

The Honorable Janice Rogers Brown
Nominee to the United States Court of Appeals for the D.C. Circuit

- Justice Brown testified for nearly five hours at her hearing and answered every charge leveled against her by Senate Judiciary Committee Democrats and the liberal groups who make their living smearing the reputations of President Bush's judicial nominees.
- **An American success story.** Justice Brown's rise from humble beginnings to the highest court of the largest state in the country is a truly inspiring American success story.
- Justice Brown was born in Greenville, Alabama in 1949. During her childhood, she attended segregated schools, and 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.
- Her family moved to Sacramento, California when Justice Brown was in her teens, and she later received her B.A. in Economics from California State in Sacramento in 1974, and her J.D. from the UCLA School of Law in 1977.
- Justice Brown has served on California appellate courts for nine years. She was a member of the California Court of Appeal, Third District from 1994-96, and was appointed by Governor Wilson to the California Supreme Court in May of 1996.
- **A Mainstream Judge.** Any fair review of Justice Brown's testimony and record on the bench demonstrates that she is a conscientious judge whose opinions are well within the legal mainstream. In Justice Brown's words, her only job as a judge "is to get it right."
- Some facts to remember about Justice Brown:
 - She was re-elected with 76 percent of the vote by the people of California in her last election— the largest margin of ANY of the four Justices up for retention that year.
 - Justice Brown was called upon by the Chief Justice of her court in 2001 and 2002 to write the majority opinion more times than any other Justice on the court.
 - 12 judges, including every former Court of Appeal colleague and four current California Supreme Court Justices, have written letters of support on her behalf. One letter noted:

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 an 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.

A Judge Who Will Interpret the Law, Not Make it from the Bench. Despite the claims of her opponents, Justice Brown's record demonstrates a commitment to the rule of law, and is marked by fairness to all. Some cases you won't hear about from her liberal detractors:

People v. McKay- Justice Brown, in a lone dissent, voted to overturn the drug conviction of an individual stopped by the police for riding his bicycle the wrong way down a one-way street.

Justice Brown believed that the actions of the police in this case amounted to racial profiling, and, if allowed to stand, could lead to more instances of discriminatory law enforcement. She wrote: "If we are committed to a rule of law that applies equally to minorities as well as majorities, to the poor as well as the rich, we cannot countenance standards that permit and encourage discriminatory enforcement."

People v. Woods- Justice Brown dissented in this case, arguing for the exclusion of evidence obtained during a warrantless search of a person's home based on consent given by the person's roommate.

In the opinion, Brown noted: "In appending the Bill of Rights to the Constitution, the framers sought to protect individuals against government excess By their decision today, a majority of this court set the history of personal liberties back more than 200 years and resurrect a specter of the general warrants and writs of assistance so abhorred in England and the American Colonies – the very impetus of the Fourth Amendment."

Kasler v. Lockyer- Justice Brown wrote the opinion of her court upholding California's assault weapons ban, despite her legal view that the Second Amendment protects an individual's right to own firearms. The NRA attacked Justice Brown in a series of television commercials that ran in California following the decision.

Dispelling liberal myths about Justice Brown. Democrats on the Senate Judiciary Committee echoed several themes during the hearing in a cynical attempt to smear Justice Brown's reputation.

Myth: Justice Janice Rogers Brown is "anti-government."

Reality: Justice Brown has been a public servant in California for 25 years. In her own words: "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.”

A review of Justice Brown’s opinions demonstrates that she understands that government can and does play an important role in her state and in America:

- ✓ In *People ex rel. Lockyer v. Shamrock Foods*, Justice Brown voted to uphold stringent state standards for identifying and labeling milk and milk products, thereby protecting the health and safety of California consumers.
- ✓ In *People ex rel. Lungren v. Superior Court*, Justice Brown agreed that the phrase “source of drinking water” in the government’s Safe Drinking Water program includes faucets allegedly containing lead, allowing the Attorney General to sue faucet manufacturers to protect California consumers.
- ✓ In *Hartwell Corp. v. Superior Court*, Justice Brown voted to allow injured plaintiffs to use state law to sue water utilities for injuries caused by harmful chemicals in water.
- ✓ In *Ramirez v. Yosemite Water Co.*, Justice Brown agreed that state regulations regarding overtime pay were validly enacted and should be liberally interpreted to provide greater protection for Californians than is provided under federal law.
- ✓ In *Ventura Cty. Deputy Sheriffs’ Assoc. v. Bd. of Retirement*, Justice Brown voted to expansively interpret regulations so that thousands of employees would receive higher pension payments.
- ✓ In *Pearl v. Workers’ Compensation Appeals Board*, Justice Brown agreed that an injured police officer was entitled to receive higher government benefits payments under the state’s Public Employees’ Retirement Law and regulations.

***Myth:** Justice Janice Rogers Brown believes that property rights trump individual rights and would turn back the clock to the Lochner-era invalidation of important social legislation.*

Reality: Justice Brown testified and has acknowledged in her opinions that the Lochner court has been **justly criticized** for using the due process clause in the Constitution as “a blank check to alter the meaning of the Constitution as written.”

She also noted in her testimony that Lochner has been discredited, and that it is a case that has been universally condemned.

Liberals have seized on Justice Brown’s comments that were critical of a small portion of Justice Holmes’ dissent in Lochner to argue that she supports the majority’s opinion in that case. That

argument is simply wrong.

Justice Holmes had argued in his dissent that the Framers did not consider any particular economic theory when drafting the Constitution. Justice Brown disagrees with that notion and instead believes that the Framers indeed intended to protect economic rights through the “takings” clause of the Fifth Amendment, which prohibits the government from taking private property without compensation.

In Justice Brown’s view, the rights contained in the Fifth Amendment stand on equal footing with the other rights contained in the Constitution. This is not a novel legal theory: the Supreme Court has recognized it in more than one recent case (*Dolan*, *Nollan*).

However, Justice Brown has never endorsed the majority’s opinion in *Lochner*, which was used to strike down employee wage and hour protections and other laws on the grounds that the government could not interfere with an employee’s “freedom to contract”- a constitutional right invented out of whole cloth and later disavowed by the Supreme Court.

Myth: Justice Janice Rogers Brown is “anti-affirmative action.”

Reality: Justice Brown has stated in her judicial opinions that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”

She also has noted that the Constitution permits race-conscious programs, and she favorably cites Supreme Court decisions establishing an affirmative duty to desegregate where there has been a showing of prior discrimination.

Opponents have cynically seized on her opinion in the *Hi-Voltage* case as “evidence” that she is opposed to affirmative action. Nothing could be further from the truth.

In writing for a **unanimous** court, Justice Brown struck down a San Jose minority contracting program because it violated Proposition 209, a provision of the California Constitution that prohibits discrimination against, or 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. **Every judge in California who reviewed this program found it unconstitutional.**

Myth: Justice Janice Rogers Brown is “anti-abortion.”

Reality: Justice Brown has never publicly stated her views on abortion. At her hearing, she acknowledged that the Supreme Court has found a right to privacy in the Constitution, and that such right extends to a woman’s right to have an abortion. She noted that she accepted that *Roe* and *Casey* are the law of the land, and that she would follow those precedents as a

member of the D.C. Circuit if called upon to do so.

Justice Brown's opponents have used her dissenting opinion in *American Academy of Pediatrics v. Lungren* to argue that she is anti-abortion, because she voted to uphold a California law requiring minors to get the consent of their parents or a court order before receiving an abortion.

What her opponents ignore was that Justice Brown was attempting to follow decades of Supreme Court precedent, which have long held that parental consent statutes like the one at issue in the *Lungren* case are constitutional. According to a 2000 poll, 82 percent of Americans support parental notification statutes.

Myth: Justice Janice Rogers Brown is "anti-senior citizen."

Reality: At her hearing, Justice Brown expressed her strong opposition to age discrimination. Time and time again, Justice Brown has voted to uphold the rights of individuals who are the victims of age discrimination.

In fact, in *Stevenson v. Huntington Memorial Hospital*, Justice Brown joined the majority of her court in upholding the rights of an age discrimination plaintiff to recover damages under California's Fair Employment and Housing Act, the comprehensive statute California's legislature adopted to deal with age discrimination.

Critics of Justice Brown have seized upon her comments in *Stevenson* that age discrimination is different than race or sex discrimination because it does not stigmatize older workers as evidence that she is anti-senior citizen. In fact, the United States Supreme Court has agreed with Justice Brown. In a case involving the constitutionality of a Massachusetts statute, the Supreme Court has stated:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. (*Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)(per curiam).

Myth: Justice Janice Rogers Brown is unduly harsh on criminal defendants.

Reality: Justice Brown has been a staunch defender of the rights of criminal defendants. She has issued several opinions arguing for reversals of criminal convictions, including death sentences, when she believed that the Constitution warranted it.

In *People v. McKay*, Justice Brown argued for the exclusion of evidence of drug possession that was discovered after the defendant was arrested for riding his bicycle the wrong way on a

residential street, suggesting the possibility of racial profiling.

In *People v. Woods*, Justice Brown dissented, arguing for the exclusion of evidence obtained during a warrantless search of a person's home based on consent given by the person's roommate.

Justice Brown authored an opinion in *In re Brown* reversing a verdict and death sentence in a case where the prosecutor deprived the defendant of a fair trial by failing to both discover and disclose an arguably exculpatory blood test.

In another case called *In re Visciotti*, Justice Brown dissented from the majority opinion, arguing that a defendant's death sentence should be set aside on grounds of ineffective assistance of counsel.

Justice Brown's critics have unfairly focused on her dissent in *People v. Mar*, the so-called "stun belt" case. In that case, Justice Brown argued that because a defendant had not demonstrated that he was in any way prejudiced because he was required to wear a stun belt during his trial – a showing he was required to make – the Court should not overturn his conviction for assaulting a police officer.

The use of the stun belt in this case was reasonable, given that the defendant's own attorney 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.

Numerous federal and state courts have upheld the use of stun belts at trial, including the United States Courts of Appeals for the Fifth, Seventh, Ninth and Tenth Circuits, and state appeals courts in Colorado, Delaware, Minnesota and Washington.