STUDENT SYMPOSIUM

Introduction:

THE CALIFORNIA SUPREME COURT AND JUDICIAL LAWMAKING —

The Jurisprudence of the California Supreme Court

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This student symposium focuses on lawmaking by the California Supreme Court. One way to place these articles in context is to ask a fundamental question: Do judges make law? Are they lawmakers? Chief Justice Roberts in his confirmation hearings famously suggested they are not when he compared judges to umpires who call balls and strikes — but do not "legislate" the rules of baseball.[1]

A similar view was prevalent when Roger Traynor was appointed to the California Supreme Court in 1940. At that time legal formalism — the view that judges apply but do not make law, and that policy has no role in judicial decision making — was the norm in judicial decisions and mainstream legal thought.[2] Leaving aside whether this is an accurate description

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1 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

2 In 1939, the year before Traynor was appointed to the bench, for example, Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*, wrote approvingly of judges who recognized that their task was

of the historic (or current) role of courts in America (it is not), it was a view that Traynor challenged soon after taking the bench.

In the field of torts, formalism was linked to what might be called traditional tort theory and "the fundamental proposition . . . which link[ed] liability to fault."[3] In his famous 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,[4] however, Traynor called on his Court not only to make new law, but to do so by adopting a strict liability rule in products liability cases — and to do this based on a policy that had recently been disdainfully dismissed by a leading torts scholar as "sentimental justice" unfit for a court of law.[5] Traynor wrote in *Escola* that a strict liability rule was justified in products cases in part because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[6]

Nor did Traynor confine his view of judicial lawmaking to common law subjects such as torts. In 1948, for example, Traynor's opinion for the court in *Perez v. Sharp*[7] held California's anti-miscegenation statute unconstitutional (thus preceding the United States Supreme Court's similar holding by twenty years).[8] By 1956, Traynor wrote, 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.[9]

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to articulate "principles deduced from the cases[,] . . . to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning." *See* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 375, 39 Colum. L. Rev. 20, 23, 48 Yale L.J. 390, 393 (1939) [hereinafter cited to Harv. L. Rev.]. In Seavey's view a judge's "opinions of policy" had no place in this process. *See id*. at 373.

[3] Ezra Ripley Thayer, *Liability Without Fault*, 29 Harv. L. Rev. 801, 815 (1916); *see also* Seavey, *supra* note 2, at 375 (noting the policy of no liability for non-negligent conduct).

[4] 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

[5] Seavey, *supra* note 2 at 373.

[6] *Escola*, 150 P.2d at 441.

[7] 198 P.2d 17 (Cal. 1948).

[8] *See* Loving v. Virginia, 388 U.S. 1 (1967).

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

Judge Richard Posner has written of norms that exist within the community of judges. Most judges, in his view, "derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges,"[10] And to be regarded "as a good judge requires conformity to the accepted norms of judging."[11]

In judging, as in art, however, "norms are contestable,"[12] and "[r]apid norm shifts are possible . . . , because the products of these activities cannot be evaluated objectively."[13] In law it is the innovative judges who "challenge the accepted standards of their art, . . . [and these] innovators have the greater influence on the evolution of their field."[14] Posner cites Holmes, Brandeis, Cardozo, and Hand as "examples of judges who succeeded by their example in altering the norms of opinion writing."[15] Justice Traynor could be added to this list. By his example and through his extrajudicial writings, Traynor also altered the norms of opinion writing and judicial decision making.

In a series of articles beginning in 1956, Traynor articulated the jurisprudential perspective that would guide his Court over the next decades. Stated simply, Traynor's view was that courts are lawmakers and policy does — and should — shape their lawmaking. Thus, Traynor wrote, "Courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."[16] If this perspective sounds familiar it is because of its similarity to Judge Richard Posner's legal pragmatism.[17]

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10 Richard A. Posner, How Judges Think 62 (2008).

11 *Id*. at 61.

12 *Id*. at 63.

13 *Id*. at 64.

14 *Id*. at 12–13.

15 *Id*. at 63.

16 Traynor, *supra* note 9, at 232. This comes with the qualification that in constitutional matters judges should generally — but not always — defer to legislative judgments. *Id*. at 241.

17 Judges, Posner writes, "are rulemakers as well as rule appliers." In a particular case, "[a]n appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one." Richard A. Posner, The Problematics of Moral and Legal Theory 248–59 (1999). In this process the goal is to "mak[e] the choice that will produce the best results." *Id*. at 249.

This jurisprudential perspective also has a distinguished pedigree. As I have recently explained, early incarnations of this view can be found in the works of four giants in American law: Justice Oliver Wendell Holmes, Judge — later Justice — Benjamin Cardozo, and the Legal Realists Leon Green and Karl Llewellyn.[18]

Following Traynor's lead, the California Supreme Court became the most innovative[19] and influential[20] state supreme court in the nation — and continues to be so to this day. Four examples illustrate "Traynor-style" lawmaking by the California Supreme Court. The first, *Greenmen v. Yuba Power Products, Inc.*, is a 1963 decision in which Traynor, in an opinion for a unanimous Court, wrote his *Escola* strict liability proposal and policies into California Law.[21] Based on these policies, the California Supreme Court, with little hesitation, then quickly extended strict liability beyond manufacturers to include retailers,[22] wholesalers,[23] and lessors.[24] These rulings, which courts across the nation quickly followed, represented, according to Prosser, "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[25]

The second and third examples also involve common law subjects — the tort doctrines of contributory (and comparative) negligence and assumption of risk. Each involves lawmaking that occurred after Traynor's

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[18] *See* Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability,* 50 San Diego L. Rev. 537 (2013). *See also* Edmund Ursin, *How* Great *Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial lawmaking*, 57 Buff. L. Rev. 1267 (2009).

[19] *See* Grant Gilmore, The Death of Contract 91 (1974).

[20] Measured by decisions that have been "followed," as that term is employed by Shepard's Citations Service, "over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues." Jake Dear & Edward W. Jessen, "*Followed Rates" and the Leading State Cases, 1940–2005*, 41 U.C. Davis L. Rev. 683, 683, 710 (2007). Five of the six *most* followed of the "most followed" decisions are tort decisions rendered since 1960. *See id*. at 708–09.

[21] *See* 377 P.2d 897, 900–01 (Cal. 1963).

[22] *See* Vandermark v. Ford Motor Co., 391 P. 2d 168, 171–72 (Cal. 1964).

[23] *See* Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552, 557 (Ct. App. 1965).

[24] *See* Price v. Shell Oil Co., 466 P. 2d 722, 723, 726–27 (Cal. 1970).

[25] William L. Prosser, Handbook of the Law of Torts § 97, at 654 (4th ed. 1971).

retirement, in one case by the still-liberal California Supreme Court, in the other by a Court dominated by conservative justices.

The contributory negligence rule, which as late as the 1960s was the law in most states, deprived an injured plaintiff of recovery from a negligent defendant if the plaintiff also had been negligent. The harsh effect of this rule had long been apparent.[26] It throws the entire loss on an injured party, even though he was only slightly negligent, and relieves a negligent defendant of liability however much he may have contributed to the injury. In contrast, a rule of comparative negligence apportions damages according to the relative negligence of the two parties.

Nevertheless, courts had consistently refused to adopt the comparative negligence principle, despite the fact that few disinterested observers had defended contributory negligence on the merits. Why did courts refuse to institute this change? The answer is that the judiciary viewed this reform as beyond their competence, as inappropriate to their institutional role. In *Maki v. Frelk*,[27] decided in 1968, for example, the Illinois Supreme Court explained "that such a far-reaching change, if desirable, should be made by the legislature rather than by the court."[28]

In 1975, five years after Traynor's retirement, however, the California Supreme Court in *Li v. Yellow Cab Co. of California* abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.[29] After *Li*, plaintiff negligence no longer completely bars recovery in negligence suits; rather, damages are only "diminished in proportion to the amount of negligence attributable to the person recovering."[30]

Li also had a second ruling, this one involving the doctrine of assumption of risk. Under this doctrine a person who voluntarily encountered a specific known and appreciated risk (whether reasonably or unreasonably)

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[26] *See*, *e.g.*, 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1193–1209, 1236–41 (1956).

[27] 239 N.E. 2d 445 (Ill. 1968).

[28] *Id*. at 447.

[29] 532 P.2d 1226 (Cal. 1975). *See* Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 253–59 (1981).

[30] *Li*, 532 P.2d at 1243.

could not recover when injured by a negligent defendant. *Li* held that the defense of assumption of risk was merged into the general scheme of assessment of liability in proportion to fault in instances in which the plaintiff unreasonably encountered a specific known risk created by a defendant's negligence.[31] Thus it appeared, oddly enough, that a non-negligent plaintiff might still be totally barred from recovery.

In its 1992 *Knight v. Jewett* decision,[32] however, the now-conservative Court, in a plurality opinion by then Justice Ronald George, rewrote the law, effectively abolishing the traditional defense of assumption of risk.[33] At the same time, however, the Court also created a policy-based new doctrine favorable to defendants who are participants in active sports. As now Chief Justice George later explained in an opinion for the majority of the Court, to "impose liability on a coparticipant for 'normal energetic conduct' while playing — even careless conduct — could chill vigorous participation in the sport" and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity."[34] As "a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."[35] Accordingly, the Court created a limited-duty rule: "[C]oparticipants breach a duty of care to each other only if they 'intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' "[36]

For our fourth example we return to constitutional law and another opinion by Chief Justice George for the majority of the Court. In the widely known *In re Marriage Cases,* the Court held that California's

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31 *Id.* at 1240.

32 834 P. 2d 696 (Cal. 1992). The views expressed in George's plurality *Knight* opinion were subsequently embraced by a majority of the Court. *See* Kahn v. East Side Union High School District, 75 P. 3d 30, 38 (Cal. 2003) (George, C.J.).

33 *Knight*, 834 P. 2d at 714 (Kennard, J., dissenting). To maintain continuity with its *Li* decision, however, the *Knight* Court retained the terminology of assumption of risk. *See* Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty for Sports Regime*, 45 San Diego L. Rev. 383 (2008).

34 *Kahn,* 75 P.3d at 38.

35 *Id.*

36 *Id.* at 38–39 (quoting *Knight*, 834 P.2d at 711).

limitation of marriage to a union of a man and a woman violated the equal protection provision of the California Constitution.[37] Like Traynor's *Perez* decision, *In re Marriage Cases* was decided by a Court that split 4–3. Firmly grounding his opinion in *Perez*, George wrote, "The decision in *Perez,* although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized."[38] Only time will tell if *In re Marriage Cases* will be similarly regarded, but the spate of federal district court and courts of appeals decisions[39] overturning bans on same-sex marriage — including California's Proposition 8 which had (temporarily as it turns out) reinstated a ban on same-sex marriage[40] — suggests that it might well be seen as equally prescient.

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[37] 183 P.3d 384 (Cal. 2008). The Court also — and importantly — held that the strict standard of judicial review was applicable because

> (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple. *Id.* at 401.

Based on this, the Court wrote that to uphold the differential treatment of opposite-sex and same-sex unions, the state had to establish "(1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest." *Id.* Applying this standard, the Court

> conclude[d] that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest. *Id.*

[38] *Id.* at 399.

[39] *See, e.g.,* Baskin v. Bogan, Nos. 14-2386 to 14-2388, *and* Wolf v. Walker, No. 2526 (7th Cir. September 4, 2014) (Posner, J.) (holding Indiana and Wisconsin bans on same-sex marriage unconstitutional).

[40] After the California Supreme Court held that California's limitation of marriage to a union of a man and a woman violated the Equal Protection Clause of the California Constitution, California voters approved Proposition 8, a ballot initiative

So for the past seven decades the California Supreme Court — whatever its ideological makeup — has been a lawmaking Court with policy at the heart of its lawmaking. It has embraced the lawmaking role that Traynor articulated in a series of articles in the 1950s and 1960s when he wrote that "judicial responsibility connotes . . . the recurring formulation of new roles to supplement or displace the old [and the] choice of one policy over another."[41] Guided by this jurisprudential view, the Court became the most influential state supreme court in the nation.

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The three articles in this symposium focus on different aspects of the court's lawmaking. In the first article, Evan Youngstrom notes that for several decades the California Supreme Court has been the most influential state supreme court in the nation and asks why the Court has been so influential. He concludes that this influence can be attributed to the Court's rejection of legal formalism and its embrace of a policy-based lawmaking role. Then, after discussing examples of the Court's innovative decisions, he explains why this type of judicial lawmaking is appropriate for a state supreme court.

Next, Aaron Schu asks whether Traynor should be considered to be an "activist" judge. He notes the definition of an activist judge offered by Ben

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amending the California Constitution to define marriage as a union between a man and a woman. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8). Same-sex couples then successfully challenged in Federal District Court the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Federal Constitution. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal 2010).

California officials had refused to defend the law, but the initiative's official proponents were allowed to intervene to do so. On appeal, the Ninth Circuit affirmed the District Court's decision. *See* Perry v. Brown, 671 F.2d 1052, 1095) (9th Cir. 2012). In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the United States Supreme Court held that the initiative's proponents lacked standing, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal. The District Court's 2010 holding went into effect in June 2013 when the District Court's previous stay was lifted.

[41] R.J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 Sask. L. Rev. 201, 213 (1967).

Field, author of a book on Traynor,[42] as one who "explicitly departs from legal precedent in favor of his or her sense of justice or social values."[43] This would include a judge's decisions involving common law subjects or statutory interpretation; and, indeed, two of Field's principal chapters focus on just such Traynor opinions. In contrast, Judge Richard Posner defines an activist judge as one who "enlarg[es] judicial power at the expense of the power of other branches of government,"[44] as in holding legislative or executive action unconstitutional. Decisions in private law subjects, under this definition, would not be activist even if they departed from precedent. In examining Traynor's opinions Schu concludes that, under Posner's definition, Traynor, like Holmes, should be classified as a "mixed" activist/restrained judge, activist in some constitutional areas, but generally restrained.

Then, in the third article Marissa Marxen examines Chief Justice Traynor's approach to statutory interpretation. She begins by explaining different theoretical approaches put forth by academics and others, including "intentionalism," "purposivism," "textualism," and "dynamic interpretation." In light of these approaches, she examines notable Traynor opinions involving statutory interpretation. She concludes that Traynor employed a blend of purposivism and dynamic interpretation in these cases.

The articles in this symposium present three perspectives on the judicial lawmaking of the California Supreme Court, with two of them focusing specifically on the work of Chief Justice Roger Traynor, one of the great judges in American history.[45] Judge Posner has written that he is "struck by how unrealistic are the conceptions of the judge held by most people,

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[42] *See* Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor (2003).

[43] Aaron J. Schu, *Justice Traynor's "Activist" Jurisprudence: Field and Posner Revisited*, 9 Cal. Legal Hist. 423, 427 (2014), (citing Field, *supra* note 42, at 121).

[44] *Id.* at 431 (citing Richard A. Posner, How Judges Think 287 (2008).

[45] *See* Henry J. Friendly, Tribute, *Ablest Judge of His Generation*, 71 Cal. L. Rev. 1039, 1039 (1986). In addition to Traynor, Friendly at various times identified only Holmes, Brandeis, Cardozo, Hand, Harlan Fisk Stone, Frankfurter, Robert Jackson, Hugo Black, and Traynor as great. Traynor "was the only contemporary on Friendly's list." David M. Dorsen, Henry Friendly: Greatest Judge of his Era 122 (2012).

including practical lawyers and eminent law professors who have never been judges — and even some judges."[46] If the articles in this symposium have shed some light on judges and judicial lawmaking and suggested new areas for research,[47] they have done a valuable service.

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EDITOR'S NOTE:

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor Edmund Ursin, who offers a course each year in Judicial Lawmaking at the University of San Diego School of Law, graciously agreed to propose to his Spring 2014 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Ursin, I have selected the three that appear on the following pages as a student symposium on the California Supreme Court and judicial lawmaking.

— SELMA MOIDEL SMITH

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46 Posner, *supra* note 10, at 2.

47 For example, in addition to the Traynor decisions involving statutory interpretation presented by Marxen, other Traynor decisions illustrate further aspects of Traynor's creative use of statutes. *See. e.g.*, Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943) (violation of criminal statute "does not create civil liability . . . . The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court [chooses to] adopt[] in the determination of such liability.").

JUDICIAL LAWMAKING, PUBLIC POLICY, AND THE CALIFORNIA SUPREME COURT

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TABLE OF CONTENTS

I. INTRODUCTION 395

A. FOUNDATION: COURTS MAKE LAW 396

II. SHOULD COURTS ACTIVELY MAKE LAW? 398

A. JUSTICE TRAYNOR BELIEVED COURTS SHOULD ACTIVELY MAKE LAW 398

1. JUSTICE TRAYNOR'S LIMITS ON JUDICIAL LAWMAKING . . . 399

B. JUSTICE TRAYNOR BELIEVED COURTS SHOULD REFLECT MODERN PUBLIC POLICY TRENDS WHEN THEY MAKE LAW . . . 401

III. THE CALIFORNIA SUPREME COURT EMBRACES JUDICIAL LAWMAKING 401

A. THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA STATE LEGISLATURE CO-EXIST AS LAWMAKING INSTITUTIONS . . 403

IV. THE CALIFORNIA SUPREME COURT REFLECTS THE PUBLIC'S PERCEPTION OF SOUND POLICY WHEN IT MAKES LAW 404

A. CALIFORNIANS' LIBERAL AND PROGRESSIVE PUBLIC POLICY TENDENCIES 406

B. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE THE COMMON LAW 407

1. PRODUCTS LIABILITY 408

2. LANDOWNERS' DUTY OF CARE 409

3. COMPARATIVE NEGLIGENCE 410

C. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE CONSTITUTIONAL DOCTRINES . . . 412

V. COUNTERS TO CRITICS OF THE CALIFORNIA SUPREME COURT'S JUDICIAL LAWMAKING MODEL 416

A. CALIFORNIA SUPREME COURT JUSTICES ARE ACCOUNTABLE TO THE PEOPLE, SO THE COURT CAN LEGISLATE WITHOUT VIOLATING DEMOCRATIC PRINCIPLES 416

1. CALIFORNIANS HOLD THE CALIFORNIA SUPREME COURT JUSTICES ACCOUNTABLE WHEN A JUSTICE'S POLICIES DIRECTLY CONFLICT WITH CALIFORNIANS' PUBLIC POLICY . . . 419

B. THE CALIFORNIA SUPREME COURT FACTORS RELIANCE INTO ITS OPINIONS 419

C. THE CALIFORNIA SUPREME COURT IS A COMPETENT LAWMAKING INSTITUTION 421

VI. CONCLUSION 422

I. INTRODUCTION

A recent study showed the California Supreme Court is the most followed state court in the nation.[1] Between 1940 and 2005, other state supreme courts followed the California Supreme Court 1,260 times,[2] which is twenty-five percent more than any other state high court.[3] Therefore, the California Supreme Court is a unique provider of persuasive authority to the rest of the country. But, why is the California Supreme Court so influential?

The California Supreme Court is the most influential state court for two connected reasons. First, the Court embraces judicial lawmaking and rejects formalism. Formalists contend courts should not make law, use policy, exercise discretion, or explore extrinsic sources when deciding cases.[4] Starting in the Traynor era, the California Supreme Court redefined its role as a legitimate and influential lawmaking institution[5] that actively makes law, uses policy, exercises discretion, and explores extrinsic sources.

Second, the Court modernizes California's law to reflect the public's perception of sound policy. When the California Supreme Court faces a hard case, the Court identifies trends in public policy, and then uses its lawmaking power to align the law with that policy. In other words, the Court follows William Hurst's model of judicial lawmaking because the Court expresses the times and foretells the generation to come.[6]

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1 *See* Jake Dear & Edward Jessen, *"Followed Rates" and Leading State Cases, 1940–2005*, 41 U.C. Davis L. Rev. 683, 694 (2007).

2 *Id.*

3 *Id.* (explaining that the Washington Supreme Court was the second most followed state supreme court with 942; thus, the California Supreme Court is followed twenty-five percent more than any other state supreme court).

4 Richard Posner, The Problematics of Moral And Legal Theory 7–8 (1999) (explaining the formalist view that courts "do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts — mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) — for guidance in deciding new cases.").

5 Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 Buff. L. Rev. 1267, 1276 (2009).

6 Leonard W. Levy, The Law of the Commonwealth and Chief Justice Shaw 157 (1957) (explaining that "great jurists like Shaw, who vitalize and revitalize the law so that it may fulfill its function, can channel and legitimatize social change in as

As Richard Wasserstrom emphasizes, "a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of society."[7] Thus, a democratic lawmaking institution, which reflects contemporary public policy trends, will be the most endearing and influential. This paper argues the California Supreme Court's interpretation of its role within government, as a lawmaking institution that reflects contemporary public policy, makes it the most influential state court. Therefore, other courts should consider adopting a similar model to facilitate the evolution of the law to reflect public policy trends.

A. FOUNDATION: COURTS MAKE LAW

Although judicial lawmaking is not expressly set forth in the Constitution, courts inherently make law.[8] In the United States, Chief Justice John Marshall fortified the judicial branch as a lawmaking institution when he established judicial review in *Marbury v. Madison*.[9] Judicial review combined with precedent and *stare decisis* gives the judicial branch immense lawmaking powers.[10] Since *Marbury*, courts have exercised their lawmaking powers to help shape America's substantive law: constitutional and common.[11]

Simply put, "when courts decide cases, their decisions make law because they become precedent."[12] Many famous judges expressly recognized the judiciary's lawmaking power. For example, Justice Oliver Wendell Holmes stated, "I recognize without hesitation that judges do and must legislate."[13] More recently, Justice Antonin Scalia said, "Judges in a real sense 'make' law."[14]

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reasoned a way possible. William Hurst remarked that great judges have the ability to express the times or foretell the generation to come.").

7 Richard Wasserstrom, The Judicial Decision 10 (1961).

8 Adam N. Steinman, *A Constitution For Judicial Lawmaking*, 65 U. Pitt. L. Rev. 545, 548 (2004).

9 Marbury v. Madison, 5 U.S. 137, 177 (1803) (concluding that "it is emphatically the province and duty of the judicial department to say what the law is.").

10 H.L.A. Hart, The Concept of Law 121–35 (1961) (explaining that in a *stare decisis* system, courts perform a rule-producing function, in which public policy may be taken into account).

11 Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. Rev. 1, 3 (1990).

12 *Id.*

13 S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

14 James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

Courts make laws in three ways.[15] First, courts adjudicate cases so that the final judgment "is a legal decree" for the litigating parties.[16] Also, courts make law by "promulgating rules," such as practice and procedure instructions for the courtroom.[17] But the most influential form of judicial lawmaking is when appellate courts legislate because they create precedent for future cases."[18] As Judge Richard Posner concludes, an appellate judge's job is to "apply an old rule unmodified, modify then apply the old rule, or make and apply a new rule."[19]

Although courts still create and modify laws in the common law, legislatures displaced courts as the major lawmakers in the United States.[20] But ironically, the increased rate of new legislation also increased judicial lawmaking.[21] Legislatures cannot create codes to cover every social situation[22] because "legislatures are neither omnipresent nor omniscient."[23] "Society changes at a rapid rate, and legislatures frequently do not manufacture enough law necessary to cover new disputes created by new social relationships."[24] Thus, courts fill these ever-present gaps at an escalating rate.[25]

Finally, as Judge Posner points out, active judicial lawmaking is not based on liberal or conservative politics.[26] Both conservative and liberal courts make law regardless of their political tilt. Thus, judicial lawmaking is "independent of the policies that other governmental institutions happen to be following."[27] The "right" outcome "depends on the particular historical situation, in which the judge finds himself."[28]

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15 Steinman, *supra* note 8, at 552.

16 *Id.*

17 *Id.*

18 *Id.*

19 Posner, *supra* note 4, at 248–49.

20 John Poulos, *The Judicial Philosophy of Roger Traynor*, 46 Hastings L.J. 1643, 1701 (1995).

21 *Id.*

22 *Id.*

23 Roger J. Traynor, *Comment on Courts and Lawmaking*, Legal Institutions Today And Tomorrow 52 (Monrad G. Paulsen ed., 1959).

24 Poulos, *supra* note 20, at 1701.

25 *Id.*

26 Richard Posner, *The Meaning of Judicial Self-Restraint*, 59 Ind. L.J. 1, 12 (1983).

27 *Id.* at 14.

28 *Id.* (explaining that if Chief Justice Marshall had used judicial restraint in *Marbury,* it would have been a disaster).

II. SHOULD COURTS ACTIVELY MAKE LAW?

Critics attack judicial lawmaking from both sides.[29] Some believe courts should not tread on the legislature's territory.[30] Others fault courts for reluctance to declare new law.[31] The historical debate as to whether courts should actively engage in lawmaking will not end soon. But the tide shifted toward the approval of an active lawmaking judiciary. The acceptance of the California Supreme Court's judicial lawmaking model is hard evidence that the tides have turned. Essentially, Traynor shaped the California Supreme Court's judicial lawmaking model. Thus, Traynor was correct because he advocated for a broad construction of the judiciary's lawmaking authority.

A. JUSTICE TRAYNOR BELIEVED COURTS SHOULD ACTIVELY MAKE LAW

Justice Traynor believed courts should make law when old doctrines become unsound due to society's fluctuating expectations. Traynor's view of judicial lawmaking "emphasized the practical necessity of judicial innovation to meet constantly changing social conditions and values."[32] In Traynor's view, a court's role is to "search for solutions, hammer out new rules that respect values, which survived the tests of reason and experience, and anticipate what contemporary values will meet those tests."[33] Traynor did not believe judicial creativity was the enemy; he believed a lack of judicial creativity was.[34]

Generally, Traynor opposed formalism because formalists "either denied courts are lawmakers, or citing *stare decisis*, argued they should not be."[35] Basically, Traynor would disagree with the position taken by Chief Justice John Roberts in his confirmation hearing, in which Roberts said that courts should be simply "umpires calling balls and strikes."[36]

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29 Wachtler, *supra* note 11, at 1.

30 *Id.*

31 *Id.*

32 Ursin, *supra* note 5, at 1308.

33 *Id.* at 1309 (quoting Justice Traynor).

34 *Id.*

35 Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 165 (1960).

36 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55

"Traynor recognized significant differences between hard cases involving [constitutional] law and hard cases involving common law."[37] However, he was also concerned with a major likeness: a judge is faced in both realms with the same dilemma of contemplating competing policies.[38] So in either realm, judges must "arrive at a value judgment as to what the law ought to be and spell out why."[39] But, Traynor noted courts should generally defer to "legislative judgments in constitutional adjudication."[40]

1. Justice Traynor's Limits on Judicial Lawmaking

Justice Traynor believed courts are restrained when they make law. Traynor believed "the primary obligation of a judge is to keep the law's evolution on a rational course. Reason, not the rulebook, is the soul of the law."[41] Traynor also said, "Unlike the legislator, the judge takes precedent as his starting-point, so he is constrained to arrive at a decision in the context of ancestral judicial experience."[42] Essentially, a "court is not at liberty to seek hidden meanings not suggested by statutes, [precedents], or extrinsic aids."[43] Further, Traynor acknowledged a judge's explanation for evolving the law must "persuade his colleagues, make sense to the bar, pass muster with scholars, and allay suspicion of any man in the street."[44] Thus, a judge's lawmaking power is limited procedurally and substantively to reach a socially acceptable decision.

In common law, Traynor was less concerned with courts engaging in large-scale lawmaking because the "legislature can always step in to unwrite the common law that the judge [wrote]."[45] Traynor believed courts

(2005) (statement of John G. Roberts, Jr.).

[37] Ursin, *supra* note 5, at 1310.

[38] *Id.*

[39] Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 234 (1962).

[40] Ursin, *supra* note 5, at 1270.

[41] Roger J. Traynor, *Limits on Judicial Creativity*, 63 Iowa L. Rev. 1, 7 (1977).

[42] Roger J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 Sask. L. Rev. 201, 203 (1967).

[43] Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 618 (1961).

[44] *Id.* at 621.

[45] Ursin, *supra* note 5, at 1355.

should "play an active role in bringing the common law into conformity with [contemporary] social realities and values."[46]

However, in constitutional law, Traynor used a combination of creativity and caution. In the constitutional realm, courts can limit the legislature's power.[47] In other words, the court tells the legislature it cannot do something, and except by constitutional amendment, only the court can change its constitutional rulings. So, Traynor advised courts to defer to the legislature, but they should not let tradition thwart constitutional scrutiny.[48]

Traynor used a pragmatic analysis to determine if courts should avoid deference to the legislature. Traynor's analysis included four factors; (1) the issue's urgency, (2) competing interests (*i.e.* costs and benefits to society), (3) if the legislature will cure the problem, and (4) if the Court can issue justice within the time prescribed.[49] On balance, if these factors weigh against deference, then the court should act.

When this slim exception applies, Traynor believed courts have a responsibility to safeguard "civil liberties, which are the sum and substance of citizenship."[50] Traynor grounded his position on limited constitutional lawmaking by demonstrating "social changes [consistently] bring about the rise, fall, and modification of constitutional doctrines."[51] In essence, Traynor believed courts should defer to the legislature, unless modern public policy directly conflicts with constitutional doctrines.

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[46] *Id*. at 1295.

[47] *Id*. at 1292.

[48] *Id*. at 1314.

[49] Traynor, *supra* note 41, at 13 ("If on rare occasion [a judge] contemplates a decision of constitutional tenor, intended to prompt legislators to take action, he must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others. If this hurdle is cleared, he must still analyze whether legislators would otherwise remain delinquent toward the federal or a state constitution, despite the pleas of their constituents. The second hurdle cleared, he must finally analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed.").

[50] Ursin, *supra* note 5, at 1313.

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

B. JUSTICE TRAYNOR BELIEVED COURTS SHOULD REFLECT MODERN PUBLIC POLICY TRENDS WHEN THEY MAKE LAW

Under the "consent of the governed" theory of government, laws' premises come from the ground up, not from the top down.[52] In other words, laws are created by interpreting the will of the people and exist to serve the people.[53] Holmes articulated and Traynor followed the premise that law embodies the preference of the "people in a given time and place."[54]

Traynor believed courts should factor modern public policy trends into the court's decision-making process. He explained that judges always choose "one policy over another"[55] when making a decision. Essentially, Traynor believed a judge's job is to displace old polices with new ones.[56]

Traynor noted, "Courts have a creative job to do when they find that a rule has lost its touch with reality. The rule should be abandoned or reformulated to meet new conditions and moral values."[57] "The task [of interpreting public policy trends] is not easy," but judges should do their best.[58] This public policy concept guided the Traynor-era California Supreme Court and its descendants to modernize innumerable laws to reflect Californians' perception of sound policy.

III. THE CALIFORNIA SUPREME COURT EMBRACES JUDICIAL LAWMAKING

The California Supreme Court embraces its lawmaking function to supplement the Legislature and facilitate the law's evolution. "During Justice

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52 Alexander Tsesis, *Self-Government and The Declaration of Independence*, 97 Cornell L. Rev. 693, 696 (2012).

53 John Locke, Two Treatises on Government 104 (Peter Laslett ed., Cambridge Univ. Press 1988) ("Reason being plain on our side, that men are naturally free, and the examples of history shewing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people; there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the first erecting of governments.").

54 Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

55 Traynor, *supra* note 42, at 213.

56 Ursin, *supra* note 5, at 1276.

57 Traynor, *supra* note 51, at 232.

58 *Id.*

Traynor's tenure, California witnessed a transformation of the judicial role."[59] California's liberal social policies coupled with political and economic development forced the California Supreme Court to expand its role to supplement the Legislature.[60]

This renaissance came about because Traynor and the California Supreme Court embraced judicial lawmaking and rejected formalism.[61] Since 1940, numerous California Supreme Court decisions exemplify the Court's willingness to supplement the Legislature. But, please note this paper does not discuss a vast number of very influential cases.[62] All of the Court's

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59 Craig Green, *An Intellectual History of Judicial Lawmaking*, 58 Emory L.J. 1196, 1247 (2009).

60 *Id*.

61 Ursin, *supra* note 5, at 1276–77.

62 Here are some examples of California Supreme Court decisions which span generations and are widely influential: *Summers v. Tice*, 33 Cal.2d 80 (1948) (shifting the burden to the defense to disprove causation when it was clear one of two defendants must have caused the plaintiff's injury, but it was unclear which one); *Lucas v. Hamm*, 56 Cal.2d 583 (1961) (allowing beneficiaries of wills to pursue a professional negligence action despite a lack of privity); *Seely v. White Motor Co.,* 63 Cal.2d 9 (1965) (holding strict liability does not extend to recovery for purely economic loss); *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263 (1966) (requiring the insurer to defend an action in which the interests of insurer and insured are so opposed as to nullify the insurer's fulfillment of its duty of defense and of the protection of its own interests); *Dillion v. Legg*, 68 Cal.2d 728 (1968) (expanding the tort of negligent infliction of emotional distress (NIED) beyond its traditional form, which was limited to plaintiffs standing in the same "zone of danger" as a relative who was killed); *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566 (1973) (recognizing the tort of insurance bad faith); *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425 (1976) (holding that mental health professionals have a duty to protect individuals who are being threatened with bodily harm by a patient); *Ray v. Alad Corp.,* 19 Cal.3d 22 (1977) (creating an additional exception to the traditional successor liability framework (product-line exception), which imposes liability on an asset purchaser for the seller's defective products if the purchaser continues to manufacture the seller's product line following the transaction); *Barker v. Lull Engineering Co.*, 20 Cal.3d 413 (1978) (describing two ways in which a product can be defective); *People v. Wheeler*, 22 Cal.3d 258 (1978) (prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588 (1980) (creating the doctrine of market share liability); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988) (holding that the covenant of good faith and fair dealing applies to employment contracts and that breach of the covenant may give rise to contract, but not tort, damages); *Thing v. La Chusa*, 48 Cal.3d 644 (1989) (withdrawing from the expansive form of NIED set forth in *Dillon* and imposing a rigid bright-line test for recovery in bystander NIED cases); *In re Alvarez*, 2 Cal.4th 924 (1992) (explaining the

decisions include a similar factor that transcends decades and justices: lawmaking, which reflects contemporary public policy trends.[63]

The Court implemented the procedure that "cases must be decided in the long run" so that they are harmonious with the "moral sense of the community."[64] Regardless of whether the injustice is in the constitutional or common law realm, the Court is willing to make law when it no longer aligns with modern public policy trends. As the Court saw it, "judicial doctrines are on trial as well as the litigants, and only doctrines that meet the test of experience survive."[65]

A. THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA STATE LEGISLATURE CO-EXIST AS LAWMAKING INSTITUTIONS

Justice Traynor viewed the California Supreme Court and California State Legislature as "co-workers," not competitors.[66] Sometimes the Court is forced to engage in judicial lawmaking because of legislative inaction.[67]

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appropriate remedy for ineffective counsel that resulted in a defendant's decision to reject an offered plea bargain); *People v. Leahy*, 8 Cal.4th 587 (1994) (imposing limitations on the use of a certain type of field sobriety test); *Waller v. Truck Insurance Exchange,* 11 Cal.4th 1 (1995) (finding no duty to defend allegations of incidental emotional distress damages caused by the insured's non-covered economic or business torts); *Temple Community Hospital v. Superior Court*, Cal.4th 464 (1999) (declining to recognize a new proposed common law tort of intentional third-party spoliation of evidence).

[63] Dear, *supra* note 1, at 702–03.

[64] Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (explaining that statutory interpretation is purely judicial in character and that the interpretation should reflect the community standards).

[65] Walter Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CAL. L. REV. 11, 18 (1965).

[66] Traynor, *supra* note 43, at 616 ("The judiciary must continue as a co-worker with the legislature in the development of the law.").

[67] The California State Legislature cannot act to align the law with modern public policy trends when it is stalemated by party polarization. Recently, the United States has experienced significant party polarization, which is not present in the general population. PIETRO NIVOLA & DAVID BRADY, RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 1 (Brookings Institution Press, vol. 2, 2006). Although the Democrats have a supermajority in the California State Legislature, the Legislature still becomes stalemated by party polarization. *See* John Diaz, *How California tamed its once-dysfunctional Legislature,* SFGATE (Feb. 21, 2014), http://www.sfgate.com/default/article/How-California-tamed-its-once-dysfunctional-5256895.php

The Court supplements the Legislature when there is "legislative indifference, legislative sensitivity to political issues, or legislative adherence to singular agendas."[68]

The justiciability doctrine combined with checks and balances allows the California Supreme Court and the California State Legislature to coexist as lawmaking institutions.[69] As Edward White explains, the justiciability doctrine is "the primary force harmonizing judicial lawmaking with the doctrine of separation of powers. Properly understood and applied, justiciability principles serve as the foundation for legitimate judicial lawmaking."[70]

Further, the checks and balance system restricts the Court from usurping too much lawmaking power. Essentially, the Court and the Legislature have a symbiotic relationship, each drawing on the actions of the other. The Legislature passed statutes "whose applicability to specific situations was uncertain, the Court undertook the applications, and the Legislature revised that decision if they found a specific application offensive."[71]

IV. THE CALIFORNIA SUPREME COURT REFLECTS THE PUBLIC'S PERCEPTION OF SOUND POLICY WHEN IT MAKES LAW

The use of public policy in judicial decision-making[72] ignited the flame which made the California Supreme Court the most influential state court. Early in the Traynor era, many frowned upon using public policy in judicial decision-making[73] because most judges embraced formalism. But, "during the 1960s and 1970s, the California Supreme Court was a frequent legislator, comfortable with basing its lawmaking on policies, which was abhorrent to

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(explaining that recent terms of the California State Legislature have seen party polarization, which caused dysfunction).

68 Traynor, *supra* note 43, at 618.

69 *Id.*

70 Edward White, The American Judicial Tradition: Profiles of Leading American Judges 255 (1976).

71 *Id.*

72 Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts,* 13 U. Pa. J. Const. L. 455, 456 (2010).

73 Ursin, *supra* note 5, at 1273.

formalists."[74] Subsequent generations of the California Supreme Court followed Traynor's lawmaking model.[75] Therefore, the Court's model persists because it passed the tests of experience, but the Court's model didn't just survive, it flourished.

The Court uses public policy in its analysis "not because it is particularly desirable, but because there is often no feasible alternative."[76] "Modern times demand judicial creativity, and advances in the social sciences assist the judge in this task."[77]

Additionally, the Court considers competing political interests when determining modern public policy trends because the justices are subject to retention elections. Former California Supreme Court Justice Otto Kaus stated, "There is no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he has to make them near election time. That would be like ignoring a crocodile in your bathtub."[78]

However, the "mass public is generally uninterested in politics, especially supreme court decision making. Consequently, there are a limited number of high-salience issues in which the justices have strong incentive to take into account voter backlash."[79] But California Supreme Court justices understand their role within government, so they will not issue a decision that significantly diverges from contemporary public policy.[80] The

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[74] *Id*. at 1338.

[75] *See* Knight v. Jewett, 3 Cal.4th 296 (1992) (using policy to limit liability for participants in sporting events); Dear, *supra* note 1, at 703 (explaining that the data suggests the current generation of the California Supreme Court will continue to influence other courts because they follow the Traynor-era judicial lawmaking model).

[76] Henry Friendly, *The Courts and Social Policy: Substance and Procedure,* 33 U. Miami L. Rev. 21, 22 (1978).

[77] Richard Posner, *The Rise and Fall of Judicial Self-Restraint,* 100 Cal. L. Rev. 519, 540 (2012) (quoting Ben Field who spoke about Traynor's writings and decisions).

[78] Otto Kaus often stated that ignoring the political consequences of visible decisions is like ignoring a crocodile in your bathtub. Paul Reidinger, *The Politics of Judging,* 73 A.B.A.J. 52, 58 (1997).

[79] Devins, *supra* note 72, at 473.

[80] Lee Epstein & Jack Knight, The Choices Justices Make 157–59 (1998) (explaining that justices "operate within the greater social and political context of the society as a whole, so the justices must attend to those informal rules that reflect dominant societal beliefs about the rule of law in general, and the role of the Supreme Court in particular — the norms of legitimacy"); Barry Friedman, *Mediated Popular*

justices know the electorate[81] and the Legislature[82] can and will override a decision if it steps outside Californians' public policy limits.

A. CALIFORNIANS' LIBERAL AND PROGRESSIVE PUBLIC POLICY TENDENCIES

Justice Holmes articulated the maxim that laws are best created by reflecting the public's perception of sound policy. In industrial accident cases, Holmes recognized that juries often found for injured plaintiffs, despite the judges' instructions which dramatically favored industrial defendants.[83] Holmes foresaw a shift in tort law because he understood "the life of the law has not been logic: it has been experience."[84] Essentially, Holmes believed that public policy dictates what the law should be. Thus, a governing institution that reflects contemporary public policy trends will create laws the people want.

California is a populous state with dynamic and diverse social, cultural, and economic conditions. The diverse nature of California produces "a wealth of litigation capable of yielding leading decisions."[85] Thus, the California Supreme Court "addresses difficult cases of broad application," and it faces novel cases that arise from new social conditions.[86] Therefore, when the Court addresses these questions, it must look at a variety of competing policy issues.

Constitutionalism, 101 Mich. L. Rev. 2596, 2606–07 (2003) (asserting that judicial decision making is often consistent with popular opinion).

[81] The electorate will retaliate against a California Supreme Court decision in two ways. First, the electorate can remove a justice through the retention election. Second, the electorate can amend California's Constitution through a referendum to alter the Court's decisions.

[82] Because the Democrats hold a supermajority, the California State Legislature can quickly overturn a peculiar California Supreme Court decision that does not align with Californians' expectations.

[83] Holmes, *supra* note 54, at 463.

[84] Oliver Wendell Holmes, The Common Law 4 (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

[85] Dear, *supra* note 1, at 703.

[86] Dear, *supra* note 1, at 707.

Inevitably, the Court reflects Californians' political orientation. The majority of Californians are liberals and progressives, which is illustrated by Californians' recent voting trends. California's 113th congressional delegation is regarded as one of the most liberal. "Six of the House's fifteen most liberal members, based on their voting records, come from California. Conversely, none of the fifteen most conservative members of Congress come from California."[87] Further, Californians' liberal propensity can be seen in the California State Legislature, where at present the Democrats hold a supermajority.[88] Indeed many exceptions apply to Californians' liberal propensity, but as a general notion, most Californians are liberals and progressives. So, the Court is generally bonded to a liberal or progressive public policy position on high-salience issues.

However, this liberal and progressive propensity also helped the California Supreme Court become the most influential. Gregory Caldeira explained that the most prestigious and influential high courts throughout history are characterized as "politically liberal."[89]

B. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE THE COMMON LAW

The California Supreme Court foreshadowed large doctrinal shifts for the nation in the common law. The Court's opinions demonstrate that it modernized the law to align with emerging trends in public policy. Specifically, the California Supreme Court identified and updated outdated policies in products liability, landowner duties, and negligence law. These cases "dispel the myth" that the Court could not make "fundamental changes to tort law."[90]

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[87] Dan Walters, *Californians Dominate "Most Liberal" Rankings in Congress*, The Sacramento Bee (Feb. 6, 2014), http://blogs.sacbee.com/capitolalertlatest/2014/02/californians-dominate-most-liberal-rankings-in-congress.html.

[88] Diaz, *supra* note 67.

[89] Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 Pol. Behav. 83, 101 (1983) (asserting that the most "innovative and prestigious state supreme courts" are those that have "handed down numerous progressive decisions" characterized by "political liberalism" and "judicial activism").

[90] Edmund Ursin & Virginia Nolan, Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century 175 (1995).

1. Products Liability

Traynor built the foundation for California's eventual shift to strict products liability with his 1944 concurring opinion in *Escola v. Coca-Cola Bottling Co.* In *Escola*, the Court held the defendant was liable for an exploding soda bottle which injured a waitress.[91] In the concurring opinion, Traynor reasonably deduced the forward-looking position that manufacturers should be strictly liable for defective products.[92] Strict liability should be adopted because plaintiffs are not in a position to refute the defense of due-care.[93] Thus, the risk of loss should be distributed as a cost of doing business.[94]

Traynor supported the proposed change in the law by citing public policy,[95] and he overtly argued that the law should reflect public policy.[96] He said, "If public policy demands a manufacturer be responsible, then there is no reason not to fix responsibility openly."[97] Traynor's concurrence rippled through the legal system because it argued that laws should reflect contemporary public policy trends.[98]

Eighteen years after *Escola*, the California Supreme Court officially aligned the law with public policy in *Greenman v. Yuba Power Products, Inc.*[99] The opportunity for the Court to act came from a case where a defective power tool seriously injured the plaintiff. *Greenman* was the "first unequivocal court decision adopting both the rule and the theory of strict liability for products."[100] Traynor unceremoniously cited his concurrence in *Escola* to support the holding in *Greenman* because the shift in public policy was now very clear.[101]

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[91] Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461 (1944).

[92] *Id*. at 462.

[93] *Id*. at 463.

[94] *Id*. at 462.

[95] *Id*. ("Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.").

[96] *Id*. at 463.

[97] *Id*.

[98] John Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 Hofstra L. Rev. 455, 456 (1974).

[99] *See* Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57 (1963).

[100] Wade, *supra* note 98, at 459.

[101] *Greenman*, 59 Cal.2d at 63.

Traynor's *Escola* concurrence and *Greenman* logically extended strict liability from food cases to all products.[102] At the time, William Prosser believed the California Supreme Court's position on strict products liability was too radical and disruptive.[103] But Prosser was incorrect because *Greenman* "produced a rapid revolution" of products liability reform.[104] Now, *Greenman* is the cornerstone of American law for defective products.[105] As Judge Henry Friendly noted, the California Supreme Court influenced the nation's products liability laws because it made laws which reflected modern public policy trends.[106]

2. Landowners' Duty of Due Care

In its 1968 opinion *Rowland v. Christian*, the California Supreme Court eliminated the archaic landowner rules in favor of a general duty of due care for all visitors to land.[107] The Court discarded the categories of trespasser, licensee, and invitee, which determined the level of due care owed by a landowner.

The Court could have justly resolved *Rowland* without making new law, but the Court used the opportunity to "discard inflexible and confusing rules" that no longer reflected modern public policy.[108] The Court explained that modern public policy considerations dictated that the rule should change. "Public policy changed from concern for the rights of the individual landowner to a greater concern for public safety."[109]

Rowland rippled through the American legal system because "innumerable judicial descendants adopted *Rowland*."[110] *Rowland*'s impact is

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102 This is a prime example of Traynor's "creative judicial elaboration." *See* Traynor, *supra* note 23 at 52.

103 Ursin, *supra* note 5, at 1304.

104 Wade, *supra* note 98, at 459.

105 Wade, *supra* note 98, at 459.

106 Friendly, *supra* note 76, at 27 n.26 (noting the California Supreme Court, *i.e.* Justice Traynor, "sounded the bell" for products liability reform by using public policy).

107 Rowland v. Christian, 69 Cal. 2d 108, 120 (1968) (creating a unitary standard for landowners' duty of due care).

108 Gary T. Shara, Comment, *California Applies Negligence Principles in Determining Liability of a Land Occupier*, 9 SANTA CLARA LAWYER 179, 188 (1969).

109 Douglas Bergere, *Negligence — Duty of Due Care-Invitee/Licensee/Trespasser Distinction Abolished — Rowland v. Christian*, 10 WM. & MARY L. REV. 495, 497 (1968).

110 Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377, 401 (2000) ("Since its publication in 1968, the seminal case of *Rowland v. Christian*, has stood as the gold

evident because it started a national trend towards the adoption of a unitary standard.[111] Also, modern California courts treat *Rowland* as the "gold standard" for determining the existence of a legal duty of care.[112]

Moreover, the Restatement (Third) of Torts adopted the *Rowland* standard.[113] The Restatement's adoption of *Rowland* is significant because the purpose of the Restatement is to inform judges and lawyers about general principles of the common law. The Restatement implicitly proposes that courts should adopt *Rowland*'s substantive holding: landowners owe a general duty of due care for all visitors to land.[114] But more controversially, by adopting *Rowland*, the Restatement implicitly approves of active judicial lawmaking. This implicit approval by the American Law Institute further demonstrates that the California Supreme Court's judicial lawmaking model is influential, reasonable, and widely accepted.

3. Comparative Negligence

In *Li v. Yellow Cab*, the California Supreme Court adopted comparative negligence and rejected contributory negligence.[115] Again in 1975, the Court used its lawmaking power to promote modern public policy. The

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standard against which the imposition of common law tort liability in California is weighed by the courts in this state. Since *Rowland* was decided, its innumerable judicial descendants have adopted the *Rowland* court's multi-factor duty assessment in determining whether a particular defendant owed a tort duty to a given plaintiff. These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability.").

[111] Michael D. Green, *Introduction: The Third Restatement of Torts in a Crystal Ball*, 37 Wm. Mitchell L. Rev. 993, 1002 n.30 (2011); *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 cmt. reporters' note (stating that, of forty-eight states that can be classified, twenty-four had adopted a unitary duty for invitees and licensees).

[112] *Juarez*, 81 Cal. App. 4th at 401.

[113] Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 (2012).

[114] *Id.*

[115] *Li v. Yellow Cab Co.,* 13 Cal.3d 804, 805 (1975).

Court concluded "logic, practical experience, and fundamental justice" justified a doctrinal shift.[116]

The Court specifically noted that juries often did not follow the contributory negligence doctrine. "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and the compromise in the jury room results in some diminution of damages because of the plaintiff's fault."[117] Therefore, the doctrinal shift to comparative negligence aligned the law with what the people practiced and wanted, *i.e.* public policy.

However, many debated this doctrinal shift. The most compelling argument against judicial adoption of comparative negligence is that the change should be left to the Legislature.[118] Before *Li*, the California Civil Code contained a statute that arguably codified the contributory negligence defense.[119] Some argued that the code restricted the Court from eliminating contributory negligence.[120]

However, the Court dispensed with the myth that they could not adopt comparative negligence. The Court explained that the judiciary created the contributory negligence defense, so courts have the power to change it.[121] The Court also determined that the Legislature did not intend to preclude judicial action to remove contributory negligence.[122] The Court relied on outside studies[123] and the code itself[124] to justify its action. Further, the

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116 *Id.*

117 *Id.* at 811.

118 Victor E Schwartz, *Judicial Adoption of Comparative Negligence — The Supreme Court of California Takes A Historic Stand,* 51 IND. L.J. 281 (1976); *Li*, 13 Cal.3d at 813.

119 *Li*, 13 Cal.3d at 816 (explaining that Section 1714 of the Civil Code does not preclude the Court from removing contributory negligence because the Legislature did not intend to exclude judicial action).

120 Izhak Englard, *Li v. Yellow Cab. Co. — A Belated and Inglorious Centennial of the California Civil Code,* 65 CAL. L. REV. 4, 7 (1977) ("Two conflicting interpretations of the pertinent language of section 1714 were advanced. The first argued that section 1714 had codified the doctrine of contributory negligence, thus rendering the 'all-or-nothing' rule invulnerable to attack in the courts except on constitutional grounds.").

121 *Li*, 13 Cal.3d at 813.

122 *Id.* at 816.

123 *Id.* at 814–15.

124 England, *supra* note 120, at 7 ("[The Court] interpreted the language of section 1714 as establishing in specific terms a rule of comparative negligence. The use of the compound conjunction 'except so far as' indicated a legislative intent to adopt a system

California Supreme Court demonstrated to other state courts that they could also judicially adopt comparative negligence.

Li is significant because it gave other courts persuasive precedent to change the law. The Illinois Supreme Court demonstrated a comedic reversal when they struggled with the adoption of comparative negligence. In 1968 the Illinois Supreme Court refused to adopt comparative negligence in *Maki v. Frelk* because "such a far-reaching change should be made by the legislature rather than by the court."[125] Thirteen years later, in *Alvis v. Ribar,* the Illinois Supreme Court reversed its position and adopted comparative negligence.[126] The *Alvis* Court cited *Li* along with several other cases to justify that judicial action is appropriate because the courts created the contributory negligence doctrine,[127] and the legislature did not act.[128]

C. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TO UPDATE CONSTITUTIONAL DOCTRINES

In constitutional law, the California Supreme Court fortified equality as a fundamental right for Californians, influenced the United States Supreme Court, and laid the foundation for protecting gay marriage. Although the Court generally defers to the Legislature on constitutional issues,[129] the Court uses its lawmaking power to modernize constitutional doctrines when they directly conflict with contemporary public policies.

In 1948, Traynor authored the *Perez v. Sharp* opinion, which struck down a ban on interracial marriage.[130] *Perez* was significant because it was the first case of the twentieth century to invalidate an anti-miscegenation law.[131] The Court anticipated the imminent civil rights movement when it emphasized that a civilization based on equality is repulsed by

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other than one where contributory fault on the part of the plaintiff would operate to bar recovery.").

125 Maki v. Frelk, 40 Ill.2d 193, 196 (1968).

126 Alvis v. Ribar, 85 Ill.2d 1, 28 (1981).

127 *Alvis*, 85 Ill. 2d at 21.

128 *Id*. at 22; *Maki*, 40, Ill.2d at 203.

129 Ursin, *supra* note 5, at 1314.

130 Perez v. Sharp, 32 Cal.2d 711 (1948).

131 Randall Kennedy, Interracial Intimacies 259–66 (2003).

racism.[132] To justify the holding, the Court cited several social science studies[133] and policy reasons,[134] which emphasized the illogical foundation of racism.[135] Specifically, during oral argument, Traynor directly attacked the 'white superiority doctrine' when he said, "Anthropologists say there is no such thing as race."[136]

Nineteen years after *Perez*, the United States Supreme Court followed the California Supreme Court's lead and banned anti-miscegenation laws for the nation in *Loving v. Virginia*.[137] However, Chief Justice Warren's approach was very different than Traynor's.[138] Warren "devoted very little attention to social scientific evidence; instead he focused on normative matters of racial equality and personal choice."[139] However, "the similarities in the way Warren and Traynor discuss race and marriage are especially noteworthy and should not be overlooked."[140] Both decisions reveal "a commitment to racial equality and a commitment to marital autonomy."[141] Also, Traynor[142] and Warren both relied on the Due Process Clause and Equal Protection Clause to invalidate the ban on interracial marriages.[143] Thus, the opinions differ on the surface, but both are based on the same public policy of social equality.

"*Perez* highlights the Court's early efforts to grapple with notions of colorblindness, which are now enshrined in equal protection law."[144] Although many Californians did not approve of interracial marriage

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132 *Perez*, 32 Cal.2d at 715 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

133 *Id*. at 756–60.

134 *Id*. at 737–38.

135 R.A. LENHARDT, THE STORY OF *PEREZ V. SHARP*: FORGOTTEN LESSONS ON RACE, LAW, AND MARRIAGE 366 (2011).

136 Transcript of Oral Argument at 3–4, *Perez,* 198 P.2d 17 (No. L.A. 20305).

137 LENHARDT, *supra* note 135, at 365–366. *See also* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967).

138 LENHARDT, *supra* note 135, at 366.

139 *Id*.

140 *Id*.

141 *Id*.

142 *Perez*, 32 Cal.2d. at 714.

143 *Loving*, 388 U.S. at 2.

144 LENHARDT, *supra* note 140, at 345.

in 1948,[145] the Court correctly identified the emerging social equality trend in public policy[146] because "today, *Perez* is recognized as clearly correct."[147]

Further, *Perez* created the foundation that allowed the Court to protect gay rights six decades later. In *Perez*, Traynor expressed that the right to choose one's partner is fundamental and vital to the Constitution. In 2008, the Court used Traynor's words to constitutionally protect gay rights in *In Re Marriage*.[148]

The *In Re Marriage* cases demonstrated a more recent example of the Court aligning the law with emerging public policy trends in constitutional law. Historically, Americans ostracized the gay culture. However, by the early 1990s Americans started to shift their attitudes.[149] By 2006, fifty-five percent of Americans accepted gay culture,[150] and by 2008, a majority of Californians accepted gay marriage.[151] Once the "acceptance" was apparent, the California Supreme Court aligned the law with this emerging public policy trend. In 2008, the Court held that forming a family relationship is a fundamental constitutional right for *all* Californians.[152]

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145 R. A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Anti-miscegenation Law, and the Fight for Same-Sex Marriage*, 96 Cal. L. Rev. 839, 848 (2008).

146 After *Perez*, Traynor noted, "It is now widely, if not universally, accepted that there is no rational basis in any law for race discrimination." Traynor, *supra* note 51, at 237.

147 Plaintiff-Appellants' Brief at 48, Hernandez v. Robles, No. 103434/04, 7 N.Y. 3d 338 (N.Y. 2006).

148 *In re* Marriage Cases, 43 Cal.4th 757, 781 (2008).

149 Marilyn Elias, *Gay teens coming out earlier to peers and family*, USA Today (Feb. 2, 2007), http://usatoday30.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm (explaining graphically by region that Americans' perception of gay culture shifted and that now a majority of Americans support gay culture).

150 *Id.*

151 John Wildermuth, *The California Majority Supports Gay Marriage*, SFGate (May 28, 2008), http://www.sfgate.com/news/article/CALIFORNIA-MAJORITY-BACKS-GAY-MARRIAGE-3211777.php (explaining Californians' public opinion of gay marriage shifted in a dramatic fashion, and now a majority of Californians openly support gay marriage, according to a Field Poll).

152 *In re* Marriage Cases, 43 Cal.4th at 782 (2008) ("The substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.").

Proposition 8 was the conservative reaction to the shift in public policy toward acceptance of gay marriage.[153] In a highly contested election, California voters narrowly passed Proposition 8, a constitutional amendment aimed at stopping gay marriage.[154] In its 2009 opinion *Strauss v. Horton*, the Court deferred to the electorate and upheld Proposition 8.[155] However, the Court narrowly construed the amendment to a hollow definition of the term "marriage," and the Court upheld the basic civil right to form a family relationship.[156]

In *Strauss v. Horton,* the Court continued its tradition of upholding voter-approved constitutional amendments. But the Court did not give conservatives the ultimate victory when it upheld Proposition 8 because the Court narrowly construed the definition of "marriage." Essentially, the Court only facially changed the law because it upheld substantive gay rights, so the Court gave the ultimate victory to Proposition 8 opponents. Thus, the Court followed its precedent and the policy of social equality when it upheld Proposition 8. The Court used a flurry of litigation around gay marriage to align the law with the policy of social equality.

Although California was not the first state to legalize gay marriage, the Court leveraged California's influence to further gay rights. Now, the dominos are falling.[157] Traditionally conservative courts in Iowa and Utah now expressly recognize gay rights. In *Kitchen v. Herbert*, the federal district court in Utah recounted the history of same-sex marriage by citing California's same-sex marriage litigation history.[158] This in-depth reference

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153 *See* Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1064 (2009).

154 Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 18–20 (1978) ("Supporters of minority rights must be concerned with the initiative process because that process often serves those opposed to reform. Tumultuous media campaigns are not conducive to careful thinking and voting.").

155 *See* Strauss v. Horton, 46 Cal.4th 364 (2009).

156 *Id.* at 388 (emphasizing "only among the various constitutional protections recognized in the *Marriage Cases* as available to same-sex couples, it is only the designation of marriage that has been removed by this initiative measure").

157 Richard Wolf, *Same-Sex Marriage On Winning Streak Toward High Court*, USA Today, (Feb. 15, 2014), http://www.usatoday.com/story/news/nation/2014/02/14/supreme-court-gay-lesbian-marriage-virginia/5485119/.

158 *See* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1198 (D. Utah 2013).

demonstrated that the California Supreme Court influenced the decision to strike down a ban on same-sex marriage. In *Varnum v. Brien,* the Iowa Supreme Court cited *In Re Marriage* multiple times to demonstrate that other courts legalized gay marriage because public policy has shifted.[159]

V. COUNTERS TO CRITICS OF THE CALIFORNIA SUPREME COURT'S JUDICIAL LAWMAKING MODEL

Historically, critics of judicial lawmaking cite accountability, reliability, and competence as the main reasons courts should not tread on the legislature's territory.[160] However, these arguments hold less weight with the California Supreme Court. The accountability factor weighs less because California's justices are held accountable through the appointment process and retention elections. The reliance critique weighs less because the Court creatively includes the "reliability" factor into its opinions' application. The competence factor weighs less because the justices study independently, consider *amici* and Brandeis briefs, and use extrinsic sources supplied by vigorous advocates.

A. CALIFORNIA SUPREME COURT JUSTICES ARE ACCOUNTABLE TO THE PEOPLE, SO THE COURT CAN LEGISLATE WITHOUT VIOLATING DEMOCRATIC PRINCIPLES

The premise behind democracy is that public decisions should reflect the will of the people.[161] Therefore, government officials making decisions need to be accountable to the people. California uses a merit-based appointment process and retention election system to ensure that the justices are held accountable because they make laws that impact Californians' everyday lives.

In California, Supreme Court justices must be an attorney or judge for ten years prior to their appointment.[162] First, the governor nominates the

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159 *See* Varnum v. Brien, 763 N.W.2d 862, 882–94 (Iowa 2009).

160 Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

161 Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, AM. ECON. REV., Sep. 2004, at 1.

162 Cal. Const. art. VI, § 8.

justices, and then they must be confirmed by the Commission on Judicial Appointments, which consists of the chief justice, the attorney general, and a presiding justice of the courts of appeal.[163] After appointment, the justice is subjected to a retention vote in the first general election and every twelve years thereafter.[164] The California judicial selection and retention election system is known as the "California Plan."[165]

The California Plan is a merit-based judicial selection and retention system.[166] Generally, merit plans reduce political influence, thus resulting in better justices.[167] Undoubtedly, political pressures affect the judicial selection process in some way because of recent political polarization.[168] However, a justice must impress the governor and the selection committee to reach the bench, so a justice is unlikely to embody a polarized viewpoint. Further, the people hold a revolving veto power over a sitting justice, so the justice is unlikely to develop a polarized viewpoint. Additionally, the retention rate for California justices is very high,[169] so justices are unlikely to be swept away by polarized political waves in the electorate.

A counter to judicial accountability (*i.e.* judicial retention elections) is that it strips judges of some of their independence. However, Supreme

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163 *Id.*

164 Cal. Const. art. VI, § 16.

165 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1, 30 (1995).

166 *Id.* at 31.

167 *Id.*

168 Polarized political parties no longer represent the moderate American electorate. Wealth disparity, immigration, and other forces in modern American politics cause extreme party polarization:

> In the choreography of American politics inequality feeds directly into political polarization, and polarization in turn creates policies that increase inequality. Some direct causes of polarization can be ruled out rather quickly. The consequences of "one person, one vote" decisions and redistricting can be ruled out because the Senate and the House are polarized. The shift to a Republican South can be ruled out because the North is also polarized. Primary elections can be ruled out because polarization actually decreased after primaries became widespread.

Nolan McCarty et al., Polarized America 1 (2d ed. 2006).

169 Gerald Uelman, *California Judicial Retention Elections*, 28 Santa Clara L. Rev. 333, 335 (1988) (explaining that only fourteen California Supreme Court justices have been removed from office since 1855).

Court Justice Sandra Day O'Connor, a vocal critic of judicial elections,[170] concedes that judicial accountability advances the rule of law and furthers judicial integrity.[171]

Times have changed since Hamilton penned *Federalist Paper No. 78*, when the judiciary was the weakest branch of government.[172] Indeed, the Founding Fathers implemented judicial independence in the federal model to insulate the judiciary, but the people want judicial accountability because courts do make law, not just "call balls and strikes." This is evident because a supermajority of states implemented judicial elections. Currently, thirty-eight states have some type of judicial election for the state's high court.[173]

Another counter to judicial accountability is that it invites politics into judicial decision-making. Justice O'Connor said, "Judicial elections powered by money and special interests create the impression, rightly or wrongly, that judges are accountable to money and special interests, not the law."[174] However, money that supports political agendas is constitutionally protected,[175] so these influences are inevitable. But Californians hold a veto over Supreme Court justices, like they do with legislators, so people can remove a justice.

Additionally, California Supreme Court justices do not need to constantly campaign because they have twelve-year terms. Essentially, the justices do not need to start campaigning on their first day in office, like

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170 Annemarie Mannion, *Retired Justice Warns Against Politicians In Robes,* Chicago Tribune, (May 30, 2013), http://articles.chicagotribune.com/2013-05-30/news/chi-retired-justice-warns-against-politicians-in-robes-20130530_1_o-connor-bias-judges (explaining that Justice Sandra Day O'Connor has been a vocal critic of judicial elections).

171 Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 Denv. U. L. Rev. 1, 4 (2008).

172 Alexander Hamilton, *The Federalist No. 78*, (Clinton Rossiter ed., 1961) (examining the role of the judiciary as a limited functioning branch of government).

173 American Bar Association, Fact Sheet On Judicial Selection Methods In States, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited May 16, 2014).

174 Bill Rankin, *Ex-justice Says Contested Elections Threaten Fair Judiciary*, The Atlanta Journal–Constitution, (Aug. 12, 2013), http://www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC/.

175 *See* Citizens United v. FEC, 558 U.S. 310, 339 (2010) (announcing that financial speech deserves the highest constitutional protections).

most legislators do.[176] The long terms allow the justices to be independent because they can exercise wide discretion during their decade-long tenure. Therefore, time, instead of campaign commercials, vindicates or condemns the justices' policies and judgments.

1. Californians Hold the California Supreme Court Justices Accountable When a Justice's Policies Directly Conflict with Californians' Public Policy

In the 1986 general election, Californians sent a message to the justices that the Court must reflect public policy. Californians looked at the justices' "subjective value judgments"[177] (*i.e.* policies), when they decided to oust Chief Justice Bird and others because they were "soft on crime."[178] Californians rejected Bird mainly because she reversed every one of the death penalty cases that came across her desk.[179] Californians handily removed Bird with a 66 percent "no" vote.[180] Thus, the justices understand their decisions need to be socially acceptable to Californians; otherwise they may be removed from office.

B. THE CALIFORNIA SUPREME COURT FACTORS RELIANCE INTO ITS OPINIONS

A major critique of active judicial lawmaking is a lack of stability in the law, *i.e.* reliance. The critics argue that people cannot rely on precedent because the Court may change the law at any moment. To reduce reliance issues, the California Supreme Court factors reliance into its opinions and creatively chooses the fairest course for the parties and society.

Essentially, reliance is a double-edged sword. Traynor noted that a dilemma arises when people substantially relied on precedent the Court now finds

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[176] Legislators are constantly campaigning, instead of focusing on legislative matters because they must start campaigning on their first day in office so they can be re-elected. *See* Ryan Grim, *Call Time For Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST, (Jan. 8, 2013), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

[177] Michael Dann & Randall Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1433 (2001).

[178] *Id.* at 1432.

[179] *Id.*

[180] *Id.*

unsound.[181] The Court may retroactively apply the new law.[182] This causes hardship on the party who relied, but a substantial benefit to the other who benefits from the new law.[183] Or, the Court may apply the old law, and prospectively apply the new law.[184] This protects the party who relied, but hurts the other because he is subjected to an unsound law.[185] Traynor said the Court should balance "whether or not the hardship of defeating reliance of one party will outweigh the hardship of subjecting the other to a precedent unfit to survive."[186] "Barring exceptional situations, where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, a court should be free to overrule such a precedent."[187]

To dull the double-edged sword of reliance, Traynor advocated that the Court should "retreat or advance the law with minimum shock to its evolutionary course and with a minimum shock to those who relied upon judicial decisions."[188] In other words, the Court should "interweave the new with the old to make a seamless whole."[189]

To confront large doctrinal shifts (*i.e.* when reliance is a major issue), the California Supreme Court weighs competing reliance interests and creatively chooses the fairest course for society and the litigants. In *Li*, for example, the California Supreme Court held that the doctrinal shift to comparative negligence is "given a limited retrospective application."[190] The Court applied comparative negligence to all future cases and retrials, but the Court did not apply comparative negligence to cases already in trial.[191] After balancing the litigants' reliance interests, the Court concluded, "This is a case where the litigant before the court should be given the benefit of the new rule."[192]

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181 Traynor, *supra* note 35, at 167.

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at 168.

187 Traynor, *supra* note 23, at 66.

188 Poulos, *supra* note 20, at 1705.

189 *Id.*

190 *Li*, 13 Cal.3d at 808.

191 *Id.* at 829 (explaining the retroactive and prospective application of the new contributory negligence doctrine).

192 *Id.*

C. THE CALIFORNIA SUPREME COURT IS A COMPETENT LAWMAKING INSTITUTION

Unlike the legislature, "justices may not commission scientific studies, convene groups of experts, or issue notice-and-comment procedures."[193] However, this "legislative subpoena power" is unnecessary for the California Supreme Court to obtain adequate information to correctly adjudicate cases before it. Traynor noted, "Only a small fraction of cases are of a complexity that calls for inquiry beyond the facts and available precedents."[194] However, when justices need more information, they study independently, solicit Brandeis and *amicus* briefs, and use information supplied by the vigorous advocates. Thus, like the Legislature, the Court is competent when it makes new laws.

When justices need more information, they study outside materials to supplement their decision.[195] Today, the Internet gives justices infinite information at their fingertips. If the justices need "legislative facts," then the justices can quickly research existing studies, assess competing interests, and examine legislative records: all with a click of the mouse. Or even easier, the justices can order their clerks to comb the Internet for the required information.

Also, interested parties can file Brandeis and *amicus* briefs with the Court to support their positions. Thus, the Court is aware of scientific and outside perspectives on the issues. Brandeis briefs bring to the Court a compilation of scientific information and social science. *Amicus* briefs allow interested parties to make their position known. Also, the *amicus* brief acts as a notice-and-comment procedure because interested parties are put on notice when the case is on appeal, and then the interested parties can comment on the case through the *amicus* brief. Traynor argued that Brandeis and *amicus* briefs should be used more often.[196] Since his time, the use of these briefs skyrocketed in the California Supreme Court and others.[197]

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193 Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2010).

194 Traynor, *supra* note 43, at 627.

195 Dear, *supra* note 1, at 705 (explaining that the California Supreme Court's culture from the 1940s until today supports independent study, which is apparent in the opinions).

196 Traynor, *supra* note 43, at 627.

197 *The Rise of Amicus Briefs*, APPELLATE PRACTICE COMMITTEE NEWSLETTER (International Association of Defense Counsel) March 2010.

Further, vigorous advocates bring case-specific experts, studies, and knowledge to the Court. Essentially, these advocates come to trial prepared to educate the Court on the issues at hand. Recently, advocates use experts and studies more often in litigation,[198] so the Court is supplied with ample information from the parties. The Court can consider the experts' opinions and contrast them with independent research.

The argument against courts' using every available resource is that judges will be overwhelmed with conflicting information to consider. However, Traynor articulated the counter to this. He explained that judges can "detect latent quackery in science or medicine, edit the swarm spore of the social scientists, and add grains of salt to the fortune-telling statistics of the economists."[199]

VI. CONCLUSION

The California Supreme Court is the most followed state court because it embraces its lawmaking powers and uses public policy in its decision-making process. Great courts, like great judges, are known for their active role in lawmaking, not for idle adherence to precedent.[200] The California Supreme Court is a "great court" because its significant influence proves its lawmaking model is successful. The data indicates the California Supreme Court will continue to influence other courts for the foreseeable future,[201] so the Court's lawmaking model will continue to gain traction. Therefore, other courts should consider embracing a similar model to facilitate the evolution of the law to continually align with public policy.

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198 Faust F. Rossi, *Modern Evidence and the Expert Witness*, 12 Litig. 18 (1985) (asserting that inflation in the use of experts is the result of (1) the growth of complex litigation, (2) the explosion of technology and science, (3) the increasing creativity of advocates, and (4) liberality of the rules of evidence).

199 Traynor, *supra* note 43, at 627.

200 *See generally* Ursin, *supra* note 5.

201 Dear, *supra* note 1, at 702–03.

JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE:

Field and Posner Revisited

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TABLE OF CONTENTS

I. INTRODUCTION 425

II. BEN FIELD'S "JUDICIAL ACTIVISM": TRAYNOR AS AN ACTIVIST JUDGE....................................427

A. BEN FIELD'S CONCEPTION OF JUDICIAL ACTIVISM..........427

B. BEN FIELD ON JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE 428

III. JUDGE POSNER ON JUDICIAL ACTIVISM 431

A. JUDGE POSNER'S DEFINITION OF AN ACTIVIST JUDGE 431

B. JUDGE POSNER'S ACTIVIST/RESTRAINED SPECTRUM AND "MIXED" JURISTS 433

IV. BEN FIELD AND JUDGE POSNER REVISITED: JUSTICE TRAYNOR AS AN ACTIVIST JUDGE? 434

A. REVISITING BEN FIELD: JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE 434

B. JUSTICE TRAYNOR REVISITED: TRAYNOR'S CONSTITUTIONAL JURISPRUDENCE........................436

1. JUSTICE TRAYNOR'S RESTRAINED JURISPRUDENCE 438

2. JUSTICE TRAYNOR'S ACTIVIST JURISPRUDENCE 440

C. JUDGE POSNER REVISITED: JUSTICE TRAYNOR'S PLACE ON THE ACTIVIST/RESTRAINED SPECTRUM 443

V. CONCLUSION 446

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

[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

[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

[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

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[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

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[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

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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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THE INFLUENCE OF JUSTICE TRAYNOR'S APPROACH TO STATUTORY INTERPRETATION ON MODERN AMERICAN LAW

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I. INTRODUCTION

With the recent "statutorification" of American law, a judge's approach to statutory interpretation has become increasingly important. Each judge's approach can determine the outcome of his or her decision, and many judges use differing approaches. Naturally, the approach adopted by an influential judge, like Chief Justice Roger Traynor, whose widely adopted opinions changed the course of law, has the potential to influence the law of the entire nation.

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She wishes to dedicate this paper to her father, Jeffrey L. Marxen, M.D., who died during her first year of law school and always supported her educational endeavors. Additionally, she wishes to thank Professor Michael B. Rappaport of the University of San Diego School of Law for making Legislation and Administrative Law interesting enough to inspire this paper.

II. THE IMPORTANCE OF STATUTORY INTERPRETATION

Statutory interpretation plays an important role in assuring the separation of powers essential to the proper functioning of our government. As James Madison opined, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself."[1] The Founding Fathers obliged the government to control itself by creating a system of government based upon the separation of powers. Article I allows the legislature, consisting of the House of Representatives and the Senate, to make the law; article II vests the executive branch with the power to execute the laws; and article III empowers the judiciary to interpret and apply the laws created by the legislature.[2] Frequently, this interpretation involves interpreting the statutes and laws created by Congress.

Today, statutes, not common law, constitute the main source of modern American law.[3] As a result, the judiciary's interpretive role assumes great importance in "the 'hard cases' not clearly answered by the statutory language" because the court must apply and interpret the statutes enacted by Congress while simultaneously refraining from usurping the legislature's lawmaking power.[4] Thus, "any conflict between the legislative will and the judicial will must be resolved in favor of the former."[5] Accordingly, "statutory interpretation is not 'an opportunity for a judge to use words as empty vessels into which he can pour anything he will.'"[6] Rather, a judge must show deference to the legislature and its lawmaking power when interpreting statutes.

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1 The Federalist No. 51 (1787) (James Madison).

2 U.S. Const. Articles I–III.

3 William N. Eskridge, Jr. & Philip R. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 669 (3rd ed. 2001).

4 *Id.*

5 *Id.* (citing Reed Dickerson, The Interpretation and Application of Statutes 8 (1975)).

6 *Id.* (quoting Frankfurter, J.) (internal citation omitted).

III. THEORIES OF STATUTORY INTERPRETATION

"Three different theoretical approaches have dominated the history of American judicial practice. . . ."[7] Each approach rests upon "different versions of the role of the interpreter and the nature of our constitutional system."[8]

The first approach, *intentionalism*, mandates that the interpreter identify and then follow *the original intent* of the statute's drafters.[9] Intentionalists look first to statutory language but also "attempt to discern the legislature's intent by perusing all available sources, including, principally, legislative history."[10] Supporters of this approach, including Supreme Court Justice Stephen Breyer and former Supreme Court Chief Justice William Rehnquist, "argue that it supports the separation of powers expressed in the Constitution" because "[t]he legislative branch, not the judiciary, has the constitutional power to legislate," and "in order to avoid 'making law,' courts should strive to carry out the legislature's intent."[11] Thus, "[i]intentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature."[12] Some notable criticisms of intentionalism include arguments that "the intent of a legislative body cannot be ascertained from anything less than the language of the statute approved by that body"; "judges can manipulate legislative history to support their own interpretation"; "in any major piece of legislation, the legislative history is extensive, and there is something for everyone";[13] and finally, because the legislative history is neither approved by a legislature nor the executive, resort to legislative intent undermines the legislative process required by state and federal constitutions: "approval by the legislatures and presentment to the executive for approval or veto."[14]

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[7] *Id.* at 670.

[8] *Id.*

[9] *Id.*

[10] Linda D. Jellum & David Charles Hricik, Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies 97 (2006).

[11] *Id.*

[12] *Id.* at 97–98.

[13] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 36 (1997) ("As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.").

[14] Jellum & Hricik, *supra* note 10, at 98.

The second approach, *purposivism*, dictates that the interpreter choose "the interpretation that best carries out *the statute's purpose*."[15] Thus, this approach "focuses on the broad goals of a statute, on the problem the legislatures meant to address by passing the statute."[16] Purposivism differs from the other theories in that it "allows courts to seek meaning from the broadest number of sources to make a more informed decision."[17] Hence, "[i]t urges the court to consider *all* of the relevant evidence bearing on the meaning of the language at issue because the underlying premise is that the more such evidence the court considers, the more likely it is that the court will arrive at a proper conclusion regarding that meaning."

The third approach, *textualism*, requires the interpreter to follow *the "plain meaning*" of the statute's text.[18] As a result, "[t]extualists look to the text to find 'a sort of objectified' intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[19] This approach stems from a strict view of separation of powers, which believes that if the language of a statute is clear, courts must interpret the statute according to the language only, because "if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."[20] Thus, in order to adhere to the separation of powers dictated by the Constitution, the judiciary must not look to the intent of the legislature but only the meaning of the law enacted.[21] Accordingly, this approach "examines the fewest sources" looking only "at the text at issue and also the language of other statutes" but neither the legislative history nor the purpose for the statute.[22] Textualists believe "that by holding Congress to its words, they ensure that only language actually enacted will be given the force of law and, further, that they will not engage in legislating, which is, they believe, the exclusive province of Congress."[23]

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15 Eskridge & Frickey, *supra* note 3, at 670.

16 Jellum & Hricik, *supra* note 10, at 99.

17 *Id.* at 100.

18 Eskridge & Frickey, *supra* note 3, at 670.

19 Jellum & Hricik, *supra* note 10, at 95.

20 Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

21 *Id.*

22 Jellum & Hricik, *supra* note 10, at 95.

23 *Id.*

Finally, a more recent approach, *dynamic interpretation*, advanced by William Eskridge, Jr., encourages courts to interpret statutes dynamically.[24] Eskridge notes that if judges interpret the Constitution in light of its text, historical background, subsequent interpretational history, related constitutional facts, and current social facts and the common law in light of the text of precedents, their historical context, subsequent history, related legal developments, and societal context, then why do most judges only consider the text and historical context of statutes?[25] Eskridge contends that statutes, like the Constitution and common law, should "be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."[26] The aforementioned three prevalent approaches to statutory interpretation "treat statutes as static texts," examining the intent of the legislature at the time the statute was enacted,[27] and therefore, assuming "that the legislature fixes the meaning of a statute on the date the statute is enacted."[28] Eskridge notes, however, that "[a]s society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate" and "the legal and constitutional context of the statute may change," so the intent of the legislature must adapt to the changes of the times.[29]

Generally, "state courts have been more likely to resolve issues of statutory interpretation by construing the apparent meaning of the statutory language — without *any* examination of the statute's purpose or legislative history," seemingly utilizing a textualist approach.[30] Beginning in the post–World War II era, however, California "often eschewed a plain meaning

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[24] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

[25] *Id.* at 1479.

[26] *Id.*

[27] Intentionalists would ask how the legislature "would have intended the question to be answered had it thought about the issue when it passed the statute," while purposivists would ask which approach "furthers the purposes the legislature had in mind when it enacted the statute." *Id.*

[28] *Id.* at 1479–80.

[29] *Id.* at 1480–98.

[30] Eskridge & Frickey, *supra* note 3, at 741 (noting that some surmise this is due to "the dearth of legislative history materials available for state statutes and a more restrained methodology practiced by many state judges").

approach."[31] The California Supreme Court began its now prevalent habit of using "a contextual approach to interpret legislation broadly to promote liberal social policy and fairness."[32] However, this notwithstanding, "statements by ordinary legislators are rarely given much, if any, weight."[33]

IV. THE INFLUENCE OF JUSTICE TRAYNOR

In 1940, Traynor's appointment to the California Supreme Court occurred at a time when "the lawmaking role of courts was very much in dispute" due to the recent end of the *Lochner* era.[34] His appointment to the bench marked the turn of a new direction for the Court. By the late 1950s, Traynor had become so influential at the California Supreme Court that his views prevailed among the justices, leading the Court to become "the leading supreme court in the nation."[35]

In 1964, twenty-four years after his appointment as an associate justice, Traynor became chief justice of California. Traynor wrote over 900 opinions during his time on the bench, many of which became landmark decisions adopted by other states, influencing the course of the law.[36] In total, the California Supreme Court produced sixteen decisions followed at least three times by out-of-state courts during Traynor's tenure on the Court (although admittedly most of these decisions involve tort liability rather than statutory interpretation).[37]

Given how widely followed his decisions were, Traynor's method of statutory interpretation, which embodies his style of judicial lawmaking and invariably influenced those widely-followed decisions, created law.

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[31] *Id.* (citing People v. Hallner, 277 P.2d 393 (Cal. 1954); McKeag v. Board of Pension Comm'rs of Los Angeles, 132 P.2d 198 (Cal. 1942)).

[32] *Id.*

[33] *Id.* at 997 (citing Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513 (Cal. 1998)).

[34] Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1290 (2009).

[35] *Id.* at 1276 (citing Jake Dear & Edward W. Jessen, *"Followed Rates" and the Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 683, 710 (2007) (noting that "five of the six *most* followed of the 'most followed' are tort decisions rendered since 1960")).

[36] John W. Poulous, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1645 (1995).

[37] Jake Dear & Edward W. Jessen, *supra* note 35, at 702.

Through the subsequent adoption of those decisions throughout the country, his method of statutory interpretation impacted the nation.

V. JUSTICE TRAYNOR'S VIEWS ON JUDICIAL DEFERENCE TO THE LEGISLATURE

As a highly influential judge authoring widely adopted opinions, Traynor's approach to statutory interpretation, which naturally influenced those opinions, is of great importance due to its ability to influence the law when referred to, approved of by, or adopted by other state courts throughout the country.

A. HISTORICAL CONTEXT OF VIEWS ON STATUTORY INTERPRETATION DURING AND FOLLOWING THE TRAYNOR ERA

Traynor's extrajudicial and judicial writings achieved prominence during the 1950s, when the legal process school, led by Henry Hart and Albert Sacks, displaced formalism and legal realism as the dominant modes of legal thought.[38] Throughout the late 1950s and 1960s, Hart and Sacks used their prominence to dominate and innovate in the field of statutory interpretation, beginning with their book *The Legal Process*, published in 1958.[39]

Hart and Sacks supported a purposivist approach to statutory interpretation.[40] They believed courts possessed the ability to correct mistakes in the text of a statute "when it is completely clear from the context that a mistake has been made," so long as they do not subvert "the legislative process and all other processes which depend on the integrity of the language."[41] Professor Hart "cautioned that law — particularly statutory law, which takes the form of general and prospective directives — is inherently incomplete."[42] Thus, in the absence of a clear directive addressing specific

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38 Ursin, *supra* note 34, at 1300.

39 Eskridge & Frickey, *supra* note 3, at 699.

40 *Id.* at 699–700; *see also* Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 136 (2008) ("Henry M. Hart explains that law is 'a purposive activity, a continuous striving to solve the basic problems of social living.'").

41 *Id.* at 704–05 (citing *The Legal Process* 1375 (1994 ed.)).

42 McGowan, *supra* note 40, at 136.

problems, Hart and Sacks "believed that officials should fill gaps or resolve ambiguities through "reasoned elaboration."[43] For Hart and Sacks, reasoned elaboration meant elaborating "the arrangement [e.g., the statute, regulation, or precedent] in a way which is consistent with the other established applications of it and in a way that best serves the principles and policies it expresses," rather than construing a statute in light of one's own personal policy preferences.[44]

The purposivist approach of Hart and Sacks assumes that "[e]very statute must be conclusively presumed to be a purposive act."[45] Thus, courts must "[d]ecide what purpose ought to be attributed to a statute," and "interpret the words of the statute immediately in question so as to carry out the purpose as best it can."[46] Because Hart and Sacks' approach,[47] as compared to other purposivist approaches, was a text-based approach, they believed the "words of a statute guide and restrain interpretation in two ways."[48] First, the "text illuminates plausible statutory purposes."[49] Second, the statutory text "constrains the range of statutory interpretations."[50] Although Hart and Sacks advised referring to a wide range of materials

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43 *Id.*

44 *Id.* (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 147 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994)) (internal quotations omitted).

45 *Id.* at 137.

46 Hart & Sacks, *supra* note 44, at 1374.

47 Hart and Sacks' approach to statutory interpretation directs that, "[i]n interpreting a statute, a court should:

> 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
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> 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either —
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> (a) a meaning they will not bear, or
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> (b) a meaning which would violate any established policy of clear statement."

See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 693–700 (1987) (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. 1958).

48 McGowan, *supra* note 40, at 137.

49 *Id.*

50 *Id.*

to "illuminate a statute's context and purpose," they also cautioned that interpreters must keep in mind that the legislature is the primary policy-making body and depends on the courts "to effectuate its policies," thus, "contextual aids such as legislative history . . . help courts . . . shed light on the statute's 'general purpose.' "[51] Thus, Hart and Sacks, like Traynor, believed that the court and the legislature should be partners in lawmaking.[52]

Some scholars argue that Traynor's views more closely aligned themselves with those of Hart and Sacks' students and successors in the area of statutory interpretation, William Eskridge, Jr. and Philip Frickey. Eskridge and Frickey, however, wrote after Traynor's time, during the 1980s until Frickey's death in 2010 (although Eskridge continues to write on the matter). Eskridge and Frickey advanced the aforementioned dynamic theory of statutory interpretation, encouraging an interpretation of statutes which allows them to evolve in light of changed circumstances.[53] They argued that "statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put 'in' the statute by the enacting legislature," but rather "is a dynamic process, and that the interpreter is inescapably situated historically."[54] This view is in accord with Traynor's belief that it is not only appropriate, but desirable, for courts to examine statutes critically. Thus, Hart and Sacks, like Traynor, recognized a lawmaking role for courts but also encouraged deference to the legislature, particularly in the realm of constitutional law.

B. TRAYNOR'S VIEWS ON STATUTORY INTERPRETATION

Regardless of whether one believes that judges should or should not consider policy, which may factor into *why* judicial lawmaking is good or bad, it is important to analyze *how* a judge who considers social policy relevant to judicial decision-making can constitutionally incorporate that policy

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[51] *Id.*

[52] *Id.* at 138.

[53] Eskridge & Frickey, *supra* note 3, at 707.

[54] William N. Eskridge, Jr., *Statutory Interpretation As Practical Reasoning*, 42 Stan. L. Rev. 321, 345 (1990) (citing Eskridge, *Supra* note 24, 1479 ("attacking the view that statutory interpretation is always a search for original legislative intent or purpose"); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988) ("attacking the view that statutory interpretation must focus only on the statutory text")).

while making a decision where a relevant statute applies. Because Traynor believed that courts "must engage in 'judicial elaboration' when applying statutes to situations not anticipated by the drafters,"[55] many place Traynor within the dynamic interpretation approach to statutory interpretation.

Traynor believed courts must interpret statutes in accordance with legislative intent; however, in doing so, the role of the courts also includes making alterations to the statute in order to serve that legislative intent because the legislature lacks the ability to alter statutes to keep pace with the times. In some instances, this means a court's interpretation may differ from that which might logically stem from the plain text of the statute. Thus, this interpretation may qualify as "legislating from the bench" because a judge is "rewriting a statute" or writing something into the statute that was not written, voted on, and enacted into law by the legislature. However, most would agree that Traynor's decisions ultimately arrived at the right result. Further, to the extent that his decisions may include consideration of extratextual sources, he cannot be criticized for adopting the approach that best suits his needs, as his decisions interpreting statutes adopt a uniform approach, approving the consideration of as many sources as possible to arrive at the result in conformity with the legislature's intent.

Because it is impossible to foresee the future and "legislatures are neither omnipresent nor omniscient," Traynor urged courts to "expect our statutory laws to become increasingly pliable to creative judicial elaboration.'"[56] He believed courts should apply statutes as the legislature wanted them applied because the legislature was incapable of amending statutes quickly enough to keep up with the needs of society. This appears to comply with Hart and Sacks' approach of the time, urging courts to interpret statutes according to their purpose. Thus, Traynor advocated deference to the legislature; however, he felt it was up to the judiciary to interpret legislation in light of the needs of society, or as Justice Holmes would say, "the felt necessities of the time."[57] As a result, Traynor looked down on

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[55] Poulous, *supra* note 36, at 1686, n.194 (citing Traynor, *supra* note 47, at 617–19).

[56] Roger J. Traynor, *Comment on Courts and Lawmaking, Legal Institutions Today and Tomorrow*, LEGAL INSTITUTIONS TODAY AND TOMORROW 60 (Monrad G. Paulsen ed., 1959).

[57] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963).

all canons of statutory interpretation that deflect attention from legislative purpose.[58] At the same time, many of Traynor's decisions utilize both grammatical and substantive canons of interpretation such as the doctrine of *in pari material* or the whole act rule.

Despite the fact that Traynor "spent the first decade of his legal career specializing in tax law," a statute-oriented area of the law centered around the Internal Revenue Code and "far removed from the common law style that became his primary legacy," his views on statutory interpretation have received scant attention.[59] Those that have given this subject attention, argue that "[a]lthough Traynor hinted at a seemingly dynamic approach to statutory interpretation, perhaps a natural outgrowth of his creative common law bent, his judicial opinions hew closer to the legal process theories of that era and reflect a decidedly pragmatic cast."[60]

In *Perez v. Sharp*,[61] Traynor authored the opinion overturning a state law prohibiting miscegenation, making the Supreme Court of California the first state supreme court to abolish such laws. In *Perez*, the petitioners, Andrea Perez, a white female, and Sylvester Davis, an African American, sought a writ of mandamus compelling the County Clerk of Los Angeles to issue them a certificate of registry and a license to marry under Cal. Civ. Code, § 69, which provided: "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."[62] Petitioners, members of the Roman Catholic Church, which "has no rule forbidding marriages between Negroes and Caucasians," contended that the statutes were unconstitutional on the grounds that they prohibited the free exercise of their religion and denied to them the right to participate fully in the sacraments of that religion."[63] At first glance, a strict textualist approach would appear to require a ruling upholding the prohibition.

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[58] *See e.g.*, Traynor, *supra* note 56.

[59] Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 278 (2000).

[60] *Id.* at 278–79.

[61] 198 P.2d 17 (Cal. 1948).

[62] *Perez*, 198 P.2d at 17–18 (noting that the relevant statute, Civil Code, section 69, which implemented Civil Code, section 60, provided: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.").

[63] *Id.* at 18.

Traynor first looked to the language of the statute and held that "[s]ection 69 of the Civil Code and section 60 on which it is based are therefore too vague and uncertain to be upheld as a valid regulation of the right to marry," a fundamental right.[64] He concluded that "[e]nforcement of the statute would place upon the officials charged with its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute."[65] Traynor viewed this as an impossible feat due to the failure of the Legislature to supply conceptions of race classification because "[i]f no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one."[66] In this respect, Traynor yielded to the lawmaking power of the Legislature by refusing to rewrite the statute. He also held that the statute violated "the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[67]

While not explicitly stating he was doing so, Traynor, who spoke out against canons of statutory interpretation in his extrajudicial writings, appears to rely on the substantive canon of statutory interpretation that courts must interpret statutes to advance federal values, including clear statement rules and the advancement of fundamental rights, such as marriage.[68] He also appears to utilize the canon of constitutional avoidance, "which requires courts to construe statutes so as to avoid ruling on potential constitutional questions."[69] However, he found no interpretation of the statute by which

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64 *Id.* at 29.

65 *Id.*

66 *Id.*

67 *Id.*

68 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 940, (2013). While "[i]t is worth noting that clear statement rules have come under sustained attack as an improper exercise of judicial power or policymaking," others, such as Scalia, note that "[t]he presumption is based on an assumption of what Congress, in our federal system, would or should normally desire." *Id.* at 957, 1025, n.190 (2013).

69 *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 Harv. L. Rev. 1798, 1799 (2003); *see also* Edward J. DeBartolo

infringement of the fundamental right of marriage could be avoided and no reasonable interpretation of the statute by which it could be construed as constitutional, and thus, had to strike down the statute.

Next, in order to support his conclusion that the statutes were unconstitutional, Traynor discussed previous amendments to the statutes.[70] He noted that, because states may validly regulate marriage, the fact that the law interfered with a religious right did not provide a per se invalidation under the First Amendment (observing that states could validly prevent the practice of bigamy, which is a part of some religions), so long as the law was "directed at a social evil and employs a reasonable means to prevent that evil."[71] However, if the law was both discriminatory *and* irrational, "it unconstitutionally restricts not only religious liberty but the liberty to marry as well."[72]

Traynor, in adherence to his legal pragmatism,[73] also considered policy in declaring the law unconstitutional. In terms of policy considerations

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Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). According to this canon, "when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and one of those interpretations is reasonable, "the canon functions as *a means* of *choosing between them*," requiring the court to choose the reasonable interpretation over the unreasonable interpretation, which may require reading a statute's text in light of its purpose. *See* Clark v. Martinez, 543 U.S. 371, 385 (2005); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.").

70 *Perez*, 198 P.2d at 21–22.

71 *Id.* at 18.

72 *Id.* at 18.

73 *See* Ursin, *supra* note 34, at 1314–15 (discussing how "Traynor's combination of creativity and caution in the realm of statutory and constitutional interpretation resembles the views later articulated by" Judge Posner's pragmatic jurisprudence, which in turn stemmed from Justice Oliver Wendell Holmes, Jr., and counseled deference to the legislature, but allowed judges, when deciding issues of moral or political nature, to issue an opinion on a constitutional matter based upon that judge's intuitions of public policy); *see also* Linda E. Fisher, *Pragmatism Is As Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. Rev. 455, 468 (2001) (discussing how a "pragmatist judge considers stability of the legal system, legal tradition, and deference to other branches of government to be important legal virtues," but will allow "the service of other social needs" to trump them, "according to notions of good policy"); *see also* Ursin, *supra* at 1315–16 ("Posner writes that an implication of his pragmatic jurisprudence is that 'courts will tend to treat the Constitution and the common law, and to a

and fairness, in the absence of an emergency, states may not "base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups."[74] Thus, Traynor concluded that "[a] state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency."[75] Further, because the right to marry is an individual right, not a right of a racial group, "[b]y restricting the individual's right to marry on the basis of race alone," the statutes at issue violated the Equal Protection Clause of the United States Constitution.[76]

Traynor also examined the history of the legislation at issue as well as the arguments in support thereof, looking at similar statutes (utilizing the doctrine of *in pari materia,* requiring similar statutes to be interpreted in light of each other).[77] One of the justifications for the statute was that the races should not intermix because of the physical inferiority of certain races, but Traynor cited "statistics showing that there is a higher percentage of certain diseases among Caucasians than among non-Caucasians," and that some diseases were even most prevalent among white persons.[78] While acknowledging that "[t]he Legislature is free to prohibit marriages that are socially dangerous because of the physical disabilities of the parties concerned,"[79] Traynor concluded that because the miscegenation statute condemned "certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical qualifications of the individuals concerned," no compelling justification could be shown to sustain the discrimination under the statute against the strong presumption against discrimination in the face of the Equal Protection Clause.[80] In essence, Traynor, relying on social science data, used a purposivist approach to examine the purpose of the statute at the

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lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.'").

[74] *Perez*, 198 P.2d at 20.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 21–22.

[78] *Id.* at 23, nn.3–4.

[79] *Id.* at 24 (citing Civ. Code §§ 79.01, 79.06).

[80] *Id.*

time it was enacted and noted that the statute as enacted could not accomplish its stated purpose.

Traynor also found the statute too vague to be upheld. He argued, "Even if a state could restrict the right to marry upon the basis of race alone, sections 60 and 69 of the Civil Code are nevertheless invalid because they are too vague and uncertain to constitute a valid regulation."[81] When crafting a statute regulating a fundamental right, "[i]t is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will."[82] Citizens may not be deprived of liberty for the violation of an uncertain and ambiguous law.[83] "An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate."[84] In the statute at issue, the Legislature referred to five races but failed to make provision for applying the statute to persons of mixed race, leading to a problem as to how to apply the statute to a person who had some, but not all, African-American ancestors.[85] If the statute were to apply to people of mixed race, how could the statute be applied?[86] Because the Legislature failed to define what makes one fall into a certain race, the application would lead to an absurd result by forcing the courts to determine whether a person falls into a certain race enumerated under the statute because of any trace of ancestry.[87]

Traynor again examined the Legislature's purpose in creating the statute, determining that "[t]he apparent purpose of the statute is to discourage the birth of children of mixed ancestry within this state."[88] He concluded, however, that the purpose could not be accomplished without considering

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81 *Id*. at 27.

82 *Id*.

83 *Id*. (citing, *inter alia*, United States v. Cohen Grocery Co., 255 U.S. 81, 89–92 (1921); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1931); Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

84 *Id*.

85 *Id*. at 28.

86 *Id*.

87 *Id*.

88 *Id*.

persons born of mixed ancestry.[89] If a statute regulating fundamental rights cannot be reasonably applied to accomplish its purpose, it is unconstitutional.[90] He then reasoned, "This court therefore cannot determine the constitutionality of the statute in question on the assumption that its provisions might, with sufficient definiteness, be applied to persons not of mixed ancestry."[91] If the classification of a person of mixed ancestry depends upon a given proportion of Mongolians or Malayans among his ancestors, how can this court, without clearly invading the province of the Legislature, determine what that decisive proportion is?[92] Thus, Traynor used the void for vagueness doctrine, which requires legislatures to enact reasonably clear guidelines, so that men of common intelligence are not "forced to guess at the meaning" of a criminal statute,[93] to conclude the statute failed to provide reasonable notice to men as to its enforcement, and was thus, unconstitutional and void.

Thus, in *Perez*, Traynor showed deference to the Legislature but, ultimately, struck down the statute at issue by using the void for vagueness doctrine; adopting a purposivist approach and looking to the purpose of the Legislature in enacting the statute, pointing out that the statute did not accomplish that purpose; and pointing out that the statute was unconstitutional. By not attacking the Legislature's purpose in enacting the statute and supporting his decision striking the statute down by showing the statue could not accomplish the Legislature's purpose, Traynor arrived at his result without infringing on the Legislature's lawmaking power. Further, it is noteworthy that Traynor struck down the law using these "neutral" approaches without relying only upon notions of morality and personal policy preferences, inasmuch as Traynor himself felt the anti-miscegenation laws were evil.[94] Most importantly, Traynor's *Perez*

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89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *See e.g.*, Smith v. Goguen, 415 U.S. 566, 575–73 (1974) ("The doctrine incorporates notions of fair notice or warning, [requiring] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'").

94 *See* Ursin, *supra* note 34, at 1315 ("Traynor's holding in *Perez v. Sharp* that California's anti-miscegenation legislation was unconstitutional reflected Traynor's view of

opinion received resounding approval, commended by many as being far ahead of its time (nineteen years, to be exact) and was even cited by the U.S. Supreme Court decision declaring anti-miscegenation statutes unconstitutional in *Loving v. Virginia* ("The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California").[95]

People v. Knowles[96] — disapproved on another ground in *People v. Beamon*,[97] and superseded by statute on another ground as stated in *People v. Tribble*,[98] — nevertheless demonstrates "[t]he fullest expression" of Traynor's views on the subject of statutory interpretation.[99] *Knowles* involved a statute criminalizing kidnapping. In holding that the statute allowed robbery to be punished under the statute, Traynor expressed his approval of relying on extrinsic aids when interpreting a statute.[100] He noted that courts may properly rely on "the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures," but that the primary source in determining the purpose of the Legislature must be the words of the statute.[101]

In *Knowles*, the defendant contended that for armed robbery, the crime of which he was convicted, Penal Code section 209 cannot be construed to apply to the crime of robbery because the statute "applies only to orthodox kidnapping for ransom or robbery, not to the detention of the victim during the commission of armed robbery."[102] Traynor rejected this interpretation by analyzing the language of the statute, history of the statute (including relevant amendments), plain meaning of words in the statute, intent of the Legislature, purpose of the statute, similar federal statutes, and other cases

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the 'insidiously evil thing' of racial discrimination and qualifies as an application of an 'outrage jurisprudence.'"); *see also* Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor 44 (2003) (pointing out that it was "paradoxical that Traynor used such a conventional method of analysis to reach such innovative results.").

[95] 388 U.S. 1, 7, n.5 (1967).

[96] 217 P.2d 1, 2–19 (Cal. 1950).

[97] 504 P.2d 905, 914, n.9 (Cal. 1973).

[98] 484 P.2d 589, 592 (Cal. 1971).

[99] Lars Noah, *supra* note 59, at 278–79.

[100] *Knowles*, 217 P.2d at 5–6 (Cal. 1950).

[101] *Id.*

[102] *Id.* at 2.

decided under the statute.[103] Traynor concluded that the defendant's "interpretation of section 209 finds no support in its language or legislative history; it could not be sanctioned without a pro tanto repeal by judicial fiat."[104]

First, Traynor analyzed the language of the statute, which he quoted as follows: "Every person who seizes, confines . . . or who holds or detains [any] individual . . . to commit extortion or robbery . . . is guilty of a felony."[105] Traynor noted that, first, even the defendant conceded that the ordinary interpretation of the language did not support his argument, and second, under the language of the statute, "one accused of armed robbery who has inflicted bodily harm on the victim, can be charged with a capital offense."[106] Although in his common law opinions, Traynor might have allowed considerations of policy and justice to lead to a different conclusion, in this statutorily controlled case, Traynor contended:

> Reasonable men may regard the statute as unduly harsh and therefore unwise; *if they do, they should address their doubts to the Legislature*. It is not for the courts to nullify a statute merely because it may be unwise. '*We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it*.'[107]

Thus, Traynor shows substantial deference to the Legislature, by adhering to the statute and its purpose, despite the fact that he finds that the statute could be "unduly harsh."

In analyzing the text of the statute, Traynor examined the plain meaning of the words of the statute, finding the conduct at issue applicable to those words. In *Knowles*, the defendant and his accomplice restrained a person in his stockroom for fifteen to twenty minutes and inflicted bodily

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[103] *Id*. at 2–9; *but see*, *id*. at 18 (Edmonds, J., dissenting, arguing that "the grammatical construction and language of the statute, the legislative history and development of section 209, and the legislative intent as derived from the history and circumstances surrounding the enactment of the 1933 amendment clearly show that one can commit robbery without also being guilty of kidnaping.").

[104] *Id*. at 2.

[105] *Id*. at 7 (bracketing by Traynor).

[106] *Id*. at 3.

[107] *Id*. at 3–4 (quoting Cardozo, J., in Anderson v. Wilson, 289 U.S. 20, 27 (1933)) (emphasis added).

harm on that person during the detention while the accomplice "rifled the cash register."[108] Traynor looked to the plain meaning of the words of section 209, remarking that, "Webster's New International Dictionary, Unabridged Edition (1943), defines 'seize' as 'To take possession of by force,' and 'confine' as 'To restrain within limits; to limit; . . . to shut up; imprison; to put or keep in restraint . . . to keep from going out.' "[109] Under the plain meaning of the words of section 209, the defendant's conduct of compelling the victim to enter a room at gunpoint and forcing him to remain in that room for fifteen to twenty minutes clearly fell within the scope of section 209.

Second, Traynor also used the history of the statute in arriving at his conclusion, noting its prior versions and the significance of amendments.[110] He pointed out that certain amendments demonstrated "a deliberate abandonment of the requirement of movement of the victim that characterized the offense of kidnapping proscribed by section 209 before the amendment . . . [that changed the offense] 'from one which required the asportation of the victim to one in which the act of seizing for ransom, reward or to commit extortion or robbery became a felony.' "[111] Thus, Traynor used the history of the statute to assure he furthered the Legislature's purpose.

Third, Traynor examined the intent of the Legislature in order to reject the defendant's contention that "the Legislature intended that the statute apply only to acts of seizure and confinement incident to a 'traditional act of kidnapping,' " meaning asportation of the victim. In rejecting this contention, he noted that, in amending the statute, the Legislature had broadened, rather than narrowed, the statute, so, it would be illogical to suggest that "conduct aptly described by the statute is not punishable" just because that conduct may have been excluded under the "traditional act of kidnapping."[112] In doing so, he pointed out that the Legislature unquestionably had "the power to define kidnapping broadly enough to include the offense here committed," and that "[s]ubject to the constitutional prohibition of cruel and unusual punishment, the Legislature may

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108 *Id.* at 4.
109 *Id.*
110 *Id.*
111 *Id.* (citing People v. Raucho, 8 Cal. App. 2d 655, 663).
112 *Id.*

define and punish offenses as it sees fit."[113] Even if their definition of an offense differs from the way other states define that offense or what has ordinarily been defined under that offense, courts cannot (and *should not*) question "the motives of a legislative body."[114] This statement in particular shows Traynor giving substantial deference to the Legislature. Traynor also noted, "The statutory definition of the proscribed offenses is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping."[115] Traynor elaborated on why the text should be interpreted according to its plain meaning:

> When the Legislature has made such acts punishable as kidnapping, this court should not impute to the statute a meaning not rationally supported by its wording. . . . "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body." The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. Section 209 clearly prohibits and punishes the offense committed by defendant; there is no basis for supposing that the Legislature did not mean what it said.[116]

In this analysis of the statute, Traynor exhibits substantial deference to the Legislature by deferring to the text of the statute and refusing to "inquire into the motives" of the Legislature. He displays a true purposivist approach in this opinion, looking to the intent of the Legislature at the time the statute was enacted, seemingly declining to alter the purpose of the statute to fit the present times even though he saw the statute as unduly harsh:

> An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. . . . Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well

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[113] *Id.*

[114] *Id.* at 4–5.

[115] *Id.* at 5.

[116] *Id.* (quoting Cardozo, J, dissenting in United States v. Constantine, 296 U.S. 287, 298–99) (internal citations omitted).

> their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.
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> "While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature." A standard of conduct prescribed by a statute would hardly command acceptance if the statute were given an interpretation contrary to the interpretation ordinary men subject to the statute would give it. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids.[117]

Although Traynor might have felt at liberty to completely rewrite the law if the case were controlled by the common law, he recognized the importance of interpreting statutes according to their ordinary meaning because, if he were to interpret the statute in a manner counterintuitive to its ordinary meaning, then people could not rationally act in a manner that would avoid having their conduct fall under the statute, and the statute could lead to arbitrary enforcement. Thus, just as he did in *Perez*, Traynor

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[117] *Id.* at 5–6 (quoting, first, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMB. L. REV. 527, 543; and, second, Addison v. Holly Hill Fruit Products Co. 322 U.S. 607, 618) (internal citations omitted).

interprets the statute at issue in the way that best provides the public notice of what conduct should be avoided in order to prevent prosecution under the statute. While in *Perez*, this entailed striking the statute down entirely, here, it involves upholding the statute and interpreting it according to its plain meaning, and not, as the defendant requested, in a manner contrary to that ordinary meaning. Thus, Traynor found the defendant's interpretation of the statute resting "entirely upon speculation," void of support from the statutory language, contextual implications, and legislative history.[118]

Fourth, Traynor also looked to other statutes,[119] including the federal statute on kidnapping — known as the Lindbergh Law,[120] which served as a model for the California Legislature's revisions to section 209 — and cases interpreting that statute, including, *Gooch v. United* States,[121] noting that that statute did not limit its prohibition to what the defendant contended fell within "orthodox kidnapping for ransom."[122]

Fifth, Traynor looked to other cases decided under the statute, reasoning that the unequivocal language of the statute, as well as the cases decided under the statute, gave "no merit to defendant's contention that the Legislature did not intend to change the substantive nature of the existing crime."[123]

Traynor's *Knowles* opinion, although demonstrating "hints of endorsement for any number of approaches," pilots "a middle and pragmatic course between the extremes of textualism and dynamism, preferring a form of purposivism or what some have called modified intentionalism."[124] For the most part, however, the *Knowles* opinion is a rarity in that most of Traynor's statutory opinions "made no mention of extrinsic aids to construction, focusing only on the drafting history behind a particular provision — particularly tracing revisions of the text over time — to help understand legislative intent where the words did not provide a plain

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118 *Id*. at 6.

119 By examining other statutes, Traynor again utilizes a canon of statutory interpretation: the doctrine of *in pari materia*.

120 18 U.S.C. § 1201.

121 297 U.S. 124, 126 (1936).

122 *Knowles*, 217 P.2d at 6.

123 *Id.*

124 Lars Noah, *supra* note 59, at 279–80.

enough meaning."[125] However, "[o]n one occasion, he did credit affidavits submitted by legislators involved in the drafting of a statute as a source of relevant guidance."[126] Thus, "[d]espite an announced willingness to consider pre-enactment materials, their infrequent citation confirms that practical limitations affected the interpretation of state statutes during this period more so than the theoretical disputes prominent today in the federal courts."[127] Further, *Knowles* became an important case because it was cited approvingly by nine different states for affirming various important principles of law, and Traynor's analysis was integral to arriving at those conclusions.[128]

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125 *Id.* at 280; *see also id.*, n.89 (citing *In re* Culver, 447 P.2d 633, 634–37 (Cal. 1968); Harvey v. Davis, 444 P.2d 705, 709 (Cal. 1968); California Motor Transp. Co. v. Public Utils. Comm'n, 379 P.2d 324, 326 (Cal. 1963); Burge v. City and County of San Francisco, 262 P.2d 6, 10–12 & n.7 (Cal. 1953); People v. Odle, 230 P.2d 345, 347–49 (Cal. 1951); *In re* Garcia's Estate, 210 P.2d 841, 842–43 (Cal. 1949); Loustalot v. Superior Court, 186 P.2d 673, 676–77 (Cal. 1947); *In re* Halcomb, 130 P.2d 384, 387–88 (Cal. 1942) (Traynor, J., dissenting)).

126 *Id.* at 280 (citing Silver v. Brown, 409 P.2d 689 (Cal. 1966); Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049, 1055–56 (Cal. 1972) ("struggling to resolve conflicting post-enactment explanations of intent").

127 *Id.* at 280.

128 Morrisey v. State, 620 A.2d 207, 212 (Del. 1993) (distinguishing facts but approving of the holding allowing for the defendant to be charged with multiple offenses); State v. Hall, 86 Idaho 63, 76 (Idaho 1963) (approving of the holding, noting that "'[t]rue kidnapping' in the 'traditional' or 'conventional' sense, however, does not occur whenever there is incidental movement, however slight, of a murder victim."); People v. Wesley, 421 Mich. 375, 411–12 (Mich. 1984); State ex rel. Le Mieux v. District Court, 166 Mont. 115, 120 (Mont. 1975) ("We agree with the rationale of *Knowles*."); Jacobson v. State, 89 Nev. 197, 203 (Nev. 1973) (citing *Knowles* for the proposition that "[m]ovement of the victim is only one of several methods by which the statutory offense may be committed."); State v. Ginardi, 111 N.J. Super. 435, 440 (App.Div. 1970) (using *Knowles* to distinguish the factual circumstances in that case); State v. Clark, 80 N.M. 91, 94 (N.M. Ct. App. 1969) (citing Knowles approvingly: "If there is an unlawful restraining or confining, the length of time involved in such restraint or confinement is immaterial."); People ex rel. Eldard v. La Vallee, 15 A.D.2d 611, 612 (N.Y. App. Div. 3d Dep't 1961) (approving of *Knowles*: "It is the singleness of the act and not of the offense that is determinative."); State v. Walch, 346 Ore. 463, 470 (Or. 2009) (approving of the holding but distinguishing the applicable Oregon statute); State v. Innis 433 A.2d 646 (1981) ("California was not alone in supporting the view that the degree of asportation needed to commit a kidnapping offense could be minimal.").

Two years later, Traynor authored the opinion in *De Burgh v. De Burgh*.[129] As Traynor later wrote, he "analyzed [California's recrimination] statute that had been conventionally invoked as providing an absolute defense of recrimination and found that it gave the trial court discretion to grant or deny a divorce as the public interest indicated."[130] This holding, in turn, has been credited with laying the foundation for California's no-fault divorce legislation.

In *De Burgh*, a wife sought divorce from her husband on the grounds of extreme cruelty, but her husband cross-complained for divorce on the same ground. At the time, California only permitted divorce if the complaining party could prove one of the statutorily prescribed grounds of fault sufficient to justify a divorce. However, if the other party to the proceeding could prove the complaining party was also at fault, that party proved the defense of recrimination, and no divorce would be granted.[131] Traynor examined whether the case at issue warranted application of the doctrine of recrimination.[132] In determining the issue, as in *Knowles* and *Perez*, he examined the wording and legislative background of the applicable statues along with the history of the doctrine of recrimination and its objectives.[133]

First, Traynor again used the doctrine of *in pari materia* and examined other provisions on the same topic:

> [T]ogether, Sections 111 and 122 of the Civil Code provide: 'Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.' We are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce.[134]

He explained, "Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: 'Divorces must be

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[129] 250 P.2d 598 (Cal. 1952).

[130] Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. Ill. L.F. 230, 232 (1956).

[131] *See id.*

[132] *De Burgh*, 250 P.2d. at 600.

[133] *Id.*

[134] *Id.*

denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.' "[135]

Second, Traynor also used the tool of reasoning by analogy to other areas of law, ultimately finding analogy to contract law inappropriate because marriage is much more than a contract and can only be terminated with the consent of the state.[136] Thus, in a divorce proceeding, while the court must consider the rights and wrongs of the parties as in contract litigation, it must also examine "the public interest in the institution of marriage."[137]

Third, Traynor examined the Legislature's purpose in enacting the statute, which he determined to be fostering the family unit. Traynor noted, "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life," and "[s]ince the family is the core of our society, the law seeks to foster and preserve marriage."[138] However, Traynor also recognized that "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."[139] He elaborated, "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."[140]

In abolishing the doctrine of recrimination, Traynor looked back to the origination of the doctrine, going as far back as the English ecclesiastical jurist, Lord Stowell.[141] He also examined past precedent regarding the doctrine, making a point of overruling certain precedent.[142] He distinguished the statute at issue concerning recrimination from the precedent interpreting the general doctrine of recrimination prior to the statute enacted by the California Legislature in 1872.[143] He also examined the precedents listed by

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135 *Id.*

136 *Id.* at 601.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*.

142 *Id.* at 601–05 ("To the extent that the following cases support a mechanical application of the doctrine of recrimination, they are disapproved . . .").

143 *Id.* at 602.

the commissioners who drafted the Code, noting, "It is apparent from the decisions that were listed that the Legislature intended that divorce cases involving recrimination be governed by the same principles that apply generally throughout our jurisprudence."[144] He stressed that while the plaintiff's fault is always important in any case, such fault should not be "exalted above the public interest."[145] Defenses such as *in pari delicto* must still apply, but respect for the public interest must create an exception to the doctrine of unclean hands, from which the defense of recrimination stems.[146] Thus, "it is clear that the Legislature, in relying upon judicial principles of general application, intended that in divorce litigation the fault of the plaintiff should have no more significance than elsewhere in the law."[147] Thus, "with this purpose in mind it worded the statute to require that a cause of divorce shown by defendant must be 'in bar' of the plaintiff's cause of divorce" and "would have defeated its own purpose had it closed the avenues to divorce when the legitimate objects of matrimony have been destroyed."[148] Hence, Traynor's extensive analysis allowed him to conclude that, "a strict recrimination rule fails in its purpose of denying relief to the guilty," in uncontested divorce cases where neither spouse is "innocent."[149]

Next, Traynor looked to California cases decided since the enactment of the Code, social developments over the past several decades (such as the rising divorce rate and recognition of marriage failure as a social problem), divorce laws in other states (some of which required that the plaintiff's offense be of the same type as the defendant's offense or that the case involve equal guilt), and the work of leading scholars.[150] Traynor recounted how in 1948, a committee of experts of the American Bar Association strongly urged the elimination of the defense of recrimination,[151] but showed judicial restraint by noting that "[i]n view of the statutory provisions on the subject,

144 *Id.*

145 *Id.*

146 *Id.* at 602–03.

147 *Id.* at 603.

148 *Id.*

149 *Id.*

150 *Id.* at 603–05.

151 *Id.* at 605 (citing Report of Legal Section of National Conference on Family Life 1, 3, 7 (1948); Zechariah Chafee, Jr., Some Problems of Equity 73 et seq. (1950).

we are not free to go so far."[152] Further, he also concluded that "the comparative guilt of the parties will be without significance in every case," but that

> some of the evils pointed out by the Bar Association Committee can be avoided within the framework of the existing statute if it is kept in mind that the doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is neither puristic nor mechanical, but an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large.[153]

Ultimately, Traynor "concluded that section 122 of the Civil Code imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as 'in bar' of the plaintiff's cause of divorce based upon the fault of the defendant."[154] As applied to the case at hand, he held the evidence presented created ample support to conclude that the parties' misconduct should not bar a divorce based upon the aforementioned considerations because there had been "a total and irremedial breakdown of the marriage."[155] In a court's determination of when a cause of divorce shown against a plaintiff constitutes a bar to the suit for divorce, Traynor ruled that divorce courts, as courts of equity, are "clothed with a broad discretion to advance the requirements of justice in each particular case," but among things should consider "the prospects of reconciliation, the comparative fault of the plaintiff and the defendant, and the effect of the marital strife upon the parties, their children, and the community."[156]

In 1969, California became the first state to enact a no-fault divorce statute, which abolished all fault-based grounds for divorce and allowed for only two no-fault grounds, "irreconcilable differences" and "incurable insanity."[157] The *Report of the Governor's Commission on the Family*,

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152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 605–06.

156 *Id.* at 605–07.

157 Former Civ. Code, § 4506, added by The Family Law Act, Stats. 1969, ch. 1608, § 8, eff. Jan. 1, 1970, repealed and reenacted as Fam. Code, § 2310 without substantive change, Stats. 1992, ch. 162, § 10, eff. Jan. 1, 1994.

proposing the law, even credited Chief Traynor's *DeBurgh* opinion as its inspiration for the law.[158] This action reflects legislative approval of the decision; however, many question if it would not have been appropriate for Traynor to defer to the Legislature in *DeBurgh* given that they were considering the issue at the time of the decision.

C. CONCLUSION

Many legal scholars describe Traynor as a judicial activist. Given his stance on the role of courts, Traynor would likely regard this as a compliment. However, although he may have taken an "activist" approach to his common law precedents, as the aforementioned opinions demonstrate, his opinions in cases controlled by relevant legislation demonstrate a mix of creativity and deference to the Legislature (without adopting a strict textualist approach), while still examining considerations of policy. Thus, many believe Traynor's opinions all arrive at the "right result." With his common law decisions, there is less tactical strategy in achieving this right result because courts are given far more discretion in the common law, of which they are the primary lawmakers. However, his opinions involving statutory construction warrant more applause given his ability to stress the importance of the text while not overemphasizing extratextual sources to the extent that he might be considered "legislating from the bench."

Traynor's methodical analysis in cases like *Perez* allowed him to reach innovative results, which although criticized by some at the time, could not be attacked on the grounds that he failed to show deference to the Legislature or was *Lochnerizing*.[159] Traynor, although believing antimiscegenation laws to be wrong, crafted a methodical analysis that could not be attacked on the grounds that he was basing the decision solely on his personal policy preferences.

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[158] Report of the Governor's Commission on the Family 91 (1966), Comment to § 028.

[159] *See* Lochner v. New York, 198 U.S. 45 (1906) (striking down a labor statute on the basis that it interfered with the freedom of contract); *but see id.* at 75–76 (Holmes, J., dissenting) ("liberty, in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.") (internal quotations omitted).

Further, *DeBurgh* might have come out differently had Traynor taken an approach to interpretation that scorned resort to extratextual sources. *DeBurgh,* in turn, laid the foundation for California to become the first state to adopt no-fault divorce legislation, a pioneering move that has been followed in every state in the nation.[160] Many recognize that Traynor and his innovative California Supreme Court, in becoming the first state high court to introduce no-fault divorce, were integral to this development in the law.

Traynor proved himself to be an unusually influential judge, and the policies of an influential judge are therefore important and influential as well. Traynor's approach, including elements of both purposivism and dynamic interpretation, still demonstrates a consistency that permeated his opinions. These opinions, as previously discussed, became widely adopted by other states — some adopted by the U.S. Supreme Court, while others led to nationwide changes in the law. Justice Traynor's judicial philosophy clearly impacted the law of the United States.

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[160] *Id.* 230, n.4 (citing Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 33 Fam. L.Q. 865, 911 (2000) ("Currently, all 50 states have enacted some form of no-fault divorce legislation, either based on the parties' separation for a specified period of time, or based upon the parties' incompatibility or irreconcilable differences.").