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Race, Gender at the Supreme Court

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In a parody of affirmative action, the Senate failed to assess seriously Clarence Thomas's fitness for the Supreme Court. Casualties include blacks, women, Democrads, and the Court's own moral authority.

The confirmation hearings of Clarence Thomas were a great national Rorschach test. The lesson, some say, is that the United States has made great progress in race relations. Or, is it that racism is alive and well? Some concluded that women gained a new place in politics, so that even an issue as threatening to men as sexual harassment can no longer be swept under the rug. Others learned that women are still not taken seriously by a male power establishment and it doesn't pay to speak up. For a few, the Thomas affair demonstrated the strength and adaptability of our political institutions. For many, it revealed rot at the core.

Whichever interpretations ultimately dominate the nation's collective self-understanding, politics after Thomas will never be the same. The hearings not only changed the way we will frame issues of race and gender, but also the institutional machinery black constituents, who strongly favored a with which we will resolve them. Lost in all the rumbling about race and gender and party politics is the most profound transformation of all: the gradual erosion of the Supreme Court's moral authority as it becomes less a co-equal branch and more explicitly a creature of presidential ideology and policy strategy.

Political analysts of every stripe immediately recognized the nomination as a brilliant maneuver to split the traditional liberal alliance between the civil rights movement and the women's movement. By naming an anti-affirmative-action black man to fill the ninth seat on an otherwise all-white court, Bush forced liberals to

choose between black representation on the court or public policy efforts to create opportunity for minorities. By naming an opponent of choice on the abortion issue, he forced liberals to choose between their black replacement for Justice Thurgood Marshall, and their female constituents, who for the most part favored leaving abortion decisions in the hands of individual women. In short, liberals had to choose between the potent symbolism of demographic representation and the pragmatic reality of policy substance.

The real comeuppance for liberals is that they will have to stop relying on crude symbols of race and gender, and instead develop policy positions that speak to women and blacks in all their diversity about issues of well-being, work, and family. This means going beyond the civil rights agenda of the sixties, and even the social equality agenda of the seventies and eighties, to a deeper understanding of how discrimination, subjugation, and exclusions work -- and work differently -- in different social institutions.

Affirmative Inaction

Republicans successfully maneuvered the confirmation process so it became a parable about the dangers of affirmative action as conservatives have portrayed it. Liberals, so the conservative story goes, in their efforts to provide equal opportunity for the disadvantaged, might ignore competence, sacrifice quality, and destroy organizations in the process. The Democrats fell right into the conservative trap and played out the script.

First George Bush, a steadfast opponent of affirmative action who sees quotas lurking everywhere, made a nomination that looked an awful lot like filling a black quota on the Court. He named a black man who had less than a year and a half of judicial experience; lacked any coherent judicial philosophy; and was in all probability willing to lie to get the job, since it is unlikely in the extreme that a lawyer of his generation never discussed *Roe v. Wade.*

Next, Clarence Thomas, who has insisted blacks don't need special consideration, that they should earn their positions the hard way, invoked racism as a special consideration the moment he got into trouble, precisely so he wouldn't have to defend against the harassment charge the hard way. ("I will not get into any

discussion about my private life," he said, and Democrats on the Judiciary Committee obliged him. Only a week earlier, he and the White House had peddled his private life as his main qualification for the job.) Even though Thomas is black, and pejorative racial stereotypes about sexuality do exist, does that mean his behavior cannot be examined and held to the standards of the law of the land? Thomas seemed to think so.

Thus, conservatives capitalized on the very brand of affirmative action policy they nominally reject: fixed quotas and lowered standards applied on the basis of skin color. The southern Democrats, too, used Thomas as a cipher; if voting for him would get them kudos from their constituency, they would support him, no questions asked. Sad to say, many liberals participated in this form of deference to skin color, though it is not the brand of affirmative action most would otherwise defend. Hobbled by the Dixiecrats, by their own unwillingness to play hardball politics, by Senator Ted Kennedy's personal troubles, and by a general squeamishness about confronting racial issues head on, liberals on the Judiciary Committee did exactly what many people most fear and resent about affirmative action: They brushed aside the question of the candidate's competence.

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Although the American Bar Association rated Thomas as only "minimally qualified" for the Supreme Court, the Judiciary Committee failed to investigate his competence in any serious way. They deferred to him when he insisted he had no opinion on issues of jurisprudence or specific cases, or when he said it would be "inappropriate" or "improper" for him to comment on recent cases. Improper for someone applying for a permanent job on the Supreme Court? When the committee questioned Thomas about legal views he had expressed in speeches, he often replied that his statements weren't really his positions, that they were thoughts of the moment, and that he hadn't really understood the implications of decisions about which he had offered strong opinions. His strongest defense was that his critics had mistaken mere opportunism for extremism.

The Judiciary Committee largely ignored all these signs of his inability to articulate a coherent position, and assumed instead that he was stonewalling to avoid giving opponents anything to use against him. But it was entirely possible and plausible that

Thomas simply didn't know constitutional law and didn't follow the jurisprudential disputes about recent cases of the Supreme Court. No one was willing to push very hard to find out.

The Democrats' great political failure on affirmative action went virtually unnoticed. They allowed the conservatives to act out a bankrupt version of affirmative action, one that ought to get elected representatives into trouble with both black and white voters.

Democrats might have started by forcing Thomas to address his views on affirmative action in the context of his own life. They could have used the Thomas family story [See article, page 78] to show that access to jobs in the privileged, primary labor market is largely through expensive credentials and personal networks. Lacking these credentials and networks, most of the working poor, like Thomas's sister and mother, participate in a secondary labor market where the jobs are underpaid and carry no pensions, health insurance, unemployment benefits, job security, or pathways to better jobs. Economic security and upward mobility through hard work -- the great social backdrop against which affirmative action seems unnecessary -- are simply not there for many Americans.

Democrats might have used the hearings to challenge the conservative portrayal of affirmative action as a departure from the "normal" merit-based system of job recruitment, promotion, and pay allocation. They could have asked Thomas whether he supports veterans' preferences and seniority, two major departures from merit in the normal labor market that overwhelmingly disadvantage women and blacks respectively.

They could have shown how the notion of individual achievement used by conservatives to promote Thomas and debunk affirmative action profoundly oppresses women. It labels men like Thomas, supported at every stage of his life by female relatives, as products of their own efforts, while it denigrates women like his sister, who work at taking care of their families, as dependent scroungers.

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The hearings were, at bottom, a political default. Many Democrats have come to

accept the tacit premise that a President is entitled to his Supreme Court nominees, no matter how scantly qualified, no matter how extreme their views. The Senate was moved to vote down Robert Bork not because of his extreme views, but because of his extreme arrogance. Thomas in the end received forty-eight negative votes rather than the anticipated thirty to thirty-five, only because of the sexual harassment charge. Democratic senators seem to accept that as long as a candidate has no overt prejudices, no criminal record, and -- better yet -- no record of jurisprudence, controversial or otherwise, they are obliged to vote for him. They seem to accept that if they turn down scholarly right-wing judges, the corollary is that they must vote to confirm mediocre ones.

These assumptions are, of course, preposterous. The Democrats ought to demand that the President's judicial nominees be both judicially distinguished and ideologically moderate, not one or the other. This is, after all, the all-time record era of divided government. It is only reasonable that a President who shares power with a Democratic Senate should not be able to insist on nominees well to his own right -- men whom he has been nominating mainly to curry favor with the Republican party's extreme right wing. Bush has no respect for either the Senate's advise-and-consent function or for the Court's stature as an institution. Dwight Eisenhower, who had both, nominated William Brennan -- William Brennan! -- with the full knowledge that he was a liberal Democratic state judge, as well as Earl Warren, a moderately liberal Republican governor.

Supreme Courtship

It was a failure of politics in the first set of hearings -- a failure to challenge the candidate's temperament, philosophy, and qualifications -- that led indirectly to the bungled attempt in the second set of hearings to challenge the candidate's character. If the hearings united everyone against the *idea* of sexual harassment, they also exposed profound disagreement over what it is. The term is nowhere mentioned in Title VII of the Civil Rights Act of 1964, but since 1986, the act's prohibition of "discrimination on the basis of sex" has been interpreted by the Supreme Court to include two types of sexual harassment: "Quid pro quo" harassment, when a supervisor or employer makes sexual favors a condition of the job or promotion; and "hostile environment" harassment, when an employer permits unwelcome remarks, pornographic posters, or constant attention to a person's sexuality that interferes

with her ability to perform her job.

The treatment of Anita Hill demonstrated one of the inadequacies of formal civil rights law. When a woman comes forward with a sexual harassment claim in 1991, she is protected by a judicial doctrine that recognizes sexual harassment as a civil rights violation. But judicial doctrine is only as good as the way it is interpreted, and sexual harassment, like rape, has mostly been adjudicated from a male point of view which largely ignores realities of gender power.

Hill was verbally battered by older white men who asked her in a hundred ways why she hadn't behaved as they would have in such a situation. Why had she followed Thomas to another job and maintained good relations with him if she found his behavior so unbearable? They simply could not imagine what it is like to try to make it as a young, black woman in a racist, sexist world. As soon as they got close to understanding, they shivered at how the dirty little secrets of their own world of power would look to the American public. Perhaps, as elected politicians, they could imagine all too well what it is like to have to make nice to people you despise but whose support you need. But like Clarence Thomas, they pretended that individuals make their careers by themselves, and so refused to regard Anita Hill's situation from the point of view of someone who needs other people -- and knows and admits she needs other people -- to get anywhere.

Anita Hill's hearing was a kind of symbolic rape trial. Her virtue and character were challenged, while Thomas's behavior and motives were taken at his word. Her sexuality was examined and pontificated upon by witnesses-turned-pop-psychologists. Witnesses for Thomas were encouraged to speculate on her motivations for fantasizing the events she described. An acquaintance was brought in to testify to her proclivity to see romantic interest where there was none. She even underwent the ritual physical examination familiar to rape victims, this one in the form of a lie detector test. Though Senator Joseph Biden, the Judiciary Committee's chairman, didn't admit the test as evidence, it is a tribute to the power of the symbolic ritual that her lawyer advised her to take the test, while Bush publicly called it "a stupid idea" for Thomas.

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For all the prurient interest that may have made people watch, listen, and read, the motive force for this national exercise was a clash of deep male and female anxieties. For women, it was the anger at being transformed into a raw sexual object and the powerlessness to stop or undo that transformation. For men, it was the fear of false accusation and of prosecution for a crime whose standards are not clear to anyone, least of all themselves.

The hearings, surveys, interviews, and polls dramatized this conflict without moving an inch toward resolving it. We were left with a host of questions. What are the limits of permissible courtship in the workplace? Have the boundaries of the workplace expanded to include the bar around the corner, the restaurant, the apartment near the office, the out-of-town conference hotel? What can a woman reasonably be expected to do to defend herself at the moment? Since sexual harassment, like rape, is usually an offense without witnesses, what will count as evidence? How can a man defend himself against harassment charges besides simply denying them?

For starters, to frame the issue as one of confusion over standards of permissible courtship is to miss the mark. True, harassment often includes activities that in another context would be courtship -- asking for a date, making flattering comments, touching, kissing -- but context is all the difference. Though the workplace is often the setting for social mixing, the job and particularly the supervisory relationship are not mixers. No woman or man can do his or her job, let alone be perceived as doing it well, while being treated as an object of sexual conquest. What may seem to a man a minor sexual comment, joke, or advance can assault a woman by abruptly shifting her mental focus from work tasks and temporarily casting her out of her work role. That's the mild form. Sexual demands, forced conversations about sex, or unwelcome touches do more than temporarily displace her identity; they suppress it and deny it by making her sexuality more important than her work. This is what women mean when they say harassment is about power, not sex.

This is also why styles of courtship are irrelevant. The issue is not, as Orlando Patterson wrote in *The New York Times,* whether people from different regions, social classes, or ethnic backgrounds have different styles of courtship. According to Patterson, regaling a woman with "Rabelaisian humor" is a normal part of Southern

working-class courtship ritual, and Anita Hill, who surely understood that, was "disingenuous" when she displaced Thomas's behavior from its context and brought it into the white, upper-middle class work world of the senators. Patterson concluded that if Thomas had done exactly what Anita Hill said he did, he would be morally justified in lying because she had applied the wrong standards to his behavior and he didn't deserve the "self-destructive and grossly unfair punishment" that telling the truth would bring.

Therein lies the rub. Just whose standards should be applied to the kind of behavior at issue here? Sexual harassment, like rape, is a crime of coercion (though it is not strictly a crime, but a civil rights violation). Harassment is coercing someone into sexual contact they don't want to have and coercing them out of one identity and into another. Only genuine consent can render an activity non-coercive, and therefore the standard of judgment should reflect how the action looks to the weaker party, given the real disparity of power. It is a mockery of the liberal ideal of autonomy to interpret a potentially coercive relationship from the point of view of the person who has the power to coerce. The only just criterion in a harassment case is whether the woman felt she had the freedom to resist, without taking career risks.

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Is that unfair to men? Are men supposed to be mind-readers, you ask? Well, yes. Parents, who exercise inordinate physical and psychological control over children, are morally and legally obliged to understand their children's needs, even when their children can't talk. They are not free to abuse children because the children don't protest. In any situation of power, the powerful have a moral obligation to see the world from the point of view of those they govern or control, and to exercise power in the interests of the governed. Just consent is what makes power legitimate instead of tyrannical.

Especially since most harassment takes place in private, with no witnesses, the weaker party needs the protection of a legal standard that says her "no" means "no." She can't enforce her "no". Sometimes, she feels too threatened even to utter her "no." As long as men are in positions of power, the burden is on them to anticipate how their actions affect weaker people. This is the burden that goes with the privilege of power.

There is work to be done to get this standard to prevail in courts as harassment cases are adjudicated, and even more important, in men's heads as they live their daily lives. The women's cause was enormously advanced by the outpouring of tales of harassment following the Hill testimony. Perhaps the next step should be

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