

ROGER J. TRAYNOR PROFESSORSHIP

ACCEPTANCE BY JOHN E. NOYES*

I sincerely thank California Western School of Law and the Traynor family for the honor of being named the inaugural Roger J. Traynor Professor of Law.

My favorite topic is “international law and . . .”—fill in the blank. I have a few comments about international law and Justice Traynor. Now I suspect that when most of us hear the name “Roger Traynor,” international law is not the first thing that comes to mind. We think about Justice Traynor’s groundbreaking constitutional and common law opinions. We think about *Escola*¹ and *Greenman*,² for example, which introduced strict products liability in torts, and about *Perez v. Sharp*,³ which struck down California’s anti-miscegenation statute on equal protection grounds long before the U.S. Supreme Court reached a similar result.⁴ We think about Justice Traynor’s pragmatism and his links to legal realism.⁵ We study his careful style of judicial reasoning and analyze why and when he was willing to depart from precedent.⁶ But we usually don’t think first about international law when we think about Roger Traynor. And, I must say, with some reason.

* Roger J. Traynor Professor of Law, California Western School of Law. Thanks to Cavan Cox, who provided valuable research assistance for this essay.

1. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

2. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

3. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

4. *Loving v. Virginia*, 388 U.S. 1 (1967); *see also* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

5. *See* BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* 6-16 (2003).

6. *See* G. EDWARD WHITE, *AMERICAN JUDICIAL TRADITIONS* 243-66 (3d ed. 2007). For Justice Traynor’s analysis of judicial decision-making, *see*, for example, Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962).

The Supreme Court of California, during Roger Traynor's tenure from 1940 to 1970, applied substantive rules of international law in only a few cases. The clearest examples were cases that involved treaties regulating the taxation of foreign entities, extradition, and inheritance.⁷ As the court recognized, the U.S. Constitution establishes U.S. treaties as part of the supreme law of the land.⁸ The court also analyzed a few statutes that incorporated treaty rules by reference.⁹ And, although the days when U.S. courts had regularly invoked the law merchant and other aspects of the law of nations were long gone by 1940, the Supreme Court of California still occasionally invoked non-treaty international law principles.¹⁰

Justice Traynor himself can't be called a leader when it comes to applying treaties or customary international law rules in the U.S. legal system. Although Justice Traynor joined some of the opinions in which the Supreme Court of California relied on treaties as rules of decision,¹¹ he wrote none of them, and he did not focus on applying

7. *Scandinavian Airlines Sys., Inc. v. County of Los Angeles*, 363 P.2d 25, 41-44 (Cal.), *cert. denied*, 368 U.S. 899 (1961) (applying 1939 U.S.-Sweden convention and protocol concerning double taxation); *Coumas v. Superior Court*, 192 P.2d 449 (Cal. 1948) (applying 1931 U.S.-Greece extradition treaty); *In re Estate of Knutzen*, 191 P.2d 747, 750 (Cal. 1948) (applying 1923 U.S.-Germany treaty on inheritance rights).

8. U.S. CONST. art. VI, cl. 2. The court recognized this principle in several cases in which it did not use a treaty rule, *see, e.g.*, *Kramer v. Superior Court*, 222 P.2d 874 (Cal. 1950) (refusing to rely on treaty when timely appeal not filed), as well as in cases in which the court applied treaties.

9. *See, e.g.*, *Palermo v. Stockton Theatres, Inc.*, 195 P.2d 1 (Cal. 1948).

10. *See, e.g.*, *In re Estate of Larkin*, 416 P.2d 473, 478-79 & n.7 (Cal. 1966) (noting international law principle of national treatment of aliens); *In re Estate of Arbulich*, 157 P.2d 433, 450-52 (Cal.) (Carter, J., concurring), *cert. denied*, 346 U.S. 897 (1953) (discussing rights of consular officials under international law); *Takahashi v. Fish & Game Comm'n*, 185 P.2d 805 (Cal. 1947), *rev'd on other grounds*, 334 U.S. 410 (1948) (recognizing concepts of territorial sea and high seas); *Allen v. California Water & Tel. Co.*, 176 P.2d 8, 15 (Cal. 1946) (recognizing international boundary with Mexico and Mexico's freedom of action within its territory, absent treaty limitations).

11. In the cases cited in footnote 7, Justice Traynor joined the court's opinion in *Coumas* and *Knutzen*. He dissented in *Scandinavian Airlines System*. Although Justice Traynor recognized that U.S. treaties could provide a binding rule of decision, he, unlike the majority, interpreted the treaty at issue in that case to permit the County of Los Angeles to impose property taxes on foreign airlines. *Scandinavian Airlines System*, 363 P.2d at 46-47 (Traynor, J., dissenting).

treaties in his scholarship. He also sometimes found reasons not to apply international law rules that other justices invoked. Why? If we look at cases in which Justice Traynor rejected international law arguments, we get a few insights into his approach to judging.

Consider *People v. Sidener*, a 1962 case in which Traynor wrote the majority opinion.¹² The court upheld the constitutionality of a California statute providing that a recidivism charge, which would increase a defendant's criminal penalties, could only be dismissed when the district attorney moved to dismiss it. According to the dissent, the statute impermissibly infringed on judicial authority; the courts should be able to dismiss such charges on their own. To support its position, the dissent argued—here's the international law bit that Justice Traynor did not accept—that when Mexican territory was transferred to California in the 1840s, “established” international principles provided that preexisting Mexican civil law affecting individuals remained in force.¹³ This Mexican law gave the courts, rather than the executive branch, the discretion to drop certain criminal charges. Traynor disagreed with the dissent's historical and international law-based argument,¹⁴ but, more fundamentally, he found it irrelevant. “The meaning of constitutional provisions . . . is not static,” he wrote, “and the scope of judicial power” with respect to criminal charges “is not found in history alone.”¹⁵ Defining criminal offenses and punishments were “legislative matters.”¹⁶ In short—vintage Traynor—the law must respond to changing times and social needs, and the values of California society in the early 1960s left it to the legislature to determine criminal penalties. An old international law rule that would have given weight to nineteenth-century Mexican law really wasn't relevant.¹⁷

12. *People v. Sidener*, 375 P.2d 641 (Cal. 1962), *cert. denied and appeal dismissed*, 374 U.S. 494 (1963).

13. *Id.* at 650 (Schauer, J., dissenting). For a discussion of the international law principle that a change in sovereignty may leave intact the predecessor sovereign's domestic law affecting individuals, see, for example, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 623-28 (6th ed. 2003).

14. Justice Traynor thought that the statute restored part of a prosecutorial common law power of *nolle prosequi*. *Sidener*, 375 P.2d at 643.

15. *Id.* at 644.

16. *Id.*

17. Echoing Justice Traynor's view that the law must respond to current social

Well, what about newer international law? Some California litigants invoked treaty provisions in challenging racially discriminatory state statutes. In *Perez v. Sharp*, the 1948 case about the legality of mixed marriages, Justice Carter, in his concurring opinion, cited the U.N. Charter to support his view that racially discriminatory laws violated “fundamental” legal precepts.¹⁸ But Justice Traynor, writing for the majority, did not cite the Charter. He relied instead on the Constitution’s Equal Protection Clause and quoted social science literature to establish that California’s statutory racial classifications were irrational. Justice Traynor also concurred in another 1948 case involving a challenge to a California statute that prohibited aliens from owning land; he found an equal protection violation, while the majority used a treaty-based argument.¹⁹

The California Supreme Court considered the legal effect of the U.N. Charter in the court’s most infamous international law case, *Sei Fujii v. California*,²⁰ decided in 1952. In *Sei Fujii* the court squarely addressed whether the anti-discrimination articles of the Charter,²¹ a U.S. treaty, should apply under the Supremacy Clause of the U.S. Constitution to invalidate California’s alien land law. The court, in an opinion that Justice Traynor joined, concluded that those Charter articles were not self-executing and thus could not be judicially applied absent implementing federal legislation.²² The court instead

needs, the dissent recognized that its own historical argument was not dispositive:

(W)hat is an essential part of the judicial process . . . is neither static in quality nor fixed in time. . . . The real issue . . . is not whether the hearing and determination of the question of dismissing a charge of prior conviction was an essential part of the judicial process in 1849 or 1872 or 1879; rather, the issue is whether such hearing and determination is today an essential part of that process.

Id. at 652 (Schauer, J., dissenting).

18. *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948) (Carter, J., concurring).

19. *Palermo v. Stockton Theatres, Inc.*, 195 P.2d 1 (Cal. 1948).

20. *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). The case is still excerpted in U.S. international law textbooks. See, e.g., MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 186-89 (3d ed. 2006).

21. U.N. Charter arts. 55-56.

22. Several commentators argued at the time that state courts should directly apply the U.N. Charter and other treaties in cases affecting individuals. See, e.g., Quincy Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J.

relied on the Fourteenth Amendment to invalidate the discriminatory statute. Professor Lockwood has argued that the U.N. Charter “help[ed] American courts find the United States Constitution,” by promoting revised understandings of the Fifth and Fourteenth Amendments.²³ Some convincing evidence supports that assertion. But for Justice Traynor, the sources and reasoning that a rational judge would use to overturn a discriminatory law should be familiar to the local bench and bar. The reasoning must persuade the local society. The new U.N. Charter, though “a moral commitment of foremost importance,”²⁴ was just too unusual and controversial to use as a U.S. legal source, especially when the Fourteenth Amendment could be called into service.²⁵

Although Justice Traynor is not renowned for using treaties or other substantive rules of international law, he is justly famous for his work in one area that we could characterize as a type of international law. That’s the field of conflict of laws, which international lawyers call private international law. Now, we could have an interesting discussion about the senses in which private international law, and especially the part governing choice of law, is truly international. What is the law that determines which among multiple competing laws should govern in multijurisdictional disputes or transactions? It’s a myth that choice-of-law principles are necessarily part of state or

INT’L L. 62 (1951). For an excellent discussion of the self-executing treaty doctrine and the Constitution’s Supremacy Clause, see Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). For the Supreme Court’s most recent pronouncement on self-executing treaties, see *Medellín v. Texas*, 129 S. Ct. 360 (2008).

23. Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 902 (1984).

24. *Sei Fujii*, 242 P.2d at 622. The *Sei Fujii* court did not, however, rule that every article of the U.N. Charter was not self-executing, suggesting that the Charter’s privileges and immunities articles would have direct effect in U.S. courts without implementing legislation. *Id.* at 621.

25. The Supreme Court of California addressed the U.N. Charter argument, which was not essential to the court’s holding, because a lower court had relied on the Charter in striking down the discriminatory California statute at issue. *Sei Fujii v. State*, 217 P.2d 481 (Cal. Dist. Ct. App. 1950). According to Professor Lockwood, the explanation for the supreme court’s refusal to rely on the U.N. Charter “rests less with a view of judicial restraint, than with a recognition of the strong anti-United Nations feelings prevailing at the time.” Lockwood, *supra* note 23, at 930.

national law. It's certainly historically inaccurate to take that position.²⁶ Many scholars have regarded the principles governing choice of law as universal, often grounded in natural law precepts; and today some treaties specify choice-of-law principles.²⁷ In short, choice-of-law law may derive from international sources.

If we look at choice of law from a practice perspective, we also see it as "international" or "transnational." International lawyers, who work with cases and transactions involving people or events in more than one country, regularly grapple with choice-of-law and other conflicts issues. I once had a student who took five courses from me. I asked, during the last course, "don't you get tired of hearing the same thing?" I meant that each of us—each faculty member—has his or her own views about the nature of law and the legal process. Each of us communicates those core views in different courses. But with Conflicts and International Litigation, two of the courses I've taught, there's *really* a significant overlap. I took over International Litigation from Chin Kim when he retired. He had called the course Private International Law. It addresses the same core issues as Conflict of Laws.

Justice Traynor was at the center of the U.S. "conflicts revolution."²⁸ This revolution rejected a widely accepted territorial approach to choice of law. That approach led courts to apply one or another state's law based solely on one particular territorial contact, without concern for the content of the law. Traynor instead favored, as a judge and later as a scholar, a version of interest analysis to solve choice-of-law problems.²⁹ Under interest analysis, to be a bit simplistic, a court

26. See Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L.Q. 1 (2006).

27. Hague Convention on the Law Applicable to Traffic Accidents, May 4, 1971, 965 U.N.T.S. 416; Hague Convention on the Law Applicable to Products Liability, Oct. 2, 1973, 1065 U.N.T.S. 192.

28. Modern conflict of laws textbooks still excerpt many of Justice Traynor's opinions. See, e.g., PETER HAY, RUSSELL J. WINTRAUB & PATRICK J. BORCHERS, CONFLICT OF LAWS 301-03, 479-81, 564-66, 595-98 (12th ed. 2004) (excerpting *Worthley v. Worthley*, 283 P.2d 19 (Cal. 1955), *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953), *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961), and *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)).

29. See Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 INT'L & COMP. L.Q. 121 (1976) [hereinafter Traynor, *War and Peace*]. Justice Traynor did not arrive at interest analysis all at once. In one of his early choice-of-law opinions, he used the language of the traditional territorial approach but characterized the

tries to ascertain the policies related to the potentially applicable laws of different states. It then determines whether those policies actually apply to the parties in the multistate context at issue. If a state has no significant policies at stake, its territorial connection to an accident or transaction should not, by itself, lead the court to apply that state's law. In essence, Traynor followed the same judicial methodology in conflicts cases that he followed in other cases. He was willing to reshape or abandon wooden precedent. He reasoned carefully. He applied state policies that helped state citizens when the facts of a case brought those policies into play. We see these features in Traynor's conflicts opinions as well as in his other opinions.

I know I've claimed that we may regard conflict of laws as a type of international law, but I doubt that Justice Traynor did. He was not what I would call an "internationalist." He was a state supreme court justice, immersed in California law and policy. Had he identified the source of the choice-of-law law that California courts applied in conflicts cases, I suspect he would have called it California common law rather than universal international law. Furthermore, Justice Traynor's approach to choice of law had a forum law bias. He deferred to California statutes or judicial precedents when he found—not always an easy determination—that they applied to interstate or international situations.³⁰ Where he didn't find a controlling statute or precedent that applied to multijurisdictional situations, and where California and another jurisdiction both had applicable policies, he would generally choose California law.³¹ Justice Traynor, in his conflicts opinions as in

issue, in a negligence case involving a survival action, as "procedural." This characterization led Justice Traynor to apply forum (California) law. His opinion made clear that California policies were applicable, and that using the law of the place of the accident (Arizona) to deny recovery in a case involving a California victim and a California tortfeasor (the decedent) would have been unjust. Traynor later noted that *Grant* was "developed . . . against the brooding background of a petrified forest," but that it helped clear the path towards California's rejection of the traditional approach and adoption of interest analysis. Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959)

30. Traynor, *War and Peace*, *supra* note 29, at 130-34.

31. *See id.* at 148-54. Justice Traynor's use of interest analysis was nuanced, and he exercised discretion when he evaluated applicable policies in light of the facts of cases. For example, in *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961), a case concerning an oral contract made in Nevada that a California plaintiff sought to enforce against the estate of a decedent who had died domiciled in California,

his other opinions, sought to further the needs of California society.

Justice Traynor recognized that change was a legal constant. The law did and should change, to “meet new conditions and new,” in his view, “moral values.”³² Would a judge who today followed Justice Traynor’s approach to judging be more of an internationalist? That question doesn’t have a quick or easy answer, and the answer probably would be different for different issue areas. The question is really part of a broader one: how can, and when should, international law be brought into the U.S. legal system? That’s one of the questions that occupies those of us who see in international legal developments promising ways to address some truly pressing international and national problems. Justice Traynor sought to use the law to address current social needs, though he also, I believe, recognized that we will never have a cavernous gap between generally accepted societal values and legal developments. I imagine—and here I hope I’m not simply projecting my own international outlook—that Roger Traynor, were he with us today, would have contributed vitally to our consideration of how international law intersects with the U.S. legal system in the changed circumstances of the twenty-first century.

Let me close by again thanking the Dean, the Trustees, and the Traynor family for this honor. I also particularly want to acknowledge the help I have received over the years from Associate Dean William Aceves, from some excellent research and teaching assistants, and from our outstanding librarians. I also greatly appreciate the support of our various administrative professionals, including Sandy Moreau, Diane Shragg, Joyce Stallworth, and Diane Sopko. We all know these are the folks who really run California Western and make it possible for the faculty to teach, write, and engage in professional service. I thank my colleagues, who continue to teach me a lot. Finally, I thank my family, for their tremendous patience and for teaching me that I really cannot do anything just by myself.

Justice Traynor compared a substantial Nevada interest in upholding the contract with the policy behind California’s statute of frauds. Instead of simply applying that California policy and refusing to enforce the contract, however, Traynor also noted California’s general policy of protecting the reasonable expectations of contracting parties. He upheld the contract, thus giving effect to the “common policy of both states.” *Id.* at 910.

32. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 232 (1956).