2005

A Curious Concurrence: Justice Brandeis' Vote in Whitney v. California

David Skover
Ronald Collins

RONALD K. L. COLLINS
AND DAVID M. SKOVER

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> From the tenor of the opinion . . . one would anticipate that Justice Brandeis must end up in dissent. In fact, however, he concurs in affirming the conviction of Miss Whitney. This outcome leaves us with a train of puzzles as to what he has been saying. (Harry Kalven, Jr.)[1]

On May 16, 1927, a unanimous Supreme Court affirmed California's conviction of Charlotte Anita Whitney for criminal syndical-

Ronald K. L. Collins is Scholar, First Amendment Center, Arlington, Virginia. David M. Skover is Dean's Distinguished Research Scholar and Professor of Law, Seattle University Law School.

AUTHORS' NOTE: We sincerely thank Geoffrey Stone, who encouraged this article and then shepherded it through the editorial process, and Martin Redish and Hans Linde, who gave valuable suggestions to improve the piece. Our appreciation goes, as well, to Dean Elena Kagan of the Harvard Law School, and David Warrington and Edwin Moloy of Special Collections at the Harvard Law School Library, for permission to reprint various items from the Louis Brandeis Papers. We are grateful to William Eigelsbach of Special Collections at the University of Tennessee Library, who assisted our research in the Edward T. Sanford Materials Collection, and to Vanessa Yarnell, who enabled our research at the U.S. Supreme Court library. This article is dedicated to our friend and colleague Steven Shiffrin—a wonderful soul who, like Harry Kalven before him, honors the "worthy tradition" by keeping alive the fighting spirit of dissent. Steve: this one is for you.

[1] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 164 (Harper & Row, 1988).

0-226-36251-5/2006/2005-0009$10.00

ism.[2] The patrician social activist was known both for her family's privileged status and for her allegiance to Leftist principles. She was a member of California's Communist Labor Party, which led to her arrest for organizing and participating in a group that advocated criminal syndicalism. After the Court's ruling, the fifty-nine-year-old dissident faced up to fourteen years in prison. Only a gubernatorial pardon would change her fate.

Justice Louis Brandeis—the great dissenter, advocate of civil liberties, and champion of free speech—joined in that judgment. Nonetheless, he penned a remarkable concurring opinion, now hailed as "a brilliant exposition of the new philosophical defense of political dissent."[3] The opinion has been celebrated as one of the most conceptually influential and rhetorically powerful justifications for First Amendment liberties. That seminal concurrence has been described as "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment,"[4] and as "rank[ing] among the most frequently cited [opinions] ever written by a Supreme Court Justice."[5]

Brandeis's memorable concurrence has been the focus of much scholarly analysis. In 1988, Vincent Blasi authored a Talmud-like line-by-line exegesis of most of Brandeis's words.[6] Other commentators, such as Bradley Bobertz,[7] Ashutosh Bhagwat,[8] David Rabban,[9] and Cass Sunstein,[10] wrote of the significance of the *Whitney* concurrence in the evolution of First Amendment theory and doctrine. Still others, like Thomas Emerson[11] and Rodney Smolla,[12]

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[2] *Whitney v California*, 274 US 357 (1927).

[3] Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 100 (California, 1991).

[4] Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm & Mary L Rev 653, 668 (1988).

[5] Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909–1931*, 40 Wm & Mary L Rev 557, 645 (1999) (footnote omitted).

[6] See Blasi at 668–97 (cited in note 4).

[7] See Bobertz at 641–47 (cited in note 5).

[8] See Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in Michael C. Dorf, ed, *Constitutional Law Stories* 418–520 (Foundation, 2004).

[9] See David M. Rabban, *Free Speech in Its Forgotten Years* 365–71 (Cambridge, 1997).

[10] See Cass R. Sunstein, *Democracy and the Problem of Free Speech* 26–28 (Free Press, 1993).

[11] See Thomas I. Emerson, *The System of Freedom of Expression* 106 (Vintage, 1970).

[12] See Rodney A. Smolla, *Free Speech in an Open Society* 105–06 (Knopf, 1992).

depicted Brandeis's handiwork as a brilliant foreshadowing of a more promising future for freedom of speech.

Neither these nor the many other commentaries on the *Whitney* case, however, have devoted extensive attention to the following question: Given Brandeis's faith in speech freedoms, why did he *concur* in the judgment of the Court in *Whitney v California*? When commentators have addressed that question at all, they have given variations on the same simple answer: Brandeis (joined by Holmes) concurred with the majority, "but *only* because the question of freedom of expression had not been raised sufficiently at trial to qualify as an issue on appeal."[13] Virtually everyone has accepted, with little or no question, Justice Brandeis's assertion[14] that jurisdictional impediments necessitated his vote in the case.[15]

But what if those commentators (and many others) were too credulous? What if such jurisdictional impediments were more deliberately chosen than doctrinally compelled? Or what if there were jurisdictional problems, but of a rather different order than Justice Brandeis had suggested? What if Brandeis were wrong in the reasons he tendered for voting to uphold Ms. Whitney's conviction? Such queries raise yet larger questions: Is it possible that the *Whitney* case was far more complex than Brandeis's concurrence suggested?

Much as we admire Louis Brandeis's eloquent and compelling First Amendment jurisprudence in *Whitney*, we find his jurisdictional and substantive arguments suspect. For that matter, we find it difficult to believe that the learned Brandeis was entirely unmindful of the shortcomings of those arguments. Given such shortcomings, we consider Brandeis's opinion to be a most curious concurrence. It is curious in its depiction of the facts and the law of the case, and it is equally curious when considered alongside other

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[13] Juliet Dee, *Whitney v. California*, in Richard A. Parker, ed, *Free Speech on Trial* 38–39 (Alabama, 2004) (emphasis added).

[14] 274 US at 379–80 (Brandeis concurring).

[15] See, e.g., Daniel A. Farber, *The First Amendment* 61 (Foundation, 1998); Martin Shapiro, *Whitney v. California*, in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds, *The First Amendment: Selections from the Encyclopedia of the American Constitution* 135 (Macmillan, 1990); Philippa Strum, ed, *Brandeis on Democracy* 238 (Kansas, 1995) ("Brandeis wrote a concurrence rather than a dissent because Whitney's lawyers had not argued that the statute was an unconstitutional limitation on speech that presented no clear and present danger to the state, which were the grounds on which he would have overturned the conviction. Brandeis felt constrained to follow the Court's rule that it would not decide a case on the basis of an argument not made by the attorneys."); Kermit L. Hall, William M. Wiecek, and Paul Finkelman, *American Legal History: Cases and Materials* 419 (Oxford, 1991).

opinions penned by Justice Brandeis. For those reasons, we aim to provide a more searching examination of Brandeis's vote in *Whitney*.

It is a largely overlooked fact: what Brandeis did in *Whitney* must be viewed against the backdrop of what he did in *Ruthenberg v Michigan*, a 1927 unpublished First Amendment case. In his *Ruthenberg* dissent, Brandeis first introduced the lofty free-speech principles that later found their way into his *Whitney* concurrence. More important for our purposes, however, is the irony that the far more radical creed, conduct, and associations of Charles Ruthenberg won Brandeis's First Amendment toleration, whereas the relatively benign behavior and associations of Anita Whitney did not; and that similar criminal syndicalism prosecutions resulted in different votes by Brandeis. Why is this so?

The answer to that question is tied to the fact that the First Amendment story of Anita Whitney is inextricably linked to that of Charles Ruthenberg. And a fascinating story it is, both in law and history. It involves, in various ways, an array of characters ranging from a U.S. Supreme Court Justice (James McReynolds) to a lawyer for the Hearst newspapers (John Francis Neylan) to two civil liberties appellate lawyers (Walter Pollak and Walter Nelles) to a Brandeis law clerk (Walter Landis) to an Alameda County prosecutor (Earl Warren) and finally to a California governor (Clement Calhoun Young). More significantly, this story establishes that generations of lawyers and scholars remained oblivious to the obvious, and let Brandeis's rhetoric divert them from what they might otherwise have noted about his reasoning. Finally, this story shows how, even as Brandeis sought to justify his concurrence on procedural grounds, he ended by concluding that Ms. Whitney's conviction had to be sustained *on the merits*.

I. The Free-Speech Story of Charles Ruthenberg and Anita Whitney

Charles Emil Ruthenberg and Charlotte Anita Whitney both castigated the abuses of American capitalism and imperialism, and demanded that the constitutional guarantees of free speech and association protect their right to do so. Both suffered the indignities and penalties of social intolerance, police harassment, criminal prosecution, and judicial sanction for advocating dissident beliefs and associating with communist groups. And both asked the United

States Supreme Court to safeguard their expressions of defiance, and were rebuffed.

Their similarities notwithstanding, the differences between them were stark and significant. Ruthenberg was a commoner from an immigrant family; Whitney was upper-middle class and from a distinguished bloodline. Ruthenberg found his radical roots early on in life—preaching on street corners, supporting labor strikes, organizing antiwar demonstrations, recruiting and training party workers, and campaigning for office as a socialist candidate; Whitney came to her dissident beliefs much later, after devoting years of service as a social worker, probation officer, political lobbyist, suffragette, civil rights activist, and civic league president. As national executive secretary of the Communist Party, Ruthenberg gained a reputation as the "most arrested red in America,"[16] reportedly with more than sixty indictments pending against him at one time; Whitney was arrested only once, on charges of aiding and abetting criminal syndicalism as a member of the Communist Labor Party of California, and that after having delivered an address to the Women's Civic Center of Oakland about the economic and political disenfranchisement of African-Americans and the nation's abhorrent practices of lynching. And, more central to our purposes, Justice Brandeis raised a First Amendment lance in Ruthenberg's defense against criminal syndicalism charges, but raised a shield for the state when Whitney was similarly charged. The free-speech story of Charles Ruthenberg and Anita Whitney is a study in contrasts, and an ironic tale of how a notorious dissident was lost to legal history whereas a minor figure was catapulted into it.

A. THE YOUNGER YEARS

On July 7, 1867, Charlotte Anita Whitney was born in San Francisco into an influential and refined family. She could count five Mayflower pilgrims on her father's side; on her mother's side, the Dutch Van Swearingen family, who settled in 1640 in Maryland, could claim two American Revolutionary officers, one a colonel in the Virginia militia who produced a line of genteel slave

[16] This title was coined by the *Chicago Daily Tribune* in a report on Ruthenberg's arrest in Chicago after a telegram informed the Illinois authorities that he had been indicted in New York for violation of the state's criminal syndicalism act. See *Most Arrested Red "in America" Is Seized Again*, Chicago Daily Tribune (Dec 2, 1919), p 5 ("It is said at present he has more than sixty indictments pending against him.").

owners. Anita's father, who suffered health conditions, escaped the climate of New England by migrating to California in the 1860s to begin a successful legal practice; there, he met his wife, and raised his children in an environment of comfort and culture. In the fall of 1885, George Whitney packed his daughter off to the East Coast to be educated at Wellesley. She spent her holidays with her aunt and uncle-in-marriage, the conservative Supreme Court Justice Stephen J. Field.[17]

Three years before Whitney entered college, Charles Ruthenberg was born in Cleveland, Ohio, in a small wooden-framed house. His birth on July 9, 1882, added a ninth child to the immigrant family that had left Germany only four months earlier. "Worker August Ruthenberg," as his father's name was recorded on his marriage license, was a longshoreman who raised his family in one of Cleveland's poorer districts. A socialist who believed in organized labor, August never seriously engaged in radical politics but exposed his son to Sunday afternoon discussions with his blue-collar friends on the philosophy of Schopenhauer, Hegel, and Schelling. Though Charles had wanted to go to high school and college, his father's premature death of typhoid on August 23, 1898, forced him to earn money for the family. He became a carpenter's assistant, working ten hours a day for $9.00 per week.[18]

In 1892–1893, while Ruthenberg learned his fourth- and fifth-grade lessons, Whitney engaged in social work at the College Settlement on New York's lower east side, where she was first exposed to real poverty. Anita had found "at last . . . something vital to be done."[19] Returning to California in 1901, she began a lengthy stint in charitable work. She served as secretary for the Associated Charities of Alameda County from 1903 to 1910, and spearheaded a successful campaign to oust racetrack betting. As

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[17] The essential facts in this paragraph are substantiated in the two most important biographical works on Charlotte Anita Whitney. See Al Richmond, *Native Daughter: The Story of Anita Whitney* 17–21 (Anita Whitney 75th Anniversary Committee, 1942); Lisa Rubens, *The Patrician Radical: Charlotte Anita Whitney*, 65 Cal History 158, 160 (1986). See also Clare Shipman, *The Conviction of Anita Whitney*, 110 The Nation 365 (1920).

[18] The essential facts in this paragraph derive from the major biographical work on Charles Ruthenberg. See Oakley C. Johnson, *The Day Is Coming: Life and Work of Charles E. Ruthenberg* 7–15 (International Publishers, 1957). Lesser works on Ruthenberg include Elizabeth G. Flynn, *Debs, Haywood, Ruthenberg* (Workers Library, 1939), and Jay Lovestone, *Ruthenberg: Communist Fighter and Leader* (Workers Library, 1927). See also Theodore Draper, *American Communism and Soviet Russia: The Formative Period* 13–28, 40–57, 243–47 (Vintage, 1986).

[19] Quoted in Shipman at 160 (cited in note 17).

the first probation officer of Alameda County, she established efficient methods that set the standards for her successors. She helped orchestrate the 1911 victory for women's suffrage in California. As president of the California Civic League, she strove for laws securing minimum wages for women and children, the pasteurization of milk, the abatement of red-light prostitution districts, and the right of women to serve on juries.[20]

Not social work, but socialist work was the toil of Charles Ruthenberg in his early adulthood. At twenty-six years of age, he took the pledge at a Socialist Party meeting in January of 1909. That summer, he gave street-corner soapbox speeches on socialist principles, including the need to secure rights for laborers, women, and racial minorities. Somewhat self-conscious and halting as a speaker, he nevertheless demonstrated the knowledge, earnestness, and commitment that qualified him to head the Socialist ticket as a mayoral candidate in 1911 and a gubernatorial candidate in 1912. Ruthenberg used the power of his campaign to publicize the corruption of capitalist politics and to endorse the struggles of striking workers. Although he lost both elections, Ohioans cast more socialist votes in 1912 than any other state, and Ruthenberg's tally for the governorship was only a little less than the 89,930 for Eugene Debs's presidential candidacy. As organizer and secretary of Local Cleveland, Ruthenberg focused in 1913 on the induction of new party members and mass circulation of leaflets informing the public of socialist platforms. Late in that year, he was arrested for the first time at one of his street-corner speeches; though he was released without charge, this event marked the beginning of his ascent in the public consciousness—and police vigilance.[21]

Perhaps nothing propelled that ascent more than Ruthenberg's mobilization of public opinion in favor of worker strikes and in opposition to "imperialist wars." In 1914 (the same year that Anita Whitney joined the Socialist Party, after having witnessed the vicious treatment of organizers for the International Workers of the World), Ruthenberg initiated a statewide crusade on behalf of Ohio coal miners. In the week that World War I broke out in

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[20] The facts on Anita Whitney's social and civic work are substantiated in Bhagwat at 409 (cited in note 8); Rubens at 160–61 (cited in note 17); Shipman at 365 (cited in note 17). See also Franklin Hichborn, *The Case of Charlotte Anita Whitney* 3 (unidentified publisher, 1920) (pamphlet on file with authors).

[21] The essential facts in this paragraph were derived from Johnson at 21–25, 28, 39–41, 44–45, 70–71, 80–81, 86 (cited in note 18).

Europe, he mounted a demonstration in Cleveland attended by 3,000 people who applauded his rebuke of war launched by capitalist profiteers. "Capitalism," he charged, "is fighting to replace democracy in this country with a military machine."[22] And Ruthenberg was prepared to fight back for the minds and bodies of Americans who might listen to his provocative rhetoric.[23]

B. THE WAR YEARS

"You Will Pay in Blood and Suffering" read the leaflet distributed by the Socialists of Cleveland on April 1, 1917. It was one of many warnings delivered at a series of antiwar rallies organized by Charles Ruthenberg to protest America's impending entry into World War I. When Congress declared war on Germany five days later, he composed a "Manifesto Against War," which the *Socialist News* published. "In all history," Ruthenberg wrote, "there has been no more unjustified war than that which this nation is about to engage in. . . . No greater dishonor has been forced upon a people than that which the capitalist class is forcing upon this nation against its will."[24] The Manifesto urged workers to engage in a general strike that would trammel the war economy and force the government to remain neutral.[25]

Ruthenberg had long foreseen public counteroffensives to suppress socialist demonstrations against American war policy. "We are being tested by fire," he notified the readers of the *Socialist News*.[26] Still, the heat had not yet been directed against him personally. That was to change in June of 1917. Under the pressure of local businesses and newspapers, the Printz-Biederman Company forced Ruthenberg to choose between his political activities or his purchasing-agent job; he chose socialism, and was fired. Even worse, a Cleveland federal grand jury indicted him, along with two of his colleagues, for obstructing the Conscription Act. The prosecution's star witness was a young man unknown to him, Alphons J. Schue, who had pled guilty for refusing to register after

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[22] Quoted in Johnson at 103–04 (cited in note 18).

[23] The facts in this paragraph are found in Bhagwat at 409–11 (cited in note 8); Rubens at 161–63 (cited in note 17); Johnson at 87–91 (cited in note 18).

[24] Quoted in Johnson at 113 (cited in note 18).

[25] The essential facts in this paragraph were derived from id at 109–16.

[26] Quoted in id at 110.

having been induced by Ruthenberg's speeches not to comply with the law. With an unsympathetic jury, a guilty verdict was no surprise. Before his sentencing, Ruthenberg addressed the court: "I am not conscious of having committed any crime. The thing I am conscious of is having endeavored to inspire higher ideals and nobler lives. If to do that is a crime in the eyes of the Government, I am proud to have committed that crime."[27] He was sentenced to one year in the workhouse at Canton, Ohio.[28]

Out of jail on bail pending the appeal of his conviction, Ruthenberg mounted a vigorous mayoral campaign under the slogan: "For Socialism, Peace and Democracy." His address to an audience of 10,000 sympathetic listeners at the Cleveland Federation of Labor's picnic on Labor Day was meant to be one of the campaign's highlights. As Ruthenberg spoke, however, a cluster of rowdy soldiers pushed their way to the front of the crowd and demanded that he step down; they climbed onto the stage, shoving and punching anyone who tried to stop them. They succeeded in breaking up the assembly as thousands fled into the streets. Ultimately, Ruthenberg was not elected mayor, although he ran in third place with 27,865 votes, more than double his tally for the prior mayoral election. Two months later, in January of 1918, he entered prison after his antirecruitment conviction was upheld by the U.S. Supreme Court, with Justice Brandeis joining a unanimous judgment that rejected a host of alleged criminal procedural errors.[29] He was released in December of that year, after serving ten months on good behavior as a clerk-typist in the prison office.[30]

1919 proved a life-transforming year for both Charles Ruthenberg and Anita Whitney. That year, both left socialism to become communists, participated actively in the formation of communist party branches, and were arrested under state criminal syndicalism or anarchism statutes. In June, Ruthenberg joined ninety-four delegates from twenty states at the Left Wing Conference in New York to debate the means of overtaking the Socialist Party and transforming it into a Marxist working-class party governed by communist principles. At the September national

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[27] Quoted in id at 121.

[28] The essential facts in the paragraph were derived from id at 117–21.

[29] See *Ruthenberg v United States*, 245 US 480 (1918).

[30] The essential facts in this paragraph were derived from Johnson at 122–37 (cited in note 18).

convention of the Socialist Party in Chicago, the left-wingers abandoned the convention to begin the American Communist movement, but the movement divided at birth into the Communist Party of America (the more radical branch, led by Ruthenberg as National Secretary) and the Communist Labor Party of America (with Alfred Wagenknecht as Executive Secretary). The CLP's National Program called for a "unified revolutionary working class movement in America," recommended the general strike as a political weapon, and endorsed the Industrial Workers of the World by declaring: "In any mention of revolutionary industrial unionism in this country, there must be recognized the immense effect upon the American labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggle and heroic sacrifices in the class war have earned the affection and respect of all workers everywhere." It was this tribute to the IWW that would later prove to be Whitney's tribulation.[31]

Returning to California, the left-wing delegates were eager to win over the Socialists for the newly formed Communist Labor Party. Anita Whitney was among those who voted to change their affiliation. The first convention of the Communist Labor Party of California assembled at Loring Hall in Oakland on November 9; Whitney was selected as a member of the credentials and resolutions committees. After morale-boosting preliminaries—three cheers for the Bolsheviki and some spirited singing—the convention got down to business. Most of the convention's energy was consumed in a dispute over a resolution recognizing "the value of political action." Whitney strongly backed the "political action" resolution, but the majority feared that it represented no more than a reversion to the parliamentarianism of the Socialist Party and rejected it in favor of the more belligerent language of the CLP National Program. That vote did not deeply alienate Anita: she remained at the convention until it adjourned and subsequently attended at least one state executive committee meeting of the newly created party.[32]

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[31] The facts in this paragraph are substantiated in Draper at 17–20 (cited in note 18); Johnson at 145–46 (cited in note 18); Richmond at 76–77, 110 (cited in note 17); Rubens at 163–64 (cited in note 17); Blasi at 3 (cited in note 4).

[32] The facts in this paragraph are substantiated in Richmond at 77–78 (cited in note 17); Blasi at 3–4 (cited in note 4); Shipman at 365 (cited in note 17); Friend William Richardson, *Case of Anita Whitney* 2–3 (California gubernatorial papers, Nov 28, 1925) (on file with authors). The official Communist Labor Party songbook included such wildly

The *Oakland Enquirer*'s next-day description of the convention set off chain reactions for months to come. "The American flag hung in one corner of the room," the story read. "But, during the noon hour, a huge red cloth was hung so that the American flag was no longer visible while the radicals prepared to adopt their un-American constitution." On November 11, 400 American Legion members and sympathizers raided Loring Hall; the rioters hurled furniture, pictures, charters, and insignia from the Communist Labor Party office windows, and set the place ablaze. (On the same day, a Legionnaire raid of the IWW hall in Centralia, Washington, ended in a lynching of one IWW member.) In all of this, the flames were fanned by national hysteria: having ordered his infamous "red raids," Attorney General Mitchell Palmer declared on November 14 that he had a list of 60,000 individuals, both citizens and aliens, under Justice Department investigation.[33]

Two weeks after the Loring convention, eleven key figures in the Communist Labor Party of California were arrested and charged with criminal syndicalism. Effective on April 30 of 1919, California's criminal syndicalism statute had been presented to the legislature as an emergency measure for the "immediate preservation of the public peace and safety," and had passed by unanimous vote of the senate and with only nine dissenting votes in the assembly. The act defined "criminal syndicalism" as "any doctrine or precept advocating . . . the commission of crime, sabotage . . . or unlawful acts of force and violence . . . as a means of accomplishing a change in industrial ownership or control, or effecting any political change"; and it provided that any person who "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism" is guilty of a felony punishable up to fourteen years in prison.[34] The act's chief target was the International Workers of the World. The IWW had not only been

outlandish musical propaganda as the following: "Onward, Chrisian Soldiers! Rip and tear and smite! / Let the gentle Jesus bless your dynamite . . . . Onward, Christian Soldiers! Eat and drink your fill. / Rob with bloody fingers, Christ O.K.'s the bill."

[33] The facts in this paragraph were drawn from Richmond at 83–89 (cited in note 17); Hichborn at 11 (cited in note 20); *Oakland Veterans Raid Communists*, New York Times (Nov 13, 1919), p 1.

[34] For an annotated text of the California criminal syndicalism act, see 23 *California Jurisprudence* 1101–33.

instrumental in orchestrating labor strikes and slowdowns to improve conditions for industrial laborers and migratory farm workers, but it was suspected of more nefarious and surreptitious deeds in California: destroying hop kilns, burning wheat and hop fields, placing phosphor bombs in haystacks and barns, among other activities. With the criminal syndicalism law, California state authorities now had a forceful weapon against the IWW, and strike back it did: almost immediately, James McHugo, the IWW secretary in Oakland, and dozens of IWW adherents were indicted under the act. But the IWW was not to be the only target of prosecution for criminal syndicalism, as Charles Ruthenberg and Anita Whitney came to understand only too well.[35]

Ruthenberg was arrested on two separate occasions and under two separate state laws before the turn of the year. Shortly after Ohio's state legislature enacted its syndicalism statute, he was arrested in July of 1919 at the Cleveland Socialist headquarters and charged "with circulating copies of the *Messenger* . . . which advocates the Soviet form of government." With that indictment still pending, Ruthenberg was arrested again on December 1—this time in Chicago, following a telegram from New York authorities that he had been indicted under New York's 1902 Criminal Anarchy Law for publishing the Left Wing Manifesto, adopted at the June conference, that advocated the forceful eradication of established government. Whereas the Ohio charges were quietly dismissed, the New York prosecution was set for trial in October of 1920.[36]

In contrast, Anita Whitney could not have anticipated her criminal syndicalism arrest. The Oakland Civic Center, an organization of conservative middle- and upper-class "club women" who were the wives of distinguished doctors, lawyers, professors, and public officers, had asked the patrician communist to address them on November 28. She delivered a dynamic speech on "The Negro Problem in America," recounting the shameful history of slavery, deconstructing the theory of black inferiority, and comparing cur-

[35] The essential facts in this paragraph were drawn from Richmond at 82–83, 88 (cited in note 17); Richardson at 1 (cited in note 32); Woodrow C. Whitten, *Trial of Charlotte Anita Whitney*, 15 Pacific Historical Rev 286, 292 n 36 (1946).

[36] The essential facts in this paragraph derived from Johnson at 147–48 (cited in note 18); *Most Arrested Red "in America"* at 5 (cited in note 16); *Two Convicted of Anarchy: Ferguson and Ruthenberg Given State's Prison Sentences*, Washington Post (Oct 30, 1920), p 4; *Radicals' Release Ordered by Court*, New York Times (April 20, 1922).

rent disparities in the economic and political power of the races. What most grabbed Whitney's audience, however, was her shocking statistics on and descriptions of the abhorrent practice of lynching. Coming to a rousing conclusion, Whitney figuratively wrapped herself in red, white, and blue: "It is not alone for the Negro man and woman that I plead, but for the fair name of America that this terrible blot on our national escutcheon may be wiped away. . . . Let us then both work and fight to make and keep her right so that the flag that we love may truly wave 'O'er the land of the free / And the home of the brave.'"[37]

The club ladies applauded her; but upon her exit, she was arrested. Detective Fenton Thompson informed the stunned fifty-two-year-old communist stalwart that she was charged with criminal syndicalism. Although Whitney was at that time the treasurer of the Labor Defense League, an association formed to defend and employ counsel for penniless defendants, she had sacrificed so much of her own funds that she had insufficient resources to make bail for herself. While her friends scrounged for bond money, she was led to a cell, searched, and divested of her jewelry. To her indignant allies, she had a characteristically humble answer: "Why worry about it? They do it to others—hundreds of others. Why not to me?" On December 30, Whitney's information was filed: five counts, all drawn in the language of the relevant statute. The first count charged: "the said Charlotte A. Whitney . . . unlawfully, wilfully, wrongfully, deliberately and feloniously organize[d] and assist[ed] in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism." A demurrer to the information was overruled, her request for a bill of particulars was denied, and trial was set for January 27 of 1920. Thus began the case that would later be known as *Whitney v California*.[38]

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[37] The essential facts in this paragraph were drawn from Richmond at 90–96 (cited in note 17); Reubens at 163–64 (cited in note 17); Shipman at 365–66 (cited in note 17); Anna Porter, *The Case of Anita Whitney*, New Republic (July 6, 1921), pp 165–66.

[38] The essential facts in this paragraph derived from Richmond at 96–98 (cited in note 17); Porter at 165–66 (cited in note 37); Shipman at 365–66 (cited in note 17); Brief for Plaintiff-in-Error, *Whitney v California*, U.S. Supreme Court October Term, 1925—No 10 (Sept 4, 1925), pp 7–9 (available at http://curiae.law.yale.edu).

C. WHITNEY'S WOES

Thomas H. O'Connor—a stocky man of intense energy, sharp intellect, and charm—was one of San Francisco's legal "stars," a criminal defense lawyer with a reputation for strategic brilliance and rhetorical eloquence. His friend, Fremont Older (the social activist editor of *The Call*), had so interested O'Connor in Anita Whitney's case that he offered to represent her pro bono as lead counsel. In contrast, his associate counsel, J. E. Pemberton (an aging Socialist and country judge), was much less confident of his competence as a trial lawyer. The O'Connor-Pemberton duo would be up against John U. Calkins and Myron Harris as the prosecuting attorneys, the latter a flag-waving orator. When O'Connor first entered the courtroom of Superior Judge James G. Quinn on Tuesday, January 27, 1920, the attorney did not appear his typically vigorous and assured self. Explaining that the distress and distraction caused by his young daughter's illness with influenza had prevented him from preparing sufficiently for trial, O'Connor asked Quinn for a continuance. The jurist would have none of it, and demanded that the trial commence. On the second day of voir dire, O'Connor himself was stricken with influenza, but the judge showed no mercy: the jury of six women, six men, and a female alternate had been chosen and were being held day and night in custody at the state's cost,[39] so the court was ready to hear opening statements.[40]

Myron Harris promised to prove the syndicalist nature of the national Communist Labor Party with which Anita Whitney was associated:

> We will show that although she, herself, in expressions of opinion, may have said that she was for changes by political action, . . . that her every attitude and everything that she has done

[39] Indeed, the jury's seclusion did cost Alameda County a pretty penny, although Judge Quinn might never have imagined the extent of the damages. One account puts it colorfully: "[The jury] left Alameda County aghast with a bill of $3,000 [recall: in 1920 dollars] to cover its expenses. . . . [T]hose who did the condemning ate hearty breakfasts, dinners and suppers, smoked fine cigars, kept themselves well groomed [with expensive haircuts, shaves, and toilet articles], dipped into popular magazines at random. . . . One paper commented: '[N]ext time it is anticipated that a trip to Palm Beach or the Canadian Rockies may be thrown in as a sort of diversion.'" Richmond at 113–14 (cited in note 17).

[40] The facts in this paragraph are substantiated in id at 98–101; Shipman at 366 (cited in note 17); Whitten at 288 (cited in note 35).

> showed her to be a radical, not of the conservative Socialist Party, but a member of the Communist Labor Party, which is in violation of this law.[41]

When Harris mentioned the Third International at Moscow and the International Workers of the World, it became clear that the prosecution aimed to associate Whitney with the Communist Party of California, through it with the national party, and through the latter with the Russian party and the radical IWW. The theory of the state's case, in short, was "stacked up like the House that Jack Built. Miss Whitney was a member of the Communist Labor party, this party had endorsed another party, and members of that other party had been convicted of 'criminal syndicalism.'"[42]

O'Connor immediately objected: Without charging Whitney with membership and participation in a group that itself engaged in criminal syndicalism, the prosecution's case rested solely on guilt by a nebulous chain of associations. He moved for a directed verdict after the prosecution's opening statement, but Judge Quinn denied the motion. Now, it was O'Connor's turn to show the defense's hand. Whitney's innocence would be demonstrated by her own political beliefs and personal interactions with the Communist Labor Party of California, all of which exhibited no purpose or objective that might be characterized, beyond a reasonable doubt, as criminal syndicalism.[43]

On Saturday, February 7, O'Connor died of influenza. Without O'Connor to resist them, the state's attorneys transformed Anita Whitney's trial into a prosecution of the IWW. A mountain of evidence—approximately 60 percent of that introduced by the prosecutors—substantiated the IWW's syndicalist character. There was everything from IWW songs to excerpts of IWW-circulated literature to testimony by professional witnesses of the IWW's suspected destruction of industrial and agricultural property. The twenty-some witnesses for the prosecution had built a formidable case against the IWW. But the IWW's connection to Anita Whitney hung by a slender thread: the Communist Labor Party of California, of which she was an organizing member, had

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[41] Quoted in id.

[42] Shipman at 366 (cited in note 17). See also Brief for Plaintiff-in-Error at 10 (cited in note 38).

[43] The essential facts in this paragraph were derived from id at 10–11; Whitten at 288–89 (cited in note 35).

adopted the Communist Labor Party of America's platform, which in its section on industrial unionism endorsed the IWW as an example of "the revolutionary industrial proletariat of America." In short, Anita Whitney was criminally responsible because of this tenuous nexus to the alleged syndicalist activities of certain members of the IWW.[44]

The defense relied on only two witnesses. First, there was Max Bedacht, a National Executive Committee member for the Communist Labor Party of America, who testified to a resolution passed at the national convention[45] that might cast doubt on the state's characterization of the CLP as a violent or terrorist organization. Second, there was Anita Whitney. Taking the witness chair on February 19, she asserted, in essence, that although she was a member of the Communist Labor Party of California, she neither understood nor intended it to be a vehicle of criminal syndicalism, and it was neither her purpose nor that of the state party to engage in violence, terrorism, or violation of any law.[46]

At the end of the trial, Judge Quinn instructed the jury as to the California law of criminal syndicalism, but refused several of the defense's requests for instructions. He did not instruct the jury that Whitney could be convicted only if she specifically intended to act in a way forbidden by the law.[47] Whitney's lawyer did not request that the court give an explicit "clear and present danger" instruction—that is, whether at the time of Whitney's active association with the Communist Labor Party of California, its activities (including the endorsement of the IWW) created a clear and present danger of the sort of sabotage, terror, or violence

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[44] The essential facts in this paragraph were derived from Richmond at 109–12 (cited in note 17); Whitten at 291–92 (cited in note 35); Shipman at 366 (cited in note 17); Richardson at 11 (cited in note 32); Brief for Plaintiff-in-Error at 10–17 (cited in note 38). It should be noted that the U.S. Supreme Court record in *Whitney v California* (on file in the Supreme Court library) contains no complete transcript of the entire trial, although it does contain transcripts of excerpted testimony by a substantial number of the prosecution's witnesses.

[45] The resolution read in relevant part: "[T]he Communist Labor Party proclaims that the term 'direct action' is not associated with terrorism, violence or any other perverted meaning which capitalist lawmakers have given this phrase, but by it is meant such united action by the workers on the job which they may use in forcing concessions from the employing class directly without the use of the capitalist state." Cited in Whitten at 293 n 39 (cited in note 35).

[46] The essential facts in this paragraph derived from id at 292–93; Shipman at 366 (cited in note 17).

[47] See Brief for Plaintiff-in-Error at 15–17 (cited in note 38).

prohibited as "criminal syndicalism" by California law. The importance of that missing instruction would later become pivotal.

It took six hours on Friday, February 20, for the twelve jurors to reach consensus: guilty on count 1 (knowing membership or organization of an association "assembled to advocate, teach, aid and abet criminal syndicalism"). After the court refused to extend Whitney's bail of $2,000 pending an appeal, she was immediately taken to the county jail. When she returned to Judge Quinn's courtroom four days later to receive her sentence, the chamber was packed. "As (Anita) entered," reporter Alma Reed described in a special story for the *New York Times*, "I was present to witness the silent tribute of 300 men and women prominently identified with the leading social service and public welfare agencies of the state. They arose as she passed down the aisle to her seat, and they remained standing until sentence had been pronounced." Whitney's allies were pained to hear the penalty: imprisonment of one to fourteen years in San Quentin.[48]

Whitney's conviction and sentence inspired sharply worded critique by the press on both sides of the divide. The *Sacramento Bee* censured her for betraying her social and cultural status to consort with outlaws. In contrast, the *San Francisco Call* commended her: "The colonists were wrong when they burned witches; the people were wrong when they spat upon the abolitionists. And the people of California may be equally wrong when they send Anita Whitney to prison."[49] Moreover, a host of distinguished voices rose up to condemn the injustices done to Whitney. Religious leaders, politicians, and civic and civil rights organizations pointed to the Whitney case as a telling example of the perils of indiscriminate red-baiting.[50]

Anita Whitney was fifty-two years old when she was convicted, and she would be sixty years of age before she finally emerged from the shadow of prison. Her trek in the appellate process would prove arduous, unpredictable, and long, lasting more than seven years. The team of three who led that journey in its earliest stages were John Coghlan and J. E. Pemberton, her trial lawyers, headed

[48] The citations from Alma Reeds's narrative in this paragraph and the next were taken from Richmond at 114–16 (cited in note 17).

[49] The two newspaper quotations were reprinted in Reubens at 164 (cited in note 17).

[50] The facts in this paragraph derived from Richmond at 119–23 (cited in note 17).

by John Francis Neylan. A "respectable, conservative California legal talent," Neylan was a "Hearst lawyer and a prominent counsel for a large number of local corporations."[51] Whitney's appellate team filed an opening brief (July 21, 1920) and a closing brief (April 8, 1921) before the District Court of Appeal of California in San Francisco, one of the state's six intermediate courts of review.[52] Those briefs laid out a plan of attack against the criminal syndicalism statute itself, and against its application to the "refined, cultured, intellectual woman who has spent her life and private fortune in charitable and philanthropic work for the relief and betterment of her fellowmen."[53]

The appeal moved along three strategic fronts:

1. *The criminal information did not state the acts constituting a public offense with enough particularity or in ordinary and concise language:* Thus, Whitney was denied "the right to be sufficiently informed of the nature of the accusation against her, to enable her to prepare her defense."[54]

2. *The evidence presented by the prosecution at trial was insufficient to justify the verdict:* Anita Whitney may have held unconventional beliefs, but "mere opinion cannot be punished as a crime."[55] Moreover, "[t]here is not one scrap of evidence even remotely suggesting that she ever endorsed any act of violence either by [the Industrial Workers of the World or the Bolsheviks of Russia] or by individuals belonging to these organizations."[56]

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[51] Paul L. Murphy, *The Constitution in Crisis Times: 1918–1969*, 85–86 (Harper & Row, 1972). But see Roger W. Lotchin, *John Francis Neylan: San Francisco Irish Progressive*, in *The San Frisco Irish: 1850–1976*, 86–110 (Smith McKay, 1978). Even so, this "progressive" was highly critical of FDR: "[T]he nation and its people have been brought to the verge of disaster by President Roosevelt." *Addresses by John Francis Neylan: The Politician, The Enemy of Mankind* (privately printed pamphlet, 1938).

[52] Appellant's Opening Brief in the California District Court of Appeal, First Appellate District—Division One, *The People of the State of California v Charlotte A. Whitney*, Criminal No 907 (July 21, 1920), reprinted as Exhibit A in Brief for Plaintiff-in-Error (cited in note 38); Appellant's Closing Brief in the California District Court of Appeal, First Appellate District—Division One, *The People of the State of California v Charlotte A. Whitney*, Criminal No 907 (April 8, 1921), reprinted as Exhibit B in Brief for Plaintiff-in-Error (cited in note 38).

[53] Appellant's Opening Brief at i (cited in note 52).

[54] Id at iii–xviii.

[55] Id at xix. See generally id at xix–xx.

[56] Appellant's Closing Brief at xxiv (cited in note 52). See generally id at xxiv–xxviii.

3. *The California criminal syndicalism act is void for vagueness:* If it were "permissible to introduce in evidence manifestoes of the Bolshevist Party of Russia to show the character of the Communist Labor Party of Oakland," then the statute's terms are too vague and indefinite to be susceptible to reasonable definition.[57]

All three arguments identified classic due process violations. No specific First Amendment violations were alleged. Before the appellate court rendered its ruling, however, Whitney's counsel filed a supplemental brief[58] to emphasize the federal unconstitutionality of the California criminal syndicalism act and Whitney's conviction. "We desire at this time to raise herein a federal question," the brief asserted. "[M]ere membership in an organization, without the doing or commission of any overt act is not a crime; it is a constitutional right and privilege; and the legislature cannot otherwise provide. . . . By attempting to punish her for the exercise of her legal and constitutional right, the state is abridging the privileges and immunities of a citizen of the United States."[59]

None of the appellant's claims struck a chord with the California District Court of Appeal. A three-judge bench unanimously upheld Whitney's conviction on April 25, 1922.[60] Running merely five paragraphs, the opinion largely relied on California Supreme Court precedent[61] to reject the appellant's due process claims. The only memorable section of the opinion was the court's depiction of Whitney's purposes, if only because of its overheated rhetoric:

> That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least, lending her presence and the influence of her character and position to an organization whose purposes and sympathies savored of treason, is not only past belief but is a matter with

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[57] Id at xlvii.

[58] Supplemental Brief for Appellant in the California District Court of Appeal, First Appellate District—Division One, *The People of the State of California v Charlotte A. Whitney*, Criminal No 907 (July 21, 1920), reprinted as Exhibit C in Brief for Plaintiff-in-Error (cited in note 38).

[59] Id at lvii–lviii.

[60] *People v Whitney*, 57 Cal App 449, 207 P 698 (1922).

[61] See *People v Taylor*, 187 Cal 378, 203 P 85 (1921) (upholding a criminal syndicalism conviction on the basis that sufficient evidence existed for the jury to find that the Communist Labor Party of California, of which the defendant was an organizer and member, constituted a syndicalist group within the meaning of the California law).

> which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act.[62]

The worst fears of her appellate counsel had come true: Unless this appellate ruling were overturned, Whitney had been tried and convicted, and her conviction might stand, "not for any act of her own," but because others with whom she was not proven "to have had the slightest dealings started fires and carried poisons in other parts of the State."[63] The California Supreme Court denied Whitney's petition for review[64] without issuing an opinion.[65]

Despite the slim chances for any case to be considered by the U.S. Supreme Court, there were good reasons why the Court might be interested in *Whitney v California*. The case had the potential to make new law. The Court had yet to decide whether the First Amendment rights of political speech and association applied against the states through the Fourteenth Amendment; it had yet to hold state regulation of expressive liberties to a higher standard than reasonableness; and it had yet to determine the circumstances in which a member of an organization should be held responsible for the group's unlawful conduct.

To raise the odds of winning, John Francis Neylan needed some heavyweights in the appellate bar to assist him. There was Walter Heilprin Pollak of New York, who would soon argue before the U.S. Supreme Court in *Gitlow v New York*[66] and later in *Powell v*

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[62] 57 Cal App at 452, 203 P at 699.

[63] Appellant's Opening Brief at xxi (cited in note 52).

[64] Appellant's Petition for a Hearing by the Supreme Court, *The People of the State of California v Charlotte A. Whitney* (June 3, 1922) (available at http://curiae.law.yale.edu).

[65] Brief for Plaintiff-in-Error at 2 (cited in note 38).

[66] 268 US 652 (1925). The *Gitlow* decision upheld the conviction of a radical Socialist, who assisted the publication of the Left Wing Manifesto and the organization of the Communist Labor Party of America, under New York's criminal anarchy statute. In dicta, Justice Sanford's opinion of the Court *assumed* that liberties of speech and press were protected by the Fourteenth Amendment's Due Process Clause against impairment by a State. The majority determined, nevertheless, that a State, in the exercise of its police power, could punish utterances tending to incite crime or disturb the public peace.

Enunciating what is known as the "bad tendency test," Sanford's opinion reasoned that a State might "suppress the threatened danger in its incipiency." He declared: "[The State] cannot reasonably be required to defer the adoption of measures for its own . . . safety until the revolutionary utterances lead to actual disturbances of the public peace of imminent and immediate danger of its own destruction."

New York's criminal anarchy statute was understood to import the legislature's determination that such utterances were so inimical to the general welfare and involved such danger of substantive evil that they could be penalized under the police power, and every

Alabama[67] (one of the famous Scottsboro cases).[68] Walter Nelles of New York also came on board. As counsel for the National Civil Liberties Bureau, he had edited a book on the federal Espionage Act cases[69] before his involvement in *Whitney*; he would argue *Gitlow* with Pollak; and subsequently he taught jurisprudence at the Yale Law School.[70]

The Supreme Court granted a writ of error. After the case record had been transferred to the Court, an unusual procedural twist occurred. Whitney's attorneys filed a stipulation of the parties before the California District Court of Appeal, and the court issued an order on December 9, 1924, that amended the record by including the following statement:

> The question whether the California Criminal Syndicalism Act (Statutes 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court.[71]

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presumption had to be indulged in favor of the validity of the statute. Because the statute did not penalize the utterance of abstract doctrine or academic discussion but rather denounced the advocacy of action for accomplishing the overthrow of organized government by unlawful means, it was constitutional as applied to the Left Wing Manifesto's advocacy of mass action progressively leading to industrial disturbances, mass strikes, and revolutionary mass action aimed at destroying organized parliamentary government.

[67] 287 US 45 (1932). See generally Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Louisiana State University Press, 2nd ed, 1984).

[68] See *W. H. Pollak Dies; Leader at Bar, 53*, New York Times (Oct 3, 1940), p 25. First Amendment scholar Zechariah Chafee remarked of Pollak after his death: "It is hard to realize that a person so much alive as Walter Pollak can be dead. . . . He radiated generous enthusiasm for justice, delight in mental activity, unexpected flashes of wit. We have lost him when we need him most." Zechariah Chafee, Jr., *Walter Heilprin Pollak*, The Nation (Oct 12, 1940), pp 318–19. For an account by his son (later Dean of the Yale and University of Pennsylvania Law Schools and a federal judge), see Louis H. Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 Harv CR-CL L Rev 1 (1982).

[69] Walter Nelles, *Espionage Act Cases: With Certain Others on Related Points* (National Civil Liberties Bureau, 1918). Nelles also edited *Law and Freedom Bulletins* (National Civil Liberties Bureau, 1920), including discussion of the 1917–20 prosecution and appeal of IWW members in Chicago under the federal Selective Service and Espionage Acts. See *Haywood v United States*, 268 F 795 (1920).

[70] See *Prof. Walter Nelles of Yale Law School: An Expert on Labor Injunction and Former Lawyer Here Is Dead at Age of 53*, New York Times (April 1, 1937), p 23.

[71] Petition for Rehearing, *Whitney v California*, U.S. Supreme Court October Term, 1925, No 10 p. 2 (available at http://curiae.law.yale.edu).

Securing such a state court "certificate" and amending the case record for federal high court review was a lawyerly move that Walter Pollak and Walter Nelles knew well. Indeed, they had done exactly that in *Gitlow*.[72] Now, once again, the savvy appellate advocates were looking down the road to avoid any possible procedural hurdles. The adequacy of the California District Court of Appeal "certificate" was an issue that would cause legal delay and confusion, but ultimately would make the Supreme Court's review possible.

D. RUTHENBERG'S RUIN

While Anita Whitney's criminal syndicalism case was still under consideration in the California District Court of Appeal, Charles Ruthenberg's criminal anarchy case was just beginning in the New York State trial court system, where he faced charges for his activities as national secretary of the Communist Party of America. The prosecution relied heavily upon Ruthenberg's publication of the Left Wing Manifesto that appeared in *The Revolutionary Age* on July 5, 1919. Ruthenberg's defense "was to present frankly and fully his reasons for thinking and acting as he did,"[73] ensuring that the state did not mischaracterize his views as incitement for violence. The jury convicted him, and he was sentenced to five to ten years of hard labor at the Sing Sing state penitentiary. Eighteen months later, the New York Court of Appeals reversed Ruthenberg's conviction on a technical statutory ground.[74]

Forty days later, Ruthenberg found himself once again on the wrong side of the bars—this time in St. Joseph, Berrien County, Michigan. The central executive committee of the Communist

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[72] See note 66; see also Philip B. Kurland and Gerhard Casper, eds, 23 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 530 (University Publications of America, 1990).

[73] Johnson at 149 (cited in note 18).

[74] The essential facts in this paragraph derived from id at 149, 152–53; *Gitlow, Anarchist, Gets Limit Sentence*, New York Times (Feb 12, 1920), p 15; *Grand Jury to Pass upon Radicals Here*, New York Times (July 14, 1919), p 15; *New York Judge Orders Two Chicago Reds to Prison Cells*, Chicago Daily Tribune (Oct 30, 1920), p 12; *Two Convicted of Anarchy*, Washington Post (Oct 30, 1920), p 4; *Lawyer, a Convict, Argues for Release*, New York Times (April 15, 1922), p 6; *Radicals' Release Ordered by Court*, New York Times (April 20, 1922), p 15; *New York v Ferguson*, 234 NY 159, 136 NE 327 (1922) (reversing Ruthenberg's conviction because the jury was wrongly allowed to infer that he was a manager or proprietor of *The Revolutionary Age*, and thus subject to prosecution under the New York criminal anarchy statute).

Party of America had called a national delegate convention for late August of 1922. In advance of the convention, the seventy-five delegates began gathering on Tuesday, August 15, at an isolated summer resort in Bridgman, near St. Joseph; Ruthenberg aimed to reconcile differences among various factions to ensure united support at the convention for the newly formed Workers' Party. A veil of secrecy covered the event: the delegates met in a sand-dune amphitheater surrounded by woods; every individual was given an alias and a numbered portfolio for documents; all portfolios were collected and stored at night in two barrels that were sunken in the ground and covered with sand and natural debris; and all outside contact was forbidden.[75]

Delegates from the Comintern of Moscow, the Red Trade International of Moscow, and the Hungarian federation were there; but so was a mole, a delegate clandestinely working for the Bureau of Investigation in the U.S. Department of Justice. From August 15 to 22, the delegates debated and voted—until federal agents, tipped off to the event, were spotted near the meeting place. Suspecting an incipient police raid, the foreign delegates quickly exited and many others hurried off. Deputy U.S. marshals appeared on the morning of August 22 to arrest the assembly.[76]

The information filed against Ruthenberg charged that he "did voluntarily assemble with a certain society, group and assemblage of persons, to wit, the Communist Party of America, formed to teach and advocate the doctrines of criminal syndicalism."[77] The prosecution's main witness at trial was Francis Morrow, or "K-97," the government agent who was a delegate to the Communist Party's national convention. K-97 testified that Ruthenberg had attended the Bridgman convention as a member of the Central Executive Committee of the Communist Party of America, contravening the defense's claim that Ruthenberg had attended the meeting as an advocate for the adoption of an open and legal Workers' Party.[78]

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[75] The essential facts in this paragraph were drawn from *People v Ruthenberg*, 229 Mich 315, 321–22; 201 NW 358, 359–60 (1924); Johnson at 154 (cited in note 18); *C. E. Ruthenberg, Head of Communists, Dead*, Washington Post (March 3, 1927), p 8.

[76] The essential facts in this paragraph derived from Johnson at 154–56 (cited in note 18); *People v Ruthenberg*, 229 Mich at 323–23; 201 NW at 360 (cited in note 75).

[77] *People v Ruthenberg*, 229 Mich at 320; 201 NW at 359 (cited in note 75).

[78] The essential facts in this paragraph derived from Johnson at 163 (cited in note 18); *Accused Burns in Red Trial*, New York Times (April 21, 1923), p 15; *Links Ruthenberg to*

Ruthenberg testified about and entered into evidence the proposed program of the Workers' Party that he had introduced to the delegates at Bridgman. On the one hand, as the defendant pointed out, the program insisted that the party's function was to be overtly political, rather than covertly subversive: "The class struggle must take the form of a political struggle, a struggle for the control of the government." On the other hand, there was text that, at least in its tone, might be read as more threatening: "The Workers' party declares one of its chief immediate tasks to be to inspire in the labor unions a revolutionary purpose and to unite them in a mass movement of uncompromising struggle against capitalism." Similarly, the resolutions of a committee that Ruthenberg had steered, which were adopted unanimously at the Bridgman convention, had the same ambivalent quality; some appeared to distance the Workers' Party from the illegal Communist Party ("A legal C.P. is now impossible. Should conditions change only a convention can change the party's policy.") and others seemed to maintain that integral link ("The illegal Communist party must continue to exist and must continue to direct the whole Communist work.").[79]

Striving to dispel any negative implications that might be drawn from the Workers' Party program and resolutions, Ruthenberg insisted that, although the program endorsed the ultimate control of the American government by the working class, it did not advocate or teach crime, sabotage, violence, or other illegal forms of terrorism as the means to bring about that end. At most, the program did "nothing more than to predict that force, violence, civil war and bloodshed will be the inevitable consequence of the class struggle"[80] between the working class and the capitalist state. But Ruthenberg's characterization of his personal and his party's purposes was challenged, not only by K-97, but also by the damning inferences that could be derived from the illegal Communist Party's effective control of the legal Workers' Party agenda. To

Reds: "K-97" Asserts He Was a Delegate at Raided Convention, New York Times (April 24, 1923).

[79] All of the quotations in this paragraph referring to the Workers' Party program and the adjustment committee's resolutions derived from *People v Ruthenberg*, 229 Mich at 332–33, 336–37; 201 NW at 363–65.

[80] Transcript of Record in the Supreme Court of the United States, October Term, 1926, *Charles E. Ruthenberg, Plaintiff in Error v The People of the State of Michigan*, No 44, p 189 (filed Feb 19, 1925) (brief on file at the Library of the U.S. Supreme Court, Washington, DC).

that extent, the testimony of Jay Lovestone, the national secretary of the Communist Party of America, who had participated actively at the Bridgman convention, undercut the defense's theory of the case. Addressing the purposes of the Workers' Party, Lovestone stated unequivocally that "the members of the open party were to carry out the policies of the Communist party" and the "Workers' party . . . was in all respects a Communist organization."[81]

Throughout the trial, the defense had argued that Michigan's criminal syndicalism act, both on its face and as applied to Ruthenberg's participation at the Bridgman convention, violated state constitutional and federal Fourteenth Amendment guarantees of political speech and association. The defense would find yet other grounds for objection when Judge White denied its specific requests to charge the jury in conformity with its claims of constitutional liberties.

In view of the existing state of federal free-speech law, the trial court judge's instructions to the jury might well have been deemed relatively unassailable. The judge began by enumerating the task for the jurors:

> It is not disputed that the convention held near Bridgman was a meeting of the Communist Party of America, nor is it disputed that the respondent was present at that meeting; which leaves for your consideration these three questions: 1st. Was the Communist Party of America, at the time the respondent assembled with that organization . . . a society formed to teach and advocate criminal syndicalism? 2d. Was the Communist Party at the time and place in question an assemblage to further the alleged unlawful purposes of the organization? 3d. Did Charles E. Ruthenberg assemble with the Communist Party voluntarily, that is to say, with the conscious purpose and design to further and aid the teaching and advocacy by the Communist Party of the doctrines of criminal syndicalism?[82]

In regard to the first question, the judge elaborated on the difference between advocacy of communist sociopolitical theory and advocacy of criminal syndicalism:

> In order to establish that the Communist Party was at the time and place in question an organization which taught and ad-

[81] *People v Ruthenberg*, 229 Mich at 337–38; 201 NW at 365.

[82] Transcript of Record at 190 (cited in note 80).

> vocated criminal syndicalism, the prosecution must satisfy you from the evidence beyond a reasonable doubt, not alone that this party taught the theory that the social forces now in operation would of their own momentum bring about an encounter of force between opposed social classes, but also that this party taught and advocated crime, sabotage, violence and terrorism as the method or one of the methods of accomplishing the changes in the organization of society desired by the communists.[83]

Significantly, however, the judge refused two instructions requested by the defense that aimed to infuse the "clear and present danger" test into the interpretation of the statute.[84] Considering the evidence and the instructions, few were surprised when the jury reached a verdict of guilty on May 2, 1923.[85]

Ruthenberg's brief to the Michigan Supreme Court was filed on September 19, 1924.[86] It challenged the criminal syndicalism act as unconstitutional on its face and as applied, under both the Michigan Constitution and the federal Fourteenth Amendment, on several grounds:[87]

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[83] Id at 191.

[84] Rejected request no. 12 read:

> You are instructed, in further definition of the doctrines of criminal syndicalism, that the statute is directed against the teaching and advocacy of crime, sabotage, violence and other unlawful methods of terrorism as an immediate program of action. If you find from the evidence that the Communist Party, at the time and place alleged, was an organization which taught the desirability of revolutionary changes in our social institutions, but did not teach or advocate that anyone should proceed presently to commit acts of crime, sabotage, violence, or terrorism, then it is not established that the assemblage in question constituted a violation of the statute and you should declare the respondent not guilty.

And rejected request no. 13 read:

> [For there to be teaching and advocacy within the contemplation of the statute,] the time and circumstances must be such that the teaching or advocacy of the prohibited doctrines presents a clear and imminent danger that acts of crime, sabotage, violence or terrorism may result from the advocacy. If you find . . . that no circumstances have been presented in evidence making manifest a clear and imminent danger of such acts of criminal injury on account of the teachings and advocacies of the Communist Party, then your verdict should be not guilty.

Id at 199.

[85] Id at 237.

[86] *Ruthenberg Files Appeal*, New York Times (Sept 20, 1924), p 18.

[87] In addition to the claims enumerated in the text, Ruthenberg alleged that the trial court erred by (1) overruling the defendant's challenge to a juror, (2) denying the defendant's motion for a bill of particulars, and (3) denying the defendant's motion to suppress evidence found in his suitcase at the Bridgman convention on the basis that the state

1. *On its face, the Michigan criminal syndicalism act is void for vagueness:* the provisions of the Michigan statute "are too vague, uncertain and indefinite to form the basis of a prosecution for crime."[88]

2. *On its face, the Michigan criminal syndicalism act violates freedoms of speech and association guaranteed by the state constitution and the Fourteenth Amendment:* the Michigan statute punishes "as a felony the enunciation of a doctrine without the intent, the occasion, . . . or the imminent result of such enunciation," in violation of state and federal guarantees of free speech and association.[89]

3. *As applied, the Michigan criminal syndicalism act violates Ruthenberg's freedoms of speech and association guaranteed by the state constitution and the Fourteenth Amendment:* by the information or evidence adduced by the state at trial, it does not appear (*a*) "that the assemblage in question by any teaching or advocacy gave rise to imminent danger of criminal injury to any persons or property, or to any governmental establishment or operation, or to the public peace or welfare in any respect," and (*b*) "that there was any attempt or intent, either by the alleged unlawful assemblage or by [Ruthenberg] as a participant therein, to solicit, induce, incite or promote any acts of criminal injury under circumstances involving a clear and present danger of the consummation of such injury."[90]

These arguments were brushed aside by the Michigan Supreme Court. On December 10, 1924, the court unanimously upheld Ruthenberg's conviction. To the claim of vagueness, the court declared: "The naivete of this should make a Communist smile. One need read but little to discover what the terms sabotage and violence mean . . . . Sabotage has had a well understood meaning ever since French industrial workers threw their sabots, or wooden shoes, into machinery."[91] Ruthenberg's second claim of facial un-

violated his constitutional right against a wrongful search and seizure. The Michigan Supreme Court rejected these claims with dispatch. See *People v Ruthenberg*, 229 Mich at 326–31, 201 NW at 361–63.

[88] Transcript of Record at 236 (cited in note 80).

[89] Id.

[90] Id.

[91] *People v Ruthenberg*, 229 Mich at 325; 201 NW at 361.

constitutionality fared no better: "This statute reaches an abuse of the right to freely speak, write and publish sentiments, and is squarely within the accountability allowed to be exacted . . . . The reasons advanced here against the constitutionality of the act have been urged against similar acts in other jurisdictions and found to have no merit."[92]

Most of the court's vehemence was reserved for Ruthenberg's as-applied argument. Excerpting lengthy passages from the Workers' Party program and resolutions adopted at the Bridgman convention, borrowing pieces from Jay Lovestone's testimony, and much more, the court painted as colorful a portrait as possible of Ruthenberg's syndicalist status:

> Defendant was acting under orders from Moscow. He was pledged to obey such orders and, under this record, it taxes credulity too far to believe he was endeavoring to bring Communist doctrines and tactics within the law. . . . [His purpose] was to further the ends of the underground or illegal party, and that purpose and such ends center upon the destruction of republican or parliamentary form of government by direct action and criminal force.[93]

And what of "clear and present danger"? This, too, was dismissed with fervor:

> The Communists say they are but prophets of disorder, violence and destruction eventually to come. In the sweet bye and bye, they say, resistance to their schedule will lead to the shedding of blood but the guilt will rest upon those who fight to maintain government under the Constitution of the United States. But they are militant prophets, to say the least, with present activities toward fulfillment of what they prophesy. Prophecy of violence to come does not mantle present militant organization and criminal activities to hurry its advent.
>
> Quaint Old Thomas Fuller, 275 years ago, hit off defendant's plea of present innocent advocacy of eventual force and violence when he said: "It is dangerous to gather flowers that grow on the banks of the pit of hell, for fear of falling in; yea, they which play with the devil's rattles will be brought by degrees to wield

[92] *People v Ruthenberg*, 229 Mich at 323–24; 210 NW at 360.

[93] *People v Ruthenberg*, 229 Mich at 331–32, 339–40; 210 NW at 363, 365–66.

> his sword; and from making of sport, they come to doing of mischief."[94]

On January 5, 1925, Ruthenberg was sentenced to serve between three and ten years in the Jackson state prison. He served only twenty days of his term before he was released. His attorneys had petitioned Justice Louis Brandeis for a writ of error enabling them to seek review in the U.S. Supreme Court of the Michigan court's judgment in *People v Ruthenberg*. Brandeis granted the writ of error on January 19, ordering that the writ would operate as a supersedeas upon providing a bond for $7,500. (Earlier, Justice James C. McReynolds had refused to grant Ruthenberg such a writ.) The bail bond was delivered and approved on January 26, and Ruthenberg was once again at liberty—just in time to deliver an address at the first annual Lenin memorial meeting in Madison Square Garden.[95]

II. The Supreme Court Story: The Two Minds of Louis Brandeis

The story of the Whitney and Ruthenberg appeals is the story of the two minds of Louis Brandeis. One case he didn't want to decide, but was forced to; the other he did want to decide, but was unable to. One case impelled him to apologetic concurrence; the other provoked him to uninhibited dissent. One case was to be resolved by procedural rules; the other on the merits with a new vision of the First Amendment. All of this changed unexpectedly—and the two minds of Louis Brandeis melded into one.

A. IF AT FIRST YOU DON'T SUCCEED . . .

With Anita Whitney's case still pending before the Supreme Court (and held over to be considered along with *Ruthenberg v Michigan* in the October term of 1925), her legal team mulled over the arguments that might finally win the day. Their brief focused

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[94] *People v Ruthenberg*, 229 Mich at 353–54; 210 NW at 370.

[95] The essential facts in this paragraph were drawn from Johnson at 164–65 (cited in note 18); *Ruthenberg Is Sentenced*, Los Angeles Times (Jan 6, 1925), p 1; *U.S. High Court to Hear Plea of Ruthenberg*, Chicago Tribune (Jan 23, 1925), p 10; *Ruthenberg May Win Review by High Court*, New York Times (Jan 23, 1925), p 2; Order Allowing Writ of Error, in Transcript of Record at 241 (cited in note 80); *Ruthenberg Out on Bail: Released Pending Appeal, He Will Speak at Lenin Meeting Here*, New York Times (Jan 27, 1925), p 10.

on the state's infringement of Whitney's liberties of assembly, speech, and association protected under the Due Process Clause of the Fourteenth Amendment. Specifically, the brief contended that a "statute which is applied to attach penal consequences to joining an organization still in its formative stage, because that organization subsequently acquires over defendant's protests a questionable character, imposes a 'previous restraint' upon the right of assembly." Moreover, the brief argued that the Communist Labor Party of California's convention of November 9, 1919, had no quality of incitement, and that Whitney's conviction would have violated due process even if she had participated in all the purposes and activities of the convention. This was so because nothing short of "incitement to violent action" can be punished without infringing the rights of free speech and assembly. Distinguishing Whitney's case from *Gitlow*, in which the Left Wing Manifesto was held to be a call to illegal mass action, the brief stressed that the program of Whitney's party (recognizing the "long and valiant struggles and heroic sacrifices" of the IWW "in the class-war") was no more than a "generalized statement of collective sympathy," and could not be construed as any type of incitement, much less the "direct incitement" found in *Gitlow*.[96]

Whitney's counsel anticipated that the trial record could be viewed as providing scant basis for the Supreme Court's assertion of federal question jurisdiction. The brief, accordingly, emphasized the "certificate"—the stipulation of the parties and order of the California intermediate court of appeal—in establishing that jurisdictional basis:

> In the District Court of Appeal and also upon her application for leave to appeal to the Supreme Court of California, Miss Whitney contended that the statute "and its application in this case is repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States . . . ." (*Stipulation and addition to the record*, filed Dec. 16, 1924). That contention "was considered and passed upon" by the District Court of Appeal—the highest California Court to which appeal was permitted—and was overruled by that court (*Order amending record*).[97]

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[96] See note 66. The essential facts of this paragraph derive from Brief for the Plaintiff-in-Error at 66–84 (cited in note 38).

[97] Id at 4 (omitting page numbers for the transcript of record).

Two years after the Court had agreed to review *Whitney v California*, oral arguments were finally heard on October 6, 1925. From the tenor of the Justices' questions, they appeared most concerned over the precise character of Anita Whitney's involvement with the Communist Labor Party of California. They closely questioned counsel as to whether Whitney had attended party meetings after the Loring Hall organizing convention, and whether she had put her weight behind any syndicalist proposal or action. Given the Court's parsing of the merits, it must have been a surprise when its decision was rendered thirteen days later. The Court's one-line per curiam opinion dismissed the case for want of jurisdiction.[98]

However bleak things looked at that time, Anita Whitney still had a chance in the court of public opinion. Talk of pardon was everywhere in the California air, and an "Anita Whitney Committee" was soon formed to rally public support. But Whitney would have none of it. "I'm not going to ask for a pardon," she told an Associated Press reporter. "If the Governor is disposed to pardon anyone, let him liberate the poor men who are now imprisoned for violation of this same law and whose guilt may be less than mine." In any event, Governor Friend W. Richardson released a thirteen-page statement denying the pardon. For the governor, the simple truth was that Anita Whitney had assisted the Communist Labor Party, an organization that had engaged in "sedition and disloyalty amounting to almost treason."[99]

Whitney's lawyers were confident that the Supreme Court had not fully appreciated the jurisdictional base for appeal that they laid when they had sought a certificate from the California District Court of Appeal. Accordingly, they filed a petition for rehearing.[100] "This court acted under a misapprehension of the facts," the petition explained. The state intermediate appellate court's "order and the stipulation upon which it was entered did not constitute an attempt to confer jurisdiction upon this court by consent."

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[98] The essential facts in this paragraph derived from *State Act Up in Highest Court*, Los Angeles Times (Oct 7, 1925), p 3; *Whitney v California*, 269 US 530 (1925).

[99] The essential facts of this paragraph were drawn from *Woman Syndicalist Will Not Seek Pardon*, New York Times (Oct 22, 1925), p 7 (AP story); *War Group in Whitney Case*, Los Angeles Times (Nov 4, 1925), p 7; *Whitney Case Details Given*, Los Angeles Times (Nov 27, 1925), p 6; Richmond at 131–36 (cited in note 17); Richardson at 13 (cited in note 32).

[100] Petition for Rehearing (cited in note 71).

Rather, "the stipulation and order stated the actual facts concerning the raising of . . . Federal questions in the California District Court of Appeal, and the stipulation was entered into and the order was made for the purpose of enabling these actual facts to appear in the record."[101]

It is unusual for the Supreme Court to grant review in a case, hear oral arguments, and then withdraw its jurisdiction. It is still more unusual for the Justices to rehear such a case when their jurisdiction remains highly doubtful. But on December 14, 1924, the Court agreed to take a second look at *Whitney v California*. The Justices, or a majority of them, wanted to decide this case, and they were unwilling to let possible jurisdictional barriers stand in their way. Rehearing was rescheduled for March 15, 1926.[102]

B. BRIEFLY PUT

In late February of 1926, Ruthenberg's lawyers filed their brief for plaintiff in error in the U.S. Supreme Court.[103] Mindful of procedural snags, they devoted several pages to establishing federal jurisdiction based on what had been expressly claimed at various stages of the case. Before proceeding to the specific "errors intended to be charged," the brief stressed the issue of imminence:

> Under the interpretation of the statute given to the jury, it made no difference that the assembly at Bridgman did not *then* and *there* advocate the doctrines of criminal syndicalism. . . . It is enough that *somewhere and [sometime]* there had been formed a party to teach and advocate the doctrines of criminal syndicalism, and that this meeting at Bridgman "was called and for the purpose of promoting, carrying out and furthering the fundamental general designs and objects of the party." (emphasis in original)

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[101] Id at 2.

[102] Briefs were filed by Whitney's counsel and the state's attorney reiterating the same arguments, substantive and procedural, that they had made in earlier briefs, although to some degree with stronger analysis and precedential authority. See Supplementary Brief for Plaintiff-in-Error, *Whitney v California*, U.S. Supreme Court October Term, 1925—No 10 (available at http://curiae.law.yale.edu); Brief of Defendant-in-Error on Rehearing, *Whitney v California*, U.S. Supreme Court October Term, 1925—No 10 (March 10, 1928) (available at http://curiae.law.yale.edu).

[103] The following summary of Ruthenberg's arguments derives from Brief for Plaintiff-in-Error, *Ruthenberg v Michigan*, U.S. Supreme Court October Term, 1925—No 44 (Feb 27, 1926), pp 2–8, 13–14, 16–19, 21–24, 33–36, 42–46, 53 (brief on file at the Library of the U.S. Supreme Court, Washington, DC).

Addressing that point more fully, the brief emphasized that the "record presents, in a general way, three versions of the doctrines of the Communist Party." One of those doctrines ("Marxian theories") was largely philosophical, while another (derived from isolated passages selected from isolated documents collected by the prosecution) was inflammatory, while yet another version of Communist Party doctrine (proffered by the defense) was innocently organizational. If, indeed, there were *three* versions of Communist doctrine, could the State select one, ignore the others, and proceed to convict Ruthenberg without violating his right to due process?

Among the arguments offered by Ruthenberg's lawyers were the following:

1. *First and Fourteenth Amendment Rights of Assembly Violated:* This argument distinguished *Gitlow* and made several specific points, such as

   - *Crime of Assembling*: "The crime of 'assembling' is an absolute novelty in American law. *This is the only case of record in all our law books . . . in which the judgment depends solely on a charge of assembling with a society devoted to the propagation of a certain form of doctrine.*" (emphasis in original). That is, the "act of 'assembling' takes its criminal quality from the antecedent character of the society with which the accused assembles, not from any actual advocacy of criminal syndicalism that is aided or instigated by his act of assembling."

   - *Opinion vs. Incitement*: "One may be an anarchist and give frequent expression to his anarchistic belief without running afoul of the [criminal syndicalism] statute. An utterance without *incitement-quality* and *incitement-intent* is not criminally punishable." Indeed, "*[u]ntil opinion by its form and intent passes over this realm of incitement it is beyond the reach of the police power.*"

   - *Conspiracy*: The crime with which Ruthenberg was charged smacked of the more traditional crime of conspiracy, which the brief was quick to distinguish: "the charge laid out in this case and the evidence by which it is supported do not fall within the classification of conspiracy. It was not alleged or proved that the plaintiff in error, at the time and place of

the supposed felony, entered into a certain plan and agreement with other persons to undertake the future dissemination in some form of the doctrine of criminal syndicalism." If the idea of conspiracy can be detached from the logic of the state syndicalism law, what then is the purpose of such a law other than to penalize beliefs?

2. *State Syndicalism Law is Beyond the "Police Power"*: The brief explained that the Michigan law contravened the State's lawful police powers because the "statute does not require that the said act of assembling shall present or manifest a clear and present danger of overt criminal injury or public disturbance."

3. *The State Law is Impermissibly Vague:* The "provisions of the said statute," the brief concluded, "are too vague, uncertain, and indefinite to provide an ascertainable standard of guilt, in contravention of the due process provision of the Fourteenth Amendment."

The State's brief made the standard arguments of the day in a standard way. It tendered two basic arguments:[104]

1. *Limited Scope of Right to Assembly:* The Fourteenth Amendment right of assembly urged by Ruthenberg is limited to "peaceable assemblies to perform the duties or exercise the privileges of citizens to petition the legislature for a redress of grievances." It does not extend, by contrast, to "advocacy of the doctrines of armed mass action, insurrection and civil war for the violent and forcible overthrow and destruction of organized government, . . . which are the fundamental tenets of the Communist Party of America."

2. *Valid Exercise of "Police Power":* "The right 'peacefully to assemble,'" the brief maintained, "does not deprive the state of Michigan of the primary and essential right of self-preservation, nor does the Fourteenth Amendment limit the power of the State of Michigan to deal with crimes, and this is true even though the statute makes intent unnecessary as an element of the offense."

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[104] The summary of the State's arguments derives from Brief for Defendant-in-Error, *Ruthenberg v Michigan*, U.S. Supreme Court October Term, 1925—No 44 (April 26, 1926), pp 6–11 (brief on file at the Library of the U.S. Supreme Court, Washington, DC).

Notably, the State's brief lacked any detailed discussion of exactly how Ruthenberg's association with the Communist Party of America amounted to the kind of criminal syndicalism likely to produce a clear and present danger.

As the draft opinions in *Ruthenberg v Michigan* were circulated for consideration, one thing was becoming increasingly obvious: It would be *Gitlow v New York* all over again—Sanford writing for the majority with Brandeis and Holmes in dissent. Justice Sanford was moving along the same tracks that he had in *Gitlow*, wherein he wrote:

> Every presumption is to be indulged in favor of the validity of the statute. . . . And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare"; and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest."[105]

The *Ruthenberg* majority had not moved a doctrinal inch from its position in *Gitlow*, in which Justice Sanford approvingly echoed the view of others:

> "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."[106]

And *Gitlow* was nothing if not a reaffirmation of the bad tendency test: "In such case it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."[107]

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[105] 268 US at 669.

[106] Id at 669–70 (quoting *People v Lloyd*, 304 Ill 23, 35, 136 NE 505, 512 (1922)).

[107] Id at 671.

What was different in *Ruthenberg* was that Brandeis, rather than Holmes,[108] was now penning the dissent (App. A).[109] Brandeis, like Holmes before him, refused to yield to Sanford's reaffirmation of the bad tendency test. But Brandeis was doing something more than reaffirming the clear and present danger test; he was moving beyond it—and with Holmes's approval.

Brandeis spoke of Holmes's "clear and present danger" formulation as if it were the starting point of his constitutional analysis, and stressed the importance of analytical clarity: "We must bear in mind . . . the wide difference legally between assembling and conspiracy, between advocacy and incitement, between preparation and attempt." Before proceeding to either his own reworking of Holmes's test or any application of the law to the facts of the case, Brandeis's *Ruthenberg* dissent informed his readers of the values to be safeguarded by his notion of the First Amendment. He wrote with the grace and democratic fervor of Walt Whitman: "In a democracy public discussion is a political duty. This principle lies at the foundation of the American system of government. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. Without free speech and assembly discussion would be futile."[110] Combining that poetic elegance with Enlightenment reasoning, he went on to add what would become memorable lines:

> Those who won our independence by revolution 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 recognized that the greatest menace to freedom is an inert people; that the greatest menace to stable government is repression; and that the fitting remedy for evil counsels good ideas. Believing in

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[108] Id at 672–73 (Holmes dissenting).

[109] The quotations in Brandeis's *Ruthenberg* dissent that follow derived from Unpublished Draft of Brandeis Dissenting Opinion in *Ruthenberg v Michigan*, dated Oct 1, 1926, in *The Louis Brandeis Papers: Part I, 1916–1931* (Harvard Legal Manuscripts, Harvard Law School Library), microfilm reel 34, frames 00351–00360.

[110] What David Cole said of Brandeis's concurrence in *Whitney* holds equally true for his draft dissent in *Ruthenberg*: "As Holmes had done in *Abrams*, Brandeis retained the outline of the *Schenck* clear and present danger test, but filled it with new meaning, substituting an essentially political justification for Holmes's quasi-economic reliance on the discovery of truth through free trade in ideas. Brandeis, who never used Holmes' market metaphor, shifted the focus of the First Amendment from the pursuit of transcendent truth to subjective individual freedom and intersubjective political deliberation." David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 Yale L J 857, 888 (1986) (footnote omitted).

> the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so as to guarantee free speech and assembly.

Returning to doctrine, Brandeis categorically rejected *Gitlow* and the majority in *Ruthenberg*: "Only an emergency can justify repression. Mere bad tendency of the utterance cannot." Tweaking Holmes's test while giving it greater staying power, Brandeis then declared: "[N]o 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." Moreover, "even imminent danger cannot justify resort to prohibition of functions essential to effective democracy, unless the evil apprehended is relatively serious."

Brandeis's draft dissent was equally striking in the lengths to which it went to apply the Justice's vision of the First Amendment to the facts in the case. The discussion of Communist doctrine was so extensive in *Ruthenberg* that it might have made the petitioner happy to have such information readily available in a nationally distributed government document. "The [Party] teaching is that American Democracy is a fraud," wrote Brandeis, "that not merely the practice, but the form of our government makes it the effective instrument of capitalist control." Such descriptions might have struck some as out of place, because their very presentation might be understood as an expression of sympathy. But the progressive Brandeis spared no adjectives in expressing his disdain for the Party's "foul" or "noxious doctrine" made possible by the "dictatorship of the proletariat." Even so, he felt the need to remind Americans: "Those who won our independence by revolution valued liberty both as an end and as a means." In other words, the ideal of revolution need not be judged as un-American.

The draft of the *Ruthenberg* dissent was relentless in its demonstration that the Communist Party of America, as constituted in 1922, posed no "imminent danger that some evil might result from Ruthenberg's assembling with [it]." More accurately, no such danger reasonably could have been inferred from the record as presented in the case. Drawing on that record and on matters of "judicial notice," Brandeis declared:

- "There is no suggestion of sabotage. In fact, the Party rejects as absurd the theory that the revolution can be accomplished by the direct seizure of industry without first overthrowing the capitalist state."

- "The predicted use of force in the final struggle by which the communist state is to be substituted in America for the capitalistic was in 1922 a remote contingency."

- "The Party had then less than six thousand members, scattered throughout the United States. Of these, all but five thousand were foreign born—persons apparently of small means and unfamiliar with the English language."

- "Even if all the resources, intellectual and financial, of the Russian Soviet Republic were to be devoted to propaganda here, the process of converting any substantial portion of the thirty million American workers to revolutionary views would necessarily be a slow one."

- "If the only evil apprehended was illegal violence in the final struggle, there could be no basis for a claim that mere assemblage with this society, although formed to advocate the noxious doctrine, would create imminent danger of the evil."

- "[W]hile the criminal state of mind was to be developed, the time was apparently not then deemed ripe for putting foul doctrines into practice, either as a means of preparation and education or otherwise."

- "There is not even a suggestion that Ruthenberg had, in any connection, committed, or attempted or conspired to commit, or had incited any other person to commit, any act of violence or terrorism."

- "[There was not] a particle of evidence [introduced] that these delegates, or any of the Party's officers, had advocated resort in the near future to crime, sabotage, violence or other unlawful methods of terrorism as a means of preparation for accomplishing industrial or political reform, or for any other purpose, either in Michigan or elsewhere in the United States, or had

attempted or conspired or threatened to resort, or had incited any other person to resort to such means of preparation."

Little remained to be done, save perhaps some last minute proofing by the clerks. Sanford and his colleagues had prevailed again, but at least this time Brandeis had raised a formidable lance in dissent. This dissent would be remembered much the same way that Holmes's dissent in *Abrams*[111] would be remembered. Brandeis dissenting in *Ruthenberg*—it would in time become a familiar phrase in American law.

It had been 10 months since the Justices heard oral arguments in *Ruthenberg v Michigan*. The time had arrived for the Court printer to release the opinions. But something unexpected happened. On March 3, 1927, there was a story in the *Washington Post* bearing the headline: "C. E. Ruthenberg, Head of Communists, Dead."[112]

His death came as a complete surprise, except to a few in his inner circle. A week or so earlier, while Ruthenberg was in New York, he had doubled up in pain in his hotel room, this in the presence of friends who expressed concern and urged him to see a doctor. "No," he replied, "I've got to get to that meeting in Chicago." When the pain subsided, he was off on a train to the windy city to attend another Party meeting. His friend and ideological ally, William Z. Foster, was concerned at how pale he looked when they met in Chicago. "You look sick, Charley," he said. To which came the reply: "Yes, Bill, I'm kind of under the weather." A few hours later Ruthenberg collapsed and was taken immediately to the American Hospital. The doctors performed an emergency appendectomy, but to no avail. Three days later, on March 2, 1927, Charles Emil Ruthenberg was dead at forty-four—acute peritonitis.[113]

An honor guard flanked the body as it lay in state at the Ashland Boulevard Auditorium in Chicago. A long line of mourners passed by. There was a funeral march to Graceland Cemetery Chapel. Later Ruthenberg's body was cremated and his ashes were taken in a bronze urn to New York's Manhattan Lyceum. Later still, the urn (inscribed,

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[111] 250 US 616, 624–31 (1919) (Holmes dissenting).

[112] Washington Post (March 3, 1927), p 8.

[113] The facts in this paragraph derived largely from Johnson at 177–78 (cited in note 18); Draper at 243–47 (cited in note 18).

"Our Leader, Comrade Ruthenberg") was taken by a special guard wearing red shirts and black armbands to memorial meetings at Carnegie Hall, Central Opera House, and the New Star Casino. Some 10,000 comrades flocked to the memorial events to stand, one last time, with Ruthenberg. In Russia, too, they saluted him. At the official request of the Communist Party of the Soviet Union, his ashes were sent to Moscow to rest beneath the Kremlin wall. He was the last American to receive that "honor."[114]

The case that had been so important to Brandeis—both in terms of articulating his vision of First Amendment law and in applying it—was now lost. Within a week, the writ of error in *Ruthenberg v Michigan* (No. 44) was dismissed.[115]

C. CHANGING HORSES IN MID-STREAM

Even before Charles Ruthenberg died and his writ of error was dismissed, the Court divided along the same lines in its treatment of *Whitney*. Seven Justices intended to dispose of *Whitney* on the merits, presumably along the same lines of reasoning as in *Ruthenberg*,[116] and Justices Brandeis and Holmes planned to concur in the judgment alone. Brandeis prepared a lackluster two-paragraph opinion (App. B)[117] largely contesting the majority's assumption of jurisdiction. After noting the petitioner's failure to raise the issue of clear and present danger in the state courts, Brandeis obliquely declared: "[T]here was evidence on which the court or jury might have found that such [a clear and present] danger existed." Accordingly, he conceded that "the judgment of the state court cannot be disturbed."

Had Brandeis left his draft concurrence in *Whitney* untouched, the history of First Amendment law would have been deprived of

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[114] The facts in this paragraph derived largely from Johnson at 177–78 (cited in note 18); Draper at 243–47 (cited in note 18); Arthur Schlesinger, Jr., *Hitched to a Red Star*, New York Times (July 24, 1960), Book Review, p 3.

[115] *Ruthenberg v Michigan*, 273 US 782 (1927).

[116] We can only speculate here, since we have been unable to locate the original majority opinion in *Ruthenberg* and the earliest drafts of the majority opinion in *Whitney*. Nevertheless, given the arguments made by Justice Brandeis in his unpublished *Ruthenberg* dissent, it is clear that the majority had planned to reach the merits. Likewise, the unpublished early draft of Brandeis's *Whitney* concurrence establishes that the majority had never planned to dismiss the case for procedural reasons.

[117] A draft of Brandeis's original concurrence in *Whitney* is contained in his papers, and is virtually identical to what was set out in the final two paragraphs of the published opinion. It is reprinted as Appendix B.

"one of the great majestic, stirring tributes to freedom of expression."[118] But he did not. He seized much of his rhetoric and reasoning in *Ruthenberg*, and reworked it. Sometimes lifting whole passages with minor modifications, sometimes rearranging phrases and sentences, and sometimes inserting new observations, Brandeis infused brilliance, vitality, and eloquence into his *Whitney* opinion.

On May 16, 1927—more than five years after the start of Whitney's trial—the Court issued its decision in *Whitney v California*.[119] Whitney's conviction was upheld by a unanimous Court. Justice Sanford, the author of *Gitlow*, wrote for the majority of seven Justices who viewed *Whitney* as tantamount to a *Gitlow* "bad tendency" case.[120] Little need be said here about the majority's opinion, other than that in its unusually generous grant of review, Sanford felt obliged to declare: "[T]he usual course here taken to show that Federal questions were raised and decided below is not to be commended . . . ."[121] In contrast, the opinion was ungenerous in its grant of free-speech protection. The Fourteenth Amendment notwithstanding, the opinion was highly deferential to state statutory determinations of dangerous expression. Such determinations "must be given great weight. Every presumption is to be indulged in favor of the validity of the statute . . . ."[122] Only patently unreasonable laws or laws unreasonably applied[123] could be set aside as violations of due process.

Brandeis's concurrence, joined by Justice Holmes, rejected the "bad tendency" test in favor of the "clear and present danger" standard. Brandeis perceived Sanford's constitutional analysis as devoid of any meaningful First Amendment restraints: "I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desira-

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[118] Smolla at 106 (cited in note 12).

[119] 274 US 357 (1927)

[120] See note 66.

[121] 274 US at 361.

[122] Id at 371.

[123] In the same term as the *Whitney* decision was rendered, a unanimous opinion (per Justice Sanford) set aside a criminal syndicalism conviction on the grounds that the law as applied violated due process. *Fiske v Kansas*, 274 US 380 (1927). The conviction of Harold B. Fiske, an IWW organizer, was reversed because it was obtained "without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution." Id at 387.

bility of a proletariat revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment."[124] On the procedural side of the ledger, Brandeis rejected the majority's assumption of jurisdiction. "Our power of review in this case is limited . . . to the particular claims duly made below, and denied."[125] Finding no clear and present danger issue raised by Whitney's counsel in the state court proceedings, Brandeis added: "We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. . . . Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."[126]

Substantively, the similarities and differences between Brandeis's opinions in *Ruthenberg* and *Whitney* are notable. Taken together, they provide a fuller view of Brandeis's ideas—both as conceptualized and applied—than has heretofore been known. Brandeis's *Ruthenberg* opinion lacks some of the polish that made his *Whitney* concurrence so remarkable. Understandably, *Ruthenberg* does not contain at least one memorable passage found in *Whitney*: "Men feared witches and burnt women."[127] And *Ruthenberg* is not as comprehensive in its formulation of the clear and present danger test. What *Whitney* lacks, in contrast, is precisely what *Ruthenberg* proffers: an extended and forceful application of Brandeis's approach to the facts of the case.

Given Brandeis's jurisdictional concerns in *Whitney*, he did not examine the *application* of his test to the facts. As Brandeis explained in *Whitney*:

> Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the

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[124] 274 US at 379 (Brandeis concurring).

[125] Id at 380 (Brandeis concurring).

[126] Id.

[127] Id at 375.

> existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed.[128]

Among possible reasons for such failures of proof, two stand out as most likely. First, Whitney's trial lawyers focused on her personal innocence rather than on the criminal culpability of the group. In contrast, Ruthenberg's lawyers built a strong record concerning the legal character of the Communist Party of America. Second, since the First Amendment had not at the time of the trial been applied to the states, Whitney's counsel may not have believed it necessary to request a clear and present danger jury instruction. Ruthenberg's attorneys, however, requested (though were denied) a clear and present danger jury instruction. Hence, the jurisdictional problems that plagued *Whitney* were absent in Ruthenberg's case.[129]

One other difference between what Brandeis wrote in *Ruthenberg* and *Whitney* is worth some reflection; it concerns the question of the burden of proof in criminal syndicalism cases argued after *Schenck v United States*.[130] Specifically, which side (the prosecution or the defense) bears the burden of making such a showing of "clear and present danger" to the trier of fact? In *Ruthenberg*, Brandeis seemed to be saying that such a burden rested with the state: "The jury [was] not instructed that there must be clear and present danger of immediate violence to justify conviction." In *Whitney*, Brandeis appears to point in the other direction: "The legislative declaration" of the California syndicalism statute creates "a rebuttable presumption" that the clear and present danger "conditions have been satisfied." By that measure, the state need not

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[128] Id at 379.

[129] An interesting (and professionally important) question is whether a court (and specifically a Justice such as Brandeis) should hold counsel to an obligation to make legal arguments that prior opinions have not encouraged or have rejected—for instance, that the First Amendment (via the Fourteenth Amendment) should bind the States exactly as it does Congress—or rather should understand an invocation of the Fourteenth Amendment generously to encompass whatever the court is prepared to make of it. This point is discussed more fully in Part III.

[130] 249 US 47 (1919). Rejecting a First Amendment challenge to a conviction under the Espionage Act of 1917, Justice Holmes's opinion of the Court in *Schenck* reasoned: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Id at 52.

offer such proof as part of its case in chief. Rather, it would be incumbent on the defense to rebut the presumption of danger. Since Whitney's lawyers had neither offered rebutting evidence nor sought a jury instruction challenging the legislative presumption, the Supreme Court (Brandeis insisted) was unable to take the matter up de novo in a state case.

Had Ruthenberg lived, the *Whitney* concurrence would have been far more modest. It would have been a short and technical opinion, and devoid of the luster that made it famous. In other words, it would have been lost to history.

D. THE PHOENIX RISES

Eugene Debs predicted in 1925 that "Anita Whitney will not go to prison."[131] By 1927, after the Supreme Court's affirmance of her conviction, that prediction seemed fanciful. But a few days before the Court granted a rehearing in *Whitney v California*, something unusual happened. It was something that caught the attention of Anita Whitney's lead appellate counsel, Walter Pollak. One of Pollak's former clients, Benjamin Gitlow, who six months earlier had lost his First Amendment case in the Supreme Court, was pardoned by the governor of New York.[132]

Shortly thereafter, in June 1927, California Governor Clement Calhoun Young pardoned Whitney,[133] an act of clemency that surprised many. Few governors, let alone a Republican governor like Young, ever pardoned a "Red" at a time when Communists were so demonized. So, why was Anita Whitney pardoned? The answer is every bit as curious as almost everything else in her case.

The pardon application and much of the campaign were spearheaded by Whitney's former California appellate lawyer, John Francis Neylan. The Hearst lawyer who looked out for the interests of management,[134] Neylan was a man of power. From his plush suite at the Palace Hotel, he developed legal arguments to

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[131] Quoted in Richmond at 137 (cited in note 17).

[132] The facts in this paragraph are substantiated in *Gitlow v New York*, 268 US 652 (1925); *Gitlow Is Pardoned by Governor Smith as Punished Enough*, New York Times (Dec 12, 1925), p 1; *Gitlow, Set Free, Rejoins Radicals*, New York Times (Dec 13, 1925), p 18.

[133] *Miss Whitney Granted Pardon in California*, Washington Post (June 21, 1927), p 1 (AP story).

[134] See *John Francis Neylan, 74, Dies in San Francisco*, Washington Post (Aug 22, 1960).

save the liberty of a client whose political creed was antithetical to his professional existence.

He also recruited others to his cause. The list of those who endorsed a pardon for Whitney was a Who's Who of captains of commerce. Politicians also stepped forward to advance the pardon campaign. "Were I Governor, I would pardon her at once," declared U.S. Senator Hiram Johnson (R-CA). University professors, social workers, economists, and civic and religious leaders followed suit. Even Walter J. Peterson, who had been in charge of the detail that arrested Whitney, said that her arrest was a mistake:

> I investigated Anita Whitney's record in 1919 . . . . I found that she had always done an enormous amount of good in the community. . . . She was one of those idealists who want to make the world better for everyone. I ordered Fenton Thompson not to arrest her. But he was so zealous he went over my head to Commissioner J. F. Morse and the arrest was made. No constructive good can be done by making a martyr of Anita Whitney. She should never have been held to answer in the first place.[135]

The beneficiary of the pardon, however, resisted these efforts. "I have done nothing to be pardoned for," she told a reporter for the *Oakland Tribune* in May of 1927. "I have no intention of asking for a pardon." And then, in allegiance to her ideological comrades, she declared: "I have nothing to complain of in comparison with Sacco and Vanzetti."[136] The editors of the *Los Angeles Times* were so taken aback by her response that they remarked: "If Anita Whitney will not sign her own petition for leniency, there isn't much reason why anyone else should."[137]

While this campaign was building momentum, Ms. Whitney was still out on bail on her $10,000 bond. She probably would have been rearrested and ordered to start her prison time at San Quentin had it not been for the hesitancy of the Alameda District Attorney, Earl Warren.[138]

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[135] Richmond at 139 (cited in note 17).

[136] All of the newspaper references come from or are quoted in *Miss Whitney Won't Ask Pardon*, New York Times (May 17, 1927), p 31.

[137] *Has an Interest*, Los Angeles Times (June 21, 1927), sec A, p 4.

[138] See *Miss Whitney Won't Ask Pardon*, New York Times (May 17, 1927), p 31.

On June 20, 1927, Governor Young pardoned Anita Whitney. His reasons for issuing the pardon:

- "Because I do not believe under ordinary circumstances this case would have ever been brought to trial."
- "Because the abnormal conditions attending the trial go a long way toward explaining the verdict of the jury."
- "Because I feel that the criminal syndicalism act was primarily intended to apply to organizations actually known as advocates of violence, terrorism, or sabotage, rather than to such organizations as the Communist Labor Party," and
- "Because the judges who have been connected with the case as well as the authors and some of the strongest advocates of the law under which Miss Whitney was convicted unite in urging that a pardon be granted."[139]

The pardon apparently won the approval of Louis Brandeis. Shortly after it was issued, the Justice wrote to his friend, Harvard Law Professor Felix Frankfurter: "The pardon of Anita Whitney was a fine job."[140] A few weeks later, Whitney celebrated her sixtieth birthday. She was now a free woman, thanks largely to conservative capitalists.[141]

In her last years, Anita Whitney remained true to her stripes. She still passed out leaflets at factory gates, picketed at the German Consulate, and took to a "soapbox in Dolores Park to talk about the Japanese internment."[142] Even at eighty-three, when she was frail, she allowed longshoremen to carry her to a political rally where she spoke in defense of her fellow activists in the labor movement. In February of 1955, she died at her home in San Francisco,[143] having lived just long enough to hear the news about

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[139] Quoted in *Miss Whitney Granted Pardon in California* at 1 (cited in note 133).

[140] Melvin I. Urofsky and David W. Levy, *"Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter* 293 (Oklahoma, 1991) (letter dated June 26, 1927).

[141] Richmond at 140 (cited in note 17).

[142] Rubens at 169 (cited in note 17).

[143] See *S.F. Woman Supporter of Reds Dies*, Los Angeles Times (Feb 5, 1955), p 2; *Anita Whitney, Old-Time Communist Dies at 87*, Washington Post (Feb 6, 1955), sec A, p 14. Her private papers appear to have been destroyed by an unsympathetic relative. See Rubens at 167 (cited in note 17).

the Court's landmark ruling in *Brown v Board of Education*.[144] Whereas Charles Ruthenberg's death had robbed him of a lasting name in the law, it made Whitney's name memorable. And whereas the Court had not given Whitney her liberty, it gave her a legacy.

III. Brandeis's Vote Against Whitney: Procedural and Substantive Faults

Justice Brandeis voted for Charles Ruthenberg on both procedural and substantive grounds, and voted against Anita Whitney on both procedural and substantive grounds. We find it difficult to accept such different outcomes.

The final two paragraphs of Brandeis's concurrence in *Whitney* usually have been ignored. They stated, in full:

> Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. *She might have required that the issue be determined either by the court or the jury*. She claimed below that the statute as applied to her violated the Federal Constitution; but *she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury*. On the other hand, *there was evidence on which the court or jury might have found that such danger existed*. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. *In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed.*
>
> Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, *Murdock v. City of Memphis*, 20 Wall. 590; *Haire v. Rice*, 204 U.S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry. v. Duvall*, 225

[144] 347 US 483 (1954).

> U.S. 477, 485–488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg v. United States*, 163 U.S. 632, 658–660; *Clyatt v. United States*, 197 U.S. 207, 221–222. This is a writ of error to a state court. *Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.*[145]

At the outset, note that Brandeis offers two kinds of arguments as to why he votes to affirm Whitney's conviction—jurisdictional and substantive. Generally speaking, this two-track line of argument suggests that even if one were to grant arguendo that there were no jurisdictional impediments, Brandeis was nonetheless prepared to vote against Whitney on the substantive merits. On both tracks, we think Brandeis had it wrong, and we surmise that he may well have known it.

A. JURISDICTION

Louis Brandeis's noted biographer, Alpheus Thomas Mason, echoed the *Whitney* concurrence when he wrote: "Miss Whitney had not, as she might have done, raised the question whether there was in fact a 'clear and present danger' manifest in her acts."[146] That echo has reverberated down the halls of academe for almost eight decades; it is the conventional wisdom. That "wisdom," however, both assumes too much and understands too little. For the matter is much more complicated. Brandeis was right to flag jurisdictional problems, but wrong in the way he resolved them.

From the beginning, *Whitney* was not a case that Brandeis wanted to hear. Recall that the Court first had denied jurisdiction over the appeal, and granted a rehearing only after Whitney's counsel maintained that the California court's certificate established jurisdiction. Even then, Brandeis might have been disinclined to hear the case, as revealed in his astute clerk's thirteen-page typed memorandum. Had Brandeis's brethren paid allegiance to the law tendered in James Landis's memo, *Whitney* could not have remained on the Court's docket.

According to that memo, there was no basis for finding a federal

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[145] 274 US at 379–80 (Brandeis concurring) (emphasis added).

[146] Alpheus Thomas Mason, *Brandeis: A Free Man's Life* 565 (Viking, 1946).

question in the *Whitney* trial and appellate court record. Among the reasons presented, the following were most significant:[147]

No federal claim raised at trial: Examining the trial record, only a demurrer to the information remotely suggested a constitutional claim. The demurrer asserted generally "that the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional." Citing six Supreme Court rulings, Landis emphasized "the doctrine that a mere assertion of unconstitutionality and invalidity will be taken to have had reference to the state and not the federal constitution."

No federal claim raised by the certificate: Landis found the certificate suspect: "[T]he certificate in this case is really a stipulation by counsel approved by the court (not signed by any member of the court). Its effect is thus considerably weaker than the usual type of certificate signed by the presiding justice of the state court." Moreover, the certificate alone was "incompetent to originate [a federal] question." The only value of a certificate was to make more specific the federal claim that was already in the record.[148]

No federal question necessarily decided by the state court: Landis acknowledged that Supreme Court jurisdiction would lie if a state court actually decided a federal question but attempted to conceal its decision by failing to mention the federal claim in its opinion. Regarding the existing state of First Amendment law, however, Landis concluded: "[T]here must be something in the record (including the opinion) that the state court was led to suppose that the plaintiff in error claimed protection

[147] The references to James Landis's memorandum, the synthesis of the arguments therein, and the supporting quotations are drawn from James M. Landis, *In re #10—Existence of a Federal Question in the Record* (undated memorandum to Justice Brandeis regarding jurisdictional hurdles in *Whitney v California*), in *The Louis Brandeis Papers: Part I, 1916–1931* (Harvard Legal Manuscripts, Harvard Law School Library), microfilm reel 34, frames 00325–00337.

[148] Notably, Landis took pains to distance *Whitney* from another case argued by Walter Nelles and Walter Pollack, *Gitlow v New York*, 268 US 652 (1925), in which a certificate from the New York Court of Appeals had been used to establish the existence of a federal question for Supreme Court jurisdiction. The *Gitlow* case was readily distinguished on the grounds that the federal First and Fourteenth Amendment claim had been specifically raised in and ruled upon by the New York trial and appellate courts. See Kurland and Casper at 521–531 (cited in note 72).

> under some specific clause of the constitution. In view of the fact that the claim for protection in this case . . . is by no means fully and specifically developed by the decisions of the Supreme Court of the United States, it would seem to be highly erroneous to assume that the state court . . . necessarily decided that the statute was not in conflict with the federal constitution."

Thus, Landis (who would later serve as dean of the Harvard Law School) submitted that Whitney's writ of error should be dismissed. Surprisingly, Brandeis dismissed the sound advice of his law clerk, and signed onto the majority's dubious grant of jurisdiction to reach the federal First Amendment claim.

Instead, Brandeis faults Whitney's counsel for failing to raise a clear and present danger claim at her state court trial. But could that fault be fairly charged? At the time of Whitney's trial, neither the First Amendment nor the Supreme Court's "clear and present danger" test had been applied to the states. Whitney's trial took place in early 1920. But as late as 1922, the Court insisted that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech.'"[149] Dicta to the contrary did not come until June of 1925 in *Gitlow v New York*.[150] The *holding* of *Stromberg v California*[151] explicitly applying the First Amendment to the states through the Fourteenth Amendment did not come until May of 1931, and the First Amendment right of assembly that was at the core of the *Whitney* case was not imposed on the states until 1937.[152]

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[149] *Prudential Insurance Company of America v Cheek*, 259 US 530, 543 (1922).

[150] 268 US 652, 666 (1925).

[151] 283 US 359, 368–69 (1931) (striking down on First and Fourteenth Amendment grounds a California statute criminalizing the display of a red flag as a statement of "opposition to organized government"). In *Fiske v Kansas*, 274 US 380 (1927) (a unanimous decision filed on the same day as *Whitney*), the Court set aside a Kansas syndicalism conviction of an IWW organizer because the State's indictment and prosecution failed to introduce any real evidence of the group's unlawful purposes. As applied, the law was "an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant." Id at 387. *Fiske* has been understood by some distinguished First Amendment scholars to be the first case to uphold a defendant's claim to protection of the First Amendment. See, e.g., Emerson at 103 (cited in note 11). See also Zechariah Chafee, Jr., *Free Speech in the United States* 352 (Harvard, 1941). Professor Chafee does observe, however, that "[i]t might be assumed that the court did nothing more than declare that a man cannot be convicted for a crime which is neither charged nor proved." Indeed, this narrower construction of *Fiske* strikes us as the more accurate one.

[152] *DeJonge v Oregon*, 299 US 353 (1937).

Given the state of the law, the "clear and present danger" test was not likely to be invoked by Whitney's defense counsel, and the California courts would not likely have granted a request for such an instruction.[153] Thus, Brandeis's declaration that Anita Whitney "might have required that [the First Amendment's "clear and present danger"] issue be determined either by the court or the jury" asked too much of trial counsel.[154]

So, why did he do it? Charles Ruthenberg's death on March 2, 1927, must have frustrated Brandeis. The formidable dissent that he had drafted for *Ruthenberg* stood to be lost to history. The solution might have seemed obvious: adapt the *Ruthenberg* dissent to the facts in *Whitney*. But Landis's memorandum powerfully argued that the Court lacked jurisdiction in *Whitney*. Recall that Brandeis originally had prepared a two-paragraph opinion dispensing with Whitney's appeal for procedural reasons. If he continued down that course after Ruthenberg's death, there would then have been no reason for him to reach the First Amendment. When the *Whitney* majority leaped over the federal jurisdictional hurdles to reach the merits of the case[155] (and reinvigorate the

[153] The fact that Ruthenberg's trial and appellate attorneys explicitly raised federal constitutional speech and assembly claims and requested trial court instructions on those issues, which were predictably refused, in no way undercuts our point. After all, Ruthenberg and his counsel had faced scores of criminal indictments, and were extremely familiar with all the procedural and substantive gambits that might conceivably be used in his defense. In that respect, their particularized expertise far exceeded that of Whitney's state trial and appellate counsel.

[154] Strictly speaking, Brandeis appears misleading when he suggested that Anita Whitney should have raised a First Amendment clear and present danger defense, for that constitutional reference masked an analogous *statutory* burden that Whitney's counsel did not satisfy. Brandeis's concurrence presented the California legislature's explanation of the contemporary conditions threatening public order and justifying the enactment of an emergency measure. He read the California statute as creating a presumption of public harm arising from syndicalist activities—a presumption that could be rebutted by the defendant with sufficient evidence that no such imminent danger existed. Essentially, the statutory burden and the constitutional one mirrored each other; in all likelihood, a defendant who rebutted the statutory presumption would have made an argument quite similar to a First Amendment clear and present danger defense. But the two are different in this important respect: if Anita Whitney had prevailed on statutory grounds, a court would not thereafter entertain any constitutional challenge to the same effect. See, e.g., *Siler v Louisville & Nashville R. Co.*, 213 US 175 (1909). By the same logic, if Whitney failed to raise a state statutory defense, she could not thereafter assert a federal First Amendment claim. This is but another reason why Brandeis ought to have restrained himself from waxing long on the First Amendment.

[155] "Sanford did not explain why the justices bent their rules in this case; most likely, the conservative majority wanted to warn political radicals that not only could publishing calls for revolution be punished—as *Gitlow* had ruled—but that simply joining a 'revolutionary' group could lead to prison." Peter Irons, *A People's History of the Supreme Court* 290 (Penguin, 1999).

"bad tendency" test[156]), Brandeis felt obligated to counter both their jurisdictional and substantive arguments. The result was his curious concurrence in *Whitney*.

B. SUBSTANCE

The links between Miss Whitney, the mild-mannered political reformist, and the hot-headed IWW radicals were so tenuous as to be farcical. But Brandeis chose to lend his name to that farce. Consider the following passage from his concurrence: "there was other testimony which *tended* to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member." In other words, there was evidence in the record that *might* establish: (1) that some extremists in the IWW conspired to commit immediate and dangerous illegal acts; (2) that the Communist Labor Party of America "furthered" that conspiracy by recognizing in its National Program the "long and valiant struggle and heroic sacrifices" of the IWW; (3) that the Communist Labor Party of California additionally "furthered" that conspiracy by adopting the National Program of the Communist Labor Party of America; and (4) that Anita Whitney could be prosecuted for her otherwise lawful membership and innocent participation in the Communist Labor Party of California.[157]

Under that application of the California statute, the "evils" of the IWW are imputed to Anita Whitney in such a way that its criminal acts stain her. She is sullied by her mere assembly with the CLPC, regardless of her own intent in assembling and regardless of whether or not that assembly meaningfully furthers the conspiratorial schemes of the IWW. This theory of culpability posits, with Brandeis's approval, that if the IWW's activities produce an imminent danger of serious violence, then responsibility

[156] See Rabban at 17–18, 118–19, 132–34, 193–200, 256–58, 282–85, 291–92, 320–26 (cited in note 9).

[157] Remember that, under the California statute, her criminal culpability was completed by her membership in the CLPC, her presence at its organizing convention and involvement in its committees, her grudging acceptance of the CLPC's rejection of her reformist "political action" resolution, her continued active attendance at the organizing convention, and of course her willingness to entertain silly radical songs.

for that danger "flows" to Whitney. Such logic removes any semblance of actual causation from the constitutional equation. That Brandeis understood this problem is evidenced by his *Ruthenberg* dissent, where he wrote that there must be a "proximate relation of cause to consequence of which alone the law commonly takes account." That language did not find its way, however, into his *Whitney* concurrence. To the extent that Brandeis abandoned that concept in *Whitney*, his heroic First Amendment formulation collapses into a variation of the majority's "bad tendency" test.

Indeed, the Justice's own law clerk, James Landis, cautioned Brandeis about this problem. In his October 27, 1926 memorandum on the *Whitney* case, Landis incisively observed:

> [I]t may be argued that we have a situation where [the IWW's] industrial crimes were likely to occur whether the Communist Labor Party of California existed or not; [but] that the danger of such crimes was substantially increased by (a) the existence of a group like the CLP which, while it did not advocate sabotage, yet justified violation of law as a remedy for the ills of the proletariat, the same ills, to a certain extent, which disturbed the IWW, or by (b) expression of approval given by the CLP, or (c) by both together. The argument of course assumes that the evil tendency of the speech or assembly is enough to remove it from the protection of the fourteenth amendment . . . . But in any case where there is no direct incitement, it is very dangerous to allow a limitation on the right of free speech or assembly to be based on an evil tendency, whether to create a danger or to increase an existing danger. Many innocent activities, certainly protected by free speech, might be condemned under such a rule. . . . Hence we ought to require at least a clear demonstration of the effect or tendency of the acts punished in increasing the danger.

Landis went on to apply his understanding of the "imminent incitement" test to the *Whitney* facts:

> Such a demonstration doesn't exist here. . . . (i) The reference in the National Program of the CLP of America to the IWW is nothing more than a statement of approval; a pledge of "whole-hearted support" in a political platform may be disregarded. The statement is in very general terms, it may or may not be understood to refer to the criminal activities of the IWW, [and it] was not communicated directly to the people whom it is here argued it will influence. . . . Hence it is very doubtful whether the Cal. Party's statement of approval . . . would carry

> a dynamic quality such as would lead to action on the strength of it. (ii) I find more plausible the idea that the very existence of the CLP of Cal., a group with similar ultimate aims and an ethic which excuses law-violation, would lend encouragement to these active syndicalists. The suggestion may indicate the danger of the whole theory which would uphold the statute.[158]

What, then, was Justice Brandeis thinking? One is left to wonder why he proceeded beyond the jurisdictional analysis to the substantive discussion that could prove so problematic.

IV. History in the Making

> Having much, of course, makes one want more, and this appears true for Brandeis scholarship as well. (Melvin I. Urofsky)[159]

However Brandeis voted in *Whitney*, the final result in the case would have been the same. And while a vote in her favor might have made the pardon campaign on her behalf easier, it proved unnecessary. So why is it important which way Brandeis voted as long as he wrote what he did?

It is a truism, but one worth repeating nonetheless: context gives words their fullest meaning. Context puts flesh on skeletal words. The idea was not foreign to Brandeis; it is a leaf out of his book: "No law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises and to which it is to be applied."[160] The same, of course, holds true for Brandeis[161] and

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[158] Memorandum on *Whitney v California*, October 27, 1926, pp 5–6, in *The Louis Brandeis Papers: Part I, 1916–1931* (Harvard Legal Manuscripts, Harvard Law School Library), microfilm reel 34, frames 00307–00312. This memorandum was unsigned. Based on our understanding of the record of correspondence between Brandeis and his clerks at the time, we assume that James Landis authored it; if it were not Landis, then it would have been Robert Page.

[159] Melvin I. Urofsky, *The Brandeis Agenda*, in Nelson L. Dawson, ed, *Brandeis and America* 132, 147 (Kentucky, 1989).

[160] Louis D. Brandeis, *The Living Law*, 10 Ill L Rev 461, 467 (1916).

[161] Professor Urofsky makes a telling point:

> . . . I keep coming back to the man, to his life and work. On several occasions I thought I had finished, and each time I would run across something new, a letter or an opinion or a source I had not seen before, and suddenly there would be a new idea, a new appreciation of what he stood for. I am not done exploring Brandeis, but it is a vast territory, and those of us working it there welcome company.

Urofsky at 148–49 (cited in note 159).

what he wrote in *Whitney*.

While others have written thoughtfully on the meaning of the words of Brandeis's great concurrence,[162] they have done so with too little historical backdrop. We have attempted to provide a measure of context heretofore missing, or missing in the sense that much of the available historical information had not been collected in a single place.

We came to this juncture by asking: "Why did Brandeis concur in *Whitney*?" That question led us back not only to the life and times of Charlotte Anita Whitney, but also to those of Charles Ruthenberg. At the end of this inquiry, some may sense that we have done little more than return to the place from whence we began, namely, that Brandeis concurred in *Whitney* for jurisdictional reasons. Even if that were true, it does not discount the importance of a fuller and more informed understanding of *why* Brandeis did what he did.

As rhetorically rich and intellectually astute as Brandeis's concurrence was, we submit that it might have been better still had he *applied* those insights to the facts of *Whitney*, much as he had done in his *Ruthenberg* dissent. In light of his jurisdictional concerns, he might have voted to remand the case for further proceedings.

Be that as it may, it is enough, for our purposes anyway, that the story of Brandeis's concurrence has been told more fully than ever before. And what an amazing story it is in the history of free speech in America.

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[162] See, e.g., Blasi (cite in note 4); Robert M. Cover, *The Left, the Right, and the First Amendment*, 40 Md L Rev 349 (1981).

APPENDIX A[†]

SUPREME COURT OF THE UNITED STATES

No. 44 — October Term, 1926

Charles E. Ruthenberg, Plaintiff in Error	In Error to the Supreme Court of the State of Michigan.
vs.	
The People of the State of Michigan.	

Mr. Justice Brandeis, dissenting.

Ruthenberg was tried, convicted and sentenced for the crime of voluntary assembling with the Communist Party of America, a society "formed to teach or advocate the doctrines of criminal syndicalism" — and for that crime only. This new felony of voluntarily assembling is very unlike the ancient misdemeanor of unlawful assembly. Its criminal quality does not arise from immediate danger of breach of the peace incident to a gathering at a particular time and place under particular circumstances. It inheres, as the statute is construed by the Supreme Court of Michigan, in every gathering of a society, formed to advocate the obnoxious doctrine of criminal syndicalism. 229 Mich. 315. The mere act of assembling is given the dynamic quality of crime. The accused is to be punished, not for violence or threat of violence, not for attempt, incitement or conspiracy, but for a step in preparation which, if it threatens the public order at all, does so only remotely. There is guilt, although there was no present act of promulgation of syndicalism. What the society had done before the accused attended the meeting and what the assemblage did later, are of no significance except as evidence to establish the purpose of the meeting and his election to join it. The felony is complete at the moment the accused becomes part of the particular assemblage, whatever the time, place or circumstance, however remote the danger appre-

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hended, and however improbable that serious evil will eventually befall. Is the statute so construed and as here applied consistent with the due process clause?

[2] The right to liberty obviously does not prevent a State from taking action reasonably required to protect itself from destruction or serious political, economic or moral injury. To this end, it may, in the exercise of its police power, ordinarily adopt any measure which the governing majority deems necessary and appropriate. But, despite arguments to the contrary which had seemed to me persuasive, it has been settled that the State's power, so far as its exercise involves fundamental rights of the citizen, is restricted by the due process clause in matters of substantive law as well as in procedural law. Whether a particular measure is reasonable and appropriate, may therefore present a justiciable federal question. In this case, the matters requiring consideration are whether the right to peaceful assembly is one of the fundamental rights; if so, what its limits are; and whether these have been invaded by the statute as construed and applied. As to the first of these enquiries, there seems little room for doubt. The right of assembly partakes of the nature of the rights to free speech, to a free press, and to teach — the fundamental rights with which it is closely associated. See *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Pierce v. Society of Sisters*, 268 U.S. 510. The protection extended by the Constitution to the right of assembly must, therefore, be as broad as that enjoyed by these other fundamental rights. Like them, it may be restricted only if, and to the extent that its exercise involves clear and present danger.

The novelty in the prohibition introduced is that the statute aims not directly at the practice of criminal syndicalism, but at the preaching of it. The practice of "sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform" had already been made a crime. So had conspiracy, and incitement to others, to use such means. But no attempt was made to prove any such overt act in Michigan, or elsewhere in the United States, nor to show danger of breach of the peace at the assemblage. The convention was held in a remote and secluded spot supposed to be known only to a few trusted delegates who attended it. There was not even danger that the obnoxious doctrine would be taught at the convention. All the delegates were familiar with it.

[3] Since the attack made upon the statute as construed and applied, our decision of this question must depend upon the specific facts. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. But, before these can be examined profitably, it is necessary to determine generally, when a danger shall be deemed clear; how remote the danger may be and still be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means

of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrines which a vast majority of its citizens believes to be false and fraught with evil consequences; in other words, why free speech and assembly were made constitutional rights. We must bear in mind, also, the wide difference legally between assembling and conspiracy, between advocacy and incitement, between preparation and attempt.

In a democracy public discussion is a political duty. This principle lies at the foundation of the American system of government. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. Without free speech and assembly discussion would be futile. With them, discussion affords ordinarily adequate protection against the dissemination of the noxious doctrine. Those who won our independence by revolution 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 recognized that the greatest menace to freedom is an inert people; that the greatest menace to stable government is repression; and that the fitting remedy for evil counsels good ideas. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution as to guarantee free speech and assembly.

To self-reliant men, with confidence in the power of reason applied through the process 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 **[4]** before there is opportunity for full discussion. Only an emergency can justify repression. Mere bad tendency of the utterance cannot. If authority is to be reconciled with freedom this rule must prevail.[1] Moreover, even imminent danger cannot justify resort to prohibition of functions essential to effective democracy, unless the evil apprehended is relatively serious. Pro-

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[1] Compare Z. Chafee, Jr., 'Freedom of Speech,' pp. 24–39, 207–221, 228, 262–265; H. J. Laski, 'Grammar of Politics,' pp. 120, 121. See Thomas Jefferson: "If there be any among us who wish to dissolve the union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." First Inaugural Address. Also: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, Vol. 123, P. 8. And Lord Justice Scrutton in Rex v. Secretary for Home Affairs, Ex parte O'Brien, (1923) 2 K. B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . . " Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431, 461.

hibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because it is an inappropriate means of protection. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.

In the case at bar, the evil feared was obviously not a trivial one. But the question for decision is whether there was reasonable ground for fear. No such ground existed, unless there was in 1922 imminent danger that some evil might result from Ruthenberg's assembling with the Communist Party of America, and unless the **[5]** evil which might reasonably be apprehended was one sufficiently serious to make denial of free speech and assembly an appropriate remedy. These matters require consideration not only of the doctrine to be advanced, but also of the circumstances under which it was to be preached.

The Program and other documents introduced at the trial establish that the doctrine to be taught and advocated by the Communist Party of America was "criminal syndicalism." The Party teaches that workers are now exploited and oppressed; that the interests of capital and labor are irreconcilable; that the low condition of labor results from the fact that existing government, municipal, state and national, constitutes government by and for the capitalist class; that the class struggle is inevitable; and that to secure adequate relief, the class struggle must take the form of political struggle — a struggle for the control of government. The Party declares that the ultimate goal is destruction of existing government and substitution of a proletarian dictatorship; that, as the workers are dependent for life, liberty and happiness upon the ownership and control of the raw materials and machinery of production, this dictatorship will take these from capitalists; that it will establishment ownership; that with such ownership it will develop management of the industries by the workers; and that it will, in time, include as workers the whole adult population.

There is no suggestion of sabotage. In fact, the Party rejects as absurd the theory that the revolution can be accomplished by the direct seizure of industry without first overthrowing the capitalist state. The teaching is that American Democracy is a fraud, that not merely the practice, but the form of our government makes it the effective instrument of capitalist

control; that effective control by the workers can be secured only through destroying the existing government and substituting therefore the dictatorship of the proletariat, in the form of workers' councils or Soviets; that this indispensable revolutionary change can be achieved through the mass power of the exploited class, provided its members are united in unshakable loyalty to the principles and leaders of the Party; but that the capture of political power cannot be effected by the ballot alone; that to overthrow capitalist government, resort must eventually be had to the same kind of armed force which **[6]** is now used by the ruling class to keep the working class in subjection; and that in the transition period from Capitalism to Communism force must and will be used to establish and to maintain the dictatorship of the proletariat.

The predicted use of force in the final struggle by which the communist state is to be substituted in America for the capitalistic was in 1922 a remote contingency. The Party had then less than six thousand members, scattered throughout the United States. Of these, all but five thousand were foreign born — persons apparently of small means and unfamiliar with the English language. The aggregate of a year's expenditures for all its activities was $185,715. Even if all the resources, intellectual and financial, of the Russian Soviet Republic were to be devoted to propaganda here, the process of converting any substantial portion of the thirty million American workers to revolutionary views would necessarily be a slow one. Before the predicted cataclysm could supervene, there would be ample time and opportunity to meet false assertions by evidence and fallacious reasoning by sound argument. If the only evil apprehended was illegal violence in the final struggle, there could be no basis for a claim that mere assemblage with this society, although formed to advocate the noxious doctrine, would create imminent danger of the evil. There was absent that proximate relation of cause to consequence of which alone the law commonly takes account.

The claim seriously urged is a different one. It is that the Communist Party of America advocates, as a means of preparation for the final struggle, the immediate commission of criminal acts of violence or other unlawful methods of terrorism; and that the possibility of such immediate preparatory acts constitutes clear and present danger which justifies denial of the right of assembly. The Program supplies ample evidence that the Party plans to propagate immediately the criminal state of mind. It proclaims boldly the foul doctrine that the end justifies the means. It declares that the party does not feel itself bound by existing laws, because these were forced upon the workers by the "bourgeois class state." It states that it will prepare the workers for the ultimate armed insurrection incident to overthrowing the capitalist state, by teaching **[7]** its members and other workers, that during the intermediate period of preparation, the fighting proletariat must come into open conflict "with bourgeois

justice and the organs of bourgeois state apparatus." But, while the criminal state of mind was to be developed, the time was apparently not then deemed ripe for putting foul doctrines into practice, either as a means of preparation and education or otherwise.

The Party announces its purpose to unite industrial workers, farm laborers, working farmers and negroes, and to build a United Front of the whole exploited class, so that its direct mass power may become a factor in the class struggle, which is eventually to culminate in armed insurrection and civil war. It declares, that in order to educate members of the Party to assume leadership of the mass, its tentacles should reach out into every form of workers' organizations; that it will strive to control these organizations and the workers; and that its members should participate in elections and endeavor to revolutionize both organized and unorganized labor. But neither in the record, nor in matter of which we take judicial notice, is there any basis for a contention that in 1922 the time and conditions were deemed by the Party opportune for any form of immediate violence, or that there was any reason for belief on the part of the state authorities that the Party deemed it to be so. So far as it appears, neither the Party, nor any member of it had therefore resorted to any act of violence, or had attempted, threatened, or conspired to do so; or deemed that immediate acts of violence were then advisable.

The Party propagation of the criminal state of mind by its teaching, and its program of violence as a means of preparation, bring the danger incident to formation of the society nearer than it would be, if the only violence to be apprehended were that involved in the predicted final struggle. Every denunciation of existing law tends in some measure to increase the probability that there will be some violation of it.[2] Condonation of a breach enhances the probability. Expressions of approval add to the probability. Advocacy heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for **[8]** denying free speech, where, as here, the advocacy falls short of incitement. Here, there is nothing to indicate that the advocacy would be immediately acted on. To support a finding of such danger it would have to be shown either that immediate violence was, in fact, advocated, or that the past conduct of Ruthenberg, or other delegate furnished reason to believe that such advocacy was then contemplated. The documents introduced showed little more than what sort of people were gathered at the convention, their beliefs and their hopes.

Ruthenberg was not an obscure or mysterious person. He and his history were well known. He was nearly forty years old. Continuously

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[2] Compare Judge Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540; Judge Amidon in United States v. Fortuna, Bull. Dept. Justice No. 148, pp. 4–5; Chafee, "Freedom of Speech," pp. 46–56, 174.

since his birth he had been a citizen of Cleveland, Ohio. From 1909 to 1919, he had been an active member of the Socialist Party. He had several times been its candidate for mayor. He had been its candidate, also, for state treasurer, for governor, for representative in Congress and for United States senator. It is true that he had been arrested repeatedly in Cleveland and elsewhere. But no prosecution had ripened into final sentence, except one. That was for violation of the Selective Draft Act by inducing another to fail to register. See *Ruthenberg v. United States*, 245 U.S. 480. All other prosecutions were likewise for political speeches or for the circulation of political literature. There is not even a suggestion that Ruthenberg had, in any connection, committed, or attempted or conspired to commit, or had incited any other person to commit, any act of violence or terrorism.

The past conduct of the others in attendance at the Bridgman convention afforded likewise no basis for apprehending immediate violence. Every person present was a duly accredited delegate. All that these men had done, and all that they planned, had presumably been learned by the State. For ever since the organization of the party in September, 1919, Francis A. Morrow had been employed by the Department of Justice as a spy upon its operations. In that capacity, he joined the Party and had become active in its counsels. Being active and trusted, he had been elected as a delegate to this convention. It was he who became their chief witness. But neither through his testimony, nor otherwise, was there introduced a particle of evidence that these delegates, or any of the Party's officers, had advocated resort in the near future to crime, sabotage, violence or other unlawful methods of terrorism as a means of preparation for accomplishing industrial or political reform, or for any other purpose, either in Michi**[9]**gan or elsewhere in the United States, or had attempted or conspired or threatened to resort, or had incited any other person to resort to such means of preparation.

The secrecy of the meeting was not, under the circumstances, evidence of any such illegal purpose. Secrecy was resorted to, not because the formation of the Party was believed to be illegal, or because some act in violation of some law of Michigan or of the United States was contemplated, but for a very different reason. Those who formed the Communist Party of America at Chicago in 1919 had done so openly. The organization meeting and its later proceedings had been as public as those of other political parties. Without change of platform or general plans, the Party was converted later into a secret organization, because the Secretary of Labor had ruled meanwhile that mere membership in it by an alien authorized his deportation under the Act of Congress, October 16, 1918, c. 186, § 2, 40 Stat. 1012, amended June 5, 1920, c. 251, 41 Stat. 1008; and because several thousand persons resident in the United States had been arrested through operations of the Department

of Justice, on the charge that they were aliens liable to deportation because of membership in the Communist Party of America. See *Colyer v. Skeffington*, 265 Fed. 17.[3] As most of the members of the Party were aliens, the Secretary's ruling, and the occurrences of January, 1920, led the Party to believe that secrecy was essential to its existence.[4]

The jury were not instructed that there must be clear and present danger of immediate violence to justify conviction. It is contended that neither the jury nor this Court has any concern with the question whether the existence of this weak political party did in fact furnish a reasonable basis for the belief that assembling with it constituted a clear and present danger of serious evil; that it was the function of the legislature of the State to determine **[10]** whether, under then existing conditions, voluntary assembly with a society formed to advocate the overthrow of organized government by force and violence constituted a clear and present danger of substantive evil; and that, by enacting the measure, the legislature had impliedly decided that question in the affirmative. Compare *Gitlow v. New York*, 268 U.S. 652, 668–671. The legislature must, obviously, determine, in the first instance, whether a danger exists which calls for the particular protective measure which it enacts. But where the statute enacted is valid only in case certain conditions exist, the enactment cannot alone establish the facts which are essential conditions of the statute's validity. This is not a case like *Hawes v. Georgia*, 258 U.S. 1, where the prosecution relies upon the statute as creating a rebuttable presumption.

Statutes enacted under the police power, which imposed merely absolute prohibition, as distinguished from regulation, have been repeatedly held invalid in cases involving the liberty to engage in business.[5] The power and duty of this Court are no less where the liberty involved is that of free speech and assembly.

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[3] Among the members so arrested were many citizens, but all these were immediately released as soon as the fact of citizenship was ascertained. This action by the Government showed that there was no reason to believe that the persons arrested had violated either any federal or state law, since in making the arrests agents of the Department of Justice cooperated with the state authorities. "The Deportations Delirium of Nineteen Twenty," by Louis F. Post, pp. 51–55.

[4] "The Deportations Delirium of Nineteen Twenty," by Louis F. Post, pp. 80–153.

[5] Compare Frost v. R.R. Comm. of California, 271 U.S. __; Weaver v. Palmer Bros. Co., 270 U.S. 402; Jay Burns Baking Co. v. Bryan, 264 U.S. 504; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Adams v. Tanner, 244 U.S. 590.

APPENDIX B[†]

SUPREME COURT OF THE UNITED STATES

No. 3 — October Term, 1926

Charlotte Anita Whitney, Plaintiff in Error *vs.* The People of the State of California.	In Error to the District Court of Appeal, Appellate District, Division One of the State of California

Mr. Justice Brandeis, concurring.

This writ of error was allowed under §237 of the Judicial Code solely on the ground that a right guaranteed by the Federal Constitution was denied. Our power of review in this case is necessarily limited to the question, *Murdock v. City of Memphis*, 20 Wall. 590; *Haire v. Rice*, 204 U. S. 291, 301; and as to it, there can be no review unless, and except so far as, the claim of right was duly made below, and the denial was followed by appropriate exceptions. *Seaboard Air Line Ry. v. Duval*, 225 U. S. 447, 485–488. For the writ of error is to a state court; and we, therefore, lack the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, even although the objection was not taken in the trial court. *Wiborg v. United States*, 163 U. S. 632, 659–660; *Clyatt v. United States*, 197 U. S. 207, 221–222.

The claim mainly urged is that the Criminal Syndicalism Act as here applied violates the right of free speech and assembly. It was not disputed that the defendant became a member of the Communist Labor Party; was on its committee of resolutions; and attended its meetings in California from time to time. The evidence was directly largely to the issue whether the organization was of such a character as to bring it within the class of organizations prohibited by the statute. For reasons stated

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by me in *Ruthenberg v. Michigan*, decided this day, the statute is, in my opinion, invalid, if applied at a time when there did not exist clear [2] and present danger as there defined. Whether in 1919, when Miss Whitney did the things complained of, there was such danger in California, might have been made the important issue in the case. The defendant might have required that either the court or the jury determine that issue. But she made no specific request to that end. She did not even make a general request for a directed verdict. On the other hand, there was evidence on which the court or jury might have found that such danger existed. Under these circumstances the judgment of the state court cannot be disturbed.