S. HRG. 108–463

CONFIRMATION HEARING ON THE NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEDNESDAY, OCTOBER 22, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:12 a.m., in Room SH–216, Hart Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, DeWine, Sessions, Craig, Chambliss, Cornyn, Leahy, Kennedy, Feinstein, Feingold, Shumer, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Welcome to the Committee. This morning, the Committee considers the nomination of California Supreme Court Justice Janice Rogers Brown to be United States Circuit Judge for the District of Columbia Circuit.

The last nominee considered for this court, Miguel Estrada, in my opinion, was treated shamefully by this Committee. He was badgered for adhering to the Code of Judicial Ethics, his record was distorted, and he was attacked for withholding information that he could not provide.

After such obstructionist tactics, this impressive Hispanic immigrant became the first appellate court nominee in history to be defeated by a filibuster. Many are proud of that fact, but I think it was a sad day for this institution.

Last month, the Washington Post observed that the judicial confirmation process is "steadily degrading." I believe that the nomination before us offers another opportunity, indeed, an obligation, to change this trend. The fight over judicial appointments is about more than the dispute of the moment. It is about who should govern; the people through their elected representatives or unelected and largely unaccountable judges.

President Bush describes his judicial nomination standard this way: "Every judge I appoint will be a person who clearly understands the role of the judge is to interpret the law, not to legislate from the bench. My judicial nominees will know the difference."

The powerful liberal groups fighting these nominees also know the difference, but they take a different view. They want to win, and since their interests often lose when legislators legislate, they

want the judges to do it instead. These groups, their strategy is like cooking spaghetti. They throw everything at the nominee, and when something sticks, the nominee is done.

Make no mistake, the single most important issue for these groups is abortion. Merely a suspicion that nominees may harbor personal pro-life beliefs is sometimes enough to prevent confirmation. Sworn testimony that they will follow the law despite their personal beliefs is not enough. Entire careers of demonstrating a commitment to the rule of law over their personal beliefs is not enough or satisfactory. Their personal beliefs alone are deemed disqualifying.

I do not personally know Justice Brown's personal view on abortion and, frankly, I do not care. Her decisions as a jurist are guided by the law, not her personal beliefs, which is one of the important marks of a good judge. Justice Brown, however, did one thing that liberal interest groups seem to not be able to forgive. She issued an opinion that would have found constitutional California's parental consent law. I expect we will hear a great deal about this case today, and it explains why, according to yesterday's Sacramento Bee, liberal groups plan to "bombard Senators with 150,000 pieces of opposition mail from abortion rights backers." In my book, that is what we call spam.

But Justice Brown faces a second hurdle beyond the abortion litmus test that all nominees face. She is a conservative African-American woman, and for some that alone disqualifies her nomination to the D.C. Circuit, widely considered a stepping stone to the United States Supreme Court.

Now, I want to make clear that I am not referring to any of my colleagues who are on the Committee, but let me show you what I am talking about; an example of how Justice Brown's attackers will sink to smear a qualified African-American jurist who does not parrot their ideology. It is a vicious cartoon filled with bigotry that maligns not only Justice Brown, but others as well—Justice Thomas, Colin Powell, and Condoleezza Rice. It is pathetic, and it is the utmost in bigotry that I have seen around here in a long time. I hope that everyone here considers that cartoon offensive and despicable. I certainly do. It appeared on a website called BlackCommentator.com.

Unfortunately, some of Justice Brown's opponents appear to share similar sentiments. I was deeply disappointed when, during a recent press conference, the all-Democrat Congressional Black Caucus applauded when one of its members said, "This Bush nominee has such an atrocious civil rights record that Clarence Thomas would look like Thurgood Marshall in comparison." To some of her opponents, Justice Brown is not even qualified to share the stage with the despised Justice Thomas.

Now, some of Justice Brown's other opponents will pull isolated bits and pieces from Justice Brown's rich and textured background in an attempt to discredit and belittle her accomplishments. Some may simply ignore any decisions they think would reflect positively on Justice Brown's judicial record, but I hope this hearing will be fair and open-minded. We owe Justice Brown no less.

We will hear more about Justice Brown's credentials and legal career, but let me just briefly highlight a few facts that are important I think for everybody to hear.

Justice Brown grew up the daughter of sharecroppers in segregated, rural Alabama. As a single mother, she worked her way through Cal State, Sacramento, and UCLA Law School. She has spent nearly a quarter-century in public service, including nearly a decade on different levels of the California appellate bench.

In 1996, she became the first African-American woman to sit on the California Supreme Court. She was retained with 76 percent of the vote in her last election. Let me repeat that—76 percent of the vote in California. I suspect that any member of this Committee would be pleased to garner 76 percent of the vote. Of course, Senator Leahy often gets that.

[Laughter.]

Chairman HATCH. This overwhelming vote of—

Senator LEAHY. My gosh, Orrin, you got something right. I agree with you on that one.

[Laughter.]

Chairman HATCH. I did not say the vote was good. I just said you get—

[Laughter.]

Chairman HATCH. Now, this overwhelming vote of confidence for Justice Brown by the people of California reflects that Justice Brown is hardly out of the mainstream; a conclusion buttressed by the fact that last year she wrote more majority opinions than any other justice on the California Supreme Court.

Those who know and have worked with Justice Brown confirm that she is what a judge is supposed to be. In a letter dated October 16th, 2003, a dozen of her former judicial colleagues, both Democrats and Republicans, wrote, "We know that she is a jurist who applies the law without favor, without bias, and with an even hand."

A bipartisan group of professors of California law schools wrote, "A fair examination of her work reveals that Justice Brown resolves matters as individual cases, not generalized or abstract causes."

They praise her for her "open-minded and fair appraisal of legal argumentation, even when her personal views may conflict with those arguments."

What more could we ask for in a judge? Not that this matters to the powerful special interests and political interests attacking Justice Brown. One report, for example, quotes prominently from an Op-Ed piece criticizing her opinion in an affirmative action case. To my surprise, the Op-Ed's author, Berkeley law professor, Stephen Barnett, was one of the signatories on the law professors' letter endorsing Justice Brown's nomination.

The powerful political interests opposing President Bush's judicial nominations want judges who will advance their narrow, leftist ideology. To them, results matter more than the law. That is the wrong standard. I hope the better stand prevails and that the downward slide of the confirmation process can be reversed. Let us seize this opportunity and make that happen today.

With that, I will turn to the distinguished Senator from Illinois.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman. Justice Brown, thank you for joining us this morning.

I would like to begin by putting this nomination in historical context. Justice Brown was nominated to fill the eleventh seat on the D.C. Circuit Court that has 12 authorized judgeships, but when President Clinton tried to appoint an eleventh and twelfth judge to this same court—Elena Kagan and Allen Snyder—the Chairman of this Committee denied them a hearing and a vote.

Senate Republicans argued the D.C. Circuit was fully operational with 10 judges. The D.C. Circuit's workload did not justify any additional judges. Since 1997, the D.C. Circuit's workload actually decreased by 27 percent according to the Administrative Office of the U.S. Courts.

I also want to note the oddity of President Bush traveling 3,000 miles away from Washington, D.C., to pick a judge for the D.C. Circuit. Perhaps it is not hard to understand. There are only 71,000 members of the D.C. Bar who might have been considered. I am told that it is rare for a President to appoint someone to the D.C. Circuit who does not practice in Washington and is unfamiliar with Federal agencies. I do not think there is any sitting member of the D.C. Circuit at this point who has had no background in D.C. or with Federal agencies. In Justice Brown, we have such a nominee.

The D.C. Circuit is a critically important appointment, second only to the U.S. Supreme Court in its impact on law and policy in America. It is a unique appellate court. Congress has granted an exclusive jurisdiction over some issues. Half the court's caseload consists of appeals from regulations or decisions by Federal agencies. For example, regulations adopted under the Clean Air Act by the EPA, labor management decisions of the NLRB, rules propounded by OSHA and many other administrative matters that affect Americans across the country typically end up in the D.C. Circuit Court.

I also want to make a final point before discussing Justice Brown and her record. Although Senators on this side of the dais will raise numerous concerns about her nominations, it should not be forgotten that the Senate has confirmed the vast majority of President Bush's judicial nominees. To date, we have confirmed 165 nominees and held up 3. The score is 165 to 3, for those who are following this process.

Republicans express outrage that three of President Bush's nominees have not received an up or down vote on the Senate floor, yet 63—63—of President Clinton's judicial nominees never received an up or down vote in this Committee. The 63 were either denied a hearing or a vote or both. They were victims of quiet filibusters in the Judiciary Committee. These 63 represent 20 percent of all of President Clinton's judicial nominees. By contrast, the three nominees held by the Senate represent 2 percent of President Bush's judicial nominees.

Our Federal judiciary is conservative and becoming more so. On the U.S. Supreme Court, seven of the nine justices were appointed by Republican Presidents. On our U.S. Court of Appeals, the courts of last resort for the vast majority of litigants, nine out of the Na-

tion's thirteen Circuit Courts today have a majority of Republican appointees. The D.C. Circuit is among them. Democrats have a majority on only two courts of appeal, two are equally divided.

Now, let me say a word about today's nominee. Justice Brown's life story, which the Chairman has alluded to, and her achievements are amazing, and I congratulate you on your appointment to the court in California. To your supporters, you are an eloquent and passionate voice for conservative values. In both your opinions and your speeches, you speak with great flair and great intellect. Others, however, tell a different story. They say you are a results-oriented judicial activist who fashions her opinions to comport with her politics. You are a frequent dissenter in the right-ward direction, which is quite a feat, given that you serve on a court that is made up of six Republican-appointed judges and only one Democrat.

I have conducted my own independent assessment of your record, and I must confess to some serious concerns. A few years ago, Justice Brown, you told an audience that, "Since I have been making a career out of being the lone dissenter, I really didn't think anybody reads this stuff."

Well, we do. You are a lone dissenter in a great many cases involving the rights of discrimination victims, consumers and workers. In case after case, you have come down on the side of denying rights and remedies to the disadvantaged. Oftentimes, you ignore established precedent to get there.

In a housing discrimination case, you were the only member of your court to find the California Fair Employment and Housing Commission did not have the authority to award damages to housing discrimination victims.

In a disability discrimination case, you were the only member of your court to conclude that, due to a technical reading of the law, the victim was not entitled to raise past instances of discrimination that occurred.

You are the only member of your court to conclude that age discrimination victims should not have the right to sue under common law, an interpretation directly contrary to the will of the California legislature.

You were the only member of the California Supreme Court who dissented in a case involving the sale of cigarettes to minors. All of the other justices ruled that a corporation can, on behalf of the public, sue a retailer that illegally sells cigarettes to minors under the State's Unfair Competition Law.

You were the only member of the California Supreme Court who would strike down a San Francisco law providing housing assistance to displaced low-income, elderly and disabled people.

You were the only member of the California Supreme Court who concluded there was nothing improper about requiring a criminal defendant to wear a 50,000-volt stun belt during the course of his trial.

You were the only member of the California Supreme Court who voted to overturn the rape conviction of a 17-year-old girl because you felt the victim gave mixed messages to the rapist.

You were the only member of the California Supreme Court who dissented in two rulings that permitted counties to ban guns or gun sales on fairgrounds and other public properties.

As an appellate court judge, you ruled that paint companies could use Prop 13 as a shield to avoid paying fees for the Childhood Lead Poisoning Prevention Act, a critical law used to evaluate, screen, and provide medical treatment for children at risk for lead poisoning. The California Supreme Court reversed you unanimously.

Justice Brown, in many of these cases there were clear precedents you chose to ignore. In other areas, Justice Brown, you were joined by a few of your colleagues, but again often in dissent. In the area of employment discrimination, you have concluded that victims who are repeatedly harassed in the workplace must take a back seat to the free speech rights of harassers. Your supporters point to this case as an example of your commitment to civil liberties. I see it as a commitment to ignoring clear, established U.S. Supreme Court precedent in this area of discrimination.

You have staked out a disturbing position on the sensitive issue of affirmative action. In the case of *High Voltage Wire Works* v. *City of San Jose*, you referred to affirmative action as, "entitlement based on group representation," and you equate affirmative action with Jim Crow laws. The chief justice of your court called your analysis, "unnecessary and inappropriate," and "a serious distortion of history."

In another civil rights case, another colleague accused you of "judicial law-making."

Justice Brown, your record is that of a conservative judicial activist, plain and simple. You frequently dismiss judicial precedent and stare decisis when they do not comport with your political views.

The Senate questionnaire that is sent to judicial nominees asks for your comments on judicial activism. Here is what you said, "Judicial integrity requires a conscious effort to subordinate any personal beliefs which conflict with proper discharge of judicial duties."

Justice Brown, I do not think your decisions follow your own advice. The ABA has given you a partial rating of not qualified. This is the lowest rating given thus far to any of President Bush's Circuit Court nominees. The ABA does not provide an explanation for their rating unless a nominee is rated fully not qualified.

When the California State Bar Commission evaluated you in 1996 and gave you a majority rating of not qualified for the California Supreme Court, the Commission stated that its rating was based, in part, on your "tendency to interject her political and philosophical views into her opinions."

I am concerned with the views you have taken, but I am also concerned with the ways in which you express them. Many of your court opinions and speeches are very harsh. In your solo dissent in the case involving cigarette sales to minors you wrote, "The result is so exquisitely ridiculous it would confound Kafka."

You also wrote that "The majority chooses to speed us along the path to perdition."

In an unfair competition law case, in which you were the sole dissent, you wrote, "I would put this sham lawsuit out of its misery."

In your solo dissent in the stun belt case, you lambasted the opinion of your colleagues and accused them of "rushing to judgment after conducting an embarrassing google.com search for information outside the record."

In your lone dissent in a discrimination case, you wrote that the majority "does violence to both the statute limitations and to the entire statutory scheme."

According to press reports, you and the chief justice of your court, a fellow Republican, are at such loggerheads you communicate only by memo.

Lastly, let me talk for a minute about the world according to you as you see it. It is a world, in my opinion, that is outside of the mainstream of America. For example, to Justice Brown, any attempt by the Government to protect victims or consumers is a sop to special interests. You criticize politicians for "handing out new rights like lollipops in the dentist's office."

You delivered a speech in which you said, "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to extract."

In a case involving a San Francisco housing law that helped the low income and elderly, you wrote, "Theft is theft, even when the Government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the Government."

Your dissent in the cigarette case accused the rest of your colleagues of creating a standardless, limitless attorney fee machine.

You criticized California's anti-discrimination agency, writing in a dissent, "Not only are administrative agencies not immune to political influences, they are subjected to capture by a specialized constituency. Indeed, an agency often comes into existence at the behest of a particular group, the result of a bargain between interest groups and lawmakers."

The list goes on and on. I am troubled by what you have written and said, but this is one that I think, frankly, puts you into a rare minority category when it comes to viewing where America is today, and here is what you wrote: "Where Government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies."

You described the year 1937, the year in which President Roosevelt's New Deal legislation started taking effect as "the triumph of our own socialist revolution."

Given that the Federal Government and its role in our lives is your major responsibility if you are appointed to the D.C. Circuit Court, I hope you can understand why some people have taken great issue with statements that you have made and the philosophy which you bring before this Committee.

Joining us today from the House of Representatives are Delegate Eleanor Holmes Norton, Elijah Cummings, and I think I saw Congressman John Conyers also join in reference to your nomination.

For these reasons, and many more as I have reviewed your record, I find it interesting that this position, which has become really the center point of controversy with the Miguel Estrada nomination, that the White House would not send us a nominee from this area closer to the mainstream, but once again challenge us to try to ask the hard questions to make certain that you or any nominee is deserving of a lifetime appointment to this position.

Thank you, Mr. Chairman.

Senator SPECTER. Mr. Chairman?

Chairman HATCH. The Senator from Pennsylvania?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Mr. Chairman, I had asked you before the hearing started for leave to make a brief statement, and I had asked that because I talked yesterday to a former Senator, former Governor, Pete Wilson, who called me about Justice Brown and also to make a comment about the cartoon that you have already referred to, but I would like to say just a little more, but I will be conscious of the time and the fact that customarily only the Chairman and the Ranking make statements.

Chairman HATCH. Go ahead, Senator, and then we will turn to Senator Leahy, who is ranking on this Committee, and then we are going to turn to the witnesses.

Senator SPECTER. Pete Wilson called yesterday. He was our colleague in the Senate for 8 years before he became Governor of California and had some very high words of praise for Justice Brown, and I wanted to pass that on at the opening part of the record because Mr. Wilson could not be here, and we have a practice of not having outside witnesses in, in any event.

I had not known you were going to make reference to this cartoon, but it is symptomatic of the presumption of problems which seems to precede nominees before they come before the Judiciary Committee for a hearing. It is a cartoon which has a very unflattering picture of Justice Brown—I had not known what Justice Brown looked like when I saw the cartoon. Now, that I see her, it is even a greater distortion than I had anticipated—and a caricature of President Bush saying, "Welcome to the Federal bench, Ms. Clarence, I mean, Ms. Rogers Brown. You will fit right in." And in the back are Justice Clarence Thomas, and Secretary of State Colin Powell, and National Security Adviser Condoleezza Rice.

And it seems to me that, while people have a right constitutionally to print such cartoons, that this Committee ought to be on special guard about prejudgment, and opinions have been expressed by many people really prejudging Justice Brown.

With great respect and deference to my colleague from Illinois, after listening to the Senator from Illinois, it seems to me that Justice Brown has been convicted without a hearing. I think that would be a good closing prosecutorial speech, but not an opening prosecutorial speech in the review of cases.

I do not believe that there is anything wrong with being a dissenter. I do that occasionally myself. In fact, some people think more than occasionally and too often.

[Laughter.]

Senator SPECTER. When I think of Holmes and Brandeis, and Black and Douglas, and Brennan, I think of many dissenters, and sometimes the dissenters have the majority opinion.

Now, Justice Brown, I do not know whether I am going to vote for you or not. I do not know enough about you at this point, but I have asked for a review of some of the cases because you have already been pigeon-holed and categorized, and I wonder what your real views are, and I intend to listen to what you have to say.

When the Senator from Illinois talks about a harassment case and your dissent out of touch with the precedence, that was a case where damages were awarded for comments which were verbal abuse in the workplace—I wanted to get the word exactly right—and you found, in dissent, that although the monetary damages were fine, that you could not have a prior restraint.

Now, I have not gone back over all of the prior restraint cases, but I remember Near v. Minnesota, the landmark case in the field, and you do not have prior restraint on speech cases. You just do not do that.

And when I have looked at your record on Fourth Amendment cases, I have seen you have a very broad interpretation of civil rights on Fourth Amendment cases. I had heard that you were unduly zealous on capital punishment cases, and I find your dissent in the case of Visciotti, where you said there was ineffective assistance of counsel on Sixth Amendment grounds. And as I have reviewed the case on parental consent, I want to hear more about that, where you said that the statute ought to be upheld on a narrow instruction, and the majority of the court concluded that there was a violation of the Constitution of privacy, that you should not have to ask for parental consent.

I want to see what you have to say about that. My views on that subject are well known, but I am not about to chastise you because your views are different from mine. I would like to hear what your judicial reasoning is.

I have a lot more to say, and I will have a chance to when my turn comes on the questioning, but I am again sorry to see that your nomination has already become entangled with prior nominations, and I say this with deference to the Chairman and with deference to the Senator from Illinois. I do not think Miguel Estrada has anything to do with Justice Brown. That is gone. We have had our say on that, and I do not think that a score of 165 to 3 means anything. I think the question is whether you are qualified to be a Court of Appeals judge for the District of Columbia, and it is a national court. It is right under the Supreme Court.

I am not surprised to see somebody from California nominated. As a matter of fact, I would like to see someone from Pennsylvania nominated. We do not have to take the judges inside the Beltway—

Senator SCHUMER. I nominate Arlen Specter.

Senator SPECTER. —or Vermont. It is a national court. I do not see in the world what the relevancy has to do with your nomination. We do not have to function solely within the Beltway. There are some qualifications outside the Beltway, but I do not like the way this hearing has started. I hope I like better the way it ends, although, again, I repeat, I do not know whether I am for you or against you, but I do think you are entitled to a fair hearing before

you are convicted, if you are to be convicted. You may be acquitted. You may be confirmed, but let us see, let us see what you have to say, and that is what a hearing is supposed to be about.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

I think everybody agrees on the offensive nature of the cartoon. I notice that we are keeping that website up for the TV cameras. I am wondering if we are doing a disservice by leaving that up and on. It is up to you, of course.

Chairman HATCH. I do not know what you are talking about.

Senator LEAHY. Is it not over there? Does it have the website showing on the bottom of that?

Chairman HATCH. I do not know.

Senator LEAHY. It does not? Oh, okay. Yes, it does. Well, I mean, that is your choice, Mr. Chairman, whether you want to keep broadcasting the website or not, but I would suggest you may want to take it down. I find that cartoon offensive, just as I find offensive some of the cartoons from the right that have attacked me on my religion and elsewhere for being on this Committee. All of these things are offensive. I agree with Senator Specter the Constitution allows it, no matter how offensive they have been toward me or toward you, Justice Brown, or anybody else, but I would also just correct one thing in the record. It was said this is the first hearing we have had on vacancies in the D.C. Circuit since Miguel Estrada. Actually, we had Mr. Roberts, a candidate of President Bush's for the D.C. Circuit, somebody I voted for, and he was confirmed and is now on the court.

And I do think that, as Senator Durbin said, that 165 passed, 3 not, is significant. There were, after all, 61 of President Clinton's that were not passed because they were never given a hearing or they were filibustered because one person, in effect, a silent filibuster because one person objected to them, and they never even got a hearing.

So I think that President Clinton would have been happy to have traded more than 60 of his that did not go through for the 3 of President Bush's that did not go through.

But today we are here for Justice Brown. Of course, her nomination is going to be considered at length. She has a record, both on the bench and off. Her record does raise a variety of concerns about her judicial philosophy and fitness for a lifetime appointment to the D.C. Circuit. We will look into the factors that made up the unqualified rating by some in ABA, but that is why the Constitution entrusted the appointment and confirmation of lifetime positions on the Federal court to not just one, but to two branches of Government.

I guess what we have to understand, the confirmation of lifetime appointments to the Federal judiciary, under our Constitution, is not just the province of one end of Pennsylvania Avenue, it is the province of both. The President can nominate whomever he wants,

but the Senate has to determine whether we will advise and consent to that, and I know the Committee takes the responsibility seriously.

I worry that some of us who have exercised our constitutional duty to examine the records of judicial nominees have been barraged by some on the right with shrill and unfounded name-calling because of it. I hope we can see the end of the ugly game. Senator Hatch has said this should end. I agree with him, but it should end on both sides.

When we opposed Charles Pickering, we were called anti-Southern. Of course, this overlooked the fact that 38 percent of the judges we have confirmed are from the South, even though the South makes up 25 percent of the Nation's population. The reason, of course, there were so many vacancies is that the Republicans refused to allow the confirmation of a large number of President Clinton's nominees. We put them through.

When we opposed Miguel Estrada, we were called anti-Hispanic, even though the record of Democrats supporting Latinos for the Federal bench is unmatched in American history.

When we opposed Priscella Owen, they were reduced to branding us being anti-women; a complaint that is so laughable it is hard to even mention it.

And in an especially despicable ploy that has not been seen in the Senate in modern times, when we opposed William Pryor, the right stooped to religious McCarthyism—religious McCarthyism—which has no place in the United States Senate. I do not believe it has any place in America.

So let us not do name-calling. Let us go to substance. When Senators of good conscience and true purpose ask serious, substantive questions of this nominee, let us stick to the substance and let the right-wing tactic of smears and name-calling subside and disappear. Let us not see the race card dealt from the shameful deck of unfounded charges that some stalwarts of this President's most extreme nominees have come more and more to rely upon as they further inject partisanship and politics into the appointment and consideration of judges who are being nominated to be part of an independent, nonpartisan, nonpolitical judiciary.

No matter what position any Senator takes in this nomination, whether it is in support or opposition, I know that it will not be taken because of race. Maybe those who ultimately support Justice Brown, even though they oppose affirmative action, they will be doing that because they believe she will be even-tempered and evenhanded. Those who oppose her will do so because they retain serious doubts about her nomination or see her as an ideologue or judicial activist.

Now, because of her record, her record to date, several organizations do oppose Justice Brown's confirmation, including the Nation's premier African-American Bar Association, the National Bar Association, its State counterpart, the California Association of Black Lawyers, the foremost national civil rights organization, the Leadership Conference on Civil Rights, and the entire membership of the Congressional Black Caucus, including the delegate from the District of Columbia, where this court sits, Delegate Eleanor Holmes Norton.

Now, I would hope these groups and individuals are not going to be accused of being anti-African American in the way Hispanic organization leaders were maligned because they had opposed Miguel Estrada.

Let us hope during the questioning and the debate we focus on substance because there is much to discuss. Justice Brown's record gives us a lot to discuss, and that is what it is for. I think she should have an opportunity to explain her views and respect for precedent, on judicial activism, on statutory interpretation, free speech, civil liberties, limitation of damages, deference to jury verdicts and the standards of review that apply to infringement of constitutional rights.

She has written opinions or spoken on all of these topics and more. And actually on some of them I find it hard to reconcile what she says on 1 day with what she may say on another on the same subject, but we will ask about that.

This court is the most prestigious and powerful appellate court below the Supreme Court. We have chosen here in the Congress to vest the D.C. Circuit with exclusive or special jurisdiction over cases involving environmental, civil rights, consumer protection and workplace statutes.

We saw what happened when a number of President Clinton's nominees were sent up here—Elena Kagan, Alan Snyder. They were nominated. They were never even allowed a Committee vote or Senate consideration. Dean Kagan, who now heads the Harvard Law School, never even received a Committee hearing. She may feel she is better off.

But we have Justice Brown is this President's third nomination to the D.C. Circuit. All have received hearings. John Roberts was voted through this Committee. As I said, I voted for him, and then he was confirmed by the Senate to the D.C. Circuit.

So, Mr. Chairman, I thank you for your consideration. Let us go forward on the merits. Let us leave the posturing and the name-calling off this Committee. Every one of the Senators has a grave duty under the advise and consent provision, and that is what we should do. We should not be called anti-Catholic, anti-black, anti anything else up here. We are United States Senators who try our best to do our duty and uphold our constitutional—

Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Cornyn, we will take—

Senator SCHUMER. Mr. Chairman, could I just make a brief statement? You are letting some—

Chairman HATCH. I agreed to the four, but I want to get to the hearing, and we will give enough time for you to make statements during your question period.

Senator Cornyn?

PRESENTATION OF JUSTICE JANICE R. BROWN, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, and I hope this microphone is working. I cannot really tell, but I think I hear—

Senator LEAHY. Pull it closer, John. Pull it a little bit closer.

Senator CORNYN. All right. Unaccustomed, as I am, to assuming this position before the Committee, I do it with a little trepidation and perhaps a little awkwardness, but—

Senator SESSIONS. Trust me, it is better up here than down there.

Senator CORNYN. Mr. Chairman, Senator Leahy, I am privileged to introduce to the Committee today a distinguished jurist from the California Supreme Court, Justice Janice Rogers Brown, who has been nominated to serve on the D.C. Circuit Court of Appeals.

I must confess to feeling like I am a participant in a kabuki performance, to some extent, already, but let me do the job that I have gladly embraced here by introducing this fine person and this fine judge to the Committee.

As you know, Mr. Chairman, one-fourth of the D.C. Circuit Court of Appeals is currently vacant. And as you also know, the Presidents traditionally look across the Nation for highly qualified individuals to serve on this important court, from Judge Karen LeCraft Henderson, a former Federal judge on the District Courts of South Carolina to former University of Colorado law professor, Stephen F. Williams, and former University of Michigan law professor, Harry T. Edwards.

Justice Brown has almost 10 years of experience as an appellate judge. As others have recounted, she was first appointed to the Court of Appeals in 1994 and then to the Supreme Court in 1996 and has had a distinguished record on that court as a judge.

As judge—and I will ask that the first chart be put up—as judge, Justice Brown has received strong support from Californians. As you can see, Justice Brown, during the 1998 election, she was one of four justices of the California Supreme Court, including the Chief Justice, who were up for retention elections, and California voters supported all four of those justices.

Justice Brown received a yes vote of 76 percent of California voters, the highest vote percentage of all four justices, and hardly the vote of confidence for somebody who can be fairly or accurately characterized as out of the mainstream.

Justice Brown, along with her colleagues, also received strong support from one of her State's largest newspapers, the San Francisco Chronicle. As the Chronicle editorialized, "It takes judges with deep respect for the law and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the right outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary by retaining Supreme Court justices who have all demonstrated a commitment to sound decision-making. If you don't like the law or if it conflicts with the State Constitution, change it. The judiciary's job is to make sure the laws are applied fairly. Brown and her colleagues have approached this duty with diligence, and integrity and should be retained." And, indeed, she was.

I am extremely impressed, Mr. Chairman, by Justice Brown's extensive record of dutiful public service, but of course there is more to Justice Brown than just her resume. Indeed, sometimes during the hearings on these nominees, I feel like the nominees become a

symbol or perhaps a caricature, and we fail to recognize that they are real, live human beings.

As a strong, yet modest, person, Justice Brown may not feel comfortable talking openly about her personal life story, but I hope that members of the Committee will ask her about it, and I believe the Chairman has already alluded to the fact that she was born in Alabama as the daughter of sharecroppers.

She is personally all too familiar with the scourge of racism and segregation. She came up of age in the midst of Jim Crow policies in the South. She grew up listening to her grandfather's stories about NAACP lawyer, Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks. And her experience as a child of the South motivated her desire to become a lawyer and then a judge.

After her father later joined the Air Force, she became, like me, a military brat, traveling with her family from military base to military base. I am pleased to observe that her travels included several years in the great State of Texas, including childhood stints in Fort Worth and in San Antonio, at Lackland Air Force Base, where my father was likewise stationed.

Given Justice Brown's childhood and life experiences facing racism, I was especially alarmed by what I have seen and what I have heard from some of her opponents, and indeed the despicable racist cartoon that some of her opponents are using to smear her has already been displayed in this hearing, and I, for one, hope that rather than take it down, we keep that cartoon up during the remainder of this hearing, and I hope we also hear from this Committee a denunciation of such low and unworthy tactics, certainly beneath the dignity of this body, and I believe beneath any sort of semblance of civilized discourse.

Some have alleged that Justice Brown singlehandedly dismantled affirmative action in California. As a former State Supreme Court justice myself, I can tell you that these critics have no understanding of the law or how judges operate under our system.

In 1997, California voters amended their State Constitution by approving Proposition 209. As you can see on the easel, the California Constitution states in language that you do not have to be a lawyer to understand, "The State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race in the operation of public employment, public education or public contracting."

Because of the clear terms of Proposition 209, the United States Supreme Court recently noted that in California racial preferences in admissions are prohibited by State law. Do Justice Brown's critics also disagree with Justice O'Connor who authored the opinion or Justices Stevens, Souter, Ginsburg and Breyer, who joined her?

All Justice Brown did was her job. She authored a majority opinion for a unanimous Supreme Court, in forcing the clear terms of Proposition 209. Indeed, every single judge involved in the case at the trial court, the Court of Appeals, and the Supreme Court agreed with her. They agreed that the challenged San Jose program violated the will of the voters as expressed in Proposition 209.

Then-Justice Stanley Mosk, the court's leading liberal, according to the San Francisco Chronicle, not only joined Justice Brown's

opinion, he also wrote his own concurring opinion, stating that I agree with the court, with the substance of its analysis and, if anything, I would go farther than it does.

If critics do not like Justice Brown's decisions, they should change the law, rather than attack her for doing the job that she is sworn to do as a judge by faithfully interpreting the intent of that law. She is just doing the job that we ask judges to do, not as politicians, but as judges. I will quote the San Francisco Chronicle, again. "If you do not like the law or if it conflicts with the State Constitution, change it." But I fear we are attacking the messenger.

Others have criticized Justice Brown for her willingness to enforce a common-sense law enacted by the California legislature. The law would have required parental consent before a minor could obtain an abortion, which is similar to laws throughout the country. But the California Supreme Court issued a divided 4 to 3 opinion, invalidating the law. Justice Brown would have deferred to the State legislature and enforced the law. She was hardly alone in that view, and again then-Justice Stanley Mosk, the court's leading liberal, as called by the San Francisco Chronicle, also voted to uphold the law.

Indeed, according to a June 2000 Los Angeles poll, 82 percent of Americans support parental consent laws, and the year after Justice Brown issued her opinion, the Chronicle published the editorial I mentioned earlier. That editorial praised Justice Brown and her colleagues and supported her retention election.

Mr. Chairman, I join others on this Committee and in this body in expressing my deep concern about the hostility and destructiveness of the judicial confirmation process. And the Senator from Pennsylvania has aptly pointed out we are convicting people for certain beliefs, and thoughts and statements before they have even had an opportunity for a hearing.

If this continues much longer, I fear that fine jurists and fine human beings, like Justice Brown, will just simply quit accepting nominations to the Federal bench, and all Americans will lose as a result.

Senators should vote their conscience, no doubt about it. Every judicial nominee deserves a vote on the basis of reasonable criteria and the merits, and not on the basis of special interest group politics or other divisive criteria or slanderous racist cartoons such as we have seen depicted here.

I hope this Committee and the Senate will confirm this exceptional judicial nominee, Justice Janice Rogers Brown.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator. I appreciate it.

Justice Brown, would you please rise and raise your right hand.

Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice BROWN. I do.

Chairman HATCH. Thank you.

Justice Brown, if you would care to, introduce your husband and anybody else who you care to introduce, and if you would care to make an opening statement, we would love to have it at this time.

STATEMENT OF JUSTICE JANICE BROWN, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Justice BROWN. Thank you, Mr. Chairman. It is my pleasure to be here. I am honored to come before this Committee, and I am anxious.

I would like to introduce my husband, who is the only actual family member who is here with me. His name is Duane Parker.

Chairman HATCH. Would you please stand, Mr. Parker. We are honored to have you with us.

Justice BROWN. And I would, also—there are many other people here who are like family to me, and the proof of that is that even though I sternly told them not to attend this hearing, they came anyway. I do not want to introduce all of them, but I would like to acknowledge a few of them.

A couple of my attorney staff are here, Susan Sola and Danny Chou.

Chairman HATCH. If you would stand, please. We are honored to have you here as well.

Justice BROWN. And a very dear and long-time friend, Judge Patricia Esgro.

Chairman HATCH. Judge, we are honored to have you with us. Would you care to make any other statement?

Justice BROWN. I was not going to make an statement, but something has come up that I think I should respond to.

I was not going to bring up that cartoon, but since a lot of people have, there is something that I would like to say. The first thing that happened was I talked to my judicial assistant yesterday. Her voice sounded very strange, and I said to her, "What is wrong? What is happening?" And I realized that she sounded strange because she was choking back tears. And when I asked her what was wrong, she really started to cry. She is a very composed, very calm woman, and she started to cry, and she said, "Oh, Judge, these horrible things, you haven't seen what they've done."

And I, of course, was not there to comfort her. I have been here meeting with anybody who would meet with me, but while I have been having those meetings, people have said to me, "Well, you know, it's not personal. It's just politics. It's not personal." And I just want to say to you that it is personal. It's very personal to the nominees and to the people who care about them.

I have dealt with hatred and bigotry in my life, and I can't tell you how distressing I find it to see this cartoon, which is intended to be so demeaning to a group of black people, and to know that it was circulated by other black people. But like the other Senators have noted, I have always argued that the First Amendment permits this kind of expression, no matter how offensive, and I haven't changed my mind just because it's been directed to me.

I had not seen the cartoon when I was talking to her, and I asked my husband, "Well, what is it? What does it say?"

And he said, "Well, there's Colin Powell."

And I said, "Colin Powell is in this cartoon?"

And he said, "Yes, and Condoleezza Rice."

I said, "I'm in a cartoon with Colin Powell and Condoleezza Rice? Wow. I'm in good company."

So I am going to look at this as an unwitting compliment to me and not focus on the vicious motivation for it, and that's all I wanted to say.

[The biographical information of Justice Brown follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

My legal name is Janice Rogers Brown; my maiden name was Janice Olivia Allen. Other names used: Janice O. Rogers.

2. Address: List current place of residence and office address(es).

Residence:

Rancho Murieta, California 95683

Office:

California Supreme Court
350 McAllister Street, 4th Floor
San Francisco, California 94102

3. Date and place of birth.

May 11, 1949, Greenville, Alabama.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I am married, and my spouse's name is Duane Allen Parker. He performs under the name Dewey Parker and most people know him by that name. He is a musician and is self-employed.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

California State University, San Francisco (1967-1969)
California State University, Sacramento (1972-1974)
B.A., Economics (1974)
University of California, Los Angeles, School of Law (1974-1977)
Juris Doctor (1977)
University of Virginia, School of Law (2002-present)
Graduate Judges Program
LL.M. expected 2004

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1999 - Present	Member Board of Regents University of the Pacific
1999 - Present	Member Board of Regents Pepperdine University
1996 - Present	Associate Justice California Supreme Court
1998 - 1999	Adjunct Professor University of the Pacific McGeorge School of Law
1994 - 1996	Associate Justice California Court of Appeal Third District
1994 - 1996	Member Community Learning Advisory Board Rio Americano High School Academia Civitas
1991 - 1994	Legal Affairs Secretary State of California Governor Pete Wilson
1990 - 1991	Senior Associate Nielsen, Merksamer, Parinello, Mueller & Naylor
1987 - 1990	Deputy Secretary & General Counsel State of California Business, Transportation & Housing Agency

1979 - 1987	Deputy Attorney General Attorney General's Office California Department of Justice
1977 - 1979	Deputy Legislative Counsel State of California Legislative Counsel Bureau

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Not applicable.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Honorary Law Degrees:
Pepperdine University School of Law
Southwestern University School of Law
Catholic University of America School of Law

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Bar Associations:

California State Bar (1977-1994)
Sacramento County Bar
Sacramento Women Lawyers
Women Prosecutor's of California (1991-1994)

Legal or judicial related committees or conferences:

Commission on the Future of the Courts (1991-1993)
Judicial Council Judgeship Needs Standing Advisory Committee (1993-1996)
California Judges Association Civil Justice Committee (1994-1996)
Judicial Council of California, Family and Juvenile Standing Advisory Committee (1996-1998)
Governor's Child Support Task Force (1993-1994)

Statewide Advisory Committee for the Office of Criminal Justice Planning's Minority Round Table (1987-1989)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The only organization to which I now belong that might do some limited lobbying is the California Judges Association.

Other organizations:

American Judicature Society
California Supreme Court Historical Society
Rancho Murieta Homeowners Association

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

California Supreme Court	12/28/77
U.S.D.C. Eastern District of California	10/02/81
Supreme Court of the United States	4/18/83
U.S.D.C. Northern District of California	2/5/85
U.S. Court of Appeals (9th Cir.)	9/6/85

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published Articles (Tab 1):

Brown, *California Supreme Court Sesquicentenniel Celebration*, Cal. Historical Society Newsletter (2000) p. 3.
Brown, *Unstrung Heroes: The Role of Public Lawyers* (1996) Public L.J. 2.

Brown, *Politics: A Vision for Change*, The Docket (Dec. 19, 1993) p. 13.
Brown, *The Quality of Mercy* (1992) UCLA L.R. 327

Speeches:

Listed below are speeches which reference constitutional or legal policy issues. Copies are attached.

Hyphenasia: The Mercy Killing of the American Dream
McGeorge School of Law
May 15, 1995 – Sacramento Tab 2

Law Day Speech to the
Sacramento Co. Bar Association
May 1, 1996 – Sacramento Tab 3

The Situation is Hopeless But Not Desperate:
The Once and Future Role of Lawyers in America
(With Bibliography)
L.A. Barristers Club – Summer Associates Dinner
July 24, 1996 – Los Angeles Tab 4

How Open Do We Have to Be?
(With Bibliography)
San Diego National Business Women's Forum
San Diego Chamber of Commerce
March 27, 1997 – San Diego Tab 5

Head First Out of Eden
(The Once and Future Legal Profession)
(With Bibliography)
Pasadena Bar Association – Law Day
May 1, 1997 – Pasadena Tab 6

Resistance is Futile
(With Bibliography)
CJER Research Attorneys Institute
Friday, September 26, 1997
Anaheim, CA Tab 7

"Soulfood: The Diet for the Virtuous Lawyer"
California League of Cities
Monday, October 13, 1997
San Francisco, California Tab 8

The History of the World – Part 3,912
Senior Legislative Drafting Seminar
Institute of Legislative Practice
McGeorge School of Law
Friday, November 21, 1997
Sacramento, California Tab 9

Character And Good Principle:
"The Wind Beneath Our Wings"
American Association of
Welfare Attorneys (W/Bib. in Footnotes)
December 7-8, 1997
San Diego, California Tab 10

California Lincoln Clubs
Justice of the Year Award
December 11, 1997
Los Angeles, California Tab 11

Hearts Touched With Fire
Pepperdine School of Law
Commencement Address
May 22, 1998 Tab 12

Higher Ground
St. Thomas More Society of Santa Clara County
Thursday, October 15, 1998 Tab 13

It's Not Cool Being Mean
Sonoma County Bar Association
Pro Bono Awards Luncheon
Fountain Grove Country Club
November 20, 1998 Tab 14

Justice Puglia Retirement Dinner
February 18, 1999 Tab 15

Frederick Douglas Moot Court Competition
Introductory Remarks
Hyatt Hotel, Fisherman's Wharf, San Francisco
February 25, 1999 Tab 16

Hyphenasia: The Mercy Killing
of the American Dream II
Claremont McKenna College
Constitution Day
September 16, 1999 Tab 17

California Supreme Court
Politics 101: Back to the Future:
CLRE Awards Ceremony
Sacramento Association of Realtors
February 29, 2000 Tab 18

"A Whiter Shade of Pale": Sense and Nonsense -
The Pursuit of Perfection in Law and Politics
The University of Chicago Federalist Society
April 20, 2000 Tab 19

"Holding Everything Up"
Address to the Black Women Lawyers
Claremont Resort
May 21, 2000 Tab 20

Fifty Ways to Lose Your Freedom
Ninth Annual Public Interest Law Students Conference
The Institute for Justice
August 12, 2000 Tab 21

"Truth, Justice & The American Way"
FBI National Academy Associates Luncheon
November 16, 2001 Tab 22

"Novus Ordo Seclorum—Again?"
Orange County Federalist Society Luncheon
Thursday, October 24, 2002 Tab 23

Keepers of the Faith; Defenders of the Light
(Deus Lux Mea Est)
Catholic University of America
Columbus School of Law
Commencement Address
May 24, 2003 Tab 24

13. Health: What is the present state of your health? List the date of your last physical examination.

The present state of my health is good.

My last complete physical was conducted on 12/5/02. I had a more limited employment physical in conjunction with this application on May 30, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In this state, appellate judges are initially appointed by the Governor and then required to run for retention in the first eligible election.

1996-present:	Associate Justice, California Supreme Court. This is the California Court of Last Resort which has statewide jurisdiction.
1994 - 1996	Associate Justice, Third District Court of Appeal. This is an intermediate appellate court. Its jurisdiction extends from Kern County in the south to the Oregon border on the north, covering all the interior counties.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism

of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Citations for the 10 most significant cases:

People v. ex rel. (Gallo) v. Acuna (1997)
14 Cal.4th 1090.
American Academy of Pediatrics v. Lungren (1997)
16 Cal.4th 307, 418 (Dis. Opn.)
Landgate, Inc. v. Cal. Coastal Commission (1998)
17 Cal.4th 1006, 1035 (Dis. Opn.)
Aguilar v. Avis Rent-A-Car System, Inc. (1999)
21 Cal.4th 121, 189 (Dis. Opn.)
Lane v. Hughes Aircraft Company (2000)
22 Cal.4th 405, 421 (Maj. & Conc. Opns.)
Kasler v. Bill Lockyer, as Attorney General (2000)
23 Cal.4th 472, 503 (Maj. & Conc. Opns.)
Hi-Voltage Wire Works v. City of San Jose (2000)
24 Cal.4th 537.
Kasky v. Nike (2002) 27 Cal.4th 601,628 (Dis. Opn.)
Pavlovich v. Super. Ct. (2002) 29 Cal.4th 262.
Beck v. Wecht (2002) 28 Cal.4th 289.

(2) Summary of cases reversed or criticized:

a) Reversals
Sinclair Paint v. State Board of Equalization (1996) 52 Cal.Rptr.2d 572
Paint manufacturer challenged constitutionality of fees assessed under Childhood Lead Poisoning Prevention Act. The case presented the purely legal question of whether these exactions were properly characterized as "fees" or "taxes." The label had constitutional significance because post-Proposition 13 imposition of taxes required a two-thirds vote of the Legislature. The trial court concluded these fees were taxes and granted summary judgment for the plaintiffs. I agreed. Although the line between fees and taxes is admittedly blurred, an exaction

designed primarily to raise revenue and unrelated to regulation of the on-going business was deemed, under existing precedent, to be a tax. The California Supreme Court granted review and reversed, holding that an exaction which raises revenue to mitigate past damages could be characterized as a regulatory fee. (*Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866.)

c) Depublication
People v. Ramsey (1995) 39 Cal.Rptr.2d 3
Defendant, whose convictions for murder and robbery had been affirmed, was retried on special circumstance issue of whether murder was committed to facilitate robbery. The Shasta County Superior Court entered judgment on jury verdict that special circumstance was established, and appeal was taken. We held the jury could properly be instructed that it could not redetermine defendant's guilt of robbery and murder, but only whether murder was committed to facilitate robbery.

(3) Other opinions dealing with state or federal constitutional issues:

Loder v. City of Glendale (1997) 14 Cal.4th 846, 933 (Conc. & Dis. Opns.)
Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 584 (Dis. Opn.)
San Remo Hotel L.P. v. City and County of San Francisco (2002) 27 Cal.4th 643, 691 (Dis. Opn.)
Keenan v. Super.Ct. (2002) 27 Cal.4th 413, 417 (Conc. Opn.)

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Not applicable

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a judicial law clerk.

2. whether you practiced alone, and if so, the addresses and dates;

I have never been a sole practitioner.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1996 - Present	Associate Justice California Supreme Court 350 McAllister Street San Francisco, California 94102
1998 - 1999	Adjunct Professor University of the Pacific McGeorge School of Law 3200 Fifth Avenue Sacramento, California 95817
1994 - 1996	Associate Justice California Court of Appeal Third District 914 Capitol Mall Sacramento, California 95814

1991 - 1994	Legal Affairs Secretary Governor Pete Wilson State of California State Capitol Sacramento, California 95814
1990 - 1991	Senior Associate Nielsen, Merksamer, Parinello, Mueller & Naylor 770 L Street, Suite 800 Sacramento, California 95814
1987 - 1990	Deputy Secretary & General Counsel State of California Business, Transportation & Housing Agency 980 9th Street, Suite 2450 Sacramento, California 95814
1979 - 1987	Deputy Attorney General Attorney General's Office California Department of Justice 1300 I Street Sacramento, California 95814
1977 - 1979	Deputy Legislative Counsel State of California Legislative Counsel Bureau State Capitol, Suite 3021 Sacramento, California 95814

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

See below.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I am currently an appellate judge. I began my judicial career at the appellate level and have been on the bench eight and a half years - seven years on the Supreme Court. The

nature of the work is self-evident and at the Supreme Court level all of the work product is published.

Before being appointed to the bench, I served as legal counsel (Legal Affairs Secretary) to Governor Pete Wilson, members of his cabinet and senior staff, and provided advice concerning litigation, legislation, and the legal implications of proposed policies. The Legal Affairs Office also monitored all significant state litigation, had general supervisory responsibility for departmental counsel, and acted as liaison between the Governor's Office and the Attorney General's Office when representation or client advice was needed. In this capacity, I sometimes drafted briefs, although front-line involvement in litigation was rare. I was involved in strategic decisions and reviewed the briefs in cases of special interest to the Governor. In addition, I handled all requests for executive clemency, and during my tenure, the office developed procedures for parole decision review and negotiations for Indian gaming compacts.

I spent a year in private practice in the Government Law section of a private law firm, specializing in issues related to energy, environment, and managed health care.

As a Deputy Secretary for the Business, Transportation and Housing Agency (BT&H), I supervised state business regulatory departments - banking, real estate, corporations, savings and loans, and insurance (before it became independent). That assignment required me to become familiar with the major legal and policy issues related to financial industries, such as the regulatory restructuring of financial institutions and the savings and loan bailout. I chaired the White Collar Crime Task Force, an informal working group

designed to improve investigation and prosecution of major fraud cases. While I was actively involved in drafting legislation, I did no trial work during my tenure at BT&H.

As deputy attorney general, I handled a wide variety of legal work. From 1979 to 1984, as an attorney assigned to the criminal division, I prepared respondents' briefs for 30 to 40 criminal appeals a year. (I also filed People's appeals - though they were rare.) Approximately a third of these appeals required oral argument. The Sacramento office handled appeals in both the Third and the Fifth District Courts of Appeal. Occasionally, review would be granted in the Supreme Court.

The Criminal Division also provided some limited opportunities for trial work, including jury trials, as a result of conflicts and recusals by district attorneys, and as part of exchange programs in which deputy district attorneys and deputy attorneys general exchanged jobs.

From 1984 to 1987, I worked in the Civil Division, Government Section, in the Attorney General's office. The Government Section specifically represented constitutional officers and other high ranking state officials. The emphasis on classically governmental functions meant the attorneys in the section were required to handle a seemingly infinite variety of issues and procedures - some of them venerable and ancient (like *quo warranto*) and many completely novel (like the challenges arising from virtually every budget cut). The practice included administrative hearings, law and motion, and general civil litigation, ranging from straightforward contract disputes to political law violations to major class actions. While in the Civil Division,

I handled cases in both state and federal courts.

My first job after law school was in the Legislative Counsel Bureau - an office which assisted the Legislature with bill drafting and provided confidential legal advice on questions related to the scope, impact, and constitutionality of proposed legislation. This assignment did not involve any litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

As noted earlier, I have not been an active litigator since 1987. Between 1979 and 1987, litigation activity was fairly extensive.

Assignments in the Criminal Division occasionally involved some civil work dealing with habeas filings. Work in the Civil Division, however, had no criminal component.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

Criminal Division (1979-1984)

(1) Federal Courts	5%
(2) State Courts	95%

Civil Division (1984-1987)

(1) Federal Courts	50%
(2) State Courts	30%
Administrative Tribunals	20%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During my time in the Criminal Division, I would estimate that I handled roughly 100 appeals. In those cases, despite the long list of names on the briefs, I generally acted as sole counsel. I also tried half a dozen jury trials. While in the Civil Division, I had a huge caseload, but the claims rarely went to trial. Perhaps ten reached the law and motion or summary judgment stage; two or three were tried to judgment. One of these, however, was a massive class action which actually took ten years to complete. I acted as chief counsel in that case for the first five years.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

Criminal Division	(1979-1984)
(1) Jury	10%
(2) Non-jury	90%
Civil Division	(1984-1987)
(1) Jury	0%
(2) Non-jury	100%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) *California Radioactive Materials Management Forum et al. v. Health and Welfare Agency et al., Court of Appeal - Third Dist. No. C013930*

Opposing Counsel:	Remcho, Johansen & Purcell Joseph Remcho (State Bar records indicate Deceased) Robin B. Johansen Karen A. Getman
Current Address:	Remcho, Johansen & Purcell 201 Dolores Avenue San Leandro, California 94577 510-346-6200
	Strumwasser & Woocher Frederic D. Woocher Michael J. Strumwasser
Current Address:	Strumwasser & Woocher 100 Wilshire Boulevard, #100 Santa Monica, California 90401 310-576-1233
Justices:	Sparks, Puglia and Raye

My participation involved the production and filing of an amicus brief. The case arose out of a dispute over an application for license for construction of a low level radioactive waste disposal facility in Ward Valley. After the Department of Health Services had completed an extensive hearing process on the pending license application and had determined no further hearing was legally required, the Senate Rules Committee had obtained an agreement from the Secretary of Health and Welfare and the Director of Health Services, during their respective confirmation proceedings, to hold an additional form of adjudicatory proceeding.

Because real parties in interest (members of the Senate Rules Committee) argued strenuously that

exacting such a *quid pro quo* was an appropriate part of the confirmation process, the Governor's Office filed an amicus brief. The amicus was limited to issues concerning the proper scope of legislative confirmation powers, and argued the Legislature could not coerce a particular exercise of discretion as a condition of confirmation.

The appellate court concluded the agreement was unconstitutional and void. Real parties petition for review in the Supreme Court was denied.

(2) *CSEA v. State of California, U.S. District Court, Eastern District, No. C-84-7275*

Plaintiff's Counsel:	Melvin K. Dayley Counsel, California State Employees Assoc.
Current Address:	Law Office of Melvin K. Dayley 1939 Harrison Street, #320 Oakland, California 94612 510-444-1555
Trial Judge:	Marilyn Hall Patel

This case lasted ten years, and I was lead counsel for the first five years. *CSEA v. State of California* was a major employment discrimination class action. The case actually began as a comparable worth suit, claiming employees in predominantly female classifications were paid less for jobs equal in value to jobs of higher paid predominantly male classifications.

The growing weight of unanimously adverse case law forced plaintiff to recast its case in terms of intentional discrimination. Since plaintiff's theory of the case was a moving target, it was difficult to define, focus, or limit the issues and the result was a massive discovery burden. Plaintiff demanded and received tens of thousands of documents and hundreds of thousands of electronic records, including the complete employment databases of the State Controller's Office and the State Personnel Board.

Defendant's motion for summary judgment, filed three years after the case began, was denied by the trial judge despite plaintiff's failure to provide credible evidence of intentional discrimination.

The first phase of the bifurcated trial began in February 1989; the final phase was completed in 1991. Finally, in 1993, almost ten years after the case was filed, the trial judge issued her final order, granting judgment to the state defendant for every claim.

(3) *California v. Beheler* (1983) 463 U.S. 1121.

Opposing counsel:	Julie Newcomb
Current Address:	California Unemployment Insurance Appeals Board 2400 Venture Oaks Way Sacramento, CA 95833 916-263-6820
Justices:	Per curium decision with Stevens, Brennan, and Marshall dissenting.

I was the sole appellate counsel. Beheler's felony-murder conviction was reversed by the Fifth District Court of Appeal. Beheler had voluntarily contacted police and provided a detailed description of a murder committed during a robbery attempt. Beheler and several other men had planned and abetted the robbery and were present when the killing occurred. Although Beheler was not under arrest when he made his statement and was allowed to leave after the interview, the court ruled Beheler's confession was not voluntary.

On the People's behalf, I argued that the court's decision misapprehended the scope and function of the Fifth Amendment. The USSC agreed and, in a published per curiam order, restated the parameters of voluntary confessions.

(4) *People v. Nelums* (1982) 31 Cal.3d 355.

Counsel:	James D. Skow
Current Address:	Law Office of James D. Skow P.O. Box 276092 Sacramento, CA 95827-6092 916-363-8115
Justices:	Richardson wrote the opinion in which Bird, Mosk, Newman, Kaus, Broussard and Reynoso concurred.

I was the sole appellate counsel and argued on behalf of respondent, The People. The defendant had been convicted of several counts of robbery and other assorted misdeeds. His sentence was enhanced for personally using a firearm. On appeal he contended he should have been permitted to provide evidence that the gun was inoperative. (Ironically, the gun used was inoperable only because defendant had used the wrong bullets.) The Third District Court of Appeal agreed with defendant's argument; however, I sought hearing in the Supreme Court, arguing that operability was irrelevant as long as the defendant used a gun designed to shoot which had the appearance of shooting capability. A unanimous Supreme Court agreed.

(5) *People v. Dennis* (1986) 177 Cal.App.3d 863.

Counsel:	Francine T. Kammeyer
Current Address:	Cal. Dept. of Social Services 744 P St. M/S 4-161 Sacramento, California 95814 916-657-2398
Justices:	Sparks, Carr, and Sims

I prepared, filed and argued the People's appeal, which the Third District granted, concluding that the trial court's ruling deprived the People of due process.

In *Dennis,* after trial but before sentencing, the trial court granted defendant's motion for substitution of counsel after an *in camera* hearing from which the prosecutor was excluded. The court granted a new trial based on counsel's claimed deficiencies without permitting the prosecutor to respond to the claims or present any contrary evidence.

The Third District Court of Appeal granted the People's appeal, concluding the trial court's procedure resulted in an ex parte order insulating the defendant from an adversarial proceeding and allowing him to circumvent his burden in attacking his conviction.

(6) *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316.

Counsel:	Ronald A. Zumbrun (For Petitioner)
Current Address:	Zumbrun Law Firm 3800 Watt Avenue, No. 101 Sacramento, California 95821 916-486-5900
	Joseph Remcho (for Real Parties In Interest) Joseph Remcho (State Bar records indicate Deceased)
Justices:	Puglia, Evans, and Blease

This case arose out of a challenge to a 1984 statutory initiative (the Legislative Reform Act of 1983) which attempted to limit legislative spending. California taxpayers filed suit seeking a declaration of the Act's validity and compelling the Legislature to comply with its terms.

I prepared and filed an amicus brief, arguing for the People's right to legislate through the initiative process, but conceding that a statutory initiative was an inadequate tool to rein in the Legislature's constitutionally mandated powers. The appellate court reached a similar conclusion.

(7) *Cronk v. Municipal Court* (1982) 138 Cal.App.3d 351.

Counsel: Richard Phillips (State Bar records indicate Deceased) Deputy State Public Defender

Justices: Puglia, Evans and Blease

Defendant had been charged with murder in a complaint that did not specify degree. The defendant sought to enter his plea of guilty before the prosecutor could amend the complaint to allege special circumstances which would make him eligible for the death penalty. Defendant claimed Penal Code section 859 was mandatory and required the judge to accept his plea immediately and foreclose the People's right to amend.

The judge declined to succumb to this bit of gamesmanship and I filed a brief on behalf of the People, as real party in interest, arguing the trial judge correctly disposed of the issues and did not abuse his discretion. The appellate court agreed.

(8) *People v. Price* (1984) 151 Cal.App.3d 803

Counsel: James F. Johnson

Current Address: 2269 Chestnut Street, No. 384
San Francisco, California 94123
415-455-8251

Justices: Andreen, Hansen, Gallagher

I filed respondent's brief and supplemental briefing requested by the court. The primary

issues in this case, which involved multiple sexual offenses against a single victim, related to sentencing and the use of particular factors to enhance punishment and the authority to sentence consecutively. The Fifth District Court of Appeal concluded the trial judge had made a number of errors in sentencing and remanded the case on behalf of the People.

(9) *People v. Rioz* (1984) 161 Cal.App.3d 905

Counsel:	Howard J. Berman Robert J. Wade Clifford Gardner Frank Di Sabatino
Current Address:	Howard J. Berman The Hearst Building Third & Market St., No. 1100 San Francisco, California 94103 415-495-3950
Current Address:	Robert J. Wade P.O. Box 1585 Riverside, California 92502-1585 909-678-6551
Current Address:	Frank Di Sabatino 6320 Van Nuys Boulevard, #212 Van Nuys, California 91401 818-786-6493
Current Address:	Clifford Gardner 2088 Union Street, No. 3 San Francisco, California 94123 415-922-9404
Justices:	Hamlin, Granson, and Woolpert

I prepared and filed the respondent's brief which raised numerous issues, including the validity of Evidence Code section 1103. The appellate court reversed the convictions because four Hispanic defendants had been forced to rely on a single

interpreter. However, the case also involved some significant evidentiary rulings.

This was a rape case. Under Evidence Code section 1103, the prior sexual conduct of the victim is not admissible to prove consent, but the evidence may be admissible under section 782 when the credibility of the complaining witness is attacked.

The tension between these two provisions requires a delicate balancing act, and most of the analysis was directed to the resolution of these issues.

(10) *People v. Courts* (1985) 37 Cal.3d 784

Counsel:	Sharon Quinn
Current Address:	Dept. of Child Support Services P.O. Box 5700 Auburn, California 95604 530-889-5700
Justices:	Bird, Mosk, Broussard, Reynoso for the majority Lucas, Kaus, Grodin, dissenting

I prepared and filed a respondent's brief on behalf of the People. This was a case dealing with the right of a criminal defendant to be represented by an attorney of his own choosing. Appellant, who was being represented by a public defender, sought a continuance on the first day of trial to complete arrangement to obtain private counsel. The trial court's refusal to grant the continuance became the basis of the appeal.

The Court of Appeal affirmed the conviction, but the Supreme Court accepted the case for review. A closely divided court reversed appellant's conviction, concluding (1) the trial judge had abused his discretion by refusing to grant the continuance, and (2) an appellant's "right to counsel of his choice 'requires reversal

regardless of whether he in fact had a fair trial.' "

I left the Criminal Division in 1984 and the case was assigned to another deputy attorney general to argue the case before the Supreme Court.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

In addition to the legal activities described in response to 17(c)(4) above, I have served on a number of court-related committees, including the Commission on the Future of the California Courts and the Judgeship Needs Advisory Committee.

The Commission on the Future of the Courts (20/20 Vision) was a three-year task force, convened by former Chief Justice Malcolm Lucas, which brought together a diverse group of lawyers, judges, academics, and social scientists to think creatively about how to improve access to, and the fairness and efficiency of, the court system.

The Judgeship Needs Advisory Committee was an even more long-term project, which spent five years developing a quantitative model to assess the need for new judicial officers. The model has since been implemented by the Administrative Office of the Courts.

I also served on the initial board of the McGeorge School of Law's Institute for Legislative Practice. Among other things, the Institute provides the Legislature with an annual summary of appellate opinions which suggest subjects for legislative action.

Chairman HATCH. Well, thank you so much. We will have 10-minute rounds, and I will begin.

You have had some criticism already on some of the cases that you have sat in on. You have been on the Supreme Court of the State of California for now 10 years, elected by 76 percent of the people. Do you have any idea how many cases you have actually sat in on or had anything to do with?

Justice BROWN. Yes, Mr. Chairman. I have been on the California Supreme Court for 7 years. I have been on the bench over 9 years. But on the California Supreme Court, I have participated in something over 750 matters.

Chairman HATCH. Now, you have been attacked by many groups, mainly the usual suspects among liberal special interest groups who we have to put up with around here. The Democrats have to put up with some of the conservative special interest groups. That is just a fact of life, but the way I see it, these liberal groups do not like the fact that you rule in accordance with the law, instead of in accordance with their particular policy preferences.

Now, while such opposition has become predictable, it just as surely ignores the reality that you are an accomplished judge whose record and opinions demonstrate a fidelity in applying the law, rather than in indulging your own personal or policy preferences, but your opponents also ignore the cases they would prefer that nobody hears about in which you have issued what some would consider liberal rulings, in favor of criminal defendants, workers, consumers, and environmentalists, if you will. Let me just ask you about a few of these cases.

Did you not dissent from the majority's approval of a death sentenced in the Visciotti case based on the fact that the defendant had not been effectively represented by counsel?

Justice BROWN. I did, and that is rare, because in every criminal case, and certainly in every capital case, there is likely to be a claim that there was ineffective assistance of counsel. And it's rare for anybody to take that argument seriously, but in this case I really felt like an argument was made that simply couldn't be ignored.

Chairman HATCH. Also, in the Fourth Amendment case, *people* v. *Woods*, you dissented from the majority's sanctioning of a warrantless search because it essentially ignored the constitutional rights of a probationer's roommates; is that right?

Justice BROWN. That is correct. I have always been a strong proponent of enforcing the Fourth Amendment.

Chairman HATCH. Right. And then there is your dissent in *People* v. *McKay*, which one law professor praised as, "Required reading for all criminal lawyers."

In this case, you would have suppressed drug evidence obtained from a defendant whose only apparent crime was riding a bicycle the wrong way down the street; is that right?

Justice BROWN. That is correct. That was one of those cases which Senator Durbin pointed out, in which I was the lone dissenter, but I was the lone dissenter because it is very clear that what was happening here is that these minor traffic infractions could actually be used to justify these very broad searches, and I argued very strenuously that to give that kind of discretion to law

enforcement was likely to lead to arbitrary and discriminatory enforcement.

Chairman HATCH. Let me ask you about the *People* v. *Floyd* case, in which you dissented from the majority's affirmation of a defendant's conviction for possession of cocaine. Now, this was, as I understand it, decided in the context of Proposition 36, which California voters approved in 2000, and which required that eligible defendants convicted of nonviolent drug possession offenses receive probation conditioned on participation in and completion of an appropriate drug treatment program instead of receiving a prison term or probation without drug treatment.

Now, why did you dissent and advocate a broader, more defendant-friendly reading of the law in that case?

Justice BROWN. Well, the electorate in that case seems to have wanted to provide a broad opportunity for people who were only convicted of drug offenses to have this opportunity for rehabilitation rather than to be sent to prison.

The majority of my court took a very narrow view of who should be eligible for participation in these programs, but it seemed to me the clear intent of the electorate here was the make the program really quite broad. One of the things that was said in the ballot pamphlet is that putting defendants into these rehabilitation programs was actually much cheaper than sending people to prison. So the money that we had could do much more good by allowing people to participate in the drug program.

Chairman HATCH. You have also ruled against tobacco companies in the *Nagel* v. *R.J. Reynolds* case. Here, you carefully reviewed a State law that granted some degree of protection to tobacco companies from product liability claims and found that the law did not bar fraud claims; is that right?

Justice BROWN. That is correct.

Chairman HATCH. In *Mercado* v. *Leon*, you reversed the trial court's determination and allowed a mother of an injured patient to recover for emotional distress even without a showing that the doctor's conduct was outrageous; is that right?

Justice BROWN. That is true. That had been a limit on the ability to recover in those kinds of cases.

Chairman HATCH. In *Hamilton* v. *Asbestos Corporation*, did you not author an opinion on a statute of limitations issue that allowed an injured plaintiff more time in which to file a personal injury claim against various asbestos defendants?

Justice BROWN. Yes. The question there was when did the statute begin to run in terms of whether you could file the claim.

Chairman HATCH. In *County of Riverside* v. *Superior Court*, did you not write an opinion holding that under the Public Safety Officer's Procedural Bill of Rights, a peace officer is entitled to view adverse comments in his personnel file and file a written response to a background investigation of the officer during probationary employment.

Justice BROWN. That is also correct, Mr. Chairman.

Chairman HATCH. Okay. And in the 1997 case, *Mountain Lion Foundation* v. *Fish and Game Commission*, was not your opinion again for the court's majority by the way, described by environmental groups as "a clear affirmation of strong environmental pro-

tection in California," and a reaffirmation of "the importance of endangered species protection"; is that right?

Justice BROWN. I had not heard the comment from the environmental groups, but it was a case that said that the Fish and Game Commission had to play by the rules if they were going to remove a species from the Endangered Species List.

Chairman HATCH. So the overall point here is that your opinions have fallen on both sides of many public policy issues.

Justice BROWN. I think that's true.

Chairman HATCH. The way I see it, you have applied the light equally to litigants in cases that have come before you regardless of the policy principles that are at stake. Do you think that is a fair characterization?

Justice BROWN. I think that that is a fair characterization. I think that one of the reasons I am eager to have this hearing and to discuss what I have done is that I think if my record is fairly evaluated no conclusion can be reached except that I do the job the way it is supposed to be done, that I am a principled judge, and that I am not an idealogue of any persuasion.

Chairman HATCH. I expect that during the course of this hearing we are going to hear much about other cases that you have decision during your tenure on the bench. We have already heard some by the Senator from Illinois, Senator Durbin, so I felt that it was important at the outset to demonstrate your record of fairness in reaching the results the law compels instead of some predetermined outcome, because that is the implication of the criticisms of some of these outside groups and maybe even some of our colleagues. But we will undoubtedly hear today, also hear today about some of the speeches that you have given in a personal capacity. Some may even find some of those speeches or some of the language in those speeches inflammatory, at least that has been the accusation.

So let me ask you this, Justice Brown, right out of the gate. Do you understand the distinction between acting as a judge in an official capacity, and are you committed to following the law and not injecting your personal opinions in your judicial opinions?

Justice BROWN. I absolutely understand the difference in roles in being a speaker and being a judge.

Chairman HATCH. Let me, for anyone who still has concerns about Justice Brown's legal philosophy, to her separate opinion in the case of *Katzberg* v. *UC Regents*, which the Court decided unanimously last November. In this opinion you explained why it was inappropriate for the Court to seek guidance for its decision beyond the state constitution and its drafters' intent, and counseled that the Court should, quote, "remain faithful to its role as the final arbiter of the meaning of our state constitution, and to respect the demarcations between the respective branches of government." Now, as I view it, this is the antithesis of judicial activism and demonstrates a profound respect for the proper role of the courts in our constitutional system. Is that correct?

Justice BROWN. I think that is correct and I think you will see many, many decisions in which I have deferred to the legislature or argued for separation of powers or for restraint in the judicial role.

Chairman HATCH. My time is just about up, but I want to congratulate you for being here. I want to say that knowing you, I have really been impressed with your approach towards judging, and I am just very honored to be part of this hearing and to have you here.

My time is up. We will turn to Senator Durbin.

Justice BROWN. Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Chairman Hatch. Let me say at the outset what my colleagues have said. That cartoon is despicable. It is outrageous. I am sorry that we are even displaying it in this room. It does not deserve that kind of attention. It is beyond our condemnation, and I apologize on behalf of all of the members of the Committee and everyone in Congress that you and your family would be subjected to this. Though I do not know the origin of it, it is sad that anyone who comes before us would face that kind of criticism and I am sorry that you have experienced this, and I am sorry that your friends are feeling your pain in this moment too.

It is an impossible situation here. We are asked to sit in judgment of a person we have never met, try to judge that person on the basis of what they have said and what they have done and try to project what they have said and what they have done into some kind of a suggestion of what they might do in the future.

I hope you understand that we do have to ask questions about what you have said as a judge. If we are to set you aside and say everything is out of bounds, we have to accept the President's nomination as proof positive that you are ready for the Court, we would not be meeting our constitutional responsibility. We have to ask probing questions in the hope that the record and the answers will give us an indication of who you are and what you really believe. There are many who have reviewed the same record that I reviewed and are skeptical as I am about your nomination to this D.C. Circuit Court. The Congressional Black Caucus, represented by Delegate Eleanor Holmes Norton and Congressman Elijah Cummings, and Congressman Conyers, who was here earlier, in a rare move took a position against your nomination. I am asking to be made part of the record letters from 19 members of the California Congressional Delegation as well as letters from 59 organizations and over 200 law professors, all opposing your nomination.

Chairman HATCH. Without objection, they will be put in the record.

Senator DURBIN. So there is some controversy attached to this. Do you think it is fair for us to ask you what your position is on issues based on how you have ruled in past cases and statements you have made in speeches?

Justice BROWN. I certainly think it's fair, Senator, for you to examine my record and my body of work as a judge.

Senator DURBIN. I do too.

Justice BROWN. That's what's at issue here.

Senator DURBIN. Exactly. Is it also fair for us to look for nominees to the D.C. Court of Appeals who are in the mainstream of public thought rather than too far to the left or too far to the right?

Justice BROWN. I really am not sure how to answer that. I don't know what your responsibility is. I wouldn't try to define it for you. I think that what you should be looking for are judges who under-

stand what the judge's role is and who do the job, who take every case as that case arises, look at the law and the facts and the litigants and what is happening in that particular case and try to reach the right answer. That's the only agenda I have. If that's the kind of judge you're looking for, I'm that kind of judge.

Senator DURBIN. Would you say that your political philosophy and beliefs are in the mainstream of American political thought?

Justice BROWN. I don't—I hesitate to try to say what is the mainstream of American political thought. I think that my judicial decisions are very balanced.

Senator DURBIN. Let us go specifically to a question that I think really gets to the heart of it. You made a speech to the Federalist Society at the University of Chicago Law School, something I am familiar with, a large chapter. It was a speech in April of 2000, and said several things there. I made reference to some of them. You called 1937, the year in which President Roosevelt's New Deal legislation started taking effect, "the triumph of our own socialist revolution." What do you mean by that?

Justice BROWN. Well, Senator, what I'm doing there is making a speech, and I note that the speeches that have been of most interest to people are the ones that I have made to younger audiences, to law students. And in making a speech to that kind of audience, I'm really trying to stir the pot a little bit, to get people to think, to challenge them a little bit, and so that's what that speech is designed to do.

But I don't—I do recognize the difference in the role between speaking and being a judge.

Senator DURBIN. We all understand, as public speakers, that sometimes you want to be provocative, but I want to know if you believe that. Do you think that the Franklin Roosevelt New Deal was the beginning of a socialist revolution in America?

Justice BROWN. I don't think that—I think the speech has to be taken as a whole. Now, I understand that my—you know, my speeches are maybe not the greatest. I don't have a speech writer and I do these things myself, and I have a demanding day job so I often don't have a lot of time to do them, but I think the speech speaks for itself, and I tried to set it in context.

Senator DURBIN. Let us go to another part of the speech then. Are you familiar with the *Lochner* decision?

Justice BROWN. Yes, I am.

Senator DURBIN. This is a decision where the Supreme Court basically struck down a Massachusetts law that was establishing standards when it came to the work regulations of those in the baking industry. It was a limitation on exploitation of labor. This *Lochner* decision has been referred to over and over again as a seminal decision as to the Supreme Court going too far in striking down state and local regulation to protect, in this case, workers. You stated that you felt the dissent in the *Lochner* case by Justice Holmes was wrong in this speech that you made in Chicago. So again, I have to ask you, were you trying to be provocative or do you really believe that?

Justice BROWN. Well, Senator, I have, in my opinions, said that to the extent the *Lochner* court was using the due process clause as a sort of blank check to write anything they wanted into the

Constitution, they were justly criticized. And I have in other opinions spoken approvingly of Justice Holmes' general attitude of deference toward the legislature because I agree strongly with that.

The particular issue there that I was trying to focus on was simply the implication in his footnote that the Constitution really takes no view of economic liberties. So it was that that I was looking at.

Senator DURBIN. Justice Brown, that puts you in a very, very limited group of people who have come before this Committee seeking a judicial appointment. Justice Bork has been critical of the *Lochner* decision. Chairman Hatch has been critical of the *Lochner* decision.

Chairman HATCH. Almost everybody has.

Senator DURBIN. Almost everyone has, and yet you seem to argue here that—let me quote you directly here—in your words, quote: "It dawned on me that the problem may not be judicial activism. The problem may be the world view, amounting to altered political and social consciousness out of which judges now fashion their judicial decisions." End of quote.

You seem to be suggesting—and I want to hear your explanation here—that when the Supreme Court ruled that Massachusetts was wrong in limiting exploitation of labor, that they were espousing an economic point of view that they have no business espousing, and that those who were critical of it were also espousing an economic view. Where do you come down on this?

Justice BROWN. No, Senator. I hope that I didn't—

Senator DURBIN. I am sorry. I have been saying Massachusetts. This is New York. I stand corrected.

Justice BROWN. I think that my response was misunderstood. What I said was I have, in my own decision, said that the *Lochner* court was justly criticized to the extent that they were using the due process clause to insert their personal political views, and so when I say that I was responding to his implication, I'm really talking about the dichotomy that eventually develops where economic liberty, property, is put on a different level than political liberties. So that was my focus there.

And I don't think that that idea is out of the mainstream at all. I think there are very many commentators who say, you know, there doesn't seem to be a basis for having created this dichotomy. And in fact, the Court itself, in more recent cases has actually said, you know, maybe that idea doesn't really work, and there's no grammatical basis for saying we ought to treat these differently.

Senator DURBIN. I see my time is about up and I see other colleagues here. We will have another round. Thank you.

Chairman HATCH. Thank you. Well, as you can see, she criticized *Lochner* like all the rest of us.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Justice Brown, in the case of *American Academy of Pediatrics* v. *Lundgren*, either dissented from the decision of the Court, a 4–3 decision, where the Supreme Court of California held that the California court imposed a higher standard on privacy. This involved a case where the issue was of a parental consent or judicial bypass for the abortion of a minor. I have made an inquiry as to whether

other decisions of yours involved the abortion issue. Is this the only decision? That is the only one I have been able to locate with my staff and Committee staff.

Justice BROWN. This is the only time that particular issue has come before our court.

Senator SPECTER. The only time. Is it not true that the California Constitution can impose a more rigid standard on privacy? You cite in your opinion decisions by the Supreme Court of the United States, and you enumerate justices who have upheld the constitutionality of parental consent or judicial bypass, but is it not true that the California Constitution can impose a more rigorous standard on privacy which would render that statute unconstitutional?

Justice BROWN. Well, obviously, I did not think so, Senator. I guess I should start by saying that this particular case had come before our court before, and shortly before I was appointed to that court, the court had looked at the same issue, had looked at this exact same law, and by a 4–3 decision had said that the law did not violate privacy rights under the California Constitution.

Senator SPECTER. Justice Brown, my question is a narrow one, as to whether the California Constitution cannot impose a more rigid standard on privacy.

Justice BROWN. Well, as to that specific question I think the answer is no.

Senator SPECTER. The California Constitution cannot impose a more rigid standard on privacy than the U.S. Constitution?

Justice BROWN. Well, let me explain, Senator. The California Constitution does actually include the word "privacy," which is not expressed in the U.S. Constitution, so perhaps an argument could be made that, you know, something different was intended. But when you go back and look at the legislative history, you know, the discussion about that provision, what they cite to is actually *Griswold*. So the argument is that it appears that all they were trying to do was make, express what the U.S. Supreme Court had decided in terms of privacy.

Senator SPECTER. I believe a State may have a Constitution which has a more rigid standard. You can justify your opinion on the ground, and you go into it in some detail, but you did not think the California Constitution meant that.

Let me move on to the case of *Hi-Voltage* v. *San Jose*, where you invalidated affirmative action which was taken under a statute on the ground that California Proposition 209 provides that the State shall not grant preferential treatment on the basis of race, sex, color, ethnicity or national origin. But is not the California Constitution on Proposition 209 subordinate to the Equal Protection Clause of the 14th Amendment so long as there is a compelling State interest and the issue is narrowly tailored to address an identified remedial need?

Justice BROWN. Well, if you're asking whether a State would be precluded from having a higher standard, I don't think so. I mean the U.S. Supreme Court has recognized that in fact in California that prohibition obtains.

Senator SPECTER. Does not the Supremacy Clause of the Constitution mean that the equal protection of the 14th Amendment trumps California Proposition 209?

Justice BROWN. Doesn't the Supremacy Clause mean that?

Senator SPECTER. Yes.

Justice BROWN. Well, the U.S. Supreme Court has not said that.

Senator SPECTER. I am not sure whether they have said it or not. Maybe they have not had it presented, but the State cannot have a constitutional provision which conflicts with a U.S. constitutional provision, can it?

Justice BROWN. I think that—and I have to admit that this is not the issue that was before us in that case, and so this is not an issue that I have looked at in detail.

Senator SPECTER. You may say that the program did not meet the equal protection clause of a compelling state interest or was narrowly tailored to address an identifiable remedial need, but I do not think that you can just base the conclusion on Proposition 209 when it conflicts with the Equal Protection Clause.

Justice BROWN. Well, since that was not the question that was presented to us, and the question was only whether the program of the city of San Jose violated the California Constitution, I just have to say it's not an issue that I've looked at.

Senator SPECTER. Was the San Jose provision addressing a compelling state interest? I am going back to the 14th Amendment. The question is whether it was addressing a compelling state interest and was sufficiently narrowly tailored because if it satisfies the Equal Protection Clause of the 14th Amendment, would that not prevail over Proposition 209?

Justice BROWN. I don't know if it would or not, Senator, because the only case that we have that I can think of that focuses on this is the recent case of the U.S. Supreme Court, and it's focusing on universities, and its analysis is fairly specific to diversity in that context.

Senator SPECTER. Let me move now to *Aguilar* v. *Avis* on the prior restraint case, which involved the issue of verbal harassment sufficiently pervasive so as to create an abusive working environment. And in your opinion you said, among other things, quote: "Plaintiffs should not be subjected to racial invectives in the workplace," close quote. But then you found that the remedy of damages was sufficient, and that an injunction would be inappropriate as a prior restraint. The question in my mind is whether this verbal abuse and these racial slurs, do they constitute fighting words?

I have not recently reviewed Justice Murphy's opinion, but my recollection is that there is some language that the right of freedom of speech ends at the end of someone's nose, and that fighting words are not constitutionally protected. Would these racial slurs be tantamount to fighting words?

Justice BROWN. I don't know that any finding of that kind was made by the lower court here. It was—a decision was made that this was pervasive enough that it created a hostile work environment, and that's how the case was analyzed. And so my concern was with the content based prior restraint, which under the precedents of the U.S. Supreme Court is something that is done very, very rarely if ever, and even in extremely sensitive situations such as national security, the U.S. Supreme Court has said that's not appropriate.

Senator SPECTER. Would you have to have a finding by the lower court if they were fighting words for you to consider the specific language which was before your appellate court to make a determination as to whether they were fighting words and therefore outside of the ambit of First Amendment protection?

Justice BROWN. Well, I think that generally the court would look at the record that comes up to it and what the court below was actually deciding, and that's what we did in this case.

Senator SPECTER. Justice Brown, I had commented in my statement about a number of your opinions on a very broad interpretation of the Fourth Amendment, which I found commendable in finding unreasonable searches and seizures and invalidating convictions, but also on the inadequacy of counsel in the *Visciotti* case, and you dissented on a death case there.

The one other case I want to ask you about in the limited time is *People* v. *McKay*, where a person was arrested for the infraction of riding his bicycle in the wrong direction on a residential street, and after he failed to produce a driver's license pursuant to a California statute, he was arrested and searched. You made a finding that you suspected racial profiling may have been a factor in the arrest, and thought that the search and seizure was inappropriate. It sounds a lot like the stop and frisk cases of the mid 1960's when the Supreme Court changed the rule of search and seizure for temporary stops and frisking. But I am struck by your words "suspected that racial profiling may have been a factor." Did you have an evidentiary base for thinking that racial profiling was there? If it was, obviously it is insidious and ought to be stricken, but do you recollect?

Chairman HATCH. Senator, your time is up.

But answer the question, if you will, Justice.

Justice BROWN. Senator, as I recall, there was no testimony concerning that.

Senator SPECTER. Thank you very much, Justice Brown.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Specter.

Senator Kennedy.

Senator KENNEDY. Thank you very much.

Justice Brown, as others have stated, all of us deplore the kind of cartoon that is displayed here and all that it suggests. I have been on this Committee for some number of years, since I have been in the Senate, and we have really been free from this kind of activity, suggesting, and I must say in more recent times some of these kinds of suggestions have been raised. But it has no place anyplace in our society, and particularly not here associated with you.

I am very concerned about your statements that you have made in your speeches which are highly critical of the role of Government. This is particularly important because if you are confirmed you are going to sit on the D.C. Circuit, whose job is primarily to review the governmental actions. And to mention again in your speech at the Federalist Society, you stated, "Where Government moves in, communities retreat, civil societies disintegrate, our ability to control our own destiny atrophies. The result is families under siege, war on the streets, unapologetic expropriation of prop-

erty, the precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility, the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible."

That is in the Federalist speech on April 20th.

Then in the 1999 speech at Claremont McKinney College you stated, "Where Government advances, it advances relentlessly, freedom is imperiled, community impoverished, religion marginalized, civilization itself jeopardized."

Now, the D.C. Circuit Court has the very special jurisdiction, National Labor Relations Board, how workers are going to be treated, whether they are going to be able to have their rights represented in the workplace. You have OSHA as a result—and many people are against OSHA—but since the time of passing of OSHA we have cut in half the number of deaths as a result in the workplace in our country over the period of the last 30 odd years. That is OSHA, and it continues to be out there, trying to protect workers in the workplace. You have the endangered species area. You have a whole range of Environmental Protection Acts, the Clean Air, the Clean Water Acts, real implications in terms of communities. I could take you up to Woburn, Massachusetts, where *Civic Action*, the book and the movie was written about, that 12 children died from poisons that were put into the water because people dumped into a site just north of that community, and the water came down deep in the seepage and came into wells that were being used within that community.

These issues have real implication for real people, and they are Government, Government, Government action, that are out there to protect people.

My question to you, how in the world can anyone whose rights are being represented and protected by these organizations have any confidence with how you will rule in the D.C. Circuit when you have taken these positions which are clear from the reading and your testimony, have such a despicable attitude towards what Government and Government institutions can do?

Justice BROWN. Well, Senator, I think they can have absolute confidence. I think if you review my record and the way that I have ruled as a Judge, you could have absolute confidence as well. I don't hate Government. I am part of Government. I have been a public servant for 99 percent of my professional career. I know that there are some things that only Government can do, some things that would not get done unless Government does it. So I can implement the law. I have been doing that.

Senator KENNEDY. The reason we raise it is because of these other statements about your attitude towards—and there are people that have that view. I respect that. I mean I respect it. I differ with it. I think there are legitimate roles and there are other places where it should not be, but there are legitimate areas where we have seen where Government has not taken action where there has been extraordinary exploitation. You see it with regards to stockholders in the WorldCom or you see it with regards to pension rights, how they have been thrown over the side when you do not have some protections. You see it with the Government role—NIH is a governmental agency, National Institute, cancer research, gov-

ernmental agency. And your hostility is to extraordinary in these kinds of statements, I was just again startled by the strength. It was not just one speech. It was not just even a phrase that my colleague pulled out about Franklin Roosevelt and socialism. I am not just taking one comment about the definition of Government or even one speech but several.

Justice BROWN. I understand what you are saying, Senator, so I want to do everything I can to assure you that I understand that Government can have a very positive role and that there are very beneficial things that Government can do. We all, I think, respond and speak out of our experiences and out of the things that move us and that concern us. And so what I am talking about there is really where the Government takes over the roles that we used to do as neighbors and as communities and as churches. I think it is important for us to preserve civil society, but I am not saying there is no role for Government.

Senator KENNEDY. Well, I am not sure that that comes through as clearly as you have stated it here. Let me go to an issue regarding the racial slurs and the unlawful harassment. In your record concerning your cases in the area of employment discrimination, I would like to ask you about your decisions in that area. The Supreme Court, as you know, has held that verbal harassment violates Federal job discrimination laws based on sex or race and if it is so extreme that it creates a hostile work environment. And that was something that was recognized in 1991 on the Civil Rights Act, which I was the principal sponsor of, Title VII. This is what was in the report in Title VII, which was particularly concerned with providing remedies to victims of harassment and specifically discussed verbal harassment and other harassment that might be considered in speech.

Let me read you some of the examples that we wrote in Title VII. In the House report, James Williams suffered through racial slurs, jokes, pranks, such as the posting of a Ku Klux Klan application on the company bulletin board in an oppressively racist work environment.

The legislative history shows Ramona Arnold, a female police officer, suffered when, among other things, sexual pictures with her name written on them and posted around the station house, signs saying, "Do women make good police officers? No." were posted around the station house and on her supervisor's car.

Rodney Consten, a millwright, got along well until he used anti-Semitic references on this. All this spelled out with regards to the verbal harassment.

Then we came to the situation in the *Aguilar Avis* case with which you are familiar. You wrote a dissent arguing the First Amendment prevented the court from ordering a supervisor not to use racial slurs in the workplace. You reached this conclusion even though a jury found that the same supervisor harassed Latino workers by calling them racially derogatory names. Apparently, in your view, it did not matter that the trial judge found that a court was probably the only way to make harassers stop using these slurs.

In your dissent, you acknowledged the Supreme Court had held that verbal harassment based on race or sex is unlawful, but you

question whether the Supreme Court's opinion is consistent with the First Amendment. Your dissent in this case was not limited to California law. You went so far as to suggest that the First Amendment prevents courts from prohibiting verbal harassment under Title VII of the Civil Rights Act of 1964, the Federal law against job discrimination based on race, sex, national origin, and color discrimination.

You recognized that there were remedies, remedies for damages. But how are we going to expect a worker that may be successful and is told, if your position holds, that if they go back into that workplace and they continue to be harassed, harassed, harassed with these verbal remarks, they can come back in court tomorrow and get another judgment in damages? How does that possibly advance the cause of justice and fulfill what we were trying to do to deal with this kind of verbal harassment in the civil rights laws?

Justice BROWN. Well, Senator, let me say that I absolutely agree with you that no one should be subjected to this kind of harassment, to verbal slurs. I couldn't agree with you more, and as someone who has been on the receiving end of that kind of conduct, you have my wholehearted support in terms of saying we have to do something about that. And we have, and all that I was saying in that case is that the damages remedy is a deterrent. I think that damages in this particular case would be totally effective because you are dealing with this corporation that is not going to want to go through this continually and which, if they don't respond, will actually be probably looking at punitive damages.

So the only question really that was open there was whether you had to go further to this content-based prior restraint, which I think is really a problem under the First Amendment.

If there were no other way, then, you know, maybe it would weigh the other way. But here I think there was an adequate deterrent, and I think probably money damages is more of a deterrent.

Senator KENNEDY. Well, my time is up, but what you are basically saying is that he goes back to work and has to file another case, and another case and another case and another case and another case. How many of these—and go through all of the costs of litigation that comes with that rather than just having what we were very clear in the 1991 Act? You mentioned earlier you read and value legislative history as very clear in what we were trying to do in Title VII in 1991. We used these illustrations time and time again in that report, exactly what we were trying to do. I am just disappointed at the fact that that part you found as a dissenter unable to follow.

Justice BROWN. Well, I think these are difficult cases, Senator, because there are countervailing interests, and there were a number of other judges on my court who also expressed the same concern about a prior restraint.

Senator KENNEDY. Well, I think you were in the minority on this, were you not?

Justice BROWN. Well, I was in the minority, but I was not alone.

Chairman HATCH. Senator, your time is up.

Senator Craig?

Senator CRAIG. Thank you very much, Mr. Chairman.

Justice Brown, we have not met. I am looking forward to that. I am one of the few on this Committee who is a non-lawyer, so I will not dwell a great deal on different cases or decisions you have made. I am extremely interested, though, in the character of the person because we all seek to have in these high courts people of outstanding integrity, who believe in our Constitution, and who recognize its importance as the foundation of our Government.

I am reading a quote from a national organization that happens to think quite highly of you when they say that, "Justice Brown represents the very best in American legal life," I think you probably also represent the very best in American life. "A woman of impeccable character and unimpeachable integrity, she overcame any challenges on her past to a seat on the highest court of America's largest State. Her dedication to upholding the Constitution is clear," and so far today it is obviously that and becoming more clear.

"She has shown unfailing dedication to the rule of law, even in cases where it led her to conclusions with which many disagreed." I think the discourse with the Senator from Massachusetts in the last few minutes might suggest some of that.

"Her record is one of moderation and excellence in protecting racial equality, defending civil and constitutional rights, safeguarding the right to free speech"—I believe we have just discussed that a bit—"protecting the right of consumers and being fair to criminal defendants. Most importantly, her intelligence and thoughtfulness are a perfect fit for the D.C. Circuit, a court that has attracted the best and the brightest in our legal tradition."

That is a pretty outstanding statement and recommendation. So the question then is: Are you qualified?

Justice BROWN. I was afraid you were going to ask me if I disagreed with that.

Senator CRAIG. No, I am not going to do that.

[Laughter.]

Senator CRAIG. But the question is and we are to seek out whether you are qualified. One Senator from Illinois suggested that the ABA suggested you were not qualified. Let the record show that a minority of that Committee said you were not qualified. A majority said you were qualified.

In fact, I find it interesting that when the ABA meets—I have found it fascinating over the years to watch us use ABA ratings. If you agree with them, they are great. If you disagree with them, it is a bunch of lousy lawyers who got together and who had all the wrong opinions about a certain subject, and in this case an individual qualified to be a judge.

If the Committee of the ABA has been unanimous in its rating, the Chair so states; otherwise, the Chair discloses that the nominee received the specific rating for a majority and a substantial minority of the committee, noting that a minority gave the nominee another rating. In other words, so stated as the Committee reacts.

The majority rating is the official rating of the committee. ABA's official rating of you is qualified. That is what this Committee record ought to show, not to slide in in an opening comment that somehow the ABA found you unqualified.

Miguel Estrada, unanimously well qualified. Well, nobody spoke of that here except those who supported him. It was not used as a tool of argument.

Priscilla Owen, unanimously well qualified; Pryor, substantial majority, qualified.

Oh, what games we play.

Mr. Chairman, in searching out why—let me see if I can find what I am interested in here—why a cartoon of the kind that has appeared in a liberal newspaper would characterize you as such, here is the only thing I can find, and this is from a national columnist, and he says, "What really scares the left about Janice Rogers Brown is that she has guts as well as brains. They haven't been able to get her to weaken or to waver. Character assassination is all they have left."

Let's talk about your character. Tell me about your mother and the influence she and your father had on you. I suspect that down deep there stands a foundation. Would you please?

Justice BROWN. Well, thank you, Senator, for giving me the opportunity to respond. I am not a person that talks much about my personal life, but you are right. There is a foundation, and it is a strong one. I come from a very loving, supportive family, but a family that I guess is a little bit firm and stern in the way they look at life and—

Senator CRAIG. Disciplined?

Justice BROWN. —personal responsibility. If my family had a motto, it would be, "Don't snivel." So that is what I grew up with.

The greatest influence probably on me was my grandmother, perhaps both of my grandmothers, who were themselves very strong women, of somewhat limited education but very bright women, very determined women. And my grandmother on my father's side probably was the person who in my early life really shaped the character that I have. She was a woman who did not suffer fools gladly, someone who had a very, very strong sense of herself as a person and of her dignity. She taught me when I was very little that there are some things that you have to submit to. I grew up in an era when everything was segregated, and so she would say, well, you have to go to a school that's segregated because you must get an education, and you have to go to a hospital if you are sick, and if it's segregated, you don't have any choice. But about those things where you have a choice, you will not do that. You will not go in the back door of movie theaters. You will not go in the back door of the bus station. You will not go in the back door of a place to eat.

And so this was her attitude, that you have to deal with what you have to deal with. You can be bowed but not broken unless you allow people to do that to you.

We had a very clear sense of right and wrong in the family in which I grew up. We had a very strong work ethic. And so that is kind of what I was raised—a very deep faith that is part of your life and that your life is supposed to reflect that you are a person of faith. And I remember a conversation that I had with her, and I was very young and I don't know why we had this conversation. But she said, you know, there are no menial jobs. You do whatever you need to do to take care of your family. But you do that job the

best you can, and someday when you go on to something better—and you will—they should say about you 10 years later, That Janice, she was the best dishwasher we ever had.

So her attitude was, whatever you do, be a legend. So that's kind of my background.

Senator CRAIG. Is that grandmother still alive?

Justice BROWN. She is not. I wish she was.

Senator CRAIG. I wish she were, too.

Justice BROWN. But I know she's here in spirit.

Senator CRAIG. She obviously would be and I am sure is very, very proud of you. Thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Justice Brown, thank you very much for the time you spent with me yesterday. I appreciated it, and I thought a lot about it. And I have reviewed some more of your opinions. I have reviewed all your speeches going back to 1993. And the conclusion I come to from the speeches is that they are extraordinary for a sitting justice to make when you are an appellate court justice as well as a Supreme Court Justice, that your views are stark. So the question I have: Is that the real you? Will that be the you as an appellate court justice on the most important circuit in the land? And how can I depend on the fact that you are going to disassociate yourself from these views and follow the law?

So I thought, well, let me take a look at some of her opinions on stare decisis, and let me begin by saying I was always very impressed with something Alexander Hamilton said in the 78th Federalist Paper, and that is, "To avoid an arbitrary discretion in the courts, it's indispensable that they should be bound down by strict rules and precedent." And, generally, when we have a judge before us, I cannot remember us really confirming anybody that did not say they would strongly agree to abide by precedent.

But when I reviewed your cases, I found that in many respects you openly flouted precedent, and let me give you some examples: *Kasky* v. *Nike*, *Stop Youth Addiction* v. *Lucky Stores*, *Green* v. *Raley Engineering*, and *People* v. *McKay*. And here is what you said in those cases.

In *People* v. *Williams*, you argued that you were "disinclined to perpetuate dubious law for no better reason than it exists."

In *Kasky* v. *Nike*, you argued for overturning precedent related to the definition of commercial speech because it didn't take into account the "realities of the modern world."

In *People* v. *McKay*, you argued against existing precedent. You argued that, "If our hands really are tied, it behooves us to gnaw through the ropes."

Now, there are questions of great constitutional import that come before the D.C. Circuit. If I combine these opinions with your rather stark personal philosophy and the words you have used in speeches for 10 years now, how can I depend on you, A, following precedent, carrying out the doctrine of stare decisis, and giving people just simply a fair shake when you have a whole litany of

these statements which, for a judge, are extraordinary intemperate to be making?

Justice BROWN. Well, Senator Feinstein, I thank you for the question and I thank you for your time yesterday.

Senator FEINSTEIN. You are welcome.

Justice BROWN. I really appreciated having an opportunity to talk with you. I actually thought it was an interesting conversation.

Let me respond to your question first by taking issue with the characterization that my speeches are intemperate. I may speak in a very straightforward way. I am very candid, and sometimes I am passionate about what I believe in. But often I am talking about the Constitution, and what is being reflected in those speeches is that I am passionately devoted to the ideals on which I think this country is founded. And I try to get people to recognize how important that is.

Senator FEINSTEIN. Then you would say that the quote which I read to you yesterday—and I will just read one part today—on Government is that "the result of Government is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible," you really believe that?

Justice BROWN. Well, as we discussed yesterday, I am myself part of Government. I think that there are many things that Government does well, many things that only Government can do. But I'm referring there to the unintended consequences of some things that Government does. But I would really like to go back and respond to the specific cases.

You take issue with the fact that I sometimes chide the court or sometimes suggest to the court that we should review prior precedent. I do that. I don't think that's something that a judge should not do. But I think you have to recognize that the roles may be different. If you are part of an intermediate appellate court, you are bound by precedent. Whenever that precedent is clearly on point, you have no choice about that. I have been a member of an intermediate appellate court, and I have been bound by precedent, and I have lived within that precedent.

When I was a member of the Third District Court of Appeal, I wrote more than 150 opinions, only three, I think, separate opinions, and only two dissents. There was nothing for me to talk about because, to the extent this was controlled by a higher court, it was controlled by a higher court. I did exactly follow that precedent.

The role of a Supreme Court, a court of last resort, I think is different, because except for the U.S. Supreme Court, there is no one to rethink what we do. And so it is the court itself which has to decide whether they need to think differently about some precedent that they have laid down.

I think it is perfectly appropriate, even if you are on an intermediate appellate court, to say this is the decision that I come to because I am bound by this precedent, but I think the court ought to take a look at this because it is not now working well.

So two things are going in these cases. In *Kasky* v. *Nike*, I'm acknowledging that there is a line of precedent that the Supreme Court has laid down, that we are bound by that, but I'm saying to the court, Perhaps you ought to rethink this because times have

changed and perhaps it is not working very well. And I think that is a perfectly legitimate position for a lower court judge to take, and it doesn't mean that you flouting precedent.

Now, in the *Stop Youth Addiction* case, that was really a different kind of problem because that was our case. The reason that I have such a problem with 17–200 and these particular statutes is they have no standing requirement. And because they don't and because mostly of the way the court has interpreted the language, it is not here a legislative problem. In fact, at the point that I did the *Stop Youth* case, there had been a very recent report from the Law Revision Commission that said the court's interpretation in these cases has created a problem because the interpretation has been so broad that we have this separation of powers problem, we have a due process problem.

So I was talking to my colleagues on my court, saying we have perhaps created this problem, and if you've been keeping track of what's going on in California, you know there has been a very heated debate about 17–200 and whether it needs to be fixed and what the problems are. And those problems flow from that broad interpretation.

So there, again, I think I was doing what a judge should do, which is saying to my colleagues, you know, we have made this decision, we have this long line of decisions, but when we see what the result of it is, maybe we need to think again about what we were doing.

Green v. *Raley Engineering*, I'll probably get in trouble here because I don't remember that case very specifically. But I think that what was going on there was the expansion of a Tammany claim. That is a common law claim that the California courts basically invented, saying if you are fired for some reason that violates public policy, you may have a cause of action. Even if you have no statutory claims of any kind, you may have a common law cause of action. But the court, when it created that remedy, said we are only filling in gaps. You know, we have done this so that where there is no remedy, there is no law, and somebody is in this situation, they can have a remedy.

And so I often have a disagreement with my colleagues because I'm saying to them, You said this measure was for the gaps, and yet you are constantly expanding it. And we also said we won't find public policy. We won't just go out there and invent it. We will only find that there's a violation of public policy where it's tethered to either the Constitution or some statute, so that we're deferring to the legislature, not just inventing it. But then we constantly expand it.

So those are the kinds of discussions that I'm having with my colleagues in those particular cases.

Senator FEINSTEIN. What would be your position on stare decisis then as an appellate court judge in the Federal system?

Justice BROWN. Well, as an intermediate—a judge on an intermediate appellate court, I would follow binding precedent. I absolutely have demonstrated that I will do that.

Senator FEINSTEIN. Okay. Because takings cases perhaps will come before you in one way or another, and we discussed your dissenting opinion yesterday in *San Remo* v. *San Francisco*—and for

those that don't know, this was a challenge to a city ordinance, and what the ordinance said is that in order to transition a hotel from residential use to transient use, the owner of the hotel would have to pay a fee, which could then be used to help people that were transitioned find other housing. The city has a short housing supply, and I think everybody knows the rest of that.

The plaintiffs apparently claimed that the ordinance amounted to unlawful takings of their property. You agreed with them and said, in short, this ordinance is not a matter of officially organizing the uses of private property for the common advantage; instead, it is expressly designed to shift wealth from one group to another by the raw exercise of political power; and as such, it is a per se taking requiring compensation.

Now, the majority said in response to your opinion, however strongly and sincerely the dissenting justice may believe that Government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties, nothing in the law of takings would justify an appointed judiciary in imposing that or any other personal theory of political economy on the people of a democratic state, which kind of gets to my point. Would you impose your personal opinion, as the majority said you were doing in this case, on the people of a democratically elected country?

Chairman HATCH. Senator, your time is up, but answer the question.

Senator FEINSTEIN. Thank you.

Justice BROWN. Senator, I thank you for the question. Let me say, first of all, that I have great sympathy for the idea that there is a great need for low-income housing in San Francisco. I myself can't afford to live there, so I can understand that the city has a need and a problem that it needs to solve.

Let me say that, despite the majority's characterization of what I was saying there, I was not suggesting that any appointed judiciary should impose its political view. What I was saying is that there is an express prohibition in the Constitution, both U.S. and California, that says however beneficial the purposes for which Government is doing whatever it's doing, it cannot do it by taking private property without paying just compensation.

So I think the minority's characterization there is just flatly wrong.

Senator FEINSTEIN. How is this taking private property? No one was taking the property away from the owner. The owner wanted to change the nature of the property from residential to transient. How is this removing, how is this a taking?

Justice BROWN. Excuse me for interrupting you, Senator. This is a taking because what is really happening here is the city is saying, as a property owner, you still have the property, that is, you have nominal ownership, but if you want to do something with the property, you basically have to ransom it back from us. You have to pay us to get that use back.

And I think the best example of this, because it was very interesting to me at the oral argument in this case, I said to the attorney who was arguing for the city, could you, because there is traffic congestion in San Francisco, and you want to get people off the

highways and make the traffic congestion go away, could you tell me that I have to use my car, and during certain hours, I have to pick up someone from the casual car pool as a way of dealing with traffic congestion?

To which he said—I said, Would that be a taking?

He said, Oh, no, that would just be a regulation of use.

So, I mean, I think it's obvious, when you make it some other kind of commodity, like a vehicle, what's happening here. And to me it was very clear. And I think that what I've said was very consistent with some of the Supreme Court decisions that have come down in the last 15 years, like *Dolan* and *Nolan*.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Justice Brown, I know you have been asked about this, and I am not going to ask you about your speech to the Federalist Society. But I was struck by it. To put this in context, I live in a town of 1,200 people. It is about five miles from where I was born in Vermont, a beautiful, beautiful spot. The Government of it is a basically volunteer Select Board. They make sure there is school for the children, whether it is police protection or fire protection or the roads—I live on a dirt road, but whatever—any of the roads that are paved.

When I read your Federalist Society speech, where you say "where Government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is families under siege, war in the streets, precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility, the triumph of deceit." You may not be surprised that when I mentioned this to members of the Select Board they say, "That is us? We are working here for nothing trying to get this through."

I just mention that you can see why some may feel that, contrary to your view, not all Governments in the United States of America are corrupt, deceitful or encouraging war in the streets.

On another question, you state that you are a firmly committed to the notion of judiciary restraint, but in *Lane* v. *Hughes Aircraft*, you said that creativity was a permissible judicial practice. All judges make law. I would think that creative lawmaking was the provence of whatever the legislative body is.

So which branch of Government do you think is best equipped to determine the proper role of Government in society?

Justice BROWN. Well, there is no question that that role belongs to the Legislative Branch.

Senator LEAHY. Under what definition would your view of judging not be considered judicial activism?

Justice BROWN. I don't think that my view of judging would be considered judicial activism at all.

Senator LEAHY. Even though you say all judges make law?

Justice BROWN. Well, of course, they do, Senator, in the sense that there are still some common-law issues, and when dealing in the common law, judges do make law in that sense; in other words, you know, if they decide to expand some common-law remedy or something like that. We have been talking here about something

that the California Supreme Court did. We call it a Tammany claim. That is law that the California Supreme Court made.

Senator LEAHY. Well, you also said in a speech at the National Conference of State Legislators that courts have found "constitutional rights which are nowhere mentioned in the Constitution." Would that include the right to travel?

Justice BROWN. I am actually not familiar with cases on the right to travel.

Senator LEAHY. What about the right of parents to direct the upbringing of their children?

Justice BROWN. I don't recall that there is any language that says specifically parents have the right to direct the upbringing of their children.

Senator LEAHY. The right of privacy?

Justice BROWN. Well, the Court, in Griswold, itself had several different ideas about that.

Senator LEAHY. I know what the Court has done, but do you find that right in the Constitution?

Justice BROWN. Well, the Court itself didn't find that right in the Constitution.

Senator LEAHY. Justice Brown, I do not mean to be nit-picking. Do you find that right? Trust me, all of us read those cases trying to get through law school or the bar exam, but do you find a right of privacy in the Constitution?

Justice BROWN. Do I find it in the text of the Constitution, the U.S. Constitution? No.

Senator LEAHY. Now, you said at Pepperdine 3 years back, 4 years back, that the United States Supreme Court was incorrect in applying the Bill of Rights to the States. If I may read the quote, "The United States Supreme Court, however, began, in the 1940's, to incorporate the Bill of Rights into the Fourteenth Amendment. The historical evidence supporting what the Supreme Court did here is pretty sketchy. They relied on some historical materials which are not overwhelming. The argument on the other side is pretty overwhelming, and it is probably not incorporated."

Did the Supreme Court wrongly decided the cases incorporating the Bill of Rights into the Fourteenth Amendment?

Justice BROWN. You know, actually, one of the reasons that I never transcribed that particular discussion was because I wasn't very satisfied with it. But at the time I was reading a number of things which were looking at this whole question of whether incorporation was right or wrong, and I found it pretty convincing.

I have since actually found a lot of other things going the other way in dealing with the debates at the time of the post-Civil War amendments, which suggests that some of that might have been there. So I would have to say that that probably is not entirely correct. The only—I think it still remains anomalous to incorporate the First Amendment, but there certainly may be, you know, argument on both sides.

Senator LEAHY. Justice Brown, you say that you have thought about it some more since just as recently as 1999, but these cases had strong precedents before that. I mean, they had been decided. They had been incorporated in other decisions. They had been accepted body of law in this country. In 1999, you questioned that.

Now, in your confirmation hearing, between then and your confirmation hearing, you change.

I am not suggesting a confirmation conversion.

Justice BROWN. No.

Senator LEAHY. But from the time you were in law school and practicing law on the court, it is well understood in this country that the Supreme Court had incorporated the Bill of Rights into the Fourteenth Amendment. You had your questions in 1999 in a speech at Pepperdine. I am not quite sure, what is your position today?

Justice BROWN. Well, you know, the position that counts, and I think I said that, is that whether that's right or wrong, what the Supreme Court says is what counts. And so, of course, you know, as a law student and as a judge, I have followed those precedence. Sometimes speeches are an opportunity to just kind of think out loud, and at the time I had seen some material which really raised some questions about this, but I think I was very clear in saying it really doesn't matter. They have said it, and that's the law.

Senator LEAHY. And that's your opinion today.

Justice BROWN. Yes.

Senator LEAHY. Your view today.

Justice BROWN. Yes.

Senator LEAHY. I'm just curious how you analyze things. I have not practiced before the California Supreme Court. I doubt if I ever will, so I don't know how you face things, other than what I have read.

So let us take an issue in the news today. A law recently passed by the Florida legislature that allowed the Governor of the State to replace the feeding tube of a severely brain-damaged woman, over the wishes of her husband. Now, I have heard very strong arguments on both sides. I am not trying to decide who is right on this or not. But if you were presented with a challenge to a statute such as this, how would you approach the legal and Constitution analysis? How would you weigh the interests of the party, including the family members who apparently disagree with one another, with the woman's doctors, the State? I am thinking of *Washington* v. *Glucksberg*.

Again, as I say, I have no idea what I would do in a situation like that, but is there a limit on the power of the legislature in a situation like this? How would you approach that if that was suddenly dropped in your lap?

Justice BROWN. Senator, I don't think I can possibly answer that question.

Senator LEAHY. I'm not asking you to answer a question of how you would come out, but how would you analyze that? How would you weigh the interests of the parties? How would you weigh the interests of the State? What would you think about the power of the legislature in a situation like this? I mean, how would you go about approaching it?

Justice BROWN. Well, you know, of course, a legislative act always starts with a presumption of constitutionality, but I would have to know much more about everything, about the facts, and the law here, and the prior history of this case. There is no way that I could possibly tell you anything more than that.

Senator LEAHY. What kind of facts would you look for?

Justice BROWN. Well, presumably, the—you know, I just have to say I don't even know what the legislature is really doing here because I thought you said that the tube had been removed by the court and that the legislature—

Senator LEAHY. Gave the Governor the power to order it back.

Justice BROWN. There are so many different levels of—

Senator LEAHY. Fair enough. I am just curious how, I mean, I am not, as I say, I do not know how I would decide, but I was curious what you would look at, and that is what I was asking.

May I just ask one more question, Mr. Chairman?

Chairman HATCH. Sure. Go ahead.

Senator LEAHY. The Libertarian Law Council, you criticized the judiciary "for taking a few words which are in the Constitution, like due process and equal protection, imbuing them with elaborate and highly implausible etymologies."

What are some examples of that?

Justice BROWN. Well, I think we talked about this earlier, when Senator Durbin was talking about Lochner, which is one of those cases sort of universally condemned by everybody because the argument is that, you know, is there substance to the due process clause or can you just use it to insert whatever you want into the Constitution?

Senator LEAHY. That is the only example?

Justice BROWN. Well, it is probably the best example because everybody knows it.

Senator LEAHY. But you gave a pretty strong statement here. You seem to be talking about more than one case. What are some of your other examples?

Justice BROWN. None come to mind. I mean, Lochner would certainly be one. Maybe *Dred Scott* is such a case.

Senator LEAHY. We'll make sure you have a copy of the speech, look at it again. Would you take a look at it and give me if there are some other examples you have in mind.

Thank you.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Just one question to clarify. You said that you did not find the right to privacy in the express language of the Constitution.

Justice BROWN. That is correct.

Chairman HATCH. Nobody can find it there.

Justice BROWN. Nobody can find it there.

Chairman HATCH. But do you agree there is a right to privacy that has now been established by the Supreme Court in *Griswold* and—

Justice BROWN. It is clearly established by the Supreme Court. That is the law.

Chairman HATCH. Do you accept it?

Justice BROWN. Certainly.

Chairman HATCH. We will go to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Justice Brown, we are delighted to have you here. As a native of Alabama, the State is proud of you and the record you have achieved. You came up in tough times not too far from where I

grew up, not too many—a few years younger than I, and those were not easy times.

And I note, with interest, your statement that your grandfather admired Attorney Fred Gray for his challenging the segregation that existed at that time. There is no need to deny it. It was a fact. That is what the situation was. And he came out of law school with a commitment to end that. I read his book. Perhaps you have. I have it on my credenza, "Bus Ride to Justice." He was Rosa Parks' attorney, Martin Luther King's attorney. He handled the *Gomillion* v. *Lightfoot* case. One of the most extraordinary lawyers in America, and he now is the president of the Alabama Bar Association, which I think is a good tribute to his great career.

But I just know, and from reading your remarks and your history, that you are passionately committed to liberty, and rights, and freedom, and equality for people. Would you share a little bit for us how you come to have your views. And I know they do not always agree with current political wisdom on every area, but your basic commitment to these values is powerful.

Justice BROWN. Well, I think, Senator, that I have this basic commitment because it is not just history to me, and it is not just law, it is my life. I think that the Equal Protection Clause is the centerpiece of the framework of our Constitution. I think it is probably the most important thing that we have ever done is to try to guarantee people equality under the law, and maybe that is because I have lived in a time when that was not so.

Senator SESSIONS. I noticed one of your comments dealt with the fact of, yes, we respect legislation and law, but we have a right to understand that laws can be better and that laws can be unfair and unjust, such as the segregation laws that provided advantages to one race and disadvantages to other races in the South not too many years ago.

So I think having a moral foundation for your beliefs is not a negative, but is a strength. Do you not think that Martin Luther King's arguments went to a moral and religious values as much as it did to some sort of complex interpretation of the Supreme Constitution?

Justice BROWN. Absolutely, I do, Senator. In fact, one of his most famous speeches, what he says is that the Constitution should be viewed as a check that had been written to future generations about what they could expect. And I believe that the beginning of the civil rights movement in this country very much emphasized exactly that idea about equal justice and the idea of everybody being created equal and that being the promise of America that we should try to bring to fruition.

Senator SESSIONS. I thank you for sharing that. I just, from seeing your record, it is clear to me that you analyze cases fairly or you take them on the law as you see it. You are not driven by politics, but you try to do the right thing. If you were driven by politics or those kind of things, you would probably be more conforming to what everybody else thinks somebody should do in this day and age, and I salute you for that.

Mr. Chairman, I am just so impressed with the support this fine nominee has had. I noticed this stunning reelection vote, I believe 76 percent of the vote to be reelected in the State of California. Ev-

erybody knows that California is not considered a conservative State. If this lady were some sort of out-of-the-mainstream, how would she win such a predominant vote there?

Actually, she is part of a movement to strengthen the rule of law in the State courts of California and very, very strong support.

Chairman HATCH. She not only had 76 percent, but she was the top vote-getter among other justices.

Senator SESSIONS. I think that is so important to note.

A bipartisan group of 15 law professors wrote this Committee, and they said, "We know Justice Brown to be a person of high intelligence, unquestioned integrity and even-handedness. Since we are of differing political views," all of these professors had different political perspectives, "Democrat, Republican and Independent, we wish especially to emphasize that what we believe is Justice Brown's strongest credential for appointment to this important seat on the D.C. Circuit, her open-minded and thorough appraisal of legal argumentation."

Is that something you, praise you would cherish, Justice Brown?

Justice BROWN. I appreciate that. I believe that I am open-minded, but I did grow up with a grandmother who said, "It's a fine thing to have an open mind, but it shouldn't be so open everything in it falls out."

Senator SESSIONS. Well said. And they note, even if your personal views might disagree with the law as it exists, those arguments. So I think that is great.

A bipartisan group of your current and former colleagues have written also in support. Twelve former colleagues, judges, wrote this Committee, "Much has been written about Justice Brown's humble beginnings and the story of her rise to the California Supreme Court is truly compelling, but that alone would not be enough to gain our endorsement for a seat on the Federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis," not some groups around here to make money running direct mail, claiming that they are stopping extremist judges. That is what they do, distorting people's records.

They know you. They have worked with you, and they say that "She is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical and very hardworking. We know that she is a jurist who applies the law without favor, without bias, and with an even hand."

They could put that on your tombstone. That would be pretty good.

Justice BROWN. It would be pretty good.

Senator SESSIONS. Ellis Horvitz, a Democrat and one of the deans of the appellate bar in California has written in your support, noting, "In my opinion, Justice Brown possesses those qualities an appellate judge should have. She is extremely intelligent, very conscientious and hardworking, refreshingly articulate—" In fact, I think you have a wonderful way with words. "—and possessing great common sense and integrity. She is courteous and gracious to the litigants and counsel who appear before her," and

we can see that in your demeanor here today, and I think that is an important characteristic of a judge.

Regis Lane, director of Minorities in Law Enforcement, wrote, the minority law enforcement officers in all of California wrote, "We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service. In many conversations I have had with Judge Brown, I have discovered that she is very passionate about plight of minorities in America based on her upbringing in the South. Justice Brown's view that all individuals who desire the American dream, regardless of their race or creed, can and should succeed in this country, are consistent with MILE's mission to ensure brighter futures for the disadvantaged and youth of color."

Well, you have been a leader in the State, and the Governor's Office of General Counsel for the California Business and Transportation Group, deputy attorney general in the Office of the Attorney General, and a legislative counsel to the California Legislative Counsel Bureau. It's an extraordinary experience in government issues. They have suggested you have not been in Washington, but it does not mean you have not dealt with Government issues throughout your career; is that not true, Justice Brown?

Justice BROWN. That is true, Senator. I don't have the specific Federal experience, but I am not without experience in administrative law.

Senator SESSIONS. And some of those issues dealt with the Federal Government at times, did they not?

Justice BROWN. That's true.

Senator SESSIONS. Well, Mr. Chairman, I just want to say that it is so wonderful to see a justice of her skill and ability and integrity, proven record, who has the broad support in the State of California, be nominated for this important office.

I would note on the question of whether or not this court needs 12 judges, I do not believe it needs 12. I suggested some time ago that we not, we reduce officially the number for the bench, and my colleagues on the other side of the aisle blocked that and did not support that, and now they are talking about that. It is something that we should consider.

I believe, I would be reluctant to fully fill this bench to 12, but we are now I think 9 or 10, and we need another judge, and I think this would be a great justice to the court.

Chairman HATCH. Thank you, Senator. I personally believe we ought to put a full component on the bench, and the administration has nominated people for at least 11 of the seats.

We have a vote on the floor, so here is what we are going to do, and you have been sitting there for quite a while. Senator Feingold is coming back to question you. He will have 10 minutes while the rest of us go to the floor. I will immediately return, but we will allow Senator Feingold, who is a gentleman, to start his questioning, even without me here. I am sure that will be fine with you, too.

And then what we are going to do, because there are other Democrats who would like to ask questions, including the Ranking Member here today, we will recess until 2:15—is that okay with

you? That will give you a little bit of a break, and then we will come back, and hopefully this next round will complete the hearing for today, and we will finish it today.

So we appreciate your patience. I personally appreciate your articulate answers to all of the questions that are very difficult questions for anybody, and you have handled them very well.

So, with that, we are going to take off and vote. When Senator Feingold gets here, his staffer will have him ask questions, and then we will adjourn till 2:15. I will try and get back myself, but if I do not, and he finishes, then let us just adjourn, but no more than 10 minutes. Okay?

[Laughter.]

Justice BROWN. Thank you, Mr. Chairman.

Chairman HATCH. I do not want everybody else on my back. So 10 minutes, I have tried to maintain that, even though I have had to yield a little bit here, and I want to thank my colleagues for honoring that and showing respect to the Chair. It means a lot to me.

So, with that, we will recess until Senator Feingold gets here. He will ask you his 10 minutes, and then we will recess until 2:15.

[Recess from 12:42 p.m. to 12:49 p.m.]

Senator FEINGOLD. [Presiding] I will call the Committee back to order. I want to thank the Chairman and the majority for allowing me to proceed in this manner so I can ask my questions.

Justice Brown, welcome, and thank you for appearing before the Committee.

A little while ago you testified in response to questions from Senator Hatch that your record could lead to no other conclusion than, quote, "I am not an idealogue of any persuasion," unquote. You said that, right?

Justice BROWN. Yes.

Senator FEINGOLD. Let me read the opening of a speech you gave to the Federalist Society in 2000 at the University of Chicago Law School. You said, "I want to thank Mr. Schlangen for extending the invitation, the Federalist Society, both for giving me my first opportunity to visit the city of Chicago and for being, Mr. Schlangen assured me in his letter of invitation, a rare bastion, nay, beacon of conservative and libertarian thought. That latter notion made your invitation well nigh irresistible. There are so few true conservatives left in America that we probably should be included on the Endangered Species List. That would serve two purposes, demonstrating the great compassion of our Government and relegating us to some remote wetlands habitat where out of sight and out of mind we will cease being a dissonance in collectivist concerto of the liberal body politic."

Can you explain what you meant when you testified that you were not an idealogue of any persuasion in light of what you said in that speech?

Justice BROWN. Well, I—yes, Senator, I can. And what I was referring to when I was speaking to the Chairman is that I think—and he was talking about what I have done as a judge, and I think that if you look at the cases that I have done as a judge, you will find a very evenhanded application of the law, that I approach the task by looking at the law and the facts in the particular case, and just trying to get it right.

Senator FEINGOLD. So if we were to really put your statement in context you would say, I am not an idealogue of any persuasion in my role as a judge? Is that a more accurate statement?

Justice BROWN. I'm not—I think that's one way of putting that, but I'm not sure that I would concede that because I really don't think that the conservative view that I have, which is a kind of classical conservatism, is ideological at all. But I can certainly say that I'm not ideological as a judge.

Senator FEINGOLD. Well, I tried to give you a way out, but I do admire your candor. [Laughter.]

Let me try something else, exploring some of your writings relating to senior citizens. You dissented in an age discrimination case, *Stevenson* v. *Super. Ct.* In that case Ms. *Stevenson* worked for a hospital for over 30 years and shortly before her dismissal by the hospital Ms. *Stevenson* took a period of approved medical leave from work. She informed the hospital that she wanted to return to work well within the period during which her right to reinstatement was guaranteed by hospital policy. Despite this, the hospital refused to reinstate her to her old position or to reinstate her to another position pending an available opening at her original job. Ultimately the hospital fired Ms. *Stevenson* and she sued.

The issue in the case was whether Ms. *Stevenson* was entitled to sue her employer under the common law theory that the hospital's actions constituted a wrongful discharge because of a fundamental public policy against age discrimination.

The majority of the court found that Ms. *Stevenson* could bring such a lawsuit. You dissented. In your dissent you stated: I would deny the plaintiff relief because she has failed to establish the public policy against age discrimination inures to the benefit of the public or is fundamental and substantial. Discrimination based on age does not mark its victim with a stigma of inferiority and second class citizenship. It is the unavoidable consequence of that universal leveler, time, you wrote.

Before asking you about that dissent, let me also note a portion of a speech you gave in August 2000 to a group called the Institute for Justice. You stated the following: My grandparents generation thought being on the Government dole was disgraceful, a blight on the family's honor. Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to extract.

You go on to say in the same speech: Big government is not just the opiate of the masses, it is the opiate, the drug choice for multinational corporations and single moms, for regulated industries and rugged midwestern farmers and militant senior citizens.

In light of these statements it is not surprising to me that a number of organizations representing seniors, led by the National Senior Citizens Law Center, have written to the Committee in opposition to your nomination. I would like to give you a chance to explain the statements I just quoted, but let me also ask you two questions.

First, do you really believe that age discrimination does not stigmatize elderly Americans, and that this kind of discrimination not only should be tolerated in our society but is actually natural and justifiable?

Second, given the views you have expressed, can you understand why senior citizens would be concerned about appearing before you in an age discrimination case? And what in your record would you point to alleviate those concerns?

I guess I will simply, hearing no objection, have a letter from the National Senior Citizens Law Center included in the record at this point.

But now I will turn to you for your explanation of your comments and your answer to those two questions.

Justice BROWN. Thank you, Senator. I hope I can remember all of the different parts of this question. I want to start with *Stevenson* because I think somehow making a jump that what I did in *Stevenson* had something to do with, you know, what I said in the speech, and nothing could be further from the truth.

The first thing to know about *Stevenson* is that age discrimination is covered by the Fair Employment and Housing Act in California. We call it FEHA. The way that the legislature has provided for age discrimination gives a more limited remedy and it's available in more limited circumstances than other kinds of discrimination. So part of what I am saying there, the legislature has already determined. In other words, the California legislature treats age discrimination differently than other kinds of discrimination. And my statement that it doesn't have the stigma simply reflects the reality that we all know and love people who are old, and if we have a long life we are going to be people who are old. We all pass through that stage. So in that sense it's different from being a racial minority or gender discrimination.

The other thing that I want to make clear about *Stevenson* is that I'm not here denying a remedy for this litigant, because they do have a remedy under FEHA. The question that was presented to our court was should we also have this parallel common law remedy? And we've talked about this a lot this morning, but in California the court has said if you are fired from a job for a reason that violates public policy, then you may have something which we call a Tammany claim, meaning you may have this common law remedy that may also apply. I have argued in a series of cases that because the legislature has acted comprehensively in providing for the FEHA, have actually balanced the competing considerations here and have determined how it wants this to work, that this is a circumstance where it may not be appropriate for the court to come in and create another remedy that is parallel to and perhaps undermines what the legislature is doing.

Senator FEINGOLD. I appreciate your explication of *Stevenson* and your reasons for it, and I did invite you to do that, but let me now return in my remaining time to the two questions that flow from that. I acknowledge your obviously superior knowledge of the California law certainly to mine, and your point that perhaps the California law relating to age discrimination is not as expansive as some other discrimination law. But my sense is that of course California does, through its legal system, strongly the problem of age discrimination and has passed laws to try to deal with it. Is that correct?

Justice BROWN. That's correct.

Senator FEINGOLD. In light of that I would like to hear your answers to the two questions that I—you are right, I did as you for a number of things, so let me review what they were.

First, do you believe that age discrimination does not stigmatize elderly citizens, and that this kind of discrimination not only should be tolerated in our society but is actually natural and justifiable?

And the second question was: can you understand, given both the *Stevenson* case and the comments that I read from your speech that there could well be senior citizens who would be concerned about appearing before you, and what do you have to say to them?

Justice BROWN. Let me respond to the first part of that which is I do not believe that I have ever said that age discrimination should be tolerated. I don't believe I've ever said that any kind of discrimination should be tolerated. What's being discussed there is simply that age discrimination may be different than other kinds of discrimination, not that it should be tolerated.

Senator FEINGOLD. Does it or does it not stigmatize elderly Americans, age discrimination?

Justice BROWN. I do not think that it is the same as—you know, I think that discrimination is wrong. I think that we have laws against age discrimination and they should be enforced. But I think the fact that we all pass through these stages makes it different in quality from other kinds of discrimination.

Senator FEINGOLD. I think that is a fairly straight answer and I am going to take it as saying that you do not think it stigmatizes senior citizens, although it may have other negative consequences.

Justice BROWN. I think that—

Senator FEINGOLD. Is that a fair statement?

Justice BROWN. I think that would be fair.

Senator FEINGOLD. And then what would you say to seniors who would appear before you in court who have expressed concerns about your positions in these cases and your statements?

Justice BROWN. I would say to them that they should have no concern because when they come into a courtroom or when their case is presented at an appellate court of which I am a member, I am going to look at their case, I am going to look at the law, I am going to look at exactly what's happening, exactly the remedy that we have, and I am going to try to resolve that case correctly, and that is what I have always done, and I will continue to do that.

Senator FEINGOLD. I thank you. Normally I get a little extra time due to a kindly Chairman, but I have to keep my word. So with that we will be—thank you, Justice. We will be recess until 2:15.

[Lunch recess at 1:00 p.m.]

[AFTERNOON SESSION (2:31 p.m.]

Chairman HATCH. I apologize for being a little bit late but between asbestos reform, class action reform, other judges and Medicare and prescription drug reform, I just could not get back until now, so I apologize.

Let us turn to Senator Schumer. It is his turn to question. Senator, you have 10 minutes.

Senator SCHUMER. Thank you, Mr. Chairman.

First, I had wanted to give a little statement, so I am going to do that.

Chairman HATCH. That will be fine.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. I have to say, Mr. Chairman, that I for one am disappointed to be here on this nomination. Instead of finding well-qualified, consensus and moderate nominees, the White House has once again, in my judgment, reached out for an out-of-the-mainstream activist of the first order. It is almost as if the administration is looking for the nominee who will most antagonize us, not personally, but through her views, rather than one on whom we can all agree.

In case after case Justice Brown goes through pretzel-like contortions of logic to get to results that hurt workers, undermine environmental protections and do violence to basic rights.

As I reviewed Justice Brown's record, the one thing that came through loud and clear is that she is consistently inconsistent. Time and time again when a legal question is presented twice, she takes two totally opposite approaches in order to achieve the outcome she wants. A judge who makes the law instead of interpreting it is a judicial activist. Making law, not interpreting it, is an undesirable quality in a judge whether that judge is coming from the far right or the far left, whether that judge is coming from the most liberal or the most conservative side, because the founding fathers wanted judges who interpret law not make law, and if you are at the extremes you tend to have such passionately felt views that you want to make law, not interpret it. If you have a passion to bring the United States back to the good old days of the 1920's or 1890's it is not a very good bet that you are going to interpret law.

Judicial activism would be bad on any court, but it is especially dangerous on the D.C. Circuit which is known for good reason as the Nation's second highest court. Especially when it comes to workers' rights and the environment, the D.C. Court is arguably the most important court in the Nation. Since the Supreme Court takes so few cases each year, and since a grossly disproportionate number of labor and environmental cases come to the D.C. Circuit, this is often the court of last resort for those who seek to vindicate workers' rights and protect the environment.

Now, Judge Brown's record, when it comes to workers' rights, the environment and many other important issues leave many of us up here scratching our heads in wonderment. In a sense I have to respect her bluntness, but it is obvious to me that many of the President's judicial nominees want to return us not just to the 1930's but to the 1890's. I know this has been discussed, but I cannot get over it. In Justice Brown's case she is remarkably straightforward in her praise of the *Lochner* case, and her criticism of Justice Holmes' famous dissent there, calling Justice Holmes simply wrong. Even Justice Bork defended the Holmes' dissent. In *Lochner* the Court invalidated a New York labor statute that limited the number of hours laborers in bakeries could work. Fundamental justice for most Americans for close to 100 years. The Court, over Judge Holmes' vigorous and ultimately vindicated dissent, held the New York statute violated a liberty of contract right that had not

been previously recognized, and the doctrine lived for three decades until the Court shifted.

If you ask most lawyers to name the worst of Supreme Court decisions in the 20th century, *Lochner* would be at the top of the list. But Justice Brown thinks it was correctly decided. Even Justice Scalia, who so often advocates cutting back on Congress's power to protect basic rights, is content to let the states do so themselves. In this instance, as in others, Justice Brown finds herself willing to go even further to the right than Justice Scalia. Justice Brown not only wants to turn back the clock, she wants to turn back the calendar, and not just by a few years, but by a century or more.

Justice Brown, you seem like a nice person. You are clearly a very smart person. But to me, brilliance is not the only criteria. You can be the smartest person in the world, but if your views are way out of the mainstream you do not belong on the D.C. Court of Appeals. So I want to tell you that there is a lot in your record that troubles me, and I think you have got a rough road to hoe, at least on this side of the aisle.

My question is this: before we broke for lunch you made the point that we should view your speeches separately from your judicial opinions. You said, if I understand it correctly, that while your political opinions may reflect your personal views, it is your judicial opinions that reflect what kind of judge you would be on the D.C. Circuit.

First I would like to know is that a fair understanding of what you said?

Justice BROWN. I think so.

Senator SCHUMER. Thank you. In light of that, I would ask a follow up question on your comparison of the post *Lochner* era to a socialist revolution. You distanced yourself from that comparison by saying it was a part of a speech made to a young audience, and designed to, as I believe you said, stir the pot. While I think it is a pretty radical comment for a sitting judge to make, even if it is just designed to spur debate, I am not satisfied that it is just your personal view and has no bearing on your judicial opinions, because we all know that judges' personal views affect their judging. We do not have to draw on evidence of other conduct.

Let us go to your own record. In *Santa Monica Beach* v. *Super. Ct.* you called the, quote, "demise of the *Lochner* era the revolution of 1937." Those are your words. Those are nearly identical to what you said in your Federalist Society speech. So even if we were believing your court views as opposed to your stirring the pot to these young minds' views, you still seem to cling to that belief, at least until today.

You were also asked about a speech given to the Institute of Justice, where you said, quote, "If we can invoke no ultimate limits on the power of Government, a democracy is inevitably transformed into a kleptocracy, a license to steal, a warrant for oppression." You dismissed that speech as well, claiming that it did not necessarily reflect your views as a judge. But in *San Remo Hotel* v. *City and County of San Francisco*, you said—and that is a case obviously—"Turning a democracy into a kleptocracy does not enhance the stature of thieves, it only diminishes the legitimacy of Government."

Are these not your views both as a private citizen and as a judge? If not, can you explain why virtually identical rhetoric, that many would call quite extreme, finds its way into both your speeches and your judicial opinions?

Justice BROWN. Thank you for your question, Senator. There is a lot there, so I will try to work backwards from your question to some of the more general statements that you made. I will willingly acknowledge that a judge is not some kind of automaton or computer. You know, a judge is a thinking human being, and the writing of a judicial opinion is an organic activity. So it is never true that nothing of a judge is reflected in the work that they do. Writing is that kind of task. And I think judges have struggled with this forever, and there's lots of good commentary about how it is that a judge achieves the necessary distance. And Judge Hand said, you know, a judge has to be like a runner, stripped for the race. Frankfurter said, no, it's more that—you can't ever not be what you are, but you have to be very conscious of it and you have to put it aside and you have to deal in a very candid way with the way that you approach the task. So I do not think that the sides are hermetically sealed, but I think that you can be very principled in the way that you approach the work, and that when you make a decision, your decision has to be on the law and the facts in an individual case and has to be justified, and that you have to create a context that allows people to evaluate what you've done and see it clearly.

Senator SCHUMER. I guess I would ask the question. You were telling all of us—I am sorry I could not be here this morning for much of the time—but you were telling us that your views, as you do in speeches and whatever else, are different than your court-written opinions, and yet in these two instances, both again—these are pretty severe statements that you made—you made very similar statements in your opinions. So how can we believe you when you say, "Oh, well, do not worry about what I say in the rest of the world; just look at what I say as a judge," when the two are so much the same, and you still seem, even if we were to discount all your speeches, to still hold these views of kleptocracy and *Lochner*, and again, the way I look at it, going back to the 1890's. I think we have made great strides in America. I would say 97 or 98 percent of all Americans would agree with me we have made great strides.

And you seem to feel—and you know, we are always a little leery when people come to this table looking for our support. We have to look at the record in the past. But whether you look at the written record—because everyone comes before us and says, "Forget what I did in the past. I will just interpret the law." Now, fortunately you have a record and you are a forthright and very intelligent person. So we can ask. It is not like some of the others who refuse to answer any questions. But your judicial opinions seem to have the same views. Again, explain to me why I should believe that the two are separate when you have used very similar language and very similar thinking that you used in your speeches in your court opinions?

Chairman HATCH. Senator, your time is up.

But you should answer the question.

Justice BROWN. Okay. I totally agree with you, Senator, in saying that we've made great strides. I certainly know that, and I've seen that in my lifetime. It's one of the reasons that I think this is a great country, because we've been able to be self critical and we've been able to change, and we've been able to bring into being some of the, I think, sort of underlying aspirational goals that go all the way back to the Declaration of Independence. So I agree with you totally about that. And—

Senator SCHUMER. Just explain to me how we can reconcile what you said this morning in almost identical language and identical thinking in both the court cases and the speeches in these two instances.

Justice BROWN. I think the way that you can reconcile is exactly the way that I have explained. I don't think that any human being thinks in a vacuum. I think that you always come out of a world view—you are always working through your experience, your education, your convictions, but as a judge you have to be conscious of that and then deal with what's before you.

Now, it may turn out that when I have done this, absolutely even-handedly and carefully and thoughtfully, that I reach a conclusion, you know, where I think, well, you know, this looks like this other thing. But we ought to be concerned about is whether I am in fact trying to reach that conclusion or being results-oriented. And I really think that if you look at my work you will not see that.

Now, what you said earlier was "you are consistently inconsistent," and then you used that to say, well, you know, "but you're also ideological." I don't think that both those things can go together. What you are seeing, what you think of as consistently inconsistent is because I am simply looking at the case, I am looking at law. I am trying the right decision in each case.

Senator SCHUMER. I just want to ask one more question, Mr. Chairman, with your indulgence.

Do you stand by your views in *San Remo Hotel* v. *City and County of San Francisco* about kleptocracy, and do you stand by your views in *Santa Monica Beach* v. *Super. Ct.* about the demise of the *Lochner* era and the revolution of 1937?

Justice BROWN. Well, the cases say what they say, and I hope that—I always try to do an analysis that is very assessable, that anybody who reads it can understand what I've said.

Senator SCHUMER. So you do stand by them?

Justice BROWN. I have tried to write—

Senator SCHUMER. You can answer that yes or no.

Justice BROWN. Well, the cases are there. I guess that's—

Senator SCHUMER. So the answer is yes.

Justice BROWN. Well, the concern I have, Senator, is that you started off—

Senator SCHUMER. But—

Chairman HATCH. Let her answer the question.

Justice BROWN. —making a lot of statements about what that was, and so—and what my views were and what that meant. And so all I'm saying is what's in the cases is in the cases, and it should be clear.

Senator SCHUMER. I am going to take that as you stand by those views because you have not refuted them here and you said what is in there is in there.

Thank you, Mr. Chairman.

Chairman HATCH. Let me just say I do not take it that way. I take it that, Senator, you have interpreted it the way you want to, but that is not the way I meant it.

Senator SCHUMER. Well, Mr. Chairman, it is a simple yes or no question. Do you stand by them? Do you not stand by them? And we cannot get a yes or no.

Chairman HATCH. No, it is not because she has consistently explained throughout this whole hearing that she put this language into those opinions and that that language deserves to be interpreted differently from the way you have interpreted it. It is not just a simple yes or no. I think that is a fair statement, is it not?

Justice BROWN. Yes.

Chairman HATCH. In other words, you do not have to take Senator Schumer or my interpretation of what your cases say. But to try and paint you like your back in the *Lochner* era, without understanding what *Lochner* is all about I think is just wrong.

Justice BROWN. Mr. Chairman—

Chairman HATCH. You do understand it.

Justice BROWN. Mr. Chairman, if I may, I do need to follow up on something because the prologue to your question was quite long.

And you made a statement that: You're obviously out of the mainstream, you clearly take positions that not even very conservative judges take, and you base that on this idea that I want to return to *Lochner*, that I said *Lochner* was rightly decided. I have never said that. And in fact, in my cases, I have actually said that to the extent that *Lochner* court was using the Due Process Clause as a blank check to simply insert their political views into the Constitution, that they were justly criticized. And I have also said that that portion of the Holmes' dissent, which is simply reflecting a deference to the legislature, is one that I generally agree with.

Senator SCHUMER. Do you agree with the holding of *Lochner*?

Justice BROWN. I have said that I think that it's appropriately criticized and it's been discredited. I mean *Lochner* is like this curious case that has actually ended up creating a new word in the English language, and I think I've even said that it stands for—it's the most pejorative thing that you can say among attorneys.

Senator SCHUMER. You do not agree with the holding of *Lochner*?

Justice BROWN. I think that I've been clear. I said that it is appropriately criticized to the extent that they were inserting their views into this case, or into the Constitution I guess. That's the issue.

Senator SCHUMER. Thank you, Mr. Chairman.

Senator DURBIN. Mr. Chairman?

Chairman HATCH. I will be happy to turn to you, Senator Durbin, but I want to follow up with some questions.

Senator DURBIN. If I can ask the Senator from New York to just if you could, stay a moment.

I would like to read into the record what you said, and this was at the Federalist Society, University of Chicago Law School speech, April 20th in the year 2000. Here is what you said: "In his famous,

all too famous dissent in *Lochner*, Justice Holmes wrote that the, quote, 'Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire,'" end of quote. And then you went on to say: "Yes, one of the greatest, certainly one of the most quotable jurists this Nation has ever produced, but in this case he was simply wrong. That *Lochner* dissent has troubled me, has annoyed me for a long time, and finally I understand why. It's because the framers did draft the Constitution with a surrounding sense of a particular polity in mind, one based on a definite conception of humanity."

Justice Brown, you were unequivocal here in saying that you disagreed and that Justice Holmes was wrong, and despite the statements by the Chairman and some of the things you have said today, unless you are prepared to disavow this speech and some other things you have said, I have to say your words are very clear.

Justice BROWN. Well, I think I was clear, too, Senator, and I think that what is being said there—and I think the context of the speech bears it out—is that I had a difference of opinion with this idea that the Framers of the Constitution had no economic notion. I think it's very clear, when you read the history, that there was a concern about property; that the American Revolution was a revolution that was really fought over property; that one of the reasons that the Constitution came into being, you know, instead of just modifying the Articles of Confederation, was that there was concern about what legislative majorities were doing with property. So both in the Constitution and in the Bill of Rights, that concern, you know, finds expression in specific language.

Senator DURBIN. I would like to ask more questions, but if you would like to go first?

Chairman HATCH. Let me go first, and then we will turn to Senator Durbin. Let me follow up on Senator Specter's question about your opinion in the *Hi Voltage* case, Proposition 209, and the Federal Supremacy Clause. Now, the Ninth Circuit Court of Appeals, clearly one of the most liberal if not the most liberal appellate court in the country, or at least in the Federal judicial system, we will put it that way, has ruled—and this is noted in the majority opinion of the Proposition 209 case—that Proposition 209 does not violate the Equal Protection Clause. Also, Federal courts have ruled that that proposition does not violate Federal civil rights statutes.

Now, in your opinion, I would note you acknowledge the Supremacy Clause would dictate Federal law would prevail; if Proposition 209 violated the U.S. Constitution or Federal statutes, that literally Federal law would prevail. Is that correct?

Justice BROWN. Of course.

Chairman HATCH. Okay. Now, Justice Brown, throughout this hearing, we have heard that you are too critical of Big Government. Join the crowd. There are a lot of us up here who are, too, and there are a lot of judges throughout the country who are, both liberal and conservative judges. But I think a close examination of your record indicates that any personal antipathy you may have expressed towards Big Government does not interfere with your ju-

dicial decisionmaking. I think any fair reading of your opinions will result in that conclusion.

Now, we can pick cases out of your 750-plus cases that you have sat in on and helped to decide and wrote opinions on. We can pick cases, anybody on this Committee could pick cases with which they disagree. But that is true of every judge, unless you are just totally liberal or totally conservative, and some people think that might be a good thing. I do not. I think being totally right is better than being liberal or conservative. I think doing total justice is more important than being liberal or conservative. I think doing what is right is more important than being liberal or conservative. But, naturally, you are going to have liberals on this Committee who do not agree with some of your decisions, but, by gosh, they agree with a lot of them, too.

Now, what does that mean? Does that mean that you are outside the mainstream when you can please them on some but you don't please them on the others? And you are going to have conservatives that don't agree with all your opinions, but on some they are going to agree. Does that mean you are out of the mainstream? Heavens, no. That is true of almost any judge that is in any kind of a tough situation of making real decisions in this world based upon the law.

Now, let's take, for example, the case of *Lundgren* v. *Super. Ct*. There you joined in an opinion upholding the Safe Drinking Water and Toxic Enforcement Act of 1986, and you expansively interpreted the phrase "source of drinking water" to include faucets allegedly containing lead so that the plaintiffs could proceed with their case. Is that right?

Justice BROWN. That's correct.

Chairman HATCH. Well, I think that would please all of our liberal brethren, and sisters, and I hope it would please all of our conservatives, because it happened to be right. So the Government does have the responsibility in assisting and protecting the environment, doesn't it?

Justice BROWN. Yes, it does.

Chairman HATCH. And you have never said otherwise.

Justice BROWN. And I have never said otherwise.

Chairman HATCH. And isn't it also true that in *Bockrath* v. *Aldrich Chemical Company* you upheld the right of the plaintiff to sue for exposure to toxic chemicals using the Government's environmental regulations? Didn't you do that?

Justice BROWN. That's true.

Chairman HATCH. Well, that sounds to me like something that should please my colleagues on the other side and say, Well, maybe she is in the mainstream because we agree with her. I can name a lot of cases they agree with you on, but I can show some that they don't agree. They are showing them here. But that doesn't mean you are outside the mainstream. That is just a shibboleth. That is a phony excuse to say we are not going to vote your way. And it is a cover-up more than it is an honest, intellectual process.

Isn't it true that in *Lockyer* v. *Shamrock Foods* you upheld California's very stringent standards for identifying and labeling milk and milk products, thereby ensuring that the Government has a role in protecting the safety of our children and all Californians? Is that correct?

Justice BROWN. That's correct.

Chairman HATCH. My goodness, I think our colleagues on the other side ought to be shouting "Hurray" for you. My goodness. And I think our colleagues on this side would as well.

In *Ramirez* v. *Yosemite Water Company*, you joined in an opinion validating State regulations regarding overtime pay, didn't you?

Justice BROWN. I did.

Chairman HATCH. Well, by gosh, how could you do that if you hate Government like they have lifted these quotes out of your speeches?

You don't have to answer that. That was rhetorical.

[Laughter.]

Chairman HATCH. Isn't it true that in *Pearl* v. *Workers' Compensation Appeals Board*, you upheld the role of the Workers' Compensation Appeals Board in applying a stringent standard of "industrial causation" for a worker's injury, thereby showing that the State has a proper role in ensuring the safety of workers? Didn't you do that?

Justice BROWN. That's true, Senator.

Chairman HATCH. Well, my gosh, how could you support the Government? I mean, that is odd because I have been hearing that you do not support the Government, that your statement lifted out of context should ban you from serving any further as certainly a judge on the Circuit Court of Appeals for the District of Columbia.

Well, Justice Brown, in light of all these cases, you know, I find it a bit hard to believe that those who never met a Government program they did not like should be criticizing you, who has met Government programs that you have sustained because the law required it. Do you differ with that?

Justice BROWN. I don't disagree with anything that you say, Mr. Chairman.

Chairman HATCH. Well, let's take a look at one more case that shows your respect for the proper role of Government. In the 2002 case, *Kasler* v. *Lockyer*, didn't you author the court's opinion upholding State gun control legislation?

Justice BROWN. I did.

Chairman HATCH. And specifically you rejected the proposition that the State Constitution includes a right to bear arms?

Justice BROWN. The California Constitution, unlike the Federal Constitution, does not have a specific right to bear arms. It does have a right to fish, but no right to bear arms.

Chairman HATCH. So you upheld the California Constitution?

Justice BROWN. Yes.

Chairman HATCH. Well, my goodness, it would seem to me some of our colleagues on the other side ought to give you credit for that. But I have not heard that yet. I have not heard very much credit given to you for all these opinions with which they agree, and we could name dozens of them—in fact, probably most of them.

Didn't anti-gun control groups like Handgun Control and the Center to Prevent Handgun Violence applaud your decision while the National Rifle Association ran an advertisement targeting you as hostile to the Second Amendment? Didn't that happen?

Justice BROWN. The National Rifle Association was very unhappy with that decision, ran a series of infomercials where my picture was prominently displayed.

Chairman HATCH. Does that give you second thoughts? Maybe you should not have done that to irritate the National Rifle Association like that. Does that give you second thoughts?

Justice BROWN. Well, no, because—

Chairman HATCH. Why?

Justice BROWN. Because I approached the case to decide what the right answer is, and that is the only point—

Chairman HATCH. Based upon what? Based upon what?

Justice BROWN. Based upon the Constitution and the law that applies to it.

Chairman HATCH. Based upon the Constitution and the law.

Justice BROWN. And what the facts are.

Chairman HATCH. That is what judges should do, shouldn't they?

Justice BROWN. I think so.

Chairman HATCH. Well, some of our colleagues want judges to make laws. Now, that happens on both sides of this table from time to time, but in all honesty, a lot of our liberal colleagues would just love to have judges on the appellate courts who would make the laws that they would never have a chance of getting through the elected representatives of the people in the Congress.

Well, in case there is any doubt about your real concern about the consequences of gun violence, let me quote from your concurring opinion in *Kasler*: "It is impossible not to grieve for the thousands of young men cut down in their prime, impossible not to mourn toddlers slaughtered in the midst of innocent play, impossible to ignore the grim reality of schoolchildren whose final moments echoes with screams of terror and the sudden slap of bullets. All too often, the killers are children, too."

You said that, didn't you? You wrote that?

Justice BROWN. I did write that, yes.

Chairman HATCH. Okay. Well, Justice Brown, Senator Feinstein mentioned that she was deeply troubled by your dissenting opinion in *People* v. *McKay*. However, I have got to say I am deeply impressed with your opinion in that particular case, which involved a young man arrested for riding his bicycle in the wrong direction. You were the sole dissenter in a 6–1 decision.

Now, would you please take some time and tell this Committee about that case and why you wrote a separate opinion dissenting, in part?

Justice BROWN. Thank you for the opportunity to explain that case, Mr. Chairman. I was somewhat surprised that Senator Feinstein took issue with that case. It's true I was the lone dissenter, but it was a case where there was a use of a very minor infraction to generate a very broad-ranging search, and that happened because under California law you can't really be arrested for an infraction. It's a cite and release, and so there would never be any search incident to arrest.

But in a circumstance where it's a minor infraction and then you don't provide what is considered to be adequate identification, then the officer is permitted to actually arrest the person who has been stopped. And what happens is that once you have an arrest or a

potential arrest, then you can have a search incident to that arrest, and that's a very broad-ranging search.

So what happened in this case was a man who was stopped for riding his bicycle on the wrong side of the street ended up being subjected to a custodial search, essentially; contraband was discovered, and he ended up with a 3-year prison sentence.

So what I was doing in that case was simply saying to my colleagues to give this kind of unbridled discretion to a police officer invites discriminatory enforcement, and that was very consistent with prior precedent of our court, which had in a slightly different context said that that was inappropriate.

So even though what the court did was justifiable under precedent, there was other alternative precedent which would have allowed them to reach a different conclusion in this case, or at least so I thought. And I thought it was worth exploring that and making that argument. Unfortunately, I didn't convince any of my colleagues.

Chairman HATCH. But you felt it was an unreasonable search and seizure under the circumstances.

Justice BROWN. I did.

Chairman HATCH. Under the Fourth Amendment.

Justice BROWN. I thought that to permit that kind of search under those circumstances really opens up the potential for a lot of small infractions to be turned into basically general searches, a kind of law enforcement mechanism that could be applied very arbitrarily.

Chairman HATCH. That I have to say I don't think the Supreme Court of the United States would permit in its current makeup. Now, could I just finish this? My time is up, but I will try and finish this line of thought.

You wrote in your opinion some striking language that I would ask you to comment upon after I finish quoting you. You wrote, "In the spring of 1963, civil rights protests in Birmingham united this country in a new way. Seeing peaceful protesters jabbed with cattle prods, held at bay by snarling police dogs, and flattened by powerful streams of water from fire hoses galvanized the Nation." You go on to say, "Without being constitutional scholars, we understood violence, coercion, and oppression. We understood what constitutional limits are designed to restrain. We reclaimed our constitutional aspirations. What is happening now is more subtle, more diffuse, and less visible, but it is only a difference in degree. If harm is still being done to people because they are black or brown or poor, the oppression is not lessened by the absence of television cameras."

You continue: "I do not know the defendant's ethnic background. One thing I would bet on"—this is your opinion, what you wrote in it. "One thing I would bet on, he was not riding his bike a few doors down from his home in Belair or Brentwood or Rancho Palos Verdes, places where no resident would be arrested for riding the 'wrong way' on a bicycle, whether he had his driver's license or not."

Well, it would not get anyone arrested unless he looked like he did not belong in the neighborhood. You understand that, don't you? Let me continue.

"That is the problem, and it matters. If we are committed to a rule of law that applies equally to 'minorities as well as majorities, to the poor as well as to the rich,' we cannot countenance standards that permit and encourage discriminatory enforcement."

You made those comments in that opinion, didn't you?

Justice BROWN. I did.

Chairman HATCH. And some of those comments came because you understood through your background how oppressive unreasonable searches and seizures might be, not because you had unreasonable searches and seizures, but you saw people in the South who were exposed to that type of bad treatment or you knew of them.

Justice BROWN. That's right, Mr. Chairman, because discriminatory enforcement is another way to discriminate, and the point I was trying to make there is that there may be more subtle forms of discrimination, but we nevertheless have to continue in our aspiration to root that out wherever we find it and to make sure that everyone is treated equally before the law.

Chairman HATCH. Well, I would just note for the record something remarkable that Timothy P. O'Neill, professor of law at the John Marshall Law School in Chicago, wrote regarding this case. In calling upon Illinois not to make what he sees as the "mistake that the California Supreme Court made in *McKay*", that is, what Mr. O'Neill characterizes as allowing "police to flout State laws on arrests," Mr. O'Neill approvingly cites and quotes from Justice Brown's opinion before writing, "Justice Janice R. Brown's concurring and dissenting opinion in *McKay* should be required reading for all criminal lawyers." High praise indeed.

Now, I think it is really unfair to have you, the nominee of the President of the United States for the Circuit Court of Appeals for the District of Columbia, be picked apart on perceptions of what you might have done on half of your cases—not even half but some isolated cases that have been quoted here and will be quoted more perhaps before this hearing is over, and ignoring all of the terrific legal work you have done.

I happen to agree with your cases that are being criticized here. I think you can explain every one of them and explain them intelligently and show that not only you are in the mainstream, you are one of the great jurists in this country. But ignore all the other great cases that you have done? To pick isolated cases? We are known to do that here on this Committee. It is not fair, but then, again, members can do whatever they want to do on this Committee, within reason.

So I just want you to know that I don't see one reason in the world for anybody not to support your confirmation here, but let's listen to the other side and see what they have to say.

Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman.

Justice Brown, during the lunch break, a number of my colleagues in the Senate asked me, "How is your hearing going with Justice Brown?" and I told them that you made a very positive impression, that some of the information that was brought forward by my Republican colleagues about a terrible racist cartoon I thought really created an environment within the Committee where people

were really trying their best to be as fair as they could under very trying circumstances.

But I said—and I think others on the Committee have agreed with me here—we struggle with nominees who come before us and don't just say, "Take me for what I've said. There are some things," some of the nominees say, "that I now agree with and some things I don't agree with."

As Chairman Hatch has said, you have been party to a lot of decisions as appellate court judge and a Supreme Court Justice, and it is almost like Senator Hatch and myself—well, maybe not so much in his case, but if you look at all the votes we have cast, you can just about mold whatever kind of political figure you want out of those votes.

But over time, an impression is created, and the impression may be of a conservative to my right and a liberal to his left. But that is just a natural conclusion.

I think the thing that continues to trouble me is this belief that judges are automatons, that it is just almost a robot reaction, that all you have to be told is here is the precedent, here are the facts, and here is the decision that comes out the other end. I don't think that is how it works. I really believe that there is an element of judgment involved here, and whenever there is judgment, there is subjectivity. You will see some facts differently than your colleagues. We do in the Senate. We do in the House. And the question then is: When there is a subjective element, what will be going through your mind? That is probably what we are asking here.

I don't apologize for raising questions about opinions that you have written. If we cannot ask questions about those, I might say to the Chairman, why are we even here? There is no point in it. We are just supposed to take President Bush's nominees and say, if you like them, Mr. President, that is just fine? I don't think that is our responsibility. I think we have more that we have to look to.

I want to go to two specific areas here and see if I can ask you for your reasoning. *People* v.*Mar*, involving a criminal defendant who was asked to wear a 50,000-volt stun belt during the trial, the defendant was on trial for resisting arrest, forced to wear the stun belt beginning on day two of the trial, though he had been well behaved on the first day. Wearing that stun belt made him nervous, especially during his testimony, and stun belts have a history of accidental activations and the belt administers a 50,000-volt shock for 10 seconds, enough to cause immediate uncontrolled body seizures as well as skin welts and the like.

You were the dissenting vote in that case. The rest of the Justices on the Supreme Court—and as I might remind those following this, six Republicans, one Democrat. The rest of the Justices on the court felt that it was unfair to require this defendant to wear this apparatus while he was on trial, a very serious trial, a very serious charge.

You suggested in your dissent that a high school student could do a better job than the majority on your court, the court that you serve on, of researching the issues. You accused your colleagues of "rushing to judgment after conducting an embarrassing Google.com search for information outside the record."

Do you stand by those statements today?

Justice BROWN. Well, I thank you for asking that question, Senator, because it is something I really would like to explain.

The question that was before our court was: one, should the trial court have held a hearing to decide whether restraints should be used? And, two, if yes and they did not, was the error prejudicial? So the court decided based on an earlier precedent that we have called Duran that there should have been a hearing. It wasn't completely clear that a hearing was required because the basis of Duran was that visible restraints might have an effect on the jury and, therefore, the court should look and make a finding that those visible restraints were required.

So it wasn't clear what should happen when the restraints were not visible. But assuming that the court is right, that there should have been a hearing and there should have been a finding, then the next question was: Was there prejudice? And the court actually doesn't find that there was prejudice. This defendant testified fully.

Now, so let me go back to the beginning here. I don't know whether a stun belt should be used here. I don't know whether a stun belt should ever be used. I don't know exactly how these stun belts operate, and I don't know exactly what they do. And the reason for that is that question was never presented to the court. There was nothing in the record before us about that because that's not what the case was about.

So the majority here may well be right, and in a different kind of case, were it a case for a declaratory relief saying these shouldn't be used, where both sides had an opportunity to present their evidence, they might well have reached that conclusion.

In a case where something had happened to this particular defendant and it was a tort claim of some kind, where there was evidence on both sides and there was a record presented to us, that might be the right conclusion.

I am not saying in any of this that stun belts should be used or that that's a good idea or anything. My concern in this case was about what the court did. There is a particular way that appellate process is supposed to be conducted, and it is to look at the law and the facts, the claim that is being presented in the particular case, and to resolve that case. And so what the court was doing here was completely outside the record.

So I don't think that what I was saying there is at all odd or outside the mainstream or anything like that. I think everybody agrees how appellate courts are supposed to operate, and here the court just decided it would do otherwise.

Senator DURBIN. On its face, wearing a 50,000-volt stun belt while you are criminal defendant during the course of your trial, you couldn't accept that that might create some psychological problem for the defendant?

Justice BROWN. Well, the record doesn't actually establish that. The defendant testified fully. And there's no indication that he was inhibited in any way. That's the problem. An appellate court—I could speculate all kinds of things. But the court is actually supposed to rule on the basis of the record.

Senator DURBIN. Well, I read the record here, and frankly I think there is evidence that, at least as counsel said, "he feels that putting the belt on him now is basically creating a difficult mind situa-

tion for him to be able to think clearly and be able to testify properly without having a breakdown of his strong emotions." That is in the record. That is what you had before you.

Justice BROWN. That's what counsel said before he testified, but he testified and none of those things happened.

Senator DURBIN. Well, I just frankly think if we are going to go around with 50,000-volt stun belts and hand them out to Senators and witnesses before committees, I think we may have shorter hearings and different questions and most of us will take judicial notice of why. And I can't understand why you were the single dissent in that—

Chairman HATCH. But normally we don't have violent criminals in our courtroom here.

Senator DURBIN. Well—

Chairman HATCH. Although I have seen some.

Senator DURBIN. But the point I want to make is if we are talking about a presumption of innocence, which at times it is painful to presume, and we are talking about a criminal defendant having a chance to defend himself before a jury of his peers, you can't stack the deck going in. You basically have to say there is going to be a fair trial. And this went to it.

Let me go to one other point, if I might, and that is this whole question of property rights, because I think that keeps recurring in your speeches. In fact, you have made reference to it today. And I would like to ask you if you believe there is a hierarchy of rights in this country and whether in that hierarchy of rights that the rights to property are as equal to or greater than the rights which we customarily assign to people in terms of their own freedoms and liberties, speech, religion, assemblage, privacy.

Where do you put the right to property in that hierarchy?

Justice BROWN. Well, I think there has been a great deal of discussion about the dichotomy that was created, and I think even the Supreme Court itself has in more recent cases acknowledged that that dichotomy, that notion that property rights are not entitled to the same level of protection as what is called fundamental rights or fundamental liberties, I think the Supreme Court itself has reconsidered that and certainly has said something like that in cases like *Nolan* and *Dolan*.

There's nothing that I can see in the grammar or the way the provision is put together that suggests to me that the drafters of the Constitution were looking at this differently. And there is much historical information that suggests that they saw property and liberty as indivisible. In other words, they were sort of opposite sides of the same thing, and there's the language that's often used that property is the guardian of every other right.

Senator DURBIN. So do you believe—I want to make sure this is clear for the record because some of your speeches I think go far afield of what you have just said. Do you happen to believe that the liberty of the individual is equal to the property rights of another individual in this hierarchy of rights?

Justice BROWN. Well, I want to answer this question clearly, and I'm not sure, the way you phrased the question. But let me try to—

Senator DURBIN. I want you to put it in your words.

Justice BROWN. Okay.

Senator DURBIN. Forget my question. Just explain your thinking.

Justice BROWN. Let me try to put it in my words. I believe that property and liberty—when the Fifth Amendment says, you know, no deprivation of life, liberty, or property without due process of law, it seems to me that those are really all on the same level. I'm not saying that, you know, property is greater, but I really think that it's very clear that property and liberty are linked in the minds of the drafters of those provisions. And one of the very interesting things that I have seen lately is an essay by Madison where he talks about the—you know, he talks about property in a way that almost brings together property rights and the First Amendment because he's essentially saying a man has a property in his ideas.

Senator DURBIN. You wrote in this famous speech to the Federalist Society, since it has become famous today—

Justice BROWN. It has become famous. Actually, the audience was only about 40 people, and so it's gotten much wider distribution now.

Senator DURBIN. It is a very—you know, you talk about doing these speeches part-time. Even though I do not agree with much of your speech, it is an excellently researched and footnoted speech. So if this is what you do part-time, I don't know if your husband gets to see you at all.

But let me just say this: You say in this speech, "Protection of property was a major casualty of the Revolution of 1937." That, of course, refers back to Franklin Roosevelt's New Deal. What did you mean by that?

Justice BROWN. I don't think that's at all controversial. After 1937—there's a famous footnote in a case called *Carolene Products*, Footnote 4, that infamous footnote, where the court basically said, well, we are kind of just going to do rational basis review of economic regulation, but we will do a stricter scrutiny where the rights of—I believe the phrase they use is—"insular minorities" is involved. And so that's the beginning of the Supreme Court jurisprudence that says, well, you know, property rights, all you have got to have is a rational basis for doing it; but if you're getting into these fundamental liberties, then we are going to have strict scrutiny and we are going to really look very carefully at what the legislature is doing.

But I do think that the court has begun to rethink that, and not just recently—

Senator DURBIN. Do you think that is wrong? Do you think that conclusion is wrong?

Justice BROWN. That you should have a different level of scrutiny—

Senator DURBIN. Different standard for property rights as opposed to these so-called fundamental rights.

Justice BROWN. Yes, because I think that—I wish I could articulate this better, but I think that they're the same thing. I mean, I really think that—I come across again and again in the historical reading that I do this idea that the Founders saw this as indivisible. And it makes sense. If you don't have the wherewithal, you know, to keep a roof over year head, to provide for your needs and so forth, your political rights are not going to be very meaningful.

Senator DURBIN. But do you not concede as well—and Senator Hatch has read, I thought, a very stirring quote from one of your opinions. Do you not concede as well that if we equated property rights with personal rights, the civil rights movement would have been a much different civil rights movement? Because the people who were arguing against opening up their hotels and their restaurants for the accommodations of people of color were basically people who said these rights of these individuals don't supersede your rights as property owner and business owner.

Now, when you sit before us here and say I think they are the same, do you understand why someone on this side of the table, maybe on this wing of the table, would scratch their head and say, How can she say that? How can you reach that conclusion in light of the history of this country over the last 75 years?

Justice BROWN. Well, Senator, I'm very glad that you explained what you were thinking because that clarifies for me, and so I think I can respond to that.

When I say they are the same—and, you know, that they are—I am really looking at the Fifth Amendment in particular and this idea of, you know, whether you have to have compensation, in other words, taking for a public purpose without compensation. I'm not saying that you could never regulate property. Property has been regulated since the—you know, since the beginning of this country. I'm not saying that you could never have laws that say that people who are in a business that you regulate have to behave in a certain way. California has a very long history of anti-discrimination laws that says if you are a commercial establishment, you have to treat everybody the same. I don't think there's any problem with that at all.

Senator DURBIN. Well, all right. I think we are getting closer to an understanding of one another's position on that, and I think that when I read your speech—and, Mr. Chairman, with your permission, I would like to have this speech to the Federalist Society, which you, I believe, were on the board of, entered into the record at this point in the hearing.

Chairman HATCH. Without objection.

Senator DURBIN. I think when people read this speech, they might draw a different conclusion than what you have just said, and therein lies the difficulty. I have never seen you before. I have never heard you speak before. To my knowledge, we have never met before. All I have to go on is what you have written and what you have given to us in your speeches and in your court opinions. And they lead many of us on this side of the aisle to the conclusion that your views are not mainstream views.

Now, you have explained some of them today, and some you have qualified, modified, maybe some you have changed, whatever, however anyone wants to characterize it. But I hope that you understand that what we are about here is to try to understand who you are, and in that moment of subjectivity as a judge, which each legislator and each judge has, we would like to know what is going to move you forward, what will your values be. And that is the purpose of these questions, and I thank you for coming today, as well as your husband.

Justice BROWN. Well, I thank you also, Senator, and I hope that I have been able to allay some of your concerns. And one thing that may help you is to look at how I have talked about this in opinions, and I think it will be very clear to you that what I am talking about when I saw I have a problem with this dichotomy is that just this idea that economic regulation doesn't deserve any attention.

Chairman HATCH. Well, thank you. Let me just follow up with just a few clarifying things. The Fifth Amendment of the United States Constitution states in its final clause, "nor shall private property be taken for public use, without just compensation." That is basically what you believe in.

Justice BROWN. Exactly.

Chairman HATCH. When it comes to property rights, and that is expressly in the Constitution. Right?

Justice BROWN. Yes, and I feel very strongly that where language is expressly in the Constitution, judges have an obligation to enforce the prohibitions in the Constitution.

Chairman HATCH. Okay. Now, let me just go back to the Lochner situation just for a minute, just so we make sure that the record is clear.

In *Santa Monica* v. *Super. Ct.*, you said for the record that Lochner was "justly criticized," as you have repeated here today. Here is your quote: "The problem with Lochner was not that it sought to make judicial review meaningful or that it deemed economic interests worthy of protection. The Lochner court was justly criticized for using the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written."

I don't know how anybody could disagree with that, between you and me, who understands constitutional law.

Now, in addition, your reference to the revolution of 1937, you said "in that case"—it is in quotes—"so that the reference is to the so-called revolution of 1937." That was in quotes. Now, here is the full quote: "The revolution of 1937 ended the era of economic substantive due process, but it did not dampen the court's penchant for rewriting the Constitution."

So what I interpret that to mean is that you were not happy with the court's penchant to use substantive due process in Lochner any more than you are enamored with the court's penchant for using substantive due process thereafter.

Justice BROWN. Well—

Chairman HATCH. You are not alone in that criticism.

Justice BROWN. That is correct, and I think that would make me very much in the mainstream. That's right down the middle.

Chairman HATCH. And there is no question about that.

Now, let me just take a second or two on this stun belt thing because I think some people might misconstrue some of that, so let me do this. As I understand it, you were the sole dissenter in that case in which a majority of the California State Supreme Court overturned the conviction of a man who was forced to wear a stun belt while testifying.

Now, let me ask you a few questions about the case of *People* v.*Mar*. That is the cases involved, if I understand it, since it has been raised.

Justice Brown, the rule in California states that a defendant may not be subject to restraints in the courtroom while in the jury's presence unless there is a showing of a manifest need for restraints. Is that correct?

Justice BROWN. That's correct.

Chairman HATCH. Okay. Now, isn't it true that the facts in this case suggested that the defendant posed a danger of violent conduct?

Justice BROWN. The fact—well, he was, one, arrested for a violent offense and—

Chairman HATCH. In fact, didn't the judge himself indicate his concern about the defendant's "tendency to engage in violent conduct"?

Justice BROWN. He did, and there was even some statement about some concern from his defense counsel. What the court said, though, was that wasn't a hearing and a finding within the meaning of *Duran*. But there was some evidence of that.

Chairman HATCH. All right. Indeed, in permitting the use of restraints, the trial court had found that the defendant, from the trial court, "was on trial for assaulting a guard, he had previously been convicted of escape and of assaulting a police officer, and on two recent occasions he had threatened correctional officers and threatened his own defense attorney."

The defendant's own attorney had argued that the defendant was incompetent, that he was incapable of having rational conversations with counsel, that his behavior was "explosive," and that he was psychotic. Isn't that correct?

Justice BROWN. That's correct.

Chairman HATCH. Okay. Up until the decision in *Mar*, Justice Brown, isn't it true that California courts had seen stun belts as humane up until that decision?

Justice BROWN. Well, they had certainly been used, and the legislature had not prohibited them.

Chairman HATCH. Let me quote from one court opinion. The California Court of Appeals noted that the belt "does not diminish courtroom decorum, is less likely to discourage the wearer from testifying, and should not cause confusion, embarrassment, or humiliation."

Now, Justice Brown, your argument was simply that the defendant had not demonstrated that he was in any way prejudiced by the use of the stun belt, a showing he was required to make. He would have to show he was prejudiced, but he didn't. Is that correct?

Justice BROWN. That was the issue before the court, and as near as I can tell, there is no finding by the majority and no actual argument that there was actual prejudice here.

Chairman HATCH. Well, the stun belt was not visible to the jury either, was it?

Justice BROWN. That's my understanding.

Chairman HATCH. Was there any evidence that the jury knew that he was wearing a stun belt?

Justice BROWN. I don't know. I'm not aware of anything in the record—

Chairman HATCH. I don't believe there was.

Justice BROWN. —that suggests they were.

Chairman HATCH. Yes, I don't believe there was. But the point is that many other cases have upheld the use of stun belts at trial, including U.S. Courts of Appeal for the Fifth, Seventh, Ninth, and Tenth Circuits and the Colorado, Delaware, Minnesota, and Washington State courts. So to try and say you are outside the mainstream because you dissented in that case, with all these facts the way they were, I think is an overreach at best. In fact, I think most of the complaints have been an overreach at best.

Senator DURBIN. Mr. Chairman?

Chairman HATCH. Yes, Senator Durbin.

Senator DURBIN. Mr. Chairman, I would like to have permission to enter the entire case into the record.

Chairman HATCH. Without objection.

Senator DURBIN. I believe that you have read selectively and found things that support the witness' position, but—

Chairman HATCH. I sure have.

Senator DURBIN. —there is a lot of evidence to the contrary here which I think should be part of the record. Let's put the entire case in.

Chairman HATCH. That will be fine. We will put that in the record. But the point I am making is that reasonable minds can differ, and even though you were in the sole dissent, there are a lot of other jurisdictions that permit stun belts in the case of violent or dangerous witnesses. And we will put that in the record as well.

I understand there is no other Senator who wants to question. Let me just close by saying, Justice Brown, I have been around here 27 years. Admittedly, I am a Republican. Admittedly, I like this administration. Admittedly, I am pleased with virtually all the judgeship nominees that have been nominated by the President, and I think most of them have been, without question, superior nominees.

How anybody would not think you are a superior nominee is beyond me. I am impressed with you personally. I am impressed with your ability to discuss these very consequential and difficult areas of law and to make the sense that you have. You have done better than an awful lot of top-level intellectual legal thinkers who have appeared before this Committee.

You have a record that I think is exemplary, although there will be those on both sides of this dais who will disagree with you from time to time on some of your opinions, as your colleagues on the court have done and as you have done with them.

There is no question about your decency, your honor, your integrity. And I believe there is a real difference between giving speeches where you want to get people excited and get people interested and the need to do what is right when you are on the bench, which you have done.

I think if anything comes through to me, it is that you have followed the law regardless of what anybody thinks, including yourself, that the law is the important thing to you. Is that a fair comment?

Justice BROWN. I think that's a very fair comment. I have only one agenda when I approach a case, and that's to try to get it right.

My allegiance is to the Constitution. I take an oath as a judge to defend the laws and the Constitution of the State of California, and I have tried very conscientiously to do that.

Chairman HATCH. As well as the Constitution of the United States of America.

Justice BROWN. Yes.

Chairman HATCH. Well, I have to say, I am really impressed with you and the way have handled yourself and the intelligent way that you have spoken to this Committee and answered questions that have been very difficult questions from both sides of the table, but especially from my colleagues' side because they are naturally interested in who the President nominates and whether they are worthy of these very, very substantial and top positions.

I don't see how anybody watching this hearing today and listening to you could conclude that you are outside the mainstream of American jurisprudence. That is just a shibboleth. That is used a lot just because they do not have anything else to use. And that has been done by both sides, I have to say. But I believe you have handled this hearing very, very well, and I am going to do everything I can to see that you are confirmed to this very important position. And I believe once you are on that court you will do a terrific job of serving all Americans, not just one side or the other but all Americans, and that is what I would expect of you, and that is the least I would expect of you, with the abilities and the intelligence that you have.

We are grateful that you have sat through this hearing this long. It has been a difficult one for you, in a way, but you have handled yourself well.

With that, since there are no further questions from anybody and I have kept the record open—unless you have something to say?

Justice BROWN. I would like just to thank you, Mr. Chairman, for chairing this Committee. I would like to thank the ranking chairman. I also want to thank the President for nominating me to this position. And if I am confirmed, I would be honored to serve. I thank all of the members of the Committee for giving my nomination prompt consideration, and I appreciate their courtesy.

One person that I forgot this morning when I was introducing my family was my mother, whose name is Doris Holland. She is not here. She did not think she would be up to the rigor of this hearing because she thought they would be abusing her child and she wasn't sure that she could control herself. But I have been treated with great courtesy, and I appreciate that very much.

And I want to make a commitment to every member of this Committee that if I am confirmed to serve on the D.C. Circuit, I will not let you down. I have tried all my life to act with principle and with integrity, and I know my role as a judge, and I will make every effort to do the very best that I can.

Chairman HATCH. Well, thank you. That is all we can ask of you, and I hope our colleagues pay attention to those comments.

With that, we will recess until further notice.

[Whereupon, at 3:40 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Supreme Court of California
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JANICE R. BROWN
JUSTICE

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Biden. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

Janice R. Brown

cc: The Honorable Patrick J. Leahy,
Ranking Member

JANICE BROWN'S RESPONSES
TO FOLLOWUP QUESTIONS
FROM
SENATOR JOSEPH R. BIDEN

***Lochner* Questions**

In a series of speeches to the Federalist Society and the Institute for Justice three years ago, you openly supported a return to the *Lochner* era. As every law student learns, in the 1905 *Lochner* case, the Supreme Court struck down a state worker protection law because it purportedly conflicted with the so-called right to contract. The *Lochner* ruling sparked a spirited dissent by Justice Holmes, who wrote that the Constitution does not embody any particular economic philosophy, but is instead made to govern people of widely varying philosophies. But for the next thirty years of the *Lochner* era, the Court continued to invalidate progressive federal and state statutes designed to improve working conditions and jump-start the economy out of the Great Depression. And as every law student learns, the Court finally overruled *Lochner* and put an end to the *Lochner* era in the 1930s. Virtually every prominent constitutional scholar – from the left, the center, and the right – agrees that *Lochner* is a paradigmatic example of inappropriate judicial activism.

In your speeches, you asserted that Holmes was "simply wrong" in concluding that *Lochner* is discredited because it sought to impose a particular economic philosophy upon the Constitution. And you criticized the case that overruled *Lochner* -- a 1937 case called *West Coast Hotel Co. v. Parrish* -- as "mark[ing] the triumph of our own socialist revolution."

Why do you believe that *Lochner* was correct and *West Coast Hotel* was wrongly decided? Do you believe that your views on *Lochner* are extreme? Do you believe they are moderate?

RESPONSE: I have never said either that I believed *Lochner* was correctly decided or that *West Coast Hotel* was wrongly decided. Neither have I ever called for a return to the *Lochner* era. Rather, I have written that the U.S. Supreme Court in *Lochner* "was justly criticized for using the due process clause 'as though it provided a blank check to alter the meaning of the Constitution as written.' " (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 968 P.2d 993, 1041, fn. 2 (dis. opn. of Brown, J.).) I have also written that we would do well to heed the advice of Justice Holmes in his *Lochner*

dissent in assessing whether liberty interests are protected by the Constitution. (*American Academy of Pediatrics v. Lungren* (1997) 940 P.2d 797, 871.)

While it is true that I have criticized one point made by Justice Holmes in his dissenting opinion in *Lochner*—his intimation that the Constitution takes no particular view of economic interests—I did not intend in making that point to express any disagreement with Justice Holmes's vote to uphold the constitutionality of the maximum hours law at issue in *Lochner*. I believe that my criticism of *Lochner* places me within the mainstream of American legal thought.

Takings and Wealth Distribution

In your dissent in *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002), a takings challenge to a law designed to address San Francisco's affordable housing crisis, you describe Supreme Court takings precedent as "labyrinthine and compartmentalized" and you advocate a new "conceptual approach that takes seriously the constitutional prohibition against uncompensated takings of private property." *San Remo*, 41 P.3d at 125. Specifically, you suggest invalidating any law that has the effect of redistributing wealth from one group to another because such laws do not provide landowners with an "average reciprocity of advantage." You also state that "restriction of any one of the several rights that constitute private property in effect takes that property."

Many basic government programs, including—to name just one example—progressive taxation, have the effect of transferring wealth from one group to another.

Do you still believe that any law that redistributes wealth is unconstitutional? Do you believe progressive taxation is unconstitutional? Why? What about other programs that treat the poor differently from the wealthy? Don't those have the effect of transferring wealth from some citizens to others?

RESPONSE: I have never said that I believe that any law that redistributes wealth is unconstitutional. With respect to progressive taxation, the United States Supreme Court has clearly indicated that

progressive taxation is constitutional. (*Brushaber v. Union Pacific Railroad Co.* (1916) 240 U.S. 1.) The constitutional guarantee against uncompensated takings is not violated by every adjustment of the benefits and burdens of economic life.

Your views on takings law closely parallel the views of Professor Richard Epstein, whose work you cite in your *San Remo* dissent. *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002). Epstein acknowledges that his theory calls into question "many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation."

Do you agree with Professor Epstein's views about the reach of the Takings Clause? If not, please specify specific areas of disagreement.

RESPONSE: As you note in your question, Professor Epstein takes a very sweeping view of the breadth of the takings clause. My views do not closely parallel his. In particular, I do not agree with his view quoted above and believe it to be inconsistent with U.S. Supreme Court jurisprudence.

The *San Remo* majority responds to your dissent and accuses you of letting your ideology dictate conclusions that are not justified by precedent or the text of the Takings Clause. The court states: "However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties, nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state."

How do you respond to this charge of judicial activism by your colleagues?

RESPONSE: I believe that my opinion in *San Remo* correctly applied U.S. Supreme Court precedent and California Supreme Court precedent. My analysis was consistent with the conclusions of the Court of Appeal below which held that (1) the individualized, discretionary exaction (the required conversion fee) was subject to the heightened scrutiny standard of *Nollan/Dolan;* (2) the complaint stated a claim for an as-applied taking with respect to the conversion

fee and the city's requirement that hotel owners offer lifetime leases to all residential guests; and (3) that the *Ehrlich* "rough proportionality" standard (*Ehrlich v. Culver City* (1996) 12 Cal.4th 854) was not met. Moreover, the Court of Appeal also noted that appellants originally made their claim in federal court and obtained an injunction from the federal district court enjoining the city's enforcement of the ordinance in question.

Acquaintance Rape

In a case decided this year, *In re John Z*, the California Supreme Court majority held that, when two people who know each other are engaging in sexual intercourse, when one of them withdraws her consent, and the other continues to engage in the sex against his partner's explicit wishes, he is committing rape. As you may know, this issue is of particular importance to me. As the author of the Violence Against Women Act, I have spent many years trying to make clear to the world that acquaintance rape is rape, and that "no" means "no." To its credit, the majority of the California Supreme Court agreed in this case.

However, while you agreed that "no" means "no," you disagreed as to outcome. In your dissent, you stated that "even if we assume that [the woman's] statements evidenced a clear intent to withdraw consent, sexual intercourse is not transformed into rape merely because a woman changes her mind."

Why do you believe that a woman withdrawing consent does not change sex into rape? What is required for rape?

How do you square your views with the growing body of state and federal law which hold that rape is committed when the woman withdraws consent—at any stage—and yet is forced to continue?

RESPONSE: As I indicated in my opinion in that case, I agree that a woman has an absolute right to say "no" to an act of sexual intercourse. I also agree that after intercourse has commenced, she has an absolute right to call a halt and say "no more" and if she is compelled to continue, a forcible rape is committed.

This was an extremely distressing case. I read every word of the record and after doing so I had an honest concern about whether the prosecutor had proven the elements of the offense. The juvenile

here was charged with forcible rape. This is a very serious felony—a strike under California's three strikes law.

I tried to make clear that my concern was a narrow one—completely consistent with "the growing body of state and federal law which holds that rape is committed when the woman *withdraws consent*—at any stage—and yet is *forced* to continue." (Italics added.) I agreed with the majority that "clear withdrawal of consent nullifies any earlier consent and forcible persistence in what becomes nonconsensual intercourse is rape . . . ." The questions in this case, however, were whether the prosecution had proved the necessary element of force and the woman had clearly withdrawn consent. In reviewing the evidence, I questioned whether the elements of forcible rape had been proven beyond a reasonable doubt. This is not to say, however, that the defendant could not have been convicted of a lesser sexual offense.

According to the majority, the woman testified that she "kept . . . pulling up, trying to sit up . . . [a]nd he grabbed my hips and pushed me back down and he rolled me back over so I was on my back." Further, "she tried to get off, but he grabbed her waist and pulled her back down." According to the majority and the Court of Appeal, this testimony was credited by the court.

Yet, your rendition of the facts omitted this testimony. In your dissent, you stated that "it is not clear that [the woman] was forcibly compelled to continue."

Janice Brown Responses
to Senator Biden

Why did you omit these seemingly crucial facts from your dissent? If the court credited the testimony that you ignored, what basis did you have to rule that consent was not clearly withdrawn and force was not used? As an appellate judge, what is your role in reviewing findings of fact by the trial court?

RESPONSE: In reviewing a criminal conviction challenged as lacking evidentiary support, an appellate court must review the whole record in the light most favorable to the prosecution to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

The salient facts in this case were undisputed and I credited the testimony quoted above. The chronology described in your question, however, related to the initial encounter, i.e., whether there was consent at all. Taking into account the testimony you cited, the majority assumed the victim "impliedly consented to the act, or at least tacitly refrained from objecting to it, until defendant had achieved penetration." Thus, both the majority and the dissent assume this testimony is credible and I summarize it briefly at page 189. (*In re John Z.* (2003) 60 P.3d 183, 189.) The focus of the dissent, however, is on whether there was a clear withdrawal of consent and whether the victim was forcibly restrained or threatened with harm thereafter. This is the critical time frame in which the elements of postpenetration rape would have to be proven.

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JANICE R. BROWN
AFRIP

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Durbin. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

Janice R. Brown

cc: The Honorable Patrick J. Leahy,
Ranking Member

JANICE BROWN'S RESPONSES
TO FOLLOWUP QUESTIONS
FROM
SENATOR DICK DURBIN

1. At your hearing I asked you about the April 2000 speech you delivered to the Federalist Society chapter of the University of Chicago Law School. I have some additional questions about your remarks in that speech.

A. You stated: "[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate." Do you believe that "big government" is a form of slavery? Why or why not? In what specific ways do you believe "big government" to be "the opiate" in our society?

RESPONSE: As a general matter, my speeches are not law review articles or books—and thus are not intended to represent a definitive and complete cosmology. The ideas expressed in them are neither novel nor generally controversial and the source material is identified. I make it a practice to encourage listeners to read the source materials for themselves.

The referenced passage does not say big government is a form of slavery. Dependence upon government, however, can become a problem for some, as Congress, for example, recognized when it passed welfare reform legislation.

B. You also stated: "The greatest innovation of this millennium was equality before the law. The greatest fiasco – the attempt to guarantee equal outcomes for all people." Please explain what you meant by this. To what "attempts to guarantee equal outcomes for all people" were you referring?

RESPONSE: I do believe that the "most important thing we [as a nation] have ever done is to try to guarantee people equality under the law." It is the greatest legacy America has bequeathed to the world. The language in the speech you reference distinguishes equality before the law from equality of outcomes: "The great innovation of this millennium was equality before the law. The greatest fiasco—the attempt to guarantee equal outcomes for all people." Providing equality before the law is quite a distinct concept from guaranteeing equality of outcomes. The contrast I sought to

draw was between American liberty and the oppressiveness of totalitarian regimes.

All three branches of our government can, and should, do everything possible to guarantee equal treatment under the law. Not only is such equality expressly guaranteed by the words of the Constitution, equality under law is the fulfillment of national aspirations that go all the way back to the Declaration of Independence.

C. You have given speeches to the Federalist Society on this and other occasions. Do you agree with the following statement from that organization's mission statement: "*Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.*" Why or why not?

RESPONSE: As a judge, I have not had occasion to determine whether the law schools and legal professors are by and large liberal or conservative, and thus do not find myself qualified to offer an opinion on this subject.

2. You gave a speech to the Institute for Justice in August 2000. I would like to ask you about several remarks you made in that speech.

A. You stated that judges are "captives of an intellectual world view that is completely antithetical to the kind of substantive limits an authentic historical interpretation of our constitutional traditions would impose." What did you mean by this? In your view, are the U.S. Supreme Court's rulings that have established a constitutional right to privacy and reproductive freedom products of this intellectual world view?

RESPONSE: In the Institute for Justice speech, I was trying to trace, in very summary fashion, large arcs of history and philosophy. As I have noted in many speeches, there is a profound difference between the modest and practical aspirations of the American Revolution (undergirded by the Scottish School of Commonsense) and the European notion of human perfectibility (as exemplified by

the French Revolution). The discussion had no relation to any Supreme Court ruling.

B. You also stated: "In the last 100 years – and particularly in the last 30 – the Constitution, once the fixed chart of our aspirations, has been demoted to the status of a bad chain novel." What did you mean by this? What do you think should be done to counter this "demotion" of the Constitution?

RESPONSE: As I indicated at my hearing, I often use my speeches as an opportunity to be provocative. As a judge, however, it is my duty to conscientiously apply United States Supreme Court precedent, and that is what I will continue to do if confirmed to the D.C. Circuit Court of Appeal. My comments in the speech you reference were directed at the general notion of judicial activism and efforts of judges to use the Constitution to pursue policy agendas rather than interpret the text of the document.

C. You also stated that "even conservative judges who take the rule of law seriously are appalled by legislative actions which violate the whole spirit, if not quite the letter, of provisions clearly designed to limit government." To what legislative actions were you referring?

RESPONSE: I had no particular legislative actions in mind. I was commenting on general trends.

D. You said that decisions of supreme courts, including the California Supreme Court, "seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless photo-op compassion and political correctness." Please provide examples of how you believe the California Supreme Court and the U.S. Supreme Court fit this description.

RESPONSE: Again, I was reflecting on my perception of a general trend in recent jurisprudence and have no particular example in mind.

Janice Brown's Responses
to Senator Durbin

3. You made a speech at the Libertarian Law Council in 1997 in which you said: "From the 1960s onward, we have witnessed the rise of the judge militant. The classical conception of the judicial role was viewed as too confining, boring, and above all insufficiently responsive to social problems."

A. What do you mean by the term "judge militant"?

RESPONSE: The "judge militant" is the paradigm judicial activist; the opposite of the restrained and deferential judge.

B. Please provide examples of Justices on the U.S. Supreme Court, past or present, whom you would consider to be a "judge militant" and explain why.

RESPONSE: In the speech, I contrasted the approach of Justice Brennan with Judge Learned Hand. In that speech, I repeat Judge Hand's summation of his judicial philosophy—Oliver Cromwell's admonition to the Kirk of Scotland: " 'I beseech you in the bowels of Christ, think that ye may be wrong." In contrast, Justice Brennan when asked if he felt he had ever made a mistake in 33 years on the Supreme Court, replied, "Hell, no. I never thought I was wrong."

I agree with Hand. Restraint and humility are among the most important characteristics of a good judge. By restraint I do not mean timidity. I mean self-knowledge and self-discipline.

4. In a speech you made to the Sacramento Bar Association in 1996, you made the comment that politicians were "handing out new rights like lollipops in the dentist's office."

A. What new rights were you referring to?

RESPONSE: I was merely commenting in general terms and was not specifically criticizing any particular legislative action.

B. Which of these "new rights" do you believe should be curtailed or eliminated?

RESPONSE: As a judge I have no role to play in curtailing or eliminating any rights the Legislature chooses to award. In this

context, the judicial role is limited to interpreting those laws enacted by the Legislature.

5. In a 1997 speech you gave at McGeorge School of Law, you accused courts of "constitutionalizing everything possible" and "taking a few words which are in the Constitution like 'due process' and 'equal protection' and imbuing them with elaborate and highly implausible etymologies."

A. Please provide examples of things that have been "constitutionalized" and, in your view, should not have been?

RESPONSE: I have written that I believe the *Lochner* court was justly criticized for using the due process clause "as though it provided a blank check to alter the meaning of the Constitution as written." (*Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 675.)

B. Do you believe that courts have created rights that should not have been created, in the name of "due process" and "equal protection"? If so, which ones?

RESPONSE: An example can be found in my prior answer. As a general matter, however, my role as a judge is to conscientiously apply precedent, whether or not I personally agree with that precedent.

6. In the case Aguilar v. Avis Rent A Car System, Latino employees at Avis's San Francisco airport office were subjected to severe and pervasive racial harassment by their supervisor. He called them derogatory names and demeaned them for their lack of English language skills. A jury found Avis liable and the plaintiffs were awarded damages. The court also ordered an injunction against future racial harassment by the supervisor. Justice Brown, you dissented in this case, suggesting that the harasser's free speech was more important than the Latino employees' right not to be racially harassed.

A. At your nomination hearing, in a response to Senator Specter about this case you stated that "my concern was with the content-based prior restraint." Yet your dissent in this case clearly indicates that you had another concern as well: the free speech rights of harassers. Do you believe that the issue of whether Title VII hostile work environment theory violates First Amendment is an open question?

Janice Brown's Responses
to Senator Durbin

RESPONSE: The issue of whether Title VII hostile work environment theory violates the First Amendment is not an open question. The dissenting opinion expressly recognizes, for instance, that employees can sue and recover damages if they are subject to racially discriminatory language establishing a hostile work environment.

B. You testified at your hearing that prior restraints are permitted "very, very rarely if ever, and even in extremely sensitive situations such as national security, the U.S. Supreme Court has said that's not appropriate." However, the majority opinion in this case discusses 5 Supreme Court precedents that do permit prior restraints in analogous situations, and your dissent failed to address any one of these cases. How is your approach to this issue reconcilable with the 5 cases discussed by the majority – Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), Times Film Corp. v. Chicago, 365 U.S. 43 (1961), Freedman v. Maryland, 380 U.S. 51 (1965), Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973), and Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973)?

RESPONSE: I believe it is correct to say content-based prior restraints are permitted "very, very rarely if ever. . . ." As stated by the United States Supreme Court, "prior restraints on speech and publication are the *most serious and least tolerable* infringement on First Amendment rights." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559, italics added.) The circumstances where a prior restraint is constitutionally permissible are carefully limited (see *Near v. Minnesota* (1931) 382 U.S. 697, 716) and the high court has even found prior restraints unconstitutional where national security was at stake (see *New York Times Co. v. United States* (1971) 403 U.S. 713, 723-724).

I did not address any of the cases cited by the plurality as permitting prior restraints, because, as my colleague, Justice Mosk, pointed out in his dissent, those cases were inapposite. *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, *Times Film Corp. v. Chicago* (1961) 365 U.S. 43, *Freedman v. Maryland* (1965) 380 U.S. 51, and *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, all involve limited injunctive remedies against the sale or exhibition of obscene materials. Obscenity is not constitutionally protected speech. *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376 addressed the constitutionality of commercial speech in support of

an illegal commercial activity. Again, as Justice Mosk notes, the Supreme Court emphasized its order did not endanger "arguably protected speech." The speech in this case, by contrast, while certainly regulable, was protected by the First Amendment.

C. You compared the issue of workplace harassment to KKK rallies and Nazis marching in Skokie, Illinois. Do you believe that such events, where people can close their windows or not attend, should be treated as the legal equivalent of workplace harassment? Why or why not?

RESPONSE: I do not believe, nor do I assert in my opinion, that rallies in public venues are the legal equivalent of workplace harassment, and the United States Supreme Court has not treated the two in an equivalent manner.

7. In the case Konig v. Fair Employment and Housing Commission, you were the only member of your court to rule that the housing discrimination victims were not entitled to damages. The plaintiff, Sheryl McCoy, was an African-American woman who wanted to rent an apartment. As she was reading the rental notice on the door of the apartment building, the white owner came to the door and said: "Get off my porch. You're trying to break into my house." When Ms. McCoy explained that she was there to learn about the rental unit, the owner responded: "You know you don't want to rent this place. You're here to break in. Shame on you. I'm not going to rent to you. I'm not going to rent to a person like you." Black and white testers were later sent to the apartment – the black testers were turned away while the white testers were welcomed and offered the rental unit.

I am troubled not only that you were the sole member of your court to conclude that the victim was not entitled to receive damages, but also by your approach to the work and mission of independent agencies. You wrote: "Not only are administrative agencies not immune to political influences, they are subject to capture by a specialized constituency. Indeed, an agency often comes into existence at the behest of a particular group – the result of a bargain between interest groups and lawmakers."

RESPONSE: Before addressing your specific questions relating to *Konig v. Fair Employment and Housing Comm.* (2002) 28 Cal.4th 743, allow me to clarify the issue and my position in that case. The question presented in *Konig v. Fair Employment and Housing Comm.* (2002) 28 Cal.4th 743, was whether, in addition to awarding

damages for the plaintiff's economic loss, the Fair Employment and Housing Commission could award noneconomic damages for intangible and unquantifiable loss due to emotional distress without violating the "judicial powers" clause of the California Constitution. (Cal. Const., art. VI, § 1.) Akin to the doctrine of separation of powers, California's judicial powers clause prohibits the legislative and executive branches of our government from exercising powers reserved to the judicial branch.

Only a decade earlier, in *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, the court had concluded that an award of emotional distress damages by the Commission violated the judicial powers clause. As the court explained, "[T]he primary regulatory purpose of the [FEHA] is to *prevent* discrimination in housing before it happens and, when it does occur, to offer a streamlined and economical administrative procedure to make its victim whole *in the context of . . . housing* [citation]. The award of unlimited general compensatory damages is neither necessary to this purpose nor merely incidental thereto; its effect, rather, is to shift the remedial focus of the administrative hearing from affirmative actions designed to redress the particular instance of unlawful housing discrimination and prevent its recurrence, to compensating the injured party not just for the tangible detriment to his or her housing situation, but for the intangible and nonquantifiable injury to his or her psyche suffered as a result of the respondent's unlawful acts, in the manner of a traditional private tort action in a court of law. [Citations.]" (*Id.* at p. 264, italics in original.) In my view, the majority in *König* failed both to explain what change in statutory law could alter that conclusion and to demonstrate that such a change would, in any event, overcome the judicial powers problem and justify rejecting our precedent.

A. What particular groups and constituencies do you believe caused the formation of the state Department of Fair Employment and Housing? Do you believe that this agency is "captured" by these groups and constituencies? Why or why not?

RESPONSE: My observations quoted in your question were not intended as a specific criticism of the Fair Employment and Housing

Commission. Rather, my point was a general one, to underscore the fundamental necessity and essential value of the judicial powers limitation in our state government. Simply because administrative agencies are not the direct result of popular election, or that they may be more efficient in discharging their limited functions, does not make them immune to the political process. For that reason, among others, I expressed concern that the court should be more cautious in allowing another branch of government to assume judicial powers.

B. You were the sole member of your court to conclude that courts are in a better position than the Department of Fair Employment and Housing to award damages to discrimination victims. Your rationale seems to be that courts are more independent. Why isn't an agency that handles discrimination claims every day – the frivolous as well as the meritorious – in a better position than a court in awarding appropriate damages to victims?

RESPONSE: My point was not whether an administrative agency is in a better position than a court in awarding appropriate damages to victims. As the above-quoted passage from *Walnut Creek Manor v. Fair Employment & Housing Com.* reflects, the court fully endorses the commission's authority when it is, in fact, resolving claims of housing discrimination and awarding restitutionary and/or injunctive relief consistent with that authority. I completely agree with that position. When, however, an administrative agency adopts an adjudicatory role, as with the award of nonquantifiable emotional distress damages, it encroaches on the prerogatives of an independent branch of government. That is what our court held in *Walnut Creek Manor* and the view I held to in *Konig*.

In addition, any concern that the commission's inability to award emotional distress damages would leave a complainant without adequate recovery is addressed by specific statutory provisions advising that such damages must be sought in court. (See Gov. Code, §§ 12980, subd. (d), 12981, subd. (g).)

8. In the case Richards v. CH2M Hill, the plaintiff, Lachi Richards, was diagnosed with multiple sclerosis in 1988 and became wheelchair-bound. Between 1988 and 1993, her employer failed to reasonably accommodate her on numerous occasions and Ms. Richards ultimately received a jury award of $1.5 million. Justice Brown, you were the only member of your court to conclude that

the plaintiff should not have the right to sue for much of the discrimination she suffered because it occurred prior to the running of the statute of limitations. Your colleagues reached the opposite conclusion and ruled that a discrimination victim could receive compensation for injuries that were part of a "continuing violation." In your dissent, you chastised the majority opinion, writing that it "does violence to both the statute of limitations and to the entire statutory scheme." You rejected the continuing violation theory and insisted that a discrimination victim be forced to sue separately for each wrongful act. **The U.S. Supreme Court recently held in Amtrak v. Morgan that the continuing violation theory of discrimination was valid and compensable. Do you believe that Amtrak v. Morgan was wrongly decided? Please explain.**

RESPONSE: The continuing violation doctrine was developed by the courts as an equitable exception to the statute of limitations, limited to narrowly circumscribed situations, such as instances of hostile work environment or situations in which the employer has concealed the nature of its discriminatory practice. (See *National Railroad Passenger Corporation v. Morgan* (2003) 536 U.S. 101, 115-118; *Moskowitz v. Trustees of Purdue University* (7th Cir. 1993) 5 F.3d 279, 281-282.) My position in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, was simply that the evidence established discrete acts of discrimination; thus, the case did not come within the continuing violation rationale. (See *Richards*, at p. 828.)

The view expressed in my dissent is fully consistent with the United States Supreme Court's holding in *National Railroad Passenger Corporation v. Morgan*, *supra*, 536 U.S. 101, applying the continuing violation doctrine in the context of Title VII. In *Morgan*, the high court expressly rejected the "course of conduct" variant of the doctrine: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." (*Id.* at p. 113.) This was the view articulated in my dissent in *Richards* regarding the statute of limitations for California's Fair Employment and Housing Act, which has an even more generous statutory period than Title VII. I further agree with the United States Supreme Court that "[h]ostile environment claims are different in kind from discrete acts" (*id.* at p. 115) and should come within the continuing violation rationale.

Janice Brown's Responses
to Senator Durbin

9. In the case Hi-Voltage Wire Works v. City of San Jose, you made it clear you believe that affirmative action is discriminatory and that U.S. Supreme Court decisions that have upheld affirmative action were wrongly decided. You referred to affirmative action as "entitlement based on group representation" and write that it is the equivalent of racist laws that existed in the United States prior to the civil rights movement. You stated: "Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm [affirmative action] had its parallel in laws antedating the Civil Rights Act [of 1964], when government could legally classify according to race."

A. As the San Francisco Chronicle put it, "To compare affirmative action to laws designed to promote segregation, as Justice Brown's analysis does, is absurd." Justice Brown – please explain why you view affirmative action as the equivalent of Jim Crow laws.

RESPONSE: I do not believe that affirmative action programs are the equivalent of Jim Crow laws, nor did the majority opinion express such a view. There are obviously many differences between the two, and I have never suggested otherwise.

B. In your Hi-Voltage opinion, you gave a one-sided analysis of the arguments for and against Proposition 209. You quoted extensively from the pro-Prop 209 pamphlet but you did not quote from the anti-Prop 209 pamphlet at all. You quote a portion of the pro-Prop 209 pamphlet that states "special interests hijacked the civil rights movement." Is that a view that you personally share?

RESPONSE: It is common practice for the court to consult ballot pamphlet arguments to the extent they illuminate voter intent. In this particular case, the arguments both in favor and against essentially agreed on the impact of Proposition 209 if enacted. The argument in favor, however, contained more direct and specific indicia of the scope of the initiative and the historical antecedents that would inform its interpretation. Moreover, in relying on ballot arguments, the court must take them as written, including whatever rhetoric or hyperbole the drafters choose to make their case to the electorate. Thus, an opinion quoting such language can never be construed as evidence of the authoring justice's, or signatory justices', personal views.

C. What is your response to Chief Justice George's view that your Hi-Voltage opinion is "a serious distortion of history and does a grave disservice to the sincerely held views of a significant segment of our populace"?

RESPONSE: I respectfully disagree with the Chief Justice's view, as did most members of the court. I believe that the court's opinion in that case faithfully interpreted the law and would point out all of those justices signing that opinion were members of minority groups, including Justice Mosk, who was universally considered the court's most liberal jurist at the time.

D. Justice Brown, you quoted President Jimmy Carter in your dissent. While it is true that he said the words that you quoted – "Basing present discrimination on past discrimination is obviously not right" – he was discussing the need to appoint more women and minorities to the bench and his frustration that selection committees told him they couldn't find many qualified women and minorities who had served on state courts or in large firms. How do you reconcile your use of President Carter's quote to criticize affirmative action with his clear intention to support affirmative action?

RESPONSE: The court's opinion did not use President Carter's statement for the purpose of criticizing affirmative action. The court's opinion, in fact, expressed no view on the wisdom of affirmative action. Rather, the court's opinion used President Carter's statement to summarize the principle advocated by those supporting Proposition 209.

10. In the case Sinclair Paint Company v. State Board of Equalization, when you were on the appellate court, you wrote a decision that held that paint companies did not have to pay a fee pursuant to the Childhood Lead Poisoning Prevention Act – a law used to evaluate, screen, and provide medical treatment for children at risk for lead poisoning. In the statute creating the fee, the California legislature found that "[e]xposure to even low levels of lead can result in brain damage and behavior problems that seriously impair a child's performance in school." You struck down the fee in this case because you held that it was insufficiently related to the conduct of the paint companies and therefore, pursuant to Proposition 13, that it amounted to an uncollectible tax. The California Supreme Court reversed you in a 7-0 unanimous opinion. The court found that the fee readily fit into the category of regulatory exceptions to Prop 13.

Janice Brown's Responses
to Senator Durbin

A. The regulatory fee created by the Childhood Lead Poisoning Prevention Act is what is known as a "polluter pays" law, by which those industries that are responsible for a public health problem are assessed a fee to help clean it up. Do you have a philosophical objection to the "polluter pays" principle?

RESPONSE: The question presented to the court in *Sinclair Paint Company* was only whether exactions assessed under the Childhood Poisoning Prevention Act were properly characterized as fees or taxes. The label was constitutionally significant because, after Proposition 13, taxes required a two-thirds vote of the Legislature. Under existing precedent, an exaction designed primarily to raise revenue and unrelated to the regulation of the ongoing business was generally deemed to be a tax. I wrote the unanimous opinion for the Court of Appeal, concluding that the exaction was a tax. The Supreme Court granted review and reversed.

I have no philosophical objection to the polluter pays principle, and even if I had such an objection, it would not have been relevant to my view of the case.

B. How should a state fund its efforts to eliminate childhood lead poisoning if those who helped cause the problem are not held responsible for their actions?

RESPONSE: My opinion in *Sinclair* did not suggest that those who cause a problem should not be held responsible. It simply decided whether the exaction in that case required a two-thirds vote of the Legislature. I have no personal view of how the state should fund its efforts to reduce childhood lead poisoning and had no personal objection to the statute at issue in that case.

C. The Supreme Court unanimously reversed your appellate decision in this case. Are you willing to concede that your decision was a mistake? If not, please explain.

RESPONSE: I believe that my opinion faithfully applied California precedent. The California Supreme Court is, of course, free to articulate a different rule. Failing to anticipate the new rule, however, does not mean the lower court's opinion was a mistake. (See *Stark Oil Co. v. Khan* (1997) 522 U.S. 3, 20 ["The Court of

Appeals was correct in applying [the] principle . . . for it is this court's prerogative to overrule its precedents"].)

11. In the case Stop Youth Addiction v. Lucky Stores, the majority of your court held that a corporation can, on behalf of the public, sue a chain of retail stores that illegally sells cigarettes to minors under the state's Unfair Competition Law (UCL). You were the lone dissent. In this case, Lucky Stores and other retailers sold cigarettes to children, contributing to the problem of youth cigarette addiction. The state UCL clearly authorizes "any person" to bring an action on that person's behalf or on the public's behalf. But in your solo dissent, you criticized the majority's ruling that private citizens have the right to bring suit on behalf of the general public to recoup illegally obtained profits under this law. You wrote: "The focus of the UCL is competitive injury, not general disgruntlement."

A. Justice Brown, do you believe that the motivation behind this suit was "general disgruntlement"?

RESPONSE: The statement that "the focus of the UCL is competitive injury, not general disgruntlement," was not meant to suggest anything about the particular plaintiff's motivations in that case. Rather, in this portion of the opinion, I attempted to outline the historical understanding which should inform the court's interpretation of the term "unlawful."

B. I assume you would concede that merchants who violate the law by selling tobacco products to minors gain an unfair competitive advantage over their law-abiding competitors. So why shouldn't the legislature provide incentives for private citizens to do what the government isn't willing, or lacks sufficient resources, to do?

RESPONSE: There is often an appropriate role for private attorneys general in enforcing consumer protection laws. This case did not involve a claim by a competing merchant or a consumer; it sought to enforce a criminal prohibition.

C. Many federal environmental and qui tam statutes allow "private attorneys general" to go to court and vindicate the public's interest in the way the plaintiffs did in this case. You said in your dissent that to allow private attorneys general to bring cases under the UCL undermines the separation of powers by depriving the executive of its constitutionally assigned discretion to enforce the law.

Janice Brown's Responses
to Senator Durbin

Do you believe that the use of private attorneys general violates separation of powers principles in all areas of the law or just some? Which ones?

RESPONSE: My argument that a completely unfettered right to sue, without any requirement of concrete injury, may violate separation of powers principles is based upon a United States Supreme Court decision (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555), which questioned a similarly broad federal citizen suit standing provision.

D. In your dissent you wrote that "granting injunctive relief against a few retailers – even a thousand – in a series of private unfair competition suits is not likely to have a measurable impact on the availability of cigarettes to minors." What was the factual basis for this conclusion, or was it your own personal opinion? Even if it were true, wouldn't it apply equally whether the retailers were enjoined by private citizens or by the state Attorney General?

RESPONSE: This portion of the opinion sought to show how individual regulatory efforts to enforce what is essentially a criminal statute might actually undermine the kind of uniform and comprehensive effort which the Legislature had enacted to deal with the specific problem of underage smoking. *Stop Youth* was actually an unusual UCL case because the unlawful practice alleged was a criminal violation. My argument was that Penal Code section 308 and the Stop Tobacco Access to Kids Enforcement Act embodied the Legislature's expressed preference for coordinated, statewide prosecution efforts.

E. Do you believe that the $10 billion in restitution that the plaintiff sought to have paid into the State Treasury would not have a measurable impact on the availability of cigarettes to minors? Why or why not?

RESPONSE: I do not know whether the defendants in that case even had the capacity to pay $10 billion in restitution and have not studied whether such a payment would have impacted the availability of cigarettes to minors.

F. Why do you believe that the majority opinion in this case created "a standardless, limitless, attorney fees machine"? This case was decided in 1998 – have the last 5 years borne out your prediction?

RESPONSE: Many of the concerns I expressed in my opinion have been raised by others in recent years. Numerous articles, for example, have appeared in both legal publications and papers of general circulation documenting abuses of the UCL as well as the concerns of public officials and the Legislature. (See Tansey, *Battle Brews Over Consumer Protection in State*, S.F. Chronicle (Sept. 28, 2003) section I, p. 1; Stern, *A Handicapper's Guide to 17200; Judges and Lawmakers are Grappling with the Unfair Competition Law. It's Time to Make Some Predictions*, The Recorder (Feb. 18, 2003) p. S3.)

12. **You have cited Kasler v. Lockyer as one of your ten most significant opinions. In addition to writing the majority opinion, you also wrote a concurring opinion in which you stated: "The dichotomy between the United States Supreme Court's laissez-faire treatment of social and economic rights and its hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid." The Supreme Court has long adhered to the principle of strict scrutiny in examining the constitutionality of laws burdening fundamental rights, which includes discrimination on the basis of race. Therefore, I am troubled by your characterization of this standard as "hypervigilance." Please explain what you meant by this statement and in particular what standard of review you believe the court should use in cases of racial discrimination.**

RESPONSE: The United States Supreme Court has used strict scrutiny in examining laws burdening fundamental rights, and I would apply strict scrutiny to such laws if confirmed. I would also apply strict scrutiny to those laws that discriminate on the basis of race, consistent with United States Supreme Court precedent.

13. President Bush has said publicly that he would appoint "strict constructionists" to the Supreme Court in the mold of Justices Scalia and Thomas.

A. Would you consider your own judicial philosophy to be in that mold?

RESPONSE: I do not consider myself to be in the mold of any particular Supreme Court justice. I do, however, admire particular characteristics of each justice.

B. Would you consider yourself to be a "strict constructionist"?

RESPONSE: It is difficult to understand precisely what others mean by the term "strict constructionist." To summarize my own views, my approach to judging favors the prudential case for judicial restraint, allowing the political branches the widest possible purview, while insisting that the words of the Constitution do have meaning.

C. **Do you believe that such cases as Roe v. Wade and Miranda v. Arizona are consistent with strict constructionism? Why or why not?**

RESPONSE: As stated above, it is difficult to know exactly what others mean by the term "strict constructionist," so it is difficult to say whether those cases are consistent with "strict constructionism." It is important to note, however, that the United States Supreme Court has recently reaffirmed the vitality of both decisions, and I will apply them faithfully if confirmed.

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JANICE R. BROWN
JUSTICE

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Edwards. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

Janice R. Brown

cc: The Honorable Patrick J. Leahy,
Ranking Member

JANICE BROWN'S RESPONSES TO FOLLOWUP QUESTIONS FROM SENATOR JOHN EDWARDS

Question #1

You have not always been consistent in your interpretation and application of existing law in your decision-making. For example, in Apartment Association of Los Angeles County v. City of Los Angeles, you wrote, "[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of the words...In my view, the voters did not intend the courts to look any further than a standard dictionary in applying the term." 24 Cal. 4th 830 (2000)

However, in considering the validity of a California constitution provision prohibiting affirmative action, you wrote, "[t]he electorate did not approve Proposition 209 in a vacuum...we can discern and thereby effectuate the voters' intention only by interpreting this language in a historical context." Hi-Voltage Wire Works v. City of San Jose, 24 Cal. 4th 537 (2000). You then interpreted this language, according to Chief Justice Ronald George, by "ventur[ing] back to the beginnings of our nation's history . . . rather than review[ing] the specifics of the city's challenged affirmative action program to determine whether the program violates this state constitutional provision." Id at 580.

These inconsistencies appear to fall into a troubling pattern: your method of interpretation seems to vary depending upon the nature of the case and the method you choose tends to lead to rulings in favor of corporate interests and against individual civil rights.

For example, in the Hi-Voltage case, Justice George issued a strong dissent in which he objected to "[t]he overall tenor" of your written opinion's discussion of Bakke, Weber, Johnson, and Price, "including its repeated and favorable quotation from dissenting opinions in these cases and from academic commentators critical of these decisions - leaves little doubt that the majority opinion embraces the view that the types of affirmative action programs at issue in these past decisions *always* have violated the provisions of the federal and state equal protection clauses and Title VII, and that the numerous decisions of the United States Supreme Court and this court that reached a contrary conclusion were wrongly decided." Id. at 577.

Janice Brown's Responses
to Senator Edwards

a. Is Justice George's assessment of your view of these cases correct? Please explain why or why not.

RESPONSE: With all due respect, I must take issue with the question's premise. I have conscientiously tried to be consistent in my interpretation and application of existing law. My aim has always been to get it right, not favor one litigant over another. I have no bias against workers or the civil rights laws of our nation. I obtained my social security card when I was 14. Even before that, I worked in the cotton fields with my grandfather. I have worked, and worked hard, for more than 40 years. By the time I was 21, I had experienced numerous acts of bigotry, prejudice, and injustice. I know exactly the difficulties women and African-Americans confront in the workplace and in society.

Moreover, in *Apartment Association of Los Angeles v. City of Los Angeles* and *Hi-Voltage Wire Works v. City of San Jose,* although the language cited may seem to implicate the same canon of statutory construction, the question presented to the court was quite distinct. In the former, the question was simply a matter of interpreting the plain meaning of the text of the California Constitution. In the latter, there was no dispute about the plain meaning of the words, but the City argued the words should *not* be given their ordinary meaning because the electorate intended something different. Thus, the question was whether the voters' intent differed from the words.

With respect to your specific question, although I authored the majority opinion in *Hi-Voltage*, it is, in fact, an opinion of the court, signed by a majority of its members. As with any majority opinion, my personal views are entirely irrelevant; the decision must and can only follow the law as a *majority* of the court understands it.

It should also be noted that all of those justices signing the *Hi-Voltage* majority were members of minority groups, and included Justice Stanley Mosk, universally considered the court's most liberal jurist. By signing the opinion, they not only endorsed the result (with which the entire court agreed) but the analysis as well. They also were aware of the Chief Justice's assessment and were unpersuaded.

Regarding Chief Justice George's opinion, and with all due respect to the Chief Justice, the dissent clearly misunderstood the purpose and content of much of the majority analysis, in particular the historical development.

It is important to remember that at the time Proposition 209 was placed on the ballot, the campaigns for and against were particularly contentious and fraught with intense feelings. Even though the measure had been approved by a significant majority of the voters (54%) and had withstood challenges to its constitutional and statutory validity in federal court (see *Coalition for Economic Equality v. Wilson* (9th Cir. 1997) 122 F.3d 692; *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480), that remained the situation four years later when *Hi-Voltage* came before the California Supreme Court. In this highly charged circumstance, it was particularly incumbent for the Supreme Court to make the basis for its ruling accessible to everyone who might be affected by it.

In addition, both the ballot arguments in favor of Proposition 209 and the appellate arguments of the City of San Jose and its amici referenced historical antecedents, particularly the Civil Rights Act of 1964 and subsequent interpretation of the Act by the United States Supreme Court. (See *Hi-Voltage* (2000) 24 Cal.4th 537, 560-562, 566-568.) At the very least, any analysis of the question presented would need to include some explication of the Act as construed by the high court during the three decades from its enactment to 1996. Without a historical perspective, it would also have been impossible to persuasively respond to the City's argument that in referencing the Civil Rights Act, the voters intended to import the gloss of United States Supreme Court decisions upholding affirmative action programs such as the one in question. (See *id.* at pp. 566-568.)

For these reasons, it was essential to review the United States Supreme Court's Title VII jurisprudence—as well as equal protection decisions that developed in tandem—to determine both the original construction of the Act and any changes that might reflect on and give content to the voters' intent to "restate[]" its animating principles.

b. Did you believe at the time you wrote the majority opinion in Hi-Voltage that Bakke, Weber, Johnson, and Price were wrongly decided? If so, explain why you believed they were wrongly decided. If not, please explain why you believed they were correctly decided.

RESPONSE: The cases you cite are decisions of the Supreme Court of the United States. The majority opinion in *Hi-Voltage* did not suggest that these cases were wrongly decided. I accept the majority opinions in those cases, to the extent that they have not been overruled by subsequent decisions, as the law of the land by which I would be bound as a member of the D.C. Circuit Court of Appeal.

c. If you believed at the time that the foregoing cases were wrongly decided, do you still hold this view? If not, please explain your current view and what caused you to change your mind.

RESPONSE: Please see response to 1(b) above.

Question #2

In Hi-Voltage, you harshly criticized affirmative action programs, arguing that, absent a showing of actual discrimination, such programs "replace individual right of equal opportunity with proportional group representation." Do you still believe that affirmative action programs are justifiable only in cases in which actual discrimination has been established? If so, please explain. If not, please describe other circumstances in which you believe affirmative action to be appropriate.

RESPONSE: Traditionally, the United States Supreme Court has required some showing of past discrimination to justify affirmative action programs in the areas of minority hiring and contracting. (See e.g., *Adarand v. Pena* (1995) 515 U.S. 200.) However, the court recently held that a race-based university admissions policy could survive strict scrutiny review without a showing of past discrimination. Instead, the court held that public universities have a compelling interest in ensuring a diverse student population regardless of whether the university previously engaged in discrimination. (See *Grutter v. Bollinger* (2003) 123 S.Ct. 2325.) I will faithfully follow these and other Supreme Court precedents if confirmed to the D.C. Circuit Court of Appeal.

Janice Brown's Responses
to Senator Edwards

Question #3

In his Hi-Voltage dissent, Justice George noted that "when a college or university whose student body has been and continues to be almost all White voluntarily decides to institute an affirmative action policy under which qualified minority applicants are given special consideration, the justification for the policy may not be based upon any notion of 'entitlement based on group representation' or 'proportional group representation,' but instead may well stem from a genuine belief on the part of the institution that an integrated student body will provide a better education for all students attending the school."

a. At the time you wrote the majority opinion in Hi-Voltage, did you agree or disagree with Justice George's assessment of the validity of diversity as a basis for affirmative action in education? Please explain.

RESPONSE: When the majority decision in *Hi-Voltage* was written, only one justice of the United States Supreme Court had specifically endorsed diversity, in dicta, as a basis for affirmative action in education (*Regents of Univ. of Cal. v. Bakke* (1978) 438 U.S. 265 (Powell, J. concurring); at least one lower federal court had rejected it (*Hopwood v. Texas* (5th Cir. 1996) 78 F.3d 932). Consequently, I believe that, at the time *Hi-Voltage* was written, it was an open question as a matter of federal constitutional law.

b. Do you now agree or disagree with Justice George's view of affirmative action as an appropriate method to achieve educational diversity? Please explain.

RESPONSE: The United States Supreme Court has ruled that achievement of educational diversity constitutes a compelling interest that can justify the use of race as one factor in university admissions, and I will follow that precedent. However, the court also acknowledged a program designed to achieve racial balance would violate the Equal Protection Clause. This was apparently the flaw in the university's undergraduate admissions program.

c. Do you believe that Justice George's assessment is consistent with the U.S. Supreme Court's ruling in Grutter v. Bollinger? Please explain why or why not.

RESPONSE: To the extent that Chief Justice George believed that diversity constitutes a compelling state interest in the context of higher education, his views are consistent with the Court's opinion in *Grutter v. Bollinger* (2003) 123 S.Ct. 2325.

d. Do you agree with Justice George's view that "a comparable justification may underlie many of the affirmative action programs voluntarily instituted in recent years by those large corporations that have concluded that an integrated work force (including management) enables the organization to better serve its diverse clientele." Please explain why or why not.

RESPONSE: Corporate programs do not implicate either Proposition 209 or the federal Equal Protection Clause, both of which only constrain the actions of government. Corporations are free to implement any programs they feel will better serve their diverse clientele, provided those programs do not violate antidiscrimination statutes.

Question #4

a. During your confirmation hearing, Senator Specter asked whether the San Jose provision at issue in Hi-Voltage addressed a compelling state interest and was sufficiently narrowly tailored. You responded that you did not know "because the only case that we have that I can think of that focuses on this is the recent case of the U.S. Supreme Court, and it's focusing on universities, and its analysis is fairly specific to diversity in that context." In this case, presumably Grutter v. Bollinger, the Court found racial diversity in higher education to be a compelling state interest and, is thus, an appropriate basis the University of Michigan Law School's affirmative action program.

RESPONSE: *Grutter v. Bollinger* is the case to which I referred in response to Senator Specter's question at the confirmation hearing.

b. Do you believe that the University of Michigan case was properly decided? Please explain why or why not.

RESPONSE: I have not seen the briefs in the *Grutter* case and did not have the benefit of hearing the oral argument; thus, I cannot offer any informed personal opinion. However, the U.S. Supreme Court has decided that race conscious admission policies are permissible under the Equal Protection Clause as long as the system does not impose a quota and race is only considered as a plus factor. I would, of course, follow the Court's precedent.

c. As you indicated in your testimony, Grutter v. Bollinger addressed diversity in higher education. Do you believe the Court's analysis can be applied to race- or gender-conscious affirmative action programs in employment, government contracts and other aspects of American life? Please explain why or why not.

RESPONSE: I cannot say whether the court's analysis in *Grutter v. Bollinger* could be applied to race-or gender-conscious affirmative action programs in other aspects of American life. The *Grutter* case does not provide any broadly applicable bright line rule. Indeed, Justice O'Connor acknowledges that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." (*Grutter v. Bollinger* (2003) 123 S.Ct. 2325, 2338.)

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JANICE R. BROWN
JUSTICE

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Feinstein. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

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cc: The Honorable Patrick J. Leahy,
Ranking Member

**JANICE BROWN'S RESPONSES
TO FOLLOWUP QUESTIONS
FROM
SENATOR DIANNE FEINSTEIN**

1. San Remo Hotel v. City and County of San Francisco, 41 P.3d 87 (Cal. Sup. Ct. 2002) involved a challenge to a city ordinance which required hotel owners who wanted to transition a hotel from residential use to transient use to pay a fee. You dissented from the majority's decision.

During the hearing, you testified that the city ordinance in the San Remo case was "a taking because what is really happening here is the city is saying, as a property owner, you still have the property, that is, you have nominal ownership, but if you want to do something with the property, you basically have to ransom it back from us. You have to pay us to get that use back." You then stated, "And I think the best example of this, because it was very interesting to me at the oral argument in this case, I said to the attorney who was arguing for the city, could you, because there is traffic congestion in San Francisco, and you want to get people off the highways and make the traffic congestion go away, could you tell me that I have to use my car, and during certain hours, I have to pick up someone from the casual car pool as a way of dealing with traffic congestion?"

Are you saying that a city's imposition of HOV-lanes would amount to a taking because it required drivers to have a certain number of occupants in their car in order to drive in an HOV-lane or suffer a fine if they failed to comply? Please explain.

RESPONSE: No. My hypothetical did not involve the imposition of HOV-lane restrictions. When a city designates HOV-lanes, the only consequence of a driver's decision not to participate in a carpool is that he is limited to other (and perhaps slower) lanes if he chooses to drive. In my hypothetical, by contrast, drivers were being required to use their car in a particular way.

Would city ordinances which impose rent control in apartment buildings constitute a taking because it is a restriction on the use of property of a free owner? Please explain.

RESPONSE: No. The United States Supreme Court has indicated that rent control ordinances do not constitute per se takings. (See, e.g., *Pennell v. City of San Jose* (1988) 485 U.S. 1, 11, fn. 6.) Such ordinances may, however, lead to regulatory takings, depending on the facts of a particular case (e.g., a case where a landlord is required to charge no more than $5 a month in rent for a three-bedroom apartment).

2. In your testimony, you stated that you were not espousing your own personal theory of political economy as the majority accused you of in the San Remo case. Specifically you said, "I was not suggesting that any appointed judiciary should impose its political view."

Nonetheless, in the San Remo dissent, you point out several types of regulations that you say the government can impose such as regulations to restrict business signs to advertise their business or laws which would prohibit the operations of slaughterhouses in residential neighborhoods. San Remo, 41 P.3d at 126. You say that these regulations are permissible because they are "appropriate and mutually beneficial" to property owners. San Remo, 41 P.3d at 126. You compare those permissible regulations to the ordinance in this case which you determine is an impermissible taking. According to you, an impermissible taking is one which

> "rather than promoting 'an average reciprocity of advantage,' it is merely designed to benefit one class of citizens at the expense of another; that is if it simply shifts wealth by a raw act of government power. The government, . . . has deprived the property owner of a right associated with his property, shifting that right to another party, but it has in no sense compensated the owner by enhancing in some real way, the value of the rights the owner has retained." San Remo, 41 P.3d at 126.

Are you saying only where property owners receive favorable benefits which are equal to the cost of such regulations can the government regulate use of land? If your answer is yes, please provide case authority for your position.

RESPONSE: No. It is clear that the takings clause is not violated by every adjustment of the benefits and burdens of economic life. Rather, the United States Supreme Court has held that the takings clause may be violated when the burdens of economic life are clearly

disproportionate, "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49.) In addition, the "average reciprocity of advantage" language quoted above is from Justice Holmes's opinion in *Penna Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.

Specifically, the government programs listed below could all be characterized as being expressly designed to shift wealth from one group to another. Are these all unconstitutional takings?

Progressive taxation
Unemployment benefits
Estate tax
Minimum wage laws
Protection of the habitat of endangered species on private land
Social Security System
Medicaid and Medicare programs.

RESPONSE: Although it is not possible to answer this question in the abstract because each case would depend upon the particular claim and the law and the facts of that case, I note that many if not all of these programs have already survived different constitutional challenges. (See *Steward Machine Co. v. Davis* (1937) 301 U.S. 548 [upholding the constitutionality of Title IX of the Social Security Act]; *Helvering v. Davis* (1937) 301 U.S. 619 [upholding the constitutionality of Titles II and VIII of the Social Security Act]; *Brushaber v. Union Pacific Railroad Co.* (1916) 240 U.S. 1 [upholding the constitutionality of a progressive income tax]; *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379 [upholding the constitutionality of Washington's minimum wage law]; *Heitsch v. Kavanagh* (6th Cir. 1953) 345 U.S. 939 [rejecting Takings Clause challenge to federal estate tax]; *Quarty v. United States* (9th Cir. 1999) 170 F.3d 961, 969 ["It is well established that Congress's general exercise of its taxing power does not violate the Fifth Amendment's prohibition on takings without just compensation"].)

3. When asked whether you believe that the liberty of the individual is equal to the property rights of another individual your answer was "I believe that property and liberty—when the Fifth Amendment says, you know, no deprivation of life, liberty, or property without due process of law, it seems to me that those are really all on the same level."

Many of this nation's civil rights laws interfere with the right of private owners to exclude minorities from their property. Like the ordinance in the San Remo case, these laws apply only to those who decide to offer some form of public accommodations. The Supreme Court has ruled in cases such as Heart of Atlanta Motel v. United States, 379 U.S. 241, (1964), that property owners are not entitled to compensation under the Takings Clause for their restriction on their right to exclude.

Wouldn't your view of the Takings Clause require a different result? Please explain.

RESPONSE: No. To the extent the takings clause is implicated in cases like *Heart of Atlanta Motel,* the claim has been correctly rejected by every court to consider it. A property owner in the business of providing hotel accommodations to the general public can hardly complain of a compensable taking because he is required to make those accommodations available to the paying public on an equal basis. As the Supreme Court noted in *Heart of Atlanta Motel,* an innkeeper has no "right to select its guests as it sees fit, free from governmental regulation." (*Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 259.) The line of cases holding that such regulations do not violate the due process clause goes back to "the Civil Rights Cases themselves, where Mr. Justice Bradley for the court inferentially found that innkeepers, 'by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.' " (*Id.* at p. 260.)

4. In High Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. Sup. Ct. 2000) you wrote the majority opinion which struck down San Jose's enactment of a program which violated Proposition 209. Proposition 209 prohibited discrimination against or granting preferential treatment on the basis of race or sex.

Janice Brown Responses
to Senator Feinstein

How do you respond to Chief Justice George's criticism in High Voltage that

> "the general theme that runs through the majority opinion's historical discussion – that there is no meaningful distinction between discriminatory racial policies that were imposed for the clear purpose of establishing and preserving racial segregation, on the one hand, and race-conscious affirmative action programs whose aim is to break down or eliminate the continuing effects of segregation and discrimination, on the other – represents a serious distortion of history and does a grave disservice to the sincerely held views of a significant segment of our populace." High Voltage, 12 P.3d at 1095.

RESPONSE: Although I authored the majority opinion in *Hi-Voltage*, it is, in fact, an opinion of the court, signed by a majority of its members. As with any majority opinion, my personal views are entirely irrelevant; the decision must and can only follow the law as a *majority* of the court understands it.

I respectfully disagree with the Chief Justice's view, as did most members of the court. I believe that the court's opinion in that case faithfully interpreted the law and I would point out that all of those justices signing the opinion were members of minority groups, including Justice Mosk, who was universally considered the court's most liberal jurist at the time. By signing the opinion, they not only endorsed the result (with which the entire court agreed) but the analysis as well.

At the time Proposition 209 was placed on the ballot, the campaigns for and against were particularly contentious and fraught with intense feelings. Even though the measure had been approved by a significant majority of the voters (54%) and had withstood challenges to its constitutional and statutory validity in federal court (see *Coalition for Economic Equality v. Wilson* (9th Cir. 1997) 122 F.3d 692; *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480), that remained the situation four years later when *Hi-Voltage* came before the California Supreme Court. In this highly charged circumstance, it was particularly incumbent for the

Supreme Court to make the basis for its ruling accessible to everyone who may be affected by it.

In addition, both the ballot arguments in favor of Proposition 209 and the appellate arguments of the City of San Jose and its amici referenced in various respects historical antecedents, particularly the Civil Rights Act of 1964 and subsequent interpretation of the Act by the United States Supreme Court. (See *Hi-Voltage*, *supra*, 24 Cal.4th at pp. 560-562, 566-568.) At the very least, any credible analysis of the question presented would need to include some explication of the Act as construed by the high court during the three decades from its enactment to 1996. Without a historical perspective, it would also have been impossible to persuasively respond to the City's argument that in referencing the Civil Rights Act, the voters intended to import the gloss of United States Supreme Court decisions upholding affirmative action programs such as the one in question. (See *id.* at pp. 566-568.)

For these reasons, it was essential to review the United States Supreme Court's Title VII jurisprudence—as well as equal protection decisions that developed in tandem—to determine both the original construction of the Act and any changes that might reflect on and give content to the intent to "restate[]" its animating principles.

Supreme Court of California
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JANICE R. BROWN
JUSTICE

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Kennedy. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

Janice R. Brown

cc: The Honorable Patrick J. Leahy,
Ranking Member

JANICE BROWN'S RESPONSES
TO QUESTIONS
FROM
SENATOR EDWARD M. KENNEDY

You dissented from the majority opinion in *Aguilar v. Avis Rent A Car* System, 980 P.2d 846 (Cal. 1999). *Aguilar* was a case brought under California's anti-discrimination law in which Latino employees of Avis successfully proved at trial that they had been subjected to racial harassment, by among other things, a supervisor's use of derogatory racial names toward them in the workplace. Following the jury's verdict that the Latino plaintiffs had suffered discrimination, the trial court judge issued an injunction barring the use of racial epithets by the defendants in the future. The intermediate appellate court upheld the injunction after narrowing it to apply only to the workplace and to a specific list of derogatory racial or ethnic epithets. The California Supreme Court upheld the injunction as well, ruling that when derogatory speech creates a hostile work environment, an injunction barring it is not an invalid prior restraint on speech under the First Amendment and the California constitution's free speech clause.

Your dissent would have invalidated the injunction as a violation of the defendants' right to freedom of speech. This concerns me, because I believe the plurality of the Supreme Court was correct that a narrowly crafted injunction barring racial harassment in the workplace – after a judge or jury has found the conduct to be unlawful discrimination – is not barred by the First Amendment. *But what concerns me most about your dissent is that you went further and suggested that, in your view, even where no injunction is at issue, harassing speech that creates a hostile work environment cannot be challenged under the anti-discrimination laws because it is protected by the First Amendment.* This would be completely inconsistent with the settled law of sexual harassment. Under well-established Supreme Court cases – *Meritor Savings Bank v. Vinson* and its progeny – offensive verbal (or physical) conduct of a sexual nature that creates a hostile work environment is sexual harassment that violates Title VII of the Civil Rights Act of 1964.

In your dissent in *Aguilar,* you attack the plurality for treating this issue as one that "the high court resolved long ago," you disparage as "censorship" the conclusion that such conduct is actionable notwithstanding the First Amendment, and you suggest that the correct rule is that, applied

to harassing speech, "Title VII is unconstitutional" under the First Amendment. 980 P.2d at 892. This seems to be extremely outside the mainstream of accepted legal views.

1. Is it your view that it is an unresolved question whether the First Amendment permits a cause of action under Title VII for harassing speech that creates a hostile work environment?

a. If so, please explain in detail the legal basis for this view.

RESPONSE: As my dissent acknowledges, the United States Supreme Court has held that the First Amendment permits a cause of action for damages under Title VII for harassing speech that creates a hostile work environment. (*Aguilar v. Avis Rent A Car* (1999) 21 Cal.4th 121, 190-191 (dis. opn. of Brown, J.).)

The *Aguilar* case presented a very difficult issue—one which splintered the court. In fact, the case produced no majority opinion and three judges dissented from the plurality's holding that the First Amendment does not bar a content-based prior restraint when the speech constitutes racial harassment in the workplace. Nothing in my dissent in *Aguilar*, however, was intended to suggest that harassing speech which creates a hostile work environment cannot be challenged under the federal anti-discrimination laws. Although stated in broad terms, the first part of the dissent is solely an attempt to respond to the plurality's suggestion that " 'speech of this nature [expressing racist and discriminatory views]' " is not " 'constitutionally protected' " (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 191 (dis. opn. of Brown, J.), quoting *id.* at p. 135). I argue that even though such speech is abhorrent and wrong, the United States Supreme Court has long established that speech expressing racist and discriminatory views is constitutionally protected. But, recognizing that the First Amendment protects certain speech does not mean that all regulation of offensive speech in the workplace is precluded.

b. If this is not your view, do you believe that to the extent that it prohibits harassing speech, Title VII is unconstitutional under the First Amendment? Please set forth in detail the legal bases for your response.

RESPONSE: Please see response to subpart (a).

c. Why in *Aguilar* did you criticize the court's plurality for assuming the U.S. Supreme Court "resolved that issue long ago," and doing so "in favor of censorship," and why did you suggest that the application of Title VII in these circumstances "is unconstitutional"?

RESPONSE: My criticism was leveled at the plurality's assumption that the Supreme Court long ago settled that an injunction might properly be issued when a jury has found the conduct constitutes unlawful discrimination. I had not found convincing evidence that the Supreme Court would approve a content-based prior restraint in such circumstances.

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), you discussed the use of race-conscious measures to remedy discrimination. Although the issue in *Hi-Voltage* was whether or not a city contracting program violated the California Constitution, that case did not involve a federal claim, your opinion discussed at length the use of race- and gender-conscious remedies under Title VII. In particular, you suggested that race-conscious remedies for racial discrimination are inconsistent with the Title VII's original purposes. In discussing a Supreme Court case in which the court permitted use of gender-conscious remedies under Title VII, you state that the Court "*replaced individual right of equal opportunity with proportional group representation. Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race.*" (emphasis added).

Janice Brown's Responses
to Senator Kennedy

2. Is it your view that, under Title VII and the Equal Protection Clause, race-and-gender-conscious remedies "pursued for the purpose of eliminating invidious discrimination," are no different from laws that permitted racial segregation?

RESPONSE: I have never said, nor do I believe, that race-and-gender-conscious remedies pursued for the purpose of eliminating invidious discrimination are no different from laws that permitted racial segregation.

3. Do you believe that race-conscious remedies are inconsistent with the purposes of Title VII? If not, please explain what you meant in stating that "history reveals that this prevailing social and political norm had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race."

RESPONSE: The United States Supreme Court repeatedly has held that race-conscious remedies are not inconsistent with the purposes of Title VII and I conscientiously will follow these and all other United States Supreme Court precedents if confirmed to the D.C. Circuit Court of Appeal.

The quoted statement in *Hi-Voltage* was not meant to express any opinion whatsoever as to the propriety or constitutionality of race-conscious remedies. The statement was simply part of the historical discussion and merely constituted an observation that there were some parallels—as well as some distinctions—between the court's movement toward "proportional group representation" and "laws antedating the Civil Rights Act." In making this observation, the opinion neither impliedly disapproved of race-conscious remedies nor impliedly stated that such remedies are inconsistent with the purposes of Title VII.

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JANICE R. BROWN
JUSTICE

November 4, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Kohl. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

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cc: The Honorable Patrick J. Leahy,
Ranking Member

JANICE BROWN'S RESPONSES
TO FOLLOWUP QUESTIONS
FROM
SENATOR KOHL

1. One of my priorities on the Judiciary Committee is my role on the Antitrust Subcommittee. I believe that strong antitrust enforcement is essential to ensuring that competition flourishes throughout our economy, benefiting consumers through lower prices and better quality products and services. The federal courts are essential to the firm enforcement of our antitrust laws, and to ensuring that anticompetitive conduct is prevented.

Please explain your views regarding the role of the judiciary with respect to the enforcement of antitrust law.

RESPONSE: My present court has few occasions to interpret antitrust provisions; however, my view is generally that constitutional protections are not absolute and that judicial review must always be exercised with a great deal of legislative deference.

2. Justice Brown, you have become known for your strong beliefs that the courts have in recent years inadequately protected private property interests. In one dissenting opinion on the California Supreme Court, for example, you wrote that "the right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion."

Antitrust remedies may include a prohibition on one company acquiring private property – another business – or require the divesting of existing assets in order to preserve competition. In light of this, do we have reason to worry that your strong belief that governmental regulation of private property warrants close judicial scrutiny means that you will be reluctant to approve the aggressive enforcement of antitrust laws?

RESPONSE: No. My concerns about the protection of private property center around the Takings Clause of the Fifth Amendment and related state constitutional provisions. However, I have never argued that these protections are absolute. California's antitrust law (known as the Cartwright Act) is modeled on federal antitrust provisions, and was enacted more than 60 years ago. (Bus. & Prof. Code, § 16600 et seq.) I have never suggested that aggressive enforcement of these antitrust laws implicates the Takings Clause.

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Dear Chairman Hatch:

Enclosed please find my answers to the questions posed by Senator Leahy. I trust that it is fully responsive. Thank you for your courtesy.

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cc: The Honorable Patrick J. Leahy,
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JANICE BROWN'S RESPONSES
TO QUESTIONS
FROM
SENATOR PATRICK LEAHY

Constitutional Rights:

1. At your hearing last week, I asked you to provide the Committee with some examples of where you believe the judiciary has taken, as you said in a 1997 speech to the Libertarian Law Council, "a few words which are in the Constitution like 'due process' and 'equal protection' " and imbued them with "elaborate and highly implausible etymologies?" In addition to Lochner and Dred Scott, the two cases you mentioned at your hearing, where else do you believe the courts have done that?

RESPONSE: The referenced portion of the 1997 speech addressed concerns about judicial activism. In response to your question, I sought to identify cases about which there seems to be universal agreement that the judges' actions in those cases symbolize judicial usurpation of governmental power better exercised by our elected officials. In my view, it is the duty of appellate judges to ensure that judicial review, which is necessary in our constitutional republic, not be transformed into judicial supremacy. My point was not to focus on any particular case, but rather to identify the kinds of concerns which should engage the conscientious jurist.

2. At your hearing last week, you said that the "most important thing we have ever done is to try to guarantee people equality under law." However in a speech given to the Federalist Society in 2000, you added that "the greatest fiasco" of this millennium has been "the attempt to guarantee equal outcomes for all people." Please explain what you meant by that. What role do you think the government and courts should play to guarantee equal treatment under the law?

RESPONSE: I do believe that the "most important thing we [as a nation] have ever done is to try to guarantee people equality under law." It is the greatest legacy America has bequeathed to the world. The language in the speech you reference distinguishes equality before the law from equality of outcomes: "The great innovation of this millennium was equality before the law. The greatest fiasco—

the attempt to guarantee equal outcomes for all people." Providing equality before the law is quite a distinct concept from guaranteeing equality of outcomes. The contrast I sought to draw was between American liberty and the oppressiveness of totalitarian regimes.

All three branches of our government can, and should, do everything possible to guarantee equal treatment under the law. Not only is such equality expressly guaranteed by the words of the Constitution, equality under law is the fulfillment of national aspirations that go all the way back to the Declaration of Independence.

3. I would like you to expand on your answers given to the Committee last week on the constitutional right to privacy. Do you believe there is a right to privacy in the U.S. Constitution? Where is it located? From what does it derive?

RESPONSE: The United States Supreme Court has established that the right to privacy exists in the Constitution and I will faithfully apply Supreme Court precedent in this area if confirmed as a member of the D.C. Circuit. While I noted at my hearing that the word "privacy" does not appear in the federal Constitution, the right is derived from the First, Third, Fourth and Ninth Amendments.

4. One recent case in which the U.S. Supreme Court recognized protection of individuals' liberty was Lawrence v. Kansas, in which the Supreme Court held that the Texas statute that made it a crime for two people of the same sex to engage in certain intimate sexual conduct is an unconstitutional violation of the due process clause. Justice Kennedy wrote, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." In a 1996 speech to the Sacramento County Bar Association, you said, "To the founders, rights were essential to liberty because rights were an antidote to oppressive laws." In your opinion, does the Court's holding in Lawrence v. Kansas protect individuals' right to engage in conduct without being subject to an "oppressive law"? Do you think the rights found by the Court in this case are merely another example of the judiciary doing what you criticized in your 1997 speech – "finding constitutional rights which are nowhere mentioned in the Constitution?" Please explain.

RESPONSE: The 1996 Law Day speech did not anticipate the court's holding in *Lawrence v. Kansas*, which I accept as the law of the land. I have neither read the briefs nor heard the oral arguments in the *Lawrence* case. I therefore do not believe that I have the necessary information to offer an opinion about the decision in that case. In my speech, by noting that "[t]o the Founders, rights were essential to liberty because rights were an antidote to oppressive laws," I was trying to contrast this antecedent notion of negative rights with the more current view of positive rights. The difference has real significance for all aspects of liberty.

5. You have been critical of two-tier scrutiny for the protection of rights. In your dissent in Santa Monica Beach v. Superior Court of L.A. County, you wrote, "Nothing in the text or structure of either provision suggests an infringement of a property interest ought to be accorded greater deference than a restriction on a liberty interest. Economic freedoms are no different from other freedoms protected by the Constitution." In Galland v. City of Clovis – a case which dealt with compensation for economic injury caused by prior rent control ceilings –you were criticized by the majority for considering delays in price adjustment, the "constitutional equivalent of intentional racial discrimination." Your dissent analogized rent control to a case in which "a city discriminated against a Black-owned business in the award of city contracts." As a member of the D.C. Circuit, would you follow the longstanding principle that where government action is based on suspect classifications or infringes on fundamental constitutional rights, like freedom of speech or the right to privacy, then strict scrutiny applies?

RESPONSE: Yes. Strict scrutiny of government action based on suspect classifications or infringements of fundamental constitutional rights has long been the established standard of review. If confirmed to the D.C. Circuit Court of Appeal, I would apply that principle wherever appropriate.

Judicial Interpretation

6. You said at your hearing that you could not be both "consistently inconsistent" and "ideological" in your judicial opinions. But, a close examination of your opinions show that depending on the issue of the case and the result you

want to reach, your respect for precedent and rules of judicial interpretation change. There are numerous examples of this and I will provide just a few:

In Katzberg v. Regents of University of California, in order to limit tort remedies, you disregarded federal precedent stating that "defaulting to the high court fundamentally disserves the independent force an effect of our Constitution." But, in American Academy of Pediatricians v. Lungren, in order to limit the right to privacy, you wrote, "where, as here, a state constitutional protection was modeled on a federal constitutional right, we should be extremely reticent to disregard U.S. Supreme Court precedent delineating the scope and contours of that right."

In Galland v. City of Clovis, when the court limited damages for a property owner who suffered economic harm, you wrote, "I think the majority is wrong as a legal matter to limit damages as it does. The exacting constitutional standard for establishing a due process violation should not serve to restrict damages once the high threshold is met. Rather, once the threshold is met, damages should be sufficient to compensate the plaintiff fully for the constitutional wrong, as well as to create the appropriate disincentive for the state." But, in Lane v. Hughes Aircraft Company, when it was a worker who suffered harm, you took the position that punitive damages against the employer should be capped, writing, "I would hold that, in the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record."

When the rights of criminal defendants were at stake, you had one view of juries, writing in People v. Guiuan, "I do not share the majority's dim view of jurors. Rather, I would presume, as we do in virtually every other context, that jurors are 'intelligent, capable of understanding instructions and applying them to the facts of the case.'" But, you had a different position of juries when they were given the ability to impose economic damages on businesses found guilty of employment discrimination in Lane v. Hughes Aircraft Company, writing, "when setting punitive damages, a jury does not have the perspective, and the resulting sense of proportionality, that a court has after observing many trials."

In Osborg v. City of Stockton, you criticized a law restricting the rights of property owners and wrote the "role of public authorities must be enhanced without placing too great a burden on liberty." However, you authored the

opinion in People ex. rel. Gallo v. Acuna, upholding a law restricting the rights of criminal suspects and wrote, "the security and protection of the community is the bedrock on which the superstructure of individual liberty rests...liberty unrestrained is an invitation to anarchy."

To me, these examples indicate that you have a tendency to insert your own ideology into your judicial opinions. Please respond and explain why your approach to judicial interpretation differs so dramatically depending on the result you are trying to reach.

RESPONSE: As discussed in more detail below, the case comparisons cited in this section do not reflect any inconsistency regarding respect for precedent or rules of judicial interpretation. I believe that it is the duty of appellate judges in each case to analyze the relevant principles and the facts and to assess them in their particular context in light of the question presented.

The question in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, was whether article I, section 7, subdivision (a) of the California Constitution—which was added to our state Constitution by voter initiative and provides in part that "[a] person may not be deprived of life, liberty, or property without due process of law"—independently supports a tort action for monetary damages. The majority opinion reviewed the history of the initiative and found no evidence the electorate intended this provision to authorize such an action. That determination should have concluded our inquiry. Instead, the majority, without any textual support, went on to determine whether the electorate intended to foreclose a damages remedy. Moreover, its subsequent analysis drew substantially on the United States Supreme Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388, in which the high court found the basis for a "constitutional tort" in a violation of the Fourth Amendment. I explained in my separate opinion (*Katzberg, supra*, at pp. 330-332) my view that neither the text nor the history of California's "liberty" clause reflected any intent to incorporate the *Bivens* analysis or otherwise provide the basis for a constitutional tort.

American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, involved an entirely different question—interpreting the California Constitution's express right of privacy as it applied to a

minor's ability to obtain an abortion without parental consent or judicial bypass. As with California's "liberty" clause at issue in *Katzberg*, this provision was added by voter initiative. However, unlike the situation in *Katzberg*, the history of the privacy clause established that the electorate intended the meaning of "privacy" in this context to reflect the federal right of privacy the United States Supreme Court had derived from the First, Third, Fourth, and Ninth Amendments of the U.S. Constitution in such cases as *Griswold v. Connecticut* (1965) 381 U.S. 479. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23, 28.)

The difference between *Katzberg* and *American Academy of Pediatrics* is thus the distinction between *no evidence* of the electorate's intent that one particular provision of the California Constitution be construed by reference to the U.S. Constitution and an *express* intent that another provision be so construed.

My position in *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, was that the majority had impermissibly imposed state administrative impediments to the plaintiffs' ability to seek a federal remedy pursuant to 42 United States Code section 1983 for an acknowledged egregious violation of their rights. (See *id.* at pp. 1047-1052.) In my view, the majority had no more authority to preclude the plaintiffs from seeking recovery in this situation than if they had been asserting a claim of racial discrimination.

In *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, the question concerned punitive damages, recoverable in addition to compensatory damages that fully compensate the plaintiff for any injury and intended to punish and deter malicious or oppressive conduct. My separate opinion addressed the problems—including some of constitutional dimension (see *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 123 S.Ct. 1513, 1519)—that arise in the absence of some guidance for juries and courts to determine how, in the ordinary case, an appropriate punitive damages award should be calculated. Unlike the situation in *Galland*, where the plaintiffs were effectively foreclosed from pursuing any recovery, the question of punitive damages in *Lane* arose only because the plaintiffs had been fully compensated for both their economic and noneconomic losses.

With respect to *People v. Guiuan* (1998) 18 Cal.4th 558 and *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405 and the jury's

abilities: In any criminal trial the jury is fully and specifically instructed on the operative principles of law, and absent evidence to the contrary, a reviewing court is to presume the jurors followed those instructions. The situation in *Lane*, a civil trial involving punitive damages, was entirely different in that the jury was only instructed in vague and general terms as to the manner in which it should calculate the amount of punitive damages. In my view, unlike trial judges, who see an array of tort actions and a range of misconduct that allows them to calibrate a "punishment that fits the crime," juries have little exposure in this regard and therefore have a poor basis for making a reasonable determination without more specific guidance from the courts.

With respect to *Osborg v. City of Stockton* (unpublished) and *People ex. Rel. Gallo v. Acuna*, the two cases are generally quite consistent although they have distinct procedural postures. *Osborg* dealt with an ordinance—the validity of which was being submitted for judicial determination. *Gallo* dealt with a judicial determination, based on copious evidence, that certain specified conduct constituted a public nuisance. The court's ability to make such a finding was subject to stringent standards. In *Gallo*, the public officials who sought the injunction had to establish the long history of the gang problem in the neighborhood, the seriousness and intractability of this problem, its adverse impact on the constitutional rights of neighborhood residents, and the failure of all other remedies. In *Osborg*, the public officials testified that no less draconian solution than the permanent 24-hour parking ban had been tried; no attempt had been made to establish a connection between the regulation and the project's objectives; no attempt was made to ease the burden for neighborhood residents. In both cases, I acknowledge that protecting public order is a necessary precondition to a free society. In *Osborg*, I concluded that mere administrative convenience was not enough to outweigh the residents' liberty interest.

Lochner:

7. I would like to provide you with another chance to reply to a yes or no question that was asked at your confirmation hearing: Do you agree with the holding in Lochner?

RESPONSE: No.

8. In your 2000 speech to the Federalist Society, you were critical of the New Deal and Great Society programs. You said the "New Deal" has "inoculated the federal Constitution with a kind of underground collectivist mentality" and that it caused "the Constitution itself [to be] transmuted into a significantly different document."

a. Please explain, with specific examples, how the New Deal "transmuted" the Constitution.

RESPONSE: While I had no specific examples in mind when I gave the speech you reference, the ultimate effect of the Supreme Court's decisions regarding New Deal programs was to establish judicial deference on economic and administrative issues and judicial supremacy over all else.

b. There have been numerous successful laws and programs that stemmed from the New Deal, including Social Security, labor standards, and the Securities and Exchange Commission. Would you describe those programs and regulations as "socialist"?

RESPONSE: No. The laws and programs referenced in your question have all survived constitutional challenges.

c. As many of the regulatory agencies that govern programs that stemmed from the New Deal often come before the D.C. Circuit, how would you be able to guarantee that you would be fair in judging challenges to laws which you have implied should not have been found to be constitutional?

RESPONSE: I would, of course, follow controlling precedent. To the extent new challenges come before the D.C. Circuit, I would follow the teachings of the Supreme Court concerning the appropriate scope of congressional powers.

Affirmative Action:

9. You have received a great deal of criticism for your opinion in Hi Voltage Wire Works v. City of San Jose. In that case, the issue facing the California Supreme Court was whether an outreach program, adopted by the

city of San Jose requiring contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include women and minority subcontractors in their bids, was an unconstitutional violation of Proposition 209. Chief Justice Ronald George refused to join in your opinion because he thought "the major portion" of your discussion was "unnecessary to the resolution of the issue" before the court and "less than evenhanded." Can you explain to the Committee why you felt it was necessary in this case to go beyond Proposition 209 to claim that affirmative action programs violate Title VII?

RESPONSE: The opinion I authored, which was signed by a majority of the court, did not find that affirmative action programs violate Title VII. As with any majority opinion, my personal views are entirely irrelevant; the decision must and can only follow the law as a *majority* of the court understands it.

It should also be noted that all of those justices signing the *Hi-Voltage* majority were members of minority groups, and included Justice Stanley Mosk, universally considered the court's most liberal jurist. By signing the opinion, they not only endorsed the result (with which the entire court agreed) but the analysis as well.

At the time Proposition 209 was placed on the ballot, the campaigns for and against were particularly contentious and fraught with intense feelings. Even though the measure had been approved by a significant majority of the voters (54%) and had withstood challenges to its constitutional and statutory validity in federal court (see *Coalition for Economic Equality v. Wilson* (9th Cir. 1997) 122 F.3d 692; *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480), that remained the situation four years later when *Hi-Voltage* came before the California Supreme Court. In this highly charged circumstance, it was particularly incumbent for the Supreme Court to make the basis for its ruling accessible to everyone who might be affected by it.

In addition, both the ballot arguments in favor of Proposition 209 and the appellate arguments of the City of San Jose and its amici referenced in various respects historical antecedents, particularly the Civil Rights Act of 1964 and subsequent interpretations of the Act by the United States Supreme Court. (See *Hi-Voltage* (2000) 24

Cal.4th 537, 560-562, 566-568.) At the very least, any credible analysis of the question presented would need to include some explication of the Act as construed by the high court during the three decades from its enactment to 1996. Without an historical perspective, it would also have been impossible to persuasively respond to the City's argument that in referencing the Civil Rights Act, the voters intended to import the gloss of United States Supreme Court decisions upholding affirmative action programs such as the one in question. (See *id.* at pp. 566-568.)

For these reasons, it was essential to review the United States Supreme Court's Title VII jurisprudence—as well as equal protection decisions that developed in tandem—to determine both the original construction of the Act and any changes that might reflect on and give content to the voters' intent to "restate[]" its animating principles.

Avis v. Aguilar:

10. While many questions were asked at your hearing about your dissenting opinion in Avis v. Aguilar, you only responded to the portion of your dissent which expressed your concern with the "injunction" that was imposed by the trial court. But, your opinion in that case went beyond the issue of prior restraints on speech. You wrote that racial slurs in the workplace, like other "racist and discriminatory views" such as the Nazis marching in Skokie, are "protected by the First Amendment to the federal Constitution." It was only halfway through your dissent that you wrote, "Moreover...we are dealing with an absolute prohibition – a prior restraint." Do you think racial discriminatory language in the workplace can be regulated at all in order to prevent a hostile work environment?

RESPONSE: I certainly believe that racially discriminatory language in the workplace can be regulated so long as these regulations do not violate the First Amendment. Indeed, the dissenting opinion expressly recognizes such an instance: "employees can sue and recover damages" if they are subject to racial discriminatory language establishing a hostile work environment. (*Aguilar v. Avis Rent A Car* (1999) 21 Cal.4th 121, 194.)

Janice Brown's Responses
to Senator Leahy

11. You also stated at your hearing that you believed that "damages" would have been a "totally effective" remedy in this case because the corporation would want to act to prevent the imposition of punitive damages. However, in past cases, you have argued for limited damages in discrimination cases against employers and corporations. For example, in Lane v. Hughes Aircraft, you wrote a separate concurrence to explain why judges should grant a new trial when they find punitive damages excessive. How do you reconcile your statement in Avis that the threat of "hefty punitive damages" is an effective remedy against such racial discrimination in the workplace with your belief that such punitive damages should be limited in these types of cases?

RESPONSE: My statements concerning punitive damages in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 194 (*Aguilar*) (dis. opn. of Brown, J.) and *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 421-429 (*Lane*) (conc. opn. of Brown, J.) are wholly consistent. In *Lane*, my concurring opinion addressed the arbitrariness of punitive damage awards and the "resulting gross variability" which ultimately implicates "the rights of defendants to due process and equal protection of the laws" under the federal and California Constitutions. (*Lane*, at p. 422.) Because our case law provided no "beginning point of reference" for determining the propriety of a punitive damages award, these awards "tend to vary widely, depending as much on the vicissitudes of jury decisionmaking as on the facts of the case." (*Ibid.*) In the interest of fairness to defendants and to alleviate the serious due process and equal protection concerns, the concurring opinion suggested that punitive damages should be limited except in exceptional cases. This proposal to limit punitive damages was hardly unusual or outside the mainstream. As the opinion noted, numerous jurisdictions, including "Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma and Texas" (*id.* at p. 426) had already imposed similar limitations on punitive damages awards. Indeed, the United States Supreme Court has recently held that the "Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor" (*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) __ U.S. __ [123 S.Ct. 1513, 1519-1520]), and established limits on punitive damage awards analogous to the limits proposed in my concurring opinion (*id.* at p. 1524 ["Single-digit multipliers are more likely to comport

with due process, while still achieving the State's goals of deterrence and retribution"]).

And, as the United States Supreme Court expressly recognized, these constitutionally required limitations on punitive damage awards do not detract from the deterrent or punitive effect of these awards. (See *State Farm Mutual Automobile Ins. Co.*, *supra*, 123 S.Ct. at p. 1524.) Such a conclusion is borne out by the legislative and empirical evidence cited in the concurring opinion. As noted in the opinion, the California Legislature has consistently established "double or treble damages" as the proper measure of damages designed to punish and deter a defendant for its wrongful act. (*Lane*, *supra*, 22 Cal.4th at pp. 425-426 (conc. opn. of Brown, J.).) In other words, the Legislature—which is best equipped to ascertain the proper measure of damages that will adequately punish and deter future wrongful conduct—has determined that double or treble damages are sufficient. Moreover, the concurring opinion cites studies showing that punitive damage awards "rarely exceed three times compensatory damages." (*Id.* at p. 427.) As such, the limits on punitive damages proposed in my concurring opinion in *Lane* would not lessen their deterrent or punitive value. The awards are still " 'hefty' " and constitute "an effective remedy against such racial discrimination in the workplace."

It is important to note that large punitive damage awards are not the only remedy against racial discrimination in the workplace. Employers must face not only the specter of punitive damages but must also shoulder the "cost of litigation and a [compensatory] damage award" as well as the possibility of "attorney fees." (*Aguilar*, *supra*, 21 Cal.4th at p. 194 (dis. opn. of Brown, J.).) Together, these various damage awards are "sufficient to deter any 'unwanted racial discrimination.' " (*Ibid.*) Finally, the stigma of a judgment holding that the employer allowed, condoned, or supported racial discrimination constitutes a strong deterrent in today's competitive marketplace and removes any doubt that there is an effective remedy against such discrimination in the workplace even without injunctive relief.

Janice Brown's Responses
to Senator Leahy

12. In your dissent in Avis v. Aguilar and in your testimony last week, you stressed the extremely limited circumstances in which a prior restraint of speech is constitutional. However, in People ex. rel. Gallo v. Acuna, you authored the 4-3 decision allowing cities to prohibit suspected gang members from engaging in otherwise legal behavior including "standing, sitting, walking, driving, gathering or appearing anywhere in public view" with other gang members. Please explain how you came to this determination. Where do you draw the line on when and where individual liberty could be restrained?

RESPONSE: Drawing the line on when and where individual liberty can be restrained is a highly specific inquiry that depends, among other things, on the nature of the liberty, the proposed restriction on that liberty, and the specific facts of each case. The importance of deciding each case in light of the particular restriction at issue and the specific facts of the case is demonstrated by my opinions in *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 (*Gallo*) and *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 189 (*Aguilar*) (dis. opn. of Brown, J.). In *Gallo*, the majority opinion initially concluded that the injunction at issue did not implicate the defendants' right to freedom of association under the First Amendment and was not unconstitutionally overbroad or vague. (*Gallo*, at pp. 1110-1119.) After resolving these constitutional challenges, the opinion concluded that the enjoined activity constituted a public nuisance (*id.* at pp. 1120), and that the trial court had equitable jurisdiction under our statutes and case law to enjoin public nuisances (*id.* at pp. 1102-1109).

Finally, the majority opinion in *Gallo* considered whether the injunction infringed the defendants' right to free speech under the First Amendment. As an initial matter, the opinion found that the injunction was content-neutral and did not restrict defendants' expressive activities because of their content, message, or subject matter. Because the injunction was content-neutral—and not a content-based restriction on speech—it was not a prior restraint and was not subject to the stringent test imposed on such restraints. (See *Thomas v. Chicago Park District* (2002) 534 U.S. 316, 321-322 [holding that a licensing scheme did not need to "contain certain procedural safeguards in order to avoid constituting an invalid prior restraint" because the scheme was "not subject-matter censorship but

content-neutral time, place, and manner regulation of the use of a public forum"].) Instead, the opinion applied the lesser standard imposed on content-neutral injunctions enunciated by the United States Supreme Court in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 776, and considered whether the injunction burdened " 'no more speech than necessary to serve' an important government interest." (*Gallo, supra*, 14 Cal.4th at p. 1120.) In concluding that two challenged provisions of the injunction burdened no more speech than necessary to serve an important government interest, the majority opinion carefully considered the specific facts of the case. In particular, the opinion held that, given the long history of the gang problem in the neighborhood, the seriousness and intractability of this problem, its adverse impact on the constitutional rights of neighborhood residents, and the *failure of all other remedies*, "we cannot say that the ban on any association between gang members *within the neighborhood* goes beyond what is required to abate the nuisance." (*Id.* at p. 1121.) The opinion further noted that, based on the evidence in the record, "the gangs and their members engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct." (*Ibid.*) As such, the injunction, in light of the particular facts of that case, would not be unduly restrictive of any constitutionally protected expression.

By contrast, the injunction in *Aguilar* was a *content-based* restriction on speech because it restricted the defendants' speech based solely on "the content of the speech and the direct impact that speech ha[d] on its listeners." (*United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 811.) Moreover, the injunction forbade these " 'communications . . . in advance of the time that such communications are to occur.' " (*Alexander v. United States* (1993) 509 U.S. 544, 550.) As such, the test enunciated in *Madsen*—which only covered content-neutral injunctions—did not apply. Instead, the injunction in *Aguilar* had to meet the test created by the United States Supreme Court for prior restraints. And this test is quite stringent. As stated by the United States Supreme Court, "prior restraints on speech and publication are the *most serious and least tolerable* infringement on First Amendment rights." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559, italics added.) Indeed, the United States Supreme Court has carefully limited the

circumstances where a prior restraint is constitutionally permissible (see *Near v. Minnesota* (1931) 382 U.S. 697, 716), and has even found prior restraints unconstitutional where national security was at issue (see *New York Times Co. v. United States* (1971) 403 U.S. 713, 723-724).

Because the injunction in *Aguilar* did not meet the stringent requirements imposed on prior restraints, I dissented and concluded that the injunction was unconstitutional. Indeed, unlike the extensive record in *Gallo* which detailed the extent and intractability of the gang problem and its substantial impact on the constitutional rights of neighborhood residents, the record before us in *Aguilar* was quite limited. As the dissenting opinion noted, "we do not know what exactly plaintiffs' supervisor said, how often he said it, or what the surrounding circumstances were. Moreover, we do not know whether the damages award, which defendants have chosen not to challenge, was adequate to bring an end to the conduct that created the hostile work environment." (*Aguilar, supra,* 21 Cal.4th at p. 195.) Because the court lacked this information and could not possibly conclude that an injunction was necessary to remedy the problem despite the damages award, the dissenting opinion concluded that the injunction could not meet the stringent test imposed by the United States Supreme Court on prior restraints.

Judicial Remedies:

13. In Galland v. City of Clovis, you wrote a separate dissent to argue that the court was "wrong as a legal matter to limit damages" when it limited administrative remedies available to a landlord who was financially injured. However, in cases that have come before you on the California Supreme Court where the injured party was a worker in an employment discrimination case, rather than a property owner, you have taken the position that available remedies are limited by California's Fair Employment and Housing Act and, further, that punitive damages should be capped, regardless of the determination made by the jury. Can you explain to the Committee how you distinguished between injured parties?

RESPONSE: I make no effort in my opinions to distinguish between injured parties. Instead, I believe my role is to determine what remedy the law provides for particular injuries.

In *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, I took the position that the court should not endorse a *duplicative* common law remedy for violation of California's Fair Employment and Housing Act (FEHA), when to do so would interfere with and disrupt the carefully crafted statutory scheme by which the administrative agency is authorized to rectify, remedy, and deter discriminatory employment practices. (See *id.* at pp. 912-917.) I took the same position in *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, because the record made absolutely clear that the plaintiff employee was pursuing a FEHA cause of action in court, which would afford full recovery for economic and noneconomic loss as well as punitive damages if appropriate. (*Id.* at pp. 1163-1164.)

In *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, I would not deny the plaintiff employee full recovery under the FEHA for any claim timely filed. The only question was whether the plaintiff could disregard the statute of limitations applicable to discrete acts of discrimination—as opposed to a claim of a hostile work environment or concealed discriminatory practice—under the "continuing violation" doctrine. This doctrine is a narrow equitable exception to the statute of limitations, which, as the United States Supreme Court explained in *National Railroad Passenger Corp. v. Morgan* (2003) 536 U.S. 101, does not apply in cases of discrete acts.

In *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66—the only case in which I took a position that would deny the employee recovery—the majority had failed to justify its clear departure from recent precedent intended to guard against judicial policymaking and failed to accord due deference to the legislative branch in articulating public policy. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095.)

My position in these cases was based on the express terms and purpose of the applicable law, not on any hostility to employee causes of action.

In *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, my position was unrelated to the employee status of the plaintiffs but solely concerned the general question of providing guidance for juries and judges in calibrating punitive damages. My purpose was to suggest a rational standard—tethered to analogous legislative

limitations on punitive recovery—for avoiding widely varying and potentially arbitrary punitive damage awards that may risk a violation of due process. (See *id.* at pp. 422, 429.) Moreover, as previously noted (see Question #6), the plaintiffs in *Lane* had been fully compensated for both economic and noneconomic losses.

Likewise, my opinion in *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, was not based on the plaintiffs' status as property owners. As my analysis should make clear (see *id.* at pp. 1049-1050), I would have been equally at odds with the majority had they imposed the same state administrative impediments to a federal statutory remedy against a plaintiff claiming invidious discrimination. My point was that since 42 U.S.C. section 1983 does not require the exhaustion of state administrative remedies for one class of injured plaintiffs, state courts cannot impose such a requirement for a different class of plaintiffs who have also—as all acknowledged—suffered demonstrable injury.

Judicial Temperament:

14. I would like to give you an opportunity to respond to concerns about your judicial temperament. During your tenure on the California Supreme Court, you have been a prolific writer of dissents and many of your court opinions and speeches are replete with scorn and sarcasm. There have been reports that you and Chief Justice George only communicate via memorandum. How will you work with others on the D.C. Circuit?

RESPONSE: I have always had a productive, cordial, and compatible working relationship with my colleagues on both the California Supreme Court and the Court of Appeal. This is true specifically with respect to my relationship with Chief Justice George. In fact, reports that Chief Justice George and I only communicate via memorandum are completely untrue.

To date while on the Supreme Court, I have participated in more than 750 matters and have voted with the majority in more than 75% of those decisions. During my 7 terms with the court, I have authored 118 majority opinions (approximately 1/3 unanimous)—for an average of 17 per term, with the highest production of any justice (19+ per term) for the last three terms. While I have authored 80 dissenting opinions, only 1/3 were lone

dissents, meaning at least one of my colleagues agreed with the views expressed in 2/3 of my dissents.

Considering these statistics in light of the appellate process—which, by its nature, requires consensus building and would marginalize any individual who was not open to compromise—unattributed rumors of my inability to work well and productively with my colleagues are disturbing to me because they are more than greatly exaggerated.

I therefore do not anticipate any difficulty working with others on the D.C. Circuit.

Judicial Seminars:

15. As a member of the California Supreme Court, you have accepted gifts from interest groups with a conservative ideological agenda. These have included "educational seminars" funded by the Liberty Fund, the Association of Defense Counsel and the Law and Organizational Economic Center of Kansas University. A 1999 article in the Wall Street Journal recognized that while "there's nothing illegal about this...some see at least the potential for a conflict of interest." What kind of activities did you participate in at these "seminars?" What issues were discussed? Please provide to the Committee a copy of any agendas or materials from the seminars you attended. Do you see any conflict between participating in these seminars and the issues that come before you as a judge? Did any of the sponsors of these trips have cases pending before you in the California Supreme Court? Have you attended any educational seminars that put forth different viewpoints? If so, please provide the sponsor, dates, places and agendas or other materials from those seminars.

RESPONSE: In almost 10 years on the bench I have participated in three educational programs hosted by the organizations identified in your question: (1) a 3- day round table discussion of the Restatement (Third) of Torts: Products Liability *Is it a Reasonably Safe Product?*, hosted by the Law and Organizational Economic Center (LOEC) at the University of Kansas; (2) a 2-week law and economics course, Economics Institutes for State Judges, also hosted by the LOEC; and (3) a 4-day class focusing on the Fourteenth Amendment, Tenth Judicial Seminar on the Constitution, "Constitutional Interpretation: The Judiciary and the Protection of

Liberty," hosted by The Center for Judicial Studies in cooperation with The Liberty Fund, Inc.

For the past two years I have been enrolled in the Graduate Judges Program, working to obtain a Master of Laws in the Judicial Process at the University of Virginia School of Law.

I see nothing improper or unethical about these seminars or with the general proposition that judges should try to increase their knowledge and improve their skills.

11/05/2003 21:31 FAX
California Supreme Court 415 865 7184 11/05/03 05:49P P.001 002

Nov 05 03 05:59p
California Supreme Court 415 865 7184 11/05/03 05:46P P.002 P.1

Supreme Court of California
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-3600
(415) 865-7040

JANICE R. BROWN
Justice

November 5, 2003

The Honorable Orrin G. Hatch
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Hatch:

Enclosed please find my answer to the followup question posed by Senator Leahy. I trust that it is fully responsive. Thank you for your courtesy.

Very truly yours,

Janice R. Brown

Janice R. Brown

cc: The Honorable Patrick J. Leahy,

Ranking Member

JANICE BROWN'S RESPONSES
TO FOLLOWUP QUESTION
FROM
SENATOR PATRICK LEAHY

Judicial Seminars:

Justice Brown - In the written questions, Senator Leahy asked you to provide detailed information regarding the "educational seminars" you participated in during your tenure as a judge. You responded that you attended two seminars sponsored by the Law and Organizational Economics Center at the University of Kansas and one sponsored by the Liberty Fund. Please provide the Committee with the dates, places, activities and agendas from those three seminars. Also, please provide the same information about any other seminars you attended by any other groups.

RESPONSE: Attached are the agendas, which include the dates, places and activities, for the only three seminars I have attended.

TENTH JUDICIAL SEMINAR

on the

CONSTITUTION

"Constitutional Interpretation: The Judiciary and the Protection of Liberty"

May 13 - 18, 1997
Marriott's Casa Marina
Key West, Florida

READINGS

1. **First Session (Morning, Wednesday, May 14)**

Discussion Leaders: *Professors Berger and Baker*

CONSTITUTIONAL INTERPRETATION: TWO VIEWS OF ORIGINALISM

Antonin Scalia, "Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in ***A Matter of Interpretation: Federal Courts and the Law***. Princeton: Princeton University Press, 1997, pp. 37 - 47.

Raoul Berger, "A Lawyer Lectures a Judge," 18 ***Harvard Journal of Law & Public Policy*** 851 - 865; and "Jack Rakove's Rendition of Original Meaning," 72 ***Indiana Law Journal*** 619 - 649.

Plaut v. ***Spendthrift Farms***, 113 S.Ct. 147 (1995).

Board of County Commissioners, Wabaunsee County v. ***Umbehr***, 116 S.Ct. 2353 (1996).

THE CONSTITUTION AND THE ORIGINAL INTENT OF THE FRAMERS

James McClellan, "Editor's Introduction" to ***James Madison's Notes on the Debates in the Federal Convention***, pp. ix - xlvi. (Review)

The Federalist, Nos. 10, 37-39, 47-51.

2. **Second Session (Afternoon, Wednesday, May 14)**

Discussion Leader: *Professor McDowell*

THE FEDERAL JUDICIARY IN THE CONVENTION AND DURING RATIFICATION DEBATES

Ralph A. Rossum, "The Courts and the Judicial Power," in Leonard W. Levy and Dennis J. Mahoney (eds.); ***The Framing and Ratification of the Constitution***. New York: Macmillan Publishing Company, 1987.

Madison's Notes on the Debates in the Federal Convention, pp. 58 - 66.

Farrand, ***Records of the Federal Convention***.

Yates' Notes, pp. 105 - 106.
King's Notes, pp. 106 - 109.
Pierce's Notes, pp. 109 - 110.
Mason's Notes, pp. 110 - 114.

Madison's Notes on the Debates in the Federal Convention, pp. 67 - 72.

Farrand, ***Records of the Federal Convention***.

Yates' Notes, pp. 126 - 127.
King's Notes, pp. 127 - 128.
Pierce's Notes, pp. 128 - 129.

Madison's Notes on the Debates in the Federal Convention, pp. 300 - 308; 321 - 330, 508 - 512.

The Federalist, Nos. 78 - 83.

The Essays of Brutus, Nos. XI - XV, in Herbert J. Storing (ed.) ***The Complete Anti-Federalist***.

Letter No. XV from the Federal Farmer, in Herbert J. Storing (ed.) ***The Complete Anti-Federalist***.

3. **Third Seminar (Morning, Thursday, May 15)**

Discussion Leader: *Professor Rossum*

THE FRAMING AND RATIFICATION OF THE BILL OF RIGHTS

The Federalist, No. 84.

Helen E. Veit et al. (eds.) ***Creating the Bill of Rights: The Documentary Record of the First Federal Congress.***

Introduction, pp. ix - xvii.
Madison's Resolution, pp. 11 - 14.
Amendments Proposed by the States, pp. 14 - 28.
House Committee Report, pp. 29 - 33.
House Resolution & Articles of Amendment, pp. 37 - 41.
Articles of Amendment, as Agreed to by the Senate, pp. 47 - 49.
Conference Committee Report, pp. 49 - 50.

Debates in the House of Representatives, pp. 77 - 95, 104 - 107, 128 - 131, 150 - 153, 157 - 159 (Mr. Madison), 182 - 190, 193 - 199 (Mr. Sherman).
Letters and Other Documents, pp. 218 - 220, 220 - 222 (Mr. Sherman), 235 - 238, 266 - 268, 272 (Mr. Lee), 275 - 277, 280 - 282, 284 - 285 (Mr. Adams), 288 (Mr. Morris), 289 (Mr. Henry), 290, 292 (Mr. Mason), 295 - 296, 299 - 300.

4. **Fourth Session (Afternoon, Thursday, May 15)**

Discussion Leader: *Professor Baker*

CONSTITUTIONAL INTERPRETATION

Joseph Story, ***Commentaries on the Constitution of the United States.*** "Rules of Interpretation," pp. 382 - 442.

Gibbons v. ***Ogden***, 9 Wheat. 1 (1824).

McCulloch v. *Maryland*, 4 Wheat. 316 (1819).

U.S. Term Limits, Inc. v. *Thornton*, 115 S.Ct. 1842 (1995).

Romer v. *Evans*, 116 S.Ct. 1620 (1996).

Michael H. v. *Gerald D.*, 491 U.S. 110 (1989).

5. **Fifth Session (Morning, Friday, May 16)**

Discussion Leader: *Professor Berger*

THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT

Raoul Berger, "Reflections on Constitutional Interpretation" (original paper).

Raoul Berger, "Liberty and the Constitution," 29 *Georgia Law Review* 1 - 14 (1995)

Alfred Avins (ed.), *The Reconstruction Amendments' Debates*, pp. 94, 149 - 160, 186 - 188, 217 - 221, 505 - 512, 526 - 530.

6. **Sixth Session (Afternoon, Friday, May 16)**

Discussion Leader: *Professor Morgan*

APPLICATION OF THE BILL OF RIGHTS TO THE STATES

Eugene W. Hickok, Jr., *The Bill of Rights: Original Meaning and Current Understanding*, pp. 11 - 16.

Barron v. *Baltimore*, 7 Peters 243 (1833)

Gitlow v. *New York*, 268 U.S. 652 (1925)

Palko v. *Connecticut*, 302 U.S. 319 (1937)

Everson v. *Board of Education*, 330 U.S. 1 (1947)

Adamson v. *California*, 332 U.S. 46 (1947)

Duncan v. *Louisiana*, 391 U.S. 145 (1968)

Griswold v. *Connecticut*, 381 U.S. 479 (1965)

7. **Seventh Session (Afternoon, Saturday, May 17)**

Discussion Leader: *Professor McDowell*

THE ORIGINAL MEANING AND CONTEMPORARY UNDERSTANDING OF THE BILL OF RIGHTS

Eugene W. Hickok, Jr., ***The Bill of Rights: Original Meaning and Current Understanding***, pp. 41 - 69, 303 - 311, 333 - 350, 419 - 473.

APPENDIX

8. **Seminar Participants**

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

Is it a Reasonably Safe Product?

University of Kansas, Lawrence, Kansas

Agenda for June 26 - 27, 1998

FRIDAY, JUNE 26, 1998

1:00 – 2:00 Registration

2:00 – 2:05 Welcome

Henry N. Butler, Director, Law and Organizational Economics Center, University of Kansas

2:05 – 3:45 **The Restatement Process and Major Changes in the Restatement (Third)**

Moderator:

Justice Edward Larson, Supreme Court of Kansas

The American Law Institute Reporters (60 minutes):

Professor James A. Henderson, Jr., Cornell Law School

Professor Aaron D. Twerski, Brooklyn Law School

3:45 – 4:15 Break

4:15 – 6:00 **Traditional Restatement or Harbinger of Policy Changes?**

Moderator:

Justice Gregory Kellam Scott, Supreme Court of Colorado

Presenters (10 minutes each):

Richard D. Hailey, President Association of Trial Lawyers of America

Professor Andrew F. Popper, American University, Washington College of Law

"Tort Reform Policy More Than State Law Dominates Section 2 of the (Third) Restatement"

Professor Gary T. Schwartz, UCLA School of Law

"The Nature of the New Restatement"

Sheila H. Birnbaum, Partner, Skadden, Arps, Slate, Meagher & Flom, LLP (New York City)

Professor M. Stuart Madden, Pace University School of Law

"The *Products Liability Restatement* Warning Obligations: History, Corrective Justice and Efficiency"

Response:

Professor James A. Henderson, Jr., Cornell Law School

Professor Aaron D. Twerski, Brooklyn Law School

6:30 – 7:00 Reception – Lawrence Holidome

7:00 Dinner

Introduction:

Justice Elizabeth Weaver, Supreme Court of Michigan

Speaker:

Geoffrey C. Hazard, Jr., Director, American Law Institute

"Formulating Rules of Liability"

SATURDAY, JUNE 27, 1998

7:00 – 8:00 Continental Breakfast

8:00 – 9:45 **Section 2 (b): Reasonable Alternative Design**

Moderator:

Justice Raul Gonzalez, Supreme Court of Texas

Presenters (10 minutes each):

Design-Based Liability in American Products Liability Law

Professor Marshall S. Shapo, Northwestern University School of Law

"Defective Restatement Design"

Professor Frank J. Vandall, Emory University School of Law

"Your Honor, Section 2(b) of the *Restatement (Third)* should be rejected for the following reasons:"

Professor William E. Westerbeke, University of Kansas School of Law

Victor E. Schwartz, Crowell & Moring, LLP (Washington)

"The Reality and Public Policy Behind Sound Design Cases-Section 2(b) of the New *Restatement (Third) of Torts: Products Liability*"

Theodore S. Jankowski, Director, Corporate Legal Services, Johnson Controls

"Strengths of the Section 2(b) of the *Restatement (Third) of Torts: Products Liability* in Encouraging the Socially Desirable Result of a Reasonably Safe Product"

The "Habush Amendment": Section 2(b), Comment *e*

Larry S. Stewart, Stewart, Tilghman, Fox & Bianchi (Miami)

"Manifestly Unreasonable Design: The Habush Amendment: An Exception to Proof of a Reasonable Alternative Design"

Malcolm E. Wheeler, Wheeler Trigg & Kennedy (Denver)

"Section 2(b), Comment *e*: An Invitation to a Party of Unknown Purpose"

Response:

Professor James A. Henderson, Jr., Cornell Law School

9:45 – 10:15 Break

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

Is it a Reasonably Safe Product?

University of Kansas, Lawrence, Kansas

Tentative Agenda for June 26 - 27, 1998

SATURDAY, JUNE 27, 1998 (continued)

10:15 – 12:00 **Other Key Provisions**

Moderator:

Judge William Ray Price, Supreme Court of Missouri

Presenters (8 minutes each):

Section 2 (c): Warnings

Jeffrey S. Thompson, Williams Bailey Law Firm, LLP (Houston)

Richard O. Faulk, Gardere, Wynne, Sewell & Riggs, LLP (Houston)

"Limitations on the Duty to Warn"

Section 3: Circumstantial Evidence Supporting Inference of Product Defect

Bill Wagner, Wagner, Vaughan & McLaughlin (Tampa)

"Help for 'The Other Side'"

Dean Harvey S. Perlman, University of Nebraska College of Law

"Section 3's Circumstantial Evidence Rule: Can it Cure the Defects in Section 2?"

Section 5: Liability of Suppliers of Raw Materials and Component Parts

Jerry R. Palmer, Palmer, Lowry & Leatherman (Topeka)

"The Restatement and the Liability of Suppliers of Raw Materials or Component Parts"

Hildy Bowbeer, Senior Counsel, 3M

"The Restatement (Third)'s Approach to Component Supplier Liability – Where the Common Law and Sound Policy Converge"

Section 12: Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

Professor Richard L. Cupp, Jr., Pepperdine University School of Law

"Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessors"

Professor Michael D. Green, University of Iowa College of Law

"Fairness and Successor Liability: The Limits of the Common Law Process"

Response:

Professor James A. Henderson, Jr., Cornell Law School

12:00 Departure

2:00 – 3:30 Optional Walking Tour of Lawrence – Eldridge Hotel Lobby

7:30 – 10:15 Reception for Attendees Staying Saturday Evening

Law and Organizational Economics Center

June 1999 *Economics Institute for State Judges*
Program Agenda — Week One

The Eldridge Hotel and The University of Kansas
Saturday, June 19 to Friday, June 25, 1999

Saturday, June 19, 1999

Registration: **Noon to 4:00 — The Eldridge Hotel Lobby**

Session 1 — Welcome and Introductions
Time: 4:00 - 6:00 — The Eldridge Hotel — **Crystal Ballroom**
Welcome: Henry Butler
Leader: Barry Baysinger
Program Overview:
Henry Butler
Reading Assignments:
- Chapter I, Butler, *Economic Analysis for Lawyers.*

Reception: 6:00 — The Eldridge Hotel — **The Garden**
Dinner: 6:30 — The Eldridge Hotel — **Crystal Ballroom**

Sunday, June 20, 1999

Session 2 — Exchange, Cooperation, and Opportunity Cost
Lunch: 12:00 - 12:45 — The Eldridge Hotel — **Crystal Ballroom**
12:45 — Board the bus to the University of Kansas, School of Law
Time: 1:00 - 5:00 — The University of Kansas — **Green Hall — Room 107**
5:00 — Board the bus to the Eldridge
Instructors: Keith Chauvin and Barry Baysinger
Topics: Scarcity; Mutually Beneficial Exchange; Comparative Advantage; Producer and Consumer Surplus; Subjective Value; Marginal Analysis; Diminishing Marginal Utility; Opportunity Cost; The Laws of Supply and Demand
Reading Assignments:
- Chapters I, II, and III, Butler, *Economic Analysis for Lawyers.*

Monday, June 21, 1999

Session 3 — Production, Costs, and Supply

Breakfast: 7:30 - 8:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Time: 8:00 - 12:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Instructors: Keith Chauvin and Henry Butler
Topics: Marginal Productivity; The Law of Diminishing Marginal Returns; Costs of Production; Elasticity; Marginal Revenue Product; Demand for Labor

Reading Assignments:

- Sections A and B, Chapter V, Butler, *Economic Analysis for Lawyers*.

Lunch: 12:00 - 12:30 — The University of Kansas — **Alumni Center — Paul Adam Lounge**
Time: 12:30 - 2:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Instructor: Barry Baysinger
Time: 2:30 - 3:30 — The Eldridge Hotel — The Lobby - Optional attendance. A brief history of the Eldridge Hotel given by local historian, Katie Armitage. A walking tour of Old West Lawrence will follow (weather permitting).

Tuesday, June 22, 1999

Session 4A — Prices, Markets, Information, and Coordination

Breakfast: 7:30 - 8:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Time: 8:00 - 12:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Instructors: Maurice Joy, Keith Chauvin, and Henry Butler
Topics: The Role of Prices in Allocating Resources; Information and Prices; Allocative Efficiency; Competitive Equilibrium; The Meaning of Market Value

Reading Assignments:

- Chapter III, Butler, *Economic Analysis for Lawyers*.
- Sections A and B, Chapter IV, Butler, *Economic Analysis for Lawyers*.

Lunch: 12:00 - 1:00 — The University of Kansas — **Alumni Center – Paul Adam Lounge**

Session 4B — Competition and Monopoly — Tuesday Afternoon

Time: 1:00 - 5:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Instructors: Keith Chauvin and Henry Butler
Topics: The Meaning of Competition: Structure versus Process; Price Takers and Price Setters; Deadweight Loss; Pricing Practices; Cartel Theory; Game Theory; Resale Price Maintenance as Competitive Process

Reading Assignments:

- Chapters V, Butler, *Economic Analysis for Lawyers*.

Wednesday, June 23, 1999

Session 5 — Regulation and Public Policy Analysis
Breakfast: 7:30 - 8:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Time: 8:00 - 12:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Instructors: Henry Butler and Barry Baysinger
Topics: Constrained Maximization and Legal Constraints; Coase Theorem and Property Rights; Empirical Evidence; Market Failures: Externalities, Public Goods, Information Asymmetry, Monopoly; Public Choice Theory; Rent Seeking.

Reading Assignments:

- Section B.5, Chapter I, Butler, *Economic Analysis for Lawyers*.
- Sections D & E, Chapter II, Butler, *Economic Analysis for Lawyers*.
- Section C, Chapter VII, Butler, *Economic Analysis for Lawyers*.
- Section B, Chapter II, Butler, *Economic Analysis for Lawyers*.

Working Lunch:
12:00 - 2:00 — The University of Kansas — **Alumni Center — Summerfield Room**.
Video, "Currents of Fear"

Thursday, June 24, 1999

Session 6 — Concepts in Statistics
Breakfast: 7:30 - 8:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Time: 8:00 - 12:00 —The University of Kansas — **Alumni Center — Summerfield Room**
Instructor: Mark Haug
Topics: Scientific Method; Causality; Hypothesis Testing; Probability and Probability Distributions; Correlation and Regression

Reading Assignments:

- "Statistics for Lawyers"
- Section A, Chapter IX, Butler, *Economic Analysis for Lawyers*.

Lunch: On Your Own

Afternoon Session — The Eldridge Hotel — Crystal Ballroom
Time: 4:30 - 6:30 — Video, "Breast Implants on Trial"
6:30 — Board the bus at the Eldridge Hotel

Reception: 6:45 — Henry and Mary Butler's Home
8:45 — Board the bus to Eldridge

Friday, June 25, 1999

Session 7 — Capital Values and Interest

Breakfast: 7:30 - 8:15 — The University of Kansas — **Alumni Center — Summerfield Room**
Note: Breakfast is 45 minutes long in order to allow you time to checkout of the hotel.

Time: 8:15 - 12:00 — The University of Kansas — **Alumni Center — Summerfield Room**
Note: Class begins at 8:15 in order to allow you time to checkout of the hotel.

Instructor: Maurice Joy

Topics: The Time Value of Money; Present Value; Discount Rates; Risk and Rate of Return; Capital Asset Pricing Model; Logic of Portfolio Theory; Business Valuation.

Reading Assignments:

- Chapter IV, Butler, *Economic Analysis for Lawyers*.
- Chapter XI, Butler, *Economic Analysis for Lawyers*.

Lunch: 12:00 — 1:00 — The University of Kansas — **Alumni Center — McGee/All American Room**

Departure

Economics Institutes for State Judges
Program Agenda — Week Two

Sundial Beach Resort, Sanibel Island, Florida
Saturday, December 11 to Saturday, December 18, 1999

Saturday, December 11, 1999

Registration: **Noon to 5:00 p.m. — The Lobby**
Reception: 6:15 to 7:00 p.m. — The Main Pool
Dinner: 7:00 — The Sanibel/Captiva Room

Sunday, December 12, 1999

Breakfast: On Your Own
Coffee for Spouses: 9:30 to 10:30 a.m. — The Flamingo Room

Lunch: 11:30 to Noon — The Sundial I and II Rooms
Session 8 — Lecture: "Free Market Environmentalism?"
Time: Noon to 1:15 p.m. — The Sundial I and II Rooms
Welcome: Henry N. Butler, Director, LOEC
Lecture: "Free Market Environmentalism?"
Professor Terry L. Anderson, Senior Fellow, The Hoover Institution, Stanford University; Executive Director, Political Economy Research Center

Reading Assignment:

- Chapter 1, "Nature's Entrepreneurs," in Anderson and Leal, *Enviro-Capitalists: Doing Good While Doing Well*
- Chapter 9, "The Good, The Bad, and The Ugly," in Anderson and Leal, *Enviro-Capitalists: Doing Good While Doing Well*

Session 9 — Externalities, Property Rights & Transaction Costs
Time: 1:30 to 5:30 p.m. — The Sanibel/Captiva Room
Instructor: Terry Anderson
Topics: Tragedy of the Commons; Positive and Negative Externalities; Coase Theorem; Corrective Taxation; Public Goods Theory; Marginal Analysis.

Reading Assignment:

- Chapter VI, "Externalities" in Butler, *Economic Analysis for Lawyers.*
- Chapter 8, "Elements of Property Rights: The Common Law Alternative," by Roger E. Meiners, in Bruce Yandel, *Land Rights, The 1990's Property Rights Rebellion*

Monday, December 13, 1999

Breakfast: 7:30 to 8:00 a.m. — The Sanibel/Captiva Room

Session 10 — Economics of Accounting Data
Time: 8:00 to Noon — The Sanibel/Captiva Room
Instructor: Maurice Joy
Topics: Financial Statements; Historical Costs and Opportunity Costs; Accounting Values v. Financial Valuation; Accounting Values v. Market Values.

Reading Assignments:

- "Valuation of Close Corporations," pp. 220-254 in Chapter IV, Butler, *Economic Analysis for Lawyers.*
- *Kamin v. American Express Company*, pp. 758-762 in Chapter X, Butler, *Economic Analysis for Lawyers.*
- "Event Study Methodology," pp. 896-910 in Chapter XI, Butler, *Economic Analysis for Lawyers.*
- "Does Pay to Manipulate EPS?" by Ross Watts, *The Revolution in Corporate Financ Second Edition*, Joel M. Stern and Donald H. Chew Jr., eds. Blackwell 1992
- "Financial Statements and Information" in Chapter II, by William L. Beedles and O. Mauri Joy, *Just Enough Finance for Operating Managers.*

Optional Working Lunch:
Noon to 1:30 p.m. — The Sundial I and II Rooms
Maurice Joy
Personal Investing Seminar and Question & Answer Session.

Tuesday, December 14, 1999

Breakfast: 7:30 to 8:00 a.m — The Sanibel/Captiva Room

Session 11: **Organizational Economics**
Time: 8:00 to Noon — The Sanibel/Captiva Room
Instructors: Baysinger, Butler and Chauvin
Topics: Free Riding; Shirking; Conflicts of Interest (Attorney-Client, Broker-Seller, Shareholder-Manager); Information Costs; Economics of Advertising; Reputation Effects; Market Forces and Contractual Performance; Franchising; Theory of the Firm; Contractual Theory of the Corporation.

Reading Assignments:

- Chapter X, "Organizational Economics," in Butler, *Economic Analysis for Lawyers.*

Lunch: On Your Own

Wednesday, December 15, 1999

Breakfast: 7:30 to 8:00 a.m. — The Sanibel/Captiva Room

Session 12 — Risk, Injury, and Liability
Time: 8:00 to Noon — The Sanibel/Captiva Room
Instructor: Butler and Chauvin
Topics: Risk Aversion; Risk; Measurement of Risk; Market Reactions to Risk (Wage, Price, Property Value); Value of Life; Alternative Liability Rules; Insurance.

Reading Assignments:

- Chapter 22, "Product Safety," in *Economics of Regulation and Antitrust*, by W. Kip Viscusi, J. Vernon, and J. Harrington. Second Edition, The MIT Press, 1995.
- Section D, "Tort Law" of Chapter IX, "Risk," in Butler, *Economic Analysis for Lawyers.*

Recommended Reading:

- Chapter IX, "Risk" in Butler.
- Chapter 23, "Regulation of Workplace Health and Safety," in Economics of Regulation and Antitrust, by W. Kip Viscusi, J. Vernon, and J. Harrington. Second Edition, The MIT Press

Working Lunch:
Noon to 2:00 p.m. — The Sundial I and II Rooms
Video, "Are We Scaring Ourselves to Death?"

Thursday, December 16, 1999

Breakfast: 7:30 to 8:00 a.m. — The Sanibel/Captiva Room

Session 13 — Scientific Methodology and the Admissibility of Expert Testimony
Time: 8:00 to Noon — The Sanibel/Captiva Room
Instructors: Alvan R. Feinstein, Sterling Professor of Medicine and Epidemiology, Yale University
D. Bruce Johnsen, J.D, Ph.D., George Mason University School of Law

Reading Assignments:

- "Clinical biostatistics XLVII. Scientific standards vs. statistical associations and biologic logic in the analysis of causation," by Alvan R. Feinstein
- "Double Standards, Scientific Methods, and Epidemiologic Research," by Alvan R. Feinstein and Ralph I. Horwitz
- "Fraud, Distortion, Delusion, and Consensus: The Problems of Human and Natural Deception in Epidemiologic Science," by Alvan R. Feinstein
- "The Methodology of Positive Economics," by Milton Friedman

Working Lunch:
Noon to 2:00 p.m. — The Sundial I and II Rooms
Peter Huber, Senior Fellow, Manhattan Institute

Reading Assignments:

- "Science in the Courts," by Peter W. Huber and Kenneth R. Foster, from the Manhattan
- Institute's Center for Judicial Studies, Civil Justice Memo, No. 33, September 1997

Friday, December 17, 1999

Breakfast: 7:30 to 8:00 a.m. — The Sanibel/Captiva Room

Session 14 — Risk Analysis
Time: 8:00 - Noon — The Sanibel/Captiva Room
Instructor: Butler and Chauvin
Topics: Risk Analysis, Rationality; Scientific Evidence; Hazard Warnings; Toxic Torts; Risk v. Risk; Effects of Liability.

Reading Assignments:

- Chapter 19, "Introduction: The Emergence of Health, Safety, and Environmental Regulation," in *Economics of Regulation and Antitrust*, by W. Kip Viscusi, J. Vernon, and J. Harrington. Second Edition, The MIT Press, 1995.
- Section E, "Risk Regulation," of Chapter IX, "Risk," in Butler, *Economic Analysis for Lawyers*.

Lunch: On Your Own

Reception: 6:30 p.m. — The Main Pool
Dinner: 7:15 p.m. — The Main Pool

Saturday, December 18, 1999

Breakfast: 7:30 to 8:15 a.m. — The Sanibel/Captiva Room

Session 15 — Economic Analysis of Law
Time: *8:15 to noon — The Sanibel/Captiva Room
Instructors: Baysinger, Butler and Chauvin.

Reading Assignments:

- Chapter II, "The Methodology of Law & Economics," in Butler, *Economic Analysis for Lawy*

Lunch: Noon — Beaches Lounge "To Go" boxes will be provided for participants

Departure

*Note: Class begins 15 minutes later than on preceding days to allow time for checkout

Economics Institutes for State Judges
Program Agenda — Week Two

Sundial Beach Resort, Sanibel Island, Florida
Saturday, December 11 to Saturday, December 18, 1999

Saturday, December 11, 1999

Registration: **Noon to 5:00 p.m. — The Lobby**

Reception: 6:15 to 7:00 p.m. — The Main Pool

Dinner: 7:00 — The Sanibel/Captiva Room

SUBMISSIONS FOR THE RECORD

October 16, 2003

The Honorable Orrin G. Hatch,
Chairman
Senate Committee on Judiciary
Washington, D.C. 20510

The Honorable Patrick Leahy,
Ranking Member
Senate Committee on Judiciary
Washington, D.C. 20510

Re: **Reject the Nomination of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit**

Dear Senators Hatch and Leahy:

On behalf of the AFL-CIO, I am writing to express our strong opposition to the nomination of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit and to urge that her nomination be rejected in favor of a more moderate, mainstream nominee.

Since 1996, Janice Rogers Brown has served as an Associate Justice on the California Supreme Court. When Justice Brown was nominated to the California Supreme Court, three-fourths of the California State Bar's Commission on Judicial Nominees rated her "unqualified" for the position because of her lack of experience and her tendency to inject her own personal views into her judicial opinions. Her seven years tenure on the California Supreme Court has demonstrated that her critics were right.

In her judicial writings and public statements, Justice Brown expresses an ideology defined by overriding concern for property rights and deep disdain for government. She has authored opinions restricting free speech rights, undermining health and safety protections, and banning affirmative action. Likewise, she has written dissents that would have barred civil rights claims, denied effective remedies to victims of unlawful discrimination, struck down an affordable housing program in San Francisco as an unconstitutional "taking" of private property, and allowed companies to shut down group e-mail from outside individuals or organizations.

Justice Brown's speeches make it abundantly clear that her judicial decisions reflect a deeply-held ideology that is utterly hostile to the interests of the working men and women we represent. For example, in a speech to the conservative Institute for Justice, Justice Brown derisively compared the year 1937, when the Supreme Court began upholding major pieces of New Deal legislation such as minimum wage laws, to "the triumph of our own socialist revolution." In her speeches, she compares "big government" to "slavery" and an "opiate."

Justice Brown has gone so far as to say that "[t]oday's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract."

The D.C. Circuit is widely regarded as the second most important court in America, second only to the U.S. Supreme Court. It is the court that most often reviews rules and decisions issued by federal agencies in the area of worker protections, civil rights, environmental protections, and other important concerns. The court reviews more decisions of the National Labor Relations Board than any other court, and frequently hears challenges to health and safety protections adopted by OSHA, MSHA, and other federal agencies. It is clear that the actions and decisions of the D.C. Circuit have a direct and profound impact on the lives of millions of working men and women across the United States.

In our view, a person with such extreme views is unsuitable for a lifetime appointment to any court, but particularly to the D.C. Circuit, given the court's uniquely important role in overseeing the actions and decisions of government agencies and programs. We urge you to reject Justice Brown's nomination in favor of a more moderate, mainstream nominee.

Thank you for your consideration of our views.

Sincerely,

William Samuel, Director
DIRECTOR OF LEGISLATION

c: Members of Senate Judiciary Committee

ADA
AMERICANS FOR DEMOCRATIC ACTION
1625 K Street, N.W. * Suite 210 * Washington, DC 20006 * (202) 785-5980 * 785-5969
adaction@ix.netcom.com * http://www.adaction.org

October 16, 2003

Dear Senator:

I write to you on behalf of Americans for Democratic Action (ADA) our nation's oldest multissue, liberal political membership organization founded in 1947 by Eleanor Roosevelt, Joseph Rauh and others.

We strongly oppose the nomination of the California Supreme Court Justice Janice Rogers Brown, to a seat on the U.S. Court of Appeals for the District of Columbia Circuit. She has a record of ideological extremism and aggressive judicial activism that makes her unfit to.

The *New York Times* has described Brown's nomination as part of the Bush Administration's "further effort to remake the federal courts in its own ideological image."[1] When Brown was nominated to California the state supreme court in 1996, she was found "unqualified" by the state bar evaluation committee, because of her relative inexperience, because of concerns that she was "prone to inserting conservative personal views into her appellate opinions" and complaints that she was "insensitive to established precedent."[2]

During her time on the bench, she took positions hostile to issues of race discrimination, rights of the disabled, affirmative action, and reproductive rights. Her record raises serious questions about her commitment to equal justice and her fitness for an appointment to the Court of Appeals.

Race Discrimination: Justice Brown has dissented in favor of dismissing a number of race discrimination claims, raising questions about her willingness to give fair and individual consideration to such claims. In *Konig v. Fair Employment and Housing Comm'n,* [3] she argued against the ability of the state employment and housing commission to provide damages for emotional distress to victims of race and other forms of discrimination. In *Peatros v. Bank of America,*[4] Justice Brown took the position that the National Bank Act effectively immunized banks under its jurisdiction from state claims by employees for race and age discrimination.

Rights of the Disabled: In *Richards v. CH2M Hill, Inc.,*[5] the majority of the court found that an engineering firm's successive failures to accommodate a disabled employee and

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[1] "More Conservatives for the Courts," *New York Times* (July 29, 2003).
[2] Maura Dolan, "Bar Faults High Court Nominee in Key Areas," *Los Angeles Times* (April 26, 1996) at A1("High Court")
[3] 50 P.3d 718 (2000).
[4] 990 P.2d 539 (2000).
[5] 29 P.3d 175 (Cal. 2001).

continuous acts of harassment over a four-year period constituted a single, actionable, continuing violation under the Fair Employment and Housing Act (FEHA). Justice Brown dissented, arguing that the disabled employee should have been able to recover only for those acts of discrimination that fell within the one-year statute of limitations period under the FEHA. Brown's dissent, if adopted, would have forced victims of discrimination to bear the nearly insurmountable burden of suing separately for each of the discriminatory acts committed by their employers.

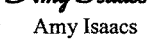
Affirmative Action: In *Hi-Voltage Wire Works v. City of San Jose* [6]Justice Brown's majority opinion held that a "set-aside" program for minority and women-owned contractors violated Article I, Section 31 of the California Constitution (which prohibits discrimination and preferential treatment on the basis of race, sex, color, or national origin). All seven justices invalidated the program, but several wrote concurrences criticizing the breadth of Brown's majority holding. Chief Justice George, who concurred in the judgment, but did not join the majority, wrote that Brown's opinion implies that US Supreme Court decisions upholding affirmative action programs were "wrongly decided" and that her analysis "represents a serious distortion of history."

Reproductive Rights: Brown urged a restrictive reading of a state constitutional right to privacy in her dissent in the case of *American Academy of Pediatrics v. Lungren.* [7] A plurality of the court struck down a provision that required a minor to seek parental consent to terminate a pregnancy. Distinguishing the Supreme Court's decision in *Planned Parenthood v. Casey,* [8] the court noted that the California's constitution, which explicitly provides for a right of privacy, is broader than that provided by the US Constitution. Justice Brown criticized the court for reinventing legal standards, misapplying its newly created standards, disposing of two decades of "highly pertinent" U.S. Supreme Court opinions, eliminating the threshold elements of a state privacy case, and subjecting the provisions at issue to an "inherently insurmountable" level of judicial scrutiny. Brown argued that the privacy clause of the state constitution had been modeled upon privacy rights implied in the U.S. Constitution, and thus, the U.S. Supreme Court's evolving privacy jurisprudence should guide California's interpretation of its privacy clause.

Judge Brown's record shows a predilection for placing her personal prejudices above the law. Only a judge who exhibits a very high standard of impartiality and respect for the law should be promoted to one of the highest courts in the land. Judge Brown does not meet that standard.

We urge you to oppose the nomination of Janice Rogers Brown.

Sincerely,



Amy Isaacs
National Director

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[6] 24 Cal. 4th 537 (2000).
[7] 16 Cal. 4th 307 (1997).
[8] [14]See 50U.S. 833 (1992).

AMERICANS FOR TAX REFORM

Grover G. Norquist President

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

October 20, 2003

Dear Chairman Hatch:

As you know, the Senate Judiciary Committee will hold a hearing on Wednesday, October 22 on the nomination of Janice Rogers Brown to be U.S. Circuit Judge for the District of Columbia. **ATR strongly supports this nomination, and I urge you to support a speedy confirmation for Mrs. Brown.**

As more and more of President Bush's judicial nominees face indefinite filibusters in the Senate, cases continue to languish before the federal courts at the expense of the American taxpayer. The political agendas of a few senators cannot and should not be allowed to cripple the entire judicial branch of the federal government.

Mrs. Brown holds an impeccable record of service on the bench, and was the first African-American woman to serve on the California Supreme Court. The daughter of sharecroppers, Judge Brown rose from a childhood in segregated schools to a distinguished legal career and honorary law degrees from some of the nation's finest schools.

There is little debate about Mrs. Brown's fitness to serve on the D.C. Circuit Court. The question is whether politics will supersede the taxpayers' need for an efficient, just court system. I urge you not to let that happen, and to support a smooth confirmation for Janice Rogers Brown.

Onward,

Grover Norquist

1920 L Street NW • Suite 200 • Washington DC 20036

518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234 phone
(202) 466-2587 fax
americansunited@au.org
www.au.org

October 21, 2003

Honorable Orrin G. Hatch
Chairman
Senate Committee on the Judiciary
104 Hart Senate Office Building
Washington, DC 20510-4402

Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510-4502

Dear Chairman Hatch and Ranking Member Leahy:

On behalf of Americans United for Separation of Church and State, I am writing to express our strong opposition to the confirmation of California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit. Founded in 1947, Americans United is a leading religious liberty organization, representing over 70,000 members as well as allied houses of worship in all 50 states. We believe that the confirmation of Janice Rogers Brown would do tremendous damage to religious liberty rights of millions of Americans.

In a speech to the Pepperdine Bible Lectureship in 1999 entitled, "Beyond the Abyss: Restoring Religion on the Public Square," Justice Brown made clear that she seriously questions firmly settled constitutional law applying the protections in the Bill of Rights to the States through the Due Process Clause of the Fourteenth Amendment. See Palko v. Connecticut, 302 U.S. 319 (1937). This extreme view would have dramatic consequences for Americans' most basic and fundamental First Amendment rights, among many others. In her speech, Justice Brown stated:

> The United States Supreme Court . . . began in the 1940's to incorporate the Bill of Rights into the Fourteenth Amendment. Now, that has an interesting effect on how the law about religious expression gets developed. Because they incorporated all of the Bill of Rights into the Fourteenth Amendment, that not only made them binding on the States, that is to say that now the States were covered by the first ten amendments as the Federal government, it also gave tremendous power to the Federal judiciary, because now they [would] decide at least the minimum level of protection that would be provided for all of these rights. The historical evidence supporting what the Supreme Court did here is pretty sketchy . . . So if you went by the language you certainly would not get there. They relied on some historical materials which [are] not overwhelming. The argument on the other side is pretty overwhelming that it's probably not incorporated.

If Justice Brown were able to act on such a radical view, she would effectively bar religious minorities from exercising any rights under the U.S. Constitution for the protection of their religious practices against State intrusion. At a time when America should be reaffirming its commitment to religious pluralism, Justice Brown is advocating a dangerous course.

Justice Brown also belitted the importance of the separation of church and state in the Pepperdine speech. She maintained that the U.S. Supreme Court had:

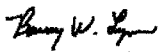
> skipped over a lot of formidable interpretive problems that required a real attention to language and history and purposes that had been lavished on other parts of the Constitution but were not really given to this part of the First Amendment. The Court instead relied on a rather uninformative metaphor of the "wall of separation between church and state." And that was their substitute for really getting in and trying to figure out what this meant.

These views would threaten the fundamental rights of countless Americans, especially in view of the D.C. Circuit's exceptionally powerful role among the federal circuit courts. Indeed, Americans United is seriously concerned that such a position could result in States blatantly violating the Establishment Clause of the First Amendment, as well as the rolling back of basic Free Exercise rights to State employees, beneficiaries of State government programs, and other individuals interacting with State governments. The results of any alteration to the "incorporation doctrine," established decades ago, would have devastating consequences for millions of Americans relying on the federal courts to protect their individual rights.

Americans United does not oppose Brown's nomination because of her personal religious beliefs or her conservative views in general. Rather, we have serious concerns that her extreme views of the non-applicability of the Bill of Rights to the States, as well as her rejection of the separation of church and state embodied in the Establishment Clause, could dramatically undermine core religious liberty protections.

We therefore urge the Committee to reject the confirmation of Janice Rogers Brown to the D.C. Circuit. If you have further questions, please do not hesitate to contact Aaron D. Schuham, Legislative Director, at (202) 466-3234, extension 240.

Sincerely,



Rev. Barry W. Lynn
Executive Director

cc: Members of the Senate Judiciary Committee

CHAMBERS OF
DANIEL A. BARKER
JUDGE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

(602) 542-3432
FAX (602) 542-7801
dbarker@azbar.org

October 17, 2003

Via Facsimile: (202) 228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Justice Janice R. Brown to the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Hatch:

I write with pleasure to wholeheartedly and enthusiastically endorse the nomination of Justice Janice R. Brown to the United States Court of Appeals for the District of Columbia Circuit.

It has been my privilege to be associated with Justice Brown for the past two years. I have literally spent hours in the classroom with Justice Brown on topics as diverse as environmental federalism to constitutional law and international human rights. For the past two summers, we have been fellow participants in a graduate program for judges at the University of Virginia that includes twelve weeks of classroom discussion and work. I have had the opportunity to see her analytical skills, her reasoning, her understanding of complex factual and legal issues and her ability to fairly and evenhandedly apply facts to law in a myriad of circumstances.

Without hesitation, and unequivocally, I can tell you that Janice Brown is a judge of the highest order. She is eloquent and clear spoken; she is balanced and compassionate; and, she has the ability to cut to the core of a legal issue and resolve it squarely on constitutional and legal principles. She is not swayed by the passions or emotions present in hotly contested issues, but is able to remain well grounded and firm in applying the applicable law.

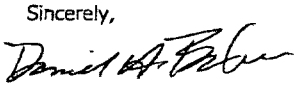
I can appreciate that my comments may seem uncommonly high. But Janice Brown is an uncommon woman. She has that rare gift of extraordinary life experiences that are combined with intellectual training and rigor to make her uniquely qualified to sit on one of our nation's highest courts. Just as she has been a strengthening asset to the state of California on its supreme court, so she will be on the Court of Appeals. She will be someone that both the lay person on the street, and the legal scholar at the university, can look to with assurance in knowing that she will faithfully and impartially apply the law and uphold the highest legal standards.

It is my present privilege to serve on the same court that Justice Sandra Day O'Connor served on before her appointment to the United States Supreme Court. I do not know Justice O'Connor, but I know the court from whence she came. I can tell you from one who serves on that court that Janice Brown possesses all of the attributes and talents that any fair-minded individual would look for in a judge for the United States Court of Appeals.

I urge you, and each member of the Senate Committee on the Judiciary, to confirm the nomination of Janice R. Brown. I recommend her unhesitatingly.

My thanks to you and all the senators for your service on behalf of our country.

Sincerely,



Daniel A. Barker

cc: The Honorable Patrick J. Leahy (via facsimile–202-224-9516)
The Office of Legal Policy (via facsimile–202-514-5715)

"A Whiter Shade of Pale": Sense and Nonsense –
The Pursuit of Perfection in Law and Politics
The Federalist Society
University of Chicago Law School
April 20, 2000, Thursday
12:15 p.m.

Thank you. I want to thank Mr. Schlangen (fondly known as Charlie to my secretary) for extending the invitation and the Federalist Society both for giving me my first opportunity to visit the City of Chicago and for being, as Mr. Schlangen assured me in his letter of invitation, "a rare bastion (nay beacon) of conservative and libertarian thought." That latter notion made your invitation well-nigh irresistible. There are so few *true* conservatives left in America that we probably should be included on the endangered species list. That would serve two purposes: Demonstrating the great compassion of our government and relegating us to some remote wetlands habitat where – out of sight and out of mind – we will cease being a dissonance in collectivist concerto of the liberal body politic.

In truth, they need not banish us to the gulag. We are not much of a threat, lacking even a coherent language in which to state our premise. [I should pause here to explain the source of the title to this discussion. Unless you are a very old law student, you probably never heard of "A Whiter Shade of Pale."] "A Whiter Shade of Pale" is an old (circa 1967) Procol Harum song, full of

nonsensical lyrics, but powerfully evocative nonetheless. Here's a sample:

> "We skipped the light fandango
> turned cartwheels cross the floor
> I was feeling kinda seasick
> but the crowd called out for more
> The room was humming harder
> as the ceiling flew away
> When we called out for another drink
> the waiter brought a tray."

There is something about this that forcibly reminds me of our current political circus. The last verse is even better.

> "If music be the food of love
> then laughter is its queen
> and likewise if behind is in front
> then dirt in truth is clean. . . ."

Sound familiar? Of course Procol Harum had an excuse. These were the 60's after all, and the lyrics were probably drug induced. What's our excuse?

One response might be that we are living in a world where words have lost their meaning. This is certainly not a new phenomenon. It seems to be an inevitable artifact of cultural disintegration. Thucydides lamented the great changes in language and life that succeeded the Pelopennesian War; Clarendon and Burke expressed similar concerns about the political transformations of their own time. It is always a disorienting experience for a member of the old guard when the entire understanding of the old world is uprooted. As James Boyd White expresses it: "[I]n this world no one would see what he sees, respond

as he responds, speak as he speaks,"[1] and living in that world means surrender to the near certainty of central and fundamental changes within the self. "One cannot maintain forever one's language and judgment against the pressures of a world that works in different ways," for we are shaped by the world in which we live.[2]

This is a fascinating subject which we do not have time to explore more thoroughly. Suffice it to say that this phenomenon accounts for much of the near hysterical tone of current political discourse. Our problems, however, seem to go even deeper. It is not simply that the same words don't have the same meanings; in our lifetime, words are ceasing to have *any* meaning. The culture of the word is being extinguished by the culture of the camera. Politicians no longer have positions they have photo-ops. To be or not to be is no longer the question. The question is: how do you feel.

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is "The Road to Serfdom."[3] He was right, of course; but the intervening years have shown us that there are many other roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. And we no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is *the* opiate. The drug of choice for multinational corporations

and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens.

It is my thesis today that the sheer tenacity of the collectivist impulse — whether you call it socialism or communism or altruism — has changed not only the meaning of our words, but the meaning of the Constitution, and the character of our people.

Government is the only enterprise in the world which expands in size when its failures increase. Aaron Wildavsky gives a credible account of this dynamic. Wildavsky notes that the Madisonian world has gone "topsy turvy" as factions, defined as groups "activated by some common interest adverse to the rights of other citizens or to the permanent and aggregate interests of the community,"[4] have been transformed into sectors of public policy. "Indeed," says Wildavsky, "government now pays citizens to organize, lawyers to sue, and politicians to run for office. Soon enough, if current trends continue, government will become self-contained, generating (apparently spontaneously) the forces to which it responds."[5] That explains how, but not why. And certainly not why we are so comfortable with that result.

America's Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the founders set out to establish good government "from reflection and choice,"[6] they also acknowledged the "limits of reason as applied to constitutional design,"[7] and wisely did not seek to invent the world anew on the

basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition.

"The Framers understood that the self-interest which in the private sphere contributes to welfare of society — both in the sense of material well-being and in the social unity engendered by commerce — makes man a knave in the public sphere, the sphere of politics and group action. It is self-interest that leads individuals to form factions to try to expropriate the wealth of others through government and that constantly threatens social harmony."[8]

Collectivism sought to answer a different question: how to achieve cosmic justice – sometimes referred to as social justice – a world of social and economic equality. Such an ambitious proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems but new and improved human beings as well.

The great innovation of this millennium was equality before the law. The greatest fiasco — the attempt to guarantee equal outcomes for all people. Tom Bethell notes that the security of property — a security our Constitution sought to ensure — had to be devalued in order for collectivism to come of age. The founders viewed private property as "the guardian of every other right."[9] But, "by 1890 we find Alfred Marshall, the teacher of John Maynard Keynes making the astounding claim that the need for private

property reaches no deeper than the qualities of human nature."[10] A hundred years later came Milton Friedman's laconic reply: " 'I would say that goes pretty deep.' "[11] In between, came the reign of socialism. "Starting with the formation of the Fabian Society and ending with the fall of the Berlin Wall, its ambitious project was the reformation of human nature. Intellectuals visualized a planned life without private property, mediated by the New Man."[12] He never arrived. As John McGinnis persuasively argues: "There is simply a mismatch between collectivism on any large and enduring scale and our evolved nature. As Edward O. Wilson, the world's foremost expert on ants, remarked about Marxism, 'Wonderful theory. Wrong species.' "[13]

Ayn Rand similarly attributes the collectivist impulse to what she calls the "tribal view of man."[14] She notes, "[t]he American philosophy of the Rights of Man was never fully grasped by European intellectuals. Europe's predominant idea of emancipation consisted of changing the concept of man as a slave to the absolute state embodied by the king, to the concept of man as the slave of the absolute state as embodied by 'the people' — i.e., switching from slavery to a tribal chieftain into slavery to the tribe."[15]

Democracy and capitalism seem to have triumphed. But, appearances can be deceiving. Instead of celebrating capitalism's virtues, we offer it grudging acceptance, contemptuous tolerance but only for its capacity to feed the insatiable maw of socialism. We

do not conclude that socialism suffers from a fundamental and profound flaw. We conclude instead that its ends are worthy of any sacrifice – including our freedom. Revel notes that Marxism has been "shamed and ridiculed everywhere except American universities" but only after totalitarian systems "reached the limits of their wickedness." [16]

> "Socialism concentrated all the wealth in the hands of an oligarchy in the name of social justice, reduced peoples to misery in the name of shar[ed] resources, to ignorance in the name of science. It created the modern world's most inegalitarian societies in the name of equality, the most vast network of concentration camps ever built [for] the defense of liberty."[17]

Revel warns: "The totalitarian mind can reappear in some new and unexpected and seemingly innocuous and indeed virtuous form. [¶] . . . [I]t . . . will [probably] put itself forward under the cover of a generous doctrine, humanitarian, inspired by a concern for giving the disadvantaged their fair share, against corruption, and pollution, and 'exclusion.' "[18]

Of course, given the vision of the American Revolution just outlined, you might think none of that can happen here. I have news for you. It already has. The revolution is over. What started in the 1920's; became manifest in 1937; was consolidated in the 1960's; is now either building to a crescendo or getting ready to end with a whimper.

At this moment, it seems likely leviathan will continue to lumber along, picking up ballast and momentum, crushing everything in its

path. Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

But what if anything does this have to do with law? Quite a lot, I think. In America, the national conversation will probably always include rhetoric about the rule of law. I have argued that collectivism was (and is) fundamentally incompatible with the vision that undergirded this country's founding. The New Deal, however, inoculated the federal Constitution with a kind of underground collectivist mentality. The Constitution itself was transmuted into a significantly different document. In his famous, all too famous, dissent in *Lochner,* Justice Holmes wrote that the "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*"[19] Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong. That *Lochner* dissent has troubled me – has *annoyed* me – for a long time and finally I understand why. It's because the framers did draft the Constitution with a surrounding sense of a particular polity in mind, one based on a definite

conception of humanity. In fact, as Professor Richard Epstein has said, Holmes's contention is "not true of our [ ] [Constitution], which was organized upon very explicit principles of political theory."[20] It could be characterized as a plan for humanity "after the fall."

There is nothing new, of course, in the idea that the framers did not buy into the notion of human perfectibility. And the document they drafted and the nation adopted in 1789 is shot through with provisions that can only be understood against the supposition that humanity's capacity for evil and tyranny is quite as real and quite as great as its capacity for reason and altruism. Indeed, as noted earlier, in politics, the framers may have envisioned the former tendency as the stronger, especially in the wake of the country's experience under the Articles of Confederation. The fear of "factions," of an "encroaching tyranny"; the need for ambition to counter ambition"; all of these concerns identified in the Federalist Papers have stratagems designed to defend against them in the Constitution itself. We needed them, the framers were convinced, because "angels do not govern"; men do.

It was a quite opposite notion of humanity, of its fundamental nature and capacities, that animated the great concurrent event in the West in 1789 – the revolution in France. Out of that revolutionary holocaust – intellectually an improbable melding of Roseau with Descartes – the powerful notion of abstract human rights was born. At the risk of being skewered by historians of ideas, I want to suggest that the belief in and the impulse toward human perfection, at least

in the political life of a nation, is an idea whose arc can be traced from the Enlightenment, through the Terror, to Marx and Engels, to the Revolutions of 1917 and 1937. The latter date marks the triumph of our own socialist revolution. All of these events were manifestations of a particularly skewed view of human nature and the nature of human reason. To the extent the Enlightenment sought to substitute the paradigm of reason for faith, custom or tradition, it failed to provide rational explanation of the significance of human life. It thus led, in a sort of ultimate irony, to the repudiation of reason and to a full-fledged flight from truth – what Revel describes as "an almost pathological indifference to the truth."[21]

There were obviously urgent economic and social reasons driving not only the political culture but the constitutional culture in the mid-1930's – though it was actually the mistakes of governments (closed borders, high tariffs, and other protectionist measures) that transformed a "momentary breakdown into an international cataclysm."[22] The climate of opinion favoring collectivist social and political solutions had a worldwide dimension.

Politically, the belief in human perfectibility is another way of asserting that differences between the few and the many can, over time, be erased. That creed is a critical philosophical proposition underlying the New Deal. What is extraordinary is the way that thesis infiltrated and effected American constitutionalism over the next

three-quarters of a century. Its effect was not simply to repudiate, both philosophically and in legal doctrine, the framers' conception of humanity, but to cut away the very ground on which the Constitution rests. Because the only way to come to terms with an enduring Constitution is to believe that the human condition is itself enduring.

For complex reasons, attempts to impose a collectivist political solution in the United States failed. But, the political failure was of little practical concern. In a way that is oddly unappreciated, that same impulse succeeded within the judiciary, especially in the federal high court. The idea of abstract rights, government entitlements as the most significant form of property, is well suited to conditions of economic distress and the emergence of a propertyless class. But the economic convulsions of the late 1920's and early 1930's passed away; the doctrinal underpinnings of *West Coast Hotel* and the "switch in time" did not. Indeed, over the next half century it consumed much of the classical conception of the Constitution.

So secure were the intellectual underpinnings of the constitutional revolution, so self-evident the ambient cultural values of the policy elite who administered it, that the object of the high court's jurisprudence was largely devoted to the construction of a system for ranking the constitutional weight to be given contending social interests.

In the New Deal/Great Society era, a rule that was the polar opposite of the classical era of American law reigned. A judicial subjectivity whose very purpose was to do away with objective gauges of constitutionality, with universal principles, the better to give the judicial priesthood a free hand to remake the Constitution. After a handful of gross divisions reflecting the hierarchy of the elite's political values had been drawn (personal vs. economic rights, for example), the task was to construct a theoretical system, not of social or cultural norms, but of abstract constitutional weight a given interest merits – strict or rational basis scrutiny. The rest, the identification of underlying, extraconstitutional values, consisted of judicial tropes and a fortified rhetoric.

Protection of property was a major casualty of the Revolution of 1937. The paradigmatic case, written by that premiere constitutional operative, William O. Douglas, is *Williamson v. Lee Optical.*[23] The court drew a line between personal rights and property rights or economic interests, and applied two different constitutional tests. Rights were reordered and property acquired a second class status.[24] If the right asserted was economic, the court held the Legislature could do anything it pleased. Judicial review for alleged constitutional infirmities under the due process clause was virtually nonexistent. On the other hand, if the right was personal and "fundamental," review was intolerably strict. "From the Progressive era to the New Deal, [ ] property was by degrees ostracized from the company of rights.[25] Something new, called

economic rights, began to supplant the old property rights. This change, which occurred with remarkably little fanfare, was staggeringly significant. With the advent of "economic rights," the original meaning of rights was effectively destroyed. These new "rights" imposed obligations, not limits, on the state.

It thus became government's job not to protect property but, rather, to regulate and redistribute it. And, the epic proportions of the disaster which has befallen millions of people during the ensuing decades has not altered our fervent commitment to statism. The words of Judge Alex Kozinski, written in 1991, are not very encouraging. " 'What we have learned from the experience of Eastern Europe and the Soviet Union . . . is that you need capitalism to make socialism work.' In other words, capitalism must produce what socialism is to distribute."[26] Are the signs and portents any better at the beginning of a new century?

Has the constitutional *zeitgeist* that has reigned in the United States since the beginning of the Progressive Era come to its conclusion? And if it has, what will replace it? I wish I knew the answer to these questions. It is true – in the words of another old song: "There's something happening here. What it is ain't exactly clear."[27]

The oracles point in all directions at once. Political polls suggest voters no longer desire tax cuts. But, taxpayers who pay the largest proportion of taxes are now a minority of all voters. On the other hand, until last term the Supreme Court held out the promising

possibility of a revival of what might be called *Lochnerism*-lite in a trio of cases – *Nollan, Dolan,* and *Lucas.* Those cases offered a principled but pragmatic means-end standard of scrutiny under the takings clause.

But there are even deeper movements afoot. Tectonic plates are shifting and the resulting cataclysm may make 1937 look tame.

Lionel Tiger, in a provocative new book called The Decline of Males, posits a brilliant and disturbing new paradigm. He notes we used to think of a family as a man, a woman, and a child. Now, a remarkable new family pattern has emerged which he labels "bureaugamy." A new trinity: a woman, a child, and a bureaucrat."[28] Professor Tiger contends that most, if not all, of the gender gap that elected Bill Clinton to a second term in 1996 is explained by this phenomenon. According to Tiger, women moved in overwhelming numbers to the Democratic party as the party most likely to implement policies and programs which will support these new reproductive strategies.

Professor Tiger is not critical of these strategies. He views this trend as the triumph of reproduction over production; the triumph of Darwinism over Marxism; and he advocates broad political changes to accommodate it.

Others do not see these changes as quite so benign or culturally neutral. Jacques Barzan finds the Central Western notion of emancipation has been devalued. It has now come to mean that "nothing stands in the way of every wish."[29] The result is a

decadent age – an era in which "there are no clear lines of advance"; "when people accept futility and the absurd as normal[,] the culture is decadent."[30]

Stanley Rosen defines "our present crisis as a fatigue induced by
. . . accumulated decisions of so many revolutions."[31] He finds us, in the spirit of Pascal, knowing "too much to be ignorant and too little to be wise."[32]

I will close with a story I like a lot. It's a true story. It happened on June 10, 1990. A British Airways jet bound for Malaga, Spain, took off from Birmingham, England. It was expected to be a routine flight. As the jet climbed through the 23,000-foot level, there was a loud bang; the cockpit windshield directly in front of the captain blew out. The sudden decompression sucked Captain Lancaster out of his seatbelt and into the hole left by the windscreen. A steward who happened to be in the cockpit managed to snag the captain's feet as he hurtled past. Another steward rushed onto the flight deck, strapped himself into the captain's chair and, helped by other members of the crew, clung with all his strength to the captain. The slipstream was so fierce, they were unable to drag the pilot back into the plane. His clothing was ripped from his body. With Lancaster plastered against the nose of the jet, the co-pilot donned an oxygen mask and flew the plane to Southampton – approximately 15 minutes away – and landed safely. The captain

had a fractured elbow, wrist and thumb; a mild case of frostbite, but was otherwise unharmed.

We find ourselves, like the captain, in a situation that is hopeless but not yet desperate. The arcs of history, culture, philosophy, and science all seem to be converging on this temporal instant. Familiar arrangements are coming apart; valuable things are torn from our hands, snatched away by the decompression of our fragile ark of culture. But, it is too soon to despair. The collapse of the old system may be the crucible of a new vision. We must get a grip on what we can and hold on. Hold on with all the energy and imagination and ferocity we possess. Hold on even while we accept the darkness. We know not what miracles may happen; what heroic possibilities exist. We may be only moments away from a new dawn.

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1 James Boyd White, When Words Lose Their Meaning (Univ. of Chicago Press 1984) p. 4.

2 *Ibid.*

3 F. A. Hayek, The Road to Serfdom (Univ. of Chicago Press 1994).

4 Golembiewski & Wildavsky, The Cost of Federalism (1984) *Bare Bones: Putting Flesh on the Skeleton of American Federalism* 67, 73.

5 *Ibid.*

6 Hamilton, The Federalist Papers No. 1 (Rossiter ed. 1961) p. 33.

7 Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (March 1, 1994) 24 American R. of Public Admin. 85 [1994 WL 2806423 at *10].

8 John O. McGinnis, *The Original Constitution and Our Origins* (1996) 19 Harv. J.L. & Pub. Policy 251, 253.

9 Tom Bethell, *Property Rights, Prosperity and 1,000 Years of Lessons,* The Wall Street J. (Dec. 27, 1999) p. A19.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

[13] John O. McGinnis, *The Original Constitution and Our Origins*, *supra*, 19 Harv. L. & Pub. Policy at p. 258.
[14] Ayn Rand, Capitalism the Unknown Ideal (New American Lib. 1966) pp. 4-5.
[15] *Ibid.*
[16] Jean Francois Revel, Democracy Against Itself (The Free Press 1993) pp. 250-251.
[17] *Id.* at p. 251.
[18] *Id.* at pp. 250-251.
[19] (198 U.S. at p. 75.)
[20] Clint Bolick, Unfinished Business (1990) p. 25, quoting *Crisis in the Courts* (1982) The Manhattan Report on Economic Policy, Vol. V, No. 2, p. 4.
[21] Jean Francois Revel, The Flight From Truth (Random House N.Y. 1991) p. xvi.
[22] *Id.* at p. xxxvii.
[23] 348 U.S. 483.
[24] Tom Bethell, The Noblest Triumph (St. Martin's Griffin, N.Y. 1998) p. 175.
[25] *Id.* at p. 176.
[26] Alex Kozinski, *The Dark Lesson of Utopia* (1991) 58 U.Chi. L.R. 575, 576.
[27] Buffalo Springfield, For What It's Worth (1966).
[28] Lionel Tiger, The Decline of Males (Golden Books, N.Y. 1999) pp. 21, 27.
[29] Edward Rothstein, N.Y. Times (April 15, 2000) p. A17.
[30] *Ibid.*
[31] Stanely Rosen, *Rethinking the Enlightenment* (1997) 7 Common Knowledge, p. 104.
[32] *Ibid.*

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October 16, 2003

Via Facsimile at 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Justice Janice Brown

Dear Chairman Hatch:

I write to support Justice Janice Rogers Brown's nomination to the United States Court of Appeals for the District of Columbia. As a former student extern in her chambers, I had the privilege of her mentorship not only as a young lawyer, but as a member of the African American community. She is an accomplished jurist and author of numerous opinions that convey true genius and elegance. You should vote to confirm Justice Brown for appointment on the federal appellate bench.

Some commentators believe Justice Brown is "unfit to serve on the powerful federal appeals court."[1] They criticize Justice Brown because she authored the California Supreme Court majority opinion in *Hi-Voltage Wire Works, Inc. v. City of San Jose*,[2] and argue that this opinion "made it extremely difficult to conduct any sort of meaningful affirmative action program in California."[3] They also claim that Justice Brown relied too heavily "on dissenting and concurring opinions of Supreme Court justices" in striking down the City of San Jose's affirmative action program.[4] These critics rely too heavily on their views on social policy and ignore the history of affirmative action.

Justice Brown's opinion in *Hi-Voltage Wire Works* found that California voters intended, when they approved Proposition 209, to proscribe affirmative action programs like the one employed by the City of San Jose.[5] At bottom, San Jose's program required contractors bidding on public works to treat minority or women subcontractors more favorably by providing notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which was required for non-minority contractors. Justice Brown, with the majority of

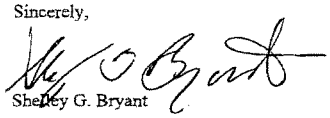
the court including Associate Justice Stanley Mosk, found that the program violated the California Constitution as amended by Proposition 209 because it required favorable treatment of subcontractors based on race and gender.

Justice Brown did not rely too heavily on Supreme Court precedent in drafting the *Hi-Voltage Wire Works* opinion. She simply articulated the truth – that "courts have been instrumental in effecting positive change in the quest for equality," but they have struggled in "articulating a coherent vision of the civil rights guaranteed by our Constitution."[6] Even those legal scholars who support affirmative action admit that it was "never formulated as a coherent policy, but evolved through a series of presidential executive orders, administrative policies, and court decisions."[7] Most importantly, a review of affirmative action programs in most contexts necessarily requires one to look at Supreme Court decisions on the subject.[8] In reality, this criticism is aimed at a messenger who delivered an unpopular message.

Justice Brown's critics do not dispute that the *Hi-Voltage Wire Works* opinion was correct. They agree that the California constitution required the court to strike down the affirmative action program at issue in that case.[9] Therefore, you should certainly give these critics and their arguments consideration, but weight their opposition appropriately.

Please contact me if you require further comment or additional information.

Sincerely,



Shelley G. Bryant

cc: The Honorable Patrick J. Leahy
Via Facsimile at 202-224-9516

Office of Legal Policy
Via Facsimile at 202-514-5715

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[1]RALPH G. NEAS AND KWEISI MFUME, PEOPLE FOR THE AMERICAN WAY AND NATIONAL ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, LOOSE CANNON: REPORT IN OPPOSITION TO THE

CONFIRMATION OF JANICE ROGERS BROWN TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT 1 (2003).

[2] 24 Cal. 4th 537, 101 Cal. Rptr. 2d 653, 12 P.3d 1068 (2000).

[3] NEAS & MFUME 9.

[4] NEAS & MFUME 1.

[5] 24 Cal. 4th at 562

[6] 24 Cal. 4th at 545.

[7] Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 57 (2002) *citing* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 165 (1995).

[8] Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661, (2001) (reviewing U.S. Supreme Court and California Supreme Court decisions to provide insight and guidance to policy makers at the school district level regarding the effect of Proposition 209 on granting racial preferences).

[9] NEAS & MFUME 9.

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Wiley W. Manuel Bar Association
Keith J. Staten

*Deceased

October 17, 2003

VIA FAX & U.S. MAIL

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary
Committee
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Washington, DC 20510
FAX: 202-224-6331

The Honorable Patrick Leahy
Ranking Member, Senate
Judiciary Committee
152 Dirksen Senate Office
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Washington, DC 20510
FAX: 202-228-0861

Dear Senators Hatch and Leahy:

On behalf of the California Association of Black Lawyers ("CABL"), I write to express our strong opposition to the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit.

CABL is the only *statewide* organization of African American lawyers, judges, professors and law students in the State of California. We are an affiliate of the National Bar Association (the "NBA") and we join the National Bar Association in its opposition to Justice Brown. (The NBA recently forwarded CABL's Official Position Paper opposing Justice Brown's nomination to you. I am enclosing a copy, for your easy reference.)

As California lawyers, we are familiar with Justice Brown and her record on the California Supreme Court. We are deeply concerned about her extremist judicial philosophy, that she has manifested in numerous opinions over the years. It is clear to us that she misuses precedent and

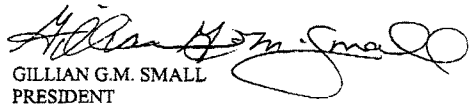
challenges precedent, in order to achieve the result she desires. A prime example is her opinion in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California's Supreme Court's first application of Proposition 209. According to Chief Justice Ronald George, who refused to join her opinion, Justice Brown seriously distorted the history of civil rights jurisprudence and concluded outright that the U.S. Supreme Court decisions supporting affirmative action were wrongly decided.

California has strong civil rights statutes, and many of us litigate pursuant to these statutes. Yet Justice Brown has repeatedly deviated from precedent in order to narrowly interpret these statutes and render them virtually inaccessible to victims of discrimination.

We urge you to undertake an extremely careful review of Justice Brown and her record. We hope that you will conclude, as we have done, that she is simply not within the mainstream of legal thought. She is therefore not suited for appointment to the second most important court in our nation, the D.C. Circuit.

Respectfully yours,

CALIFORNIA ASSOCIATION OF
BLACK LAWYERS



GILLIAN G.M. SMALL
PRESIDENT

Enc.
cc: 2003-2004 CABL Board of Directors
Clyde Bailey, Esq.- NBA President

9904-135\2078727.1

THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS CONTEMPLATES JUSTICE BROWN'S JUDICIAL NOMINATION TO THE U.S. COURT OF APPEALS

Recently, President Bush announced his nomination of California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit. To date, the California Association of Black Lawyers ("CABL") has responded to a number of recent inquiries from the media regarding CABL's position pertaining to President George W. Bush's plans to nominate California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit. CABL President Gillian G.M. Small participated in telephone interviews with the S.F. and L.A. Daily Journal legal newspapers, as well as the San Francisco Chronicle and the Sacramento Bee newspapers regarding CABL's position on Justice Brown's nomination. President Small's comments from those interviews were recently quoted on the front pages of the aforementioned newspapers.

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Justice Brown's Political Roots and Family Background

Justice Brown has strong roots in the South, a commonality of background that she shares with many of CABL's members. Justice Brown is the descendant of a sharecropper from rural Alabama who brought his family to Sacramento after joining the Air Force. Brown graduated in 1977 from the University of California, Los Angeles School of Law. Thereafter, Brown worked for 12 years as a state government lawyer before joining a lobbying and legislative law firm led by Steve Merksamer, former republican Governor George Deukmejian's Chief of Staff. She then served as former

republican Governor Pete Wilson's Legal Affairs Secretary, before he nominated her to a state appellate court position. Two years later, Wilson nominated her to the California Supreme Court. She was confirmed in 1996, over the concerns of the state's judicial vetting committee, which rated her "not qualified" because of her limited judicial experience.

Brown has served on the California Supreme Court for seven years, providing a substantial amount of her work for analysis by critics and supporters, alike. If appointed, Brown would follow Justice Judith Rogers, a President Bill Clinton appointee, to become the second African American woman judge on the D.C. Circuit Court. Many people consider this appointment as preliminary grooming for a future nomination to the U.S. Supreme Court. This consideration is not without merit: Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsberg all previously served on the prestigious D.C. Circuit Court.

Justice Brown's Failed Judicial Record: A Premonition of the Future?

CABL has undertaken a very thoughtful review and evaluation of Justice Brown's written opinions, as well as the opinions of CABL's members. At this point, CABL finds itself in what some might deem to be a difficult position. To date, there are only four black women on the federal appellate bench. CABL strongly supports and advocates the proposition of increasing representation of Black jurists by either the appointment or election of more Black judges to the bench, as well as the elevation of current Black judges to higher courts. In addition, various individuals within CABL agree with Justice Brown on a number of matters, albeit, perhaps for different reasons, such as crime victim rights, as well as the appropriate manner in which society should treat non-violent criminal drug defendants. This is underscored where Justice Brown, as a lone dissenter in *People v. Floyd*, 03 C.D.O.S. 6400, dealt with substance-abuse treatment mandated for non-violent drug offenders under Proposition 36. Under the California Supreme Court's recent 6 to 1 decision, an unknown amount of criminal defendants will remain in jail, instead of being referred to drug treatment programs, because the measure does not currently provide that drug treatment be made available retroactively for defendants sentenced before the measure's effective date. Justice Brown is quoted as stating in the dissent [that]: "Even one year's incarceration of defendant [$24,000] will far exceed the amount taxpayers would pay to divert him from the criminal justice system altogether [$4,000 for drug treatment program]." Brown wrote: "Since he [the defendant] will not be eligible for parole for many years, the actual cost will likely be 'the wasteful expenditure' of hundreds of thousands of dollars for an individual 'who would be better served by community-based treatment,'" which was the language used on the ballot presented to voters. In her dissent, she further noted that the majority took an "unnecessarily narrow assessment of the electorate's intent and in doing so, fails to effectuate the express purpose of the initiative."

As illustrated above, most would find Justice Brown to be a very intelligent jurist who is one of the best authors of opinions on the California Supreme Court. However, the question before CABL is whether Justice Janice Rogers Brown will be a responsible

voice upon which Black America can depend when fundamental legal issues of race that may profoundly impact Black people in the areas of advancement in business, education, civil rights, and the judicial arenas arise.

In reviewing her prior opinions, it is difficult to concretely categorize Justice Brown. However, we can definitively pinpoint Brown's ideology through the prism of the court decisions in which she participated in the deliberation thereof. While it is always challenging to prognosticate what decisions she may render in the future, a thorough review of her legal opinions are instructive.

CABL's Review of Justice Janice Brown's Key Decisions Supports Its Opposition to Brown's Nomination

Upon rigorous scrutiny of her record, we submit that CABL unequivocally should oppose her nomination, in the interest of the continued advancement of Black America. CABL, a Black Bar Association primarily concerned with issues of social justice, racial diversity and equality, should not lend support to her nomination, or any other person who has demonstrated a pattern of issuing judicial opinions that are diametrically opposed to the central goals of the organization. Accordingly, we cannot endorse Justice Brown's potential appointment to the D.C. Circuit Court. We need only review a number of decisions where she either wrote the majority opinion, concurred, or dissented to reach that conclusion. For example:

Under the guise of supporting free speech, Brown issued a disturbing opinion in a dissent to *Aguilar v. Avis Rent A Car System Inc.*, 21 Cal.4th 121 (1999). The case concerned an injunction by a trial court prohibiting an employee of Avis from using racial epithets against the plaintiffs. The employee challenged the injunction as a prior restraint on his free speech. The majority found that a remedial injunction to prevent further racial epithets does not violate the right to free speech if the epithets have contributed or will contribute to a hostile work environment that constitutes employment discrimination. Brown begins her dissent with a robust view of free speech as requiring the protection of all viewpoints, even viewpoints that are deeply offensive to others. "[T]hough the expression of such sentiments may cause much misery and mischief, hateful thoughts cannot be quelled at too great a cost to freedom." In this case, Brown finds little support for the suppression of hate-filled, race-based "free speech." (Justice Clarence Thomas later dissented from the U.S. Supreme Court's failure to review the decision.)

Next, in what is considered Justice Brown's highest profile decision, *Hi-Voltage Wire Works Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000), we grasp a glimpse of what may be in store for minorities under her stewardship. In *the City of San Jose*, Justice Brown wrote the majority opinion striking down a San Jose ordinance that required the City of San Jose to solicit bids from companies owned by minority and women subcontractors. She reasoned that the plan to seek minority subcontractors violated Proposition 209, which is the 1996 voter–adopted state constitutional amendment that

banned racial preferences. She further concluded that instead of affirmative action, "equality of individual opportunity is what the constitution demands."

Next, in an opinion written in 2002, *People v. McKay*, the California Supreme Court upheld the conviction of a black bicyclist who was stopped by police for riding his bicycle the wrong way on a one-way street. Police searched Conrad McKay and found methamphetamine. He was sentenced to nearly three years. The majority, in upholding the conviction, left it to the "judgment of the arresting officer" on whether to arrest or follow a "cite-and-release procedure," whereby violators of non-criminal infractions could be ticketed and released. Justice Brown, in a lone dissent, said the decision left open the door to racial profiling. In light of this opinion, Justice Brown's supporters may opine that everyone may well be in for a surprise, should she ever be appointed to the High Court. However, it is also a widely shared counter-opinion that there is comfort in knowing that a jurist may vote in a manner that is not inconsistent with her voting record. In short, CABL would support a nominee whose voting record comports with fairness and who possesses a realistic perspective of the past, present, and future Black America.

Final Consideration of Justice Brown's Judicial Nomination

Although her dissenting opinion in *McKay* shows that Judge Brown may have compassion for the plight of people of color, Brown's philosophical bent squarely comports with the philosophies espoused by the Bush administration regarding affirmative action. In an amicus brief filed in the *Grutter v. Bollinger* case, the White House told the U.S. Supreme Court that it opposed the University of Michigan's race-based admissions policies. Several CABL members have queried that if Justice Brown had been the deciding vote in this case, would she have struck down the University of Michigan's policy of considering race as a factor based on the same rationale she relied upon in the *City of San Jose* case. Moreover, would she have found the consideration of race to be a compelling state interest which passes constitutional muster?

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California Association of Black Lawyers
Gillian G.M. Small - President
An Affiliate of the National Bar Association
Mailing Address: 20 Sunnyside Avenue, Suite A, # 383
Mill Valley, California 94941-1928
www.calblacklawyers.org
Telephone (510) 251-2864, Ext. 533
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gsmall@wulfslaw.com

OFFICIAL POSITION PAPER OF THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS ON JUSTICE BROWN'S JUDICIAL NOMINATION TO THE U.S. COURT OF APPEALS

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WARD A. CAMPBELL

October 20, 2003

The Honorable Orrin Hatch
United States Senator
Chairman, Senate Judiciary Committee
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am a former colleague of Justice Janice Rogers Brown in the California Attorney General's office. I also dealt with her during her tenure as legal affairs secretary to Governor Pete Wilson. I am honored that she is listed as my sponsor as a member of the Bar of the United States Supreme Court. I enthusiastically support her nomination as a judge to the DC Circuit.

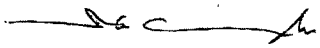
Janice Brown is affectionately remembered by her fellow deputies who worked with her at the Department of Justice. I had the opportunity to work with her on a co-defendant appeal in which we both filed petitions for writ of certiorari to the United States Supreme Court. Her excellent written work ultimately prevented the retrialsof two confessed murderers. It was a pleasure to work with her. She was highly respected in the very collegial atmosphere of our appellate division.

Later in 1992, I again had the pleasure of working with Janice in a very different capacity during her tenure as legal affairs secretary to Governor Pete Wilson in 1992. She successfully navigated the first death penalty clemency proceeding in California since 1967. At all times, she was open to suggestion and advice in devising an unique review process that fairly fit the needs of the Governor, the prosecutor, and the prisoner.

As a friend, I was moved personally to write this letter because of the unfair criticisms levelled at Janice in the time leading to her confirmation hearing. Needless to say I was shocked by depictions of her which are completely inconsistent with the person I have known and worked with here in California. The critical "analyses" of Janice's work strike me as as more visceral, than objective. There is something incongruous about asserting that Janice Brown, a true American success story, is not sufficiently committed to constitutional and civil rights.

Janice is a thoughtful, reflective, and compassionate person. She reaches her own conclusions independently only after great deliberation. Not surprisingly, she has diverse interests and she has shown the ability to handle varied work assignments throughout her career. Her background and experience have superbly prepared her for the federal bench. She will be greatly missed here in California. The President has shown great wisdom in his selection and I urge the Senate to ratify his nomination of Janice Rogers Brown to the DC Circuit..

Sincerely,



WARD A. CAMPBELL
Supervising Deputy Attorney General
California Department of Justice

cc: The Honorable Dianne Feinstein
United States Senator

MHA McDonough Holland & Allen PC
Attorneys at Law

Robert K. Puglia
Retired Presiding Justice
Court of Appeal, Third District
ALTERNATIVE DISPUTE
RESOLUTION/MEDIATION

Sacramento Office
916.444.3900 tel
916.444.3249 fax
rpuglia@mhalaw.com

October 16, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

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tel 916.444.3900
fax 916.444.8334

Oakland
199 Harrison Street
Suite 1300
Oakland CA
94612-3582
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fax 510.839.9104

Yuba City
Century Park Drive
Suite A
Yuba City CA
95991-5729
tel 530.674.9761
fax 530.671.0990

www.mhalaw.com

Re: Nomination of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

We are members of and present and former colleagues of Justice Janice Rogers Brown on the California Supreme Court and California Court of Appeal for the Third Appellate District. Although we span the spectrum of ideologies, we endorse her for appointment to the U.S. Court of Appeals for the D.C. Circuit.

Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand. Because of these qualities, she has quickly become one of the most prolific authors of majority opinions on the California Supreme Court.

Although losing Justice Brown would remove an important voice from the Supreme Court of California, she would be a tremendous addition to the D.C. Circuit. Justice Brown would bring to the court a rare blend of collegiality, modesty, and intellectual stimulation. Her judicial opinions are consistently thoughtful and eloquent. She interacts collegially with her colleagues and maintains appropriate judicial temperament in dealing with colleagues, court personnel and counsel.

MHA McDonough Holland & Allen PC
Attorneys at Law

If Justice Brown is placed on the D.C. Circuit, she will serve with distinction and will bring credit to the United States Senate that confirms her. We strongly urge that the Senate take all necessary steps to approve her appointment as expeditiously as possible.

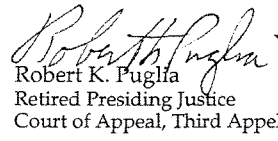
Joining me in this letter are Justices Marvin R. Baxter, Ming W. Chin and Carlos R. Moreno of the California Supreme Court and Presiding Justice Arthur G. Scotland and Justices Rodney Davis, Harry E. Hull, Jr., Daniel M. Kolkey, Fred K. Morrison, George W. Nicholson, Vance W. Ray and Ronald B. Robie of the California Court of Appeal, Third Appellate District.

I am informed that Justice Joyce L. Kennard of the California Supreme Court has already written a letter in support of Justice Brown's nomination.

Chief Justice Ronald M. George and Justice Kathryn M. Werdegar of the California Supreme Court are not opposed to Justice Brown's appointment but it is their long standing policy not to write or join in letters of support for judicial nominees.

Thank you for your consideration of this letter.

Very truly yours,



Robert K. Puglia
Retired Presiding Justice
Court of Appeal, Third Appellate District

RKP/aep

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Committee for Judicial Independence

1900 N. Beverly Glen Blvd.
Los Angeles, CA 90077
Phone: (310)474-5149
Fax: (310)474-2162
Email: info@extremistcourts.org

FOR IMMEDIATE RELEASE
October 20, 2003

CONTACT: SUSAN LERNER
310/474-5149 or 310/962-5657

COMMITTEE FOR JUDICIAL INDEPENDENCE JOINS WITH BROAD COALITION OF GROUPS STATE-WIDE IN OPPOSING NOMINATION OF CALIFORNIA SUPREME COURT JUSTICE JANICE ROGERS BROWN TO DC CIRCUIT

Cites Brown's Record of Substituting Her Extremist Views for Precedent and Statutes

Joining with other groups in the Justice for All Project, the Committee for Judicial Independence announced a grassroots campaign to oppose the nomination of Janice Rogers Brown to the District of Columbia Circuit Court of Appeals. "Brown brings an extreme world view, strongly out of step with the majority of Americans, with her onto the bench. Her vitriolic dissents on the California Supreme Court betray a hostility toward current environmental, workers' rights and civil rights legislation, and an alarming nostalgia for legal philosophies that led to the Robber Baron era. Knowing her record as we do, we Californians have a special responsibility to help keep Brown off the DC Circuit, where her retrogressive and extreme view of law and society would hobble government's ability to protect our rights and liberties nationwide," said Susan Lerner, the Committee's founder and chair. "During her 7 years on the California Supreme Court, Justice Brown has displayed open hostility to the very concept of regulating private interests for the public good and an eagerness to bypass existing law and substitute her personal view of what the law should be. She has been sharply criticized by colleagues on the California Supreme Court for allowing her personal beliefs to drive her opinions and refusing to accept the court's precedents."

This willingness to allow ideology to substitute for precedent makes Brown one of the most extreme in a series of radical Bush nominations intended to unbalance and pack the federal courts. Because her dissents are so corrosive and disdainful of those who disagree with her radically skewed world view, significant questions have been raised as to whether Brown has the requisite judicial temperament to serve on the federal court.

Justice Brown could do irreparable damage to our rights if she is confirmed as a Justice of the DC Circuit Court of Appeals. The District of Columbia Circuit is second in importance only to the Supreme Court. It hears challenges to federal regulatory actions from all over the nation. In the past decade it has emerged as the major court from which Supreme Court nominees are chosen. Justice Brown's hostility to government playing any active role is such that she has declared that the 1937 Supreme Court decision to let New Deal legislation stand was "our own socialist revolution." Lerner said that "since there is no Senator from the District of Columbia, we hope Senators Feinstein and Boxer, knowing Brown's record in California, will play a leading role in opposing Brown's confirmation. Their strong opposition will send the necessary message to President Bush that he should stop appointing extremists to the federal appellate courts," said Lerner.

The Committee for Judicial Independence joins with other Justice for All Project members, including the NAACP Legal Defense Fund Western Region, Black Women Lawyers of Los Angeles, SEIU Local 99, the California Women's Law Center, People for the American Way, the Feminist Majority, and Planned Parenthood Los Angeles in urging Senators Feinstein and Boxer to use **all available means** to oppose this nomination .

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The Committee for Judicial Independence is a grassroots advocacy organization dedicated to an independent judiciary and to the appointment of independent, fair and open minded judges, that seeks to foster public interest and involvement in the judicial appointment and confirmation process and to inform and activate Americans to the threat posed by the Extreme Right's concerted effort to take over the federal courts.

RESOLUTION IN OPPPOSITION TO THE CONFIRMATION OF JUSTICE JANICE ROGERS BROWN TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

WHEREAS, the federal judiciary has long been an important bulwark for safeguarding civil and constitutional rights and liberties, and environmental protections; and

WHEREAS, the U.S. Court of Appeals for the D.C. Circuit has a unique position and critical role in our federal justice system and is widely regarded as the second most important court in the United States; and

WHEREAS, the nomination of Justice Janice Rogers Brown continues the administration's disturbing pattern of nominating individuals who have records of deep hostility to core civil and human rights principles; and

WHEREAS, Justice Brown's record as a California Supreme Court associate justice demonstrates a strong, persistent, and disturbing hostility towards affirmative action, civil rights, the rights of peoples with disabilities, workers' rights, and criminal justice; and

WHEREAS, Justice Brown's opinions on civil rights and discrimination cases are perhaps the most troubling part of her record, revealing a blatant disregard for judicial precedent and a desire to limit the ability of victims of discrimination to sue for redress;

NOW THEREFORE BE IT RESOLVED, that in an effort to protect the independence and fairness of the federal judiciary for generations to come, Delta Sigma Theta Sorority, Incorporated, opposes the confirmation of Justice Brown;

BE IT FINALLY RESOLVED, that Delta Sigma Theta Sorority, Incorporated, joins the NAACP, NAACP Legal Defense and Educational Fund, National Organization for Women, Leadership Conference on Civil Rights and others civil rights organizations in urging the U.S. Senate Judiciary Committee, and if required, the full Senate to reject the nomination of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit, and calls on its chapters and members to mount a campaign in opposition to confirmation including letter writing, senatorial visits, media outreach and community education and mobilization.

Adopted by the National Executive Board of Delta Sigma Theta Sorority, Inc. on October 4, 2003.

COMMUNITY RIGHTS COUNSEL
DEFENDERS OF WILDLIFE
EARTHJUSTICE

October 21, 2003

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: The Nomination of Justice Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit

Dear Chairman Hatch and Ranking Member Leahy:

We are writing to express our extremely strong concerns about the nomination of California Supreme Court Justice Janice Rogers Brown to a lifetime seat on the United States Court of Appeals for the DC Circuit.

The importance of the DC Circuit to the future of our nation's federal environmental protections cannot be overstated. The DC Circuit has the power – often the exclusive power – to hear challenges to health, safety, welfare, and environmental protections issued by federal government agencies. Except for the handful of cases that the Supreme Court agrees to review, the DC Circuit is the final arbiter of whether a federal protection will stand or fall. The concern of the national environmental community over the future of the DC Circuit is reflected in the attached letter that 16 national groups sent to Senator Schumer, then-chair of the Judiciary Subcommittee on Administrative Oversight and the Courts, regarding that Subcommittee's hearing on "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court."

Janice Rogers Brown has an extremely disturbing record for a lifetime nominee to this critical court. In speeches, she has expressed the view that the federal government is a "leviathan" that is "picking up ballast and momentum, crushing everything in its path." "Where government moves in," she has argued, "community retreats, civil society disintegrates, and our ability to control our own destiny atrophies." Government, Brown says, has become the "drug of choice" for ordinary Americans. She claims that "Today's senior citizens blithely cannibalize their grandchildren" to "get as much 'free' stuff as the political system will permit them to extract."

Justice Brown's unfathomably bleak view of Americans and the motives and operation of the United States government lead her to believe that unelected judges and the judiciary must actively rein government in. Thus Brown openly yearns for a return to the pre-New Deal era of *Lochner v. New York*, when the Supreme Court repeatedly invalidated progressive federal and state statutes designed to improve working conditions and jump-start the economy out of the Great Depression. Brown characterizes the Supreme Court's decision to reject constitutional challenges to Depression-era reforms of the New Deal – which serve as precedent for our nation's environmental protections – as "the triumph of our own socialist revolution."

Brown's views on the limits of congressional power place her almost alone at the fringe of constitutional interpretation. Virtually every prominent constitutional scholar – from the left, the center, and the right – agrees that *Lochner* is a paradigmatic example of inappropriate judicial activism.

Chairman Hatch, in describing the perils of an activist judiciary, has placed *Lochner* in the company of the infamous *Dred Scott* ruling that legitimized the spread of slavery and helped provoke the Civil War. Robert Bork has denounced the *Lochner* decision as an "abomination" that "lives in the law as the symbol, indeed the quintessence of judicial usurpation of power." As explained by Edwin Meese, "the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority." Meese, in defending the judicial selections of Presidents Ronald Reagan and George H.W. Bush has declared that "to both Chief Executives the activist Court of the *Lochner* era was as illegitimate as the Warren Court."

Brown's extreme judicial philosophy pervades the opinions she has written in her six years as a California Supreme Court justice. For example, during the course of one of her speeches that celebrates the *Lochner* era, she describes three recent Supreme Court regulatory takings rulings as holding "out the promising possibility of a revival of what might be called Lochnerism-lite" under the Takings Clause. In a series of lone dissents in takings cases, Brown attempts to realize this promise by advocating a startlingly expansive view of judicial power under the Takings Clause. As the majority responds in one of these cases, "nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state."

As the attached report demonstrates in much greater detail, Janice Rogers Brown's views on constitutional issues such as the economic due process rulings of the *Lochner* era and the proper reach of the Takings Clause put her on the far fringes of constitutional interpretation. Her opinions indicate a willingness, indeed zeal, to inject these views into the case law even in the face of binding precedent. The Senate must give Brown's nomination to the environmentally-critical DC Circuit the closest possible scrutiny.

Thank you for considering these important concerns regarding Justice Brown's record and for taking seriously your Constitutional advise and consent responsibility.

Sincerely yours,

Doug Kendall
Executive Director
Community Rights Counsel

William Snape
Vice President and General Counsel
Defenders of Wildlife

Glenn P. Sugameli
Senior Legislative Counsel
Earthjustice

cc: Members, Senate Committee on the Judiciary
Attachments (2)

Congressional Black Caucus

of the United States Congress

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NOT PRINTED OR MAILED AT PUBLIC EXPENSE

October 17, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Leahy:

On behalf of the Congressional Black Caucus, I am writing to strongly oppose the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. After considering Justice Brown's voluminous record and her public statements, we firmly believe that she is unfit to serve on the second most powerful court in the country. Because her appointment to the D.C. Circuit could deny millions of Americans the promise of justice enshrined in the United States Constitution, we are spelling out our concerns at a Congressional Black Caucus press conference today. Further, we will be taking out special orders on the floor of the U.S. House of Representatives and because Justice Brown's views and opinions offend so many, we will be asking our colleagues to join us as well. California delegation Democrats are also sending a letter stating their opposition to Justice Brown's nomination. We will encourage our Senate colleagues, their constituents, and all who believe the federal courts are a critical component of our democracy and of equal protection of the laws to oppose the nomination of Janice Rogers Brown.

Inherent in the judicial appointment power is the responsibility to nominate men and women who respect our laws and our Constitution, and possess the temperament and intelligence required to render fair and just decisions. Yet, President Bush's nomination of California State Supreme Court Justice Janice Rogers Brown ensures only that he remains faithful to his campaign promise to nominate men and women in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia. We are appalled. By

sending Justice Brown's nomination to the Senate for consideration, the President disregards the exemplary careers of moderate, talented, lawyers who are in the mainstream of legal thought. Given President Bush's abdication of his responsibility, we call on the Senate to exercise its advice and consent responsibility faithfully.

Justice Brown is a notoriously conservative lawyer and jurist, but her conservatism alone would not inspire this letter. We write you because Justice Brown's record raises serious questions about her ability to divorce her ideological views from her responsibility to render decisions based on a fair and precedent-based interpretation of the law and the Constitution.

Justice Brown's disdain for legal precedent could not be clearer. In many of her decisions, Justice Brown appears to be a jurist on a right-wing mission. That is the only interpretation we can give decisions such as *Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1068 (Cal.2000). Justice Brown wrote the opinion for the California Supreme Court, but went out of her way to make it nearly impossible to have a meaningful affirmative action program in California. Stretching Proposition 209 to unnatural limits, her opinion ignores legal precedent set by the U.S. Supreme Court that makes clear that affirmative action is legal under Title VII of the Civil Rights Act of 1964 and the U.S. Constitution. For example, her opinion prohibits California jurisdictions from requiring that its contractors conduct meaningful outreach to minority and women-owned subcontractors, a common practice of state governments and the federal government under this and past administrations. Justice Brown's entire career shows that she has no respect for the federal regulatory process or for the role of the federal government whose laws she would administer, particularly laws that address the long-standing problems encountered by racial and ethnic minorities, women, workers, seniors, and others. Ms. Brown has argued that over the last 30 years, government has been "transformed from a necessary evil to a nanny," and she tells audiences that policy makers are "handing out new rights like lollipops in the dentist's office."

Worse, Ms. Brown freely weaves her personal philosophy into her opinions. Justice Brown's *Hi-Voltage Wire Works* opinion is so tortured that California Supreme Court Chief Justice Ronald George – who, like Ms. Brown, was also appointed to the California Supreme Court by Governor Pete Wilson – wrote:

> The overall tenor of the majority opinion's discussion of these decisions [U.S. and California Supreme Court decisions dealing with affirmative action] – including its repeated and favorable quotation from dissenting opinions in these cases and from academic commentators critical of these decisions -- leaves little doubt that the majority opinion embraces the view that the types of affirmative action programs at issue in these past decisions always have violated the provisions of the federal and state equal protection clauses and Title VII, and that the numerous decisions of the United States Supreme Court and this court that reached a contrary conclusion were wrongly decided.

Chief Justice George went on to write:

> The general theme that runs through the majority opinion's historical discussion – that there is no meaningful distinction between discriminatory racial policies that were imposed for the clear purpose of establishing and preserving racial segregation, on the one hand, and race-conscious affirmative action programs whose aim is to break down or eliminate the continuing effects of such segregation and discrimination, on the other – represents a serious distortion of history and does a grave disservice to the sincerely held views of a significant segment of our populace.

Similarly, in *Aguilar v. Avis Rent A Car Systems, Inc.* 980 P.2d 846 (Cal.1999), the trial court found that Avis created a hostile work environment in violation of the California Fair Housing and Employment Act by allowing one employee to subject Latino employees to racial slurs. The court issued an injunction to prevent the employee from using racial slurs and to prevent Avis from allowing him to do so. On appeal, Avis argued that the injunction was a violation of First Amendment rights. A majority of the California Supreme Court upheld the injunction. Astonishingly, Justice Brown disagreed. She argued that racially discriminatory speech in the workplace – even when it rises to the level of illegal race discrimination – is protected by the First Amendment. To reach that conclusion, Justice Brown had to ignore several decisions by the U.S. Supreme Court and had to embrace a philosophy that, if it were to become the law of the land, would make it almost impossible for judges or legislators to effectively stop racial and sexual harassment involving speech in the workplace. In her Senate Judiciary Committee questionnaire, Justice Brown listed the *Aguilar* dissent as one of her ten most significant opinions.

Justice Brown is not qualified to serve on the Court of Appeals for the D.C. Circuit. Our nation's courts of appeals are almost always the courts of last resort for Americans who use our federal courts, and of the appellate courts, the D.C. Circuit is the most powerful. With exclusive jurisdiction over many laws affecting the workplace, the environment, civil rights, and consumer protection, and as the primary court for interpretation of administrative law, the D.C. Circuit has a uniquely important role in our system of law and justice. Accordingly, the men and women appointed to this court should be highly regarded by their colleagues and those who will appear before them. Justice Brown does not inspire such confidence in her peers. The American Bar Association Ratings Committee gave her a majority "qualified"/minority "not qualified" rating. No member of the Committee found her to be "well-qualified." She is only the second sitting judge nominated by President Bush to an appellate court who has received a partial "not qualified" rating from the ABA. Her nomination to the California Supreme Court was also marked by similar concerns.

After reviewing Justice Brown's record, we agree with those who believe she was not qualified to serve on the California Supreme Court and those who argue that she is not qualified to sit on the Court of Appeals for the D.C. Circuit today. Justice Brown's record proves that she is unable or unwilling to divorce her personal views from her responsibility to fairly interpret the law and the Constitution. She should not be elevated

to a federal court where she could further undermine the rule of law and the attendant legal protections.

We will not stand on the sidelines as equal rights and long sought federal rights become casualties of an effort to reshape our federal courts and eliminate these rights. Nothing less than our liberty and our freedom are at stake. We ask you to reject the nomination of Janice Rogers Brown.

Sincerely,

Elijah E. Cummings
Chair, Congressional Black Caucus

JOHN CORNYN

United States Senator - Texas
CONTACT: DON STEWART
(202) 224-0704 office
(202) 365-6702 cell

FOR IMMEDIATE RELEASE
October 22, 2003

JUSTICE JANICE ROGERS BROWN

U.S. Sen. John Cornyn, a member of the Senate Judiciary Committee and chairman of the subcommittee on the Constitution, introduced California Supreme Court Justice Janice Rogers Brown, nominee for the U.S. Court of Appeals for the D.C. Circuit before the committee at her nomination hearing Wednesday:

Mr. Chairman and Ranking Member, I am privileged to introduce to the committee a distinguished jurist from the California Supreme Court, Justice Janice Rogers Brown, who has been nominated to serve on the U.S. Court of Appeals for the D.C. Circuit.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit court is currently vacant. As you also know, Presidents traditionally look across the nation for individuals to serve on the D.C. Circuit bench – from Judge Karen LeCraft Henderson, a former federal judge on the District of South Carolina, to former University of Colorado law professor Stephen F. Williams and former University of Michigan law professor Harry T. Edwards.

Justice Brown has almost ten years experience as an appellate judge. First appointed to the state court of appeals in 1994, she was elevated to the state supreme court in 1996, when she became California's first African-American female Supreme Court justice.

Even before 1994, Brown had already established a distinguished record of public service. She served as a Deputy Legislative Counsel from 1977 to 1979, Deputy Attorney General from 1979 to 1987, Deputy Secretary & General Counsel of California's Business, Transportation & Housing Agency from 1987 to 1990, and Legal Affairs Secretary for Governor Pete Wilson from 1991 to 1994.

As a judge, Justice Brown has received strong support from Californians. During the 1998 elections, four justices of the California Supreme Court – including the Chief Justice – were up for a retention vote before the California electorate. California voters supported all four justices. Justice Brown received yes votes from 76% of California voters – the highest vote percentage of all four justices, as you can see in the chart.

Justice Brown, along with her colleagues, also received strong support from the *San Francisco Chronicle*. As the *Chronicle* editorialized: "It takes judges with a deep respect for the law, and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the 'right' outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary . . . by retaining . . . Supreme Court justices who . . . have all demonstrated a commitment to sound decision making. . . . If you don't like a law – or if it conflicts with the state constitution – change it. The judiciary's job is to make sure that laws are applied fairly. . . . Brown [and her colleagues] have approached this duty with diligence and integrity" and "should be retained."

I am extremely impressed by this extensive record of dutiful public service. But of course, there is more to Justice Brown than just her resume. As a strong yet modest person, Justice Brown may not feel comfortable talking openly about her personal life story, but I hope that members of this committee will ask her about it. She was born in Greenville, Alabama, the daughter of sharecroppers. She is personally all too familiar with the scourge of racism and segregation. She came of age in the midst of Jim Crow policies in the South. She grew up listening to her grandmother's stories about NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks, and her experiences as a child of the South motivated her desire to become a lawyer.

- more -

After her father later joined the Air Force, she became – like me – a military brat, traveling with her family from military base to military base. I am pleased to observe that her travels included several years in the great state of Texas, including childhood stints in Ft. Worth [when her family moved to Carswell Air Force Base and she spent her third and fourth grade years at M.L. Kirkpatrick Elementary School] and San Antonio [when her family moved to Lackland Air Force Base in San Antonio and she spent her fourth through sixth grade years in the Edgewood School District].

Given Justice Brown's childhood and life experiences facing racism, I am especially alarmed by what I have seen and heard from some of her opponents. Perhaps the worst of all is a negative cartoon I recently saw, which I ask to be displayed on the easel. The cartoon depicts Justice Brown in an extremely negative and offensive light, all because of the color of her skin. Mr. Chairman, I sincerely hope that attacks like this will have no bearing whatsoever on this committee's consideration of her nomination.

Some have instead alleged that Justice Brown singlehandedly dismantled affirmative action in California. As a former state supreme court justice myself, I can tell you that these critics have no understanding of the law or of how judges operate.

In 1997, California voters amended their state Constitution by approving Proposition 209. As you can see on the easel, [Article I, Section 31 of] the California Constitution now states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race . . . in the operation of public employment, public education, or public contracting."

Because of the clear terms of Proposition 209, the U.S. Supreme Court recently noted [in *Grutter v. Bollinger* (2003)] that, "in California, . . . racial preferences in admissions are prohibited by state law." Do Justice Brown's critics also disagree with Justice O'Connor, who authored the opinion, or Justices Stevens, Souter, Ginsburg, and Breyer, who joined her?

All Justice Brown did was author the majority opinion for a unanimous California Supreme Court to enforce the clear terms of Proposition 209. Every single judge involved in that case – at the trial court, the court of appeals, and the state supreme court – agreed with her that the challenged San Jose program violated the will of the voters as expressed in Proposition 209. Then-Justice Stanley Mosk – the court's "leading liberal" according to the *San Francisco Chronicle* – not only joined Justice Brown's opinion, he also wrote his own concurring opinion stating that "I agree with the court in the substance of its analysis" and, if anything, "I would go farther than it does."

If critics don't like Justice Brown's decisions, they should change the law, rather than attack her for partisan political gain. She's just doing her job as a judge, not as a politician. I'll quote the *San Francisco Chronicle* again: "If you don't like a law – or if it conflicts with the state constitution – change it."

Others have criticized Justice Brown for her willingness to enforce a common-sense law enacted by the California Legislature. The law would have required parental consent before a minor can obtain an abortion. But the California Supreme Court issued a divided 4-3 opinion invalidating that law. Justice Brown would have deferred to the state legislature and enforced the law.

She was hardly alone in that view. Then-Justice Stanley Mosk – again, the court's "leading liberal," according to the *San Francisco Chronicle* – also voted to uphold the law. Indeed, according to a June 2000 *Los Angeles Times* poll, 82% of Americans support parental consent laws. And the year after Justice Brown issued her opinion, the *San Francisco Chronicle* published the editorial I mentioned earlier, praising Justice Brown as well as her colleagues, and supporting her retention in the 1998 elections.

Mr. Chairman, I am deeply concerned about how hostile and destructive the Senate's judicial confirmation process has become. If this continues for much longer, fine jurists like Justice Brown will stop accepting nominations to the federal bench – and all Americans will lose as a result. Senators should vote their conscience on every judicial nominee, of course. But most of all, Senators should vote – and they should vote on the basis of reasonable criteria and the merits of each nominee, and not on the basis of special interest group politics or other irrelevant and divisive criteria. I hope that this committee, and this Senate, will confirm this exceptional judicial nominee, Justice Janice Rogers Brown.

Thank you, Mr. Chairman.

Sen. Cornyn chairs the subcommittee on the Constitution, Civil Rights & Property Rights, and is the only former judge on the committee. He served previously as Texas Attorney General, Texas Supreme Court Justice, and Bexar County District Judge.

-30-

Californians for Brown

California voters during the 1998 elections

	Yes %
Justice Janice Brown	76
Chief Justice Ronald George	75
Justice Stanley Mosk	70
Justice Ming Chin	69

San Francisco Chronicle (11/5/1998) (100% of precincts reporting)

Californians for Brown

San Francisco Chronicle

"It takes judges with a deep respect for the law, and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the 'right' outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary on November 3 by retaining . . . Supreme Court justices who . . . have all demonstrated a commitment to sound decision making. . . . If you don't like a law -- or if it conflicts with the state constitution -- change it. The judiciary's job is to make sure that laws are applied fairly. . . . Brown [has] approached this duty with diligence and integrity. [She] should be retained."

San Francisco Chronicle editorial, *Vote for Independent Court* (9/27/1998)

California Law on Racial Preferences

Proposition 209 and the California State Constitution (Article I, Section 31)

"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

U.S. Supreme Court

"[I]n California, . . . racial preferences in admissions are prohibited by state law."

Grutter v. Bollinger, 123 S.Ct. 2325, 2346 (2003) (Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer)

California Law on Racial Preferences

California Supreme Court: *Hi-Voltage Wire Works, Inc. v. City of San Jose* (Cal. 2000)

- Justice Brown authored the majority opinion for a unanimous California Supreme Court to enforce the clear terms of Proposition 209.
- Every single judge involved in that case – at the trial, appellate, and state Supreme Court – agreed with her that the challenged San Jose program violated the will of the voters as expressed in Proposition 209.
- Then-Justice Stanley Mosk – the court's "leading liberal" according to the SF Chronicle – joined Justice Brown and wrote a concurring opinion stating that "I agree with the court in the substance of its analysis" and, if anything, "I would go farther than it does."
- Justice Brown: "Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." The U.S. Constitution "does not preclude race-conscious programs" to remedy past discrimination.

California Law on Parental Consent

California Supreme Court: *American Academy of Pediatrics v. Lungren* (Cal. 1997)

- The California Legislature enacted a common-sense law requiring parental consent before a minor can obtain an abortion.
- California Supreme Court issued a divided 4-3 opinion invalidating that law.
- Justice Brown would have upheld the law. She was not alone – then-Justice Stanley Mosk – the court's "leading liberal" according to the SF Chronicle – also voted to uphold the law.

The American people

82% of Americans support parental consent laws.

Los Angeles Times poll (6/18/2000)

California Law on Parental Consent

San Francisco Chronicle: After the 1997 decision

"It takes judges with a deep respect for the law, and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the 'right' outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary on November 3 by retaining . . . Supreme Court justices who . . . have all demonstrated a commitment to sound decision making. . . . If you don't like a law -- or if it conflicts with the state constitution -- change it. The judiciary's job is to make sure that laws are applied fairly. . . . Brown [has] approached this duty with diligence and integrity."

San Francisco Chronicle editorial, *Vote for Independent Court* (9/27/1998)

Superior Court of California,
County of Sacramento

David De Alba
Judge

October 20, 2003

SERVED BY FACSIMILE AND MAILED

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D. C. 20510

RE: Janice R. Brown's
Nomination to the United States Court of Appeal
District of Columbia

Dear Senator Feinstein,

It is with great pleasure that I write in support of Janice Brown's nomination to serve as a member of the United States Court of Appeal for the District of Columbia. I have known Justice Brown for approximately twenty-four years. We were colleagues as young lawyers in the Office of the Attorney General for the State of California. Indeed, we worked closely together as members of the same team in the Criminal Division of that office for several years. Since our days as deputy attorneys general, I have always admired Justice Brown's dedication to the law and her work ethic.

Since our days as young prosecutors, I have observed and admired Justice Brown's development as a lawyer and as a judge. I have appeared before her during her tenure as a member of the Court of Appeal and as a member of the California Supreme Court. Of course, like many others, I have read many of her published opinions. Even though I may not always agree with her opinions, I have always found them to be scholarly, thorough in their analysis and well reasoned. She has grown immensely as a jurist and today is one of the most productive members of our state Supreme Court. No one can criticize her fidelity to the law and her work. She is a tireless worker and cares deeply about her convictions.

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(916) 874-5564 • FAX (916) 874-8229

The most impressive qualities about Justice Brown are her honesty and humility. She is never boastful or arrogant despite her success and position. She is a kind and humble person who is always gracious to people irrespective of their title or position in life.

I am aware that many will be critical of philosophical positions she has espoused in her various opinions. However, I believe that she deserves confirmation and would serve with distinction. She is imminently qualified to sit as a judge of the Court of Appeals for the District of Columbia. Thank you for considering my views.

Sincerely yours,

David De Alba
Judge of the Superior Court
Sacramento County, California

cc: Justice Janice R. Brown

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Statement of Senator Richard J. Durbin

on

California Supreme Court Justice Janice Rogers Brown
Nominee to the U.S. Court of Appeals for the District of Columbia Circuit

before the

Senate Judiciary Committee

Wednesday, October 22, 2003

I would like to begin by putting this nomination in some historical context. Justice Brown was nominated to fill the eleventh seat on the D.C. Circuit, a court that has 12 authorized judgeships. But when President Clinton tried to appoint an eleventh and twelfth judge on that court – Elena Kagan and Allen Snyder – the then-Republican Chairman denied them a vote and a hearing.

In other words, Justice Brown has been nominated to fill a seat that should never have been vacant.

Senate Republicans argued that the D.C. Circuit was fully operational at 10 judges and that the D.C. Circuit's workload did not justify any additional judges. Since 1997, the D.C. Circuit's workload actually decreased by 27%, according to the Administrative Office of the U.S. Courts.

I also want to note the oddity of President Bush going 3000 miles away from Washington D.C. to pick a judge for the D.C. Circuit. Does he really think there are no qualified judges among the 71,000 members of the District of Columbia Bar to serve on this important court?

I am told that it is rare for a President to appoint someone to the D.C. Circuit who does not practice in Washington and is unfamiliar with federal agencies. I don't think there is any sitting member of the D.C. Circuit right now who had zero background in D.C. or with federal agencies. In Justice Brown, we have such a nominee.

The D.C. Circuit is a critically important court, second only to the U.S. Supreme Court in its impact on law and policy in America. It is also a unique appellate court. Congress has granted it exclusive jurisdiction over certain issues, and half the court's caseload consists of appeals from regulations or decisions by federal agencies. For example, regulations adopted under the Clear Air Act by the EPA, labor-management decisions of the NLRB, rules propounded by OSHA, and many other administrative matters that affect Americans across the country, typically end up on the courthouse steps of the D.C. Circuit.

I also want to make a final point before discussing Justice Brown. Although Senators on this side of the dais will raise numerous concerns about her nomination, it should not be forgotten that the Senate has confirmed the vast majority of President Bush's judicial nominees. To date we have confirmed 165 nominees, and held up just 3. The score is 165-3.

Republicans express outrage that 3 of Bush's nominees have not received an "up or down" vote on the Senate Floor, yet 63 of President Clinton's judicial nominees never received an "up or down" vote in the Judiciary Committee. The 63 were denied either a hearing, a vote, or both – they were victims of quiet filibusters in the Judiciary Committee. These 63 represent 20% of all President Clinton's judicial nominees. By contrast, the 3 nominees stopped by this Senate represent just 2% of Bush's judicial nominees.

Our federal judiciary is conservative and becoming more so. On the U.S. Supreme Court, 7 of the 9 Justices were appointed by Republican presidents. On our U.S. Courts of Appeal – the courts of last resort for the vast majority of litigants – 9 out of the nation's 13 circuit courts today have a majority of Republican appointees. The D.C. Circuit is among them. Democrats have a majority on only 2 courts of appeal, and 2 are equally divided.

Now let me say a word about today's nominee. Justice Brown, your life story and achievements are certainly amazing, and I congratulate you on your appointment. To your supporters, you are an eloquent and passionate voice of conservative values. In both your opinions and your speeches, you speak with great flair and intellect.

Others, however, tell a different story. According to them, you are a results-oriented judicial activist who writes her opinions to comport with her politics. You are a frequent dissenter in the rightward direction – which is quite a feat given that you serve on a court that is made up of 6 Republican-appointed judges and just 1 Democratic-appointed judge.

I have conducted my own independent assessment of your record, and I must confess to deep concerns.

Justice Brown, a few years ago you told an audience that "since I have been making a career out of being the lone dissenter, I really didn't think anyone reads this stuff." Well we do. You are the lone dissenter in a great many cases involving the rights of discrimination victims, consumers, and workers. In case after case, you come down on the side of denying rights and remedies to the downtrodden and disadvantaged. Oftentimes you ignore established precedent to get there.

In a housing discrimination case, you were the only member of your court to find that the California Fair Employment and Housing Commission did not have the authority to award damages to housing discrimination victims.

In a disability discrimination case, you were the only member of your court to conclude that due to a technical reading of the law, the victim was not entitled to raise past instances of discrimination that occurred.

You are the only member of your court to conclude that age discrimination victims should not have the right to sue under common law – an interpretation that is directly contrary to the will of the California legislature.

You were the only member of the California Supreme Court who dissented in a case involving the sale of cigarettes to minors. All the other justices ruled that a corporation can, on behalf of the public, sue a retailer that illegally sells cigarettes to minors under the state's unfair competition law.

You were the only member of the California Supreme Court who would strike down a San Francisco law that provided housing assistance to displaced low-income, elderly, and disabled people.

You were the only member of the California Supreme Court who concluded that there was nothing improper about requiring a criminal defendant to wear a 50,000-volt "stun belt" at his trial.

You were the only member of the California Supreme Court who voted to overturn the rape conviction of a 17-year-old girl because you felt that the victim gave mixed messages to the rapist.

You were the only member of the California Supreme Court who dissented in two rulings that permitted counties to ban guns or gun sales on fairgrounds and other public property.

As an appellate court judge, you ruled that paint companies could use Proposition 13 as a shield to avoid paying fees per the Childhood Lead Poisoning Prevention Act – a critical law used to evaluate, screen, and provide medical treatment for children at risk for lead poisoning. The California Supreme Court reversed you unanimously.

Justice Brown, in many of these cases, there were clear precedents that you chose to ignore simply because you disagreed with them.

In other important areas, Justice Brown, you were joined by a few of your colleagues – but again, often in dissent.

In the area of employment discrimination, you have concluded that victims who are repeatedly harassed in the workplace must take a back seat to the free speech rights of their harassers. Your supporters point to this case as an example of your commitment to civil liberties. I see this case as your commitment to ignoring established U.S. Supreme Court precedent in this vital area of anti-discrimination law.

You have also staked out a disturbing position on the sensitive issue of affirmative action. In the case Hi-Voltage Wire Works v. City of San Jose, you refer to affirmative action as "entitlement based on group representation" and you equate affirmative action with Jim Crow laws.

The Chief Justice of your court called your analysis "unnecessary and inappropriate" and "a serious distortion of history." In another civil rights case, a different colleague accused you of "judicial lawmaking."

Justice Brown, your record is that of a conservative judicial activist, plain and simple. You frequently dismiss judicial precedent and stare decisis when they do not comport with your ideology.

The Senate questionnaire that is sent to judicial nominees asks for your comments on judicial activism, and this is what you said: "Judicial integrity requires a conscious

effort to subordinate any personal beliefs which conflict with the proper discharge of judicial duties." Justice Brown, I don't believe you follow your own advice.

The ABA has given you a partial rating of Not Qualified – this is the lowest rating given thus far to any of President Bush's circuit court nominees. The ABA does not provide explanations for their ratings unless a nominee is rated fully Not Qualified.

However, when the California State Bar Commission evaluated you in 1996 and gave you a majority rating of Not Qualified for the California Supreme Court, the Commission stated that its rating was based in part on your "tendency to interject her political and philosophical views into her opinions."

I am concerned not only with the extreme views you have taken but also about the way in which you express them. Many of your court opinions and speeches are troubling.

In your solo dissent in the case involving cigarette sales to minors, you wrote: "The result is so exquisitely ridiculous, it would confound Kafka." You also wrote that "the majority chooses to speed us along the path to perdition." In an unfair competition law case in which you were the sole dissent, you wrote: "I would put this sham lawsuit out of its misery."

In your solo dissent in the stun belt case, you lambasted the opinion of your colleagues and accused them of "rushing to judgment after conducting an embarrassing Google.com search for information outside the record." In your lone dissent in a discrimination case, you wrote that the majority "does violence to both the statute of limitations and to the entire statutory scheme."

According to press reports, you and the Chief Justice of your court, a fellow Republican, are at such loggerheads that you communicate only by memo.

Lastly, let me talk for a minute about the world according to Janice Rogers Brown. It is a world, in my opinion, that is outside of mainstream thought in America. For example, to Justice Brown, any attempt by the government to protect victims or consumers is merely a sop to special interests. You have criticized politicians for "handing out new rights like lollipops in the dentist's office."

You delivered a speech in which you said: "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract."

In the case involving a San Francisco housing law that helped the low-income and the elderly, you wrote: "Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government."

Your dissent in the cigarettes case accused the rest of your colleagues of creating "a standardless, limitless, attorney fees machine."

You criticized California's anti-discrimination agency, writing in a dissent: "Not only are administrative agencies not immune to political influences, they are subject to capture by a specialized constituency. Indeed, an agency often comes into existence at the behest of a particular group – the result of a bargain between interest groups and lawmakers."

In addition, you have made inflammatory remarks about supreme courts, and you specifically named your own court as an example. You said that such courts "seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless photo-op compassion and political correctness."

You have also accused courts of "constitutionalizing everything possible" and "taking a few words which are in the Constitution like 'due process' and 'equal protection' and imbuing them with elaborate and highly implausible etymologies." You have complained that in the last 30 years the Constitution "has been demoted to the status of a bad chain novel."

I am troubled not only about your hostility to our nation's Constitutional tradition but also your hostility to the federal government, particularly your remarks equating government to slavery. You have said: "[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate."

You have also said publicly: "Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies." And you have described the year 1937 – the year in which much of President Franklin Roosevelt's New Deal legislation took effect – as "the triumph of our own socialist revolution."

Given your hostility to the federal government and its role in our lives, your nomination to the D.C. Circuit is ironic – this court is the federal government's principal regulatory overseer. For all of these reasons, I am skeptical about this nomination.

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October 21, 2003

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

I write in support of President Bush's nomination of Justice Janice Rodgers Brown to the United States Court of Appeals for the District of Columbia Circuit.

I am a practicing attorney in California, specializing in civil appeals. I teach appellate procedure as an adjunct professor at the University of California, Hastings College of the Law, and am principal co-author of a treatise on California appellate practice. I have filed briefs and presented oral argument before the California Supreme Court in numerous cases during Justice Brown's tenure at that court, as both counsel of record and counsel for amici curiae.

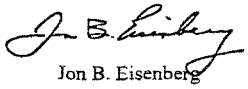
Among those cases is *High-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537 (2000), where I submitted an amicus curiae brief urging the court to uphold the "affirmative action" program at issue in that case.

I was deeply disappointed with Justice Brown's *High-Voltage* decision, which rejected my position. That does not, however, change my opinion of her qualifications for appointment to the United States Court of Appeals. In every case where I appeared before her as a practicing attorney, as well as in her decisions generally, which I have closely studied in my roles as law professor and author, I have found her to be a talented, sincere, and thoroughly dedicated appellate judge of the highest integrity – and, by the way, a marvelous writer. I respectfully disagree with those of my political soulmates who view our

disapproval of her political philosophy as grounds for opposing her confirmation, for I believe that an appointee's judicial qualifications, not political philosophy, should be the focus of the confirmation process.

I therefore urge the Senate Judiciary Committee and the full Senate to approve Justice Brown's nomination.

Very truly yours,



Jon B. Eisenberg

JBE:mmg

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

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October 20, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Ref: Recommendation
Justice Janice Rogers Brown

Dear Chairman Hatch:

It is with profound respect that I offer my strongest personal recommendation of California Supreme Court Justice Janice Rogers Brown to the United States Court of Appeals in Washington D.C.

I know Janice personally, professionally, and we currently serve together on the Board of Regents of the University of Pacific. The qualifications that bring her to the attention of the United States Senate are obvious: extremely bright, well educated, scholarly, sound judgment, and the author of crisp, well reasoned opinions that are focused and insightful.

Janice is a student of history and thoroughly understands the cultural, racial, ethnic and dynamic social mores that make our country strong. She also clearly understands the rule of law, the importance of precedent and the care with which matters of first impression to the Court must be decided.

In my humble opinion, Janice is exceptionally well qualified for the United States Court of Appeal. Thank you for considering my recommendation. Please contact me if further information is desired.

Sincerely,

Thomas W Eres

Thomas W. Eres, ESQ.

TWE/ro

cc: Senator Diane Feinstein
Senator Barbara Boxer
Office of Legal Policy

Superior Court of California,

County of Sacramento

Patricia C. Esgr
Superior Court Jud
Department 1

October 20, 2003

Honorable Orrin Hatch
United States Senate
Chair, Senate Judiciary Committee
Attention: Ms. Rena Comisac (via FAX)

Re: **Hon. Janice Rogers Brown**
Circuit Justice for the District of Columbia - Nomination
(Full Hearing, October 22, 2003, 10:00 a.m., Dirksen Rm. 226)

Dear Senator Hatch:

I urge the Senate Judiciary Committee to approve the appointment of the Honorable Janice Rogers Brown, currently Associate Justice of the California Supreme Court, to the position of United States Circuit Justice for the District of Columbia.

Justice Brown's brilliant legal scholarship and powerful intellect are, I believe, established by the written record before your committee. I would like to address her outstanding personal characteristics, evidencing her excellent judicial temperament.

I have known Justice Brown for over twenty years. She is a good friend and a former colleague in the California Attorney General's Office. I also served as her Chief Deputy in the Legal Affairs Unit of Governor Pete Wilson's office. I have personally observed her deep integrity and passion for justice. She has devoted her life to public service and the public good. She is a woman of humility who yet possesses a fierce sense of history and patriotism.

Justice Brown is a woman of calm deliberation with a self-deprecating sense of humor. Raised in a strict home in the segregated South she is unfailingly courteous and thoughtful of others. Her experience of segregation and her admiration for the lawyers who fought against it formed her early love and respect for the law. It is that background that informs her carefully worded and expressed opinions.

I commend to you a woman who has lived the struggles of her race and emerged a compassionate and strong individual. She will serve as a bastion of justice in an uncertain world. I urge your approval, and that of the Committee, for this outstanding nominee of the President of the United States to the federal bench

Sincerely,

Patricia C. Esgro

Patricia C. Esgro
Judge of the Superior Court

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

October 22, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch, Chairman
Before the Committee on the Judiciary
Hearing on the Nomination of

JANICE ROGERS BROWN TO BE
UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

This morning the Committee considers the nomination of California Supreme Court Justice Janice Rogers Brown to be United States Circuit Judge for the District of Columbia Circuit.

The last nominee considered for this court – Miguel Estrada – was treated shamefully by this Committee. He was badgered for adhering to the Code of Judicial Ethics; his record was distorted; and he was attacked for withholding information that he could not provide. After such obstructionist tactics, this impressive Hispanic immigrant became the first appellate court nominee in history to be defeated by a filibuster. Many are proud of that fact, but I think it was a sad day for this institution.

Last month, the Washington Post observed that the judicial confirmation process is "steadily degrading." I believe that the nomination before us offers another opportunity—indeed, an obligation—to change that trend.

The fight over judicial appointments is about more than the dispute of moment. It is about who should govern: The people through their elected representatives, or unelected and largely unaccountable judges. President Bush described his judicial nomination standard this way: "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench.... My judicial nominees will know the difference."

The powerful liberal groups fighting those nominees also know the difference, but take a different view. They want to win and, since their interests often lose when legislators legislate, they want judges to do it instead. These groups' strategy is like cooking spaghetti: They throw everything at a nominee and, when something sticks, the nominee is done.

Make no mistake – the single most important issue for these groups is abortion. Merely a suspicion that nominees may harbor personal pro-life beliefs is sometimes enough to prevent confirmation. Sworn testimony that they will follow the law despite their personal beliefs is not

enough. Entire careers demonstrating a commitment to the rule of law over their personal beliefs is not enough. Their personal beliefs alone are deemed disqualifying.

I do not know Justice Brown's personal view on abortion and, frankly, I do not care. Her decisions as a jurist are guided by the law, not her personal beliefs, which is one of the most important marks of a good judge. Justice Brown, however, did one thing liberal interest groups cannot forgive: She issued an opinion that would have found constitutional California's parental consent law. I expect we will hear a great deal about this case today, and it explains why, according to yesterday's *Sacramento Bee*, liberal groups plan to "bombard . . . senators with 150,000 pieces of opposition mail from abortion rights backers."

But Justice Brown faces a second hurdle beyond the abortion litmus test that all nominees face. She is a conservative African-American woman, and for some that alone disqualifies her nomination to the D.C. Circuit, widely considered a stepping stone to the United States Supreme Court.

Now, I want to make clear that I am not referring to any of my colleagues here on the Committee. But let me show you what I AM talking about – an example of how low Justice Brown's attackers will sink to smear a qualified African-American jurist who doesn't parrot their ideology.

I hope that everyone here considers this cartoon offensive and despicable; I certainly do. It appeared on a Web site called BlackCommentator.com. Unfortunately, some of Justice Brown's opponents appear to share similar sentiments. I was deeply disappointed when, during a recent press conference, the all-Democrat Congressional Black Caucus applauded when one of its members said: "This Bush nominee has such an atrocious civil rights record that Clarence Thomas would look like Thurgood Marshall in comparison." To some of her opponents, Justice Brown isn't even qualified to share the stage with the despised Justice Thomas.

Some of Justice Brown's other opponents will pull isolated bits and pieces from Justice Brown's rich and textured background in an attempt to discredit and belittle her accomplishments. Some may simply ignore any decisions they think would reflect positively on Justice Brown's judicial record. But I hope this hearing will be fair and open-minded. We owe Justice Brown no less.

We will hear more about Justice Brown's credentials and legal career, but let me briefly highlight a few facts. Justice Brown grew up the daughter of sharecroppers in segregated, rural Alabama. As a single mother, she worked her way through Cal State Sacramento and UCLA law school. She has spent nearly a quarter-century in public service, including nearly a decade on different levels of the California appellate bench. In 1996, she became the first African American woman to sit on the California Supreme Court. She was retained with **76%** of the vote in her last election. Let me repeat that – **76%** of the vote. I suspect that any Member of this Committee would be pleased to garner 76% of the vote. This overwhelming vote of confidence by the people of California reflects that Justice Brown is hardly out of the mainstream – a conclusion buttressed by the fact that last year she wrote more majority opinions than any other justice.

Those who know and have worked with Justice Brown confirm that she is what a judge is supposed to be. In a letter dated October 16, 2003, a dozen of her former judicial colleagues, both Democrats and Republicans, wrote: "We know that she is a jurist who applies the law without favor, without bias, and with an even hand."

A bipartisan group of professors at California law schools wrote: "A fair examination of her work reveals that Justice Brown resolves matters as individual *cases*. Not generalized or abstract *causes*." They praise her for her "open-minded and thorough appraisal of legal argumentation – even when her personal views may conflict with those arguments." What more could we ask for in a judge?

Not that this matters to the powerful political interests attacking Justice Brown. One report, for example, quotes prominently from an op-ed piece criticizing her opinion in an affirmative action case. To my surprise, the op-ed's author, Berkeley law professor Stephen Barnett, was one of the signatories on the law professors' letter endorsing Justice Brown's nomination.

The powerful political interests opposing President Bush's judicial nominations want judges who will advance their narrow, leftist ideology. To them, results matter more than the law. That is the wrong standard. I hope the better standard prevails, and that the downward slide of the confirmation process can be reversed. Let's seize this opportunity and make that happen today.

# # #

Susan Horst
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October 16, 2003

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Facsimile Number: (202) 228-1698

Re: Nomination of California Supreme Court Justice Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit

Dear Chairman Hatch:

I write to add one more voice of enthusiastic support for confirmation of the Honorable Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit.

I have served as a staff attorney for the Court of Appeal, First Appellate District in California since 1980, and so regularly deal with California Supreme Court opinions in the course of my research. Although I have not had the privilege of working for Justice Brown, I long ago became her fan.

On Tuesday, October 14, 2003, the local legal newspaper, The Recorder, reported that "women's groups, black groups and pro-choice groups" were "all gunning for" Justice Brown. I am a woman, pro-choice, and pretty far-left as far as some of my family members and friends are concerned. If women's groups, black groups and pro-choice groups in fact are gunning for Justice Brown, I urge them and you to carefully read her opinions -- opinions sometimes not written in the more traditional WASP style of legal prose, but always scholarly, clear, compelling, eloquent and courageous. Justice Brown brings to the law books, and so to the public eye, a focus on the real world impact of the law on the people and the society that it orders, and she does it from a life perspective that is present on very few courts.

For example, consider the following passage from Justice Brown's dissent in *People v. McKay* (2002) 27 Cal.4th 601, 641-642:

"In the spring of 1963, civil rights protests in Birmingham united this country in a new way. Seeing peaceful protesters jabbed with cattle prods, held at bay by snarling police dogs, and flattened by powerful streams of water from fire hoses galvanized the nation. Without being constitutional scholars, we understood violence, coercion, and oppression. We understood what constitutional limits are designed to restrain. We reclaimed our constitutional aspirations. What is happening now is more subtle, more diffuse, and less visible, but it is only a difference in degree. If harm is still being done to people because they are black, or brown, or poor, the oppression is not lessened by the absence of television cameras.

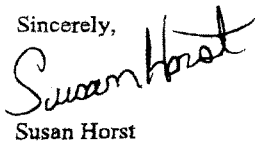
"I do not know Mr. McKay's ethnic background. One thing I would bet on: he was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes--places where no resident would be arrested for riding the 'wrong way' on a bicycle whether he had his driver's license or not."

Thankfully, neat, political labels don't fit Justice Brown. But an accurate review and assessment of her character and her work will compel only one conclusion: a yes vote for her confirmation. Any who don't want to make the effort to, or who have forgotten how to, get politics out of this process would do well to read another passage from *People v. McKay* -- one I always keep at my desk.

"To dismiss people who have suffered real constitutional harms with remedies that are illusory or nonexistent allows courts to be complacent about bigotry while claiming compassion for its victims. . . . If our hands really are tied, it behooves us to gnaw through the ropes." (*People v. McKay* (2002) 27 Cal.4th 601, 641 (dis. opn. of Brown, J.).)

Justice Brown should be promptly confirmed.

Sincerely,



Susan Horst

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
Facsimile Number: (202) 224-9516

United States Department of Justice
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September 29, 2003

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Justice Janice Rodgers Brown Nomination

Dear Chairman Hatch:

This letter is sent in support of President Bush's nomination of Justice Janice Rodgers Brown to the District of Columbia Court of Appeal.

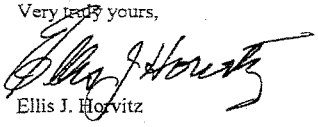
Let me first introduce myself. I have been practicing law in California for more than fifty years, almost all of that time as a civil appellate specialist. Our firm of more than thirty lawyers specializes in civil appeals. We appear regularly in the California Court of Appeal and in the California Supreme Court.

I have followed Justice Brown's career since she was appointed to the California Supreme Court. Our firm has appeared before her on many occasions. I have appeared before her on several occasions. We have also studied her opinions, majority, (concurring and dissenting), in many civil cases.

In my opinion, Justice Brown posses those qualities an appellate justice should have. She is extremely intelligent, very conscientious and hard working, refreshingly articulate, and possessing great common sense and integrity. She is courteous and gracious to the litigants and counsel who appear before her.

I hope your Committee will approve her nomination expeditiously. The President has made an excellent choice.

Very truly yours,



Ellis J. Horvitz

EJH/jgp

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

Court of Appeal
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

October 21, 2003

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

This letter is written in support of the confirmation of California Supreme Court Associate Justice Janice Rogers Brown as a judge of the United States Court of Appeals for the District of Columbia Circuit. We, the undersigned, are justices of the California Court of Appeal. As intermediate appellate court justices, we are thoroughly familiar with Justice Brown's opinions.

In her role as a justice of the California Supreme Court, Justice Brown has served California well. She has written many important decisions establishing and reaffirming important points of law. Her opinions reflect her belief in the doctrine of stare decisis and are noteworthy for their clarity and conciseness. She sets forth her views logically and intelligently. We are each personally acquainted with Justice Brown. We know her to be intelligent, thoughtful, well-read, well-rounded, insightful, and personable.

We believe she will be an excellent judge of the United States Court of Appeals. We request that you take our views into consideration during the confirmation proceedings. If you desire any further information, any of us would be pleased to provide it.

Very truly yours,

Margaret M. Grignon

MARGARET M. GRIGNON, Associate Justice

Orville A. Armstrong

ORVILLE A. ARMSTRONG, Associate Justice

Honorable Orrin G. Hatch
Page Two
October 21, 2003

PATTI S. KITCHING, Associate Justice

RICHARD M. MOSK, Associate Justice

ROGER W. BOREN, Presiding Justice

MICHAEL A. NOTT, Associate Justice

H. WALTER CROSKEY, Associate Justice

MIRIAM A. VOGEL, Associate Justice

DANIEL A. CURRY, Associate Justice

J. GARY HASTINGS, Associate Justice

PAUL A. TURNER, Presiding Justice

CHARLES S. VOGEL, Presiding Justice

yd

cc: Honorable Patrick J. Leahy, United States Senate
Office of Legal Policy

The Superior Court

STATE OF CALIFORNIA
COUNTY OF EL DORADO
495 MAIN STREET
PLACERVILLE, CALIFORNIA 95667
(530) 621-6459

October 20, 2003

Senator Orrin Hatch
U.S. Senate Judiciary Committee
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch,

I have been informed that the Senate Judiciary Committee will soon hold hearings on the President's nomination of the Honorable Janice Rogers Brown to a seat on the Court of Appeals for the District of Columbia Circuit. I write to you to offer my input on her qualifications.

First, my background, so that you will know how I can speak to her qualifications. I have been a Superior Court Judge of El Dorado County in California for over fourteen years. Prior to that, I was a Deputy Attorney General in the Sacramento office of the California Attorney General for over twenty-one years. It was during my time as a lawyer that I first met Janice Brown.

I was a supervising attorney and was on the selection committee when Janice Brown interviewed for a job. I was impressed by her from the start. When she was selected, I requested that she be placed on my team in the criminal division. Over the course of the next several years, I supervised all of her legal work, which usually meant reviewing the legal briefs she prepared in criminal cases for presentation to state and federal courts.

Ms. Brown did exceptional legal work. Her briefs were well-researched and persuasively argued. More importantly, she had a unique and special writing style, which made her briefs a special attraction and model for other deputies in the criminal division. In fact, I can recall that at least one court of appeal quoted some of her memorable prose in the final legal opinion in one case.

During this time, I also had the opportunity to get to know Janice Brown as a person. I learned that she was a person from humble beginnings who had the intelligence and fortitude to rise above all obstacles and excel in life. I also learned that she was a person of sound judgment, common sense, compassion, and the highest level of integrity. She also had a work ethic second to none.

I have followed her later legal career in the civil division of the Attorney General's Office, legal counsel to Governor Wilson, court of appeal justice, and as a jurist on the California Supreme Court. I am not surprised that she has excelled in all that she has done.

Most people tell me that the qualities they expect most from a judge are: intelligence, good judgment, an open mind, compassion, a sense of fairness, and integrity. Janice Brown has all of these qualities and more.

In tracking her legal opinions as an appellate court justice, I note that they are distinguished by the same scholarship, thoroughness, intelligence, and unique literary style that makes her stand out from most others. She has a brilliant legal mind. She cares intensely about the legal and social values that each case presents. She is open to being persuaded on any legal point. She is an independent thinker. Noone could ask more from any judge.

Having been in a position to have read and evaluated the legal opinions of a countless number of judges over my legal career, I can truly say that Janice Brown is one of those rare individuals who come along in life and set a standard for all of us to admire. She is in the same category as our greatest jurists. She would be an invaluable addition to the federal judiciary.

If I can supply any other information or be of assistance, you can contact me at (530) 621-6464.

Sincerely,

EDDIE T. KELLER
Judge of the Superior Court

P.O. Box 2854
Little Rock AR 72203-2854
(501) 664-9461
October 21, 2003

VIA FAX AND MAIL
Fax No. 202-228-1698
Fax No. 202-224-9516

Honorable Orrin G. Hatch
Chairman, Judiciary Committee
U.S. Senate
224 Dirksen Senate Office Bldg
Washington DC 20510

Re: Honorable Janice Rogers Brown - Justice, California S.Ct.
Nominee: U.S. Court of Appeals for the D.C. Circuit

Dear Senator Hatch:

I support the President's nomination of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. I have read extensively of Justice Brown, in today's papers, in some on-line news reports, and in her public materials from California (i.e., campaign information and previous judicial decisions). The President has nominated an excellent Judge. She will be a credit to her Country, her President, and all of the Senators who support her nomination.

I will also be working hard to make sure that the Senators from my own State of Arkansas, Hon. Blanche Lincoln and Hon. Mark Pryor, support her as well. Justice Brown's nomination will affect every person, business, and organization that has any interest in matters before the D.C. Circuit Court of Appeals, including my fellow Arkansans. This nomination is important here.

Thank you for bring her nomination up for a hearing and a vote before the Judiciary Committee. I wish you all well and believe that you have an excellent nominee.

Yours very truly,

A. John Kelly

Mr. A. John Kelly

AJK/fho

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006
Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

WADE J. HENDERSON
Executive Director

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American Association of University Women
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Service Employees International Union
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National Education Association
Richard Womack
AFL-CIO
Patrisha Wright
Disability Rights Education and Defense Fund, Inc.
Raul Yzaguirre
National Council of La Raza
COMPLIANCE ENFORCEMENT COMMITTEE
Karen K. Narasaki
National Asian Pacific American Legal Consortium

(*Deceased)

October 21, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, with more than 180 member organizations, we write to express opposition to the confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit. Brown's record as a California Supreme Court justice demonstrates a strong, persistent, and disturbing hostility toward affirmative action, civil rights, the rights of individuals with disabilities, workers' rights, and the fairness in the criminal justice system.

Janice Rogers Brown has often been the lone justice to dissent on the California Supreme Court, illustrating that her judicial philosophy is outside the mainstream. Not only does she show an inability to dispassionately review cases, but her opinions are based on her extremist ideology and also ignore judicial precedent, even that set by the United States Supreme Court.

Brown's opinions on civil rights and discrimination cases are perhaps the most troubling part of her record, revealing a blatant disregard for judicial precedent and a desire to limit the ability of victims of discrimination to sue for redress. In *Aguilar v. Avis Rent A Car Systems, Inc.* 980 P.2d 846 (Cal. 1999), the trial court found that the employer had violated the California Fair Housing and Employment Act by creating a hostile work environment through the use of racial slurs directed at Latino employees. On appeal, the California Supreme Court upheld the lower court's remedy that prohibited the use of racial slurs in the future, holding that prevention of such speech was not a violation of the employer's First Amendment rights. Brown dissented, arguing that the First Amendment protects the use of racial slurs in the workplace, even when it becomes illegal race discrimination. Brown's dissent virtually ignored several Supreme Court precedents. Her opinion also went so far as to suggest that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, violates the First Amendment and is therefore unconstitutional.

Janice Rogers Brown's lone dissent in *Konig v. Fair Employment and Housing Commission*, 50 P. 3d 718 (Cal. 2002), would have seriously limited the redress options available to victims of housing discrimination. Brown found that the state Department of Fair Employment and Housing Commission, unlike the courts, did not have the right to award damages for emotional distress. Further, in *Peatros v. Bank of America NT&SA*, 990 P.2d 539 (Cal. 2000), Brown argued in dissent that the National Banking Act of 1864 pre-empted California's fair employment law, thus preventing a bank employee from being able to file a lawsuit for race and age discrimination in state court. Justice Brown made this argument despite the fact that other more recent federal laws, such as the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, would clearly supercede the 135-year-old banking law on this question.

Brown has also expressed a desire to limit legal recourse for people with disabilities who are victims of discrimination. In *Richards v. CH2M Hill, Inc.*, 29 P.3d 175 (Cal. 2001), an employee sued her employer for disability discrimination based on her employer's refusal to reasonably accommodate her disability over a five-year period. The state trial court awarded the plaintiff emotional distress and economic damages. On appeal, the employer argued that the statute of limitations had run on the allegations that were more than a year old at the time the case was filed, and thus liability should be greatly reduced. In its majority decision upholding the trial court's verdict, the California Supreme Court adopted a version of the "continuing violation doctrine," under which there may be liability for acts occurring outside the statute of limitations if they are sufficiently related to acts occurring within the prescribed time period. Brown's lone dissent argued against use of the "continuing violation doctrine." Rather, she asserted her view that plaintiffs should have to file separate lawsuits, subject to separate statutes of limitations, for each act of discrimination.

In *City of Moopark v. Superior Court*, 959 P.2d 752 (Cal. 1998), Brown argued in dissent against allowing a disabled city employee to bring a cause of action under the state common law prohibiting employers from firing workers in violation of well-established, substantial, and fundamental public policies, such as the policy against firing people because they have a disability. As the author of the only dissent in *Stevenson v. Superior Court*, 959 P.2d 752 (Cal. 1998), Brown argued that the plaintiff had failed to show that public policy against age discrimination "inures to the benefit of the public" or is "fundamental and substantial." She further stated, "Discrimination based on age is not, however, like race and sex discrimination. It does not mark its victim with a 'stigma of inferiority and second class citizenship' (citation omitted); it is the unavoidable consequence of that universal leveler: time."

Brown has also shown hostility toward affirmative action. Her majority opinion in *Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1068 (Cal. 2000) has made it nearly impossible to have a meaningful affirmative action program in California. Justice Brown's opinion went so far as to also prohibit cities from requiring their contractors to reach out to subcontractor businesses owned by minorities and women. Her opinion also ignored legal precedent set by the U.S. Supreme Court. Despite consistent Court rulings that, under the right circumstances, affirmative action is permissible under federal law, Justice Brown stated that affirmative action was at odds with Title VII of the Civil Rights Act of 1964. While some of the result in this case may have been dictated by Proposition 209, California's anti-affirmative action ballot initiative, her opinion clearly misinterpreted Proposition 209 and the intentions of California residents who voted for it. One of Brown's California Supreme Court colleagues, who concurred with the result of the case, wrote that Brown's opinion seriously distorted history and that she was not

correct when she wrote that past decisions in favor of affirmative action were "wrongly decided."

Justice Brown's opinions have also shown great antagonism toward the rights of workers. In *Loder v. City of Glendale*, 927 P.2d 1200 (1997), a case addressing the constitutionality of a drug and alcohol testing program for employees of the City of Glendale, Brown, in dissent, explicitly rejected binding Supreme Court precedent that called for the use of a balancing test to weigh the interest of the government against those of its employees in assessing whether these types of tests were constitutionally permissible. Despite the clear Supreme Court precedent, Brown would have imposed a bright line rule allowing drug tests for all employees. This opinion raises very serious concerns about Brown's commitment to upholding settled law in both the workers' rights context and many other areas of civil rights and liberties.

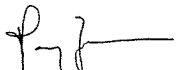
Brown's extreme ideological opinions also extend to the rights of defendants. In *People v. Mar,* 52 P.3d 95 (Cal. 2002), the California Supreme Court overturned the conviction of a defendant who was made to wear a stun belt during his testimony at trial. The belt made the defendant uncomfortable and nervous and may have affected how the jury viewed his testimony. In her dissent arguing to uphold the requirement that the defendant wear the belt, Brown berated her colleagues in a brazenly sarcastic and highly critical way, belittling the court's research into stun belts, accusing her colleagues of "rushing to judgment after conducting an embarrassing Google.com search," and implying that a high school student could have done a better job than the chief justice in preparing the majority ruling. Also, Brown's dissent in *People v. Ray* would have allowed a warrantless search of a person's home as part of law enforcement's "community care taking functions," – an exception to the Fourth Amendment's prohibition against warrantless searches not recognized by the Supreme Court.

When taken together, Justice Brown's extreme positions, her tendency toward ideologically-driven judicial activism, and her disregard for settled law, disqualify her from being elevated to any federal court, much less the D.C. Circuit, with its unique position in the federal justice system. The U.S. Court of Appeals for the D.C. Circuit has a critical role in our federal judicial system and is widely regarded as the second most important court in the United States, after the U.S. Supreme Court. Because of the importance of this court, it is critical that Justice Brown's confirmation be rejected.

For the reasons stated above, we urge the Judiciary Committee to reject Janice Rogers Brown's confirmation to the U.S. Court of Appeals for the D.C. Circuit. If you have any questions or need more information, please contact Nancy Zirkin at 202-263-2880 or Julie Fernandes, LCCR Senior Policy Analyst, at 202-263-2856.

Sincerely,

Wade Henderson
Executive Director



Nancy Zirkin
Deputy Director

cc: Members of the Senate Judiciary Committee

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
On the Nomination of Janice Rogers Brown
Judiciary Committee Hearing
October 22, 2003

Today we are here to consider the nomination of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit. I think it will come as no surprise to anyone here today that this nomination is one that will be closely scrutinized by many Senators on the Judiciary Committee. Justice Brown has a lengthy record both on the bench and off, and her record raises a variety of concerns about her judicial philosophy and fitness for a lifetime appointment to the D.C. Circuit. It is for just this purpose that the Constitution entrusted the appointment and confirmation of lifetime positions on the federal courts to not just one but to two branches of the government, and I know that this Committee takes its responsibility seriously.

Those of us who have exercised our constitutional duty to examine the records of judicial nominees have been barraged by some partisans with shrill and unfounded name-calling because of it. Let us hope that today we will see the end of that ugly game. When we opposed Charles Pickering, we were called anti-Southern. Of course our critics overlooked the fact that 38 percent of the judges we have confirmed are from the South, while Southern states make up about 25 percent of the nation's population. When we opposed Miguel Estrada, we were called anti-Hispanic, even though the record of Democrats supporting Latinos for the federal bench is unmatched in American history. When we opposed Priscilla Owen, they were reduced to branding us as being anti-woman. And, in an especially despicable ploy that had not been seen in the Senate in modern times, when we opposed William Pryor, they stooped to religious McCarthyism, which has no place in the United States Senate, or anywhere else in America.

Today, let us focus on the qualifications and the record of the nominees before us. Let the consideration of nominees not stoop to name-calling. When Senators of good conscience and true purpose ask serious, substantive questions of this nominee, let us stick to the substance and not sink to slurs that they are being anti-African American. Let the right-wing tactic of smears and name-calling subside and disappear. Let us not see the race card dealt from the shameful deck of unfounded charges that some stalwarts of this President's most extreme nominees have come more and more to rely upon as they further inject partisanship and politics into the appointment and consideration of judges to sit on the independent federal judiciary. No matter what position any Senator takes on this nomination, whether it is in support or opposition, I know that it will not be taken because of race. I expect that those who ultimately support Justice Brown, even though

they oppose affirmative action, will do so because they believe she would be even-tempered and even-handed. Those who may ultimately oppose her will do so because they retain serious doubts about her nomination, see her as an ideologue or a judicial activist, or for principled reasons without regard to her race.

Because of her record, several organizations oppose Justice Brown's confirmation, including the nation's premier African-American bar association, the National Bar Association; its State counterpart, the California Association of Black Lawyers; the foremost national civil rights organization, the Leadership Conference on Civil Rights; and the entire membership of the Congressional Black Caucus, including the Delegate from the District of Columbia, the Honorable Eleanor Holmes Norton. Are these groups and individuals going to be accused of being anti-African American in the way Hispanic organizations and leaders were maligned during the debate on the Estrada nomination? Let us hope for better.

And let us hope that during the questioning and the debate over this nomination we can focus on substance, because there is much to discuss. Justice Brown's outspoken judicial philosophy is unique. It raises many concerns. But that is what the hearing process is for -- to give Justice Brown an opportunity to explain her views on respect for precedent, on judicial activism, on statutory interpretation, free speech, civil liberties, limitation of damages, deference to jury verdicts, and the standards of review that apply to infringement of constitutional rights. She has written opinions or has spoken on all of these topics and more, and I find some of her views difficult to reconcile with one another.

The court to which she is nominated, the D.C. Circuit, is an especially important court in our nation's judicial system. It is the most prestigious and powerful appellate court below the Supreme Court, and Congress has chosen to vest the D.C. Circuit with exclusive or special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes.

Scores of President Clinton's nominees were not treated fairly, including Elena Kagan and Allen Snyder. Each was nominated unsuccessfully to vacancies on the D.C. Circuit. Elena Kagan and Allen Snyder were never allowed a Committee vote or Senate consideration. Dean Kagan, who now heads the Harvard Law School, never even received a Committee hearing.

That is not how this President's nominees have been treated. Both of his previous nominees received hearings and extensive consideration by the Senate. Justice Brown's is this President's third nomination to the D.C. Circuit, and all three will have received hearings. Indeed, with the confirmation of John Roberts to the D.C. Circuit earlier this year, the Senate has already confirmed more of President Bush's nominees to the D.C. Circuit than the Republican majority was willing to consider and vote on in the entire last three years of President Clinton's Administration.

I look forward to a hearing that will be constructive and that will help this Committee and the Senate better understand the nominee's record and fitness for this high office.

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NEWS from
CONGRESSWOMAN BARBARA LEE
9th District, California

For Immediate Release:
October 17, 2003

Contact
Stuart Chapman 202-225-2398

Congresswoman Barbara Lee Joins Congressional Black Caucus Members in Opposing President Bush's Nomination Of California Supreme Court Justice Janice Rogers Brown to the D.C. Court of Appeals

Washington, DC – Joining her Congressional Black Caucus colleagues in a press conference challenging the nomination of California Supreme Court Justice Janice Rogers Brown on the basis of protecting civil liberties and rights, Congresswoman Barbara Lee (D-CA) today issued the following statement:

"Now, more than ever, Americans are seeing their civil liberties under siege. In California, the attack has been especially severe. In our recent election, we have just defeated Proposition 54, a measure that would have kept the state from collecting data that would have protected the lives and well-being of minorities and people of color."

"Now with President Bush's nomination of Ms. Brown to the D.C. Court of Appeals – one step away from the Supreme Court – we see another attempt to undermine the rights of American citizens. While in the California State Assembly, I worked on issues relating to children's health and safety, specifically lead poisoning issues. Ms. Brown wrote an opinion invalidating a state law that required paint companies to help pay for screening and treatment of children exposed to lead paint."

"Her lack of concern for the protections of citizens is especially apparent in her rulings on Affirmative Action cases. When she was on the California Supreme Court, Ms. Brown consistently ruled against Affirmative Action. In a 2000 case, *Hi-Voltage Wire Works*, Brown suggested that affirmative action resembled segregationist laws from the Jim Crow era."

"Those decisions are wrong and outrageous. We have come too far in this country in protecting fundamental human rights to turn back the clock years and decades. I join my Congressional Black Caucus colleagues in opposition the nomination of Justice Brown to the DC Court of Appeals."

31 San Pablo Avenue
San Francisco, CA 94127
(415) 664-3991 (home)
(415) 865-7226 (work)

October 15, 2003

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Facsimile Number: (202) 228-1698

Re: Nomination of California Supreme Court Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit

Dear Chairman Hatch:

I am writing to offer my enthusiastic support for the President's nomination of California Supreme Court Justice Janice Rogers Brown to a seat on the United States Court of Appeals for the District of Columbia Circuit.

I have served as an attorney in the California appellate court system for the past twelve years. Before assuming my current position as the Managing Attorney for the California Court of Appeal, First Appellate District, I had the good fortune to serve on Justice Brown's personal staff for a period of three years. During that time, I came to know Justice Brown as a scholarly, thoughtful, and independent jurist, someone who is not afraid to speak her mind and who does so both eloquently and passionately.

Over the past several months, I have been deeply troubled by the controversy surrounding the President's nomination of Justice Brown, a nomination that, by all rights, ought to be approved by acclamation. A recent editorial, for example, described Justice Brown as a jurist "whose views seem well

to the right of the legal and political mainstream," particularly on issues of race. (Editorial, The New York Times, July 29, 2003.) This misguided criticism was based exclusively on Justice Brown's opinion interpreting California's Proposition 209, which bars racial preferences. (See *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537.) Far from being outside of the mainstream, the opinion was joined, in full, by a majority of the justices of the California Supreme Court. (*Id.* at p. 570.) These distinguished justices included the late Stanley Mosk, someone the same news organization eulogized as "the only liberal on the seven-member court" (Obituary, The New York Times, June 21, 2001), and Ming Chin, another of the Court's racial minorities.

To suggest that Justice Brown is racially insensitive is, quite frankly, absurd. Consider, for instance, her lone dissent from a recent ruling she feared would open the door to racially-motivated police misconduct. In Justice Brown's own words: "To dismiss people who have suffered real constitutional harms with remedies that are illusory or nonexistent allows courts to be complacent about bigotry while claiming compassion for its victims. Judges go along with questionable police conduct, proclaiming that their hands are tied. If our hands really are tied, it behooves us to gnaw through the ropes." (*People v. McKay* (2002) 27 Cal.4th 601, 641 (dis. opn. of Brown, J.), citation omitted.) As this passage amply demonstrates, Justice Brown is obviously someone with a profound sensitivity to the pernicious and dehumanizing effects of racism.

Nor, as some of Justice Brown's critics have suggested, does her dissenting opinion in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, reflect an anti-choice philosophy. The issue before the Court in that case was a narrow one—namely, the constitutionality of a California parental consent statute. As Justice Brown correctly noted (*id.* at p. 424), over the past three decades, the United States Supreme Court has consistently upheld the constitutionality of such laws. (See *id.* at pp. 324-325 & fn. 11.) Indeed, the California statute at issue was expressly modeled on this unbroken line of United States Supreme Court precedent. (*Ibid.*)

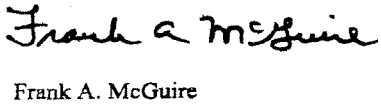
By its very nature, the statute at issue in *American Academy of Pediatrics* was required to balance the unique host of competing interests involved in an unemancipated minor's abortion decision, including the minor's constitutional rights, the constitutional rights of her parents, and the State's important interest as parens patriae. Nothing in the Court's decision addressed or otherwise implicated

an adult woman's right to an abortion. Once again, particularly telling in this regard, is the fact that Justice Brown was joined in dissent by the late Stanley Mosk (*id.* at p. 384), one of this Nation's greatest liberal jurists and a longstanding supporter of a woman's constitutional right to procreative choice. (See, e.g., *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252.)

In closing, to those who were quick to condemn the President's nomination without getting to know the nominee or her record, I would urge but a moment of quiet reflection. To the members of this distinguished Committee, I would urge that the reality of the individual not fall victim to the politics of labels. And, finally, to the full Senate, I would urge a fair, honest, and balanced assessment of Justice Brown's exemplary record, which can lead to only one conclusion—her prompt confirmation.

Thank you for your consideration.

Sincerely,



Frank A. McGuire

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
Facsimile Number: (202) 224-9516

United States Department of Justice
Office of Legal Policy
Facsimile Number: (202) 514-5715

October 15, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington D.C. 20510

Re: Justice Janice Rogers Brown

Dear Senator Hatch:

We are writing to express our support for President Bush's nomination of Justice Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit. As members of law faculties here in California, we know Justice Brown to be a person of high intelligence, unquestioned integrity, and even-handedness. Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this most important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation – even when her personal views may conflict with those arguments.

Justice Brown has served with distinction for more than seven years on our State's highest court. The first African-American woman serving on this bench, she was elevated to the California Supreme Court following several years on this State's appellate court. She has carried out these judicial assignments with diligence and effectiveness. Known for her comprehensive, rigorous, and direct (and yes, sometimes analytically critical) writing, Justice Brown's clarity of thought has often captured the mainstream of California jurisprudence.Perhaps nothing is more revealing of her mainstream views than the fact that in 2002, Justice Brown was relied upon by her colleagues to write the majority opinion more often than any other member of the Court.

A fair examination of her work reveals that Justice Brown resolves matters as individual *cases*, not generalized or abstract *causes*. As the *Los Angeles Daily Journal* concluded, it is often said among those who have followed her decisions closely that "she also defies ideological labeling, having shown [for example] libertarian leanings on free speech and search-and-seizure issues . . . ."

Justice Brown received considerable attention, of course, for her majority opinion in *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537 (2000). The holding in *Hi-Voltage* – disallowing race and gender-based contracting preferences by the State – is a faithful application of California's constitutional instruction that neither race nor sex, among other criteria, shall be a basis to either discriminate against, nor give preference to, any individual or group. Cal. Const. Art. I, section 31. It is only natural that a decision in this sensitive context would attract headlines and be assailed by some as politically mistaken. The nation may disagree on the

nuances of policy in this area, but in this instance, the California constitution is unequivocal. In any event, what is deserving or special commendation is that Justice Brown wrote as a jurist, not a politician, and she wrote for a court that was unanimous in judgment and in agreement with the two lower courts that addressed the issue.

As scholars of the bill of rights, we most certainly differ among ourselves, and with Justice Brown, on particular outcomes. Nevertheless, it is certainly hard to contest Justice Brown's commitment to individual freedom, even when rights are asserted by unpopular litigants. For instance, in *People v. Woods*, 21 Cal. 4th 668 (1999), a felony probationer obtained her freedom by consenting to probationary searches. A majority of the Court in *Woods* casually extended this consent to include the liberty interests of two non-consenting third parties, but who months later came to share a dwelling with the probationer. Justice Brown, for herself and two other members of the Supreme Court, vigorously dissented, articulating the view that a law enforcement officer may not conduct a general investigatory search of a non-probationer based upon the probation search condition of another individual.

In her judicial and professional writing, Justice Brown has often reminded us of the historical aspirations of our constitutional system. As the daughter of sharecroppers in rural and segregated Alabama, these lessons and reminders have special poignancy. Soft-spoken and humble in nature, Justice Brown does not, without considerable prompting, elaborate upon her success in overcoming adverse economic circumstances and irrational societal discrimination. She simply lets her hard work and excellence of character speak for themselves.

For the reasons briefly articulated here, we believe that Justice Janice Rogers Brown possesses the intelligence, learning, judicial experience and demeanor to fulfill the weighty and important responsibilities of the U.S. Court of Appeals. We urge the Senate Judiciary Committee and the full Senate to act promptly and favorably upon her nomination.

Respectfully submitted,[a]

Douglas W. Kmiec
Caruso Chair & Professor of Constitutional Law
Pepperdine University

Stephen Bainbridge
Professor of Law
University of California, Los Angeles

Stephen R. Barnett
Elizabeth J. Boalt Professor of Law, Emeritus
University of California, Berkeley

[Signatures continued on the next page]

[a] All school references are for identification only. Confirmations of signature on file with Professor Kmiec.

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Pepperdine University

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Pepperdine University

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Ralph A. Rossum
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Salvatori Professor of American Constitutionalism
Claremont McKenna College

[Signatures continued on the next page]

Maimon Schwarzschild
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University of San Diego School of Law
Nhan Vu
Professor of Law
Chapman University School of Law

James R. Wilburn
Dean, School of Public Policy
Pepperdine University

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

United States Department of Justice
Office of Legal Policy

10-22-03 09:26am From-Rep. Diane E. Watson 2022252422 T-518 P.002/007 F-070

Congress of the United States
House of Representatives

October 21st, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy:

As members of the California delegation to the House of Representatives we write to underscore our strong opposition to the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit.

As Californians, we are very familiar with Judge Brown and her record. Some of us knew her even prior to her tenure on California's Supreme Court. We write to ensure that the Senate takes notice of President Bush's attempt to import California's most extremist jurist to an unsuspecting Circuit 3000 miles away. Given that this Circuit is considered the most important appellate court in the country, this is a move that the Senate must not allow to happen.

First, we note that Judge Brown's nomination to the California Supreme Court was mired in controversy around many of the same reasons at issue in her present nomination. Brown was first nominated by Governor Pete Wilson in 1994, having served as his legal affairs secretary. She was rated "not qualified" by the California State Bar Judicial Nominees Evaluation Commission. Wilson appointed her instead to the Court of Appeals where she issued extremely caustic opinions.

In 1996, Governor Wilson nominated Brown to the Supreme Court again. She received another "not qualified" rating from the Bar Commission. In fact, 20 of the 23 voting members of the Commission rated her "not qualified." The rating was based in part on Brown's tendency to inject her personal and philosophical views into her judicial opinions. Another basis for the rating was her insensitivity to established precedent. Despite the negative rating, Governor Wilson – for the first time in history – proceeded with a nominee who was deemed "not qualified." Brown was confirmed by the three-person Judicial Appointments Commission, which included her former employer, the Attorney General, and a close colleague on the appellate bench.

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Once on the bench, Brown engaged in extreme judicial activism in a host of substantive areas of the law that are important to our constituents. The San Jose Mercury News has described her as a "staunch conservative on everything from affirmative action to the death penalty." (*San Jose Mercury News*, June 16, 2003.) The Los Angeles Times has said she is "widely considered the most conservative Justice [on the Court]." (*Los Angeles Times*, July 11, 1998.) Her hostile attitude toward civil rights enforcement has been reinforced by her public speeches such as the one given at a Frederick Douglass Moot Court competition in San Francisco in 1999. Brown stated that while "black people" did not "invent the game of grievance-based political action...as with everything we put our hearts into – we raised it to a high art form. . . . The current civil rights agenda apparently assumes history began in the 1960s and ended there too. It is past time to hit the eject button and get out of this time warp."

It is important to note that the state-wide African American bar association has taken a negative view of Judge Brown's nomination. The California Association of Black Lawyers concluded, after a careful review of Judge Brown's record, that "her appointment . . . may be detrimental to Black America and have far-reaching consequences for generations to come." Relying on this analysis – from lawyers who know her best – the National Bar Association, the nation's oldest and largest association of African American lawyers, is opposed to her nomination.

Perhaps most revealing is an endorsement for Judge Brown from one of the most notorious opponents of civil rights progress, Ward Connerly. Mr. Connerly is mostly recently known for his unsuccessful sponsorship of California's Proposition 54, which sought to eliminate all collecting and reporting of data concerning race and ethnicity, which would have wholly undermined civil rights enforcement in our state. In 2001, Mr. Connerly was described by the San Francisco Chronicle as a "big fan of [Judge] Brown's." (*San Francisco Chronicle*, April 29, 2001.) Given his record of opposition to civil rights causes, Connerly's assurance that Judge Brown has a "profound respect for civil rights" is extremely troubling. We also find revealing Connerly's claim that "she doesn't carry on her shoulders the burdens of anybody else or the expectations of anybody else."

In her seven years on the California Supreme Court, Brown has issued many opinions hostile to civil rights, too numerous to cite here. Most notably, Brown authored the Court's first application of Proposition 209 in *Hi-Voltage Wire Works, Inc. v. City of San Jose*. Brown's opinion is nothing short of extraordinary for its harsh attacks on the development of the United States Supreme Court's jurisprudence on affirmative action. Her opinion is all the more remarkable for the fact that Chief Justice Ronald George – nominated by Governor Pete Wilson at the same time as Brown – could not join it because he believed it was a "serious distortion of history." George stated that Brown had used "misleading and unflattering slogans to characterize past judicial decisions upholding race-conscious and gender-conscious affirmative action programs." It was George's view that Brown had simply concluded that the "numerous [affirmative action] decisions of the United States Supreme Court and this court that reached a contrary conclusion were wrongly decided."

We in California pride ourselves on our strong state civil rights statutes, including but not limited to the California Fair Employment and Housing Act. Time and again, Judge Brown has attempted to eviscerate that statute:

In *Aguilar v. Avis Rent a Car Systems, Inc.*, Brown wrote in dissent that an injunction against future racial harassment entered by trial judge Carlos Bea – a Bush nominee recently confirmed to the Ninth Circuit – violated the First Amendment. A jury had found racial discrimination by an employer, and Judge Bea entered the injunction to prevent future harm against the victims of discrimination who continued to be employed by the company. Brown, however, accused her colleagues on the court of recognizing a Fair Employment and Housing Act exception to the First Amendment. She even suggested that the federal equivalent of our state statute may be itself unconstitutional.

In *Konig v. Fair Employment and Housing Comm'n*, 50 P. 3d 718 (2002), Brown was the only Supreme Court Justice to rule that California's Fair Employment and Housing Commission did not have the authority to award emotional distress damages to victims of discrimination. A female African American police officer had sought damages for housing discrimination when a white property owner accused her of trying to break into her house when she was inquiring about an apartment rental notice posted on the door. Six of the seven members of the California Supreme Court decided that damages were permitted; Brown did not.

In *Peatros v. Bank of America*, 990 P.2d 539 (2000), Brown dissented from a ruling that a 135-year old federal law allowing banks to dismiss its officers "at pleasure" did not preempt discrimination claims under California's Fair Employment and Housing Act. Advocating full preemption, Brown stated that banks must retain authority to terminate at will to maintain confidence in financial integrity.

Brown's rulings in other areas raise serious concerns about her judicial philosophy. On abortion rights, Brown dissented from a ruling striking down California's law requiring minors to obtain parental consent before having an abortion. *American Academy of Pediatrics v. Lungren*. She criticized her colleagues for "judicial activism," writing that "[w]hen fundamentally moral and philosophical issues are involved and the questions are fairly debatable, the judgment call belongs to the Legislature." On gay rights, Brown was the only dissent in a ruling this past summer upholding the validity of adoptions by same-sex couples. *Sharon S. v. Sup. Ct. of San Diego County*. She said that second parent adoptions should be available only for couples in legal relationships. In *People ex re. Gallo v. Acuna*, Brown wrote the majority 4-3 opinion in an anti-loitering case, upholding a broad injunction preventing young Latinos from associating with each other in certain areas. She stated: "Often the public interest in tranquility, security and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. . . . Liberty unrestrained is an invitation to anarchy." Brown has also undermined health and safety protections in California. In *Sinclair Paint Co. v. Board of Equalization*, Brown authored an opinion that invalidated a state law that required paint companies to help pay for screening and treatment of children exposed to lead paint. This opinion was later overturned. Brown also authored an opinion allowing employers to require employees to agree to compulsory arbitration of employment claims (such as discrimination claims or unpaid overtime claims) even if those agreements allowed

arbitrators to impose some or all of the cost of the arbitration on the employee. *Armendariz v. Foundation Health Psychcare Servs.*

For seven years, we and our constituents have been impacted by her extreme legal jurisprudence. We know her lengthy record of troubling dissents. We know her willingness to depart from well-established precedent to achieve the legal result she desires. Janice Rogers Brown, with her narrow and indeed grim view of government's role in protecting our most basic rights, is the last jurist needed on the D.C. Circuit, with its federal agency review that impacts millions of Americans. Please heed our call and oppose this nomination. Thank you.

Sincerely,

Diane E. Watson — Maxine Waters

Lucille Roybal-Allard — Bob Filner

Tom Lantos — George Miller

Lynn Woolsey — Mike Honda

Lois Capps — Barbara Lee

Hilda L. Solis — Loretta Sanchez

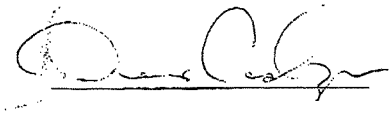
10-22-03 09:26am From-Rep. Diane E. Watson 2022252422 T-519 P.006/007 F-070

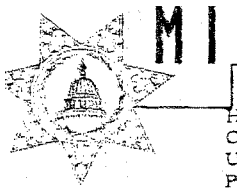
Linda T. Sánchez — Joe Baca

Anna Eshoo — Pete Stark

Juanita Millender-McDonald — Grace F. Napolitano

10-22-03 09:27am From-Rep. Diane E. Watson 2022252422 T-519 P.007/007 F-070





MILE
Minorities In Law Enforcement

Honorable Senator Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
President of the United States
224 Dirksen Senate Office Building
Washington, D.C. 20510

Eli H. Molina
MILE President

Laura Loreman

Jose Vasquez
MILE Secretary

Allen Humphries
MILE Executive Board Member
Southern California Representative

Regis Lane
MILE Executive Director

Maria Zavala
MILE Publications Editor

Demetri Oartis
Membership/MILE Outreach Coordinator

Dear Mr. Chairman:

On behalf of the Executive Board and members of the Minoritics In Law Enforcement organization (MILE), we recommend that you confirm President George W. Bush's nomination of California Supreme Court Associate Justice Janice Rogers Brown to the United States Circuit Court of Appeals for the District of Columbia. MILE is a coalition of ethnic minority law enforcement officers in California dedicated to ensuring brighter futures for disadvantaged youth and ensuring that no child is left behind.

We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service. Justice Brown's powerful and exhilarating display of jurisprudence exhibited in the written legal opinions she has issued as a California Supreme Court justice, is respected by all, regardless of race, political affiliation, or religious background. Justice Brown is a fair and just person with impeccable honesty, which is the standard by which justice is carried out.

In many conversations with Justice Brown, I have discovered that she is very passionate about the plight of racial minoritics in America, based on her upbringing in the south. Justice Brown's views that all individuals who desire the American dream, regardless of their race or creed, can and should succeed in this country are consistent with MILE's mission to ensure brighter futures for disadvantaged youth of color.

It is with great honor and pleasure that MILE and our members urge you to confirm President Bush's nomination of California Supreme Court Associate Justice Janice Rogers Brown to the United States Circuit Court of Appeals for the District of Columbia.

Respectfully Submitted,

Regis Lane
Executive Director

PACIFIC LEGAL FOUNDATION

October 16, 2003

REPLY TO: Headquarters

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: The Honorable Janice Rogers Brown, Nominee to
the United States Court of Appeals for the D.C. Circuit

Dear Chairman Hatch:

I write in support of the President's nomination of Janice Rogers Brown to serve on the federal Court of Appeals for the District of Columbia Circuit. I had the honor—and the great good fortune—to serve as Justice Brown's first chief of staff, following her elevation to the California Supreme Court in 1996. Over the course of four and a half years of service, I came to know her not only as an indefatigable, hands-on jurist, but as a legal mind possessed of extraordinary intellectual gifts, a woman of goodness, grace, honesty, and courage. With your indulgence, I'd like to take a moment—and a page or two—to discuss one of her California Supreme Court opinions that, to my mind, is representative of Justice Brown's jurisprudential style and, equally important, her kind of jurisprudential balance—her earnest quest as a jurist to "get it right."

The case I have in mind is *People ex rel. Gallo v. Acuna*, a 1997 opinion by Justice Brown for the California high court (*Gallo*, 14 Cal. 4th 1090.) In *Gallo*, the San Jose City Attorney, relying on almost fifty declarations by area residents, asked the superior court to enjoin members of a street gang from engaging in a variety of antisocial acts within a four-square-block neighborhood—the "Rocksprings" district—where gang members congregated; the specific ground relied on for injunctive relief was that the gang's activities constituted a "public nuisance." Relying on the declarations filed with the superior court, Justice Brown's opinion described Rocksprings as "occupied territory." Gang members congregated "on lawns, on sidewalks, and in front of apartment complexes . . . .," displaying, she wrote, "a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars." Neighborhood residents, she continued, "are subjected to . . . brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, [and] carports, . . . to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for . . . weapons . . . . Area residents have had their garages used as urinals; . . . their walls, fences, garage doors, sidewalks, and even their

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Atlantic: 1320 South Dixie Highway, Suite 1105 • Coral Gables, FL 33146 • (305) 667-1677 • Fax: (305) 667-7773
Hawaii: P.O. Box 3619 • Honolulu, HI 96811 • (808) 733-3373 • Fax: (808) 733-3374 • Oregon: (503) 241-8179
Washington: 10940 NE 33rd Place, Suite 109 • Bellevue, WA 98004 • (425) 576-0484 • Fax: (425) 576-9565

vehicles turned into a sullen canvas of gang graffiti. The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents . . . . do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters . . . are used to deal and stash drugs. Verbal harassment, physical intimidation, . . . and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden."

The Santa Clara County Superior Court granted a detailed preliminary injunction against the gang members' activities in Rocksprings. On appeal, however, the intermediate court of appeal vacated much of that relief, chiefly on the ground that activities of the gang that did not qualify as crimes were not enjoinable as a public nuisance, but also that the trial court's injunction was too broad and too vague to pass constitutional muster. The California Supreme Court granted review and, speaking through Justice Brown, reversed the court of appeal, reinstating the terms of the trial court's injunction.

It is not my purpose to parse the reasoning of Justice Brown's *Gallo* opinion in any detail. I call it to the Committee's attention to underline a trio of features that, to my mind, typify her judicial philosophy and confirm her qualifications to serve on the D.C. Circuit Court of Appeals. The first characteristic evident in *Gallo*'s reasoning is an express juridical commitment to the separation of powers, a commitment Justice Brown believes places significant institutional constraints on judges and the judiciary. Tracing the origins and history of the public nuisance injunction, her *Gallo* opinion is at pains to stress the principle of legislative lawmaking supremacy: "Subject to overriding constitutional limitations," she wrote, "the ultimate legal authority to declare a given act or condition a public nuisance rests with the *Legislature*; the courts *lack power* to extend the definition of the wrong or to grant equitable relief against conduct that is not reasonably within the ambit of the statutory definition of a public nuisance." "This *lawmaking supremacy*" she went on, "serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a public nuisance." (my italics throughout). An inherent judicial prudence is thus allied in this jurist with an institutional deference to the legislative department.

A second noteworthy feature of the *Gallo* opinion is an express recognition of the reciprocal interdependency of the twin imperatives of individual liberty and social stability. "Freedom and responsibility" in her pungent phrase, "are joined at the hip." Invoking opinions by Justices William Brennan and Stanley Mosk, she wrote that in the context of the public nuisance, "the community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom." "[T]he security and protection of the community" her opinion points out, "is the bedrock on which the superstructure of individual liberty rests. From Montesquieu to Locke to Madison, the description of the pivotal compact remains unchanged: By entering society, individuals give up the unrestrained right to act as they think fit; in return, each has a positive right to society's protection . . . . 'such that one citizen cannot fear another citizen.'" It was this essential *community* character of the public nuisance injunction—a feature that "embodies a kind of collective ideal of civil life which the courts have vindicated . . . since the beginning of the 16th century"—that makes possible its use "to protect the quality of organized social life." In a sense that "cannot easily be dismissed," she wrote, "the availability of equitable relief to counter public nuisances is an expression of 'the interest of the public in the *quality* of life and the total community environment.'"

The last feature of Justice Brown's *Gallo* opinion worth underlining is a steadfast adherence to the constraining—indeed, the binding force of—judicial precedent, wherever the chips may fall. Relying on U.S. Supreme Court opinions upholding, under circumscribed conditions, injunctions against anti-abortion protestors and labor unions, she said the scores of affidavits filed with the superior court portrayed "a carnival-like atmosphere of collective mayhem" that was not entitled to First Amendment protection under controlling high court precedents. I will close by quoting Justice Brown's own closing in her *Gallo* opinion: "To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom . . . is to ignore half the political promise of the Constitution and the whole of its sense . . . . Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented." Strong words, but in the face of the record made before the trial court, who would dare to call them unjustified? America needs, will always need, judges with principles and the courage to follow them, men like William O. Douglas and, before him, O.W. Holmes, Jr.; women like Janice Rogers Brown.

Thoughtful, committed, passionate about the law; practical, tough-minded, sophisticated and eloquent (and at times, I would add, downright poetic)—these are some of the descriptions applied to Janice Rogers Brown by those who know her and her judicial opinions. And of those who denounce her as a conservative breakaway from liberal African-American views, I would rejoin with one of her own lyrical tropes: "But that is life. Sometimes beauty is fierce; love is tough; and freedom is painful." *Loder v. City of Glendale*, 14 Cal. 4th 846, 938 (1997) (conc. and dis. opn. of Brown, J.)

I urge you and the members of the committee to approve the President's nomination; America is graced to have her in our presence.

Sincerely,

WILLIAM S. MOUNT
Attorney

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Janice Rodgers Brown
Associate Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

October 21, 2003

Dear Senator:

On behalf of NARAL Pro-Choice America, I write to express our strenuous opposition to the confirmation of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. Brown's record as a jurist, combined with her very provocative speeches and writings off the bench, demonstrate a serious misunderstanding of fundamental constitutional principles on privacy and a disdain for the precedents that protect fundamental liberties. She has repeatedly injected an extremist ideology into her judicial opinions. Her radical ideas concerning the appropriate degree of protection that the courts should provide for fundamental rights make her one of the greatest threats to our liberties yet nominated by this President – a distinction for which, unfortunately, she has substantial competition.

Justice Brown made her anti-privacy stance clear in the only reproductive rights case before the California Supreme Court since her appointment, in which a majority of a Republican-dominated court struck down a statute that prohibited a minor from obtaining an abortion without parental consent. The lead opinion notes that California voters decided in 1972 to add an explicit protection of the right to privacy and that the state constitution provides "greater protection of a woman's right of choice than that provided by the federal Constitution as interpreted by the United States Supreme Court."[1] They state, "California courts repeatedly and uniformly have recognized that our state Constitution has been construed to provide California citizens with privacy protections encompassing procreative decisionmaking – *broader, indeed, than those recognized by the federal Constitution.*"[2]

In characteristic fashion, Brown wrote a caustic dissent spurning the legal analysis of the plurality and concurring opinions. She misconstrues clear precedent concerning a woman's right to choose in California. Dismissing the clear consensus among California courts that protections for the right to choose are stronger under the California constitution than under U.S. Supreme Court precedent, Brown simply states, "Only by broadly misreading *Myers* [the leading California case on choice] can the plurality here avoid the analytical force of federal authority."[3] In truth, it is Brown who selectively quotes *Myers* out of context to reach her own unsupportable conclusions. *Myers*

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[1] *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 16 Cal.4th 307, 327 (1997).
[2] *Lungren* at 327 (emphasis original, citations and internal quotation marks omitted).
[3] *Lungren* at 426 (Brown, J., dissenting).

repeatedly holds that the California right of privacy is broader than the federal right[4] and extends reproductive rights to California women that the U.S. Supreme Court has denied.[5]

Brown also misreads the precedent in arguing that the parental involvement law is not susceptible to a *facial* constitutional challenge: "Because [the law] is not unconstitutional in all its possible applications, it clearly survives a facial constitutional challenge,"[6] she writes. This reasoning violates clear precedent from the California Supreme Court on the right to privacy. In these cases, the court reasoned that because a law would be unconstitutional in *many* applications, the law is facially unconstitutional. As the plurality opinion notes, *Myers*, the leading reproductive rights case in California, struck down a law that may have had some constitutional applications. Quoting another California Supreme Court case, the plurality reminds us that "a statute cannot be upheld merely because a particular factual situation to which it is applicable may not involve the objections giving rise to its invalidity. [Citations.] If the rule were otherwise, the determination of constitutionality would be a piecemeal and unpredictable process."[7] Brown, intent on her ideological agenda, could not be bothered to follow these inconvenient precedents. Instead, she identified irrelevant precedents, in which the law at issue was generally constitutional, but could, potentially, in some circumstance have be applied unconstitutionally.[8]

Brown further suggested that she would vest politicians, rather than an independent judiciary, with protecting the right to choose: She wrote: "When fundamentally moral and philosophical issues are involved and the questions are fairly debatable, the judgment call belongs to the Legislature. . . . They represent the will of the people."[9]

In other opinions not directly related to the right to privacy, Brown reveals her hostility to a host of fundamental rights. In one case, she severely criticized long-standing U.S. Supreme Court precedent on judicial review of actions by the political branches. She argued that the "dichotomy between the United States Supreme Court's laissez-faire treatment of social and economic rights and its hypervigilance" on fundamental rights "is highly suspect, incoherent, and constitutionally invalid."[10]

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[4] *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 784, 796, 29 Cal.3d 252 (1981).
[5] *Compare Myers*, 625 P.2d 779 (holding exclusion of state funding for elective abortion unconstitutional) *with Harris v. McRae*, 448 U.S. 297 (1980) (holding exclusion of federal funds for abortion not needed to save woman's life constitutional).
[6] *Lungren*, 16 Cal.4th at 422 (Brown, J., dissenting).
[7] *Lungren* at 344, quoting *Blair v. Pitches*, 486 P.2d 1242 (1971).
[8] *Compare Lungren* at 421 (Brown, J. dissenting) with *Lungren* at 347-48 (plurality opinion).
[9] *Lungren* at 447 (Brown, J., dissenting).
[10] *Kasler v. Lockyer*, 2 P.3d 581, 601 (2000).

Further evincing her hostility to the right to privacy, she continued, "Curiously, in the current dialectic, the right to keep and bear arms – a right expressly guaranteed in the Bill of Rights – is deemed less fundamental than implicit protections the court purports to find in the penumbras of other express provisions." In this case, involving the constitutionality of California's assault weapons ban, Brown compared the right to bear arms with the right of self-defense, and stated, "surely, the right to preserve one's life is at least as fundamental as the right to preserve one's privacy."[11]

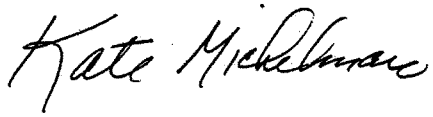
Brown's speeches and publications show that she would afford fundamental constitutional rights far less protection than mainstream jurisprudence provides. Incredibly, she argues that fundamental rights jurisprudence has *diminished* liberty:

> How? By constitutionalizing everything possible, finding constitutional rights which are nowhere mentioned in the Constitution. By taking a few words which are in the Constitution like "due process" and "equal protection" and imbuing them with elaborate and highly implausible etymologies; and by enunciating standards of constitutional review which are not standards at all but rather policy vetoes, i.e., strict scrutiny and the compelling state interest standard.[12]

Elsewhere, she has called judicial protection of fundamental rights "intolerably strict."[13]

The record is clear: In the areas of privacy and fundamental rights jurisprudence, Janice Rogers Brown has repeatedly shown herself to be far from the constitutional mainstream. She must not be confirmed.

Sincerely



Kate Michelman
President

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[11] *Kasler v. Lockyer*, 2 P.3d 581, 602 (2000).

[12] Brown, Justice of the Year Award, Speech before the California Lincoln Club, Libertarian Law Council, Dec. 11, 1997.

[13] Brown, *"A Whiter Shade of Pale": Sense and Nonsense – The Pursuit of Perfection in Law and Politics*, speech before the Federalist Society, University of Chicago Law School, Apr. 20, 2000.

NATIONAL ABORTION FEDERATION OPPOSES THE NOMINATION OF JANICE ROGERS BROWN TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Abortion Federation opposes the nomination of Janice Rogers Brown to the District of Columbia Circuit of the United States Court of Appeals, widely perceived to be the most influential of the appellate courts and a stepping-stone to the United States Supreme Court. A judge on the California Supreme Court, Brown is widely known for her reactionary politics and conservative jurisprudence. The nomination of Brown to the DC Circuit presents a direct attack on the rights of women, especially reproductive rights.

Janice Rogers Brown has a record of opposition to a woman's right to choose.

In 1997, the California Supreme Court considered whether a statute that required parental consent before a minor could obtain an abortion conflicted with the California Constitution. California's constitution differs from the U.S. Constitution in that it contains specific provisions safeguarding individual privacy. The majority found that the law violated a minor's right to privacy under the state constitution. The decision incensed Brown, who wrote an unusually bitter dissent attacking the majority opinion.

In a clear departure from the California Constitution which guarantees the right of privacy to "all people," Brown maintained that an unemancipated minor's privacy interests could not be equal to those of an adult. She even questioned whether pro-choice physicians were objective enough to determine whether a minor was able to give informed consent for an abortion. She went so far as to suggest that physicians were biased and motivated by profit rather than the welfare of their patients, relying on materials provided by the Christian Action Council (now called CareNet), an organization with a history of hostility to legal abortion.

Brown concluded by stating that the ruling would allow the courts "to topple every cultural icon, to dismiss all society values, and to become final arbiters of traditional morality."[1] Her language in this decision is characteristic of her legal writing. In other decisions, she has termed her colleagues' opinions to be "bizarre," "schizophrenic," and "lame."[2] Indeed, the California State Bar found her unqualified for the California Supreme Court because of her inexperience, her practice of inserting personal views into her opinions, and her insensitivity to established precedent. Her record indicates she has not tempered her judicial approach.

Conclusion

Selection of such a controversial nominee for appointment to the most influential of appellate courts shows that the Bush Administration continues to ignore Americans' desire for an independent judiciary. In the past, conservatives have complained that the DC Circuit had too many judges, and have called for elimination of seats. However, given the opportunity to place such a conservative judge on so high a court, the opposition to the number of DC Circuit court judges has died down. It is time for the administration to stop their efforts to pack the courts and nominate judges who can fairly adjudicate controversial matters such as abortion. For these reasons, NAF opposes the nomination of Janice Rogers Brown to the DC Circuit Court of Appeals.

---

[1] *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 441 (Cal. 1997).
[2] *County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909, 940 (CA. 1997); *People v. Mar*, 28 Cal.4th 1201 at 1231 (Cal. 2002).

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. • SUITE 1120 • WASHINGTON, D.C. 20005
(202) 638-2269 FAX (202) 638-5936

October 21, 2003

Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

RE: NAACP'S OPPOSITION TO JANICE ROGERS BROWN'S NOMINATION TO THE DC CIRCUIT COURT OF APPEALS

Dear Senator:

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest and largest civil rights organization, I would like to express, in the strongest possible terms, our ardent opposition to the confirmation of California Supreme Court Justice Janice Rogers Brown to the United States Court of Appeals for the District of Columbia.

The NAACP National Board of Directors unanimously passed a resolution on October 18, 2003 in opposition to the nomination of Janice Rogers Brown. The NAACP has also produced a report, which we previously sent to your attention, which illustrates Janice Rodgers Brown's record regarding civil rights and civil liberties of African Americans and other racial and ethnic minorities. Accordingly, we would like to urge you in the strongest possible terms to vote against this nomination, which represents a regressive step in the historic struggle for civil and equal rights.

California Supreme Court Justice Janice Rogers Brown's nomination to the D.C. Circuit Court of Appeals, which provides the final legal determinative review for many federal agencies and for most D.C. residents is very troubling on five grounds: (1) her predisposition would be detrimental to the people of D.C. and our nation, (2) Justice Brown has no connection whatsoever to the District of Columbia, (3) her disturbing stance on racial discrimination issues are inconsistent with established law, (4) her attempt to curtail civil rights and liberties, and (5) her proven opposition to equal opportunity programs like affirmative action. These grounds should give

you reason to be gravely concerned about her nomination and whether her confirmation would advance the interest of maintaining ideological balance on the Circuit Court and would ensure that the federal judiciary provides fairness and equality to all Americans.

The DC Circuit is the second most powerful court in the country. The DC Circuit oversees the actions of federal agencies. The Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, voting rights, affirmative action, clean air standards, health and safety regulations, consumer privacy and campaign finance.

The DC Circuit has produced more Supreme Court justices than any other circuit. Three of the nine current Justices – Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg – sat on the D.C. Circuit. President Bush's often-stated desire to appoint justices in the ideological mold of Scalia and Thomas may include selecting persons with similar career paths. His father nominated Clarence Thomas to the Supreme Court only sixteen months after appointing him to the D.C. Circuit. Janice Rogers Brown herself has been frequently discussed as a possible Supreme Court nominee.

California Supreme Court Justice Brown does not have a connection with the DC Circuit Court of Appeals. She is not a member of the District of Columbia Bar. Nor is she admitted to practice before the D. C. Circuit Court of Appeals or the District Court for the District of Columbia. She is not a member of any bar or court in a surrounding jurisdiction such as Virginia or Maryland. She has never practiced law outside of the State of California. Although the D.C. Circuit has on occasion included judges from outside of the District of Columbia, never has any person been nominated from across the country to this position. There are hundreds, if not thousands, of African American attorneys from any number of jurisdictions who have at least some connection to the District of Columbia and its courts and who could have been selected for this position.

Brown was rated "not qualified" by the California State Bar Judicial Nominees Evaluation Commission. The rating was based in part on Brown's tendency to inject her "personal and philosophical" views into her judicial opinions. Another basis for the rating was her insensitivity to established precedent, along with her lack of experience. Despite the negative rating, Governor Wilson – for the first time in history – proceeded

with a nominee who was deemed "not qualified." Brown was confirmed by the three-person Judicial Appointments Commission, which included her former employer, the Attorney General, and a close colleague on the appellate bench. Finally, former California Governor Pete Wilson appointed her to the Court of Appeals where she issued extremely caustic opinions. For example, in ruling against liability of a school district in *Beilke v. Amador Unified School Dist.*, Brown wrote: "The public school system is already so beleaguered by bureaucracy, so cowed by the demands of due process, so overwhelmed with faddish curricula that its educational purpose is almost an afterthought." In fact, 20 of the 23 voting members of the Commission rated her "not qualified."

In *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846 (Cal. 1999), *cert. denied*, 529 U.S. 1138 (2000), a number of Latino employees of Avis Rent A Car brought a race discrimination lawsuit based upon the use of racial epithets in the workplace by an employee. The trial court found that the employer allowed Latino employees to be repeatedly subjected to racial slurs, thus creating a hostile work environment in violation of the California Fair Housing and Employment Act ("FHEA"). To remedy the situation, the trial court enjoined Lawrence from using the racial slurs to describe Latino Avis employees and enjoined Avis from allowing Lawrence to use such slurs. The majority of the California Supreme Court upheld the injunction. Brown dissented and argued that racially discriminatory speech in the workplace, even when it rises to the level of illegal race discrimination, is protected by the First Amendment and cannot be limited. Brown also argued that even if such speech is racial discrimination, it cannot be limited by an injunction aimed at preventing a recurrence of the discrimination. In fact, Brown went so far as to suggest that the landmark civil rights law, Title VII of the Civil Rights Act of 1964 (which prohibits discrimination in employment), could be unconstitutional under the First Amendment. The Supreme Court denied review of the case, although Justice Clarence Thomas dissented from the denial of certiorari.

In *Konig v. Fair Employment and Housing Comm'n*, 50 P. 3d 718 (2002), a black female police officer sought damages for housing discrimination after she was accused of breaking into the house of a white property owner when she inquired about a apartment rental notice posted on the property owner's door. Six of the seven members of the California Supreme Court decided that damages were permitted since California's Fair Employment and Housing Act had been amended to provide an optional civil action to the

Commission's administration proceeding, which remedied the separation of powers concern previously expressed by the Court. Brown alone dissented from the decision and wrote a separate opinion arguing that the Commission should not be allowed to award damages for emotional distress to victims of discrimination. If Brown's opinion had been adopted by the whole court it would have seriously limited the avenues available for victims of discrimination to obtain full redress for their injuries.

In *Peatros v. Bank of America NT&SA,* 990 P.2d 539 (Cal. 2000). Ms. Peatros sued her employer, the Bank of America, for race and age discrimination under the California Fair Housing and Employment Act. The Supreme Court held that a 135-year-old statute was not a bar to employment discrimination actions against banking establishments in most instances. The majority explained that more recent federal civil rights laws, such as the Age Discrimination in Employment Act of 1967 and the Civil Rights Act of 1964, had superceded the 135-year-old National Bank Act. In Justice Brown's dissent she would have found that a law originally enacted during the Civil War should preempt state anti-discrimination laws on issues such as race and age, despite the obvious changes in law since that time.

In *People ex re. Gallo v. Acuna*, 929 P.2d 596, 602-03 (1997), *cert. denied*, 521 U.S. 1121 (1997). Brown wrote the majority 4-3 opinion upholding a broad injunction preventing young Latinos from associating with each other in certain areas. She wrote: "Often the public interest in tranquility, security and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. ... Liberty unrestrained is an invitation to anarchy." As Justice Mosk wrote in dissent: "The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or friend. In my view, such a blunderbuss approach amounts to both bad law and bad policy.

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), Brown authored a majority decision that makes it extremely difficult to conduct any sort of meaningful affirmative action program in California. Some of the result in this case may have been dictated by the state's anti-affirmative action ballot initiative, Proposition 209. Nevertheless, Brown's decision appeared to go much farther than necessary by prohibiting

California cities from requiring that their contractors conduct meaningful outreach to minority and woman owned subcontractors. Even more startling was Brown's analysis of federal anti-discrimination and affirmative action law. In this analysis, Justice Brown suggested that the evolution of affirmative action was somehow at odds with the purposes of Title VII of the Civil Rights Act of 1964. In making this argument, Brown relied heavily on dissenting and concurring opinions of Supreme Court justices and ignored the fact that the Court has consistently held that, affirmative action is legal under both Title VII and the U.S. Constitution.

Court watchers have repeatedly commented on Brown's ideology – she is frequently compared to Justice Clarence Thomas. Commentators have also noted that Brown's stated judicial philosophy – to interpret rather than make law – is sometimes in stark contrast to the opinions she writes, some of which seem to be characterized by an emphasis on a particular result and far-right policies rather than judicial restraint. In fact, Brown's speeches and writings reflect a right-wing political philosophy that she has incorporated directly in her judicial opinions. Finally, a number of Brown's divisive, sarcastic and caustic opinions have raised real questions about her judicial temperament and her ability to dispassionately review the cases that come before her.

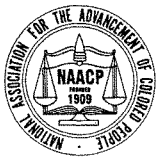
Based on her record, we urge you to vote against the nomination of California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia in the Judiciary Committee.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 638-2269.

Sincerely,

Hilary O. Shelton
Director

CC: The NAACP National Resolution in Opposition to Janice Rogers Brown's Nomination



WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

1025 VERMONT AVENUE, N.W. · SUITE 1120 · WASHINGTON, DC 20005
(202) 638-2269 FAX (202) 638-5936

ACTION ITEM PASSED BY THE NATIONAL BOARD OF DIRECTORS OF THE NAACP BY UNANIMOUS VOTE, OCTOBER 18, 2003 IN OPPOSITION TO THE CONFIRMATION OF JANICE RODGERS BROWN TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

WHEREAS, on July 25, 2003 President George W. Bush nominated California Supreme Court Justice Janice Rodgers Brown to the United States Court of Appeals for the District of Columbia; and

WHEREAS, the DC Circuit is the second most powerful court in the country, and it oversees the actions of federal agencies. Furthermore, the Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, affirmative action, voting rights, clean air standards, health and safety regulations, consumer privacy and campaign finance; and

WHEREAS, the DC Circuit has produced more Supreme Court justices than any other circuit, and Janice Rogers Brown has been frequently discussed as a possible Supreme Court nominee; and

WHEREAS, California Supreme Court Justice Brown does not have a connection with the DC Circuit Court of Appeals. She is not a member of the District of Columbia Bar, nor is she admitted to practice before the D.C. Circuit Court of Appeals or the District Court for the District of Columbia. In fact, she has never practiced law outside of the State of California; and

WHEREAS, Janice Rogers Brown has almost no experience with federal litigation. That the D.C. Circuit is the "most federal" of all the federal courts, with its special jurisdiction over federal agencies, makes Brown particularly ill-suited to this Court; and

WHEREAS, Janice Rogers Brown was rated "not qualified" by the California State Bar Judicial Nominees Evaluation Commission. In fact, 20 of the 23 voting members of the Commission rated her "not qualified." The rating was based in part on Brown's tendency to inject her "personal and philosophical" views into her judicial opinions. Another basis for the rating was her insensitivity to established precedent, along with her lack of experience; and

WHEREAS, during her tenure as a judge in California, Janice Rogers Brown has exhibited a clear hostility to civil rights and civil liberties; and

WHEREAS, there are numerous examples of this hostility. For example, she wrote the majority decision in a case that expanded Proposition 209, which outlawed Affirmative

Action in education, so that it also covered outreach efforts for minority and female-owned municipal subcontractors; and

WHEREAS, she also opposed a ruling that an injunction against racial epithets in a workplace by arguing that such an injunction violated the First Amendment; and

WHEREAS, she also argued that a law originally enacted during the Civil War should preempt state anti-discrimination laws on issues such as race and age, despite the obvious changes in law since that time; and

WHEREAS, Judge Brown also wrote the majority 4-3 opinion upholding a broad injunction preventing young Latinos from associating with each other in certain areas; and

WHEREAS, Judge Brown also opposed a ruling that California's Fair Employment and Housing Commission had the authority to award emotional distress damages to victims of discrimination; and

WHEREAS, a number of Brown's divisive, sarcastic and caustic opinions have raised real questions about her judicial temperament and her ability to dispassionately review the cases that come before her; and

THEREFORE, BE IT RESOLVED, the National Association for the Advancement of Colored People opposes the nomination of Janice Rodgers Brown to serve on the United States Court of Appeals for the District of Columbia. We believe that if Justice Brown were confirmed, her views would jeopardize the civil rights and liberties of African Americans and other racial and ethnic minorities, particularly since the DC Circuit often provides the determinative legal review of federal agency action involving labor relations, affirmative action, clean air standards, voting rights, and consumer privacy; and

BE IT FURTHER RESOLVED, the NAACP urges the Senate Judiciary Committee and the full Senate, in the strongest possible terms, to defeat Justice Brown's nomination; and

BE IT FINALLY RESOLVED, that the NAACP remains steadfast in its efforts to encourage President Bush to live up to his personal commitment to the country to be a uniter, not a divider, and to nominate a moderate candidate who will garner the trust and respect of all of the people in the DC Circuit.

NATIONAL BAR ASSOCIATION

FACSIMILE MATERIAL Reply to:

Clyde E. Bailey, Sr.
President
Rochester, NY

Kim Keenan
President-Elect
Washington, DC

Reginald M. Turner, Jr.
Vice President
Detroit, MI

Linnes Finney, Jr.
Vice President
Fort Pierce, FL

Cheryl Gray
Vice President
New Orleans, LA

Rodney G. Moore
Vice President
Atlanta, GA

Sonya D. Hoskins
Secretary
Dallas, TX

Hon. John L. Braxton
Treasurer
Philadelphia, PA

T. Andrew Brown
General Counsel
Rochester, NY

Beverly Baker-Kelly
Parliamentarian
Oakland, CA

John Crump
Executive Director
Washington, DC

September 10, 2003

Senate Judiciary Committee
United States Senate
Washington, DC 20510

Re: Justice Janice Rogers Brown Nominee to the U.S. Court of Appeals for the District of Columbia Circuit

Dear Senator:

The National Bar Association, this nation's oldest and largest Association of predominantly African American lawyers and judges, deems that Justice Rogers Brown is unfit to serve on the U.S. Court of Appeals of the District of Columbia.

Justice Brown has served the California Supreme Court for seven years, providing a substantial body of work for analysis by critics and supporters alike. If appointed, Brown would follow Justice Judith Rogers, a President Clinton appointee, to become the second African American woman judge on the D.C. Circuit Court. Many people consider this appointment as preliminary grooming for a future nomination to the U.S. Supreme Court. This consideration is not without merit: Justices Antonin Scalia, Clarence Thomas, and Ruth Ginsberg all previously served on the prestigious D.C. Circuit Court.

The National Bar Association must consider, among other things, whether a judicial nominee will be a responsible voice upon which all people, particularly people in the traditionally underserved communities, for instance African Americans, other ethnic minorities and women, can depend when fundamental legal issues of race, ethnicity, or gender may profoundly impact the designated population in the areas of advancement in business, education, civil rights, and the judicial arenas arise.

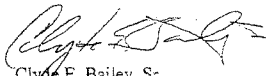
A rigorous review of several of Justice Brown's opinions in the California Supreme Court undertaken by the California Association of Black Lawyers (copy attached), an affiliate of the National Bar Association, indicates a most disturbing view and what may be in store for minorities under her stewardship on the bench. In for instance Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000), Justice Brown

NATIONAL BAR ASSOCIATION, 1225 11th Street, N.W., Washington, DC 20001-4217, Tel: 202-842-3900 • Fax: 202-289-6170
www.nationalbar.org

wrote the majority opinion striking down a San Jose ordinance that required the City of San Jose to solicit bids from companies owned by minority and women subcontractors. She reasoned that the plan to seek minority subcontractors violated Proposition 209, which is the 1996 voter-adopted state constitutional amendment that banned racial preferences. She further concluded that instead of affirmative action, "equality of individual opportunity is what the constitution demands."

In view thereof, the National Bar Association strongly urges and recommends that the Senate Judiciary Committee reject the nomination of Justice Janice Rodgers Brown to the U.S. Circuit Court of Appeals for the D.C. Circuit.

Sincerely,



Clyde E. Bailey, Sr.
President

Attachment

National Bar Association Region IX

Serving Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington & Guam

Jennifer E. Fisher
Director
California

James Davis
Deputy Director
Oregon

Lizzie Hatcher
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Black Women Lawyers of Northern California
Black Women Lawyers of Los Angeles

NEVADA
Las Vegas Chapter, National Bar Association

OREGON
Oregon Chapter, National Bar Association

WASHINGTON
Loren Miller Bar Association
Jack E. Tanner Bar Association

October 17, 2003

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510
FAX: 202-224-6331

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510
FAX: 202-228-0861

Dear Senators Hatch and Leahy:

On behalf of Region IX of the National Bar Association, I write to express our strong opposition to the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit.

Region IX represents African American lawyers, law students and judges throughout the western United States, including eight organizations representing attorneys practicing throughout the State of California. We are an affiliate of the National Bar Association, and we join the National Bar Association in its opposition to Justice Brown.

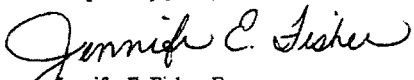
As California lawyers, we are familiar with Justice Brown and her record on the California Supreme Court. We are deeply concerned about her extremist judicial philosophy which she has manifested in numerous opinions over the years. It is clear to us that she misuses precedent and challenges precedent, in order to achieve the result she desires. A prime example is her opinion in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court's first application of Proposition 209. According to Chief Justice Ronald George, who refused to join her opinion, Justice Brown seriously distorted the history of civil rights jurisprudence and concluded outright that the U.S. Supreme Court decisions supporting affirmative action were wrongly decided.

Direct all mail to: Jennifer E. Fisher
Marshall & Swift, 915 Wilshire Blvd. Ste. 800, Los Angeles, CA 90017

California has strong civil rights statutes, and many of us litigate pursuant to these statutes. Yet Justice Brown has repeatedly deviated from precedent in order to narrowly interpret these statutes and render them virtually inaccessible to victims of discrimination.

We urge you to undertake an extremely careful review of Justice Brown and her record. We hope that you will conclude, as we have done, that she is simply not within the mainstream of legal thought. She is therefore not suited for appointment to the second most important court in our nation, the D.C. Circuit.

Respectfully yours,



Jennifer E. Fisher, Esq.
Region IX Director

Direct all mail to: Jennifer E. Fisher
Marshall & Swift, 915 Wilshire Blvd. Ste. 800, Los Angeles, CA 90017

NCJW

National Council of Jewish Women

Marsha Atkind
President

Sandra Lief Garrett
Executive Director

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Jerusalem, Israel 91905
Tel 972 2 5882 208
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Web www.ncjw.org

October 21, 2003

The Honorable Orrin Hatch
Chairman, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

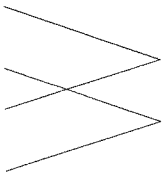
Dear Senator Hatch:

I am writing to express the opposition of the National Council of Jewish Women (NCJW) to the nomination of California Supreme Court Justice Janice Rogers Brown to the US Court of Appeals for the DC Circuit. Justice Brown's legal philosophy as embodied in her opinions on the California Supreme Court would roll back fundamental rights and constitutional protections that are the bedrock of modern jurisprudence in the areas of reproductive rights, race discrimination, and disability law, among other topics. Her opinions reveal a legal extremism and ideological approach to law that make her a poor choice for the most important circuit court of appeals in the country.

NCJW represents 90,000 members and supporters and their families across the country. We are deeply troubled by the repeated nomination of candidates for our federal appeals courts whose extreme views are far outside the mainstream of federal case law and the American legal profession. Unfortunately Justice Brown is such a nominee. Justice Brown's approach can best be illustrated by a speech she gave to the Federalist Society, in which she proclaimed that the 1937 Supreme Court was responsible for "the triumph of our socialist revolution" when that court upheld New Deal legislation.

On the California Supreme Court, Justice Brown's decisions have continued in this dismissive mode. She wrote a dissenting opinion in a parental notice law (*American Academy of Pediatrics v. Lungren*) that excoriated the majority who believed the California state constitution protected the right of privacy for minors. Her opinion cited "legal materials" from unidentified "outside proponents of the bill" to buttress her position – materials prepared by a group that operates hundreds of anti-choice crisis pregnancy centers.

Justice Brown has ruled several times in opposition to claims made by victims of race discrimination in ways that contravene existing case law. She once claimed



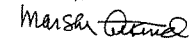
that a 135-year old federal bank law pre-empted a claim of discrimination made by a bank employee, an assertion rejected by the majority of the court. She has contended that the state employment and housing commission should not be able to award damages for emotional distress to victims of race and other discrimination. In another dissent, she maintained that the First Amendment protects racially discriminatory speech against Latino employees in the workplace, even when it created a hostile work environment. She even wrote that Title VII of the 1964 Civil Rights Act (which bars employment discrimination) could violate the First Amendment.

Justice Brown has also demonstrated her hostility to claims of discrimination based on disability. She wrote that a victim of continuing discrimination should have been forced to sue separately concerning each discriminatory act rather than rely instead for evidence on a pattern of four years of discriminatory conduct. She also asserted that victims of discrimination based on disability should not be able to bring lawsuits for relief under California common law. She once even argued that it had not been shown that a public policy against age discrimination "inures to the benefit of the public" or is "fundamental and substantial."

In short, Justice Brown's views would endanger the rights of millions of Americans who look to the courts to defend their fundamental constitutional rights, including the right to privacy and reproductive rights. When first appointed to the California Supreme Court, she was rated "unqualified" for a State Supreme Court appointment by the State Bar Committee on Judicial Nominees Evaluation. In addition to citing her inexperience, the committee raised concerns that she was insensitive to established precedent, lacked compassion and tolerance for opposing views, and was prone to inserting conservative personal views into her appellate opinions. These are not the qualities of a worthy nominee to the DC Circuit Court of Appeals.

We urge you to reject Justice Brown's nomination.

Sincerely,



Marsha Atkind
National President

Cc: Members of the Senate Judiciary Committee

President
Paul H. Tobias

President
Paul Patrick M. Clancy

Executive Director
Anne C. Dodge

Executive Board

William R. Amlong
Ft. Lauderdale, Florida

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Walnut Creek, California

Kathleen Chalk
Baltimore, Maryland

Dennis D. Egan
Kansas City, Missouri

Bruce A. Fredrickson
Washington, D.C.

Joseph G. Gordon
New Haven, Connecticut

Frederick M. Gittes
Columbus, Ohio

Donald S. Gridzberg
Minneapolis, Minnesota

Janice Goodman
New York, New York

Margaret A. Harris
Houston, Texas

Janet E. Hill
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Ellen J. Messing
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Mary Anne Sedey
St. Louis, Missouri

Patricia A. Shiu
San Francisco, California

William J. Smith
Fresno, California

Paul H. Tobias
Cincinnati, Ohio

Cathy Ventrell-Monsees
Chevy Chase, Maryland

Brad Yoshiyama
San Francisco, California

NELA STRONGLY OPPOSES THE NOMINATION OF JANICE ROGERS BROWN TO THE D.C. CIRCUIT COURT OF APPEALS

The National Employment Lawyers Association strongly opposes the nomination of California Supreme Court Justice Janice Rogers Brown to the D.C. Circuit Court of Appeals. After conducting extensive research into Justice Brown's background and legal experience, NELA has determined that she is unfit to be confirmed to such an important post.

Despite having grown up in the Deep South as the daughter of Alabama sharecroppers, Justice Brown shows a consistent measure of hostility toward the poor and toward working people who experience discrimination and harassment. In a report entitled "Loose Cannon" by People for the American Way and the NAACP, Justice Brown's opinions on civil rights are described as "perhaps the most troubling area of a very troubling body of work."[1] The California State Bar Committee on Judicial Nominees stated that Justice Brown was "insensitive to established precedent, lacked compassion and tolerance for opposing views, and was prone to inserting conservative personal views into her appellate opinions." In case after case, Justice Brown's opinions reflect a shocking disregard for civil rights.

For example, in *Aguilar v. Avis Rent A Car Systems, Inc.*, 21 Cal.4th 121 (1999), *cert. denied,* 529 U.S.1138 (2000), Justice Brown stated in a dissenting opinion that racially discriminatory speech in the workplace is protected by the First Amendment and can never be limited by an injunction. The case involved a group of Latino employees who worked at Avis in San Francisco. Subjected to a constant barrage of demeaning racial epithets and other pernicious discriminatory conduct by their supervisor, the trial court issued an injunction prohibiting the supervisor from uttering racial slurs. Although Justice Brown was not the sole dissenter, her assertion that Title VII might be unconstitutional under the First Amendment is astonishing. *Id.* at 191.

In *Konig v. Fair Employment and Housing Commission,* 28 Cal.4th 743 (2002), Justice Brown was alone in dissent, stating that the state agency charged with enforcing California's anti-discrimination laws does not have the authority to award emotional distress damages to victims of housing discrimination. In this case, an African-American female police officer was accused by the landlord of trying to break into a housing unit she had come to inquire about renting. The prejudice of the landlord was confirmed when the Fair Housing Council of Long Beach sent two female testers – one Caucasian and the other African-American – to attempt to rent the same unit. The African-American applicant was discouraged from renting the unit and questioned about how much notice she intended to give her current landlord, while the Caucasian applicant was not questioned at all. The majority noted that the California Legislature made attempts to ensure that the availability of emotional distress awards in administrative proceedings was consistent with those damages awarded under the federal fair housing statutory scheme. *Id.* at 758. Justice Brown, seemingly disdainful of the legislative action that allowed administrative awards of emotional distress damages in housing discrimination cases, argued that only judicial bodies should be allowed to make such awards.

In *Richards v.Ch2m Hill, Inc.*, 26 Cal.4th 798 (2001), a continuing violation theory case, Justice Brown dissented from the majority opinion which held that it was permissible for victims of discrimination to include evidence of acts which occurred outside the statute of limitations as long as they were sufficiently connected to acts which occurred within the

[1] Ralph G. Neas and Kweisi Mfume: "Loose Cannon" Report In Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit, August 28, 2003, p. 4.

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statute of limitations. Justice Brown argued that it was unfair to hold employers responsible for their ongoing discriminatory behavior without providing some notice of the intent to sue. Instead, she argued, victims ought to be obliged to file a lawsuit for each individual wrongful act. Even Justice Clarence Thomas rejected this view in *Morgan v. Amtrak*, a recent U.S. Supreme Court continuing violation case.

During her time on the bench, Justice Janice Rogers Brown has taken positions hostile to affirmative action, consumer protection and discrimination based on race, age, gender, and disability. She is known for her tendency to ignore judicial precedent if it does not conform to her personal views. Over and over, Justice Brown's opinions have demonstrated a blatant lack of commitment to equal justice and a judicial temperament highly unsuitable for the U.S. Court of Appeals for the District of Columbia Circuit, arguably the second most powerful and prestigious court in the country. NELA joins more than 30 advocacy and civil rights groups in urging the members of the United States Senate to oppose her confirmation.

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October 21, 2003

★ Justice
★ Independence
★ Dignity
★ Security

Honorable Orrin Hatch, Chair
Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators Hatch and Leahy:

As organizations dedicated to promoting and protecting the interests of senior citizens, we are writing to express our opposition to the nomination of Janice R. Brown, currently an Associate Justice on the Supreme Court of California, to the United States Court of Appeals for the District of Columbia Circuit.

Based on her extensive record, once confirmed to the powerful D.C. Circuit, Justice Brown could threaten the enforceability and even the viability of the senior safety net – the network of major, long-standing programs on which older Americans depend, such as Medicare, Medicaid, the Age Discrimination Act of 1967, the Nursing Home Reform Act, the Americans with Disabilities Act, the Food Drug and Cosmetic Act, and many other vital protections.

Justice Brown has emphatically proclaimed her deep and strong opposition to the framework for humanitarian government established by President Franklin D. Roosevelt and implemented by all administrations since that time, Republican and Democratic. Specifically, she has stated that the Supreme Court's decisions upholding major New Deal legislation – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Prominent among these 1937 decisions, to which she objects so strongly, was the Court's landmark determination in *Steward Machine Company v. Davis* to affirm the constitutionality of the Social Security Act.

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For nearly three quarters of a century, the Social Security Act has been the bedrock of economic security for the nation. It is dismaying that serious consideration could be given to entrusting a life-tenured seat on the court that is the federal government's principal regulatory overseer to someone who scorns the validity of this and other such fundamental guarantees. Regrettably, Justice Brown's record on the California Supreme Court, marked by numerous lone dissents, indicates her readiness to promote her idiosyncratic policy and political views with novel legal claims that contravene statutory and judicial authority. For example:

- In one such lone dissent, Justice Brown contended that rectifying age discrimination neither "inures to the benefit of the public," nor is it a "fundamental and substantial" public policy" of the state – since age discrimination simply reflects the "unavoidable consequence of that universal leveler: time." The Court majority pointed out that both the California legislature and the Court's own precedents had made a contrary judgment, which Justice Brown was inappropriately "second-guessing." *Stevenson v. Superior Court & Huntington Memorial Hospital*, 941 P.2d 1157, 1172, 1177 (Cal. 1997)

- Another lone dissent urged that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens" [in this case, low income tenants] at the expense of another [in this case, landlords]." *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 126 (2002) Under this approach, nursing home safety standards might be held to benefit elderly nursing home residents "at the expense of" nursing home owners, thereby requiring compensation – and paralyzing the Federal nursing home reform program.

- More troublesome than Justice Brown's opinions in particular cases is her frequently reiterated hostility *in principle* to democratically determined measures that distribute benefits to needy groups. In her *San Remo Hotel* dissent she asserted that such policies turn "democracy into kleptocracy." With respect specifically to benefits for older Americans, she has said:

  > "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract."

It may be difficult for many senior citizens, and their grandchildren as well, to understand how elected representatives could vote to confirm anyone with such views to a position as responsible as the D.C. Circuit Court of Appeals.

In light of her aversion to the post-1937 constitutional regime undergirding modern government, and her readiness to displace precedent with such extreme personal views, we hope and trust that you and your colleagues will recognize that the Federal judiciary is not the right place for Justice Brown.

Sincerely,

Edward C. King
Executive Director,
National Senior Citizens Law Center

For:
National Senior Citizens Law Center
National Committee to Preserve
Social Security & Medicare
Alliance of Retired Americans
Families USA
AFSCME Retirees Program
Gray Panthers
Center for Medicare Advocacy
National Health Law Program

JANICE ROGERS BROWN: A TROUBLING RECORD ON ISSUES OF CRITICAL IMPORTANCE TO WOMEN

Introduction

Janice Rogers Brown, a nominee for the U.S. Court of Appeals for the District of Columbia who is currently a justice on the California Supreme Court, has a very troubling record on women's rights and civil rights. In a series of speeches, she has articulated an ultra-conservative philosophy that is far outside the mainstream and a theory of constitutional interpretation that would seriously weaken the two most central constitutional rights for women: equal protection under the law and the right to privacy. In her judicial opinions, she has taken a position that would undermine legal protections against sexual harassment in the workplace, she has distorted the law in the service of her anti-affirmative action views, she has construed other anti-discrimination protections narrowly, and she has shown that she is willing to undermine the right to choose.

Taken as a whole, this record clearly demonstrates that Justice Brown lacks a commitment to legal rights and principles of fundamental importance to women. In addition, serious questions have been raised about Justice Brown's judicial temperament. Her record is of particular concern in light of the unique, nationwide importance of the court to which she has been nominated, the D.C. Circuit – a court that decides many major cases involving review of actions by the federal government and that is widely regarded as the second most important court in the country, after the U.S. Supreme Court.

A summary of major concerns about Justice Brown's record, from a women's rights and civil rights perspective, is set forth below.

Janice Rogers Brown's Record

Justice Brown's Views on "Our Socialist Revolution" and Government as "Goody Bag"

In several speeches, Justice Brown has revealed an ultra-conservative philosophy and theory of constitutional interpretation that is outside the mainstream of legal thought. Her views on the Supreme Court's *Lochner* era – the period during which the Court struck down worker protections like maximum hours laws and other New Deal legislation as violations of the substantive due process rights of businesses – are a prime example. The *Lochner* era, which ended in 1937, has been almost universally denounced, even by arch-conservatives such as Robert Bork, Antonin Scalia, Edwin Meese and Orrin Hatch, who have described this era as a period of illegitimate judicial activism.[1] Justice Brown, however, laments the end of the *Lochner* era as "the triumph of our own socialist revolution," *Fifty Ways to Lose Your Freedom*, speech at the Institute for Justice, Aug. 12, 2000, at 14, and disparages the laws and programs enacted

[1] Douglas T. Kendall and Timothy J. Dowling, "Judicial Throwback," *Washington Post*, September 19, 2003.

during the New Deal and Great Society eras of American history as reflections of a "collectivist impulse – whether you call it socialism or communism or altruism." *Whiter Shade of Pale: Sense and Nonsense—The Pursuit of Perfection in Law and Politics*, speech to the Federalist Society, April 20, 2000, at 4. She has dismissed government as "a goody bag to solve our private problems." *Hyphenasia: The Mercy Killing of the American Dream*, speech at Claremont-McKenna College, Sept. 16, 1999, at 4. She has said that "[t]oday's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract" – possibly a reference to the Social Security system, although she did not say so. *Fifty Ways*, at 2.

Justice Brown's extreme views, and her apparent antipathy to legislation emanating from the New Deal and Great Society and to core government functions more generally, raise serious questions about her views on federal civil rights and social welfare laws that are critical to women. If, as her speeches suggest, she sees the Social Security and welfare systems, for example, as misguided reflections of a "collectivist" impulse (which she equates with socialism and communism), she may be inclined to construe in an overly constricted way the rights and remedies provided under these programs or under other federal laws that are of utmost importance to women, such as the Family and Medical Leave Act.

Justice Brown's Views on Constitutional Protection of Fundamental Rights

Justice Brown has been highly critical of the current constitutional framework in which social and economic legislation is upheld so long as it has a rational basis, while government action impinging on fundamental rights is subject to strict scrutiny. She has described the heightened scrutiny that is applied to fundamental rights as "intolerably strict." *Whiter Shade of Pale*, speech to the Federalist Society, April 20, 2000, at 12. And this criticism is not confined to the rhetoric of her speeches. In *Kasler v. Lockyer*, 2 P.3d 581 (Cal. 2000), Justice Brown wrote a concurring opinion in which she criticized "[t]he dichotomy between the United States Supreme Court's laissez-faire treatment of social and economic rights and its hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid." 2 P.3d at 601.[2] Justice Brown has identified *Kasler* as one of her ten most important cases.

Justice Brown also has accused the courts of exceeding the limitations of their power "[b]y constitutionalizing everything possible, finding constitutional rights which are nowhere mentioned in the Constitution. By taking a few words which are in the Constitution like 'due process' and 'equal protection' and imbuing them with elaborate and highly implausible etymologies; and by enunciating standards of constitutional review which are not standards at all but rather policy vetoes, i.e., strict scrutiny and the compelling state interest standard." *The History of the World-Part 3,192*, speech given at the Institute for Legislative Practice, November 21, 1997, at 13.

[2] Justice Brown also wrote the court's majority opinion, which upheld a state law regulating assault weapons on the ground that the law did not burden a fundamental right and satisfied the rational basis test, but in her concurrence she criticized the fact that the right to bear arms has been deemed "less fundamental" than the right to privacy. 2 P.3d at 602.

Justice Brown's objections to heightened scrutiny raise concerns about her views on the Constitution's Equal Protection guarantee. Her objection to the "implausible etymology" with which equal protection has been imbued implies that she disagrees with the equal protection jurisprudence of the last 30 years under which, through heightened scrutiny, numerous harmful gender-based distinctions in law and policy have been struck down. The views Justice Brown has expressed on "natural law" reinforce this concern. She advocates adherence to natural law, which she calls an immutable body of law derived from the nature of people as human beings, and appears to believe that judicial decision-making should rest on a higher law than "man-made" laws, inextricably linked to morality. *Fifty Ways*, passim. She believes that the civil rights movement was rooted in the natural law, *id*, at 17, but that in general the breach between law and morals "is the essential feature of modern jurisprudence." *Id*, at 10. These views are troubling because the "laws of nature and of God" have been explicitly used by courts, historically, to justify gender-based discrimination – archaic and stereotypical notions about women's roles, grounded in women's "different" nature, were applied to justify discriminatory treatment in a century of gender-based Fourteenth Amendment challenges decided prior to 1971.

Her philosophy is also troubling from the standpoint of protecting the right to privacy. Justice Brown's repeated criticism of heightened scrutiny for laws impinging on fundamental individual rights, and her criticism of the "constitutionalization" of rights not expressly mentioned in the constitution, strongly suggest that she does not support protection of a woman's right to terminate a pregnancy under the unenumerated right to privacy in the U.S. Constitution. And as discussed below, her one abortion-related opinion on the California Supreme Court underscores this concern

Justice Brown's Women's Rights and Civil Rights Decisions

Affirmative Action

Justice Brown's opinion in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), is of particular concern. In this case, the state Supreme Court struck down a City of San Jose contracting program under the anti-affirmative language added to California's constitution by Proposition 209, the ballot initiative adopted by the state's voters in 1996. The program in question required contractors bidding on municipal projects to do one of two things: either contract with a specified number of women- and minority-owned subcontractors, or, failing that, document their outreach efforts directed toward women- and minority-owned subcontractors. The outreach prong required contractors to notify, solicit, and negotiate in good faith with minority- and woman-owned enterprises and to justify their rejection of those bids. The court's unanimous opinion, written by Justice Brown, construed even such targeted outreach efforts as an impermissible preference in violation of Proposition 209. Although all seven of the California Supreme Court Justices voted to invalidate the program, three of them wrote or joined separate opinions harshly critical of Justice Brown's opinion.

In her opinion, instead of simply construing the California ballot initiative's language and purpose and applying it to the San Jose program, Justice Brown lays out an extensive argument that federal law – the Equal Protection Clause of the U.S. Constitution and Title VII of the Civil Rights Act of 1964 – prohibits race- or gender-based affirmative action. To construct this case,

she draws upon Supreme Court decisions where they support her argument, and where they do not – including in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), which upheld gender-based affirmative action in employment under Title VII – she cites dissents and academic criticisms of the Court's rulings. 12 P.3d at 1077. From this selective and slanted rendition of federal precedents, she concludes that California voters, in adopting Proposition 209, simply intended to restore the law to what she believes it was meant to be all along – i.e., a categorical ban on affirmative action. 12 P.3d at 1083. Throughout her opinion, Justice Brown characterizes affirmative action with loaded terms like "quotas" and "proportional group representation" and "group entitlements."

Chief Justice George wrote a concurring opinion that contains a stinging criticism of Justice Brown's opinion. He notes that the "general theme that runs through the majority's historical discussion – that there is no meaningful distinction between discriminatory racial policies that were imposed for the clear purpose of establishing and preserving racial segregation, on the one hand, and race-conscious affirmative action programs whose aim is to break down or eliminate the continuing effects of such segregation and discrimination, on the other – represents *a serious distortion of history* and does a grave disservice to the sincerely held views of a significant segment of our populace." 12 P.3d at 1095. He asserts that, because so much of the opinion was not necessary to the resolution of the case, "it is *likely to be viewed as less than even-handed*" and "can serve only to undermine confidence in the opinion's analysis of the legal question actually presented." 12 P.3d at 1093. And he writes that because Brown's opinion uses "*misleading and unflattering slogans* to characterize past judicial decisions upholding race-conscious and gender-conscious affirmative action programs," it "will be *widely and correctly viewed as presenting an unfair and inaccurate caricature* of the objective or justification of the overwhelming majority of race- or gender-conscious affirmative action programs." 12 P.3d at 1094. (Emphasis added in all of these quotes.) Justice Kennard also wrote separately to distance himself from the Brown opinion, saying that because the case could easily be resolved by reference to the text of Proposition 209, he saw "no need to discuss potentially divisive matters, such as the history of judicial construction of federal constitutional equal protection . . . or commonly offered justifications for race-conscious affirmative action programs." 12 P.3d at 1092.

Justice Brown's opinion in *Hi-Voltage Wire Works* clearly demonstrates that she is hostile to affirmative action programs, which have been and remain critical to opening the doors of opportunity for women in employment, education, and government contracting. Beyond that, her approach to this case suggests that where she has a strong view on an issue, she is willing to distort history and law to further her agenda.

Sexual Harassment

Justice Brown's dissenting opinion in a racial harassment case has particularly troubling implications for legal protections against sexual harassment in the workplace. In *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846 (Cal. 1999), a plurality of the court ruled that an injunction barring derogatory racial epithets against Latino employees was not an invalid prior restraint of speech under the First Amendment and the California constitution's free speech clause. Justice Brown dissented on the ground that raciall-charged speech in the workplace, even

when it violates anti-discrimination laws, is protected by the First Amendment. Justice Brown's dissent, in which no other Justice joined, argues that the U.S. Supreme Court failed to take the First Amendment into account in its decisions finding that "offensive verbal conduct" can constitute actionable sexual harassment under Title VII of the Civil Rights Act of 1964, and she suggests that, when properly analyzed, the application of Title VII in such circumstances is unconstitutional. 980 P.2d at 891-892. Her opinion ignores the basic legal principle that a place of employment is not a public forum like a sidewalk, and fails to take into account the importance of prohibiting workplace discrimination that interferes with equal opportunities. Her view on this issue is clearly out of the mainstream and, if it became law, would have a devastating impact on women.

Other Anti-Discrimination Cases

In a number of other cases, Justice Brown has construed state civil rights protections narrowly and in favor of the defendant, usually as the lone dissenter, and sometimes in plain disregard of precedent. Following are a few examples.

- *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000). This was a suit for race and age discrimination in violation of state law. The defendant argued that the federal National Bank Act of 1864 insulated it from liability for discrimination claims asserted by its officers, an argument rejected by the court's majority on the ground that the banking law was impliedly amended by more recent federal civil rights laws, including Title VII and the Age Discrimination in Employment Act, and as so amended did not fully preempt the state anti-discrimination law. Justice Brown, in dissent, would have held that the banking law preempted the state law in its entirety because banks cannot effectively operate if subject to state anti-discrimination laws. The majority countered that this was demonstrably incorrect and noted that "decisional authority" to support the dissent's position ranged "between minimal and non-existent." 990 P.2d at 554.

- In *Stevenson v. Superior Court*, 941 P.2d 1157 (Cal. 1997), the court ruled that an individual could simultaneously bring a suit for age discrimination under the state anti-discrimination statute and for the common law tort of wrongful discharge in violation of public policy. The majority relied on its 1990 decision holding that the statutory language clearly reflected the legislature's intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination. Despite this precedent and the clear intent of the legislature, Justice Brown alone dissented, and read into the statutory language a bar against common law employment discrimination claims. The majority noted that the "dissent's real quarrel is . . . with this court's previous holding . . . , and even more fundamentally, with the Legislature itself." 941 P.2d at 1172. Brown subsequently asserted the same argument in her dissent in *City of Moorpark v. Superior Court*, 959 P.2d 752 (Cal. 1998), a case considering a similar question for victims of disability discrimination.

- In *Richards v. CH2M Hill, Inc.*, 29 P.3d 175 (Cal. 2001), a disability discrimination suit challenging an employer's failure to accommodate an employee's disability over a five-year period, the court adopted a version of the continuing violation doctrine that many

other courts have adopted in employment discrimination cases, under which there may be liability for acts occurring outside the statute of limitations if they are sufficiently related to acts occurring within the prescribed time period (in this case, one year). Justice Brown wrote a lone dissent, taking a position that would eviscerate the continuing violation doctrine and require employees to file separate suits, subject to separate statutes of limitations, for each act of discrimination.[3]

Justice Brown's Reproductive Rights Record

As noted above, Justice Brown has repeatedly made clear, in speeches and decisions outside the reproductive rights context, that she is highly critical of the principle that strict scrutiny should be applied to fundamental rights, and she is equally critical of providing constitutional protection for rights that are not expressly mentioned in the Constitution. These writings strongly suggest that she does not support protection of a woman's right to terminate a pregnancy under the unenumerated right to privacy in the Constitution. Her one opinion involving reproductive rights and the right to privacy – which she lists as one of her ten most significant opinions – underscores this concern.

American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997), addressed the constitutionality of a state law requiring minors to obtain parental consent for an abortion, subject to a judicial bypass provision (under which parental consent is not necessary if a judge rules that the minor is sufficiently mature and informed to make the abortion decision on her own or that the abortion would be in her best interest). Chief Justice George, writing for a plurality of three Justices (with a fourth concurring in the result) invalidated the parental-consent requirement, even with the judicial bypass provision, on the ground that it violated the right to privacy guaranteed by the California Constitution. The plurality found the California Constitution's explicit right to privacy to be broader than the federal constitutional right to privacy, under which parental consent provisions have been upheld as long as a judicial bypass option is available. Justice Brown and two other Justices each wrote separate dissents.

In the most troubling aspect of her dissenting opinion, Justice Brown indicates that she does not believe the courts should protect fundamental rights like the right to choose where to do so entails invalidating a legislative decision. Echoing her speeches criticizing "intolerably strict" scrutiny and "hypervigilence" in the area of fundamental rights, she complains that the plurality subjected the law at issue to "an inherently insurmountable level of scrutiny." 940 P.2d at 872. She writes: "When fundamentally moral and philosophical issues are involved and the questions

[3] Justice Brown also was the lone dissenter in a case involving lesbian adoption rights. In *Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554 (Cal. 2003), the court held, 6-1, that second-parent adoptions, which do not terminate the first parent's parental rights, are permissible under California law. In her dissent, Justice Brown wrote that the ruling "trivialized family bonds," and she relied in part on the legislature's purported "insistence that the adopting parents have a legal relationship with the birth parent." 73 P.3d at 582. The majority emphasized that Justice Brown had not identified any authority to support such a legislative requirement, and there was none. The majority stressed that the concern of the legislature was not with the legal relationship of the adults in question, but rather with the relationship between the putative parent and child. Justice Brown's imputation into the law of a non-existent requirement raises questions about whether she was driven by personal views on gay parenting or traditional family definitions. Moreover, if her view of the law had prevailed, it could have implications for a range of family law issues.

are fairly debatable, the judgment call belongs to the Legislature." 940 P.2d at 891. She also argues that the federal Constitution restricts the level of protection a state may give a privacy right, despite the generally accepted principle that federal constitutional rights set floors – and not ceilings – for their state right counterparts. Justice Brown also incorrectly argues that a parental consent law should survive a facial challenge so long as it is "not unconstitutional in all its applications." This test is significantly easier to meet than that articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in which the U.S. Supreme Court held that an abortion restriction (a spousal consent requirement) would be unconstitutional even if it affected only 1% of the population, because "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 505 U.S. at 837-38.

Justice Brown's dissent also displays an extreme insensitivity to the difficulty a teen faces in seeking a judicial bypass. In Justice Brown's view, forcing a minor to seek a judicial bypass is no more burdensome than subjecting the minor to a doctor's determination of whether she is competent to give informed consent for an abortion (a determination doctors must routinely make before performing any procedure). As the plurality correctly noted, requiring a woman to "go to court, to reveal her condition to a judge, and to submit to a judicial determination of competency obviously imposes a substantially greater intrusion on privacy than one that permits a woman to obtain an abortion from a physician in the same manner as she may obtain other medical care." 940 P.2d at 831. As the plurality also noted, this burden is even greater for a minor, who may be especially embarrassed or frightened to appear before a judge.

Justice Brown's opinion in *Lungren*, especially combined with her speeches criticizing the application of heightened scrutiny to fundamental rights and the "constitutionalization" of unenumerated rights, raises serious questions about whether, as a federal appellate judge, she would uphold the constitutional right to privacy and a woman's right to choose. In light of the uncertain parameters of the "undue burden" standard the Supreme Court articulated in *Casey* and the latitude that lower courts have in construing it, there is a basis for serious concern that Justice Brown would uphold legislative restrictions on the right to choose even where they are highly burdensome and, in practice, serve to eviscerate that right.

Judicial Temperament

A further concern about this nomination arises from questions about the nominee's judicial temperament. The American Bar Association's Standing Committee on the Federal Judiciary has given the nominee a rating of "qualified/not qualified," meaning that a majority of the committee's 15 members rated her "qualified," a minority rated her "not qualified," and no one rated her "well-qualified." While the reasons for this rating have not been made public, observers of the California Supreme Court have commented on Justice Brown's tendency to write caustic opinions and spark sharp divisions with her colleagues on the court. One article reported that not long after Justice Brown joined the court, Chief Justice George (who, like Justice Brown, was appointed to the court by Governor Pete Wilson) asked her to tone down her dissents. She reportedly ignored this request and now communicates with the Chief Justice only by memo. "Disorder in the Court Comes Out on the Record; Dueling Opinions by State Chief Justice and an Acerbic Dissenter Offer a Rare Glimpse of Frictions Customarily Confined to the

Inner Sanctum," Maura Dolan, *Los Angeles Times*, Dec. 27, 2002, California Metro, Part 2, at 2. One exchange with Chief Justice George was so intense that the *Los Angeles Times* published an article detailing the charges and counter-charges between the two about the quality of their research and citation to authority. *Id.* As one California law professor stated, a judge should be able to "disagree with the majority without having language that suggests somehow that the majority lacks intelligence." *Id.* Another law professor has said that the tone of Justice Brown's opinions "raises the question of her basic collegiality." "As Sharp As They Come," Mike McKee, *The Recorder*, March 3, 2003.

Conclusion

Janice Rogers Brown's record, taken as a whole, raises serious questions about her judicial temperament and demonstrates that she lacks the commitment to women's rights and civil rights that is required of any nominee to a federal court, especially to the D.C. Circuit.

NATURAL RESOURCES DEFENSE COUNCIL

VIA FACSIMILE 202-228-3954 and 415-393-0710

October 9, 2003

Senator Dianne Feinstein
United States Senate
Hart Building #331
Washington, DC 20510

RE: Nomination of Janice Brown -- OPPOSE

Dear Senator Feinstein:

We write on behalf of the over 500,000 members of the Natural Resources Defense Council (NRDC), more than 100,000 of whom are Californians, to oppose the nomination of Justice Janice Brown to the United States Court of Appeals for the District of Columbia.

The D.C. Circuit is critical to environmental protection because it is this court that is empowered to hear most cases challenging environmental rulings and regulations issued by the EPA, the Department of Interior, and other federal agencies. It is vital that the judges on this court make decisions based on the law, rather than their own policy preferences.

Justice Brown is an avowed judicial activist who has taken positions along the far-right fringes of legal thought. She has displayed open hostility to the very concept of regulating private interests for the public good. She has urged a radical expansion of the takings clause, arguing that "property and liberty are, upon examination, one and the same thing" and that "private property, already an endangered species in California, is now entirely extinct in San Francisco." *San Remo Hotel v. City of San Francisco*, 27 Cal.4th 643, 692 (2002) (Brown, J., dissenting). Justice Brown has also compared the modern regulatory state to "slavery"; opined that "adherence to natural law is the essential element of the American birthright"; and complained that the Supreme Court decisions that upheld the New Deal (and ended *Lochner*-era judicial activism) marked "the triumph of our own socialist revolution." *See* J. Brown, "Fifty Ways to Lose Your Freedom," Remarks at the Institute of Justice (Aug. 12, 2000); J. Rodgers, "A Whiter Shade of Pale: Sense and Nonsense – The Pursuit of Perfection in Law and Politics," Remarks to the Federalist Society, Univ. of Chicago L. Sch. (April 20, 2000). Given Justice Brown's advocacy of extreme personal policy preferences that are directly adverse to protection of public health and the environment, Justice Brown should not be confirmed to the D.C. Circuit.

Thank you for your consideration,

John Adams

John H. Adams
President

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NEWS RELEASE

For Immediate Release:
August 28, 2003

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'FAR RIGHT DREAM JUDGE' JANICE ROGERS BROWN JOINS LINEUP OF EXTREMIST APPEALS COURT NOMINEES

People For the American Way, NAACP Issue Joint Report on Record of Extremism and Right-Wing Activism

California Supreme Court Justice Janice Rogers Brown, one of President Bush's most recent nominees to the federal appeals court, has a record of ideological extremism and aggressive judicial activism that makes her unfit to serve on the appeals court, according to a an in-depth analysis of her record released today by People For the American Way and the NAACP. Brown, nominated to the DC Circuit Court, is one of many Bush judicial nominees that could come before the Judiciary Committee and full Senate this fall.

The report is available at: http://www.pfaw.org/go/JaniceRogersBrown

"Janice Rogers Brown is the far right's dream judge," said People For the American Way President Ralph G. Neas. "She embodies Clarence Thomas's ideological extremism and Antonin Scalia's abrasiveness and right-wing activism. Giving her a powerful seat on the DC Circuit Court would be a disaster."

"Janice Rogers Brown has a record of hostility to fundamental civil and constitutional rights principles, and she is committed to using her power as a judge to twist the law in ways that undermine those principles, said Hilary Shelton, director, NAACP Washington Bureau. "For the administration to bring forward a nominee with this record and hope to get some kind of credit because she is the first African American woman nominated to the DC Circuit is one more sign of the administration's political cynicism."

The report released today, "Loose Cannon," notes that when Brown was nominated to the state supreme court in 1996, she was found unqualified by the state bar evaluation committee, based not only on her relative inexperience but also because she was "prone to inserting conservative political views into her appellate opinions" and based on complaints that she was "insensitive to established precedent."

The report carefully examines Brown's record since she joined the court, especially her numerous dissenting opinions concerning civil and constitutional rights. Brown's many disturbing dissents, often not joined by a single other justice, make it clear that she would use the power of an appeals court seat to try to erect significant barriers for victims of discrimination to seek justice in the courts, and to push an agenda that would undermine privacy, equal protection under the law, environmental protection, and much more.

In speeches, Brown has embraced the extreme states' rights and anti-federal-government positions of the Federalist Society, the organization of lawyers and judges working to push the law far to the right. She has said that what she has called the "Revolution of 1937," when the Supreme Court began to consistently sustain New Deal legislation against legal attack, was a "disaster" that marked "the triumph of our socialist revolution."

Civil Rights, Equal Opportunity, and Discrimination

According to the report, "Justice Brown's opinions on civil rights law are perhaps the most troubling area of a very troubling body of work. These opinions reveal significant skepticism about the existence and impact of discrimination and demonstrate repeated efforts to limit the avenues available to victims of discrimination to obtain justice. Brown's opinions in this area reveal a troubling disregard for precedent and *stare decisis* – even in the context of case law that has been settled by the U.S. Supreme Court."

The report examines Brown opinions in cases involving racial discrimination, discrimination against people with disabilities and older Americans, and affirmative action. California's Chief Justice criticized one of her opinions as arguing that "numerous decisions of the United States Supreme Court and this court" were "wrongly decided" and as representing a "serious distortion of history."

Free Speech and Association

Brown's free speech opinions illustrate her tendency to rule in favor of corporations and seek to provide broad protections for corporate speech, while sometimes giving short shrift to the First Amendment rights of average citizens.

In one dissent she listed as one of her ten most significant decisions, Brown sought to expand the contexts in which corporations could make false or misleading statements without any effective legal mechanism for holding them accountable. In another case discussed in the report, Brown argued that a corporation should be granted an injunction against a former employee sending emails critical of the company's employment practices to some of his former colleagues.

Her vigorous support of strong legal protections for even false and misleading corporate speech is even more disturbing when contrasted with her willingness to enforce a very broad injunction severely restricting the ability of Latino youth who were *alleged* to be gang members to gather in certain neighborhoods.

Privacy, Family Rights, and Reproductive Freedom

As a state supreme court justice, Brown has issued only one opinion dealing with abortion, but it raises serious concerns about her judicial philosophy concerning women's constitutional right to privacy and reproductive freedom. In her dissent, Brown argued that the federal Constitutioni somehow restricts the privacy protections that may be provided by the state constitution, a position far outside the mainstream of judicial thought. She argued that the court majority's decision ruling unconstitutional a restrictive parental consent law for minors seeking abortions would allow courts to "topple every cultural icon, to dismiss all societal values, and to become final arbiters of traditional morality."

Brown partially dissented from an important ruling this year upholding the validity of second-parent adoptions in California, a ruling that was vitally important to children and parents involved in as many as 20,000 adoptions in the state, including many by same-sex couples. Brown said the ruling

"trivialized family bonds," even though the majority explained that it would encourage and strengthen such bonds.

Worker Rights, Consumer Protection and Private Property Rights

Several cases raise serious questions about Brown's willingness to enforce provisions intended to protect the average person against the power of the government or large corporations. Brown has signaled her approval of broad drug-testing provisions even in situations in which a majority of the California Supreme Court found the tests to be clearly unconstitutional, and even where it would have required explicitly rejecting U.S. Supreme Court precedent. She also wrote an opinion as a judge on the Court of Appeal that would have struck down the fee system the state had instituted to ensure that paint companies help pay for state efforts to provide for screening and treatment of children exposed to lead paint, an opinion that was overturned by the California Supreme Court. She has dissented from several rulings protecting the rights of investors and other consumers, arguing that previous precedents should be abandoned.

In dissents from decisions on rent control and a decision upholding a city ordinance protecting against displacement of low income residents, she articulated an extremist view of property rights that would, if she were given the power of a seat on the DC Circuit, have dangerous and far-reaching consequences for environmental protection and government regulation of businesses.

She vigorously dissented from a case concerning a San Francisco rule requiring residential hotel owners seeking permission to eliminate residential units and convert to tourist hotels to help replace the lost rental units. Brown's dissent said the ruling approved "theft" and said it turned democracy into a "kleptocracy." Brown's theory that regulations are not allowed unless property owners agree they would benefit them economically would preclude much economic or environmental regulation. "Nothing in the law of takings," wrote the majority, would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state."

In several speeches and one of her opinions, Brown has attacked the long-established principle that governmental action infringing on fundamental rights is subject to strict judicial scrutiny while general social and economic legislation is upheld if it has a rational basis. According to Brown, that fundamental principle is "highly suspect, incoherent, and constitutionally invalid."

Conclusion

Some GOP Senators argued as recently as 2002 that the open 11th and 12th seats on the DC Circuit were superfluous and should not be filled. It would be not only hypocritical but disastrous for Americans' rights and liberties for one of those seats to be filled by Janice Rogers Brown.

Justice Brown's record does not demonstrate the commitment to fundamental constitutional and civil rights principles that should be shown by a nominee to an important lifetime position on the federal court of appeals for the DC Circuit. To the contrary, she would be insensitive to established precedent protecting civil and constitutional rights and improperly prone to inserting right-wing political views into her appellate opinions in an effort to remake the law. Senators should not consent to her confirmation.

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Planned Parenthood®
Federation of America, Inc.

Planned Parenthood Federation of America Statement Regarding the Nomination of Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit

The Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, has a long-standing history of working to ensure the protection of reproductive rights as well as working to advance the social, economic, and political rights of women. Because lower federal courts exercise enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, PPFA believes that judges appointed to these courts must demonstrate a commitment to safeguarding these fundamental rights. PPFA will oppose confirmation of nominees who fail to do so.

We believe California Supreme Court Justice Janice Rogers Brown has demonstrated that she is not committed to protecting these rights. Therefore, PPFA opposes her nomination to the U.S. Court of Appeals for the District of Columbia Circuit.

During Justice Brown's tenure on the California Supreme Court, that court considered the constitutionality of a law requiring that a minor seek parental consent prior to having an abortion. The majority of the court struck the law down, ruling that it violated the privacy protections guaranteed by the state constitution. Justice Brown disagreed, strongly criticizing her colleagues for taking an approach that would allow the courts to "topple every cultural icon, to dismiss all societal values, and to become the final arbiters of traditional morality."[1] It seems from her dissent that Justice Brown believes that a woman's right to choose is an issue that should be left to the legislatures rather than considered a constitutional right.[2] This is a view repeatedly espoused by Supreme Court Justice Antonin Scalia who believes that the Constitution does not encompass a woman's right to choose.[3]

Justice Brown also criticized the majority's protection of minors' rights because she believes that a parent's interest in directing his child's upbringing is "a liberty interest historically more sacrosanct than a minor's right to privacy."[4] Her dissent went so far as to

[1] *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 16 Cal. 4th 307, 441 (Cal. 1997) (Brown, J., dissenting).

[2] *Id.* at 447 ("When fundamentally moral and philosophical issues are involved and the questions are fairly debatable, the judgment call belongs to the Legislature."); *see also id.* at 441 ("That is why legislatures must be accorded broad deference on issues as to which reasonable minds can differ and why courts must exercise reasoned judgment and self-restraint.").

[3] *See, e.g. Stenberg v. Carhart*, 530 U.S. 914, 956 (Scalia, J., dissenting) ("[T]he Court should return this matter to the people – where the Constitution, by its silence on the subject, left it – and let *them* decide, State by State, whether this practice should be allowed."); *Planned Parenthood of Southeastern Pa. v.* Casey, 505 U.S. 833, 979 (Scalia, J., dissenting) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.").

[4] *Lungren*, 16 Cal. 4th at 431-32.

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question whether pro-choice physicians were objective enough to determine whether a minor was able to give informed consent for an abortion.[5]

In addition to this case, Justice Brown has publicly voiced criticism of the heightened scrutiny afforded by courts to issues that involve fundamental rights.[6] She has expressed despair that judges today are "captives of an intellectual world view that is completely antithetical to the kind of substantive limits an authentic historical interpretation of our constitutional traditions would impose."[7]

Federal courts play an integral role in interpreting and thus, declaring the law. That law should be declared by individuals who have demonstrated that they understand that the Constitution protects our fundamental rights. California Supreme Court Justice Janice Rogers' record demonstrates that she is not committed to protecting these rights. Therefore, PPFA joins other organizations concerned with women's rights and civil rights in opposing her nomination to the U.S. Court of Appeals for the District of Columbia Circuit.

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[5] *Id.* at 434-36.

[6] Janice Rogers Brown, "'A Whiter Shade of Pale': Sense and Nonsense – The Pursuit of Perfection in Law and Politics," Address to The Federalist Society, University of Chicago Law School (Apr. 20, 2000), at 11-13.

[7] Janice Rogers Brown, "Fifty Ways to Lose Your Freedom," Address to The Institute for Justice, Washington, D.C. (Aug. 12, 2000), at 15.

Positive Action Coalition

October 20, 2003

Senator Orrin Hatch
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch;

Good judges are hard to come by.

In a day and age when everyone has an agenda, and many are using the federal judiciary to further that agenda, we need judges who will interpret the law as it was originally written. We need judges who will be true to the original definition of words in the laws of our nation. We need judges who will refuse to twist our laws for some progressive view of law, and will stand upon the solid unwavering foundations of the common law system. We need judges who will have the tenacity and strength to ignore precedent if it contradicts the original intent of our laws. Janice Rogers Brown is the type of judge we need on the federal bench.

Janice Rogers Brown has an exemplary record of judicial purity. She is constitutional sound, and would be an asset to our nation on the federal bench. Consider this a full, and unrestrained, endorsement of Janice Rogers Brown, to the DC Circuit Court of Appeals, by our organization. Please do everything in your power to ensure that she receives a straight up and down vote on the floor of the Senate.

We appreciate your service to our nation.

Sincerely,

Mark Iain Sutherland
President ~ Positive Action Coalition

PO BOX 270033, SAINT LOUIS, MO 63127

October 21, 2003

The Honorable Orrin Hatch
Chairman
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
153 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

We are professors at law schools across the nation writing to you to oppose the nomination of California Supreme Court Justice Janice Rogers Brown to a seat on the D.C. Circuit. In her speeches, Justice Brown has articulated an often-alarming view of the law that falls far out of the legal mainstream on a variety of topics. Of even greater concern, she has repeatedly demonstrated a willingness to render judicial decisions driven by her personal, prescriptive view of the law with little regard for the dictates of statutes and precedent.

The D.C. Circuit is widely recognized as second only to the Supreme Court in power and prestige. The court has served as a "farm team" for the Supreme Court. Three of the nine current justices were previously D.C. Circuit judges, and, of the last seven people nominated to the Supreme Court, five were sitting judges on the D.C. Circuit at the time of their nomination.[1]

The D.C. Circuit has exclusive or concurrent jurisdiction over a wide variety of issues involving labor law, environmental protection, and the validity of regulations and decisions issued by federal agencies. The Circuit currently has five active judges appointed by Republicans, including George W. Bush appointee John Roberts, and four appointed by Democrats. A recent study by Professors Cass Sunstein and David Schkade and law student Lisa Ellman argues strongly for balance on the federal courts of appeals by demonstrating how results in cases on significant issues such as environmental protection, campaign finance, employment discrimination, and reproductive freedom differ dramatically depending on whether an appellate panel is made up of Republican or Democratic appointees. *See* Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, AEI-Brookings Joint Center for Regulatory Studies (2003) (available at http://aei-brookings.org/admin/pdffiles/php7m.pdf).

Justice Brown's appointment to the D.C. Circuit would do serious harm to the current balance on that court. Justice Brown has embraced the majority opinion in *Lochner v. New*

[1] Justices Ruth Bader Ginsburg, Antonin Scalia, and Clarence Thomas previously sat on the D.C. Circuit. In addition, D.C. Circuit Judge Douglas Ginsburg and former Judge Robert Bork were nominated to the Court by President Reagan, but were not confirmed.

York, 198 U.S. 45 (1905), a long-discredited Supreme Court decision striking down maximum hour laws as inconsistent with the Due Process clause, and has argued in speeches that legislation passed during and after the New Deal is unconstitutional. She stated:

> The New Deal, however, inoculated the federal Constitution with a kind of underground collectivist mentality. The Constitution itself was transmuted into a significantly different document. In his famous, all too famous, dissent in *Lochner*, Justice Holmes wrote that the 'constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.' Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong.

Janice Rogers Brown, *A Whiter Shade of Pale*, Speech before Federalist Society, University of Chicago Law School Apr. 20, 2000 ("Federalist Society Speech") at 8.

Lochner and its progeny have been repudiated by commentators on the left, right and center as paradigmatic examples of judicial activism. The Supreme Court rejected *Lochner's* absolutist view against reasonable economic regulation of business at least 65 years ago in *West Coast Hotel Co v. Parrish*, 300 U.S. 379 (1937), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). All of the current Supreme Court justices have written or joined opinions rejecting Lochner's reasoning.[2]

In expressing her view that *Lochner* was correctly decided, Justice Brown made clear that she believes that much government regulation is misguided and unconstitutional. She argued that the New Deal "cut away the very ground on which the Constitution rests." Federalist Society Speech at 11. In another speech, she said that the federal government is "the opiate of the masses [and drug for] multinational corporations and single moms, for regulated industries and rugged Midwestern farmers and militant senior citizens." Janice Rogers Brown, *Fifty Ways to Lose Your Freedom*, Speech before the Institute for Justice Aug. 12, 2000. These remarks are nothing short of bizarre, a dramatic departure from well-settled views of the meaning of the Constitution and an articulation of a fundamental hostility to seventy years of federal law and administrative regulations, many of which will be at issue in cases before the D.C. Circuit.

Our concern that Justice Brown's views will guide, and even control, her decisions if she is confirmed to the D.C. Circuit is not speculative. Her record on the California Supreme Court includes numerous examples of an approach to judging that reflects personal opinion far more than adherence to precedent and statutes.

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[2] Eight of the nine justices have authored opinions rejecting *Lochner*, and the ninth, Justice Ginsburg, has joined opinions rejecting *Lochner*. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (Scalia, J., joined by four justices); *id.* at 701 (Breyer, J., dissenting joined by the remaining three justices); *United States v. Lopez*, 514 U.S. 549, 601-02 n.9 (1995) (Thomas, J., concurring); *id.* at 605 (Souter, J., dissenting joined by three justices); *American Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Stevens, J., concurring in part and concurring in the judgment); *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion); *id.* at 957 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part joined by three justices); *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., dissenting, joined by one justice).

In a case in which all of her colleagues upheld a San Francisco land-use regulation requiring residential hotels to obtain consent before converting to tourist hotels, Justice Brown dissented and wrote that the majority was "[t]urning a democracy into a kleptocracy." *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 128 (Cal. 2002) (Brown, J., dissenting). Ignoring the balancing test required by the U.S. Supreme Court in almost all cases involving regulatory takings, *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *but cf. Lucas v. South Car. Coastal Council*, 505 U.S. 1003 (1992), Justice Brown declared that the ordinance was "expressly designed to shift wealth from one group to another by the raw exercise of political power, and, as such, it is a per se taking requiring compensation." *San Remo Hotel L.P.*, 41 P.3d at 126 (Brown, J., dissenting). The majority reminded Justice Brown that the U.S. Supreme Court has held that "'[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received.'" *Id.* at 108 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987).

Justice Brown's opinion in an affirmative action case raises serious questions about whether she would fairly apply the Supreme Court's recent decision upholding affirmative action programs in higher education, *see Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and its longstanding holding that private affirmative action programs are consistent with Title VII of the Civil Rights Act of 1964, *see United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In *Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), Justice Brown used the first California Supreme Court case interpreting Proposition 209, which barred public affirmative action programs in California, to issue a lengthy opinion condemning affirmative action programs and Supreme Court cases that upheld them. She cited the dissenting opinion in *Weber* with approval and strongly took issue with the U.S. Supreme Court majority's position. *Hi-Voltage Wire Works*, 12 P.3d at 1076-79. She also criticized the Supreme Court's decisions upholding affirmative action programs in the public sector, even in the limited circumstances allowed by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *See Hi-Voltage Wire Works*, 12 P.3d at 1078 n.9. In a concurring decision, Chief Justice George, a fellow appointee of Governor Pete Wilson, wrote that Brown's account of affirmative action "represent[ed] a serious distortion of history." *Id.* at 1095 (George, C.J., concurring). The courts of appeals will sit in judgment of many affirmative action programs over the coming years as they decide whether a program meets the requirements of *Grutter* or fails as the program in the companion case of *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). Justice Brown's decisions in this area will almost certainly be colored by her strong opposition to affirmative action.

In *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997), the California Supreme Court dealt with a statute requiring parental consent or judicial bypass before a minor could obtain an abortion. In dissenting from the Court's decision that the statute violated the state constitution's privacy provision, Justice Brown argued that U.S. Supreme Court precedent interpreting the federal Constitution should control. In making that argument, Justice Brown ignored three crucial facts: (1) California's Constitution contains an explicit guarantee of the right to privacy not present in the U.S. Constitution; (2) the California Supreme Court has held repeatedly that the state's right to privacy is broader than the federal right to privacy; and (3) that court has ruled repeatedly that a woman's right to choose is entitled to greater protection under the California Constitution than the U.S. Constitution. *See id.* at 807-10. Justice Brown wrote a dissent that would have jettisoned California precedent on reproductive freedom. She wrote that the majority's decision "dispos[ed] of two decades of highly pertinent United States Supreme Court precedent," *id.* at 827 (Brown, J., dissenting), and accused the majority of

following a legal philosophy that let judges "topple every cultural icon, to dismiss all societal values, and to become final arbiters of traditional morality." *Id.* at 887.

Justice Brown has written similarly troubling opinions in other areas of the law, including race discrimination; *see Peatros v. Bank of America NT & SA*, 990 P.2d 539 (Cal. 2000); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846 (Cal. 1999); *Konig v. Fair Employment and Housing Comm'n*, 50 P.3d 718 (Cal. 2002); the rights of people with disabilities, *see City of Moorpark v. Superior Court*, 959 P.2d 752 (Cal. 1998); *Richards v. Ch2m Hill*, 29 P.3d 175 (Cal. 2001); the rights of gays and lesbians, *see Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); age discrimination, *see Stevenson v. Superior Court*, 941 P.2d 1157 (Cal. 1997); and the meaning of consent in rape cases, *see In re John Z.*, 60 P.3d 183 (Cal. 2003). In a case involving California's assault weapons ban, Chief Justice George criticized Justice Brown's majority opinion for "represent[ing] a clear and unwarranted frustration of the intent of the law to ban assault weapons." *Harrot v. County of Kings*, 25 P.3d 649, 661 (Cal. 2001) (George, C.J., dissenting).

The California Judicial Nominees Evaluation Commission twice found Justice Brown not qualified for a seat on the California Supreme Court, and a substantial minority of the American Bar Association Federal Judiciary Committee – either six or seven of the fifteen members – found her not qualified for a seat on the D.C. Circuit. No member of the ABA Committee rated her well-qualified, despite her six years on California's highest court. The ratings by these two bodies presumably reflect their serious concerns with Justice Brown's ability to bring to the bench an impartiality and fealty to law and precedent that should be absolute prerequisites for anyone seeking a lifetime appointment to the federal bench. We urge the Judiciary Committee to reject Janice Rogers Brown's nomination.

Sincerely,

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Note: Titles and affiliations are for identification purposes only.

October 21, 2003

Chairman Orrin Hatch
Senate Judiciary Committee
#224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Members of the African-American leadership network Project 21 are calling upon senators to give California Supreme Court Associate Justice Janice Rogers Brown fair and timely consideration as she faces the Senate Judiciary Committee on Wednesday, October 22.

Liberal special interest groups and politicians have stepped up their criticism of Brown as her hearing date nears. Liberal senators have already placed legislative holds on or are filibustering the confirmation votes of many other Bush judicial nominees in an attempt to keep them from being voted on by the full Senate. This has led to some nominees suffering in legislative limbo since May of 2001, and to Miguel Estrada withdrawing his nomination rather than prolong the attacks on his character.

Project 21 members demand that the Brown confirmation process be handled in a quick and timely manner, devoid of scare tactics and procedural skullduggery.

To follow are some quotes from individual Project 21 members about the Brown nomination:

> "The Senate's job is to give its advise and consent, not to make the judiciary into its own political image. Justice Brown is more than qualified as a jurist. If some senators would actually embrace fairness rather than obstructionism and partisanship, then I believe Justice Brown should get the fair hearing she richly deserves."
>
> — Jerry Brooks of Portland, Oregon

> "There is nothing in Judge Brown's judicial history that should disqualify her from serving on the U.S. Court of Appeals. She has proven her ability to follow the letter of the law and refrained from social engineering from the bench, despite the pervasive activism of many of today's jurists. It is time for the NAACP to step to the plate for a change and support a qualified individual who happens to be a part of their purported

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72 North Capitol Street, N.E., Suite 803
Washington, D.C. 20002-4294
02/371-1400 ★ Fax 202/408-7773
nip@nationalcenter.org ★ www.project21.org

constituency. It is also time for liberals to cease these sophomoric attempts of obstruction for their own political gain."

— Sean Turner of Atlanta, Georgia

"This is one of the clearest examples of liberal bigotry that can be identified. Jurists such as Supreme Court Associate Justice Clarence Thomas, Miguel Estrada and Justice Janice Rogers are despised by liberals because they stand for truth, integrity, accountability and responsibility to both to the law and the greater community."

— Mychal Massie of Zion Hill, Pennsylvania

"Justice Janice Rogers Brown has shown a strong belief in a color-blind Constitution, respect for free speech and a high respect for the special abilities of legislators over judges. That these qualities are seen as troubling to many groups is a sign of how far the groups have moved from the American ideal. Her opinions are well written and extensively researched, and she has earned the respect of the legal community.

"Her legal reasoning and writing are in the mainstream of conservative thought, leavened with intelligence and a thorough understanding of history and the US consritution. She has been an independent judge, willing to overturn death penalty cases where she saw the law violated by the government, hardly the rigid doctrinaire that pressure groups attempt to portray.

"In addition to her professional life, her personal story is a compelling testament to hard work and overcoming obstacles. As she has achieved personnel and professional success, her life is an American success story. Janice Rogers Brown has earned a fair hearing for the high office she has been nominated to. It is up to the U.S. Senate to give her one."

Theodore Essex of Alexandria, Virginia

Thank you for your time in this important matter.

Sincerely,

David Almasi
Director

REPUBLICAN NATIONAL LAWYERS ASSOCIATION

Robert J. Horn
Chair

Harvey M. Tettlebaum
President

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Executive Director

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Republican National Lawyers Association
Endorsement Statement
October 14, 2003

Justice Janice Rogers Brown of California
U.S. Circuit Court of Appeals for the District of Columbia

The Republican National Lawyer's Association is a national organization advancing the principles of the Republican Party and the professionalism of lawyers generally. It is pleased to endorse Justice Janice Rogers Brown, who has been nominated by President George W. Bush to the U.S. Circuit Court of Appeals for the District of Columbia. Brown, who is a 1977 graduate of the University of California School of Law, is preeminently qualified to serve and should be confirmed by the United States Senate.

Brown's legal experience and accomplishments are notable. After graduating from law school, Justice Brown began working for the California Legislative Counsel from 1977 to 1979. She then moved on to the California Attorney General's Office, where she worked for eight years. In 1987, she became Deputy Secretary and General Counsel for the California Business, Transportation and Housing Agency. She thereafter progressed to a distinguished career in the private and public sectors.

Justice Brown obtained a position as Associate Counsel in 1990 with the distinguished firm of Nielsen, Merksamer, Parrinello, Mueller & Naylor. She re-entered the public sector in 1991, as Legal Affairs Secretary to Governor Pete Wilson, followed by a position as Associate Justice of the Third District Court of Appeals in Sacramento. Finally, in 1996, she earned a seat as Associate Justice for the California Supreme Court, where she has served faithfully until the present.

Brown's professional accomplishments are augmented by significant public and community service. Particularly noteworthy are her service as Adjunct Professor for the University of the Pacific McGeorge School of Law, her service on the Pepperdine University Board of Regents, and on the California Commission on the Status of African-American Males. She has volunteered with the Center for Law-Related Education, served on the Governor's Child Support Task Force, and served on the Community Learning Advisory Board of the Rio Americano High School. She has been actively involved in women's programs at the Cordova Church of Christ in Rancho Cordova, California.

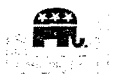
The 1,300 members of the Republican National Lawyer's Association are proud to extend their endorsement to this distinguished nominee whose record of service has respected and advanced the rights of all American citizens. We join the President in supporting this nominee and urging timely confirmation by the United States Senate.

Harvey M. Tettlebaum
National President

Brigida Benitez
Vice-President for Communications

REPUBLICAN NATIONAL LAWYERS ASSOCIATION

John P. Hewko
815 Connecticut Avenue NW
Washington, DC 20016



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October 17, 2003

Re: Requesting your support to confirm Justice Janice Rogers Brown to the U.S. Circuit Court of Appeals for the District of Columbia.

The Honorable Orrin Hatch
104 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

Via Fax (202) 224-6331

Dear Senator Hatch:

As a member of the Republican National Lawyers Association and as an attorney from District of Columbia, I write to urge you to vote to confirm Justice Janice Rogers Brown to the U.S. Circuit Court of Appeals for the District of Columbia.

The nominee is particularly qualified by distinguished professional credentials to serve. Justice Brown obtained a position as Associate Counsel in 1990 with the distinguished firm of Nielsen, Merksamer, Parrinello, Mueller & Naylor. She re-entered the public sector in 1991, as Leg Affairs Secretary to Governor Pete Wilson, followed by a position as Associate Justice of the Third District Court of Appeals in Sacramento. Finally, in 1996, she earned a seat as Associate Justice fc the California Supreme Court, where she has served faithfully until the present. Attorneys familiar with the nominee agree that while serving in these positions, the nominee has developed a keen sense of fairness and appropriate courtroom demeanor. She will be a jurist that will follow the laws as written by our legislative representatives.

Brown has demonstrated commitment to the nation and community. Particularly noteworthy are her service as Adjunct Professor for the University of the Pacific McGeorge School of Law, her service on the Pepperdine University Board of Regents, and on the California Commission on the Status of African-American Males. She has volunteered with the Center for Law-Related Education, served on the Governor's Child Support Task Force, and served on the Community Learning Advisory Board of the Rio Americano High School. She has been actively involved in women's programs at the Cordova Church of Christ in Rancho Cordova, California.

I join 1,300 other members of the Republican National Lawyers Association, including members from District of Columbia, in urging your support of Brown.

Sincerely,

John P. Hewko, Member
Republican National Lawyers Association

REPUBLICAN NATIONAL LAWYERS ASSOCIATION

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Edwin L. Hightower
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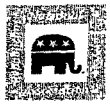
Sincerely,

Edwin L. Hightower, Member
Republican National Lawyers Association

REPUBLICAN NATIONAL LAWYERS ASSOCIATION



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October 17, 2003

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WASHINGTON, DC 20510

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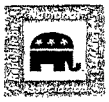
I join 1,300 other members of the Republican National Lawyers Association, including members from Louisiana, in urging your support of Brown.

Sincerely,

Eric R. Miller, Member
Republican National Lawyers Association

REPUBLICAN NATIONAL LAWYERS ASSOCIATION



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October 17, 2003

Re: Requesting your support to confirm Justice Janice Rogers Brown to the U.S. Circuit Court of Appeals for the District of Columbia.

The Honorable Orrin Hatch
104 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

Via Fax (202) 224-6331

Dear Senator Hatch:

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I join 1,300 other members of the Republican National Lawyers Association, including members from Maryland, in urging your support of Brown.

Sincerely,

Gerard W. Wittstadt, Jr., Member
Republican National Lawyers Association

New York's Senator

CHARLES E. SCHUMER

313 Hart Senate Office Building • Washington, DC 20510
Phone: (202)224-7433 • Fax: (202)228-1218

FOR IMMEDIATE RELEASE
October 22, 2003

CONTACT: Phil Singer
(202) 224-7433

SCHUMER STATEMENT ON JANICE BROWN NOMINATION

I must say that I'm disappointed to be here on this nomination today. Instead of finding a well-qualified, consensus, moderate nominee, the White House has reached out for an out-of-the-mainstream activist of the first order. It's almost as if the Administration is looking for the nominee who will most antagonize us, rather than one on whom we can all agree.

In case after case, Justice Brown goes through pretzel-like contortions of logic to get to results that hurt workers, undermine environmental protections, and do violence to basic rights.

As I reviewed Justice Brown's record, the one thing that came through loud and clear is that she is consistently inconsistent. Time and again, when a legal question is presented twice, she takes two totally opposite approaches in order to achieve the outcome she wants. A judge who makes the law, instead of interpreting it, is a judicial activist.

Making law, not interpreting it, is an undesirable quality in a judge whether she's coming from the liberal side or the conservative side, because the Founding Fathers wanted judges who interpret law, not make law.

And judicial activism would be bad on any court, but it's especially dangerous on the DC Circuit which is known – for good reason – as the nation's second highest court. Especially when it comes to workers' rights and the environment, the DC Circuit is arguably the most important court in the nation.

Since the Supreme Court takes so few cases each year and since a grossly disproportionate number of labor and environmental cases come to the DC Circuit, this is often the Court of Last Resort for those who seek to vindicate workers' rights and protect the environment.

Justice Brown's record when it comes to workers' rights, the environment, and many other important issues leaves many of us up here scratching our heads in wonderment.

In a sense, I have to respect her bluntness. It's obvious to me that many of the President's judicial nominees want to return us not just to the 1930s, but to the 1890s.

In Justice Brown's case, she's remarkably straightforward in her praise of the Lochner case and her criticism of Justice Holmes' famous dissent there, calling Justice Holmes "simply wrong." Even Judge Bork defended the Holmes dissent.

In Lochner, the Court invalidated a New York statute that limited the number of hours laborers in bakeries could work. The Court, over Justice Holmes' vigorous – and ultimately vindicated -- dissent, held that the New York statute violated a "liberty of contract" right that had not previously been recognized. The doctrine lived for three decades until the Court shifted direction in the 1930s.

If you ask most lawyers to name the worst Supreme Court decisions of the 20th Century, Lochner would be near the top of the list. But Justice Brown thinks it was correctly decided.

Even Justice Scalia, who so often advocates cutting back on Congress' power to protect basic rights, is content to let the states do so themselves. In this instance – as in others – Justice Brown finds herself willing to go even further to the right than Justice Scalia.

Justice Brown not only wants to turn back the clock, she wants to turn back the calendar – and not just by a few years, but by a century or more.

Justice Brown, I want to be frank with you. There's a lot in your record that troubles me and I think you've got a tough row to hoe up here.

#####

October 9, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

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TDD: 202.898.3481
www.SEIU.org

RE: Nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit

Dear Senators Hatch and Leahy:

On behalf of the 1.6 million working people represented by SEIU, I am writing to express our opposition to the nomination of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit. Justice Brown's record of decisions along with her public statements have convinced us that she would not be an impartial arbiter of law but rather an ideologue who would undermine the hard-fought rights of our members.

Brown's ideology makes her particularly ill suited for the D.C. Circuit – a court of exceptional importance to working men and women. The D.C. Circuit, often referred to as the "administrative law court," has jurisdiction to review the decisions of and the actions taken by our federal agencies. Of particular import, the D.C. Circuit has jurisdiction over the decisions of the National Labor Relations Board, and in the year 2000, almost one in five cases seeking review of NLRB decisions were filed in this court. Accordingly, the D.C. Circuit routinely is called on to resolve critical questions regarding workers' rights to organize and participate as active union members. In addition, the D.C. Circuit reviews regulations issued by the Occupational Safety and Health Administration and therefore often has the final word on our members' rights to a safe and healthy workplace.

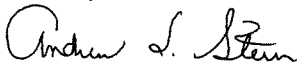
To this critically important court, President Bush has nominated an unacceptable nominee. When Janice Rogers Brown was nominated to the California Supreme Court in 1996, three-fourths of state bar evaluators for

the California State Bar's commission on judicial nominees rated her "unqualified" for the position because of her lack of experience and her tendency to inject her own personal views into her judicial opinions. And Brown's record on the California Supreme Court confirms this assessment. In her judicial writings and public statements, Brown expresses an ideology defined by overriding concern for property rights and deep disdain for government. She has authored opinions banning affirmative action, undermining health and safety protections, and restricting free speech rights. She has written dissents that would have barred civil rights claims, prevented courts from proscribing racially discriminatory speech in the workplace, and allowed companies to shut down group e-mail contact from outside individuals or organizations. Put simply, a D.C. Circuit judge who makes decisions based on such an ideology will threaten the federal government's ability to secure employees' voice at work, enforce civil rights and environmental laws, and otherwise protect our rights.

SEIU is committed to a federal judiciary that protects the civil, constitutional, and workplace rights of all Americans. We are also committed to a federal bench that decides cases based on law and precedent. Janice Rogers Brown's record strongly suggests that she would not bring an appropriate respect for these rights and principles to the bench. We therefore oppose her nomination.

Thank you for considering our views.

Sincerely,



Andrew L. Stern
International President

THE HOOVER INSTITUTION

STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

Thomas Sowell
Rose and Milton Friedman Senior Fellow
(650) 723-3303

October 19, 2003

Senator Orrin Hatch, Chairman
Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

Please allow me to express my support for the nomination of California Supreme Court Justice Janice Rogers Brown to become a federal Circuit Court judge in the District of Columbia. Her knowledge, intelligence, and courage are apparent-- and impressive -- in her judicial opinions on a wide variety of issues that have come before her in California's highest court. Most important of all, Justice Brown has repeatedly voiced her understanding of the limited role which a judge may legitimately play in the American system of government by checks and balances among its executive, legislative, and judicial branches.

As Justice Brown expressed it in one of her opinions, the "desire to do good" and "to make everybody happy" is "understandable." But, she added: "There is only one problem with this approach. We are a court." Some have objected to Justice Brown's comments on philosophical matters which occur occasionally in her opinions-- as they do in the opinions of many judges at many levels. Would those who object to her on this ground also object to Chief Justice Earl Warren's comment in Brown v. Board of Education that segregation may affect the hearts and minds of black children "in a manner unlikely ever to be undone"? Legendary Supreme Court Justice Oliver Wendell Holmes made many memorable philosophical comments in his opinions, without being thought less of because of it. Is it the simple fact that Justice Brown has made occasional passing references to matters of general philosophy in her opinions that critics object to-- or is it the fact that they happen not to agree with her philosophy?

Attempts have been made to portray Janice Rogers Brown as an "activist" judge carrying out a conservative agenda. But she has not hesitated to anger some conservatives by ruling that the California state legislature had the right to ban assault weapons. The only relevant issue to Justice Brown was whether that legislation was lawful, not whether she considered it wise or unwise. There need to be more judges like that.

(2)

Despite a tendency in the media and elsewhere to label judges "liberal" or "conservative" on the basis of how they have ruled on issues reflecting liberal or conservative constituencies, the real difference is between judges who believe that they are on the bench to resolve ideological issues and judges who see their duty as enforcing the laws passed by elected officials of whatever political or ideological persuasion. Justice Janice Rogers Brown has clearly and repeatedly shown herself to be a judge who carries out the laws as written and who does not see her role as that of making laws and social policy from the bench. She would be a valuable addition to any court on which she sits.

Sincerely,

Thomas Sowell

Testimony of Senator Paul Strauss (D- DC) Shadow
United States Judiciary Committee
Hearing: "Judicial Nomination: Janice Rogers Brown"
October 22, 2003
10:00 am
Hart SOB-216

Chairman Hatch, Ranking Minority Member Leahy and members of this committee, I thank you for the opportunity to address you today regarding the nomination of California Justice Janice R. Brown to be United States Circuit Judge for the District of Columbia Circuit.

As you weigh the merits of Ms. Brown's nomination I ask that you consider the importance of the DC Circuit to my constituents. While the DC Circuit decides important regulatory and other federal cases it serves a particularly important role in the lives of my constituents. The District of Columbia Circuit Court, the second highest court in the land, also has local jurisdiction over my constituency. As a result, the DC Circuit supplants the structure of local and state courts found in every state in the union and becomes the sole venue for appellate litigation of matters related to the laws of the District of Columbia. This is our State Supreme Court and its decisions affect the lives of everyone who makes their home in the nation's capitol.

For the states of this nation, the Circuit Court nomination process is historically guided by the state's two elected Senators, each of whom is granted the professional courtesy of consultation, if not an outright veto, over nominees to the State's court system as they progress through the Senate. Each senator may, if desired, place a hold on the nomination should it appear adverse to the interests of the citizenry.

The District of Columbia is denied any formal right to weigh in on nominations to its "state court" because we have no voting representation in the U.S. Senate. While some in the Senate have shown tremendous courtesy to me in my capacity as the popularly elected Senator for the District of Columbia, the office comes with no formal powers and I am denied the right to advocate for my constituents through official proceedings.

It is within these constraints that I ask you today to reject the nomination of Ms. Brown to the DC Circuit Court. My opposition stems from three issues. First, as this committee has examined in past hearings, it is of utmost importance that the DC Circuit Court should be balanced, and not reflect an extreme or radical ideology among any of the members in any political direction. Further, this court has served as the launching pad for more United States Supreme Court Justices than any other court in the land and its symbolic status in this regard makes extreme philosophical bias among its membership a concern for every American.

Right now, as you know, the DC Circuit Court is balanced at least with regards to parties, and by most accounts is balanced ideologically as well. Unfortunately, however, the President's choice of nominees represents a radical departure from this balanced panel and acceptance of any of these nominees, including Ms. Brown, would wreck havoc with the efforts of many to maintain this precious balance. However, it is constitutional duty of the United States Senate and, more specifically, the Senate Judiciary Committee to make the final determination. I implore you to reject the radicalization of the DC Circuit Court.

Second, Ms. Brown has pursued a notable legal career in the State of California since gaining admittance to the California Bar in 1977. However, her entire experience as both a practitioner and a juror has been rooted in the state of California, a full 2,600 miles from the jurisdiction she seeks to serve today. Without evidence of significant legal experience in the District of Columbia or anywhere in the surrounding region, it is challenging to conclude that Ms. Brown could serve as a capable interpreter of the laws of DC on behalf of its people.

Finally, I suggest that a strict numerical balance may not represent the true meaning of ideological balance as it applies to the citizens of the District of Columbia. Just as neither the courts of Massachusetts nor of Texas contain a precise numerical balance between parties and ideologies, nor should the court of the District of Columbia. Rather, political and ideological balance must be considered within the context of the citizenry to which it must respond. Balance, in the true sense of the word, should be reflected in the court as it appears in the community at large. It is the views of the citizens that should be reflected in a balanced manner, not exclusively the opinions of the nation as a whole. The DC Circuit Court should be balanced proportional to the prevailing ideology of the citizens of the District of Columbia.

To that end, a brief examination of the political and ideological representation among DC residents reflects a decidedly progressive position. The DC Circuit Court, if it is to reflect the political balance experienced daily by those of us who make our home in the District, should only move to a more progressive framework, not a more conservative one. The nomination of Ms. Brown demonstrates a radical departure from the philosophy of a balanced and reflective judiciary.

Thank you for the opportunity to submit my testimony for the record on this important issue that cannot possibly hit any closer to home. I also wish to thank Sebastian Grübel for his assistance in preparing for this hearing. I look forward to working with the Committee in the future on this and other issues germane to the District of Columbia.

PEPPERDINE UNIVERSITY

BOARD OF REGENTS

October 17, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Justice Janice R. Brown,
California Supreme Court

Dear Senator Hatch:

I am writing in support of the nomination of Justice Janice R. Brown, of the California Supreme Court, to be a judge on the D.C. Circuit Court of Appeals.

I serve as Chairman of the Board of Regents of Pepperdine University and Justice Brown is a very valuable and productive member of that board. This has given me a firsthand opportunity to become well acquainted with her and to develop a great admiration for her. Hers is a great American success story and she is much admired by all who know her.

Justice Brown has proven herself to be a fair-minded judge who considers all sides of an issue before deciding a case. She has a keen interest in the workings of our government and would make a valuable addition to the D.C. Circuit Court. I request that you give her your wholehearted support.

Sincerely,

Thomas J. Trimble

Thomas J. Trimble
Chairman

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate

cc: Office of Legal Policy

State of North Carolina
Court of Appeals
P.O. BOX 888
Raleigh, NC 27602-0888

CHAMBERS OF
JUDGE JOHN M. TYSON

TELEPHONE 919-733-4294
TELECOPY 919-733-8003
jtyson@coa.state.nc.us

17 October 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination and Confirmation of Justice Janice R. Brown for Judge of the United States Court of Appeals for the District of Columbia Circuit

Dear Senator Hatch,

Please accept this letter in support and my unqualified recommendation of the Honorable Janice R. Brown, currently Justice of the California Supreme Court, for confirmation as Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Brown will be an outstanding Federal jurist.

The confirmation process by the United States Senate presents an opportunity to examine the qualifications of our President's judicial nominees. By any measure, Justice Janice Brown is highly and uniquely qualified to be confirmed to serve on the United States Court of Appeals. Janice is a very approachable, humble, and seasoned jurist who will render impartial and dedicated service to our nation for many years.

Her life experiences are diverse, being born in Alabama, while her father served our Country on active military duty. She has personally witnessed, experienced, and excelled during great changes that occurred as America matured over the past 50 years. Justice Brown has overcome formidable challenges to rise to the pinnacle of the legal and judicial profession. These experiences produced a jurist who is uniformly fair, works hard, and acts with calm dignity.

My personal knowledge of Justice Brown is derived from daily contact with her over the past two summers. Janice and I recently completed all course work to be awarded LL.M. degree (Masters of Law) in Judicial Process from the University of Virginia School of Law. She immediately distinguished herself among the thirty-one State and Federal Judges and Justices by being elected President of

our law class. During her tenure, she planned and presided over all activities of the class and served as liaison with the faculty and law school administration. Her work was uniformly excellent and praised by all members of the class.

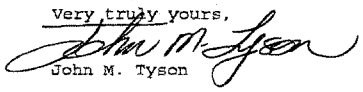
During our summers together in Charlotteville, judges had the opportunity to observe and learn the work habits and personal demeanor of our peers and classmates. Janice Brown was always prepared and contributed to the discussions of timely legal issues. Her reasoning was clear, focused, and demonstrated the knowledge, experience, and judicial temperament to diligently address thorny legal issues, particularly the administrative law cases, presented to the District of Columbia Circuit. She demonstrated a commitment to excellence. Despite a heavy class and reading schedule (5 hours of in-class instruction and 150 pages to read daily), Janice extended a helping hand, accepted extra responsibilities, and wrote a note to or visited those experiencing personal or family tragedies. Janice Brown is an encourager, a team leader, and a good friend and example to all judges in our class.

I am certain that all members of our class, who currently serve as State and Federal judges, will heartily concur that Justice Janice R. Brown is highly and unconditionally qualified to serve, and will serve with distinction, as a Judge of the United States Court of Appeals for the District of Columbia Circuit.

Her confirmation by the Senate to the United States Court of Appeals for the District of Columbia Circuit will certify to the American People that distinguished jurists are recruited, nominated, confirmed, and seated on our Federal Bench.

Please do not hesitate to call upon me for any further information that you or the Judiciary Committee desire regarding her confirmation.

Very truly yours,



John M. Tyson

JMT/dww
Enclosure
cc: Office of Legal Policy

MAXINE WATERS
MEMBER OF CONGRESS
35TH DISTRICT, CALIFORNIA

CHIEF DEPUTY WHIP

COMMITTEES
FINANCIAL SERVICES
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
BANKING MEMBER

JUDICIARY
CHAIR, DEMOCRATIC CAUCUS SPECIAL COMMITTEE ON ELECTION REFORM

Congress of the United States
House of Representatives
Washington, DC 20515–0535

PLEASE REPLY TO:
2344 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-0535
(202) 225-2201
FAX: (202) 225-7854

DISTRICT OFFICE:
10124 SOUTH BROADWAY
SUITE 1
LOS ANGELES, CA 90003
(323) 757-8900
FAX: (323) 757-8506

Statement of U.S. Rep. Maxine Waters Opposing Senate Confirmation of D.C. Circuit Court Nominee Janice Rogers Brown

CBC Press Conference
House Radio/TV Gallery
October 17, 2003
11:00 A.M.

Thank you, Mr. Chairman for convening this press conference. I have never met Judge Janice Rogers Brown, but, as a California Member of Congress, I am familiar with, and have carefully examined many of her opinions. I strongly oppose her nomination to the U.S. Court of Appeals for the D.C. Circuit and urge the Senate not to confirm her.

Judge Brown's judicial record, especially her time on the California Supreme Court

and the California Court of Appeals, demonstrates conclusively to me that she is hostile to the cause of civil rights, that she is prepared to depart from well-established precedent to advance a partisan, conservative political agenda, and that she lacks the judicial temperament required of any qualified candidate for the Federal bench, let alone for a court as important as the United States Court of Appeals for the D.C. Circuit.

If confirmed, Judge Brown will undermine important constitutional protections such as our First Amendment rights to assemble, and our civil rights and civil liberties. She also will be a determined opponent of affirmative action programs. That is why the Congressional Black Caucus, the AFL-CIO, People for the American Way, the NAACP, and many other progressive organizations are so committed to defeating Judge Brown's nomination.

Judge Brown's legal record and her views on civil rights and constitutional issues place her well outside the legal

mainstream. She is a poster woman for the far right wing. We must do everything within our power to ensure that the Senate does not confirm this unqualified candidate.

Judge Brown is the first African American Judge to be nominated by President Bush for the U.S. Court of Appeals for the D.C. Circuit. While I, and all of my Colleagues here, fervently believe that it is critical to increase the number of African Americans on our federal appellate courts, that does not mean that any of us should or will give a pass to a far right wing ideologue like Judge Brown simply because she is a minority candidate.

If the President needs help in identifying a pool of qualified African American judges for nomination to the D.C. Circuit, all of us can provide him with a huge list of qualified candidates, including a number of candidates who are considered to be conservative, who do not come with the baggage that Judge Brown carries.

Among other things, Brown seems to believe that it is an individual's constitutional right to voice racial epithets in the workplace. In a 1999 case, a trial court issued an injunction to prohibit an employee from using racial epithets against co-workers. The employee challenged the injunction as a violation of his free speech rights and Brown agreed. In her dissenting opinion, Brown claimed that use of racial slurs in the workplace, even when it rises to the level of illegal racial discrimination, is protected by the First Amendment. Her colleagues on the State Supreme Court disagreed with her and upheld the trial court's injunction.

Judge Brown's record on civil rights is a travesty. As a member of the California Supreme Court since 1996, Brown has spent most of her time on the bench opposing the civil and constitutional rights of people of color. She has fought against affirmative action and has suggested that protections against employment bias

afforded by the Civil Rights Act of 1964 are unconstitutional.

In writing the majority decision that effectively ended affirmation action in California, Brown prohibited California cities from requiring their contractors to conduct a meaningful outreach to women-and minority owned subcontractors. Brown's free speech opinions demonstrate her penchant to rule in favor of corporations, while virtually ignoring the First Amendment rights of average citizens.

In one dissenting opinion, Brown sought to allow corporations wider latitude to make false or misleading statements in commercials without any effective legal mechanism for holding them accountable. In another majority opinion, Brown wrote that Latino youths could be denied their First Amendment right to peaceful assembly in certain neighborhoods because they were merely suspected of being gang members.

Judge Brown is unqualified to sit on the D.C. Circuit Court and, according to her peers, she is unqualified to hold the job she now has. Brown's nomination to the California Supreme Court in 1996 was opposed by the State Bar of California's Commission on Judicial Nominees, which rated her "not qualified" due to her limited judicial experience and her tendency to express "gratuitous" political and philosophical views in her opinions. It was the second time Brown received a "not qualified" rating. She was rejected after her first nomination to California's high court in 1993 after the Commission rated her not qualified.

Ladies and Gentlemen, the D.C. Circuit Court is considered the most important court in the nation except for the U.S. Supreme Court. More Supreme Court Justices have first served on the D.C. Circuit than on any other Circuit Court. Based upon her dissents in the California courts, it is abundantly clear

that, if confirmed, she would use the power of the appeals court seat to try to undermine privacy, equal protection under the law, environmental protection, family rights, reproductive freedom and free speech.

We can and must place better judges on the D.C. Circuit than Judge Brown. I urge the Senate not to confirm her.

# # #

NEWS from the office of Congresswoman Diane E. Watson
33rd District - California 202-225-7084 / 202-225-2422 fax

Immediate Release
October 17, 2003

Contact: Bert Hammond
(202) 225-7084

Congresswoman Watson Opposes Nomination of Judge Janice Rogers Brown

Washington, D.C.– Congresswoman Diane E. Watson today released the following statement in opposition to the nomination of Judge Janice Rogers Brown to the D.C. Court of Appeals:

As a Californian, my opposition to Judge Brown's nomination derives from a first hand knowledge of her extreme legal jurisprudence during her seven years on the California Supreme Court. Judge Brown has spent much of her career on the court undermining the principles and laws protecting civil rights. She has accumulated a lengthy record of troubling dissents that show her willingness to engage in extreme judicial activism that would reverse our fundamental civil and constitutional protections.

Her atrocious record is too long to list, but let me just give a few quick examples in illustrating how my constituents have been adversely impacted by her presence on the court:

First, Judge Brown wrote the majority decision that not only effectively ended meaningful affirmative action programs in California, but further asserted that the U.S. Supreme Court had wrongly decided past affirmative action cases and that affirmative action is illegal under the Civil Rights Act of 1964.

Second, Judge Brown argued in a dissenting opinion that an employer cannot be ordered to protect employees from racial slurs aimed at them by another employee because racial discriminatory speech is protected by the First Amendment.

Third, Brown was the only supreme court justice out of seven to rule that California's Fair Employment and Housing Commission did not have the authority to award emotional distress damages to victims of discrimination.

As you know, the Congressional Black Caucus has come out consistently against many extreme judicial nominations. However, this Bush nominee has such an atrocious civil rights record that Clarence Thomas would look like Thurgood Marshall in comparison.

At my last count, 26 national organizations have come out in opposition to her nomination, ranging from the AFL-CIO, the National Organization for Women, the National Resources Defense Council, to the National Senior Citizens Law Center, the NAACP, and the National Bar Association.

I am also working closely with Congresswoman Norton in circulating a letter to the Democratic members of the California delegation opposing her nomination. We are still in the process of collecting signatures, but I'll be happy to share a copy of the letter with you.

Janice Rogers Brown has demonstrated on numerous occasions a willingness to depart from well-established

precedents to fulfill her own conservative agenda. She should not be rewarded with a seat on the D.C. Court of Appeals, which, as you know, is a court where most federal government actions are appealed.

I sincerely hope that members of the Senate Judiciary Committee will listen to our plea and heed our warnings by rejecting the nomination of Judge Brown. Thank you again for coming.

GOVERNOR PETE WILSON

October 15, 2003

The Honorable Orrin Hatch
Chairman
Judiciary Committee
United States Senate
Washington, D. C.

Dear Mr. Chairman:

Attached is a copy of my letter recommending Justice Janice R. Brown to be the recipient of the UCLA Alumnus of the Year Award. I think you will find it relevant to her qualifications as the President's nominee for a seat on the District of Columbia Court of Appeals Bench.

Justice Brown clearly understands the judicial responsibility of upholding the rule of law.

With warmest personal regards,

Sincerely,

Pete

2132 Century Park Lane. #301 Los Angeles, California 90067

GOVERNOR PETE WILSON

September 3, 2003

Nominating Committee
UCLA Alumni Association
Alumnus of the Year Award
C/o Robyn Goldberg
James West Alumni Center
Los Angeles, California 90045-1397

To the Nominating Committee:

I write to share with the Committee my strongest possible support of the nomination of Justice Janice R. Brown to receive the high honor that it is your responsibility to bestow. As someone who has been privileged both personally and professionally to know many of the most distinguished graduates of UCLA, I understand the difficulty you face in selecting just one man or woman from so competitive a field to be the recipient of this most prestigious award.

Yet recognizing your challenge full well, I do not hesitate to suggest that Justice Brown is the most deserving of the many possible distinguished candidates. Her career spectacularly meets the criteria prescribed by Regent Dickson in establishing the Award. More important, her personal triumph is an American success story that celebrates both the value of higher education and the critical importance of the rule of law in fulfilling the great promise of America to its citizens, both immigrant and native-born. The professional training she received at the UCLA School of Law has permitted her, even now when decades remain to further enhance her brilliant career, to have had already a profound and revitalizing impact upon the integrity of American jurisprudence.

Growing up poor and black in pre-Civil Rights Alabama she experienced racial and gender discrimination. But she chose not to be a victim – or anything less than she could become by fulfilling her high potential through a challenging and empowering higher education. She worked her way through Sacramento State University, majoring in economics, and then the School of Law at UCLA.

When I was elected Governor in November, 1990, a number of truly fine lawyers applied to become my Legal Affairs Secretary. But based upon her reputation and the acclaim she had won as both a public and private lawyer, I sought and recruited Janice Brown for the job – diverting her from the lucrative practice she would have otherwise enjoyed and causing her instead to focus her extraordinary UCLA-honed skills upon enriching the public rather than herself.

She performed the many heavy responsibilities of her office four years with unfailing fidelity and meticulous professionalism. Often she was required by her ethical code of strict constructionism to tell me what I did not wish to hear, when existing law seemed clearly unfair or inimical to the public interest – or to my political philosophy of what was best for California. Only once, when announcing a major policy decision that I felt required public explanation rather than just announcement, did I disagree with her counsel – and never with her legal judgment.

It was for this reason – for her unbending personal and professional integrity and the strict discipline with which she practiced her ethical code – that I appointed Janice Brown to fill a vacancy on the Third District State Court of Appeals, and why I subsequently elevated her to the Supreme Court of California.

I knew, admired and was grateful for her extraordinary intellect and her impressive gifts as a legal scholar and writer. But it was because I was convinced that she would be a superb judge, whose opinions and conduct on the bench would renew and strengthen the foundations of the rule of law, that I appointed and elevated her. I was and am convinced that she will inspire young Americans of every ethnic heritage to emulate her admirable example and her uncompromising judicial integrity in pursuing a career to ensure that America is in fact a land "with liberty and justice for all."

She continues to prize higher education, finding time in an incredibly demanding schedule to serve on the governing boards of Pepperdine University and the University of the Pacific, and as well has taught as an adjunct professor at the University of the Pacific's McGeorge School of Law. And she continues, as a constitutional scholar, to enhance her extraordinary capacity as a jurist – continues to learn and to share her learning as a jurist and teacher of the law. She is presently pursuing a graduate degree in constitutional law at the University of Virginia School of Law.

What more could UCLA or any of its pre-eminent sister institutions of higher learning ask of any of its graduates than that he or she – as scholar, teacher, and exemplar of judicial integrity – provide, as has Justice Brown, a deep moral and legal rudder to sustain our nation and steer it through times as challenging as any in our history.

With all respect to UCLA and its many other distinguished graduates, I submit that by conferring the very prestigious Alumnus of the Year award upon Justice Brown, the Committee will confer as much distinction upon the University as upon the recipient.

Sincerely,

2132 Century Park Lane, #301 Los Angeles, California 90067

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