering, shouting, and throwing around cash. The Dare to Be Great program was, in reality, little more than a pyramid scheme. In exchange for bringing their friends to the opportunity meetings, investors were promised a percentage of what Turner sold to their friends and a percentage of what their friends sold to other prospects and so forth.

In fact, the self-improvement tapes themselves seemed designed to foster the overzealous atmosphere at the opportunity meetings rather than to help the investors improve their personalities. As the Ninth Circuit later noted, "It is apparent from the record that what is sold is not the usual 'business motivation' type of courses. Rather, the purchaser is really buying the possibility of deriving money from the sale of the plans by Dare to individuals whom the purchaser has brought to Dare. The promotional aspects of the plan, such as seminars, films, and records, are aimed at interesting others in the Plans. Their value for any other purpose is, to put it mildly, minimal."[18]

[18]*Glenn W. Turner Enterprises, Inc.*, 474 F.2d, at 478–79. The author is the proud owner of an original "Dare to Be Great" tape. It is available in my office for any who care to listen.

The Oregon District Court, in an opinion by Judge Skopil, held that the Dare to Be Great program involved the illegal sales of securities and issued an injunction halting the program. Judge Goodwin remembers that "[w]e enjoined him from selling any more of the plans within the district of Oregon, and other courts then picked it up and enjoined him nationwide and he went broke, which he richly deserved. But we stopped him from defrauding any more people in Oregon. . . ."[19] Indeed, the Oregon injunction proved to be the beginning of a series of financial troubles that befell Turner. As detailed by a Florida court in connection with Turner's subsequent divorce, "That [Oregon] court order produced a major financial contraction for Turner Enterprises, so that . . . Glenn Turner and Turner Enterprises faced a financial crisis."[20]

The decision by the Oregon District Court was a groundbreaking opinion in defining a security. The Oregon court held that the "solely from efforts of others" prong of the *Howey* test was not to be taken literally. Seizing upon Supreme Court precedent stating that the securities laws were to be applied flexibly to reach "[n]ovel, uncommon, or irregular devices, whatever they appear to be . . ,"[21] the Oregon court found that the requirement that investors lure their friends to Turner's opportunity meetings did not remove the scheme from the realm of the securities laws. Instead, the court found that in applying the Supreme Court's definition of an investment contract, "the efforts of others which are relevant for purposes of the definition are those essential managerial efforts which affect the failure or success of the enterprise."[22] In other words, the fact that the promotion required investors to put in some effort was not fatal to the classification of the scheme as a security if the promoters provided essential management functions. The

[19]Harmon-Goodwin interview, 426.

[20]*Turner v. Turner,* 1983 WL 1680, at *1.

[21]See, for example, *S.E.C. v. W.J. Howey Co.,* 328 U.S. 293, 299 (1946) (definition of a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.") See also *S.E.C. v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 351 (1943).

[22]*S.E.C. v. Glenn W. Turner Enterprises, Inc.,* 348 F. Supp. 766, 775 (D. Or. 1972).

Ninth Circuit later affirmed this reformulation of the "solely from efforts of others" prong of *Howey*.[23]

In contrast, in *S.E.C. v. Koscot Interplanetary*,[24] the federal district court in Georgia refused to expand the *Howey* test beyond its literal terms. The Koscot Interplanetary scheme involved another Glenn Turner multilevel marketing program, this time to sell cosmetics. The Georgia court held that Koscot Interplanetary promotion did not involve a security under the *Howey* test because investors themselves had to put forth effort to bring their friends to the opportunity meetings.[25] This decision was later overturned by the Fifth Circuit, which agreed with the Oregon District Court and the Ninth Circuit that the "solely from efforts of others" test should not be applied literally.[26] This decision eventually caused Koscot Interplanetary to file bankruptcy.[27]

Many courts around the country quickly adopted the *Glenn Turner* rationale.[28] Turner himself was subsequently involved

[23]*S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973). The Ninth Circuit stated,

> The fact that the investors here were required to exert some efforts if a return were to be achieved should not automatically preclude a finding that the Plan or Adventure is an investment contract. To do so would not serve the purpose of the legislation. Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Id.* at 482.

[24]*S.E.C. v. Koscot Interplanetary, Inc.*, 365 F. Supp. 588 (N.D. Ga. 1973).

[25]*Id.* at 590–91.

[26]*S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 480 (5th Cir. 1974).

[27]*Turner*, 1983 WL 1680, at *1.

[28]See *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F 2d 236, 240 n.4 (4th Cir. 1988) (adopting the *Glenn Turner* holding and listing eight other circuits that have similarly adopted a liberal interpretation of "solely"); Arnold Jacobs, 5B *Disclosures and Remedies under the Securities Laws* §9:69 (West, Dec. 2001). (Collecting and updating cases discussing the "solely" test as articulated in the *Glenn Turner* cases). In 1975, the Supreme Court in *United Housing Foundation v. Forman*, 421 U.S. 837 (1975), hinted that it might also accept the expansion of the "solely from efforts of others" test when it stated that the "touchstone [of the *Howey* test] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *Id.* at 852. In *Forman* itself, the Supreme Court expressly reserved deciding the propriety of the *Glenn Turner* expansion of the "solely from efforts of others" test. Justice Powell observed that the Ninth Circuit had gone beyond the literal limitation of "solely" in *Howey* and that "[w]e express no view, however, as to [that] holding." *Id.* at 852 n.16. Four years later, however, in *Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. Daniel*, 439 U.S. 551 (1979), the Court repeated the *Forman* language without its qualification, thus implicitly accepting the expansive "solely" test first proposed by the Oregon court.

in countless civil, administrative, and criminal lawsuits that eroded his financial empire.[29] Even his infamous Florida castle was sold when Turner failed to pay property taxes.[30] Before it collapsed, Turner's empire had grown to include seventy-eight corporations in thirteen countries. The Federal Trade Commission estimated that Turner defrauded more than eighty-eight thousand people.[31] In 1986, Glenn Turner was convicted of criminal fraud in Arizona in connection with a pyramid scheme known as the "Challenge to America Adventure Series," and he served six years in jail. When his probation ended in 1993, Turner once again hit the motivational speech circuit, recycling his former "Dare to Be Great" speeches and tapes. Turner's new audiences, however, are quite small, and he apparently is no longer promoting his infamous pyramid marketing schemes.[32]

The *Glenn Turner* case played a pivotal role in expanding another prong of the *Howey* test—the requirement that investors invest money in a "common enterprise." The federal courts have differing views on what is required to satisfy this test. In some federal circuits, only horizontal pooling (also known as horizontal commonality) suffices in order for an investment to constitute a common enterprise.[33] Horizontal pooling or commonality refers to the situation in which the fortunes of the investors in the scheme are linked. This test necessarily requires more than one investor and in addition requires that the investors share profits in the enterprise. In the *Glenn Turner* case, however, the investors did not share profits with each other; rather each investor's individual profits varied according to the promoters' success in convincing that investor's friends to invest in the enterprise. Nevertheless, the Oregon District Court found that Turner's "promotion embodied a common enterprise, for any return to the investors depended upon the defendants' success in inducing

[29]*Turner*, 1983 WL 1680, at *1.

[30]Jim Robinson, "Dodd Neighbors to Lose More Than Curve in Road," *Orlando Sentinel*, Oct. 20, 2002.

[31]Marilee Loboda Braue, "Florida's Promoter's Scam Offers a Lesson," *The Record*, September 1, 1987.

[32]Walsh, "Speaker Returns With Less Flamboyance"; Walsh, "Glenn Turner Speaks Again; Motivational Speaker Jailed; Returns to Teach Money-Making," *Sun-Sentinel*, Oct. 9, 1993.

[33]The Sixth and Seventh Circuits require horizontal pooling to satisfy the common enterprise prong of the *Howey* test. See, for example, *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 394 (6th Cir.1989); *S.E.C. v. Lauer*, 52 F.3d 667 (7th Cir. 1995).

yet more people to invest their money."[34] In affirming the *Glenn Turner* decision, the Ninth Circuit defined a common enterprise as "one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties."[35]

While not labeled as such, the profit-sharing in the *Glenn Turner* case is an early example of vertical pooling or commonality, which refers to the situation in which the fortunes of the investor(s) and the promoter or broker of the scheme are linked. In the Ninth Circuit, either vertical or horizontal pooling satisfies the *Howey* requirement of a common enterprise.[36] In 1987, Judge Goodwin, writing for the majority in an en banc opinion, confirmed the Ninth Circuit's view, in force since the time of *Glenn Turner,* that either horizontal or vertical pooling satisfies the common enterprise element of the *Howey* test.[37]

Prosecuting promoters of fraudulent pyramid schemes can be more difficult in jurisdictions that do not adopt some version of vertical commonality. For example, *U.S. v. Holtzclaw*[38] involved allegations of criminal securities fraud against promoters implicated in a pyramid scheme to sell gold coins. The defendants were convicted by a jury on multiple counts of criminal fraud, including securities fraud in connection with their participation in the bogus program known as "Sell America." The complaining victim was the Matewan Church, which lost all of the money in its building fund. In his ruling on defendants' motion to overturn the securities fraud convictions, the West Virginia District Court addressed the common enterprise

[34]*S.E.C. v. Glenn W. Turner Enters., Inc.*, 348 F. Supp. 766, 774 (D. Or. 1972).

[35]*S.E.C. v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 n.7 (9th Cir. 1973).

[36]See, for example, *Brodt v. Bache & Co.*, 595 F.2d 459, 461 (9th Cir. 1978).

[37]*Hocking v. Dubois*, 885 F.2d 1449, 1459 (9th Cir. 1989). Similarly the Eighth and Tenth Circuits accept strict vertical commonality, in which a security can exist if the fortunes of an investor are inextricably tied to the success of the promoter, without necessarily any pooling among investors. *McGill v. American Land & Exploration Co.*, 776 F.2d 923, 925–26 (10th Cir. 1985); *Miller v. Central Chinchilla Group, Inc.*, 494 F.2d 414, 418 (8th Cir. 1974). The Fifth and Eleventh Circuits employ a more lenient test known as "broad vertical commonality." Under this test a plaintiff must show merely a link between the investor's fortunes and the promoter's efforts. See *S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir.1974); *Villeneuve v. Advanced Bus. Concepts Corp.*, 698 F 2d 1121, 1124 (11th Cir. 1983), aff'd en banc, 730 F.2d 1403 (11th Cir. 1984).

[38]*U.S. v. Holtzclaw*, 950 F. Supp. 1306, 1309 (S.D. W. Va. 1997), vacated in part on other grounds, 131 F.3d 137, No. 97-1433, 1997 WL 734026, (4th Cir. 1997).

element of the *Howey* test, noting that no horizontal pooling among investors was present:

> In this case, the pyramid scheme sold to the Matewan Church was structured so that when an investor made a sale, the profits were split between the investor and Sell America. While the fortunes of the investor were tied to the promoter, they were not tied to the fortunes of other investors—this pyramid scheme had strict vertical commonality but not horizontal commonality.[39]

The court held that horizontal pooling was required to satisfy the common enterprise element of the *Howey* test and that this pyramid scheme did not involve a security.[40]

The temerity of the Oregon court in *Turner* to move beyond the literal language of the *Howey* definition of an investment contract led to the classification of many fraudulent schemes as securities, thus enabling the courts to stop them in their tracks.[41] Judge Goodwin recognized that the Oregon court was going beyond established precedent with its decision: "I had to stretch a point a little bit, but we made it a security for purposes of federal regulation and of course that killed it and in doing that we stretched the boundaries of the securities laws a little bit so that other scams got picked up as securities and were enjoined by federal courts."[42] It is apparent from Judge

[39]*Id.* at 1316.

[40]*Id.* at 1316–17. In the *Holtzclaw* opinion, authored coincidentally by a different Judge Goodwin, Judge Joseph Robert Goodwin, the judge stated that his decision mandating horizontal commonality was compelled by "[a] contextual reading of the *Howey* test, informed by the court's understanding of *Marine Bank v. Weaver. . . .*" *Id.* at 1316. However, in footnote 13, the court admits that it is an open question whether *Marine Bank* indeed compels such a conclusion. *Id.* Indeed, in *Holtzclaw* the court references the 1985 dissenting opinion of Justice White in *Mordaunt v. Incomco*, 469 U.S. 1115 (1985) (dissenting opinion from denial of writ of certiorari) that surveyed the varying views of the federal circuit courts on the common enterprise issue. Joined by the chief justice and Justice Brennan, Justice White dissented in the denial of certiorari in the *Mordaunt* case because he felt that "in light of the clear and significant split in the circuits" on the common enterprise element of the *Howey* test, the Supreme Court should have decided this issue. *Id.* at 1117.

[41]See, for example, *Nebraska v. Irons*, 574 N.W.2d 144, 150 (Neb. 1998) (gift pyramid scheme); *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434, 441 (E.D.N.Y. 1987) (insured gold and silver bullion promotion); *S.E.C. v. Aqua-Sonic Products Corp.*, 687 F.2d 577, 582 (2d Cir. 1982) (dental products franchises).

[42]Harmon-Goodwin interview, 426.

Goodwin's recollection of the *Turner* case that, although he applauded the decision and the resulting halt to many fraudulent schemes, moving beyond established precedent was a somewhat uncomfortable experience. The judge recalls, "I was always a little uncomfortable with that one though, because there wasn't quite enough precedent to go all the way, the way I went on it. This is sort of the way the common law works, you build on what precedent you have and then try to make your law fit the facts that are established."[43]

The Ninth Circuit's reformulation of the *Howey* test has resulted in securities law coverage for many multilevel marketing promotions. The expanded *Howey* test has also proved valuable in prosecuting other schemes by fast talking promoters who attempt to fleece gullible investors. One historically popular category of scams involves animal breeding promotions, including those relating to cattle, beavers, chinchillas, foxes, and racehorses.[44] For whatever reason, investors appear particularly vulnerable to promotions promising quick and easy profits from animal breeding operations. Judge Goodwin's contribution to the literature in this area involved an operation to breed the lowly earthworm.

In *Smith v. Gross*,[45] a classic case used in law school casebooks to teach students the parameters of the coverage of the securities statutes,[46] the promoters marketed a plan to raise and sell earthworms to use as fishing bait. Utilizing a promotional newsletter, defendant Gross solicited investors to raise earthworms ostensibly to help Gross fulfill quotas in selling bait worms to fishermen in Phoenix, Arizona. Gross sold earthworms to the plaintiffs, representing that the worms would multiply sixty-four times per year. Gross further represented in the newsletter that the worms required virtually no care.

Gross's plan to market earthworms was not new, nor was it, on its own, necessarily illegal. Even today countless websites

[43]*Id.*

[44]See, e.g., *Plunkett v. Franciso*, 430 F. Supp. 235 (N.D. Ga. 1977)(cows); *Marshall v. Harris*, 276 Or. 447 (1976)(racehorse); *Miller v. Central Chinchilla Group, Inc.*, 494 F. 2d 414 (8th Cir. 1974)(chinchillas); *Continental Mktg. Corp. v. S.E.C.*, 387 F. 2d 466 (10th Cir. 1967)(beavers); *S.E.C. v. Payne*, 35 F. Supp. 873 (S.D.N.Y. 1940)(silver foxes).

[45]604 F.2d 639 (9th Cir. 1979).

[46]See, for example, Charles O'Kelly and Robert B. Thompson, *Corporations and Other Business Associations 954* (3d ed.) (Gaithersburg, Md., 1999); Robert W. Hamilton, *Corporations Including Partnerships and Limited Liability Companies* (7th ed.) (St. Paul, Minn., 2001).

are devoted to the cultivation, breeding, and marketing of earthworms.[47] But Gross did more than just sell the earthworms; he additionally represented to the investors that their success was guaranteed because Gross would repurchase all bait-size worms produced by the plaintiffs at $2.25 per pound. Plaintiffs alleged that, in fact, the repurchase offer was at ten times the market price for worms and that there was little demand for worms in the Phoenix area. Instead, plaintiffs alleged that the only way Gross could pay the repurchase price was by selling worms to new worm farmers at inflated prices. In other words, the plaintiffs alleged that Gross was marketing a classic pyramid scheme.

On the surface, a promotion tied to the fishing industry in the desert community of Phoenix, Arizona, seems ludicrous, and at some point no statute can protect some people from themselves. However, it turns out that fishing is quite popular among Phoenix residents and that the Arizona Game and Fish Department actively manages fishing opportunities for state citizens.[48] Whether these activities could ever result in a shortage of earthworms such that the price for worms would increase tenfold is, of course, debatable; suffice it to say that the possibility apparently was real enough to fool the Smiths, who sued Gross for securities fraud.

In reversing the district court's dismissal of the Smiths' case for lack of jurisdiction, Judge Goodwin, participating in a per curium opinion, held that the facts alleged in plaintiffs' complaint established that the worm promotion was an investment contract under the *Howey* test as modified by the *Glenn Turner* cases. The court stated that the complaint alleged a common enterprise because the "fortune of the Smiths was interwoven with and dependent upon the efforts and success of the defendants."[49] Only by securing additional investors could defendants

[47]See, for example, Magicworms, at www.magicworms.com (last visited March 17, 2003); Connecticut Valley Worm Farm, at www.ctvalley.com (last visited March 17, 2003); Worm Digest: *Developing a Successful Business Around Earthworms*, at www.wormdigest.org/article_45.html(last visited March 17, 2003); Vermiculture Recycling Solutions, at www.vrsllc.com. (last visited March 17, 2003).

[48]Arizona Game and Fish: *Sport Fish Species*, at http://www.gf.state.az.us/h_f/sport_fish.html (last visited March 17, 2003) (bulletins for the Arizona Game and Fish Department). Moreover, since the early 1980s, the Game and Fish Department has imported fish into urban lakes and streams for the benefit of urban dwellers who do not care to venture out into the wild to fish. Arizona Game and Fish: *Arizona Urban Fishing Program*, at http://www.gf.state.az.us/h_f/urban_fishing.html (last visited March 17, 2003).

[49]*Id.* at 643 (quoting *Glenn W. Turner Enter., Inc.*, 474 F.2d at 482 n.7).

repurchase plaintiffs' worms at above market prices and "although they [plaintiffs] were free under the terms of the contract to sell their production anywhere they wished, they could have received the promised profits only if the defendants repurchased above the market price."[50]

Next, the court applied the modified *Howey* standard of "solely from efforts of others" to plaintiffs' allegations that they were promised that worm farming required little effort on their part and that the significant effort was that of the defendants in finding new investors. Utilizing the expansive "solely" test, the court found that "the third element of an investment contract set forth in *Turner*—that the efforts of those other than the investor are the undeniably significant ones—was present here."[51] The Smiths were thus permitted to continue their securities fraud litigation against Gross and his codefendants.

Animal breeding operations and multilevel marketing schemes involving self- improvement enterprises and cosmetics provide colorful examples of fraudulent promotions that are "investment contracts" and thus securities. The wide reach of the securities laws also covers sales of securities by legitimate business enterprises. In 1989, Judge Goodwin authored a controversial opinion that expanded the reach of the definition of a security when the underlying transaction involved the sale of a Hawaiian condominium unit. By this time, it had been well established that a securities sale takes place when a developer sells a condominium unit and in the same transaction offers the buyer the opportunity to participate in a pooled rental agreement.[52] Ordinarily, the rental pool agreements provide that a manager will rent the units for the owners and distribute the profits pro rata among unit owners regardless of how many times a particular unit in the pool is actually rented. The SEC and the courts have traditionally viewed such arrangements under a *Howey* analysis and have little difficulty concluding that such packaged condominium transactions are sales of securities. Indeed, such arrangements differ only slightly from the packaged offer and sale of the orange trees and service contracts at issue in *Howey* itself.

In the 1989 case of *Hocking v. Dubois*,[53] Judge Goodwin, writing for a 6:5 majority of the Ninth Circuit sitting en

[50]*Id.* at 643.

[51]*Id.*

[52]See, for example, Offers and Sales of Condominiums or Units in a Real Estate Development, Exchange Act Release No. 33-5347 [1972–1973 Transfer Binder] Fed. Sec .L. Rep. (CCH) 79,136 (Jan. 4, 1973).

[53]885 F.2d 1449 (9th Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

banc, held that a secondary resale of a condominium unit could constitute a security under circumstances where the real estate agent also promoted the availability of an optional rental pool. This decision represents a significant expansion of the application of the securities law to real estate sales. In *Hocking*, the plaintiff hired Dubois, the defendant real estate agent, to find a Hawaiian condominium unit to purchase. Dubois located a unit for sale in a resort complex. The sellers, the Libermans (who were not named as defendants), had originally purchased the unit from the resort developers. The developers offered all prospective purchasers the opportunity to participate in a rental pool in which independent managers would rent the units for the owners and distribute the net profits pro rata to the members of the pool. The Libermans, however, had not elected to participate in the rental pool.

Sometime after purchasing the unit, the Libermans listed it for sale with defendant Dubois, who informed the plaintiff about the availability of the Liberman's unit and the opportunity to participate in the rental pool. The plaintiff purchased the Libermans' unit and elected to join the rental pool sponsored by the independent party. The plaintiff alleged that Dubois had told him his income from the rental pool would be more than sufficient to make the payments on the condominium unit and that the unit would appreciate in value. The plaintiff eventually defaulted on the payments for the condominium, claiming that the promised rental income from the pool was insufficient to make the payments. This default apparently caused the plaintiff to lose all payments previously made. The plaintiff purchaser sued Dubois and her broker, claiming that she had offered and sold a security in violation of the securities laws.

Writing for the en banc majority, Judge Goodwin reasoned that if the realtor presented a package to the buyer consisting of the condominium unit and the rental pool arrangement as part of an integrated transaction, the arrangement could be an investment contract under *Howey*. In Judge Goodwin's view, it was not necessarily fatal to the classification of the sale as a security that an independent third party operated the rental pool or that there was no connection between the sellers or their agent and the rental pool operator.[54]

The *Hocking* decision ran counter to the position taken by the SEC appearing as amicus. The SEC argued that in accor-

[54]*Hocking* at 1457–58.

dance with its earlier Release 5347,[55] the condominium sale at issue was not a security. Instead, the Commission contended that a condominium sale only involved a security when made by "developers who have an affiliation or selling arrangement with a rental pool operator."[56] In the SEC's view, Release 5347 "does not apply to persons who resell their own individual units . . . and have no affiliation or selling arrangement with the pool operator."[57] While courts generally give great deference to the view of administrative agencies in interpreting relevant statutes, Judge Goodwin noted that the SEC had not been consistent in interpreting its release and that the court would not rely on the views of the Commission.[58]

The *Hocking* decision did not garner altogether positive critical reviews. The case has been criticized because of its finding that an investment contract could exist even when there was no affiliation or selling arrangement between the sellers of the property (or their agent) and the provider of management services.[59] The development community was

[55]Exchange Act Release No. 33-5347 [1972–1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) 79,136 (Jan. 4, 1973). As noted by the court in *Hocking:*

> The release describes three situations which would involve the offering of a security: 1. The condominiums, with any rental arrangement or other similar service, are offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units; 2. the offering of participation in a rental pool arrangement; and 3. the offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit. 38 Fed.Reg. at 1735, 1736 (1973)

Hocking, 885 F.2d at 1456 n.6.

[56]*Hocking* at 1457[citations omitted].

[57]*Id.* at 1464 (Norris, J., dissenting) [citations omitted].

[58]*Id.* at 1458 ("Because of the SEC's inconsistent interpretations of Release 5347, and the lack of any case authority supporting its current position, we "accord no special weight to its views" [citations omitted]).

[59]For example, in *Allison v. Ticor Title Ins Co.*, 907 F.2d 645, 649 (7th Cir. 1990), the Seventh Circuit noted that it had "grave doubts about the correctness of *Hocking*, a 6–5 decision that did not satisfactorily address the question how a unit owner who conveys only an interest in real property vends a 'security' just because the proprietor of the condominium development offers a rental pool in which unit owners may participate if they choose. The proprietor conveys the full package and hence a 'security' to the original owner, who cannot re-convey the same package (or for that matter stop the proprietor from offering a rental pool)." For an example of academic criticism of *Hocking*, see Robert C. Art, "Sell a Condominium, Buy a Securities Lawsuit: Unwarranted Liabilities in the Secondary Market," *Ohio State Law Journal* 53 (1992): 413.

upset, because some felt that *Hocking* would adversely impact the condominium rental market that comprises a large part of the Hawaiian economy.[60] As Judge Goodwin later noted, being an appellate judge is not a popularity contest,[61] and in the *Hocking* opinion he suggests that "[i]f . . . the application of the securities laws places undue burdens on developers, real estate brokers, or condominium owners, changes in the law should be sought from Congress or the Securities and Exchange Commission."[62] As it turned out, the *Hocking* opinion, while unpopular with real estate developers, law professors, and the SEC, did not cause the real-world marketing catastrophe that the developers originally predicted. Condominium rentals in Hawaii, often in pooled arrangements, continued unabated after the *Hocking* opinion.[63]

Few cases cite *Hocking* for its actual decision that a condominium resale could constitute a security.[64] The *Hocking* opinion is cited more often for its reaffirmation of the Ninth Circuit's position that either vertical or horizontal commonality comprises a common enterprise under *Howey* and its continued adherence to the *Glenn Turner* reformulation of the *Howey* "solely from efforts of others test."[65] *Hocking* is also significant because it expressly adopts the three-part *Williamson* criteria to determine if an investor actually has control over an investment.[66] *Williamson* provides that the

[60]Mark Pedesun, "Visitor Base for Condo Rentals Grows," *Leisure Travel News*, May 24, 1999; State of Hawaii: *Facts and Figures*, at http://www.state.hi.us/dbedt/facts/statefact.html (last visited March 18, 2003).

[61]"Appeals Judge Stands Behind Ruling," *The Oregonian*, June 29, 2002.

[62]*Hocking* at 1462.

[63]Cathy S. Cruz, *Vacation ownership is Hawaii's invincible industry*, at http://www.hawaiibusiness.cc/hb122002/default.cfm?articleid=14 (last visited March 18, 2003); Russ Lynch, *Timeshares gaining acceptance in Hawaii*, at http://starbulletin.com/2001/06/21/business/story1.html (last visited March 18, 2003).

[64]*Adams v. Hyannis Harborview, Inc.*, 838 F. Supp. 676, 685 (D. Mass. 1993) is one of the very few cases to cite *Hocking* for its actual decision that a condominium sale can be a security. In *Adams*, the court cited *Hocking* for the proposition that the condominium rental pool need not be mandatory. However, the *Adams* case involved a rental pool agreement promoted by the sellers and their affiliates.

[65]Westlaw Keycite Citing Reference Search (885 F.2d 1449, headnotes 3, 4, 11) (retrieving 39 cases as of March 21, 2003).

[66]*Williamson v. Tucker*, 645 F.2d 404, 424-25 (5th Cir. 1981); *Hocking* is cited eleven times for its adoption of the *Williamson* test. Westlaw Keycite Citing Reference Search (885 F. 2d 1449, headnotes 12 & 13) (retrieving eleven cases as of March 21, 2003).

"question of an investor's control over his investment is decided in terms of practical as well as legal ability to control."[67] This means that promoters will not be able to "cheat" by creating organizations that only appear to give investors control over their business. If the investors have no practical ability to control the enterprise, then the investment is likely to constitute a security.

The cases defining a security provide the bedrock on which all securities law is based. Judge Goodwin's pragmatic approach to this task has greatly enhanced our understanding of the parameters of the securities statutes. The *Glenn Turner* case alone has been cited more than eight hundred times[68] and remains one of the most important cases addressing the definition of a security. Similarly, citations to *Smith v. Gross* and *Hocking v. Dubois* appear frequently in the securities literature.[69] Although cases involving earthworms and condominiums do not always make today's headlines, they provide a solid foundation that helps inform securities scholars of the boundaries of their discipline. Judge Goodwin's contributions to securities law jurisprudence have made a lasting impression on generations of law students and will educate those who follow. This is a legacy of which the judge should be very proud.

[67]*Hocking*, 885 F.2d at 1460. *Williamson* involved a general partnership formed to develop real estate. The investor argued that even though a general partner ordinarily has management rights, he had no effective right to control the affairs of the partnership and therefore under *Howey*, his investment constituted a security. The Fifth Circuit held in *Williamson* that

> A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

Williamson, 645 F.2d at 424.

[68]The *Glenn Turner* Oregon District Court case itself has been cited fifty-nine times; its affirmation by the Ninth Circuit another 748 times. Westlaw Keycite Citing Reference Search (348 F. Supp. 766) and (747 F. 2d 476) (March 21, 2003).

[69]As of March 21, 2003, *Smith v. Gross* has been cited eighty-four times, Westlaw Keycite Citing Reference Search (604 F. 2d 639), and *Hocking v. Dubois* has been cited 138 times, Westlaw Keycite Citing Reference Search (885 F. 2d 1449).

A Most Valuable Player: Judge Goodwin and the Federal Tax Laws

John A. Bogdanski

Do generalist judges have any business deciding tax cases? Forceful arguments can be mustered to support a negative or an affirmative answer. Advocates of specialized tax courts, at both trial and appeals levels, complain that the federal district and circuit courts lack the time and tax caseload needed to develop meaningful expertise in this complex area. On the other hand, supporters of the current system argue that judges who hear all sorts of cases, including those involving tax, are more likely to be even-handed in applying the revenue laws, and better qualified to resolve questions of state law that often underlie federal tax disputes.

A review of the dozens of tax opinions written by Judge Alfred T. Goodwin while on the federal bench reveals that the tax system has been well served by his active participation. Not only has he embodied the best traits cited by the advocates of the generalist school, but he has also shown a mastery of many facets of the Internal Revenue Code,[1] rivaling even that of some tax experts. And perhaps most notably, he has steadfastly preserved, protected, and defended that statute, often by calling up his innate common sense and excellent judgment to counteract the Code's ambiguities.

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[1]Hereinafter sometimes referred to as "the Code." References to "sections" are to sections of the Code. In the quotations herein from Judge Goodwin's opinions, footnotes and citations are omitted without further notice.

It would be difficult to write a good history of the federal tax laws without a discussion of at least a couple of Judge Goodwin's opinions. Reviewing the catalog of his tax decisions, one is struck by how many of the classic issues disposed of in the cases have subsequently been eliminated by statutory amendments. Back when the Code provided no guidance on these knotty problems, however, it was up to the judiciary to resolve them.

Before we embark on a survey of the judge's tax opinions, a caveat is in order: This is not an exhaustive collection of Goodwin's contributions to tax jurisprudence. He also has served on panels in many tax cases in which other judges wrote the opinions of the court. Any attempt to discern Judge Goodwin's influence in these other cases is beyond the scope of this essay. Nonetheless, anyone familiar with his career may intuit that his unseen hand guided the outcomes of some of those cases, as well as the cases discussed here.

I. GREATEST HITS

Goodwin's tax opinions tend to capture the judge at his finest. Perhaps his greatest contributions have flowed from his awareness that taxpayers and their advisors need the revenue laws to be as clear and predictable as possible. In *Minor v. United States*,[2] Judge Goodwin struck a blow for certainty by refusing to apply the amorphous economic benefit "doctrine" to a deferred compensation plan.

The taxpayer in question was a key shareholder and employee in a corporation that operated a medical practice. He agreed to be paid for his services in stages—a portion currently, and the rest on a deferred basis. The corporation set up a trust that held annuity policies to pay the future compensation, but the trust's assets were subject to the claims of the firm's creditors. The IRS admitted that the taxpayer had neither actually nor constructively received the income that went into the trust, but it argued that he nonetheless received a taxable economic benefit every time the balance in his deferred compensation account was increased on account of services he had performed.

The court wisely rejected the government's argument and focused instead on the language of section 83 of the Code and

[2]772 F.2d 1472 (9th Cir. 1985), aff'g docket no. CV 81-614 (W.D. Wash.) (not reported).

the regulations thereunder, which provided that an unfunded, unsecured promise to pay money in the future was not "property" for purposes of determining compensation income. Adherence to the statutory and regulatory provisions avoided what would have been a misguided trip through a confused and amorphous line of cases on what constitutes an "economic benefit"—cases that rightly were cast into the background by the superseding statute and related agency rules. Noting additionally that the plan at issue "severely stretche[d] the limits" of tax deferral,[3] Judge Goodwin's opinion in *Minor* drew a clear line, up against which employers and employees have successfully planned ever since.[4]

In the same vein was *Estate of Christ v. Commissioner*,[5] an estate tax dispute about the value of a life interest that a California woman received in a trust after her husband's death. In order to obtain the life estate, she made a "widow's election" to forgo her community property rights. She contributed to the trust her community property interest in the property that she and the husband had owned together; in exchange, her deceased husband's interest in the community property also went into the trust. The issues in the case were the proper income tax treatment of the trust during the wife's lifetime, and the proper estate tax treatment of it when she died. For several technical reasons, explained succinctly in Judge Goodwin's opinion, the wife's estate was arguing for a relatively high valuation for the life estate she received under the widow's election.

The IRS valued the life estate using the regulations' longstanding tables, which employed an assumed interest rate

[3]When the taxpayer had the temerity to request that the government be required to pay his attorney's fees, the same panel, in an unsigned order, rejected his motion. 797 F.2d 738 (9th Cir. 1986).

[4]The judge has also advanced the cause of certainty in disputes involving the validity of statutory notices of deficiency issued by the IRS. These notices are often crucial in determining whether government efforts to assess and collect taxes are precluded by statutory time bars. In *Mulvania v. Commissioner*, 769 F.2d 1376 (9th Cir. 1985), the court ruled that a misaddressed notice that was never delivered to the taxpayer was invalid, even though his accountant received a courtesy copy; the taxpayer did not file a petition in the tax court within the period allowed for such action, and the IRS never re-sent the notice to the correct address. In contrast, in *United States v. Zolla*, 724 F.2d 808 (9th Cir. 1984), cert. denied, 469 U.S. 830 (1984), a notice mailed to the address listed on the taxpayer's most recent tax return was held valid, even though the taxpayer had moved and an IRS collection officer had tracked him down at his new address. In both cases, predictability of the rules was a paramount concern addressed by Judge Goodwin's opinions.

[5]480 F.2d 171 (9th Cir. 1973), aff'g 54 T.C. 493 (1970).

of 3.5 percent and made actuarial assumptions based on mortality data compiled by the Census Bureau decades earlier. The estate argued that the tables should not have been used to value the life estate in question, since the securities in the trust earned far greater than 3.5 percent annually, and human lifespans had increased in average duration since the IRS mortality tables were published. The court declined the invitation to toss the tables aside, holding that the tax court was justified in requiring their application despite their alleged variance from the actual features of the trust in question. High returns might not have lasted, and they could have been the result of manipulation of the trust's corpus by the trustees. And although the mortality assumptions in the IRS tables may have been outdated, the estate did not present expert testimony that might have proved them so. Thus, the court ruled, the valuation driven by the standardized tables must stand.

Once again, enhanced predictability was an appealing byproduct of the decision, but the court stopped short of adopting the IRS's position that the tables must invariably be employed "unless their use is highly unreasonable." In part, the court balked at this asserted principle because the government had so often violated it in other cases. "[T]he government itself is the party best able to create certainty in this area," Judge Goodwin's opinion remarked. "[G]overnment abstention from arguing for different standards in different cases depending upon the short-run effect upon the revenue would be helpful." Thus, the line drawn by the case was not as bright as it could have been, and the absence of such a line has caused other courts to struggle with the issue in more recent years.[6] Nonetheless, *Estate of Christ* did make important points about bureaucratic consistency,[7] as well as about the virtues of standardized valuation. (More recently, Congress and the IRS have added considerable clarity to this area, with

[6]See *Shackleford v. United States*, 262 F.3d 1028 (9th Cir. 2001) (annuity won as lottery prize should not be valued using tables for estate tax purposes because it was by its terms nonassignable); *O'Reilly v. Commissioner*, 973 F.2d 1403 (8th Cir.1992) (allowing departure from tables where assets underlying trusts were earning low rates of return).

[7]See also *United States v. Metro Construction Co.*, 602 F.2d 879 (9th Cir. 1979) (taxpayers are entitled to rely on published revenue procedures when Code and regulations are ambiguous).

The judge has also required taxpayers to be consistent, holding that they may not argue for tax consequences that differ from the forms that the taxpayers themselves have selected. See *Baxter v. Commissioner*, discussed infra part II (absent fraud, taxpayer could not claim that sale contract was in fact amendment to partnership agreement).

regularly updated actuarial tables, interest rates that fluctuate monthly with the debt markets, and regulations that contain double-edged standards for abandoning the tables in appropriate cases.)

The rule of *stare decisis* and the proper standard of review for the tax court's rulings on questions of law were both before the court in *Vukasovich, Inc. v. Commissioner*.[8] Taking up the standard of review first, Judge Goodwin's opinion acknowledged that prior Ninth Circuit cases sometimes recited special deference to the tax court on legal questions. But the judge squarely rejected those pronouncements, noting with characteristic candor,

> The frequent recitations of special deference are apparently mutations that this court has ignored when we disagree with the tax court. To the extent that expressions of deference in reviewing questions of law are harmless honorifics among fellow judges, they waste ink. To the extent that they sow confusion, they are best ignored.
>
> We do not suggest that tax court decisions on questions of law are not entitled to respectful review. The legal conclusions of all courts are entitled to respect. . . . However, . . . [l]egal conclusions are either right or wrong.

Turning to the question of law that was before it, the court reversed the lower court's conclusion that a series of payments among several unrelated companies did not amount to discharge-of-indebtedness income for one of them. The taxpayer had borrowed funds from a bank and used the proceeds to buy cattle from a third party, who also agreed to fatten the cattle for market. The seller guaranteed the taxpayer's bank debt. When the cattle were later sold on the market for less than the debt, the guarantor was called on to make good on its guaranty, and it paid the lender the difference between the sale proceeds and the debt. The guarantor then came against the taxpayer for the amount it had been required to pay on the guaranty, and the two compromised for less than the amount the guarantor had had to pay. The IRS argued that the difference between the taxpayer's payment and the amount of debt that the guarantor had covered was discharge-of-indebtedness income to the taxpayer.

[8]790 F.2d 1409 (9th Cir. 1986), aff'g in part, rev'g in part T.C. memo. no. 1984-611.

In the tax court, the IRS had run into an old nemesis: *Bowers v. Kerbaugh-Empire Co.*,[9] decided by the Supreme Court sixty years earlier. That case had held that discharge-of-indebtedness income was not present when the escaped-from debt was less than the taxpayer's loss from an underlying transaction—clearly the situation in *Vukasovich*. To hold for the government in the modern case, the Ninth Circuit would have to hold that *Kerbaugh-Empire* was no longer good law, even though it had never been expressly overruled by the high court.

In a well-reasoned opinion, *Vukasovich* held that subsequent Supreme Court precedent had implicitly disavowed *Kerbaugh-Empire*. Under the later cases, discharge-of-indebtedness income was concerned not so much with any freeing up of the debtor's assets as with a proper accounting for prior receipts of tax-free loan proceeds. In response to the taxpayer's argument that the court was bound by *Kerbaugh-Empire*, Judge Goodwin's opinion explained,

> [T]he Supreme Court has long held that "a later decision in conflict with prior ones [has] the effect to overrule them, whether mentioned and commented on or not." Following an obviously outdated Supreme Court decision gives effect to an old decision only at the cost of ignoring more recent decisions. It forces the Supreme Court to reverse lower court decisions following the older law, burdening both the Supreme Court and litigants. It also deprives the Supreme Court of the benefit of a contemporary decision on the merits by the Court of Appeals.
>
> We conclude that the courts of appeal should decide cases according to their reasoned view of the way [the] Supreme Court would decide the pending case today.

Vukasovich is a great decision on both of the issues it addresses. First, it cleared the air on the standard of review of tax court decisions. Multiple levels of scrutiny and deference, which may be appropriate when applying evolving constitutional doctrines, are out of place in reviewing lower court decisions on the tax laws. Moreover, as Judge Goodwin's opinion notes, differing standards of review are typically honored more in the breach than in the observance. Second, on the substantive question, the court's forthright rejection of *Kerbaugh-Empire* has provided a beacon of clarity that is sorely lacking in other circuits. As one set of commentators

[9]271 U.S. 170 (1926).

has described it, *Kerbaugh-Empire*'s "cryptic explanation set afloat several erroneous ideas leading to a confusing patchwork of rules and exceptions that dominates the area to this day."[10] Fortunately, taxpayers and revenue agents in the Ninth Circuit are free from this confusion, and the judge was able to achieve this while paying due respect to the various Supreme Court precedents.

Though perhaps concerned with less weighty matters, *Thatcher v. Commissioner*[11] also merits admiration. At issue was a thorny problem under then-current law: the effect of assumed liabilities on what would otherwise be the tax-free incorporation of an ongoing business. To understand the stakes of the game, a brief exegesis of corporate tax law is in order. Section 351 of the Code generally shields the formation of a corporation from taxation, even if the new company takes over debts previously owed by the shareholders. The shareholders ordinarily take a tax basis in their new stock equal to the amount of money and the basis of the property that they contributed to the new corporation; liabilities that the company takes over are generally accounted for by reducing the shareholder's stock basis by the amount of the debt. If the contributed money and basis of contributed property are less than the liabilities assumed, however, the shareholders are forced to recognize the difference as gain; this prevents the stock from having a negative basis.

What if the liability assumed is a trade account payable—a utility bill, an invoice for supplies, or some other, similar liability—whose payment would have triggered a deduction if the shareholder had paid it himself or herself? Should gain be taxed to the shareholder, or should the system take into account that the liability itself would have been deductible if paid? Back in 1976, there was no statutory answer to this question, and so it fell to the courts to decide it. Declining an invitation to accept the Second Circuit's views that payables were not "liabilities" in the statutory sense, but seeing the need to reverse the tax court's view that the gain should be recognized, the *Thatcher* court adopted the approach of Judge Cynthia Hall, then a judge of the tax court and later a colleague on the Ninth Circuit. Judge Hall had dissented from the tax court majority's holding in the case. She had argued that any gain on the incorporation should be offset, or

[10]Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, vol. 1, ¶7.1, 3d ed. (Boston, 1999).

[11]533 F.2d 1114 (9th Cir. 1976), aff'g in part, rev'g in part 61 T.C. 28 (1973).

"wash[ed]," by any accounts receivable that the shareholders contributed in the same transaction. Such a setoff, Judge Goodwin's opinion noted, was "realistic" and "consistent with the spirit of §351." Although the solution eventually adopted by Congress approached the issue from a different angle, it affirmed the basic holding of *Thatcher*. In any event, the opinion illustrates Judge Goodwin's signature blend of fidelity to the statutory language, and creativity and pragmatism in problem-solving.

II. IRON MAN

Those who support creation of a specialized national court of tax appeals lament that most of the time, generalist judges cannot get the complex technical details of the Code and regulations right. Judge Goodwin's work in the tax field either disproves this assertion or marks him as an exception to the rule. Just as the foregoing decisions demonstrate the judge's ability to hit the long ball, others confirm his ability to bat for average over a long career.[12]

In one of Goodwin's earliest tax opinions, written when he was a district judge, he addressed the proper application of section 1033, regarding "rollovers" of the proceeds of involuntary conversions of property. That provision allows taxpayers to elect not to recognize gain on condemnations of property if they use the proceeds to purchase replacement property within a specified period. For the taxpayer's convenience, Congress

[12]Like many federal judges, Judge Goodwin has capably handled many cases, both civil and criminal, involving tax shelters, tax evaders, and tax protestors. These cases have multiplied toward the later phases of his tenure. See, e.g., *Sacks v. Commissioner*, 82 F.3d 918 (9th Cir. 1996) (affirming negligence penalties in connection with tax shelter limited partnership); *Speck v. United States*, 59 F.3d 106 (9th Cir. 1995) (in criminal investigation into possible tax evasion by taxpayers, IRS use of circular letters to their current and former employees was appropriate); *Clapp v. Commissioner*, 875 F.2d 1396 (9th Cir. 1989) (notices of deficiency were valid in tax shelter case involving multiple foreign trusts; stipulated judgments did not preclude taxpayer challenge to tax court jurisdiction); *United States v. Brodie*, 858 F.2d 492 (9th Cir. 1988) (criminal convictions affirmed for willful failure to file tax returns under phony tax shelter scheme); *United States v. Solomon*, 825 F.2d 1292 (9th Cir. 1987), cert. denied, 484 U.S. 1046 (1988) (affirming convictions for various tax crimes in connection with tax shelter scheme involving patents; remanding one defendant for re-sentencing); *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985) (reversing convictions of tax shelter defendants due to possible jury bias).

One of Judge Goodwin's earliest tax opinions occurred while he was serving on the U.S. District Court for Oregon. In this group photo of the district court, he stands in the back row, second from the right.

has provided that the replacement property can consist of controlling stock of a company that owns a similar asset. In *Harsh Investment Corp. v. United States*,[13] the question was how to compute the proceeds of the condemnation of a housing project and the amount reinvested in replacement property, when the taxpayer acquired stock as the replacement.

The court held that the proceeds of the condemnation should include not only the cash the taxpayer received for its equity in the condemned property, but also the mortgage from which it was released as part of the transaction. In so holding, the court correctly adhered to the Supreme Court's decision in *Crane v. Commissioner*,[14] and wisely declined to follow an earlier decision of the Ninth Circuit[15] holding that the mortgage could be ignored. Although the *Harsh* court couched its decision as distinguishing the earlier case, it came as close to

[13]323 F. Supp. 409 (D. Or. 1970).

[14]331 U.S. 1 (1947).

[15]*Commissioner v. Babcock*, 259 F.2d 689 (9th Cir. 1958).

overruling it as a district court decision could come. Crucial to its reasoning was the fact that, as is routine under *Crane*, the taxpayer had counted the mortgage as part of its cost basis in calculating depreciation deductions on the housing project.

As to the amount considered reinvested, the court in *Harsh* allowed only the amount the taxpayer paid in cash, plus the amount of a purchase money note, for the acquired stock. It rejected the taxpayer's argument that the amount of the mortgage on the property inside the acquired company should also be considered part of the cost of reinvestment. The taxpayer did not assume that mortgage, Judge Goodwin reasoned, and so it was not entitled to count it as part of the cost of replacing the condemned asset. The result was complete denial of the taxpayer's refund claim.

Baxter v. Commissioner[16] was decided shortly thereafter when, as a district judge, Goodwin sat by designation on a Ninth Circuit panel. His opinion tackled a particularly thorny problem: distinguishing a partnership from other types of economic relationships for tax purposes. Two taxpayers, Proby and Baxter, were before the court. Proby was a salesman who operated under a franchise with a manufacturer of traffic signals. As his interests began to move in other directions, Proby hired Baxter to take over the sales work, although Proby kept the contract with the manufacturer in his own name. After a short time, the two became joint venturers, but apparently without the franchisor's knowledge. Two years later, Proby and Baxter signed a "sale contract" under which Proby purported to sell the franchise to Baxter for one-third of future commissions. When the commissions came in—and at all times they continued to be paid to Proby—Proby forwarded two-thirds of them to Baxter.

The tax question was whether a partnership existed after the sale, or whether the sale terminated it. If a partnership was still present, Proby would have ordinary income of one-third of the franchise payments; if not, his income was capital gain. If the partnership still existed, Baxter would be taxed on only two-thirds of the franchise income; if not, he would be taxed on all of it. The court correctly held that the sale agreement terminated any partnership. Judge Goodwin's opinion observed, "Baxter, in effect, paid the purchase price to Proby out of the receipts of the franchise business as much as if Baxter had bought log trucks from Proby and had agreed to pay for them out of their gross earnings from hauling."

Back on the trial bench a short time later, the judge decided *Rookard v. United States*,[17] in which a taxpayer sought deduc-

[16]433 F.2d 757 (9th Cir. 1970), aff'g T.C. memo. no. 1969-87.

[17]330 F. Supp. 722 (D. Or. 1971).

tions against ordinary income for worthless debt and stock that he held in a closely held corporation that sold vehicles. As to the debt, the question was whether the taxpayer had made the loans primarily to protect his own individual business; if not, the loss was a capital loss, entitled only to second-class status. The court held that the taxpayer was merely protecting his investment in the motor company, since his primary employment was with a logging company. As to the worthless stock, Judge Goodwin held that it too was a capital loss, because it was not issued in accordance with the then-prevailing procedural requirements for "section 1244 stock," whose worthlessness would have qualified for an ordinary deduction. On both issues, the opinion conveyed a thorough understanding of the applicable law with a minimum of words. (One can almost hear him admonishing the law clerk to "leave out the broccoli," which was understood in chambers to mean omitting the adverbs.)

A few months later, again sitting by designation on the Ninth Circuit, Judge Goodwin wrote the opinion in *Evergreen Cemetery Ass'n v. United States*.[18] The question presented was whether a "perpetual care" investment trust fund set up by a for-profit cemetery operation could be treated as a not-for-profit "cemetery company," exempt from tax under section 501(c) of the Code. Writing for a unanimous panel, Judge Goodwin made the issue look easy. He summed up the court's conclusion in one pithy passage: "To call an investment company a 'cemetery company' would be similar to calling a mortgage banker a home-builder. For the purposes of exemption from taxation, the character of an organization is determined more by what it does than by what it calls itself."

Cox v. United States[19] saw the Ninth Circuit wrestle with the proper calculation of a casualty loss deduction on a couple's income tax return. The oil-producing potential of the couple's property was ruined when water suddenly and unexpectedly intruded into the layer of oil beneath the surface. The question was whether the couple could deduct any of the resulting loss in value. The government, and the district court on summary judgment, had ruled that they could not, for two reasons: (1) the couple was not "out of pocket" for any corrective actions, as none were possible, and (2) the loss in value

[18]444 F.2d 1232 (9th Cir. 1971), aff'g 302 F. Supp. 720 (W.D. Wash. 1969), cert. denied sub nom. *Washington Trust Bank v. United States*, 404 U.S. 1059 (1972).

[19]537 F.2d 1066 (9th Cir. 1976), vacating and remanding 371 F. Supp. 1257 (N.D. Cal. 1973).

was less than the previous unrealized appreciation on the property. Judge Goodwin's opinion reversed on both points, accurately pointing out that there was no authority for either proposition. In fact, the regulations made fairly clear that out-of-pocket expenses were not a prerequisite to the deduction, and that a diminution in value could be deducted so long as it was less than the taxpayers' cost basis.

Two of the judge's cases involved application of the Supreme Court's definition of a tax-free "gift" for income tax purposes.[20] In *Allen v. United States*,[21] a split panel affirmed a district court finding that the taxpayer's transfer of timberland to a California city possessed the "detached and disinterested generosity" that the Supreme Court said was the hallmark of a gift. Thus, the transfer was deductible as a charitable contribution. By making the transfer, the taxpayer secured the city's approval of a subdivision plan for his adjoining land. Writing for the majority, Judge Goodwin noted that there was conflicting evidence on whether the taxpayer's dominant motive was generosity or self-interest, but that the lower court's resolution of the issue must stand. He wrote,

> True, as the government argues, there is an element of quid pro quo in the city's approval of a desired cluster-zoning plan upon the dedication of the nine acres of redwoods. But the trial court found that the dominant motive of the landowners was to preserve the redwoods, and that the best way to do so was to give the land to the city. Circumstantial evidence tended to persuade the trier both ways. We are not at liberty to substitute our view of the subjective meaning of this evidence for that of the trier unless we can say that the trier's view was clearly erroneous. We cannot.

In a later case, however, the transferor's motive could be resolved on summary judgment. *Greisen v. United States*[22] involved the taxability of the Alaska state government's payments of "permanent fund dividends" to its residents. Here, the Goodwin opinion said the key question was one of law, not fact.

[20]See *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

[21]541 F.2d 786 (9th Cir. 1976), aff'g in part, vacating in part N.D. Cal. (not reported).

[22]831 F.2d 916 (9th Cir. 1987), aff'g 635 F. Supp. 481 (D. Alaska 1986), cert. denied sub nom. *Beattie v. United States*, 485 U.S. 1006 (1988).

The taxpayers argued alternatively that the dividends were not "income" within the scope of the Sixteenth Amendment, and that they were gifts as defined in the income tax statute. The court disagreed. It turned aside the constitutional argument, which the taxpayer based on the notion that Alaska citizens owned the state's natural resources. "The dividends represent interest from the Permanent Fund, which consists of a portion of all mineral lease payments made to the state," the court observed. "Even if the citizens of Alaska owned the principal of the fund, the interest on that principal would constitute gross income and thus would be subject to taxation."

As for the proposition that the dividends were gifts in the statutory sense, the court examined the legislative history of the 1980 state statute authorizing the distributions. From it, the court concluded that the dividends were paid "out of a sense of moral or legal duty," either real or perceived. Because of this motivation, the payments could not be treated as gifts, and thus were taxable as income.

Allen and *Greisen* may appear contradictory at first, but on reflection they are perfectly consistent with each other and with controlling authority. In one a gift was found, as a matter of fact; in the other, no gift was found, as a matter of law. However, the transferors were very different: an individual in the former case and a state government in the latter. While the intent of an individual is best decided by a trial court that typically gets to look that person in the eye, the intent of a legislature can be gleaned only from legal documents, which one court is probably as capable as another of reading and interpreting.

In sum, although the tax *cognoscenti* may attempt to make their area of expertise seem too mysterious for a common law jurist, Judge Goodwin's opinions over more than three decades show that, in capable hands, it is not. In his opinions, taxpayers and the government alike have had their issues resolved not only with analytical clarity, but also with a hardheaded pragmatism that a court of specialized tax technicians might very well lack.

III. "DESPITE THE INCONVENIENCE"

The most difficult tax cases in which Judge Goodwin has authored the opinions of the court are also the most interest-

ing of the lot. Two of these[23] involved the same taxpayer, Walt Disney Productions, and the same issue—whether its master film negatives were "tangible property" eligible for the investment tax credit (since repealed, but at this writing rumored to be on the comeback trail). In both rounds of litigation, the court held that they were, and in the process it invalidated a Treasury regulation to the contrary. Judge Goodwin's first opinion explained,

> In attributing all of Disney's labor and production costs of the negatives to the copyrighted print, the regulation defeats the purpose of the credit. For example, the same regulation, if applied to a production machine in an automobile factory, would deny the investment credit on all but the material costs of a machine developed and patented for use in the manufacturing plant although the amount paid to the inventor for the idea of the machine was insignificant and the bulk of the costs of the machine were the ordinary labor and engineering costs of its production. Disney argues that its film negatives, like the hypothetical production machines, are standardized units of depreciable property which Disney uses to produce other products, the positive prints, and that the attribution of all the value of the film to the copyright, like the attribution of all the value of a machine used in production to a patent eventually procured on it, is unwarranted. We agree.

In the second case, the judge put it even more succinctly:

> Most of the value of the exhibition prints rests on the right of exclusive exploitation protected by copyright, but that fact does not render the capital asset (the master negatives) an intangible. A machine which stamps out patented products for sale is tangible. The character of the acquisition costs of that machine is not affected by the character of the end product, even if

[23]*Walt Disney Productions v. United States*, 549 F.2d 576 (9th Cir. 1976, as amended 1977), aff'g 36 AFTR2d 6327, 75-2 U.S. Tax Cas. (CCH) ¶9824 (C.D. Cal. 1975) (not officially reported); *Walt Disney Productions v. United States*, 480 F.2d 66 (9th Cir. 1973), aff'g 327 F. Supp. 189 (C.D. Cal. 1971), cert. denied, 415 U.S. 934 (1974).

> the value of the entire system is dependent on the patent, i.e., an intangible.[24]

Realty Loan Corp. v. Commissioner[25] presented the age-old tax conundrum of whether a particular bundle of rights was "property" or "income." The taxpayer, a mortgage servicing company, sold its business to a purchaser who agreed to make a series of payments over a number of years. The IRS denied capital gain treatment and installment reporting of the income under section 453, on the ground that the sale contract was an anticipatory assignment of income. The court rejected this position, allowing both tax benefits. Judge Goodwin's opinion declared,

> The Commissioner's brief suggests that his actual concern is with the installment sale of unaccrued contract rights. However, the Commissioner has not shown how the installment treatment of the sale of such rights could be an abuse of the installment-sale provisions of the Code. Allowing installment-sale treatment of unaccrued contract rights together with other kinds of property is consistent with the purpose of §453's predecessor as stated by the Supreme Court: the avoidance of the hardship of immediate taxation of unreceived and unreceivable sums, and the avoidance of the difficulty of valuation of installment obligations. The reference to the "basis" of the property in §453 does not indicate otherwise. Many items, such as copyrights or patents, may have no "basis" but are nonetheless "personal property" eligible for installment-sale treatment.

Tax may not be rocket science, but it sometimes touches on that discipline. In *Jones v. Commissioner*,[26] the Ninth Circuit ruled that a NASA scientist received a tax-free prize, rather than taxable compensation for personal services, when he received a $15,000 award from NASA for "the totality of his achievements" over a 40-year career with that agency. The IRS

[24]For the judge's interpretation of the term "recycling equipment" under the special investment tax credit once available for "energy property," see *Pepcol Manufacturing Co. v. Commissioner*, 13 F.3d 355 (10th Cir. 1993) (Goodwin, J., by designation; 2-1 decision) (process of turning discarded beef bones into coating for photographic papers was not "recycling"; regulation that precluded credit for animal waste processing equipment was valid).

[25]478 F.2d 1049 (9th Cir. 1973), aff'g 54 T.C. 1083 (1970).

[26]743 F.2d 1429 (9th Cir. 1984), rev'g 79 T.C. 1008 (1982).

insisted that the award was simply a bonus, and it pointed to a longstanding regulation providing that a payment by an employer to an employee was not excludible from income if it recognized an employment-connected achievement. Judge Goodwin's opinion declared the regulation invalid, noting,

> The government argues that its bright-line rule falls well within the range of permissible statutory interpretation. Such a reading does satisfy the lawyer's craving for a bright-line rule. But bureaucratic convenience here is inconsistent with the purpose of the statute. We decline to uphold [the regulation] as applied in this case. As applied here, the bright-line rule devours the statute it was intended to interpret. . . .
>
> When an employer makes an award out of a desire to honor, or to show respect or admiration for, an employee, and the award is not compensation for some recent benefit to the employer, the award should be excluded under §74 if it otherwise qualifies for exclusion. When the facts suggest that the employer's purpose in making the award was to compensate the employee, however, the award should be included in the employee's income. This approach may make a little more work for the commissioner and the courts, but their job is to decide cases despite the inconvenience of doing so.

In the end, Jones's award was held to be a tax-free prize. (Congress subsequently narrowed the exclusion for prizes so drastically that it has effectively repealed it.)

The exclusion from income of damages received on account of personal injuries has proved enigmatic over the years, to say the least. A split panel of the court provided some much-needed certainty in this area in *Hawkins v. United States*,[27] which held that receipt of punitive damages was never eligible for the exclusion, under section 104(a)(2), because the purpose of such awards is to punish the defendant, and not to compensate the plaintiff. At issue were punitive damages that an Arizona couple had been awarded against an insurance company after the insurer was found to have denied their auto insurance claim in bad faith. The claim arose out of an accident in which the taxpayers' car had been "totaled." Judge Goodwin's majority opinion noted,

[27]30 F.3d 1077 (9th Cir. 1994), rev'g 71 AFTR2d 2123, 93-1 U.S. Tax Cas. (CCH) ¶50,208 (D. Ariz. Feb. 16, 1993) (not officially reported), cert. denied, 515 U.S. 1141 (1995).

> The Hawkinses do not contend that their punitive award has any compensatory purpose whatsoever. They concede that the $15,000 compensatory damage award completely covers their actual injuries, including the two-week deprivation of the family car, their out-of-pocket losses totalling less than $1,000, and their emotional distress. The additional $3.5 million in punitives were awarded not because the Hawkinses had suffered severe injuries but because Allstate's conduct had injured numerous other people.
>
> Whatever combination of policy or administrative convenience justifies giving the entire proceeds of Allstate's alleged bad faith to the Hawkinses—rather than distributing it among Allstate's other victims or donating it to the most deserving charity—the rationale (if any) has nothing to do with restoration of lost capital. The $3.5 million does not compensate the Hawkinses for any injury, economic, intangible or otherwise. It is a pure windfall, as much an accession to wealth as a successful lottery ticket or a game show winnings. The Hawkinses have not been made whole; they have won the litigation lottery.[28]

Although this holding and rationale have been approved by a subsequent amendment to the Code, the same panel's take on the taxability of compensatory damages awarded in age discrimination cases was nullified. In the latter case,

[28]The taxpayers in *Hawkins* sought to exclude their punitive damages on the additional ground that a subsequent amendment to the Code clearly indicated that the damages should not be taxed. The later amendment (since modified) held that punitive damages were taxable in cases in which no physical injury was involved, which the Hawkinses read as meaning that such damages *were* excludible in all pre-existing cases involving personal injuries such as emotional distress. Judge Goodwin's opinion rejected this argument, noting that "an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite." Quoting *United States v. Price*, 361 U.S. 304, 313 (1961), it added that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." See also *Vukasovich, Inc. v. Commissioner*, discussed supra part I (recodification of entire Code in 1954 did not signal congressional endorsement of pre-existing Supreme Court decision on taxation of discharge of indebtedness). Just such an inference was accepted, however, in the first Walt Disney case, discussed supra; there, the court held that the legislative history of 1971 amendments to certain investment tax credit provisions provided guidance on the meaning of other, unamended provisions relating to that credit. "[W]hile subsequent legislative history normally is not of controlling weight," the *Disney* court noted, "it should not be ignored when it is clearly relevant."

Schmitz v. Commissioner,[29] the panel ruled unanimously that damages received under the Age Discrimination in Employment Act (ADEA) were based on "tort type rights," as required by the prevailing regulations. The Supreme Court reversed, holding that the ADEA regime was not tort-like, and that liquidated damages under that statute were meant to be punitive.[30] The congressional follow-up to these cases short-circuited the *Schmitz* issue; now a physical injury or sickness is required in order for the tax exclusion to apply. As noted earlier, however, Congress also adopted Judge Goodwin's stance on punitive damages—even in cases involving physical injuries, they are taxable today.

When someone's motivation drives the tax consequences of a transaction, trouble usually ensues. So it was in *Folkman v. United States,*[31] involving alleged business travel expenses for two Pan American World Airways navigators who also served in the National Guard. Pan Am based the two men in San Francisco and New York, respectively, but they and their families established their homes in Reno, so that the two could fly jets as pilots for the Nevada Air National Guard. As soon as each finished his flights for Pan Am, he would immediately head back to Reno for the dual purposes of being with his family and getting in his pilot time with the National Guard. Each deducted the costs of his round trips to and from Reno to his Pan Am duty station. One also deducted the costs of meals and lodging in New York; the other deducted the costs of meals in Reno. The district judge ruled that the round trips were deductible, and that meals and lodging at the airline duty posts of San Francisco and New York would also be deductible if properly substantiated. However, the trial court held that only one taxpayer's lodging expenses, in San Francisco, were substantiated.

The Ninth Circuit was first called on to decide where the taxpayers' "homes" were—a crucial question, since only travel expenses incurred while "away from home in pursuit of a trade or business" are deductible. The court quite correctly reversed the district court, and held that the Pan Am duty stations were the taxpayers' "homes" in the tax sense, since they spent far more working days there than in Reno and earned far more income from their Pan Am jobs than from

[29]34 F.3d 790 (9th Cir. 1994), aff'g T.C. Order, vacated, 515 U.S. 1139 (1995) (mem.).

[30]See *Commissioner v. Schleier,* 515 U.S. 323 (1995).

[31]615 F.2d 493 (9th Cir. 1980), vacating and remanding 433 F. Supp. 1022 (D. Nev. 1977).

their National Guard gigs. This ruled out deductions for meals and lodging in San Francisco and New York.

From this conclusion, the government also argued that no deduction was allowable for any of the round trips or any expenses in Reno, on the ground that the trips to that city were simply commuting by the men, enabling them to be with their families. The court of appeals disagreed. It reasoned that the taxpayers' trips to Reno had a sufficient business purpose to support travel expense deductions. Judge Goodwin's opinion declared,

> While Folkman and Dehne might have returned to their family homes after their flights, but for a business exigency—the Nevada Air National Guard's residency requirement—those homes would have been located near their airline duty posts, rather than in Reno. The district court found that both Folkman and Dehne moved to Reno from the San Francisco Bay area "because they were required to do so in order to obtain and retain employment as pilots with the Nevada Air National Guard" and that "(r)esidences in Reno, Nevada were established for sound business reasons and were not dictated by personal desire or fancy."
>
> If the Air National Guard imposed no residency requirement and the taxpayers' families lived in the duty post cities, instead of Reno, travel expenses on those occasions when the taxpayers served with the National Guard would have been deductible. To deny identical deductions when, as here, business exigencies compelled the taxpayers' families to live in the secondary employment locale, would be both inconsistent and unjust.

The court affirmed the deductibility of the airfares, except for those Reno trips during which the taxpayers did not fly for the military. It remanded the case for further findings on which trips fit into that nondeductible category.

The holding in *Folkman* seems consistent with long-established regulations in the area, which provide that the availability of business deductions for travel hinges on whether the away-from-home trip "is related primarily to" business, rather than personal, activities. Most of the journeys back to Reno were decidedly for both purposes, but the court can be read as having held that the primary cause, due to the guard's residency requirement, was business necessity rather than personal preference. Although this characterization is perhaps a stretch, one should keep in mind that the court

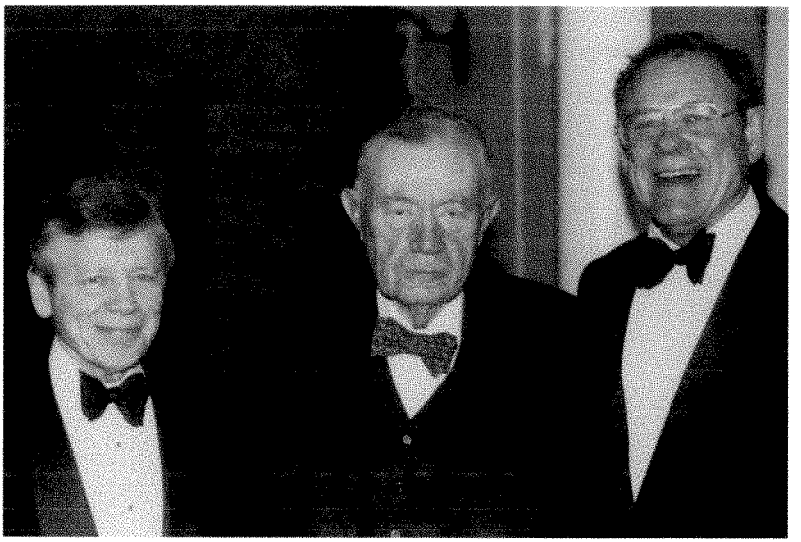
allowed only the air fares to be deducted; the San Francisco lodging expenses that the district court had allowed were disallowed on appeal, and the taxpayers did not appeal the lower court's disallowance of the Reno meals. If meal and lodging expenses in Reno had been on the table, the case would have been more difficult, and the Ninth Circuit's analysis might not have been the same.

Perhaps the nastiest tax thicket into which Judge Goodwin has been forced to march was the question presented in *Leopold v. United States*.[32] At issue was whether the contents of *inter vivos* trusts established by a wealthy man should be included in his gross estate for estate tax purposes upon his death, under the "string" provisions of sections 2036 and 2038. The decedent had provided that the income from the trusts was to be paid to his two daughters by his first marriage, except that while the daughters were under the age of twenty-one, the trustees could accumulate the income, in their "uncontrolled discretion . . . for the support, education, maintenance and general welfare" of the girls until they reached that age. The decedent was one of the two trustees.

As is typical in estate tax cases, the federal tax consequences depended largely on the rights of the parties under state law. The court found that the trust "requires the trustees to maintain the daughters in their accustomed way of life," and that this limitation on their discretion eliminated the decedent's power over part of the income for purposes of sections 2036 and 2038. Judge Goodwin's opinion concluded that the corpora of the trusts should be included, but that from the values of the trust assets should be subtracted "the actuarial value of that segment of the future income stream which the decedent would be obligated to distribute currently to his daughters." How that stream would be computed was not spelled out, and the case apparently settled on remand before further explanation was forthcoming, but the Ninth Circuit opinion dictated an acceptable compromise solution, at least on a theoretical plane.[33]

[32]510 F.2d 617 (9th Cir. 1974, as amended 1975), aff'g in part and rev'g in part 29 AFTR2d 1518, 72-1 U.S. Tax Cas. (CCH) ¶12,837 (C.D. Cal. 1972) (not officially reported).

[33]A similar outcome can be found in *Lewis v. Commissioner*, 560 F.2d 973 (9th Cir. 1977). There a business executive established that he was entitled to deductions for use of his personal residence for business entertainment on behalf of his employer. Judge Goodwin's opinion ruled, however, that no proper allocation had been performed between use of the residence for business and personal purposes; it remanded the case to the tax court for further findings relating to this allocation. (This issue was subsequently eliminated, or substantially reduced in importance, by enactment of I.R.C. §280A(c)(1), which generally prohibits deductions of this nature.)



Chief Judges Browning, Chambers, and Goodwin.

To sum up, anyone who thinks that a federal appeals judge has an easy job must never have held that job. As with almost any area of law, the federal tax law can present some extremely tricky issues; as to some of them, no solution a court can reach will seem entirely satisfactory or beyond dispute. When confronted with such issues, Judge Goodwin has discharged his duties with the greatest intellectual integrity, and with implicit acknowledgment that matters are not always cut and dried. What is more, his resolution of the difficult dilemmas has most often been the right one.

IV. GREAT DEBATES

No one bats 1.000, and among the Goodwin tax "opera," some controversial opinions can be found. At the top of this short list is the judge's "shot heard 'round the world": *Starker v. United States*.[34] The facts of the case have been learned by a generation of law and accounting students: T.J. Starker, a Corvallis, Oregon, timber baron, had highly appreciated

[34]602 F.2d 1341 (9th Cir 1979), aff'g in part, rev'g in part 432 F. Supp. 864 (D. Or. 1977).

timberland that he wished to part with in a tax-free "like kind" exchange under section 1031. Crown Zellerbach (Crown) was eager to play the exchange partner, and it wanted access to the taxpayer's land immediately, but the taxpayer had not yet selected the property he would receive in the exchange. Starker had no interest in any property Crown owned, but under the Ninth Circuit's decision in *Alderson v. Commissioner*,[35] this was not fatal to nonrecognition of gain under section 1031: Crown could buy replacement property of Starker's choosing and convey it to him in the "like kind" swap. The problem was Crown's desire to get title to, and possession of, the taxpayer's land immediately, while the taxpayer's replacement property had not yet even been identified.

The solution the parties decided to try was to have Starker convey his property immediately, in exchange for Crown's promise to purchase replacement property and deed it to Starker as he identified it over the following five years. If at the end of the five years, no replacement property had been conveyed to Starker, he would be entitled to cash equal to the value of the property he originally conveyed, net of the value of the property he subsequently received. Every year in the interim period, Starker would also earn a "growth factor" equal to 6 percent per year on his outstanding balance under the contract. The "growth factor" would be satisfied either in "like kind" property or in cash at the end of the executory period.

Within two years, the taxpayer had identified "like kind" replacement property, and, pursuant to the contract, Crown had indeed purchased it and conveyed it as Starker specified. The taxpayer took the position that the transactions constituted an exchange under section 1031. The IRS disagreed, however, its principal assertion being that since the title transfers were not simultaneous, they did not constitute the requisite "exchange" under that Code section.

The case was difficult not only on a substantive plane, but also on a procedural one. Joining with T.J. Starker in the transactions with Crown were his son and daughter-in-law. They too sought nonrecognition treatment, and they too were denied it by the IRS. The children brought a refund suit over the issue in the federal district court, and won.[36] But when their father's related (and much larger) refund case was heard by the same district judge, Gus Solomon, two years later, he

[35]317 F.2d 790 (9th Cir. 1963).

[36]35 AFTR2d 1550, 75-1 U.S. Tax Cas. (CCH) ¶8443 (D. Or. 1975) (Solomon, J.; not officially reported).

changed his mind and ruled for the government. Thus, the Ninth Circuit was called upon to make law on collateral estoppel as well as on the definition of an "exchange" for purposes of section 1031.

The appeals court ruled that the government would have been estopped from trying to get the district judge to change his mind on the father's transactions, except that his case differed from that of his offspring in a couple of respects. First, in specifying the replacement property, unlike his son and daughter-in-law, he requested and got from Crown a mere contract right to purchase one parcel, rather than title to it. Second, also unlike his son and daughter-in-law, he had title to two of his replacement properties placed directly in the name of a third party (his daughter). This was enough to prevent collateral estoppel as to those three incoming properties, and so the appeal of the substantive issue was still alive.

Turning to that issue, the Ninth Circuit held that the transactions generally qualified as an "exchange." The court rejected the government's argument that simultaneity of transfers was required. Discussing a handful of older cases, the court noted that no decision had ever imposed this requirement and that in some of the cases, there had been the possibility, right up until the closing of the exchange, that the taxpayer would receive cash instead of property. In response to the government's contention that the Code required Starker to receive real property, not just a contract right, at the time he transferred title to Crown, Judge Goodwin's opinion declared,

> [T]he government offers the explanation that a contract right to land is a "chose in action," and thus personal property instead of real property. This is true, but the short answer to this statement is that title to real property, like a contract right to purchase real property, is nothing more than a bundle of potential causes of action: for trespass, to quiet title, for interference with quiet enjoyment, and so on. The bundle of rights associated with ownership is obviously not excluded from section 1031; a contractual right to assume the rights of ownership should not, we believe, be treated as any different than the ownership rights themselves. Even if the contract right includes the possibility of the taxpayer receiving something other than ownership of like-kind property, we hold that it is still of a like kind with ownership for tax purposes when the taxpayer prefers property to cash before and throughout the executory period, and only like-kind property is ultimately received.

> The metaphysical discussion in the briefs and authorities about whether the "steps" of the transactions should be "collapsed," and the truism that "substance" should prevail over "form," are not helpful to the resolution of this case. At best, these words describe results, not reasons. A proper decision can be reached only by considering the purposes of the statute and analyzing its application to particular facts under existing precedent. Here, the statute's purposes are somewhat cloudy, and the precedents are not easy to reconcile. But the weight of authority leans in T.J. Starker's favor, and we conclude that the district court was right in *Starker I*, and wrong in *Starker II*. Thus, on the merits, the transfer of the timberland to Crown triggered a like-kind exchange. . . .

But the properties that Starker had had transferred directly to his daughter did not qualify, including one that he rented from her for use as his principal residence. These, the court concluded, did trigger taxable gain, and the question was the proper timing of that income. The court, mindful of the advantages of tax deferral, ruled that the gain must be recognized in the year in which the taxpayer conveyed his property, not the later year in which the offending properties were transferred back. (As for the "growth factor," it was treated, quite rightly, as taxable interest income.)

With a long-term contract such as Starker's, the distinct possibility existed that by the time it became clear that no qualified exchange had taken place, the statute of limitations could have run on the taxable year in which the taxpayer transferred his or her property to the exchange partner. Since the Ninth Circuit was ruling that the gain would be recognized in that earlier taxable year, it made it possible for the gain to escape taxation entirely, due to the running of the statute. To this concern, Judge Goodwin's opinion responded,

> We realize that this decision leaves the treatment of an alleged exchange open until the eventual receipt of consideration by the taxpayer. Some administrative difficulties may surface as a result. Our role, however, is not necessarily to facilitate administration. It is to divine the meaning of the statute in a manner as consistent as possible with the intent of Congress and the prior holdings of the courts. If our holding today adds a degree of uncertainty to this area, Congress can clarify its meaning.

Here was a conclusive resolution of all of the issues presented. But while taxpayers hailed *Starker*, some commentators were not so convinced of its correctness. Perhaps the most cogent criticism was a point not squarely made in the government's brief: The taxpayer may have begun and ended the transaction with an investment in real estate, but during the executory period, while he was shopping for replacement property, he held the economic opposite of such an investment. While Starker searched for new parcels, he was holding a "balance" of "exchange value credits" under his contract with Crown that was expressed in dollars, not acreage. Thus, during that period, if the value of real estate had fallen, it would have been of no concern to Starker, as it would have been to an owner of real property. Amidst all the huffing and puffing about simultaneity of deed transfers and the applicability of the step transaction "doctrine," this important economic reality seems to have been overlooked.

Additionally, some found irony in the *Starker* court's emphasis on the fact that the taxpayer "preferred" to receive "like kind" property rather than cash. Of course, scoffed commentators—the taxpayer intended to pay no tax. Should that fact have worked so greatly in his favor?

The "administrative difficulties" alluded to by the court—particularly the problem of an expiring statute of limitations—were also cited as a weakness of the decision. But these difficulties were very short-lived. In 1980, Congress amended the installment sales provisions of section 453 in such a way as to reverse *Starker*'s holding on timing. At least in cases in which installment reporting was available, any gain recognized on account of receipt of money or non-"like kind" property in the deferred transaction would be reportable in the year the taxpayer received it, not in the earlier year in which the taxpayer transferred his or her property.

Moreover, in 1984, Congress took Judge Goodwin up on his suggestion and tightened the requirements for a successful deferred exchange. Under the revisions, nonrecognition for a deferred exchange is available only if (1) the replacement property is identified within forty-five days after the taxpayer conveys title to the exchange partner, and (2) the transaction is closed within 180 days after that conveyance. Although these changes have cut back the potentially wide sweep of the *Starker* decision, Congress, through the amendments, has affirmed the opinion's basic soundness while curing any remaining administrative problems.

The rest is history. "Like-kind" exchanges have become a big business, with scores of "exchange intermediaries" cropping up all over the country. (One such company is named

Starker Services.) There is now a "Society of Exchange Counselors." Law school graduates find jobs as "section 1031 facilitators." Elaborate regulations detail the requirements not only for *Starker* transactions but for "reverse *Starkers*" as well. Whatever the merits and demerits of Judge Goodwin's opinion, it certainly has served as a significant stimulus to the economy. (Legend has it that the decision also made for some interesting conversations between Judges Solomon and Goodwin over lunch and at other social occasions for a number of years after it was decided.)

Another decision that raised a few eyebrows was *Estate of Ellingson v. Commissioner*,[37] involving the marital deduction under the estate tax. A decedent's estate sought the deduction for a trust that went into effect on the decedent's death. The trust provided that its "entire net income" was to be paid to his surviving spouse for her life, with the remainder to pass to others on her death. The deceased husband's estate made an election to claim a deduction for the sizeable corpus of the trust, as "qualified terminable interest property"—a tax term of art universally referred to by the cutesy acronym QTIP. The election and the deduction eliminated any estate tax on the trust until the future death of the widow.

The IRS challenged the deduction, citing a provision of the trust instrument whereby the trustee could force accumulation of any income that "exceed[s] the amount which the Trustee deems to be necessary for . . . [the surviving spouse's] needs, best interests and welfare." This, the government contended, violated a key requirement for QTIP status—that the spouse have an unqualified, lifelong right to all the income from the QTIP property, payable no less frequently than annually. Although the surviving spouse was co-trustee with her son, and thus could have vetoed any accumulation, there was no guarantee that she would remain a trustee for the rest of her life, and so the question was whether she truly had the unqualified right to all the income for life in the face of the trust's accumulation provision.

As in *Leopold*, the issue boiled down to the meaning of the trust provisions under state law—here, Arizona—and in interpreting state law, the court allowed Ellingson's trust to bootstrap itself into QTIP qualification. The trust document expressly set forth the settlor's intent that the trust qualify under the QTIP rules (although it left it up to the trustee whether to make the statutory election to have it treated as a QTIP trust). And since a power to accumulate income would

[37]964 F.2d 959 (9th Cir. 1992), rev'g 96 T.C. 760 (1991).

ruin QTIP qualification, Judge Goodwin's opinion reasoned, the settlor must have intended that the power not be exercisable, at least if the QTIP election was made. Following that intent, the accumulation power was declared a nullity under state law, and thus under estate tax law as well. The QTIP election and the marital deduction were therefore allowed.

Some critics have not been kind to this decision. The opinion refers twice to the fact that loss of the deduction would have forced the family to sell the farm to pay the estate tax, and some have pointed out that such equitable considerations are irrelevant when a taxing statute is at issue. (In response, one might note that the judge is not overly reluctant to tax widows when he finds that the statute requires it.[38])

Another sore spot for some reviewers of *Ellingson* was the court's analysis of the marital trust's provisions. Judge Goodwin's explanation hearkens back to the sometimes-derided intent focus that bailed out the taxpayer in *Starker:* The taxpayer's intent to pay no tax insured that his estate did not in fact have to pay any.

In fairness to the *Ellingson* court, however, its focus on how the trust agreement would be interpreted by the highest court of Arizona was clearly correct. It is well established that one needs to hypothesize what would have happened had a trustee sought to accumulate income over the widow's objection. With the trust having "marital deduction" written all over it, and by implication the QTIP election and its accompanying mandatory distribution rules, would the Arizona Supreme Court have allowed the trustee to deprive Mrs. Ellingson of her annual income stream? Unless one thinks so, one must agree with Judge Goodwin on the federal estate tax question.

Whatever the critics may say about some of Judge Goodwin's tax opinions, they cannot ever accuse him of being timid, or of presenting the facts or issues in an obfuscatory manner. Neither the litigants in the cases nor the masses who have been affected by their outcomes have ever been left in doubt as to what was being decided, or how. Moreover, cases such as *Starker* and *Ellingson* showcase a keen intellect, seeking to arrive at a just and principled result in line with the Code and the precedents that have interpreted it. Even if one disagrees with the results, one cannot fault the character or quality of the process. (Of course, strong arguments are still being made that the results in the judge's more controversial tax cases were in fact correct!)

[38]See, e.g., *Willging v. United States*, 474 F.2d 12 (9th Cir. 1973), rev'g 313 F. Supp. 297 (E.D. Wash. 1970) (farmer's estate required to pay income tax on appreciation in value of crop inventory prior to his death; basis step-up of I.R.C. §1014 unavailable).

CONCLUSION

As Congress continues to enact more detailed revenue laws, the role of the judiciary in federal tax matters seems to be gradually diminishing. Unfortunately, however, the creativity and *chutzpah* of taxpayers and their advisors are outpacing the ability of the legislators to plug every hole in the dike. Never has the need been greater for a strong and principled judiciary to preserve, protect, and defend the tax system, and Judge Goodwin's work is a fine example of what is required. In celebrating his career, the tax professionals of the West Coast, and indeed of the entire country, should be the life of the party.

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Compiled by Stephen L. Wasby

Book Reviews

The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court, by John W. Dean. New York: Free Press, 2001; 333 pp.; $26.00, cloth.

If you read only one book about Richard Nixon's presidency, read this book. Reading former White House counsel John Dean's book is the simplest possible way to get an up-close and personal perspective on the complex and deeply disturbing behavior of the thirty-seventh president of the United States.

John Dean obviously set out with three purposes in writing this book. First, he wanted to take personal responsibility for the Rehnquist appointment in his continued effort to apologize for his sins of thirty years ago. Second, he wanted to produce a semi-scholarly work, a fact that is demonstrated by the book's heavy footnoting and copious quoting from original sources, especially the recently released White House tapes. Third, he wanted to produce a highly readable, easily digested history of one aspect of the Nixon presidency (the appointments of Supreme Court justices Powell and Rehnquist), as exemplified by his handy "cast of characters" at the beginning of the book and his first-person narrative textured with self-conscious explanations of what he thought or knew at the time.

Dean succeeds admirably in his third goal and moderately in his second, but he offers up to the reviewer, interviewer, and commentator cannon fodder in failing at his first goal. Speaking of reviewers, a perusal of some twenty or more reviews of this book that have appeared in the popular press reveals critic after critic tripping over themselves to quote as many of Nixon's obnoxious bigotries as can fit within the pages of a review. Indeed, most reviews of this book say very little about the book and a great deal about Nixon's conduct and Rehnquist's qualifications and confirmation process behavior. In the interest of fairness, in this review I will focus on some of the strengths and weaknesses of the book itself. Those of you who want to read the horrific observations Nixon made in private about women, Jews, his cabinet, and a host of other subjects will either have to get hold of a copy of the book or read some other review.

At this writing, President George W. Bush and the Democratic-led Senate are locked in a battle over the ability of the president to appoint whomever he wishes to the federal bench, which roughly parallels the hostilities between President Clinton and the Republican Senate from 1995 to 2000. These battles, of course, grew from the fertilizer of the Bork and Thomas confirmation fights, and a rich literature exists describing the intensive campaigns conducted during these skirmishes.

As of this date, virtually any candidate for the federal bench is subject to intensive vetting and microscopic analysis of all aspects of his or her life. Dean's book presents a historical picture of an almost quaint and superficial process whereby a series of potential candidates for the Supreme Court were analyzed in a perfunctory and idiosyncratic fashion. Indeed, the least rigorous scrutiny of any candidate during that period was directed at Rehnquist himself, whose vetting consisted mostly of the disclosure to the president that Rehnquist had been first in his class at Stanford Law School and a law clerk to Justice Robert H. Jackson. The revelation that the Nixon White House was so disorganized and cursory in its screening of Supreme Court candidates is very surprising, since the nominations of Rehnquist and Lewis Powell came on the heels of the Justice Abe Fortas scandals and the Senate's rejection of candidates Clement Haynsworth and G. Harrold Carswell. Dean provides a valuable historical service by collecting all available information on President Nixon's process of selecting Powell and Rehnquist.

Dean's book also provides a frightening glimpse into Nixon's presidential decision-making style. In addition to being prejudiced and narrow-minded, Nixon was secretive and paranoid (H.R. Haldeman's description). Of course, like other presidents, when the mood suited him Nixon leaked his decisions to the press, and, like all modern politicians, he made all of his decisions about Supreme Court justices with an eye toward manipulating the press coverage of the appointment. On the other hand, Nixon kept the most basic aspects of his decision-making hidden from even his closest advisors, like H.R. Haldeman, whom Nixon never told about the Rehnquist selection. Nixon seemed to relish the notion that he could announce a decision that was previously unknown not only to the press and the public, but to his own inner circle. Dean's book follows the twists and turns of Nixon's decision-making in a linear fashion that captures the mercurial, vindictive, and unpredictable path Nixon took to the appointments of Powell and Rehnquist. According to biographer Richard Reeves, Nixon had a tendency to "fall in love" with intelligent, self-confident people; one of the most astonishing

aspects of the Rehnquist choice is that Nixon, at the last minute, fell in love with the idea of appointing Rehnquist, who, until that time, had not been seriously considered for the appointment.

Yet Dean's book also documents the fact that there was method in Nixon's madness. Nixon clearly had demographic and ideological criteria in mind in his selection of these Supreme Court justices, and he also had a clear purpose in the endeavor. There is no doubt that Nixon's overriding goal was to increase his presidential influence and popularity, especially given the fact that he was operating in the year before his reelection campaign. Thus, despite his anti-woman bias and the tremendous resistance and interference of Chief Justice Warren Burger, Nixon was willing to appoint a woman to the Court to curry political favor. On the other hand, his primary personal focus was to reverse the excesses of the Warren Court and to appoint truly conservative justices to the Supreme Court. Nixon was especially concerned with appointing justices who would be tough on criminals.

Although Dean faithfully records these criteria and, with relative objectivity, lays out the history of these appointments, he fails to give the devil his due. The fact of the matter is that Nixon succeeded perhaps beyond his wildest expectations in his selection of Rehnquist. Rehnquist may have his critics (and Dean clearly is one of them), but there is no doubt that Rehnquist has been the embodiment of Richard Nixon's highly conservative judicial philosophy. Moreover, Nixon made no secret of the fact that he wanted to appoint such justices when he ran for president in 1968 and made the Supreme Court one of his whipping boys. Thus, judging from the standards of keeping his promises to the electorate or fulfilling his public policy goals in making his appointment, Nixon's selection of William Rehnquist clearly ranks as one of the most successful in American history.

It is easy to criticize and even satirize Nixon's nomination of G. Harrold Carswell to the Supreme Court, but in selecting Lewis Powell and William Rehnquist Nixon was choosing two individuals whose professional qualifications were above reproach. Indeed, the irony and paradox of Dean's book are that it describes a despicable, often irrational, and consistently erratic presidential decision-making process that produced two exceptionally qualified Supreme Court justices. Again, if Nixon's Supreme Court process were judged only on the basis of the qualifications of the candidates to be Supreme Court justices, his selections of Rehnquist and Powell would give him extremely high marks. Moreover, in keeping with the theme of a private decision-making process that can be criti-

cized only with a public result deserving much praise, Nixon's public performance in appointing Powell and Rehnquist was also admirable. Dean's book quotes Nixon's statesman-like presentation of Powell and Rehnquist to the public, which was dignified, thoughtful, and completely devoid of the rancor and bigotry manifested by the president's process and motivations.

Dean's book is inaccurately titled *The Rehnquist Choice.* It would have been more accurate to title the book *The Powell and Rehnquist Choices.* Of course, given Dean's and his publisher's goal to sell books and the hope that curiosity about a controversial president and Supreme Court justice would do the trick, the focus is understandable. But this book is actually about two appointments, one of which—Powell's—was universally acclaimed. Because of Dean's focus on Rehnquist, and because of the obvious anti-Nixon and anti-Rehnquist slant in the writing, the book and almost all of its reviewers miss the most interesting aspect of this story. *The Rehnquist Choice* describes the selection, for theU.S. Supreme Court, of two extremely qualified people, both of whom went on to give the Court and the nation distinguished service for many years. Thus, although Nixon's process invites the reader's scorn and dismay, a more measured appraisal is probably in order. Despite all of his personal shortcomings and despite his unseemly behavior in private, Richard Nixon did manage to make two first-rate appointments to the Supreme Court (at least judged by the qualifications of the candidates), and he did so in a manner that quelled the controversy about Supreme Court appointments and restored at least temporary dignity and honor to the public discourse about the Court. If we are to condemn the private Richard Nixon for his personal failures, how must we judge the public Richard Nixon for his mastery of this field? John Dean's book offers us an opportunity to examine a question that no doubt will vex generations of historians as it eludes an easy answer.

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Understanding the Arizona Constitution, by Toni McClory. Tucson: University of Arizona Press, 2001; 230 pp., illustrations, appendices, index; $29.95, cloth; $14.95, paper.

This book opens with a vignette from the territorial days. It seems that the governor received a $25,000 payoff from one of the railroads. In a refreshing display of sagebrush ethics, the governor returned $20,000 to the railroad president with a

note explaining that the legislature could be bought for much less. At first glance, the title, *Understanding the Arizona Constitution*, would suggest a subject matter tailored to an Arizona readership. Knowing the names of Arizona's fifteen counties or the fact that if the governor travels out of state, the executive power succeeds to the secretary of state, are not matters of universal significance. To the reader's delight, however, this is one book that should not be judged by its cover.

Understanding the Arizona Constitution is an excellent read for anyone interested in Western legal history. In describing the origins of Arizona's constitution, McClory develops a theme that pervades much of the history of the West. Directly or indirectly, Spanish and Mexican rule, resistance by Native Americans, a lawless frontier period, and an unhappy territorial experience each left a mark on the state's modern government and laws. The author shows how the past, seen through this prism, continues to mold the shape of state government. It is this insightful and informative overview of the historical and political setting that distinguishes the work.

At the turn of the century, the American West was still in a state of flux. The exact terms for the admission of Arizona and New Mexico to the Union were highly debated. Concerns as to geographical boundaries, the political impact of a predominantly Catholic and Hispanic population, and alignment as a Republican or Democrat state led to a unique circumstance: Arizona's admission as a state would be subject to veto by President Taft. Unhappy with territorial governors and pet legislatures that seemed to favor railroads and business interests, the people proposed a constitution that provided for secret ballots, direct primaries, initiatives, referenda, and the recall of public officials. In 1910, this progressive constitution was vetoed by President Taft for a single reason: concern that the inclusion of a provision allowing for the recall of judges would compromise judicial independence. In a second round, however, the judge recall provision was removed, and the revised constitution was approved. The next year a constitutional amendment reinserted the provision for the recall of judges, and in the election of 1912 President Taft garnered the fewest Arizona votes among the four candidates.

Understanding the Arizona Constitution is well written in both content and style. McClory analyzes the separate branches of government with a healthy injection of anecdotes and comparative statistical data. Helpful too are generous references to websites for further online study. The author's inclusion of point and counterpoint descriptions of constitution-based features such as short terms in office, regulatory boards whose members are not subject to patronage appoint-

ment, and minimal eligibility requirements to run for office, all result in an excellent primer on the basic notions of representative democracy. McClory also explains the complicating role of separately elected county and local governments and the interplay of Arizona's twenty-one tribal governments and sixteen hundred education and special tax districts.

Mention state government to the average person, and the image of a single, integrated political system comes to mind. *Understanding the Arizona Constitution* reminds us that the political reality is quite different. Providing citizens with adequate schools, medical services, and public safety is a dicey proposition when only some 25 percent of the land is privately owned and subject to property taxes. Good intentions and well-developed public policy must give way to multiple stakeholders and interest groups. All the while, underneath this diverse and headless body politic, a constitutional foundation requires that Arizona's leaders confront the challenges of the new millennium with a weaponry crafted from the early 1900s.

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Nature's Justice: Writings of William O. Douglas, edited by James M. O'Fallon. Corvallis: Oregon State University Press, 2000; 320pp., bibliography, index; $35.00, cloth.

Nature's Justice: Writings of William O. Douglas is a compilation of the justice's many writings drawn from his opinions, books, and other works. Through the presentation of his writings, the editor attempts to give a picture of one of the more influential Supreme Court justices of the twentieth century. The selections are divided into chapters that cover Justice Douglas's youth, his life in the Northwest, his days as a professor and as one of President Roosevelt's New Deal favorites, his concerns as a civil libertarian, his writings about international affairs with emphasis on Vietnam, and his concerns about the environment.

The selections cover a variety of topics from his autobiography, some of his more famous opinions, such as *Griswold v. Connecticut*, and his thoughts on the wilderness and fly fishing. From his writings, a picture emerges of a man who grew up in relative poverty, who excelled from an early age in academics and sports, and who applied a social science approach to many of his opinions. From a New Deal perspective, he sought to allow the vast growth of the federal government into every aspect of the economy while protecting the rights

of the individual to free speech, privacy, and protection from state intrusion by means of unreasonable search and seizure. The work of the editor is unobtrusive and rarely interferes with Justice Douglas's presentation of himself. Some of the most delightful passages concern his love for the isolation of the Wallowa Mountains of Oregon and his frequent escapes after the end of the Supreme Court term to the solitude of the Northwest and the challenge of fly fishing. His writings express the importance he placed on the individual and his need for protection from business and the economy. The writings also demonstrate his faith in the role of the federal government in managing the economy, regulating securities markets, protecting civil rights, and promoting the Bill of Rights in modern society.

One of the ironies of the collection is the growing concern he expressed toward the end of his career and after retirement about the federal government he had helped to create during the New Deal years. After his retirement, a certain sense of disillusionment becomes more evident in his writings. He also expressed his concerns about increased automation and the resultant loss of employment in vast sectors of the workforce. However, notwithstanding his uneasiness about the expansion of a government that has changed from the ideals of the New Deal, Justice Douglas concluded that only the growth of the public sector would be able to offset the loss of jobs in the private sector.

The writings express Justice Douglas's confidence in liberal policies at the federal level, his belief that prosperity and freedom can come only from the extension of the federal government into every area of the economy, with increasing domination over backward and mean-spirited state and local governments. The individual comes across as both exalted in his rights and powerless in the face of business and economic trends. Douglas saw regulation and bureaucratic control as the primary means of protection for the helpless individual living from paycheck to paycheck. At the same time, he expressed concern about the Pentagon and the growth of government welfare for the rich and powerful. In his writings he treats every tax deduction as only one more benefit provided by the federal government to the least deserving. He holds out every government defense program as only another means for the expanding military-industrial complex to grow even greater.

When read as a collection, Justice Douglas's writings present a complex picture of the justice who did so much to foster individual rights while also encouraging the growth of government and regulation, which has done so much to restrict personal initiative and enterprise. Many of his post-

retirement writings disappointingly adopted the language of the 1960s, with references to the "Establishment" and the need to accept the "Revolution." Some of the analysis that led him to finding the right to privacy in the "penumbra' of the Bill of Rights seems missing from his later expressions. Possibly, if he had lived to see the growth of computerization into every area of life and the wealth that has resulted, he would have changed his conclusion about the need for government to protect the individual from the effects of automation.

As a thought-provoking study of one of the important justices of the twentieth century and of the views expressed from the 1930s through the 1970s, *Nature's Justice* provides the legal and social historian with important insight into an era that is critical to so many of today's policy debates.

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Fluid Arguments: Five Centuries of Western Water Conflict, edited by Char Miller. Tucson: University of Arizona Press, 2001; 354 pp., index; $45.00, cloth.

In *Fluid Arguments: Five Centuries of Western Water Conflict*, editor Char Miller undertakes the ambitious goal of understanding contemporary water issues in the American West by examining their historical contexts through an interdisciplinary analysis. The idea for the book grew out of a conference on water in the American West in 1998 sponsored by the American Society for Environmental History, which drew an array of scholars, water-management professionals, and ordinary citizens. The discussions and conversations around past water policies and current conundrums continued and evolved into this book of seventeen essays, divided into five sections.

It is a well-known axiom that he/she who controls the water, controls the land. These essays reinforce this concept repeatedly—in fact it is the central concept of both the book and of water use in the region. Although Native Americans may have limited their use of water to that found on the surface, their placement along the Rio Grande indicated an appreciation of this finite resource. Water was always an important factor in the settlement and development of the northern provinces of New Spain. This appreciation and acknowledgment of the value of this liquid resource, moreover, intensified throughout the nineteenth and twentieth

centuries with the spawning of political battles and numerous lawsuits over the use and distribution of water in the West.

The book attempts an even-handed approach to water issues, technologies, methodologies, and historiography through a series of essays written mostly by academic historians, although a couple of geographers, political scientists, public historians, and a lone lawyer are included in the list. Many of the essays are outstanding, particularly those relating changes over time in concepts and perceptions—whether about water, land use, or cultures. For example, in the essays about Pima and Kiowa water use, written by Dudley and Lynn-Sherow respectively, we see rich tapestries of interwoven threads relating water to economics, culture, and identity. Lynn-Sherow, moreover, goes on to explore the evolution of the concept of water within Kiowa cultural and spiritual life, thus adding texture to the familiar context of Euro-American-introduced environmental changes.

These pieces flow well into the more historiographic and conceptual essays. We begin to understand the complexity and evolution of water policy and law through a series of essays by Pisani, Newell, McCool, and Sánchez. Pisani's overview of the federal government's Indian policies on water and irrigation projects enable the reader to comprehend the woes of the Kiowa and the Pima more acutely. Newell's explanation of the Winters doctrine, a seminal point in water law history for everyone in the region, and McCool's overview of the long, often bitter negotiation among tribes, western states, and the federal government in implementing this standard really expand the reader's awareness of the difficulty of establishing water rights in the region. McCool also offers suggestions about how to transform water rights into a return of land, thus righting past injustices caused by federal water and land policies. Sánchez's article admittedly advocates changes in viewing the effects of water policies and the means of obtaining legal redress and protection from them.

Some of the book's case studies explain newer methodologies. Opie's essay, for example, graphically demonstrates the information one can glean from a map when it is presented in its natural-systems context rather than the artificially imposed county-grid lines—a visual reinforcement of a theme underlying Sánchez's article. Other cases demonstrate that theories (or myths) and experiences may not always coincide, a common theme in Western history. The final essay by Rothman is illustrative; it dampens the idea that agricultural is a significant factor in most Western economies, while buoying the reality of the American West as an urban and often service-oriented region. His essay raises the question of the Information

Revolution's impact on claims for water. Still other case studies, such as Jackson's essay on dam-building by private interests in Colorado, point out anomalies in general trends.

My criticisms of the book are few, but perhaps significant. *Fluid Arguments* includes no discussion of the Spanish law out of which grew the concept of prior appropriation. In addition, the two articles dealing with Spanish historical context seem contrived and gratuitous, possibly because the authors do not develop their twentieth-century contexts adequately, alluding to them only in their conclusions. There were also editorial oversights: an unclear sentence in the conclusion of essay eleven; contradictory meanings for *encomienda*; "casual" instead of "causal." Despite these problems, however, this book is a good beginning for understanding the complexities and vagaries of a subject that will dominate the American West for the foreseeable future.

Stefanie Beninato, Ph.D.
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Articles of Related Interest

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

Alton, Stephen R. "From *Marbury v. Madison* to *Bush v. Gore*: 200 Years of Judicial Review in the United States," *Texas Wesleyan Law Review* 7 (2001).

Choy, Catherine Ceniza. "Asian American History: Reflections on Imperialism, Immigration, and 'The Body,'" *Amerasia Journal* 26:1 (2000).

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Haney-Lopez, Ian F. "Protest, Repression, and Race: Legal Violence and the Chicano Movement," *University of Pennsylvania Law Review* 150 (2001).

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_____. "To Encourage the Preservation and Sanctity of the Marriage Relation: Victorian Attitudes in Arizona Territory and the Murder Prosecution of Franck C. Kibbey," *Journal of Arizona History* 42:3 (Autumn 2001).

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Simmons, Thomas E. "Territorial Justice Under Fire: The Trials of Peter Wintermute, 1873–1875," *South Dakota History* 31:2 (Summer 2001).

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Thompson, Jerry. "'That's Just What Kids Did Back Then': Joe Lynch Davis, the Oklahoma Gang, and the Robbery of the Golden State Limited," *Journal of Arizona History* 42:4 (Winter 2001).

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