to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases 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. . . . And the general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[470] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive to the Court.[471] It is not clear what test, if any, the majority would have used, although the "bad tendency" test has usually been associated with the case. In *Whitney v. California*,[472] the Court affirmed a conviction under a criminal syndicalism statute based on the defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence, which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be ex-

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[470] 268 U.S. at 670–71.

[471] 268 U.S. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Id. at 673.

[472] 274 U.S. 357, 371 (1927).