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**JUSTICE JANICE ROGERS BROWN – CANDIDATE FOR SUPREME COURT**

## I. BACKGROUND AND SUMMARY

Janice Rogers Brown would be the first African-American woman to sit on the Supreme Court of the United States. She is 52. She is married and has one son from her marriage to a previous, now-deceased husband who died of cancer approximately 13 years ago.

Janice Brown grew up as the daughter of a sharecropper turned military man in segregated Alabama. Her family refused to use segregated facilities, which she said "meant no movies, no restaurants, and on some occasions you go thirsty." Brown worked to put herself through California State University at Sacramento, graduating as an economics major in 1974. She was a member of the Black Students Union in college and considered herself a liberal: "In reality, a lot of what that was about was that we were young. We thought we had it figured out. We had some of it right, but certain things after a while became to me crazy."

Justice Brown then attended UCLA Law School, graduating in 1977. She worked in state government for the next 13 years. From 1977 to 1979, she served as an attorney in the Bureau of Legislative Counsel. From 1979 to 1987, she was an attorney in the state Attorney General's office. From 1987 to 1990, she was general counsel of the state Department of Business, Transportation & Housing. In 1990 and 1991, she was a lawyer in private practice at a

firm in Sacramento. In 1991, Governor Pete Wilson asked her to be his general counsel (known in California as Legal Affairs Secretary). At the time, she publicly described herself as "more conservative" than Governor Wilson.

She served as Governor Wilson's Legal Affairs Secretary until 1994, at which time she was appointed to the California Court of Appeal (the intermediate state appellate court), where she served for two years. In 1996, Brown was appointed to the California Supreme Court after a somewhat controversial selection process. The JNE Commission (the state equivalent of the ABA) rated her unqualified, primarily because of her limited judicial experience. Governor Wilson and Attorney General Lundgren complained loudly about the rating, citing examples of other jurists who had served ably without extensive judicial experience, and calling the rating politically motivated. Governor Wilson stated: "I have personally experienced her intellect, her scrupulous integrity, both personal and intellectual, her temperament, her courage and her character. I know her to be an outstanding choice to fill the vacancy." Governor Wilson ultimately ignored the rating and proceeded with the nomination. Justice Brown stated at the news conference announcing her nomination: "I have come a very long way from the cotton fields of Luverne, Ala., to this nomination here today. But all of my life I was taught that you can aspire to anything if you are willing to work for it and to persevere. I dreamed a dream like this a long time ago--not this one but a more modest one--a dream that I would be a judge." At the time, Justice Brown was publicly supported by all of her judicial colleagues on the Court of Appeal (six Republicans and three Democrats). In addition, the California Association of Black Lawyers voted unanimously to endorse Brown.

Justice Brown was subsequently approved by the statutorily authorized three-member

Commission on Judicial Appointments and took her seat on the California Supreme Court, the first African-American woman to sit on that court. Two years later, she was retained in a statewide election after being endorsed by, among others, the *San Francisco Chronicle*.

Justice Brown has stated that "if there's a recurrent theme in what I do, it's humility, the recognition of human limitations. There is no perfection in human endeavor. We just do the best we can." She has certainly done "the best she can," as her performance as a state Supreme Court Justice over the last 5 years has only further demonstrated.

As a Justice on the most important state supreme court in the Nation (as measured by California's population and by the Court's broad criminal and civil jurisdiction), she has made an extraordinary mark. She is a strong conservative jurist who has forcefully and persuasively addressed many of the most difficult legal and constitutional issues of the day. Her written opinions are thoughtful and impressive -- deeper and more intellectual than the typical American appellate judge -- and they plainly reveal a conservative philosophy of judging and of constitutional and statutory interpretation.

Her record suggests that Justice Brown likely would be a strong conservative jurist on the United States Supreme Court, a philosophical amalgam of Justices Rehnquist, Scalia, Thomas, Black, Frankfurter, Harlan, and Holmes. She is a textualist, an originalist, a proponent of bright lines rather than balancing tests, deferential to legislative processes on controversial social issues, protective of property rights, protective of free speech, and tough on crime and the death penalty. She has a libertarian streak on free speech, property rights, and certain kinds of search and seizure issues -- not unlike Justice Thomas and Justice Scalia.

Her writings reveal that she is quite confident of her views and very firm in her

convictions. She has no apparent concern about casting the sole vote in support of a particular result or approach. Indeed, she very frequently dissents or concurs alone.

She is committed to judicial restraint in those constitutional cases where the constitutional provisions are vague or ambiguous (due process cases, for example), and she frequently cites opinions of Justices Frankfurter and Holmes to support her position in those kinds of cases. In constitutional cases more generally, she is a textualist and originalist and believes that core constitutional principles ought not to be balanced. She routinely criticizes balancing tests as anathema to principled judicial decisionmaking. In statutory cases, she is a textualist, although she will certainly look to other interpretive sources when the text is ambiguous (as, of course, will all of the U.S. Supreme Court Justices).

In her tenure on the California Supreme Court, she has addressed many of the most divisive and difficult legal issues -- issues with enormous social and economic ramifications.

She has routinely upheld the California death penalty statute against constitutional challenge (she has voted not to affirm death sentences in a small handful of cases where other errors warranted a new trial or sentencing proceeding).

She voted to uphold an abortion parental consent law against a constitutional challenge and argued that the majority's decision to strike down the law showed the "folly of the court as philosopher kings."

She interpreted Proposition 209 (the California anti-racial-preferences referendum) to bar preferential contracting *and* preferential outreach programs. Her opinion advocated the "colorblind" interpretation of both Title VII and the equal protection clause and was critical of United States Supreme Court decisions departing from the colorblind principle

and effectively sacrificing individual rights for group rights.

She voted to uphold an anti-gang injunction, employing compelling and powerful language about the evils of gang violence in urban neighborhoods and noting that "liberty unrestrained is an invitation to anarchy."

She voted to strike down as violative of First Amendment rights an injunction on harassing speech in the workplace, a decision later supported by Justice Thomas, who wrote a dissent from denial of certiorari in the same case. (Her position would have allowed suits for damages for harassing speech, but not a prior-restraint anti-speech injunction.)

She voted (along with a unanimous California Supreme Court) that under state law and the federal Constitution, the Boy Scouts could not be forced to hire a gay scoutmaster.

She voted to uphold a county drug testing program, again employing strong language about the role of the government as an employer as opposed to as a regulator.

She voted to carve out a new exception to the Fourth Amendment warrant requirement for warrantless searches pursuant to community caretaking functions (an exception a few other state courts also have adopted).

She has consistently advocated a very strong pro-property-rights reading of the takings clause, for example, by voting to strictly scrutinize rent control ordinances on the ground that they can constitute a taking.

Her votes in Religion Clause cases suggest that she believes the Religion Clauses neither require nor permit discrimination against religion, and that the Legislature has ample room to accommodate religion (that is, to single religion out for special favorable treatment in appropriate circumstances).

In a separate concurrence in a decision in which she otherwise voted to uphold a ban on certain assault weapons, she noted that total disarmament (that is, an outright state ban on firearms) would pose serious problems under the Second Amendment.

She has written decisions on tort law, punitive damages, securities regulation, and antitrust that are strong pro-business, common-sense decisions.

Finally, on one of the most critical issues dividing conservative judges on the Supreme Court of the United States, she does not accept *stare decisis* when she believes an earlier decision was incorrect or unprincipled or unworkable. She has frequently argued (again, like Justices Scalia and Thomas often do) that a particular case or line of cases was wrongly decided and should be reconsidered or overruled.

As a jurisprudential matter, there appear to be only a few areas where a judicial conservative might raise questions about her general approach.

*First*, on two Fourth Amendment issues, she has applied a slightly more expansive interpretation of the Fourth Amendment's prohibition on unreasonable searches than some conservatives judges might. In one case, she stated that those who live in a house with a probationer retain their Fourth Amendment rights even though probationers do not. In the other, she stated that the police constitutionally may not, absent ample justification, simply trespass onto private property to look into an open window for evidence of criminal activity. Of course, both Justices Scalia and Thomas, otherwise conservative judges, often interpret the Fourth Amendment far more expansively that many (and sometimes all) of the other Justices on the Supreme Court, for example in drug testing and roadblock cases. In addition, it bears emphasis that Justice Brown has authored several important pro-law-enforcement Fourth Amendment

decisions, so there is little basis for concluding that she is unduly expansive in her interpretation of the Fourth Amendment.

*Second*, Justice Brown has contended that the state constitutional guarantee of equal protection is not as toothless as the equivalent federal equal protection clause with respect to ordinary social and economic legislation. In particular, in one case exempting certain categories of lawyers from mandatory continuing education requirements, she would have more closely scrutinized the legislature's line-drawing (means-ends scrutiny, as she put it) than did the majority in that case.

*Third*, in order to avoid additional delays in capital sentencing, she has argued that a late-filed *state* habeas petition should not be denied on procedural grounds alone. She contended that the vagueness of the state standard for procedurally barring late-filed state habeas petitions inevitably meant that there would be extensive state litigation over whether the case fell into one of the exceptions for delay -- and that the federal courts, in any event, would not rely on that state procedural ground in dismissing the federal habeas petition because it was not "regularly" applied. All of this back and forth and to and fro, she said, would delay capital sentences from being carried out. Needless to say, her approach here, albeit somewhat counterintuitive for a conservative, reflects both her discomfort with vague balancing tests and her desire to streamline the capital sentencing process, which are sound positions.

Notwithstanding her extensive record, it also bears mention that there are a few constitutional issues as to which we have little indication about her philosophy. For example, she has not opined on the proper scope of the Commerce Clause or of Eleventh Amendment sovereign immunity. At a minimum, we can predict that she likely would be a strong proponent

of Eleventh Amendment sovereign immunity given her long experience in state government and in the state attorney general's office (although she might be somewhat uncomfortable that the text of the Eleventh Amendment does not mention sovereign immunity).

Because she rose from humble beginnings and would be the first African-American woman on the Supreme Court, we are cautiously optimistic that Justice Brown's confirmation chances are favorable. Absent an unforeseen situation, there likely would be 45 solid Republican votes for Brown (with Senators Collins, Snowe, Specter, Jeffords, and Chafee the likely question marks).

As to the Democrats, several Democratic Senators who are running for re-election in 2002 are from states where it may be difficult, for a variety of reasons, to oppose Janice Brown. They include Max Cleland (Georgia), Mary Landrieu (Louisiana), and Jean Carnahan (Missouri). In addition, Zell Miller (Georgia), John Breaux (Louisiana), Harry Reid (Nevada), Robert Byrd (West Virginia), and Ben Nelson (Nebraska) are less likely to yield to the interest groups on a Janice Brown nomination than other Democrats might. To the extent abortion becomes a (or the) focal point of the debate over Justice Brown, Senators Johnson (South Dakota), Lincoln (Arkansas), Conrad (North Dakota), Dorgan (same), and Baucus (Montana) may still be amenable to voting for her given their states' largely pro-life views. (Breaux, Byrd, Conrad, Dorgan, Miller, Dodd, Feingold, and Nelson voted for Attorney General Ashcroft.)

That said, it is likely that certain interest groups would strongly oppose Janice Brown and that a sizeable percentage of Senate Democrats would vote against her. The opposition to her would likely focus on *three* points.

*First*, she is conservative, and opponents almost certainly would try to portray her as a

might criticize her as injudicious or intemperate (and perhaps link this to her relatively aggressive approach on *stare decisis*). In defending her writings, we can argue that she is equally passionate in ruling for a criminal defendant who received ineffective assistance of counsel in a capital case as she is in protecting the rights of property owners. In addition, her personal demeanor is extremely soft-spoken and disarming, and she is an excellent oral advocate. She would make an absolutely superb witness at a confirmation hearing. We therefore believe she would leave an impression far different from Judge Bork, for example, whose personal appearance and demeanor before the Committee only seemed to confirm what liberals already suspected and feared from his writings.

*Third*, some might try to attack her as unqualified because she was voted unqualified in 1996 by a majority of the California JNE Commission (the equivalent of the ABA in California). But that rating was based largely on her supposed lack of requisite judicial experience for a seat on the California Supreme Court. In response, Governor Wilson, Attorney General Lundgren, and many others vigorously attacked the Commission as politically motivated. In any event, we believe that it would be laughable for anyone now to argue that she is unqualified for the Supreme Court given her years of judicial experience, the strength of her record on the California Supreme Court, her tenure as general counsel for the Governor of California, and her service in the Attorney General's office and other state offices. She is as qualified (really, more qualified) by dint of her experience than were several of the current Justices (Rehnquist, Thomas, O'Connor, and Souter) when they were appointed to the Supreme Court. In addition, the intellectual depth of her opinions flatly belies any claim that she is not qualified.