WHITNEY V. CALIFORNIA (1927)

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In *Whitney v. California*, Anita Whitney attended a meeting in Oakland to organize a branch of the Communist Party. She was charged and convicted under the California Criminal Syndicalism Act. This law criminalized any person knowingly becoming a member of an organization that called for "the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Generally speaking, state criminal syndicalism laws were designed to curb groups like the Communist Party that advocated radical political and economic change through lawless (and often violent) means. The Supreme Court upheld the California law and Whitney's conviction—urging deference to the state legislature. But this case is best remembered for Justice Louis Brandeis's powerful concurrence—advancing a vision of robust free speech protection that would influence the Court for decades. Within Brandeis's concurrence, we see the foundation for future speech-protective decisions by the Supreme Court, culminating in *Brandenburg v. Ohio* (1969). With *Brandenburg*, the Court finally wrote Brandeis's *Whitney* concurrence into bedrock constitutional doctrine—concluding that, generally speaking, the government may not restrict speech unless it is directed to and likely to cause immediate lawless action.

Excerpts from Justice Brandeis's Concurring Opinion

- Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. . . .

- Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .

- Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. . . .