1-1-1996

The California Supreme Court, 1940-1964: The Gibson Era

Charles J. McClain
Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation
INTRODUCTION

On June 10, 1940, Associate Justice Phil S. Gibson succeeded William Waste as chief justice of California, elevated to the position by Democratic Governor Culbert L. Olson. He was the state's twenty-second chief justice and would preside over the California Supreme Court for almost a quarter century, longer than any chief justice save one in the court's history. Gib- son's tenure as chief justice coincided with a period of monumental social, economic, and demographic change in California. During these years the population grew from some seven to some 18 million (its racial and ethnic composition changed as well), and by the time Gibson left the court, in August, 1964, California was the largest state in the union. The state's economy was also transformed during these years and its wealth, both in aggregate and per capita terms, increased dramatically. Both of these developments—the growth in population and the economic expansion—were related in significant ways to the country's mobilization for the Pacific War and to federal defense spending during the Korean and Cold Wars.

The period would prove to be an extraordinarily eventful one for the California Supreme Court. While chief justice, Gibson oversaw, indeed was the driving force behind, a major overhauling of the state's judicial machinery. More important, he and his colleagues on the bench in a series of decisions, some of which might be truly called pathbreaking, transformed major sectors of the state's public and private law. These decisions brought attention and increased prestige to the court. In 1940, the California high court was seen as a solid if unspectacular tribunal, one that exerted considerable
The California Supreme Court Historical Society

regional influence but that did not have much in the way of a national reputation. By the time Gibson retired it was perhaps the most highly regarded state appellate court in the nation.

I. THE GIBSON COURT, THE 1940s AND BEYOND

The First Justices of the Gibson Court

Phil S. Gibson had been appointed associate justice of the Supreme Court by Governor Olson, a New Deal Democrat and the first Democratic governor of California since 1914, in August 1939. Gibson was a Missourian by birth and had taken both his B.A. and law degrees at the University of Missouri. He also studied law briefly at the Inns of Court in London after serving in the army in France during World War I. He practiced law for some years in Missouri but in 1922 moved to Los Angeles. There he built a successful civil practice, representing clients including several major Hollywood studios in business and real estate transactions and working for a time with another attorney destined to become a supreme court justice, B. Rey Schauer. He became involved in politics in a major way in 1938 when he made a substantial contribution to Culbert Olson’s election campaign and arranged for the campaign to find office space on favorable terms. He quickly became a trusted Olson confidante and campaign adviser, and after the election Olson appointed him director of finance in his new administration, the post he occupied when he was called to the bench. Like Governor Olson he was a liberal Democrat, a strong supporter of the New Deal policies of Franklin Roosevelt.4

The court Gibson took control of consisted of himself, one earlier Olson appointee, Jesse Carter of Redding, and four justices appointed by previous governors, John W. Shenk, Frederick W. Houser, Jesse W. Curtis, and Douglas Edmonds. Jesse Carter was Olson’s first appointee to the supreme court. A longtime Olson supporter and confidant (he had served as chairman of Olson’s campaign planning committee), he took his seat in July 1939.5 Carter brought 26 years experience as a trial lawyer to the supreme court bench. He was a graduate of the night program at Golden Gate College of Law (then called the YMCA Law College) in San Francisco and after graduation and admission to the bar settled in the northern California community of Redding, in Shasta County. There he developed a thriving practice, specializing in the representation of northern California farmers in
Charles J. McClain

disputes with power companies over water rights. He served also for a time as district attorney of Shasta County and, while in private practice, served for a number of years as the part-time city attorney for the cities of Redding and Mt. Shasta. One of the most colorful figures to ever serve on the court, Carter was a blunt-spoken, somewhat cantankerous man, with sharply defined views on a number of issues—the sacredness of jury verdicts, for example. He did not hesitate to lambaste his colleagues both on and off the bench, when he thought they strayed from the true path. At times his commentary was longer on moral outrage than it was on careful legal analysis. His language was also often far too intemperate. At other times, however, what he had to say was right on the mark. Carter was the great dissenter of the Gibson court. Indeed, he was the greatest dissenting justice in the entire history of the California Supreme Court, writing a total of 505 dissenting opinions over the course of his 20-year career.6

The four justices appointed by previous governors were all southern Californians. John Shenk had been on the supreme court 16 years when Gibson was named chief. A man of conservative bent, thought hardly an ideologue, he was partial to business interests and somewhat hostile to government regulation. He had written opinions on a wide range of subjects but in 1940 was best known for two on the water rights of landowners. Indeed by virtue of these two opinions he had established the reputation as the court’s leading expert, and one of the leading experts in the state, on the subject of water law.7 Prior to his appointment to the supreme court Shenk had been the city attorney of Los Angeles and a superior court judge and before choosing the law as a career had been a farmer, a rancher, and, for a brief stint, an elementary school teacher. He had attended the University of Michigan law school but had not graduated. Shenk would serve on the Gibson court for 19 years, giving him by the end of his career a total tenure of 35 years on the court, to date the longest in the tribunal’s history.8

Like Shenk, Houser, Curtis and Edmonds had served stints on the lower courts before being appointed to the supreme court bench. Frederick W. Houser had spent 15 years as a District Court of Appeals justice and 16 years as a Los Angeles superior court judge before being appointed a supreme court justice in 1937. Like Shenk, he was not a law school graduate.9 Jesse Curtis, who had been appointed a supreme court justice in 1926, earned his law degree from the University of Michigan in 1891. He had served on the San Bernardino County superior court and the District Court of Appeals before going on the supreme court bench. Douglas

5
Edmonds, graduated from the University of Southern California law school in 1910 (it was then a night school) and practiced law in Los Angeles for some years before being appointed a municipal court judge in 1926. He was later appointed to the superior court bench and became a justice of the supreme court in 1936.

Gibson's elevation to the chief justiceship left his seat vacant and gave the governor the chance to make a third appointment to the high court and in the process to give a more Democratic cast to a court that for years had been staffed almost entirely by justices appointed by Republican governors. Olson's first choice to succeed Gibson was Max Radin, a law professor at Boalt Hall, the law school of the University of California, Berkeley, a nationally known legal scholar, and a close Olson confidant and political adviser. But Radin was a man of pronounced and well-publicized liberal views who had involved himself in several controversial causes. It was a period of rising conservatism in the state and, as could have been predicted, the nomination provoked opposition in certain state bar circles. But it was the determined opposition of then Attorney General Earl Warren, a member and unofficial administrator of the Commission on Qualifications, which, most agree, ultimately caused the nomination to founder. The commission voted 2-1 against confirming the nomination. The governor might have pursued the matter further, but Radin asked Olson to withdraw his name from consideration. Olson, it seems, was determined to have a legal academic on the court, and asked Radin to suggest the name of another scholar. He recommended one of his Boalt Hall colleagues, Roger J. Traynor. Olson, who was acquainted with Traynor's contributions during the 1930s to the reform of the state's tax laws (see below), readily accepted the suggestion, and the nomination was quickly approved by the Commission on Judicial Qualifications. After the selection of Gibson himself, it would prove to be Olson's most consequential supreme court appointment.

Roger J. Traynor, then 40 years of age, was a California Supreme Court justice of a new and very different stripe (as of course Radin would have been had he been able to take a seat on the bench). He held both a Ph.D. and a law degree from the University of California, Berkeley, and had been teaching at that institution, first in the political science department, then in the law school, since 1927. He had taught a variety of subjects but had chosen to specialize in taxation. His numerous articles in this field brought him to the attention of state officials, who recruited him during the 1930s to assist in the revamping of the state's corporation, franchise, and sales tax
laws. In addition to performing these legislative drafting chores, Traynor served at various times during the 1930s—either concurrently with his teaching or during leaves of absence from the university—as first administrator of the state’s sales tax and as legal counsel to the State Board of Equalization. At the time of his appointment by Olson to the bench Traynor was probably the leading expert on taxation in the state and indeed achieved something of a national reputation in the field. But it was taxation alone that seemed to engage his interest. He had in his scholarly writings given little indication of that deep and broad-ranging engagement with legal doctrine and public policy that would later mark his career as a judge and legal writer.11

The court just described would undergo very few changes in membership over the next two decades, for the bulk of Gibson’s tenure, that is to say. Between 1940 and 1959 a total of only nine justices would serve with Gibson. Frederick Houser died in October 1942, giving Governor Olson the opportunity to fill a fourth court position. For it he chose B. Rey Schauer, a former Los Angeles County Superior Court judge and former Gibson law associate, then sitting on the District Court of Appeals. Curtis retired from the court in 1945, and then Governor Earl Warren filled the vacated position with Homer Spence, a District Court of Appeals justice and the first Stanford Law School graduate to be appointed to the court.12 At year’s end, 1955, Justice Edmonds retired, and Republican Governor Goodwin Knight appointed Marshall McComb, then sitting on the District Court of Appeals to fill the vacancy (like Earl Warren, Knight would make only one appointment to the court during his tenure as governor). McComb would serve on the supreme court for over 20 years. As a lawyer he had once written an article urging judges to write shorter opinions, and on the bench, as one scholar has observed, he followed that argument to its logical conclusion.13 He became famous for what might be called the nonopinion opinion. His style was to approach an issue by posing a series of questions and then answering them yes or no, often with just a sentence or two of elaboration, occasionally with none.14 Justice McComb is a tragic figure in the court’s history. Insisting on remaining a justice long after his mental powers had failed him, he was eventually forced off the bench by order of the supreme court itself, pursuant to a recommendation of the Commission on Judicial Performance.15 From 1959-62 the court underwent considerable turnover in personnel—five new justices joined the tribunal in this three-
The California Supreme Court Historical Society

year period—and the character of the court changed. I shall reserve until later in the chapter a discussion of these changes.

Throughout Gibson's tenure the justices of the court seem to have gotten on well together. Notwithstanding the presence on the tribunal of men of different political outlooks and sharply different temperaments (the cerebral academic Traynor, the contentious populist Carter), notwithstanding Justice Carter's penchant for acerbic criticism of his colleagues, no fissures or fault lines seem to have developed, none anyway that seriously impeded the work of the court. This is no doubt in large part a tribute to Gibson's leadership skills.

FIRST REFORMS IN JUDICIAL ADMINISTRATION

The chief justice of a state high court not only presides over the deliberations of his or her own tribunal, but is also, by virtue of the post, chief executive of the state's entire judicial system, with ultimate responsibility for its smooth operation. Some find this responsibility bothersome and an unpleasant distraction from the more intellectually interesting job of addressing the important legal questions that come before appellate courts. Gibson was perfectly comfortable with his administrative duties and took them very seriously. Indeed a concern for improving the administration of the courts would be one of the defining features of his tenure as chief justice. It was evident from the very beginning of his administration.16

Within months of taking office Gibson announced his strong support for a State Bar recommendation that the legislature confer the power to make rules of procedure on the Judicial Council, the committee of state court judges, chaired by the chief, that was responsible for monitoring and making recommendations for the improvement of judicial operations. Congress had given such power to the United States Supreme Court in 1934, and the legislatures of several states had given similar powers to their own high courts, but the California legislature still retained exclusive authority in this area. The proposal made a great deal of sense, Gibson agreed, but that step would be meaningless, he cautioned, unless the legislature also provided the means for its effective exercise. The judges who constituted the Judicial Council were too busy with their ordinary judicial duties to do the extensive research that would be a necessary preliminary to the revision and drafting of rules of procedure. Money should be appropriated to empanel a body of experts—judges, legal academics, and lawyers—who
could attend to this task under council supervision. And that body of experts should be assisted by a professional support staff. (The council at the time had no professional staff.) Furthermore, Gibson urged, a professional staff should be made available to the council on a permanent basis, to assist it in the discharge of its responsibilities.\textsuperscript{17}

Gibson’s plea bore fruit. In 1941, the legislature gave the Judicial Council authority to issue rules of appellate procedure and practice and appropriated funds to hire a committee of experts and support staff to assist in the drafting effort. By early 1943, new Rules on Appeal were ready for legislative consideration and on July 1 of that year went into effect. As Gibson hoped, appropriations were made to retain on a permanent basis some of the research staff who had assisted in the enterprise. Thereafter the Judicial Council would have a permanent research staff at its disposal.

If a professional research staff was important for the proper functioning of an institution like the Judicial Council, it was even more important in Gibson’s mind to the proper functioning of a state high court. Since the 1920s the California Supreme Court had employed law clerks to assist the justices in legal research and writing. (In this respect it was something of a pioneer among state appellate courts.) In 1940 each justice was assigned one such clerk. Some of these were what today would be called “elbow clerks,” recent law school graduates serving temporary stints on the court before commencing careers in practice. Others were there on a more open-ended basis. Gibson moved early to expand the size of the research staff and to formalize the position of research attorney and to make it more attractive. To these posts he was able to recruit a highly talented corps of young lawyers, some of whom decided to make careers out of their jobs. As the years passed the research attorneys became increasingly integrated into the court’s decision making. All of the justices of the Gibson court came to rely heavily on them for the drafting of their opinions as have almost all California Supreme Court justices ever since—a development that has not pleased all court observers.\textsuperscript{18}

\section*{GETTING CONTROL OF THE DOCKET}

The California Supreme Court in 1940 had an extensive jurisdiction. Litigants could appeal directly to it from the superior courts in equity cases, in cases involving title or possession of real property or challenges to the legality of taxes or fines, and in certain kinds of probate matters. The court
The California Supreme Court Historical Society

was obligated to hear appeals from the superior court “on questions of law alone” in criminal cases where judgment of death had been rendered. It had original (as well as appellate) jurisdiction to issue writs of mandamus, habeas corpus or prohibition. Finally it had discretion to review “matters pending” before the District Courts of Appeal, the intermediate appellate courts that had been established in 1904, which, in the words of the constitution, the court could order “transferred to itself for hearing and decision.”

By the time Gibson took office, thanks in part to the large mandatory jurisdiction described above, the court’s docket was bulging with a three-year backlog of pending but undecided cases. Invoking a provision of the constitution, seldom before used, that allowed the supreme court to send any matter pending before it to the district courts of appeal for decision, Gibson on April 23, 1942, ordered over 800 cases so transferred. To help the DCA’s deal with their now increased caseloads the supreme court announced that they would be given additional pro tem justices (an additional division had already been added to the Los Angeles DCA.) The court simultaneously announced that its future policy would be to send all primary appeals to the DCA’s for initial consideration. Eventually this policy was extended to most petitions for writs. With these changes, the high court’s docket now consisted almost entirely of cases previously decided by the DCA’s which, in the exercise of its discretion, it decided it wanted to review. During Gibson’s tenure about one in every four petitions for review was granted.

COPING WITH THE RISE OF THE MODERN REGULATORY STATE

Among the hundreds of cases crowding the California Supreme Court docket in the summer of 1940, only a few involved truly significant questions of public law or seemed to portend much for the future development of public policy in the state. One of these few was Laisne v. The California State Board of Optometry, a challenge by an optometrist to the revocation of his license to practice. It raised issues affecting all licensed professionals in the state and indeed the whole of the then relatively new field of administrative law.

By the 1940s, California had numerous administrative agencies, governmental regulatory bodies for the most part created by the legislature
to which the legislature had delegated legislative or judicial powers or both. Though these agencies wielded considerable power and were in fact affecting large areas of the state’s social and economic life, there was precious little law concerning the extent to which their actions were the subject of supervision and control by the courts.  

Among the most important administrative agencies were the boards and commissions that controlled access to and regulated the practice of the professions. E. W. Laisne, a Fresno optometrist, had had his professional license revoked after a hearing before the State Board of Optometry, the agency that controlled access to the optometric profession and regulated its practice. The charge against him was unprofessional conduct. Specifically, he was charged with using the title “Dr.” as a prefix to his name, without using the word “Optometrist,” as a suffix, and with practicing optometry under a fictitious name, both violations of the Business and Professions Code. After a hearing the state board ordered his certificate of registration canceled and his license to practice revoked. Laisne then brought a mandamus proceeding in the superior court challenging the board decision. He contended that his business operations were in full compliance with law and that his only crime was that he had engaged in innovative business practices. He was, he claimed, the victim of a vendetta by colleagues jealous of his success who had instigated the disciplinary proceeding and who had prejudiced the minds of the board against him. He demanded a trial de novo in the court, during which he should have the chance to introduce evidence to support his claims. But the court refused to consider anything other than the record of proceedings before the board and affirmed that agency’s decision. Laisne appealed this decision to the District Court of Appeals, which ruled in his favor. A week after Gibson took his seat as chief justice, the California Supreme Court granted the agency’s petition for review, and in November oral argument was heard.

The supreme court did not render its decision in the case until March of 1942. In an opinion written by Justice Jesse Curtis the court overruled the superior court and held that Laisne was entitled to a trial de novo in that court, during which he should have the right to introduce new evidence and after which he could expect the court to exercise its independent judgment concerning the legitimacy of the claims against him. A mere review of the record compiled at the administrative hearing would not suffice. If the court restricted itself to reviewing the administrative record, Curtis wrote, then it would, in effect, be endowing the administrative body with complete
judicial power, which was reserved under the state constitution to the courts.\textsuperscript{27} It would also be denying Laisne his rights under the Due Process Clauses of the state and federal constitutions, inasmuch as it would be permitting the deprivation of a valuable right (a “property right,” the court called it, interestingly, foreshadowing a point of view that would later loom large in later constitutional jurisprudence)\textsuperscript{28} without the opportunity for full judicial consideration of the bona fides of the deprivation.\textsuperscript{29}

Chief Justice Gibson wrote a long, caustic dissent, one joined in by Justices Edmonds and Traynor. The court, he charged, was now taking a large and perhaps irrevocable step down a path it had rather tentatively set out on a few years earlier. In the 1939 case, \textit{Drummey v. State Board of Funeral Directors and Embalmers},\textsuperscript{30} another case involving the revocation of a professional license, the court, had held (for the first time) that mandamus was the appropriate remedy for reviewing such revocation decisions.\textsuperscript{31} It had also ruled that in such a review the trial court had to exercise an independent judgment on the facts. But, Gibson noted, the \textit{Drummey} court had said nothing about a \textit{de novo} trial of the issues, and it had emphasized that the agency findings and determinations came to the reviewing court with a strong presumption of correctness.\textsuperscript{32} Gibson did not approve of the \textit{Drummey} decision, but, he complained, the court was now going well beyond \textit{Drummey}. It was now saying that in cases of this sort there should be complete judicial retrials, retrials in which the factual findings of the administrative agency would in effect be relegated to the sidelines. And this, he thought, was both unwarranted as a matter of law and unwise as a matter of policy.

There was nothing in the Due Process Clause, Gibson wrote, that forbade a court from according finality to the fact determinations of administrative agencies so long as it was satisfied that those findings were supported by substantial evidence in the record. That was the standard of review required by due process, Gibson affirmed, and to conclude otherwise, as the court had done, was simply to misread the cases.\textsuperscript{33} Not only was the rule wrong, said Gibson, it was unworkable. If courts had to hold a whole new trial every time an agency deprived someone of a property right, they would soon find themselves having to hold trials in countless cases. Finally, Gibson thought the decision posed a serious threat to the continued effective functioning of an indispensable agency of government, the state’s administrative agencies. “[S]tripped of [their] prestige and authority,” lacking confidence that the records they produced
would be given any significant deference, they would soon find themselves unable to perform their tasks efficiently. The chief justice's prediction probably would have proved accurate had the court not substantially qualified its *Laisne* decision in an opinion it handed down the following year.

In *Dare v. Board of Medical Examiners* a "naturopath" sought a writ of mandamus to overturn a decision of the state Board of Medical Examiners revoking his license. The trial court issued an alternative writ, in effect an order to show cause, that brought the matter up for trial. But at the trial to determine whether a peremptory (final) writ should issue, the petitioner refused to allow the record accumulated at the board hearing to be introduced in evidence. Relying on *Laisne*, he argued that it had no proper place in the proceeding and that he had a right to "a trial anew [in the superior court] without qualification or limitation" of all the issues in dispute. (The petitioner seemed to be arguing that a person subject to administrative proceedings could go through the motions at the administrative hearing and wait until the mandamus action to present his real case.) The trial court rejected these contentions and refused to issue the peremptory writ, and the supreme court affirmed, in an opinion authored by Justice John Shenk. The petitioner was misconstruing the court's intent in *Laisne*, Justice Shenk explained. The record produced in administrative proceedings was not only relevant, it was a crucial piece of evidence for the reviewing court to look at in its effort to reach an independent judgment. To be sure, the trial court had discretion to receive new evidence from the mandamus petitioner, but if it was convinced that all competent evidence had been introduced in the administrative hearing and all the issues fully aired, it could base its independent judgment entirely on a review of the record there compiled. Indeed, Shenk wrote, a trial court could refuse even to review the administrative decision in the first place, i.e. issue the alternative writ, if, in its view, the mandamus petitioner had not in his application made out a *prima facie* case for its issuance.

The *Dare* decision, then, made clear that the record accumulated at administrative hearings was to be accorded substantial weight and that the term, trial *de novo*, was not to be taken in a literal sense. The court had in short not intended in *Laisne* that administrative agencies be read out of existence. Their factual findings were to be taken seriously. It was just that in certain kinds of cases they were to be subject to more exacting judicial scrutiny than in others.
The California rule requiring courts to exercise their independent judgment on the facts when reviewing license revocation decisions is something of an oddity in American administrative law and has been the subject of continuing controversy from the moment it crystallized. Shortly after the *Laisne* decision was handed down, Dudley McGovney, a leading California legal academic, published an article in the *California Law Review* highly critical of the court ruling and of the line of decisions he saw it as culminating. Conversely he praised Chief Justice Gibson’s dissent, ranking it among “the ablest opinions to be found in the reports of any court.” Over the years others, both on and off the bench, have weighed in with their own critiques. But the rule is still in place. (Indeed it has in the contemporary era been extended to apply to administrative decisions affecting any fundamental vested right.) Its persistence is probably attributable to the rather deeply ingrained suspicion, harbored not only by judges but by large sectors of the California citizenry, that professional licensing bodies cannot be trusted always to act in disinterested fashion. There is the fear that these bodies, made up as they tend to be of the most established members of a trade, might on occasion mount disciplinary actions against a practitioner not because he was doing something unprofessional or unethical but simply because he was engaging in practices that threatened the status quo. That seemed to be what Justice Carter, who had voted with the majority in *Laisne*, was saying about the California rule when he explained its genesis and rationale to an oral history interviewer some 20 years after that decision. “It was felt,” he said, “that there might be some prejudice on those boards in passing upon the conduct of the members of their profession and that [these members] would be more apt to have exact justice if their records were reviewed by a judge. . . .”

*Laisne* and its progeny significantly altered the landscape of administrative law and affected the lives and livelihoods of thousands of Californians—all those practicing a licensed trade or profession. But they had little import and aroused little interest outside the state’s borders. It was the court’s decisions in the areas of tort law and civil rights that first thrust the Gibson court into national prominence. Several deserve to be called landmarks in the history of American law.
BEGINNING THE TORTS REVOLUTION—NEGLIGENCE

In its first dozen years the Gibson court substantially transformed the state’s tort law, significantly easing the burden of proof of causation for certain tort plaintiffs, abolishing immunity to suit in tort for one important class of tort defendants, and creating one new tort cause of action. These major changes were brought about without substantial controversy among the justices, a rather remarkable fact considering the range of legal and political viewpoints present on the court during these years.

Res ipsa loquitur—the thing speaks for itself—is a tort law doctrine, or to be precise a principle of evidence law applicable in torts cases, which says that under certain circumstances the law will presume the defendant’s negligence and throw on him the burden of rebutting the presumption. The principle goes back to a mid-nineteenth century British case where a barrel fell on the head of the plaintiff from the window of defendant’s second-story warehouse but where the plaintiff could prove no specific acts of negligence on the part of defendant or his agents. Such things do not ordinarily happen, the court said, in the absence of negligence and it was right for the law to presume negligence on the defendant’s part. By the end of the nineteenth century the res ipsa principle had been accepted by most American high courts, the high court of California included. All agreed that for the plaintiff to invoke the doctrine he needed to show that the harm about which he was complaining was of the sort that would not ordinarily happen in the absence of negligence. The other commonly stated requirement was that the instrumentality causing the harm have been in the exclusive control of the defendant. But the doctrine was applied in different ways by different states, some courts construing it very narrowly, others more broadly. In a series of decisions handed down in the 1940s the Gibson court significantly liberalized the criteria under which res ipsa might apply, creating in the process a legal environment much more hospitable to the claims of tort plaintiffs. The decisions had impact beyond California’s borders.

In the 1943 case of Honea v. City Dairy a schoolchild had bought several bottles of milk from a local dairy at her teacher’s request and had brought them back to school. One of the bottles broke as she entered the building and she sued the dairy, alleging that the bottle was defective and relying principally on the doctrine of res ipsa. The defendant argued that
the doctrine was unavailable inasmuch as it had yielded control of the bottles before the accident occurred. But the court, in an opinion written by Gibson, rejected this argument. The purpose of the exclusive control principle, said the court, was to rule out the possibility that the accident might have been caused by some factor that had intervened after the defendant yielded control but there was, it said, enough evidence in the record to rule out this possibility. The plaintiff, the court implied, had therefore satisfied the “control” requirement of res ipsa. But she was found wanting with respect to the other requirement. The court was prepared to agree that the bottle was defective when the plaintiff bought it but was unwilling, Gibson wrote, to draw the inference that the defect must have been the result of the bottler’s negligence and to throw on the defendant the burden of dispelling that inference. The weight of authority, he said, was that an inference of negligence could not be drawn from the breaking of a glass bottle containing an ordinary, harmless substance like milk though he went out of his way to note that the same consideration might not apply to a bottle of carbonated liquid. Less than a year later the court confronted just such a case.

The plaintiff in Escola v. Coca Cola Bottling Co., a waitress in a restaurant, had been severely injured while attempting to move a bottle of Coca Cola from the case in which it had been delivered to a refrigerator. She rested her case on res ipsa grounds and won a jury verdict. On appeal the supreme court affirmed, the chief justice again writing for the court. Citing Honea, Gibson reiterated that control at the time of the alleged negligent act was what counted and that plaintiff need only show that nothing had intervened to change the injury-causing instrument after it left the defendant’s possession. But, explaining more fully what this entailed than the court had in Honea, he noted this didn’t mean that the plaintiff needed to eliminate every possible interference that could have occurred. “[T]he requirement is satisfied,” he wrote, “if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff. . . .” As to the second res ipsa requirement, that the accident be the kind that wouldn’t ordinarily happen without the defendant’s negligence, the court was prepared to differentiate between bottles of noncarbonated and of carbonated liquid. Bottles of the latter sort are not ordinarily defective, the court found, absent negligence by the bottling company.
Gibson’s opinion in Escola broke no new legal ground either with regard to *res ipsa loquitur* or with respect to exploding beverage bottles. (As Gibson noted, several other state courts had reached the same conclusions earlier in similar circumstances.) It rather aligned California law with an already developing line of tort doctrine. The same cannot be said of the concurrent opinion penned in the case by Associate Justice Roger Traynor. It posited a radical, new theory of tort liability.

Traynor contended that the plaintiff’s right to recover for product-caused injuries ought no longer to be predicated on proof of the manufacturer’s negligence. Rather, he wrote, it was time for the courts to recognize “that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human being.” Public policy and the reality of modern industrial society demanded no less, he argued. It was inevitable that the products of mass production would from time to time cause harm to members of the public, harms that at times would be overwhelming. Members of the public, he asserted, were as a rule unprepared either to prevent these accidents from happening or to deal with their consequences. Matters stood otherwise with the manufacturer. He was in the best position to guard against such mishaps and also, through insurance, in the best position to provide compensation to those who were injured. (He could pass the cost of insurance on to consumers in the form of increased prices.) Requiring the plaintiff to prove negligence was unsatisfactory. Sometimes, even with the aid of *res ipsa loquitur*, it would be impossible for the plaintiff to meet that burden. Also sometimes the manufacturer might not have been negligent. But even if not he was responsible for the product reaching the market, and that, it seems, was for Traynor enough justification for imposing liability on him.

The opinion was ambiguous and left many questions unanswered. It used the terms “absolute” and “strict” liability, two terms generally thought to have different connotations, as if they were interchangeable. Parts of it seem clearly to indicate that Traynor wished to make manufacturers guarantors of the safety of their products, the only qualification on the plaintiff’s right to recover being a showing that he or she had used the product in the normal and proper way. (The court had applied such a standard to the manufacturers of foodstuffs, Traynor noted, on the theory of a warranty running with the goods.) On the other hand the opinion spoke of “defective” products, a word resonant of fault, and that implied a
need to show something more. Traynor gave no hint as to what he thought the operational meaning of this vague and pregnant term might be. Justice Traynor's approach to the problem of defective products would eventually be adopted by the Gibson court and by the courts of most other American states, but almost two decades would elapse before that happened. The opinion caused virtually no notice at the time, even among scholars of tort law whose antennae were customarily attuned to cutting-edge developments in the field.54

Roger Traynor is generally esteemed one of the great appellate judges of the twentieth century.55 He was the dominant intellectual presence on the Gibson court and during this period of the court's history would author a disproportionate share of its most important and influential opinions. This, the occasion of his first great opinion as a justice of the Gibson court, seems an appropriate juncture at which to say more about the nature and sources of his jurisprudence.

Traynor was the first full-time law faculty member to be appointed to the California Supreme Court. As such he brought to the tribunal some new and different qualities. He brought first that skill in the analysis of legal doctrine that was (is) the law professor's stock in trade. But more than that. He was an unusually reflective legal academic and had, more than most, a propensity to think broadly about the law and the social context in which it is embedded. (One must remember that he possessed a Ph.D. as well as a law degree.) Traynor seems to have come to the court with a well-developed set of views concerning the judicial role and these views do not seem to have changed much over the years though their application to different areas of law certainly did.56 The main outlines of his judicial philosophy are clear not only from his opinions but from the many law review articles he published while sitting on the court.

Traynor was a firm believer both in activist government in general and an activist judiciary in particular. He was convinced of the law's ability to ameliorate, if not solve, social problems and believed just as strongly that courts should be partners with the legislature in this process. Sometimes this meant modifying or discarding old precedents that had lost touch with reality and were no longer serving any useful social purpose. (He compared appellate judges to good gardeners, whose job was to prune the law of useless or outmoded rules and thereby allow it to grow more vigorously.) At times it meant putting the most socially beneficial gloss on the often vague and general words of statutes. Sometimes, in the absence of legisla-
tive action, it meant creating new law from the bench. In all instances, the
court’s job was the same, to keep the law in step with society’s changing
needs. One sees signs of this philosophy in virtually all of Justice
Traynor’s major opinions, including his *Escola* concurrence. The industrial
revolution and the rise of mass production had totally changed the
relationship between consumer and manufacturer, and the law needed to be
brought abreast of this changed relationship.

In advancing the law’s social agenda and in seeking to solve novel and
complex legal questions, Traynor believed judges ought to look to the
writings of legal academics for guidance, and he drew heavily on that
source in fashioning his own opinions. Specialist legal scholars were the
people who had looked most thoroughly at these problems—that was what
they spent most of their waking hours doing—and therefore were in a good
position to show the way to solutions. Traynor was thus in his deci-

dionmaking less the originator of new legal doctrines than the transmitter of
the innovative ideas of others. This should not be taken to mean that he
was a mere conduit, passing on the ideas of others without any digestion or
alteration on his part. Quite the contrary. When others’ views appeared in
his opinions, it is quite clear that they had first passed through the filter of
his own well developed legal sensibility and his own coherent vision of
law’s place in society.

Traynor’s indebtedness to the legal academy is certainly evident in the
*Escola* case. His opinion contains some 20 references to law review
articles. The main source of his ideas, however, seems to have been
he cites, along with several Prosser articles, in his opinion. There one finds
the key notions that *res ipsa* will often not be of help to injured consumers,
that the manufacturer, because of insurance and prices, is in the best
position to handle the costs of industrial accidents, that there is no reason
in principle or policy for treating food products any differently from other
products that, when defective, pose a high risk of injury, and that instead
of invoking the legal fiction of a warranty, the cleaner and simpler thing to
proceed is to impose strict liability as a matter of public policy.

Traynor’s proposed new, broad expansion of liability in *Escola* should
not mislead one into thinking that his only interest was in expanding
liability and increasing the size of awards to personal injury plaintiffs. His
torts ideas taken as a whole had just as much potential to narrow as to
expand the exposure of torts defendants. Throughout his career on the
The California Supreme Court Historical Society

bench he propounded the view, taken it appears from Oliver Wendell Holmes, that the setting of the standard of care in torts cases ought as much as possible to be removed from the discretion of juries and consigned to the court. Whenever there was evidence of violation of a statute, for example, whether by the defendant or the plaintiff, he thought the court ought to instruct the jury that this was negligence as a matter of law. In an age when contributory negligence was a defense, such an instruction could of course work to defeat the claims of tort plaintiffs. He was dubious of pain and suffering as an element of damages in torts cases and came to believe that they ought to be restricted, if not entirely eliminated. He was also quite skeptical of the justifiability of punitive damages. As noted earlier, Traynor’s doctrine of strict liability for defective products would eventually win the day. His views on radically restricting the role of juries and on limiting or eliminating damages for pain and suffering would not.

As was pointed out, Escola represented no breakthrough in res ipsa jurisprudence on the part of the Gibson court. But in Ybarra v. Spangard, another res ipsa case decided six months after Escola, the Gibson court struck out on a bold new path. Here the court was confronted not with a defective product but with allegedly defective medical treatment and not with a single defendant but with several. The plaintiff here had gone into the hospital for an appendectomy and awoke from surgery with a sharp pain in his right shoulder. There was no history of prior injury to that part of his body, nor had he ever experienced pain there before. The pain continued to bedevil the patient after he left the hospital, and he required a good deal of treatment. Eventually he filed suit against anyone who had had anything to do with his treatment during his hospitalization but was nonsuited at trial on the grounds that he could point to no instrumentality that had caused his injury nor to any specific defendant who was responsible for the allegedly negligent act.

In a unanimous opinion written by Gibson the court reversed, holding that in this case it was proper to apply res ipsa to all the named defendants. Indeed Gibson thought that the case came “within the reason and spirit of the doctrine more fully perhaps than any other.” He acknowledged that many courts had been reluctant to extend the doctrine to cases involving injuries from medical treatment (as opposed to defective products). But, he went on—and the statement says much about the California Supreme Court’s general approach to tort law during this period—this “was due to the tendency . . . to lay undue emphasis on the limitations of the doctrine,
Charles J. McClain

and to give too little attention to its basic underlying purposes.” These courts, he wrote, were guilty of transforming a simple rule of common sense into a rigid legal doctrine. Res ipsa’s underlying rationale was that there were circumstances where the true cause of an injury was accessible to the tort defendant but not to the plaintiff. When one cut through to the core, this was such a case. The objection that the plaintiff could not identify the instrumentality that had caused his injury was easily met, Gibson thought. The plaintiff could show that some external force had caused him injury while he was unconscious and in the hospital’s care, and that was a clear enough identification of the instrumentality. Gibson went on to state the general principle for which the opinion stood. Where a patient received unusual injuries while unconscious, anyone who had had “any control over the plaintiff’s body or the instrumentalities which might have caused the injuries” was to be faced with the inference that he or she was responsible and was to be called upon to provide an explanation that would meet and refute the inference.

Summers v. Tice, decided four years later, was another case involving multiple defendants where the circumstances suggested (indeed it was indisputable) that one of them had been responsible for the plaintiff’s injury but where the plaintiff was not in a position to offer proof as to who it was. Though not formally a res ipsa case Summers employed a very similar line of reasoning and reached a similar result, which was to permit a finding of negligence on the part of defendants without any direct evidence of legal responsibility for a harm. Here the plaintiff had been quail hunting with two companions when he was hit in the eye by birdshot. The shot had clearly come from the direction of his companions. The plaintiff filed suit against both. In a bench trial he was able to show that both had been firing carelessly in his direction and that the shot that hit him had come from one, but only one, of the defendants’ guns. He could not produce evidence as to which. The trial court found the defendants jointly liable for the harm and the supreme court affirmed, Justice Carter writing the opinion. In cases of this sort, the court found, it was proper to throw on the defendants the burden of showing their innocence. Absent that, it was proper to hold them both liable. Carter cited several old cases where hunters had been held jointly liable for shooting accidents even though the evidence did not point to a single defendant, but these cases involved a finding that the defendants had been acting in concert, for some common purpose. But the eminent legal scholar, John Wigmore, had suggested that
liability ought to be the rule in these sorts of cases even when there was no common enterprise, and the court agreed. The defendants had both acted carelessly vis-à-vis the plaintiff, and one of them had clearly caused the plaintiff’s harm. As in Ybarra, they were in a far better position than the plaintiff to sort out which of them it had been. Reasons of justice and public policy dictated that they should do so.  

Ybarra and Summers were decided four years apart and addressed different legal issues, but they have tended to be paired together in discussion as standing for the same general proposition, namely that in certain torts cases the burden of proof of causation will be shifted from plaintiff to defendant and if that burden is not met the defendant will be saddled with liability. The decisions attracted considerable attention at the time they came down and may be counted among those that first focused the attention of the national legal community on the Gibson court. They have had considerable influence on the decisional law of other states and have attained the status of household names in the legal academic literature (it would be hard to find a torts casebook that did not prominently feature both). The reaction to them has not been universally favorable, however. Ybarra, in particular, has aroused controversy. It has been criticized by some academics on the ground that it imposed liability on a wide class of defendants not engaged in a common enterprise, some of whom were more probably than not, not negligent, and some state courts have resolutely refused to follow it.

BEGINNING THE TORTS REVOLUTION—CHARITABLE IMMUNITY, EMOTIONAL DISTRESS

Justice Traynor believed one of the jobs of a state appellate court was, within reason and the constraints imposed by legislation, to keep the law abreast of society’s changing needs. Usually this meant discarding outworn common law rules. Occasionally it meant creating new rules of law. We find Justice Traynor doing each of these things in two important decisions that can be seen as rounding out this first outburst of Gibson court creativity in the law of torts.

The doctrine of charitable immunity, exempting charitable institutions from liability for the torts of their servants, has its origins in the dictum of a nineteenth-century English court. It was justified on a variety of grounds, none of them very convincing, and had a checkered history in this country.
A few states never accepted it. Most accepted it in modified form. The doctrine was almost universally unpopular with legal scholars who could often be heard calling for its abolition. California moved some distance in that direction at a relatively early date. In a Court of Appeals decision rendered in 1927 it ended the exemption as to the tort claims of strangers.\footnote{7} And in a very important opinion handed down by the California Supreme Court in 1939, \textit{Silva v. Providence Hospital}, it abolished the exemption as to paying patrons of a charity (the charity in question was here a hospital and the plaintiff a patient with a malpractice claim).\footnote{75} There remained, however, the last vestige of the doctrine, the immunity from suit by nonpaying beneficiaries, a rather large vestige to be sure, by definition. In \textit{Malloy v. Fong},\footnote{76} a 1951 decision, Traynor, writing for a unanimous court, and with little discussion swept this away.

The plaintiff here was a youth who had been injured while in the care of a charity sponsored by the Presbyterian Church and through the negligence of the charity’s agents. The church interposed the defense of charitable immunity, arguing that \textit{Silva}’s holding was limited to the paying patrons or beneficiaries of a charity. That might be so, as a technical matter, Traynor responded, but what the defendants had failed to notice was that had effectively abandoned the principal foundation on which the whole California law of charitable immunity depended, the so-called implied contract theory which said (rather implausibly) that when one accepts charitable benefits he impliedly waives his right to sue the benefactor. The reasoning of \textit{Silva} thus could not be limited to the facts of that case.\footnote{77} \textit{Malloy} can be seen as writing the closing chapter on a story whose main plot line was already reasonably well laid out by the time the case came up for decision. \textit{State Rubbish Assn. v. Siliznoff},\footnote{78} an early 1952 case, set California tort law off in a whole new direction.

The common law has always accorded a wide range of protections to physical well being but has historically been wary of according legal protection to one’s mental well being, though it has made nods in that direction. Mental distress was a legitimate and at times a major element of damages in the ancient action for defamation and in the modern action for invasion of privacy. In the tort of assault, which is the intentional placing of someone in fear of immediate physical harm interference with mental peace could be said to constitute the gravamen of the complaint. But to recover in assault the plaintiff usually had to show an objectively founded fear of some very imminent harm. The classic example given was of the
defendant who strikes at the plaintiff with a stick but narrowly misses him. It was in other words a narrowly conceived exception to the prevailing notion of no tort based on mental suffering per se. There was no recognition of a general right to be free of unjustified interference with mental tranquility.

At issue in *State Rubbish Assn. v. Siliznoff* were the strong-arm tactics of a trade association. The case arose formally as an action on a series of promissory notes, executed by the defendant Siliznoff, a rubbish collector, on behalf of the plaintiff, an incorporated association of rubbish collectors. The notes were payment by way of compensation to a third party whose business the defendant had taken away. Siliznoff answered that he had executed the notes under duress and asked that they be canceled. He further cross complained for damages in assault against the plaintiff, alleging that its agents had repeatedly threatened him with physical violence when he proved recalcitrant in paying up. These threats, he alleged, had made him a mental and physical wreck. At trial he won a judgment for compensatory and punitive damages, from which judgment the State Rubbish Association appealed. The basis for the appeal was that Siliznoff had not made out a case for assault since there was no allegation that the plaintiff had been put in fear of imminent physical harm (the threats in question related to possible future harm). But Justice Traynor and his colleagues thought the time was ripe for change in the common law of California. “We have concluded,” he wrote, “that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.” As common law judges are often wont to do when they make major changes in the law, Justice Traynor sought to show that the law had already edged precisely close to the position the court was taking if it had not already reached that point. Normally in these situations authors of opinions seek to connect their conclusions with the conclusions and reasoning to be found in prior decisions of their own courts. But the chief authority Traynor relied on to support his was the American Law Institute’s Restatement of Torts. The ALI’s Restatements, which had begun with the limited aim of summarizing the nation’s decisional law in various areas soon took on the task of extrapolating from the decisions to trends and finally of suggesting possible avenues of reform. The Restatement of Torts, as early as 1934, Traynor noted, had recognized liability for physical injury
or illness when a defendant subjected a plaintiff to severe mental distress and could have foreseen that the distress would lead to such illness or injury. And he pointed to several recent California District Court of Appeals decisions that reflected this view. Since 1934, a number of legal scholars had published articles forcefully advocating that interference with mental tranquillity be recognized as an independently compensable claim. In response the Restatement had been amended in 1947 to do just that. One who, without privilege, caused severe emotional distress was liable “for such distress and for bodily harm resulting from it,” it provided.

As applied to the case at bar Traynor thought the scholars’ and Restatement view the embodiment of logic and good public policy. Siliznoff’s suffering was certainly real. There was no conceivable justification for the actions of the Rubbish Association agents. The law already gave compensation for mental suffering if incident to the torts of assault, battery, false imprisonment, and defamation. There was no reason why it should stop there. “In cases where mental suffering constitutes a major element of damages, it is anomalous to deny recovery because the . . . intentional misconduct fell short of producing some physical injury,” Traynor wrote. It was the first time that an American high court had so categorically endorsed the Restatement position.

RACE AND THE LAW

As noteworthy as were the torts cases just discussed, they are overshadowed in significance by a series of race relations cases the court decided during roughly the same period. These mark, in my judgment, more of a turning point in the court’s history. They grew out of attacks by black and Asian residents on discriminatory laws and practices. The outcomes of these cases were generally, though not entirely, favorable to the minority claimants, that in itself an event worthy of remark. But as important as the outcomes were the opinions that the cases produced, majority, concurring and dissenting. They struck a new note in California jurisprudence. In them one finds for the first time a real appreciation of the problem of racial bigotry in California and recognition that addressing the problem was in part a judicial function. By the end of this period it was clear that a majority of the justices believed the court had an important role to play in promoting racial justice. It would be extravagant to claim that these decisions transformed the social landscape of race relations in the state (one may question
whether court decisions ever do that), but they did affect that landscape in significant and positive ways.

**RACIALLY RESTRICTIVE COVENANTS: FAIRCHILD V. RAINES**

The African American population of California was relatively tiny during the nineteenth century, numbering about 11,000 at its height in 1900, but there was a significant migration of blacks into the state in the first decades of the twentieth century, and by 1940 the figure had risen to 124,000. Tens of thousands more would pour into the state during the war years and immediately thereafter, many attracted by the prospect of work in the state’s burgeoning defense industries.³⁴

Blacks settled disproportionately in urban areas, Los Angeles in particular, and there one of the most pressing problems they encountered was housing discrimination. The discrimination had legal underpinnings. In 1917 the United States Supreme Court had ruled that it was unconstitutional for a city or state to mandate residential segregation, but white property owners, anxious to keep blacks and other minorities out of their neighborhoods, had hit on the device of the restrictive racial covenant to accomplish the same result. These purely private agreements bound the owners of land and their successors in interest never to sell or rent to non-Caucasians so that a subsequent landowner who might wish to sell or rent to a nonwhite would be prevented by the agreement from doing so. Because the agreements were purely private, they were held to be immune to constitutional challenge by the United States Supreme Court.³⁶ The California Supreme Court had early on held them to be valid and enforceable.³⁷ This did not keep blacks from continuing to challenge them, however, and in a couple of California cases they had succeeded in at least blunting their impact. In the 1934 case of Foster v. Stewart, for example, a District Court of Appeals refused to enforce a racially restrictive covenant that would have prevented a black couple from occupying a home in a housing tract on the grounds that the covenant was contingent on all lot owners in the tract signing it, something that had not occurred, that the lots that were the subject of the covenant were widely separated, and that the agreement was not limited as to duration.

*Fairchild v. Raines,* which came before the California Supreme Court in 1944, was one of several challenges to racially restrictive covenants
Charles J. McClain

brought in southern California in the early 1940s by black litigants with the support of civil rights organizations. It was the only one to make it to the California high court.90 The case arose on facts similar to Foster. Here, too, a group of white property owners, citing a racially restrictive covenant, sought to enjoin a black couple, Ross and Helen Raines, from occupying a house in a subdivision, this one in Pasadena. As in Foster the lots covered by the covenant were noncontiguous. But here the covenant was of limited duration and, though all owners in the tract had not signed the agreement, it was, by its terms, clearly intended to become effective as to the signers irrespective of what other lot owners in the tract did.

Justice Schauer wrote the opinion for a unanimous court. Reversing a trial court decision enjoining the Raines’ from occupying their property, the court held that the trial judge had failed to exercise the discretion that he should have as an equity judge. The Raines had argued that as a result of demographic changes the area surrounding the tract was occupied mainly by non-Caucasians and that nonwhites occupied many houses in the tract itself. To enforce the covenant, they contended, would be of little benefit to the plaintiffs and would impose immense hardship on the Raines.91 There was a well-established equity principle which said that courts would not enforce restrictive covenants when the character of a neighborhood had radically changed, Schauer noted, and there was evidence in the trial court record to support the Raines’ contentions on the racial makeup of the area. The trial court had acted as if the plaintiff’s right to an injunction was absolute once they showed that there was a valid restrictive covenant that covered the Raines’ property. But there was no such absolute right. In fact, following equitable principles, it should have considered whether enjoining the Raines from occupying their property would, in light of all the circumstances, be fair. Another way of putting the question was whether, in light of the changed circumstances, the original purpose of the covenant could still be realized. If it could not, it would be inequitable to enforce it against the Raines.92

Schauer’s majority opinion did not go much beyond established American legal doctrine on the question of racially restrictive covenants. (Changed conditions was a well-recognized ground for refusing to enforce such agreements.) It certainly did not question the legitimacy or enforceability of such covenants. Nor did it evidence any sensitivity to the hardships they were imposing on the state’s growing black population.
Justice Roger Traynor’s concurring opinion breathed a very different spirit. The case should not be determined purely on the basis of the economic interests of private property owners, Traynor argued. The public interest, too, had to be considered. Blacks had been moving in increasing numbers from the rural South into urban communities across the country for some time, Traynor observed. (The opinion is replete with references to the growing sociological literature on black migration.) The pace of immigration into California had picked up substantially in recent years because of the war. Because of racial covenants they were finding it impossible to find decent housing and were being crowded into unwholesome and congested districts, “plague spots for race exploitation, friction and riots,” as he put it (quoting the report of a presidential advisory commission). The trial court on remand, Traynor concluded, ought to ask whether enforcement of the covenant at issue would deprive “the colored population” (i.e., not just the Raines) of access to decent housing and force it to continue to live in congested conditions. If so, it should not be enforced. “Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the sound development of the whole community,” he urged.

The opinion did not go so far as to say that racially restrictive covenants should yield to black desire for decent housing wherever they might seek it in a community. It was limited to cases where covenants stood in the way of the expansion of districts that were already heavily nonwhite. But it was probably as much as a justice could have said at the time without being seen as hopelessly in advance of public opinion.

One passage in the Traynor opinion seems particularly significant in retrospect. “The problem of race segregation,” Traynor wrote, “cannot be solved by the courts alone, for it involves emotions and convictions too deeply imbedded in the social outlook of men to be uprooted overnight by judicial pronouncements. Nevertheless the problem must be confronted step by step, however provisional the solution, with regard both for the interest of minority groups and the general public interest.” It was the first time that a justice of the California Supreme Court had ventured the thought that resolving the problem of racial discrimination in the state was in part a judicial task.
ENDING SEGREGATION IN UNIONS: JAMES v. MARINSHIP

Race segregation of another sort was the principal issue before the court in a case it decided a few months after Raines. The case of James v. Marinship, an enormously important one, is intimately connected with the great black migration into California during World War II, a migration occasioned by the thousands of new jobs created by the state's burgeoning defense industries. The shipyards in particular, engaged in constructing vessels for the U.S. government, were hiring thousands of new workers, most in skilled craft positions. Because there was a severe civilian labor shortage and because the companies that operated the yards and built the ships in them generally had contracts with the government pledging nondiscrimination in employment, blacks had no difficulty finding shipyard work. The Marinship Corporation, a venture of the San Francisco Bechtel company, operated a huge shipyard in Sausalito, across the Golden Gate Bridge from San Francisco. By 1944 it employed 22,000 workers and 10 percent of the work force was black. The Marinship workers were represented by the International Brotherhood of Boilermakers union, which had a collective bargaining agreement with the company providing both for a hiring hall and for a closed shop. Under these provisions the company could only fill open positions with workers who had been referred to it by the International's local affiliate, Local No. 6, and membership in Local No. 6 was made a condition of employment at the company.

The International Boilermakers union had a long history of discrimination against blacks. Until 1937 it admitted no blacks to membership, but in that year it authorized the chartering of separate auxiliary black locals. In the first years of the war Local No. 6 dispatched black workers to Marinship without requiring union membership, but in August of 1943 an auxiliary black local, Local A-41, was chartered, and Local No. 6 began to insist that blacks join it in order to be cleared for work at Marinship. The creation of the segregated local provoked outrage among many black shipyard workers and in the black community, and a group called the San Francisco Committee Against Segregation and Discrimination quickly came into existence to oppose the boilermakers' actions. It was led by Joseph James, a journeyman welder at the yards and an active member of the NAACP.

About half the black workforce joined the auxiliary local, and in November Local No. 6 asked the company to fire all who had not. When
the company began the process of doing this, attorneys for the threatened workers, who included James, filed suit in United States District Court against Marinship and the boilermakers asking for an injunction. The District Court issued a temporary restraining order but eventually dismissed the case for lack of jurisdiction. (The court could find no colorable claim of a violation of any federal law.) A similar suit was then filed in state court. The complaint pointed to a range of discriminatory practices on the part of the boilermakers’ union. Local A-41 had no voice in the management of its own affairs nor in the affairs of its parent union, Local No. 6. It had no business agent of its own nor any grievance committee. It could not deal with the employer on behalf of its members. It played no role in filling open positions at the yard. That was done exclusively through the agency of the all-white local. Finally, and significantly, the very act of segregation was a kind of discrimination, “based on blind prejudice and hatred.” The Boilermaker practices, acquiesced in by Marinship, were, the complaint charged, “contrary to the public policy of the State of California” and to “natural justice and the law of the land.” A Marin County superior court entered an injunction against the company and the union, and this decision was appealed to the California Supreme Court, with Thurgood Marshall of the NAACP Legal Defense Fund participating as co-counsel on appeal for the respondents.

Chief Justice Gibson affirmed the lower court ruling for a unanimous court. He acknowledged that unions had the right to engage in concerted activity for a wide variety of ends and that one of these was the establishment and maintenance of a closed shop. On the other hand it was equally well established that a state had the right to protect its citizens against abuses of the right of concerted activity. The right to work was fundamental. A union with a closed shop agreement with an employer had a kind of labor monopoly, Gibson reasoned, and as such occupied a quasi-public position, one that carried with it obligations. It could not, he ruled, arbitrarily limit access to membership for that in effect would be arbitrarily denying to individuals in a given locality the right to pursue a trade or vocation (citing, among other authorities, the Restatement of Torts). Membership in the Caucasian race was an example of an arbitrary limitation on access to membership. The question then became whether maintenance of a separate union for blacks was in effect a denial of membership, and Gibson thought that it was. Membership meant full and equal membership, but, for all the reasons mentioned in the black shipyard
workers' complaint, membership in Auxiliary A-41 was not the equivalent of full membership. It was a distinctly unequal and inferior kind of membership.  

Gibson contended that the union's practices were contrary to the public policy of the United States as well. He cited a Presidential Executive Order urging full participation in the war effort regardless of race or color, a recent U.S. Supreme Court decision under the Railway Labor Act holding that an all-white union which was exclusive representative for a bargaining unit consisting of blacks and whites had an obligation to deal fairly with black members of the unit, and the U.S. Constitution which, Gibson said, though technically inapposite because no state action was involved, could nonetheless be said to embody a policy of nondiscrimination. These were weak reeds on which to lean, it must be said, and indeed highlight how far in advance of federal labor law the California court was. Neither the Executive Order nor the Supreme Court decision said anything about the legitimacy of segregated locals, and the principle of U.S. Constitutional law most relevant to the case was the separate-but-equal doctrine of *Plessy v. Ferguson*, still good law at the time. It would take another 20 years before federal law made it illegal for unions to discriminate on the basis of race in admission to membership.

**A BLOW AT ANTIMISCEGENATION LAWS**

In 1947, Andrea Perez, a white woman, and Sylvester Davis, a black man, sought to obtain a marriage license from the county clerk of Los Angeles County. He refused on grounds that the California Civil Code both forbade the issuance of licenses authorizing the marriage of whites and Negroes and made such purported marriages void. The couple then brought a mandamus action in the supreme court asking the court to declare the civil code provisions null and void and to compel the county clerk to issue the license.

At the time California was one of 30 states with antimiscegenation statutes (laws prohibiting intermarriage between persons of different races) on the books. Its laws, like those of most of the other 29 states, were of ancient lineage. California enacted its first antimiscegenation statute, a law prohibiting marriages between blacks and whites, in 1850, at the first session of the legislature. The law was amended in 1905, to prohibit marriages between whites and Mongolians, and when in 1933, an appeals
The California Supreme Court Historical Society

court held that this ban did not apply to marriages between whites and Filipinos, the legislature promptly amended the statute to ensure that it did. Of all American statutes that have ever been enacted on the subject of race, the miscegenation laws were probably the most overtly racist. They were openly justified on the basis that nonwhites were mentally and/or physically inferior to whites and that miscegenetic unions were likely to produce defective offspring or on the (related) ground that they diluted racial purity, something apparently thought worth preserving in its own right. But no antimiscegenation law had ever been ruled invalid in an American court. Indeed so widespread was the understanding that these laws were legitimate that hardly anyone had ever thought it worth his while to challenge them.

In one of its sharpest breaks with a prevailing legal consensus, a closely divided California Supreme Court, in Perez v. Sharp, held the state antimiscegenation laws to be violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Justice Traynor, who wrote the court’s opinion, drew both on constitutional doctrine and social science scholarship to reach this conclusion. His beginning premise, drawn from the Lochner-era U.S. Supreme Court case, Meyer v. Nebraska, was that the right to marry was a fundamental constitutional right. As such it could only be restricted by the state to promote some very important social objective and then only by the use of reasonable means. At the same time, both old Supreme Court cases, like Yick Wo v. Hopkins, decided in 1886, and more recent ones like Hirabayshi v. United States, decided in 1943, made clear that racial classifications were suspect. Indeed in Hirabayashi, a case challenging a wartime curfew imposed by military authorities on Japanese Americans living on the West Coast, the court had characterized such classifications as “odious” and said that they were “in most circumstances irrelevant and prohibited.” (Ironically, the court here upheld the military decision.) In its most recent term in fact the Supreme Court had ruled that “compelling justification” would be needed to sustain differential treatment based on race. Applying these principles to the California statutes, Traynor found they could not withstand scrutiny.

Lawyers for Los Angeles County, who argued the case in the high court, had devoted some 35 pages of their brief on appeal to a survey of the “scientific” evidence supporting the proposition that blacks were inferior to whites and that miscegenetic marriages produced inferior offspring.
But Traynor was able to point to a newer body of scholarly literature that explained any differences between the races that might exist in terms of environmental rather than physical or biological causes and furthermore showed that the offspring of mixed-race marriages were not inferior to their parents. Even if one wished to contest these more modern views, Traynor argued, one certainly had to concede that there were great variations among individuals in all races and that no generalization could capture these differences. But the right to marry, he stressed, was an individual right. The state then seemed to be interfering with the exercise of a fundamental right on the basis of generalizations that were probably spurious or at best untrustworthy.

As noted above, the court was divided. Justices Gibson, Carter, and Edmonds joined with Traynor in voting to strike down the antimiscegenation laws. (Edmonds in a concurring opinion contended that the right to marry was an aspect of religious liberty, specifically guaranteed by the First Amendment. When rights specifically guaranteed by the Constitution were interfered with, he argued, citing the opinion of U.S. Supreme Court Justice Robert Jackson in West Virginia v. Barnette, the state bore the very heavy burden of showing there was a clear and present danger justifying the interference.) Justice Shenk wrote an acerbic dissent, one joined in by Justices Schauer and Spence. In it he accused the majority of legislating from the bench. The right of the state to regulate the marriage relationship was universally recognized, he contended, and its right to prohibit miscegenetic relationships had been likewise recognized by every court that had considered the question. The court was simply substituting its own version of good public policy for that decided on by the legislature.

CONFRONTING THE HERITAGE OF ANTI-ORIENTALISM

Anti-Asian prejudice is one of the great leitmotifs of California history as it is in the history of other western states. In confronting this problem the Gibson court moved more hesitantly than it did in the field of black civil rights, though not for any lack of will on the part of the chief and several other justices.

Hostility toward Chinese immigration dominated public affairs during the nineteenth century and led to the enactment of a battery of harsh laws designed to discourage Chinese immigration. In the twentieth century, as
the number of Chinese dwindled (thanks mainly to the impact of federal exclusion legislation) and as Japanese immigration into the state increased, the focus of hostility shifted to that Asian immigrant group. Large numbers of Japanese immigrants went into farming and there many prospered, especially in fields such as fruit and vegetable production. Resentment at Japanese success in the agricultural sector and a general desire to discourage Japanese immigration produced in 1913 of the first of the state’s so-called Alien Land Laws. It had the effect of forbidding aliens ineligible to citizenship, a designation that at the time encompassed Japanese and other Asian immigrants, from owning agricultural land and provided that land acquired in violation of this ban should escheat to the state.2

When in response to this law Japanese farmers began to put land titles in the name of their children born in the United States (and by virtue of that fact American citizens) and to have themselves declared guardians of their children’s estates, the California electorate responded by approving in 1920 a ballot initiative that included a provision disqualifying ineligible aliens from acting as guardians of the agricultural estates of their minor children and another saying that when agricultural land was conveyed to a U.S. citizen but the consideration paid by an ineligible alien a *prima facie* presumption should arise that the transfer was made with intent to evade the law.2

The Japanese mounted several legal challenges to California’s Alien Land legislation and were successful in some. In 1923, the California Supreme Court voided the guardianship provision of the 1920 initiative on Fourteenth Amendment Equal Protection grounds.2 But in the same year the U.S. Supreme Court affirmed the constitutionality of the law’s ban on agricultural landholding by Japanese. (Indeed, in a companion case involving the Washington Alien Land Act, the court held that Japanese aliens had no right to own residential or commercial property either though they could lease both kinds.)2

And two years later it rejected a challenge to the measure’s evidentiary rule creating a presumption of intent to evade the law when certain transactions occurred.2

As the law had crystallized after court glosses by the mid-1920s, then, Japanese aliens could neither own nor lease agricultural land, but they could legally acquire land in their citizen children’s names and serve as guardians of their estates. As such they could live on the land, actively manage it, and be compensated for their activities. Payment for their children’s land would raise the presumption that the whole transaction was
a sham, but they could rebut the presumption by showing that it was
genuine, i.e., that they exercised none of the prerogatives of ownership and
that they were managing the estate of their children purely for their benefit.
Guardianship is, naturally, a far cry from ownership, and the Alien Land
Law rankled deeply with the Japanese, but the guardian-manager arrange-
ment at least gave them a way to earn a livelihood and provide for the
future of their offspring.

For a variety of reasons—lack of resources, declining public interest
(the passage of federal legislation in 1924 banning future Japanese
immigration may have defused public passion), and the less than ideal state
of the law—California did not seek to vigorously enforce the Alien Land
Law in the 1920s and ’30s. It pursued comparatively few escheat actions
against Japanese farms and was not always successful in those that it did.
On the eve of World War II the Japanese were still a dominant force in
California agriculture, occupying some 42 percent of the acreage in the
state devoted to truck farming and producing the lion’s share of most of the
state’s vegetable crops.  

The outbreak of hostilities with Japan pushed

In 1942, pursuant to military orders, virtually all persons of Japanese
ancestry living in California, Washington, and Oregon were uprooted from
their homes and forcibly evacuated to relocation centers away from the
Pacific coast. The next year, on May 5, 1943, the California Senate, finding
that “Japanese people resident in the State of California” had proven to be
a menace to California’s (and the nation’s) peace and safety, that their
removal was only temporary, and that their return might again threaten the
public weal, voted unanimously to empanel a senate fact-finding committee
to look into “all facts concerning the return of the Japanese people to this
state.” Its particular focus was to be the Alien Land Law. By subterfuge
and device, the resolution stated, the Japanese had turned the law into a
“virtual nullity.” Vigorous enforcement, it strongly implied, might make
the Japanese think twice about returning.  

A month later, on June 8, 1943, Governor Earl Warren approved a bill
tightening the reporting requirements of the Alien Land Law and broaden-
ing the enforcement powers of the attorney general. In February 1944,
the attorney general, in cooperation with local prosecutors, began a
systematic investigation of Japanese landholdings in the state and at the
same time commenced what could probably be called a campaign of
escheat actions against Japanese farms. (By the end of the year some 25
The California Supreme Court Historical Society

were underway; by the end of fiscal year 1945-46, the total of actions underway or concluded had risen to 56.)\(^1\) One of the first of these actions was aimed at two parcels of agricultural land in San Diego County bought respectively in 1934 and 1937 by the parents of Fred Y. Oyama, an American citizen and a minor, and put by them in his name. Subsequent to the first purchase Fred Oyama’s father was appointed guardian of his person and estate. At trial the attorney general was able to show that the Oyama parents had occupied the land and further that they had not filed guardianship reports required by the act. Relying on this evidence and on the presumption provision of the Alien Land Law, the trial court found that the land conveyances had been undertaken with intent to evade the law and that the lands in question had as of the date of purchase escheated to the state. From this decision an appeal was taken to the California Supreme Court.

The Oyama case evoked considerable interest in the California civil rights/civil liberties community and three of its most prominent members, A. L. Wirin, Saburo Kido, and Fred Okrand, represented the Oyamas in their appeal. (Kido and Wirin had filed an amicus brief on behalf of the Japanese American Citizens League in *Korematsu v. United States*, the unsuccessful challenge to the wartime evacuation orders.)\(^3\) They argued that the Alien Land Law had been enacted for a racially discriminatory purpose and that racial intolerance lay behind the sudden, recent upsurge in its enforcement. Recent decisions of the Supreme Court—they cited *West Virginia v. Barnette*,\(^1\) the Jehovahs’ Witnesses flag-salute case, and (with mixed feelings no doubt) *Korematsu*—had heightened the standard for reviewing laws that trenched on civil liberties or discriminated against racial minorities.\(^3\) Applying this standard, they contended, the Alien Land Law could not pass constitutional muster.

Justice Edmonds delivered the opinion of the court. The states had always been given broad power to regulate the ownership and disposition of real property within their borders, he wrote, and that included the right to discriminate against aliens. The U.S. Supreme Court had specifically addressed the question of the constitutionality of California’s Alien Land Law and had upheld it. Edmonds agreed that recent decisions had introduced a new and more stringent test for judging the constitutionality of certain kinds of laws, but, he argued, the test applied only to laws that interfered with those liberties that were protected by the First Amendment. When it came to laws restricting property ownership, it was sufficient that the state show there was a rational basis supporting them.\(^1\)

---

\(^1\)\(^{29}\)\(^{129}\)\(^{30}\)\(^{31}\)\(^{32}\)\(^{33}\)
Charles J. McClain

At a technical and formalistic level, Edmonds’ analysis was no doubt correct. But one is disappointed to find in the opinion no acknowledgment at all of the racial antagonism that produced the Alien Land Law or that lay behind the renewal of enforcement activity. The same disconnectedness from social and political context is even more evident in the opinion Edmonds wrote for the court a year later in *Takahashi v. Fish and Game Commission*, another case involving governmental action aimed at ousting Japanese residents of California from a line of work in which they were disproportionately active.

On the same day on which Governor Warren approved the 1943 amendment to the Alien Land Law, he also approved an amendment to the Fish and Game Code providing that henceforth no sport or commercial fishing licenses should be issued to any “alien Japanese.” At the urging of the senate fact-finding committee mentioned above, which thought singling out the Japanese by name made the law vulnerable to constitutional attack, the wording was changed in 1945 to make the provisions apply to “aliens ineligible to citizenship,” a designation that by then encompassed only Japanese, Hindus, and Malayans (the Chinese had been made eligible for naturalization in 1943).

Torao Takahashi began working as a licensed commercial fisherman in 1915 and plied this trade continuously until 1941, when he was evacuated from California to a relocation camp. Upon his return to the state in 1945, he sought to renew his license, but the Fish and Game Commission refused his request, citing the newly enacted Fish and Game Code provision. Takahashi then secured a writ of mandamus from Los Angeles County Superior Court, and from this judgment the state appealed.

On appeal Takahashi’s attorneys pointed to the legislative history surrounding the provision as clear proof of the fact that its purpose was to discriminate against the Japanese. But Edmonds, writing for the court majority, chose to view the case essentially through the same lens he had used to view *Oyama*, as one involving the exercise of a state prerogative more or less insulated from constitutional scrutiny. If the state had special rights with regard to land within its borders, it also had special rights with regard to its natural resources. A long line of cases, he wrote, stood for the proposition that the state was the owner of natural resources within its boundaries, including fish in its coastal waters. As such it had broad authority to determine who should have the privilege of fishing for sport or commercial purposes. It could limit that privilege to its own citizens if it
wished, denying it to citizens of other states even. If the legislature
determined that fish conservation measures were warranted, neither the
constitution nor logic stood in the way of its, as a first step, denying the
privilege to ineligible aliens. Edmonds brushed the legislative history
argument aside. The Japanese were not singled out in the law in his view.
Indeed several other Asian groups were by the measure’s terms subject to
its prohibitions. The change in wording in 1945, rather than being an
attempt to continue the ban on Japanese fishing by other means could, he
thought, just as easily show a “legislative desire to avoid the possibility of
Japanese racial discrimination by extending the prohibition to all persons
within a given class.”

It was not one of the more compelling pieces of
analysis that came down from the court during the Gibson era.

The majority opinion produced an angry dissent from Justice Carter,
one joined in by Gibson and Traynor. Instead of seeing the law as an effort
to conserve natural resources, he preferred to see it as a thinly disguised
effort to deny to returning Japanese fishermen the right to earn a livelihood,
but the right of lawful resident aliens to gainful employment was protected
by the Fourteenth Amendment Equal Protection Clause and could not be
arbitrarily infringed. Even if the law were taken as not really aimed at the
Japanese, it was still vulnerable to attack on the same grounds. When it
came to the right to pursue a vocation, there seemed no justification for
distinguishing between different classes of aliens.

The Oyama and Takahashi decisions were deeply disappointing to
California’s resident Japanese, but in 1948, the United States Supreme
Court reversed both. In Oyama v. California, it held that the presumption
of intent to evade provision of the California Alien Land Law violated the
equal protection rights of the Oyamas’ citizen son. And in Takahashi v.
Fish and Game Commission, it ruled, without addressing the allegations
of anti-Japanese bias behind the law, that a state’s proprietary interest in its
fish was insufficient to permit it to so cut back on the right of lawful
resident aliens to pursue a livelihood.

The Oyama decision did not void the Alien Land Law as a whole,
merely its presumption provision. (Four of the nine justices, however, had
indicated that they were prepared to invalidate the whole act.) Technically
the state was free to go back to court and seek to prove the case against the
Oyamas without the aid of the presumption. But, reacting to the decision,
Attorney General Fred Howser said he thought that the law itself would be
declared unconstitutional if it again came before the court and soon
Charles J. McClain

thereafter decided to halt all investigations under the act and to dismiss all pending escheat actions.\textsuperscript{142}

The California high court came within one vote of voiding the whole Alien Land Law in June 1948. \textit{Palermo v. Stockton}\textsuperscript{143} was an interesting case. The Alien Land Law, as noted above, granted alien Japanese only such property rights as were guaranteed them under the treaty between the United States and Japan. That treaty was abrogated in 1940, however, and its abrogation raised the question whether alien Japanese retained any property rights in California. In 1944, the lessors of a theater filed suit against their lessee, a corporation owned by Japanese nationals, asking the court to declare the lease invalid under the Alien Land Law. The case eventually reached the supreme court, which held that when the Alien Land Law was enacted it incorporated by reference the provisions of the U.S.-Japan treaty relating to property rights, one of which was the right to lease commercial property. This became part of the law itself and survived the abrogation of the treaty. Justices Carter and Traynor and the chief justice thought the court should go further and hold the whole act unconstitutional, but Justice Schauer speaking for the majority wrote that the court should say nothing about this issue since it was not really before the court and was unnecessary to a decision in the case.\textsuperscript{144}

The issue of the Alien Land Law's constitutionality was placed squarely and unavoidably before the court in \textit{Sei Fujii v. California},\textsuperscript{145} a quiet title action filed in August 1948 by Sei Fujii, an alien Japanese resident and an official of the Japanese American Citizens League. The land in question was an unimproved city lot in Los Angeles deeded the month before to the plaintiff. (In \textit{People v. Oyama} the California high court confirmed that the law prohibited Japanese aliens from owning any kind of real property, not just agricultural land.)\textsuperscript{146} At a trial held in March 1949, the court ruled that the lot had escheated to the state. This judgment was appealed to the District Court of Appeals, which held (in what was probably the most doctrinally ambitious decision ever to come out of the intermediate appellate courts) that California's Alien Land Law violated that provision of the United Nations Charter that obliged signatories to promote human rights and fundamental freedoms without regard to race.\textsuperscript{147} The California Supreme Court took the case for review but did not hear oral argument or issue a decision until 1952.

By the time it came to deciding \textit{Sei Fujii}, the Gibson court not only had the District Court of Appeals decision to ponder as it once again confronted
the question of the Alien Land Law's constitutionality but also the decision of a sister court, the Oregon Supreme Court, which at the end of 1948 had ruled that that state's own alien land law violated the Fourteenth Amendment. Chief Justice Gibson wrote the opinion for the court. He rejected the DCA's use of the United Nation's Charter to invalidate the Alien Land Law. The charter provisions cited, he wrote, were not self-executing and could not be seen as imposing obligations on member states. They could not therefore be used to nullify a state law. There remained the question of the law's compatibility with the U.S. Constitution. And with the support of three other members Gibson found it to be incompatible. (Justice Edmonds, author of the opinion in *Oyama*, had reversed his position and provided the deciding vote.)

Gibson's analysis ran parallel to that of the Oregon Supreme Court though it was more elaborate and more systematic. Although he conceded that the U.S. Supreme Court had never overruled its 1920s decisions upholding the western states' alien land laws, he thought its recent decisions in *Oyama* and *Takahashi* invited further consideration of the constitutional issues raised in those early cases. That consideration had to be undertaken, he thought, through the lens of other recent Supreme Court precedent—cases like *Shelley v. Kraemer* and *Korematsu*—which stood for the proposition that the right to own property was a civil right protected against discriminatory treatment by the Fourteenth Amendment and for the proposition that racial classifications were suspect and "subject to the most rigid scrutiny." The California Alien Land Law purported to classify on the basis of eligibility to citizenship but in fact classified on the basis of race. Its generally acknowledged purpose, Gibson wrote, was to eliminate Japanese competition in farming. The prevention of competition in farming might be a legitimate state objective but excluding a racial minority from the field was not a constitutionally impermissible means to that end. Gibson also thought the distinction often made between aliens' right to earn a living and their right to own property inapposite or at best outmoded. "The right to earn a living in many occupations [farming being one]," he wrote, "is inseparably connected with the use and enjoyment of land." The opinion was a something of a bold extrapolation from existing U.S. Supreme Court doctrine, a bit of a constitutional reach in fact. But when it came to the Alien Land Law a reach was probably long overdue.
If the record of the Gibson court in the area of race relations is one generally of leadership in the dismantling of racial barriers, its record in the field of civil liberties is one of the expansion of individual rights, followed by contraction. The contraction, one must hasten to add, was not entirely of its own making.

Reviewing the early decisions of the Gibson court one is struck by how protective of the rights of free speech, association, and assembly and tolerant of dissent that tribunal was. The 1941 case of Bogunovic v. U.S. Dept. of Labor is a good example. In that case a superior court rejected an application for naturalization on the ground that the applicant had once subscribed to a Communist Party newspaper. Justice Shenk ordered the lower court to reconsider. The mere fact of the applicant’s subscription to a Communist paper was far short of sufficient to rebut the positive evidence of good character and attachment to constitutional principles that had been adduced at the hearing. Justice Shenk, as noted above, was one of the more conservative members of the Gibson court. Even more emblematic of this outlook are three major cases decided over the next few years: Communist Party v. Peek, Ellis v. Board of Education, and Danskin v. San Diego Unified School District. Communist Party v. Peek, decided in 1942, arose out of a piece of legislation, introduced by Governor Olson at the behest of Republican and Democratic leaders and passed by overwhelming majorities in both legislative houses in 1941, which denied to any political party that bore the name “Communist,” or that was affiliated in any way with any foreign entity or that advocated the overthrow of the government by unlawful means the right to participate in a primary election. When the Communist Party of the United States was denied a place on the August 1942 primary ballot, it brought an action challenging the validity of the statute, and the court upheld the challenge. Chief Justice Gibson found the first two provisions to be violative of the state constitution. They either unreasonably interfered with the right of suffrage or violated the state constitutional prohibition against “special legislation” or did both.

The right of suffrage was a sacred right, enshrined in the state’s fundamental law, Gibson wrote. Since, as Gibson noted, “the party system
furnishes the means by which the citizen's right of suffrage is made effective."\textsuperscript{154} to deny a party access to the state's election machinery was to severely trammel the right of suffrage. The state had to have a powerful reason for doing so and the court could find none here. To bar a political party from primary elections simply because it had the word "Communist" in its name was no reason at all in the court's view. Names were an often unreliable guide to a group's beliefs even assuming that a group's beliefs alone could form the basis for barring it from elections. The state, in oral argument, had asked the court to take judicial notice of the fact that the Communist Party advocated the overthrow of the government by force and violence, but Gibson declined to do so. The doctrine of judicial notice was only applicable where facts were undisputed and the plaintiffs here denied this charge. The provision barring from the primary ballot groups having any affiliation whatsoever with any foreign entity was found to be much too broad and sweeping to pass muster as a reasonable regulation of the electoral process. The court did uphold the provision denying access to the ballot to groups advocating the violent overthrow of the government but it did not believe that a law could designate a particular group as fitting that description (which the law in question impliedly did). That would be special legislation barred by the state constitution.\textsuperscript{155}

\textit{Ellis v. Board of Education},\textsuperscript{156} a 1945 case, involved a group at the other end of the political spectrum. Individuals associated with the right-wing minister, the Rev. Gerald L. K. Smith, made application to use a San Francisco high school for a mass meeting. They were told by the school board, citing a regulation, that they could do so only if they took out a substantial liability insurance policy. They refused, brought a mandamus action in the supreme court and were granted the writ. Traynor, who wrote the opinion of the court, found the terms of the state Civic Center Act controlling. That act obligated school districts to make school buildings available to the public for meetings during nonschool hours free of charge and took precedence over any regulation of the school board. To saddle the petitioners' with the cost of liability insurance would in effect be to saddle them with a cost the school district was meant to bear and would frustrate the act's purposes.

The \textit{Ellis} petitioners claimed that the school board regulation infringed as well their constitutional rights, but Traynor declined to address these claims, treating the case as purely one of statutory construction.\textsuperscript{157} He showed no such reluctance to address constitutional issues in \textit{Danskin v.}
San Diego Unified School District, another case involving the right of access to school property under the Civic Center Act.

In 1945 the legislature passed an amendment to the act, providing that groups that advocated the violent overthrow of the government should be denied the use of school property. It also gave school boards discretion to require anyone seeking to use school buildings to file affidavits of loyalty. The measure originated in the Fact-Finding Committee on Un-American Activities, a joint committee founded in 1941 to investigate subversive activities and chaired for practically the whole of the 1940s by Los Angeles Senator Jack Tenney (the committee was known popularly as the Tenney Committee). When the San Diego Civil Liberties Committee applied to use a junior high school auditorium for a meeting but was denied access on the ground that the applicants refused to sign an oath of nonaffiliation with groups advocating the violent overthrow of the government, it brought a mandamus action in the high court to compel the school board to let it use the building without condition. Drawing on recent U.S. Supreme Court precedent, Justice Traynor, writing for the majority, had little difficulty in concluding that the amendment to the Civic Center Act violated the U.S. Constitution.

In a series of decisions handed down in the late 1930s and war years, the United States Supreme Court had elevated the freedoms of speech and assembly to a preferred position in the pantheon of constitutional rights and substantially limited the circumstances under which states could interfere with their exercise. Under these decisions the state could only prohibit or punish speech if it threatened to bring about the imminent occurrence of a very serious substantive evil (a reformulation, it appears, of Justice Holmes' old "clear and present danger" test, a test that had theretofore never received the court's unqualified endorsement, with a sharpened emphasis on the concept of the imminence of the danger). As Traynor (plausibly) read these opinions, advocacy of the overthrow of the government by force, by itself, did not meet the standard. If the state could not prohibit groups from using school buildings merely because they advocated revolutionary doctrines, it followed a fortiori that it could not require groups to provide affidavits that they did not advocate revolutionary doctrines as a condition of using them.

As noted, Traynor's conclusions owed much to recent U.S. Supreme Court precedent, but Traynor pushed this precedent to the limit and added his own embellishments. The opinion contains some of the most expansive
language to be found in the California court’s history on the value of free speech and on the dangers of governmental censorship. Altogether it probably represents the high watermark of free speech jurisprudence in the Gibson era.  

By the time the Gibson court confronted its next great set of civil liberties issues, the doctrinal climate had changed substantially.

The California legislature’s Tenney Committee, source of the legislation struck down in Danskin, was responsible for setting in motion those events that led to California’s great loyalty oath controversy. In early 1949 it, as part of a comprehensive program of “antisubversive” legislation, proposed a constitutional amendment to take from the University of California Board of Regents and vest in the legislature full power to evaluate the loyalty of university employees. To head off this development, the regents a few months later adopted their own loyalty oath for U.C. employees and in April 1950 made its signing a condition of employment for the 1950-51 academic year. Thirty-one faculty members, among them the very distinguished psychologist, Edward C. Tolman, refused to sign and were dismissed from the faculty. Some of these retained the eminent San Francisco attorney and later federal judge, Stanley Weigel, to represent them, and on August 31 he filed a mandamus action in their behalf in the Third District Court of Appeals.

A few weeks later Governor Earl Warren made a surprising move that complicated the whole picture. Warren had opposed the regents’ loyalty oath, arguing that it was both unnecessary and ineffectual (a Communist would take it and laugh at it, he said) and as a member of the board had voted against its imposition. But on September 21, for reasons that are not clear, he asked the legislature to pass a bill requiring all state employees to sign an oath declaring that they did not belong to any organization advocating the forcible overthrow of the government and would not join any such organization during their employment. The legislature quickly did this, adding to Warren’s proposed language a disclaimer of membership in such organizations during the five years previous to employment. The measure became known as the Levering Act, after its sponsor in the state assembly.

The Regents of the University of California, after some initial reluctance, decided that the Levering Act oath applied to U.C. employees and that they should have to sign it in addition to the regents’ own oath. With the exception of a mere handful of employees everyone did. One of the handful was Russell Fraser, an instructor, who, interestingly, had
signed the Regents' oath. He was discharged from his position and soon thereafter filed a mandamus action challenging his dismissal in the supreme court. A faculty member employed by the state college system, Leonard Pockman, similarly refused to take the Levering oath, and when the university stopped his paychecks, likewise brought a mandamus action against his university in the supreme court.

In May 1951, the District Court of Appeals ruled in favor of Tolman and his U.C. colleagues. The court, in an opinion written by future Gibson court justice, Paul Peek, held that the regents' oath contravened Section 3, Article XX of the state constitution. That section prescribed an oath for all state officers and went on to say that "no other oath, declaration or test" should be required of them. To Peek the section reflected commitment on the part of California to the principle of freedom of conscience and the belief that no one should be subjected to a test of religious or political beliefs as a condition of holding office or, in this case, public employment. The opinion, replete with quotations from the great free speech opinions of U.S. Supreme Court justices Holmes, Hughes, and Jackson, is a rather remarkable one for the times. It had, however, the briefest of lives. No sooner had it come down when the Supreme Court took up review on its own motion, thus consigning Justice Peek's views to legal oblivion. With the grant of review in the Tolman case, the court now had three loyalty oath cases to decide. The decision in all three came down on the same day, October 17, 1952.

The California loyalty oath cases raised major issues under the First Amendment, but both the political and the constitutional climate on questions of free speech and association had changed markedly since the time the court confronted them in Danskin. As is well known, the years following World War II were years of rising anxiety about the threats, real and imagined, posed by Soviet Russia abroad and communist subversion within the United States. Popular opinion grew increasingly suspicious of political heterodoxy, and this in turn led to legislation at the national and state levels designed to enforce political conformity. California's loyalty oaths are a case in point. It appears that the United States Supreme Court was itself affected by these trends. Beginning about 1950 the high tribunal began to retrench substantially on the expansive view of the First Amendment it had sketched out in its early 1940s decisions—the opinions Justice Traynor drew on in Danskin. In 1951, for example, it affirmed the conviction of leaders of the U.S. Communist Party essentially for the crime of
being party leaders. In 1952, it upheld a New York law making any individual belonging to a list of subversive organizations maintained by the state *prima facie* ineligible for employment in the public schools. More to the point in three decisions rendered in 1950 and 1951, it upheld the validity of loyalty oaths, one imposed by the city of Los Angeles on its employees. It was one of the low points in the history of civil liberties in America.

Given the precedents just mentioned, it is not surprising that the Gibson court gave very short shrift to the First Amendment claims advanced in the loyalty oath cases. In *Tolman v. Underhill*, the case involving the University of California faculty, it sidestepped them completely, finding rather that the legislature, by enacting the Levering Act, had occupied the field on the subject of loyalty oaths for state employees, leaving no room for supplementary legislation by any other governmental entity, including the regents. Under this principle, the dismissed U.C. faculty members were to be reinstated but on the condition that they take the oath prescribed by the Levering Act, an act whose validity it affirmed in *Pockman v. Leonard*. The recent decisions of the U.S. Supreme Court, it held in *Pockman*, were dispositive of Professor Pockman’s First Amendment claims. There was left the state constitutional argument. But, unlike the DCA, it was unwilling to read Article XX of the state constitution as affording him any independent protection. It found that the disclaimer of disloyalty prescribed by the Levering Act was but the flip side of the affirmation of loyalty prescribed by the constitution and did not substantially or materially add to it.

Chief Justice Gibson wrote the opinions in both *Tolman* and *Pockman* and had the concurrence of all justices except Jesse Carter. Carter, who himself adamantly refused to take the Levering oath, explained his opposition in the latter case. The Levering oath was, he thought, the product of the “hysteria which has pervaded this country and particularly this state during the past five or six years.” In including a disclaimer of past membership in subversive organizations he thought it clearly did materially add to the constitutional oath and as such was proscribed.

**BUSINESS REGULATION**

If the Gibson court was moving in phase with the U.S. Supreme Court on questions of civil liberties, it was not quite doing the same thing on
questions of business regulation. In the late 1940s the U.S. Supreme Court, capping a process that had begun a decade earlier, handed down a series of decisions that seemed to signal the total abandonment of constitutional scrutiny of ordinary business regulation. As the court put it in a famous 1952 case, it did not wish to sit as a “superlegislature,” weighing the wisdom or fairness of ordinary economic regulation. To be sure there were limits to what legislatures could do. Legislation had to rest on a rational basis, but, in practice, it became clear from the court’s decisions, almost any basis would allow economic or business regulation to pass constitutional muster. The limits of its tolerance were made clearest, perhaps, in the 1947 case of Kotch v. Board of River Pilot Commissioners where it rejected a challenge on due process grounds to a Louisiana law whose effect was to reserve the profession of river pilot to the friends and relatives of existing pilots. A majority of the Gibson court was unwilling to similarly abandon constitutional oversight of economic regulation, especially if the regulation in question seemed to smack of economic favoritism. Two opinions authored by Justice Shenk are emblematic.

In Accounting Corp. v. State Board of Accountancy, decided in 1949, Shenk, with the support of all his colleagues, struck down a provision of the Business and Professions Code, which barred all corporations from the practice of public accountancy unless they had been in business for the three years prior to the legislation’s effective date. The measure, he ruled, violated the federal Equal Protection Clause and provisions of the state constitution declaring that all laws should be of a general nature and barring the granting of special privileges. The legislature, in the course of regulating entry into a profession or occupation, could differentiate between individuals based on previous experience (exempting some, for example, from new examination requirements), but it could not differentiate between corporations based solely on years of corporate existence. “Forbearance by the courts from hasty invalidation of legislation is imperative,” Shenk wrote. But he went on: “[A] statute which permits some corporations to continue operations as public accountants while denying others that privilege where no reasonable grounds exist for such favoritism, denies equal protection to the excluded corporations and grants unlawful special privileges to the favored.”

In State Board v. Thrift-D-Lux Cleaners, decided four years later, the question before the court was the validity of a 1945 law regulating the dry
cleaning industry. The law, a rather unusual example of state-sanctioned price fixing, empowered a state board, consisting mainly of the existing owners of dry cleaning establishments, to set mandatory minimum prices for dry cleaning in an area when 75 percent of the area's shops requested it. The board brought proceedings against the defendant for charging 69 cents for cleaning and pressing a man's suit instead of one dollar, which had been established as the mandatory minimum for the Los Angeles area. The trial court sustained the defendant's demurrer and was affirmed on appeal. Justice Shenk, but now with the support of only a bare majority of his colleagues, ruled that the statute violated the Due Process Clauses of the state and federal constitutions. He conceded that recent decisions of the U.S. Supreme Court gave the state wide berth to regulate business practices, including the prices businesses charged, but argued that even the liberalized standard required that legislation be in furtherance of the general welfare. Fixing minimum prices for dry cleaning, he found, bore no relation to promoting the public, health, safety, or welfare (as opposed to the welfare of some dry cleaning businesses) and constituted "an unnecessary and unreasonable restriction on the pursuit of private and useful business activities." The statute was infirm on other grounds as well, he ruled. It constituted an unreasonable delegation of legislative authority to private persons. Dry cleaning shops were being delegated the legal power to fix prices for services with inadequate guides or standards for the exercise of that power. Justice Traynor, joined by Gibson and Carter, thought Shenk was misreading recent U.S. Supreme Court precedent which, he argued, essentially immunized the dry cleaning law from due process scrutiny. Reminding his colleagues of Holmes' words in *Lochner v. New York*, he accused the majority of foisting their economic and moral beliefs on the public. Judges, he said, were no better qualified than legislators to decide what economic and social policies the state should adopt.

Traynor's reading of federal constitutional doctrine (at least on the question of the permissible range of economic legislation) was almost certainly more accurate than Shenk's, but Shenk's opinion rested on state as well as federal constitutional grounds and probably for this reason was not appealed and is still good law. It would be exaggeration to say that aversion for legislation restrictive or potentially restrictive of competition, embodied in decisions like *Thrift-D-Lux* and *Accountancy Corporation* was a main theme in Gibson court jurisprudence, but it was a point of view
that reared its head with some regularity during the Gibson period. (We saw it earlier, in the Laisne and Dare cases.)

Even Traynor, the justice perhaps least sympathetic to close judicial scrutiny of economic regulation, shared it to some extent. This is clear from his concurring vote in Accountancy Corporation and from an opinion he wrote for the court toward the end of the Gibson period. In Blumenthal v. Board of Medical Examiners, a 1962 case, Traynor overturned a state law imposing on those wishing to become dispensing opticians a requirement that they have apprenticed with a licensed dispensing optician for at least five years. The law, he thought, in opening only one avenue of entry into the profession, contravened the federal and state equal protection requirements that regulatory legislation “avoid arbitrary and unreasonable classifications.” It was also bad because it conferred on existing opticians “the unlimited and unguided power to exclude from their profession any and all persons.”

REFORM OF THE INFERIOR COURTS

At the end of the 1940s Chief Justice Gibson turned his attention and considerable energy again to the subject of judicial administration. His concern now was with California’s lower trial court system. The major trial courts in California were the superior courts. Each county was allocated one of these, with the number of judges assigned to each varying depending on population. There were certain anomalies in the superior court system. Because each county was entitled to at least one judge there were a few rural counties where the superior court did very little business. (In Alpine County, for example, in one five-year period the Superior Court tried but eleven cases.) But these anomalies were as nothing compared to those that beset the lower state courts.

The system of trial courts below the superior courts was, to put it mildly, complex. There were at the time 768 inferior courts scattered over the state, falling into seven different categories. There were two different types of municipal court, one constitutionally based, the other not; township justices’ courts, again of two types (“townships” were geographical subdivisions within a county created by county ordinance); two different kinds of city courts; and finally tribunals known as police courts. Some municipalities had several different inferior courts with concurrent or overlapping jurisdiction operating within their borders. Stockton, for example, had a city court, a police court, and two township justices’ courts.
Many of the courts operated part-time. Many were staffed by laypersons. Inefficiency, waste of resources, confusion, and a fair measure of incompetency marked the system. It was, as Gibson put it bluntly in 1949, "a damn stupid arrangement."\(^{190}\)

Most reasonable people had recognized for a long time that the lower trial court system was in need of reform, and over the years various organizations had offered plans for reform, but none had made any headway because of opposition principally, though not exclusively, from sitting inferior court judges and their staffs. In 1946 the State Bar, after considerable study, proposed a comprehensive and sensible plan for the reorganization of the lower courts, but it encountered such opposition when announced that it was not even introduced in the legislature. The following year, however, the state legislature, wishing perhaps to capitalize on the interest generated by the State Bar proposals, directed the Judicial Council to undertake a thorough study of the organization and functioning of the inferior court system and to make recommendations for its improvement. Gibson seized the opportunity. Under his direction the council proceeded over the next year and a half not only to conduct the study but to lay the political groundwork for its implementation.\(^ {191}\) Special efforts were made to involve the lower court bench in the enterprise from beginning to end. All lower court judges received detailed questionnaires soliciting their input. Over two hundred were personally interviewed. When the broad outlines of a reform plan were ready they were submitted to these judges for review and comment. Perhaps, most important, when a detailed, final plan of court reorganization was ready, it had in it grandfathering provisions generous to incumbents. When the Judicial Council submitted its recommendations in February 1949, it was able to report that they had the overwhelming endorsement of all interested parties, including the lower court bench.\(^{192}\)

Gibson’s plan called for a greatly simplified lower court structure. Henceforth there would be only two types of inferior courts: municipal courts, serving judicial districts with populations in excess of 40,000, and justice courts, serving districts with lesser populations. The drawing of district boundaries and details of court jurisdiction were to be left to the legislature. Provisions designed to improve the competency of the inferior bench were included. Five years experience in law practice were to be necessary for appointment to the municipal courts, bar admission, or successful passage of a special exam for appointment to the justice courts.
Incumbent judges were to have priority of appointment to the newly created courts, and incumbents wishing appointment to the new justice courts were to be exempt from the examination requirement.  

Both passage of a constitutional amendment and enactment of implementing legislation were necessary to carry out the Judicial Council plan, but Gibson lobbied the plan hard and both proved easy of accomplishment. A few months after the Judicial Council submitted its report, the legislature enacted the necessary implementing legislation. It was to be effective upon passage of a constitutional amendment, and in November 1950, the voters by a wide margin approved the necessary amendment to the constitution. The new plan went into effect on January 1, 1952.

Of all the reforms in judicial administration engineered by Gibson during his tenure as chief, the reorganization of the inferior courts system was doubtless his most important. Indeed it was described by one chairman of the California Conference of Judges as “probably the most important reform that has taken place in the Judicial Department of our State since its beginning.”

II. THE DECADE OF THE ’50s

If the early 1950s were marked by major developments in the law of civil rights, civil liberties, and torts, taking the decade as a whole it could probably be said that the dominant item on the court’s agenda was criminal law and jurisprudence.

The Emergence of California’s Exclusionary Rule

In February 1954, Justice Jesse Carter delivered an address to the Lawyers Club of San Francisco on the subject of recent trends in supreme court decision making. Never one to mince words, he characterized these trends as “decidedly reactionary.” In workers compensation cases, he argued, the court was leaning too much in the direction of employers and depriving workers of benefits they were entitled to. In negligence cases, he maintained, the court by promulgating rules concerning what constituted negligence as a matter of law, was depriving litigants of the right to trial by jury. Some of his sharpest rhetoric he reserved for the line of California court decisions refusing to exclude from criminal trials evidence obtained by illegal means. These decisions, he maintained, “nullified the Fourth
Amendment to the Constitution of the United States” (and the cognate provision of the state constitution, Article I, Section 19) and effectively abrogated the right of privacy in California. “With these holdings,” he remarked, “I have always been in disagreement.”

In the early 1950s California like most other states admitted into criminal prosecutions evidence that had been obtained in violation of the Fourth Amendment guarantee against unreasonable searches and seizures or in violation of other constitutional guarantees. The United States Supreme Court had ruled as early as 1914 in *Weeks v. United States* that such evidence could not be used in federal criminal prosecutions. Otherwise, it said, the Fourth Amendment would be deprived of its force and effect. Thirty-two years later, in the case of *Wolf v. Colorado*, the court ruled that Fourth Amendment rights were binding on the states as a matter of Fourteenth Amendment Due Process and that unreasonable searches and seizures by state officials violated these rights. Somewhat anomalously, however, it refused to make the *Weeks* rule barring the use of illegally obtained evidence binding on the states as well. The states rather were left free to determine for themselves how best to effectuate the message of *Wolf*.

The leading California case on the subject of illegally obtained evidence was *People v. Gonzales*, a 1942 opinion written by Justice Traynor. There the appellants argued that the Fourth Amendment prohibition on unreasonable searches and seizures was part of the concept of ordered liberty that the Due Process Clause of the Fourteenth Amendment embodied (the position ultimately endorsed by the U.S. Supreme Court in *Wolf*) and that in receiving unlawfully obtained evidence the court had denied them their due process rights. Traynor rejected this argument. Due process in criminal procedure meant the right to a fair and impartial trial, but the use of unlawfully obtained evidence did not necessarily taint the fairness or impartiality of criminal proceedings. The following year the court, in an opinion by Justice Edmonds, reaffirmed the rule of nonexclusion. Justice Carter wrote vigorous dissents in both cases, being joined in the latter case by Justice Schauer, who had recently taken his seat on the bench. Extremely aggressive police practices in Los Angeles County caused the Gibson court to revisit the rule of nonexclusion once again in the early 1950s.

*People v. Antonio Rochin*, perhaps the most famous case not to be decided by the Gibson court, arose out of a conviction for heroin posses-
Charles J. McClain

sion. The evidence that had been used to convict the defendant had been obtained, to put it mildly, by singular means. Los Angeles County sheriff’s deputies, acting without a search warrant, had broken into the defendant’s apartment, where they found him seated at a table containing two capsules on it. When the defendant put these in his mouth, they grabbed him and tried unsuccessfully to cause him to spit them out. They then took him to a local hospital, had him strapped to an operating table, and had his stomach pumped. The capsules were found to contain heroin. On appeal to the Second District Court of Appeal he maintained that the evidence used against him had been obtained in violation of his constitutional rights and should not have been received at trial, but that tribunal, citing the doctrine of nonexclusion laid down in Gonzales, affirmed the conviction. A petition for hearing in the California Supreme Court invited that tribunal to reexamine the Gonzales rule, but it denied the petition—over separate dissents by Carter and Schauer, Schauer in his comparing the methods used by the Los Angeles deputies to the use of physical torture. Fortunately the matter didn’t end there. The United States Supreme Court granted certiorari and in an opinion by Justice Frankfurter reversed the conviction, ruling that it had been obtained by methods that shocked the conscience and that as such were violative of the Due Process Clause of the Fourteenth Amendment.

The methods used to obtain evidence in People v. Irvine were not as offensive to the sense of decency as those used in Rochin though they were egregious enough. While the defendant, a man suspected of bookmaking activities, was away from home Los Angeles police officers had a key to his home made, entered the premises (again without a warrant), and there installed a concealed microphone. Wires were strung from it through a hole they drilled in his roof to a listening device in a nearby garage. At his trial officers were allowed to testify to incriminating conversations they overheard. After conviction Irvine appealed his conviction to the District Court of Appeal, which affirmed it. As in Rochin, the California Supreme Court denied a petition for a hearing, Justices Schauer and Carter again opining that it should be granted. As in Rochin, the matter went up on certiorari to the United States Supreme Court, but this time Justice Jackson affirmed the conviction. He expressed outrage at the conduct of the Los Angeles police officers, even directed that the case record be forwarded to the attorney general for possible prosecution under U.S. civil rights laws, but did not think it would be warranted to overrule Wolf and make the

53
exclusionary rule binding on the states. For one thing he was not entirely sure that the federal exclusionary rule was having its desired effect. The petitioner argued that the conduct of the police was as shocking as that in *Rochin* and that the evidence should have been excluded on due process grounds but Jackson thought *Rochin* was clearly distinguishable, noting that a crucial element present there, physical coercion, was missing here. Discretion as to how to enforce the prohibition against unreasonable searches and seizures was, it seemed, still to be left to the states unless police conduct reached a *Rochin*-like level of excess. Notwithstanding the refusal to overrule *Wolf*, the *Irvine* decision, taken as a whole, was subject to being read as a warning shot across the bow of the states. Three justices were prepared to rule the evidence gathered inadmissible. One justice in the majority, Justice Clark, wrote that he would have come down the other way on the issue of exclusion had he been on the court when *Wolf* was decided. Even in Justice Jackson’s majority opinion one could detect a tone of uneasiness with the status quo, and he invited the states “further to reconsider their evidentiary rules” in cases of this sort. *Irvine v. California* was decided by the U.S. Supreme Court in 1954. The following year the California Supreme Court did just what Justice Jackson suggested and reached a radically new conclusion.

*People v. Cahan,* like *Irvine,* arose out of the Los Angeles police department’s crusade against illegal gambling. It too involved the trespassory entry into a home of an alleged bookmaker and the installation of a listening device although here the entry and installation was done with the approval of the chief of police acting on the purported authority of a statute. Certain physical evidence was also collected after warrantless forcible entries onto the defendant’s premises. The evidence gathered was introduced in court over the defendant’s objections and led to a conviction and an order of probation, and this was appealed to the California high court. By a 4-3 vote the court reversed the conviction and its own longstanding nonexclusionary rule.

The chief justice and Justice Traynor had changed their minds, and Justice Traynor, who wrote for the majority, explained why. The evidence against the defendant had been seized by police officers in “flagrant violation” of one of the most important rights secured to individuals by the United States and California constitutions. California, like most states, had long adhered to the rule that evidence seized in violation of the constitution could still be admitted in court. And Traynor fully and fairly
set forth the good arguments that existed in support of this position: the job of courts was to discover truth, and evidence illegally seized was ordinarily just as true and reliable as legally gathered evidence; exclusion of evidence neither punished the perpetrator nor offered recompense to the victim of the illegal search; there was no convincing empirical evidence that the exclusionary rule worked to deter illegal searches. All true, Traynor agreed, but it was clear that something needed to be done if the Fourth Amendment was not to become a nullity. Case after case was appearing in the appellate reports (and these he suggested were just the tip of the iceberg) detailing instances of intrusive invasions of privacy by police officers. Remedies other than exclusion, to the extent they existed—and Traynor expressed doubt whether they really did exist—had completely failed to deter this kind of conduct. And courts, by having to admit the evidence these officers illegally seized, were being forced to condone their lawlessness. The court was compelled to try something different, and that something, as his brethren Carter and Schauer had long argued, was the adoption of a rule barring the use of illegally obtained evidence.

The rule that the court was adopting, Traynor wrote, was “a judicially created rule of evidence,” adopted not because mandated by the Constitution either of the United States or of the state but rather out of respect for the court’s own dignity and integrity. Its purpose was modest. It would not put an end to illegal police practices, but there was reason to hope it would discourage them. It was to be seen, too, as a statement of general principle, opening the door “to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.” These rules, Traynor stressed, would be developed by the California court according to its own lights, with no obligation to follow federal cases if they were found, as was widely believed, to have introduced “needless refinements and distinctions” into criminal law enforcement.

People v. Cahan is one of Traynor’s most thoughtful opinions and one of his most persuasive. It displays its measure of outrage at police misconduct, but it is basically moderate in tone and proceeds in careful, systematic, nonhistrionic fashion to its conclusion. Although that conclusion represented a radical change of direction for California law, the impression one is left with from reading the opinion is not of a court embarking on some rash or wilful experiment in judicial activism but rather
of a court forced to do what it was doing by the sheer weight of experience. Like many of Traynor's opinions it owes little to the briefs that were filed in the case.

_Cahan_ was not the first state court opinion to announce the adoption of an exclusionary rule. A number of states had adopted some version of the rule beforehand, but Traynor's opinion was perhaps the best reasoned argument in support of adoption that had been written up to that point. The U.S. Supreme Court singled it out for special attention in 1961 in _Mapp v. Ohio_ when, in reversing its own longstanding position, it ruled that the exclusionary rule was binding on the states.

Justice Traynor spoke in _Cahan_ of the need to develop workable guidelines in the area of search and seizure that would protect privacy without unduly impeding law enforcement, and the Gibson court quickly set about doing just that, with Traynor himself taking the lead role. In the year following _Cahan_ it handed down 21 search and seizure opinions (in the immediate aftermath of the decision it transferred to itself 20 search and seizure cases pending in the District Courts of Appeal), with Justice Traynor writing 18 of these. Over the course of the next six years, up to time of the U.S. Supreme Court decision in _Mapp_ that is to say, it would decide 45 search and seizure cases, with Justice Traynor writing the opinion in 23. Writing in 1965, Justice Walter Schaefer of the Illinois Supreme Court characterized these opinions as the most valuable body of search and seizure law then available.

The cases covered a very wide range of situations, but running through all of them, as Gordon Van Kessell has pointed out, was a "quest for clear practical and balanced search and seizure standards." The object was not to spin elaborate doctrinal webs but rather to set forth guidelines that were protective of privacy and that at the same time could be easily understood and, given the exigencies of criminal law enforcement, easily followed by the police. Technicality and needless complexity were to be eschewed. Several opinions, all written by Justice Traynor within a year of _Cahan_, may serve to convey the flavor of this approach.

In _People v. Simon_ police stopped two persons, one of whom appeared to be underage and in possession of an alcoholic beverage. Prior to making the arrest they conducted a search of one of them and found a marijuana cigarette. Rejecting an argument that the evidence should have been suppressed, the court found the search justified as incident to a lawful arrest though conducted prior to it. This ran contrary to the weight of
authority in the federal courts. In *People v. Martin*, the court allowed a defendant to have evidence suppressed that had been seized in the course of an illegal search of another person. Under the rule prevailing in the federal courts the defendant could only have evidence suppressed if his own property or privacy rights had been invaded. To Traynor, making the question of suppression turn on tort and property concepts defeated the purpose of the exclusionary rule, which was to deter improper police conduct.

In *People v. Badillo* the court made clear that it would have low tolerance for warrantless police entries onto private premises. Here narcotics agents, acting on little more than the strong suspicion that defendant was in possession of heroin, broke into his home causing him to flee and throw a package of what proved to be heroin into the arms of a waiting agent. The evidence was found to be inadmissible. But in *People v. Maddox*, another case involving forcible entry into a home, decided a few days afterward, the court reached a different result. *Maddox* involved a prosecution for the sale of heroin. Officers were told by a witness that he had just purchased heroin in defendant’s home, a known venue for the sale of narcotics. One of them went to the defendant’s door, knocked on it, and upon hearing what sounded like retreating footsteps, kicked it in and entered the house, where he soon found in plain view narcotics paraphernalia. Under a provision of the California Penal Code, officers, before breaking into a house to make an arrest, were supposed to first announce their presence and explain why they wanted entrance. The court ruled that the evidence was admissible even though the officers hadn’t done this. The purpose of the exclusionary rule and of the code provision was to protect the privacy of the home from unreasonable invasion by police. The officers had here acted reasonably inasmuch as they could with justification have believed that to hesitate would have endangered their safety or led to the destruction of evidence. The U.S. Supreme Court would eventually reach the same conclusion.

*Mapp v. United States* introduced a new element into the search and seizure picture and portended to some a radically diminished state court role in this area of law, but even after *Mapp* Traynor hoped that the United States Supreme Court would allow the states some leeway to develop their own detailed search and seizure rules. This was not to be. In the wake of *Mapp*, again to quote Professor Van Kessell, the United States Supreme Court decided in effect to preempt the field and to “accept the burden of
developing detailed and pervasive Fourth Amendment standards applicable to all state criminal prosecutions.\textsuperscript{224} The states have been living with the legacy of that decision ever since.

**CRIMINAL LAW—DIMINISHED CAPACITY**

Perhaps the most interesting and most controversial developments in criminal jurisprudence during the Gibson years was the court’s creation of the doctrine that later came to be called “diminished capacity,” the product of two decisions rendered a decade apart, in 1949 and 1959. Ventures into the thorny field of mental illness and criminal responsibility, whether undertaken by legislatures or by courts, are notoriously fraught with peril, and the Gibson court’s venture proved no exception.

California, like many other states, has historically allowed criminal defendants to enter pleas both of not guilty and not guilty by reason of insanity in response to a charge. These pleas put both the defendant’s guilt and his mental state in issue. In 1927, the legislature in an effort to keep psychiatric or psychological testimony (viewed with some distrust by the legislators) from distracting the jury in its determination of the accused’s guilt, divided trial in such cases into two phases, a guilt phase and an insanity phase. During the guilt phase of the trial evidence bearing on the question of insanity was to be excluded. It proved not so easy in practice, however, to keep the two phases so separate and distinct. It is a bedrock principle of criminal law that every crime has a physical and a mental part. Proof of guilt depends not only on a showing that the defendant committed an act but that he committed the act with some sort of bad or criminal intent (\textit{mens rea}, guilty mind, is the legal term). Trial judges found themselves confronted with the question whether to admit during the guilt phase of the trial evidence bearing on the defendant’s possession or lack of criminal intent that might also raise questions about his sanity.\textsuperscript{225} At times they would admit the evidence, at other times they wouldn’t. In the case of \textit{People v. Wells}\textsuperscript{226} the trial judge decided to exclude it and since the defendant was convicted of a capital offense and sentenced to death, there was an automatic appeal to the supreme court. The court took the occasion to try to clarify the question of the correct approach to bifurcated trials.

Wesley Robert Wells, a Folsom Prison inmate serving an indeterminate sentence of five years to life for possessing weapons while in prison, was accused of assaulting a prison guard by means likely to produce great
bodily injury and "with malice aforethought." Under section 4500 of the Penal Code conviction of this offense carried a mandatory death sentence. He pled not guilty and not guilty by reason of insanity. During the guilt phase of the trial his court-appointed attorneys sought to introduce the testimony of prison psychiatrists that they had observed Wells just before the alleged assault and found him to be in a state of extreme nervous tension, that this made him unusually sensitive to external stimuli and fearful for his safety and that he might have believed, even against the facts, that the prison guard was about to assault him at the time he struck the guard. If this were true, counsel argued, it would negate a finding of malice aforethought required for conviction under the law. The offer of proof was rejected by the trial judge on the ground that it bore on the question of sanity, and this rejection formed one of the bases of Wells' appeal. (For reasons that are unclear Wells withdrew his plea of not guilty by reason of insanity at the conclusion of the guilt phase of the trial.)

The court, in an opinion by Justice Schauer, ruled that it was error to exclude Wells' evidence. When a defendant was accused of a criminal offense, the state bore the burden of proving all elements of the crime charged, including the mental element, and the defendant had the right to contest every element. To deny him that right, Schauer suggested, might violate his rights under the Fourteenth Amendment Due Process Clause. The psychiatric testimony Wells wished to present, while not available to prove insanity (since that was reserved for the second phase of the trial) nor to prove self-defense (since that was limited to acts actually necessary or that would appear necessary to a reasonable person to protect one's safety) was admissible to show the absence of malice aforethought, the mental element that made the offense with which Wells was charged a particularly aggravated one. It was the first instance in which the supreme court had permitted the introduction of any evidence of mental abnormality in the guilt phase of a criminal trial.

Having announced the new doctrine, Schauer then proceeded to deliver a lengthy discourse on the handling of Wells-type evidence in similar criminal cases, clearly intended for the benefit of trial courts and trial counsel generally. First, the court made clear that the rules were to apply only to classes of crime where proof of a specific mental state was required for conviction. Murder was one such crime (like Wells' alleged crime it required malice aforethought), burglary another (intent to commit a felony at the time of the trespassory entry). In all such cases evidence of a
defendant’s mental state tending to negate the existence of that mental element was to be admissible. On the other hand, Schauer stressed, the conclusive presumption of sanity at the guilt phase of the trial was to remain in place and evidence tending to prove legal insanity was to continue to be inadmissible during this trial phase. How to distinguish between the two types of evidence during the guilt phase? Schauer offered this explanation: evidence tending to show that the defendant, in committing the act with which he was charged, did not possess the specific mental state was to be admitted, evidence tending to show that he could not possess said state was not to be admitted for that went to the issue of sanity. The case at bar provided an example of the principle in operation, Schauer said, because here the offer of proof was not to show that the defendant lacked the mental capacity to have malice aforethought but rather that because of nervous tension he didn’t have malice aforethought at the time he struck out at the guard.230 Having said all of the above, the court majority then went on to affirm Wells’ conviction, holding that the trial court error was harmless since there was plenty of independent evidence of Wells’ malice toward his victim.231

The idea that a disturbed mental state could defeat the special mental element required for conviction of crime had been bandied about in the academic literature for some time. Two years before the Wells decision Henry Weihofen and Winfred Overholser had published a widely noticed article in the Yale Law Journal arguing that a mental disorder might at times not rise to the level of insanity and justify an acquittal but might be enough to negate a finding of premeditation and deliberation in a first degree murder charge and reduce the offense from first to second degree.232 The courts of several states had given some sort of endorsement to the idea.233 But Wells was the first instance in which a high court of a major state had not only endorsed the idea but provided so extensive a brief in justification of it.

The Wells decision cannot be said to have stirred huge interest in the legal community or to have had much immediate impact on the course of criminal trials. The case was avidly seized on, however, by certain members of the mental health community who saw it as having revolutionary potential. Chief among these was the psychiatrist Dr. Bernard Diamond, a man who would later go on to become one of the leading figures in the field of law and psychiatry. Diamond viewed Wells as in the short-term opening the way to the much more dynamic use of psychiatric
testimony in criminal trials and in the longer term as the entering wedge for the overthrow of the whole of the existing legal doctrine of mental illness and criminal responsibility. During the 1950s he and others were on the lookout for cases that might be used as vehicles for the further development of the ideas adumbrated by Justice Schauer and his colleagues. They thought they had found such a vehicle in the supreme court case of People v. Gorshen.

Nicholas Gorshen was a longshoreman who was charged with the murder of his foreman. Diamond was called in to examine Gorshen and concluded that the man was suffering from a peculiar mental illness. The illness would cause him to lose consciousness and go into a trance. It would flare up, however, only for a few moments at a time a few times a week and then would subside. At trial Diamond testified that Gorshen had killed the foreman following one of these trances. He had acted with full knowledge of what he was doing but under the compulsive belief that he had to kill the man to avoid sliding further into insanity. He had acted in effect as a kind of automaton. It followed that he did not have the mens rea for murder and could be convicted at most of manslaughter. He was convicted in a bench trial of second degree murder and appealed the judgment to the supreme court.

Diamond and several other psychiatrists worked with counsel in preparation of the appeal and several submitted an amicus brief in Gorshen’s behalf. What they got out of their efforts was in truth not a great deal. Schauer, writing for the majority, affirmed the second-degree murder conviction, rejecting the contention that the trial judge had by his own words indicated that he could find no malice aforethought. The court did confirm the rule of Wells and the validity of accepting Diamond’s testimony during the guilt phase but went little beyond that. It certainly broke no new doctrinal ground.

Many in the mental health community saw the Gorshen decision as vindication for their position, however, and Diamond publicly looked forward to what he called “the next step after Gorshen,” the extension of “the principle of limited or diminished responsibility” to all classes of crime. That was not destined to happen. There was certainly more use of psychiatric testimony in the guilt phases of criminal trials after Gorshen. In subsequent years the court would modestly extend the Wells-Gorshen rule to encompass other crimes where specific intent was an element of the offense. But even as this was happening a counter trend of reaction to
Wells-Gorshen was beginning to set in. As early as 1961 two very prominent criminal law commentators were calling Wells-Gorshen a failure. The admission of evidence of the defendant’s mental state in the guilt phase of the trial, they argued, was undermining the very purpose of the bifurcated trial, which was to keep from the jury during the first phase distracting, sympathy-provoking testimony and allow it to concentrate on the question of guilt. (In 1956 a District Court of Appeals had ruled that lay as well as psychiatric testimony concerning the defendant’s mental state was admissible during the guilt phase.) Disillusionment gradually spread to the public at large. Eventually, in 1981, the legislature abolished the defense of diminished capacity, and the electorate ratified that choice with an initiative measure it passed the following year. But the full story of these developments lies well outside the scope of this chapter.

CRIMINAL LAW—CAUSE CELEBRE

As the Wells case reveals, the penal law of California in force during the Gibson years had its Draconian side. Wells was sentenced to death essentially for the crime of aggravated assault, and his conviction and death sentence were affirmed by the supreme court. Certain justices thought evidence concerning Wells’ mental state had been improperly excluded from his trial, but none of the justices expressed any reservation about the law under which he had been convicted. Nor were any reservations expressed in any of the other cases that the Gibson court decided involving the convictions of prisoners under Penal Code 4500 for nonlethal assaults.

Another law authorizing capital punishment for a crime not involving the taking of human life was Penal Code Section 209, California’s kidnapping statute. This statute, as the Gibson court originally had to apply it, encompassed not only traditional acts of kidnapping (abduction for ransom or reward) but any seizure or asportation or even detention of a victim for purposes of robbery if the victim suffered bodily harm of any sort. In 1951, the law was amended to require that the victim be physically moved, but even so its potential coverage was extremely broad. In several instances the Gibson court had to review death sentences meted out under this law. The most interesting of these undoubtedly was the case of Caryl Chessman.

Chessman was a career criminal and ex-convict who in 1948 was charged with a string of armed robberies and sexual assaults committed in
the Los Angeles area.241 Since there had been both seizure and asportation of the female victims of the assaults by a man who told them “this is a stickup” and since sexual assault qualified as bodily harm, he was charged specifically in these cases with violations of Penal Code Section 209 (kidnapping for robbery with bodily harm). A man of great native intelligence and with a strong streak of cockiness, he refused the aid of counsel and insisted, against the advice of the court, on conducting his own defense. The prosecution was able to present indisputable evidence that Chessman was guilty of some of the robberies with which he was charged and substantial evidence, including victim identification and Chessman’s own confession, that he was guilty of the sex crimes. Chessman, who had a legal adviser in the later stages of the proceedings, conducted a defense that for a layman was impressive, but he made blunders that any criminal lawyer probably would have avoided. After a trial marked by some irregularities the jury found him guilty of 15 armed robberies and of two violations of Section 209 and it fixed his punishment for the latter offenses at death.242

The appellate history of the Chessman case spans more than a decade. During this period of time Chessman filed 11 appellate actions in the supreme court of California, 12 in the inferior federal courts, and 18 in the Supreme Court of the United States. He had the assistance of extremely competent counsel (indeed, some of the best attorneys in the state) in these proceedings, but here too, as at the trial level, he took an active part in the preparation and argument of his case.243 He also pursued his case actively in the court of public opinion, publishing, while on San Quentin’s death row, several books defending himself and attacking capital punishment. He eventually won the attention and support of public figures around the world. It is with his main actions in the supreme court of California, the main venue of his appeals, that we are here concerned.

Since Chessman had been sentenced to death he had an automatic appeal to the state supreme court, but before that could be heard he filed a motion in the high court raising an issue that would ultimately become the principal basis of his appeals in most later proceedings. The court reporter assigned to Chessman’s trial had died before he was able to complete the transcribing of his shorthand notes. This might normally not have been a problem, but this reporter used an outmoded form of shorthand and several competent reporters stated that his notes were virtually untranscribable. Eventually another reporter was found to complete the preparation of the
The California Supreme Court Historical Society

trial transcript. (It would later emerge that this reporter was the prosecutor’s uncle by marriage.) Chessman’s position was that the trial transcript had not been prepared in the method prescribed by law and that consequently there was not an adequate record for the supreme court to review on appeal. He contended he was entitled to a new trial. The court denied his motion, a majority finding that the transcript as prepared was sufficient to permit a fair hearing of Chessman’s appeal on the merits. Justices Carter and Edmonds disagreed, arguing that the transcript, given the circumstances of its preparation, was an approximate and not an exact or complete record of the trial.²⁴⁴

In his appeal on the merits Chessman raised a number of points. He complained about the failure of the trial judge sua sponte to control the conduct of the prosecutor at the trial (Chessman had himself made no complaint about it at the time). He objected to the admission of his confessions, which he said had been obtained by duplicity. He objected to the trial judge’s instructions. He raised several other points as well, including, again, the matter of the trial transcript’s alleged inadequacy. But the court ruled against him on all these points.²⁴⁵ But this was not the last the Gibson court was to hear from Chessman. Far from it.

In July 1954, just a few days before a scheduled execution date, one of Chessman’s attorneys tracked down Justice Carter then on vacation at a remote rural site and presented him with evidence of the relationship between the prosecutor and the substitute reporter who had completed the job of transcribing the original reporter’s notes. He persuaded Carter to issue a stay of execution pending determination of a petition for certiorari then under consideration in the Supreme Court of the United States.²⁴⁶ The United States Supreme Court eventually took up Chessman’s case and ordered that a hearing be held on the matter of the trial transcript’s preparation. Lengthy hearings were held under the auspices of a new trial judge, who found at their conclusion that the transcript reflected the trial adequately enough to serve as the record on appeal.²⁴⁷ The California Supreme Court then took up Chessman’s appeal on the merits for a second time, now on the basis of a resettled transcript.

Chessman made the alleged inadequacy of the “resettlement” proceedings the principal basis of this appeal, but the court had clearly had enough of argument about the now famous transcript and gave it short shrift. Chessman raised again points he had made in his first appeal on the merits,
Charles J. McClain

but he made no headway with the court on these points either. On July 7 it affirmed by unanimous vote his judgment of conviction and sentence of death.248 He was left with an appeal for a commutation of sentence to then Governor Edmund G. (Pat) Brown, a known opponent of capital punishment. Chessman had a clemency hearing before Brown, but Brown was thoroughly put off by the arrogant way in which Chessman conducted himself and by his refusal to express remorse for any of his crimes and refused to grant clemency. Even if he had chosen to do so he would have needed the concurrence of a majority of the supreme court, and a straw vote of the justices had revealed that only three were prepared to support him.249 On May 2, 1960, Caryl Chessman was executed in the gas chamber at San Quentin Prison. Many years later Chief Justice Gibson, reflecting back on the case, said the vote was a mistake.250

III. THE FINAL YEARS OF THE GIBSON COURT

The final five years of Chief Justice Gibson’s tenure were extremely eventful. They saw a large makeover in the court’s membership, the passage of a Gibson-sponsored constitutional amendment affecting the judiciary, and the rendering of several opinions of major significance, one probably the most influential handed down during the Gibson era.

APPOINTMENTS

As was noted earlier, one distinguishing characteristic of the Gibson Court was the stability of its membership over time. The period between 1959 and 1962, however, was one of considerable turnover in personnel, with five different justices joining the tribunal during these three years. Death ended the long careers of Jesse Carter in March 1959 and of Justice Shenk in August. The following year Homer Spence, another justice with long tenure, retired. Democratic Governor Brown appointed, successively, to these vacant seats Raymond Peters, Thomas White, and Maurice Dooling, three District Court of Appeals justices of long tenure. Peters brought the most impressive background of experience to the job. Not only had he been a DCA justice for 20 years at the time of his appointment but also he had served as a pro tem justice of the supreme court on a regular basis during Gibson’s term (almost on a continuous basis during the war years) and had been the supreme court’s chief law secretary during the 1930s.
Justice Peters' would serve for fourteen years on the court and would author many important opinions, several during the period he was an associate justice of the Gibson court.

Justices Dooling and White both resigned their positions in 1962, and Governor Brown nominated Matthew Tobriner and Paul Peek to fill the vacancies left by their departures. Tobriner was then a Court of Appeals justice, having been appointed to that position three years earlier. Before that he had headed a prominent San Francisco union-side labor law firm and had been active in Democratic politics. Peek was a Court of Appeals justice as well, of 20 years experience. He was also the former Democratic speaker of the California Assembly and had served as secretary of state under Governor Culbert Olson. Peek would retire from the court in 1967. Tobriner would go on to serve for 19 years. He had a very broad view of the judicial role and would emerge under later chief justices as perhaps the leading liberal activist justice of the modern era in California. One opinion he authored while on the Gibson court is worthy of special mention for its resonance, in terms of the issues dealt with if not the result reached, with one of the most discussed religious freedom cases of the contemporary United States Supreme Court. In *People v. Woody*, 251 he reversed the conviction of a group of Navajos who had been prosecuted under the Health and Safety Code for possession of peyote. He ruled that since the Navajos were using the peyote in connection with a bona fide religious ceremony and since the state had shown no compelling interest why its law had to be applied in this instance, the conviction violated the Navajos' rights under the First Amendment Free Exercise Clause. 252

It would be wrong to say that there had ever been deep ideological divisions in the Gibson court or sharply defined voting blocs, but it would not be wrong to say that for most of its history the tribunal did have its more liberal and its more conservative wings and that these wings were in a kind of balance with each other. If we look at the eight justices with longest tenure on the court, we can, painting with a broad brush, say that Gibson, Traynor and Carter were the liberals; Shenk and Spence the conservatives. Justices Schauer and Edmonds were less conservative than Shenk and Spence but clearly less activist than the three liberals. McComb, who replaced Edmonds in 1956, was somewhat more conservative than him. The Brown appointments just discussed changed this ideological balance, leaving Schauer and McComb as the only conservatives on the court and
tilting the court more to the liberal and activist side of the spectrum. Several of the late decisions of the Gibson court are explainable in these terms.

FINAL REFORMS IN JUDICIAL ADMINISTRATION

In 1956 Chief Justice Gibson submitted to Governor Goodwin Knight a report on the “Condition of Judicial Administration” in California. In it he pointed with satisfaction to the efforts that had already been made to improve judicial administration in California. But he stressed that much more needed to be done if the state were to cope with the challenges imposed on it by its exploding population and rapid economic growth, and he set forth the elements of a comprehensive program of further reform at all levels of the judiciary. One pressing need, Gibson wrote, was to establish some mechanism for the removal of, as he put it, “the occasional judge temperamentally unfit or unfortunately incapacitated to perform the judicial duties in the proper manner.” (At the time the only methods for removing such a magistrate were the cumbersome and difficult ones of impeachment and judicial recall.) He also commented favorably on the idea of establishing for the California courts something like the federal judicial system’s Administrative Office of the Courts, an office independent of the Judicial Council but under its supervision that could be delegated responsibility for its research program and for the discharge of other administrative tasks.253

Three years later, in 1959, the Judicial Council incorporated Gibson’s proposed reforms, along with one other, in a constitutional amendment for submission to the state electorate at the November 1960 general election. The amendment, a proposed revision of Article VI, the judicial article of the state constitution, expanded the membership of the Judicial Council to include four members of the State Bar and two legislators. It authorized the council to appoint an administrative director of the courts. It finally provided for the creation of a Commission on Judicial Qualifications, consisting of judges, lawyers, and citizens, charged with the responsibility, empowered to hear complaints of judicial malfeasance or misfeasance and to recommend the removal or involuntary retirement of judges (the old Commission on Qualifications, which passed on proposed judicial appointments was to be renamed the Commission on Judicial Appointments). The proposed amendment met with little opposition and passed by a large majority at the general election. In 1962 an Administrative Office
The California Supreme Court Historical Society

of the Courts began to function, with Ralph Kleps as its first director. It became the research and staff arm of the Judicial Council.

Completing the Tort Revolution—Ending Tort Immunities

In 1951, in *Malloy v. Fong*, the Gibson court had abolished the last vestiges of the doctrine of charitable immunity, but other tort immunities remained. One large one was the immunity of governmental entities, known sometimes as sovereign immunity, another was interspousal immunity.

The rule of governmental or sovereign immunity had been subjected to a drumbeat of academic criticism for years but was the rule in California as it was virtually everywhere else. In *Muskopf v. Corning Hospital District*, the court revisited the doctrine and decided that it should disappear. The plaintiff here had fallen and injured her already broken hip while in the defendant’s hospital and alleged that staff negligence was the cause. The defendant demurred to the complaint on grounds of sovereign immunity, and the trial court sustained the demurrer. Justice Traynor, with the support of four other justices, reversed. “After a reevaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust,” he wrote. The rule was anachronism without rational basis. The general rule of sovereign immunity had its origins in medieval notions of royal power (but even in medieval times it had not produced the harsh results it currently did). The rule of local government immunity was traceable to an eighteenth-century English case, highly peculiar in its facts, which had been incorporated without reflection into the American common law. There was great dissatisfaction with the rule and it had over the years become riddled with exceptions, some created by the legislature, others by courts. These in turn had created an anomalous situation that allowed some victims of tortious governmental conduct to recover and prevented other seemingly equally deserving plaintiffs from doing so. The policy reasons advanced to support the doctrine were no longer convincing. Abolition of the rule would not bankrupt government. Governmental entities were capable of procuring insurance to cover their losses. And since the doctrine was at bottom a court-created one, it was in the power of the court to abrogate it. The courts in other jurisdictions, Traynor noted, had already done so.
Charles J. McClain

Traynor argued that in abrogating the doctrine of governmental immunity the court was making no sharp break with the past. It was rather, he said, merely taking “the final step that carries to its conclusion an established legislative and judicial trend.” Traynor surely exaggerated. If there was a trend, it was an ambiguous one, and the court was leaping well ahead of it. There were to be sure numerous exceptions to the rule of governmental immunity, but it was still the background rule in all but three of the states. As recently as three years previous the California court had reaffirmed the doctrine and said change was up to the legislature. The better explanation of what the court was doing was probably the blunt one offered by Schauer. The court felt itself saddled with a rule it considered unjust and irrational, had become impatient with the legislature’s failure to address the problem in comprehensive fashion, and now, thanks to the recent Brown appointments, had the votes to do something about it.

Announcement of the Muskopf decision caused a commotion in California state and local government. The attorney general, noting that the decision was about to subject government entities to substantial liability, liability for which many were unprepared, asked the court to postpone the effective date of the decision until the legislature had had a chance to enact certain procedural measures to deal with the situation. The court didn’t accede to this request, but at its 1961 session the legislature passed a bill suspending the effective date of the decision until three months after the end of the 1963 session. At the 1963 session it enacted a comprehensive tort claims act, subjecting most government entities to liability for the tortious acts of their agents, but with some exceptions and some limitations.

The rule of interspousal immunity made it impossible for one spouse to sue the other in tort even for an intentional tort like assault and battery. It had existed in California since 1909, the product of a California Supreme Court decision. In two 1962 decisions handed down the same day, Justice Peters pronounced the doctrine dead, in Self v. Self as to intentional torts, in Klein v. Klein as to negligence. As to intentional torts, the rule was a senseless one and its abolition was long overdue. It was predicated on the legal fiction, long since abandoned, that man and wife were one legal person. Its policy justification was the bizarre one that permitting personal tort actions between husband and wife would destroy the peace and harmony of marriage. (As the torts scholar William Prosser observed: “This is on the bald theory that after a husband has beaten his wife there is a state of peace and harmony left to be disturbed.”) As to negligence the case for
abolition was a little less clear cut, but Peters could see no logical or legal reason for distinguishing unintentional from intentional torts. Self was a unanimous decision. Justice Schauer, joined by McComb, dissented in Klein, arguing that interspousal liability for negligence raised the possibility of fraud and collusion between spouses and that the legislature should be given time to study the question and come up with solutions.

**COMPLETING THE TORT REVOLUTION— THE GREENMAN DECISION**

In 1944, in *Escola v. Coca-Cola Bottling Co.*, Justice Traynor had stated his view that manufacturers ought to be held strictly (or as he then put it “absolutely”) liable when they placed on the market an article that proved to have a defect that caused injury to human beings. Having taken this position, he did not waver from it. As noted above, he restated his views and expanded on them in 1949 in his concurring opinion in *Gordon v. Aztec Brewing Co.* And in 1958 in *Trust v. Arden Farms*, a personal injury case involving, like *Escola*, an injury caused by a broken bottle, he again restated them, here too in a concurring opinion. As of the 1960s, however, he had not been able to persuade his colleagues of the correctness of this approach. This did not mean that victims of defective products were without recourse in California. The state's liberal *res ipsa* doctrine made it possible for them often to recover against manufacturers on a negligence theory. And when it came to defective foodstuffs, thanks to the 1939 decision in *Klein v. Duchess Sandwich Co., Ltd.*, a regime of strict liability was effectively already in place albeit not under that name. And in these respects, by this time, the torts jurisprudence of California mirrored that of most other American states.

One cannot say exactly what it was that caused the California Supreme Court in 1963 to adopt by unanimous vote in *Greenman v. Yuba Power Products, Inc.* the position Justice Traynor had so long plumped for. Change was certainly in the air. There was as the decade of the '50s turned, it was clear, a palpable uneasiness in many state courts with the existing products liability regime (an uneasiness that was duplicated in the academic literature) and signs of a gathering momentum for major change. In 1959 a California District Court of Appeals came close to adopting the Traynor position. In *Peterson v. Lamb Rubber Co.* it held that an implied warranty of fitness for use accompanied manufactured articles, at least those that
were potentially dangerous (here a grinding wheel), and that such warranties could serve as basis for a lawsuit by one injured by the employee of a corporation that had purchased the article. The California Supreme Court, which accepted the Peterson case for review, reached the same conclusion a year later. The corporation’s employee, it said, “should be considered to be in privity to the vendor-manufacturer with respect to the implied warranties of fitness for use.”

Around the same time the New Jersey Supreme Court handed down a decision of far-reaching import. In Henningsen v. Bloomfield Motors it held that an implied warranty of fitness accompanied the manufacture and sale of automobiles, notwithstanding a disclaimer of all warranties in the purchase contract, and that it ran to the ultimate purchaser who could recover if the automobile were proven to be defective (actually beyond since the plaintiff here was the purchaser’s wife). It was the first state supreme court to unequivocally extend the implied warranty principle to something other than food products. All of the cases just discussed sounded nominally at any rate in the language of contract. None formally endorsed the principle of “strict liability.”

Greenman v. Yuba Power Products like Peterson involved an allegedly defective tool, here a multipurpose power tool that could be used, among other things, as a wood lathe. The plaintiff had received it as a gift from his wife. While using it to work a piece of wood, the piece flew out of the machine and struck him in the head, fracturing his skull. He sued the manufacturer alleging defective design and construction and pleading alternative theories of negligence, breach of express warranty, and breach of implied warranty. The court dismissed the implied warranty cause of action but allowed the case to go forward on the other causes of action, and the jury returned a verdict against the manufacturer of $65,000. The manufacturer’s chief defense on appeal was that the plaintiff had not given it timely notice of the accident as was required by law and that his warranty claim was therefore barred.

In a short but trenchant opinion Traynor, joined by all the justices, affirmed the judgment for Greenman. He essentially declared the argument about warranties to be irrelevant or at least of secondary importance. Traynor announced that henceforward the liability of manufacturers to consumers was not to be governed by the law of contract or the intricacies of the law of sales but rather by the law of tort. Manufacturers were to be held “strictly liable” for any articles they placed on the market that proved to have defects that caused injury to human beings. (Traynor read Hennin-
gsen as saying as much even though it used the language of warranty.) To recover against a manufacturer an injured plaintiff need only show that he had been using a product in a proper manner, that the product was defective in design or manufacture, and that he did not know of the defect. The purpose of the new rule was to shift the cost of product-caused injuries from the shoulders of users to the shoulders of manufacturers, parties better able to bear these costs and to prevent the injuries from happening in the first place. The Escola concurrence had finally become the law of California.\textsuperscript{269}

\textit{Greenman v. Yuba Power Co.} had an enormous impact on American torts jurisprudence. It, along with the Henningsen case, paved the way for the American Law Institute to modify its Restatement of Torts in 1964 to say that sellers of all products in defective condition were strictly liable for physical harm to ultimate users or consumers. The section had previously applied only to sellers of food products.\textsuperscript{270} Strict products liability then proceeded to sweep the field, becoming soon the law of most of the states. Greenman represented not the end but rather only the beginning of the products liability story. The decision raised a host of difficult questions, legal and conceptual, and both the courts and legal scholars, it may fairly be said, are still in the process of trying to answer them.\textsuperscript{271}

\textbf{CIVIL RIGHTS REVISITED}

Two race relations opinions, both authored by the chief justice for a unanimous court, merit attention. They are evidence of the very liberal consensus on civil rights that had by this time emerged on the court. \textit{Burks v. Poppy}\textsuperscript{272} concerned the interpretation of the Unruh Civil Rights Act. Passed in 1959, this measure provided that all Californians were entitled to “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of any kind whatsoever.” The defendant, a company engaged in the business of constructing and selling tract housing had refused to sell to the plaintiffs, who were black, and they filed suit for damages and injunctive relief under the act. The company argued that the act should be construed narrowly as applying only to businesses selling goods or services in a fixed location, but the court had no difficulty in reading the language as indicating a legislative intent to cast the net very broadly and in concluding that real estate developers were covered by its provisions.
A more controversial case, not for its holding, but for its dicta, was *Jackson v. Pasadena City School District*. The plaintiff here, a black schoolboy, brought a mandamus action against the Pasadena City School District to compel it to allow him to transfer from the junior high to which he had been assigned to another that was predominantly white. He alleged that the district, at the behest of white parents, had gerrymandered school zones for the purpose of "instituting, maintaining and intensifying racial segregation." Reversing a demurrer sustained by the trial court, the supreme court ruled that the district’s actions if proved constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. It went further. Even in the absence of intentional discrimination by a school board, as was here alleged, a student might in certain circumstances be entitled to relief. "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps . . . to alleviate racial imbalance in schools regardless of its cause," the court declared. *Jackson* looked both backward and forward—backward to the line of Gibson court decisions attacking more or less classic forms of discrimination, forward to thornier, less easily decided issues like *de facto* segregation and school busing.

**WATER LAW**

Water has been called the lifeblood of California. Crucial to the state’s economy but in short supply, at least in the state’s most habitable areas, it has been a perennial source of conflict, between private parties on the one hand, between private parties and the state on the other. Disputes about water policy and use have often found their way to the California Supreme Court, and great water law cases punctuate the court’s history. Two water law decisions of the Gibson court merit attention. Neither, by any stretch, could be called a great case inasmuch as neither made new public policy or broke any new legal ground. Both had very important consequences, however, for the state’s economic development.

*Ivanhoe Irrigation District v. All Parties*, the less important of the two, arose out of a trial court’s refusal to confirm a contract entered into by a state irrigation district for the delivery of water from the Central Valley Project. The Central Valley Project was a huge federally built and managed water distribution and flood control system servicing the (mainly agricultural) needs of California’s great central valley, the wide expanse of rich
alluvial plain running for about two-thirds the state’s length between the Sierra Nevada and the Pacific coast range mountains. Under federal law the irrigation district had to agree that no landholder receiving CVP water for irrigation should receive it for more than 160 acres of land. It was this feature, chiefly, that led the trial court to refuse confirmation. Spinning a novel and complex legal theory, Justice Shenk affirmed the trial court ruling. The state held its domestic waters, he said, in trust for all its inhabitants. When the federal government acquired state water rights, as it had in connection with the CVP, it acquired them subject to the same trust obligations. Discrimination among water users based on the extent of their landholdings constituted a violation of the trust. It also, Shenk opined, violated the federal Equal Protection and Due Process Clauses. Gibson wrote a stinging dissent, arguing that Shenk’s trust theory had no basis in law and predicting that the decision would end federal water development assistance for California at a time, as he put it, “when the need for rapid development of our water resources is most critical.” The United States Supreme Court soon reversed the California decision, holding that Shenk’s trust theory did not apply to federally appropriated waters and rejecting his conclusion that the 160-acre limitation violated either the Due Process or Equal Protection Clauses of the Constitution. If the Shenk opinion is still interesting for anything, it is for Shenk’s trust theory of water ownership that was left undisturbed by the United States Supreme Court.

Metropolitan Water District v. Marquardt, a 1963 decision, involved the legality of another (to use the water historian Norris Hundley’s term) massive hydraulic venture, the State Water Project. Consisting of some 20 dams, 23 pumping stations, eight powerplants, and seven hundred miles of canals and pipelines, the State Water Project was designed to move water in immense quantities from the comparatively water-rich north to the water-hungry center and south of the state. Much larger in scope than the Central Valley Project, it was supposed to meet all of the future water needs, residential, agricultural, and industrial, of the state, a state whose population, some were predicting with pride, would rise to some 35 million by 1990. Unlike the CVP, the State Water Project was to be state-funded and state-operated. To finance its construction the state legislature submitted to the voters for approval at the November 1960 general election a bond measure authorizing the issuance of $1.75 billion in general obligation bonds, the largest bond issue ever proposed by a state government up to that time.
Charles J. McClain

The State Water Project was extremely controversial. Many northern Californians saw it as detrimental to their interests. Even some southerners opposed it because they thought they were already adequately supplied with water and that they would wind up paying for water they did not really need. The project did command widespread support among large agricultural interests and their allies in the Central Valley since it promised to deliver large quantities of water free of the acreage limitations imposed by federal law. It took the boundless energy and supreme political skills of Edmund G. (Pat) Brown to finally turn the project into a reality. And even then it just barely happened. The bond issue authorizing construction passed by a mere 174,000 votes out of a total of 5.8 million cast at the election. Predictably, shortly after its passage it was challenged in court.

The legal challenge to the bond measure was in the form of a mandamus action to force the executive secretary of the Metropolitan Water District of Southern California, the district serving greater Los Angeles, to take steps to carry out a contract with the state for the delivery of project water. The secretary, with the support of the district attorneys of 24 counties, attacked the bond issue on some six (state) constitutional and 17 nonconstitutional grounds. Some of the arguments were makeweights; a few were more serious. The most serious was probably the contention that the voters had approved a measure authorizing funds for the completion of the water delivery system but that the amount of money to be raised was inadequate to complete it. Since there was no environmental law on the books or even much in the way of environmental consciousness in the population at large, no arguments were made about the project’s likely environmental consequences. Gibson moved in businesslike fashion through all the allegations, addressing and rejecting each in turn, usually in a few paragraphs’ discussion. The chief justice, a man as convinced as the governor of the need for rapid development of the state’s water resources, it was clear from the opening paragraphs, was not going to find any excuse to stand in the way of Brown’s plans for California. Nor were any of his colleagues. The vote was unanimous to let the writ of mandamus issue.

CONCLUSION

In his 1928 monograph, The Paradoxes of Legal Science, Justice Benjamin Cardozo describes the history of legal development as the history of an eternal tug of war between conservation and change, rest and motion.
The Gibson years were unquestionably years of motion in California. If one looked at the reforms in judicial administration alone the description would be apt. Gibson’s reforms thoroughly transformed the structure and operations of the whole state court system, making it one of the most modern in the country and leaving it much better equipped than it had been before to meet the judicial needs of the vast and growing state. But this was a period of extraordinary change in substantive law as well. Indeed it is hard to think of a comparable period in the history of any state that has witnessed so much change in so many different areas of law. And the question arises, what factors account for the Gibson court’s extraordinary record of doctrinal innovation.

During the first 20 years of Gibson’s tenure there was a solid core of justices—Traynor, Carter, and Gibson himself—who were to one degree or another activist by temperament. They had confidence in the law’s ability to shape the social landscape, to act as a catalyst for social change. Justices Schauer and Edmonds could be persuaded to join this group from time to time, and a majority could thus be fashioned for one of the court’s bolder moves—Perez v. Sharp, for example, or People v. Cahan. (By the last years of Gibson’s chief justiceship there was a solid majority of activist judges on the tribunal.) Moving beyond the core and the occasional swing justices there was a surprisingly broad consensus on the court in favor of some change. Almost all of the justices seem to have been receptive to the view that the court had an obligation to keep the law abreast of modern social needs and that the law of California was lagging behind these needs—at least in some areas. This was particularly noticeable in fields like torts where changes were brought about in almost every instance by unanimous or near unanimous votes. The same can even be said of some of the civil rights cases.

It is doubtful though whether all of this would have happened without the leadership of the chief justice. Gibson was a soft-spoken person of great personal warmth, but no one who ever dealt with him had any doubts about the forcefulness and determination that lay beneath the surface. He radiated, as his friend Governor Brown observed, the habit of command. The qualities of forcefulness and determination were coupled with a well-developed political sense, one that his stint as director of finance in the Olson administration, a post requiring great political savvy, could not help but have honed.282 Gibson knew how to deal with people to get results. These skills, as we have pointed out, were much in evidence in his
Charles J. McClain

implementation of administrative reforms. They must also have stood him in good stead in building consensus for changes in the substantive law.

Roger Traynor's presence on the court was obviously too an extremely important element in the mix. He provided leadership as well, of an intellectual variety. He funneled into the court's deliberations his own ideas and the best ideas, as he saw them, of the legal academy, lifting discussion, one imagines, to a new level of seriousness. He could also articulate the rationale for legal change better than any of his fellow justices. On the other hand, unlike other legal academics who have sat on high courts, he appears to have been neither overbearing nor condescending in his dealings with others. One cannot document specific instances in which he influenced his fellow justices, but it would be surprising if the weight of his intellectual presence did not tell from time to time in decision making.283

There is finally a negative factor that needs to be considered. No countervailing forces arose during the Gibson years to stop the court in what it was doing or suggest that it should slow down. No serious attempts were made during Gibson's tenure to upset either by legislation or voter initiative any of his court's decisions. (Initiatives designed to overturn California Supreme Court decisions have occurred with some regularity in the recent past.)284 This was probably because the court in general was moving in phase with public opinion or at least was not too far ahead of it. One evidence of this is the relative dearth of news media commentary critical of the court. Another is the vote in judicial retention elections. These elections give voters a chance to express their disapproval for the direction in which a tribunal is going by voting justices of whom they disapprove out of office. During Gibson's tenure the vote was always lopsidedly in favor of retention. Gibson, Traynor, and Carter, the three most activist members of the court, won the last retention elections in which they stood—elections held in the years 1958 and 1962—by margins of seven, nine, and 10 to one.285

Why might the several audiences to which the court spoke—press, legislature, general public—have watched acquiescently while the court remade so much California law. The two decades following World War II were, as the historian James Patterson has observed, years of "grand expectations" in America. Vibrant economic growth gave Americans a new sense of optimism. It led them to believe that by their purposive actions they could solve whatever problems confronted them, whether domestic or foreign.286 Nowhere was growth more vibrant than in the state of California.
Nowhere was there more of a sense of dynamism in the air. It is perhaps not surprising that in a period of expansive feelings generally that many members of the public, like so many justices of the Gibson court, would take an expansive view of the law's possibilities.
NOTES

Charles J. McClain

Charles J. McClain is Lecturer in Law and Vice-Chair, Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California, Berkeley.

I am grateful to Stephen Barnett and Lawrence Friedman for comments on an earlier draft of this paper. I am also grateful to Matti Fromson for her excellent research assistance throughout the project and Ed Cohen for his valuable help in the beginning. I profited greatly from conversations with the following Supreme Court law clerks or research attorneys: Peter Anderson, Donald Barrett, Philip Johnson, Juliet Lowenthal, and Mrs. Victoria Gibson. I would like to thank Ginny Irving and Debby Kearney of the Boalt Hall Library research staff for their help in locating materials. I would finally like to acknowledge the generous financial support provided by the California Supreme Court Historical Society and the Center for the Study of Law and Society.

1William H. Beatty was chief justice from 1889-1914. His tenure exceeded Gibson’s by only a few months.

2On the same day that it announced Gibson’s retirement as chief justice, the San Francisco Chronicle ran another front-page story reporting that California had surpassed New York in population (at least if military personnel were factored out). San Francisco Chronicle, Sept. 1, 1964, 1.

3These changes in California during and after World War II are ably chronicled in Warren A. Beck and David A. Williams, California: A History of the Golden State (Garden City, 1972), Chapters 19 and 20 and in Gerald D. Nash, The American West Transformed: The Impact of the Second World War (Bloomington, 1985), passim.


5The Carter nomination proved controversial because of a provision in the state constitution that forbade the appointment of any California elective official to a nonelective office. Because of this provision the Commission on Qualifications of Judicial Appointments, which reviewed judicial nominations, refused to act on the Carter nomination. This prompted Carter to bring a mandamus action in the supreme court aimed at forcing the commission to act. The court quickly took up the matter and held that the constitutional section in question did not apply because the position of supreme court justice was “elective” in the sense that justices had periodically to stand for confirmation by the electorate. Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179 (1939).


8Johnson, History of the Supreme Court Justices, supra n. 4, 99-109.

9Though not a law school graduate, Justice Houser has a special place in the history of formal legal education in California. While apprenticing for a Los Angeles firm in the late 1890s, he decided that the training he was receiving was not giving him an adequate understanding of (interestingly) the theoretical principles underlying the law. He proceeded to organize a study group, consisting of fellow apprentices, to remedy this defect. The group raised enough money to hire a preceptor. It was soon incorporating as the Los Angeles Law School and in 1901 affiliated with the University of Southern California. In 1903 it became the official law department of USC. The details of this remarkably interesting story are supplied in John G. Tomlinson, "USC Law School: Largely a Student's School," USC Law 3-4 (Spring, 1996). All along, it appears, Houser had the ambition of founding a law school.

10The failed Radin nomination to the supreme court is a fascinating story in its own right. A good account of it, and of the complex story of Warren's antagonism, is to be found in G. Edward White, Earl Warren: A Public Life (New York, 1982), 58-67.


12Olson who was governor for but one term, was able to make four appointments to the court. Earl Warren, by contrast, who served as governor for 10 years, from 1943-53, was able to make only one.


For one such opinion rendered during Gibson's tenure see In re Harris, 56 Cal. 2d 879 (1961), a case that dealt with the conviction of a bookseller for obscenity and raised major issues of constitutional law. Justice McComb disposed of the issue in a sentence. In his later years he took to writing dissenting "opinions," which
Charles J. McClain

consisted of saying simply "I dissent."


19California Constitution, Art. VI, Sec. 4, 4c.

“Transfer,” the procedure by which District Court of Appeals decisions reached the California Supreme Court, deserves some elaboration. A litigant dissatisfied with a DCA decision could file a petition for review with the supreme court. The supreme court had total discretion to decide which petitions to grant. If it granted a petition, it would order the matter “transferred” to itself. Under this conception of appellate review, an unusual one in America, the court was not seen as reviewing the intermediate appellate court decision but rather as reviewing de novo the judgment of the trial court. Indeed the District Court of Appeals decision was treated for all practical purposes as if it had never been rendered. As the court itself put it: “When an order of transfer from the District Court of Appeal to the Supreme Court is made, the decision of the District Court of Appeal is set aside and the matter is then pending in this court the same as if originally lodged here.” McDonough v. Goodcell, 13 Cal. 2d 741, 745 (1939). Most of the cases discussed in this chapter were first the subject of decision by a District Court of Appeals, but one could usually not discover this from the texts of the supreme court opinions.

Though the power was seldom exercised in the Gibson era, the supreme court could also transfer a case from a District Court of Appeal to itself sua sponte, without any request from the litigants, either before or after decision. On this power

20Calif. Const., Art. VI, Sec. 4(c). There was an implicit exception for death penalty appeals.


Relatedly, Gibson early in his administration terminated the practice of sitting in departments. Under the constitution the court could hear and decide cases either in bank (with all seven justices participating) or in departments, each department to consist of three judges. If the decision was rendered by a department, any four judges could order the case to be heard anew in bank. This procedure was widely used in prior administrations, but Gibson, who thought the court acted more efficiently when it sat in bank, ended it within months of becoming chief. Phil S. Gibson, *Southern California Law Review* 29:389, 394 (1956). The last decision to be handed down by a department was *Wiseman v. Sierra Highland Mining Co.*, 17 Cal. 2d 690 (1941), decided at the end of March 1941.

22Almost but not all. Death penalty cases continued to go directly to the supreme court from the trial courts. Further, on the civil side, some of the most important cases handled by the Gibson court were direct appeals from the superior courts in equity matters—including two of the cases discussed in this chapter, *Fairchild v. Raines*, 24 Cal. 2d 818 (1944); and *James v. Marinship*, 25 Cal. 2d 721 (1944).


24There was nothing exceptional about California, of course. The immediately preceding decades had witnessed the multiplication of administrative agencies and the expansion of their power in other states and at the federal level.

25This information is garnered from the case file, State Archives, Sacramento. The specific nature of Laisne's complaint is not evident from the published opinion of the supreme court.

26*Laisne v. California State Board of Optometry*, 19 Cal. 2d 831 (1942). There is no mention in the supreme court opinion of the proceeding in the District Court of Appeal. As noted above, when the supreme court granted a petition for review after a DCA decision, it saw itself as reviewing the decision of the trial court.

27*Laisne*, at 835.


29*Laisne*, 845.

3013 Cal. 2d 75 (1939).
In a previous case, *Standard Oil Co. v. State Board of Equalization*, 6 Cal. 2d 557 (1936), the court had held that the *writ of certiorari* was not an appropriate method for reviewing the decisions of administrative agencies since they were nonjudicial bodies.

*Laisne*, 851. In *Drummey* the mandamus review had, by stipulation of the parties, been limited to the record compiled at the administrative hearing.

Gibson thought the original *Drummey* decision was unsound on this score, but the majority was now compounding the error.

*Laisne*, 866.

21 Cal. 2d 790 (1943).

*Dare*, 793.

*Dare*, 796-97. This principle was affirmed in another decision rendered the same year. See *Sipper v. Urban*, 22 Cal. 2d 138 (1943).

A few years later the court made clear that its “independent judgment” doctrine was to be taken seriously too. In *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301 (1948), a challenge by a physician to the suspension of his license by an administrative agency, the court ruled that a trial court, with no evidence before it other than the record produced at the administrative hearing, was perfectly free to reach its own conclusion as to the adequacy of that record and on that basis to overrule the agency.


The rule was incorporated into the California Administrative Procedure Act, enacted in 1945. See Cal. CCP 1094.5 (c).

*Carter*, oral interview, *supra* n. 6, at 145. Louis Jaffe, a leading scholar of administrative law, had this to say of the California rule: “[I]t can be justified in so far as it gives additional procedural protection to an interest of great importance as where a professional license has been revoked. The protection may be more needed to overcome likely prejudices of professional licensing bodies against mavericks and unconventional practitioners.” *Louis Jaffe, Judicial Control of Administrative Action* (Boston, 1965), 191. These remarks seem particularly apropos in the *Laisne* case. Through its long history the California optometric profession has not been known for its hospitality toward “unconventional practitioners” or business innovations that threatened to disturb the status quo of its members.

On retrial, it is interesting to note, the superior court found in Laisne’s favor and ordered his license restored. 68 Cal. App. 2d 440, 441.


22 Cal. 2d 614 (1943).

*Id.*, 618.
The California Supreme Court Historical Society

46 Id., 621-22.
47 24 Cal. 2d 553 (1944).
48 Id., 458.
49 Id., 459.
50 See, e.g., Bradley v. Conway Springs Bottling Co., 118 P. 2d 601 (1941), a case involving a set of facts remarkably similar to those in Escola, and other cases cited in the opinion.
51 Id., 461.
52 Id., 462-63.
53 Id., 465. In Klein v. Duchess Sandwich Co., Ltd., 14 Cal. 2d 272 (1939) the court effectively made manufacturers of foodstuffs guarantors of the safety and wholesomeness of their products in the hands of ultimate consumers. The opinion in the case was written by Justice Houser.

Thus Fleming James, a leading American torts scholar and one sympathetic to the notions of rethinking the foundations of tort law and expanding tort liability, took no notice of it at all in a 1946 article in the Yale Law Journal surveying wartime developments in the field. Fleming James, “Accident Liability: Some Wartime Developments,” Yale Law Journal 55:365 (1946). The article did comment on the majority opinion in Escola.


56 Most notably in the area of criminal law, see infra.

57 Justice Traynor’s views on government and the judicial role are rather fully set forth in his articles “Law and Social Change in a Democratic Society,” University of Illinois Law Forum 1956:230 and “No Magic Words Could Do It


60For most of his tenure on the bench Justice Traynor was aided in the task of opinion writing by a superb lawyer and legal draftsman, Donald Barrett. Barrett joined the court’s research staff in 1948 and retired as chief research attorney in 1983. He was Traynor’s principal research assistant and worked with him on many of his most important cases during these years. He developed such a close relationship with Justice Traynor that he could often anticipate how the justice would approach a case and could produce a draft opinion that reflected Traynor’s views without much direction. Traynor’s approach to opinion writing when working with him, according to Barrett, was to turn the case file over to him and ask him to come up with a draft. (Traynor normally did not wish to discuss a case before seeing something in writing.) Having gotten the draft Traynor would then edit it for publication, sometimes heavily, sometimes very lightly. [Interview with Barrett]. When Traynor worked with other research attorneys and law clerks he provided more guidance at the outset, although not as much as one might think. On Traynor’s relationship with Barrett and other research attorneys and clerks see Peter Anderson, “Roger J. Traynor: A Remembrance,” California Law Review 71:1066-71 (1971).

61William L. Prosser, Handbook of the Law of Torts (St. Paul, 1941), 466-469; 688-693. One also finds here the point, made by Justice Traynor in the opinion, that the action for breach of warranty originally sounded in tort and not in contract. Escola, 466. Prosser, 690.

62For Traynor’s views on the effect violation of a statute should have see: Clinkscales v. Carver, 22 Cal. 2d 72 (1943); Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581 (1947), concurring opinion; Startup v. Pac. Elec. Rwy. Co., 29 Cal. 2d 866 (1947), concurring opinion; and Stickel v. San Diego Elec. Rwy., 32 Cal. 2d 157 (1948), dissenting opinion. In this last case it was the plaintiff’s (or
rather the plaintiff's decedent's) alleged violation of a statute that was at issue. The plaintiff's wife was killed and the plaintiff injured in an intersection collision involving a truck she was driving and a bus owned by the defendant company. There was considerable evidence that the bus driver was negligent, but the defendant alleged that the plaintiff's wife was intoxicated, an allegation denied by the plaintiff. The majority of the court believed that there was enough evidence to support a verdict for the plaintiff. Traynor argued in dissent that it was error for the trial judge not to have instructed the jury that it should return a defense verdict if it believed the plaintiff was intoxicated.

6See "The Ways and Meanings of Defective Products and Strict Liability," in The Traynor Reader, supra, n. 57, at 236. On pain and suffering damages see his dissenting opinion in Seffert v. L.A. Transit (1961), 56 Cal. 2d 498. In this case, where pecuniary damages were in the order of $55,000, Traynor voiced the view that an award of $134,000 for pain and suffering could only have been the product of passion or caprice on the part of the jury and would have remanded the case for retrial on the issue of damages. Pain and suffering damages, he argued, originated in primitive conceptions of retribution and were becoming increasingly anomalous in modern industrial society where insurance and the price mechanism were coming to be seen as the preferred tool for distributing losses. 56 Cal. 2d, at 510-11. This last statement speaks volumes about Justice Traynor's understanding of tort law.

6425 Cal. 2d 486 (1944).
65Id., 490.
66Id., 489.
67Id., 493.
68Id., 494. For an earlier decision, by the Montana Supreme Court, applying res ipsa in a hospital setting, see Maki v. Murray Hospital, 7 P. 2d, 228 (1932). The case is discussed in the Ybarra opinion. Here as in Ybarra a patient entered a hospital for treatment. Due to his condition he fell into a delirium and awoke from it to discover that he had fallen from a third-floor window and had suffered severe injuries. Unlike in Ybarra here the sequence of events that caused the patient’s injuries and the identity of the parties who might have been involved were fully known to the hospital.

6933 Cal. 2d 80 (1948).
70The cases are noted at 84.
71Id., 85-86, 88. Another torts case appearing in the same volume as Summers deserves mention for the light it throws on the progress of Justice Traynor's thinking on the subject of strict liability. Gordon v. Aztec Brewing Co., 33 Cal. 2d 514 (1949), was very similar on its facts to Escola. The plaintiff, a cafe owner, was seriously injured when a bottle of beer exploded in his hands. At trial he introduced evidence tending to show that the defendant did not adequately inspect bottles at
its brewery and that the bottle in question had suffered no damage in transportation at the hands of the independent distributing company that had delivered it. Justice Shenk, writing for the majority, held that these facts were enough to justify the giving of a *res ipsa* instruction at trial.

Traynor concurred in the result but believed it rested on the wrong legal grounds. The evidence, he thought, tended to show that normal handling by the distributing company’s employees might just as easily have produced the defect that caused the explosion. *Res ipsa* was therefore an inapposite instruction to give. The majority was saying in effect that the defendant was liable not only for defects present in bottles when they left its brewery but also for defects that might develop in the course of distribution. "If such liability is to be imposed," he wrote, "it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases" (p. 530). He would have preferred that the court impose strict liability on the bottler not only for defects in the bottles produced at its plant but also for "defects that result from normal marketing procedures" (p. 531). The bottler would then have an incentive to produce bottles that were safe and sound when they left its control but would continue safe and sound up to the time they reached the hands of the consumer.

In *Escola* the defendant was both bottler and distributor and in control of the bottle that caused the injury up to the time it reached the hands of the plaintiff. Here the defendant had relinquished control of the bottle to a third party before that time but that made no difference so far as Traynor was concerned. He was in short now prepared to extend the doctrine of strict liability a significant step beyond that he had sketched out in *Escola*.

77See Peter Schuck, ed. *Tort Law and the Public Interest* (N.Y., 1991), 19, describing *Ybarra* and Traynor’s concurring opinion in *Escola* as among the great landmarks of American tort law.

78For a tally of states accepting and rejecting *Ybarra*, see 67 A.L.R. 4th 544. One of the earliest critics was Warren Seavey. See Seavey, "Res Ipsi Loquitur: Tabula in Naufragio," *Harvard Law Review* 63: 643 (1950). Seavey, while critical of *Ybarra*, thought *Summers* was justifiable on the ground that there was clear evidence that both defendants had breached a duty of care toward the plaintiff, *Id.*, 648.


75*Silva v. Providence Hospital*, 14 Cal. 2d 762 (1939).

7637 Cal. 2d 356 (1951).

77*Id.*, 364-65.

7838 Cal. 2d 330 (1952).

79Siliznoff, 336.
The decisions, cited at 337, all involved instances of outrageous conduct producing severe mental distress, which in turn produced definite physical symptoms.


Siliznoff, 337.

Had he wished, Traynor could have shoehorned Siliznoff into the existing (limited) law, which allowed litigants to recover damages when physical harm followed on mental distress. Among Siliznoff’s complaints was that the threats had made him severely nauseous, forcing him to take to bed. That was one of the main reasons why punitive damages were appropriate, his attorney argued on appeal. Respondent’s Brief in the District Court of Appeal, 6-7.


Buchanan v. Warley, 245 U.S. 60 (1917).


24 Cal. 2d 818 (1944).

Among the signers of the amicus brief filed in the supreme court in the Raines’ behalf were two prominent black attorneys, Willis Tyler and Loren Miller, long active in the civil rights movement and then representing black litigants in other similar cases. Tyler had been involved in restrictive covenant litigation for many years and had represented the defendants in Foster. Miller was during the years in which he practiced probably California’s most important black lawyer. A resourceful, imaginative legal craftsman, he was involved in many landmark civil rights and civil liberties cases over the course of his long career, including Shelley v. Kraemer, 334 U.S. 1, decided by the U.S. Supreme Court in 1948. In that case the court held that the judicial enforcement of racially restrictive covenants was state action violative of the Fourteenth Amendment Equal Protection Clause. Miller and Thurgood Marshall were lead counsel in that case. On Miller see Clement Vose, Caucasians Only: the Supreme Court, the NAACP, and the Restrictive Covenant Cases (Berkeley, 1959), passim, and Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality (New York, 1975), passim.

1d., 822.
A few years later the Raineses were subject of another proceeding (brought by the same plaintiffs) aimed at enjoining them from occupying their property. The trial court again issued an injunction but was reversed on appeal by the California Supreme Court, citing the U.S. Supreme Court decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding judicial enforcement of racially restrictive covenants to be violative of the Equal Protection Clause). See *Cassell v. Hickerson et al.; Fairchild v. Raines et al.*, 31 Cal. 2d 869 (1948).

*Id.*, 834.

*Id.*, 834.

*Id.*, 833.


*Id.*, 264.

*Id.*, 269-71.

*Id.*, 271.

Respondents' Brief on Appeal, 7-13, California Supreme Court case file, California State Archives.

"Closed shops" are illegal under current labor law.

*Id.*, 736-39. The point was not as well developed as it might have been. The union contended that it was not denying membership to anyone, merely segregating members. Gibson did not expand sufficiently on how membership in a segregated auxiliary local might adversely affect black access to job openings or the terms and conditions of black employment.

*Id.*, 739-41. *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944). The facts that gave rise to this case are appalling. A railworkers union that excluded blacks from membership but that represented a bargaining unit consisting of both blacks and whites negotiated a contract limiting the number of blacks who could be employed in certain skilled crafts jobs. It informed the employer that its ultimate objective was to eliminate all blacks from these positions, reserving them for whites only. The supreme court held that the union's actions violated its duty of fair representation under the Railway Labor Act.

Section 703 (c) of the Civil Rights Act of 1964 forbade unions from discriminating on a racial basis in admission to membership or from segregating members if that "would tend to deprive any individual of employment opportunities." Courts soon held that the maintenance of segregated locals was a per se violation of the act. See *United States v. Local 189, United P & P, AFL-CIO, CLC* (U.S.D.C., E. Dist. La., 1969); *United States of America v. Intn 'l Longshoremen's Association*, 460 F. 2d 497 (1972). The *Steele* case, mentioned above, has occasionally been misinterpreted as holding that it was illegal for unions to discriminate in admission to membership on racial grounds. It did not.
The California Supreme Court Historical Society

105 Civil Code Section 69 provided "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." Section 60 provided: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."

106 The case was Roldan v. Los Angeles County, 129 Cal. App. 267, 18 P. 2d 706 (1933). The amendment referred to is to be found in Stats. 1933, 561.


108 32 Cal. 2d 711 (1948).


110 320 U.S. 81 (1948).


113 Herbert Hovenkamp has shown how a biological paradigm, which posited a hierarchy of racial ability based on heredity and which dominated scholarship up to the 1920s, was in succeeding decades gradually supplanted by an "environmentalist paradigm," which cast doubt on the permanence or objectivity of racial categories and explained differences between the races in terms of the environment. He points in particular to seminal works published during this period by the American anthropologist, Melville Herskovits, and the Swedish social scientist Gunnar Myrdal. The emergence of this new "environmentalist paradigm," he believes, was an essential precondition to the emergence of a newer more liberal race-relations jurisprudence in the courts. The argument seems borne out in Perez. Traynor cites both Herskovits and Myrdal in his opinion. See Hovenkamp, supra n. 107, passim and at 670-71.

114 Id., 720-23. Traynor also found that the California legislative scheme was irrational (it permitted whites to marry Hindus and Mexicans, who were thought to be at least partly nonwhite) and vague (it included no clear criteria of racial membership) and this further undermined its legitimacy. Id., 721.

115 319 U.S. 624 (1943).

116 Id., 740-42. In their argument on appeal the petitioners, both Roman Catholics, had laid great stress on the statutes' alleged interference with their religious freedom.

117 Id., 742 & ff. Shenk considered the proposition that interracial marriage was bad for the public welfare one that was amply supported in the scholarly literature.

The act said ineligible aliens should have the right to hold real property interests only to the extent they were guaranteed by treaty. The treaty between the U.S. and Japan gave Japanese aliens no right to own or lease agricultural land.

Stats. 1913, 206 & ff.; Stats, 1920, lxxvii & ff. In 1923 the law was amended to say that escheats would be deemed to have occurred as of the date of the transfer in violation of the law’s prohibitions. Stats. 1923, 1022 & ff.


Sen. Journal, May 5, 1943, 55th Sess., 2977. Many of the Japanese had not been removed from California but rather were living at relocation camps within the state’s borders. The camp at Manzanar, for example, in the remote California desert held some 10,000 persons, mainly former residents of southern California.

Stats. 1943, 2999 & ff.


323 U.S. 214 (1943). Okrand and Wirin, along with Loren Miller, the black attorney mentioned above, were probably the most important civil liberties/civil rights lawyers of the Gibson era. The names of these three attorneys appear over and over again, either as counsel of record or amicus counsel, in the case reports. Okrand’s and Wirin’s firm represented the American Civil Liberties Union of Southern California. Saburo Kido was wartime president of the Japanese American Citizens League and its counsel.

319 U.S. 624 (1943) (nullifying on First Amendment free exercise grounds a West Virginia law requiring schoolchildren to take part in a flag salute ceremony each day).

Appellants Opening Brief, California Supreme Court Case File, *People v. Oyama*, 29 Cal. 2d 164 (1946), State Archives, Sacramento, California. *Korematsu*
had sanctioned the wartime relocation orders but had also said that measures of this sort, aimed at a discrete racial minority, were constitutionally suspect and could only be justified if there were a compelling state interest for them.  

133*People v. Oyama*, 174-77. Edmonds also rejected the claim that the California law violated the equal protection rights of the Oyamas' citizen son. The son could not claim that his rights had been violated because his father had sought to use him to evade the law. It was he said, "the deficiency of the alien father and not of the citizen son which was controlling." At 178.

134*30 Cal. 2d 719 (1947).*

135*Stats. 55th Sess., 3039-40.*

136On the background to the change in wording see *Report of the Senate Fact-Finding Committee on Japanese Resettlement* (1945), 56th Sess., 5-6, 8. Available in State Archives. The committee had originally been called the Fact-Finding Committee on the Japanese Problems.

137*Id., 729-31.*

138*Id., 732.*

139*Id., 737 & ff.*

140*332 U.S. 633 (1948).*

141*334 U.S. 410 (1948).*

142*San Francisco Chronicle, Jan. 28, 1949, 2; quoted in Note, California Law Review 36:320, 324 (1948).* On the decision to halt escheat actions see *California Attorney General, Biennial Report to the Legislature, 1946-48, 64.* This did not prevent the attorney general from defending the Alien Land Law vigorously when it was challenged, as it was later in the case of *Sei Fujii v. California*, discussed infra.

143*32 Cal. 2d 53 (1948).*

144*Id., at 65.* The supreme court adopted more or less in toto the opinion of the District Court of Appeal, authored by future California Supreme Court Justice Paul Peek.

145*38 Cal. 2d 718 (1952).*

146*People v. Oyama*, 180.


149*Id., 730.* He noted that the California court itself, in *Perez v. Sharpe*, had endorsed this same proposition.

150*Id., 735-37.*

151Gibson and his colleagues may not have been far ahead of public opinion. In November, 1946 the state's electorate had voted down by a better than two-to-one margin, a proposed constitutional amendment designed to validate certain changes made by the legislature in the Alien Land Law and thereby strengthen it
Charles J. McClain


15218 Cal. 2d 160 (1941).


154*Id.*, 543.

155*Id.*, 546-50.

15627 Cal. 2d 322 (1945).

157*Id.*, 329-30.

15828 Cal. 2d 536 (1946).


160A. L. Wirin as lead attorney for the petitioners.


162Danskin, 543, 548.

163Some have a distinctly Holmesian ring to them, as in reference to "the competitive struggle of ideas for acceptance," and in this sentence: "[T]he dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas." Danskin, 548. They are further evidence of Holmes' influence on Traynor.


165Gardner, 220-223.


167Of this period one historian has written: "The years following World War II brought the most comprehensive assaults on liberty the nation had witnessed since the late 1790s." James MacGregor Burns, *A People's Charter: The Pursuit of Rights in America* (New York, 1991), 283.

168*Dennis v. United States*, 341 U.S. 494 (1951). The force of that decision was substantially undermined six years later, however, in *Yates v. United States*, 354 U.S. 298 (1957), the court there holding that the mere advocacy of the overthrow of the government by force as an abstract theory could not be the basis for a
prosecution under the Smith Act.


171 39 Cal. 2d 707 (1951).

172 39 Cal. 2d 676 (1952).

173 In Fraser v. Regents of the University of California, 39 Cal. 2d 717 (1952), the court affirmed the dismissal of Professor Fraser, the University of California instructor, for failing to take the Levering Act oath.

174 Id., 688 & ff. The state constitutional argument became completely moot the following month when the electors of California, by an overwhelming majority, voted to add the Levering Act oath to the constitution.


178 34 Cal. 2d 136 (1949).

179 Art. I, Sec. 11 and Art. I, Sec. 21, respectively.

180 Id., 191.

181 40 Cal. 2d 436 (1953).

182 Id., 441.

183 Id., 448.

184 198 U.S. 45, 74-76 (1905).

185 Id., 458. Holmes, as is well known, was agnostic at best on the usefulness of economic regulation. It is clear from the dissent that Traynor had considerable sympathy for legislation of this sort. The law in question, he thought, designed as it was to prevent "destructive competition" in an industry, served a useful public purpose. Id., 451.

186 For another early example of Gibson court hostility to anticompetitive legislation see Del Mar Canning Co. v. Payne, 29 Cal. 2d 380 (1946), striking down an administrative regulation on the issuance of permits for the taking and processing of sardines on grounds it imposed undue burdens on new entrants and unduly advantaged existing businesses.

187 57 Cal. 2d 228 91962).

188 Id., 235. The law required all to do a five-year apprenticeship but imposed no requirement on existing licensed opticians to take on apprentices.
Charles J. McClain

189Winston W. Crouch and Dean E. McHenry, California Government: Politics and Administration (Berkeley, 1949), 177.


191An earlier survey of the lower courts had been done by the staff of the Judicial Council at Gibson’s direction at the very beginning of his term. See Judicial Council of California, Ninth Biennial Report to the Governor and the Legislature (1942), 5 & ff.


195The case he singled out for criticism was Gray v. Brinkerhoff, 41 Cal. 2d 180 (1953). Here a pedestrian, while in a crosswalk, had been struck and seriously injured by a truck. The jury, however, returned a verdict for defendant. The supreme court, in an opinion by Justice Schauer, ruled that there could be no doubt that the truck driver had been negligent and that the plaintiff had not been contributorily negligent and that the jury should have been directed to return a verdict for the plaintiff.


19820 Cal. 2d 165.

199Gonzales, 170.

200People v. Kelley, 22 Cal. 2d 169 (1943).


202Id., 143.


205Id., 134.
Police misconduct in connection with criminal investigations was a matter of growing concern to the State Bar. In 1954, the State Bar Committee on Criminal Law and Procedure addressed the question of whether the state ought to adopt the federal rule of exclusion when evidence was seized in violation of constitutional rights. (One local bar association had passed a resolution advocating this.) It expressed shock at the conduct revealed by cases like *Rochin* and *Irvine* but said more study was needed before it could make such a recommendation. *Journal of the State Bar of California* 29:263-64 (1954).

That it was the accumulated weight of police misconduct in Los Angeles and elsewhere that turned Traynor's (and presumably Gibson's) mind is made clear in the opinion. And Justice Traynor underscored that point six years later in an address he delivered at Duke University. "It was the cumulative effect of such routine that led us at last in the case of *People v. Cahan* to reject illegally obtained evidence." R. Traynor, "*Mapp v. Ohio* At Large in the Fifty States," 1962 Duke Law Journal 319, 322. Traynor seems to have been reinforced in his conclusions by the writings of the noted criminal law scholar, Francis Allen. Allen had himself come to the conclusion that adoption by the states of the federal rule of exclusion was the only practicable way to enforce Fourth Amendment rights. See F. Allen, "The Wolf Case: Search and Seizure, Federalism and Civil Liberties," Illinois Law Journal 45:1 (1950). Allen's writings are referred to six times in the *Cahan* opinion.

One interesting brief filed in the case was that submitted by A. L. Wirin on behalf of the southern California branch of the American Civil Liberties Union. It pointed out that of the approximately 8,800 criminal filings in Los Angeles County Superior Court in 1954, only 17 involved the use of search warrants. See Brief of ACLU, Southern California Branch In Opposition to Petition for Rehearing, *People v. Cahan*, case file, State Archives, Sacramento, California. Wirin then had pending in Los Angeles Superior Court a taxpayer suit against the chief of the Los Angeles police, seeking to enjoin him from the further spending of public funds for electronic surveillance of the kind at issue in *Cahan*. Two years after *Cahan*, the supreme court ruled that the ACLU was entitled to a hearing on whether the Chief truly intended to cease and desist from the now forbidden practice. See *Wirin v. Parker*, 48 Cal. 2d 890 (1957).

367 U.S. 643; the reference to *Cahan* is at 651.

The Recorder, Feb. 27, 1956, 1. On the same day it decided *Cahan*, the court decided *People v. Berger*, 44 Cal. 2d 459 (1955), affirming a trial court ruling that
evidence seized pursuant to a warrant that placed no restrictions on the place to be searched or the things to be seized was not admissible in evidence.


21845 Cal. 2d 645 (1955).

219The U.S. Supreme Court eventually would adopt the position taken by the California Supreme Court. See Rawlings v. Kentucky, 448 U.S. 98 (1980).

22045 Cal. 2d 755 (1955).

22146 Cal. 2d 269 (1956).


223In Ker v. California, 374 U.S. 23 (1963), citing the California Supreme Court opinion in Maddox.

224Van Kessell, 1250.

225As the distinguished criminal law commentator, Sanford Kadish, observes: “Evidence of mental insanity tending to establish legal insanity will usually do double service as also tending to establish the absence of the specific mens rea required.” “The Decline of Innocence,” Cambridge Law Journal 26:273, 282 (1968).

22633 Cal. 2d 330 (1949).

227Wells, 346.

228Wells, 345. The court analogized Wells’ claim to a claim of intoxication, noting that the law allowed the fact of the accused’s intoxication to be considered whenever a particular mental state was necessary for conviction. At 356.

229The refusal to receive evidence was not the only issue in the Wells appeal, nor, to judge from the emphasis counsel put upon it in their appellate brief, even the principal one. One very important issue, argued at length by counsel, was whether Wells was really a life prisoner. The statute under which he had originally been convicted specified five years as the minimum term of imprisonment but set no maximum. That was to be set by the Adult Authority but it had not yet done so.


231Justice Carter dissented in the case. He thought the new rule being promulgated by the majority was both impractical and illogical. It was illogical because it violated the fundamental logical principle that the greater includes the less. The best evidence that a defendant did not harbor a specific mental intent was to show that he could not harbor it. It was impractical because trial judges would not know how to apply the arcane distinction being here proposed. Id., 359-62.

See, e.g., *People v. Moran*, 249 N.Y. 179, 163 NE 553 (1928), (affirming the first-degree murder conviction of a defendant who claimed to be of extremely low intelligence but endorsing in principle the idea that "feebleness of mind or will" could be considered on the question of premeditation and deliberation in such cases); and *State v. Anselmo*, 46 Utah 137, 148 P. 1071 (1915) (reversing a first-degree murder conviction for failure of the trial judge to adequately instruct the jury on the effects that epilepsy exacerbated by drinking might have had on the accused's ability to deliberate and premeditate.)


Diamond had an ambitious vision of the course of future developments in the criminal jurisprudence of California. He hoped it would advance (through judicial decisions, one presumes) to the point where, as he put it "the treatment principle would be extended to all prisoners—sane, insane, fully responsible, and partially responsible—to each according to need and to none according to legal classification." See Bernard L. Diamond, "Criminal Responsibility of the Mentally Ill," *supra*, n. 236, at 86.


Or purported to. The legislation as it now appears in the Penal Code still allows evidence of mental disease or defect to be introduced in the guilt phase of the trial to show that the defendant did not actually form the necessary mental state when a specific intent crime is charged. See California Penal Code Sec 28. The actual effect of the section is still the subject of controversy.

See *People v. Silva*, 41 Cal. 2d 778 (1953); *People v. Jefferson*, 47 Cal. 2d 438 (1956). One particularly troubling case is *People v. Harmon*, 54 Cal. 2d 9 (1960). Harmon, a life prisoner, was convicted of stabbing a fellow prisoner and sentenced to death. His victim survived the attack. During his appeal the legislature amended Section 4500 to provide that the trial judge or jury could decide on a sentence less than death if the victim didn’t die. But the court, here in a close 4-3 vote, held that the defendant should not have the benefit of the new statute. A postscript on Wells. Wells' sentence was eventually commuted by the governor. The other defendants were not so fortunate.
The perpetrator of some of these crimes had become known during the police investigation as the “red light bandit” since his modus operandi was to accost victims in parked cars in a vehicle sporting a red spotlight.

For a detailed account of the Chessman trial and the later appellate proceedings see William M. Kunstler, Beyond a Reasonable Doubt: The Original Trial of Caryl Chessman (Westport, 1973).

Among the attorneys who assisted Chessman at one stage or another in the appellate proceedings were: Melvin Belli, George Davis, and the three civil liberties lawyers mentioned above: Loren Miller, A. L. Wirin, and Fred Okrand.

People v. Chessman, 35 Cal. 2d 455 (1950).

People v. Chessman, 38 Cal. 2d 166 (1951).

The story is told in Jesse Carter, oral history, Golden Gate Commencement Address, 9-10. See also Edmund G. (Pat) Brown, Public Justice, Private Mercy: A Governor’s Education on Death Row (N.Y., 1989), 26-27.

These hearings were tumultuous and controversial. At one point Chessman put the presiding judge himself on the stand for examination.

People v. Chessman, 38 Cal. 2d 166 (1951).

The story is told in Jesse Carter, oral history, Golden Gate Commencement Address, 9-10. See also Edmund G. (Pat) Brown, Public Justice, Private Mercy: A Governor’s Education on Death Row (N.Y., 1989), 26-27.

These hearings were tumultuous and controversial. At one point Chessman put the presiding judge himself on the stand for examination.

People v. Chessman, 38 Cal. 2d 166 (1951).

The story is told in Jesse Carter, oral history, Golden Gate Commencement Address, 9-10. See also Edmund G. (Pat) Brown, Public Justice, Private Mercy: A Governor’s Education on Death Row (N.Y., 1989), 26-27.

These hearings were tumultuous and controversial. At one point Chessman put the presiding judge himself on the stand for examination.
The California Supreme Court Historical Society

266343 P. 2d 261.
267Peterson v. Lamb Rubber Co., 54 Cal. 2d 329, 348. As was the custom the DCA opinion is not mentioned in the supreme court opinion, written by Justice Schauer.
269A year later the court in Vandermark v. Ford Motor Co., 61 Cal. 2d 256 (1964), the court held that retailers as well as manufacturers were strictly liable for defective products. The vote again was unanimous.
270Tentative Draft No. 10 of the Restatement of Torts 2d, Section 402A.
27257 Cal. 2d 463 (1962).
27359 Cal. 2d 876 (1963).
274Id., 879.
275Id., 881.
276The most famous being perhaps Lux v. Haggin, 69 Cal. 255 (1886), the leading case on the water rights of private landowners and one of the most important water law decisions ever rendered by an American court.
27747 Cal. 2d 597 (1957).
278Id., 648.
28059 Cal. 2d 159 (1963).
281It was described by the director of the agency designated to oversee it as "the greatest water project ever conceived by man." William Warne, Foreword, "Progress Report on the State Water Project," California, Department of Water Resources, 1961. The full story of the project is told in Norris Hundley, The Great Thirst: Californians and Water, 1770s-1990s (Berkeley, 1992), 272 & ff. The predictions concerning population growth were not off the mark by much.
283The comments here and elsewhere in this chapter on the dynamics of decision making in the Gibson court are, I need to stress, the product of my
informed speculation. There are no conference notes or other internal court documents that would throw light on the court’s inner workings. Nor are the writings of the justices very informative on this question.

One Gibson court innovation was eventually repudiated by the voters. Diminished capacity was abolished by voter initiative in 1982.

