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 Friendly[2] 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 connotation[5] 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

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[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.

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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.

II. BEN FIELD'S "JUDICIAL ACTIVISM": TRAYNOR AS AN ACTIVIST JUDGE

A. BEN FIELD'S CONCEPTION OF JUDICIAL ACTIVISM

For Ben Field, an activist decision is one that "explicitly departs from legal precedent in favor of [a judge's] sense of justice or social values."[11] As one commentator notes:

> What "activist" means to Field is that a judge assesses the public policy behind a law and is unafraid to update, overrule, or modify if that law leads to outdated, unjust, and ineffectual results. Law is not fixed like commandments in stone tablets, but is to be viewed realistically and applied pragmatically in service to the times of the people who must live by it.[12]

The quintessential example, according to Field, is Justice Harlan Stone's famous footnote in *United States v. Carolene Products Co.*, which "expand[ed]" the rights enumerated in the Bill of Rights and "held that they applied to the states, reversing longstanding precedent."[13]

Applying this definition to Justice Traynor, Field found that Traynor's use of "policy innovations" and "efforts at reform" made him an activist jurist.[14] Specifically, it was "Traynor's concern for society's weak and his willingness to depart from legal convention on their behalf."[15] Field offers Traynor's opinions *Perez v. Sharp*,[16] *De Burgh v. De Burgh*,[17] and *People v. Cahan*,[18] as well as Traynor's famous products liability opinions in *Escola*

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[11] FIELD, *supra* note 6, at 121.

[12] Allen G. Minker, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor*, THE FREE LIBRARY, http://www.thefreelibrary.com/Activism+in+Pursuit+of+the+Public+Interest%3A+The+Jurisprudence+of...-a0160714435 (last visited May 16, 2014) (reviewing FIELD, *supra* note 6).

[13] FIELD, *supra* note 6, at xvi.

[14] *Id.* at xv, xvi.

[15] *Id.* at xvii.

[16] 198 P.2d 17 (Cal. 1948).

[17] 250 P.2d 598 (Cal. 1952).

[18] 282 P.2d 905 (Cal. 1955).

v. Coca-Cola Bottling Co.[19] and *Greenman v. Yuba Power Products, Inc.*,[20] as evidence of Traynor's "activist" jurisprudence.[21]

B. BEN FIELD ON JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE

Ben Field's first example of Justice Traynor's activist jurisprudence is perhaps one of Traynor's most notable constitutional opinions.[22] In *Perez v. Sharp*, the California Supreme Court, led by Traynor, abolished California's anti-miscegenation law, which had prevented the issuance of marriage licenses "authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race.'"[23] According to Field, Traynor's break from precedent made *Perez* an activist opinion: "Traynor's opinion in *Perez* undeniably broke from precedent, and Traynor made no effort to disguise the novelty of his decision."[24] Instead, Traynor overturned the statute based on his belief that it "lacked a 'legitimate legislative objective' because its assumptions about race had been refuted by contemporary science and social science."[25]

Field turns next to Traynor's opinion in *De Burgh v. De Burgh*, where the California Supreme Court "did away with one of the major bulwarks of the at-fault [divorce] system: the defense of recrimination."[26] Specifically, Traynor, writing for the Court, "discarded the common law rule treating recrimination as an automatic bar to divorce,"[27] placing it instead "in the discretion of the trial court . . . whenever each party could show some fault

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19 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

20 377 P.2d 897 (Cal. 1963).

21 *See* Field, *supra* note 7, 19–95.

22 Field also briefly examines several other Traynor opinions, including *People v. Oyama*, 173 P.2d 794, 804 (Cal. 1946) (Traynor, J., concurring), *rev'd*, *Oyama v. California*, 332 U.S. 633 (1948), *Takahashi v. Fish & Game Commission*, 185 P.2d 805 (Cal. 1947) (Traynor, J., concurring in dissent), *rev'd*, 334 U.S. 410 (1948), and *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966) (Traynor, J., concurring in judgment), among others. As Field did not utilize these opinions in his primary analysis, this paper does not discuss them here, although it discusses *Takahashi* in subsequent Parts. *See infra* Part IV.

23 Field, *supra* note 7, at 22 (quoting *Perez*, 198 P.2d at 18).

24 *Id.* at 34.

25 *Id.* at 39–40.

26 Catherine Davidson, *All the Other Daisys: Roger Traynor, Recrimination, and the Demise of At-Fault Divorce*, 7 Cal. Legal Hist. 381, 384 (2012).

27 *Id.* at 389.

in the other."[28] According to Field, the decision "could have been resolved easily by precedent, if the precedent had not conflicted with the justices' values and perception of social realities";[29] specifically, "Traynor's conception of the public interest in the family contained the seed of the change."[30] For Field, then, Traynor's opinion in *De Burgh*, like *Perez*, was an activist one.

Next, Field examines Traynor's opinion in *People v. Cahan*, where the California Supreme Court adopted the exclusionary rule for evidence obtained in illegal police searches.[31] According to Field, "Traynor's opinion in *People v. Cahan* . . . was unusual both because it marked a departure from precedent and because Traynor himself authored the precedent it overruled."[32] For Field, "*Cahan* and the search and seizure decisions that followed it demonstrated Traynor's concern over the practical effect of sophisticated police tactics on the privacy rights of individuals."[33] "Traynor explained that his decision in *Cahan* was the means to achieve the policy objective of deterring illegal police searches," rather than the U.S. Supreme Court's determination that the exclusionary rule was an important part of the Fourth and Fourteenth Amendments.[34] Thus,

> *Cahan* . . . exemplified Traynor's conception of judicial creativity. Like the Pragmatist philosophers, Traynor believed that judgment was the process of bringing experience to bear on the facts. His experience on the bench impelled him to overrule his own decision, *Gonzales*, when he realized it had failed to deter illegal searches, and he crafted new rules to serve that function. *Cahan* and its progeny functioned as a coherent system of rules instituted because of the need for a practical, *policy-oriented* approach to the problem of illegal police searches. Traynor called on judges to assert judicial contract over law enforcement measures. He believed the health of the law required that law enforcement yield to judicial authority. . . . Traynor gave clear *policy reasons*, based on observation of

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28 *Id.* at 390.

29 Field, *supra* note 7, at 45 (citing De Burgh v. De Burgh, 250 P.2d 598 (Cal. 1952)).

30 *Id.* at 68.

31 *See* 282 P.2d 905 (Cal. 1955).

32 Field, *supra* note 7, at 69 (citing *Cahan*, 282 P.2d 905).

33 *Id.* at 81.

34 *Id.* at 85 (quoting Mapp v. Ohio, 367 U.S. 643, 657 (1961)).

> police practices, *for the departure from precedent*. His innovations in search and seizure law reflected his civil libertarian sympathies . . . . *Cahan* and its progeny incorporated into law these changing value judgments on police tactics.[35]

Lastly, Field analyzes two of Traynor's most well-known opinions, both in the area of products liability.[36] "In his 1944 concurrence in *Escola v. Coca-Cola Bottling Co.* Traynor set forth his theory that manufacturers should be held strictly liable for injuries caused by design or manufacturing defects."[37] In 1963, "all of Traynor's colleagues joined his opinion in *Greenman v. Yuba Power Products, Inc.*, making the California Supreme Court the first court to adopt a rule of strict products liability."[38] For Field, the *Greenman* opinion was a "landmark in the massive shift in judicial thinking toward strict liability,"[39] and it was this shift that made the *Escola* and *Greenman* opinions activist, as "[s]trict liability broke with legal convention" and "signaled a 'quiet revolution' in the law."[40]

As a review of these opinions shows, Field believes that Traynor "was an activist judge in that he departed from precedent in favor of his conception of the public interest."[41] In these "landmark" decisions, Traynor "diverged from legal convention not only in their result, but in their method," explicitly utilizing public policy in making his determinations.[42] Further, it was Traynor's use of "untraditional sources, such as academic writings and policy-oriented studies" and belief that "modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task" that made Traynor's decisions "activist" for Field.[43]

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35 *Id.* at 93 (emphasis added).

36 *Id.* at 116 (noting that "state courts outside of California cited the [*Greenman*] decision in 280 opinions" and that "after 1963, state courts outside of California cited [the *Escola* concurrence] approvingly 60 times").

37 *Id.* at 95.

38 *Id.* (footnote omitted).

39 *Id.* at 116.

40 *Id.* at 119 (quoting James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability*, 37 UCLA L. Rev. 479, 483 (1990)).

41 *Id.* at 121.

42 *Id.*

43 *Id.*

III. JUDGE POSNER ON JUDICIAL ACTIVISM

A. JUDGE POSNER'S DEFINITION OF AN ACTIVIST JUDGE

Having established Ben Field's conception of activism and reviewed his analysis of Justice Traynor's seminal opinions, this Part examines Judge Posner's definition of the term. In Posner's view, "the major concern over activism . . . centers on the fact that in holding a statute unconstitutional, a court is *cutting back on the power of the legislature*."[44] Thus, for Posner, "unless [the court] is acting contrary to the will of the other branches of government it is not being activist."[45] Posner has further refined his conception of activism. In *How Judges Think*, he distinguished between two senses of the term, noting that "[i]n one sense . . . it means enlarging judicial power at the expense of the power of the other branches of government (both federal and state)."[46] In a different sense, judicial activism "refers to the legalist's conceit that his technique for deciding cases minimizes judicial power by transferring much of that power back, as it were, to elected officials . . . from whom the judges are thought to have wrested it by loose construction."[47] For clarity purposes, this paper focuses solely on Posner's broader definition of activism, that is, when a court holds a statute unconstitutional, thereby "cutting back on the power of the legislature."[48]

To illustrate Posner's judicial activism further, consider his definition of judicial restraint, which he considers the opposite.[49] As Posner writes, "constitutional restraint," also referred to as "'separation of powers judicial

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[44] Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14 (emphasis added).

[45] *Id.* at 14.

[46] Posner, *supra* note 10, at 287 (citing Richard A. Posner, The Federal Courts: Challenge and Reform 318 (1996)).

[47] *Id.*

[48] Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14. Based on this definition, this paper excludes from its analysis in Part IV Traynor's opinions in voter-approved legislation, including *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966) (Traynor, J., concurring in judgment).

[49] "Judicial modesty or self-restraint," Posner writes, is "understood as the rejection of judicial activism in the sense of judicial aggrandizement at the expense of the other branches of government." Posner, *supra* note 10, at 287–88.

self-restraint,' or . . . 'structural restraint,' "[50] occurs where "judges are *highly* reluctant to declare legislative or executive action unconstitutional."[51] This conception translates to "the judge's setting as an important goal of his decisionmaking the cutting back of the power of his court system in relation to — as a check on — other government institutions."[52] Thus, a restrained judge, "if he is a federal judge . . . will want his court to pay greater *deference* to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government."[53]

As an example of restraint, Posner provides the hypothetical decision overruling *Marbury v. Madison*,[54] which "would be self-restrained . . . because it would reduce the power of the federal courts vis-à-vis other organs of the government."[55] Similarly, Posner explains that *Erie Railroad Co. v. Tompkins*[56] "is a self-retrained decision . . . because it reduced the power of the federal courts vis-à-vis the state courts," and conversely, *Mapp v. Ohio*[57] "is activist because it had the opposite effect."[58]

Importantly, in contrast to Field's conception of *judicial activism*, Posner's activism has nothing to do with a judge's common law opinions. Posner does not consider these decisions activist, as legislatures can always overturn a common law decision by passing a statute, and thus the court is not usurping power from the legislature.[59] Professor Edmund Ursin illustrates this

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[50] *Id.* at 11. For clarity purposes, like Posner, the remainder of this paper refers to restraint or judicial restraint as encompassing the several forms of the terms. *See id.* at 12.

[51] Posner, *The Rise and Fall*, *supra* note 5, at 521.

[52] Posner, *The Meaning of Judicial Self-R*estraint, *supra* note 5, at 11–12.

[53] *Id.* at 12 (emphasis added). By deference, Posner does not mean a "modest, deferential, [or] timid judge" with a "lack of self-esteem or self-confidence and . . . [an] above-average reverence of precedent." *Id.* at 18. Rather, in Posner's sense of the word, deference is the belief that "the courts ought to be deferring to the other branches of government." *Id.* at 18.

[54] 5 U.S. (1 Cranch) 137 (1803).

[55] Posner, *The Meaning of Judicial Self-R*estraint, *supra* note 5, at 13.

[56] 304 U.S. 64 (1938).

[57] 367 U.S. 643 (1961).

[58] Posner, *The Meaning of Judicial Self-R*estraint, *supra* note 5, at 13–14 (footnotes omitted).

[59] *See* Richard A. Posner, The Problematics of Moral and Legal Theory 247 (1999) (noting, in the context of oil and gas law, that the "legislature can always step in and prescribe an economically sound scheme of property rights"); *see also* Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18 (noting that "considerations

point by comparing Traynor's *Escola* concurrence with the U.S. Supreme Court's controversial decision in *Lochner v. New York*[60]: "Unlike Traynor's *Escola* proposal, *Lochner* and its progeny were constitutional decisions in which the court limited the power of the legislature."[61] Ursin continues, "A court engaging in . . . large scale lawmaking would not have been usurping legislative authority because the legislature can always step in to unwrite the common law that judges write."[62]

B. JUDGE POSNER'S ACTIVIST/RESTRAINED SPECTRUM AND "MIXED" JURISTS

In addition to these general conceptions of activist and restrained judges, Judge Posner provides a basic spectrum of judicial decisionmaking that "runs from activist to restrained."[63] On one hand is the judicial activist, or "aggressive judge," who "expands the Court's authority relative to that of the other branches of government."[64] On the other is the "modest [or restrained] jurist," who "tells the Court to think very hard before undertaking to nullify the actions of the other branch of government."[65] Thus, as Posner writes, one can "identify Rehnquist, Frankfurter, Burger, and Scalia as the most restrained Justices" and "Douglas, Brennan, Black, and Marshall as the most activist."[66]

Although these classifications represent the ends of Posner's spectrum, in some jurists, "restrained and activist strains are mixed," as on occasion, such jurists "plow new constitutional ground."[67] Among Posner's "mixed" activist/restrained jurists are "John Marshall, Holmes, Brandeis, Cardozo, Robert Jackson, and Henry Friendly."[68] Holmes, for example, was

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of judicial self-restraint" are "irrelevant" in areas of "private judge-made law as distinct from public law," with Holmes's tort decisions as an example).

60 198 U.S. 45 (1905).

61 Ursin, *supra* note 1, at 1292 (footnotes omitted).

62 *Id.* at 1355; *see also* Virginia E. Nolan & Edmund Ursin, *An Enterprise (No-Fault) Liability Suitable for Judicial Adoption — With a "Draft Judicial Opinion,"* 41 SAN DIEGO L. REV. 1211, 1214 (2004) ("[S]cholars [in the 1950s] generalized their *Lochner*-inspired concerns over judicial activism (in constitutional law) to include the common law.").

63 Posner, *The Rise and Fall*, *supra* note 5, at 551.

64 POSNER, *supra* note 10, at 286.

65 *Id.* at 286, 287.

66 Posner, *The Rise and Fall*, *supra* note 5, at 554–58.

67 *Id.* at 554–58.

68 *Id.* at 555.

not exclusively deferential to the legislature; rather, he overruled as unconstitutional certain statutes that made him "puke."[69] As Posner writes, "Holmes's opinions on the Supreme Judicial Court of Massachusetts upholding the rights of unions, and his later, more famous opinions for the United States Supreme Court dissenting from decisions that invalidated social welfare legislation on 'liberty of contract' grounds are generally thought to be the apogee of judicial self-restraint."[70] Holmes, however, was "far from uniformly restrained in constitutional cases — think of his free speech and habeas corpus opinions, and his dissent in the wiretapping case (*Olmstead*). Although they are not closely reasoned opinions, they are sharp reactions to government actions that he found abhorrent."[71]

Justices Brandeis and Frankfurter also fall into Posner's "mixed" activist/restrained grouping. Brandeis "embraced . . . (constitutional) restraint, adopting, advocating, and amplifying doctrines . . . that eliminate[d] or at least postpone[d] occasions on which a federal court deems itself authorized to declare a legislative or executive measure unconstitutional."[72] However, "[n]o more than Holmes was Brandeis uniformly restrained," as he "participated in decisions that invalidated New Deal legislation."[73] Similarly, although Frankfurter advocated restraint "with a noisy passion," he "displayed no restraint when it came to the Fourth Amendment and the Equal Protection Clause; he was passionate in support of declaring public school segregation unconstitutional."[74]

IV. BEN FIELD AND JUDGE POSNER REVISITED: JUSTICE TRAYNOR AS AN ACTIVIST JUDGE?

A. REVISITING BEN FIELD: JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE

Ben Field and Judge Posner have incompatible conceptions of judicial activism. On one hand, Field focuses on breaks from precedent and the use

69 Posner, *supra* note 10, at 288.

70 Posner, *The Rise and Fall*, *supra* note 5, at 526 (footnotes omitted).

71 *Id.* at 526–27.

72 *Id.* at 527.

73 *Id.*

74 *Id.* at 530–31.

of policy in judicial decisionmaking without regard for any common law and constitutional law distinctions. On the other, Posner, whose definition encompasses only constitutional decisions, focuses on whether the decision takes power away from another branch of government. These divergent conceptions raise the first general question this paper seeks to answer: Whether Field's classification of Traynor as an activist judge remains true under Posner's definition. As the following discussion demonstrates, of the five opinions Field examined, only *Perez* falls within Posner's definition of activism.

As noted, Traynor's majority opinion in *Perez* examined the constitutionality of California's anti-miscegenation law. Ultimately, the California Supreme Court, led by Traynor, struck down that statute, holding that it "denied freedom of association to every member of the population"[75] and declaring that a state's "forbidding interracial marriage was unconstitutional."[76] In Posner's terms, such an invalidation clearly falls within the "activist" category, as it cuts "back on the power of the legislature."[77] Thus, Field's activist classification of this opinion is accurate.

Traynor's *De Burgh* opinion, however, was not activist in Posner's sense, as it addressed the judge-made rule regarding fault-based divorces in California and the judicial interpretation of the related California divorce statutes.[78] More specifically, prior judicial interpretations of California's divorce statutes required "a person seeking a divorce . . . to establish one of the specified grounds for divorce, such as adultery.[79] And "divorce statutes had been interpreted to require the trial court to deny the divorce if recrimination, such as the party seeking a divorce on the grounds of adultery also having committed adultery, was proven."[80] In *De Burgh*, Traynor held that the "trial courts had discretion to grant or deny a divorce" as the public interest required.[81] As a statutory interpretation case dealing with

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75 James R. McCall, *Thoughts About Roger Traynor and Learned Hand — A Qualifying Response to Professor Konefsky*, 65 U. Cin. L. Rev. 1243, 1251 n.40 (1997).

76 Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 Calif. L. Rev. 1262, 1270 (1972).

77 Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14.

78 *See* Ursin, *supra* note 1, at 1310; Davidson, *supra* note 28, at 383.

79 Ursin, *supra* note 1, at 1310.

80 *Id.* (citing *De Burgh*, 250 P.2d at 599–600); *see also* Davidson, *supra* note 28, at 383 (noting that California's "divorce system [was] generally statutory").

81 *Id.* at 1311 (citing *De Burgh*, 250 P.2d at 603–07).

judge-made rules, then, Traynor's *De Burgh* opinion was not activist in Posner's terms. Thus, Field's classification of this opinion is inaccurate.

The *Cahan* opinion tracks *De Burgh* in that it should not be classified as activist; the *Cahan* decision dealt with a judge-made rule of evidence. As Justice Walter Schaefer notes, in *Cahan* " '[Traynor] concluded' . . . writing for the majority, 'that evidence obtained in violation of the constitutional guarantees is inadmissible.' "[82] Field himself cites the decision as creating "a judicial rule of evidence barring the admission at trial in California courts of evidence obtained in an illegal police search."[83] Although it most certainly took away power from law enforcement, the decision was based on a rule of evidence, not an unconstitutional statute, and thus does not qualify as activist in Posner's terms. Therefore, like *De Burgh*, Field's characterization of *Cahan* as an activist opinion is unsupported.

Lastly, Traynor's opinions in *Escola* and *Greenman* do not support Field's activist classification. Rather, they fall outside the scope of Posner's definition, as both are common law decisions dealing with strict products liability; the California legislature could have overruled Traynor's strict products liability rules. Thus, neither decision is activist in Posner's terms.

To review, of the opinions Field cites as evidence of Traynor's activist jurisprudence, only the *Perez* opinion clearly supports his conclusion. The *De Burgh*, *Cahan*, *Escola*, and *Greenman* opinions, however, are not supportive. Based on these opinions, then, it cannot be said that Traynor was an activist judge in Posner's terms; Field's classification is at best inconclusive.

B. JUSTICE TRAYNOR REVISITED: TRAYNOR'S CONSTITUTIONAL JURISPRUDENCE

Having established that Field's supporting case law is inconclusive, this paper turns to Justice Traynor's most notable constitutional opinions to determine whether he should be classified as an activist judge in Judge Posner's terms.[84] As the following discussion shows, Traynor's constitutional

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[82] Schaefer, *supra* note 1, at 13 (quoting *Cahan*, 282 P.2d at 911–12).

[83] Ben Field, *The Jurisprudence of Innovation: Justice Roger Traynor and the Reordering of Search and Seizure Rules in California*, 1 CAL. SUP. CT. HIST. SOC'Y Y.B. 67, 68 (1994).

[84] Traynor penned over 900 opinions in his thirty years on the California Supreme Court. *See* Wright, *supra* note 76, at 1262. As Schaefer notes, "[a]ll that an outside

jurisprudence reveals a generally restrained approach, but his racial discrimination and free speech opinions show strains of judicial activism.

Before delving into Traynor's constitutional jurisprudence, a review of his general position on constitutional decisionmaking provides important context to the discussion. Traynor once wrote that "a state judge is . . . bound to be aware of the signs that we may cross new frontiers in constitutional law"[85] and that "the growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a *judicial lethargy* that masks itself as judicial dignity with the tacit approval of an equally lethargic bar."[86] Without further inquiry, these assertions seem to urge courts to take an activist jurisprudential view: crossing new frontiers — or overturning statutes — when necessary and calling for "judicial boldness."

Traynor, however, also "warned judges against usurping the legislative function," writing that

> [s]tudents of constitutional law will find valid grounds for difference as to how readily a court should arrive at a constitutional rule that nudges a legislature into social reform along one expansive front or another. Nevertheless there remains widespread agreement that the *court itself cannot be the engine of social reform*. The very responsibilities of a judge as an arbiter disqualify him as a crusader.[87]

This reflects Posner's view of a restrained jurist. Compare it to his definition of judicial restraint in *The Rise and Fall of Judicial Self-Restraint*: "judges are highly reluctant to declare legislative or executive action unconstitutional — deference is at its zenith when action is challenged as unconstitutional."[88] Further, as Ursin writes, for "Traynor . . . there was no inconsistency in calling for deference to the legislature in constitutional

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generalist can do is offer some rather random but hopefully relevant, observations about some aspects of [a judge's] work," and in reviewing Traynor's constitutional jurisprudence, that is all this paper seeks to do. *See* Schaefer, *supra* note 1, at 11.

[85] Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. Ill. L.F. 230, 237.

[86] Roger J. Traynor, *Comment on Courts and Lawmaking*, *in* Legal Institutions Today and Tomorrow, 58, 52 (Monrad G. Paulsen ed., 1959) (emphasis added).

[87] Lynn D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 BYU L. Rev. 811, 818 (quoting Traynor, *supra* note 6, at 5) (emphasis added).

[88] Posner, *The Rise and Fall*, *supra* note 5, at 521.

decision making while insisting on a creative role for courts when it came to the common law."[89] Ultimately for Traynor, "however sensitive judges become to the need for law reform they must necessarily keep their dispassionate distance from that ball of fire that is the living law. The United States Supreme Court had 'stated that it is not for them to pass judgment on the wisdom of legislation,' and the California Supreme Court had 'accepted that thesis.' "[90]

1. Justice Traynor's Restrained Jurisprudence

Turning to Justice Traynor's constitutional jurisprudence, his opinions largely echo this sense of deference. Perhaps most indicative is Traynor's opinion in *People v. Sidener*,[91] where, writing for the court, he upheld a statute that punished recidivists more severely than first-time offenders.[92] Exhibiting Posner's sense of judicial restraint, Traynor wrote that "[i]t is not [the judiciary's] concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects."[93] This deference to the California Legislature clearly does not fall within Posner's conception of activist jurisprudence.

Traynor's opinion in *Gospel Army v. City of Los Angeles*[94] also evidences a restrained jurisprudential approach. In that case, Traynor, writing for the Court, upheld Los Angeles ordinances that regulated "transactions in secondhand goods and solicitations for charitable purposes."[95] Disregarding Gospel Army's argument that the ordinances "abridged its religious liberty,"[96] Traynor found the ordinances not violative of the First

89 Ursin, *supra* note 1, at 1292.

90 *Id.* at 1312 (quoting Traynor, *supra* note 24, at 237) (footnotes omitted) (internal quotation marks omitted).

91 375 P.2d 641 (Cal. 1962), *overruled in part*, People v. Tenorio, 473 P.2d 993 (Cal. 1970).

92 The statute itself provided that "a recidivism charge, which would increase a defendant's criminal penalties, could only be dismissed when the district attorney moved to dismiss it." John E. Noyes, *Justice Roger Traynor Professorship Acceptance*, 39 Cal. W. Int'l L.J. 384, 386 (2009).

93 *Sidener*, 375 P.2d at 653 (quoting State v. Industrial Accident Comm'n, 310 P.2d 7 (Cal. 1957)) (internal quotation marks omitted).

94 163 P.2d 704 (Cal. 1945).

95 *Id.* at 706.

96 *Id.*

Amendment.[97] Thus, like *Sidener*, Traynor's *Gospel Army* should be classified as restrained in Posner's terms, not activist.

Similarly, Traynor's social welfare opinions evidence Posner-style restraint. First, in one of his earliest opinions, *Alameda County v. Janssen*,[98] Traynor examined the constitutionality of California's Welfare and Institutions Code, which authorized "releases of liens held against real estate belonging to the needy aged."[99] Traynor upheld the legislation, deeming it "clearly justified in its belief that the release of liens held against the property of indigent recipients of aid is for the general public welfare."[100]

Traynor's last opinion,[101] his dissent in *Goytia v. Workmen's Compensation Appeals Board*,[102] also shows a restrained approach to constitutional decisionmaking. The majority in *Goytia* reviewed a decision of the Workmen's Compensation Appeals Board that reduced a permanent disability award, which it eventually annulled,[103] holding that "potential future earnings should have been considered in determining earning capacity."[104] Traynor, however, "would have the court defer to the branch of the government charged with administering a social program."[105] As Elizabeth Roth notes, "[u]nderlying his opinion is the view that the court's supervisory powers have been overexercised."[106] Taken together, neither *Janssen* nor *Goytia* qualify as activist under Posner's definition.

Moreover, although, as discussed below, Traynor's free speech opinions generally represent an activist approach, several exude judicial restraint in Posner's sense — in particular, Traynor's opinion in *In re Bell*,[107] which held as valid in part and invalid in part a county's anti-picketing ordinance,

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97 *Id.* at 711–13.

98 106 P.2d 11 (Cal. 1940).

99 Elizabeth Roth, *The Two Voices of Roger Traynor*, 27 Am. J. Legal Hist. 269, 274–75 (1983) (citing *Janssen*, 106 P.2d at 14).

100 *Janssen*, 106 P.2d at 15, 16. For a more detailed discussion on the decision, see Roth, *supra* note 99, at 274–76.

101 Roth, *supra* note 99, at 286.

102 464 P.2d 47, 53 (Cal. 1970) (Traynor, C.J., dissenting).

103 *See id.* at 48 (majority opinion).

104 Roth, *supra* note 99, at 286.

105 *Id.*

106 *Id.*

107 122 P.2d 22, 27–28 (Cal. 1942).

and his opinion in *Payroll Guarantee Association v. Board of Education*,[108] which held valid a California statute that limited school building availability for community activities. Further, one of Traynor's last opinions, *In re Bushman*,[109] upheld the constitutionality of California Penal Code section 415, which made it a misdemeanor to "maliciously and willfully disturb[] the peace or quiet of any . . . person . . . by tumultuous or offensive conduct."[110] Traynor, writing for the Court, found that "[s]ection 415 [was] not unconstitutionally vague and overbroad" and that it "assures that conduct protected by the First Amendment's guarantee of freedom of speech is not made criminal."[111] Taken together, these opinions, in that they upheld or upheld in part various statutes or ordinances, represent Posner's judicial restraint, not his judicial activism.

2. Justice Traynor's Activist Jurisprudence

Despite this generally restrained approach, Justice Traynor believed that courts had "an 'active responsibility in the safeguard of those civil liberties that are the sum and substance of citizenship.' "[112] This "active responsibility," perhaps what Judge Friendly calls a "sense for the 'right' result,"[113] surfaced in two major areas of Traynor's constitutional jurisprudence — racial discrimination and free speech — resulting in activist jurisprudence in Posner's view.

It was in the area of racial discrimination where Traynor was perhaps the most activist. In particular, Traynor felt "changes in public opinion on race discrimination have compelled reinterpretation of the fourteenth amendment, itself a product of violent social change."[114] By the 1950s, Traynor opined that it was "widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an *insidiously evil thing* that deprives the community of the best of all its people as it deprives individuals and groups to give of their best."[115] As noted, Traynor's

[108] 163 P.2d 433, 434–36 (Cal. 1945).
[109] 463 P.2d 727 (Cal. 1970).
[110] *Id.* at 729 n.1.
[111] *Id.* at 730–31.
[112] Traynor, *supra* note 85, at 241.
[113] Friendly, *supra* note 2, at 1040.
[114] Traynor, *supra* note 85, at 239.
[115] *Id.* at 237 (emphasis added).

opinion in *Perez*, which overturned California's anti-miscegenation law, can be characterized as activist in Posner's terms.

Several of Traynor's opinions on California's Alien Land Act can also be classified in this way. Justice Jesse Carter's *Takahashi v. Fish and Game Commission*[116] dissent, which Traynor joined, noted that "highly persuasive arguments may be made that the law . . . is aimed solely at Japanese in an obvious discrimination against a particular race," and would have overturned the statute on equal protection grounds.[117] Similarly, Traynor's joint concurrence in *Palermo v. Stockton Theatres, Inc.*[118] evidences an activist approach to racial discrimination issues. There, Traynor argued that California's prohibition on aliens' owning land was "clearly unconstitutional, and should, therefore, be stricken down."[119] Specifically, "[i]f the state could prohibit aliens ineligible to citizenship from owning or leasing property it would thereby effectively prevent such persons from conducting ordinary industrial or business enterprises," which would "impose upon the alien ineligible to citizenship an economic status inferior to all others earning a living in the state" that "cannot be sustained under the Fourteenth Amendment."[120] Lastly, in *Sei Fujii v. California*, Traynor concurred with Chief Justice Gibson's opinion that held the Alien Land Law invalid under the Fourteenth Amendment, as it was "obviously designed and administered as an instrument for effectuating racial discrimination," and served no "legitimate interest[] of the state.[121]

Similarly, several of Traynor's free speech opinions warrant an activist characterization. In *First Unitarian Church of Los Angeles v. County of Los Angeles*,[122] Traynor, dissenting, took an activist approach in reviewing the constitutionality of section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code.[123] Although the

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116 185 P.2d 805 (Cal. 1947) (Traynor, J., concurring in dissent), *rev'd*, 334 U.S. 410.

117 *Id.* at 821.

118 195 P.2d 1, 9 (Cal. 1948) (Traynor, J., concurring).

119 *Id.* at 10.

120 *Id.* at 9–10.

121 242 P.2d 617 (Cal. 1952).

122 311 P.2d 508, 522 (Traynor, J., dissenting), *rev'd*, 357 U.S. 545 (1958).

123 Section 19 of article XX "denied a tax exemption to any organization 'advocating the overthrow of the Government of the United States or the State by force or violence or other unlawful means.'" Adrian A. Kragen, In Memoriam: Roger J. Traynor,

majority held that free speech under the First Amendment was not an absolute right, and that "the prevention of subversion was an appropriate basis for restricting free speech," Traynor argued that "[s]ection 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict[ed] free speech."[124] For Traynor, "[t]he majority opinion [went] far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. Section 19 of article XX, implemented by section 32 . . . , arbitrarily assumes that those who seek tax exemptions advocate overthrow of the government unless they declare otherwise."[125] Thus, for Traynor, a "law with such consequences cannot stand in the face of the constitutional guarantees.[126]

Traynor's opinion in *Danskin v. San Diego Unified*[127] was likewise activist in Posner's terms. In that "landmark case" that "further solidified the rights of free speech and assembly for political dissenters,"[128] Traynor invalidated a California statute that required "school boards [to] allow free use of school auditoriums for public meetings but prohibited use by organizations seeking forcible overthrow of the government."[129] Writing for the court, as Chief Justice Donald Wright noted, Traynor found that "[i]t is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable."[130] Thus, "[s]ince the state cannot compel 'subversive elements' directly to renounce their convictions and

Chief Justice Traynor and the Law of Taxation, 35 HASTINGS L.J. 801, 811 (1984) (quoting CAL. CONST. art. XX, § 19 (West 1954) (repealed 1976 and exact language reenacted at CAL. CONST. art. VII, § 9 (West Supp. 1984))). Section 32 "implemented section 19 by requiring any organization applying for a tax exemption to declare that it did not advocate violent overthrow of the government." *Id.* (citing CAL. REV. & TAX CODE § 32 (West 1970)).

124 *First Unitarian*, 311 P.2d at 522 (Traynor, J., dissenting).

125 *Id.* at 527.

126 *Id.*

127 171 P.2d 885 (Cal. 1946).

128 Wright, *supra* note 81, at 1269.

129 *Id.*

130 *Id.* at 1270 (quoting *Danskin*, 171 P.3d at 892) (internal quotation marks omitted).

affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building."[131]

Taken together, Traynor's opinions in *First Unitarian* and *Danskin* show an activist approach, as he invalidated statutes as violative of freedom of speech protections in both cases. These opinions, together with his racial discrimination jurisprudence and his "judicial deference to legislation in all other areas,"[132] demonstrate that Traynor's constitutional jurisprudence contains aspects of both an activist and a restrained jurist.

C. JUDGE POSNER REVISITED: JUSTICE TRAYNOR'S PLACE ON THE ACTIVIST/RESTRAINED SPECTRUM

How then, should Justice Traynor be classified, if one were to classify him in Judge Posner's activist/restrained terms? He was not an activist in Ben Field's sense, nor was he purely activist as Posner conceives the word. And although Posner classifies other "great pragmatic judges and Justices," he does not expressly classify Traynor in activist/restrained terms. Rather, he implicitly labels Traynor an activist judge in discussing judicial pragmatism, first, by quoting Field on Traynor's judicial decisionmaking method:

> Traynor's landmark decisions diverged from legal convention not only in their results, but in their method. Unlike earlier *judicial activists* who couched their innovations in conventional language, Traynor announced explicitly that he was making public policy. His innovative decisions relied little on precedent. They consisted mainly of policy analysis, and they often drew criticism in the dissents of other California Supreme Court justices for that reason. Traynor's innovative opinions often referred to untraditional sources, such as academic writings and policy-oriented studies. He believed that modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task.[133]

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131 *Danskin*, 171 P.2d at 891.

132 McCall, *supra* note 80, at 1251.

133 Posner, *The Rise and Fall*, *supra* note 5, at 540 (quoting Field, *supra* note 6, at 121) (emphasis added).

Second, in *The Rise and Fall of Judicial Self-Restraint*, Posner refers to "the distinguished *pragmatic activist* Roger Traynor."[134] The following subpart suggests that Traynor, like Justice Holmes, should be classified as a "mixed" activist/restrained jurists, not simply as an activist.

A comparison of Traynor's constitutional jurisprudence and Posner's example of Holmes, whom he classifies as "mixed" activist/restrained, illustrates why Traynor should be classified in this way. As Posner points out, "Holmes's opinions on the Supreme Judicial Court of Massachusetts upholding the rights of unions, and his later, more famous opinions for the United States Supreme Court dissenting from decisions that invalidated social-welfare legislation on 'liberty of contract' grounds, are generally thought to be the apogee of judicial self-restraint."[135] One of these "more famous opinions" is his dissent in *Lochner v. New York*,[136] which typifies Holmes's deference to legislatures, as the opening lines of that opinion indicate:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. *But I do not conceive that to be my duty*, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.[137]

Ursin further demonstrates Holmes's constitutional deference, quoting Holmes's earlier essay, *The Path of the Law*.[138] As Ursin notes, Holmes had "suspected that the fear of socialism had influenced judicial action," and "took aim at "people who no longer hoped to control the legislatures and looked to the courts as expounders of the Constitutions,' warning that

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134 *Id*. at 554 (emphasis added).

135 *Id*. at 526 (footnotes omitted).

136 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

137 *Id*. (emphasis added).

138 *See* Ursin, *supr*a note 1, at 1292.

'new principles have been discovered outside the bodies of those Constitutions, which may be generalized into acceptance of economic doctrines which prevailed about fifty years ago.' "[139] In particular, "Holmes . . . urged judges to 'hesitate' before 'taking sides upon debatable and often burning questions.' "[140]

Compare Holmes's constitutional deference to Traynor's warning that judges "must necessarily keep their dispassionate distance from that ball of fire that is the living law."[141] Remember too that Traynor's opinions in *Sidener*, *Gospel Army*, *Janssen*, *Goytia*, *In re Bell*, *Payroll Guarantee*, *In re Bushman* can all be characterized as restrained in Posner's terms, just as Holmes's dissent in *Lochner*. Consider, in conclusion, Traynor's words in *Sidener*: "It is not [the judiciary's] concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects"[142] and Holmes's in *Lochner*: "I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.[143]

Despite Holmes's belief that "courts [generally] ought to be deferring to the other branches of government," he carved out several exceptions.[144] As Posner writes, Holmes "was far from uniformly restrained in constitutional cases."[145] According to Posner, Holmes invalidated "government actions [he] found abhorrent."[146] As examples, Posner cites "Holmes's activist dissent in *Abrams*,"[147] which "combined Holmes's conception of Social Darwinism and the "competitive struggle in the intellectual marketplace,"

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[139] *Id*. at 1292 (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 467–68 (1897)) (internal quotation marks omitted).

[140] *Id*. (quoting Holmes, *supra* note 143, at 468).

[141] *Id*. at 1312 (quoting Traynor, *supra* note 24, at 237) (footnotes omitted) (internal quotation marks omitted).

[142] *Sidener*, 375 P.2d at 653 (quoting State v. Industrial Accident Comm'n, 310 P.2d 7 (Cal. 1957)) (internal quotation marks omitted).

[143] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[144] *See* Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18.

[145] Posner, *The Rise and Fall*, *supra* note 5, at 526–27 (footnote omitted).

[146] *Id*. at 527.

[147] *Id*. at 543 (citing Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting)).

and his "activist dissent in *Olmstead*."[148] Similarly, "Holmes was not necessarily inconsistent in wanting to restrict government regulation of speech and the press more than the courts were doing and regulation of wages and hours less," as "the language and history of the first amendment . . . created an open area in which a belief in a Darwinian struggle for survival among competing ideas could be made law, without usurpation."[149]

Like Holmes's activist opinions in *Abrams* and *Olmstead*, as well as his activist approach to free speech jurisprudence, Traynor too, in the areas of racial discrimination and free speech, had specific areas of law in which he was particularly activist. Just as Holmes's belief in the Social Darwinism and the marketplace of ideas "infused" his First Amendment opinions,[150] so too did Traynor's abhorrence for the "insidious evil" of racial discrimination result in activist opinions in *Perez*, *Takahashi*, and *Palermo*. Likewise, Traynor's protection of free speech in *First Unitarian* and *Danskin* resulted in opinions that can be classified as activist.

Thus, as both Holmes's and Traynor's constitutional jurisprudence contain restrained and activist strains, and as Posner classifies Holmes as a "mixed" activist/restrained jurist, so too should Traynor be classified as "mixed" activist/restrained. Traynor's general deference in constitutional law, as evidenced by his opinion in *Sidener*, among others, compares readily to Holmes's restrained *Lochner* dissent. And just as Holmes penned activist opinions in free speech areas and in *Abrams* and *Olmstead*, so too did Traynor invalidate statutes in select areas: racial discrimination and free speech. Thus, rather than being considered an activist or pragmatic activist, in Posner's view, Traynor should be characterized as "mixed" activist/restrained.

V. CONCLUSION

Under Judge Posner's conception of judicial activism, Ben Field's conclusion that Justice Traynor was an activist judge is unsupported. Of the cases Field reviewed, only one — *Perez* — falls under Posner's definition of activist. Traynor's opinions in *De Burgh*, *Cahan*, *Escola*, and *Greenman* do not.

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148 *Id.* at 543–44.

149 Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18–19.

150 *Id.* at 23.

But does a revisiting of Traynor's constitutional jurisprudence nevertheless warrant an activist characterization? A survey of his constitutional opinions shows that like Holmes, Traynor maintained a general deference to the legislature — a restrained view in Posner's terms. In specific areas, however, Traynor's jurisprudence is clearly activist. *Perez*, among other racial discrimination opinions, indicates Traynor's disgust with this "insidiously evil thing." Likewise, Traynor's free speech opinions show a willingness to invalidated statutes and ordinances he felt violated free speech guarantees. Is this enough to warrant an activist classification? Posner's classification of Holmes suggests not. Similar to Traynor, Holmes generally cautioned deference in constitutional law, illustrated most eloquently by his *Lochner* dissent. However, as Posner notes, Holmes was unequivocally activist in his free speech jurisprudence, among others. Thus, just as Posner classified Holmes as a "mixed" activist/restrained judge, so too should he classify Traynor.

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