Race, Gender, and the Supreme Court
Deborah A. Stone

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 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 constituents, who strongly favored a 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.
Republican succeeded 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.

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.

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 em-

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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.

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 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 behav-
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.

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 enor-

mously advanced by the outpouring of tales of harassment following the Hill testimony. Perhaps the next step should be “outing”—telling stories with names attached. The fear of false accusations might just do wonders to get men to feel in their stomachs the vulnerability and powerlessness women live with constantly.

**Fair Judging**

It is in just such situations, where the points of view of the powerful can obliterate those of the weak, and where objective evidence is difficult if not impossible to obtain, that we most need judges we can trust. We need judges who have the capacity to empathize, to evaluate evidence and arguments from multiple points of view, and to suspend judgment while they move between different points of view. Clarence Thomas showed few of these qualities.

As Ronald Dworkin noted in the *New York Review of Books*, Thomas asserted views in a speech to the Heritage Foundation that

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would logically require the Supreme Court to outlaw abortions after conception. (In other words, the Supreme Court should not just roll back *Roe v. Wade* so that states may outlaw abortions if they wish, but it should revoke the states’ current authority to permit abortions.) If, as he told the Judiciary Committee, he was merely trying to appeal to his conservative audience in that speech, had only skimmed the article whose ideas he endorsed, and had thought the ideas would be interesting “to play around with,” then he has a rather cavalier attitude about the responsibilities of a federal judge to develop considered views on issues over which he will exercise great power.
Thomas gave us other glimpses of his cavalierness toward judging. In maintaining he had never discussed *Roe v. Wade*, he was saying he felt no need to engage with the legal community or anyone else about one of the major constitutional and political issues of his era. In endorsing the view that Anita Hill was part of a liberal interest group conspiracy to undo him, he showed a healthy disrespect for evidence. In announcing that he had not watched or listened to any of Anita Hill’s testimony, he showed a disdain for the fact-finding process. It is not clear which is the scarier prospect: a Supreme Court justice who thinks abortion should be entirely outlawed, or one who thinks it is proper for a judge to decide without paying much attention to evidence or argument.

**Equal Opportunity on Trial**

In the background of the Thomas hearings was the paradoxical issue of affirmative action. Was he the ultimate affirmative action hire? Would he do the ideological bidding of his conservative sponsors and be the definitive fifth vote against affirmative action? And is affirmative action worth defending? This was the debate that the Judiciary Committee never quite had, and one that liberals ought to be leading. In the hearings themselves, the Democrats failed to use the confirmation process as a venue to dissect the symbol affirmative action has become, and to defend a coherent affirmative action policy aimed at making formal legal equality a reality.

In the university, ordinarily a bastion of liberal values, the scramble to recruit black university professors from a very small pool of qualified applicants has created a mentality of grudging tokenism in many academic departments and has left a residue of bad feeling among the professorate of both races. Many white college professors feel coerced into hiring colleagues of seemingly lower formal qualification, while many highly qualified blacks resent the presumption that they were hired only because of their race. This dynamic has left some liberal intellectuals particularly skeptical of the whole approach. However, it is wrong to project the college experience onto affirmative action generally. Affirmative action is not simply, or even mostly, for professional elites. The real action is out there in construction, manufacturing, clerical jobs, unionized public-sector jobs, transportation, and the like. It is in these sectors that formal qualifications matter less, yet oddly, minorities and women have been excluded from the better paying manual jobs.

Affirmative action has also been criticized for giving disproportionate help to relatively advantaged blacks, while ignoring masses of poor blacks. But affirmative action was never intended as a means to improve jobs at the lower end; it couldn’t possibly do anything to increase pay, benefits, job security, or advancement opportunity in the secondary labor market. Of course, we ought to make bad jobs better through other policies such as minimum-wage, tax credits, health insurance, and unemployment insurance; and we ought to make paid employment less hostile to family life.

Liberal leaders need to explain that the working poor are poor and sometimes unemployed because their government and business leaders don’t provide a stable economy and a decent safety net, not because unqualified women and members of minority groups are taking their otherwise terrific jobs. But affirmative action shouldn’t be blamed for these broader economic failures. Rather, affirmative action was intended and designed to improve access to better jobs and careers, and to do so by altering systemic barriers to entry. In that, it has succeeded.
administration devised affirmative action and the Supreme Court approved affirmative action in the first place. In 1965, under Executive Order 11246, the administration required federal contractors to take affirmative steps to overcome past patterns of racial exclusion. In 1969 the Nixon administration's pilot "Philadelphia Plan" added the requirement of specific "goals and timetables" to overcome persistent racial exclusion in skilled construction work. In the 1978 Bakke case, involving a University of California minority admissions plan, a fragmented Court concluded that minority representation goals could be constitutional. In 1979 the Supreme Court approved a voluntary affirmative action plan adopted by United Steelworkers and Kaiser Aluminum. The company hired only people with prior experience for its skilled crafts positions. On its face, the prior experience requirement was neutral, but since black workers had long been excluded from craft unions, few had any experience in skilled craftsmanship. To address this problem, the union and company created an on-the-job training program for all its employees. Entry into the program was determined by seniority (which again gave white workers an advantage), but half the slots were reserved for black employees, even if they had less seniority than other white applicants.

The Supreme Court's first explicit approval of a court-imposed plan with preferential hiring goals came in 1986, in a case filed against a local union of the Sheet Metal Workers International Association by the Equal Employment Opportunity Commission. The union had barred black workers from its apprenticeship program until 1964, and after that, continued to award apprenticeship positions primarily on the basis of "sponsorship" by current union members. Obviously, the sponsorship requirement, although it never mentioned race, had the effect of keeping out non-whites. By the time the case reached the Supreme Court, the union had ignored several court orders enjoining it to stop its discriminatory practices and increase its hiring of non-whites.

Also in 1986, the Court approved a voluntary affirmative action program in a government agency. In this case, the Santa Clara County (California) Transportation Agency was trying to increase the number of ethnic minorities and women in professional, administrative, technical, and skilled craft positions. In fact, at the time of this case, there were no women in the 238 skilled craft jobs, although women were 36 percent of the area labor force. Despite the nominal openness of traditionally male jobs to women, deep and long-standing patterns of hostility to women prevented them from seeking these jobs or succeeding in them. So the agency set long-term hiring and promotion goals based on percentages of ethnic minorities and women in the area labor force, but didn't reserve any fixed number of slots for these groups. Instead, its plan called for taking sex and ethnicity into account as additional factors when there were several qualified applicants for a position. On that basis, the agency promoted a woman to the job of road dispatcher, from a pool of seven applicants who were deemed qualified after a first interview. The plan was challenged by a man who had received two points more than she—on an eighty-point scale—in the initial interview. (Think about the validity of a two-point difference in anything so subjective as an interview.) The Court allowed her promotion and the plan to stand, noting approvingly that the agency's plan created no "absolute bar" to men, set no quotas, and used sex and ethnicity criteria

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only in addition to job-related standards. These cases established the broad outlines of affirmative action policy. Neither these nor other affirmative action plans approved by the Supreme Court were cases of someone arbitrarily seeking to fill a statistical quota for women or minority workers. They were cases where simply changing the formal rules and nominally opening up jobs and training programs to previously excluded groups was patently insufficient to establish genuine equal opportunity.

Affirmative action is sometimes necessary to enforce formal civil rights. Deeply rooted patterns of racial and gender exclusion, harassment, and discrimination have not been eliminated by government civil rights law. The Supreme Court has approved race-conscious remedies when ostensibly race-neutral selection procedures either deliberately or inadvertently perpetuate the effects of prior discrimination. The Court has shown an increasing preference for race-neutral remedies, but has never said that race-conscious remedies for prior discrimination would be impermissible when race-neutral remedies are ineffective.

There is still plenty of room for this kind of affirmative action, if only liberal leaders dare articulate a rationale. Defensible affirmative action programs do not, as the caricature suggests, put people in skilled positions for which they are not qualified. They put sufficiently qualified people in a position to acquire more skills and knowledge, and to be eligible for further upward mobility genuinely based on their achievement. These programs recognize that when there is a surplus of qualified people for any job or training position, it is permissible to take into account other standards, such as ethnicity or sex, in making a selection from a pool of qualified people. The Supreme Court has consistently endorsed this kind of affirmative action, as long as the plan is temporary and doesn’t entirely exclude whites or males from the opportunities.

Of course, an increasingly conservative Court may well pull back from the brand of affirmative action that seeks to broaden minority representation on the job, and narrow permissible affirmative action to cases of individual remedy rather than redresses of social patterns of exclusion. But that is no reason for liberals to give up on the affirmative action ideal, any more than liberals should give up on reproductive rights because the courts have begun to erode the guarantees of Roe. As in the case of Roe, an increasingly hostile judiciary means precisely that liberals must win their case in the court of public opinion and electoral politics. The tellingly labeled “Civil Rights Restoration Act,” opposed by the administration all the way to the signing ceremony in the Rose Garden, illustrates how strong political action can and should counteract backsliding by conservative courts.

Since 1989, attempts to overturn major Supreme Court rulings have been virtually permanently on the congressional agenda. The Thomas hearings, brought an almost immediate White House “compromise” on the previously deadlocked civil rights legislation, which, for all its gaps, is a vigorous rejection of a major line of recent Supreme Court interpretation. Congress failed to overturn Rust v. Sullivan, the “gag rule” on publicly funded women’s health clinics. Ironically, that failure will probably assure that abortion is a prominent issue throughout the 1992 presidential campaign, and therefore a constant reminder of just how far out of touch with the mainstream the Supreme Court has strayed.

Congress and Court in the Dock

By the end of the second round of hearings, nearly everyone had lost sight of the Supreme Court as an institution. The Senate didn’t grapple in the slightest with the institutional questions raised by Anita Hill’s testimony: In the adjudication of disputes, how should judges assist the weak? How, in other words, is a court to be more like an umpire and less like a hired thug? And getting down to the brass tacks of advice
and consent, is Clarence Thomas a man who has any moral sense of how to handle his own power? The Senate failed as a body of public counsellors. It behaved instead like a master of television ceremonies and submitted Hill's and Thomas's performances to the national clap-o-meter of a hasty public opinion poll.

Most senators framed the issue as a criminal trial where the decision was guilty or innocent. Senator Biden told The New York Times "In my mind if there is substantial doubt, you resolve that doubt in favor of the accused." Beyond-a-reasonable-doubt is indeed the standard of justice courts apply when they are considering depriving someone of fundamental liberties—sending them to prison, for example. But it is assuredly not the appropriate standard when a legislature is considering elevating someone to a position of great power, from which he can be removed only with tremendous difficulty, and in which he will decide on the liberties of every citizen. Senator Kennedy came close to the point when he said, "In a case of this magnitude, where so much is riding on our decision, the Senate should give the benefit of the doubt to the Supreme Court."

Lacking any standard by which to assess the rightness of political issues, our politicians grab at standards from other spheres of life, such as personal character or criminal trials. The important questions remain unasked: What kind of institution is the Supreme Court? How and to whom is it accountable? What are reasonable criteria by which to evaluate the qualifications of proposed justices? What makes for good judging, and how can the extraordinary power of judges contribute to democracy rather than erode it?

While the legal scholars are still debating whether judges decide by some neutral principles of legal reasoning or are mere mortals exercising power, the public and the politicians know the answer. Nominations politics for the last few years has made it clear to anyone who doesn't remember Franklin Roosevelt's court-packing scheme. The last two Presidents have nominated judges with extremist views, and used their appointment powers to gain control of the judicial branch and thereby implement their preferred policies, in open defiance of Congress. Congress and interest groups have responded by playing the same game—though far less adroitly—treated the federal courts, and especially the Supreme Court, as just another political institution to be "won."

Even the Supreme Court, in an otherwise unobjectionable spring 1991 decision holding that elections of state judges are subject to the Voting Rights Act, implied that courts are political bodies. But if judges are to have legitimacy as neutral umpires and if they are to decide conflicts on the basis of higher principles, then they must not be regarded as merely political creatures representative of particular constituencies or current ideological fashions. If courts become merely representative institutions rather than deliberative ones, they risk losing their ability to resolve conflict on the basis of principle rather than raw power, and the rule of law suffers.

The Supreme Court's moral authority may have taken particularly heavy blows with the Thomas appointment, but if so, these losses are only part of a larger trend. Supreme Court nominations are increasingly hard to distinguish from electoral campaigns. Large majorities of Congress have voted on several recent occasions to overturn Supreme Court rulings. Coming at a time when several Supreme Court rulings on civil rights and one on abortion were under siege within Congress, the Thomas hearings only further dramatized that the Court's decisions are the result of a highly politicized selection process, just like the decisions of the other branches of government. It may be harder and harder to sustain popular support for the least democratic branch. Not that anyone will attempt to do away with the Court, but the Court's only real enforcement power resides in its ability to command respect and exert moral suasion.