INTRODUCTION

Challenges of the Modern Era

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In the first two decades of the twentieth century, the constitutional doctrine of the Court majority could fairly be summarized by two generalizations: the National Government has no role to play in the protection of individual rights, and laissez-faire economics is constitutionally required. Indeed, the Conservatives' lack of interest in enforcement of the Sherman Act was consistent with their constitutional position on laissez faire economics. Neither government nor corporations should interfere with the free workings of the market system. By then, however, two appointees of progressive Presidents—Justice Holmes and Justice Brandeis—had begun the task of forcing their brother Justices to reconsider both propositions. It was slow going, with far more defeats on both than victories. Perhaps if the United States had stayed out of World War I, Holmes and Brandeis might have made greater headway, at least with respect to the protection of individual rights.[1] As Professor Belknap points out, however, during and in the aftermath of that war, Attorney General Mitchell Palmer began to see subversives everywhere, particularly in the emerging labor movement. Indeed, he succeeded in destroying the one national labor organization that at that time amounted to anything.[2]

A few bright spots existed, however. Justice Holmes succeeded in obtaining a majority for the proposition that Federal habeas corpus relief was available for a state prisoner who had been convicted in a trial dominated by a mob.[3] That decision overruled an opinion to the contrary written a few years earlier by Justice Pitney.[4] In the 1927 case of *Nixon v. Herndon*,[5] Holmes succeeded in restoring the fifteenth amendment to the Constitution from its deep sleep after 1887; the Court held that the states

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[1] *See generally* P. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979).

[2] The International Workers of the World did not survive the Palmer era.

[3] *See* Moore v. Dempsey, 261 U.S. 86 (1923) (overruling Frank v. Mangum, 237 U.S. 309 (1915)).

[4] *See supra* note 3.

[5] 273 U.S. 536 (1927).

could not by law exclude blacks from the Democratic primary elections. The Court also made a major step forward in the protection of individual political rights when it recognized in *Near v. Minnesota ex rel. Olson*[6] that the first amendment applied to the states as well as to the Federal Government. On the whole, however, very little progress was made with respect to the protection of individual rights through the Constitution until after the Second World War.

On the economic front, the critical event was the election of Franklin D. Roosevelt in 1932. By 1937, the pressure that he put on the Court through the famous Court-packing proposal and the workings of the appointive process resulted in the abandonment of the Court's efforts to maintain that laissez-faire economics was constitutional law. The passage of the Wagner Act and the decision in *NLRB v. Jones & Laughlin Steel Corp.*[7] upholding the constitutionality of that statute meant that from thence forward, labor organizations could no longer be treated as subversive.

It was organized labor that first forced the Court to reconsider the Civil Rights Acts, which had been passed in the 1870's and had been largely buried. That reconsideration began in the great 1939 case of *Hague v. CIO*,[8] involving the attempt by a prominent New Jersey politician to control a haven for runaway sweatshops.[9] The *Hague* case might have led to progress for other disadvantaged groups such as blacks and women had not World War II interfered. During World War II, the Court largely put the issues of individual rights on the back burner. In some instances, the Court invented new doctrines such as abstention as a means for avoiding the adjudication of civil rights cases.[10] After the war, the same sort of hysteria that followed World War I produced the McCarthy era, and the Court certainly did not distinguish itself by resisting that hysteria in any meaningful man-

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6 283 U.S. 697 (1931). The *Near* holding that the first amendment applied to the states by virtue of the fourteenth amendment had been articulated in Justice Brandeis's dissenting opinion in Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting). Brandeis's position was assumed arguendo by the majority in Gitlow v. New York, 268 U.S. 652 (1925), but the Court held that no first amendment violation was presented by that case.

7 301 U.S. 1 (1937).

8 307 U.S. 496 (1939).

9 For the background of the *Hague v. CIO* dispute, see Gibbons, *Hague v. CIO: A Retrospective*, 52 N.Y.U. L. REV. 731 (1977).

10 *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941).

ner.[11] Not until the decision in *Brown v. Board of Education*[12] in 1954 did the Court begin to become a significant protector of the rights of individuals. Shortly after that decision, in October of 1956, the next New Jersey Justice, William Brennan, took his place on the Court.

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[11] Perhaps the Court's least distinguished effort was Dennis v. United States, 341 U.S. 494 (1951), in which the majority, although it could not agree on an opinion of the Court, upheld the constitutionality of the Smith Act, ch. 439, § 2, 54 Stat. 670, 671 (1940) (current version at 18 U.S.C. § 2385 (1982)) (providing criminal sanctions for conspiring to overthrow the Government).

[12] 347 U.S. 483 (1954).