

JUSTICE TRAYNOR'S “ACTIVIST” JURISPRUDENCE:

Field and Posner Revisited

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I. INTRODUCTION

Justice Roger J. Traynor's reputation as a great judge is widely known.¹ Commentators and jurists alike, from Chief Justice Warren Burger and Judge Henry Friendly² to Professors Robert Keeton and G. Edward White, have recognized him as such.³ Yet commentators have long labeled Traynor an activist,⁴ a term that has developed a negative connotation⁵ and one that Traynor once referred to as "befuddled" and "misbegotten."⁶ Among them is Ben Field.⁷ And although others share Field's conception of an activist judge,⁸ by no means do commentators universally accept it,⁹ most notably, Judge Richard Posner, whose definition of activism focuses only on a judge's constitutional jurisprudence.¹⁰ In light of this disparity, this paper

¹ See, e.g., *THE TRAYNOR READER: NOUS VERRONS: A COLLECTION OF ESSAYS BY THE HONORABLE ROGER J. TRAYNOR*, at ix (San Francisco: The Hastings Law Journal, 1987); Robert E. Keeton, *In Tribute to Roger Traynor*, 2 *HOFSTRA L. REV.* 452, 452 (1974); Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 *CALIF. L. REV.* 11, 24 (1965); Edmund Ursin, *How Great Judges Think*, 57 *BUFF. L. REV.* 1267, 1271 (2009).

² See Warren E. Burger, *In Memoriam — Roger John Traynor*, *A Tribute*, 71 *CALIF. L. REV.* 1037 (1983); Henry J. Friendly, *In Memoriam — Roger John Traynor*, *Ablest Judge of His Generation*, 71 *CALIF. L. REV.* 1039 (1983).

³ See Keeton, *supra* note 1, at 452; G. Edward White, *Tribute, Roger Traynor*, 60 *VA. L. REV.* 1381, 1383 (1983).

⁴ See, e.g., Craig Green, *An Intellectual History of Judicial Activism*, 58 *EMORY L.J.* 1195, 1248 n.229 (2009).

⁵ See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 *CALIF. L. REV.* 519, 533 (2012) [hereinafter Posner, *The Rise and Fall*] ("Judicial activism' survives as a vague, all-purpose pejorative."); see also Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 50 *INDIANA L.J.* 1, 14 (1983) [hereinafter Posner, *The Meaning of Judicial Self-Restraint*] ("Although activism is respectable enough among academics today, it still is not sufficiently respectable among the general public for judges to dare to admit that they are activists . . .").

⁶ Roger J. Traynor, *The Limits of Judicial Creativity*, 63 *IOWA L. REV.* 1, 2, 5, 7 (1977).

⁷ BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* 121 (2003).

⁸ See, e.g., Harry N. Scheiber, *A Jurisprudence of "Pragmatic Altruism": Jon van Dyke's Legacy to Legal Scholars*, 35 *U. HAW. L. REV.* 385, 394 (2013).

⁹ See Keenan D. Kmiec, Comment, *The Origin and Current Meaning of "Judicial Activism,"* 92 *CALIF. L. REV.* 1441, 1463–76 (2004) (classifying several different definitions of judicial activism).

¹⁰ Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14; Posner, *The Rise and Fall*, *supra* note 5, at 521. As one commentator has noted, Judge Posner's definitions

first addresses whether Field's conclusion that Traynor was an activist judge remains true under Posner's definition. This paper determines that it does not. Further, because Field examined only one of Traynor's constitutional opinions, this paper delves deeper into Traynor's constitutional jurisprudence to determine whether an activist classification in Posner's terms is nevertheless appropriate. Determining that it is not, this paper turns to a discussion of the appropriate classification of Traynor's constitutional jurisprudence, concluding, based on a comparison with Justice Oliver Wendell Holmes, that Traynor belongs on Posner's list of "mixed" activist/restrained jurists.

In addressing these questions, this paper proceeds as follows: After this introduction, Part II outlines Field's definition of judicial activism and details his conclusions on Traynor. Part III turns to Posner's seminal works on judicial lawmaking, first by reviewing Posner's definition of *judicial activism* before turning to his definition of judicial restraint and concluding with an overview of his activist/restrained spectrum.

Part IV begins the analysis portion of this paper by revisiting Field's classification of Traynor and concluding that, based on Posner's definition of judicial activism, Field's conclusion is unsupported. Part IV then turns to Traynor's constitutional jurisprudence, examining Traynor's notable opinions and classifying each in Posner's terms. After establishing that Traynor's constitutional jurisprudence has both restrained and activist characteristics, this paper inquires as to how Posner would classify Traynor's constitutional approach, ultimately concluding by comparison to Holmes that Traynor's constitutional jurisprudence should be characterized as "mixed" activist/restrained. Part V concludes.

of judicial activism are slightly different. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 580 n.2 (2012). Specifically, in his book *How Judges Think*, Posner defines "the activist/restraint spectrum according to whether a decision 'expands the Court's authority relative to that of the other branches of government.'" *Id.* (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 287 (2008)). For the purposes of this paper, the author utilizes activism in the sense that "courts declare 'legislative or executive action unconstitutional.'" *Id.* at 581 (quoting Posner, *The Rise and Fall*, *supra* note 5, at 521); *infra* Part III.