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SOUTHDAKOTA V. BROWN:1 JUDICIAL ENFORCEMENT OF GOVERNOR’S DUTY TO EXTRADITE FUGITIVES

In December 1976, the State of South Dakota petitioned the California Supreme Court for a writ of mandamus to compel Governor Edmund Brown, Jr. to extradite a convicted fugitive from South Dakota. In South Dakota v. Brown, the court denied that petition and held that the gubernatorial duty to extradite a convicted felon and fugitive from a sister state was incapable of judicial enforcement. The court, adopting a tone of judicial self-restraint, only peripherally examined the constitutional separation of powers question actually resolved in the case. In its central line of analysis, the court instead embarked on an ill-conceived construction of the statute in question, the California Uniform Criminal Extradition Act.2 By framing the issue of judicial enforcement as exclusively one of statutory interpretation, the court departed from established California precedent requiring the issuance of mandamus to the executive branch in appropriate cases.

This Note focuses on the Brown court’s analysis of the issue of state court enforcement of the gubernatorial extradition duty imposed by the Extradition Act. It examines the court’s construction of the Act, as well as the court’s initial decision to frame the basic question addressed as solely one of statutory interpretation. The conclusion reached is that the Brown court’s analysis is a product of result-oriented judicial reasoning. This Note does not address the court’s handling of enforcement of the federally imposed duty3 nor the theoretical justifications for gubernatorial discretion in extradition of interstate fugitives.

The facts of the case are straightforward. After a jury trial in the Seventh Judicial Circuit of South Dakota on July 25th and 26th of 1975, Dennis Banks was convicted of riot while armed with a dangerous weapon and assault with a dangerous weapon without intent to

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1. 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978) (Richardson, J.) (5-1 decision). The supreme court, reversing a unanimous court of appeal, denied South Dakota’s petition for a writ of mandamus to compel the governor to extradite Dennis Banks and discharged the writ issued by the court of appeal in South Dakota v. Brown, 138 Cal. Rptr. 14 (1977). South Dakota applied directly to the California Supreme Court for a writ of mandamus. The supreme court transferred the petition to the Court of Appeal for the Third Appellate District.


3. In concluding that the federally imposed extradition duty is not enforceable by a California court, the Brown court relied heavily on Kentucky v. Dennison, 65 U.S. 66 (1861), and In re Manchester, 5 Cal. 237 (1855). Much of this Note’s criticism of the court’s unsound reliance upon these two cases in the context of the state imposed duty is also relevant to the court’s analysis of the federal context. See text accompanying notes 13-36 infra.
On July 26, Banks posted bond. He was released on bail, agreeing not to travel outside South Dakota and to return for sentencing on August 5, 1975. When Banks failed to appear on the scheduled date, a bench warrant was issued for his arrest. Banks was later seized in California. In February of 1976, the Governor of South Dakota presented Governor Brown of California with a demand for Bank's extradition. The State of South Dakota responded to Brown's subsequent action with a petition to the California Supreme Court on December 28, 1976, for a writ of mandamus to compel extradition. When the supreme court announced its decision on March 20, 1978, Governor Brown had yet to act on the demand. Though the supreme court denied the petition to compel extradition, it noted that a writ of mandamus could be issued ordering the governor to exercise his discretion. Subsequently, Governor Brown declared his refusal to extradite Banks.

I

THE OPINION

The duty of a California governor to extradite fugitives from sister states is derived from two sources: the federal Constitution, together with its implementing legislation, and California's Extradition Act. The court began its analysis with an examination of the federal provisions. After briefly reviewing United States Supreme Court and California Supreme Court authorities which have characterized the duty imposed by the federal Constitution as "mandatory," the opinion concluded that as a matter of established federal and California law, the federal duty to extradite is unenforceable by either federal or California state courts. In support of this conclusion, Justice Richardson cited cases which purportedly reached a similar result. Further, he argued

4. S. D. Compilled Laws Ann. § 22-10-5 (aggravated riot) and § 22-18-1.1(2) (aggravated assault). These sections in their present form are part of the 1976 revisions to the South Dakota Criminal Code. The relevant Code sections in force at the time Dennis Banks was tried and convicted were the prerevision versions of § 22-10-5 (riot while armed) and § 22-18-11 (assault without intent to kill but with intent to injure) which were repealed as part of the 1976 revision.

5. U.S. Const. art. IV, § 2, cl. 2. Acting upon an opinion by Attorney General Randolph that the extradition clause was not self-executing, the United States Congress in 1793 passed implementing legislation which is found in its current version at 18 U.S.C. §§ 3181-3195 (1969). A brief history of this legislation is contained in the Commissioners' Prefatory Note, Uniform Criminal Extradition Act [11 U.L.A. 52 (West 1974)].


8. The federal cases cited were: Taylor v. Taintor, 83 U.S. 366 (1872); Kentucky v. Dennison, 65 U.S. 66 (1861). Cited as authority from state courts were: In re Manchester, 5 Cal. 237 (1855); People v. Millspsaw, 257 App. Div. 40, 12 N.Y.S.2d 435 (1939), rev'd on other grounds, 281 N.Y. 441, 24 N.E.2d 117 (1939); Carpenter v. Lord, 88 Or. 128, 171 P. 577 (1918); Ex parte Wallace, 38 Wash. 2d 67, 227 P.2d 737 (1951).
that the absence of specific enforcement procedures in both the extradition clause of the United States Constitution and its implementing legislation necessarily precluded enforcement of the federal duty in *Brown*.

After disposing of the federal duty on enforceability grounds, the court considered the duty imposed upon the governor by the Extradition Act. Primarily on the basis of a lengthy interpretation of the Act, the court concluded that there was no evidence that the present statute, or its precursors, authorized judicial enforcement of the governor's extradition duty. Two elements dominated this interpretational analysis: (1) an examination of the source and historical development of the state's first extradition statute, which was enacted in 1851; and (2) a survey of what the court termed the "general tenor" of the various provisions of the present Extradition Act. The court buttressed its conclusion that the Act creates no judicially enforceable gubernatorial duty to extradite with the observation that this interpretation accords with the practices of the last five California governors, and is supported by considerations of public policy. Finally, the majority concluded that while the court could not compel the governor to extradite, it could require *some* gubernatorial action within a reasonable time.

Since the court focused its inquiry upon a two-pronged examination of the Extradition Act, the elements of that analysis merit careful consideration in evaluating the *Brown* opinion as a whole.

II

THE LANGUAGE OF THE CALIFORNIA EXTRADITION ACT

To support its construction of legislative intent, the *Brown* majority relied principally upon the language of California's current Extradition Act. Like its precursors, it conforms closely to the wording of the extradition clause of the United States Constitution. After the adoption in 1851 of the federal language as part of California's first extradi-

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9. Section 1549.2 of the current California Uniform Criminal Extradition Act reads:

If a demand conforms to the provisions of this chapter, the Governor or agent authorized in writing by the Governor whose authorization has been filed with the Secretary of State shall sign a warrant of arrest, which shall be sealed with the State Seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

**CAL. PENAL CODE** § 1549.2 (West 1970). The extradition clause of the United States Constitution provides:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.
tion statute, the federal extradition clause was interpreted as incapable of judicial enforcement against a state governor, despite its ostensibly mandatory nature. The Brown court argued that since the California legislature did not materially alter the statute's language following announcement of these decisions, the limitations grafted by the courts onto the federal extradition clause must have been intended by the legislature to be incorporated in the California statute and its successors.

In concluding that the language of the statute had not been materially altered, the court was unimpressed by the adjustments which the legislature did in fact make in the wording of the Extradition Act, distinguishing it from the federal model. In adopting the Uniform Criminal Extradition Act in 1937, the legislature modified the Uniform Act by changing "if the Governor decides that the demand should be complied with, he shall sign a warrant of arrest" to "[i]f a demand conforms to the provisions of this chapter, the Governor . . . shall sign a warrant of arrest." Nonetheless, the Brown court concluded that the legislature, in enacting the Extradition Act, intended a discretionary rather than mandatory gubernatorial obligation to extradite fugitives from other states. To arrive at this result, the court misused two authorities.

A. The Court's Reliance on Kentucky v. Dennison

The first case that the Brown court misused was Kentucky v. Dennison, which held that a federal court could not issue mandamus to compel extradition by a state governor. Ten years prior to Dennison, California had adopted its original extradition statute, which cast the gubernatorial duty in language essentially conforming to the federal extradition clause. The Brown court reasoned that the California legislature's failure, subsequent to Dennison, to alter the language of the Extradition Act must imply that the legislature intended to place the same limitation on the California judiciary that Dennison had imposed.

13. 65 U.S. 66 (1861).
14. Id. at 107-10.
15. Ch. 29, § 665, 1851 Cal. Stats. 286.
16. As enacted in 1851, prior to either the Dennison or Manchester decisions, the California statute repeated the terms of the federal extradition clause with only minor changes:

A person charged in any State or Territory of the United States, with treason, felony, or other crime, who shall flee from justice, and be found in this State, shall on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime.

Ch. 29, § 665, 1851 Cal. Stats. 286 (italics indicate words not found in the federal extradition clause). The apparent import of this language is the imposition of a mandatory duty. See cases cited at notes 6 & 7 supra and note 38 infra.
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on federal courts. Such an implication, however, is not reasonable in light of the scope of the Dennison decision.

In Dennison, the State of Kentucky sought a writ of mandamus to compel the Governor of Ohio to extradite a fugitive from Kentucky charged with the crime of inducing and assisting a runaway slave. The Governor of Ohio had refused extradition on grounds that the crime charged was neither a crime in Ohio nor an offense "already known to the common law and to the usage of nations." Chief Justice Taney, writing for a unanimous Supreme Court, denied the writ in spite of the language of the Act of 1793—the federal statute implementing the extradition clause—stating that "it shall be the duty of the executive authority of the state . . . to cause the fugitive to be delivered." In assessing this language, Taney specifically noted that the terms used would normally create a mandatory and enforceable duty. He interpreted the legislative phrase "it shall be the duty" to "imply the assertion of the power to command and to coerce obedience." Taney then reached the extraordinary conclusion, however, that Congress, motivated by federalist concerns, had intended these words in the Act of 1793 to be merely "declaratory" of "moral duty." Whatever the modern opinion about the scope and wisdom of Dennison, the decision cannot provide the Brown court with a legitimate tool for turning California legislative inaction into an endorsement of state court inability to compel state executive compliance with an extradition demand. Dennison concerns the power of a federal court to compel state action. The case was argued and decided on the eve of the Civil War, in the midst of the secessionist controversy over states' rights and slavery. Concerns of federalism form a cornerstone of its

17. 65 U.S. at 99.
18. 1 Stat. 302 (1793) (emphasis added).
19. 65 U.S. at 107.
20. Id.
21. While Dennison was reaffirmed eleven years later in unambivalent language, Taylor v. Taintor, 83 U.S. 366, 370 (1872), a comment made in passing on Dennison by the United States Supreme Court in Michigan v. Doran, 99 S. Ct. 530 (1978), indicates a measure of uncertainty as to its present validity. ("Whatever the scope of discretion vested in the governor of an asylum state, cf. Kentucky v. Dennison . . . ." Id. at 535.) Also, as Justice Mosk pointed out in his dissenting opinion in Brown, "[t]here is serious question whether the rigid federalism of Dennison would be followed today when a constitutional issue is involved. The high court has not hesitated to order state and local officials to comply with constitutionally required school desegregation." 20 Cal. 3d at 781 n.1, 576 P.2d at 484 n.1, 144 Cal. Rptr. at 769 n.1 (Mosk, J., dissenting) (citations omitted).
22. The Brown court noted that, in altering the California extradition statute in 1872 and in 1937, the legislature did not explicitly refute Dennison. Consequently, the court reasoned, the statute should be interpreted as incorporating a limitation on state court enforcement similar to that set forth in Dennison on federal court enforcement. 20 Cal. 3d at 771-74, 576 P.2d at 477-79, 144 Cal. Rptr. at 762-64.
logic. 23 The lack of specific California legislative response to this decision should therefore be interpreted to indicate Dennison's irrelevance to the issue of state judicial authority to compel state executive action. Particularly in light of the well-established federal constitutional principle that questions of intrastate separation of powers are beyond the reach of federal courts, 24 the Brown court's contrary understanding is unreasonable.

The illogic of the inference of legislative intent regarding Dennison drawn in Brown can be further demonstrated by noting Dennison's treatment of the statutory language in the Act of 1793. The opinion explicitly states that the language in question—"it shall be the duty"—implied a power of compulsion when used in "ordinary legislation." From the context, this appears to refer to legislation which does not concern the balance of power between the federal and state governments. The court also noted that the word "duty" used in the Act of 1793 "points to the obligation of the State to carry it [the governor's extradition duty] into execution"—an apparent concession to state government authority in the area of enforcement. In short, the Court in Dennison clearly indicated that the source of its limitation on federal court enforcement was the federal-state context and not the federal language itself. Thus, contrary to the inference drawn by the Brown majority, the California legislature would not reasonably have concluded that the Dennison limitation was inherent in the federal language. No specific repudiation should have been necessary on the part of the legislature to avoid sanctioning the Dennison limitation with its adoption and retention of federal language.

The California Penal Code provides additional support for the argument against an inference of legislative intent to adopt the Dennison limitation. A principle of statutory construction codified in Penal Code section 5 in 1872, and cited by the majority in Brown, states: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." 25 Because the language at issue in Brown was originally adopted in 1851, well before the announcement of Dennison in 1860, and since the 1872 and 1937 extradition statutes were, as the Brown court argues, 26 "substantially the same" as the 1851 statute in their use of language taken from the federal Constitution, Penal Code

23. The section of the case considering the mandamus question focused almost exclusively on discussion of the states' rights aspect of the problem. The absence of an explicit enforcement provision in the Act of 1793 was referred to in only a single sentence of the opinion. 65 U.S. at 107.
26. 20 Cal. 3d at 774, 576 P.2d at 479, 144 Cal. Rptr. at 764.
section 5 dictates that they be viewed for purposes of construction as continuations of the 1851 statute. Clearly, the 1851 statute's use of federal language nine years prior to Dennison can import no legislative intent whatsoever in regard to Dennison. Consequently, on the basis of their perpetuation of the use of federal language, subsequent statutes should be presumed neutral in relation to Dennison.

B. The Court's Reliance on In re Manchester

The second case upon which the Brown majority relied was In re Manchester. The case was used both as authority for the proposition that California courts cannot enforce the federal constitutional obligation to extradite, and to support the unenforceability of the apparently mandatory terms of California's Extradition Act. The problems resulting from the court's misuse of Manchester are compounded by its contention that since post-Manchester legislative amendments to the Extradition Act did not seek to overturn the case, the state legislature supported a discretionary rather than mandatory interpretation of the governor's extradition responsibilities.

In re Manchester, however, is insufficient authority for the argument advanced by the Brown court. Written by Chief Justice Murray in 1855, the opinion takes up scarcely two pages in the official California Reports. Furthermore, it only fleetingly addresses the proposition which the Brown court considers central to this controversy. The key language is:

_It may be as well to state, in limine, that I do not consider, under the distribution of powers by the Constitution of this State, the Judiciary are denied jurisdiction in this class of cases [habeus review of imprisonment pursuant to extradition]. The very object of habeus corpus, was to reach just such cases; and while the Courts of the State possess no power to control the Executive discretion, and compel a surrender, yet, having once acted, that discretion may be examined into, in every case where the liberty of the subject is involved._

The Brown court's treatment of this isolated phrase as a bar to enforcement of a state created extradition duty is unsound for a

27. 5 Cal. 237 (1855). In re Manchester dealt with a challenge under federal law to the incarceration of a fugitive pursuant to a gubernatorial extradition warrant. The case held that the court can examine the validity of the state chief executive's warrant of extradition under habeus corpus and that such a warrant may be supported by a requisition from a demanding state which: (1) charges a crime but does not set forth the offense in the detail required by an indictment and (2) states that the person sought committed a crime and then fled but does not use the words "fugitive from justice." _Id._ at 238-39. The court also held that the demanding governor's certification was adequate authentication of the requisition and that the court would not look beyond the governor's certification in judging the authenticity of the requisition and its supporting papers. _Id._

28. _Id._ at 238 (emphasis added).
number of reasons. First, the statement itself mistakes substantive law. If the italicized portion of the quote is recast in the form of a syllogism, the major premise is that courts cannot control executive discretion, the minor premise is that extradition is a discretionary duty, and the conclusion is that the courts therefore cannot compel extradition.

The major premise was by 1855 and remains today a commonplace principle under both the federal29 and California30 Constitutions. Manchester's unstated but necessary minor premise, however, commands far less support. The Brown court of appeal decision stated explicitly that Manchester was an exception to the uniform characterization in California case law of the governor's extradition duty as nondiscretionary;31 the Brown supreme court decision noted that cases subsequent to Manchester had characterized the duty as mandatory.32 The contention that this Manchester premise is an erroneous characterization of both the federal and state imposed extradition obligations is supported by a long line of both federal33 and California34 cases.

The Brown court itself recognized and retained the well-established mandatory characterization of this duty.35 But having accepted the duty as de jure mandatory, the Brown court reasoned that the obligation was nonetheless unenforceable. This conclusion resulted in de facto gubernatorial discretion in extradition matters; the reasoning in Manchester, to the contrary, concluded that the duty was unenforceable because it was de jure discretionary. If the Manchester dictum quoted above was an accurate statement of law, there would have been no need for the Brown court's elaborate enforceability discussion, since it is well established in California that de jure discretionary duties of the governor are unenforceable by writ of mandamus. The Brown court's extended search for enforcement authorization suggests that it

30. Jenkins v. Knight, 46 Cal.2d 220, 293 P.2d 6 (1956); People ex rel. McCauley v. Brooks, 16 Cal. 11 (1860); People ex rel. McDougall v. Bell, 4 Cal. 177 (1854). Just three years prior to Manchester, Chief Justice Murray in his opinion in Fowler v. Pierce, 2 Cal. 165 (1852), had identified the line between discretionary and mandatory executive duties as the constitutional line of demarcation between those acts of its coordinate branch which the court could and could not compel.
32. 20 Cal. 3d at 770, 576 P.2d at 476, 144 Cal. Rptr. at 761.
33. See cases cited at note 8 supra.
35. "From all of the foregoing we conclude that . . . the federal Constitution imposes upon the Governor a mandatory obligation to extradite a fugitive to a demanding state . . . ." 20 Cal. 3d at 771, 576 P.2d at 477, 144 Cal. Rptr. at 762.
was not comfortable itself with *Manchester*’s characterization of the gubernatorial duty.

The erroneous nature of this characterization, which formed the minor premise of the syllogism outlined above, necessarily destroys the force of that syllogism and thus invalidates the reasoning of the court in *Manchester* concerning enforcement of the governor’s extradition duty. Consequently, the *Brown* court could not soundly rely on *Manchester* as authority for a rule barring enforcement of extradition.

A second difficulty with the *Brown* court’s reliance on *Manchester* stems from the ambiguity in the *Manchester* court’s intended scope of reference. It is unclear from Chief Justice Murray’s opinion whether his statement concerning judicial authority refers solely to the court’s lack of power to compel the federal obligation, or extends as well to the California statutory obligation. As a general proposition concerning judicial authority, it seems to refer to both. Only federal law was at issue in the case, however, and the opinion never referred to the state extradition statute enacted four years before.\(^{36}\)

Finally, it is noteworthy that the *Manchester* court’s statement regarding judicial power of compulsion to extradite is dictum. The power to compel was not at issue in *Manchester*, nor was it an essential element of the two major issues presented: judicial authority under writ of habeus corpus and the standard of sufficiency utilized to evaluate a challenged warrant requisition.

For these reasons, the *Brown* court’s reading of *Manchester* is both precedentially and analytically inappropriate. The significance of this misreading of *Manchester* is twofold. First, as noted earlier, the majority’s use of the case provided an essential step in its construction of the Extradition Act. The court reasoned that if a rule barring enforcement of a state-created duty had been clearly established by *Manchester*, then the legislature’s failure to indicate a purpose to depart from that established rule in subsequent statutory enactments (*i.e.*, the enactments of the 1872 and 1937 extradition statutes) demonstrated intent to maintain and incorporate the established rule. A close reading of *Manchester* demonstrates, however, that no such inference should be drawn from legislative silence. Moreover, a legislative purpose to adopt a judicially enforceable right no longer appears to be a radical departure from established law once *Manchester*’s proper scope is understood. Thus, the *Brown* court’s interpretation of the Extradition Act is seriously flawed.

\(^{36}\) Ch. 29, § 665, 1851 Cal. Stats. 286.
III

THE "GENERAL TENOR" OF THE EXTRADITION ACT

In the second phase of its two-pronged analysis, the Brown court attempted to demonstrate that the "general tenor" of the Extradition Act provides for de jure executive discretion rather than judicially imposed mandatory performance. To this point in its analysis, the court appeared to accept the traditional characterization of a de jure mandatory, but nonetheless unenforceable, duty.\(^{37}\) With its assessment of the tenor of the Extradition Act, however, the court recharacterized, without explanation, the duty as de jure discretionary. This characterization not only departs from established California precedent\(^ {38}\) but also raises supremacy clause questions of conflict with federal law which has uniformly stipulated a mandatory duty.\(^ {39}\) The court, though, may well have insulated its decision from this potential infirmity by advancing the principle of state court enforcement authorization, which, as a matter of state separation of powers, is not a matter of federal concern.\(^ {40}\) Finally, by neglecting to assess the range of possible alternative readings of the admittedly ambiguous statute, the Brown court failed to choose in a principled manner among alternative constructions of the Extradition Act. A fair assessment of these alternatives would likely have led to an opposite conclusion on the issue of the court's enforcement power.

Without doubt, a measure of statutory ambiguity is created by apparently conflicting provisions of the Extradition Act. On one hand, section 1548.1 ("it is the duty of the Governor to have arrested and deliver up" any requested fugitive)\(^ {41}\) and section 1549.2 ("if a demand conforms to the provisions of this chapter, the Governor . . . shall sign a warrant of arrest")\(^ {42}\) appear to speak in clear mandatory tones. On

\(^{37}\) See note 35 supra. The distinction, which is admittedly a fine one, is between de facto discretion resulting from judicial unenforceability and unenforceability resulting from de jure discretion. In reviewing the Extradition Act, the court stated "it is likely that the Legislature chose to frame the obligation to extradite in mandatory terms in order to avoid the appearance of inconsistency with prior federal and state law, and to emphasize the Governor's high obligation to carry out the extradition laws." Id. at 774, 576 P.2d at 479, 144 Cal. Rptr. at 764. In closing, the court again noted that the extradition "duty may be considered mandatory in nature." Id. at 779, 576 P.2d at 482, 144 Cal. Rptr. at 767.

\(^{38}\) See cases cited at note 34 supra.

\(^{39}\) See cases cited at note 6 supra.

\(^{40}\) See note 24 supra.

\(^{41}\) CAL. PENAL CODE § 1548.1 (West 1970). The full text of § 1548.1 reads: Subject to the provisions of this chapter, the Constitution of the United States, and the laws of the United States, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State.

\(^{42}\) Id. § 1549.2. The full text of § 1549.2 appears at note 9 supra.
the other hand, section 1548.3 (granting gubernatorial investigatory power to have reported "the situation and circumstances of the person so demanded, and whether he ought to be surrendered according to the provision of this chapter") and section 1554 ("[t]he Governor may recall his warrant of arrest or may issue another warrant whenever he deems it proper") seem to allow discretionary executive action.

The Brown court resolved this conflict by concluding that the discretionary sections dominated the mandatory provisions. This resolution rejected alternative interpretations offered by the State of South Dakota. First, the court refused to limit section 1548.3 to authorizing investigations of only the formal sufficiency of extradition papers, on the ground that such a limitation would render the clauses "situation and circumstances of the person" and whether he "ought to be surrendered" to be but "pure surplusage." Similarly, the warrant revocation powers of section 1554 were found to have broader scope than mere reference to situations where a Governor's warrant was either no longer necessary or formally defective, since confining the clause in this manner "strains the statutory language." Neither, argued the court, should the authorization of the clause be confined to cases of extradition to California (thus excluding a governor's ability to revoke warrants extraditing from the state), since this would make the sequential placement of section 1554 within the Act "odd" and "unusual." In thus opting for a dominating discretionary tenor, the court found the explicit grant of discretion in some other sections of the Act no barrier to interpreting the ostensibly mandatory phrasing of sections 1548.1 and 1549.2 as judicially unenforceable, and hence de facto discretionary.

The court's justifications for rejecting South Dakota's alternative interpretations are not analytically persuasive. First, a limitation of section 1548.3 to authorize only investigations of formal extradition request sufficiency need not create any "pure surplusage." The language of that section explicitly states that the investigation power granted therein relates to the governor's duties throughout the chapter, which in

43. *Id.* § 1548.3. The full text of § 1548.3 reads:
When a demand is made upon the Governor of this State by the executive authority of another State for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any district attorney in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered according to the provision of this chapter.
44. *Id.* § 1554.
45. 20 Cal. 3d at 776, 576 P.2d at 480, 144 Cal. Rptr. at 765.
46. *Id.* at 775, 576 P.2d at 479, 144 Cal. Rptr. at 764.
47. *Id.* at 776, 576 P.2d at 480, 144 Cal. Rptr. at 765.
the California Penal Code constitutes the entire Extradition Act. Moreover, section 1548.3 is the only section in the Act granting investigatory power. Within the Act, duties are imposed on the governor in both mandatory and discretionary terms, varying with the factual context of the demand. Consequently, since it is the only source of investigatory power in the Act, section 1548.3 must provide a range of investigatory power broad enough to cover the spectrum of investigations which could be invoked under the provisions of the chapter. Although section 1548.3 does not specify any limitations, it need not be inferred that its entire range of investigatory powers applies under every provision of the Act. Thus, the court could have interpreted the discretionary language of section 1548.3 in a limited fashion, applicable in the openly discretionary provisions of the Act. Such an interpretation would neither have slighted the mandatory language of sections 1548.1 and 1549.2 nor have rendered the language of section 1548.3 extraneous.

Second, in rejecting a procedural limitation upon the warrant revocation powers of section 1554 as straining the statutory language, the court ignored the fact that all of the alternative constructions addressed by the court would have stretched the statutory language to varying degrees. Indeed, the rationale supplied by the court in making its choice among interpretations seems disingenuous, given the fact that the interpretation chosen by the court places a greater burden upon the language of both sections 1548.1 and 1549.2 than the rejected alternative. The chosen construction—finding the mandatory language to be discretionary—constitutes a substitution of judicial language for that used by the legislature; it gives the words of both sections meanings completely different from their normal legislative import. The rejected construction of section 1554, on the other hand, would merely have limited the language actually chosen by the legislature.

Third, the court’s estimate of the sequential import of the Act’s statutory language is misinformed. Undermining this estimate is the fact that fifteen other sections of the Act separate section 1554 from section 1548.3, many of which are unrelated to the issuance or recall of the governor’s warrant to extradite a person from California. Additionally, the court failed to note that section 1554 immediately precedes that section of the Act dealing with warrants demanding extradition to

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48. Id. §§ 1547-1558.
49. Id. §§ 1548.1, 1549.2 (extradition of fugitives from another state).
50. Id. § 1549 (extradition of persons who did not leave demanding state voluntarily); id. § 1549.1 (extradition of persons not present in demanding state when crime occurred).
California. As Justice Mosk pointed out in his dissent, section 1554 is numbered compatibly with section 1554.1, which specifically addresses the topic of warrants requisitioning the return of fugitives to California. Furthermore, these two sections were once part of the same statute which stipulated that section 1554 referred solely to such requisitioning warrants. These factors, ignored by the Brown court, demonstrate that the evidence concerning the sequential import of the statutory sections is, at best, conflicting. On the basis of this suspect ground, the court nevertheless adopted an interpretation which prescribed the substitution, rather than the limitation, of statutory language.

The Brown court would have achieved a more satisfactory construction of the Extradition Act by resolving the Act’s ambiguities in a manner which comported more closely with accepted principles of statutory construction. As both commentators and courts have pointed out, the power to construe mandatory language as discretionary is “dangerously liable to abuse, and one which should be most carefully guarded in its exercise.” The doctrine of restraint was well articulated by the Mississippi Supreme Court in an early case involving statutory construction:

This mode of getting rid of a statutory provision by calling it directory is not only unsatisfactory on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts which approaches so near to legislative discretion that it ought to be resorted to with reluctance, only in extraordinary cases, where great public mischief would otherwise ensue, or important private interests demand the application of the rule. . . . It is dangerous to attempt to be wiser than the law; and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. A judge should rarely take upon himself to say that what the legislature have required is unnecessary.

Thus, the Brown court’s objective should have been the articulation of a construction which altered the language of the statute as little as possible. To that end, any of the implied limitations on sections 1548.3 and 1554 considered in Brown would have been preferable to the constructions ultimately adopted by the court.

A second principle of statutory construction mentioned but given no weight by the Brown court is the rule that “[w]here both mandatory and directory verbs are used in the same statute . . . it is a fair infer-

52. 20 Cal. 3d at 784, 576 P.2d at 485, 144 Cal. Rptr. at 770 (Mosk, J., dissenting).
53. Id.
ence that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings." The legislature applied both recognized mandatory language as well as recognized discretionary language in the Extradition Act, thus strengthening the inference that the legislature used the two divergent modes purposefully. Application of this principle to Brown provides further support for the constructions of the Extradition Act rejected by the court, which would have emphasized the mandatory import of sections 1548.1 and 1549.2.

A third principle of statutory construction ignored by the Brown court relates to the possible supremacy clause problems raised by the court’s definition of the gubernatorial duty as de jure discretionary. In the same context, federal law has defined this duty as mandatory. The supremacy clause of the United States Constitution dictates that in cases of conflict, the federal provision controls and the conflicting state legislation is rendered invalid. The California Supreme Court as recently as 1976, in an opinion by Justice Richardson, admonished that “courts have an obligation to construe statutes in a way as to avoid serious constitutional doubts” in relation to the federal Constitution. A related canon of construction states that courts should presume a legislative intent to enact a constitutionally sound statute. Justice Richardson’s opinion in Brown, however, has imputed to the legislature of California an intent to contradict the terms of the federal extradition clause and its implementing legislation. Although the result reached in Brown was framed as a function of state court enforcement authorization, the retention of mandatory characterizations of the gubernatorial duty under sections 1548.1 and 1549.2 would have avoided potential supremacy clause tensions, and therefore should have been adopted by the court.

In sum, the court in Brown has chosen, from among several alternatives, the construction which most severely strains the language of the Extradition Act. Furthermore, it has selected the only construction

57. See, e.g., CAL. PENAL CODE § 1548.1 (West 1970) (“it is the duty of the Governor”); id. § 1549.2 (“the Governor . . . shall sign a warrant of arrest”).
58. See, e.g., id. §§ 1549, 1549.1 (“the Governor . . . may also surrender”).
59. See cases cited at notes 6 & 7 supra.
which requires the imputation of legislative intent to contradict federal law. In doing so, the court has violated established principles of statutory construction while failing to adequately substantiate the construction adopted.

IV

STATUTORY MISINTERPRETATION AND THE BROWN COURT

A. Judicial Authority: The Enforcement of Mandatory Gubernatorial Duties

The majority in Brown was analytically ambivalent in proceeding to its desired result. The court initially accepted the traditionally established mandatory characterization of the gubernatorial extradition duty. Toward the end of the opinion, however, the court argued that the legislature intended to create a discretionary duty. The resulting inconsistency suggests more fundamental fallacies in the court's approach to the enforcement question than the errors of statutory construction and treatment of precedent previously discussed in this Note. The primary fallacy—which becomes apparent upon examination of California case law prior to Brown—lies in the court's failure to address adequately the constitutional dimension of the enforcement issue. Rather, the court, without discussion, chose to frame the issue solely in terms of statutory interpretation of the Extradition Act.

The primary obstacles in the court's path to denying the writ sought by South Dakota were two-fold: the traditional characterization of the extradition duty as mandatory under both federal and California law, and the California rule that mandatory gubernatorial duties are enforceable by writ of mandamus. The Brown court handled the characterization problem by adhering to the mandatory label in some parts of the opinion, while treating the duty elsewhere in the opinion as discretionary and simply ignoring the problems raised by the discretionary definition.

The court skirted traditional notions of the enforceability of mandatory gubernatorial duties by developing a distinction between enforceable and unenforceable mandatory duties. In concluding that the governor's extradition duty was an unenforceable mandatory duty, the court relied almost exclusively on the absence of any legislative intent in the Extradition Act to authorize judicial enforcement. It ignored the line of California authorities that have established that the

63. See notes 35 & 37 supra.
64. 20 Cal. 3d at 774-77, 576 P.2d at 479-81, 144 Cal. Rptr. at 764-66.
65. See cases cited in notes 6 & 7 supra.
66. See cases cited in note 78 infra.
enforceability of mandatory duties is derived not from the legislative intent concerning the proper role of the courts, but rather from the constitutionally prescribed role of the court in relation to the executive branch.

The court's approach revealed a misperception of the customary significance of the statute sought to be enforced in California cases analyzing the issue of judicial enforcement. This confusion stemmed in part from the court's failure adequately to distinguish the distinct questions of judicial authority and executive duty posed in cases like Brown. In resolving such enforcement questions, the court normally seeks to discern a statutory definition of the obligation that the legislature intended to impose on the executive.\textsuperscript{67} In pursuing this task, interpretation of the statute creating the executive duty is quite logically a primary focus of judicial inquiry. The nature of the duty, once defined, is critical in the court's enforcement determination: mandatory or ministerial duties are traditionally held enforceable in California, while discretionary duties are not.\textsuperscript{68} The source of the court's authority to enforce mandatory duties, however, is the principle of supremacy of law inherent in the constitutional framework of California government.\textsuperscript{69} It has not been found to depend on the legislature showing an intent that a mandatory duty be enforced by writ of mandamus.\textsuperscript{70}

B. McCauley v. Brooks: \textit{Separation of Powers and the Enforcement Issue}

An early California case, often cited as authority for executive amenability to mandamus, fully explores the separation of powers dimension of the enforcement issue. In \textit{McCauley v. Brooks},\textsuperscript{71} the court's analysis of judicial authority to issue a writ of mandamus to the executive branch emphasized the California Constitution's provision for a separation of state governmental powers.\textsuperscript{72} This principle of separa-

\textsuperscript{67} See, e.g., Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Stuart v. Haight, 39 Cal. 87 (1870); Middleton v. Low, 30 Cal. 596 (1866).
\textsuperscript{68} Jenkins v. Knight, 46 Cal. 2d 220, 293 P.2d 6 (1956); Elliott v. Pardee, 149 Cal. 516, 86 P. 1087 (1906); Harpending v. Haight, 39 Cal. 189 (1870).
\textsuperscript{69} Jenkins v. Knight, 46 Cal. 2d 220, 293 P.2d 6 (1956); McCauley v. Brooks, 16 Cal. 11 (1860). California cases have consistently based their holdings of gubernatorial amenability to writ of mandamus "on the fundamental principle that under our system of government no man is above the law." 46 Cal. 2d at 223, 293 P.2d at 8 (1956).
\textsuperscript{70} Cases holding that the governor is amenable to writ of mandamus do not refer to legislative intent in regard to the statute to be enforced as a source of enforcement authorization. See, e.g., Jenkins v. Knight, 46 Cal. 2d 220, 293 P.2d 6 (1956); Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Elliott v. Pardee, 149 Cal. 516, 86 P. 1087 (1906); Harpending v. Haight, 39 Cal. 189 (1870); Stuart v. Haight, 39 Cal. 87 (1870); Middleton v. Low, 30 Cal. 596 (1866).
\textsuperscript{71} 16 Cal. 11 (1860).
\textsuperscript{72} Id. at 39-47. The California Constitution presently provides for division of the powers of the state government in CAL. CONST. art. III, § 3.
tion, however, was found by the court to be limited by the coordinate principle that no officer of the government is above the law.\textsuperscript{73} In short, the principle of separation was seen as one of restricted rather than absolute independence of governmental branches. Though the \textit{McCauley} case itself concerned issuance of a writ of mandamus to the state controller, the court addressed the governor's role in dictum. In matters involving discretion, the court said the governor "is independent of the other departments,"\textsuperscript{74} while in nondiscretionary areas, he "is subject, like every other citizen, to the law"\textsuperscript{75} and hence may be compelled to act by the judicial branch through the writ of mandamus.\textsuperscript{76} In supporting his analysis, Chief Justice Field relied upon other cases which were equally explicit in grounding court enforcement of mandatory gubernatorial duties in a constitutionally based notion of restricted separation of powers.\textsuperscript{77}

Since \textit{McCauley}, a number of California cases—none of which were distinguished or even discussed by the majority in \textit{Brown}—have held what \textit{McCauley} stated in dictum, that the governor may be subject to a writ of mandamus.\textsuperscript{78} Some of these cases make explicit the constitutional basis for their holdings\textsuperscript{79} and regularly refer to \textit{McCauley} as authority, thus implicitly reaffirming Chief Justice Field's supremacy of law and separation of powers reasoning.\textsuperscript{80} In many cases, however, courts proceed directly from statutory interpretation for the purpose of defining the executive duty to a conclusion on enforcement.\textsuperscript{81} The constitutional step has become so well established that the analysis is often truncated, and the constitutional basis not explicitly stated. Perhaps this is one explanation for the confusion exhibited by the majority of the \textit{Brown} court.

Thus, the \textit{Brown} court is unique not only in its reference to the Extradition Act as a source of enforcement authorization, but also in its failure to consider other sources. The first of these innovations seems merely misguided. The second, however—ignoring a source of en-

\textsuperscript{73} 16 Cal. at 41.
\textsuperscript{74} \textit{Id.} at 40.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 41.
\textsuperscript{77} \textit{E.g.,} Whiteman v. Chase, 5 Ohio St. 528 (1856) (cited in the \textit{McCauley} opinion as State v. The Governor of Ohio).
\textsuperscript{78} Jenkins v. Knight, 46 Cal. 2d 220, 293 P.2d 6 (1956); Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Elliott v. Pardee, 149 Cal. 516, 86 P. 1087 (1906); Harpending v. Haight, 39 Cal. 189 (1870); Stuart v. Haight, 39 Cal. 87 (1870).
\textsuperscript{79} Jenkins v. Knight, 46 Cal. 2d 220, 293 P.2d 6 (1956); Harpending v. Haight, 39 Cal. 189 (1870).
\textsuperscript{80} Jenkins v. Knight, 46 Cal. 2d 220, 223, 293 P.2d 6, 8 (1956); Hollman v. Warren, 32 Cal. 2d 351, 354, 196 P.2d 562, 564 (1948); Harpending v. Haight, 39 Cal. 189, 210 (1870).
\textsuperscript{81} \textit{E.g.,} Stuart v. Haight, 39 Cal. 87 (1870).
forcement authorization that has been highlighted in a continuous line of cases since *McCabe*—reflects a significant lack of candor on the court's part. The opinion suggests a judicial sleight of hand that is compounded by the majority's failure to acknowledge its substantial departure from established California precedent. In essence, the Brown court has carved out exceptions to both the sphere of court power delineated in the *McCabe* line of cases and the court's constitutionally granted mandamus jurisdiction. In doing so, it examined neither the pertinent cases nor the relevant constitutional provisions.

C. From Legislative Silence to Legislative Intent: The Unreasonable Inference in Brown

Another substantial weakness in the Brown opinion is the court's unreasonable reliance upon legislative silence in discerning legislative intent. The court implicitly deferred to a presumed legislative definition of the appropriate balance of power between the judiciary and the executive in extradition matters. But the Brown majority failed to identify any evidence in either the Extradition Act itself or its legislative history that indicates that the legislature intended to address the issue of court enforcement in the Act. Quite simply, there is no such evidence. To the contrary, as argued above, a close reading of *Manchester* and *Dennison* demonstrates that those cases did not necessitate any response from the legislature. The court nevertheless persevered in seeking such an intent and consequently was compelled to place undue significance upon legislative silence in its ill-conceived statutory analysis.

Reliance on legislative silence as a source of legislative intent has been characterized by a number of courts and commentators as a highly suspect instrument of statutory construction and application. Legislative failure to address an issue in explicit terms is susceptible to a number of inconsistent inferences. Given the vagaries of the legislative process, the legislature may well have been unaware of the problem or too preoccupied with other areas of lawmaking to formulate a policy on the issue. Alternatively, the legislature may have purposefully deferred to judicial resolution, or may have desired for any number of reasons to leave the matter unresolved. The Brown court provided no

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82. 20 Cal. 3d at 771-74, 576 P.2d at 477-79, 144 Cal. Rptr. at 762-64.
83. See text accompanying notes 13-36 supra.
84. Girouard v. United States, 328 U.S. 61, 70 (1946); R. Dickerson, *The Interpretation and Application of Statutes* 181-83 (1975); J. Sutherland, *supra* note 51, § 49.10.
85. R. Dickerson, *supra* note 84, at 181.
86. Girouard v. United States, 328 U.S. 61, 70 (1946).
grounds for eliminating any of these potential contrary inferences in relation to the Extradition Act.

The court's reliance on legislative silence is particularly inappropriate in *Brown* in light of the nature of the subject under consideration. In an issue of constitutional stature, it is unlikely that the legislature would have elected to determine the judicial-executive balance of power in extradition matters by *implication* rather than by express pronouncement on the subject. Rather, the fact that in the past the court has delineated the constitutionally prescribed balance of power in the area of judicial enforcement against the chief executive—as the *McCauley* line of cases amply demonstrates—strongly supports the argument that the legislative failure to speak manifested deference in favor of judicial resolution of the question, thus allowing the court to continue in its well-established role.

**CONCLUSION**

The California Supreme Court's primary errors of commission in *South Dakota v. Brown* were two-fold. First, the court relied in its reasoning on unsound readings of both the *Dennison* and *Manchester* cases. Second, the court's statutory analysis of the Extradition Act manifested a manipulative use of the silence of successive California legislatures that enacted the succeeding versions of the state's extradition legislation. The court's primary error of omission was its failure to explore the constitutional separation of powers issue raised by the court's holding. As a result of these deficiencies, the *Brown* court's opinion exhibits both analytical ambivalence and reasoning that strained to support the result reached by the court. As the court's first attempt to deal directly with court enforcement of the California governor's duty to extradite a convicted felon and fugitive from a sister state, the opinion provides neither a candid nor convincing rationale for the unenforceability of the gubernatorial duty.

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Britt v. Superior Court:1 First Amendment Limitations on Discovery

The supreme court imposed constitutional limitations on pretrial discovery in private civil suits. The defendant2 in Britt attempted through deposition inquiries to learn about the involvement of plaintiffs and nonparties in certain political organizations. The California Supreme Court held that the defendant's questions violated associative privacy rights guaranteed by the federal and state constitutions.3 In invalidating the specific deposition questions at issue in Britt on grounds of overbreadth, the court implied that precisely limited and clearly relevant questions about associative activities might in some cases be justified by the state's substantial interest in furthering the goals of the California Discovery Act.4

Although prior cases, including United States Supreme Court cases, have recognized first amendment limitations on compulsory disclosure of associative affiliations, in most of these cases the stifling effects of disclosure were either proven or apparent. In Britt, the plaintiffs made no showing that disclosure would have any chilling effect on political activity. Yet, without requiring evidence of such harm, the Britt majority applied a form of first amendment strict scrutiny. This Note will argue that the court's approach represents a legally sound commitment to the preservation of associative anonymity.

This discussion of Britt proceeds in four stages. First, the facts of the case and the rationale of the majority opinion are summarized. Second, the historical development of associative anonymity protections is traced. Third, the court's most significant decision in this case—the decision to apply strict scrutiny without requiring evidence of a chilling effect on first amendment rights—is analyzed. Finally, the court's actual application of first amendment strict scrutiny is examined.

1. 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (Tobriner, J.) (4-3 decision).
2. As used throughout this Note, "defendant" refers to the San Diego Unified Port District, the real party in interest in the litigation. The named defendant on review was the Superior Court, since the case went to the Supreme Court on the issue of whether a writ of mandate should issue against the lower court. See text accompanying note 7 infra.
3. CAL. CONST. art. I, §§ 1, 2, 3 (1849, amended 1974); U.S. CONST. amend. I.
I

THE OPINION

Nine hundred and thirty-six owners and residents of homes located near the San Diego airport sued the San Diego Unified Port District, seeking damages for diminution of property values, personal injuries, and emotional disturbances. The defendant commenced discovery pursuant to the California Discovery Act. In deposing a number of the plaintiffs, the defendant tried to obtain information allegedly relevant to its defenses of res judicata, failure to mitigate damages, and the statute of limitations. The defendant asked about:

1. plaintiffs' "membership in various organizations opposed to the . . . way in which the Port District operates its Airport";
2. any meetings which plaintiffs may have attended "concerning the Airport, including dates, topics and speakers";
3. any correspondence which plaintiffs received from such organizations;
4. "the identity of other people who attended meetings";
5. "the content of discussions with others regarding the meetings";
6. the identity of those persons with whom plaintiffs discussed such matters; and
7. any financial contributions by plaintiffs to such organizations, including the "amount, date, and identity of person requesting funds."

Plaintiffs refused to answer these questions and moved for a protective order. The defendant moved to compel, claiming that the information requested was necessary to establish its defenses. The trial court granted defendant's motion. The plaintiffs then filed a petition for extraordinary relief in the California Supreme Court. The supreme court found that the discovery order was much broader than the scope of the issues in the litigation justified, and therefore the discovery order violated plaintiffs' first amendment rights. The court issued a peremptory writ of mandate directing the trial court to vacate its discovery order.

Justice Tobriner, writing for the majority, recognized the political efforts of anti-airport groups as lawful associational activity protected by the state and federal constitutions. He then noted that legitimate
associational activity may be chilled not only by overt attempts to discourage participants from exercising their constitutional rights, but also by more subtle means such as compelling disclosure of participants' identities. Justice Tobriner cited the seminal case of *NAACP v. Alabama ex rel. Patterson* for the proposition that "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." According to Justice Tobriner, the right to associational anonymity is not limited to groups expressing dissident or minority views. The Constitution protects popular and unpopular groups alike, because even the members of a supposedly popular group may be subject to harassment by those opposed to their organization's aims. Anonymity of political ties allows an individual to follow his or her conscience in pursuing lawful political activities without fear of reprisal.

The opinion acknowledged, however, that the right of associational privacy is not absolute. When the state advances an interest of great importance, and the means used to secure that interest are as narrowly tailored as possible, disclosure may be compelled. In applying this standard, Justice Tobriner rejected several of defendant's arguments for requiring disclosure on the facts of *Britt*.

He first refuted the defendant's argument that compulsory disclosure is permissible when it is sought in the context of private litigation and not "in furtherance of any independent governmental inquiry into private associational activity." Justice Tobriner identified two elements of state action in *Britt*: first, a governmental unit in the position of a litigation defendant sought to discover allegedly protected information; second, the judiciary was asked to enforce a discovery order which infringed on allegedly protected areas. He treated the latter definition of state action as the relevant one, observing that in private litigation as in other contexts, disclosure may be sought in order to

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11. 20 Cal. 3d at 853, 574 P.2d at 771, 143 Cal. Rptr. at 700 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).
12. *Id.* at 856, 574 P.2d at 773, 143 Cal. Rptr. at 702.
13. Although the majority need only have identified the Port District's interest in preparing and presenting all its defenses as the relevant state action, Justice Tobriner greatly enlarged the significance of the *Britt* holding in dicta: "in light of . . . the fact that in this area, judicial discovery orders inevitably involve state-compelled disclosure of presumptively protected information, the principles [stated here] have equal application to purely private litigation." 20 Cal. 3d at 856 n.3, 574 P.2d at 773-74 n.3, 143 Cal. Rptr. at 702-03 n.3 (emphasis added).
harass or embarrass the parties "by probing deeply into areas which an individual may prefer to keep confidential." Justice Tobriner then characterized the state's interest in discovery, "facilitating the ascertainment of truth in connection with legal proceedings," as significant and legitimate. Nonetheless, he found this interest insufficient to justify the challenged discovery questions in *Britt*.

Justice Tobriner next addressed the defendant's argument that disclosure should be compelled since the parties claiming a right to associational anonymity were not *defendants*, as in *NAACP v. Alabama ex rel. Patterson*, but rather *plaintiffs*. He conceded that in some instances a plaintiff may partially waive his or her right to associational privacy by bringing a lawsuit. In *Britt*, however, the challenged discovery questions asked for the names of nonparties who were present at meetings the plaintiffs attended. These nonlitigants had not waived any associational privacy rights; therefore, the challenged discovery order was overbroad as to them. Moreover, even if plaintiffs had waived their own first amendment rights, they did so only to the extent that their associational activities were "directly relevant" to their claims. Plaintiffs "[did] not seek recovery for any damage to their associational interests, [did] not claim that any of these injuries were incurred while pursuing associational activities, and [did] not request any relief with respect to the port district's relationship with such associations." Since plaintiffs' complaint did not put into issue any aspect of their associational conduct, questions about such conduct were inappropriate.

Finally, the majority found that, even if the plaintiffs' associational activities were implicated in their cause of action, the defendant's method of obtaining information about such activities was unconstitutional. Justice Tobriner observed that the relationship between the plaintiffs' activities in community groups and the Port District's defenses—the statute of limitations, res judicata, and the failure to miti-

14. *Id*. at 857, 574 P.2d at 774, 143 Cal. Rptr. at 703.
15. *Id*. (quoting *In re Lifschutz*, 2 Cal. 3d 415, 432, 467 P.2d 557, 568, 85 Cal. Rptr. 829, 840 (1970)). The state's interest in furthering discovery is more completely described by the dissent. Discovery is to be allowed to:
  - give greater assistance to the parties in ascertaining the truth and checking and preventing perjury; provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; make available in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; expedite litigation; simplify and narrow the issues; and expedite and facilitate both preparation and trial

17. 20 Cal. 3d at 859, 574 P.2d at 775, 143 Cal. Rptr. at 704.
18. *Id.*, 574 P.2d at 776, 143 Cal. Rptr. at 704-05.
gate damages—was "extremely tenuous at best." But he did not base the majority decision on any lack of relevance of the information sought to the proposed defenses. Whether the applicable relevance standards had been met or not, the discovery order was still unconstitutional, because the defendant's questions probed too broadly into constitutionally protected areas. Justice Tobriner characterized this fault as "overbreadth" and found it to be fatal to the defendant's case.

II

HISTORICAL BACKGROUND—THE LAW OF ASSOCIATIONAL PRIVACY

The United States Supreme Court seemed to assume in early cases that states could legitimately compel disclosure of associational ties. In 1958, however, in the landmark case of *NAACP v. Alabama* ex rel. Patterson, the Court recognized a right to associational privacy. It held that an order to compel discovery of the NAACP's membership list was an unconstitutional infringement of freedom of association. Two years later the Court reaffirmed the *NAACP* holding in *Bates v. Little Rock*. Both *NAACP* and *Bates* involved attempts by southern states to stifle the activities of the NAACP by forcing the organization to reveal its members. In *NAACP*, Alabama officials sought the NAACP membership list allegedly to determine whether the organization was subject to the state foreign corporation registration statute. In *Bates*, municipal officials of two Arkansas cities sought the NAACP membership list allegedly to determine whether the NAACP was an organization subject to a municipal license tax. In both cases, there was clear evidence on the record that disclosure of membership would result in harassment and abuse. In *NAACP*, Justice Harlan suggested that the "closest scrutiny" is appropriate in such cases. The state must establish a "compelling" interest or "controlling justification" to justify action impairing the right to freedom of association.

*NAACP* and *Bates* established that mandatory disclosure of or-

19. Id. at 860, 574 P.2d at 776, 143 Cal. Rptr. at 705.
23. Id. at 521-22, 523-24; 357 U.S. at 462.
24. 357 U.S. at 461.
25. Id. at 463 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion)).
26. Id. at 466.
27. However, the Court, in *NAACP*, never ruled on the importance of Alabama's reason for
ganizational affiliations could violate the first amendment. In subsequent cases affirming the right to associational privacy, the Court held that a state could not require a teacher, as a condition of employment, to file a list of groups in which he or she participated,28 demand the membership list of a legitimate organization to ascertain the extent of Communist infiltration,29 or require applicants to the state bar to disclose their inactive membership in subversive groups.30 The theory behind these decisions is identical to that underlying the right to the anonymous expression of political opinions.31 Anonymity may be essential to ensure the expression of ideas, especially unpopular ideas. When members of political groups are threatened with public identification and reprisals, they may be deterred from discussing important public matters.32 Associational privacy33 may, therefore, be necessary in order to guarantee the freest exchange of thoughts in a "marketplace

In requiring disclosure since it found that the identity of NAACP members had no "substantial bearing" on the issue of whether the NAACP was a foreign corporation. Id. at 464.


31. See text accompanying notes 54-61 infra.


In Britz, the majority was unclear in identifying the interests at stake. Sometimes Justice Tobriner seemed to be talking about a privacy interest, as when he stated that disclosure may probe into areas "which an individual may prefer to keep confidential." 20 Cal. 3d at 857, 574 P.2d at 774, 143 Cal. Rptr. at 703. However, if the holding in Britz rested solely on privacy grounds, one of the major issues in the case, whether the plaintiffs could claim a first amendment interest without showing any harm to this interest, would have been moot. Plaintiffs would only have had to plead that some state action violated the expectation of privacy to establish their constitutional claim. The Britz majority, therefore, were mainly concerned with associational and speech freedoms, not with the right to privacy.
of ideas."\textsuperscript{34}

The standard to be used in judging the permissibility of infringements of associational privacy rights has been vigorously disputed. One faction of the Court, led by Justice Harlan, advocated a balancing process: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."\textsuperscript{35} The opposing faction, led by Justices Black and Douglas, felt that the Court lacked the competence to apply a balancing standard and therefore favored affording absolute protection to first amendment interests. The "absolutists" argued that the exact nature and scope of the competing interests at stake are difficult to identify.\textsuperscript{36} They further contended that even when the interests at stake can be identified, there is no principled way to decide when and to what extent first amendment rights can legitimately be infringed. In their view, "perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the time."\textsuperscript{37}

The absolutists never won a firm majority of the Court. A state's power to abridge personal liberties in appropriate situations has consistently been recognized, although the Court has failed to delimit this power with any precision. No one standard is consistently applied in adjudicating disclosure cases,\textsuperscript{38} but in recent years the Court has at

\textsuperscript{34} The policies underlying freedom of speech have been variously expressed. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (preserving an uninhibited marketplace in which truth will prevail); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (permitting private satisfaction of intellectual and emotional needs); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stabilizing government by free discussion of grievances); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (finding true ideas through competition of the market); Meiklejohn, The First Amendment Is an Absolute, 161 SUP. CT. REV. 245 (promoting collective self-government). See generally Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 GEO. WASH. L. REV. 429, 434-48 (1971). The "marketplace of ideas" concept is the value most obviously served in cases preserving freedom of association rights.


\textsuperscript{38} See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (balancing explicitly used); Branzburg v.
least nominally invoked the balancing approach most frequently. Under this approach, revelation of associational ties may be required if the harm suffered by the disclosing parties is outweighed by a "compelling" state interest.\footnote{Hayes, 408 U.S. 665 (1972) (balancing used as a secondary test); Tailey v. California, 362 U.S. 60 (1960).}

As a practical matter, the court seems to balance interests only as a last resort. Instead, the Court has developed complementary standards of overbreadth and relevancy. Not only must the state show a compelling reason for demanding disclosure, but the information sought must be "substantially related" to the achievement of the compelling interest\footnote{39. The terminology used by the Court to describe this first amendment standard varies. See, e.g., Buckley v. Valeo, 424 U.S. 1, 64, 68 (1976) (requiring "subordinating" or "substantial" state interest); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (requiring a "controlling justification"); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (requiring "compelling" state interest).} and the required disclosure must be narrowly tailored to achieve the state's objective.\footnote{40. Recently, the United States Supreme Court has found few compelling state reasons which justify disclosure requirements. Those which have been recognized include the nation's interest in security or self-preservation. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 165-67 (1971); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 93-96 (1961); Barenblatt v. United States, 360 U.S. 109, 127-28 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959). But see Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957). Another recognized compelling interest is the state's right to investigate possible criminal violations in grand jury proceedings. Branzburg v. Hayes, 408 U.S. 665 (1972). The Supreme Court has also acknowledged as compelling the public's interest in preventing and detecting corruption in politics. Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Harriss, 347 U.S. 612 (1954).}

Although the Court looks for compelling state interests in both first amendment and fourteenth amendment cases, the test used in these two areas is very different. The effect of finding a compelling interest in a first amendment case is much less decisive than in a fourteenth amendment case. See note 90, infra.


43. See United States v. Robel, 389 U.S. 258, 265 n.20 (1967); Gunther, Reflections on Robel: It's Not What the Court Did But the Way That It Did It, 20 STAN. L. REV. 1140 (1968).
III
THE APPROPRIATENESS OF FIRST AMENDMENT STRICT SCRUTINY

Britt v. Superior Court is significant in that the court applied first amendment strict scrutiny without requiring proof of harm to plaintiffs' associational or speech interests. The decision does not, as the dissenters suggested, depart dramatically from precedent, but rather, at most extends the rationale of prior federal and state disclosure cases. Although some recent United States Supreme Court cases seem to stress the importance of proof of a chilling effect on the record, all of these cases are distinguishable from Britt. Moreover, as a matter of policy, the course taken by the Britt majority is a logical and effective way to ensure the protection of potentially threatened constitutional freedoms.

A. Precedent

According to Justice Tobriner, two decades of United States and California Supreme Court decisions have recognized that "compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional rights of association." Therefore, whenever a person asserts a first amendment privilege to resist the disclosure of his or another person's membership in a political group, the majority would conclusively presume, for the purpose of deciding whether or not to apply strict scrutiny, that the possibly detrimental effects of disclosure exist.

The dissenters would refuse to accord any such presumption to the first amendment claim. Instead, they would require plaintiffs to make some factual showing that the disclosure sought would inhibit, or at least would probably inhibit, protected activities. As Justice Richardson noted, such a showing was made in the NAACP case but was not made by the Britt plaintiffs. In the absence of such a showing, the majority had no legitimate basis for concluding that any first amendment interests were implicated in Britt and for applying strict scrutiny.

The United States Supreme Court has never held that a chilling effect must be established in the record before first amendment strict scrutiny may be invoked. However, the Court has rarely adjudicated a compulsory disclosure case in which a chilling effect was neither proved in the record nor readily foreseeable. As the Britt dissenters pointed out, in both NAACP v. Alabama ex rel. Patterson and Bates

44. 20 Cal. 3d at 848, 574 P.2d at 728, 143 Cal. Rptr. at 697 (emphasis added).
45. For a listing of cases in which the Court has "inferred" harm, see Murasky, The Journalist's Privilege: Branzburg and Its Aftermath, 52 Texas L. Rev. 829, 853-56 (1974).
46. 20 Cal. 3d at 869-70, 574 P.2d at 782, 143 Cal. Rptr. at 711.
v. Little Rock, the NAACP made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility." In two other lines of disclosure cases, when the Court could clearly predict that disclosure would have harmful repercussions, strict scrutiny has been applied without requiring actual proof of a chilling effect.

In one line of cases, the obvious unpopularity or minority position of a group has either indicated an improper motive of harassment in seeking disclosure or portended the public abuse which would result from disclosure. In Gibson v. Florida Legislative Investigation Committee, for example, the Court held that a committee investigating Communists could not force the NAACP to surrender its membership list. The ostensible purpose of the disclosure request was to determine the amount of Communist infiltration into the NAACP. The Court seemed to rely on its own knowledge of the intense resentment engendered by the militant civil rights movement to predict the chilling effects that exposure of the supporters of the unpopular NAACP would have. Without citing any actual evidence that disclosure would injure the members of the Florida NAACP, the Court blocked the legislative committee's action. It found neither a compelling state interest justifying exposure of NAACP members, nor a substantial relationship between the identity of NAACP members and the committee's investigative goal.

In the second line of cases, the potential or actual use of the information sought by the state—to grant or deny a benefit—has enabled the Court to conclude that disclosure would be patently chilling. Thus, the Court has held that a state cannot require all teachers in the public schools to file a list of all their associational activities every year as a condition of employment. States have also been forbidden from asking applicants to the state bar about their membership in subversive groups, unless the inquiry is narrowly tailored to discover knowing endorsement of the violent objectives of such groups.

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47. 357 U.S. 449 (1958).
51. Id. at 556-57.
Britt presented a very different factual setting both from the two lines of cases in which harm was clearly foreseeable, and from the cases in which harm had actually been proved. No proof of harm to plaintiffs' first amendment interests was established in the record, nor could harm easily be anticipated. The political unpopularity of the anti-airport groups was unknown, and the state was not requiring disclosure as a condition of granting or denying a benefit. On its face, Britt presented a weaker factual situation for inferring harm and applying strict scrutiny than prior freedom of association cases. Nevertheless, the course taken by the California Supreme Court in Britt was not unprecedented.

The United States Supreme Court has addressed an analogous situation in a case involving the right to anonymous speech where, as in Britt, the harm resulting from disclosure was not clearly foreseeable. In Talley v. California, the Supreme Court applied a first amendment standard without requiring proof of a chilling effect. The Court ruled that a Los Angeles ordinance prohibiting the distribution of anonymous handbills was overbroad on its face. Citing NAACP and Bates, Justice Black explained that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." The Talley case recognized that anonymity may be essential to the expression of political beliefs. Therefore, when anonymity in political activities or speech is threatened, strict scrutiny should be applied.

Britt is in accord not only with the principles of Talley v. California, but also with the leading California case on the right to anonymous speech. In Huntley v. Public Utilities Commission, the

(state employees cannot be fired for membership in Communist party); Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967) (loyalty oath, which required California employees to deny past, present, or future membership in groups that advocate the forceful overthrow of the government, held invalid).

54. 362 U.S. 60 (1960).
55. Writing for the majority, Justice Black applied an overbreadth analysis. Justice Harlan concurred separately. He argued that a weighing process was appropriate, and, applying that process, found the state's interest insufficient to justify the ordinance's deterrent effect on free speech. 362 U.S. at 66-67. Three dissenters would have also applied first amendment strict scrutiny in the form of a balancing process, but would have found the ordinance constitutional. 362 U.S. at 69-70.
56. Subsequent to the Talley case, the Court has limited the doctrine of overbreadth in cases involving the facial invalidity of a statute. See Arnett v. Kennedy, 416 U.S. 134 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Younger v. Harris, 401 U.S. 37 (1971). See also County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974). Britt is not a case about the facial overbreadth of the discovery statute, but rather is a case about an overly inclusive application of the statute. For a helpful discussion of the difference between statutory overbreadth and what one commentator calls "jus tertii," see Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974).
57. 362 U.S. at 65.
California Supreme Court invalidated a utilities commission requirement that phone subscribers who tape political messages identify themselves in the recording. Although Huntley, who espoused extreme right-wing opinions, made no showing that disclosure of his identity would lead to harassment or injury, the court assumed a first amendment right was implicated and strictly scrutinized the challenged state action. It held that the regulation violated Huntley's right to anonymous speech because the state had no legitimate, much less compelling, interest in forcing him to identify himself. Moreover, any possible interest of the phone company in disassociating itself from political commentary available on its lines could be vindicated by a method that did not infringe on Huntley's first amendment rights.

Britt affirms and broadens the principles of first amendment anonymity articulated in Huntley by applying those principles to a more difficult set of facts. Arguably, in Huntley, harm to the plaintiff's first amendment interests could be inferred from the unpopularity of petitioner's extreme right-wing views. In Britt, however, there was less reason to suspect that the associations involved were comparably unpopular, and it was therefore more difficult to infer that the revelation of anti-airport activism would chill the expression of political beliefs. Furthermore, in Huntley the state asserted no plausible interest in forcing phone subscribers to identify themselves in taped political messages. In contrast, the state in Britt had an ostensibly legitimate interest in pursuing discovery. Thus, in acting to prevent the disclosure of associational affiliations, even though the state had a legitimate interest in the disclosure and no evidence of a chilling effect could easily be inferred, the Britt court expanded the protection of anonymity established in Huntley.

Two recent United States Supreme Court cases—Branzburg v. Hayes and Buckley v. Valeo—may be read to stand for the proposition that, in disclosure suits, a chilling effect on first amendment rights...
will not automatically be presumed. Upon closer reading, however, both are reconcilable with cases like *Talley v. California, Huntley v. Public Utilities Commission* and *Britt v. Superior Court*.

In *Branzburg v. Hayes*, the Court refused to grant news reporters a privilege against revealing the names of their sources to grand juries. The Court found that the “public interest in law enforcement and in ensuring effective grand jury proceedings is sufficient to override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions . . . .” One factor in the Court's decision was the absence of evidence showing “how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.” In *Buckley v. Valeo*, the Court upheld the disclosure provisions of the Federal Election Campaign Act of 1971 against a charge that the Act was overbroad in requiring the disclosure of contributors to minority parties. The plaintiffs in *Buckley* argued that the Act would stifle new or unpopular causes that should be afforded particularly stringent first amendment protection. The Court refused to grant a blanket exemption for such minor parties, finding *NAACP v. Alabama ex rel. Patterson* inapposite where any “serious infringement on first amendment rights brought about by the compelled disclosure of contributors is highly speculative.” However, the Court emphasized that individual exemptions from the Act might be justified by a clear showing of harm to a minority party.

It is as yet unclear how *Buckley* and *Branzburg* will be interpreted. Both cases are distinguishable from cases like *Talley v. Cali-

66. Justice Tobriner did not consider this interpretation of *Buckley* and *Branzburg*. See 20 Cal. 2d 166, 170 (1951).

67. 408 U.S. at 690.

68. Id. at 693. The dissenters in *Branzburg* took issue with the majority's reliance on empirical proof of harm: “we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist . . . .” Id. at 733. The dissenters argued that common sense and available information had in the past been used by the Court to predict harm to first amendment interests. Id. at 733-36.


70. 424 U.S. at 70.

71. See note 79 infra.

fornia and Britt v. Superior Court since in neither Buckley nor Branzburg was the applicability of strict scrutiny an issue—there was proven harm to associational interests on both records, and the Court invoked strict scrutiny as a matter of course.73 Thus, in neither case did the Supreme Court require proof of harm before applying strict scrutiny. Proof of harm was pertinent, however, in the strict scrutiny balancing process of weighing the state's interest against the injury caused by the state's action. The distinction between the initial applicability of strict scrutiny and the interest/injury balancing is not an empty one. First amendment scrutiny may take a variety of forms.74 If the court finds that the infringing state action is invalid on the ground of a lack of a compelling state interest,75 relevance,76 or overbreadth,77 the amount of harm caused by the challenged state action may never come into issue.78 However, if the court actually engages in balancing the government's interest against the harm suffered by plaintiffs and third parties, evidence of harm will be crucial.79 This is the lesson of Buckley v. Valeo and Branzburg v. Hayes.


73. In Buckley, the Court noted that appellants "offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On the record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." 424 U.S. at 72 (footnote omitted).

Harm was also established in the record in Branzburg, 408 U.S. at 693-95. The balancing type of strict scrutiny was used only as an alternative standard. The majority argued that even if the standard developed in the NAACP and Bates line of cases was applied, that standard was satisfied in Branzburg: "The requirements of those cases which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here." Id. at 700.

74. See text accompanying notes 38-43 supra.


78. This is admittedly an oversimplification, particularly with respect to the overbreadth doctrine. Whether or not a court engages in an explicit balancing process, a decision that state action infringes impermissibly on first amendment interests will be based to some extent on an assessment of actual or potential injury to those interests. A statute is overbroad only when it infringes too broadly on a protected area.

79. Not knowing which of the available forms or stages of first amendment scrutiny will be applied, the practitioner is well-advised to try to establish proof of a chilling effect in the record. Proving harm to first amendment interests may be a difficult task; it is not easy to predict how disclosure may discourage activism. To the extent that proof must be attempted, the guidelines provided in Buckley v. Valeo to establish when minor parties should be exempted from disclosure provisions are useful:

The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no
To summarize, in employing first amendment strict scrutiny without requiring proof of harm, the majority in *Brill* did not depart radically from federal or state precedents. No United States or California Supreme Court case has conditioned the applicability of first amendment strict scrutiny on proof of harm. Nor do the recent decisions of the United States Supreme Court in *Buckley v. Valeo* and *Branzburg v. Hayes* establish a threshold requirement of empirical proof of harm before strict scrutiny may be invoked. These cases only emphasize the importance of empirical proof when first amendment injuries are balanced against a compelling state interest.

B. Policy

Historically, the judiciary has protected associational anonymity when public identification of group membership would intimidate the expression, or even formation, of beliefs and ideas relating to "political, economic, religious, or cultural matters . . . ." The *Brill* dissenters argued that associational anonymity need only be protected when a violation of that anonymity would clearly chill the exercise of speech freedoms. But in cases involving disclosure of associational ties, it is often difficult to predict the future stifling effects of publicity on first amendment rights. The relevant consideration is not whether a chilling effect will certainly occur, but whether it is worth taking the risk that it might occur. Sometimes a court has clues as to the likelihood of harm. A clear history of oppression or other indication of the unpopularity of a group might alert the court to the possibly adverse consequences of disclosure. The motive of the body seeking disclosure or the use to which the information is to be put might also signal the impermissibility of the inquiry. When there are no such clues to bolster an individual’s allegation that publicity will chill his or another’s exercise of first amendment rights, the question becomes whether a court should

424 U.S. 1, 74 (1976). See also text accompanying notes 81-84 infra.


84. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *Vogel v. County of Los Angeles*, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).
assume that disclosure will have no chilling effect. The Britt majority refused to assume the absence of a chilling effect:

Although the aims of the local associations involved in this case may find general support among San Diego residents, an individual's participation in such advocacy organizations could nonetheless raise the ire of municipal authorities or other individuals or business entities who have substantial interests in the maintenance or expansion of current airport operations.\(^\text{85}\)

The majority's conclusive presumption of a chilling effect can be justified on several grounds. First, history has shown repeatedly that personal anonymity is essential to protect freedom of expression. In the words of Justice Black: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."\(^\text{86}\) When individuals combine efforts to pursue a goal, collective anonymity is no less essential than individual anonymity to guarantee the unhampered freedom of expression.\(^\text{87}\) Second, requiring detailed proof of the potential chilling effect of disclosure, even when such evidence can be obtained, may be undesirable. The investigative process involved in documenting past and future harassment may itself require substantial intrusion upon associational privacy. Finally, the practical difficulties of proving a chilling effect are enormously magnified when litigants are raising third party rights, as they are permitted to do in first amendment cases.\(^\text{88}\)

These reasons for presuming a chilling effect dictate that, when a court does not know whether challenged state action will chill the exercise of first amendment rights, it should resolve all doubts in favor of the party claiming the first amendment interest. The importance of freedom of speech and association in our system of government\(^\text{89}\) compels the courts to apply strict scrutiny whenever first amendment rights

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\(^{85}\) 20 Cal. 3d at 854, 574 P.2d at 772, 143 Cal. Rptr. at 701.

\(^{86}\) Talley v. California, 362 U.S. 60, 64 (1960).


\(^{88}\) NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958); Note, Standing to Assert Constitutional Jus Tertii, 88 HARV. L. REV. 423 (1974). In Britt, the plaintiffs argued that the deposition questions violated their own first amendment rights and those of members of the anti-airport groups who were not involved in the litigation.

may be jeopardized. Such an approach does not establish an inviolable right to associational anonymity. Rather, it forces a state to show the "compellingness" of its interest and the specificity of the means chosen to achieve that interest before the courts will permit an infringement of associational privacy.

The Britt majority did not, as the dissenters claimed, violate concepts of "fundamental fairness" by allowing a party who has brought suit to preclude inquiry into "relevant" matters. First, Justice Tobriner conceded that a plaintiff may "waive" his or her right to associational privacy by initiating a lawsuit. However, he articulated well-reasoned limitations on the scope of "waiver" in such a situation. He asserted that a plaintiff cannot waive a third party's right to associational privacy. In the great number of cases in which information about associational membership is sought, third party rights will be implicated. He also asserted that in bringing suit a plaintiff waives his or her associational privacy rights only to the extent that such matters are directly relevant to the litigation. In cases like Britt, plaintiffs who are suing for personal injuries and property damage unrelated to any associational interest cannot fairly be said to have waived their rights of associational privacy. Second, the dissenters' equation of a full and fair adjudication of legal problems with the discovery of all relevant information was too facile. In many instances the law of evidence excludes admittedly relevant information in order to further a more important public policy. Surely the public policy behind the psychotherapist/patient privilege—encouraging the unhampered revelation of personal information by a patient to a treating psychotherapist—is no stronger than the public interest in fostering the unhampered expression of ideas and participation in legitimate associational activities. If the policies embodied in common law or statutory evidentiary privi-

90. It may be argued that resolving all doubts in favor of the party claiming the first amendment interests and invoking strict scrutiny essentially means ruling in favor of the party claiming the first amendment interest, because state action subjected to strict scrutiny is never found to meet rigid judicial review. This argument may be true of fourteenth amendment strict scrutiny, but is not true of first amendment strict scrutiny. Challenged state action has frequently been found to meet the requirements of first amendment strict scrutiny. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (contributors to political campaigns forced to disclose contributions); Branzburg v. Hayes, 408 U.S. 665 (1972) (newspaper reporters required to disclose sources to grand jury); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (applicant to state bar may be required to disclose knowing membership in group dedicated to overthrow of government).

91. 20 Cal. 3d at 871, 574 P.2d at 783, 143 Cal. Rptr. at 712.

92. See text accompanying notes 16-18 supra.


leges warrant the exclusion of relevant evidence, the constitutional policies underlying the first amendment deserve no less respect.

To summarize, strict judicial scrutiny of state action that may jeopardize first amendment rights is an appropriate means of safeguarding the freedoms of the first amendment whether or not a chilling effect can be shown. When it is not clear whether anonymity is necessary to preserve the unrestricted exercise of speech and associational rights, all doubts should be resolved initially in favor of the party asserting the constitutional claim. If a court finds that the challenged state action is narrowly tailored and directly relevant to a compelling state interest, and the state's interest seems to outweigh the minimal injury which may be presumed without evidence of harm, the state action should be approved.

IV

APPLYING THE FIRST AMENDMENT STANDARD

Justice Tobriner ruled for the Britt plaintiffs because the defendant's interrogatories were overbroad. Significantly, he also implied that even if the interrogatories were more precisely fashioned, they might fail the first amendment "substantial relationship" test. The majority did not balance the state's interest in discovery against the plaintiffs' first amendment rights, although presumably, had the overbreadth, substantial relevance, and compelling state interest tests been met, weighing would have been appropriate.

A. Overbreadth

Justice Tobriner disapproved the defendant's deposition questions as overbroad, finding that they were not narrowly tailored to the stated purpose of inquiry. In disapproving the entire set of deposition questions, Justice Tobriner made no attempt to separate valid questions from invalid questions. It is thus unclear whether a few impermissibly overbroad inquiries tainted the whole set or whether each of the questions asked was overbroad. Furthermore, since none of the questions was approved, it is unclear how narrowly focused questions must be to be permissible. Questions that would minimize infringement on associational privacy interests will be suggested here; a more thorough under-

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96. 20 Cal. 3d at 858, 864, 574 P.2d at 775, 779, 143 Cal. Rptr. at 704, 708. "Overbreadth" may be used to describe statutes which, on their face, infringe on constitutionally protected areas, as well as particular applications of a law which violate constitutional rights. Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974). Britt is an instance of the latter situation. See note 56 supra.
standing will have to await further clarification of the Britt holding through case law.

The Port District asserted that the challenged deposition inquiries were relevant to its defenses of res judicata, mitigation of damages, and the statute of limitations. The res judicata defense centered on the possible involvement of plaintiffs in a prior suit against the airport. An appropriately narrow inquiry for establishing this defense was suggested by Justice Tobriner himself; defendant need only ask “whether plaintiff was a member of the Loma Portal Civic Club at the time of prior litigation.”

The mitigation of damages defense centered on whether the plaintiffs, knowing of the problems associated with proximity to the airport, nonetheless bought or rented houses in the airport overflight area. Although Justice Tobriner did not suggest a narrower means of eliciting this information, it is not difficult to formulate questions that would provide the required information without infringing on associational anonymity. For example, defendant could ask: When did you buy/rent your present home? Were you aware of its proximity to the airport? Did you ask any of your neighbors about the effect of airport operations on the neighborhood?

Defendant alleged that its inquiries regarding discussions between the plaintiffs and others at meetings of the Airport Relocation Committee and other groups were relevant to its statute of limitations defense. As Justice Richardson explained in his dissent:

If, for example, the district is able to establish through attending witnesses that a particular plaintiff, at meetings 10 years before the action was filed, stated in strong terms that his residence was rendered almost uninhabitable because of airport noise, can it be contended that such expressions would not be relevant and probative on the issue of when his limitations period commenced?

There are several ways in which defendant’s deposition questions may have been broader than necessary to establish a statute of limitations defense. Defendant need not have asked about “plaintiffs’ membership in various organizations opposed to the . . . way in which the Port

98. 20 Cal. 3d at 860 n.4, 574 P.2d at 776 n.4, 143 Cal. Rptr. at 705 n.4.
99. Id. at 870, 574 P.2d at 783, 143 Cal. Rptr. at 712.
100. A claim relating to a cause of action against a local public entity for death, personal injury, or injury to personal property or growing crops must be presented no later than the 100th day after accrual of the cause of action. A claim relating to any other cause of action must be presented within one year after accrual of the cause of action. Cal. Gov’t Code § 911.2 (West 1966).
101. 20 Cal. 3d at 870, 574 P.2d at 783, 143 Cal. Rptr. at 712.
District operates its Airport.'

Although it might be important to identify what meetings in opposition to airport activities the plaintiffs attended, plaintiffs' membership per se in anti-airport organizations was irrelevant. Defendant also asked "the identity of other people who attended meetings." Although it might be important to identify who discussed airport problems with the plaintiffs or who attended meetings which the plaintiffs attended, the identity of persons who attended any meetings of the group was also irrelevant. Again, questions could be formulated which would elicit the relevant information while only indirectly compromising associational privacy. Defendant might have asked, for example: Did you ever discuss your personal or property injuries with members of your community? If so, when and with whom? Who else was present?

B. Relevance

Although Justice Tobriner disapproved defendant's questions on the grounds of overbreadth, he strongly suggested that even narrowly drawn questions relating to the airport's proposed defenses would fail on grounds of relevance. Even precise questions must be relevant to a plausible claim; in Britt, the defenses asserted by the Port District were extremely speculative, and the relationship of the information requested to these defenses was "tenuous at best." The significance of Justice Tobriner's comments about relevance can best be assessed by comparing Britt to a court of appeal case it overruled, Bakman v. Superior Court.

The facts in Bakman were virtually identical to those in Britt. In Bakman, seventy Fresno homeowners sued the city for property damages and personal injuries allegedly suffered as a consequence of airport operations. The defendant served plaintiffs with interrogatories asking about plaintiffs' medical histories and associational activities in anti-airport groups. Plaintiffs refused to answer but failed to show that disclosure would harm their own or others' constitutional interests. The trial court found that discovery was a compelling state interest, and that the relevance standards of discovery were applicable. The normal standard of relevance in discovery is quite broad: "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

102. Id. at 850, 574 P.2d at 769, 143 Cal. Rptr. at 698.
103. Id.
104. Id. at 860 n.4, 574 P.2d at 776 n.4, 143 Cal. Rptr. at 705 n.4.
105. Id. at 860, 574 P.2d at 776, 143 Cal. Rptr. at 705.
107. CAL. CIV. PROC. CODE § 2016(b) (West Supp. 1979) (emphasis added). The relevance standards of discovery have been liberally construed by California courts. See Sav-On Drugs,
Thus, after weighing the state's interest in discovery against the harm which the petitioners and third parties would suffer upon disclosure, the *Bakman* court found the challenged interrogatories to be valid.

The *Britt* majority overruled *Bakman* "on the basis of the constitutional analysis"108 in the *Bakman* opinion. The *Bakman* court erred in finding the state's interest in discovery compelling and in ruling that normal discovery standards of relevance, rather than stringent first amendment standards of relevance, should be applied.109 Instead, the court should have decided whether the constitutional overbreadth and relevance standards had been met, and thereafter, if appropriate, weighed the state's interest against the petitioners' interest.110 Thus, even if discovery is found to be a compelling state interest, the substantial relevance standards of first amendment analysis, and not merely the broad relevance principles usually associated with discovery, must be applied when associational privacy interests are at stake.

### C. Discovery as a Compelling State Interest

Since the majority disapproved the deposition questions in *Britt* on overbreadth grounds, it did not have to decide whether the state's interest was compelling enough to warrant an infringement of first amendment rights. Justice Tobriner nonetheless recognized that the "state's interest in facilitating the ascertainment of truth in connection with legal proceedings" is significant and legitimate.111 His opinion might be read as definitively labeling the state's interest in discovery as

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108. 20 Cal. 3d at 862 n.5, 574 P.2d at 777 n.5, 143 Cal. Rptr. at 706 n.5.

109. Justice Tobriner so criticized the lower court in *Britt*:

> The very breadth of the required disclosure establishes that the trial court in this case did not apply traditional first amendment analysis in passing on the validity of defendant's inquiries into the private associational realm, and in particular did not heed the constitutional mandate that "precision of [disclosure] is required so that the exercise of our most precious freedoms will not be unduly curtailed . . . ."

*Id.* at 861, 574 P.2d at 777, 143 Cal. Rptr. at 706 (citations omitted).

110. The *Britt* majority did not fault the court of appeal for applying some species of first amendment strict scrutiny upon a minimal showing of harm. It faulted the *Bakman* court for not applying the first amendment standards, particularly first amendment norms of precision tailoring, rigorously enough.

The *Britt* majority also suggested that the *Bakman* court incorrectly assigned the burden of proof on the issue of the existence of a less onerous alternative. The *Bakman* court faulted the *Bakman* petitioners for not arguing that the information sought by the city could be obtained by narrower means. 63 Cal. App. 3d at 316 n.3, 133 Cal. Rptr. at 708 n.3. In contrast, the *Britt* majority faulted the *Britt* defendant for not demonstrating that its wide-ranging discovery attempts were precisely tailored to meet the defendant's objectives. 20 Cal. 3d at 860 n.4, 574 P.2d at 776 n.4, 143 Cal. Rptr. at 705 n.4.

111. 20 Cal. 3d at 857, 574 P.2d at 774, 143 Cal. Rptr. at 703.
less than compelling. More accurately, the opinion seems to reserve the right to reassess the "compellingness" of discovery in a future case in which the means more closely fit the ends.112 This latter interpretation is supported by the fact that the majority suggested that a narrowly tailored discovery question (such as, "Were you a member of the Loma Portal Civic Club on such-and-such a date?") which is clearly related to a plausible defense (res judicata) might properly be posed to further the judicial interest in discovery proceedings.113

Although courts have been reluctant to identify interests sufficiently compelling to justify infringements of first amendment rights,114 the majority in Britt was correct in leaving open the possibility of approving future discovery attempts infringing on associational anonymity. Instances may be imagined when this would be the desirable course. Suppose, for example, that at a meeting of people opposed to airport operations, X, an intruder in the meeting, shoots M, a member of the group. M's spouse, S, also a member of the group, brings a wrongful death action against X. In preparing his defense, X seeks the names of witnesses to the incident. He therefore in the course of discovery asks S for the names of the members of the group present at the meeting. S claims a first amendment privilege. In such an instance, it is clear that discovery should be allowed. The requested disclosure is narrowly and directly tailored to the defendant's legitimate litigation needs, the disclosure is substantially related to the state's interest in providing a full and fair trial, and the plaintiff and third parties will suffer only minimal harm if their political activities in opposition to the

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113. 20 Cal. 3d at 860 n.4, 574 P.2d at 776 n.4, 143 Cal. Rptr. at 705 n.4. Presumably, the harm engendered by this disclosure would also have to be outweighed by the reason for requiring the disclosure.

114. See note 40 supra.
airport are revealed to the public.\textsuperscript{115} The \textit{Britt} holding does not foreclose the characterization of discovery as a compelling state interest in such a case.

CONCLUSION

A laudable attempt to limit incursions into associational privacy, \textit{Britt v. Superior Court} demonstrates the California Supreme Court’s firm commitment to protecting first amendment freedoms. \textit{Britt} clarifies and extends the associational anonymity interest previously recognized in \textit{Talley v. California} and \textit{Huntley v. Public Utilities Commission} by applying first amendment strict scrutiny without requiring proof of a chilling effect on first amendment freedoms. However, in cases where first amendment scrutiny takes the form of a judicial balancing of the first amendment interest against the competing state interest, proof of harm might still be necessary to preserve associational privacy. The decision also leaves open the possibility that the state interest in discovery might justify some incursions into associational privacy rights through precisely limited inquiries into matters substantially related to a clearly plausible claim.

\textit{Faith D. Dornbrand}\textsuperscript{*}

\textbf{GARFINKLE \textit{v.} SUPERIOR COURT:} \textbf{1 NO STATE ACTION IN NONJUDICIAL FORECLOSURE}

The supreme court held that California’s nonjudicial foreclosure procedure for real property does not involve state action and consequently is not subject to the constraints of the due process clause of the fourteenth amendment.\textsuperscript{2} This Note will argue that the court erred in

\textsuperscript{115} This hypothetical assumes that, as in \textit{Britt}, no evidence of a chilling effect on anti-airport activities has been offered.

\textsuperscript{*} B.A. 1975, Yale University; third-year student, Boalt Hall School of Law.

\textsuperscript{1} 21 Cal. 3d 268, 578 P.2d 925, 146 Cal. Rptr. 208 (Manuel, J.) (unanimous decision), \textit{appeal dismissed}, 439 U.S. 949 (1978). The appeal was dismissed for lack of a substantial federal question. Justices White and Marshall would have noted probable jurisdiction.

\textsuperscript{2} The court also rejected the petitioner’s contention that the due process clause of the California Constitution, \textit{CAL. CONST.} art. I, § 7(a), which does not expressly limit itself to action of a state, does not require state action. The court’s holding is perplexing in light of the court’s recent decision in \textit{Robins v. Pruneyard Shopping Center}, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). On facts virtually identical to those found in \textit{Lloyd v. Tanner}, 407 U.S. 551 (1972), and \textit{Hudgens v. NLRB}, 424 U.S. 507 (1976), discussed at notes 38-40 and accompanying
applying federal and state precedent and that the procedure does involve state action. Additionally, it will suggest that the nonjudicial foreclosure procedure violates procedural due process by denying the debtor who contests such foreclosure an opportunity to be heard.

I

THE CASE

The Garfinkles purchased a family residence from the Lannings in 1970. The Lannings had obtained financing from Wells Fargo Bank by executing a deed of trust in favor of the Bank, as beneficiary, with the purchased property as security. The trust deed contained a standard due-on-sale clause permitting the Bank to accelerate the balance due if the property was sold without the written consent of the Bank. The trust deed also contained a power of sale clause which provided that the Bank could order the trustee to sell the secured property should the trustor/debtor default.3

The Bank offered to waive its right to accelerate the remaining debt on sale of the property if the Garfinkles would assume the Lanning's loan at an increased interest rate. When the Garfinkles declined to do so, the Bank accelerated the loan, making the entire amount due and payable. Upon the Lanning's failure to pay the balance due by June 1970, the Bank recorded notice of default, as required by Civil Code section 2924.4

The exercise of nonjudicial foreclosures of real property security devices5 is regulated in California under Civil Code sections 2924

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3. 21 Cal. 3d at 272, 578 P.2d at 927-28, 146 Cal. Rptr. at 211.
through 2924h. These provisions require a trustee seeking to sell the secured property subject to a power of sale to record a notice of default with the county recorder\(^6\) and notify the trustor of the filing.\(^7\) The trustor has three months after the notice filing to "cure" the default and reinstate the trust deed.\(^8\)

Once the reinstatement period expires, the trustee must post a notice of sale in a conspicuous place and send a copy to the trustor, if a request has been recorded or the deed of trust so provides.\(^9\) After the sale notice has been posted for twenty days, the trustee may sell the property at public auction to the highest bidder.\(^10\) The trustee issues a trustee's deed to the purchaser which, if it contains a recital of compliance with the notice requirements, is "conclusive evidence [of compliance with those sections] in favor of bona fide purchasers and encumbrancers for value and without notice."\(^11\) The purchaser may then bring an unlawful detainer action against the trustor to obtain possession of the property.\(^12\)

The Garfinkles brought an action challenging the constitutionality of the nonjudicial foreclosure procedure. The supreme court unanimously held that the nonjudicial foreclosure procedure constituted private, not state, action and was therefore exempt from the constraints of the due process clause of the fourteenth amendment.\(^13\)

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7. *Id.* § 2924b(3)(6) (West Supp. 1978) requires a copy of the default notice to be sent to the trustor if the trustor had recorded a request for notice or if the deed of trust contained such a request. In 1972, **CAL. GOV'T CODE** § 27321.5 (West Supp. 1979) was amended to require that all real property deeds of trust with a power of sale specify the trustor's address and contain a request for a copy of any notice of default and of sale.
8. **CAL. CIV. CODE** § 2924c (West 1974). Reinstatement is not possible when the balance due has been accelerated under a due-on-sale clause. To cure a default of nonpayment of an accelerated balance one would have to tender the entire amount of the underlying debt. This would extinguish the deed of trust, since the deed of trust is a "mere incident of the debt or obligation which it is given to secure." Coon v. Shry, 209 Cal. 612, 615, 289 P. 815, 816 (1930).
10. **CAL. CIV. CODE** § 2924g (West 1974).
11. *Id.* § 2924.
12. **CAL. CIV. PROC. CODE** § 1161a(3) (West 1972).
13. The Garfinkles also challenged the validity of the Bank's automatic enforcement of the due-on-sale clause contained in the Lanning trust deed. The superior court overruled the Bank's demurrer as to this cause of action pending the outcome of Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978), which was pending in the California Supreme Court at the time Garfinkle was decided. Wellenkamp held that the automatic enforcement of a due-on-sale clause by an institutional lender was an unreasonable restraint on alienation.

Despite the resolution of the underlying substantive issue in the Garfinkles' favor, Wells Fargo Bank subsequently sought to conduct a foreclosure sale of the property by noticing a sale prior to September 24, 1978, the date Wellenkamp became final. Wellenkamp specifically held that the decision would not apply to cases where a foreclosure sale had occurred prior to the decision becoming final. 21 Cal. 3d at 954, 582 P.2d at 977, 148 Cal. Rptr. at 386. Despite the fact
The court rejected the contention that the state's pervasive regulation of nonjudicial foreclosures involved it significantly in the procedures and encouraged their use. The court failed to find sufficient state involvement and encouragement in the state's recognition of the legal validity of the title transferred and the state's allowance of unlawful detainer actions brought by bona fide purchasers. Furthermore, the court characterized the county recorder's acts in aiding the course of nonjudicial foreclosures as "ministerial"; the acts merely implemented contractual arrangements of private parties and were therefore insignificant for state action purposes. The court also rejected the argument that by permitting creditors to enforce real property liens the state had delegated a traditional public function; the court argued that because nonjudicial foreclosure had been judicially recognized for over a century, it was not a power traditionally and exclusively performed by the state. Finally, the court distinguished its previous findings of state action in the mechanics' and garagenian's lien procedures, which are also carried out by private parties, by noting that such liens were authorized by statute while nonjudicial foreclosure via a power of sale was "authorized solely by the contract between the lender and the trustor."

II

EXISTING STATE ACTION DOCTRINE—Flagg Brothers, Inc. v. Brooks

Prior to Garfinkle, the California courts had generally assumed that the nonjudicial foreclosure procedure does not involve state action, and one court of appeal had so held. In other recent creditor's
remedies cases, however, the California Supreme Court has found state action. In *Connolly Development, Inc. v. Superior Court,* the court held that state action was present in the California mechanics' lien and stop notice procedures. Neither procedure is possessory, both require recordation as a step toward the transfer of good title, and both are accomplished pursuant to a statutory scheme. The court rested its finding of state action on the mandatory recordation procedures, and also on the courts' extensive role in the enforcement of both procedures. In *Adams v. Department of Motor Vehicles,* the court found state action in the procedures for enforcing the possessor garageman's

In 1973, the petitioners in the instant case took their constitutional attack to the Ninth Circuit Court of Appeals. That court invoked the doctrine of abstention because the earlier California cases were not dispositive of the constitutional issue. Garfinkle v. Wells Fargo Bank, 483 F.2d 1074 (9th Cir. 1973).

19. U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (3d Dist. 1974). The court found no state action because the transfer of interest was accomplished "pursuant to procedures agreed upon in advance by the parties," and not "through the intervention of some form of governmental action or authority." 41 Cal. App. 3d at 87, 116 Cal. Rptr. at 56. See also Lawson v. Smith, 402 F. Supp. 851 (N.D. Cal. 1975).


21. Under the mechanics' lien statute, *Cal. Civ. Code* § 3110 (West 1974), one who provides material that is incorporated into property and/or provides service or labor in constructing or repairing property, is granted a statutory lien on the property. This lien must be perfected by recordation. *Id.* §§ 3115-3116. Once perfected, it is deemed prior to all encumbrances that attach subsequent to the commencement of the work. *Id.* § 3134. A materialman must file a notice with the owner of the property of intent to record a lien prior to recording the lien. *Id.* § 3144. Additionally, unless suit is initiated by the materialman within ninety days of recordation of the lien, it is extinguished by operation of law. *Id.* § 3144. The existence of the lien has no effect on the underlying debt between the materialman and the owner of the property. *Id.* § 3152.

22. The stop notice procedure provided for by *Cal. Civ. Code* §§ 3156-3175 (West 1974) provides a mechanism whereby a subcontractor materialman/creditor can insure that he will receive payment. Under § 3161, after twenty days preliminary notice to the owner of the property, the materialman/creditor may serve a stop notice upon the construction lender or the owner. The stop notice obligates the holder of the funds to withhold from the general contractor an amount sufficient to pay the stop notice claimant. The lender or owner need only obey stop notice orders where the claimant has posted a bond in the amount claimed due. Failure to comply with bonded stop notice orders makes the owner or lender personally liable to the stop order claimant.

lien. Pursuant to statute, a garageman who works on a debtor’s vehicle has a lien for the amount of the repairs. The *Adams* court found state action because the power to sell was granted by statute, not by contract, and also because the statute delegated the traditional function of lien enforcement to the garageman.

The United States Supreme Court has addressed the question of state action in summary creditor’s remedies on five occasions within the last decade. Prior to the most recent case, *Flagg Brothers, Inc. v. Brooks*, the Court virtually ignored the question of state action, assumed its presence, and concentrated on the due process questions presented. In *Flagg Brothers*, decided one day prior to *Garfinkle*, the court finally dealt with the state action question directly. In a five to three decision, the Court found no state action in a privately conducted nonconsensual sale of a debtor’s property, authorized by the New York version of U.C.C. section 7-210, to satisfy a possessory warehouseman’s lien. The New York statute allows a warehouseman to foreclose his lien on goods in his possession by holding either a public or private sale in a commercially reasonable manner, following notification of all parties known to claim an interest in the goods. A good faith purchaser takes the goods free of all rights of persons against whom the lien was valid, even when the warehouseman fails to comply with the statute.

*Flagg Brothers* spoke to the three principle theories developed by the courts to determine the presence of state action: the public function doctrine, the state encouragement doctrine and the state intervention doctrine. The Court rejected the contention that the statutory grant

25. 11 Cal. 3d at 153, 520 P.2d at 965, 113 Cal. Rptr. at 149. It is doubtful that the reasoning of *Adams* is valid following the decision in *Flagg Brothers*. Both of the reasons in *Adams* for finding state action were explicitly rejected in *Flagg Brothers*. See notes 70 & 81 infra.
26. Flagg Brothers, Inc. v. Brooks, 98 S. Ct. 1729 (1978) (no state action found in a privately conducted sale of stored household items pursuant to N.Y. COM. LAW § 7-210 (McKinney 1964) (the New York version of U.C.C. § 7-210) to satisfy a possessory warehouseman’s lien); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (state action found in a wage garnishment order issued by a clerk that ordered the garnishee not to pay over money earned by the debtor); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (state action found in a sequestration by the sheriff of personal property pursuant to a writ issued by a judge following an ex parte hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (state action found in a replevin of a stove and stereo by the sheriff following an ex parte hearing); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (state action found in a wage garnishment where, by order of the court, the employer held one-half of the debtor’s wages).
29. Id. § 7-210(1) (McKinney 1964).
30. Id. § 7-210(5) (McKinney 1964).
31. Courts have used many descriptions for the theories they have used to determine the existence of state action, including “public function,” “state encouragement,” “state involvement,”
of authority to conduct the sale was a delegation of a public function; the delegated function must be both traditionally and exclusively a public one.\textsuperscript{32} The Court also held there was no state action as a result of state encouragement of the private sale, because the state had not compelled the sale, but rather had merely acquiesced to the sale by providing a statutory remedy.\textsuperscript{33} The prior creditor's remedies cases,\textsuperscript{34} where state action had been assumed, were distinguished on the basis of the overt involvement of state officials in the questioned procedure; the Court saw the procedure in \textit{Flagg Brothers} as simply a self-help procedure for converting a possessory lien into good title.\textsuperscript{35}

\textbf{A. Public Function Doctrine}

The public function doctrine received its fullest exposition in \textit{Marsh v. Alabama},\textsuperscript{36} which held that a privately-owned company town had taken on the governmental attributes of a town. Since the state delegated these public functions to the company, the company's action became governmental action. The public function doctrine was also applied to private conduct that affected elections of public officials in \textit{Terry v. Adams},\textsuperscript{37} which held that a private Democratic Party association that selected candidates to run in primary elections performed the public function of selecting public officials. The public function doctrine was later extended to include the operation of a shopping center in \textit{Food Employees Local 590 v. Logan Valley Plaza, Inc.},\textsuperscript{38} but \textit{Logan Valley} was overruled in 1976 by \textit{Hudgens v. NLRB},\textsuperscript{39} which stated that

'The argument [that a large shopping center has areas functionally similar to facilities customarily provided by municipalities] reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, \textit{Marsh v. Alabama}, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the state. . . . In the instant case there is no comparable assumption or exercise of municipal functions or power.'\textsuperscript{40}

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\textsuperscript{32} 98 S. Ct. at 1735.
\textsuperscript{33} \textit{Id.} at 1737-38.
\textsuperscript{34} \textit{See} cases cited in note 26 \textit{supra}.
\textsuperscript{35} 98 S. Ct. at 1736 n.10.
\textsuperscript{36} 326 U.S. 501 (1946).
\textsuperscript{37} 345 U.S. 461 (1953).
\textsuperscript{38} 391 U.S. 308 (1968).
\textsuperscript{39} 424 U.S. 507 (1976).
\textsuperscript{40} \textit{Id.} at 519 (quoting \textit{Lloyd v. Tanner}, 407 U.S. 551, 568-69 (1972)).
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*Flagg Brothers* furthers the *Hudgens* constriction by holding that the function delegated must be both "traditionally" and "exclusively" a public one.\(^{41}\) In the context of creditor's remedies, where other private remedies exist, the power to execute liens is not an "exclusive" function and therefore constitutes private action.\(^{42}\) The Court based this view primarily on *Marsh* and *Terry*. The Court noted that *Marsh* involved a situation in which the private party had "performed all the necessary municipal functions in the town,"\(^{43}\) and that *Hudgens* emphasized the point by distinguishing between a town, with all its facilities, and a shopping center, with stores alone. The Court also noted that in *Terry*, the Jaybird Democratic Association "effectively performed the entire public function of selecting public officials."\(^{44}\) *Flagg Brothers* and *Hudgens*, taken together, indicate that the public function test will be construed narrowly in the future. While many functions are traditionally governmental, few are exclusively governmental.\(^{45}\)

### B. Encouragement to Act

The state encouragement doctrine is potentially the broadest state action theory. State action has been found under this doctrine in *Shelley v. Kraemer*,\(^ {46}\) *Public Utilities Commission v. Pollak*,\(^ {47}\) and *Reitman v. Mulkey*.\(^ {48}\) *Shelley* held that judicial enforcement of racially restrictive covenants was state action. *Pollak* found state action when an administrative body placed its "imprimatur" on a policy of a regulated private bus company, through consideration of a specific policy adopted by the company. *Reitman* held that a state constitutional provision that recognized the right of an individual to refuse to sell or rent property to anyone, and that also effectively repealed state legislation prohibiting private discrimination in the sale or rental of property, "encouraged" private discriminatory action to such an extent that state action was present.\(^ {49}\) The state encouragement doctrine as it was set forth in these

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41. 98 S. Ct. at 1735-37.
42. Id. at 1735.
43. Id. (emphasis added).
44. Id. (emphasis added).
45. *Flagg Brothers* noted that the state and municipal functions in *Marsh* and *Terry* had been "administered with a greater degree of exclusivity than "dispute resolution,"" 98 S. Ct. at 1737, but expressed no view on whether a "city or state might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection]." Id.
46. 334 U.S. 1 (1948).
47. 343 U.S. 451 (1951).
49. While *Reitman* is the only case to specifically use the encouragement language, both *Shelley* and *Pollak* can be seen as coming within the broad encouragement rubric. In *Shelley* the availability of judicial enforcement of private discriminatory covenants encourages their use by ensuring their viability. In *Pollak* the review of a regulated industry's policy by an administrative agency also encourages formation of the ultimate policy decision by subjecting it to outside scru-
decisions, if construed broadly, could swallow the state action limitation. Few private actions occur today without the government encouraging or effecting the outcome in some manner.\footnote{50}

The Supreme Court subsequently narrowed \textit{Reitman} in \textit{Moose Lodge No. 107 v. Irvis},\footnote{51} which found no state action in the granting of a liquor license to a club with racially discriminatory membership policies. \textit{Moose Lodge} limited \textit{Reitman} by reading that case to mean that in order to establish state action, "the State must have 'significantly involved itself with invidious discriminations,'"\footnote{52} as through the enactment of statutes "intended either overtly or covertly to encourage discrimination."\footnote{53} \textit{Moose Lodge} at the same time struck down a state regulation which required licensees to adhere to all provisions of their constitutions and by-laws. The latter holding was based on the \textit{Shelley v. Kraemer}-based doctrine that the fourteenth amendment prohibits the use of "the sanctions of the State to enforce a concededly discriminatory private rule."\footnote{54}

\textit{Pollak} was narrowed in \textit{Columbia Broadcasting System, Inc. v. Democratic National Committee},\footnote{55} which found no state action in the actions of broadcast licensees operating under the authority of the FCC, and \textit{Jackson v. Metropolitan Edison Co.},\footnote{56} which found no state action in the termination of utility service by a heavily regulated private utility. In both cases, \textit{Pollak} was distinguished on the basis that the specific policies complained of had not been scrutinized or ap-

\begin{footnotes}
\footnote{50}{For instance, if \textit{Shelley} were read expansively, judicial enforcement of private contractual agreements could transmute all such agreements into state action. As for \textit{Pollak}, regulatory agencies approve most acts of regulated industries, at least implicitly, whenever it can be shown they are aware of a practice of the regulated company. If this were enough to find state action, few actions of a regulated industry would remain in the private sector. And in \textit{Reitman}, if a state's passage of a law allowing private choice were sufficient, all private choice could be considered state action when the state fails to pass a law. Indeed, \textit{Reitman} can be read to stand for the principle that any encouragement by the state amounts to state action. See J. Hetland, supra note 5, at 154-55. It has been effectively argued, however, that \textit{Reitman} can better be understood to stand for the principle that when the state abandons a policy of strict neutrality, that is by placing a provision in the state constitution which prevents the state from prohibiting discrimination in housing, the actions of parties in furtherance of that state policy must be judged by standards applicable to the state. See Burke & Reber, \textit{State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment}, 46 So. CAL. L. REV. 1003, 1074-82 (1973). See also Evans v. Newton, 382 U.S. 296, 306 (1966) (White, J., concurring).}
\footnote{51}{407 U.S. 163 (1972).}
\footnote{52}{Id. at 173 (quoting \textit{Reitman v. Mulkey}, 387 U.S. 369, 380 (1967)).}
\footnote{53}{Id. at 173.}
\footnote{54}{Id. at 179.}
\footnote{55}{412 U.S. 94 (1973).}
\footnote{56}{419 U.S. 345 (1974).}
\end{footnotes}
proved by an arm of the government.  

Flagg Brothers continued to constrict the state encouragement rationale by rejecting the argument that the state’s provision of a remedy encouraged the warehouseman’s sale to an extent sufficient to result in state action. The Court found no state encouragement, since the parties were merely authorized to use the remedy provided, and were not compelled to do so; the state was simply stating that it would not interfere with a private sale.

It seems clear after Flagg Brothers that the state encouragement rationale will not apply in the absence of some form of state compulsion. A possible exception to this interpretation is where the state has lent aid in some form to private racial discrimination, as was the case in Shelley and Reitman, and the action of the state itself is being attacked. As for Pollak, it is questionable after Jackson whether state review and authorization by a regulatory agency will ever by itself be enough to constitute state action.

C. State Intervention

The state intervention doctrine looks to action by the state intervening in and affecting the acts of private parties, and to the actions of

57. Columbia Broadcasting noted that in Pollak “Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it . . . .” 412 U.S. at 119. Jackson found Pollak distinguishable because there the government agency had its “imprimatur placed on the practice complained of.” 419 U.S. at 357.

58. The Court rested this view of the compulsion/acquiescence distinction on Moose Lodge. Justice Stevens, in his dissent to Flagg Brothers, read Moose Lodge more broadly. He noted that the state regulation requiring club licensees to adhere to their by-laws was “neutral on its face . . . and did not compel the Lodge to adopt a discriminatory membership rule.” 98 S. Ct. at 1741 n.4 (emphasis in original). Justice Stevens took the view that Moose Lodge stood for the principle that something less than compulsion would lead to a finding of state action. He further noted that § 7-210(5) went further than acquiescence by concluding the rights of the debtor to the property in regard to a good faith purchaser. 98 S. Ct. at 1741 n.5.

59. The only case in which Shelley has been applied as controlling precedent for finding state action is Moose Lodge, which also involved a race issue. State action should not turn on the importance of the interest at stake, however, since the interest is not even relevant to the inquiry, regardless of its importance, unless the requisite state action is present. Only after the state is determined to be involved does the importance of the interest come into play. But cf. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), discussed at note 2 supra.

60. It is notable that in both Shelley and Reitman the action attacked was that of the state, which was operating affirmatively in some way to facilitate private discrimination. Thus, in Shelley, the state’s power was being invoked to enforce a racially restrictive covenant and so frustrate a sale of property between two consenting parties. In Reitman, the challenge was to a state constitutional provision that authorized private discrimination that had been illegal under prior state law. It is unclear whether this state “encouragement” would have been enough to constitute state action sufficient to support an action based on the fourteenth amendment against the private conduct itself, as opposed to a challenge to the state action constituting the encouragement.
the state's agents. Creditor's remedy cases prior to Flagg Brothers consistently presumed a sufficient quantum of state involvement to find state action. Sniadach v. Family Finance Corp.\(^6\) assumed that state action was present in a wage garnishment where, by order of the court, the employer witheld one half of the debtor's wages. Fuentes v. Shevin\(^6\) found state action in a replevin of consumer goods by the sheriff following an ex parte hearing. Mitchell v. W.T. Grant Co.\(^6\) assumed state action in a sequestration by the sheriff of personal property bought under an installment sales contract, pursuant to a writ issued by a judge after an ex parte hearing. North Georgia Finishing, Inc. v. DiChem, Inc.\(^6\) also assumed state action in a wage garnishment order issued by a clerk that ordered the garnishee not to pay over money earned by the debtor.

Flagg Brothers, in the course of finding insufficient state involvement to constitute state action, distinguished these cases on two grounds. First, in the latter cases a "government official . . . participated in the physical deprivation of [the] plaintiff's property."\(^6\) Second, in North Georgia Finishing, the ministerial acts of clerks resulted in the seizure and impoundment of the debtor's property "by the affirmative command of the law of Georgia."\(^6\) Flagg Brothers emphasized the possessory nature of the warehouseman's lien, and noted that there was no state-ordered surrender of the property, but rather a self-help conversion of a "traditional lien into good title."\(^6\) Thus, under Flagg Brothers, the state intervention rationale leads to a finding of state action when an agent of the government participates in the private action and the conduct complained of results from the state's participation.

\(^6\) 98 S. Ct. at 1736 n.10.
\(^6\) Id. Justice Stevens, dissenting in Flagg Brothers, felt that North Georgia Finishing, Fuentes, and Sniadach were not distinguishable and that those cases did not turn on questions of "overt official involvement." Stevens argued that such cases as North Georgia Finishing "must be viewed as reflecting [the] Court's recognition of the significance of the State's role in defining and controlling the debtor-creditor relationship." 98 S. Ct. at 1743 (emphasis in original).
\(^6\) Id. at 1736 n.11. Justice Stevens argued that the lack of control exercised by the state in Flagg Brothers, which under the majority's view led to a finding of no state action, was the "very defect that made the statutes in [Fuentes] and North Georgia Finishing unconstitutional." Id. at 1743 (Stevens, J., dissenting). Furthermore, he argued, Mitchell was premised on the expectation that government would "provide a reasonable and fair framework of rules which facilitate commercial transactions;" Id. (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 624 (1974) (Powell, J., concurring)). Justice Stevens urged that "[t]his 'framework of rules' is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause." Id. at 1745.
III

Case Analysis

In Garfinkle, the California Supreme Court rejected the argument that the state's delegation of real property lien execution to private parties constituted a delegation of a public function. The validity of the contractual power of sale was first recognized by the court in 1859 and preceded the enactment of specific legislation defining judicial foreclosure proceedings. The court saw nonjudicial foreclosure as a traditionally private function that parallels judicial foreclosure, not as an exclusive function of the state.

The court's reasoning is consistent with the Flagg Brothers position that the delegated function must be both traditionally and exclusively a public one. Flagg Brothers noted that in both Marsh and Terry, all of the public functions of municipal services and elections were performed by private parties, and consequently the functions delegated were both traditionally and exclusively public ones. In Flagg Brothers, Flagg sought to distinguish the court's earlier finding of state action in the garageman's lien case of Adams v. Department of Motor Vehicles, on the basis that in Adams a "power traditionally and exclusively reserved to the state," had been delegated, whereas in Garfinkle the power of sale was "created by contract, not by statute." Id. Indeed, the reasoning of Adams as to the public function test is of doubtful validity after Flagg Brothers. Adams found that the garageman's lien statute delegated the "traditional governmental function of lien enforcement" by enabling the garage to sell and pass good title to a vehicle not owned by the garage. 11 Cal. 3d at 153, 520 P.2d at 965, 113 Cal. Rptr. at 149. Furthermore, the power of sale authorized under the garageman's lien statute, CAL. CIV. CODE § 3071 (West 1974), was an alternative remedy since the lien holder in Adams could also proceed judicially on the underlying debt. Thus, the statutory rights accorded the creditor by the state, while in furtherance of the traditional rights of the creditor, were not exclusive.

Not only is the public function reasoning of Adams doubtful following Flagg Brothers, but the Adams holding may also be dubious under the state intervention rationale of Flagg Brothers. The liens in both Adams and Flagg Brothers were possessory. Since there is no overt state involvement prior to sale, the procedure in Adams would not be state action under Flagg Brothers. See note 81 infra.

71. 98 S. Ct. at 1735. Nevertheless, the public function cases dealt not with exclusivity, but instead with the nature of the function performed. Exclusivity is just one factor in determining the traditional nature of the function. Functions normally exclusively performed by a state are traditionally state functions, but they are by no means the only traditional state functions. As was pointed out by Justice Stevens in his dissent in Flagg Brothers, the exclusivity rule would appear to conflict with the holding of Evans v. Newton, 382 U.S. 296 (1966), which held the operation of a park to be a public function. 98 S. Ct. at 1742 n.10 (Stevens, J., dissenting). Justice Stevens further noted that the nature of the function regulated by the state was the "nonconsensual transfer of property rights." Id. at 1741. Justice Stevens urged that the availability of other remedies is relevant to whether or not procedural fairness is accorded by a procedure, but it is irrelevant in determining whether a function is public. Id. at 1742 n.8. Furthermore, Justice Rehnquist's refusal to speak to the issue of whether the functions of "education, fire and police protection, and tax collection" may be delegated to private parties seems to belie his notion that exclusiveness is the litmus test of the public function doctrine. Id. at 1742 n.10.
Brothers the presence of other private remedies negated the position that lien execution was an exclusive state function. In Garfinkle, not only was nonjudicial foreclosure not an exclusive state function, it was not even a traditional one. Liens have been foreclosed privately for over a century.

The Garfinkle court found the statutory regulation of nonjudicial foreclosure insufficient state encouragement to warrant finding state action. The court argued that the comprehensive regulations neither compelled inclusion of a power of sale in the trust deed nor compelled the exercise of a power so included. The court also found insufficient encouragement in the state's recognition of the legal validity of title transferred to bona fide purchasers.

In rejecting the state encouragement theory, the Garfinkle court set a high threshold of encouragement for finding state action. Despite the lack of any state compulsion, it is clear that Civil Code section 2924 substantially encourages creditors to foreclose nonjudicially. Through section 2924 a creditor may give bona fide purchasers a conclusive presumption of valid title via a quick, efficient, and inexpensive procedure. The creditor's alternative is a lengthy and costly judicial foreclosure procedure. It is thus not surprising that resort to judicial foreclosure is the exception rather than the rule in California. Under these circumstances, one could argue that the state has supplanted judicial foreclosure with nonjudicial foreclosure through its statutory scheme.

Garfinkle's high threshold of encouragement, however, is consistent with the Flagg Brothers holding that providing a new remedy is not sufficient encouragement to find state action, in the absence of state compulsion. Furthermore, as Justice Stevens noted in his Flagg Brothers dissent, the warehouseman's lien statute in that case also concluded the rights of the debtor in relation to a good faith purchaser. Garfinkle made no attempt to define the limits of the encouragement threshold. Flagg Brothers, on the other hand, drew a stark distinction between acquiescence and compulsion. It did not specifically say that only compulsion will provide the requisite quantum of encouragement, but it is hard to imagine that anything less than compulsion would qualify. In short, the levels of state encouragement in both Flagg

72. 21 Cal. 3d at 278-79, 578 P.2d at 932, 146 Cal. Rptr. at 215.
73. Id. at 279, 578 P.2d at 932, 146 Cal. Rptr. at 215.
74. See J. Hetland, supra note 5, at 155-58.
75. Not only does judicial foreclosure take longer than nonjudicial foreclosure, but the purchaser may not take possession of the property for one year due to the one year statutory redemption period. CAL. CIV. PROC. CODE § 702 (West Supp. 1979).
76. 98 S. Ct. at 1741 n.5 (Stevens, J., dissenting).
Brothers and Garfinkle were clearly greater than mere acquiescence, but both failed to reach the requisite threshold.

Garfinkle's treatment of the encouragement rationale continues the trend of Moose Lodge and Jackson of shying away from an uncontrol- lable doctrine. But if the encouragement doctrine has reached the point where only compulsion will satisfy the threshold, as appears to be the case in Garfinkle and Flagg Brothers, then it has ceased to be an independent test, because compulsion will always satisfy the state intervention test discussed below.

Garfinkle rejected the argument that the state's pervasive regulation of nonjudicial foreclosure involved it in the procedures to a degree that resulted in state action. Specifically, the court found that the recorder's acts of recording notice of default, indexing requests for copies of notice of default or sale, and recording the trustee's deed following sale were "ministerial," and not "significant." These acts did not constitute state action because no significant official act preceded the vesting of title.

Garfinkle's conclusion is inconsistent with the Flagg Brothers interpretation of the Sniadach line of creditor's remedy cases. Flagg Brothers stated that state action would be found in the context of lien execution when a government agent participates in the procedure and when a deprivation of a property interest occurs as a result of that participation. The United States Supreme Court said that "the constitutional protection attaches not because, as in North Georgia Finishing, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia." It is the result that flows from the ministerial act that must be significant, not the ministerial act itself. In contrast, no state action was present in Flagg Brothers because the lien was possessory and the sale of the debtor's interest was accomplished without an "overt governmental act."

77. See id.
78. 21 Cal. 3d at 280, 578 P.2d at 933, 146 Cal. Rptr. at 216.
79. See text accompanying notes 65-67 supra.
80. 98 S. Ct. at 1736 n.10.
81. Id. at 1735-36 n.10-11. While the presence of overt government participation was the basis on which Flagg Brothers distinguished Sniadach, Fuentes, Mitchell, and North Georgia Finishing, the distinction is not convincing. The state's role is no less important when the state grants the holder of a possessory lien the right to sell another's property than when the state grants the holder of a nonpossessory lien the right to seize another's property and then sell it. The distinction between a simple conversion of a lien into good title and the state-ordered deprivation of a property interest is illusory. In both instances a property interest is taken and the taking results from the affirmative command of the law of the state.

Nevertheless, following Flagg Brothers, one must conclude that the reasoning of Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), is no longer valid. Not only was the public function argument accepted in Adams rejected in Flagg...
Flagg Brothers state intervention concept is that state action exists when the law operates, through the participation of state officials, to conclude important rights of the debtor and creditor in the property. In the California nonjudicial foreclosure procedure, the recorder's act of recording notice of default is a necessary precondition to the passage of title through nonjudicial sale. Absent such involvement, indefeasible title would not pass to the purchaser, and nonjudicial foreclosure would as a result be virtually useless to the creditor. Thus, the non-consensual transfer of the debtor's title is achieved only through the recorder's participation.

The acts of the recorder in the California nonjudicial foreclosure procedure exceed the mere "authorization" of private conduct conferred by the statute in Flagg Brothers. They are more akin to the "affirmative command of the state" that was present in the Sniadach line of cases. To illustrate this point, assume that a creditor conducts a defective sale by not notifying the debtor of the default or of the sale. If the creditor nevertheless records the appropriate documents with the recorder, the debtor cannot regain the property from a bona fide purchaser without notice. If, however, the creditor fails to record these documents, the debtor could regain the property, since failure to record would put the purchaser on constructive notice and thus prevent him from acquiring bona fide purchaser status. Even though there is no "affirmative command"—for example, a judge issuing a writ allowing the transfer of possession or title—it is clear that in this example the involvement of the recorder makes all the difference as to whether the

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Flagg Brothers, see note 70 supra, but Adam's treatment of the state intervention test was also rejected. Adams held that since the garageman's lien remedy was created by statute, and did not come from the decisional common law, the state had intervened sufficiently for a finding of state action. Flagg Brothers flatly rejected this proposition finding that the source of the state's authorization, whether statutory or decisional, was immaterial, 98 S. Ct. at 1738, and found insufficient state action since the lien was possessory (as was the lien in Adams) and therefore the lien holder was simply "convert[ing] his traditional lien into good title." Id. at 1736 n.11.

82. While it is true that Cal. Civ. Code § 2924 provides for a conclusive presumption in favor of bona fide purchasers when they receive a trustee's deed reciting compliance with the other provisions of § 2924, failure to involve the recorder by filing a notice of default would render this protection unavailable to a purchaser against the debtor. Since the notice of default is recorded within the property's chain of title, any purchaser would be chargeable with constructive notice of the trustee's failure to comply with the statutory requisites. Any such purchaser would not be without notice and thus the conclusive presumption would not operate in his favor. Therefore indefeasible title can only be transferred when the recorder is involved. See 3 B.E. Witkin, Summary of California Law 1892 (8th ed. 1973).

83. Indeed, if a nonjudicial sale could not pass "unimpeachable title," it would be of little use to the creditor who wished to foreclose his lien because there would be few purchasers at such a sale. See J. Hetland, supra note 5, at 156.

84. Although the debtor cannot regain the property from a bona fide purchaser, he nevertheless has an action for damages against the creditor when the sale is defective. See Gonzales v. Gem Properties, Inc., 37 Cal. App. 3d 1029, 1037, 112 Cal. Rptr. 884, 889 (2d Dist. 1974).
debtor is entitled to reclaim his property. The recorder's actions are analogous to an affirmative command of the state in the sense that the transfer of indefeasible title is "a result of" the recorder's actions.

The role of recordation procedures in finding state action was recognized in the earlier California Supreme Court case of Connolly Development, Inc. v. Superior Court. Although the Garfinkle court sought to distinguish Connolly on the basis that in the mechanics' lien procedure a judicial officer became involved prior to the vesting of title, it ignored the fact that the state action finding in Connolly also rested on the requirement of recordation of the lien in order to convey good title. Thus, contrary to the Garfinkle court's conclusion, the recorda-


86. Under the mechanics' lien procedure in Connolly, the lien could only be executed judicially, Cal. Civ. Code § 3144 (West 1974), whereas in Garfinkle the lien was executed nonjudicially. Thus, in the nonjudicial foreclosure procedure a judicial officer does not become involved until after title has passed, when an unlawful detainer action is brought. See Cal. Civ. Proc. Code § 1161a(3) (West 1972).

The Garfinkle court also sought to distinguish Connolly on the basis that the sale in Garfinkle was "authorized solely by the contract between the lender and the trustor," 21 Cal. 3d at 277, 578 P.2d at 931, 146 Cal. Rptr. at 214, while the lien in Connolly was authorized by statute. The court's distinction is too narrowly drawn. The statutory or contractual source of the authorization is not the sine qua non of state action, although statutory authorization could be a factor indicating the presence of state action. But as Flagg Brothers shows, statutory authorization by itself is insufficient, and may even be irrelevant. See 98 S. Ct. at 1738.

Furthermore, in Garfinkle, while the debtor agreed to permit the creditor, through his trustee, to enforce a power of sale upon default, the trustor did not agree to allow the lender to determine when a default had occurred. Although § 2924 provides that a power of sale shall be exercised "after a breach of the obligation," it does not specify who is to determine when a "breach" has occurred. By permitting the creditor to enforce its power of sale under § 2924 where the default is disputed, the Garfinkle court ruled, by implication, that the lender has authority to determine the "breach." Cf. More v. Calkins, 85 Cal. 177, 24 P. 729 (1890) (creditor required to sue to determine amount of debt when it was uncertain). The court's holding converts a private agreement allowing a nonjudicial sale on default into an agreement allowing a sale when the beneficiary alleges there is a default. The only source for this power is state authority, not the private contract. In this respect, the contractual source of the power of sale is immaterial to the existence of state action.

87. 17 Cal. 3d at 815-16, 553 P.2d at 645, 132 Cal. Rptr. at 485.

The Garfinkle court also sought to distinguish Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), on the basis that North Carolina's nonjudicial foreclosure procedure granted greater discretion to the county clergers than is given to California's county recorders. 21 Cal. 3d at 280, 578 P.2d at 932-33, 146 Cal. Rptr. at 216. But the two procedures are not comparable. The North Carolina procedure did not involve recordation prior to sale. N.C. Gen. Stat. § 45-21.17 (Michie 1966 & Supp. 1974). Yet the clerk was involved following the sale in auditing, approving, and recording a "final report and account" of the sale. 389 F. Supp. at 1253; N.C. Gen. Stat. § 45-21.33 (Michie 1966). The clerk was also required to verify the sale and was given power to punish for contempt in order to enforce the filing of a complete and correct report. N.C. Gen. Stat. § 45-21.26 (Michie 1966). Such a report was a "necessary precondition of the trustee's power to convey to the highest bidder at the auction." 389 F. Supp. at 1256. The clerk also administered an upset bid procedure, which is not present in the California procedure. N.C. Gen. Stat. § 45-21.27 (Michie 1966). The Garfinkle court failed to explain why California's conclusive presumption of compliance with foreclosure procedures, which makes such discretion unnece-
tion of the notice of default is significant state intervention in the nonjudicial foreclosure procedure, and therefore constitutes state action.

IV

Procedural Due Process

The court's finding of no state action mooted any consideration of whether California's nonjudicial foreclosure procedure complies with due process requirements. A finding of state action might have raised serious questions about whether the due process requirement of notice is satisfied under the present nonjudicial foreclosure procedure. The court recognized this when it suggested that the legislature might consider enacting procedures that would "insure that the defaulting trustor is apprised of the lender's decision to exercise the power of sale before the statutory time to cure the default expires."88

It is also questionable that the statutory scheme would satisfy due process requirements for a sufficient opportunity to be heard. Although the filing of a lis pendens upon commencement of an action to enjoin a proposed sale will nullify the conclusive presumption in the trustee's deed, the debtor nonetheless may be dispossessed of the property before the action is completed. Additionally, the injunction process, while perhaps adequate for the simple case, might prove inadequate where extensive discovery is necessary to ascertain the facts.90 Furthermore, the debtor is required to post a bond to protect the creditor's interest.91 The bond is unrelated to the creditor's potential loss because the creditor is already protected by the debtor's equity in the property.92 The bond requirement therefore poses an unnecessary obstacle to the debtor's obtaining a judicial hearing prior to loss of the property.93 Finally, the unlawful detainer proceeding is not an ade-

88. 21 Cal. 3d at 283 n.22, 578 P.2d at 934-35 n.22, 146 Cal. Rptr. at 218 n.22.
89. CAL. CIV. PROC. CODE § 409 (West 1973). Upon commencement of the injunctive action, the filing of a lis pendens would give a potential bona fide purchaser constructive notice of the pendency of the action.
90. See J. Hetland, supra note 5, at 162-63.
91. CAL. CIV. PROC. CODE § 529 (West 1972).
92. This view is premised on a real estate market in which prices are rising, or not declining. Such a market provides a cushion in the form of the debtor's equity to reimburse the creditor for his costs should he ultimately prevail.
93. Since injunctive relief is the only procedure available to a debtor to protect his property interests, unnecessary bond requirements might be viewed as conditioning his ability to protect his rights upon wealth. See generally Boddie v. Connecticut, 401 U.S. 371 (1971) (requirement of
quate hearing because the questions of validity of title may only be litigated to the limited extent of showing compliance or noncompliance with sections 2924-2924h following a nonjudicial sale. Thus, equitable defenses, such as failure to receive notice of or the existence of a default, may not be raised.

CONCLUSION

The court's finding of no state action in nonjudicial foreclosure is not supportable under either state or federal precedent. While present case law lends support for the court's public function and state encouragement analysis, the court erred in finding insufficient state intervention. Since the sale of the debtor's property is accomplished only through the aid of the county recorder, the reasoning of Flagg Brothers compels a finding of state action in Garfinkle.

Douglas Cole Grijalva*

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People v. Fogelson. The court held that a Los Angeles ordinance which made it a misdemeanor to solicit contributions on public property without permission was invalid on its face under both the United States and California constitutions, because it gave administrative officials unlimited discretion to grant or deny permission to engage in constitutionally protected forms of solicitation. As a result, the court reversed the conviction of a member of the Hare Krishna religious sect for soliciting financial contributions while distributing literature at Los Angeles International Airport.

The court noted that in evaluating the potential overbreadth of a statute which affects first amendment rights, it is not necessary to determine whether the particular activity involved is constitutionally protected. In Fogelson, the ordinance purported to reach a broad range of solicitation activities which were clearly protected, including solicitation...
tion of religious and political contributions, union memberships, and sales of protected literature. Moreover, the court suggested that even a distinctly commercial form of solicitation may be entitled to some form of protection under recent United States Supreme Court decisions.

The court acknowledged that solicitation in public places is not immune from all governmental regulation:

The state may, for example, reasonably regulate the time, place and manner of engaging in solicitation in public places. The state may also reasonably and narrowly regulate solicitations in order to prevent fraud or to prevent undue harassment of passersby or interference with the business operations being conducted on the property. However, in the area of First Amendment freedoms, including constitutionally protected forms of solicitation, the touchstone of regulation must be precision—narrowly drawn standards closely related to permissible state interests.

The Los Angeles ordinance was defective in that it contained no such standards to guide officials in exercising their discretion to grant or deny applications to solicit on city property.

Justice Mosk's concurring opinion emphasized that the court was leaving the way open for a city to "reasonably regulate the public conduct of mendicants, including those who purport to be motivated by religious fervor."

In reaching its result, the court tracked familiar, established first amendment analysis. In one respect, however, its use of the overbreadth concept went somewhat beyond recent United States Supreme Court doctrine. Under that Court's "substantial overbreadth" approach, which applies at least where "pure speech" is not affected, a facial attack on a statute or ordinance is allowed only if the law's deterrent effect on legitimate expression is "both real and substantial." The California court dealt in the abstract with the possible chilling effect of regulations that threaten to impose sanctions on free speech and the free exercise of religion, but it did not attempt to estimate the deterrent effect of the particular Los Angeles ordinance at issue.

Neither Chief Justice Bird's majority opinion nor Justice Mosk's concurring opinion attempted to suggest the kinds of regulation of time, place, and manner of solicitation in public places that would be permissible. The court seemed to assume that some solicitation must

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2. *Id.* at 163-65, 577 P.2d at 679-81, 145 Cal. Rptr. at 544-46.
3. *Id.* at 165 n.7, 577 P.2d at 681 n.7, 145 Cal. Rptr. at 546 n.7.
4. *Id.* at 165-66, 577 P.2d at 681, 145 Cal. Rptr. at 546 (citations omitted).
5. *Id.* at 168-69, 577 P.2d at 683, 145 Cal. Rptr. at 548 (Mosk, J., concurring).
6. The court noted that the ordinance appeared to extend to "city streets and parks, clearly First Amendment forums," as well as to public areas in municipal buildings, "which are also appropriate areas for exercise of protected activity." *Id.* at 167 n.9, 577 P.2d at 682 n.9, 145 Cal. Rptr. at 547 n.9.
be permitted in public airports. But is an airport the kind of "public forum" which must remain open to political and religious activity, subject only to regulation of time, place, and manner? Could a city totally ban such activity, leaving no discretion to administrative officials as to the time, place, manner, and type of activity which should be permitted?

Although the court properly did not explicitly attempt to balance the free speech and religion interests against the interest of airport patrons in being let alone, it reached a result which accommodated both. While noting that "individuals in public places cannot expect the same degree of protection from contact with others as they are entitled to in their own homes," the court is apparently receptive to reasonable regulations which, inter alia, protect passersby against undue harassment.

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Hardy v. Stumpf. The supreme court affirmed the denial of plaintiff’s petition for a writ of mandate instructing the City of Oakland to stop using a wall-scaling performance test for police officer applicants. In so doing, the court held that the City of Oakland’s requirement that all police officer applicants be able to scale a six-foot wall did not constitute sex discrimination denying equal protection of the law, and did not violate Title VII of the Civil Rights Act of 1964.

Plaintiff was a twenty-seven year old, five foot four inch, 118 pound female who applied for a position with the Oakland Police Department. She passed the department’s written test, but failed the physical agility test when she was unable to scale a six-foot wall. The wall-scaling requirement was part of a physical performance test devised by

10. 21 Cal. 3d at 166 n.8, 577 P.2d at 681 n.8, 145 Cal. Rptr. at 546 n.8.
11. Id. at 165, 577 P.2d at 681, 145 Cal. Rptr. at 546.

1. 21 Cal. 3d 1, 576 P.2d 1342, 145 Cal. Rptr. 176 (1978) (Clark, J.) (5-1 decision).
3. The test required an applicant to run 300 feet, scale a six-foot wall, walk across a balance
the City of Oakland in response to a court of appeal decision in a prior action between the same parties that invalidated height and weight requirements for police officer applicants.

In her equal protection challenge, the plaintiff argued that the wall-scaling requirement was subject to strict scrutiny as a gender-based classification and as impinging on the fundamental right to pursue employment recognized in *D'Amico v. Board of Medical Examiners*.

The court rejected both contentions, finding that the traditional "rational relationship" text governed. The challenged requirement was not considered a gender-based classification because it was gender-neutral on its face; the fact that the requirement had the effect of disqualifying a disproportionate number of females did not, standing alone, trigger the strict scrutiny test. Nor did the court recognize a fundamental right to become a police officer. Since law enforcement involves a close relationship to the public interest and welfare and requires certain physical skills and technical knowledge, such employment is not within the right recognized in *D'Amico*, which was limited to "a common occupation in the community." The fundamental right to pursue employment is limited to employment in common occupations; it presupposes the ability to perform the job in the first place.

Thus, confining itself to a lower level equal protection analysis, the court upheld the wall-scaling requirement as having a rational relationship to job performance. A job analysis survey of Oakland police officers indicated that one occasional duty was to scale walls and fences in the routine performance of their duties, and a city ordinance limited the height of fences to six feet. On this basis, the court concluded that the city's requirement that applicants be able to scale a six-foot wall was reasonable.

The court also rejected plaintiff's Title VII challenge. Plaintiff had established a disproportionate impact on women: six times as many men as women passed the new physical agility test. Under the rule beam, run another 300 feet, register 75 pounds on a grip dynamometer device, drag a 140-pound dummy for 50 feet, and raise it to a two-foot platform, all within two and one-half minutes. 21 Cal. 3d at 6, 576 P.2d at 1343-44, 145 Cal. Rptr. at 177-78.

5. *D'Amico*, 3 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). In *D'Amico*, the court held that the right to pursue a lawful occupation is fundamental if the employment sought is a common occupation within the community.
6. 21 Cal. 3d at 7-8, 576 P.2d at 1344-45, 145 Cal. Rptr. at 178-79.
7. *Id.* at 7, 576 P.2d at 1344, 145 Cal. Rptr. at 178.
8. *Id.*, 576 P.2d at 1345, 145 Cal. Rptr. at 179.
9. *Id.* at 8, 576 P.2d at 1345, 145 Cal. Rptr. at 179.
10. *Id.*
11. *Id.*
12. *Id.* at 11, 576 P.2d at 1347, 145 Cal. Rptr. at 181.
established in *Albemarle Paper Co. v. Moody,* this showing shifted the burden to the city to demonstrate that the test was job-related, a burden which the court found satisfied. This shifted the burden back to plaintiff to come forward with a test which was equally effective, but would reduce the impact on women. As plaintiff failed to offer such a test, the claim failed.

In finding the city had satisfied its burden of proving the test valid, the court also found that the test satisfied all relevant EEOC guidelines: the job analysis survey of Oakland police officers demonstrated that the wall-scaling requirement was significantly correlated to the job; the test had "practical significance," since it consisted of typical tasks required of police officers; it was unlikely that the skills could be learned in a brief orientation period; no subjective bias was possible since the test was graded on a pass/fail basis; the test required applicants to meet only normal expectations of police officer proficiency; and any failing applicant could take the test again.

Finally, the court rejected the argument that a particular EEOC guideline required current officers to pass the new physical agility test. The court construed the guideline to require only that any group which had been adversely affected by past discrimination be allowed to qualify under earlier less stringent standards if new, more stringent standards were employed. Since there was no showing that the new test was more rigorous, the court found the guideline inapplicable.

In dissent, Justice Tobriner found that the City of Oakland had failed to meet its burden of proving the validity of the new test under the relevant EEOC guidelines. The city had offered no empirical data indicating that the test could predict, or was significantly correlated with, work behavior, that wall-scaling could not be learned in a brief time on the job, that wall-scaling was a necessary prerequisite to