Janice Rogers Brown and the Environment: A Dangerous Choice for a Critical Court

A Report by Community Rights Counsel and Earthjustice

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Summary

The United States Court of Appeals for the District of Columbia Circuit is widely viewed as the second (to the Supreme Court) most important court in the country because of its often exclusive jurisdiction to hear challenges to health, safety, welfare, and environmental protections issued by federal government agencies. Except for the handful of cases that the Supreme Court agrees to review, the DC Circuit is the final arbiter of whether a federal protection will stand or fall.

Janice Rogers Brown, a California Supreme Court justice who has been nominated for a lifetime seat on the DC Circuit, believes that the federal government is a "leviathan" that is "picking up ballast and momentum, crushing everything in its path."[1] "Where government moves in," she believes, "community retreats, civil society disintegrates, and our ability to control our own destiny atrophies."[2] Nonetheless, according to Brown, government has become the "drug of choice" of Americans "for single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens."[3] In her view, "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract."[4]

Justice Brown's unfathomably bleak view of Americans and the motives and operation of the United States government animates her determination to resort to judicial activism to reduce the ability of government to enact and enforce a wide range of accepted safeguards. She believes that because the people have been drugged and enslaved by government, unelected judges must rein government in. Thus Justice Brown openly yearns for a return to the pre-New Deal era of *Lochner v. New York,*[5] when the Supreme Court repeatedly invalidated progressive federal and state statutes designed to improve working conditions and jump-start the economy out of the Great Depression.

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[1] Janice Rogers Brown, "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Speech to The Federalist Society, University of Chicago Law School (Apr. 20, 2000), at 7-8 [hereinafter A Whiter Shade of Pale], *available at* http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf.
[2] *Id.* at 8.
[3] Janice Rogers Brown, Fifty Ways to Lose Your Freedom, Speech to the Institute for Justice, Washington, DC (Aug. 12, 2000), at 3 [hereinafter Fifty Ways], *available at* http://www.communityrights.org/PDFs/8-12-00IFJ.pdf.
[4] *Id.* at 2.
[5] 198 U.S. 45 (1905).

Justice Brown's views place her almost alone at the fringe of constitutional interpretation. Virtually every prominent constitutional scholar—from the left, the center, and the right—agrees that *Lochner* is a paradigmatic example of unconscionable judicial activism. In the words of Robert Bork, *Lochner* is an "abomination"[6] that "lives in the law as the symbol, indeed the quintessence of judicial usurpation of power."[7] As Bork notes, *Lochner* has become a verb: "when a judge simply makes up the Constitution he is said 'to Lochnerize.'"[8]

Lochner often is described as the most widely reviled decision of the last hundred years. Senate Judiciary Committee Chairman Orrin Hatch, in describing the perils of an activist judiciary, has placed *Lochner* in the company of the infamous *Dred Scott* ruling that legitimized the spread of slavery and helped provoke the Civil War.[9] As explained by Edwin Meese, "the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority."[10] Meese, in defending the judicial selections of Presidents Ronald Reagan and George H.W. Bush, has declared that "to both Chief Executives the activist Court of the *Lochner* era was as illegitimate as the Warren Court."[11]

Justice Brown has repeatedly condemned the Supreme Court's 1937 repudiation of *Lochner* as "the triumph of our own socialist revolution."[12] Indeed, in a solo California Supreme Court dissent, Justice Brown has gone even farther, declaring contrary to all evidence that "private property, already an endangered species in California, is now entirely extinct in San Francisco."[13]

Brown's extreme judicial philosophy pervades the opinions she has written in her six years as a California Supreme Court justice. For example, during the course of one of her speeches that celebrates the *Lochner* era, she describes three recent Supreme Court regulatory takings rulings as holding out "the promising possibility of a revival of what might be called *Lochnerism*-lite" under the Takings Clause. In a series of lone dissents in takings cases, Brown attempts to realize this promise by advocating a startlingly expansive view of judicial power under the Takings Clause. As the majority responds in one of these cases, "nothing in the law of takings would justify an appointed judiciary in

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[6] Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003).
[7] ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990).
[8] *Id.*
[9] *See, e.g.,* 133 Cong Rec. S14659-02; Oct. 21, 1987.
[10] Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.U. L. REV. 925, 927 (1996).
[11] *Id.* at 928.
[12] A Whiter Shade of Pale, *supra* note 1, at 10; Fifty Ways, *supra* note 3,
[13] San Remo Hotel v. City & County of San Francisco, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting).

imposing that, or any other, personal theory of political economy on the people of a democratic state."[14]

In short, Janice Rogers Brown is a judge with a virtually unlimited vision of the need for unelected judges to use their power to rein in the activities of the federal government. She is a dangerous nominee for a lifetime position on this critical environmental court. If confirmed, she would threaten some of the most cherished and fundamental protections for our nation's health, safety, welfare, and environment.

The Importance of the DC Circuit

Our nation's bedrock environmental statutes—which protect our land, air, and water—were all passed, or dramatically strengthened, by Congress during the second half of the Twentieth Century. Congress rooted most of these protections in its authority under the Constitution's Commerce Clause power to "regulate commerce among the several states." Relying on an understanding of the Constitution that was definitively established by the Supreme Court in the late 1930's—and that has rarely been challenged since—these statutes have been hailed and copied worldwide and have produced health and welfare benefits that dwarf their compliance cost to industry. For example, the public-health and environmental benefits from U.S. EPA rules outweigh the costs to industry, states, and local governments by more than a 10-to-1 margin, according to a new White House report required under the Congressional Review Act.[15]

The enactment of this nationwide web of environmental safeguards dramatically expanded both the power and prestige of the DC Circuit. Congress granted the DC Circuit power—often exclusive power—to review challenges to EPA's and other agencies' interpretations of these statutes.[16] The DC Circuit's long and scholarly opinions from the 1970's and 1980's still form the core of every environmental law casebook. Sitting in the nation's capital, with the federal government a litigant in 70

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[14] *Id.* at 110.

[15] Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Informing Regulatory Decisions: 2003 Report to Congress on the Costs & Benefits of Federal Regulations *available at* http://www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf. According to the report, on average, major rules (those costing more than $100 million annually to implement) issued by EPA between fiscal years 1992 and 2002 cost $192 million per year, and provided annual benefits worth between $1.3 billion and $4.8 billion. *Id.* at 6 tbl.1.

[16] For example, Congress has entrusted the D.C. Circuit with exclusive jurisdiction in many environmental areas, including, challenges to: regulations issued under the Resource Conservation and Recovery Act (42 U.S.C. § 6976(a)(1)); regulations under Superfund (42 U.S.C. § 9613(a)); national primary drinking water regulations (42 U.S.C. § 300j-7(a)(1)); and nationwide standards adopted under the Clean Air Act (42 U.S.C. § 7607(b)(1)).

percent of its cases, the DC Circuit has been characterized as the "ombudsman of the national government."[17]

In recent years, the DC Circuit has become an increasingly hostile forum for environmental protection. Since 1990, the DC Circuit has struck down or hindered a long list of critical environmental protections, including:

- Clean Air Act protections for soot and smog. *American Trucking Ass'n v. EPA*, 175 F. 3d 1027 (D.C. Cir. 1999), *rev'd*, 121 S. Ct. 903 (2001);

- Habitat protection under the Endangered Species Act. *Sweet Home Chapter of Cmtys. for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995);

- Clean Water Act protections for millions of acres of wetlands. *National Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998);

- Corporate average fuel economy (CAFE) standards. *Competitive Enter. Inst. (CEI) v. National Highway Traffic Safety Admin*. (NHTSA), 956 F.2d 321 (D.C. Cir. 1992);

- Designation of sites on the Superfund National Priorities List. *Harbor Gateway Commercial Prop. Owners Ass'n v. EPA*, 167 F.3d 602 (1999); *Tex Tin Corp. v. EPA*, 992 F.2d 353 (D.C. Cir. 1993);

- The ability of citizens to challenge "a regulation which permits third parties to engage in offensive behavior, [examples would include pollution, discrimination or worker safety violations] but does not require them to do so" *Animal Legal Def. Fund v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997), *rev'd en banc,* 154 F.3d 426 (D.C. Cir. 1998); and

- Guidelines on treatment of petroleum wastewater. *American Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 2000); *NRDC v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994).

A recent empirical study by Professors Christopher Schroeder and Robert Glicksman found that in the 1990's, pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision-making. Over the same

[17] 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 in the District of Columbia*, 90 GEO. L.J. 549 (2002).

period, environmental claimants saw their success rate decrease by 20 percent.[18] Empirical analysis also indicates that ideology plays a dramatic role in environmental decision-making in the DC Circuit. For example, Professor Richard Revesz found that from 1987 to 1994, panels consisting of two Democrats and one Republican reversed the EPA on procedural grounds raised by industry in between 2 and 13 percent of environmental cases. Over the same period, panels consisting of two Republicans and one Democrat reversed EPA in 54 to 89 percent of these cases. In Revesz's words, "the magnitude of these differences is staggering."[19]

The recent cases and this empirical analysis have generated unprecedented concern in the national environmental community over the future of the DC Circuit. This concern is reflected in the attached letter that 16 national groups sent to Senator Schumer, then-chair of the Judiciary Subcommittee on Administrative Oversight and the Courts, regarding the Subcommittee's hearing entitled: "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court."[20]

The Bleak World-View of Janice Rogers Brown

President Bush has nominated Janice Rogers Brown to a lifetime appointment on this critical court that serves as the "ombudsman" of the federal government. Justice Brown's speeches, including particularly a speech to the University of Chicago chapter of the Federalist Society in April 2000 and a speech later that year to the DC-based Institute for Justice, make it painfully obvious that Brown would bring to this bench a view of government and Americans that is dour, stark, and remarkably divorced from reality.

Brown characterizes the Supreme Court's rejection of constitutional challenges to Depression-era reforms of the New Deal—which serve as precedent for our nation's environmental protections—as "the triumph of our own socialist revolution."[21] This socialist revolution, she explains, "started in the 1920's; became manifest in 1937; was consolidated in the 1960's; [and] is now either building to a crescendo or getting ready to end with a whimper."[22]

Brown recognizes that "Democracy and capitalism seem to have triumphed" in America, but warns that "appearances can be deceiving."[23] She chides Americans for not

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[18] Robert Glicksman & Christopher Schroeder, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL L. REP. 10371 (2001).
[19] Richard L. Revesz, *Environmental Regulation, Ideology and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766 (1997).
[20] This letter is available at http://www.earthjustice.org.
[21] A Whiter Shade of Pale, *supra* note 1, at 8.
[22] *Id*. at 7.
[23] *Id.* at 6.

celebrating capitalism's virtues, and for instead offering it "contemptuous tolerance but only for its capacity to feed the insatiable maw of socialism."[24]

The federal government, according to Brown, bears much blame for this awful state of affairs. The government is a "leviathan" that is "crushing everything in its path."[25] "Where government moves in," she argues, "community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property, the precipitous decline of the rule of law, the rapid rise of corruption; the loss of civility and the triumph of deceit."[26] According to Brown, these consequences of government action result, in turn, in "a debased, debauched culture which finds moral depravity entertaining and virtue contemptible."[27]

Americans, however, share the blame, according to Justice Brown. While unrestrained government "leads to slavery" most Americans "no longer find slavery abhorrent."[28] "Big government," Brown argues, has become "[t]he drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens."[29] Brown charges that "[t]oday's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract."[30]

In particular, Brown complains that "[p]rotection of property was a major casualty of the Revolution of 1937."[31] In this revolution, according to Brown, "property acquired a second class status,"[32] and it "thus became government's job not to protect property but rather, to regulate and redistribute it."[33] This change "occurred with remarkably little fanfare" but was "staggeringly significant," because as a result, "the original meaning of rights was effectively destroyed."[34]

Brown concluded her Federalist Society speech by describing America's situation as "hopeless but not yet desperate."[35] Not desperate, she says, because the "arcs of history, culture, philosophy, and science all seem to be converging on this temporal

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[24] *Id.*
[25] *Id.* at 7-8.
[26] *Id.* at 8.
[27] *Id.*
[28] *Id.* at 3.
[29] *Id.* at 3-4.
[30] Fifty Ways, *supra* note 3, at 2.
[31] A Whiter Shade of Pale, *supra* note 1, at 12.
[32] *Id.*
[33] *Id.* at 13.
[34] *Id.*
[35] *Id.* at 16.

instant."[36] She urges her fellow "true conservatives" (which she declares to be so rare that they "should be included on the endangered species list")[37] to "hold on with all the energy and imagination and ferocity we possess. Hold on even while we accept the darkness. We know not what miracles may happen; what heroic possibilities exist. We may be only moments away from a new dawn."[38]

Justice Brown and *Lochner*

The "new dawn" Justice Brown envisions is not new at all. Rather, she openly yearns for a return to what is widely considered to be the darkest era of constitutional jurisprudence this country has ever had to endure.

Rhetorically, Brown asks in her Federalist Society speech "what if anything" her apocalyptic worldview has "to do with the law." She concludes: "Quite a lot."[39] Specifically, she puts much of the blame for our current predicament on the New Deal Supreme Court which transformed the Constitution "into a significantly different document."[40] In her speech to the Institute for Justice, Brown claims that the modern-era Supreme Court has reduced the Constitution to a "bad chain novel."[41]

What she calls the "socialist" "Revolution of 1937," is actually a series of Supreme Court decisions that were decided that year. These decisions overruled the several lines of Supreme Court doctrine that had invalidated scores of federal and state statutes designed to improve working conditions during the Progressive Era, and to jump-start the economy out of the Great Depression.

Most notorious of these repudiated doctrines was the version of substantive due process employed by the Supreme Court in *Lochner v. New York* and subsequent cases to strike down state and federal laws that protected workers from sweatshops, eliminated child labor, and reduced workplace hazards. As Robert Bork explains, in the *Lochner* era, "the Court invented a right to make contracts, a right found nowhere in the Constitution, and held that bakery workers and employers had a right to contract to work more than sixty hours a week and ten hours a day."[42]

Brown faults the 1937 Supreme Court for overruling *Lochner* and "inoculating the federal Constitution with a kind of underground collectivist mentality."[43] She argues

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[36] *Id.*
[37] *Id.* at 1.
[38] *Id.* at 16.
[39] *Id.* at 8.
[40] *Id.*
[41] Fifty Ways, *supra* note 3, at 2.
[42] Bork, 1 AVE MARIA L. REV. at 21.
[43] A Whiter Shade of Pale, *supra* note 1, at 8.

that the "doctrinal underpinnings of *West Coast Hotel*,"[44] the 1937 case that effectively overruled *Lochner*, eventually consumed "much of the classical conception of the Constitution."[45] Specifically defending the *Lochner*-era version of substantive due process, Brown cites 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 owners."[46]

Brown also addresses and expressly rejects the now universally accepted views of Justice Oliver Wendell Holmes in his *Lochner* dissent:

> In his famous, all too famous dissent in *Lochner*, Justice Holmes wrote that the "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong.[47]

By openly calling for a return to the *Lochner* era, Brown places herself at the far fringes of constitutional thought. While fights abound over what is and is not judicial activism, virtually everyone agrees that *Lochner* is a paradigmatic example of inappropriate judicial overreaching. Deemed an "abomination" by Robert Bork,[48] *Lochner* often is described as the most widely reviled decision of the last hundred years. As explained by Edwin Meese, "the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority."[49] Meese, in defending the judicial selections of Presidents Ronald Reagan and George H.W. Bush, has declared that "to both Chief Executives the activist Court of the *Lochner* era was as illegitimate as the Warren Court."[50] Judiciary Committee Chairman Orrin Hatch, in describing the perils of an activist judiciary, has placed *Lochner* in the company of the infamous *Dred Scott* ruling that legitimized the spread of slavery and helped provoke the Civil War.[51] Every one of the current Supreme Court justices have written or joined opinions rejecting *Lochner*'s reasoning.[52]

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[44] W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).
[45] A Whiter Shade of Pale, *supra* note 1, at 11.
[46] Fifty Ways, *supra* note 3, at 4.
[47] A Whiter Shade of Pale, *supra* note 1, at 8.
[48] Bork, 1 AVE MARIA L. REV. at 21.
[49] Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.U. L. REV. 925, 927 (1996).
[50] *Id.* at 928.
[51] *See, e.g.,* 133 Cong Rec. S14659-02; Oct. 21, 1987.
[52] Eight of the nine justices have authored opinions rejecting *Lochner*, and the ninth, Justice Ginsburg, has joined opinions rejecting *Lochner*. *See, e.g.,* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 690 (1999) (Scalia, J., joined by four justices); *id.* at 701 (Breyer, J., dissenting, joined by the remaining three justices); United States v. Lopez, 514 U.S. 549, 601-02 n.9 (1995) (Thomas,

Professor David A. Strauss of the University of Chicago School of Law has summarized the near-universal discrediting of *Lochner* in a manner that is quite prophetic when considered in conjunction with Justice Brown's nomination to the DC Circuit. According to Professor Strauss:

> *Lochner v New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years. . . . And Lochner would have some competition for the prize; *Korematsu v United States*, in particular, would be a strong contender. But judged by some rough-and-ready indicators—Would you ever cite this case in a Supreme Court brief, except to identify it with your opponents' position? ***If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?***—*Lochner* is one of the great anti-precedents of the twentieth century. ***You have to reject Lochner if you want to be in the mainstream of American constitutional law today.***[53]

Justice Brown herself acknowledges how far out-of-sync her views are with mainstream conservative legal thinking. She "initially accepted the conventional wisdom" that the doctrine used in *Lochner* was "a myth invented by judicial activists that were up to no good," and that "Lochnerism is the strongest pejorative known to American law."[54]

Justice Brown now rejects that conventional wisdom, and she chides conservatives for their "dread" of judicial activism. In her words, it "dawned on me that the problem may not be judicial activism. The problem may be the world view – amounting to altered political and social consciousness – out of which judges now fashion their judicial decisions."[55] Not coincidentally, Brown delivered these remarks to the Institute for Justice, which openly supports judicial activism and deems part of its mission to be convincing conservatives that "'conservative judicial activism' is neither an oxymoron nor a bad idea."[56]

J., concurring); *id.* at 605 (Souter, J., dissenting joined by three justices); American Dredging Co. v. Miller, 510 U.S. 443, 458 (1994) (Stevens, J., concurring in part and concurring in the judgment); Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion); *id.* at 957 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part joined by three justices); *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., dissenting, joined by one justice).

[53] David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

[54] Fifty Ways, *supra* note 3, at 3.

[55] *Id.* at 4.

[56] *See* George Will, *Take on Leviathans in Local Government*, ST. LOUIS POST-DISPATCH, July 23, 1993, 7B; *see also* William H. Mellor & Clint Bolick, The Quest For Justice: Natural Rights and the Future of Public Interest Law, Inaugural Speech Launching Institute for Justice (Sept. 10, 1991) (noting that "[w]hile

Justice Brown argues that we should not dismiss the doctrine of substantive due process for economic rights because even "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."[57] That is to say, even if a law enacted by democratically-elected officials does not violate the constitutional text, judges nevertheless should strike down the law when they are sufficiently "appalled" because the law violates some undefined "spirit" of the Constitution. Brown openly advocates precisely the kind of extra-constitutional value importation that conservatives like Robert Bork, Edwin Meese, and Senator Hatch have been condemning for decades.[58]

A return to the *Lochner* era and its extra-constitutional "liberty" of contract would undermine this nation's entire framework of environmental statutes. Most directly, our modern workplace safety laws—which protect workers from hazardous chemicals and other environmental dangers—would almost certainly fall the way of the limitation on bakery work hours in *Lochner*. More broadly, almost every environmental statute either prohibits certain types of private contracts (for example, the Endangered Species Act prohibits the sale of species on the endangered species list), or alters the terms upon which private contracts must be made (for example, the "Superfund" law has dramatically changed the way real estate is transacted in this country by making purchasers potentially liable for the environmental hazards placed on their property by former owners). These provisions of law and innumerable others could be challenged as violating the liberty of contracts.

[we] abhor[ed] many results of liberal judicial activism, we believed that emphasis on judicial restraint as an end in itself gave insufficient hope for protecting crucial rights.").

[57] Fifty Ways, *supra* note 3, at 3.

[58] One further piece of evidence of how far outside the mainstream Justice Brown's views on *Lochner* lie is the fact that even the Committee for Justice, a group established to defend President Bush's judicial nominees, will not defend Justice Brown's position on *Lochner*. Rather, the Committee attempts to suggest that Brown does not in fact advocate a return to *Lochner*. *See* Committee for Justice, *Janice Rogers Brown: A Perfect Fit for the D.C. Circuit,* at 16, *available at* http://committeeforjustice.org/contents/reading/brownreport.pdf. This assertion does not comport with Brown's words. Specifically, the Committee points to Brown's criticism of *Lochner* in a 1999 dissent in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1026 (Brown dissenting). The Committee fails the note that in her speech to the Institute for Justice, made over a year after her Santa Monica dissent, Brown acknowledges her prior criticism of *Lochner* and expressly repudiates this criticism. It is not surprising that Brown once criticized Lochner: everyone, including Robert Bork, Senator Hatch, and Edwin Meese, has done that. What is remarkable is that Brown has come to the conclusion that these conservatives and every Supreme Court justice has gotten the issue wrong and that, indeed, Lochner was correctly decided.

Beyond *Lochner*

Even if Justice Brown is confirmed to the DC Circuit and is unsuccessful in convincing her brethren to return to *Lochner*, Brown's vitriolic criticism of the "socialist revolution" of 1937 suggests dire consequences for environmental law.

The Supreme Court did far more than just repudiate *Lochner* in 1937. The Court's "switch in time," noted by Brown, includes the decision of Justice Roberts to alter his position in a number of areas and to uphold the reforms sought by President Roosevelt under the label: the "New Deal." In condemning the 1937 Supreme Court for "inoculating the federal Constitution with a kind of underground collectivist mentality,"[59] and in arguing that "if we can invoke no limits on the power of government, a democracy is inevitably transformed into a Kleptocracy—a license to steal, a warrant for oppression," Brown is plainly disparaging this entire body of decisions.[60]

Most importantly, the cases Brown implicitly repudiates include the Court's 1937 decision in *N.L.R.B. v. Jones & Laughlin Steel Corp*.,[61] which abandoned a line of cases that had attempted to distinguish between "manufacturing" and "trade" under the Constitution's Commerce Clause in order to rule that only "trade" was within the Commerce Clause power of the federal government.[62] Virtually every major environmental statute was passed by Congress in reliance on the modern interpretation of the Commerce Clause first articulated in *Jones & Laughlin*. In recent years, the DC Circuit has upheld environmental statutes—including the Safe Drinking Water Act, the Clean Water Act, and the Endangered Species Act—rejecting constitutional challenges brought by industry to Congress' Commerce Clause authority to regulate in these areas. Brown's speeches strongly suggest that she would advocate for a different result.[63]

The 1937 Supreme Court also backed away from two 1935 cases decided under the so-called non-delegation doctrine, which, read literally, would have prevented the establishment and empowerment of executive branch regulatory agencies like the Environmental Protection Agency (EPA).[64] The non-delegation doctrine was essentially

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[59] A Whiter Shade of Pale, *supra* note 1, at 8.
[60] Fifty Ways, *supra* note 3, at 4.
[61] 301 U.S. 1 (1937).
[62] *See, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1 (1895). For an account of the doctrinal transformation started by *Jones & Laughlin, see* Robert L. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645-93, 883-947 (1946).
[63] *See, e.g.,* Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (upholding Commerce Clause authority to protect endangered species on private lands).
[64] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see also* 1 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 978 (3d ed. 1999) ("the Court has not invalidated a single delegation of congressional power on nondelegation grounds since 1936").

dormant for sixty years before a panel of judges on the DC Circuit attempted to revive it in *American Trucking Association v. EPA*[65] to strike down a central provision of the Clean Air Act. The D.C. Circuit's extreme decision in this case undermined Clean Air Act enforcement until the Supreme Court granted review and unanimously reversed. The circuit court opinion illustrates the threat that doctrines like the non-delegation doctrine potentially pose to environmental protections. Justice Brown's speeches strongly suggest that she would be an enthusiastic supporter of such extreme and repudiated constitutional principles as the non-delegation doctrine in order to limit federal authority to enact and enforce basic anti-pollution and other safeguards.

Justice Brown's Judicial Opinions

Justice Brown's judicial opinions evidence a zeal for imposing her idiosyncratic and extreme views in spite of contrary precedent.

Takings Cases

In her speech to the Federalist Society, Justice Brown hails certain Supreme Court takings cases for raising the "promising possibility of a revival of what might be called '*Lochnerism*-lite" under the guise of the Takings Clause of the United States Constitution.[66] Her opinions in takings cases have attempted to turn this possibility into reality.

In her Judiciary Committee questionnaire, Justice Brown listed *Landgate, Inc. v. California Coastal Commission*[67] as one of the 10 most significant opinions she has written as a judge. In *Landgate*, a landowner sought permission to build a 9036-square-foot home and guest house, swimming pool, and septic tank on a steeply sloped lot in Escondido Canyon, a scenic recreational area that included a heavily used hiking trail to Escondido Falls.[68] The California Coastal Commission, which is responsible for the preservation of scenic and recreational resources in the coastal area, was concerned with both the runoff and erosion that would be generated from the lot as well as the impact the house would have on scenic and recreational values in the Canyon.

The Commission initially objected to a change in the lot made by the former owner of Landgate's property that had the effect of directing development towards the more fragile upper portion of the original lot. Landgate disputed the State Commission's jurisdiction to challenge this lot change, which had been approved by Los Angeles County, and prevailed in this challenge in the California courts. Subsequently, the

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[65] 175 F.3d 1027 (1999), *rev'd*, 121 S. Ct. 903 (2001).
[66] A Whiter Shade of Pale, *supra* note 1, at 13-14.
[67] 953 P.2d 1188 (Cal. 1998), *cert denied,* 525 U.S. 876 (1998).
[68] *Id*. at 1190-91.

Commission issued a permit for a smaller house on this sloped lot. Even after this approval, Landgate continued to assert that the Commission had "taken" its property, alleging that the two-year delay in development caused by the Commission's erroneous conclusion that it could challenge the lot change constituted a taking.

The California Supreme Court found that no taking had occurred. The court held that the Commission had acted under the reasonable—if erroneous—belief that it had authority to challenge the lot adjustment, and it concluded that a reasonable error by a governmental agency in the development approval process does not necessarily amount to a taking compensable under the Fifth Amendment, even if the error in some way diminishes the value of the subject property. Specifically, it held that a two-year delay in the issuance of the permit to the landowner, resulting from the Commission's determination that it had jurisdiction to declare illegal a lot change, was not a compensable taking. The U.S. Supreme Court denied review of this conclusion, and just last year in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*[69] found no taking in a case that involved a longer delay than the one at issue in *Landgate*.

Brown's intemperate dissent, joined only by Justice Baxter, accused the majority of "judicial impudence"[70] in support of a "regulatory friendly" outcome.[71] Echoing her speeches, Brown describes government as a "relentless siphon" with a "demand for free public goods [that] is infinite." She describes the Takings Clause, intended by the framers only to prohibit uncompensated expropriations of private property, as "an expression of the constitutional commitment to limiting government and maximizing individual liberty."[72] In Brown's view, "the Takings Clause, and the courts' ardent defense of it, stands as a last lonely bulwark of property rights."[73] She would have required taxpayers to pay Landgate for a "temporary taking" during the time period that the Coastal Commission prevented development as part of the lot change dispute.

Brown's rhetoric and views are even more extreme in a series of lone dissents in takings challenges to affordable housing protections. This line of cases starts with *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*,[74] in which a landlord brought a broadside attack on Santa Monica's rent-control laws. The landlord did not even allege that the rents permitted under the statute were confiscatory, which is the normal allegation in a takings case. Rather, the statute was challenged on the ground that rent control did not actually increase the supply of affordable housing. As the majority

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[69] 535 U.S. 302 (2002).
[70] *Landgate,* 953 P.2d at 1206.
[71] *Id*. at 1211.
[72] *Id*. at 1207.
[73] *Id*. at 1212.
[74] 968 P.2d 993 (Cal. 1999).

points out in finding no taking, "the notion that a court may invalidate legislation that it finds, after a trial, to have failed to live up to expectations is indeed novel."[75]

The notion may be novel these days, but it was not in the *Lochner* era. Brown would have granted courts sweeping power to reevaluate the wisdom of laws such as rent control statutes. Applying a test designed by the U.S. Supreme Court for the narrow category of cases where the government demands transfer of title to a portion of property in exchange for a building permit, Brown suggests that all takings cases should involve "a measuring whether the benefit and burden are relatively equal." Applying this standard, she concludes that all rent-control programs violate this principle because they force landlords to subsidize tenants who are unable to pay market rents rather than solving the problem through taxes distributed to the public at large.[76]

Brown's extreme views on the Takings Clause are most fully articulated in her lone dissent in *San Remo Hotel v. City & County of San Francisco*.[77] The majority upheld San Francisco's hotel conversion law that required owners of residential hotels to pay a fee whenever they demolished or changed the use of a residential hotel. In so doing, the court applied straightforward precedent that provides deference to fees set by statute. Brown disagreed and would have struck down the law because in her view, the statute placed too much of the burden of addressing the affordable housing crisis on property owners.

Brown's *San Remo* opinion is particularly intemperate. After declaring that "property ownership is the essential prerequisite of liberty," Brown declares that "private property, already an endangered species in California, is now entirely extinct in San Francisco."[78] She accuses San Francisco of implementing a "neo feudal regime,"[79] and "[t]urning a democracy into a kleptocracy."[80] She describes the affordable housing law as "theft" and states that "theft is theft even when the government approves of the thievery."[81] Closely echoing her speeches on government and property rights, Brown declares:

> Where once *government* was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil

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[75] *Id*. at 999.
[76] *Id*. at 1044; *see also* Galland v. City of Clovis, 16 P.3d 130, 163 (Cal. 2001) (Brown, J. dissenting) (asking "if we took a wrong turn long ago when we began treating rent control like any other price-regulated industry.").
[77] 41 P.3d 87 (Cal. 2002).
[78] *Id*. at 120.
[79] *Id*.
[80] *Id*. at 128.
[81] *Id*.

> because it protected private property, now private property is a necessary evil because it funds government programs.[82]

The views Brown expresses on the proper reach of the Takings Clause are just as extreme as her rhetoric. Indeed, her views are considerably more expansive than those expressed by any current Supreme Court justice and resemble quite closely the views of University of Chicago law professor Richard Epstein, whose book, *Takings: Private Property and the Power of Eminent Domain*, is cited favorably in Brown's *San Remo* dissent. Epstein enthusiastically describes his views as "invalidat[ing] much of the twentieth century legislation."[83]

Specifically, Brown describes Supreme Court takings precedent as "labyrinthine and compartmentalized" and argues for a new "conceptual approach that takes seriously the constitutional prohibition against uncompensated takings of private property."[84] The approach she advocates would invalidate any law that has the effect of redistributing wealth from one group to another. Brown argues that because such laws do not provide landowners with an "average reciprocity of advantage," these laws constitute a "per se taking requiring compensation."[85] Even more broadly, Brown argues that "restriction of any one of the several rights that constitute private property in effect takes that property."[86] In these passages, Brown is advocating for the adoption of Epstein's extreme theory of "partial" regulatory takings, which has been rejected by the Supreme

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[82] *Id*. at 120.
[83] RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 282 (1985).
[84] *San Remo,* 41 P.3d at 125.
[85] *Id*. at 126.
[86] Brown seems to recognize that the plain language and meaning of the Takings Clause is limited to actual expropriations of property, *see San Remo,* 41 P.3d at 126 ("[I]n a simple world where "property" is understood to refer to tangible property and "tak[ing] is understood to be a formal transfer of title, this constitutional injunction is relatively easy to apply." She rejects this "narrow" textual reading of the Clause, however, because such a view, in her opinion, would "trivialize the right." Justice Scalia's opinion for the Supreme Court in the *Lucas* case recognized that "early constitutional theorists did not believe the Takings Clause embraced regulations at all," Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992), and "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, . . . it was generally thought that the Takings Clause reached only a `direct appropriation' of property . . . or the functional equivalent of a `practical ouster of [the owner's] possession.'" *Id*. at 1014 (alterations in original) (citations omitted) (quoting Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879)). This conclusion is supported by extensive research into Colonial-era law. *See* FRED BOSSELMAN ET AL., COUNCIL ON ENVTL. QUALITY, THE TAKINGS ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 82-104 (1973); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1258 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995); *see also* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 230 ("My difficulty is not that [Richard] Epstein's Constitution would repeal much of the New Deal and modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."). *Compare* EPSTEIN, *supra* note 83, at 26-29.

Court in *Tahoe-Sierra* and other cases.[87] Like Epstein's, Brown's views would call into constitutional question "many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation."[88]

In his memoirs recounting his professional experiences at the Department of Justice, Harvard Law School Professor Charles Fried, who served as Solicitor General of the United States under President Ronald Reagan from 1985 to 1989, described the extreme nature of such a radical approach to the Takings Clause:

> [A]ttorney General Meese and his young advisors—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.[89]

The *San Remo* majority responds directly to Brown's dissent and accuses Brown of letting her ideology dictate conclusions that are justified neither by legal precedent nor by the text of the Takings Clause: "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."[90]

Preemption Cases

Justice Brown's disdain for governmental efforts to protect public health, welfare, and the environment is also evident in her decisions under the Supremacy Clause of the Constitution. The Constitution's Supremacy Clause clearly gives Congress the power to displace or "preempt" state and local regulators where it chooses to do so. Frequently,

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[87] *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002), and the cases cited therein.
[88] EPSTEIN, *supra* note 83, at x.
[89] CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT 183 (1991).
[90] *San Remo,* 41 P.3d at 110.

however, Congress's intent with respect to preemption is somewhat murky. Brown has been aggressive about finding preemption where Congress has been silent or less than clear.

A powerful example is Brown's opinion for the California Supreme Court in *Etcheverry v. Tri-Ag Service, Inc.*,[91] in which a pesticide company advised a walnut farmer to apply pesticides at a greater intensity than indicated on the federally-approved label. When this combination of pesticides damaged the walnut crop, the pesticide company argued that state-law claims based on a failure to warn of the risks of using a pesticide were preempted by federal law. Brown agreed with the pesticide company, notwithstanding the fact that the United States filed a brief arguing against federal preemption. The United States explained that EPA's product labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) do not even deal with issues of pesticide efficacy (whether it will control the target pest or harm the crop it was intended to protect) that were at issue in the *Etcheverry* case, and thus preemption was not appropriate.

As explained in a dissenting opinion by Justice Werdegar, Brown's opinion ignores the presumption against preemption of state laws particularly in areas such as health and safety, where historically states have played an important role. In Werdegar's words, Brown fails to heed the "most basic and important rule governing questions of federal preemption of state law: when Congress intends to displace state law, it must express that intent clearly."[92] Other opinions written by Brown in similar cases follow the same pattern.[93]

Justice Brown's Use of Concurrences to Inject Personal Views in Cases

One of the most unusual ways Justice Brown's activist tendencies manifest themselves in her work as a California Supreme Court Justice is revealed in cases in which Brown took the extraordinary step of writing both a majority opinion that explains how binding precedent controls the outcome and a concurrence that harshly criticizes the majority's conclusion and articulates a dramatically different "independent" basis for reaching the same holding. This extraordinary practice simultaneously undercuts the

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[91] 993 P.2d 366 (Cal. 2000).
[92] *Id.* at 380.
[93] *See* Peatros v. Bank of America, 990 P.2d 539 (Cal. 2000) (Brown J. dissenting) (arguing in dissent that race and age discrimination claims brought under the California Fair Housing and Employment Act were preempted under the National Bank Act of 1864). *Cf.* Sinclair Paint Co. v. Board of Equalization, 49 Cal. App. 4th 127 (1996), *rev'd* 937 P.2d 1350 (Cal. 1997) (Brown, as a California appeals court judge, struck down the Childhood Lead Poisoning Prevention Act for imposing a fee on private companies that manufactured products containing lead. Brown's conclusion, that the fee was a "tax" which was preempted by Proposition 13, was reversed by the California Supreme Court without dissent.).

majority opinion while elevating the status of what are essentially Brown's dissenting views.

For example, in *Kasler v. Lockyer*,[94] Brown's majority opinion employs a straightforward application of the well-established "rational basis" test to uphold a California law banning assault weapons against a constitutional Equal Protection challenge. By contrast, her concurrence severely criticizes the precedent relied upon by her own majority opinion and asserts that the "right to bear arms" (or "the right to preserve one's life," as she alternatively characterizes the Second Amendment),[95] should be reclassified as a fundamental right. Fundamental rights under Supreme Court case law can only be impinged using narrowly tailored means to meet compelling government needs. More broadly, she argues that the "dichotomy between the U.S. Supreme Court's *laissez-faire* treatment of social and economic rights and its hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid."[96] This concurrence thus launches a breathtaking assault on decades of well-settled constitutional law.[97]

Similarly, in *Lane v. Hughes Aircraft Co*.,[98] Brown wrote both the majority opinion and a concurrence in a case involving a multi-million dollar racial discrimination

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[94] 2 P.3d 581 (Cal. 2000).
[95] *Id.* at 602.
[96] *Id.* at 601.
[97] This is, of course, just one of many areas where Brown has advocated a fundamental change in constitutional law. Her advocacy for a return to *Lochner*-era substantive due process is a second, and her views on the expanse of the Takings Clause represent a third. A fourth area that falls beyond the scope of this report is her apparent advocacy against Supreme Court precedent incorporating the Bill of Rights against the states. In a speech to the Pepperdine Bible Lectureship, Brown argues:

> The United States Supreme Court, however, began in the 1940's to incorporate the Bill of Rights into the 14th Amendment. Now that has an interesting effect on how the law about religious expression gets developed. Because they incorporated all of the Bill of Rights into the 14th Amendment, that not only made them binding on the States, that is to say that now the States were covered by the same first ten amendments as the Federal government, it also gave tremendous power to the Federal judiciary, because now they got to decide at least the minimum level of protection that would be provided for all of these rights. The historical evidence supporting what the Supreme Court did here is pretty sketchy. The language certainly doesn't give you any clue that the first ten amendments would be incorporated in language which simply says "there shall be no denial of due process or equal protection." So if you went by the language you certainly would not get there. They relied on some historical materials which [are] not overwhelming. The argument on the other side is pretty overwhelming that it's probably not incorporated.

Janice Rogers Brown, *Beyond the Abyss: Restoring Religion on the Public Square,* transcript of speech to the Pepperdine Bible Lectureship (1999).

[98] 993 P.2d 388 (Cal. 2000).

verdict against Hughes Aircraft. After a jury awarded employees of Hughes $89.5 million in compensatory and punitive damages, the trial court issued a judgment notwithstanding the verdict and ordered a new trial. The Court of Appeals reinstated the verdict, but ordered the total award reduced to $17 million. Brown's majority opinion for a unanimous court reversed the Court of Appeals decision in favor of the trial court's finding that a new trial was warranted. The majority opinion specifically avoids ruling on the punitive damages issue, noting only that the reduction in damages is "not before us and we express no opinion about it."[99]

Despite her own recognition just sentences before that the damages issue was "not before" the court, Brown's entire concurrence argues that the California Supreme Court should rule as a matter of law that punitive damages should "rarely exceed compensatory damages by more than a factor of three," with most awards falling "well below that limit."[100] For support, Brown cites some thirty instances in California law where the legislature enacted statutes specifying awards of double or treble damages.

This opinion prompted a stinging rebuke from the late Justice Stanley Mosk, who wrote that Brown "advocates a brand of judicial lawmaking by declaring that punitive damages must not, absent some special unspecified showing, exceed actual damages by more than three times. Such a rule cannot be justified."[101] Justice Mosk points out that the legislature adopted treble damages rules in a "small minority of the statutes in which it has chosen to address punitive damages."[102] The court, he said, has no authority to "second-guess the Legislature and import a damages limitation" when the "Legislature has deliberately declined to impose one."[103]

In both these cases, Brown used the vehicle of a concurrence to undermine her own majority opinion and advocate dramatic departures from established precedent. Judges must rule on the law as it is, not as they believe it should be. These cases dramatically illustrate Brown's penchant for using legal opinions to advance her radical views on the law.

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[99] *Id*. at 391.
[100] *Id*. at 399.
[101] *Id*. at 395.
[102] *Id.* at 397.
[103] *Id.* Recently, the U.S. Supreme Court ruled that punitive damages, as a matter of due process, should not generally exceed compensatory damages by more than a factor of nine. *See* State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S.Ct. 1513 (2003). Brown's opinion, which could not have anticipated the Supreme Court's action, called for an unjustifiable cap three times less than the Court found appropriate in *State Farm.*

Conclusion

Justice Janice Rogers Brown's views on constitutional issues such as the economic due process rulings of the *Lochner* era and the proper reach of the Takings Clause put her on the far fringes of constitutional interpretation. Her opinions indicate a willingness, indeed a zeal, to inject these views into the case law even in the face of binding precedent. The Senate must give Brown's nomination to the environmentally-critical DC Circuit the closest possible scrutiny.