

## WHAT APPELLATE JUDGES DO\*

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### INTRODUCTION: THE PAST AS PROLOGUE

As we all know, partisan battles have been raging in the United States Senate over the confirmation of President Bush's nominees to various circuits of the United States Courts of Appeals and the Supreme Court. This is nothing new. We saw similar partisan battles over the judicial nominees of President Clinton<sup>1</sup> and over the nominees of presidents before him.<sup>2</sup>

But these battles raise some questions: Are appellate judges simply politicians with robes on? Does it mean anything anymore for appellate judges to "apply the law," or are appellate judges simply making it up as they go along? A good place to start is with a line from John Chipman Gray, attorney and professor at Harvard Law School, who wrote in 1909 that "the law is what the judges declare."<sup>3</sup>

In one sense, this statement remains true today, because the final decision of an appellate court still resolves a dispute of law, and therefore declares it. But in another sense, Professor Gray's

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1. See generally e.g. Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. App. Prac. & Process 29 (2003).

2. See e.g. John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush*, 5 J. App. Prac. & Process 1, 5-9, 28 (2003).

3. John Chipman Gray, *The Nature and Sources of Law* 283 (Roland Gray ed., 2d ed., Macmillan Co. 1921) (transcription from the author's notes of the Carpentier Lectures given at Columbia University in 1908).

statement had a different meaning in 1909 than it does today, because appellate decisionmaking was vastly different then.

In 1909 and before, appellate judges often decided disputes without reference to statutes, simply because few statutes existed. Appellate courts in England and in this country exercised their common law power to decide cases by making up an appropriate rule of law according to what they considered wise public policy. This is how we got such things as the rule in *Shelley's case*<sup>4</sup> and the rule against perpetuities,<sup>5</sup> both of which prevented landowners from tying up title to their land for generation after generation.

When courts exercised this common law power to make up the law, they were acting in a legislative capacity, as Justice Holmes recognized:

[I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.<sup>6</sup>

The courts' common law power to declare a rule of law in the absence of legislation on the subject exists to this day, and is found most frequently in the law of torts. A relatively recent example is found in *Greenman v. Yuba Power Products, Inc.*<sup>7</sup> In that case, a man using a Shopsmith—a combination power saw,

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4. See e.g. *Norris v. Hensley*, 27 Cal. 439, 442 (Cal. 1865) (noting that the rule in *Shelley's case* has been "established as an axiom in the English law for nearly five hundred years").

5. See e.g. *Est. of Hinckley*, 58 Cal. 457, 471-72 (Cal. 1881) (noting that the English common law, including the "great" rule against perpetuities, was adopted by the California Legislature in 1850, thus becoming a part of that state's common law).

6. Oliver Wendell Holmes, Jr., *The Common Law* 35-36 (Little, Brown & Co. 1923) (reprint of 1881 edition).

7. 377 P.2d 897 (Cal. 1963).

drill, and wood lathe—was seriously injured when a piece of wood flew up and struck him in the head. He sued the manufacturer for breach of warranty, and a jury awarded him \$65,000. The manufacturer appealed, contending that the man had not given it timely notice of breach of warranty. In an opinion by Chief Justice Roger Traynor, the Court held that the timeliness of the notice did not matter, because he should have collected on another legal theory that required no notice to a manufacturer: that the manufacturer of a product is strictly liable without fault to a consumer of the product who is injured by it when using the product as intended.<sup>8</sup>

Think about it. The rule in *Greenman* established the law not only for that case but for all later cases in California (and, in fact, the *Greenman* rule of strict liability was later adopted by almost all the states). This is a rule with enormous social and economic consequences, yet it was made up by appellate judges exercising their historic common law power. This is not to say the *Greenman* rule was wrong, because it was not. It is simply to illustrate the potency of the state appellate courts' historic common law power. Thus, to return to the point of beginning, John Chipman Gray must have meant "The law is what the judges declare" in the literal sense, believing that judges, exercising their common law power, often made up what the law was in any given case.

Since the time of Gray and Holmes, however, the common law power of both federal and state courts has been drastically diminished. The general common law power of the federal courts was severely curtailed in *Erie*,<sup>9</sup> when the Supreme Court held that, in deciding controversies between citizens of different states, the federal courts had to apply the law of the appropriate state instead of making up their own rules in the exercise of a general federal common law power. Additionally, both Congress and state legislatures have passed statutes that have invaded fields traditionally occupied by the common law power of courts. Thus, to pick but a few examples, Congress has passed laws regulating pollution and toxic waste,<sup>10</sup> defining safety

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8. *Id.* at 900.

9. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

10. See e.g. 33 U.S.C. § 1251 (containing preliminary portion of Clean Water Act) (available at <http://uscode.house.gov>).

standards,<sup>11</sup> and even specifying rules for arbitrations.<sup>12</sup> The states have enacted various uniform laws, the most influential of which is probably the Uniform Commercial Code,<sup>13</sup> which specifies the rules of law that apply to nearly all commercial transactions between merchants. In addition, each state now has a system of statutory law. California, for example, enacted its first set of comprehensive codes in 1872, basing them on the famous Field Code of New York.<sup>14</sup> And the legislatures are still at it: The 1872 California Codes take up about three feet of shelf space, while the California Codes in my chambers today occupy about forty feet of shelf space.

I am not suggesting that there is anything wrong with this assertion of legislative power; to the contrary, it reflects the democratic notion that laws should be enacted by elected representatives. I simply wish to point out that, since the nineteenth century, the power to “declare the law” has shifted from the courts to the Congress and the state legislatures.

#### TODAY’S REALITY: A NEW ENVIRONMENT

The change over time in how law is made has resulted in a significant change in what appellate judges do. While Justice Holmes spent much time grappling with the policy judgments underlying the quasi-legislative decisions he would make, modern appellate judges spend the vast majority of their time grappling with the meanings to be assigned to words provided by a legislative body.

The contemporary appellate judge is, first and foremost, dedicated to ascertaining the intent of the legislature that supplied the statutory language at issue in the case. In performing this task, the modern appellate judge is more often a textual scholar than a maker of policy. Thus, although Holmes

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11. *See e.g.* 15 U.S.C. § 2051 (containing preliminary portion of Consumer Product Safety Act) (available at <http://uscode.house.gov>).

12. *See e.g.* 9 U.S.C. § 9 (containing preliminary portion of Arbitration Act) (available at <http://uscode.house.gov>).

13. *See e.g.* Cal. Unif. Com. Code Ann. § 1101 (containing preliminary portion of California’s enactment of the UCC) (LEXIS 2005).

14. *See e.g.* *A Dictionary of Modern Legal Usage* 165 (Bryan M. Garner ed., 2d ed., Oxford U. Press 1995) (defining “code pleading” by reference to, among other things, the work of New York’s David Dudley Field).

was influenced greatly by Darwin,<sup>15</sup> the modern appellate judge is doubtless more influenced by Wittgenstein.<sup>16</sup> Indeed, I have found since joining the appellate bench that the most valuable course I took in college was not “A History of the Supreme Court” but “An Introduction to the New Criticism,” an English course that focused on the close textual reading of poetry.

Take it from me: Figuring out what a legislature had in mind is not an easy task. When it comes to using language in ways that obfuscate, a state legislature has few equals. However, the courts have adopted canons of statutory interpretation and, if these rules are applied in any given case, most judges will agree on the appropriate meaning to be given a particular statute.

#### RESPONDING TO CHANGED CONDITIONS: THE CANONS OF STATUTORY INTERPRETATION

The first and most important canon of statutory interpretation is the rule that a statute should be construed according to its plain meaning. Reduced to its essence, this rule means that if a statute says, “All red trucks must have mudguards,” a court should not say that all green trucks must have mudguards. That apparently simple principle is of critical importance to the work of the appellate judge.

Important as I think it is, I must admit that not all appellate judges subscribe to the plain-meaning rule. Some judges appear to think that language has no fixed meaning, and that the meaning of any word or phrase in a statute can never be ascertained without considering both its context and the history of the legislation in which it appears. But one judge who does think that language can carry a plain meaning is Justice Scalia, and I think that, on this point, most appellate judges agree with

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15. See *e.g.* *Buck v. Bell*, 274 U.S. 200 (1927) (condoning compulsory sterilization of the mentally deficient: “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough”) (citation omitted).

16. See Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Routledge 2001) (posing and considering problems of logic and language).

him. We use language every day in ways that show that words have a relatively fixed meaning: If the sign on the door says, for example, "Cat Veterinarian. Practice Limited to Cats," you would not take your dog inside (unless you wanted to give your dog a very special treat). Similarly, if the sign on your sidewalk says, "No parking on Thursdays. Street Cleaning," you would know that you should not park there on Thursday although it would be OK to park there on Friday. If you order pie, you do not expect cheesecake. And so forth. Understanding the plain meaning of language gets us through every day. And as my street-cleaning illustration suggests, we citizens rely on plain meaning in order to understand our laws as well. Appellate judges acknowledge this reality when they decide cases according to the plain-meaning rule.

Here's what I mean by that: When appellate courts apply the plain-meaning rule to construe a statute by using language in the way in which it is used in everyday speech, they are primarily doing two things. First, they are exercising judicial restraint by limiting the power of the court to make up the law. And second, they are telling the legislative body: "We will not try to comprehend how this sausage of a law got made; rather, you legislators are stuck, finally, with the words that were approved upon final passage of the bill."

There are, of course, exceptions to the plain-meaning rule. Many words used by legislatures are inherently vague (a subject we shall return to in a moment). Moreover, courts will not apply the plain-meaning rule where language is shown to be a typographical error, or where facially plain language in a statute is made ambiguous by other language in the statute that contradicts it. But on my court of eleven judges (who represent a broad spectrum of political views), the plain-meaning rule is uniformly followed where it applies, and it results in very few disagreements about the meaning of statutes. In fact, I think of the plain-meaning rule as the glue that holds our court together.

There are numerous other rules, or canons of statutory interpretation, that provide guidelines for how to assign meaning to unclear statutory language. Some of the more frequently used are these:

- Where statutory language is facially ambiguous, it is appropriate to study the legislative history of the statute (such as committee reports) to find out what the legislature had in mind;
- When a legislature uses words with a settled legal meaning, the words should ordinarily be given that meaning;
- Where general and specific statutory language conflict, the specific language controls;
- If possible, every word in a statute should be given meaning and significance so that there is no surplus language;
- Where two statutes conflict because they cannot be reconciled, the more recent statute controls;
- Where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.

Let me give you an example of a real-life application of that last rule: In California, it's illegal to make a criminal threat.<sup>17</sup> The Legislature has expressly said that such a threat must be a "statement made verbally, in writing, or by means of an electronic communication device."<sup>18</sup> In a case we decided, the defendant had threatened two boys not to tell the police about his spousal abuse. But he threatened them by making a gesture: He drew his finger across his throat in a slashing motion, signaling to the boys what would happen to them if they talked. After the defendant was convicted of making a criminal threat, he appealed, contending he had not violated the statute

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17. Cal. Penal Code § 422 ("Punishment for Threats") (LEXIS 2005) .

18. *Id.*

because the alleged statement was not “made verbally” (and he obviously had not made a statement in writing or by an electronic communication device).

The Attorney General and the defendant proffered competing definitions of “verbal.” The Attorney General’s dictionary said that “verbal” may include a verbal symbol (here the throat slashing). The defendant proffered a definition from a different dictionary indicating that “verbal” meant using words only, and that it did not include symbols. In light of these competing definitions, we declined to apply the plain-meaning rule, and we concluded that the term “verbal” was ambiguous as used in this statute.

We resolved the ambiguity by pointing out that the same legislative enactment that had amended the criminal-threat statute had also amended an anti-stalking statute to provide that stalking could include “a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct.”<sup>19</sup> This closely related anti-stalking statute showed that the Legislature differentiated verbal statements from conduct. We therefore concluded that the defendant’s slashing gesture constituted conduct, and that he had not made a verbal statement within the meaning of the statute.

We did not decide the case in this way because we had any public policy views about the criminal-threat statute, or because we were peculiarly interested in the rights of the defendant, or because we were “soft on crime.” Rather, we applied an established canon of statutory interpretation that directed us to use related statutory language to resolve ambiguity in the statute before us.

If judges resolve questions of statutory ambiguity by using a disciplined approach that follows established canons of interpretation, most other judges will agree with the result. For that reason, as I have said, there are few disagreements on our court with respect to the interpretation of statutes.

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19. Cal. Civ. Code § 1608.7(b)(2) (“Stalking”) (LEXIS 2005).



## DECIDING CASES IN THE MODERN ERA: THE ROLE OF THE APPELLATE JUDGE

Does what I have said mean that appellate judges no longer make quasi-political policy decisions? Not at all. Certainly no one who has read the frequent five-to-four, conservative-against-liberal decisions of the Supreme Court (including *Bush v. Gore*<sup>20</sup>) could make such a claim with a straight face. But the ability of appellate judges to make policy decisions ordinarily varies directly with the vagueness of the statutory or constitutional language that they are asked to construe. Thus, for example, if the statute says that a tax return must be filed by midnight on April 15 of each year, a court would not say that the statute means April 16. (Just ask the IRS.) On the other hand, our courts are routinely asked to apply the language of the Fourteenth Amendment providing that citizens be guaranteed “due process of law,”<sup>21</sup> or the language of the Fourth Amendment prohibiting “unreasonable searches and seizures.”<sup>22</sup> This vague language obviously allows the courts great leeway in assigning meaning to the words chosen by the Framers.

Indeed, some of the most vague and ambiguous language around is found in our federal Constitution. It is vague by necessity: It establishes the most general rules of law we have. But, as we have seen, the vagueness of the language allows the most room for judges to apply their own value judgments. That is why the major political parties are fighting tooth and nail over judicial nominees to the Supreme Court and the federal Courts of Appeals, both of which decide constitutional questions with enormous consequences.

But does this mean that appellate judges are routinely making quasi-political decisions? Are they, in fact, simply politicians in robes? My answer is no, with one exception: Because the United States Supreme Court is entrusted with the job of finally construing general and vague Constitutional

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20. 531 U.S. 98 (2000).

21. U.S. Const. amend. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

22. U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

language, it occupies a unique position. Its members must make quasi-political decisions all the time, as the frequent five-to-four split indicates. But the justices of that Court are a special case. Although appellate judges on other federal and state courts sometimes make quasi-political decisions, they are doing it a lot less frequently than they did in the day of Oliver Wendell Holmes, before the legal universe was occupied almost entirely by statutory language. The interpretation of statutes is the daily grist of both lower federal and state appellate courts. And as we have seen, this task can almost always be accomplished in a disciplined way by applying the substantive law only after using established rules of statutory interpretation.

So I am not too worried about the future of either the law or the appellate courts. My experience on the bench tells me that the law still requires interpretation to settle its meaning, and that our country's appellate judges are carefully interpreting the law in a disciplined way.

