



JANICE ROGERS BROWN: A PERFECT FIT FOR THE D.C. CIRCUIT

No matter which party controls the White House, Americans expect the President to nominate qualified, intelligent, and fair-minded candidates to preside in our federal courtrooms. These men and women of distinction need to adhere faithfully to binding precedent issued by higher courts and defer to the policy choices made by the political branches of government. They must faithfully follow the law wherever it leads them, even in the face of intense pressure from those who wish for the law to be ignored in favor of politically popular outcomes.

Fulfilling this ideal is even more pressing when it comes to the U.S. Court of Appeals for the District of Columbia Circuit. This court is considered the second most important court in the United States – second only to the U.S. Supreme Court – because Congress has given it exclusive jurisdiction over a number of important legal questions. As one legal commentator puts it: “[T]he Supreme Court most often declines to review circuit court cases that are decided en banc by the D.C. Circuit. As a result, en banc proceedings, coupled with the D.C. Circuit’s crucial role in deciding regulatory agency appeals, have helped to institutionalize the D. C. Circuit as a ‘mini [S]upreme [C]ourt’ in administrative law.”¹

The D.C. Circuit has also been a home for several of the most thoughtful judges in our legal tradition. A number of prominent jurists have served on the D.C. Circuit, earning the court the unofficial moniker of “Court of Appeals for the Academic Circuit.”² In fact, more Supreme Court Justices have come from the D.C. Circuit than from any other federal circuit court: Wiley Blount Rutledge, appointed in 1943, Frederick Moore Vinson in 1946, Warren Earl Burger in 1969, Antonin Scalia in 1986, Clarence Thomas in 1991, and Ruth Bader Ginsburg in 1993.³ In light of this hallowed tradition, Americans should be gratified that President Bush has nominated California Supreme Court Justice Janice Rogers Brown to this important court. Over the course

¹ Christopher P. Banks, “The Politics of En Banc Review in the ‘Mini-Supreme Court,’” 13 J. L. & POLITICS 377, 378-79 (1997).

² Susan Low Bloch and Ruth Bader Ginsburg, “Symposium: the Bicentennial Celebration of the Courts of the District of Columbia Circuit: Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia,” 90 GEO. L.J. 549, 564 (2002).

³ *Id.*

of her career, Justice Brown has proven herself to be a dedicated public servant, an exceptionally skilled lawyer, a hard-working state court jurist, and a great intellect.

Janice Rogers Brown not only lives up to the standards of excellence Americans expect, she eclipses them. Justice Brown's experiences as a sharecropper's daughter raised in the segregated South motivated her desire to become a lawyer. This passion for justice, combined with a top-notch work ethic and a brilliant mind, helped her become the first African-American female on the highest court of America's largest state. Time after time, she has made tough decisions by following the law wherever it leads her, not necessarily in a direction that would reflect her personal views. She articulates her positions compellingly and persuasively, but always with civility and intellectual honesty. And, in keeping with the spirit of the august court to which she has been nominated, she will bring to the federal bench a much-needed dose of intellectual stimulation. As a group of fifteen distinguished California law professors recently observed:

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 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.⁴

As they have with other qualified nominees for the federal bench, Washington's liberal special interest groups have undertaken an all-out effort to distort Justice Brown's record, claiming that it "does not demonstrate the commitment to fundamental constitutional and civil rights principles" needed for the federal bench.⁵ This is simply not the case. Justice Brown has shown the ability to buck criticism from those who simply do not understand that, as American Bar Association's Committee on Separation of Powers and Judicial Independence has observed, "a judge is under an obligation to decide cases according to the law as written, even when the consequences do not sit well with the public . . ."⁶ Her record as a California Supreme Court Justice has demonstrated that she is committed to one and only one perspective: defense of the rule of law.

No wonder that three of Justice Brown's colleagues on the California Supreme Court, along with all of her former colleagues on the California Third District Court of Appeal, have taken the extraordinary step of publicly endorsing Justice Brown's nomination:

⁴ Letter from Douglas Kmiec et al. to the Honorable Orrin G. Hatch, October 15, 2003.

⁵ People for the American Way, "Report in Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit," Aug. 28, 2003, at 39.

⁶ ABA Commission on Separation of Powers and Judicial Independence, "An Independent Judiciary," July 4, 1997, available at <http://www.abanet.org/govaffairs/judiciary/r6a.html>.

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.⁷

We wholeheartedly agree, and with great excitement join countless others, both in California and nationwide, in calling on the United States Senate to expeditiously confirm Justice Brown to the D.C. Circuit, where her open-minded, hard-working, and intellectual approach will be a perfect fit.

A Compelling Story

The story of Justice Brown's compelling rise to the highest court of America's largest state has been recounted many times, and it bears retelling. The daughter of sharecroppers, 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 University of California-Los Angeles School of Law in 1977. She also has received honorary law degrees from Pepperdine University Law School, Catholic University of America School of Law, and Southwestern University School of Law.

Justice Brown has dedicated all but two years of her twenty-six year legal career to public service. She began her career in 1977 and served two years as a Deputy Legislative Counsel in the California Legislative Counsel Bureau. From 1979-1987, Justice Brown was a Deputy Attorney General in the Office of the California Attorney General, where she prepared briefs and participated in oral arguments on behalf of the state in criminal appeals, prosecuted criminal cases, and litigated a variety of civil issues. Her keen intellect and solid work ethic made her a rising star on the California legal scene, resulting in her appointment as the Deputy Secretary and General Counsel for the California Business, Transportation, and Housing Agency in 1987, where she supervised the state banking, real estate, corporations, thrift, and insurance departments. She then served from 1991-94 as Legal Affairs Secretary to California Governor Pete Wilson, where she provided legal advice on litigation, legislation, and policy matters.

In 1994, Justice Brown was nominated and confirmed as an Associate Justice on the California Third District Court of Appeals, an intermediate appellate court. In May 1996, Governor Wilson elevated her to the position of Associate Justice on the California Supreme

⁷ Letter from the Honorable Robert K. Puglia et al. to the Honorable Orrin G. Hatch, October 16, 2003.

Court, where she has presided to this date. She is the first African-American woman to serve on the Court, and was retained with 76 percent of the vote in her last election. In 2001-02, Justice Brown's colleagues relied on her to write the majority opinion for the Court more times than any other Justice.

Justice Brown's training and experience, which are by any measure top-notch, have ideally prepared her for the federal bench. But her commitment to California and America's future has not stopped with her day job. Justice Brown has served as a Member of the California Commission on the Status of African-American Males. The Commission was chaired by now-U.S. Representative Barbara Lee (D-CA), and made recommendations on how to address inequities in the treatment of African-American males in employment, business development, and the criminal justice and health care systems. She was a member of the Governor's Child Support Task Force, which reviewed and made recommendations on how to improve California's child support enforcement system. Justice Brown also served as a Member of the Community Learning Advisory Board of the Rio Americano High School and developed the Academia Civitas program to provide government service internships to high school students in Sacramento. She also assisted in the development of a curriculum to teach civics and reinforce the values of public service.

Both on and off the bench, Justice Brown embodies the level of excellence that Americans expect their federal judges to exhibit, especially judges on our nation's second most important court. We look forward to the day that Justice Brown takes her seat on the D.C. Circuit, where she will most certainly continue her long tradition of service to the community.

A Laudable Record on Civil and Constitutional Rights

Because of the experiences of her childhood, there are few Americans who understand the lingering effects of discrimination better than Justice Brown. As Hugo Lane, the Executive Director of Minorities in Law Enforcement ("MILE"), a coalition of California minority law enforcement officers, has stated: "In many conversations with Justice Brown, I have discovered that she is very passionate about the plight of racial 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"⁸

In a California Supreme Court opinion, Justice Brown reflected on the events of her childhood:

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

⁸ Letter from Hugo Lane to the Honorable Orrin G. Hatch, undated.

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.⁹

It has been this perspective from which Justice Brown's jurisprudence on civil and constitutional rights emanates. As both a judge and an intellect, her take on these issues has played a part in uplifting the best aspirations of our constitutional system.

Standing Up to Racial Profiling: *People v. McKay*. In *People v. McKay*, the case in which Justice Brown wrote the stirring reflection on the spring of 1963 referenced above, she also 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.¹⁰ Justice Brown wrote:

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. Well . . . it would not get anyone arrested unless he looked like he did not belong in the neighborhood. That is the problem. . . . 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.¹¹

Justice Brown's opinion in *McKay* was noteworthy not only for its power, but also for the fact that she was the only member of the California Supreme Court to argue for the exclusion of the evidence in the case. Her profound sensitivity to the dehumanizing effects of racism led her to courageously buck her colleagues in arguing for the deterrence of racially-motivated police misconduct.

Efforts to Distort Justice Brown's Record: *Hi-Voltage Wire Works v. City of San Jose*. Despite her superb record, special-interest groups have nonetheless tried to distort several of Justice Brown's opinions on civil and constitutional rights issues. Take, for example, the case of *Hi-Voltage Wire Works v. City of San Jose*,¹² where Justice Brown authored an opinion for the court related to California Proposition 209. Proposition 209 amended the California Constitution

⁹ *People v. McKay*, 41 P.3d 59, 78-87 (Cal. 2002) (Brown, J., concurring and dissenting).

¹⁰ *See id.* at 78-87 (Cal. 2002).

¹¹ *Id.* at 86 (citation and quotation marks omitted).

¹² *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

to provide: “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.”¹³

At issue in the case was a San Jose minority contracting program requiring that contractors bidding on city projects to utilize a specified percentage of minority and women contractors or to document efforts to include minority and women subcontractors in their bids. Every judge who had reviewed the issue – including at the trial and intermediate appellate phases – agreed that the San Jose program constituted “preferential treatment” within the meaning of Proposition 209.¹⁴ The California Supreme Court justices unanimously concurred in the judgment of Justice Brown’s opinion in *Hi-Voltage Wire Works* affirming the lower courts’ determination.¹⁵ In fact, every judge in California who reviewed this question, from the trial court through the intermediate appellate court to all seven members of the California Supreme Court – concurred with Justice Brown.

Contrary to the assertions of the liberal smear groups, Judge Brown is not flatly opposed to affirmative action in all circumstances. In her opinion, she specifically acknowledges that “equal protection does not preclude race-conscious programs.”¹⁶ She favorably cites U.S. Supreme Court decisions establishing the “affirmative duty to desegregate” where there has been “some showing of prior discrimination.”¹⁷ In fact, her decision in *Hi-Voltage Wire Works* has received widespread praise for its faithful application of California law. For example, a large bi-partisan group of law professors unanimously agree that Justice Brown reached the legally correct result:

The holding in *Hi-Voltage* – disallowing race and gender-based contracting preference 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. 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 of 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.¹⁸

¹³ CAL. CONST. art. I, § 31.

¹⁴ *See id.*; 84 Cal.Rptr.2d 885 (Cal. App. 6 1999).

¹⁵ *See* 12 P.3d at 1068-1107.

¹⁶ *Id.* at 1087.

¹⁷ *Id.* at 1077-78.

¹⁸ Letter from Kmiec, *supra* note 4.

American Academy of Pediatrics v. Lundgren. Special interest groups have likewise attempted to misrepresent Justice Brown’s opinion in this case, where she wrote a dissenting opinion arguing that California’s abortion parental-consent law should be upheld. Several key aspects of this case bear mentioning. First, the U.S. Supreme Court long has made clear that parental-involvement laws are perfectly constitutional. In *Planned Parenthood v. Casey* – in the course of reaffirming *Roe v. Wade* – the Court held: “Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”¹⁹ The majority opinion in *American Academy of Pediatrics* expressly conceded that the statute was drafted to comply with settled Supreme Court precedent: “[I]t is quite clear that in drafting [the statute], the California Legislature itself relied heavily upon the prior United States Supreme Court decisions in this area.”²⁰

Second, the centerpiece of Justice Brown’s dissent was a plea that courts should defer to the people’s elected representatives in the legislature. She wrote: “When the claim at issue involves fundamentally moral and philosophical questions as to which there is no clear answer, courts must remain tentative, recognizing the primacy of legislative prerogatives.”²¹ Justice Brown faulted her colleagues for exercising a power that should remain with the legislature – the power to set policy: “The fundamental flaw running through its analysis is the utter lack of deference to the ordinary constraints of judicial decisionmaking – deference to state precedent, to federal precedent, to the collective judgment of our Legislature, and, ultimately, to the people we serve.”²²

Third, and most critically, Justice Brown simply argued that the California Constitution’s privacy right should be read consistently with how the U.S. Supreme Court has interpreted the federal right to privacy. This illustrates her commitment to following the rulings of the Supreme Court. California courts have long recognized that the state privacy right, added to the California Constitution in 1972, was modeled on the federal privacy right: “Testimony before the Assembly Constitution Committee, together with staff reports and analyses prepared for that committee and the Senate Constitution Committee, makes explicit reference to the federal constitutional right to privacy, particularly as it developed beginning with *Griswold v. Connecticut*.”²³

After looking behind the liberal special interest groups’ sham misrepresentations, it is clear that their criticism of Justice Brown for her dissent in *American Academy of Pediatrics* is really motivated by the fact that they flat-out oppose parental-consent laws. The special interests

¹⁹ 505 U.S. 833, 899 (1992).

²⁰ 940 P.2d 797, 807 (Cal. 1997).

²¹ 920 P.2d at 872.

²² *Id.*

²³ *Hill v. NCAA*, 856 P.2d 633 (1994).

don't approve of the fact that parental involvement is a mainstream, popular policy that is supported by an overwhelming majority of the American people. According to a 2000 *Los Angeles Times* poll, 82% of the American people support parental-consent laws.²⁴ Those who oppose Justice Brown apparently believe that 8 out of 10 Americans are ideologically unfit for the federal bench.

Richards v. CH2M Hill, Inc. Liberal critics have distorted Judge Brown's dissent in this case as well, where she simply gave effect to the legislature's careful determination that the public policy of ending disability discrimination is best served by a one year statute of limitations. Her dissent simply recognized that the California Legislature expressly chose a strict limitations period to reduce workplace discrimination, and refused to create a "continuing violation" exception to the statute of limitations in such cases.²⁵ The timely filing and investigation of complaints, and where necessary, the prompt establishment of affirmative action programs all vindicate the underlying public policy to eliminate discrimination. As the U.S. Supreme Court has itself stated: "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."²⁶

Not only was Justice Brown's point of view well within the legal mainstream, it was later vindicated by the U.S. Supreme Court. In *National Railroad Passenger Corporation v. Morgan*, the Court held that under analogous federal law, the continuing violation doctrine is not applicable to discrete discriminatory acts, for which complaints must be filed within the statutory time period, often only six months.²⁷ The Court noted that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."²⁸ As with all of Justice Brown's mainstream jurisprudence on civil and constitutional rights issues, her opinion in *Richards* demonstrates her firm commitment to the bedrock principle of civil rights for all.

Defender of the First Amendment

Defending the First Amendment is oftentimes not easy, but frequently the most difficult cases result in the most meaningful reaffirmations of the importance of free speech rights. As Judge Wilbur Pell once wrote in upholding the right of a Nazi hate group to march in Skokie, Illinois:

²⁴ See Jeff Jacoby, "The Real Extremists," BOSTON GLOBE, July 28, 2002 at E7.

²⁵ 29 P.3d 175, 193-95 (Cal. 2001) (Brown, J., dissenting).

²⁶ *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

²⁷ 536 U.S. 101, 112-13 (2002).

²⁸ *Id.*

The preparation and issuance of this opinion has not been an easy task, or one which we have relished. Recognizing the implication that often seems to follow over-protestation, we nevertheless feel compelled once again to express our repugnance at the doctrines which the appellees desire to profess publicly.

Retaining meaning in civil rights, particularly those many of the founding fathers believed sufficiently important as to delay the approval of the Constitution until they could be included in the Bill of Rights, seldom seems to be accomplished by the easy cases, however, and it was not so here.²⁹

Justice Brown has a demonstrated record of protecting free speech, and her opinions reflect a thoughtful consideration of the complex issues that arise in First Amendment cases. Though she has heard more than her share of difficult free speech cases, she has repeatedly shown her firm commitment to this bedrock constitutional right.

The First Amendment Applies to Everyone: *Nike v. Kasky*. In this case, Justice Brown dissented from her colleagues' view that Nike could be sued under California law for inaccurate comments it made in defending the company's overseas labor practices. Well within the mainstream, Justice Brown believed that the California statute authorizing the lawsuit unconstitutionally burdened free speech.³⁰ Far from defending corporate bad acts, her dissent noted that the goal should be to allow corporations to participate in the public debate without giving them free reign to lie and cheat.³¹

Several liberal commentators and groups supported Justice Brown's view. Harvard law professor Laurence H. Tribe noted after his oral argument before the U.S. Supreme Court on Nike's behalf that "if companies can be sued for alleged misstatements in their press releases, they will be reluctant to speak at all."³² According to Ann Brick of the ACLU, the California Supreme Court's majority opinion "essentially shuts business speakers out of the public debate on any issue that affects them. That kind of analysis is antithetical to the basic First Amendment principle that we let the people, not the government, decide who's right and who's wrong on an issue of public dispute."³³

Several members of the U.S. Supreme Court have likewise recognized the difficult First Amendment issues raised in the *Nike* case and have signaled that they agree with Justice Brown's view. Justice Breyer concluded in a dissent to the dismissal of certiorari (joined by

²⁹ *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

³⁰ See *Nike v. Kasky*, 45 P.3d 243, 270 (Cal. 2003) (Brown, J., dissenting).

³¹ *Id.*

³² Jim Lobe, "Rights: U.S. Supreme Court Leaves Nike Mum – For Now," INTER PRESS SERV., June 27, 2003.

³³ *Id.*

Justices O'Connor and Kennedy) that if the Supreme Court had decided the case on its merits, it likely would have agreed with Justice Brown's position. Justice Breyer noted that "it is likely, if not highly probable . . . that California's delegation of enforcement authority [of the false advertising law] to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it."³⁴ In dismissing the writ of certiorari in this case, Justice Stevens (joined by Justices Ginsburg and Souter) also noted that the case involved difficult constitutional questions. He wrote: "[T]his case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance."³⁵

No Blanket Prohibitions on Free Speech: *Aguilar v. Avis Rent-a-Car Systems*.

Notwithstanding her personal experiences with racism, Justice Brown further demonstrated her firm commitment to the First Amendment in the *Aguilar* case.³⁶ In a dissent arguing against an injunction that placed an absolute prohibition (a "prior restraint") on speech, she cited liberally to the Supreme Court's long line of First Amendment cases for the proposition that speech cannot be banned simply because it is offensive.³⁷ She noted:

None of us on this court condone ethnic and racial discrimination in the workplace, but the issue in this case is speech, not just discrimination. Speech is unpleasant sometimes. It may be disgusting. It may be offensive. . . . But, with few exceptions, none of which apply, the state and federal Constitutions prohibit courts from using their injunctive power as a surgical instrument to extricate disfavored ideas from the popular discourse, and this principle applies even here where the ideas in question were, from what we can tell from the limited record, both offensive and abhorrent.³⁸

However, she nonetheless demonstrated her commitment to equality in the workplace: "Plaintiffs should not be subjected to racial invectives in the workplace. . . . [E]mployees can sue and recover damages. It is hard to imagine any employer would continue to tolerate discriminatory speech in the workplace after shouldering the cost of litigation and a damage award."³⁹

³⁴ See *Nike v. Kasky*, 123 S.Ct. 2554, 2568 (2003) (Breyer, J., dissenting from dismissal of certiorari as improvidently granted).

³⁵ See *id.* at 2558 (Stevens, J., dismissing certiorari as improvidently granted).

³⁶ 980 P.2d 846 (Cal. 1998).

³⁷ See *id.* at 894 (Brown, J., dissenting).

³⁸ See *id.* at 895.

³⁹ See *id.* at 893-94.

Justice Brown was not alone in voicing her courageous perspective. Justices Stanley Mosk and Joy Kennard, who are considered among the most liberal members of California's Supreme Court, also dissented on First Amendment grounds.⁴⁰ Justice Brown's opinion was so powerful that it prompted one member of the U.S. Supreme Court to take the unusual step of publishing an opinion dissenting from the denial of certiorari in the case.⁴¹

Efforts to Distort Justice Brown's Record: *People ex rel Gallo v. Acuna*. Of all the misrepresentations and distortions of Justice Brown's body of jurisprudence, none is probably more ridiculous than the absurd assertion that she "denied the First Amendment rights of Latino youths to peaceful assembly" in this case.⁴² Far from engaging in "peaceful assembly", the undisputed facts of the *Acuna* case indicated that gang members in the Rocksprings neighborhood of San Jose, California openly drank, smoked marijuana, snorted cocaine from the hoods of cars, used yards and garages as urinals, sold drugs, engaged in fistfights and gunfights, and harassed, intimidated and retaliated against neighbors who dared complain to the police.⁴³

Justice Brown, writing for a majority of the California Supreme Court, simply upheld an injunction sought by the city of San Jose barring gang members from intimidating, harassing, threatening, or assaulting persons within a four-block area, from associating with one another, and from creating a public nuisance in their crime-riddled neighborhood.⁴⁴ Her opinion was well within the mainstream: six of her seven colleagues agreed with all or part of her opinion. Only the most liberal member of the Court, Justice Stanley Mosk, dissented from the entire holding of the Court.⁴⁵

In fact, the injunction was supported by then-Mayor of San Jose Susan Hammer, a Democrat and self-described "longtime member of the ACLU."⁴⁶ According to Mayor Hemmer, "you have to balance the civil liberties of the gang members against the constitutional rights of the people in the neighborhood."⁴⁷ She was not alone: two of California's largest newspapers, the *Los Angeles Times* and the *San Francisco Examiner*, spoke out in favor of Justice Brown's opinion and the use of injunctions to curb gang activity.⁴⁸ Incidentally, the injunction

⁴⁰ See *id.* at 878 (Mosk, J., dissenting); *id.* at 882 (Kennard, J., dissenting).

⁴¹ See 529 U.S. 1138 (Thomas, J., dissenting).

⁴² People for the American Way, *supra* note 5, at 17.

⁴³ See *People ex rel. Gallo v. Acuna*, 899 P.2d 66, 600-02 (Cal. 1997), *cert. denied*, 521 U.S. 1121.

⁴⁴ See *id.*

⁴⁵ See *id.* at 623 (Mosk, J., dissenting).

⁴⁶ Tim Golden, "Police Applaud Ruling to Allow Restrictions on Gang Suspects," N.Y. TIMES, February 1, 1997 at 6.

⁴⁷ *Id.*

dramatically reduced crime in the Rocksprings neighborhood – the crime rate dropped 54 percent.⁴⁹

Justice Brown’s Commitment to Civil Justice

Justice Brown has repeatedly demonstrated her willingness to enforce various constitutional and statutory provisions intended to protect employees and consumers. Her decisions regarding consumers’ rights and other related issues demonstrate that she approaches cases by following the law wherever it leads her, without regard to the background or identity of the litigants. She has authored numerous opinions protecting the rights of ordinary workers and consumers:

- In *Naegele v. R.J. Reynolds Tobacco Co.*, Justice Brown wrote that a state statute granting tobacco manufacturers immunity for certain tort lawsuits does not bar fraud claims alleging that the defendants manipulated the addictive properties of cigarettes via additives and that the defendants controlled nicotine delivery to smokers by adding ammonia.⁵⁰
- In *State Comp. Ins. Fund v. Superior Court*, she allowed a claim by insured employers against a workers’ compensation insurer for misallocating the plaintiffs’ claims expenses and reporting that misinformation to a ratemaking organization, resulting in higher premiums for plaintiffs.⁵¹
- In *People ex rel. Lockyer v. Shamrock Foods*, Justice Brown joined in an opinion holding that the more stringent state standard for identifying and labeling milk and milk products, rather than the more lenient federal standard, applied in California.⁵²

⁴⁸ See “Banging the Gangs”(editorial), S.F. EXAMINER, Feb. 4, 1997 (“a majority of Californians will hail a ruling last week from the state Supreme Court allowing cities to prohibit suspected gang members from engaging in otherwise legal behavior, such as gathering menacingly on street corners. . . . The court balanced neighbors’ safety against gang members’ freedom, and decided the former was paramount. . . . Gang members’ liberty was curtailed, but they had only their own despicable behavior to blame for it.”); “Injunction’s Proper Scope Fights Gang” (editorial), L.A. TIMES, July 15, 1997 at B6.

⁴⁹ See Carolyne Zinko, “State Top Court Upholds San Jose Curb on Gangs,” S.F. CHRON., January 31, 1997 at A19.

⁵⁰ See 28 Cal.4th 856 (2002).

⁵¹ See 24 Cal.4th 930 (2001).

⁵² See 24 Cal.4th 415 (2000).

- In *Hamilton v. Asbestos Corp.*, she ruled that the statute of limitations runs from the date the plaintiff discovered that his disability was caused by asbestos injury, not from the date of the injury.⁵³
- In *Mercado v. Leong*, a medical malpractice action, Justice Brown found that the trial court erroneously held that the mother of the patient was not a direct victim of the physician's negligence. Justice Brown allowed the mother to recover for emotional distress even absent a showing of outrageous conduct on the part of the physician.⁵⁴
- In *McKown v. Wal-Mart Stores*, she held that the hirer of an independent contractor is liable for injury to the independent contractor's employee caused by the hirer's negligent provision of unsafe equipment.⁵⁵
- In *Myers v. Phillip Morris Companies*, Justice Brown joined in an opinion holding that, although the California Legislature statutorily granted tobacco companies immunity from personal injury actions between January 1, 1988, and January 1, 1998, they are liable for injury sustained or discovered before or after that period.⁵⁶

Efforts to Distort Justice Brown's Record: *Sinclair Paint Co. v. Board of Equalization*. Despite her mainstream record on civil justice issues, the liberal special interests have nonetheless tried to distort her attempt in this case to give effect to the will of the California voters, who wanted to make it more difficult for the California Legislature to raise taxes.⁵⁷ California Proposition 13, enacted in June 1978, requires a two-thirds vote of the Legislature to increase state taxes:

Any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members . . . of the Legislature, except that no new ad velorum taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.⁵⁸

⁵³ See 22 Cal.4th 1127 (2000).

⁵⁴ See 43 Cal.App.4th 317 (1996).

⁵⁵ See 27 Cal.4th 219 (2002).

⁵⁶ See 28 Cal.4th 828 (2002).

⁵⁷ See 52 Cal.Rptr.2d 572 (Cal.App. 1997).

⁵⁸ CAL. CONST. art. XIII A, § 3.

In 1991, the California Legislature voted, by a simple majority, to assess fees on manufacturers engaged in the stream of commerce for products containing lead in order to fund a program to provide education, screening, and medical services for children at risk for lead poisoning. Justice Brown simply held for a unanimous Court of Appeals in affirming the judgment of the trial court that the assessment constituted a “tax” within the meaning of Proposition. Under applicable California case law, where payment is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax. The Childhood Lead Poisoning Protection Act did not require the plaintiff to comply with any other conditions; it merely was required to pay its share of the program costs. Thus, Justice Brown reasonably concluded that the assessment was a “tax.”⁵⁹ Although the California Supreme Court reversed Justice Brown’s opinion, it acknowledged that the distinction between taxes and fees is frequently “blurred,” taking on different meanings in different contexts.⁶⁰ Although it did not affirm the trial court’s granting of summary judgment in favor of the defendant, it did remand the case for trial so that the defendant could attempt to prove that the fees were levied for unrelated revenue purposes or that the amount of the fees bore no reasonable relationship to the social or economic burdens its operations generated.⁶¹

Sinclair Paint Co. was in no way about whether children should be protected from lead poisoning, as her critics have claimed. Justice Brown did not dispute that the goals of the program were beneficial. She merely held that it was funded in a manner that violated the California Constitution. Under Justice Brown’s opinion, the California legislature could have funded the program out of general appropriations, or in any number of lawful ways.

Lane v. Hughes Aircraft Co. In this case, Justice Brown wrote the majority opinion for a unanimous California Supreme Court in holding that the trial court properly ordered a new trial after the jury awarded nearly \$90 million in punitive damages.⁶² All of the justices on the California Supreme Court agreed with Justice Brown that a trial court judge is authorized to grant a new trial on the grounds of “excessive damages” or “insufficiency of the evidence,” and that they should not disturb the trial court’s holding that the jury awarded excessive damages and relied upon insufficient evidence.⁶³

Justice Brown also wrote separately, suggesting that punitive damages be capped at some multiple of compensatory damages.⁶⁴ This is a mainstream and widely-held opinion, as numerous other states have adopted rules limiting punitive damages as two or three times

⁵⁹ 52 Cal.Rptr. at 578.

⁶⁰ 937 P.2d 1350, 1353-54 (Cal. 1996).

⁶¹ *Id.* at 1358.

⁶² *See* 993 P.2d 388 (Cal. 2000).

⁶³ *See id.*

⁶⁴ *See id.* at 398 (Brown, J., concurring).

compensatory damages.⁶⁵ The U.S. Supreme Court has likewise noted that a ratio of more than 4-to-1 “might be close to the line of constitutional impropriety.”⁶⁶ Justice Brown’s concurring opinion was anything but improper judicial legislating: the Legislature imposed a statutory ceiling on punitive damages awards by expressly providing for new trials where the damages are “excessive,” but left it to the courts to determine what “excessive” means. Justice Brown would have shirked her duty if she had avoided the question, as one other justice would have done. She understands that appellate court opinions must give guidance to the trial courts: “Our role as the final interpreter of state law obligates us to give meaning to the term ‘excessive’ in relation to punitive damages. Otherwise, the deferential standards of review that we reaffirm today will inhibit us in providing guidance to trial courts as to how their broad discretion should be exercised.”⁶⁷

Justice Brown’s Perspective: The Takings Clause Means Something. In several speeches, Justice Brown has voiced concern over the dichotomy between the way in which the Supreme Court has handled social and economic rights on the one hand, and fundamental rights on the other.⁶⁸ The typical liberal attack groups take exception to Justice Brown’s personal view, yet fail to point out that the Supreme Court itself has expressed the view that Justice Brown is now accused of advocating – that property rights were intended to carry the same import as other rights found in the Constitution. In *Dolan v. City of Tigard*, the Supreme Court majority wrote: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”⁶⁹ The Supreme Court has also stated: “[T]he dichotomy between personal liberties and property rights is a fake one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.”⁷⁰

⁶⁵ See Lisa M. White, “A Wrong Turn on the Road to Tort Reform: the Supreme Court’s Adoption of De Novo Review in *Cooper Industries v. Leatherman Tool Group, Inc.*,” 68 BROOK. L. REV. 885, 885 n.2 (2003) (collecting statutes); see also, e.g., IND. CODE ANN. § 34-51-3-4 (capping punitive damages at the greater of three times compensatory damages or \$50,000); FLA. STAT. ch. 768.73 (capping certain punitive damage awards at the greater of three times compensatory damages or \$500,000); NEV. REV. STAT ANN. 42.005 (capping punitive damages awards at three times the compensatory damages if more than \$100,000 or \$350,000 if the compensatory damages are less than \$100,000); N.J. STAT. ANN. § 2A:15-5.14 (limiting punitive damages to the greater of \$350,000 or five times the compensatory award).

⁶⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1523 (2003).

⁶⁷ 993 P.2d at 400.

⁶⁸ See, e.g., “A Whiter Shade of Pale,” speech before the University of Chicago Federalist Society, April 20, 2000.

⁶⁹ 512 U.S. 374, 391 (1994).

⁷⁰ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Most notably, the special interests have complained that Justice Brown has bemoaned the demise of the *Lochner* era of the Supreme Court. This is not accurate: while Justice Brown has criticized Justice Holmes' dissent in *Lochner v. United States*⁷¹ on the ground that it ignores the fact that the Framers drafted our Constitution with a "surrounding sense of a particular polity in mind, one based on a definite conception of humanity,"⁷² she has also criticized the *majority* in *Lochner*:

Lochner is the name that has come to symbolize judicial usurpation of power. But 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.⁷³

Justice Brown's critics have also distorted one of her opinions in a case implicating the Takings Clause. The case of *San Remo Hotel v. City and County of San Francisco* involved a challenge to a city and county ordinance that required hotel owners who wished to convert rooms from long-term residential use to short-term "tourist" use either to pay a fee or replace the residential units that would be lost by conversion.⁷⁴ The purpose of the law was to preserve moderate- and low-income housing in San Francisco. In a sharply divided 4-3 opinion, the California Supreme Court upheld the local ordinance against facial and "as applied" challenges under the Takings Clause of the California Constitution.⁷⁵ Justice Brown dissented in defense of the property owners, noting that the statute's scheme of requiring private hotel owners to maintain and use their property for the benefit of the poor – thereby decreasing the market value of that property – constituted an unconstitutional taking.⁷⁶

Justice Brown's opinion recognized that the goal of the regulation was laudable – to provide more housing opportunities for low and middle-income residents – but felt that the California Takings Clause precluded the government from achieving that goal by police power regulation.⁷⁷ She wrote:

⁷¹ See *Lochner v. New York*, 198 U.S. 45, 65 (Holmes, J., dissenting) ("But a 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. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.")

⁷² "A Whiter Shade of Pale," *supra* note 68.

⁷³ *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1026 n.3 (Cal. 1999) (Brown, J., dissenting) (citations and quotation marks omitted).

⁷⁴ 27 Cal.4th 643 (2002).

⁷⁵ See *id.*

⁷⁶ See *id.* at 692.

⁷⁷ *Id.* at 699.

. . . [T]he facts of this case come down to one thing – the City and County of San Francisco has expropriated the property and resources of a few hundred hotel owners in order to ameliorate – off budget and out of sight of the taxpayer – its housing shortage. In short, this ordinance is not a matter of efficiently 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.⁷⁸

Justice Brown’s dissent in *San Remo Hotel* was well within the legal mainstream. Indeed, it was merely an effort to follow U.S. Supreme Court precedent in the area of takings law. In *Nollan v. California Coastal Commission*⁷⁹ and *Dolan v. City of Tigard*,⁸⁰ the Court held that the government’s limiting of a new use of private property based on a condition that has nothing to do with mitigating the effects of that proposed new use constituted improper “regulatory leveraging” in violation of the Fifth Amendment. As with all of her mainstream jurisprudence concerning civil justice issues, her opinion in *San Remo Hotel* demonstrates her firm commitment to follow binding U.S. Supreme Court precedent and, more generally, the rule of law.

Justice Brown on Crime: Even-handed and Fair

On the California Supreme Court, Justice Brown has gone out of her way to show respect for the rights of those accused of crime. Her opinions in the criminal law area cannot be pigeonholed as pro-prosecution or pro-defendant; rather, she simply followed the law in whatever direction it led.

Striving for Fairness in Capital Cases. For example, Justice Brown has authored a number of opinions setting aside verdicts or sentences for capital defendants. Writing for the court, she reversed 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.⁸¹ In another case, 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.⁸² She commented that the defense counsel’s “abysmal across-the-board performance rendered the penalty phase of the trial a complete and utter farce. Under these circumstances, this court can have no confidence that the jury was actually able to perform its normative function of

⁷⁸ *Id.*

⁷⁹ *See* 483 U.S. 825 (1987).

⁸⁰ *See* 512 U.S. 374 (1994).

⁸¹ *See In re Brown*, 952 P.2d 715 (Cal. 1999).

⁸² *See In re Visciotti*, 926 P.2d 987, 1010-12 (Cal. 1996) (Brown, J., dissenting).

determining the appropriate punishment. There has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”⁸³ Justice Brown also authored an opinion reversing a verdict and death sentence in a case where the trial court improperly denied the defendant’s motion to represent himself *pro se*.⁸⁴

Before she joined the California Supreme Court, Justice Brown wrote a compelling reflection on the state’s death penalty clemency process. She was then-Governor Pete Wilson’s Legal Affairs Secretary, and was involved in the process of executive clemency. Justice Brown wrote: “Law is narrower than justice. Mercy is broader than both. Justice can be merciless, but mercy must be just. The way we deal with the question of mercy in capital cases reflects the kind of society in which we live. . . . If we are lucky, the clemency process will retain its character as an exercise of common sense and compassion”⁸⁵ It is just this open-minded and thoughtful perspective that makes Justice Brown a perfect fit for America’s second most important court.

Defending the Fourth Amendment and Due Process. Justice Brown has been a dogged defender of Fourth Amendment rights during her tenure on the California Supreme Court. As explained earlier, she 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.⁸⁶ Justice Brown was part of a majority in *People v. Camacho* that suppressed a search and seizure on the ground that the police had no legal right to be at the location from which they observed the defendant’s illegal conduct.⁸⁷ She also dissented in *People v. Woods*, arguing for the exclusion of evidence obtained in a warrantless search of a person’s home based on consent given by the person’s housemate as a condition of probation.⁸⁸ Justice Brown wrote: “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.”⁸⁹

⁸³ *Id.* at 1012 (citation and quotation marks omitted).

⁸⁴ *See People v. Dent*, 635 P.3d 1286 (Cal. 2003).

⁸⁵ “The Quality of Mercy,” 40 U.C.L.A. L. REV. 327, 335 (1992).

⁸⁶ *See* 41 P.3d 59, 78-97 (Cal. 2002) (Brown, J., concurring and dissenting).

⁸⁷ *See* 3 P.3d 878 (Cal. 2000).

⁸⁸ 981 P.2d 1019, 1029-38 (Brown, J., dissenting).

⁸⁹ *Id.* at 1029.

Justice Brown has also looked out for the due process rights of criminal defendants. For instance, in *People v. Frazer*, she authored an opinion dissenting from the retroactive application of an expanded criminal statute of limitations, arguing that it violated due process.⁹⁰ She wrote:

. . . [L]ong after defendant achieved [a] jurisdictional repose, the majority deprives him of it without a qualm. The possibility defendant may have committed the offense does not validate the majority's due process transgression. . . . [T]he potential that a guilty person will avoid just punishment is inherent in all statutes of limitations. Society has assumed this loss in exchange for other considerations. Applying [the statute of limitations] change to defendant in these circumstances is . . . one of constitutional dimension. Whether or not such application violates the ex post facto prohibition [of the U.S. Constitution], in my view it most certainly does not comport with California's guaranty of fundamental fairness.⁹¹

Efforts to Distort Justice Brown's Record: *In re John Z.* Despite her superb record on crime-related issues, special-interest groups have nonetheless tried to distort several of Justice Brown's criminal law opinions. Take, for example, the difficult case of *In re John Z.*,⁹² a case involving the question of whether an individual could be convicted for rape if the alleged victim had arguably not clearly withdrawn her consent to sexual activity. Justice Brown simply believed that, with the facts in the record, there was a reasonable doubt as to whether the defendant may have in fact had a reasonable and honest belief in the alleged victim's consent, which required acquittal under California law. Justice Brown agreed with the majority that a woman can withdraw her consent to sexual activity, and that a forcible rape can occur if that withdrawal of consent is ignored. In fact, Justice Brown began her dissent by noting: "A woman has an absolute right to say 'no' to an act of sexual intercourse. After intercourse has commenced, she has the absolute right to call a halt and say 'no more,' and if she is compelled to continue, a forcible rape is committed."⁹³ Justice Brown also agreed with the majority that "the clear withdrawal of consent nullifies any earlier consent and forcible persistence in what then becomes nonconsensual intercourse is rape"⁹⁴

Justice Brown's argument was consistent with then-existing California legal precedent and well within the legal mainstream. Under California statutory law, a defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a *defense* to rape.⁹⁵ As Justice Brown noted in her opinion: "The crime of rape therefore is necessarily

⁹⁰ See 982 P.2d 180 (Cal. 1999).

⁹¹ *Id.* at 210-11 (citations omitted).

⁹² See 60 P.3d 183 (Cal. 2003).

⁹³ *In re John Z.*, 60 P.3d 183, 188 (Cal. 2003) (Brown, J., dissenting).

⁹⁴ *Id.*

⁹⁵ *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992).

committed [under the California Penal Code] when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act.”⁹⁶ She continued: “In other words, an act of sexual intercourse becomes rape under these circumstances if all the elements of rape are present. Under the facts of this case, however, it is not clear that [the alleged victim] was forcibly compelled to continue. All we know is that [the defendant] did not instantly respond to her statement that she needed to go home.”⁹⁷

In fact, respected legal and political commentators have criticized the majority opinion in the *John Z.* case. Admired Chicago-based litigator Robert Shapiro wrote, in an American Bar Association publication: “Once the court concluded that [the alleged victim] had meant to communicate a withdrawal of consent, it simply was not finished. It should not have been diverted by the heinousness of the crime charged from analyzing whether, in the midst of crudely satisfying his own desires, the boy really had intended to commit it.”⁹⁸ In the SAN FRANCISCO CHRONICLE, columnist Debra J. Saunders observed: “You have to wonder where justice is when courts decide that women’s actions can contradict their words, and that doesn’t constitute reasonable doubt”⁹⁹ Syndicated columnist Kathleen Parker wrote: “[Justice Brown] noted that [the defendant] might have had an ‘honest and reasonable belief’ that the girl didn’t waive consent, a defense recognized by California courts. Honest and reasonable? That sounds right. Given that the girl wanted to have sex, or at least said she did, then proceeded to have sex, and only then said she needed to go home, one could leap to the wild conclusion that the young man may not have divined her intent that he retreat.”¹⁰⁰

People v. Mar. Liberal groups also have attempted to warp the meaning of Justice Brown’s dissent in the case of *People v. Mar.*¹⁰¹ Justice Brown merely argued that because a defendant had not demonstrated that he was in any way prejudiced by use of a stun belt at trial – a showing he was required to make – his conviction for assaulting a guard should not be thrown out. Justice Brown noted that the majority had itself found that it was not explicitly apparent what effect the stun belt had on the content of defendant’s testimony or on his demeanor while testifying.¹⁰² She also observed that the majority did not provide any persuasive rationale for treating stun belts differently than any other restraint.¹⁰³ After all, the stun belt at issue was not

⁹⁶ *Id.* at 190 (quotation marks and citation omitted).

⁹⁷ *Id.*

⁹⁸ “Prejudice: Advance Sheet,” LITIGATION (AMERICAN BAR ASSOCIATION), Spring 2003 at 61.

⁹⁹ “Not As She Does,” S.F. CHRON., January 12, 2003 at D5.

¹⁰⁰ “Rape California-style is a woman’s prerogative,” CHIC. TRIB., Jan. 15, 2003 at 17.

¹⁰¹ *People v. Mar.*, 52 P.3d 95 (Cal. 2002).

¹⁰² *See id.* at 114 (Brown, J., dissenting).

¹⁰³ *See id.* at 114.

visible to the jury,¹⁰⁴ and 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.¹⁰⁵

Indeed, up until the decision in *Mar*, California courts had seen stun belts as humane. 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."¹⁰⁶ Numerous federal and state courts have also 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.¹⁰⁷

On issues related to crime, Justice Brown has demonstrated, time and again, her commitment to the rule of law. She has set aside improper verdicts and sentences in capital cases, and has spoken out against racial profiling. She has strenuously defended the Fourth Amendment. And, she has followed the law wherever it has led her, even if it has meant taking an unpopular stance in certain circumstances. It is clear that when Justice Brown moves cross-country and settles into her new chambers, she will faithfully apply the law, just like she always has.

Justice Brown: A Perfect Fit for the D.C. Circuit

Justice Brown represents the very best in American legal life. A woman of impeccable character and unimpeachable integrity, she overcame many challenges on her path to a seat on the highest court of America's largest state. Her dedication to upholding the Constitution is clear, and she has shown unfailing dedication to the rule of law, even in cases where it led her to conclusions with which many disagreed. Her record is one of moderation and excellence: in protecting racial equality, defending civil and constitutional rights, safeguarding the right to free speech, protecting the rights of consumers, and being fair to criminal defendants. Most importantly, her intellectualism and thoughtfulness are a perfect fit for the D.C. Circuit, a court that has attracted the best and brightest in our legal tradition. In the words of those who know Justice Brown best, her present and former colleagues:

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.

¹⁰⁴ See *People v. Mar*, 52 P.3d 95, 103-4 (Cal. 2002).

¹⁰⁵ *Id.* at 107.

¹⁰⁶ *People v. Garcia*, 66 Cal.Rptr.2d 350, 353 (Cal. App. 4th 1997).

¹⁰⁷ See *Chavez v. Cockrell*, 310 F.3d 805, 809 (5th Cir. 2002); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1242 (9th Cir. 2001); *United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000); *People v. Melanson*, 937 P.2d 826, 835-36 (Colo. Ct. App. 1996); *Dickens v. State*, 2003 WL 132547, at *3 (Del. 2003); *State v. Irshaad*, No. K8001097, 2002 WL 378196, at *5 (Minn. Ct. App. 2002); *State v. Wilson*, 2001 WL 1640739, at *2 (Wash. Ct. App. 2001).

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 and court personnel and counsel.

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.¹⁰⁸

We entirely agree, and urge the Judiciary Committee and the full Senate to confirm this well-qualified nominee in an expeditious manner.

¹⁰⁸ Letter from Puglia, *supra* note 7.