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."[464] The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same act with Justice Holmes writing, "we think it necessary to add to what has been said in *Schenck v. United States* only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[465] And, in *Debs v. United States*,[466] Justice Holmes upheld a conviction because "the natural and intended effect" and the "reasonably probable effect" of the speech for which the defendant was prosecuted was to obstruct military recruiting.

In *Abrams v. United States*,[467] however, Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with the United States' participation in World War I. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[468] Moreover, in *Gitlow v. New York*,[469] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the state. In so doing, the Court discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference

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[464] 249 U.S. at 52.

[465] Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).

[466] 249 U.S. 211, 215–16 (1919).

[467] 250 U.S. 616 (1919).

[468] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).

[469] 268 U.S. 652 (1925).