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March 22, 2005

The Honorable Arlen Specter
Chair, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
269 Russell Senate Office Building
Washington, D.C. 20510

RE: The Opposition of the Society of American Law Teachers (SALT) to the
Nomination of Justice Janice Rogers Brown to the United
States Court of Appeals for the District of Columbia Circuit

Dear Senators Specter and Leahy:

The Society of American Law Teachers (SALT) is the largest organization of law professors in the United States. Representing more than 900 law professors from over 160 law schools, SALT has a powerful interest in the qualifications of judges, to assure both the appropriate development of the law and an environment of integrity in which our students may practice law. Our concerns are that those persons honored with appointment to the bench possess great intellectual ability, unimpeachable rectitude, and sensitivity to the delicate task of interpreting constitutional, statutory, and other legal standards. Judges must simultaneously respect constitutive, legislative, and executive bodies, honor precedent, and maintain the law's consistency with what Justice Cardozo called "the justice to which law in its making should conform. . . ."

Applying these standards to the record of Justice Janice Rogers Brown, SALT concludes that she should not be confirmed to serve as a federal judge because she has demonstrated a profound disrespect for legislative determinations, binding precedent, and the judicial process, and a dangerous tendency to alter her principles in order to achieve the results she seeks in particular cases. In a January 13, 2004 letter to Senators Frist and Daschle, SALT urged that Justice Brown not be confirmed, and that the filibuster against her nomination continue until the nomination was withdrawn. SALT now renews its strong objection to this nomination, and urges the committee to reject it. As an organization committed to fostering diversity in all aspects of the legal profession, SALT takes no pleasure in opposing the nomination of an African-American woman, but our careful study of Justice Brown's record persuades us that she is unfit to sit on the federal bench. We explain our reasons in more detail below, discussing them under two headings: Justice Brown's disrespect for legislative action inconsistent with her philosophy, and Justice Brown's disrespect for precedent and the judicial process.

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1. Justice Brown's Disrespect for Legislative Action Inconsistent with Her Philosophy.

Justice Brown has evidenced a profound disrespect for and distrust of legislative bodies and the legislative process. It would be peculiarly ironic if the Senate were to consent to her nomination, for her record makes clear that if she were to serve as a federal judge, she would be quick to vote to invalidate acts of Congress that did not accord with her economic and political views. She has attacked the acts of Congress that made up the New Deal, stating that those regulatory and protective statutes "inoculated the federal Constitution with a kind of underground collectivist mentality."¹ She has denounced the Supreme Court's decisions upholding major New Deal legislation, calling them "the triumph of our socialist revolution."² These views would be particularly damaging on the court for which she has been nominated, the United States Court of Appeals for the District of Columbia Circuit, because it hears many cases involving challenges to acts of Congress and regulations implementing them.

a. Justice Brown's Hostility to Government.

A central thread in Justice Brown's work is a general hostility to government, and a rejection of the notion that government can and should ameliorate the burdens that life imposes on many people. She has repeated this view in several speeches, saying, *e.g.*, that:

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.³

¹Janice Rogers 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, April 20, 2000, available at <http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm> (last visited Nov. 26, 2003), at 4.

²*Id.* at 4 (stating that 1937 "marks the triumph of our own socialist revolution"); Janice Rogers Brown, *Fifty Ways to Lose Your Freedom*, Speech before the Institute for Justice, Washington, D.C., August 12, 2000, available at <http://www.communityrights.org/Newsroom/LeadStory/LSArchive/JRB.asp> (last visited November 26, 2003), at 14. Justice Brown apparently does not share "the selective approval that many conservatives give to the way it [the New Deal] saved capitalism and ensured the primacy of free markets." Alan Brinkley, *Getting Roosevelt Into One Volume, a Trick in Itself*, *The New York Times*, Nov. 26, 2003, B 20 (book review).

³*Whiter Shade*, *supra* note 2, at 2. In *Fifty Ways*, the language is only slightly altered: "in the heyday of liberal democracy, all roads lead to slavery. . . . Most of us 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." *Fifty Ways*, *supra* note 3, at 2-3. Similar attacks on government pervade Justice

She maintains that:

Government is the only enterprise in the world which expands in size when its failures increase. . . .⁴

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 on 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.⁵

In her dissent in *San Remo Hotel L.P. v. City and County of San Francisco*, Justice Brown denigrated democracy and the democratically-elected legislature accountable to the electorate, stating that the legislation at issue required that a property owner in San Francisco "must use that property according to the preferences of the majorities that prevail in the political process -- or, worse, the political powerbrokers who often control the government independently of majoritarian preferences."⁶

b. Justice Brown's Narrow View of the Public Interest.

Justice Brown disapproves of much legislation designed to protect individuals; she frequently maintains that such protection is a matter of concern to those individuals only, that there is no public interest in such protection. She expressed this position in *Stevenson v. Superior Court & Huntington Memorial Hospital*, where a principal issue was whether the policy against age discrimination met four standards: that it was supported by constitutional or statutory

Brown's *The History of the World - Part 3, 912*, presented to the Senior Legislative Drafting Seminar of the National Conference of State Legislatures on November 21, 1997, and her December 11, 1997 speech labeled "California Lincoln Club/ Libertarian Law Council/ California Club --Justice of the Year Award." In the former, at 7, she says that "government is increasingly irrelevant because it does too much"; see also *id.* at 14-16 and 19 ("Government is not here to save us."); in the latter, at 5, "every moment of our lives is subject to government regulation and control."

⁴*Whiter Shade*, *supra* note 2, at 2; see also *Fifty Ways*, *supra* note 3, at 18 ("In the last 100 years we have let the government buy our birthright with our own tax money."); *id.* at 2 ("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.").

⁵*Whiter Shade*, *supra* note 2, at 4. It is worth noting that what Justice Brown indicts here is "government," not simply, as in note 4, *supra*, and its text, "big government."

⁶*San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 691, 692; 41 P.3d 87, 120, 120 (CA 2002) (dissent of Brown, J.), cert. granted as to one question only, 125 S. Ct. 685 (2004).

provisions, that it benefited the public rather than merely an individual, that it was articulated at the time of the discharge, and that it was "fundamental" or "substantial."⁷ The majority of the Supreme Court of California held that the first three requirements "are not reasonably subject to dispute in this case," and that the fourth had been satisfied as well.⁸ Justice Brown, in a lone dissent, disagreed, writing that the plaintiff had "failed to establish [either that] the public policy against age discrimination 'inures to the benefit of the public' or [that the policy] is 'fundamental and substantial.'"⁹ In her view, prohibitions against age discrimination serve only personal, not public, interests. "In its own respect," she wrote, "the hiring and advancement of younger workers serves the public interest as fully as the retention of older, more experienced workers."¹⁰ Moreover, she wrote, "Discrimination based on age . . . is the unavoidable consequences of that universal leveler: time."¹¹ The majority opinion in *Stevenson* said that Justice Brown's "real quarrel is not with our holding in this case, but with this court's previous decision . . . and, even more fundamentally, with the Legislature itself."¹²

Justice Brown's extraordinarily narrow view of what constitutes the "public interest" and when a legislature may act to serve that interest was expressed also in her speech, *Fifty Ways to Lose Your Freedom*, where she said that:

In this brave new world, the assertion of a perspective becomes its justification. The claim is that a particular perspective serves the general welfare. What is really served is the will to power.¹³

She expressed this view in her dissent in *San Remo*, as well. Disregarding decades of jurisprudence that establish that low-income housing is a proper object of the police power,¹⁴

⁷*Stevenson v. The Superior Court of Los Angeles County*, 16 Cal. 4th 880, 889-890; 941 P.2d 1157, 1161 (CA 1997).

⁸*Id.*, 16 Cal. 4th at 894, 894-897; 941 P.2d at 1165, 1165-67.

⁹*Id.*, 16 Cal. 4th 911, 912; 941 P.2d 1176, 1177 (dissent of Brown, J.).

¹⁰*Id.*, 16 Cal. 4th at 926; 941 P.2d at 1186 (dissent of Brown, J.).

¹¹*Id.*, 16 Cal. 4th at 927; 941 P.2d at 1187 (dissent of Brown, J.).

¹²*Id.*, 16 Cal. 4th at 905; 941 P.2d at 1172.

¹³*Fifty Ways*, *supra* note 3, at 11.

¹⁴See, e.g., *The Housing Authority of the County of Los Angeles v. Dockweiler*, 14 Cal. 2d 437, 94 P.2d 794 (CA 1939) (holding that public housing projects for low-income families serve a public purpose); *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 584; 551 P.2d 1193 (CA 1976) (discussing prior cases and holding that the "legislature acted reasonably in concluding that decent housing for the affected persons serves a public purpose.").

Justice Brown wrote of the ordinance at issue: "the primary beneficiary of the regulation is not the common advantage but the low-income individuals who obtain the inexpensive housing."¹⁵ Again, in *Richards v. CH2M Hill, Inc.*, arguing, in a lone dissent, for a restrictive reading of the rights of victims of disability discrimination, she characterized those who would enforce the policy as "individuals whose only concern is their own narrow interests."¹⁶

c. Justice Brown's Restrictive View of Individual Rights and Freedoms.

Justice Brown's restrictive sense of when a legislature may act to protect people is echoed by a general absence of sympathy for individuals battered by forces beyond their control and strong support for corporate strongholds of power. She has identified altruism with communism, deprecating "the collectivist impulse -- whether you call it socialism or communism or altruism"¹⁷ In cases involving statutory interpretation, she frequently dissents from majority interpretations that allow relief to individuals injured by larger forces. Thus, she alone would have restricted the extent to which a pattern of disability discrimination might be the basis for liability;¹⁸ would have limited the relief available to other victims of disability discrimination;¹⁹ would have held that a corporation's false and misleading statements about its labor practices could not be the basis for liability under a California law that banned false and misleading commercial speech;²⁰ and would have banned continuation of second-parent adoptions by unmarried people.²¹ She was the sole dissenter from her court's holding that the Fair Employment and Housing Commission was authorized to award damages for emotional

¹⁵*San Remo*, *supra* note 7, 27 Cal. 4th at 702; 41 P.3d at 127 (dissent of Brown, J.).

¹⁶*Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 825, 832; 29 P.3d 175, 191, 196 (CA 2001) (dissent of Brown, J.).

¹⁷*Whiter Shade*, *supra* note 2, at 2 (stating 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.")

¹⁸*Richards*, *supra* note 17, 26 Cal. 4th at 802, 29 P.3d at 176-77 (holding "that an employer's series of unlawful actions in a case of failure to reasonably accommodate an employee's disability, or disability harassment, should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of 'permanence' so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile.").

¹⁹*City of Moorpark v. The Superior Court of Ventura County*, 18 Cal. 4th 1143, 959 P.2d 752, 63 Cal. Comp. Cas. 944, 958 (CA 1998)(dissent of Brown, J.); *Peatros v. Bank of America*, 22 Cal.4th 147, 183, 990 P.2d 539, 559 (CA 2000)(dissent of Brown, J.).

²⁰*Kasky v. NIKE, Inc.*, 27 Cal. 4th 939, 977; 45 P.3d 243, 268 (CA 2002) (dissent of Brown, J.), *cert. dismissed*, 123 S.Ct. 2554, 156 L.Ed. 2d 580 (2003).

²¹*Sharon S. v. The Superior Court of San Diego County*, 31 Cal. 4th 417, 457; 73 P.3d 554, 582 (CA 2003) (concurrence and dissent of Brown, J.).

distress suffered by an African-American police officer who was rejected by a landlord because of the officer's race.²² One situation in which she does favor government is in its relationships with its employees, writing that "I question whether government as an employer should be required to operate under constraints that are any different from those affecting the private employers with whom it must compete in the labor market."²³ In her *Fifty Ways to Lose Your Freedom* speech, Justice Brown said that:

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.²⁴

Justice Brown's narrow view of personal rights was expressed also in *American Academy of Pediatrics v. Lungren*,²⁵ a challenge to a state law requiring either parental or judicial approval before a minor could have abortion. We recognize that the abortion issue is highly controversial, and that reasonable judges will interpret abortion-related legislation in different ways. What is striking about Justice Brown's separate dissent in that case, however, is her position on the "threshold elements" which state law required simply to bring a claim within the California constitution's express protection of a right to privacy.²⁶ State precedent required that a "plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish . . . : (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."²⁷ A majority of the Supreme Court (and every judge below) agreed that these threshold standards had been satisfied.²⁸ Justice Brown, however, disagreed.²⁹ Arguing that

²²*Konig v. Fair Employment and Housing Cmsn.*, 28 Cal. 4th 743, 760, 765; 50 P.3d 718, 729, 732 (CA 2002) (dissent of Brown, J.) (warning that administrative agencies "are subject to capture by a specialized constituency.").

²³*Loder v. City of Glendale*, 14 Cal. 4th 846, 933, 937; 927 P.2d 1200, 1257, 1259 (CA 1997)(dissent of Brown, J.), *cert. denied*, 522 U.S. 807 (1997).

²⁴*Fifty Ways*, *supra* note 3, at 2.

²⁵*American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307; 940 P. 2d 797 (CA 1997).

²⁶Article I, Section 1 of the California Constitution provides that "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy." *American Academy*, *supra* note 25, 16 Cal. 4th at 326 n. 13, 940 P.2d at 808 n. 13.

²⁷*American Academy*, *supra* note 25, 16 Cal. 4th at 330, 940 P.2d at 811, quoting *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35-40; 65 P.2d 633 (CA 1994).

²⁸Chief Justice George wrote what is called a plurality opinion for himself and Justices Werdegar and Chin. Justice Kennard wrote a separate opinion that agreed with the plurality on these threshold and other points. See 16 Cal. 4th at 360, 375; 940 P. 2d at 832, 842 (opinion of Kennard, J.). Justices Mosk, Baxter, and Brown dissented, but only Justice Brown disagreed with respect to the threshold points. All of the lower court judges invalidated the statute, necessarily finding that the threshold standards had been satisfied. See 16 Cal. 4th at 314 n. 1; 940 P.2d at 800 n. 1. The plurality opinion said that the claim "clearly satisfies the

parents' rights are "historically more sacrosanct than a minor's,"³⁰ Justice Brown denied that "a legally protected privacy interest" was at issue and maintained that the legislation "does not implicate any 'reasonable expectation of privacy'"³¹ and "surely does not effect a serious invasion of a privacy interest."³²

d. Justice Brown's Enthusiasm for Judicial Disregard of Legislation.

As Justice Brown has concluded that legislatures should not enact such ameliorative legislation, she also has concluded that, if legislatures do so, judges, particularly conservative judges (as she describes herself), should invalidate those statutes. She made this position explicit, stating, in *Fifty Ways*, 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. And most significantly, 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.³³

Describing herself, in that speech, as a "conservative judge,"³⁴ she said that judicial activism was not the problem and that "we will have to face the countermajoritarian difficulty squarely. . . . Individual liberty cannot be preserved if the majority's will must always triumph."³⁵

'threshold elements' set forth in *Hill* in order to screen out claims that do not involve a significant intrusion upon a privacy interest protected by the state constitutional privacy clause." 16 Cal. 4th at 331, 940 P.2d at 812.

²⁹See *American Academy*, *supra* note 25, 16 Cal. 456, 418, 428; 940 P.2d 871, 878 (dissent of Brown, J.) ("The plurality purports to find that plaintiffs meet the *Hill* criteria. It does so only by a determinedly superficial application of its elements.").

³⁰*Id.*, 16 Cal. 4th at 431-2, 940 P.2d at 880.

³¹*Id.*, 16 Cal. 4th at 438, 940 P.2d at 885.

³²*Id.*, 16 Cal. 4th at 439, 940 P.2d at 885.

³³*Fifty Ways*, *supra* note 3, at 4.

³⁴*Id.* at 3.

³⁵*Id.* at 16. Justice Brown also expressed her contempt for the legislature in *The History of the World*, *supra* note 4, at 7-8 ("The Legislature simply lacks the constraints which operate in other arenas. . . . Unvalidated assumptions, academic hypotheses, and media-generated issues dominate and distort the lawmaking function.")

Justice Brown heeded her own admonition to disregard legislative determinations when she dissented in *San Remo*, and was able to use virtually the same language as she had in her *Fifty Ways to Lose Your Freedom* speech. In *San Remo*, she complained of "[t]urning a democracy into a kleptocracy"³⁶ and described the law at issue as "expressly designed to shift wealth from one group to another by the raw exercise of political power"³⁷

Her colleagues on the Supreme Court of California have commented on this tendency several times. In *San Remo*, the majority found it necessary to remonstrate:

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.³⁸

In *Warden v. The State Bar of California*, the majority said that Justices Brown and Kennard declined to defer to the legislature and instead applied a test "that permits a court . . . to reweigh the policy choices that underlay a legislative or quasi-legislative classification or to reevaluate the efficacy of the legislative measure."³⁹

On the other hand, Justice Brown's refusal to defer to legislative judgments disappears when she approves of what the legislature has enacted. In *American Academy*, where she approved of the legislation under challenge, she admonished that "legislatures must be accorded broad deference on issues as to which reasonable minds can differ and . . . courts must exercise reasoned judgment and self-restraint."⁴⁰ Such an unprincipled shift to achieve desired results should be anathema on the bench.

³⁶*San Remo*, *supra* note 7, 27 Cal. 4th at 704, 41 P.3d at 128.

³⁷*Id.*, 27 Cal. 4th at 700, 41 P.3d at 126.

³⁸*Id.*, 27 Cal. 4th at 677, 41 P.3d at 110.

³⁹*Warden v. The State Bar of California*, 21 Cal. 4th 628, 651 n. 14; 982 P.2d 154 (CA 2000), *cert. denied*, 529 U.S. 1020 (2000).

⁴⁰*American Academy*, *supra* note 25, 16 Cal. 4th at 441; see also *id.* at 447 ("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.") This deference was lacking, of course, in Justice Brown's dissent in *San Remo*.

2. Justice Brown's Disrespect for Fundamental Precedent and The Judicial Process.

Justice Brown has set herself in opposition to legal principles that long have been established as part of the foundation of the jurisprudence of the United States and California. She has urged instead that courts return to doctrines that have been condemned for decades.

Justice Brown has praised the 1905 doctrine of *Lochner v. New York*,⁴¹ which invalidated a state protective maximum-hour law because it was inconsistent with the economic views of the Supreme Court's majority at that time. Justice Brown has praised *Lochner* despite the fact that the U.S. Supreme Court rejected *Lochner* in 1937 and most mainstream legal scholars and all current Supreme Court justices have agreed in that rejection of *Lochner*.⁴²

Justice Oliver Wendell Holmes dissented in *Lochner*, maintaining that "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*."⁴³ Quoting this language, Justice Brown said:

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 In fact as Professor Richard Epstein has said, Holmes's contention is 'not true of our [] [Constitution]'⁴⁴

In another speech, Justice Brown indicated her agreement with the since-rejected views of the majority in *Lochner*, her understanding that "the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owners."⁴⁵ In *Santa Monica*

⁴¹*Lochner v. New York*, 198 U.S. 45 (1905).

⁴²The Supreme Court rejected *Lochner* 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). The current justices of the Supreme Court have rejected *Lochner* in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690, 701 (1999); *United States v. Lopez*, 514 U.S. 549, 601-2 n. 9, 605 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994); *Planned Parenthood v. Casey*, 505 U.S. 833, 861, 957 (1992); and *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989).

⁴³*Lochner*, *supra* note 41, 198 U.S. at 74, 75 (dissent of Holmes, J.).

⁴⁴*Whiter Shade*, *supra* note 2, at 4; bracketed words in her speech.

⁴⁵*Fifty Ways*, *supra* note 3, at 4 ("I found a small but credible body of scholarship suggesting that, in our early history, the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owner. Apparently, the colonists saw in the due process clause a guarantee which had a wide, varied, and indefinite content.").

Beach, Ltd. v. The Superior Court of Los Angeles County, Justice Brown said that "the majority's call to deference [to the legislature] rests on an . . . assumption [which,] a historical artifact of the demise of the *Lochner* era, has no defensible constitutional provenance."⁴⁶

Justice Brown also has attacked the long-standing principle governing Equal Protection analysis, that courts should accord great deference to "regulatory legislation affecting ordinary commercial transactions" but apply strict scrutiny where "prejudice against discrete and insular minorities" may be involved.⁴⁷ These standards, rooted in the text and footnote four of the 1938 U.S. Supreme Court decision in *United States v. Carolene Products*, have been the basis of Equal Protection analysis since then. In her speech to the Federalist Society, Justice Brown attacked the "staggeringly significant" development of "two different constitutional tests" for judicial review.⁴⁸ In her separate dissent in *Kasler v. Lockyer*, Justice Brown said that the Supreme Court's "hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid."⁴⁹ In her separate dissent in *Warden*, Justice Brown attacked "the inadequacy of federal standards" governing Equal Protection analysis.⁵⁰ In her separate dissent in *Santa Monica Beach*, Justice Brown wrote that "The rational basis test . . . is as bad in its own way as substantive due process. Neither approach finds support in the constitutional text."⁵¹ In several cases, Justice Brown has advanced the position that "property and liberty are, upon examination, one and the same thing."⁵²

⁴⁶*Santa Monica Beach, Ltd. v. The Superior Court of Los Angeles County*, 19 Cal. 4th 952, 1024, 1026 ; 968 P.2d 993, 1040, 1041 (CA 1999)(dissent of Brown, J.), *cert. denied*, 526 U.S. 1131 (1999).

⁴⁷*United States v. Carolene Products Co.*, 304 U.S. 144, 152 and 152 n. 4.

⁴⁸*Whiter Shade*, *supra* note 2, at 5.

⁴⁹*Kasler v. Lockyer*, 23 Cal. 4th 472, 503, 504, 2 P.3d 581 (CA 2000) (dissent of Brown, J.), *cert. denied*, 531 U.S. 1149 (2001).

⁵⁰*Warden*, *supra* note 39, 21 Cal. 4th at 660, 661-2; 932 P.2d 154 (CA 1999).

⁵¹*Santa Monica Beach*, *supra* note 47, 19 Cal. 4th at 1027 ; 968 P.2d at 1042)(dissent of Brown, J.); see also *The History of the World*, *supra* note 4, at 13 (charging courts with "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"); she uses precisely the same language in the California Lincoln Club speech, *supra* note 4, at 7-8.

⁵²*San Remo*, *supra* note 7, 27 Cal. 4th at 692, 41 P.3d at 120. See also Justice Brown's dissent in *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1045, 1050; 16 P.3d 130 (CA 2001) (dissent of Brown, J.), *cert. denied*, 534 U.S. 826 (2001) ("It is no answer to say that this case concerns merely an economic injury and that race is a 'suspect class' requiring different treatment under the Constitution Arbitrary and unfair treatment by the government is not merely an economic injury; it is also, like race discrimination, an affront to personal dignity."); *id.*, 24 Cal.4th at 1056 ("The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, nor partiality among its protections of liberty. Nevertheless,

Justice Brown has criticized courts for protecting constitutional rights not specifically mentioned in the constitution.⁵³ Her separate opinion in *Kasler* both referred to "an expanding array of judicially proclaimed fundamental rights" and cited as "implicit protections the court purports to find in the penumbras of other express provisions" cases involving the right to determine how to live or die, the right to marry, and the right of a family to live together.⁵⁴ Among other rights protected by U.S. Supreme Court decisions but not specifically named in the constitution are the right to privacy, the right to travel, and the right of parents to control the upbringing and education of their children.⁵⁵ Justice Brown's opposition to this fundamental rights jurisprudence puts all of these vital personal protections at risk.

Justice Brown also has expressed some extraordinary views of the constitution's Takings Clause, views inconsistent with the U.S. Supreme Court's decisions in that area. She would expand that clause to all forms of regulation which restrict any aspect of private ownership, any one of the sticks in the "bundle of sticks" that make up property interests. "Restriction of any one of the several rights that constitute private property in effect takes that property," she wrote in her dissent in *San Remo*.⁵⁶ Disregarding the general rule that courts should apply a balancing test in these cases,⁵⁷ Justice Brown's dissent in *San Remo* maintains that the ordinance there at issue 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."⁵⁸

today's majority consigns economic rights to a secondary status that can only reflect opposition to the balance the framers carefully struck between public and private power."); *Santa Monica Beach*, *supra* note 47, 19 Cal. 4th at 1026, 968 P.2d at 1041 (dissent of Brown, J.) ("Economic freedoms are no different from other freedoms protected by the Constitution.").

⁵³See *The History of the World*, *supra* note 4, at 13 (arguing that the courts enlarged their power by "finding constitutional rights which are nowhere mentioned in the Constitution."). She uses precisely the same words in the California Lincoln Club speech, *supra* note 4, at 7.

⁵⁴*Kasler*, *supra* note 48, 23 Cal. 4th at 504, 505 (citing *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (right to determine how to live or die); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); and *Moore v. East Cleveland*, 431 U.S. 494 (1977) (right of a family to live together)).

⁵⁵Justice Brown chose to rely on some of these cases in her separate dissent in *American Academy*, where she sought to uphold the legislation at issue, stating, *e.g.*, that "A parent's interest in directing his child's upbringing is firmly rooted in both the state and federal Constitutions." *American Academy*, *supra* note 25, 16 Cal. 4th at 430, 940 P.2d at 879.

⁵⁶*San Remo*, *supra* note 7, 27 Cal. 4th at 700, 41 P.3d at 126.

⁵⁷See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("essentially ad hoc, factual" balancing test); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (describing two *per se* standards as exceptions to that general rule).

⁵⁸*San Remo*, *supra* note 7, 27 Cal. 4th at 700, 41 P.3d at 126.

Courts employ balancing tests in Takings Clause and many other situations in order to take into account the facts and circumstances that vary in every case. *Per se* rules are attractive because they seem easy to apply, but they make sense only in limited situations. Justice Brown, however, favors *per se* rules not only in Takings cases but more generally. In *Loder*, she said of the balancing test established by the U.S. Supreme Court for drug testing: "As with other attempts to apply amorphous balancing tests, multi-tiered levels of scrutiny, and abstract evidentiary exclusions, the results can only be described as whimsical."⁵⁹

Justice Brown again illustrated her desire to roll back established protections important to individuals and society in *Green v. Ralee Engineering Co.* In that case, a quality control inspector claimed that his employer, a manufacturer of fuselage and wing components for military and civilian aircraft, had discharged him because he had complained that the company was shipping defective components. The Supreme Court of California, affirming the Court of Appeal, held that the employee's claim, if proved, was within the established rule that an at-will employee may not be dismissed for vindicating "important public interests . . . [that are] 'tethered to fundamental policies that are delineated in constitutional or statutory provisions.'"⁶⁰ The narrow question in that case was whether statutorily authorized federal regulations establishing safety standards satisfied that standard. The majority held that they did. Justice Brown dissented, in this case insisting that unless the legislature specifically provided such a remedy, the discharge should be permitted. She challenged not only the result in this case but also the long-standing California rule (accepted by many other states) protecting even at-will employees from discharge in retaliation for vindication of important public policies.

Justice Brown has been injudicious, inconsistent, inaccurate, and contemptuous of the civility and collegiality that should characterize the judicial process. Her separate opinions are replete with intemperate, hyperbolic, signally inappropriate language expressing disrespect for legislatures, her colleagues, and other courts, including the United States Supreme Court. "[P]rivate property," she writes in *San Remo*, "already an endangered species in California, is now entirely extinct in San Francisco."⁶¹ Referring to an ordinance and her colleagues' upholding it, she says: "theft is still theft. Theft is theft even when the government approves of the thievery."⁶² In *American Academy*, she challenged the use of "'vanishing' acts" and "smoke and mirrors" by her colleagues,⁶³ and chastised the Chief Justice for "a sentence whose length

⁵⁹ *Loder*, *supra* note 24, 14 Cal. 4th at 934, 927 P.2d at 1257.

⁶⁰ *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66, 71; 960 P.2d 1046, 1048 (CA 1998).

⁶¹ *Id.*, 27 Cal. 4th at 692, 41 P.3d at 120.

⁶² *Id.*, 27 Cal. 4th at 704, 41 P.3d at 128.

⁶³ *American Academy*, *supra* note 25, 16 Cal. 4th at 442, 940 P.2d at 887.

is exceeded only by its circuitry."⁶⁴ She has written that "the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and 'plucked the commercial doctrine out of thin air.'"⁶⁵ In *Green*, she wrote of a majority opinion that fully discussed and analyzed precedent and explained its relationship to the current holding: "With legerdemain Harry Houdini would envy, the majority summarily dispatches Without principled explanation or justification, it dispenses" ⁶⁶ In *People v. Mar*, she was the sole dissenter from a holding of prejudicial error in requiring a defendant to wear, while testifying, a stun belt that would deliver an 8-second, 50,000 volt electric shock. The majority noted that such belts often activated accidentally, that neither duration nor force of the shock could be controlled, and that the shock may cause immediate and uncontrolled defecation and urination, uncontrollable shaking, heartbeat irregularity, or seizures.⁶⁷ The majority held that wearing such a dangerous belt during his testimony would distract the defendant. Justice Brown's lone dissent deprecated her colleagues' "lame" decision, stating that "It is difficult to believe that my colleagues have actually read defendant's testimony" ⁶⁸ She chastised the majority for "relying on such secondary sources as a student comment in a law journal," asserting that:

A high school student who turned in a research paper with a bibliography like that would be unlikely to get high marks for either the distinction or the balance of the authorities cited.⁶⁹

As the majority points out in that case, "it is customary for the opinions of appellate courts to include citations to the published work of student authors," and Justice Brown herself uses such citations⁷⁰ -- as, indeed, does the United States Supreme Court.⁷¹

⁶⁴*Id.*, 16 Cal. 4th at 427, 940 P.2d at 877.

⁶⁵*Kasky*, *supra* note 21, 27 Cal. 4th at 977-8, 45 P.3d at 268, quoting Kozinski and Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 627 (1990).

⁶⁶*Green*, *supra* note 61, 19 Cal. 4th at 97, 960 P.2d at 1066 (dissent of Brown, J.).

⁶⁷*People v. Mar*, 28 Cal. 4th 1201, 1215; 52 P.3d 95, 103 (CA 2002).

⁶⁸*Id.*, 28 Cal.4th 1230,1232; 52 P.3d 114, 114 (dissent of Brown, J.).

⁶⁹*Id.*, 28 Cal. 4th at 1232, 52 P.3d at 115.

⁷⁰*Id.*, 28 Cal. 4th at 1215 n. 1, 52 P.3d at 103 n. 1. See also, *e.g.*, *Loder*, *supra* note 24, 14 Cal. 4th at 934, 927 P.2d at 1257 (dissent of Brown, J., relying on two law review comments to support her criticism of a balancing test in drug testing cases).

⁷¹See, *e.g.*, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257,272 n. 17 (1989).

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Justice Brown's colleagues have noted that her representations about other cases and records are not necessarily reliable.⁷² Her separate dissent in *Green* illustrates her often inaccurate descriptions of her colleagues' opinion. Although the majority in *Green* carefully discussed the precedents' requirement that employees "must show that the important public interests they seek to protect are 'tethered to fundamental policies that are delineated in constitutional or statutory provisions,'" ⁷³ Justice Brown writes that every pertinent case "has simply repeated the 'fundamental public policy' mantra, which remains . . . devoid of meaning or content."⁷⁴

Conclusion.

In her dissent in *San Remo*, Justice Brown expressed the "hope the plaintiffs find a more receptive forum in the federal courts."⁷⁵ SALT very much hopes that the Senate will continue to agree that she has forfeited the right to be part of such a forum.

Yours very truly,

Professor José Roberto (Beto) Juárez, Jr., Co-President
Professor Holly Maguigan, Co-President

⁷²See, e.g., *American Academy*, *supra* note 25, 16 Cal. 4th at 307 n. 23, 940 P. 2d at 822 n. 23 (correcting Justice Brown's representation about a Supreme Court opinion); see also *id.*, 16 Cal. 4th at 358 n. 33, 940 P.2d at 830 (reacting to Justice Brown's quotation from a document not in the record but appended to an amicus curiae brief); *San Remo*, *supra* note 7, 27 Cal. 4th at 663, 41 P.3d at 100 (stating that the dissent "misrepresents the facts in the appellate record.").

⁷³*Green*, *supra* note 61, 19 Cal. 4th at 71, 960 P.2d at 1048.

⁷⁴*Id.*, 19 Cal. 4th at 105, 960 P.2d at 1071 (dissent of Brown, J.). She also says that her colleagues have engaged in "decisionmaking by rote" and refers, inaccurately, to an "admitted absence of any governing legal principles." *Id.*, 19 Cal. 4th at 105, 960 P.2d at 1072.

⁷⁵*San Remo*, *supra* note 7, 27 Cal. 4th at 704, 41 P.3d at 128.