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Chief Justice Traynor and the Law of Taxation

By ADRIAN A. KRAGEN*

Most lawyers, if asked to name the area of Chief Justice Traynor's foremost contribution to the law, would suggest conflict of laws, product liability, or civil procedure. His influence was enormous in those areas, which underwent significant developments during his tenure on the California Supreme Court. It may nonetheless be persuasively argued that Chief Justice Traynor's most distinctive contribution lay in the area of taxation.

His effect on tax law was pervasive. As a law professor, Traynor influenced the professional lives of a generation of lawyers with his exacting analysis of tax issues and his commitment to intellectual rigor. As a consultant to the California State Legislature, he wrote or helped write much seminal tax legislation. While he was on the court, his opinions—both majority and dissenting—had a substantial impact on the development of California tax law. This article explores, in a biographical manner, Chief Justice Traynor's contribution to the law of taxation as a professor, consultant to lawmakers, and jurist.

In the spring of 1931 Professor Traynor began teaching a course at the University of California called Principles of Income and Inheritance Taxation. Except for a course on the constitutional principles underlying the law of taxation, the subject of tax law had never before been taught in the School of Jurisprudence. Thus, Traynor's course was the students' first exposure both to the procedural and statutory aspects of tax law and to the philosophical underpinnings of the tax system.

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The author wishes to express his appreciation to the late Stanley Surrey, Professor Emeritus, Harvard Law School, who supplied the information on Justice Traynor's federal service; the late B.J. Feigenbaum, former state assemblyman and San Francisco attorney; and Edward Stetson, former counsel to the State Board of Equalization, who supplied the background on state tax legislation and administration. He also wishes to acknowledge the fine assistance of David Gurnick, a third-year student at Boalt Hall School of Law.

Although in the 1930s the subject contained a substantial component of constitutional law, students regarded it as esoteric and extremely complicated. Traynor's reputation as a teacher, however, enticed courageous students to take the course, and his intellectual rigor convinced many of them to pursue tax law as a specialty. Over the next ten years, Traynor's course inspired a substantial number of attorneys to undertake work as private practitioners or government employees for the refinement of the federal, state, and local tax systems. Traynor inculcated in them a respect for the integrity of the tax system, which was later demonstrated by their contributions to the field of taxation.

In the early 1930's California confronted the need to raise additional revenue for welfare, education, and other governmental programs. Professor Traynor was asked to assist in devising sound methods of taxation that would equitably and efficiently raise the needed revenue. Professor Traynor was instrumental in the drafting and enactment of the retail sales tax,¹ the use tax,² and the bank and corporation franchise tax.³ In addition, he drafted the Personal Income Tax Act⁴ in its entirety. The sales tax, use tax, and personal income tax remain the major sources of revenue for the state. Cities and counties have also adopted the sales and use tax provisions, making them an important source of local revenue.

Professor Traynor also helped persuade the state legislature to approve the new taxes. He took part in meeting the constitutional challenges to the new laws, especially the use tax, and his ideas and expertise were vital in defeating efforts to have the taxes declared unconstitutional.

From 1935 until his appointment to the California Supreme Court, Professor Traynor participated in drafting amendments to and regulations for the various tax statutes. His guidance and influence helped to make the California tax administration a model for the equivalent agencies of other states. As Special Deputy Attorney General under Attorney General Earl Warren, Traynor significantly influenced the presentation of California's legal position on tax cases before the state

1. Retail Sales Tax Act of 1933, ch. 1020, 1933 Cal. Stat. 2599 (current version at CAL. REV. & TAX. CODE §§ 6051-6095 (West 1970 & Supp. 1984)).

2. Use Tax Act of 1935, ch. 361, 1935 Cal. Stat. 1297 (current version at CAL. REV. & TAX. CODE §§ 6201-6249 (West 1970 & Supp. 1984)).

3. Act of March 1, 1929, ch. 13, 1929 Cal. Stat. 19 (current version at CAL. REV. & TAX. CODE §§ 23001-26491 (West 1979 & Supp. 1984)).

4. Personal Income Tax Act, ch. 659, 1943 Cal. Stat. 2354 (current version at CAL. REV. & TAX. CODE §§ 17001-19452 (West 1983 & Supp. 1984)).

and federal courts. He advised the tax department of the attorney general on its opinions to state agencies and on its briefs before the courts. In the process, many of Professor Traynor's concepts were adopted by the courts and became guiding rules for the administration of state tax statutes.

In 1937 Professor Traynor's views on taxation gained wider recognition when he became a consultant to the United States Treasury Department. Professor Traynor received three major assignments in Washington.⁵

One project in which Professor Traynor took part was an effort to prevent the misuse of the statutes of limitation on deficiencies and refunds. In collaboration with Professors John Maguire and Stanley Surrey, Professor Traynor devised a procedure to prevent misuse of the statutes while preserving the statutes' essential purpose of laying controversies to rest. The material developed by Traynor and his collaborators was incorporated in the 1938 Act⁶ and, after the tax bar became familiar with it, was widely approved as a better method of handling the problem.

Professor Traynor's second responsibility was the development of a more efficient method for determining the tax consequences of proposed transactions. After considerable analysis of the problem, the concept of adapting the "closing agreement" procedure to future transactions was recommended and adopted.⁷ The new procedure allowed the Internal Revenue Service to issue an advance ruling on the tax consequences of a future transaction and to enter into a binding agreement with the taxpayer to honor that ruling.⁸

The third project in which Professor Traynor was involved engendered considerable controversy among the tax bar. Traynor was asked to devise a faster and more efficient method for the courts to consider tax controversies. He and his associates recommended removing tax cases from the federal district court system by the creation of a decentralized Board of Tax Appeals and a specialized Court of Appeals. Opposition to the proposal by portions of the bar and judiciary resulted in

5. Traynor was assigned a fourth project, the complete revision of the administrative provisions of the income tax system. This project, unfortunately, was diverted from congressional attention by the codification of the tax laws that became the Internal Revenue Code of 1939, Pub. L. No. 76-1, 53 Stat. 1.

6. Revenue Act of 1938, Pub. L. No. 75-554, § 820, 52 Stat. 447, 581-83.

7. Revenue Act of 1938, Pub. L. No. 75-544, § 801, 52 Stat. 447, 573 (amending Revenue Act of 1928, Pub. L. No. 70-562, § 606, 45 Stat. 791, 874).

8. See Revenue Act of 1928, Pub. L. No. 70-562, § 606, 45 Stat. 791, 874, amended by Revenue Act of 1938, Pub. L. No. 75-544, § 801, 52 Stat. 447, 573.

a battle fought in the law reviews.⁹ The controversy eventually led to the abandonment of the proposal by the Treasury Department, but consideration of a single Court of Tax Appeals has continued to this day.¹⁰ In addition, the debate over the Traynor proposal increased respect for the tax court within the legal community.

During the 1930's, Traynor wrote a number of articles on subjects in the field of taxation.¹¹ One of his earlier articles, *National Bank Taxation in California*,¹² remains the most complete work ever written on national bank taxation. Spanning three issues of the *California Law Review*, the article manifests Traynor's lucid writing, his ability to synthesize and explain complicated concepts, and the breadth of his understanding of the underlying principles of taxation.

When Professor Traynor was appointed to the California Supreme Court in 1940, many expected that he would make major contributions to the law of taxation. They were not disappointed. During his tenure on the court, he wrote more than twenty-five majority opinions and over twenty dissenting opinions, as well as a large number of concurring opinions, in tax cases.¹³ A number of these decisions had a lasting effect on the administration of the state and local tax systems in California and other jurisdictions. A discussion of some of the major cases follows.¹⁴

Justice Traynor's opinions in tax cases, like his other opinions, displayed thoughtful analysis and a superb mastery of the English language. An early opinion, *Mercury-Herald Co. v. Moore*,¹⁵ involved property tax procedure. In that case property had been deeded to the

9. See, e.g., Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U.L.Q. 399, (1940); Youngquist, *Proposed Radical Changes in the Federal Tax Machinery*, 25 A.B.A. J. 291 (1939).

10. See Caplin & Brown, *A New U.S. Court of Tax Appeals: S. 678*, 57 TAXES 360 (1979); Ginsberg, *Making Tax Law Through Judicial Process*, 70 A.B.A. J. 74 (1984); Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975).

11. McGuire, Surrey & Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L.J. 509-32, 719-78 (1939); Traynor, *National Bank Taxation in California*, 17 CALIF. L. REV. 83-119, 232-57, 456-528 (1929); Traynor & Keesling, *The Scope and Nature of the California Income Tax*, 24 CALIF. L. REV. 493 (1936); Traynor & Keesling, *Recent Changes in the Bank and Corporation Franchise Tax Act*, 21 CALIF. L. REV. 543, 22 CALIF. L. REV. 499 (1933); Traynor & Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW AND CONTEMP. PROBS. 336 (1940).

12. Traynor, *National Bank Taxation in California*, *supra* note 11.

13. The appendix contains a list of Justice Traynor's decisions in taxation cases that are not discussed in the text. These decisions cover most tax areas subject to state or local legislation.

14. It would be impossible to consider all of these cases in this brief article. Therefore, the author will focus on a few major decisions and their impact.

15. 22 Cal. 2d 269, 138 P.2d 673 (1943).

state because the former owner had failed to pay property taxes. The issue was whether a statute that terminated the former owner's right to redeem the property was unconstitutional because it impaired the obligation of contract. The Attorney General of California had filed a brief arguing that the statute was unconstitutional. When the supreme court held the statute unconstitutional, Justice Traynor filed a dissent so compelling that the Attorney General joined with the petitioner in requesting a rehearing.

After the rehearing Traynor wrote the majority opinion holding the statute constitutional. The opinion explored the basis of redemption for property tax delinquency, carefully distinguishing rights due to a contractual relationship between the state and a taxpayer from the state's right to enforce tax laws by taking possession of land because of the unpaid taxes.¹⁶ Moreover, after the land had been deeded to the state, the taxpayer retained only a revocable right to redeem. Noting that the statute provided for notice to the taxpayer, the opinion concluded that the statute was constitutional.¹⁷

Another of Justice Traynor's significant tax decisions, *West Publishing Co. v. McColgan*,¹⁸ addressed the constitutionality of the California corporation income tax. Speaking for a unanimous court, Justice Traynor wrote an opinion holding that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, did not conflict with the commerce clause of the federal Constitution. The court also decided that the Franchise Tax Commissioner had the right to determine a taxpayer's taxable income even though the taxpayer refused to furnish requested information. The opinion approved the Commissioner's action, stating that the "[p]laintiff cannot complain of alleged errors in the computation of tax liability, when it refused to avail itself of its administrative remedies to prevent or correct such errors."¹⁹

One majority opinion that contributed substantially to the area of property taxation was *De Luz Homes v. County of San Diego*.²⁰ The issue in *De Luz Homes* was the propriety of the procedure used to assess possessory interests in a housing project located on land owned by the United States. Under California law, a private party using real property owned by a tax exempt entity is subject to tax at the "full cash

16. *Id.* at 272-73, 138 P.2d at 674.

17. *Id.* at 275, 138 P.2d at 676.

18. 27 Cal. 2d 705, 166 P.2d 861, *aff'd per curiam*, 328 U.S. 823 (1946).

19. *Id.* at 712, 166 P.2d at 865.

20. 45 Cal. 2d 546, 290 P.2d 544 (1955).

value" of the possessory interest in that property.²¹ The proper method of valuation previously had been a matter of substantial controversy. Justice Traynor's opinion compared the methods of evaluation employed by the assessor and the trial court with the method proposed by the plaintiff. After examining this highly technical question, Traynor ascertained the proper method for determining the full cash value of the leasehold. The *De Luz Homes* opinion illustrates Traynor's ability to render a comprehensible decision in a highly complicated matter.

*Roehm v. County of Orange*²² further illustrates Justice Traynor's ability to contemplate an abstruse question and emerge with a lucid decision. The issue in *Roehm* was whether items of intangible property, in that case an on-sale liquor license, could be treated as personal property subject to county property taxation. The licensee argued that for over 100 years liquor licenses had been regarded as a type of intangible property that was not taxable under the California Constitution. The county contended that a liquor license was property within the meaning of article XIII of the California Constitution, that all property was taxable unless specifically exempted, and that nothing in the constitution exempted this particular type of property from taxation.

Justice Traynor examined article XIII, section 14 of the California Constitution (as amended in 1933),²³ which grants the legislature the authority to tax certain types of personal property. He concluded that section 14 was intended to define specifically which intangible property was subject to property taxation and that intangible property not specifically mentioned was excluded. He noted that the legislature had followed this interpretation in implementing the amendment. Justice Traynor's conclusion that liquor licenses are intangible property not subject to taxation is still the law. Traynor acknowledged that intangible property values may be reflected in the value of property subject to property taxation, thus giving rise to some property tax consequences from the possession of a license.²⁴ This latter view has been followed in a number of decisions since *Roehm*.²⁵

21. See CAL. REV. & TAX. CODE § 107.1 (West 1970 & Supp. 1984).

22. 32 Cal. 2d 280, 196 P.2d 550 (1948).

23. Senate Constitutional Amendment No. 30, ch. 63, 1933 Cal. Stat. 3072, 3074 (current version at CAL. CONST. art. XIII, § 14 (West 1954 & Supp. 1984)).

24. 32 Cal. 2d at 285, 196 P.2d at 556.

25. See *Simplicity Pattern v. Board of Equalization*, 27 Cal. 3d 900, 615 P.2d 555, 67 Cal. Rptr. 366 (1980); *Michael Todd Co. v. County of Los Angeles*, 57 Cal. 2d 684, 371 P.2d 340, 21 Cal. Rptr. 604 (1962); *ITT World Communications, Inc. v. County of Santa Clara*, 101 Cal. App. 3d 246, 162 Cal. Rptr. 186 (1980).

In *General Dynamics v. County of Los Angeles*,²⁶ Justice Traynor considered the application of the local property tax to limited possessory interests in tax exempt personal property. General Dynamics had contracted to operate a plant owned by the United States Navy, using equipment owned by the Navy. The county assessor took the position that the company had a possessory interest in the government-owned personal property as well as the real property. Under the doctrine of *De Luz Homes*, the possessory interest in real property was subject to property taxation. Thus, the issue was the propriety of assessing a property tax on General Dynamics' possessory interest in the personal property. The county urged that, for purposes of taxation, there was no logical distinction between possessory interests in real and personal property; therefore, it argued, the decision in *De Luz Homes* was controlling.²⁷

Justice Traynor pointed out that the legislature had provided that, for tax purposes, title to real property included the right to possession, but had failed to so provide for personal property. He concluded that even though personal property might be as valuable as real property, the legislative omission was controlling.²⁸

Justice Traynor answered the county's contention that the question of title was immaterial so long as the essential economics of the transaction were the same with the following statement:

Although in any given case the impact of a use tax and a property tax might appear identical, they are not the same thing, and we cannot sustain a property tax here on the ground that the Legislature could constitutionally provide for the levy of a tax of equal amount under a different scheme. To be valid a use or possession tax would have to apply to all tax exempt property so as not to discriminate against the private use or possession of property owned by the United States, and it is for the Legislature, not the court, to determine whether such a nondiscriminatory tax on possessory interests in tax exempt personal property should be adopted and to determine the measure of such a tax.²⁹

The opinion also examined whether the contractor could be considered the owner of the personal property. Traynor reviewed the terms of the contract and concluded that the Navy was the owner although ostensible title was in the contractor, because the title was so constricted that it rendered any ownership claim by the contractor

26. 51 Cal. 2d 59, 330 P.2d 794 (1958).

27. *Id.* at 63-64, 330 P.2d at 796.

28. *Id.* at 64-66, 330 P.2d at 797.

29. *Id.* at 67, 330 P.2d at 798.

invalid.³⁰

The opinion in *General Dynamics* is typical of the rigor of Traynor's reasoning, which was presented in a manner that seemed to preclude any substantial questioning of his conclusions. At the same time, he clearly indicated to the legislature how it could achieve a different result if it so desired.³¹ This decision has been frequently used as the guiding opinion in tax cases involving transactions with federal, state, and local governments.³²

Chief Justice Traynor's comprehension of the California tax system was especially manifest in his dissenting opinions. One of the early dissenting opinions was *Rosemary Properties, Inc. v. McColgan*.³³ This very important case concerned the interpretation of section 8(h) of the Bank and Corporation Franchise Tax Act (as amended in 1937 and 1939), which allows a corporation to deduct from gross income the portion of dividends received that is attributable to income "which has been included in the measure of the tax."³⁴ The case involved a dividend declared by a California corporation that leased oil and gas properties. For the tax years in question, 1937 and 1938, the corporation had taken the statutory deduction for depletion from gross income before declaring the dividend to Rosemary Properties, the plaintiff. By reason of the depletion deduction, the first corporation's net income for the purposes of the Bank and Corporation Franchise Tax Act was less than its earnings and profits.³⁵ Rosemary Properties argued that the dividends were entirely exempt from tax under section 8(h) of the Act.³⁶

The Franchise Tax Commissioner contended that, to the extent that the dividends were paid out of earnings and profits which exceeded net income, the income from which the dividend was paid had not been included in the measure of the tax and, therefore, the dividend was not entitled to the exemption accorded by section 8(h).³⁷ The court, however, found that the pertinent legislative enactments expressed an intent to consider the corporation's gross income, including

30. *Id.* at 68, 330 P.2d at 799.

31. *Id.* at 64-65, 330 P.2d at 797.

32. *See, e.g.,* *City of Desert Hot Springs v. County of Riverside*, 91 Cal. App. 3d 441, 154 Cal. Rptr. 297 (1979); *Annot.*, 54 A.L.R. 3d 402, 524-525 (1973).

33. 29 Cal. 2d 677, 688, 177 P.2d 757, 764 (1947) (Traynor, J., dissenting).

34. Act of July 1, 1937, ch. 836, 1937 Cal. Stat. 2324, 2328; Act of July 22, 1939, ch. 1050, 1939 Cal. Stat. 2934, 2942 (The current version reads, "which has been included in the measure of the taxes." CAL. REV. & TAX. CODE § 24402 (West 1970)).

35. *Rosemary Properties*, 29 Cal. 2d at 678-80, 177 P.2d at 758-60.

36. *Id.* at 681, 177 P.2d at 760.

37. *Id.* at 680-81, 177 P.2d at 760.

earnings and profits, in measuring the amount of the tax.³⁸ In the majority's view, because the legislature had not intended to restrict the section 8(h) tax exemption to dividends paid out of taxable net income, it was immaterial for purposes of section 8(h) that the depletion was not part of the net income figure and had not actually been taxed.³⁹

Justice Traynor's dissent reveals a broader knowledge of the basic premises of the Bank and Corporation Franchise Tax Act than is displayed in the majority opinion. Traynor illustrated by a number of examples that net income is different from earnings and profits. Earnings and profits are derived from a variety of sources, and funds from some of those sources are specifically excluded from income for bank and corporation franchise tax purposes. Such excluded funds would not be considered to have been included in the measure of the tax.⁴⁰ For example, in the case of a non-California corporation doing business in California and other states, and whose gross income is only partially attributable to California, only the portion of dividends allocable to California income would be excluded under the language of section 8(h).⁴¹ As Traynor stated, "Since such earnings and profits are not included in the corporation's net income and, therefore, not included in the measure of the tax, dividends declared therefrom do not meet the requirements of section 8(h)."⁴² Justice Traynor explained the computation of net income, earnings, and profits, as well as the way various items are reflected in each category for the purposes for determining the measure of the tax. He demonstrated that not all gross income is included in the measure of the tax and that net income was the criterion selected by the legislature.⁴³ As Traynor pointed out, the legislature intended to preclude the double taxation of income; but income that had not been directly subject to the tax did not come within the protection of the statute.⁴⁴

This dissent is a fine example of Traynor's mastery of an especially complicated area of tax law and his ability to make the intricacies of the law easily understood. In this opinion Justice Traynor also articulated his deep interest in the integrity of the taxing system, stating that

[a] comprehensive tax statute such as the Bank and Corporation Franchise Tax Act exemplifies intricate draftsmanship; it evolves out

38. *Id.* at 684-88, 177 P.2d at 762-64.

39. *Id.* at 684, 177 P.2d at 761-62.

40. *See id.* at 692-95, 177 P.2d at 767-68.

41. *Id.* at 692-93, 177 P.2d at 767-68.

42. *Id.* at 694, 177 P.2d at 767-68.

43. *Id.* at 701, 177 P.2d at 769.

44. *Id.* at 689, 177 P.2d at 765.

of the painstaking deliberations and studies not only of public officials but of others interested in tax legislation. Such a statute, wrought from a consideration of many conflicting interests, cannot long retain unity and coherence if one section or another is refabricated by the courts without regard for the structural whole. The technical concepts of the statute, its express provisions, should not lightly be vitiated by facile phrases such as 'gone through the tax mill' or 'failed by the taxmaster' that denote a lack of insight into the legislative purpose that binds together the provisions of the statute. If the express words of the statute are overridden by such phrases neither taxpayers nor tax officials can look to the written word of the statute for its authentic meaning, and the already difficult task of understanding the revenue acts becomes hopeless.⁴⁵

Two of Chief Justice Traynor's important dissents, *Flying Tiger Line, Inc. v. County of Los Angeles*⁴⁶ and *Scandinavian Airlines System, Inc. v. County of Los Angeles*,⁴⁷ (*S.A.S.*) concerned the application of the local property tax to airlines involved in interstate and foreign commerce.⁴⁸ The court treated *Flying Tiger* as a California corporation and *S.A.S.* as a foreign corporation. In *Flying Tiger*, the county had assessed the airplanes at 100% of their value without regard to the time the airplanes actually spent in Los Angeles County. In *S.A.S.*, there was an apportionment, but the airline questioned the validity of allocating to Los Angeles any foreign-registered and foreign-based aircraft.

Traynor's dissent in *Flying Tiger* agreed with the majority that a domiciliary state could not tax migrating property to the extent of its taxability elsewhere. His view, however, was that the taxing agency was only precluded from measuring the tax to the extent that the airline showed contact with other jurisdictions that would subject it to taxation. In *Flying Tiger*, and later in *S.A.S.*, he enunciated the concept that the United States Constitution does not preclude a state's apportioned taxation of aircraft flown in interstate or foreign commerce. Traynor pointed out in *S.A.S.* that, in the absence of congressional action, it was not appropriate to deny the states the authority to levy taxes on instrumentalities of foreign commerce which were within the jurisdiction of the states for a percentage of time. Congress had discretion to exercise that power, and if it did not do so, it was inappropriate for

45. *Id.* at 700, 177 P.2d at 771.

46. 51 Cal. 2d 314, 327, 333 P.2d 323, 331 (1958) (Traynor, J., dissenting).

47. 56 Cal. 2d 11, 43, 363 P.2d 25, 44, 14 Cal. Rptr. 25, 44 (1961) (Traynor, J., dissenting).

48. Although the United States Supreme Court, more than twenty years later, took a different position on the particular doctrine with which he was concerned, *see Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the decisions in the intervening period and even the opinion of the Supreme Court were materially influenced by views expressed in Traynor's dissents. *See infra* note 49.

the courts to restrict the taxing authority of the states.⁴⁹

Another noteworthy Traynor dissent is found in *First Unitarian Church v. County of Los Angeles*.⁵⁰ The case arose on the issue of the constitutionality of article XX, section 19 of the California Constitution, which denied a tax exemption to any organization "advocat[ing] the overthrow of the Government of the United States or the State by force or violence or other unlawful means."⁵¹ Section 32 of the Revenue and Taxation Code implemented section 19 by requiring any organization applying for a tax exemption to declare that it did not advocate violent overthrow of the government.⁵² The First Unitarian Church had filed an application for exemption of its real property from property tax. The exemption was denied on the ground that it had not included the declaration required by section 32. On appeal, the court upheld the constitutional and legislative provisions primarily on the grounds that the provision was uniformly applicable and did not discriminate against religious groups. The court held that the free speech provision of the first amendment of the United States Constitution was not an absolute right and that the prevention of subversion was an appropriate basis for restricting free speech.

Justice Traynor vigorously contested the latter conclusion of the majority, opening his opinion with the statement that "Section 19 of Article XX and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech."⁵³ He strenuously criticized the substance and the reasoning behind the majority opinion's conclusion that an organization is presumed to advocate the overthrow of the government by unlawful means if it does not affirmatively declare to the contrary. He

49. Traynor's theories in *S.A.S.* and *Flying Tiger* were later adopted by the California Supreme Court in *Sea Land Serv., Inc. v. County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974), and *Japan Line Ltd. v. County of Los Angeles*, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1978), *rev'd*, 441 U.S. 434 (1979). However, the United States Supreme Court reversed the *Japan Lines* decision and denied states the right to apportion *ad valorem* taxes in relation to foreign instrumentalities engaged in foreign commerce. The Court's theory was that federal uniformity would be threatened by state taxation of instrumentalities of foreign commerce and that it was essential for the federal government to speak with one voice when regulating commercial relations with foreign governments. Although the Supreme Court rejected Traynor's premise that the states had authority unless Congress acted, both Traynor's dissent in *S.A.S.* and the U.S. Supreme Court opinion in *Japan Lines* recognize that need for national uniformity. The only difference was that Traynor took the position that it was a Congressional prerogative which had not been exercised.

50. 48 Cal. 2d 419, 443, 311 P.2d 508, 522 (1957) (Traynor, J., dissenting).

51. CAL. CONST. art. XX, § 19 (West 1954) (repealed 1976 and exact language reenacted at CAL. CONST. art. VII, § 9 (West Supp. 1984)).

52. CAL. REV. & TAX. CODE § 32 (West 1970).

53. *First Unitarian Church*, 48 Cal. 2d at 443, 311 P.2d at 522 (Traynor, J., dissenting).

pointed out that the majority opinion would allow the state to make determinations on what constituted right thinking:

The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking. Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly.

.....

Errors in thought and expression are best counteracted by deeper thought and more cogent expression. Only through discussion can subversive doctrines be understood and effectively combated.⁵⁴

Although Justice Traynor had a very strong aversion to the tax exemptions contained in the state constitution, he was not willing to allow a tax exemption to be eroded or eliminated by means prejudicial to basic constitutional rights. As he stated in his dissent, "Although free speech may not be an absolute right, it must be jealously guarded."⁵⁵

The foregoing discussion of Chief Justice Traynor's career as teacher, author, consultant, and judge manifests the significant contribution he made to the law of taxation. Whether Justice Traynor's insights on taxation are his most valuable contribution to the law is really immaterial. A man of his breadth may well be regarded as a "man for all seasons." His multifold contributions to the law make him one of the most influential persons in the development of the law. His ability to develop lucid, logical answers to complex problems, his concern for the integrity of the law, and his concern for the impact of law upon people render Justice Traynor one of this country's preeminent legal teachers, scholars, and judges.

54. *Id.* at 448, 450, 311 P.2d at 526, 527.

55. *Id.* at 445, 311 P.2d at 524.

Appendix

Listed below are opinions by Chief Justice Traynor in taxation cases. The opinions discussed in the text are omitted here.

Majority opinions:

- Kulchar v. Kulchar, 1 Cal. 3d 467, 462 P.2d 17, 82 Cal. Rptr. 489 (1969) (liability for taxes under divorce decree).
- Atlantic Oil Co. v. County of Los Angeles, 69 Cal. 2d 585, 446 P.2d 1006, 72 Cal. Rptr. 886 (1968) (real property taxation of royalties under oil and gas lease).
- Decorative Carpets, Inc. v. State Board of Equalization, 58 Cal. 2d 252, 373 P.2d 637, 23 Cal. Rptr. 589 (1962) (excess sales tax payments).
- People v. Lucas, 55 Cal. 2d 564, 360 P.2d 321, 11 Cal. Rptr. 745 (1961) (state's right to property on tax-deeded land).
- Star-Kist Foods, Inc. v. Quinn, 54 Cal. 2d 507, 354 P.2d 1, 6 Cal. Rptr. 545 (1960) (procedure for obtaining relief from challenged assessment).
- Forster Shipbuilding Co., Inc. v. County of Los Angeles, 54 Cal. 2d 450, 353 P.2d 736, 6 Cal. Rptr. 24 (1960) (property taxation of leasehold in tax-exempt land).
- Texas Co. v. County of Los Angeles, 52 Cal. 2d 55, 338 P.2d 440 (1959) (property taxation of leasehold in tax-exempt land).
- Estate of Law, 50 Cal. 2d 345, 325 P.2d 449 (1958) (inheritance tax payments from decedent's estate).
- Pacific Pipeline Construction Co. v. State Board of Equalization, 49 Cal. 2d 729, 321 P.2d 729 (1958) (sales tax assessment on exchange of equipment).
- El Toro Development Co. v. County of Orange, 45 Cal. 2d 586, 290 P.2d 569 (1955) (property taxation of leasehold in tax-exempt land).
- Victor Valley Housing Corp. v. County of San Bernardino, 45 Cal. 2d 580, 290 P.2d 565 (1955) (property taxation of leasehold in tax-exempt land).
- Fairfield Gardens, Inc. v. County of Solano, 45 Cal. 2d 575, 290 P.2d 562 (1955) (property taxation of leasehold in tax exempt land).
- Peterson v. Johnson, 39 Cal. 2d 745, 249 P.2d 17 (1952) (redemption of property sold for delinquent taxes).
- Helvey v. Sax, 38 Cal. 2d 21, 237 P.2d 269 (1951) (quality of title to property obtained by tax deed).
- Estate of Knapp, 37 Cal. 2d 827, 236 P.2d 372 (1951) (valuation of decedent's estate for inheritance taxation).

- In re* Thurston's Estate, 36 Cal. 2d 207, 223 P.2d 12 (1950) (inheritance taxation on inter vivos transfer of property).
- Timm Aircraft Corp. v. Byram, 34 Cal. 2d 632, 213 P.2d 715 (1950) (property taxation of funds advanced by United States to contractor as fund to carry out contract).
- Isenberg v. California Employment Stabilization Commission, 30 Cal. 2d 34, 180 P.2d 11 (1947) (unemployment insurance contributions on behalf of freelance jockeys).
- Paso Robles War Memorial Hospital District v. Negley, 29 Cal. 2d 203, 173 P.2d 813 (1946) (taxation to repay indebtedness and property taxation of interest in tax exempt land).
- Estate of Madison, 26 Cal. 2d 453, 159 P.2d 630 (1945) (inheritance taxation of transfers in trust).
- Wells Fargo & Co. v. City of San Francisco, 25 Cal. 2d 37, 152 P.2d 625 (1944) (interest on recovery of taxes paid under protest).

Dissenting Opinions:

- Estate of Vai, 65 Cal. 2d 144, 156, 417 P.2d 161, 170, 52 Cal. Rptr. 705, 714 (1966) (Traynor, J., dissenting) (inheritance taxation of legacy executed pursuant to contract made during testator's life).
- Westminster Memorial Park v. County of Orange, 54 Cal. 2d 488, 497, 354 P.2d 247, 253, 6 Cal. Rptr. 775, 781 (1960) (Traynor, J., dissenting) (taxation of cemetery property).
- Speiser v. Randall, 48 Cal. 2d 903, 904, 311 P.2d 546, 547 (1957) (Traynor, J., dissenting) (effect on tax exemption of refusal to declare loyalty).
- First Methodist Church v. Horstmann, 48 Cal. 2d 901, 902, 311 P.2d 542, 543 (1957) (Traynor, J., dissenting) (effect on tax exemption of refusal to declare loyalty).
- People's Church of San Fernando Valley, Inc. v. County of Los Angeles, 48 Cal. 2d 899, 900, 311 P.2d 540, 542 (1957) (Traynor, J., dissenting) (effect on tax exemption of refusal to declare loyalty).
- Prince v. City of San Francisco, 48 Cal. 2d 472, 475, 311 P.2d 544, 546 (1957) (Traynor, J., dissenting) (effect on tax exemption of refusal to declare loyalty).
- People v. County of Tulare, 45 Cal. 2d 317, 321, 289 P.2d 11, 13 (1955) (Traynor, J., dissenting) (procedure to review actions of State Board of Equalization).
- Hall v. Chamberlain, 31 Cal. 2d 673, 681, 192 P.2d 759, 764 (1948) (Traynor, J., dissenting) (effect of curative legislation deed on defective tax sale).

- California Motor Transport Co. v. State Board of Equalization, 31 Cal. 2d 217, 224, 187 P.2d 745, 749 (1947) (Traynor, J., dissenting) (motor vehicle transportation license tax assessment of carrier's intracity operations).
- S. Siwel & Co. v. Los Angeles County, 27 Cal. 2d 724, 735, 167 P.2d 177, 183 (1945) (Traynor, J., dissenting) (distinction between "tax" and "assessment;" construction of statutes authorizing refund of taxes erroneously collected).
- Universal Consolidated Oil Co. v. Byram, 25 Cal. 2d 353, 364, 153 P.2d 746, 752 (1944) (Traynor, J., concurring & dissenting) (procedural requirements of equalization hearing and review of decision by county board of equalization).
- Ross v. City of Long Beach, 24 Cal. 2d 258, 265, 148 P.2d 649, 653 (1944) (Traynor, J., dissenting) (exemption from taxation of property used for public schools).
- Miller v. McKenna, 23 Cal. 2d 774, 785, 147 P.2d 531, 537 (1944) (Traynor, J., dissenting) (effect of curative legislation on prior tax proceedings).

