

Introduction

Roger J. Traynor is widely recognized among legal historians as one of the most important American jurists of the twentieth century. When Governor Culbert Olson appointed him to the California Supreme Court in 1940, the Court showed little inclination toward legal reform. That changed during Traynor's 30-year tenure on the Court, primarily because of Traynor. With Traynor in the lead, the four justices Governor Olson appointed dominated the court. Don Barrett, Traynor's clerk and friend, called the period from 1945 to 1956 the "Long Court" because the composition of the Court did not change during that period.¹ It was during the "Long Court" that Traynor gained the reputation as the leading state court judge in the nation.² By the time Governor Pat Brown elevated him to chief justice in 1964, Traynor had

¹Interview of Don Barrett by Ben Field, May 24, 1997.

²During Traynor's tenure, the California Supreme Court became the most frequently cited court by courts outside of California. A study of these citations showed that 92 percent of the California cases in the study sample were cited at least three times by out-of-state courts. Lawrence Friedman, Robert Kagan, Bliss Cartwright, and Stanton Wheeler, "State Supreme Courts: A Century of Style and Citation," *Stanford Law Review* 33:773, 805 (1981).

established himself as the most active advocate for reform on a reformist court. He authored the Court's most innovative and influential decisions, and his jurisprudence remains important today for its impact in several major fields of law.

Traynor's accomplishments were varied. Among the most significant were his judicial decisions on miscegenation, divorce, police searches, and product liability. His opinion in the 1948 case of *Perez v. Sharpe*, the first judicial decision overturning an antimiscegenation statute, was far ahead of its time. Years before the civil rights movement had begun to soften longstanding judicial support for racially discriminatory laws and without any significant political cover, Traynor led the California Supreme Court in rejecting legal prohibitions of interracial marriages. Traynor reformed family law and the doctrines governing those cases where an interstate conflict of law arose. In the 1952 divorce case of *DeBurgh v. DeBurgh*,^{he broke with} precedent underlying fault-based divorce. His opinion in *DeBurgh* laid the conceptual framework for no fault divorce in California, which in turn sparked the "divorce revolution" that swept the country. In a series of decisions, beginning with *People v. Cahan* in 1955, Traynor restructured the rules for police searches. These decisions dramatically altered the parameters of police conduct in California and foreshadowed later actions of the U.S. Supreme Court that applied nationally to police. Finally, Traynor pushed the Court to adopt a strict liability standard in product defect cases. He first articulated the public interest in holding manufacturers strictly liable for consumer injuries caused by design or manufacturing defects in his 1949 concurrence in *Escola v. Coca-Cola Bottling Company*. Nineteen years later, his opinion in *Greenman v. Yuba Power Products, Inc.* gained the unanimous support of his brethren, making California the first state to adopt a rule of strict product liability. Strict liability was the most significant doctrinal development in tort law during the late 20th century.

Traynor embraced the role of judge as policymaker. He viewed judicial activism as a necessity in a fast changing world, and many of his 892 opinions and 75 law review articles offered an intellectual justification for judicial activism. Few if any theorists of judicial decision making have so resolutely advocated activism. Even among the great judicial innovators, such as Lemuel Shaw and Benjamin Cardozo, Traynor was remarkable for his fervent advocacy of judicial policymaking. His judicial philosophy stands out in the intellectual history of judging as extreme, yet many of his most innovative opinions gained widespread acceptance and generated surprisingly little

controversy. This is a fascinating paradox.

Although no complete judicial biography of Traynor has been published to date, various legal historians have written about Traynor. Most of these commentators have examined, in approving tones, the substantive legal changes he initiated. Several, notably G. Edward White, who has written the most thorough analysis of Traynor's judicial thought to date, have also explored Traynor's philosophy of judging. According to White, Traynor's process of decision making combined reason with intuition.³ Traynor's writings provide some support for this view. In one passage he wrote,

Once he [the judge] has marshaled the data pertinent to a controversy, he must articulate a solution that calls for a discriminating sense of which available principle, if any, should govern the case. His task is least complicated when he can choose from among several plausible alternative principles that readily fit the case without looking anachronistic. As the badlands get worse there are clearer indications of what form reclamation might take, though the need remains for judgment of the highest order—that combinations [*sic*] of analysis and intuition culminating in decisions that prove prophetic.⁴

Traynor appears to have used the word “intuition” only this once in describing his decision-making process. The word denotes an absence of rational thought and inference, which seems inconsistent with Traynor's approach to judging. Traynor advocated a scientific approach to judicial policy analysis, and he claimed that judges could conduct that analysis objectively. In the tradition of Louis Brandeis, his opinions took into account social science studies and other sources outside the legal text. His judicial decisions were not the product of intuition. To the contrary, they demonstrated his great confidence in judicial rationalism.

What guided Traynor's scientific approach toward decision making was not intuition, but a cohesive conception of the public interest. He argued explicitly for public policy objectives in his innovative opinions. The arguments and language of those opinions delineated his conception of public interest and revealed the cohesive set of values, preferences, and aversions that underlay it. By treating Traynor's innovative opinions as an ideological exposition, it becomes possible to show his relationship to his ideological environment. Traynor's rhetoric connected *Perez v. Sharpe* with contemporary race relations, *DeBurgh v. DeBurgh* with

³G. Edward White, *The American Judicial Tradition: Profiles of Leading American Jurists* (Oxford, 1976), 295.

⁴Roger Traynor, “Badlands in an Appellate Judge's Realm of Reason,” *Utah Law Review* 7:157, 160–61 (1960).

contemporary conceptions of the role of women, *People v. Cahan* with contemporary attitudes toward law enforcement, and the product liability cases with contemporary views of producer/consumer relations. Understanding the relationships between these cases and their ideological environment is essential to an evaluation of Traynor's work and his influence because the extent to which his policy innovations gained acceptance and became institutionalized in American law depended largely on their resonance with his ideological surroundings.

Traynor's efforts at reform did not happen in a doctrinal vacuum. They paralleled other contemporary changes in the law, particularly the "constitutional revolution of 1937," which allowed the expansion of government regulatory power over the economy while creating a new civil liberties jurisprudence. The U.S. Supreme Court of the 1920s and early 1930s had sustained a legal structure that protected private property and struck down popular legislation that imposed regulations on businesses. Initially, the Court's opposition to government regulation of the economy put it at odds with the New Deal. During 1935 and 1936, the Court heard 10 major cases involving New Deal legislation and struck down a New Deal program in eight of those cases. These decisions threatened the core of the New Deal. In response, Franklin D. Roosevelt vilified the Court for protecting entrenched, private economic power and obstructing government efforts to regulate the economy for the public good. Public disapproval of the Court's resistance to the New Deal placed great pressure on the Court, and, ultimately, its dramatic change of course in the wake of FDR's 1937 Court-packing message allowed a massive expansion of government power over the economy.

The Supreme Court did not overturn a single New Deal program after 1937, and during the following decade, it reversed 32 of its earlier decisions.⁵ Core New Deal statutes, such as National Industrial Recovery Act and the Agricultural Adjustment Act, gained Court approval when just a few years earlier the Court had invalidated the exercise of federal power under the same statutes. Labor laws mandating collective bargaining and a minimum wage, relief programs, antimonopoly regulations, Social Security, and the host of other New Deal programs passed constitutional muster under the Court's new standards for evaluating economic programs.

While FDR's appointees to the Supreme Court expanded the government's ability to restrict private property rights, they also

⁵William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, 1995), 233.

expanded individual civil rights. As Justice Harlan Stone wrote in a now-famous footnote to his opinion in *United States v. Carolene Products Co.*, the rights enumerated in the Bill of Rights held a “preferred position.”⁶ In case after case, the Court expanded those rights and held that they applied to the states, reversing longstanding precedent. Under the so-called “second Bill of Rights,” constitutional protections for free speech, free exercise of religion, freedom from unreasonable police searches, the right to a free, court-appointed attorney, and the right against self incrimination were the law of the states as well as the law of the federal government. By 1970 the Court had incorporated almost the entire Bill of Rights into the Fourteenth Amendment, thus making it applicable to the states. Despite some backsliding during World War II and the McCarthy era, the “second Bill of Rights” created new protections for political dissenters, religious and racial minorities, and suspected criminals.⁷

The thrust of Traynor’s innovative decisions paralleled the “constitutional revolution of 1937.” Although he avoided constitutional interpretation in his innovative decisions, gravitating instead to more concrete, policy-oriented analysis, he shared the sympathies of the Courts that expanded civil rights on constitutional grounds. He opposed racially discriminatory laws, laws that perpetuated the inequality of women, and police practices that violated the constitutional rights of suspected criminals. He supported the rights of labor activists and consumers, whom he considered to be economically powerless. In keeping with the “preferred position” doctrine, he generally sided with the government against individual property rights, for instance in eminent domain cases. Traynor acted to reform the law where it preserved power relations he considered unfair, even when it meant striking down longstanding legal precedent. Traynor’s concern for society’s weak and his willingness to depart from legal convention on their behalf put him in harmony with the dominant currents of legal reform of his day.

Before joining the bench, the central event in Traynor’s experience with judicial activism had been the resistance of the U.S. Supreme Court to the New Deal. The triumph of the New Deal over the conservative Court gave judicial activism a new context. Many liberals abhorred the Court’s conservative reaction to the New Deal, and they also worried that the triumph of the New Deal over the Court had come at the expense of

⁶United States v. Carolene Products Co., 304 U.S. 144 at 152 n. 4 (1938).

⁷Leuchtenburg, *The Supreme Court Reborn*, 237–259.

politicizing the Court.⁸ Traynor was uncomfortable with the style of activism that yielded sweeping rejections of popular New Deal legislation. His success at gaining institutional acceptance for his judicial innovations depended in part on his sensitivity to the arguments against activism.

Judicial activism without controversy is difficult to accomplish. In the 1960s, the activism of the Warren Court generated so much controversy that many observers believed the court had suffered a devastating self-inflicted wound to its reputation and authority. The activism of Rose Bird, one of Traynor's successors as chief justice of the California Supreme Court, so inflamed the public that it resulted in her electoral ouster from office in 1986. Traynor's style of activism differed from that of the Warren and Bird Courts. He shared values that Earl Warren and Rose Bird championed, but unlike the Warren Court, he did not make broad statements of principle in his innovative opinions, and unlike the Bird Court, he avoided direct opposition to measures as popular and viscerally important as the death penalty. Although Traynor's advocacy of activism stood out in the intellectual history of judging as extreme, his style of activism was designed to avert controversy. His scientific approach helped him to avoid the appearance of deciding cases based on politically charged value judgments. He believed that he had a duty to reform laws that did not comport with his conception of the public interest, but the objective-sounding tone of his innovative opinions reflected his sensitivity to contemporary liberal fear of activism. In contrast with the activism of the Warren Court and the California Supreme Court under Chief Justice Rose Bird, Traynor's style of activism helped him to avoid a "self-inflicted wound" to the Court's prestige. Within the legal community, Traynor's innovative opinions often generated some criticism of his activism. However, his adroit articulation of the public interest made his reforms acceptable to other judges, even though his innovative opinions often dealt with controversial topics. Despite such controversy and despite the controversial nature of judicial activism itself, many of Traynor's activist opinions gained public acquiescence and widespread approval within the legal community.

⁸See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, 1996).