

state's justification for the act would have been subjected to a far more exacting examination than the one conducted by the Court in the case.

AFTERMATH

This decision made mere membership in a group involved in subversive activity punishable. However, Whitney was pardoned by the governor several months after her conviction was upheld by the Court.

SIGNIFICANCE

Brandeis's continued use of the "clear and present danger" standard secured its role in First Amendment analysis. His view that free speech was valuable because of its role in the deliberative process was arguably the progenitor of the representation-reinforcement theory, a theory that suggested the federal government prevented any state or group of people from acting contrary to the whole, used in subsequent cases concerning due process.

RELATED CASES

Abrams v. United States, 250 U.S. 616 (1919)
Schenck v. United States, 249 U.S. 47 (1919)
Gitlow v. New York, 268 U.S. 652 (1925)
Fiske v. Kansas, 274 U.S. 380 (1927)
Dennis v. United States, 341 U.S. 494 (1951)
Brandenburg v. Ohio, 395 U.S. 444 (1969)

RECOMMENDED READING

Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 William and Mary Law Review 653 (1988).

Ronald K. L. Collins and David Skover, *Curious Concurrence: Justice Brandeis' Vote in Whitney v. California*, 2005 Supreme Court Review 333.

Dee, Juliet. "Whitney v. California." In *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*, edited by Richard A. Parker, 36–51. Tuscaloosa: University of Alabama Press, 2003.

Emerson, Thomas I. *The System of Freedom of Expression*. New York: Random House, 1970.

Renshaw, Patrick. *The Wobblies: The Story of Syndicalism in the United States*. Garden City, N.Y.: Doubleday, 1967.



Case Title: *Stromberg v. California*

Legal Citation: 283 U.S. 359

Year of Decision: 1931



KEY ISSUE

Does a law prohibiting the display of a red flag violate an individual's First Amendment right to freedom of expression?

HISTORY OF THE CASE

In 1919, at the height of the first red scare, the state of California enacted a statute that made it a felony for someone to display a red flag so as to oppose organized government, incite anarchy, or aid propaganda. Yetta Stromberg, an employee at a children's summer camp, as a part of her job, supervised a daily flag-raising ceremony when the children would raise a reproduction of the flag of Soviet Russia and pledge allegiance to this flag. When this came to the attention of the police, Stromberg was arrested.

At trial at the Superior Court of San Bernardino County, California, the court issued jury instructions that if the jury found that the defendant had committed one of the three purposes of using the flag that the statute made illegal, the defendant should be found guilty: one, as a symbol of opposition to organized government; two, as an invitation to anarchistic action; or, three, as an aid to propaganda that is of seditious character. After being convicted under this statute, the defendant appealed to the California District Court of Appeals. The court of appeals decided that while the first of the instructed purposes

might be unconstitutional, the conviction should be affirmed because the remaining two purposes were valid.

SUMMARY OF ARGUMENTS

Stromberg argued that the California statute was a state infringement on her freedom of speech. She argued that the Fourteenth Amendment protects citizens from the infringements on their liberties, such as the freedom of expression. As such, peaceful and orderly expression such as Stromberg's is protected. The law she was convicted under could be interpreted to infringe on that liberty.

The state of California argued that the conviction should be upheld. They challenged the finding of the court of appeals that displaying a red flag as a symbol of opposition to organized government would be unconstitutional because opposing organized government by necessity calls for the government to be overthrown. As such, it is no different from the remaining purposes. These remaining purposes would be valid because freedom of speech does not protect speech that poses a clear and present danger to law and order.

DECISION

The U.S. Supreme Court reversed the decision of the California District Court of Appeals and held that the Fourteenth Amendment protected Stromberg from state infringement of her First Amendment right to speech that demonstrated opposition to organized government without causing incitement.

In his majority opinion, Justice Hughes focused on the way that the trial court handled the California statute. In its jury instructions, the trial court stated that the jury must convict if any one of the three purposes of the statute had been met; however, the verdict did not specify the particular part of the statute under which Stromberg had been convicted. Justice Hughes then stated that because the verdict was unclear as to why Stromberg was convicted, if any one part of the statute were invalid under the U.S. Constitution, the conviction must be overturned.

First, Hughes found the second and third parts of the statute (relating to actual incitements of violence by the speaker) to be valid under the

Constitution. Thus, the dispositive question in this case, according to Hughes, was whether the portion of the statute prohibiting display as a symbol of opposition to organized government was constitutional. Justice Hughes concluded that it was unconstitutional because the word *opposition* might be construed to include peaceful opposition. This vagueness might pose a deterrent to an individual's freedom of speech.

Because Stromberg's conviction might have rested on the part of the statute that was deemed unconstitutional, the conviction was reversed, and the case remanded for further proceedings where conviction would have to rest on actual "incitement" against the government. This result seemed particularly appropriate in light of the fact that the prosecutor focused most of his argument on the unconstitutional portion.

In his dissent, Justice Butler argued that Justice Hughes had not researched the jury instructions thoroughly enough. According to Justice Butler, the trial court issued instructions that stated "the inhabitants of the United States have . . . the right to advocate peaceable changes in our constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis." The dissent thought that the effect of this instruction was to limit the jury to basing a conviction of Stromberg on parts of the statute that were in fact constitutional.

AFTERMATH

The Supreme Court's decision that the portion of the statute was unconstitutional and their reversal of Stromberg's conviction were the beginning of an evolving understanding of the interplay between the First Amendment and the Fourteenth Amendment. The statute itself was repealed about two years after this decision.

SIGNIFICANCE

Stromberg v. California is a landmark case in the sense that it marked the first time that the Fourteenth Amendment's "guaranty of liberty" had been used to prevent a state from violating a citizen's right to freedom of speech and expression.

This case was heard less than 10 years after the first time that the Supreme Court recognized that the First Amendment limited state action as well as federal action.

RELATED CASES

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

Gitlow v. People of State of New York, 268 U.S. 652 (1925)

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

STATUTE AT ISSUE

1919 California Penal Code, § 403a

RECOMMENDED READING

Lawrence A. Epter, *The Clash of Outrage and the First Amendment: The Protection of Non-Mainstream Opinion*, 27 Duquesne Law Review 437 (1989).

Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 American Journal of Criminal Law 279 (2003).

Robert S. Tanenbaum, *Preaching Terror: Free Speech or Wartime Incitement?* 55 American University Law Review 785 (2006).



Case Title: *De Jonge v. Oregon*

Alternate Case Title: The “Right of Petition Clause” Case

Legal Citation: 299 U.S. 353

Year of Decision: 1937



KEY ISSUE

Does a state statute prohibiting criminal syndicalism, the advocacy of the use of crime or violence

or sabotage to effect change in government or industry, violate the right of peaceable assembly protected by the First Amendment?

HISTORY OF THE CASE

The appellant, Dirk De Jonge, assisted in conducting a meeting held under the auspices of the Communist Party. The meeting was open to the public and was concerned primarily with a continuing maritime strike, allegedly unlawful raids on workers’ halls and homes, and the shooting of a striking longshoreman by local police. No one at the meeting advocated criminal syndicalism or any other unlawful conduct. The defendant was convicted under a provision of Oregon’s Criminal Syndicalism Law declaring it unlawful for any person to assist “in conducting a meeting” of any organization that advocates criminal syndicalism. The state courts sustained De Jonge’s conviction after finding that the Communist Party had advocated criminal syndicalism at other times and places. De Jonge appealed to the U.S. Supreme Court.

SUMMARY OF ARGUMENTS

De Jonge argued that the Oregon statute, as applied to him for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated, violated the due process clause of the Fourteenth Amendment.

The state of Oregon argued that the Communist Party was an organization that advocated criminal syndicalism in general, and that general advocacy made De Jonge’s participation in a meeting held by the Communist Party a criminal act.

DECISION

The Court invalidated De Jonge’s conviction. Chief Justice Hughes wrote the opinion for the Court that the right to assemble peacefully was guaranteed by the Fourteenth Amendment. He stated that the legislature could intervene against abusive speech only by dealing with the abusive speech itself. The state could not make the peaceful assembly of persons for lawful discussion criminal; nor could it prohibit such meetings, and persons helping with the conduct of such meetings could not be made criminals for doing so.