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# The Hatch Act Reaffirmed: Demise of Overbreadth Review

# THE HATCH ACT REAFFIRMED: DEMISE OF OVERBREADTH REVIEW?

The Burger Court is "a Court in transition"[1] and Court watchers anxiously await signs of emerging trends or changes in policy. It is the task of this Comment to identify an emerging policy change in the overbreadth doctrine. Two recent cases, *United States Civil Service Commission v. National Association of Letter Carriers*[2] and *Broadrick v. Oklahoma*,[3] will be reviewed in depth. Then, the effect of these and other recent cases upon the overbreadth doctrine will be examined.

## I. Two Methods of Judicial Review

There are two methods of judicial review by which the Supreme Court seeks to eliminate unconstitutional statutory inhibitions upon rights and privileges: (1) review of a statute "as applied" and (2) review of a statute "on its face." The "as applied" method is the more traditional and restrained method of judicial review. It is based upon the concept that the judicial resolution of a constitutional controversy is justified only if it is *unavoidable* in rendering a decision in a particular case before the Court.[4] In applying this method, the Court considers the constitutional validity of a statute only in terms of its factual application in the case before it.

The other method of judicial review is facial review—the determination of whether or not a statute is invalid on its face, regardless of the constitutional status of the particular complainant's conduct. Such an aggressive method of review is employed only in reviewing statutes which affect first amendment rights, and finds its justification in the favored status of the rights of expression and association.[5] The rationale of facial review is based upon the assumption that some statutes have a deterrent, or "chilling", effect[6] upon the exercise of first amendment rights and privileges. This deterrence and the resulting loss in exercise of precious freedoms concern the Court more than any actual punishment.[7] In

1. Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan. L. Rev. 1001 (1972).

2. 93 S. Ct. 2880 (1973).

3. 93 S. Ct. 2908 (1973).

4. "In no area of adjudication is the adage 'silence is golden' more pertinent . . . than in the series of problems to which a judicial reconciliation between liberty and order gives rise. . . . When there is no duty to speak on such issues there is a duty not to speak." Poulos v. New Hampshire, 345 U.S. 395, 414 (1953) (Frankfurter, J., concurring).

5. See Thornhill v. Alabama, 310 U.S. 88, 96-98 (1940). See generally Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956); McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182 (1959).

6. The notion of a constitutional "chill" was first mentioned in Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

7. "The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).

order to remove this "chill" and prevent an irretrievable loss in freedom of expression, the Court is willing to modify traditional standards of review.[8]

A statute may be said to have a chilling effect if it is either vague or overbroad. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined."[9] Statutory vagueness may mean excessive delegation of discretion to enforcement officials without adequate standards,[10] or simply a lack of adequate warning to the innocent.[11] In addition, in the area of the first amendment privileges, vagueness is so closely related to overbreadth that the two may be practically indistinguishable.[12]

An overbroad statute, however, may or may not suffer from the defect of vagueness.[13] The Court may declare a "clear and precise enactment"[14] overbroad

8. "We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms . . . ." Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting). See, e.g., NAACP v. Button, 371 U.S. 415, 432-33 (1963); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Hobbs v. Thompson, 448 F.2d 456, 459-60 (5th Cir. 1971). See generally Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969). However, a recent step backward in "chilling effect" doctrine is Laird v. Tatum, 408 U.S. 1 (1972). In that case the Court found that petitioners' claim that their first amendment rights were chilled by the existence of a data-gathering system did not constitute a justiciable controversy because there was no showing of harm.

9. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The void-for-vagueness doctrine was conceived during the era of substantive due process and was used successfully in cases involving regulatory or economic-control legislation. Smith v. Cahoon, 283 U.S. 553 (1931); Cline v. Frink Dairy Co., 274 U.S. 445 (1927); Connally v. General Constr. Co., 269 U.S. 385 (1925); International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914). During that time, vagueness allegations in free speech cases were not well received. Fox v. Washington, 236 U.S. 273 (1915); Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915), overruled by Joseph Burnstyn, Inc. v. Wilson, 343 U.S. 495 (1952). More recently, however, the doctrine has been used by the Supreme Court in free speech cases. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 613-14 (1971); Cameron v. Johnson, 390 U.S. 611, 616 (1968); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Board of Public Instr., 368 U.S. 278, 287 (1961). For a comprehensive discussion of the vagueness doctrine see Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

10. E.g., Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Ashton v. Kentucky, 384 U.S. 195, 200 (1966); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 261-64 (1937).

11. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

12. "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 432-33 (1963). See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845 n.5 (1970) [hereinafter cited as Overbreadth Doctrine].

13. A statute may be drawn precisely but still be overbroad in its coverage. See, e.g., Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964). However, Professor Freund has characterized overbreadth as actually being a problem of latent vagueness. P. Freund, The Supreme Court of the United States: Its Business, Purposes, and Performance 67-68 (1961).

if it "sweeps within its prohibitions what may not be punished under [the first amendment]."[15] The Court will examine the statutory language in order to determine if there is a substantial possibility either that the statute could be applied to punish constitutionally protected activity, or that those affected by the statute might realistically fear such an application.[16]

Within the overbreadth doctrine there are two minor themes or considerations: (1) Is there a compelling state interest? and (2) Did the state utilize the least drastic alternative to protect or further that interest? It is generally agreed that a "substantial infringement" of first amendment rights requires a compelling state interest for its justification.[17] If a statute is drafted in vague or broad prohibitions, it will be more difficult for the courts to ascertain what interest the government seeks to protect.[18]

Once the Court determines that there is a compelling state interest to be protected, it turns to a consideration of whether or not the legislature has employed the least restrictive alternative available to protect adequately or further that interest.[19] Regardless of the enunciated method, the Supreme Court must balance

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14. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Statutes affecting first amendment rights must be "narrowly drawn to define and punish specific conduct." Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). The Supreme Court recently has utilized the doctrine of overbreadth to rule unconstitutional many statutes regulating first amendment rights. E.g., Gooding v. Wilson, 405 U.S. 518 (1972); United States v. Robel, 389 U.S. 258, 265-66 (1967); Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18-19 (1966); NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960). In Button the Court stated: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U.S. 415, 433.

15. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

16. Overbreadth Doctrine 856.

17. Lamont v. Postmaster Gen., 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring); Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Thomas v. Collins, 323 U.S. 516, 530 (1945).

18. United States v. Robel, 389 U.S. 258, 272-82 (1967) (Brennan, J., concurring); Lamont v. Postmaster Gen., 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring); Sherbert v. Verner, 374 U.S. 398, 407 (1963); Herndon v. Lowry, 301 U.S. 242, 258 (1937). Without a clear statement of legislative policy, those responsible for the statute's implementation are left without guidance as to its proper application. Greene v. McElroy, 360 U.S. 474, 507 (1959); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). See Overbreadth Doctrine 856-58.

19. "The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent." Shelton v. Tucker, 364 U.S. 479, 494 (1960) (Frankfurter, J., dissenting).

In non-first amendment cases, the doctrine of least restrictive alternative means simply that the government, when faced with a number of equally effective means to a desired end, must choose the one which is least restrictive of constitutional rights. Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969). In Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) the Supreme Court, in finding that an economic statute unnecessarily interfered with interstate commerce, considered possible alternative legislative

conflicting interests and values in examining a statute which inhibits first amendment rights.[20] If an important, general interest of the government, such as national security, were to be weighed against individual rights and freedoms, the scales would rarely tip in the individual's favor.[21] Instead, the Court will balance the "state's interest in the added effectiveness of the chosen means against the individual interest in the use of less drastic ones."[22] An overbroad statute, while perhaps very effective and based upon a legitimate state interest, may not be upheld if the loss of freedoms involved outweighs the efficiency gained by the breadth of the statute's coverage.

Overbreadth review is facial review; it does not depend upon the privileged nature of the complainant's activity.[23] This is justified by the chilling effect of the overbroad statute which would deter the "very litigants whose complaint is necessary under the as applied method to bring about erosion of overbreadth."[24] The uncertainty that their action would eventually be declared privileged by the courts, and the cost of litigation, would discourage many individuals from exercising first amendment rights.[25] This lack of dependence on the plaintiff's factual situation "renders an overbreadth claim 'ripe' almost whenever asserted."[26] However, the suit might still be found to be premature if it is uncertain whether or not the statute applies to the complainant's activity.[27]

Since a finding of overbreadth depends only upon possible, rather than actual, unconstitutional applications of a statute, the possibility of such applications must be substantial or legislation would be impossible.[28] Whether or not statutory

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approaches. But since then it consistently has refused to do so, claiming it is "not [its] function." E.g., United States v. Robel, 389 U.S. 258, 267 (1967). For a discussion of the Court's policy statement in Robel see Gunther, Reflections on Robel: It's Not What the Court Did But the Way That It Did It, 20 Stan. L. Rev. 1140 (1968). An analysis of the applicability of the least restrictive alternative doctrine in cases involving economic regulations which have been attacked under the due process clause may be found in Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967). A comprehensive summary of the use of the doctrine in several areas of the law may be found in Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964).

20. Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254, 255 (1964); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464, 466 (1969).

21. Cf. T. Emerson, A System of Freedom of Expression 116-17 (1970).

22. Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464, 468 (1969).

23. Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

24. Overbreadth Doctrine 855.

25. See Zwickler v. Koota, 389 U.S. 241, 252 (1967); Dombrowski v. Pfister, 380 U.S. 479, 486-87, 490-91 (1965); Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964).

26. Overbreadth Doctrine 864. Cf. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1379-80 (1973).

27. W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309, 312 (1967). See Harrison v. NAACP, 360 U.S. 167, 179 (1959).

28. "A substantial overbreadth rule is implicit in the chilling effect rationale. While it is

overbreadth is substantial depends upon the type of statute under review. One commentator has suggested three types of overbroad statutes affecting first amendment rights: (1) "censorial" laws which burden the expression of definable viewpoints; (2) "inhibitory" laws which restrict expression and association but are neutral as to the viewpoints advocated; and (3) "remedial" laws which inhibit first amendment activities in order to promote values which are the very concern of the amendment.[29] Of the three, censorial statutes require the least substantial degree of overbreadth to trigger overbreadth review.[30] The Court has struck down inhibitory statutes which make no attempt to define clearly the harm they seek to prevent or set forth clear standards for their application.[31] When examining a remedial statute, the Court will tolerate a considerable amount of imprecision in drafting.[32]

The ready availability of facial review is not its only justification for use in examination of overbroad statutes. The as applied method of review is unsuitable for dealing with the defects of an overbroad statute. Unless the statute lends itself to a broad per se restriction, as applied adjudication would not lessen the "chill" of an overbroad statute. Ad hoc adjudication of unconstitutional applications of an overbroad statute would offer no guidance to the potential actor covered by the literal language of the statute unless "his situation [were] on all fours with that of an earlier claimant."[33] For this reason such overbroad statutes must be invalidated completely and sent back to the legislature for redrafting.

## II. Two Recent Cases

Recently the Supreme Court upheld the constitutionality of two similar statutes which impose serious restrictions on first amendment freedoms, rejecting complainants' allegations of vagueness and overbreadth in *United States Civil Service Commission v. National Association of Letter Carriers*[34] and *Broadrick v. Oklahoma*.[35]

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true that even the most carefully drawn statutes may have some chilling effect on privileged activity . . . still the presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Overbreadth Doctrine 859.

29. Id. at 918.

30. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965).

31. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); NAACP v. Button, 371 U.S. 415 (1963); Kunz v. New York, 340 U.S. 290 (1951); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939).

32. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (employer propaganda during union representation elections); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (FCC regulations designed to promote fairness in media treatment of controversial issues); United States v. Harriss, 347 U.S. 612 (1954) (regulation of lobbying).

33. Overbreadth Doctrine 872. For a comprehensive discussion of the failure of the as applied method in curing the chill of overbroad statutes see id. at 865-910.

34. 93 S. Ct. 2880 (1973).

35. 93 S. Ct. 2908 (1973).

### A. *Letter Carriers*

The *Letter Carriers* case began when the National Association of Letter Carriers and six federal employees, in a class action,[36] sought a declaratory judgment that the provision of the Hatch Act that prohibits political activity by employees of the Executive branch[37] was unconstitutional on its face, and requested an injunction against its enforcement.[38] Each plaintiff alleged that the Civil Service Commission was enforcing, or about to enforce, the Act's prohibitions against political activity with respect to certain conduct in which he was about to engage.[39] Finding the constitutional question substantial, a three-judge court was convened.[40]

The three-judge court, in a two-to-one decision,[41] ruled that the challenged provision of the Hatch Act was unconstitutional on its face and enjoined its enforcement. The court recognized "an obvious, well-established governmental interest in restricting political activities by federal employees,"[42] but found that there were such serious defects in the drafting of the Act that it could not be upheld under contemporary first amendment standards of review.[43] Judge Gesell, writing for the majority, found the Act to be "a classic case of a statute which in

36. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

37. 5 U.S.C. § 7324 (1970) provides in pertinent part: "(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not . . . (2) take an active part in political management or in political campaigns. For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

38. Six local Democratic and Republican political committees also sought to join the action as plaintiffs and include 5 U.S.C. § 1502(a)(3) (1970) (imposing similar prohibitions on state employees covered by the Act) in the constitutional challenge. The district court held that none of the plaintiffs properly could represent all state employees covered by the Act. Therefore only § 7324(a)(2), as it affects federal employees, was considered. 346 F. Supp. at 579 n.1.

39. 93 S. Ct. at 2883. In United Public Workers v. Mitchell, 330 U.S. 75 (1947), an earlier challenge to the constitutionality of the Hatch Act, the Court refused to allow several government employees to join the suit because they had not yet violated the Act and therefore did not present a justiciable controversy. Only five years later, in Adler v. Board of Educ., 342 U.S. 485 (1952), the Court reached the merits without discussing justiciability. In Adler, plaintiff teachers challenged the constitutionality of a New York statute designed to rid the New York public school system of subversive influences, but they did not allege violation of the statute or any intention to do so.

40. The three-judge court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1970). An appeal from the decision of a three-judge court may be taken directly to the Supreme Court.

41. Judge Gesell wrote the majority opinion in which Judge Parker concurred. Judge MacKinnon dissented.

42. 346 F. Supp. at 579.

43. "Prohibitions are worded in generalities that lack precision. There is no standard. No one can read the Act and ascertain what it prohibits." Id. at 582 (footnote omitted).

its application has a 'chilling effect' unacceptable under the First Amendment."[44] However, the Supreme Court reversed in a six-to-three decision, finding the Act neither impermissibly vague nor overbroad.[45]

Both the High Court and the three-judge court set forth legislative histories of the Hatch Act.[46] To facilitate a better understanding of the issues involved, a brief history is set forth here also.

When Congress enacted the Hatch Act in 1939,[47] control over the political conduct of government employees long had been in effect. The Civil Service Act of 1883[48] forbade employees in the civil service to coerce the political action of any person or to interfere with elections by use of their official authority or influence. In 1907, President Theodore Roosevelt extended the range of controls by an executive order which prohibited not only coercion, but voluntary political activity as well.[49] During the 1938 election much publicity was given the misuse of federal funds slated for emergency public relief programs.[50] In response to pressure from the public, Congress enacted the Hatch Act in 1939 to prevent "pernicious" political activity allegedly engaged in by public employees in connection with these programs.[51] Though the Hatch Act contained essentially the same prohibitory language as the 1907 executive order,[52] its application was

44. Id. at 584.

45. 93 S. Ct. 2880 (1973). Justice White wrote the majority opinion in which Chief Justice Burger and Justices Stewart, Blackmun, Powell and Rehnquist joined. Justice Douglas filed a dissenting opinion in which Justices Brennan and Marshall joined.

46. 93 S. Ct. at 2886-89; 346 F. Supp. at 580-82.

47. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147.

48. Act of Jan. 16, 1883, ch. 27, 22 Stat. 403.

49. Exec. Order of June 3, 1907 provided: "Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."

50. 84 Cong. Rec. 9598 (1939) (remarks of Rep. Taylor); Note, The Hatch Act—Political Immaturity?, 45 Geo. L.J. 233, 234-35 (1956-57).

51. 1 Report of the Commission on Political Activity of Government Personnel 9-10 (1968). (This three volume report was compiled by an advisory commission created by Congress in 1966 (Act of Oct. 3, 1966, Pub. L. No. 89-617, 80 Stat. 868) and contains information on federal, state and foreign restrictions on the political activity of public employees.) But see Mosher, Government Employees Under the Hatch Act, 22 N.Y.U.L. Rev. 233, 234-37 (1947). For a discussion of the political atmosphere at the time the Act was passed see generally P. Herring, The Politics of Democracy 223-24 (1940); 2 S. Morison & H. Commager, The Growth of the American Republic 744 (5th ed. 1962); G. Stimpson, A Book About American Politics 106-07 (1952).

52. The word "privately" was deleted from the version passed by Congress. The Hatch Act as originally passed appears in Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147. It was amended in 1940 to extend coverage of the act to employees of the District of Columbia and to employees of federally financed projects of states and municipalities. Act of July 19, 1940, ch. 640, 54 Stat. 767. In 1950 it was amended again to leave to the discretion of the Civil Service Commission whether or not violation warranted removal. Act of Aug. 25, 1950, ch. 784, 64 Stat. 475. The principal provisions of the Act were enacted as 5 U.S.C. §§ 1302, 1308, 1501-03 & 7324-27 upon the formal enactment of Title 5 by the Act of Sept. 6, 1966, Pub. L. No.

extended to many federal employees not previously covered. Among the activities it proscribed was "an active part in political management or in political campaigns," language defined as incorporating the pre-1940 decisions of the Civil Service Commission,[53] except that such an employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates."[54]

It is this definition of political activity which the three-judge court found offensive to first amendment standards.[55] The court discussed the possibility that the pre-1940 rulings were to serve as an upper limit on prohibited political activity, while themselves being cut back by the qualifying provision in section 7324(b). However, the court found that "no constitutionally acceptable mechanism was provided for accomplishing this result,"[56] and the statute was therefore vague and overbroad.

The lower court decision came as a surprise to many who believed that the question of the Act's constitutionality had been settled in *United Public Workers v. Mitchell*,[57] which had upheld the statute. Although the *Mitchell* decision and the Hatch Act itself have been criticized severely,[58] in subsequent challenges to the Hatch Act, the federal courts have felt bound to follow *Mitchell* and uphold the constitutionality of the Act.[59]

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89-554, 80 Stat. 378. For a more detailed legislative history of the Hatch Act see Note, The Hatch Act—Political Immaturity?, 45 Geo. L.J. 233 (1956-57). See also Minge, Federal Restrictions on the Political Activities of State and Local Employees, 57 Minn. L. Rev. 493 (1973); Comment, The "Riddle" of the Hatch Act: Statutory Interpretation and the Narrowing of Vague Laws, 53 Boston U.L. Rev. 122 (1973); Note, Freedom of Political Activity For Civil Servants: An Alternative to Section 9(a) of the Hatch Act, 41 Geo. Wash. L. Rev. 626 (1973); 47 St. John's L. Rev. 509 (1973); 26 Vand. L. Rev. 355 (1973).

53. 5 U.S.C. § 7324(a)(2) (1970). For a general index of these rulings see 1 United States Civil Serv. Comm'n, Political Activity Reporter iii-xxvi (1971).

54. 5 U.S.C. § 7324(b) (1970).

55. "It is immediately unclear how the incorporation by reference and this qualifying provision were intended to operate together." 346 F. Supp. at 581.

56. Id. at 582.

57. 330 U.S. 75 (1947).

58. E.g., Hobbs v. Thompson, 448 F.2d 456, 472 (5th Cir. 1971); Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972), aff'd, 476 F.2d 187 (1st Cir. 1973); Bruff, Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 Hastings L.J. 129 (1969); Minge, Federal Restrictions on the Political Activities of State and Local Employees, 57 Minn. L. Rev. 493 (1973); Nelson, Public Employees and the Right to Engage in Political Activity, 9 Vand. L. Rev. 27 (1955); Rose, A Critical Look at the Hatch Act, 75 Harv. L. Rev. 510 (1962); Comment, The Hatch Act —A Constitutional Restraint of Freedom?, 33 Albany L. Rev. 345 (1969); Note, Freedom of Political Activity For Civil Servants: An Alternative to Section 9(a) of the Hatch Act, 41 Geo. Wash. L. Rev. 626 (1973); Comment, Civil Disabilities and the First Amendment, 78 Yale L.J. 842 (1969); 64 Nw. U.L. Rev. 736 (1970); 42 N.Y.U.L. Rev. 750 (1967); 47 St. John's L. Rev. 509 (1973); 26 Vand. L. Rev. 355 (1973).

59. Regional Park Auth. v. United States Civil Serv. Comm'n, 437 F.2d 1346 (4th Cir.), cert. denied, 403 U.S. 936 (1971); Kearney v. Macy, 409 F.2d 847 (9th Cir. 1969), cert. denied, 397 U.S. 943 (1970); Palmer v. United States Civil Serv. Comm'n, 297 F.2d 450 (7th Cir. 1962); Engelhardt v. United States Civil Serv. Comm'n, 304 F.2d 882 (5th Cir. 1962);

In *Letter Carriers*, the Supreme Court indicated its belief that *Mitchell* had decided the issue in question.[60] Although the district court had not challenged the "well-established governmental interest in restricting political activities by federal employees,"[61] the Court felt constrained to articulate what it believed to be the legislative policy behind the Act.[62] The Act itself offered little help, stating only that its purpose is "to prevent pernicious political activity."[63]

The Court discussed no less than four separate reasons for the restrictions on the political activities of federal employees: (1) the impartial execution of the laws;[64] (2) the appearance that government employees are not practicing "political justice;"[65] (3) the prevention of employing the government work force "to build a powerful, invincible and perhaps corrupt political machine;"[66] and (4) freedom of government employees from pressure "to vote in a certain way or perform political chores."[67] It is not surprising that the Court expended so much energy setting forth purposes of the Act, since it was dealing with a statute which places serious limitations on first amendment rights. It is important when examining such a statute that the Court determine that there exists a state interest which justifies such an intrusion.[68] It is not sufficient merely to state that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' "[69] Government employees may not be stripped of their constitutional freedoms as an incident of employment.[70] In his dissent, Justice Douglas stated that it is "of no concern of Govern-

Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969), appeal dismissed, 396 U.S. 278 (1970); Democratic State Central Comm. v. Andolsek, 249 F. Supp. 1009 (D. Md. 1966); Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965), rev'd on other grounds, 358 F.2d 742 (9th Cir. 1966); Wilson v. United States Civil Serv. Comm'n, 136 F. Supp. 104 (D.D.C. 1955). Contra, National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), appeal dismissed, 400 U.S. 801 (1970).

60. 93 S. Ct. at 2891. The statement "[w]e unhesitatingly reaffirm the Mitchell holding," id. at 2886, might come as a surprise to many who thought it "a safe assumption that United Public Workers retains little vitality today." T. Emerson, The System of Freedom of Expression 587 (1970) (italics deleted).

61. 346 F. Supp. at 579.

62. 93 S. Ct. at 2886-89.

63. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147.

64. 93 S. Ct. at 2890.

65. Id.

66. Id.

67. Id. at 2891. The Hatch Act restrictions are commonly presumed to protect three interests: (1) the interests of the public employees to be protected from political pressure; (2) the interest of the public in an efficient Civil Service system based on merit; and (3) the interest of the public in receiving unbiased service, regardless of political affiliation. Hearings on S. 3374 and S. 3417 Before the Senate Comm. on Post Office and Civil Service, 92d Cong., 2d Sess. 171 (1972).

68. See note 17 supra.

69. 93 S. Ct. at 2890.

70. In upholding the constitutionality of the Hatch Act, the Mitchell Court had relied upon the doctrine that public employment is a privilege rather than a right. This doctrine

ment what an employee does in his or her spare time . . . unless what he or she does impairs efficiency . . . ."[71] This is perhaps an overstatement. The government may in fact find a very real and compelling need to restrain its employees from exercising certain constitutional rights, on or off the job. However, since the statute concerns the rights of speech and association, it is imperative that the government use the least restrictive alternative available to it.[72]

When the Hatch Act was first challenged in *Mitchell*, that Court used a "rational basis" test to uphold its constitutionality.[73] In his dissent in *Letter Carriers*, Justice Douglas stated, "what may have been unclear to some in *Mitchell* should by now be abundantly clear to all. We deal here with a First Amendment right . . . ."[74] The high regard in which we hold first amendment rights demands an aggressive review of statutes which seek to regulate those rights. Instead, the Court stated that "[p]erhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it."[75] The language used is very much the language of a rational basis test. The Court even admitted that a less drastic alternative may exist: "It may be urged that prohibitions against coercion are sufficient protection . . . ."[76] But the Court bowed to what it referred to as the "joint judgment of the Executive and Congress."[77]

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was first articulated by Justice, then Judge, Holmes in the often-quoted statement, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). Mitchell cited McAuliffe in a footnote. 330 U.S. at 99 n.34. Recent cases, however, have rejected this theory. In 1971 Justice Blackmun stated, "This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374 (1971). See, e.g., Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967); Sherbert v. Verner, 374 U.S. 398, 404 (1963). See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

71. 93 S. Ct. at 2906 (Douglas, J., dissenting).

72. See note 19 supra and accompanying text.

73. "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." 330 U.S. at 101.

74. 93 S. Ct. at 2906 (Douglas, J., dissenting).

75. Id. at 2891 (opinion of the Court).

76. Id.

77. Id. In fact, there have been bills introduced in Congress which would narrow the Hatch Act's restrictions. Hearings on S. 3374 and S. 3417 Before the Senate Comm. on Post Office and Civil Service, 92d Cong., 2d Sess. 5, 8, 171 (1972). It has been suggested that a statute be drawn which would prohibit only coercion. United Public Workers v. Mitchell, 330 U.S. 75, 113 (1947) (Black, J., dissenting); Note, Freedom of Political Activity For Civil Servants: An Alternative to Section 9(a) of the Hatch Act, 41 Geo. Wash. L. Rev. 626, 641 (1973). It has also been suggested that the United States adopt the British system which restricts the political activity of certain categories of civil service employees depending

The Court examined 5 C.F.R. Part 733, promulgated by the Civil Service Commission, as the statute in question.[78] However, as the dissent pointed out, the Civil Service Commission was never given the power or authority to adjust or narrow the definition of political activity given in section 7324 (a)(2).[79] As the dissent also pointed out, 5 C.F.R. 733.122(b) is an opened-ended list which states that "[a]ctivities prohibited . . . include but are not limited to [the following]."[80] If the original definition of section 7324(a)(2) were overbroad at the time of its passage, the interpretive decisions of the Civil Service Commission would be of little help in removing the chill of such an overbroad statute. Ad hoc adjudication of an overbroad statute offers little guidance to those about to engage in an activity as yet unconsidered.[81] The Court was not bothered by this possibility, because "the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned."[82] The district court had found such prior restraint unacceptable: "Speech must not be controlled and subject to censure so that one cannot respond without prior clearance to the demands of free expression in ordinary daily affairs."[83] Thus the Court appears to have placed a new restriction on its use of overbreadth review. If a procedure is provided whereby one can obtain a prior interpretation of a contemplated act, and there has been a history of ad hoc determinations under an originally overbroad statute, the Court will not review the statute facially, but will determine its constitutionality in terms of its past applications.

### B. *Broadrick*

Another, and perhaps more serious, limitation appears to have been imposed upon the overbreadth doctrine by *Broadrick*, the companion case to *Letter Carriers*.

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upon the influence they are able to exert in their official capacity. See, e.g., Christoph, Political Rights and Administrative Impartiality in the British Civil Service, 51 Am. Pol. Sci. Rev. 67 (1957); Epstein, Political Sterilization of Civil Servants: The United States and Great Britain, 10 Pub. Ad. Rev. 281, 285 (1950). See generally Esman, The Hatch Act—A Reappraisal, 60 Yale L.J. 986 (1951); Minge, Federal Restrictions on the Political Activities of State and Local Employees, 57 Minn. L. Rev. 493, 540-41 (1973); Note, The Hatch Act—Political Immaturity?, 45 Geo. L.J. 233, 246-49 (1956-57); 47 St. John's L. Rev. 509, 526 (1973).

78. 93 S. Ct. at 2897. The Court set forth the pertinent regulations of 5 C.F.R. Part 733. Id. at 2896 n.21.

79. Id. at 2907 (Douglas, J., dissenting).

80. Id.

81. See note 33 supra. In Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973), the government argued that the terms of the article of the Uniform Code of Military Justice which authorized the court-martial of a commissioned officer for conduct unbecoming an officer and a gentleman were made certain by two hundred years of interpretation. The court found this argument "unpersuasive where the proscribed conduct is speech arguably protected by the First Amendment." Id. at 794.

82. 93 S. Ct. at 2897-98.

83. 346 F. Supp. at 585.

In *Broadrick v. Oklahoma*,[84] a class action brought on behalf of all classified employees in the State of Oklahoma, three employees of the Oklahoma Corporation Commission sought a declaratory judgment that a portion of the Oklahoma Merit System of Personnel Administration Act[85] be found unconstitutional and asked that its enforcement be enjoined. The statute is similar to the Hatch Act, as are many state laws and city ordinances, sometimes known as "little Hatch Acts."[86] The constitutional validity of such statutes has been challenged in both federal and state courts with varying results.[87] In *Broadrick* the district court found that the statute was not vague or overbroad as alleged and, as a finding of fact, found that plaintiffs failed to establish that the challenged provisions "cast any chilling effect upon any state employee's First Amendment rights."[88] Having noted probable jurisdiction,[89] the Supreme Court affirmed the decision of the three-judge court in a five-to-four decision.[90]

The majority opinion by Justice White began by citing the "important state interests" served by such restrictions on political activity. In this case the Justice

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84. 338 F. Supp. 711 (W.D. Okla. 1972), aff'd, 93 S. Ct. 2908 (1973).

85. "No employee in the classified service . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose . . . .

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." Okla. Stat. Ann. tit. 74, § 818 (1965).

86. T. Emerson, The System of Freedom of Expression 584 (1970). For a comprehensive compilation of similar state acts see 93 S. Ct. at 2912 n.2.

87. Federal courts found such statutes to be unconstitutional in Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972). Many state courts have ruled similar statutes unconstitutional. E.g., Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); Bagley v. Washington Twp. Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); City of Miami v. Sterbenz, 203 So. 2d 4 (Fla. 1967); De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (Super. Ct. L. Div. 1967); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966).

However, some courts have upheld their validity. E.g., Gray v. City of Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971); Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F. Supp. 339 (W.D. Wis. 1969) (statutes prohibiting civil service employees from running for public office); State v. Stuler, 122 So. 2d 1 (Fla. 1960) (statute prohibiting public employees from coercing or advising other employees to contribute anything of value for political purposes); Johnson v. Civil Serv. Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968); Ivancie v. Thornton, 250 Ore. 550, 443 P.2d 612 (1968), cert. denied, 393 U.S. 1018 (1969) (statutes prohibiting officeholders from running for partisan office); Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, cert. denied, 395 U.S. 906 (1969).

88. 338 F. Supp. at 715.

89. 409 U.S. 1058 (1972).

90. Justice White wrote the majority opinion in which Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist concurred. Justices Brennan, Douglas, Marshall and Stewart dissented.

listed only two governmental interests: (1) job security of civil servants and an attendant increase in qualified employees, and (2) protection of these employees from " 'political extortion.' " [91] In his dissent Justice Douglas assumed the state interest to be the promotion of efficiency, and found the statute to be an obstacle rather than a means necessary to that end. "A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive."[92]

The plaintiffs alleged that the Act was vague and overbroad. The Court summarily dismissed the allegation of vagueness.[93] However, the issue of overbreadth was given extensive treatment.

In essence, the Court refused to apply facial overbreadth review in this case. The majority opinion stated the principle "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."[94] However, the Court recognized exceptions to this principle due to "weighty countervailing policies" such as the first amendment.[95] Making no attempt to deny that it dealt with first amendment freedoms, the majority stated that it is "a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate."[96] This is because overbreadth review is "strong medicine"[97] and is "employed by the Court sparingly and only as a last resort."[98] Justice White cited two instances when facial overbreadth will not be applied: (1) "when a limiting construction has been or could be placed on the challenged statute"[99] and (2) when overbreadth claims are "invoked against ordinary criminal laws that are sought to be applied to protected conduct."[100] The Justice also stated that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner,"[101] and then cited three cases involving "remedial" statutes[102] and two cases in which the Court never reached the issue of overbreadth.[103] It is submitted that the standard of review applicable to remedial statutes may not be used properly in consideration of an inhibitory

91. 93 S. Ct. at 2913.

92. Id. at 2920 (Douglas, J., dissenting).

93. "We have held today that the Hatch Act is not impermissibly vague. We have little doubt that § 818 is similarly not so vague that 'men of common intelligence must necessarily guess at its meaning.' " Id. at 2913 (citations omitted).

94. Id. at 2915.

95. Id.

96. Id. at 2917.

97. Id. at 2916.

98. Id.

99. Id.

100. Id. at 2917.

101. Id.

102. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United States v. Harriss, 347 U.S. 612 (1954); United States v. CIO, 335 U.S. 106 (1948).

103. Pickering v. Board of Educ., 391 U.S. 563 (1968); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

statute such as the Hatch Act.[104] There is a grave and important difference between remedial and inhibitory statutes and the same standard can not be applied properly to both. In the case of remedial statutes, first amendment rights are in conflict with first amendment rights. A less rigid standard is proper in these cases as there is an overall gain in first amendment freedoms, although the drafting of the statute might render it vague or broad enough to encompass possible unconstitutional applications.[105] However, this lesser standard is not appropriate in reviewing inhibitory statutes. Although the standard of review is not as strict as for "censorial" statutes, of which the Court is particularly suspicious, inhibitory statutes are not given the same presumption of validity as remedial statutes. Nor should they be. Even though such statutes are not as offensive to our democracy as statutes which inhibit expression because of the ideology of the speaker, any statute which inhibits the freedom of expression of a large group of people deserves a strict review.

The Court concluded that the method of facial review was inappropriate in *Broadrick* because "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well."[106] Justice White had advanced this theory in another context earlier—in his dissent in *Coates v. City of Cincinnati*.[107] There, it was rejected implicitly by the majority. In this case it seems particularly inappropriate because, as Justice Brennan pointed out in his dissent, both the speech and the conduct here involved are protected equally by the first amendment.[108]

## III. Implications

This new speech/conduct distinction imposed on overbreadth review in the *Broadrick* case is neither logical nor helpful. Justice Brennan found the distinction "obscure."[109] It seems more likely that the use of the speech/conduct distinction in this case was merely a means to sidestep the use of the overbreadth doctrine.

Court watchers have predicted that the Burger Court would make a sharp break with the constitutional directions of the Warren Court by taking an extreme "law and order" stance and turning a deaf ear to claims based on freedoms of the individual.[110] Upon examining the decisions of the 1971 term of the Burger Court, Professor Gunther remarked:

The changes were marginal, not cataclysmic. "Retreats" were more typically refusals to extend Warren Court tendencies and narrow readings of Warren Court precedents:

104. The Hatch Act has been referred to as "the paradigm of an undifferentiated inhibitory law designed to serve a prophylactic purpose." Overbreadth Doctrine 922 n.307.

105. See notes 29-32 supra and accompanying text.

106. 93 S. Ct. at 2918.

107. 402 U.S. 611, 620-21 (1971) (White, J., dissenting).

108. 93 S. Ct. at 2926 (Brennan, J., dissenting).

109. Id. at 2925.

110. See, e.g., N.Y. Times, July 2, 1972, § 1, at 18, col. 1; N.Y. Times, May 24, 1972, at 28, col. 3; Editorial, Retreat on Rights, N.Y. Times, May 25, 1972 at 44, col. 1; The Nixon Way, Newsweek, June 5, 1972 at 39; The Nixon Radicals, Time, June 5, 1972, at 65.

not firm strides to the rear but sidesteps and refusals to step forward were characteristic of last term's changes.[111]

At the close of the 1972 term, however, it is now apparent that the Burger Court intends not only to refuse to extend the policies of the Warren Court, but also to make a wholesale retreat.

One such retreat may be seen in the field of obscenity. Under the test of *Memoirs v. Massachusetts*,[112] material had to be *utterly* without redeeming social value to be "obscene." In *California v. LaRue*[113] the Court exhibited its dissatisfaction with the *Memoirs* standard by refusing to apply it. In *LaRue* the Court upheld the constitutionality of a statute prohibiting obscene performances in bars. The basis for its refusal to apply the *Memoirs* standard as set forth by Justice Rehnquist,[114] was threefold: (1) the subject of the prohibition was more "action" than "speech";[115] (2) the statute did not impose an absolute ban on the activity, only the denial of a license;[116] and (3) the regulation of such behavior was permissible under the twenty-first amendment.[117] In his dissent Justice Marshall pointed out the weaknesses of the majority's reasoning: (1) the speech/conduct distinction was an improper one since drama is also protected under the *Memoirs* standard;[118] and (2) the state may not infringe a first amendment right by the denial of a privilege or benefit.[119] Even if *LaRue* is read narrowly as being decided under the twenty-first amendment,[120] it seems clear that the Court was rendering a rather tortured reading of the Constitution to avoid the stringent *Memoirs* standard.[121]

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111. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 2 (1972). A critical analysis of Professor Gunther's interpretation of the "new" equal protection may be found in Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973).

112. 383 U.S. 413 (1966). The decision announced a three-pronged test for a finding of obscenity: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Id. at 418.

113. 409 U.S. 109 (1972).

114. Chief Judge Burger and Justices Stewart, White, Blackmun and Powell joined in the majority. Dissenting were Justices Douglas, Brennan and Marshall.

115. 409 U.S. at 117.

116. Id. at 118.

117. Id. at 114-16.

118. Id. at 130 (Marshall, J., dissenting).

119. Id. at 136 (Marshall, J., dissenting).

120. In his dissent Justice Marshall stated: "Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth." Id. at 135 (Marshall, J., dissenting) (citations omitted).

121. It is interesting to note that although Justice Marshall maintained that the regula-

In the closing weeks of the 1972 term, the Supreme Court decided six cases now commonly referred to as the "obscenity cases."[122] The new standard announced in *Miller v. California*[123] represents a definite change in the Court's role as protector of first amendment freedoms from an aggressive role toward a more passive approach. The Court began by reiterating the rule that obscene material is unprotected by the first amendment.[124] It then went on to announce that the decision as to what constitutes obscene material will be judged by contemporary community standards of the local community because "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[125] The implications of this decision are far-reaching.[126]

Having examined the signs foretelling the abandonment of the Warren Court's obscenity standard, it is the contention of this Comment, even at the risk of making another "excessively gloomy"[127] prediction, that similar signs now foreshadow an abandonment of overbreadth review as a means of first amendment protection.

A dissatisfaction with overbreadth review may be seen on the part of a number of the Justices on the present Supreme Court. In *Coates v. City of Cincinnati*[128] Justice White, joined in his dissenting opinion by Chief Justice Burger and Justice Blackmun, advanced the speech/conduct distinction as a limitation on overbreadth review.[129] Justice Blackmun, dissenting in *Gooding v. Wilson*,[130] stated that the overbreadth doctrine "urgently needs re-examination."[131] Chief Justice Burger, in a separate dissent in *Gooding*, made a direct attack on the very foundations of the overbreadth doctrine. He stated that in many of the

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tions were overbroad, id. at 125, the majority did not consider the question. Nor did the majority in the "obscenity cases" consider the issue of overbreadth.

122. Heller v. New York, 93 S. Ct. 2789 (1973); Roaden v. Kentucky, 93 S. Ct. 2796 (1973); Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 93 S. Ct. 2665 (1973); Kaplan v. California, 93 S. Ct. 2680 (1973).

123. 93 S. Ct. 2607 (1973). The Court held that obscenity was "'to be defined by reference to community standards . . . not a national standard . . . .'" Id. at 2619.

124. Id. at 2613.

125. Id. at 2620.

126. Will "community standards" next define what constitutes "fighting words" or "clear and present danger?"

127. Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan. L. Rev. 1001, 1002 (1972).

128. 402 U.S. 611 (1971).

129. Id. at 618-21 (White, J., dissenting).

The speech/conduct distinction seems to be a thread running throughout the first amendment jurisprudence of the Burger Court. Consider the following language from Miller: "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." Miller v. California, 93 S. Ct. 2607, 2616 n.8 (1973).

130. 405 U.S. 518 (1972).

131. Id. at 537 (Blackmun, J., dissenting).

Court's overbreadth decisions "the statute's improper sweep and deterrent potential were amply documented by the very facts of the case before the Court."[132] He went on to state that *Cox v. Louisiana*[133]—an overbreadth decision "heavily relied on by the majority"[134]—had as its primary holding that "the statute had been unconstitutionally *applied* to appellant's conduct as revealed by the record before the Court."[135] The Chief Justice seems to be implying that a more traditional approach toward standing would be more appropriate in first amendment cases.

Recent cases have seen a majority of the Court, rather than a few dissenters, expressing misgivings about the overbreadth doctrine by avoiding a studied adherence to precedent. *Police Department v. Mosley*,[136] although well suited factually to a decision on substantive first amendment grounds or overbreadth review, was actually decided on equal protection grounds, even though the Court utilized the language of overbreadth review.[137] A "weakening Court support for first amendment rights in general"[138] has been suggested as a possible explanation for its course of action in *Mosley*.

In *Broadrick* we have seen the speech/action limitation advocated by Justice White in *Coates* become a reality. Next term perhaps we shall witness the imposition of another limitation,[139] or possibly a total abandonment of the overbreadth doctrine as a method of first amendment review. Professor Gunther has said that "[t]he Warren Court's wide open door for free speech claimants was closed somewhat, to be sure"[140] by the Burger Court. It is only hoped that the door will not be slammed shut and kept tightly closed.

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132. Id. at 532 (Burger, C.J., dissenting).

133. 379 U.S. 536 (1965).

134. 405 U.S. at 532 (Burger, C.J., dissenting).

135. Id. (Burger, C.J., dissenting).

136. 408 U.S. 92 (1972).

137. "Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes'. . . . Chicago's ordinance imposes a selective restriction on expressive conduct far 'greater than is essential to the furtherance of [a substantial governmental] interest.'" Id. at 101-02.

138. 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 469, 481 (1973).

139. For a suggestion that overbreadth review should be limited to review of state statutes see Comment, The "Riddle" of the Hatch Act: Statutory Interpretation and the Narrowing of Vague Laws, 53 Boston U.L. Rev. 122, 158 (1973).

140. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1, 3 n.12 (1972).