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I. INTRODUCTION

In *United States Civil Service Commission v. National Association of Letter Carriers,*[1] Mr. Justice White, writing for a six-man majority, stated that "there are limitations in the English language with respect to being both specific and manageably brief . . . ."[2] The result in *Letter Carriers,* and in its companion case, *Broadrick v. Oklahoma,*[3] suggests that Congress and the Oklahoma Legislature had, in proscribing certain political activities of public employees, wielded that imperfect language with as much precision as could reasonably be expected. There is, of course, nothing singularly notable in the recognition that even in the area of first amendment rights something less than perfect communication is not only acceptable but inevitable. What is significant about these two opinions is the indulgence with which the Court views the legislative effort. The Court seems not only to have recognized that words are imprecise tools but also to have displayed a new willingness, absent evidence to the contrary, to rely on the good-faith administration of the restrictive schemes. In light of the immediate past, such trust may well be "a wholly unjustified retreat from fundamental and previously well-established . . . principles."[4]

Broadrick involved a facial challenge, on the grounds of overbreadth and vagueness, to section 818 of Oklahoma's Merit System of Personnel Administration Act,[5] a statute designed to restrict the

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1. 413 U.S. 548 (1973).
2. *Id.* at 578-79.
3. 413 U.S. 601 (1973).
4. *Id.* at 621-22 (Brennan, J., dissenting).
5. OKLA. STAT. ANN. tit. 74, § 818 (1965), which provides in part:

> No employee in the classified service, and no member of the Personnel Board 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; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> 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 conduct of certain civil servants "in much the same manner that the Hatch Act proscribes partisan political activities of federal employees."[6] Noting that a procedure was available whereby a hesitant employee might obtain advance ruling on the permissibility of particular conduct,[7] the Court held[8] that the provisions were neither impermissibly vague nor overbroad. Language in *Broadrick* concerning first amendment attacks on the facial validity of statutes casts considerable doubt on recent dogma regarding such challenges.

Significantly, while the *Broadrick* majority acknowledged that the State Personnel Board had interpreted the proscriptions of section 818 to include the wearing of political buttons and the display of bumper stickers, the Court reasoned that, even though the proscriptive ambit of the section might be imprecise, the uncertainty was not relevant since the actual conduct involved was fully within the "hard core" of the statute's proscription.[9] Appellants were prevented from asserting potentially invalid applications of the statute by the "traditional rules governing constitutional adjudication"[10] that bar litigants from challenging statutes on the basis of possible invalid applications. The Court admitted, however, that it has created several notable exceptions to the "traditional rules." Thus a party is allowed to challenge potential applications (1) in cases in which individuals—not parties to a particular suit—stand to lose by

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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 rights as a citizen privately to express his opinion and to cast his vote.

Sanctions for violation of the statute include dismissal, possible criminal sanctions, and limited state employment ineligibility. Enforcement responsibility is vested in the State Personnel Board and its appointee as State Personnel Director. *Id.* § 819.

6. 413 U.S. at 602.

7. *Id.* at 608 n.7. The Court also commented that an employee was not, as in Keyishian v. Board of Regents, 385 U.S. 589 (1967), confronted with a hopeless maze of regulations.

8. There was a 5-man majority. Justice Douglas dissented separately. Justice Brennan, joined by Justices Stewart and Marshall, also dissented.

9. 413 U.S. at 608. Appellants had admittedly solicited campaigu help and funds from fellow public workers as well as received and distributed campaign posters. Referring to the Board's proscription of buttons and bumper stickers, the Court noted:

It may be that such restrictions are impermissible and that the § 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute.

Id. at 618.

10. *Id.* at 610. In support of these "traditional rules" the Court cited, *inter alia,* Younger v. Harris, 401 U.S. 37 (1971); United States v. Raines, 362 U.S. 17 (1960); United States v. Wurzbach, 280 U.S. 396 (1930); Hatch v. Reardon, 204 U.S. 152 (1907); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

dismissal of the suit and yet they "have no effective avenue of preserving their rights themselves;"[11] (2) in cases in which there is a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"[12] (a claim at the very center of appellants' suit in *Broadrick*); (3) in cases in which rights of association are ensnared in a broad proscriptive sweep burdening innocent association[13] (another claim central to appellants' case); and (4) in cases in which time, manner, and place regulations "delegated standardless discretionary power to local functionaries . . . ."[14] Interestingly, these broad categories of cases, while cited as "exceptional" cases by the *Broadrick* majority, have of late been considered to lie at the very center of first amendment doctrine. In the face of this seeming incongruity, the Court portrayed the effect and role of the overbreadth doctrine:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction of partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court *sparingly* and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.[15]

Using this assessment of principles, the Court had little trouble disposing of the appellants' claims. While noting that the discernment of overbreadth is a "matter of no little difficulty,"[16] the Court required that the overbreadth must "not only be real, but substantial as well . . . ."[17] Moreover, the Court noted that what is substantial enough to call for a radical approach varies with the degree

11. 413 U.S. at 611, *citing inter alia,* NAACP v. Alabama, 357 U.S. 449 (1958).

12. 413 U.S. at 612, *citing inter alia,* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969).

13. 413 U.S. at 612, *citing inter alia,* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

14. 413 U.S. at 613, *citing inter alia,* Shuttleswortb v. City of Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Kunz v. New York, 340 U.S. 290 (1951). Significantly, the Court makes an attempt to remove Cox v. Louisiana, 379 U.S. 536 (1965), and Edwards v. South Carolina, 372 U.S. 229 (1963), from tbe list of cases in which the Court used the overbreadth doctrine by pointing out that the overbreadth found in those cases was at best an alternative ground for decision.

15. 413 U.S. at 613 (emphasis added).

16. *Id.* at 615, *quoting* Coates v. City of Cincinnati, 402 U.S. 611, 617 (1971) (separate opinion of Black, J.).

17. 413 U.S. at 615.

to which the challenged statute points directly at speech as distinguished from conduct.[18]

Judged by these standards, the statute, although directed at expression, was found to be even-handed, noncensorial, and neutral, while aimed at "a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass."[19] Relying on the "authoritative pronouncements" of the State Personnel Board and the State Attorney General construing section 818 as barring only partisan political activity,[20] the Court rejected appellant's overbreadth argument. Furthermore, reasoning that "a federal court must determine what a state statute means before it can judge its facial constitutionality,"[21] the Court, apparently opting for an "as applied" approach, concluded that whatever defect "may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[22]

In the companion to *Broadrick, Letter Carriers,* the Court upheld a parallel challenge to section 9(a) of the Hatch Act.[23] Although the *Letter Carriers* opinion contains less general discussion of overbreadth doctrine, its tenor is likewise one of faith in officials entrusted with administration. The majority demonstrated a readiness to look beyond the face of the statute to the regulations, which, however complex or numerous, appeared to the Court to evidence consistent good faith. While the dissenting justices in both cases[24] differed on the reach of first amendment protection, they seemed

18. *Id.* at 613-14. In his dissent, Justice Brennan remarks that any speech/conduct dichotomy in the overbreadth doctrine was expressly rejected in Coates v. City of Cincinnati, 4402 U.S. 611 (1971). *See* 413 U.S. at 631-33 (Brennan, J., dissenting).

19. 413 U.S. at 616, *citing* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), and United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

20. 413 U.S. at 617-18. *See* note 9 *supra.*

21. 413 U.S. at 617 n.16.

22. *Id.* at 615-16.

23. 5 U.S.C. § 7324 (1970), which provides in part:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(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 tbe competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

24. Justices Douglas, Brennan, and Marshall dissented in both cases. Justice Stewart dissented in *Broadrick* but joined the majority in *Letter Carriers.*

most startled by the majority's disquietingly stringent view of overbreadth. *Broadrick* especially seems a revisionist approach to facial attacks in the first amendment area.

After noting briefly the "rise" of overbreadth as a jurisprudential technique, this article will describe the continuing dissatisfaction with the doctrine among certain members of the Court and will suggest that this dissatisfaction, together with the unprincipled nature of the technique, left the doctrine even at its height with a substance sufficiently plastic that "revisionism" should not be unexpected. This thesis is supported by the fact that several facets of the *Broadrick* opinion are simply straightforward developments of consistent themes of constitutional adjudication that were more submerged than abandoned during the flowering of the Warren era. The inevitable effect of *Broadrick* and *Letter Carriers* is that federal courts will now be less receptive to facial attacks, thereby relegating complainants to the good faith of state officials and a case-by-case hammering out of statutes' bounds. Furthermore, since uncontrolled discretion rather than chilling effect has been the real, if not the rhetorical, dynamic of overbreadth, a growing willingness to trust to the informed good faith of state officials will lead to a greater demand that complainants make a showing of incorrigibility not unlike the "bad faith" sought in cases like *Younger v. Harris.*[25] Failing such a showing, which only in extreme cases may be found in the statute itself, complainants will be forced to rest on an "as applied" attack.

II. Rise and Fall of the Overbreadth Doctrine

We call overbroad those statutes that include constitutionally protected conduct within their proscriptive sweep.[26] Overbroad statutes, which may in addition suffer from the vice of vagueness, are objectionable because their invalid dimensions may discourage persons from exercising first amendment rights, and because their invalid reach vests inordinate discretion in enforcement officials, juries, and judges. These statutes may, in proper circumstances, be challenged on their face without regard to the challenger's particular conduct. If the statute is found to be overbroad, it is ruled invalid at least until an acceptable revision or limiting construction can be obtained.

25. 401 U.S. 37 (1971).

26. For an exhaustive and valuable general consideration of first amendment overbreadth see Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970). *See also* Hobbs v. Thomposn, 448 F.2d 456 (5th Cir. 1971).

Despite protestation to the contrary in *Broadrick*,[27] the doctrine attained great currency in the last decade and a half of first amendment litigation.[28] Whether its popularity stemmed from "its usefulness as a technique of deciding speech problems somewhat more indirectly, often more sketchily, than the more open confrontations of ultimate speech issues,"[29] or arose because "it represents one of the few common meeting grounds for the variant views of the meaning of the First Amendment,"[30] to describe its recent use as only "sparing"[31] seems clearly inaccurate.

The doctrine, however, has always had detractors.[32] Apart from the deviation that the doctrine permits from "traditional rules" of standing, there is inherent in the facial examination of statutes the necessity of dealing with their hypothetical application.[33] An even more fundamental objection has been the seemingly unprincipled nature of the decisions. To strike a statute on its face as overbroad is to say the statute goes too far, without saying how far it may go.[34] This is paradoxical since the doctrine purports to deal with the legislative means affecting, rather than the substantive dimensions

27. *See* quoted text accompanying note 15 *supra*.

28. While the term "overbreadth" as a term of art may be considered of recent vintage, the doctrine has a healthy lineage. *See, e.g.,* Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Butler v. Michigan, 352 U.S. 380 (1957); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); Smith v. Cahoon, 203 U.S. 553 (1931). Nevertheless, as cases cited in the text indicate, the technique reached fullest use in the 1960's.

29. G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1132 (8th ed. 1970).

30. Israel, *Elbrandt v. Russell: The Demise of the Oath,* 1966 SUP. CT. REV. 193, 217.

31. *See* text accompanying note 15 *supra*.

32. *See, e.g.,* Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Powell, J., dissenting); Gooding v. Wilson, 405 U.S. 518, 528, 534 (1972) (Burger, C. J., & Blackmun, J., dissenting separately); Shelton v. Tucker, 364 U.S. 479, 496 (1960) (Harlan, J., dissenting); Kunz v. New York, 340 U.S. 290, 295 (1951) (Jackson, J., dissenting).

33. *See, e.g.,* Elfbrandt v. Russell, 384 U.S. 11 (1966). In considering the alleged overbreadth of an Arizona public employees' oath, Justice Douglas, speaking for the Court, asks: "Would a teacher be safe and secure in going to a Pugwash Conference?" *Id.* at 17.

34. Justice Jackson observed in a dissenting opinion:

> Of course, standards for administrative action are always desirable, and the more exact the better. But I do not see how this Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court never has announced what those standards must be, it does not now say what they are, and it is not clear that any majority could agree on them. In no field are there more numerous individual opinions among the Justices. . . .
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> . . . . It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards.

Kunz v. New York, 340 U.S. 290, 308-09 (1951).

of, first amendment liberties; yet invalidation of a statute because it sweeps protected conduct within its scope necessarily requires determining which expression is constitutionally protected and which is not. If that determination can be made, why should it not be stated?

A. Rationale, Corollaries, and Gaps

Whatever its virtues or currency, overbreadth remains an impressionistic doctrine, often so vague and flexible as to be guilty of the very vice it condemns.[35] The vagueness is reflected in the duality of rationales underlying overbreadth. The rhetoric of some decisions has emphasized the danger that a statute will chill the exercise of first amendment freedoms "almost as potently as the actual application of sanctions . . . ."[36] Moreover, some commentators appear to have concluded that the "chilling effect" is the central dynamic of the technique.[37] It is clear, however, that a second rationale exists, based on the concern that an impermissible delegation of authority opens the danger of "selective enforcement against unpopular causes."[38]

The proposition that the danger of chilling first amendment freedom is the key rationale of overbreadth, and that impermissible delegation plays only a minor supportive theme, fails to survive a survey of the cases.[39] Moreover, the Court's willingness to allow a subsequent restrictive reading effectively to dispel allegations of unconstitutional overbreadth further undermines the logic of that argument. If the complaining party can be frustrated by a narrowing interpretation occurring after the chill, it must be assumed that this peril is not alone sufficient to invalidate the statute.[40] Thus in *Cox*

35. It, or its close cousin, vagueness has been characterized as "inherently perplexing" and "necessarily subjective." Collings, *Unconstitutional Uncertainty—An Appraisal,* 40 CORNELL L.Q. 195 (1955). Cases applying the doctrine have been described as most notable because of "their almost habitual lack of informing reasoning." Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 70-71 (1960).

36. NAACP v. Button, 371 U.S. 415, 433 (1963).

37. *See, e.g.,* Note, *supra* note 26, at 853. *See also* Note, *The Chilling Effect in Constitutional Law,* 69 COLUM. L. REV. 808 (1969).

38. NAACP v. Button, 371 U.S. 415, 435 (1963). This peril results not only from police and prosecutorial discretion, but it is also present in the courtroom, where a lack of hard standards may breed abuse or uncertainty. *See, e.g.,* Gregory v. Chicago, 394 U.S. 111 (1969); Street v. New York, 394 U.S. 576 (1969); Stromberg v. California, 283 U.S. 359 (1931).

39. *See* Sbuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Dombrowski v. Pfister, 380 U.S. 479 (1965); Cox v. New Hampshire, 312 U.S. 569 (1941).

40. In addition, there is a troublesome incongruity in that a defendant alleging overbreadtb demonstrates by his very presence that he has not been cbilled. Generally, however,

v. New Hampshire,[41] it was determined that a party claiming relief on the basis of an overly broad licensing statute lost his claim when during the state litigation the state court had the constitutional wisdom to construe the statute narrowly. Clearly the subsequent narrow statutory construction was determinative in *Cox*, since the statute involved was very similar to another statute held overbroad only a few years earlier.[42] Furthermore, numerous cases[43] have employed the *Cox* rationale and echoed the observation that "the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."[44]

It should be noted, however, that there are certain particularly offensive statutes that a subsequent constitutional interpretation apparently will not rehabilitate. Thus, "infringement of First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have

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the "transcendent value" of constitutionally protected expression has been deemed sufficient to justify allowing attacks on overly broad statutes without a requirement that the persons making the challenges demonstrate that they were chilled. Gooding v. Wilson, 405 U.S. 518, 521 (1972), *citing* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). The plaintiff is thus a representative of the more timid public. The "hard core" defendant, however, has not always been given standing to assert the rights of individuals who are not parties. *See, e.g.,* Dombrowski v. Pfister, 380 U.S. 479 (1965). Most recently, a plaintiff's lack of fear has been used against him. *See* Laird v. Tatum, 408 U.S. 1 (1972), in which the Court suggests that plaintiffs' temerity belies the "personal stake" in the outcome that complainants must demonstrate. Such a view, carried to an extreme, would prevent virtually all overbreadth challenges.

41. 312 U.S. 569 (1941).

42. A notable state court case in this respect is *People v. Epton,* in which defendant challenged an attempt to apply the New York Criminal anarchy laws to his arguably privileged conduct. 19 N.Y.2d 496, 227 N.E.2d 289, 281 N.Y.S.2d 9 (1967), *cert. denied,* 390 U.S. 29 (1968). The statutes involved were those upheld in Gitlow v. New York, 268 U.S. 652 (1925), but which, in light of intervening doctrine, were admittedly invalid as previously interpreted. The New York court reconstrued the statute using modern doctrine and held the defendant to be subject to the statute's proscriptions, the new limits of which he was bound to have anticipated. The court presumed that the legislature intended to pass a constitutional statute regardless of changing doctrine and noted, over a vigorous dissent, that defendant was not without guidance because he had the benefit of supervening United States Supreme Court decisions regarding similar statutes.

In Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y. 1968), *aff'd,* 401 U.S. 66 (1971), the district court expressed approval of *Epton*; the Supreme Court, however, affirmed on other grounds. As recently as 1972 the Court held a Kentucky defendant to have anticipated the narrowing construction hammered out in his prosecution. Colten v. Kentucky, 407 U.S. 104 (1972). *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969), in which the majority noted that the statute had not been sufficiently narrowed by the indictment or the trial court's instructions to save it from its facial defects. If a trial court fails to restrict the statute, a later appellate restriction will not save it. *See, e.g.,* Ashton v. Kentucky, 384 U.S. 195 (1966).

43. *E.g.,* Lovell v. Griffin, 303 U.S. 444 (1938). *See* Scales v. United States, 367 U.S. 203 (1961); Poulos v. New Hampshire, 345 U.S. 563 (1952).

44. Winter v. New York, 333 U.S. 507, 514-15 (1948).

realized the law's limited scope at the only relevant time, when their acts were committed . . . ."[45] This exception to the *Cox* approach appears, at first glance, to have been vital to the holding in *Shuttlesworth v. City of Birmingham.*[46] There, the licensing ordinance involved had been applied to Shuttlesworth's 1963 conduct and received an acceptable limiting construction in the Alabama courts four years later. The Supreme Court nevertheless rejected the State's contention that Shuttlesworth, like the defendant in *Cox,* should have anticipated the narrowing construction. To so hold, the Court stated, would be to demand an "extraordinary clairvoyance"[47] on the part of Shuttlesworth. The most critical factor, however, was not a refusal to require unnatural prescience of Shuttlesworth, but the fact that he, unlike Cox, had sought and been refused a license in a manner that indicated that the ordinance was being administered in bad faith.[48] There was positive evidence not of a chill (obviously Shuttlesworth was not chilled) but of abuse in the application of a too-broad ordinance.

The secondary nature of the chill rationale in overbreadth theory is further illustrated by the cases clustered around *Dombrowski v. Pfister.*[49] The statute in *Dombrowski* was declared overbroad and its enforcement enjoined because, *inter alia,* the Court deemed the statute's breadth to be such that "no readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution . . . ."[50] To protect itself from such conduct as might be constitutionally proscribed within the scope of the statute, the state, short of relegislating, must simply

45. Gregory v. Chicago, 394 U.S. 111, 121 (1969) (Black, J., concurring). *See* Smith v. Cahoon, 283 U.S. 553, 565 (1931). The inconsistency with which the Court applies the "fair notice" rationale in such cases has already been noted. *See generally* Note, *supra* note 35.

46. 394 U.S. 147 (1969).

47. The extraordinary nature of the foresight required might seem to derive from the time span between the application and the narrowing construction of the statute—a period of 4 years. If the defendant is to be held accountable before the construction, however, it should not matter how much time passes before the narrowing construction is made. He has already acted in any case. In fact, Supreme Court doctrine in 1963 would seem to provide a litigant with a firmer basis for prediction than was available to Cox in 1941.

48. 394 U.S. at 158-59. *See* Walker v. City of Birmingham, 388 U.S. 307, 312 n.3 (1967) (Warren, C.J., dissenting). In *Walker,* a case dealing with the same ordinance as *Shuttlesworth,* Chief Justice Warren suggested another ground of distinction from *Cox*: the language of the New Hampshire statutes was more susceptible to a narrowing construction than the Birmingham ordinance. The distinction, however, seems tenuous at best. *Cf.* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 541 (1970).

49. 380 U.S. 479 (1965).

50. *Id.* at 497. *Cf.* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Court suggests that the proper limits of the statute should be determined through "case-by-case analysis," the very sort of prolonged and piecemeal remedy found objectionable in *Dombrowski.*

assume the burden of obtaining a permissible narrowing construction in a noncriminal proceeding.[51] Furthermore, an acceptable limiting construction once obtained "may be applied to conduct occurring prior to the construction . . . provided such application affords warning . . . ."[52] The Court again emphasized that it does not regard the chilling effect prior to the construction as sufficient by itself to require protection for persons previously deterred from constitutionally protected conduct by the statute. Yet obviously, even though the statute has been narrowly construed, its facial characteristics loom as large as ever to any timid citizen. As Justice Black later pointed out,

> [t]he kind of relief afforded in *Dombrowski* . . . does not effectively eliminate uncertainty as to the coverage of the state statute and leaves most citizens with virtually the same doubts as before regarding the danger that their conduct might eventually be subjected to criminal sanctions.[53]

The cases of *Brown v. Louisiana*[54] and *Cox v. Louisiana,*[55] both of which concerned the same Louisiana breach of peace statute,[56] cast a slightly different light on the question of the prominence of the chilling effect in the overbreadth doctrine. In *Cox,* the Court looked to the statutory phrase "breach of the peace," which the Louisiana Supreme Court had previously construed as encompassing not only conduct intended to agitate, molest, or interrupt, but also conduct designed merely to arouse from a state of repose,[57] and relied on the phrase's overbreadth to provide an alternative ground[58] for invalidating the conviction. Yet in *Brown,* in which—in contrast

51. 380 U.S. at 491. A finding of unconstitutional overbreadth does not kill a statute for all time; it may be revitalized by later construction. *See, e.g.,* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) (subsequent narrowing construction of parade permit ordinance revitalized the ordinance, but conviction for conduct under prior interpretation reversed). Later doctrinal or factual changes may also revitalize a statute. *See generally* O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL LAW (1935); 1 J. SUTHERLAND, STATUTORY CONSTRUCTION 24 (4th ed. 1972); Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875,* 65 COLUM. L. REV. 1394 (1965).

52. 380 U.S. at 491 n.7.

53. Younger v. Harris, 401 U.S. 37, 50-51 (1971). Justice Black proceeded to note that facial attacks are "fundamentally at odds with the function of the federal courts . . . ." 401 U.S. at 52. Absent an accompanying showing of bad faith in enforcement, sufficient irreparable harm to justify injunctive relief was not present. *See* text accompanying notes 84-86 *infra.*

54. 383 U.S. 131 (1966).

55. 379 U.S. 536 (1965).

56. LA. REV. STAT. ANN. § 14:103.1 (Supp. 1973). The statute identifies the kinds of conduct in particular places that will be regarded as disruptive of the peace.

57. 379 U.S. at 551.

58. In *Broadrick v. Oklahoma,* however, the Court indicated that this "additional reason" for the reversal of the conviction in *Cox* was unnecessary to the disposition of the case, and noted that only one member of the Court in *Brown* relied on it. 413 U.S. 614 n.13.

to *Cox*—the alleged disturbance occurred in a public library rather than on a street, a subsequent challenge to the same statute failed, indicating that at least in regard to disturbances in public buildings, the statute had survived the overbreadth attack of *Cox*.[59] Logically, if the chilling effect had been of any significance in *Cox*, then the "chill" would have remained and required the invalidation of the statute in *Brown*, since the same "breach of the peace" phrase that was objectionable in *Cox* was applied to *Brown*[60] with its terms—and hence its facial reach—unchanged.

These cases, then, suggest that the chilling element is at best of secondary significance in triggering the overbreadth doctrine. If an acceptable narrowing construction can frustrate the complainant and save the statute, or if the state, as suggested in *Dombrowski*, can obtain a limiting construction and then apply the statute to prelimitation conduct, it would seem that the real worry is not the chilling effect of the statute's terms, which after all remain the same, but rather the danger of improper application by administrative and judicial authorities—a danger that a narrowing construction can indeed mitigate. Identification of the Court's actual rationale is important, for if danger of indiscriminate application, rather than chill, is the determinative factor in a case then it can be expected that future decisions will depend more on an evaluation of the anticipated conduct of administrative officials than on an appraisal of the degree of public hesitancy that the statute may breed. Certainly, an examination of the breadth of administrative and judicial practices promises more tangible data than a search for evidence indicating a general chilling effect on the public. Furthermore, recent cases such as *Laird v. Tatum*[61] suggest that whatever its independent vitality may have been, the chilling effect argument will now encounter a less responsive Court.

B. Paths of "Retreat"

Recognition that the potential-administrative-abuse rationale

59. The survival of the statute was not clear, however, to Justice Brennan, who entered a separate concurring opinion contending that the statute was invalid in light of *Cox* because no intervening limiting construction or legislative revision of the statute had taken place since that decision, thus rendering the declaration of invalidity in *Cox* controlling. 383 U.S. at 143-46 (Brennan, J., concurring).

60. Fortunately for the petitioners, the Court found that there was no evidence to sustain application of the breach of the peace statute to their conduct, and the convictions were reversed.

61. 408 U.S. 1 (1972). *See* Gunther, *Reflections on Robel: It's Not What the Court Does But the Way That It Did It*, 20 STAN. L. REV. 1140 (1968).

has emerged as the central element in the overbreadth doctrine[62] provides a ready explanation of the Court's apparent retreat from its frequent employment of overbreadth analysis to invalidate statutes during the 1960's. With the gradual clarification of the secondary nature of the chilling effect rationale and the corresponding increased emphasis on the potential improper application of imprecise statutes, it is understandable that the Court would take an increasingly low-keyed approach to imperfection of bare statutory terms. Only rarely does a statute come to the Court bearing a precise meaning. Thus, there is often a willingness to read the best into the statute, and to presume that state officials will proceed in good faith. Absent apparent bad motives or behavior the statute will stand.

This approach, with its basic assumptions of constitutionality and good-faith enforcement, has its roots in those cases that deal with the process of interpreting statutes and predicting state administrative behavior. An examination of those cases presents a clearer view of the shift in direction that the *Broadrick* and *Letter Carriers* Court presaged.

1. *The Process of Statutory Interpretation.*—The Court noted in *Broadrick* that particularly where conduct and not merely speech is involved "the overbreadth of a statute must not only be real, but substantial as well . . . ."[63] At the very least the addition of a

62. *See* Note, *supra* note 35. The author notes that a not dissimilar dynamic, rather than lack of fair notice, is central to the vagueness doctrines. Moreover, the "chilling effect" danger, whatever its recent suhstance, seems to have met a less receptive brand of justice lately. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 13 & n.7 (1972).

Of course, the law has always had difficulty in requiring the legislature to draft its statutes in a manner comprehensible to a layman. After all, a minimum of 3 years education, much of it devoted to discerning what a legislature meant, is required for the practice of law. As Jerome Hall has noted:

> A defensible theory of *ignorantia juris* must . . . find its origin in the central fact . . . that the meaning of the rules of substantive penal law is unavoidably vague, the degree of vagueness increasing as one proceeds from the core of the rules to their periphery. It is therefore possible to disagree indefinitely regarding the meaning of these words. But in adjudication, such indefinite disputation is barred because that is opposed to the character and requirements of a legal order . . . . Accordingly, a basic axiom of legal semantics is that legal rules do or do not include certain behavior; and the linguistic problem must be definitely solved one way or the other, on that premise. These characteristics of legal adjudication imply a degree of necessary reliance upon authority. . . . The various needs are met by prescribing a rational procedure and acceptance of the decisions of the "competent" officials as authoritative. Such official declaration of the meaning of a law is what the law is, however circuitously that is determined.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382 (2d ed. 1960) Obviously, the "limitations in the English Language" have long been recognized.

63. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

substantiality requirement, even if all along implicit, connotes an attitude of greater leniency toward imprecise statutory drafting.[64] This lenient tenor was foreshadowed by the Court's treatment of the legislatively required oath considered in *Cole v. Richardson.*[65] The main objection in *Cole* was to the phrase "I will oppose the overthrow of the government . . . ." In a four-to-three decision upholding the oath, the Court depicted the phrase as a mere amenity, essentially redundant to the preceding "uphold and defend" clause in the statute.[66] The tone of the opinion was essentially one of common sense, disdaining the imaginative spectres raised by the dissenters. Moreover, the Court simply refused to "presume that the Massachusetts legislature intended . . . to impose obligations of specific, positive action on oath takers."[67] *Cole* thus represents a refusal to presume anything but the best. Apparently only a showing of dire consequences will prompt the Court to require the use of less drastic means of achieving a valid legislative purpose.[68]

Another factor encouraging a sympathetic judicial review of legislation was noted by Justice Frankfurter in his dissent in *Winter v. New York.*[69] Justice Frankfurter argued that too great a receptivity to facial attack tends to ignore that "delicate and difficult" task confronting legislators.[70] If the Court is aware of the legislative problem of treading between language too specific to be protective and language too general to be informative — the difficulty that the

64. The contention that overbreadth must be substantial to be invalid is also found in Gooding v. Wilson, 405 U.S. 518, 528 (1972) (Burger, C. J., dissenting). The idea seems to have drawn momentum from Note, *supra* note 26, in which it is proposed that "a law ought not to be struck down for overbreadth unless it lends itself to a substantial number of impermissible applications." *Id.* at 859. The author comments further that:

> The idea of "substantial overbreadth" is problematical. Leading overbreadth opinions give little indication as to the degree of overbreadth which the Court has found fatal. Plainly it is not enougb that a statute may be read to comprehend invalid applications under imaginable but highly extraordinary circumstances. A substantial overbreadth rule seems implicit in the rhetoric of chilling effect and less drastic means. A law that is not substantially overbroad is unlikely to have a drastic inhibitory impact.

Id. at 918. The author's comment seems, then, to be more descriptive than prescriptive. The willingness of the majority in *Broadrick* to emphasize "substantiality," which, as Justice Brennan points out, was always implicit, suggests more than a greater explicitness; rather it is a warning to litigants of greater judicial deference to legislative bandiwork. 413 U.S. at 615, 630.

65. 405 U.S. 676 (1972).

66. *Id.* at 683-84.

67. *Id.* at 684.

68. *See generally* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

69. 333 U.S. 507, 520 (1948) (Frankfurter, J., dissenting).

70. *Id.* at 525.

Letter Carriers majority recognized when it emphasized the limits of language[71]—then the judiciary should necessarily be more lenient when construing the facial characteristics of a statute.[72] This leniency, however, is not without limit. Thus when a federal court is confronted with an authoritative state court interpretation of a statute, it is bound by that interpretation[73] in assessing the constitutionality of the statute. Nevertheless, frequently a statute comes to the Court with less than definitive state construction. Then, as Justice Frankfurter and the opinions in *Broadrick* and *Letter Carriers* suggest, the Court must do more than simply read the act. It must sort and weigh relevant legal materials and evidence of state action that demonstrate what the statutory construction is in practice.[74] Furthermore, it appears this investigative process should now be undertaken by researchers fully attuned to all the problems of precise legislative drafting.

Perhaps the most frequently cited principle of statutory construction asserts that a statute should be construed, if possible, to save its constitutionality.[75] Of course, the limits of the judicial func-

71. *See* text accompanying note 2 *supra.*

72. This theme, which is strong although implicit in *Broadrick,* has also found expression in other recent cases. The doctrine of vagueness, for example, is not to be considered "a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are probibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972). *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963).

73. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 109-10 (1972); Cole v. Richardson, 405 U.S. 676, 697 (1972) (Marshall, J., dissenting); Gooding v. Wilson, 405 U.S. 518, 520 (1972), *citing* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Ashton v. Kentucky, 384 U.S. 195 (1966); Garner v. Louisiana, 368 U.S. 157, 166 (1961); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Smith v. Cahoon, 283 U.S. 553 (1931); Smiley v. Kansas, 196 U.S. 447 (1905). Where the challenged statute is federal the impediment disappears since the Court is the arbiter of the statute's meaning. *See, e.g.,* Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957). Tbere are, however, limits to construing even federal enactments. *See* United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

74. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (where the state court failed to clarify a provision's meaning, the Court must "extrapolate its allowable meaning" from tbe words of the ordinance itself, analogous statutes, and to some extent from the history of enforcement). A similar task of research confronted the Court in Gooding v. Wilson, 405 U.S. 518 (1972), discussed more fully *infra.*

75. *See, e.g.,* Schneider v. Smith, 390 U.S. 17 (1968); Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); NAACP v. Button, 371 U.S. 415, 448 (1963) (Harlan, J., dissenting); Scales v. United States, 367 U.S. 203 (1961). While many of the cases in which the principle is recited concern federal legislation, federal courts, absent clarity in state court construction, must also interpret state statutes. "Construe to save" is a proper guiding principle in that process.

tion circumscribe at some point the power to construe. Moreover, since the Court is dealing with first amendment preferred freedoms, some of the force of the general constitutional presumption disappears. Even if the statute loses a presumption of validity, however, a presumption that the legislature intended to enact a constitutional provision need not necessarily fall away as well. As the New York Court of Appeals observed in *Epton*,[76] it may be assumed that the legislature intended to enact a statute in harmony with the constitution.[77]

Among the techniques available to save potentially objectionable legislation is that of severing or excising the unconstitutional section. Dissenting in *NAACP v. Button*,[78] Justice Harlan complained that:

> [T]he Court should excise only the ambiguous part of it, not strike down the enactment in its entirety. Our duty to respect state legislation, and to go no further than we must in declining to sustain its validity, has led to a doctrine of separability in constitutional adjudication, always followed except in instances when its effect would be to leave standing a statute that was still uncertain in its potential application.[79]

Despite protestations that the Court lacks authority to sever only invalid portions of state statutes, it is clear that when convenient the Court—within the normal limits of judicial authority[80]—can and will sever statutes to save at least a part of them.[81] So long as the trimmed statute retains rational integrity, the Court has succeeded in enforcing the legislative will, albeit to a limited extent, without at the same time ignoring individual liberties. "As applied" litigation involves the Court in a similar process of truncation by eliminating the invalid aspects of the statute as they arise. Of course if the statute is vague as well as overbroad it may be that excision is more problematic, since in such cases the line between interpreting and rewriting is especially hazy. If, however, only a matter of truncating sections or limiting applications is involved, the Court is merely enforcing the legislative will to its permissible length.

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76. People v. Epton, 19 N.Y.2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967), *cert. denied*, 390 U.S. 29 (1968).

77. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972).

78. 371 U.S. 415 (1963).

79. *Id.* at 468-69 (Harlan, J., dissenting). *See* Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) (White, J., dissenting); Smith v. California, 361 U.S. 147 (1959).

80. *See generally* 2 J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 2401-19 (3d ed. 1943).

81. *See* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937); *cf.* 57 CALIF. L. REV. 240 (1969); 61 HARV. L. REV. 1208 (1948). *See also* Sedlar, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

One commentator has suggested that the Court comfortably can excise only in an area where clear lines between permissible and impermissible proscription can be identified.[82] Regardless of the extent to which this is true, it may still be said that while outer limits of acceptable prohibitions in the first amendment area may be hazy, it is somewhat easier to identify the inner core of prosecutable conduct and at the very least excise the remainder.[83]

2. *Predicting State Behavior.*—Predicting the likely operation of a statute requires consultation of legislative history, an inquiry into the good-faith observance by local courts of evolving constitutional doctrine, and an examination of administrative performance.[84] The inquiry is aimed at discovering whether there is evidence to indicate that the state will abuse the potentially harmful flexibility provided by the allegedly overbroad statute. This examination, if *Broadrick* is a guide to the future, will begin with a presumption of good faith and diligent awareness of constitutional protections on the part not only of legislatures, but also of courts and administrators as well. Significantly, this requirement of arguable overbreadth *plus* evidence of bad faith practice is similar to the requirements in cases such as *Younger v. Harris*[85] that deal with the propriety of intrusion into ongoing state criminal proceedings. The parallel is not chance. Both cases rest on the same brand of federalism: an increasing trust in state officials, at least to the extent of giving them an opportunity to act.

The Court's presumption that the legislature intended to promulgate a constitutional statute has already been noted as a factor enabling it to avoid striking down the statute. Furthermore, when necessary the Court may search legislative history for indications of the good-faith intent of the legislature.[86] A similar approach is used

82. Note, *supra* note 26, at 882. Among the rare examples of areas where a per se line is said to exist is that of defamation. In Grayned v. City of Rockford, 408 U.S. 104, 121 (1972), Justice Douglas's dissent suggests, however, that the application of the challenged provision in the case at bar cannot be ignored. This suggestion would seem to blur all distinction between "as applied" and facial attacks. *Cf.* Laird v. Tatum, 408 U.S. 1, 13 n.7 (1972); Gooding v. Wilson, 405 U.S. 518, 528 (1972) (Burger, C.J., dissenting) (the chill ought to appear from the facts before the Court).

83. Or the Court may, as in *Broadrick*, leave it for another day.

84. It should be noted that the emphasis on the latter factors, particularly, reflects the proposition that it is potential abuse rather than "chill" that is at the root of the overbreadth doctrine.

85. 401 U.S. 37 (1971). *See* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (Burger, C.J., dissenting).

86. Such a search is central to *Letter Carriers. See* Barenblatt v. United States, 360 U.S. 109, 117-18 (1959), in which the Court reconstructs the history of the Hatch Act.

in determining the good faith of state courts. In his concurring opinion to *Whitney v. California,*[87] Justice Brandeis was not disposed to invalidate the California syndicalism act despite what must have appeared to him to be its objectionable features.[88] Instead, Brandeis merely supposed that the clear and present danger test was part of the statute, although the defendant had the burden of putting it in issue. This approach carries with it substantial faith that state courts will accord proper deference to constitutional doctrine in dealing with the breadth of the statute's bare terms. As recently as 1972, in *Grayned v. City of Rockford,*[89] the Court, when faced with an ordinance lacking the gloss of state-court clarification, was willing to say: "[W]e think it proper to conclude that the Supreme Court of Illinois would interpret the . . . ordinance to prohibit only actual or imminent interference with the 'peace or good order' of the school."[90] That is, evidence demonstrated that Illinois courts had, in construing other statutes, properly attended to the limits of state power to regulate speech or speech-related activities. This trust is in line with what the Court stated in *Dombrowski* as the general rule: "It is generally to be presumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court. . . ."[91] While the 1960's may have seen a tendency to devour the rule[92] in the exceptional case, *Broadrick* suggests that a greater

87. 274 U.S. 357 (1927).

88. That a later court would have deemed the statute overbroad is suggested in Brandenburg v. Ohio, 395 U.S. 444 (1969). *See In Re* Harris, 20 Cal. App. 3d 632, 97 Cal. Rptr. 844 (Ct. App. 1971) (revealing that California has taken that view of its own statute).

89. 408 U.S. 104 (1972).

90. *Id.* at 111-12.

91. Dombrowski v. Pfister, 380 U.S. 479, 484 (1965). In *Dombrowski,* however, bad-faith conduct constituting irreparable harm was found.

92. Authority for the "general rule" is substantial. In Time, Inc. v. Hill, 385 U.S. 374, 397 (1967), the Court, rather than overturn the New York privacy statute involved, was able to remand with confidence, inasmuch as the New York court "has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command."

In Fox v. Washington, 236 U.S. 273, 277 (1915), Justice Holmes deemed it proper to presume that the state would construe its statute "in such a way as to avoid doubtful constitutional questions . . . ." He saw "no reason to believe that the statute [would] be stretched beyond that point" of validity. Implicit in Holmes' view is the proposition that the burden of overcoming the presumption that the state court will observe proper limits is upon the party challenging the statute. A similar vein is found in Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951):

> We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems . . . .

Similarly, in Douglas v. Jeannette, 319 U.S. 157, 165 (1943), the Court assumed, absent

observance of the "general rule" is predictable. It is clear that the Court has not always demanded evidence that the state will not properly limit its imperfect statutory terms.[93] It should be realized, however, that the rule remains available for use by justices who wish to avoid what they perceive as a recent propensity to invalidate state statutes.

The adherents and detractors of the rule are starkly arrayed in *Gooding v. Wilson,*[94] the dissenting opinions of which may be seen as especially notable harbingers of *Broadrick* and *Letter Carriers.* In *Gooding,* the Court was faced with a facial attack on a Georgia breach of peace statute[95] that had never received a clear state explication.[96] In attempting to understand the proper scope of the statute, the Court searched the dictionary[97] as well as Georgia cases, the majority of which were decided prior to 1920, to determine the likely treatment the statute would receive in Georgia courts. The majority found a less than satisfactory answer and held the Georgia law unconstitutional. To the dissenters, however, the sources, particu-

evidence to the contrary, that the import of its holding in Murdock v. Pennsylvania, 319 U.S. 105 (1943), would not be missed by the state. *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Perez v. Ledesma, 401 U.S. 82, 93 (1971) (Brennan, J., concurring in part dissenting in part); Wisconsin v. Constantineau, 400 U.S. 433, 439, 443 (1971) (Burger, C.J., & Black, J., dissenting); Harman v. Forssenius, 380 U.S. 528, 534 (1965); Harrison v. NAACP, 360 U.S. 167, 178 (1959); Speiser v. Randall, 357 U.S. 513 (1958); Wieman v. Updegraff, 344 U.S. 183 (1952). While it is recognized that some of the cases cited are "abstention" cases, the comity interest germane to federal cases treating state legislation is readily transferable to cases not involving the question of abstention. This was a major point of contention in Walker v. City of Birmingham, 388 U.S. 307 (1967), in which the petitioners' contempt conviction was sustained because, *inter alia,* he had failed to seek judicial relief from an arguably invalid injunction. In such a context the Court admonisbed that "[i]t cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims," absent a showing to the contrary. *Id.* at 319. Such a demonstration was made later in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), a case dealing with the same ordinance.

93. *See, e.g.,* Baggett v. Bullitt, 377 U.S. 360 (1964). "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Id.* at 373.

94. 405 U.S. 518 (1972).

95. GA. CODE ANN. § 26-6303 (1963): "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." For the amended statute see GA. CODE ANN. § 26-2610 (1972).

96. *See, e.g.,* Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967), in which the Georgia Supreme Court, in a brief opinion sustaining Wilson's conviction, failed to give an adequate interpretation of the statute. It noted merely tbat "[t]he language . . . conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice." *Id.* at 448. This disdain may have been the evidence of lack of constitutional diligence that prompted the Court to declare the statute overbroad.

97. 405 U.S. at 525.

larly the pre-*Chaplinsky*[98] cases, were a wholly inadequate base for the assumption that Georgia was not tending its constitutional obligations.[99] But perhaps of signal importance is the footnote in Chief Justice Burger's dissent:

> Even assuming that the statute, on its face, were impermissibly overbroad, the Court does not satisfactorily explain why it must be invalidated in its entirety. To be sure, the Court notes that "we lack jurisdiction authoritatively to construe state legislation." But that cryptic statement hardly resolves the matter. The State of Georgia argues that the statute applies only to fighting words that *Chaplinsky* holds may be prohibited, and the Court apparently agrees that the statute would be valid if so limited. The Court should not assume that the Georgia courts, and Georgia prosecutors and police, would ignore a decision of this Court sustaining appellee's conviction narrowly and on the explicit premise that the statute may be validly applied only to "fighting words" . . . . Where such a clear line defining the area of constitutional application is available, the fact that the Court cannot authoritatively construe the state statute to excise its unconstitutional applications should make us more, not less, reluctant to strike it down on its face. This is especially so when the Court, by relying on old Georgia cases to bolster its conclusion virtually concedes that the plain language does not offend the First Amendment.[100]

This statement deserves setting out at length for it may be taken as something of a manifesto of the new view of overbreadth adjudication that blooms in *Broadrick* and *Letter Carriers.* In fact, the Chief Justice's view seems almost reserved in light of the ample precedents previously noted. Interestingly, the statement refers to trust properly to be accorded not only state courts but to state prosecutors and police as well. This reference points to another source of information available to assay the good practice *vel non* of the state: administrative practice and pronouncement.

This source is central to the resolution in *Broadrick* and *Letter Carriers,* both of which advert to administrative practice and interpretation as authoritative evidence of governmental good faith. Notable in this respect is the Court's willingness in *Law Students Civil Rights Research Council, Inc. v. Wadmond,*[101] to ignore the blatantly objectionable terms of the New York bar admission applications in deference to "[l]ong usage in New York and elsewhere [which] has given well-defined contours to this requirement, which

98. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

99. Justice Blackmun, in his dissent, complained:

> If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination. The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty.

405 U.S. at 537. In fact, the tools of extrication were already at hand. All that was needed was to convince enough justices to use them.

100. 405 U.S. at 533 n.*.

101. 401 U.S. 154 (1971).

the [state has] construed narrowly as encompassing no more than 'dishonorable conduct relevant to the legal profession.' "[102] It apparently was a similar inquiry into administrative practices elsewhere, with different results, that shifted Justice Stewart to the side of those voting to invalidate in the companion cases to *Wadmond.*[103] *Wadmond,* therefore, is unusual because the regulations, although by their bare terms flying in the face of reasonably clear constitutional doctrine, were nonetheless saved by worthy and sensitive administration.[104] While *Wadmond* is hardly the first case[105] to emphasize the importance of adminstrative actions, its result strongly reinforces the thesis that administrative practices are the predominant factor in a determination of overbreadth.

Occasionally the search for state habits may be quite subtle. Thus, the Court noted in upholding the challenged support oath in *Cole v. Richardson*[106] that the absence of perjury prosecutions in the 25-year history of the oath, the spectre of which was raised by appellee, indicated that her fears were imagined.[107] So also, "daily use" may give statutory language "a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[108]

III. CONCLUSION

In *Broadrick,* Justice White suggests that the willingness of the Court in the past to accord standing to litigants to raise the overbroad aspects of a statute without regard to their own conduct depended on a "judicial prediction or assumption" regarding the threat to liberty that the statute posed.[109] The spirit with which the Court makes such predictions would appear to be determinative not

102. *Id.* at 159.

103. *See In Re* Stolar, 401 U.S. 23, 31 (1971) (Stewart, J., concurring); Baird v. State Bar, 401 U.S. 1, 9 (1971) (Stewart, J., concurring).

104. It is most difficult to justify such a decision if "chilling effect" is the central dynamic of overbreadth. *Cf.* Communist Party of Indiana v. Whitcomb, 94 S. Ct. 656 (1974) (state officials' inflexibility evidenced a less than sensitive awareness of constitutional doctrine leading to the downfall of state candidate's loyalty oath).

105. *See, e.g.,* Ehlert v. United States, 402 U.S. 99, 105 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 621 (1967) (Clark, J., dissenting); McNeese v. Board of Educ., 373 U.S. 668, 678 (1963) (Harlan, J., dissenting); Konigsberg v. State Bar, 366 U.S. 36 (1961); Konigsberg v. State Bar, 353 U.S. 252 (1957); *Cf.* National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 585 (D.D.C. 1972) (MacKinnon, J., dissenting).

106. 405 U.S. 676, 685 (1972).

107. In this regard, the most famous example is Poe v. Ullman, 367 U.S. 497 (1961).

108. Kovacs v. Cooper, 336 U.S. 77, 79 (1949). *See* Terminiello v. Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting); Winters v. New York, 333 U.S. 507, 520 (1948) (Frankfurter, J., dissenting).

109. 413 U.S. at 612.

only of the underlying standing issue but of the overbreadth claim as well.[110] The key to discovering the paths by which the Court is "retreating" from its overbreadth holiday of the sixties lies in the recognition that the central dynamic of overbreadth is the peril posed by standardless administration rather than the threat of a chilling effect on first amendment rights. That recognition enables one to see that past cases are cluttered with sources other than the statutes themselves that were searched by the Court in an effort to "predict" whether the danger of overbreadth was great enough to call for radical treatment.

Of course, the Court will still look, although apparently with a most hospitable eye, at the statute's terms. The inspection will be predicated, however, on a tolerant awareness of the difficulties of the drafter's task and the limits of the language. Since the examination of words in a vacuum has always been less than satisfactory, the court must choose between presuming and imagining the worst, or presuming and searching for the best, and it apparently is selecting the latter. Unless a convincing showing of danger—a record of inattention to constitutional standards, for example—is made, the overbreadth attack will fail.[111] Absent evidence of judicial, legislative, or administrative insensitivity to constitutional doctrine, the Court will apparently trust in the good-faith attention of state officials to safeguard civil liberties. The chill resulting from the facial language of the statute alone will be less frequently sufficient to invalidate legislation. Indeed, overbreadth plus grounds for predicting less than good constitutional faith will have to coincide.

As has been suggested with respect to other aspects of the Warren era's jurisprudence,[112] the unprincipled and impressionistic traits inherent in the overbreadth doctrine left a less than sturdy edifice for liberty. Rather than reversing substantive doctrine, a task requiring special temerity among purportedly restrained jurists, the new Court majority has utilized the numerous potential

110. As *Broadrick* exemplifies, a more restrained approach to overbreadth may take less explicit form than an express finding that a statute is not overbroad. The Court may avoid the question by simply applying the "traditional rules" of standing and denying review.

111. In this respect, the friendly atmosphere created by the Court for states facing overhreadth challenges to obscenity statutes should be noted. *See* Miller v. California, 413 U.S. 15, 24 n.6 (1973). *See also* Norwell v. City of Cincinnati, 94 S. Ct. 187 (1973); Wainwright v. Stone, 94 S. Ct. 190 (1973); Hess v. Indiana, 94 S. Ct. 326 (1973). These cases appear to attest to a growing inhospitality to facial attacks.

112. *See, e.g.*, R. McCLOSKEY, THE MODERN SUPREME COURT 258 (1972); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 3-4 (1972); Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193; Torke, Book Review, 6 IND. L. REV. 624 (1973).

routes of escape from the overbreadth technique, routes through which a Court bent on deferring to the states can readily come and go with no more than oblique clash with the recent past. These opportunities are anchored in relatively strong precedent and hence when taken may have the glitter of a return to principle and federalism. Since the means were present, *Broadrick* and *Letter Carriers* should come as little surprise.