

### RELATED CASES

*Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926)  
*Keyes v. School District No. 1*, 413 U.S. 189 (1973)

### RECOMMENDED READING

Bolmeier, Edward C. *Landmark Supreme Court Decisions on Public School Issues*. Charlottesville, Va.: Michie, 1973.

David A. J. Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 55 NYU Law Review 1 (1980).



**Case Title:** *Gitlow v. People of the State of New York*

**Alternate Case Title:** *Gitlow v. New York*

**Legal Citation:** 268 U.S. 652

**Year of Decision:** 1925



### KEY ISSUES

Does a statute that defines and prohibits the advocacy of criminal anarchy violate the First Amendment guarantees of freedom of speech and press and the Fourteenth Amendment?

### HISTORY OF THE CASE

Benjamin Gitlow was convicted with three others of the statutory crime of criminal anarchy. He was tried separately, convicted, and sentenced to imprisonment. He was indicted on two counts. The first charge was that he “advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means.” The second charge was that he had “printed, published and knowingly circulated and distributed a certain paper called ‘The Revolutionary Age,’ containing the writings set forth in the first

count.” His judgment was affirmed by both the appellate division and the court of appeals.

The statute at issue defined criminal anarchy as “the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any executive officials of government of such doctrine either by word of mouth or writing.” The statute also made it a crime to print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any such book, paper, document, or written or printed matter in any form, containing or advocating the doctrine that organized government should be overthrown.

At trial no evidence was presented regarding the effect of the distribution of this material.

### SUMMARY OF ARGUMENTS

Gitlow argued that the statute by its terms and as applied to his case violated the due process clause of the Fourteenth Amendment. He argued that as a matter of law, the publication at issue did not contravene the statute. His primary argument rested upon two propositions: (1) that the liberty protected by the Fourteenth Amendment includes liberty of speech and the press and (2) that liberty of expression, though not an absolute right, may be restricted only in circumstances in which there is necessary causal connection between the proscribed behavior and the method of the restraint; thus the restraint must be justified by the circumstances surrounding the expression.

The state argued that the material disseminated by Gitlow and that he actively advocated violated the statute at issue. They further argued that it was within the legislative powers of the state to determine which utterances were inimical to the general welfare and involved danger to such a degree as to justify the exercise of its police powers. In addition, they argued that this determination must be shown deference by the Court. It was established in *Mulger v. Kansas* (1887) that issues of the validity or constitutionality of a statute were to be decided but presuming the statute’s validity, which must be disproved by the plaintiffs. They argued that it was well established that cases should be decided on the principle that the state was the best judge of which regulations were

in the best interest of public safety and welfare. Finally, the state argued that they could not reasonably be expected to wait until the peace had been breached before they could act to prevent certain behavior.

### DECISION

Justice Sanford, writing for the majority, affirmed Gitlow's conviction, noting that the only issue litigated was "whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment." To this issue he responded that the statute at issue was not a vague proscription of the general right of expression but rather aimed at that speech that had the quality of inciting concrete action: "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging action."

He noted that the trial court applied this analysis and correctly found that material that advocated the violent overthrow of government qualified as the type of speech that the state legitimately might proscribe: "The Manifesto, plainly, is neither the statement of abstract doctrine. . . . It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government." He reasoned that the document, which in some of its more controversial areas noted "the necessity of accomplishing the 'Communist Revolution' through militant and 'revolutionary Socialism,' based on 'the class struggle' and mobilizing the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place . . . the system of Communist socialism," had the purpose of direct incitement.

Though the freedom of speech and the press has long been recognized as fundamental, it is not an absolute right. Justice Sanford noted that the state might, in the exercise of its police powers, punish those who abused this right. This was especially true in those circumstances when the speech might "corrupt public morals, incite crime, or disturb the public peace."

The right of the state to exercise this power against those who advocate direct attacks on the state through force and violence is legitimate in situations that endanger the general welfare and involve danger of "substantive evil." Justice Sanford further argued that the state's use of police power should only be deemed illegitimate in circumstances when it was arbitrary and unreasonable. This was not such a situation, as a publication that advocated the violent overthrow of the U.S. government "present[ed] a sufficient danger of substantive evil to bring their punishment within the range of legislative direction."

Justice Sanford refuted Gitlow's assertion that the state should be forced to wait until the threat of danger was realized. He contended that if that were the accepted method, the right to proscribe behavior would take effect simultaneously with the overthrow of government, in which neither the prosecution nor enforcement of the laws would be effective: "We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State, unwarrantable infringing the freedom of speech or press; and we must and do sustain its constitutionality." Under this principle, any utterance that in any way had a tendency to jeopardize public welfare and safety could be prohibited by the statute—no utterance was too trivial: "When the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such a danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within the prohibition."

Justice Holmes wrote a dissenting opinion, which Justice Brandeis joined. He contended that the principle of free speech was included within the meaning of the Fourteenth Amendment as indicated by the use of the word *liberty*. He argued that the “clear and present danger” test, established in *Charles T. Schenck v. United States* (1919), should be applied. Under that test, only words “of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent” could be regulated by the state. Under the *Schenck* test it was clear that Gitlow’s advocacy and publication did not reach the level that allowed for proscription. Justice Holmes refuted the contention of the majority that the manifesto was more than a theory and asserted that under the majority’s definition every idea could be considered incitement. He concluded that Gitlow was indicted for the publication of this material and not for its propensity to produce a certain harm. He reasoned that Gitlow’s publication merely presented a belief with fervor, and the constitutionality of statements contained therein should not be judged by the fervency of their presentation: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”

#### AFTERMATH

The Court’s treatment of state proscription of speech that the state sought to regulate has varied. In the subversive advocacy context, advocacy of the overthrow of the government, the speech was suppressed because of its effective ability to persuade the audience to act in a manner that the state considered “undesirable.” The prohibition of certain viewpoints in the *Gitlow* case was absolute. In cases involving hostile audiences, the limitations have been more limited in scope.

In later decisions, the Court adopted the “clear and present danger” standard to gauge the appropriateness of state restrictions in various First Amendment contexts. In *BRANDENBURG V. OHIO* (1969), the Court established the current

rule regarding the validity of state restrictions on the right of free speech: A state may not restrict free speech of the press except where the expression of certain views is directed at inciting or producing imminent lawlessness and is likely to incite or produce such action.

#### SIGNIFICANCE

This law was used to prosecute Gitlow, a radical socialist, in response to the assassination of President McKinley and was intended for use against social anarchists.

Gitlow was the first case to address the extent to which First Amendment rights are incorporated within the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment. Justice Holmes’s dissent in this case provided the mechanisms for establishing national standards for state and private behavior. It now serves as the mechanism by which citizens protect their rights against coercive state and private action.

#### RELATED CASES

*Mulger v. Kansas*, 123 U.S. 623 (1887)

*Great Northern Ry. v. Clara City*, 246 U.S. 434 (1918)

*Abrams v. United States*, 250 U.S. 616 (1919)

*Debs v. United States*, 249 U.S. 211 (1919)

*Frohwerk v. United States*, 249 U.S. 204 (1919)

*Schenck v. United States*, 249 U.S. 47 (1919)

*Whitney v. California*, 274 U.S. 357 (1927)

*Brandenburg v. Ohio*, 395 U.S. 444 (1969)

#### RECOMMENDED READING

Thomas C. Mackey, “*They Are Positively Dangerous Men*”: *The Lost Court Documents of Benjamin Gitlow and James Larkin before the New York City Magistrates’ Court, 1919*, 69 New York University Law Review 421 (1994).

William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 University of Cincinnati Law Review 125 (1988).

Geoffrey R. Stone, *Reflections of the First Amendment: The Evolution of the American Jurisprudence of Free Expression*, 131 *Journal of American Philosophical Society* 251 (1987).



**Case Title:** *Whitney v. California*

**Alternate Case Title:** The Criminal Syndicate Case

**Legal Citation:** 274 U.S. 357

**Year of Decision:** 1927



### KEY ISSUE

May the state make it a crime for a person to join a group that has been organized to commit “criminal syndicalism” regardless of that person’s role in the group?

### HISTORY OF THE CASE

Charlotte Anita Whitney attended a convention for the purpose of establishing a California branch of the Communist Labor Party. She sponsored a resolution calling for the achievement of the party’s goals through the political process, but the convention adopted a more militant platform. Nonetheless, she remained at the convention and thereafter continued her membership in the party. She was later convicted of violating the California Criminal Syndicalism Act, which made it a crime to organize or knowingly become a member of a group organized to advocate criminal syndicalism, defined as “any doctrine . . . advocating . . . the commission of crime, sabotage or acts of force or violence . . . as a means of accomplishing a change in industrial ownership or control, or affecting any political change.” Her petition to have the case heard by the California Supreme Court was denied, but the case reached the U.S. Supreme Court on a writ of error from the California Court of Appeal.

### SUMMARY OF ARGUMENTS

Whitney argued that because she had not intended that the party become an instrument of violence

or lawlessness, the act as applied violated her Fourteenth Amendment due process right to freedom of assembly.

California argued that the Syndicalism Act was a reasonable use of its police power in response to a perceived danger to the public peace.

### DECISION

The Court, in an opinion delivered by Justice Sanford, held that the Syndicalism Act was a constitutional exercise of the state’s police power. Justice Sanford argued that Whitney’s claim to a lack of knowledge concerning the eventual disposition of the party was a factual issue that the jury had resolved against her on the basis of evidence such as her continued membership in the party. The act, as an exercise of the state’s police power, was to be upheld unless capricious or arbitrary. In Justice Sanford’s opinion, the danger posed by criminal syndicalism not only was a sufficient basis for the act but also served to override any constitutional free speech or assembly interest that Whitney could assert.

Justice Brandeis, joined by Justice Holmes, wrote a powerful concurring opinion. He agreed with the judgment of the Court only because Whitney had not raised her First Amendment argument for consideration by the district court judge and jury; under procedural rules, this barred the Supreme Court from reviewing that issue. Nonetheless, Justice Brandeis argued cogently that the act did infringe upon Whitney’s right to freedom of assembly. In his opinion, the state could justify the act only by demonstrating that it was a response to a “clear and present danger” of a serious evil. Justice Brandeis asserted that this higher standard of review comported with the framers’ intent that we “not exalt order at the cost of liberty.” In Brandeis’s words: “To courageous, self-reliant men, with confidence in the power of free and fearless reasoning through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion.” Justice Brandeis argued that had the issue been up for review, the