Note, South Dakota v. Brown: Judicial Enforcement of Governor's Duty to Extradite Fugitives

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SOUTH DAKOTA 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

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 inaction 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 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. COMPILED 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. Millsap, 257 App. Div. 40, 12 N.Y.S.2d 435 (1939); rev’d on other grounds, 251 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-

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.

11. UNIFORM CRIMINAL EXTRADITION ACT § 7 (11 U.L.A. 180 (West 1974)).
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.
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 unambiguous 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 533.) 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. 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, 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." 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, "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 federal and California 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; the Brown supreme court decision noted that cases subsequent to Manchester had characterized the duty as mandatory. 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 federal and California cases.

The Brown court itself recognized and retained the well-established mandatory characterization of this duty. 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. 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, but also raises supremacy clause questions of conflict with federal law which has uniformly stipulated a mandatory duty. 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. 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") and section 1549.2 ("if a demand conforms to the provisions of this chapter, the Governor . . . shall sign a warrant of arrest") 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.\textsuperscript{48} 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\textsuperscript{49} and discretionary\textsuperscript{50} 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 diisingenuous, 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.\textsuperscript{51} 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

\textsuperscript{48} Id. §§ 1547-1558.
\textsuperscript{49} Id. §§ 1548.1, 1549.2 (extradition of fugitives from another state).
\textsuperscript{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.\(^{52}\) Furthermore, these two sections were once part of the same statute which stipulated that section 1554 referred solely to such requisitioning warrants.\(^ {53}\) 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.”\(^ {54}\) 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.\(^ {55}\)

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-
ence that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings.56 The legislature applied both recognized mandatory language57 as well as recognized discretionary language58 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.59 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.60 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.61 A related canon of construction states that courts should presume a legislative intent to enact a constitutionally sound statute.62 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.63 Toward the end of the opinion, however, the court argued that the legislature intended to create a discretionary duty.64 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,65 and the California rule that mandatory gubernatorial duties are enforceable by writ of mandamus.66 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 76 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. 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. 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. It has not been found to depend on the legislature showing an intent that a mandatory duty be enforced by writ of mandamus.


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 McCauley v. Brooks, 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. This principle of separa-

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).
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).
71. 16 Cal. 11 (1860).
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. In short, the principle of separation was seen as one of restricted rather than absolute independence of governmental branches. Though the 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,” while in nondiscretionary areas, he “is subject, like every other citizen, to the law” and hence may be compelled to act by the judicial branch through the writ of mandamus. 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.

Since McCauley, a number of California cases—none of which were distinguished or even discussed by the majority in Brown—have held what McCauley stated in dictum, that the governor may be subject to a writ of mandamus. Some of these cases make explicit the constitutional basis for their holdings and regularly refer to McCauley as authority, thus implicitly reaffirming Chief Justice Field’s supremacy of law and separation of powers reasoning. In many cases, however, courts proceed directly from statutory interpretation for the purpose of defining the executive duty to a conclusion on enforcement. 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 Brown court.

Thus, the 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-

73. 16 Cal. at 41.
74. Id. at 40.
75. Id.
76. Id. at 41.
77. E.g., Whiteman v. Chase, 5 Ohio St. 528 (1856) (cited in the McCauley opinion as State v. The Governor of Ohio).
81. E.g., Stuart v. Haight, 39 Cal. 87 (1870).
forcement authorization that has been highlighted in a continuous line of cases since McCauley—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 McCauley 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.\(^82\) 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.\(^83\) 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.\(^84\) 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.\(^85\) Alternatively, the legislature may have purposefully deferred to judicial resolution, or may have desired for any number of reasons to leave the matter unresolved.\(^86\) The Brown court provided no

\(^{82}\) 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 *McCaughey* 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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