

Foreword

Despite the inexorable nationalization of governmental functions and centralization of authority that America's modern development has produced, the courts of the 50 states continue to play a vital role in ordering our nation's society in virtually all its dimensions. That this is a nation composed of the states as polities and communities, each with its own constitution and not merely with "devolved" powers, remains a core reality and a shaping force in American law. All too often, scholars in the law no less than political scientists and historians—let alone journalists and public intellectuals more generally—give their attention to the courts of the 50 states largely insofar as the decisions of state judges come before the federal courts for review; all too often, the contributions of outstanding individual justices on the state bench receive far less attention, even in the media and the schools of their own states, than is given routinely to federal cases.

The scholarly and public activities of the California Supreme Court Historical Society have been intended to redress this imbalance. One aspect of the Society's efforts has been to expand the scope of legal-history writing on California to embrace the interrelationships of law with society, with the processes of economic change, with politics and ideology and culture. When the Society published its inaugural *Yearbook* volume in 1994, as editor I noted that there was a need for monographic studies on the foregoing themes and a specific deficiency in regard to biography. We lacked biographical studies of individual judges, and many of the most important figures in the state's legal history—even leading justices of the California Supreme Court since 1850—were little studied and little understood. Commenting on that lack, former Chief Justice Malcolm Lucas has written that, "As we grapple today with the scope of the rule of law and the role of our justice system," it is invaluable to have fuller knowledge

“about the individuals who crafted the opinions that helped shape our world . . . and the forces that touched them as they reached their decisions.” In the present study of the late Chief Justice Roger J. Traynor, the historian and attorney Benjamin Field carries forward in an original and insightful manner the enterprise of historical-biographical study for the California high court.

In any list of the most admired and influential state judges in the nation’s history, Traynor stands at the very top level. Perhaps more than any other state judge of his day, Traynor sought explicitly to bring the law into line with the realities of mass (and diverse) society in the modern industrial world. As Field amply demonstrates in this book, Traynor did so under the banner of “judicial creativity.” He believed that for courts always to defer passively and mechanically to doctrinal precedent was inconsistent with the great common law tradition, whose essence was the capacity for adaptation, change, and growth. Equally, he believed that it was inconsistent with American ideals regarding democratic governance for the courts to fail in their role as full partners in the process of legal ordering.

Where the court moved in an “activist” mode to institute change, as in the tort revolution that his decisions led—an area of the law in which “creativity” required innovation and doctrinal departures—Traynor built on the great Anglo-American judicial tradition of adaptation rather than perpetuating a mindless faithfulness to rules that no longer were responsive to the realities of modern California society, or doctrines that had produced manifest unfairness. In such instances, the court’s innovations could be turned back in a day by a legislature determined to follow a different course of policy. With respect to constitutional decisions, too, Traynor did fearlessly what American courts must do if they are to be effective: Perhaps more than any state judge of his day, Traynor as a scholar and Traynor as a working jurist undertook fearlessly the reconsideration of the central concepts of constitutional law and their adaptation to the realities of the modern world.

In taxation (Traynor’s teaching field at Boalt Hall before he went on the bench), in land law, and in conflict of laws, he was brilliant in the ways he applied conventional legal reasoning to produce practical consequences that did not offend modern notions of efficiency, justice, and legality. In family law, race relations, and the processes of the criminal justice system, as Field shows in his detailed and very able studies of these areas of law in the present work, Traynor’s innovations blazed the path that other courts, and ultimately the U.S. Supreme Court, would follow. In tort reform, Traynor was of truly unique importance both for his basic jurisprudential methodology and for the results. And yet, as Field is careful to show, for all his contempt for “judicial lethargy,” and despite the boldness with which he sought to demonstrate the obsolescence of established but unfair or outmoded (or ridiculous) rules of law, Traynor’s pragmatism extended to supporting in a sympathetic way what he saw as the legitimate activities and methods of the executive branch, not least the law enforcement agencies and officers. He did not reject wholesale the *conservative activism* of an earlier generation of judges, nor indeed that of some of his own colleagues on the Court; like others of the best “activist” judges, whether in a conservative or liberal mode, or still other “activists” who were simply difficult to label, Traynor was willing to acknowledge explicitly his penchant for creativity. Still, he was faithful perhaps without peer in his day to the requirement that a judge provide a carefully reasoned and clearly crafted opinion

in reaching an innovative conclusion. Moreover, he was ever mindful of the heavy responsibility for assuring fairness, for maintaining the health of the law, and for protecting the integrity of the judicial branch. Not least important, historically, is that with able fellow justices who served with him during his long tenure, the California Supreme Court was widely recognized as the most distinguished state bench in America. It was influential in shaping the direction of the law in many other state courts, as well as pointing the way to some major U.S. Supreme Court decisions.

In light, then, of Traynor's signal importance in the development of our law in the modern era, it is most fitting that the California Supreme Court Historical Society should join with the IGS Press of the University of California, Berkeley, to publish this illuminating study of a great American judge.

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