

# *The Gibson Era*

1940-1964

CHAPTER FOUR | BY CHARLES J. MCCLAIN\*

## INTRODUCTION

**O**N 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. Gibson'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 eighteen 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 and 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 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.

## FIRST REFORMS IN JUDICIAL ADMINISTRATION

The chief justice of a state high court presides not only 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.

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 constitutionally-created body 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 it should be assisted by a permanent professional support staff. (The council at the time had none.)

Gibson's plea bore fruit. In 1941, the legislature gave the Judicial Council authority to issue rules of appellate

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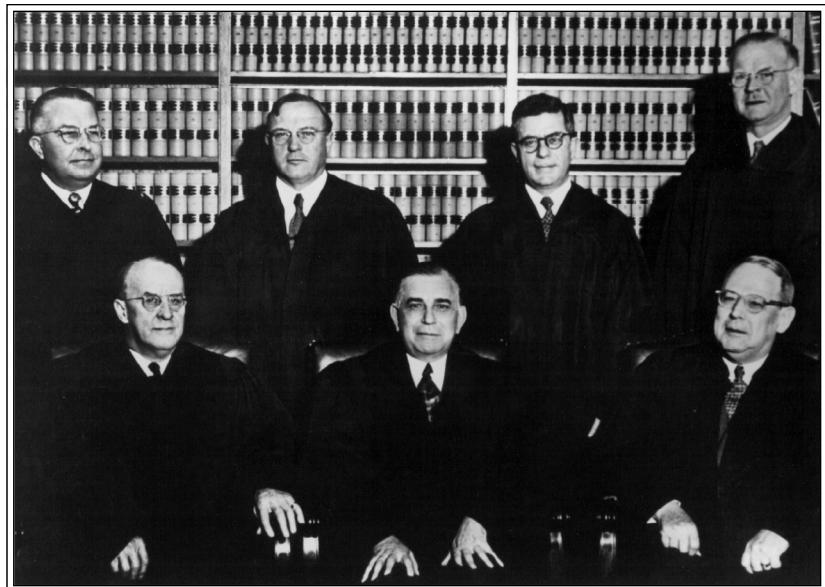
CHIEF JUSTICE  
PHIL S. GIBSON

procedure and practice and appropriated funds to hire a committee of experts and support staff to assist in the drafting effort. The committee worked under the supervision of Bernard E. Witkin, then on the Supreme Court staff, later the author of one of the most widely used treatises on California law. 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 "annual 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.

#### 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 was obligated to hear appeals from the superior court "on questions of law alone" in criminal cases where judgment of death had been rendered.



THE GIBSON COURT

CHIEF JUSTICE PHIL S. GIBSON (CENTER) AND (LEFT TO RIGHT)  
ASSOCIATE JUSTICES B. REY SCHAUER, JOHN W. SHENK, JESSE W. CARTER,  
ROGER J. TRAYNOR, DOUGLAS L. EDMONDS, AND HOMER R. SPENCE

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 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 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 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 that, in the exercise of its discretion, the high court decided it wanted to review. During Gibson's tenure about one in every four petitions for review was granted.

#### 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. Gibson knew how to deal with people to get results. These skills, as we have pointed out, were much in evidence in his 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. At the same time, he does not seem to have been overbearing or in any way condescending in advancing his views. 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.

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.) 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. Some evidence of this is the relative dearth of news media commentary critical of the Court. Another, possibly, 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 ten to one. It is true that no sitting justice had been unseated since the system went into effect in 1934. Still, the size of the margins seems significant.

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. 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, many members of the public, like so many justices of the Gibson Court, would take an expansive view of the law's possibilities.