

# Chief Justice Cantil-Sakauye’s Mission to Bring Order From Chaos

BY DAVID A. CARRILLO

CHIEF JUSTICE TANI CANTIL-SAKAUYE ends her 12 years as California’s judicial branch leader at the close of 2022, completing a term defined by intentional initiatives and unexpected challenges. The chief justice focused her policy agenda on efforts to expand access to justice and civics education, and on a quiet campaign to foster greater consensus in the court’s decisions. Yet two daunting crises came to define her term, forcing her to contend with the dual black swan events of judicial branch budget cuts and the coronavirus pandemic. Having confronted and overcome adversity, while keeping a focus on her access and education initiatives, the chief justice leaves the state’s high court and judicial branch in good order for her successor, incoming Chief Justice Patricia Guerrero.

## The Path to the High Seat

Although there is no typical path to the chief justiceship, much of Cantil-Sakauye’s career will sound familiar, even obvious in hindsight. Degrees from the University of California, time as a prosecutor, and service to Governor George Deukmejian managing his legal and legislative affairs. Appointment by Deukmejian to the Municipal Court, by Governor Pete Wilson to the Superior Court, and by Governor Arnold Schwarzenegger to the Court of Appeal. She gained substantial statewide judicial branch experience after Chief Justice Ronald M. George appointed her to the Judicial Council, and he supported her appointment as his replacement. In 2010 Schwarzenegger appointed her as California’s chief justice, and she assumed office in January 2011.

That career arc broadly resembles those of many previous chief justices: public service followed by a rise through the courts to the high seat. This made it disappointing to read that Governor Schwarzenegger had “surprised many state Supreme Court watchers” by appointing Cantil-Sakauye, with some calling her “little known outside legal circles.”<sup>1</sup> Only those who did not view a minority woman as a likely candidate could be surprised about an appellate justice with her record being appointed to lead the judicial branch.

## On the Numbers

Majority opinions authored is one measure of any justice’s success or influence. As of November 2022, Chief Justice

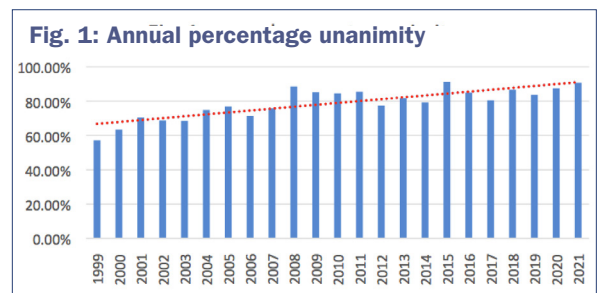


Chief Justice Cantil-Sakauye (center) at State of the Judiciary address, Mar. 17, 2014. Photo: California Courts.

Cantil-Sakauye authored 138 majority opinions, an average of 11.5 each year in her 12 years as chief justice. Justice Carol Corrigan, the court’s only current member who overlaps with Chief Justice Cantil-Sakauye’s entire tenure, authored 148 majority opinions in the same period, an average of 12.33 per year. By comparison, Chief Justice Ronald M. George in the equivalent period authored 183 majority opinions, an average of 15.25 majorities per year.<sup>2</sup>

The facts that Justice Corrigan and Chief Justice Cantil-Sakauye have similar outputs in the same period, and that the court’s overall opinion output declined in the past decade, likely flow from a combination of internal changes at the court and external forces. Internal court norms may have changed in the past decade: perhaps the court’s justices and staff now devote even more effort (compared with the already rigorous internal review that characterized the George era) to reconciling the justices’ disparate views to arrive at consensus and minimize the need for separate opinions. This would have the benefit of generating more unanimous opinions, but at the cost of leaving fewer resources for producing calendar memoranda and opinions. And the pandemic surely contributed to reducing the court’s overall output in 2020–22.

If consensus on the court is an indicator of a chief justice’s leadership, comparing the court’s vote splits during Chief Justice Cantil-Sakauye’s tenure with an equivalent period under Chief Justice George shows that the court’s unanimity rate has increased over time, and that consensus was greater under Cantil-Sakauye.



1. Paul Elias, “Gov. Nominates First Filipina-American Chief Justice,” *NBC Los Angeles*, July 21, 2010, <https://www.nbclosangeles.com/news/politics/justice-tani-cantil-sakauye/1896120/> [as of Oct. 19, 2022].

2. These figures result from Westlaw searches in the California Supreme Court database.

As Figure 1 shows, the average annual unanimity percentage increased over time. That figure first reached into the 80th percentile in 2008 (toward the end of George’s tenure) after which it remained close to or above that range.

Figure 2 shows that all nonunanimous vote splits decreased over time — both individually, and relative to the proportion of total annual unanimous decisions.

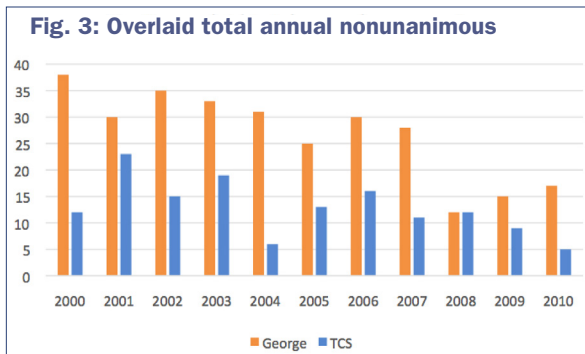
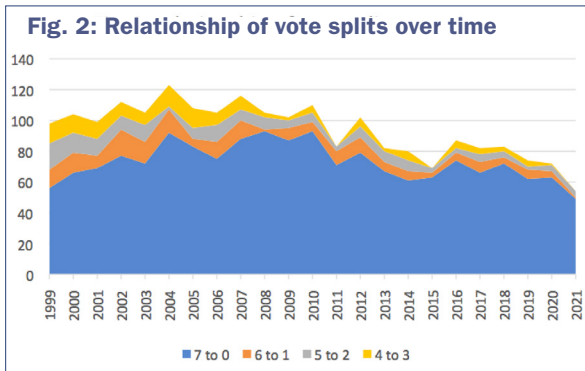


Figure 3 shows a year-to-year comparison, revealing that in every year but one the George court had more nonunanimous opinions than during Cantil-Sakauye’s tenure.

That these trendlines show consistent slopes suggests that in the whole period greater consensus has been a trend over time. And to be fair, both Cantil-Sakauye and her predecessor Chief Justice George devoted considerable energy to achieving consensus. Yet Chief Justice Cantil-Sakauye was more successful at doing so. Two related factors may have contributed to that distinction: evolution of the court’s internal review process, and different justices in the seats.

Those factors interrelate because changing the justices alters both their individual and interactive processes. If individual seat turnover were the sole cause, the year-over-year figures would show sharp transitions. Instead, the graphs show random peaks and valleys that gradually converge in a downward trend. The most significant transition is in 2008 — the highest-consensus year on the George court in this dataset — but there were no seat changes in 2007, 2008, or 2009. And the George court included some frequent dissenters: Justices Mosk, Brown, and Kennard. The correlation of their departure

with increased consensus suggests the obvious: that changing multiple seats can affect the unanimity rate if the replacements are disinclined to frequently dissent.

Overall, comparing the two periods shows a clear contrast: the court produced more opinions and had fewer unanimous opinions under Chief Justice George, and produced fewer opinions and more unanimous opinions under Chief Justice Cantil-Sakauye. The apparent upside is that this chief justice benefited from a table set with more “team players,” with the possible downside that the court’s internal review and drafting practices may be slowing production. Regardless, this chief justice played the hand she was dealt, and played it well.

## Twin Furies Arrived

Chief Justice Cantil-Sakauye confronted two principal challenges in her tenure: dramatic funding cuts and the coronavirus pandemic. As described below, she responded to both crises by mobilizing her colleagues to take effective action. The budget crisis required difficult decisions on internal cuts, and the chief justice marshaled her allies to press a public campaign to restore the funding needed to provide public access to justice. During the pandemic the courts deployed emergency authority to good advantage, building and implementing new remote-appearance systems. Both crisis responses had relatively good outcomes: the funding was ultimately restored through lobbying and improved state finances, and the pandemic stresses faced by the judicial system are now in the process of fading. Those crises leave the judiciary leaner, and with better resources for online access.

## First Crisis Response: the Budget

California’s economy cratered along with the nation’s in 2008, creating a long tail of annual state budgets that experienced major revenue shortfalls and consequently imposed painful funding cuts. In an ordinary year the judicial branch budget is just 1.5 percent of California’s general fund outlays, and the Legislative Analyst’s Office cheerily described the pre-crash 2008–09 judicial branch budget as proposing total appropriations from all fund sources of about \$3.7 billion, with “a decrease of \$14 million, under one-half percent below revised current-year expenditures.”<sup>3</sup> The governor’s post-crash 2008–09 budget, by contrast, slated the judicial branch for \$245.9 million in general fund cuts — despite the fact that the judicial branch was absorbing a 7.6 percent average annual increase in costs, partly due to trial court consolidation.<sup>4</sup>

3. “Analysis of the 2008–09 Budget Bill: Criminal Justice, Judicial Branch (0250),” California Legislative Analyst’s Office, [https://lao.ca.gov/analysis\\_2008/crim\\_justice/cj\\_anl08003.aspx](https://lao.ca.gov/analysis_2008/crim_justice/cj_anl08003.aspx) [as of Oct. 19, 2022].

4. “Proposed budget detail 0250 Judicial Branch,” California Governor’s Budget 2008–09, [https://www.ebudget.ca.gov/2008-09-EN/StateAgencyBudgets/0010/0250/mission\\_statement.html](https://www.ebudget.ca.gov/2008-09-EN/StateAgencyBudgets/0010/0250/mission_statement.html) [as of Oct. 19, 2022].

And when Cantil-Sakauye assumed the chief justice role in 2011, that year's budget imposed \$350 million in ongoing cuts from the judiciary and raided another one-time \$310 million from the court construction fund. All that after the judiciary had absorbed \$652 million in cuts in the preceding four years. The upshot is that within the new chief justice's first months on the job the judicial branch needed to find means to survive a cumulative \$1 billion funding cut, or about a third of its overall budget. After years of fighting for gradually restored funding, budget cuts arrived again in 2020, when Governor Gavin Newsom slashed \$200 million from the judicial branch to help close a \$54 billion shortfall caused by the COVID-19 pandemic.<sup>5</sup>

But the economy quickly shifted gears again with improved state revenues as the pandemic receded. In 2021 Governor Newsom signed a budget that includes \$1.2 billion in new funding for the judicial branch. That new funding (which largely restored a decade's worth of cuts) resulted from tireless lobbying and cheerleading from the chief justice. And from a new strategy: Cantil-Sakauye deployed an innovative solution of working with the governor to include the judicial branch budget in the governor's January draft budget, thus enlisting the governor to defend the funding. Long an advocate of positioning the judiciary in its rightful place as a co-equal branch of state government — with the funding it deserves — the chief justice hailed the restored resources. "This year's budget represents an unprecedented investment in our judicial branch," she said, noting that it "will fund significant investments in technology, provide critically needed judgeships and court-houses, and expand remote access to court proceedings that played a key role during the pandemic."<sup>6</sup>

## Second Crisis Response: The Pandemic

The coronavirus pandemic upended everything in spring 2020, and the courts proved to be an institution ill-suited to the new paradigm. Long used to doing things in person and on paper, ancient custom and legal requirements presented major barriers to change when emergency stay-at-home orders arrived. The key change agent that made adaptation possible was an emergency order Governor Newsom issued that delegated significant new discretionary authority to the chief justice to adapt the state's courts to the crisis and to suspend the operation of the many statutes that would have prevented a shift to online

judging.<sup>7</sup> California's high court also benefited from an existing pilot program for electronically filing petitions for review, which provided a ready basis for quickly shifting to all-electronic filing.

Chief Justice Cantil-Sakauye seized the opportunity to motivate the ponderous judicial branch to adopt a more nimble, flexible model that could keep dockets moving without unnecessary infection exposure. She rallied her colleagues to collectively identify solutions and respond to urgent needs. And the chief justice deployed her new emergency authority to good effect, ordering the entire judicial branch to expand its existing partial online options to include everything — from external filings to internal deliberations. Remote access proved to be impractical for some operations (it's awful for jury trials), but experience showed that most functions worked well enough online, as the California Supreme Court itself found in conducting its own first-ever remote oral arguments. The judiciary's crisis response was as imperfect as every pandemic initiative, but it was overall a success: the courts stayed in operation through more than two years of a pandemic.

Although those emergency measures ended in June 2022, Governor Newsom signed legislation that extended authority to hold civil and criminal proceedings remotely.<sup>8</sup> As the courts emerge from the crisis phase of the pandemic, the pandemic-imposed shift to remote judging may accelerate an existing trend of increasing remote access, making it a regular feature of routine court operations. That fits with Chief Justice Cantil-Sakauye's long-standing goal of seizing opportunities to expand access to justice. And that result seems likely: in August 2021 the Chief Justice's Workgroup on Post-Pandemic Initiatives found that remote hearings spurred case resolutions in juvenile cases and child support hearings.<sup>9</sup> This experience leaves the Judicial Council poised to adopt future remote-process reforms that will both increase access and reduce public burdens.

## Seasons of Change

Chief Justice Cantil-Sakauye's tenure was marked by turnover among her colleagues; as she commented, "I have only ever known change on this court."<sup>10</sup> The California Constitution Center confirmed this, observing that although the overall average service of the court's

5. Merrill Balassone, "What to Know About the Judicial Branch Budget," *California Courts Newsroom*, June 30, 2020, <https://newsroom.courts.ca.gov/news/what-know-about-judicial-branch-budget> [as of Oct. 19, 2022].

6. Merrill Balassone, "What to Know About the Judicial Branch Budget," *California Courts Newsroom*, June 28, 2022, <https://newsroom.courts.ca.gov/news/what-know-about-judicial-branch-budget-1> [as of Oct. 19, 2022].

7. See Jennifer King, "What Did We Learn from the California Courts' Response to the Influenza Epidemic of 1918–1919?" (Spring/Summer 2021) *CSCHS Review* 1–2.

8. Cal. Stats. 2021, ch. 214 (S.B. 241); Cal. Stats. 2022, ch. 57 (A.B. 199).

9. Merrill Balassone, "Report: Remote Proceedings Increased Access for Court Users During Pandemic," *California Courts Newsroom*, Aug. 16, 2021, <https://newsroom.courts.ca.gov/news/report-remote-proceedings-increased-access-court-users-during-pandemic> [as of Oct. 19, 2022].

10. Chief Justice Cantil-Sakauye either related or confirmed to the author her quoted statements in this article.

justices is nine years, the court experienced 100 percent turnover in the past decade: Mariano-Florentino Cuéllar left in 2021, Ming Chin in 2020, Kathryn Werdegar in 2017, Marvin Baxter and Joyce Kennard in 2014, Carlos Moreno in 2011, and Ronald George at the end of 2010.<sup>11</sup> By comparison, the George court saw groups of justices serve together for comparatively lengthy stretches. Chief Justice George and Justices Chin, Werdegar, Baxter, and Kennard each served over 20 years on the court, and they served together for about 15 years. And the court saw long stretches between vacancies in George’s time: five years 1996–2001, four years 2001–06, and five years 2006–11.

Given the nine-year average service, the George court looks anomalous for its longer terms and stable membership, and the Cantil-Sakauye period of high turnover is equally unusual for its ever-changing roster. Reflecting on this, the chief justice observed that both dynamics have distinct benefits. Stability in membership fosters familiarity, which can make opinion production somewhat more efficient. And although the membership instability she experienced lacks that familiarity, the benefit of new and more diverse perspectives brings a distinct richness to the court’s opinions. New colleagues or old friends, the fact remains that the justices of the Cantil-Sakauye era formed a tight-knit group, which she described as close colleagues who enjoyed teasing each other as they went about their work.

## Major Opinions

As David Ettinger observed, like her predecessors this chief justice often assigned major opinions to herself.<sup>12</sup> This is a standard practice on California’s high court: in making opinion assignments the chief justice considers things like fair work distribution among the chambers, a justice’s ability to craft a majority in a given case, relevant subject matter expertise, and the backlog of uncirculated calendar memos in each chambers.<sup>13</sup> And the chief justice often made herself the public face of controversial decisions that commanded the greatest public interest, which Ettinger calls “the buck stops here” factor. This section reviews a few of those cases.

In *Perry v. Brown* the court considered whether a ballot measure’s proponents have standing to defend the measure if the public officials ordinarily charged with that duty fail or refuse to defend it.<sup>14</sup> The measure at issue was 2008’s Proposition 8, which amended the

California constitution to ban same-sex marriage — certainly a matter of great public interest. Answering a certified question from the U.S. Court of Appeals for the Ninth Circuit, the chief justice wrote for the court that a ballot measure’s proponents do have standing: “In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”<sup>15</sup>

Difficult moral questions about a person’s nature, how the law defines that nature, and the legal requirements for becoming a lawyer were implicated in *In re Garcia*.<sup>16</sup> As an undocumented immigrant, Sergio Garcia confronted an apparent federal-law prohibition on joining the legal profession — but he was otherwise qualified for admission to the bar. The case also featured an unusual factor: California’s legislature enacted a law (while the case was pending) expressly to authorize his admission.<sup>17</sup> The United States Department of Justice notified the court that, in light of the new state law, issuing Garcia a law license would no longer be precluded by federal law. The chief justice’s opinion for the court granted the motion for admission, holding that “the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.”<sup>18</sup>

The decision in *Dynamex Operations West, Inc. v. Superior Court* concerning worker classifications sparked an ongoing saga of voter action and court challenges.<sup>19</sup> The chief justice’s unanimous opinion noted the “difficulty that courts in all jurisdictions have experienced in devising an acceptable general test or standard that properly distinguishes employees from independent contractors.”<sup>20</sup> This distinction is particularly difficult in industries where businesses have economic incentives to classify their workers as one or the other.<sup>21</sup> The court adopted a formula (known as the “ABC test”) that presumes that all workers

15. *Id.* at 1127.

16. (2014) 58 Cal.4th 440.

17. See Cal. Stats. 2013, ch. 573 (A.B. 1024), amending Cal. Business and Professions Code § 6064 to “authorize the [California] Supreme Court to admit to the practice of law an applicant who is not lawfully present in the United States, upon certification by the committee that the applicant has fulfilled those requirements for admission, as specified.”

18. *In re Garcia*, *supra*, 58 Cal.4th 440, 460.

19. (2018) 4 Cal.5th 903.

20. *Id.* at 927.

21. *Id.* at 913.

11. California Constitution Center, “SCOCA year in review 2019,” *SCOCABlog* Feb. 28, 2022, <http://scocablog.com/scoca-year-in-review-2021/> [as of Oct. 19, 2022].

12. David Ettinger, “The Chief Justice often writes the big opinions,” *At the Lectern*, Mar. 7, 2019, <https://www.atthellectern.com/the-chief-justice-often-writes-the-big-opinions/> [as of Oct. 19, 2022].

13. California Supreme Court, Internal Operating Practices and Procedures of the California Supreme Court, section VI(c).

14. (2011) 52 Cal.4th 1116.

are employees and permits classification as an independent contractor only if all three conditions of the test are met. California’s legislature later codified this decision.<sup>22</sup> But the issue remains in play: by adopting Proposition 22 in 2020 the voters exempted certain workers from *Dynamex* and the legislative action — and a challenge to that measure is currently on appeal.

In *Patterson v. Padilla* the chief justice wrote for a unanimous court to hold that a statutory requirement that required presidential candidates to disclose their tax returns violated the California constitution.<sup>23</sup> The decision held that the constitutional provision was intended to ensure that the voters within each qualifying political party could choose among a complete array of candidates found to be “recognized candidates throughout the nation or throughout California for the office of President of the United States.”<sup>24</sup> The statutes at issue purported to make the appearance of a “recognized” candidate for president on a primary ballot contingent on whether the candidate made the required disclosures. The court found that this additional requirement conflicted with the California constitution’s specification of an inclusive open presidential primary ballot.<sup>25</sup> Consequently, the court held that a “recognized” candidate cannot be forced by statute to release tax returns as a condition of appearing on the ballot; only the voters may decide whether refusing to make such information available to the public “will have consequences at the ballot box.”<sup>26</sup>

In her decisions for the court, Chief Justice Cantil-Sakauye displayed thoughtful analysis, employed a measured tone, and wrote the kind of precise and understandable opinions that provide clarity in the individual decision and in the law at large. Recognizing that the tasks at hand were to resolve the litigants’ dispute while reconciling the specific question within the broader legal context, this chief justice made her analysis efficient and focused. It takes a disciplined thinker to write only what’s needed, and a book of concise opinions like hers is a grand legacy.

## Access to Justice — and Civics

Some chief justices had policy or administrative agendas; others seemed more interested in deciding cases.

For example, Chief Justice Roger Traynor made major doctrinal contributions to tax and tort law. And Chief Justice George’s “seemingly boundless appetite for judicial administration and attendant politics was well known.”<sup>27</sup> At times circumstances forced issues onto a chief justice’s agenda: Chief Justice Rose Bird served during a period when capital punishment was a flash-point, and it became a key feature of her time on the court.

Civics education was the key initiative for this chief justice. Cantil-Sakauye focused on access to justice and made it her mission to improve civics learning and engagement in California. In 2017 she battled the federal government over immigration arrests in California courthouses, telling those authorities that “enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair.”<sup>28</sup> She wrote in the *Washington Post* to argue for enforcement policies consistent with due process, fairness, and access to justice:

You don’t have to read the federalist papers or be fortunate enough to get a ticket to the musical “Hamilton” to recognize the elegant weave of checks and balances set up by our Founders. Our three branches of government are co-equal; our local, state and federal governments have overlapping authority. Each branch and each entity should take care not to act in a way that undermines the trust and confidence of another branch or entity.<sup>29</sup>

Concerned that too little time was devoted to teaching civics in California public schools, in 2013 Cantil-Sakauye launched several programs as part of a broad new civics learning initiative.<sup>30</sup> She created the Power of Democracy campaign as a blueprint for revitalizing civics education, a program supported by statewide partners to help revitalize democracy and promote access to justice in California. She partnered with the Superintendent of Public Instruction to establish the California Task Force

22. See Cal. Stats. 2019, ch. 296 (A.B. 5), amending Cal. Labor Code § 3351, adding § 2750.3, and amending Unemployment Insurance Code §§ 606.5 and 621 (“This bill would state the intent of the Legislature to codify the decision in the *Dynamex* case and clarify its application”).

23. (2019) 8 Cal.5th 220. See Cal. Stats. 2019, ch. 121 (S.B. 27), amending various Elections Code provisions to “enact the Presidential Tax Transparency and Accountability Act, which would require a candidate for President, in order to have the candidate’s name placed upon a primary election ballot, to file the candidate’s income tax returns for the 5 most recent taxable years with the Secretary of State, as specified.”

24. *Patterson v. Padilla*, *supra*, 8 Cal.5th 220, 223.

25. *Id.* at 224–25.

26. *Id.* at 225.

27. Scheiber (Ed.), *Constitutional Governance and Judicial Power — The History of the California Supreme Court*, Berkeley: Berkeley Public Policy Press, Institute of Governmental Studies, 2016, 566.

28. California Courts Newsroom, “Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses,” *California Courts Newsroom*, Mar. 16, 2017, <https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-immigration-enforcement-tactics-california-courthouses> [as of Oct. 19, 2022].

29. Tani G. Cantil-Sakauye, “California chief justice: The courthouse is not the place for immigration enforcement,” *The Washington Post*, Apr. 19, 2017.

30. “State Approves More Civic Learning,” *California Courts Newsroom*, July 19, 2016, <https://newsroom.courts.ca.gov/news/state-approves-more-civic-learning> [as of Oct. 19, 2022].



*Top left:* As part of the California Supreme Court’s ongoing outreach and education efforts, the court welcomed students and teachers from Sacramento’s C.K. McClatchy High School’s Law and Public Policy Academy. *Center left:* Chief Justice Cantil-Sakauye “swears in” student judges in the mock courtroom at El Camino Creek Elementary School. *Bottom left:* Chief Justice Cantil-Sakauye visits Eastman Avenue Elementary School in Los Angeles. *Top right:* Chief Justice Cantil-Sakauye with students and teachers at John Marshall Fundamental Secondary School, with the Civic Learning Award of Excellence plaque. *Center right:* Chief Justice Cantil-Sakauye attends an event paying tribute to Filipinos and their role in helping Mexican farmworkers organize the Delano Grape Strike. *Photos: California Courts.*

on Civic Learning, a joint statewide entity that recommends actions for elevating the status of civics in California K–12 schools. And her final project addressing this issue is a new Judicial Learning Center for the public and court personnel, which incoming Chief Justice Guerrero intends to maintain.

## Conclusion

In her closing remarks at a conference shortly before her retirement, Chief Justice Cantil-Sakauye said that of all her duties, it was the policy brief she enjoyed most and would have liked to spend more time on. And her wish is granted: in September 2022 the Public Policy Institute of California chose her as its new president and chief

executive officer to replace its longtime leader Mark Baldassare.<sup>31</sup> California benefited from a steady hand in troubled times during the Cantil-Sakauye era, and she will continue to serve the state’s interests in her new policy role. As a true public servant, no one expected her to just retire quietly to a tropical island — the work goes on. ★

DAVID A. CARRILLO is a lecturer in residence and the executive director of the California Constitution Center at the U.C. Berkeley School of Law.

31. Public Policy Institute of California press release, Sept. 28, 2022, <https://www.ppic.org/press-release/tani-cantil-sakauye-named-new-president-and-ceo-of-ppic/> [as of Oct. 19, 2022].