BOOK REVIEW

THE CULTURAL IMPLICATIONS OF JUDICIAL SELECTION

Yxta Maya Murray†

RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY. *Toni Morrison, ed.*‡ New York: Pantheon Books. 1992. 475 pp. $15.00.

The Constitution allows the President to "nominate . . . by and with the Advice and Consent of the Senate . . . Judges of the supreme Court."[1] Traditionally, the same types of faces have dominated this political ritual: White men choose other White men to inhabit the corridors of power. As women and minorities have gradually gained political access and representation, however, the President's nomination and the Senate's confirmation hearings have increasingly become startling dramas in which the collisions between race, gender and power are played out.

The 1991 nomination and confirmation of Justice Clarence Thomas will go down in history as the first confirmation in which these tensions became evident. The Thomas appointment process ignited a strident debate, within the African American community and the nation as a whole, over the proper definition of "fitness," or a nominee's capacity to serve in a top government position. The issues raised during Thomas' judicial selection process focused on crucial but previously little-asked questions about race and gender. The ensuing national discussion surpassed previous battles over Supreme Court nominations by demonstrating that the confirmation process is neither race-free nor neutral. And how could it be otherwise? President Bush had vaulted Thomas, a seeming cultural anomaly, a Black "neo-conservative," into the national political spotlight by nominating him for the highest judicial position in the land. The arrival of law

† Clerk to Judge Ferdinand Fernandez, Ninth Circuit, 1994-95; Clerk to Judge Harry L. Hupp, Central District of California, 1993-94; J.D. 1993, Stanford Law School.

Many thanks to Professors Janet Halley, Barbara Babcock, Margaret Jane Radin and Ian Ayers for their inspiration as well as their substantive suggestions. Finally, I owe a debt of gratitude to my husband, Andrew Brown, for his love and encouragement.

‡ Novelist, essayist, playwright and professor. A recent winner of the Nobel prize in literature, Ms. Morrison teaches writing at Princeton University.

1 U.S. CONST. art. II, § 2, cl. 2.

professor Anita Hill and her accusations of sexual harassment further complicated matters. Her presence in the hearings made the question of Thomas' fitness even more complex by provoking discussion about the role of Black women in the larger African American community and the struggles they face at the crossroads of race and gender. Her testimony, and the Senate Judiciary Committee's dismissal of it, powerfully illustrated that the Senators' purportedly neutral inquiries into fitness were not neutral at all, but were instead shaded with biases and preconceptions.

Along with this political change has come a shift in scholarship. *Race-ing Justice, En-gendering Power, Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*[2] is an unprecedented collection of nineteen essays by scholars from different disciplines, edited and with an introduction by novelist Toni Morrison. The book's value lies in the essayists' attention to the potential race and gender meaning of the judicial selection process: it delineates the seemingly intractable cultural issues which accompany presidential nominations and Senate confirmations of women and people of color. *Race-ing Justice, En-gendering Power* presents a complement and a partial rejoinder to dominant theories about the appointment process which have been set forth by such scholars as Lawrence Tribe,[3] Bruce Ackerman,[4] Stephen Carter,[5] Robert Bork[6] and Henry Paul Monaghan.[7] It recasts their debate over judicial selection to include race and gender consciousness, and thus provides us with a broadened perspective which can help us think about ways to remedy the process.

I

DOMINANT THEORIES OF THE APPOINTMENT PROCESS AND "OUTSIDER" JURISPRUDENCE

The failed nominations of Robert Bork and Douglas Ginsburg prompted some of the most prominent members of the legal academy to tackle the judicial selection process. The main point of contention was its "politicization," that is, whether the Senate should examine a candidate's political ideology when considering her fitness for a position on the Supreme Court. Some academics, such as Tribe and Monaghan, regard Senate consideration of a nominee's political ide-

---

2 RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992) [hereinafter RACE-ING JUSTICE, EN-GENDERING POWER].

3 LAWRENCE TRIBE, GOD SAVE THIS HONORABLE COURT (1985).

4 Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

5 Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

6 ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

7 Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988).

ology as either necessary[8] or appropriate.[9] Other scholars, including Carter and Bork, argue that ideological considerations result in less qualified judges[10] and may violate the separation of powers scheme set forth in the Constitution.[11] Ackerman mourns the development of "transformative appointments," where battles over particularly brilliant and ideological nominees, such as Robert Bork, really represent battles over changes in constitutional law.[12] Accordingly, the appointment of such nominees can accomplish constitutional transformation outside of the Article V amendment process.[13] Ackerman strongly

---

8 *See* TRIBE, *supra* note 3, at 93. Tribe contends that:

> [w]hether a nominee is fit to serve as a Supreme Court Justice is a question that can be responsibly answered only after a thorough examination of the nominee's basic outlook and ideas about the law, as well as a critical assessment of the nominee's character and intellect.
>
> . . . Each Senator, as well as the President, should determine the outer boundaries of what is acceptable in terms of a potential Justice's constitutional and judicial philosophies—a candidate's substantive view of what the law should be, a candidate's institutional views of what role the Supreme Court should play.

Id.

9 *See* Monaghan, *supra* note 7, at 1206. Monaghan observes that:

> both the President and the Senate share a common responsibility for the appointment of morally and professionally fit persons to the Court. The Senate has the duty to reject any nominee whose appointment it believes will not advance the public good as the Senate understands it . . . . [N]o affirmative constitutional compulsion to confirm exists.

Id.

10 *See* BORK, *supra* note 6, at 347. Bork notes that:

> [a] president who wants to avoid a battle like mine, and most presidents would prefer to, is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups. . . . In the longer run, the anticipation that campaigns such as this may be waged is likely to affect both the course of the law and the intellectual life of the law . . . . It is quite conceivable that some lower court judges may be affected in the decisions they make and in the opinions they write.

Id.

11 *See* Carter, *supra* note 5, at 1194. Stephen Carter believes that the Senate's ideological investigation of a nominee can harm the separation of powers by making the nominee too accountable to the Senate in her future decisionmaking:

> Judicial independence, if the concept is to have any force, is not a cloak that can be thrown around a new Justice at the very last minute—after the administration of the oath. Independence must arrive earlier, and cover all potential nominees, from the moment a sitting Justice retires or dies. A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents.

Id.

Carter does not explain exactly how "quizzing" will render the nominee dependent upon the Senate. Presumably, judicial independence breaks down when the nominee, who desperately wants the position for which she has been nominated, tells the Senate that she will decide future opinions in ways that please the Senate. This genuflecting to the Senate's "political" desires impairs the nominee's ability to decide future cases without that influence.

12 *See* Ackerman, *supra* note 4, at 1171-73.

13 U.S. CONST. art. V.

criticizes this development because it "lacks institutional weight and legal focus . . . [and] also threatens to be unacceptably elitist."[14]

Although valuable in their insights and ability to spark controversy over appropriate methods of determining fitness, these scholars fail to explain fully the debate over Clarence Thomas. Their theories of the appointment process are too narrow because they examine only the propriety of the Senate's ideological investigations, and that narrowness precludes the theories from accommodating the cacophonous clash of race and gender issues which may accompany the nominations of women and people of color. The Thomas appointment illustrates the gaps in their work, for when we place Thomas on their theoretical matrix we see a contrast: something more was at stake in the Thomas hearings than merely a debate over whether the Senate should have investigated Thomas' views on abortion, the First Amendment and natural law. Instead, the Thomas appointment process raised many difficult questions beyond the propriety of Senate consideration of ideology: the substance and structure of the process also demonstrated the pervasive racial and sexual biases existing in our society.

To make sense of appointments like Thomas', we need to enrich the dominant theories about judicial selection by infusing them with race and gender consciousness. The tools for doing so have been developed by critical race theorists and feminist theorists. Critical race theory and its intersection with feminist theory, which has also been characterized as an "outsider's" jurisprudence,[15] dedicates itself to dismantling the illusion of race and gender neutrality in the law and to recognizing race and gender bias where they exist. According to Professor Mari Matsuda, it is a "jurisprudence recognizing, struggling within, and utilizing contradiction, dualism and ambiguity" which "attack[s] the effects of racism and patriarchy in order to attack th[eir] deep, hidden, tangled roots . . . . Outsiders . . . def[y] the habit of neutral principles to entrench existing power."[16] *Race-ing Justice, En-gendering Power* is the first attempt to apply this focus to judicial selection.

II

RACE-ING JUSTICE, EN-GENDERING POWER AND THE CLARENCE THOMAS HEARINGS

The collection of essays may be seen as a response to, in Morrison's words, the "emptiness, the unforthcoming truths that lay at the

---

14 *Id.* at 1182.

15 Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989).

16 *Id.* at 2324-25.

center of the state's performance"[17] in the Thomas appointment which "contributed much to the frenzy as people grappled for meaning, for substance unavailable through ordinary channels."[18] From the "confusion, the murk, the sense of helpless rage that accompanied the confirmation process,"[19] these scholars and writers attempt to make sense of "what happened, how it happened, why it happened; what implications may be drawn, what consequences may follow."[20] Although the African American community divided over Thomas' placement on the highest court, Morrison argues that its members were nonetheless able to engage in a valuable discussion over the appointment: "[R]egardless of political alliances, something positive and liberating has already surfaced. In matters of race and gender, it is now possible and necessary, as it seemed never to have been before, to speak about these matters without the barriers, the silences, the embarrassing gaps in discourse."[21]

Race-ing Justice, En-gendering Power continues this conversation. The texts reveal an almost overwhelming sense of rage and concern, but these strong emotions do not muddy the arguments. On the contrary, the essays are clarified by their authors' anger. The authors creatively use letters, narratives and other devices to analyze the Thomas appointment, and they offer many competing theses. Despite their differences, each writer shares in a common goal: to understand this episode of judicial selection in terms of its race and gender meaning. With an eye toward race and gender consciousness, the essays challenge the "neutrality" of Clarence Thomas' appointment process. They also re-examine the definitions of fitness and the proper methods of determining whether a nominee conforms to a particular notion of judicial fitness. Moreover, they examine how the process implicates African American identity and re-creates the patterns of dominance and oppression which characterize the history of people of color.

A. Challenging Neutrality

One of the authors' targets is the seeming neutrality of the judicial selection process. This image of neutrality was fostered from the beginning by President Bush's assertion that he had not chosen Thomas because of his race, but because he was the best qualified

17 Toni Morrison, *Introduction* to RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at vii, ix.

18 *Id.*

19 *Id.*

20 *Id.* at x.

21 *Id.* at xxx.

individual for the position.[22] The essayists assail Bush's claim, arguing that racial politics motivated the nomination.

In *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*,[23] Judge A. Leon Higginbotham writes that "President Bush[ ] assess[ed] that you were 'the best person for the position.' But, candidly, Justice Thomas, I do not believe that you were indeed the most competent person to be on the Supreme Court. Charles Bowser, a distinguished African-American Philadelphia lawyer, said, 'I'd be willing to bet . . . that not one of the senators who voted to confirm him would hire him as their lawyer.' . . . Rather, they were acting solely as politicians."[24]

Other essayists also criticize the purported neutrality of the choice. In her essay *Doing Things With Words: "Racism" as Speech Act and the Undoing of Justice*,[25] Claudia Brodsky Lacour concludes that the motivation prompting Thomas' nomination was far from race-neutral. Instead, she finds that Bush's choice of Thomas was grounded on racism: "[The Senators'] process of questioning Clarence Thomas . . . [was] shaped . . . by. . . 'racism.' It was, of course, precisely this . . . [racism] that enabled George Bush to nominate Thomas in the first place, and, in so doing, to call him, 'the best-qualified man for the job.'"[26] In her essay, *The Supreme Court Appointment Process and the Politics of Race and Sex*,[27] Professor Margaret Burnham also finds racial significance in the process, arguing that Bush nominated Thomas to immobilize African American dissent against an extremely conservative addition to the Court. She calls the nomination an act of "throw[ing] to the black community a crumb it could neither digest nor spit out," a "gamble for the Republicans . . . that paid off royally."[28] Similarly, Professor Kendall Thomas writes that Clarence

---

22 *See* Benjamin C. Bradlee, *America's Truthache: Access, Manipulation and the Large and Small Lies of America's Presidents*, THE WASH. POST, Nov. 17, 1991, at C1, C4 (quoting Bush as saying that "[t]he fact that [Thomas] is black and a minority has nothing to do with this sense that he is the best qualified at this time.").

23 *See* A. Leon Higginbottom, Jr., *An Open Letter to Justiee Clarence Thomas From a Federal Judicial Colleague, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 3.

24 *Id.* at 19-20.

25 Claudia Brodskly Lacour, *Doing Things With Words: "Racism" as Speech Act and the Undoing of Justice, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 127.

26 *Id.*

27 Margaret A. Burnham, *The Supreme Court Appointment Process and the Politics of Race and Sex, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 290.

28 *Id.* at 291. In full, Burnham argues that:

> [Bush] had solidified the Rehnquist-Scalia block on the court; had thrown to the black community a crumb it could neither digest nor spit out; had given wedge politics, which he hopes will keep him in the White House four more years, a dry run; had thrown into national prominence a small but vocal band of black conservatives; and painted the Democrats as a bunch of inept, braying jackasses who could not bring order to their own House, much less a nation. From the beginning, Thomas was a gamble for the

Thomas' nomination was enveloped in race-meaning "[f]rom the moment his nomination was announced, [when] the politicians and the popular press went out of their way to present an image of a man who was unique and at the same time exemplary . . . a 'Black Horatio Alger.' "[29]

The essayists' recognition of Bush's purported neutrality as disguised race consciousness resembles critical race theorists' analyses of how "color blindness"[30] in the law only disguises race consciousness and may perpetuate racial subordination. Similarly, these authors argue that Bush's and the Senate's purported color blindness only masked a political, and "cynic[al]"[31] use of race. Their essays challenge Bush's race-neutral story of Thomas' rise with competing stories about Bush's political and race-conscious choice of Thomas and about the way certain Senators specifically tied Thomas' merit to his race. In so doing, the essayists demonstrate what Professor Richard Delgado calls one of critical race theory's primary objectives: to develop "a war between stories . . . [which] contend for, tug at, our minds."[32]

This practice helps enrich our understanding of judicial selection beyond the race-neutral analysis given to us by the dominant theorists. Professor Ackerman, for example, analyzes judicial selection in terms of its potential to change the course of constitutional jurisprudence. He cites President Roosevelt's successful nominations of Justices Black, Reed, Frankfurter, Douglas, and Murphy, who were constitutionally "transformative" in their embrace of the New Deal, and contrasts them with Reagan's failed nomination of Judge Bork, who, if

---

> Republicans, for they knew that it would be more difficult to get him through the Senate than had been the case with either of the two previous nominees, Justices Anthony Kennedy and David Souter. But it was a gamble that paid off royally. As one GOP strategist crowed after the final Senate vote, "We won our nominee. We hurt the Democrats. Everything beyond that is pure political gravy."

Id.

29 Kendall Thomas, *Strange Fruit, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 364, 379.

30 Professor Neil Gotanda writes that the judiciary's vision of the Constitution as a color blind document does not result in racial equality, but rather permits it "to describe, to accommodate, and then to ignore issues of subordination. . . . Color-blind[ness] . . . is important because it suggests a seemingly neutral and objective method of decisionmaking that avoids any consideration of race." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 17 (1991).

31 Ronald Dworkin, *One Year Later, The Debate Goes On*, N.Y. TIMES BOOK REV., Oct. 25, 1992, at 1, 33. Dworkin notes that:

> President Bush['s] . . . cynicism has never been more evident than when he claimed that race played no part in his choice of Judge Thomas to replace Justice Thurgood Marshall, and that Judge Thomas, who had never practiced law or produced any legal scholarship at all, was simply "the best man for the job."

32 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418 (1989).

confirmed, would have been similarly transformative.[33] This race-less and gender-less framework fails to explain the race and gender issues accompanying the Thomas nomination. The Thomas nomination is not important simply because he does or does not fit on a continuum of "transformability." The essayists in *Race-ing Justice, En-gendering Power* reveal the Thomas nomination as, instead, "deformative"[34] because Bush chose Thomas based on his race; because Bush's assertion of race-neutrality was hypocritical and used to stymie political opposition, and because, despite the veneer of race neutrality, Thomas' merit and worth were packaged and inextricably tied to his race and to his climb up the rungs of class associated with that race.[35]

B. The Question of "Fitness"

The essayists in *Race-ing Justice, En-gendering Power* continue to challenge the neutrality of the Thomas proceedings and ferret out their race-meaning by dismantling the question of fitness in judicial selection and examining the cultural assumptions that it assigns. "Fitness" is an expansive term that can encompass various factors: it is the catch-all phrase which designates whether a nominee is qualified to serve as a justice. So viewed, fitness is an accumulation of competence or merit, ideology and moral character. The essayists in *Race-ing Justice, En-gendering Power* analyze how Thomas "measured up," and how race and gender politics insinuated themselves into the final determination of fitness.

---

33 Ackerman, *supra* note 4, at 1174-75.

34 *See* Thomas, *supra* note 29, at 382. This is Professor Kendall Thomas' term. He argues that:

> In symbolic terms the Thomas nomination was a wholesale rejection of the moral legacy of the Civil Rights Movement, and the memory of the suffering and struggle that the story of that movement has come to represent in American political culture. For this reason I believe that the Thomas confirmation hearings were not "transformative" at all. To the contrary. I would submit that the appointment of Clarence Thomas to the Supreme Court is more correctly characterized as a "deformative" moment in the history of American constitutional politics.

Id.

35 *Id.* at 381-82. Professor Thomas notes this gap in theory:

> Although the terms of Ackerman's analysis take us some way toward an understanding of the meaning of the Thomas appointment, they do not go far enough. A successful account of the Thomas nomination must come to grips with the specificity and siguificance of race as an independent factor in the politics of Supreme Court appointments.

Id.

1. *Competence or Merit*

Clarence Thomas graduated from the Yale Law School in the middle of his class,[36] was chairman of the Equal Employment Opportunity Commission,[37] and had spent one year on the District of Columbia's Court of Appeals[38] before being elevated to the Supreme Court. Thomas may be seen as a weak choice because of his youth,[39] his performance at the E.E.O.C.[40] and his legal scholarship.[41] It may be unfair to dismiss Thomas immediately as unfit for the position of justice because of the conclusions of "competence" that we can derive from his resume. Not all supreme court justices have served on a judicial bench,[42] and others have been firmly criticized for lack of competence although they later rose in our esteem.[43] Nevertheless, the essayists in *Race-ing Justice, En-gendering Power* who discuss Clarence

---

36 *See* Fred Barnes, *Weirdo Alert: White House Watch—the campaign to sell Clarence Thomas to the Senate*, THE NEW REPUBLIC, Aug. 5, 1991, at 7.

37 *See* R.W. Apple, Jr., *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle: 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1, A19.

38 *The White House*, FED. NEWS SERVICE, Oct. 16, 1991, *available in* LEXIS, Legis Library, FEDNEWS File.

39 Clarence Thomas was 43 years old at the time of his confirmation. *See Justice Thomas: On What Basis?*, N.Y. TIMES, Sept. 22, 1991, § 4, at 16A.

40 *See* Congressional Black Caucus Foundation, *In Opposition to Clarence Thomas: Where We Must Stand and Why*, *in* COURT OF APPEAL 231 (1992). The author observes that:

> While Chairman of the Equal Employment Opportunity Commission Thomas consistently advocated narrow interpretations of civil rights precedents, including *repeated refusals to seek the full range of remedies against discrimination* provided by statute and by case law. Thomas was so reluctant to bring class and systemic cases that Congress had to earmark EEOC funds specifically for that type of enforcement and threaten to cut the budget of the chair and members of the EEOC. Because of his mismanagement and indifference, *more than 13,000 age discrimination claims* missed the statutory deadline for action and had to be revived by special statute.

Id. at 234.

41 *See* Barbara Allen Babcock et al., *Judge Clarence Thomas' Views on the Fundamental Right to Privacy: A Report to the United States Senate Judiciary Committee*, *in* COURT OF APPEAL 255 (1992). Babcock argues that:

> At the core of Thomas' claims to constitutional authority and a dominant theme throughout his writings and speeches is a belief that the Constitution should be interpreted in light of "natural law" or "higher law." . . . "Natural law" is a slippery concept. It has been invoked in noble causes . . . . But it has also been used in invidious ways. . . . Despite the central role natural law plays in his professional writings, Judge Thomas has said surprisingly little about the specific content of his natural law philosophy. His discussions of natural law, though numerous, tend to be abstract and repetitive, often confusing, and sometimes contradictory.

Id. at 259.

42 Consider, for example, Felix Frankfurter, who, although active in government, had never been a judge, and had devoted his life to constitutional scholarship before his elevation to the Court. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 220-22 (3d ed. 1992).

43 Hugo Black initially appeared to be a terrible choice for the position. *Id.* at 214-16 ("The intellectual and soft-spoken liberal was portrayed as being utterly unqualified by training, temperament, and constitutional dedication.").

Thomas' professional capacities agree that he is not qualified to serve on the Court, and indeed, some find that his work is the product of a "mediocre mind."[44] It is nothing new that they should conclude that Thomas' credentials do not justify his placement on the court; nominees for that position have been challenged on those grounds before.[45] What is compelling is how they detail the way that race informed the question of whether Thomas was competent to be a Justice.

The essayists note that the concept of Thomas' fitness was not linked so much to his professional and intellectual accomplishments as to his rise to power despite his race and class. Margaret Burnham writes that "[e]arly in the process the whole country . . . became invested in Thomas' success and transformed into a cheering squad for their 'local black boy made good.' "[46] Professor Kendall Thomas illustrates this measure of Thomas' merit when he quotes Senator Danforth, who framed Thomas' competence to be a Supreme Court Justice in terms of his race and class difference: "Nobody here was born black in the segregated South . . . Nobody here was raised in a shack for 7 years without plumbing, in a broken home. Nobody knows that. Nobody has experienced that. Clarence Thomas has."[47]

Congress did not measure Thomas' intellectual competence to serve on the Court solely by his credentials; Thomas was not touted for his scholarship his performance in government, or his service on the bench. Instead, Congress filtered the question of Thomas' competence through the question of race, and his praise was meted out with explicit reference to his race. Whether this is troubling or not can be debated: after all, the individual who rises through the ranks of power while weighed down by prejudice may deserve special recognition. Thomas was, however, being judged in a purportedly race neutral process. Two things—the close connection between his perceived merit and stories about poverty and bigotry[48] together with his

---

44 *See* Manning Marable, *Clarence Thomas and the Crisis of Black Culture, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 61, 64 ("At best, Thomas's publisbed writings revealed the working of a mediocre mind.").

45 *See* ABRAHAM, *supra* note 42, at 214 (discussing Justice Black).

46 *See* Burnham, *supra* note 27, at 300.

47 *See* Thomas, *supra* note 29, at 380. *See also Remarks by Senator Joseph Lieberman (D-Ct) During Floor Debate Regarding Nomination of Clarence Thomas to the Supreme Court: U.S. Senate,* FED. NEWS SERVICE, Oct. 4, 1991, *available in* LEXIS, Legis Library, FEDNEWS File [hereinafter *Remarks by Senator Joseph Lieberman*] ("Indeed Judge Thomas' entire life is an inspiring example of what an individual who has faith, ability, and a desire to work can achieve in this country, even in the face of the worst kinds of prejudice and adversity.").

48 Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 390. West discusses these stories, mentioning "his birth in Jim Crow Georgia, his childhood spent as the grandson of a black sharecropper, his undeniably black phenotype degraded by racist ideals of beauty, and his gallant black struggle for achievement in racist America." *Id.* at 391-92.

weak credentials—may convey a troubling message about what it means to be the "best" qualified man of color for the position: that even the "best black"[49] will still be found lacking.

The dominant scholars on judicial selection do not make room for these conceptions in the determination of intellectual competence or merit. Stephen Carter writes that "it is perfectly sensible for the Senate to review a candidate's professional experience to determine whether she meets some baseline standard of legal and intellectual competence."[50] "Legal and intellectual competence," or what also might be called "merit," in judicial selection appears to be a race-free concept, and Carter's work treats it that way. In the Thomas hearings, however, the determination of competence was not neutral.

What did it mean that Thomas' merit was so expressly linked to his race and class even while politicians claimed that they were scrutinizing him in a neutral process? The essayists' re-interpretations of "merit" in judicial selection attempt to expose what some critical race theorists call the "deep-rooted assumption of cultural universality and neutrality [which] have removed from critical view the ways that American institutions reflect dominant racial and ethnic characteristics."[51] Thomas' nomination introduced him into a process where he was a virtual novelty: only one African American, Thurgood Marshall, had ever entered it before. That determinations of Thomas' competence were not made without reference to his race reveals that the concept of competence is steeped in what Kimberlé Crenshaw calls the "white norm."[52] The merits of other nominees for the Court have not been so measured, but because Thomas did not fit into the "mythical norm,"[53] the Senate calibrated his merit differently, in a way that highlighted his race for all to see.

---

49 STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49 (1991) (referring to disparate assessment afforded Black achievement). *See also* West, *supra* note 48, at 391 (finding that the choice of Thomas exemplified "white-racist stereotypes about black intellect.").

50 Carter, *supra* note 5, at 1186.

51 Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 762.

52 Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988). Crenshaw discusses the fatuous but dangerous myth of neutrality that is masked as a white norm: "The white norm . . . has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it." *Id.*

53 AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER 114, 116 (1984):

> Somewhere, on the edge of consciousness, there is what I call a *mythical norm*, which each one of us within our hearts knows 'that is not me.' In america, this norm is usually defined as white, thin, male, young, heterosexual, christian, and financially secure. It is within this mythical norm that the trappings of power reside within this society.

2. *Ideology*

Fitness to be a Supreme Court Justice increasingly involves an investigation of a nominee's ideology. That inquiry includes an examination of the nominee's views on issues (such as criminal justice, abortion and free speech) and her approach to the construction of statutory and constitutional language (such as Justice Scalia's strict constructionism or Chief Justice Warren's method of broadly interpreting constitutional language).[54]

Clarence Thomas' ideology was one of the most hotly contested issues in his nomination. Aligned with a Black neo-conservative movement, Thomas has argned against affirmative action,[55] does not believe in abortion,[56] and allegedly has made some highly controversial and derogatory comments regarding past civil rights leaders.[57] Thomas' backers, having learned from Bork's spectacular failure, encouraged him to emphasize some aspects of his judicial philosophy but to de-emphasize his views on abortion and affirmative action.[58]

The essayists in *Race-ing Justice, En-gendering Power* disagree on the significance of Thomas' views. In *Clarence Thomas and the Crisis of Black Political Culture* Manning Marable argues that Thomas' conservative ideology renders him unfit to sit on the Court because it makes him unable to represent African Americans in that position.[59] According to Marable, Thomas' pronounced conservatism and his departure from the liberal views and goals of most African Americans have a direct relationship to his ethnicity. Marable argues that Thomas' politics prevent him from being an authentic ethnically Black person:

---

54 *See* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988) ("Though focus on the nominee's character remains paramount, the other dominant factors have shifted from sectional and party affiliations to social and judicial philosophy.").

55 *See* Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, *in* ASSESSING THE REAGAN YEARS 391, 395 (David Boaz ed., 1988) (criticizing United Steel Workers v. Weber, 443 U.S. 193 (1979)).

56 *See* Congressional Black Caucus, *supra* note 40.

57 *Id.* at 241. (Thomas allegedly complained that civil rights leaders had done "nothing right" and that all they ever do is "bitch, bitch, bitch, moan and whine.").

58 Senator Joseph Lieberman stated that:

> I must say that I found Judge Thomas' testimony . . . unsatisfying . . . because he appeared almost casually willing at times to express opinions on some very current and complex issues of constitutional law . . . and reluctant to express any thoughts on others. . . . I have concluded that the confirmation process, particularly as it has evolved since the Bork nomination, evoked that result.

Remarks by Senator Joseph Lieberman, *supra* note 47. *See also* Donald U. Devine, *Reform the Judicial Nomination Process Now: Five Proposals for a Return to Senatorial Comity*, *in* THE HERITAGE LECTURES, Nov. 12, 1991, *available in* LEXIS, Legis Library, HFRPTS File ("Thomas was schooled by a team of Washington insider lobbyists to 'learn' from the Kennedy and Souter successes to be evasive in his answers to questions.").

59 *See* Marable, *supra* note 44, at 82.

"[Thomas works] to promote [his] own career[ ] . . . . Racially, Thomas remains 'black': both by governmental definition and societal recognition . . . . Yet ethnically Thomas has ceased to be an African American, in the context of political culture, social values and ideals, and commitment to collective interests."[60]

Other essayists, however, find Thomas' approach to be a symbol of strength in the Black community. Carol M. Swain, in her essay *Double Standard, Double Bind: African American Leadership After the Thomas Debacle*,[61] writes that "[d]uring the confirmation process, it became dramatically evident that there is no one person, nor, indeed, one single voice to speak on behalf of African Americans. . . . The diversity of black opinion . . . can be viewed as a sign of maturity within the African-American community."[62] Similarly, Toni Morrison saw the political division over Thomas' judicial philosophy as evidence that "black people think differently from one another; it is also clear that the time for undiscriminating racial unity has passed. A conversation, a serious exchange between black men and women, has begnn in a new arena, and the contestants defy the mold."[63] Morrison and Swain agree that the emergence of different ideologies is a positive development because it allows for diversity within the African American community and also acknowledges a strain of Black conservatism. Swain notes that "African Americans are not nearly as single-mindedly liberal as they are often portrayed to be. On non-economic issues, in fact, a clear strand of conservatism is evident."[64]

The analysis of ideology in *Race-ing Justice, En-gendering Power* departs from traditional theories about the role of ideology in judicial selection. Under dominant theories of judicial selection, "ideology" is a race-free concept,[65] and the debate focuses on the propriety of con-

---

60 *Id.* at 81-82.

61 Carol M. Swain, *Double Standard, Double Bind: African-American Leadership After the Thomas Debacle, in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 215, 215.

62 *Id.*

63 Morrison, *supra* note 17, at xxx.

64 Swain, *supra* note 61, at 222.

65 Lawrence Tribe finds that a nominee's "judicial philosophy" is best examined by asking "potential Justices about the substantive *directions* they believe the Supreme Court should take, and why—and how they would have it proceed along those paths. . . ." TRIBE, *supra* note 3, at 103-04.

Robert Bork grounds his ideas of judicial ideology on the labels "conservatism" and "liberalism":

> [I]n each era the Court respond[s] to the ideology of the class to which the Justices fe[el] closest. By observing the values the Court chooses to enforce, it is often possible to discern which classes have achieved dominance at any given time in our history. 'Dominance,' as I use the word here, is not an entirely clear concept. It refers to the tendency of a class's ideas and values to be accepted by the elites that form opinion. In this century, we have seen the Court allied to business interests and the ideology of free enterprise. We have seen that ideology lose its power with the arrival of the New

sidering it as an aspect of fitness.[66] In *Race-ing Justice, En-gendering Power*, ideology's significance directly relates to the African American community: Is Thomas' conservatism an impediment to his fitness because his philosophy will perpetuate racial stigma and obstacles? Or is it merely a symbol of maturity in the African American community which will not preclude his ability to represent that community on the bench?

This debate over Thomas' ideology echoes a division among legal scholars of color—the critical race theorists and the black neo-conservatives. Although both camps lament the current social and economic status of African Americans, they advocate different methods of repair. Critical race theorists "urge mobilization, disruption, and subversive storytelling to fuel change."[67] Black conservatives such as Stephen Carter advocate a form of "self help" which entails a "phaseout of affirmative action" accompanied by the "creation of a cadre of black professionals who, by being too good to ignore, refute all the racist stereotypes."[68]

Although Swain and Morrison do not adopt the tenets of Black conservatism, their argument that Thomas' views signify a maturity in the Black community echoes Carter's sentiment that "[t]he dissenting black intellectual, in short, can expect ostracism; and the predictable effect of the ostracism is to discourage freedom of thought."[69] Simi-

---

> Deal and the effect of that ideological shift on the Supreme Court. The intellectual class has become liberal, and that fact has heavily influenced the Court's performance. For the past half-century, whenever the Court has departed from the original understanding of the Constitution's principles, it has invariably legislated an item on the modern liberal agenda, never an item on the conservative agenda.

BORK, *supra* note 6, at 130.

66 *See supra* notes 3-7 and accompanying text.

67 Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writings About Race*, 91 COLUM. L. REV. 1547, 1556 (1991) (book review).

68 CARTER, *supra* note 49, at 94-95. Carter suggests that:

> What is needed . . . is the development of a better grammar of race, a way through which we can at once take account of it and not punish it. And a sensible way to start . . . is to say that with all the various instances in which race might be relevant, either to the government or to individuals, it will not be used as an indicator of merit—no one will be more valued than anyone else because of skin color. The corollary is that everyone's merit would therefore be judged by the same tests, and if the tests in question are unfair . . . then they will be swept away *and replaced with something else.*

Id. at 227-28.

69 CARTER, *supra* note 49, at 129. Carter laments that these dissenters are silenced and not able to engage in a debate about the proper methods for aiding the Black community without being "excoriated." *Id.* at 107. Carter also examines the psychological pain which accompanies that ostracization:

> Clarence Thomas put it this way: "I don't like being controversial and unpopular among members of my race . . . . I hate it that other people of my race think, 'Here's this black guy trashing everything that's supposed to be good for us.' "

larly, Marable's argument that Thomas' conservatism threatens African American welfare resembles critical race scholar Kimberlé Crenshaw's sentiment that the black neo-conservative "self-help" model exchanges explicit notions of racial bias for cultural "norms" which perpetuate stereotypes about people of color.[70]

Traditional theorists may respond that these analyses of the Clarence Thomas hearings add nothing new to the established debate over the place of ideology in the determination of fitness. They may argue that these fights over Thomas' ideology may properly be subsumed into the political/non-political framework established in previous works. According to Tribe, Bork, Carter and their colleagues, the important questions are whether the Framers intended to allow inquiries into ideology when they gave the President and the Senate Article Two, Section Two powers; whether investigations into ideology can diminish the separation of powers; and whether considering ideology raises or lowers the quality of the individuals that we place on the Court.[71] Moreover, their conception of ideology is a race-free one which looks to labels such as "conservatism" and "liberalism" for its ultimate definition. These dominant theories, however, lack the proper focal points to analyze race and gender in the judicial selection process with adequate specificity.

The essayists in *Race-ing Justice, En-gendering Power* shift this focus. First, they eagerly ask questions about race and ideology. To Morrison, Marable and Swain, the issue is not whether investigation into Thomas' ideology subverts original intent or threatens separation of powers, but what it means to the African American community. These essayists want to know if different ideologies in the African American community equal maturity or self-destruction. They also ask questions about racial representation that the dominant theories ignore. Moreover, these essayists supplement the simple notion of ideology that classifies in terms of conservatism (anti-abortion, strict-constructionism) or liberalism (pro-defendant's rights, so-called "judicial activism"). The discussion of judicial philosophy in *Race-ing Justice, En-gendering Power* does not just correspond to the conservative and liberal labels, but examines whether ideology may have a direct relationship with Black identity. These essayists delve into the difficult

---

Id. at 130-31 (citing Paul Weyrich, *Clarence Thomas: Here Comes the Judge*, WASH. TIMES, Mar. 1, 1990, at E1).

70 Crenshaw, *supra* note 52, at 1379. Crenshaw argues that theses like Carter's and Thomas' "appl[y] the same stereotypes to the mass of Blacks that white supremacists had applied in the past, but bas[e] these modern stereotypes on notions of 'culture' rather than genetics." *Id.*

For an examination of the similarities between critical race theory and black conservatism, see Delgado, *supra* note 67.

71 *See supra* notes 4-8 and accompanying text.

question of whether there is a nexus between ethnicity and ideology, or whether "blackness" is a construct apart from politics.

The questions posited by Marable, Morrison and Swain may seem like just one of the many examples of the expressly political process of public debate about the meaning of a nominee. And they *are* such examples. They are also more than just a political debate over one nominee. They are questions about how the Thomas appointment reflects the changing identity of African Americans as a group.

3. *Moral Character*

Moral character and ethics are traditionally accepted factors to consider in the determination of fitness for appointment of a Supreme Court Justice. They have also destroyed some nominations.[72] Moral and ethical character became a pivotal issue in the Thomas hearings once Anita Hill accused Thomas of sexually harassing her with stories about his sexual prowess and his consumption of pornography.[73] Although the Senate initially ignored Hill's allegations, it eventually held the now-famous special hearings to determine the truth of her allegations.

Toni Morrison argnes that these hearings were not a truth seeking mission to discover whether Thomas had the appropriate moral character to serve on the Court. Rather, she finds that the charge of harassment took on a different meaning in this nomination because of Thomas' race. For Morrison, the fact that Thomas is an African American is the main reason that the nomination was still viable after the accusation and the subsequent hearings:

> An accusation of such weight as sexual misconduct would probably have disqualified a white candidate on its face. Rather than any need for "proof," the slightest possibility that it was publicly verifiable would have nullified the candidacy, forced the committee members to insist on another nominee rather than entertain the necessity for public debate on so loathsome a charge. But in a racialized and race-conscious society, standards are changed, facts marginalized, repressed, and the willingness to air such charges, actually to debate them, outweighed the seemliness of a substantive hearing because the actors were black.[74]

---

72 Consider, for example, Justice Fortas' nomination to Chief Justice which was cut short in part because of evidence of his greed, revealed when reporters discovered that "he had accepted a then-huge lecture fee ($15,000) to conduct a series of university seminars." ABRAHAM, *supra* note 42, at 291. Consider also District of Columbia Circuit Judge Douglas Ginsburg's nomination, which failed after reporters found that he had smoked marijuana while a Harvard Law School professor and also had some conflict of interest problems. *See* Aric Press, *Pot and Politics*, NEWSWEEK, Nov. 16, 1987, at 46.

73 *See* Gloria Boger, *The Untold Story*, U.S. NEW & WORLD REP., Oct. 12, 1992, at 28.

74 Morrison, *supra* note 17, at xvii.

According to Morrison, although the Committee stalled on their decision to consider Hill's charges, the Committee ultimately used the charges levied against Thomas' moral character to objectify him and to focus on Black people's bodies in a way that is *de rigueur* in white discourse.[75] Morrison contends that "it seems blazingly clear that [this was an] unprecedented opportunity to hover over and to cluck at, to mediate and ponder the limits and excesses of black bodies [and so] no other strategies were going to be entertained."[76] Indeed, the additional hearings were spectacles, with references to Thomas' comments about his penis size, his pubic hair, and his descriptions of pornographic movies.[77]

Morrison reads the Senate Judiciary Committee's treatment of the moral character issue as racial politics—a way of objectifying Black people and exemplifying racial subordination by focusing on Black sexuality and physicality. This understanding marks a departure from traditional theories about the judicial selection process. Paul Freund, for example, finds that "focus on the nominee's character remains paramount"[78] and Stephen Carter advocates trying "to get a sense of the whole person, an impression partaking not only of the nominee's public legal arguments, but of her entire moral universe."[79] Morrison expands on the previous theories by showing how morality, privacy and race can mix together in ways not anticipated by Freund and Carter's flat assertions of the propriety of moral character investigation. She first illustrates how the "moral character" investigation delved into the private realm of sexuality, and then she shows how the Committee felt comfortable doing this because of Thomas' race, and thus used the inquiry as a vehicle for racial subordination—the "clucking" over Black bodies.[80]

---

75 *Id.* at xvii.

76 *Id.* at xiv, xvii.

77 Adam Clymer, *Parade of Witnesses Support Hill's Story, Thomas's Integrity*, N.Y. TIMES, Oct. 14, 1991, at A1: "Professor Hill . . . said Judge Thomas had spoken to her of pornography, specific sexual acts and the size of his penis."

78 Freund, *supra* note 54, at 1146.

79 Carter, *supra* note 5, at 1198.

80 Morrison, *supra* note 17, at xii-xix. Morrison's discussion of the moral character issue in Thomas's hearings resembles Professor Derrick Bell's analysis of the " 'ideological hegemony' of white racism" which provides a " 'public rationale to justify, explain, legitimize, or tolerate racism.' " It is "sustained by a culturally ingrained response by whites to any situation in which whites aren't in a clearly dominant role." DERRICK BELL, AND WE ARE NOT SAVED 156 (1987) (quoting Manning Marable, *Beyond the Race Dilemma*, NATION, Apr. 11 (1981), at 428, 431). Morrison's argument that the hearings on sexual harassment were motivated by a desire to objectify black bodies, that "no other strategies were going to be entertained," may be seen as an example of Bell and Marable's arguments that whites respond in a race-conscious and racist way when they are not clearly in control. Here, the all-white Senate Judiciary Committee may have reacted to Thomas in the way that Morrison argues contributes to racial subordination because the Committee was considering allocating a great deal of power (and, perhaps, some of their control) to a Black man.

Morrison's discussion of the Committee's disturbing focus on Black illicit sexuality also calls upon another question: how the proceedings implicated Black identity. Negative images of African Americans existed outside of the moral character investigation and problematic issues about the intersection of race and gender also surfaced. Thus, the Thomas hearings reflected racial and gender biases.

C. The Hearings and Black Identity

> Be thou a spirit of health or goblin damned,
> Bring with thee airs from heaven or blasts from hell,
> Be thy intents wicked or charitable,
> Thou com'st in such a questionable shape
> That I will speak to thee . . . . Let me
> not burst in ignorance, but . . . . Say,
> why is this? Wherefore? What should we do?
>
> —Shakespeare, *Hamlet, Prince of Denmark*, Act I, scene iv[81]

The essayists in *Race-ing Justice, En-gendering Power* delineate how familiar patterns of racial stereotyping and race and gender subordination were re-played in the selection process. The candidate himself, President Bush, Senators and the press used racial stereotypes to depict Thomas. Stereotypical assumptions about Black women also surfaced after Anita Hill publicly accused Thomas of sexual harassment; moreover, disturbing examples of Black women's lack of power were evident in the way that the hearings were conducted and structured.

1. *The Process, Thomas and Stereotypes About Black Men*

Both the nomination and the confirmation processes evoked stereotypes about Black men and their sexuality. Stereotypes about Black male sexuality appeared often in President Bush's, the Senate's and the press' explicit references to Thomas' body parts. Thomas observed this reliance on Black male sexual stereotyping and manipulated it to his own advantage. These stereotypes and the reactions to them are disturbing and sometimes confusing: after all, some of the worst incidents of stereotyping came from Thomas' supporters, and Thomas' curious evocation of stereotypes may have clinched his appointment. Most important, however, is what the evocation of these stereotypes reveals about the appointment process and its concomitant theories. It also demonstrates how Thomas' introduction into the process dismissed illusions of its purported neutrality.

81 THE COMPLETE SIGNET CLASSIC SHAKESPEARE 925 (Sylvan Barnet ed., 1972).

a. *Parsing*

Various stories about Thomas, minute characterizations that served to parse him into racially-tinged parts that informed the whole, were evident in the President's and some senators' comments. The press latched onto these stories and conveyed them with zeal. There was, for example, an unprecedented focus on his the nominee's body and bodily functions. Morrison notes that the media placed a "curious spotlight on his body"[82] by focusing on his "weight lifting",[83] and by reducing Thomas to his physical elements. Senator Pete Domenici remarked, for example, that he "wanted to find out . . . as best I could what his life—from outhouse to the White House . . . has been like."[84] Morrison also discusses how Bush made the final offer to Thomas in Bush's bedroom and that Thomas himself commented that he did not like to play golf because "[t]he ball's too small."[85] These references diverted attention away from Thomas' mind, and they also served to sexualize him—to translate his body parts into the bathroom or the bedroom.[86] This form of stereotyping (the Black man as "body") could only make him more understandable and familiar.

Another troubling example of the Senate's interest in Thomas' physical characteristics is found in Senator Danforth's introduction of Thomas by referring to the laugh:

> I concede that there is something weird about Clarence Thomas. It's his laugh. It is the loudest laugh I have ever heard. It comes from deep inside, and it shakes his body. And here is something at least as weird in this most up-tight of cities: the object of his laughter is most often himself.[87]

Morrison writes that the discussion of the laugh did not merely represent Thomas' good nature, but rather was a "gesture of accommodation and obedience needed to open discussion with a Black person and certainly to continue it."[88] Morrison challenges the genial, laughing character created and coddled by Thomas and his backers with her own version: The laugh signified a malleability and obsequiousness which is unexpected in Supreme Court Justices, but which eased Thomas into acceptance and accessibility.[89]

---

82 Morrison, *supra* note 17, at xiii.
83 *Id.*
84 *Id.* at xiv.
85 *Id.*
86 *Id.*
87 *Id.* at xii-xiii.
88 *Id.* at xiii.
89 *Id.*

b. *The "high-tech lynching"*

In his defense against Hill's charges, Thomas himself made a disturbing use of racial stereotypes which drew on the painful history of African Americans:

> [This is] a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree.[90]

Thomas attempted to transform the sexual harassment charge into an indictment of his conservative ideology, his self-help thesis to "do for" himself; he then defended against this charge with the counter accusation of a "high-tech lynching." Yet the sexual content of the charge and the corresponding defense was still available: the lynching of Blacks is historically linked to suspicions of Blacks overstepping their social and sexual boundaries.

By appealing to this history, Thomas transformed himself from Morrison's laughing man into what Nellie Y. McKay describes in her essay *Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Woman Spoke Out*:[91] "He, with a great display of arrogance . . . thundered and roared his denials, daring the white men chosen to decide on his fitness for the Court to deny him access to that seat."[92] Thomas' successful act of self-preservation was, as Kimberlé Crenshaw writes in *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*,[93] to "drape himself in a history of black male repression"[94] by naming himself the victim of a high-tech lynching. Thomas transmogrified himself into an angry Black man by identifying himself as the victim and by accusing Hill of siding with the enemy—a White lynch mob. McKay finds that "Thomas' evocation of the single most emotional issue at the heart of the black and white community's relationship further inscribed his determined use of racial-sexual politics to gain his ends."[95] Thomas' lynching metaphor disarmed the African American community. Many rallied to his side after he spoke in his own defense—and his approval ratings in the Black community rose from fifty-four percent to nearly eighty per-

---

90 Thomas, *supra* note 29, at 366.

91 Nellie Y. McKay, *Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Woman Spoke Out*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 269.

92 *Id.* at 271.

93 Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antitrust Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 402.

94 *Id.* at 416.

95 McKay, *supra* note 91, at 284.

cent.[96] His reference to lynching succeeded in part because his appeals to racial victimization tapped into a profound source of suffering. It was true: Black men had been lynched for misguided perceptions of their sexuality. The Senators recognized the power of the reference, and "could not muster the moral authority to challenge Thomas' sensationalist characterization."[97] In the hubbub and histrionics, however, an important fact was forgotten. Thomas was telling the wrong story. Black men had been lynched for allegedly raping *White* women.[98]

c. *Stereotypes in the process and theory of judicial selection*

This analysis of the racial politics in judicial selection enables us to understand the Thomas event in ways that previous theories could not. Post-Thomas theories about judicial selection must be broader than the one espoused by Professor Monaghan, who argues that "[t]he entire appointment process is best understood as largely beyond the operation of norms of legal right or wrong; instead it involves mainly questions of prudence, judgment, and politics."[99] New theories must incorporate an awareness of how racial stereotyping can permeate the process, shape the characterization of nominees, and affect the reactions that nominees elicit.

Monaghan might respond that the racial politics so evident in the Thomas proceedings were merely products of the already political selection process which his theory identifies. Yet the analysis of how race figured in the process in sometimes subtle ways—in a comment or a description—adds a new dimension to our understanding of what the "political" is. The meaning of "political" in the judicial selection process, where the nominee is a woman or person of color, must also encompass how *race* and *gender* politics insinuate themselves into the process to accomplish various ends. An analysis of judicial selection should also critique how racial stereotypes can be used and re-used to belittle African Americans (by White senators) or be manipulated to defend against allegations of illegal or unethical conduct (by the nominee). Monaghan's theory and others like it fail to examine with any detail the various roles that race and gender play, beyond some generic, race-neutral concept of politics.

---

96 Crenshaw, *supra* note 93, at 417.

97 *Id.* at 416.

98 Nellie McKay writes that "Besides, no man, white or black, has ever faced death for the sexual abuse of a black woman." McKay, *supra* note 91, at 285. Kimberlé Crenshaw writes the "allegations relating to the sexual abuse of black women have had nothing to do with the history of lynching, a tradition based upon white hysteria regarding black male access to white women." Crenshaw, *supra* note 93, at 416.

99 Monaghan, *supra* note 7, at 1207.

2. *The Hearings, Race, and Gender*

Troubling issues concerning gender and its intersection with race emerged in the Hearings. The Committee used questionable methods to de-legitimize Anita Hill's character and, in the process, entertained images about her which were more a product of stereotype than truth. Additionally, the procedural aspects of the hearings evoked questions about power imbalances along racial and gender lines.

a. *Stories*

Certain members of the Senate fostered two images of Anita Hill to impugn her character. One line of questioning in the hearings elicited answers that depicted her as a fantasizer who craved male adoration and who wrongly imagined that they reciprocated her attentions. Senator DeConcini, for example, asked John Doggett, a lawyer who had known Hill in 1982, whether she would "somewhat fantasize as to a relationship that she thought she was going to have with you."[100] Doggett, on the basis of his "male intuition," depicted Hill as a spurned woman, who had made "bizarre" and "intense" comments to him about their non-existent relationship and tried to "hit" on him.[101] Doggett asserted that Hill's allegations against Thomas were also fantasies, the product of her deluded mind: "I believe . . . that there is absolutely no truth to what she has said. But I believe that she believes it. I was impressed with her confidence, her calm, even though the things she was saying in my mind, were absolutely, totally beyond the pale of reality."[102] Senator Specter asked Charles A. Kothe, the founding dean of Oral Roberts University, to read language from his affidavit which said "I'm convinced that [the allegations are] a product of fantasy," even though Kothe later called his "selection of words . . . unfortunate."[103] Other senators depicted Hill as a deliberate liar,[104] who had lifted stories about Thomas' consumption of pornography from a 1988 Tenth Circuit case[105] and his alleged comments to her from *The Exorcist*.[106]

---

100 *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 437 (1991).

101 *Id.* at 554-57.

102 *Id.* at 573.

103 *Id.* at 553.

104 *See* Hendrik Hertzberg, *Leaks, Lies, and the Law: What Became of the GOP's Anita Hill Conspiracy Theory?*, THE WASH. POST, Dec. 1, 1991, at C1, C4 ("Arlen Specter . . . accused Hill . . . of 'flat-out perjury.' ").

105 *Id.*

106 *Id. See* CLARENCE THOMAS: CONFRONTING THE FUTURE 73 (1992) [hereinafter CONFRONTING THE FUTURE].

It is difficult to imagine that the Senators would have treated Hill in the same way if she were White. All women have a sad history of sexual abuse, but the complaints of White women are more likely to be believed or, at least, cared about.[107] The Senators' treatment of Hill corresponds to Black women's traditional experience. Patricia Williams confronts the stories about Hill with her own.[108] She writes from the perspective that these depictions of Hill were true—yet to call the hearings truth could only transform Hill into what she was painted to be:

> Thus it is that Anita Hill is dispositively a witch. Everything she touched inverted itself. She was relentlessly ambitious yet "clinically" reserved, consciously lying while fantasizing truth. Lie detectors broke down and the ashes of 'impossible truth' spewed forth from her mouth. She was controlled yet irrational, naive yet knowing, prim but vengeful, a cool, hotheaded, rational hysteric.[109]

This narrative performs what Professor Richard Delgado would deem an "important destructive function,"[110] by taking the position that these stories were true and were correctly situated in the realm of neutrality. If that is so, then Hill, a black female law professor, can be only part human, the rest being "of the potent black witchcraft breed, with tar and owl feathers and howling winds."[111] The witch metaphor encompasses all of the stories that the hearing participants told about Hill. It shows how the tales were symptoms of the race and gender clash between Hill and a process which uses the White male as its primary referent: Hill, a "mixture heretofore not recognized in the glos-

---

107 *See* Crenshaw, *supra* note 93, at 414. Crenshaw notes that:

> Black women experience much of the sexual aggression that the feminist movement has articulated but in a form that represents simultaneously their subordinate racial status. While the fallen-women imagery that white feminists identify does represent much of black women's experience of gender domination, given their race, black women have in a sense always been within the fallen-woman category.

Id.

See also Joan Didion, *Sentimental Journeys*, *in* BEST AMERICAN ESSAYS 1992, 1, 7-8 (Susan Sontag ed., 1992) (discussing the different responses to the 1989 rape of the "Central Park Jogger," a white professional woman, and the "3,254 other rapes [that] were reported that year, including one the following week involving the near decapitation of a black woman in Fort Tryon Park.").

108 Patricia J. Williams, *A Rare Case Study of Muleheadedness and Men: Or How to Try an Unruly Black Witch, With Excerpts From the Heretical Testimony of Four Women, Known to be Hysterics, Speaking in Their Own Voices, as Translated for This Publication by Brothers Hatch, Simpson, DeConcini, and Specter*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 2, at 159.

109 *Id.* at 169.

110 This type of narrative shows "that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic." Delgado, *supra* note 32, at 2415.

111 Williams, *supra* note 108, at 165.

sary of racial tropes,"[112] did not come before the Committee as one woman with allegations, but rather was an incomprehensible figure, a "mermaid" or a "Loch Ness monster."[113]

b. *Procedure*

An analysis of the race and gender significance of the Thomas proceedings must also address a procedural aspect of the hearings. The essayists do not investigate this aspect with any great depth. The hearings on sexual harassment were conducted like a criminal trial in one important way: the allocation of the "burden of proof." Senator Danforth told the Senate that:

> the burden against the accuser [Anita Hill] must be very heavy in a case such as this to discourage exactly the kind of process we have seen particularly during the last 10 days . . . [I]f we vote against Clarence Thomas we reward a process which is clearly wrong. And for that reason, not for the sake of Clarence Thomas, but for the sake of the basic American standard of decency and fairness, I ask Senators to vote for the confirmation of Clarence Thomas.[114]

This allocation of the burden of proof in judicial selection is unprecedented.[115] Indeed, the importance of the Senate's decision would seem to argue against such an allocation. Any Senator harboring doubt about Thomas' conduct should have voted against the nomination. Nevertheless, it appears that Danforth's rhetoric persuaded his colleagues to use something like a reasonable doubt standard when determining Thomas' fitness in this area.[116]

This allocation of a very heavy burden of proof to Anita Hill was not, despite Danforth's argument, a way to achieve decency and fairness. Instead, it incorporated the biases against Black women into the

---

112 Morrison, *supra* note 17, at xvi.

113 Williams, *supra* note 108, at 165. *See also* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32, 68 (1987) ("The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated . . . . Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussions or even imagination"); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 130 (1991) ("[T]he perspective we need to acquire is one beyond those . . . boxes that have been set up. It is a perspective that exists on all . . . levels . . . simultaneously. It is this perspective, the ambivalent, multivalent way of seeing, that is at the core of what is called critical theory, feminist theory, and much of the minority critique of law."); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, *in* FEMINIST LEGAL THEORY 235, 255 (1991) ("In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced.").

114 *See* CONFRONTING THE FUTURE, *supra* note 106, at 151.

115 *See* David Lauter, *Crucial Votes Seem Headed Toward Thomas*, L.A. TIMES, Oct. 15, 1991, at A1 (discussing the "emerging standard" of a burden of proof).

116 Burnham, *supra* note 27, at 317-18 ("In these circumstances, where the burden of proof had been placed on Anita Hill, a viewer whose mind was in equipoise would likely be of the opinion that Thomas should be confirmed.").

structure of the hearings. Conceptually, the allocation of a burden of proof seems like a race and gender neutral apparatus; it is an integral part of the legal system that exists without reference to individual characteristics. Yet, it sharply demonstrates the fiction of neutrality: this burden rigidified and legitimized the bias that already existed against Hill.[117] Although the Senators may have disbelieved Hill because of their own preconceptions about Black women's veracity and sexuality, the burden that was placed upon her may have made their disbelief appear the product of a neutral mechanism in an orderly and fair process.

The Senate's treatment of Anita Hill seems less surprising considering that women of color face both race and gender discrimination.[118] Nevertheless, to understand exactly how the Senators' sought-after testimony reflected racist and sexist stereotypes and how the burden of proof presented a microcosm of societal discrimination, it is necessary to specify how race and gender affects the institution of judicial selection. Only by explicitly examining the examples of stereotyping and bias that existed in the Thomas hearings can we identify the race and gender-consciousness, clothed as neutrality, that danced through the proceedings as evocatively and seemingly elusively as Hamlet's ghost. Only by naming the configurations of race and gender can the screen upon which Hill (and Thomas) were placed and judged by the President, the Senate, and the nation be understood. It is not the stage identified by previous theorists, one whose only identi-

---

117 *See* WILLIAMS, *supra* note 113, at 48 ("What was most interesting to me in this experience [the submission of a law review article] was how the blind application of principles of neutrality . . . acted either to make me look crazy or to make the reader participate in the old habits of cultural bias."). *See also* Bob Dart, *Is Judge a Villain or a Victim?*, THE ATLANTA CONST., Oct. 15, 1991, at A7 ("Uncertainty is virtually guaranteed because the hearing was not a trial in which Ms. Hill's charges against Judge Thomas had to be proved beyond a reasonable doubt. In this case, each senator sets his or her own standards for determining the confirmation verdict.").

118 *See* Crenshaw, *supra* note 52, at 73 n.3. Crenshaw clarifies that:

> The most common linguistic manifestation of [the tendency to treat race and gender as mutually exclusive categories of experience and analysis] is represented in the conventional usage of the term "Blacks and women." Although it may be true that some people mean to include Black women in either "Blacks" or "women," the context in which the term is used actually suggests that often Black women are not considered. . . . It seems that if Black women were explicitly included, the preferred term would be either "Blacks and white women."

Id.

See also McKay, *supra* note 91, at 277-78. McKay observed that:

> For in all of their lives in America, whatever the issue, black women have felt torn between the loyalties that bind them to race on one hand, and sex on the other. Choosing one or the other, of course, means taking sides against the self, yet they have almost always chosen race over the other: a sacrifice of their self-hood as women and of full humanity, in favor of the race.

Id.

fiable players were a vague idea of "politics," robed in costumes of conservatism or liberalism and intellectual "competence." The substance and the procedure of the hearings, instead, were shaped by gender and race.

III
TOWARD REPARATION

> . . . there is
> No common vantage point, no point of view
> Like the "I" in a novel. And in truth
> No one never saw the point of any. This stubble-field
> Of witnessings and silent lowering of the lids
> On angry screen-door moment rushing back
> To the edge of woods was always alive with its own
> Rigid binary system of inducing truths
> From starved knowledge of them.
>
> —John Ashbery[119]

The essayists in *Race-ing Justice, En-gendering Power* fight against the constraints of language and bias to name what had only flitted before the viewers of the Thomas hearings as shadows of meaning. Digging deep through the words and the different layers of meaning, they help construct a vision of the changing appointment process, one which "women and minorities" are infiltrating slowly. The biased nature of the process is evident in the way individuals used race and gender to obfuscate, to compartmentalize and to manipulate. What surfaces is the understanding that the Thomas appointment process was diseased, so infected with racism and sexism that it could not operate without those referents. The Committee, which is politically accountable to the voters,[120] seeks to avoid a repeat performance and is currently trying to develop ways to remedy the process. The Committee would be wise to read *Race-ing Justice, En-gendering Power* before making any final decisions.

The problems with the judicial selection process detailed here have no easy solutions. The racism, sexism and stereotyping in the Thomas incident are products of the seemingly intractable problems of prejudice imbedded in the strata of our history and evident in almost every aspect of our society. Perhaps we cannot correct the judi-

---

119 John Ashbery, *No Way of Knowing, in* SELF-PORTRAIT IN A CONVEX MIRROR 56 (1975).

120 *See, e.g., Arlen Specter's Rude Awakening*, WASH. POST, Oct. 18, 1991, at D1 ("[Specter] has been castigated by women's groups, called Public Enemy No. 2 by feminist Betty Friedan . . . and become the object of fury from women all over the country for his surgical questioning of Professor Anita Hill during the Senate Judiciary Committee hearings on Judge Clarence Thomas"); *The Thomas Confirmation*, N.Y. TIMES, Oct. 18, 1991, at A10; *Specter Voices Disappointment with Clarence Thomas*, REUTERS, Sept. 9, 1991, *available in* LEXIS, Nexis Library, REUTERS File.

cial selection process until we alter the existing macro-patterns of gender and race subordination. *Race-ing Justice, En-gendering Power*'s ability to leave the reader with these hard questions about judicial selection, however, may demonstrate that real change in the process is possible if we just know where to start looking for answers. Armed with this realization, I offer the following suggestions as starting points in what can hopefully be a long and fruitful search for reparation.

The strength of *Race-ing Justice, En-gendering Power* lies not in uniformity of opinion, but in its robust exchange of ideas. It is a dialogue examining the race and gender issues apparent in the Thomas hearing. The Committee should try to produce a similar dialogue in its proceedings when developing a new process. At the most general level, reparations should begin with a critique of neutrality, a comprehension that choices about what questions senators ask and about the structure of the hearings may have significant race and gender meaning, especially where women and people of color are involved in the process.[121] For example, the Committee should re-think its amenability to holding the more controversial hearings in closed sessions.[122] Although closed sessions would give the hearings a patina of neutrality, they are a decidedly non-neutral practice. Because the public would be ignorant of the Committee's investigation of the most difficult issues, charges like sexual harassment could be taken less seriously. Likewise, the members of the Committee would be immune from public response to whatever exhibitions of race and gender bias occurred behind closed doors. Senate Judiciary Committee hearings

---

121 *See* Minow, *supra* note 113, at 70. ("There is no neutrality, no escape from choice. But it is possible to develop better abilities to name and grasp competing perspectives, and to make more knowing choices thereafter.").

122 *See Nightline: A Town Meeting: A Process Run Amok—Can It Be Fixed?* (ABC television broadcast, Oct. 16, 1991), *available in* LEXIS, Nexis Library, SCRIPT File:

> Sen. Specter: . . . I think there's a start the committee could do, and that is to have executive sessions. I was interested in that —
>
> Koppel: By which you mean closed sessions?
>
> Sen. Specter: Yes, I mean closed sessions . . . . [W]e should have it and we should have that with very limited staff and very limited handlers with regard to the nominee and have half a day or a day or two days. The Intelligence Committee does this and the Ethics Committee does this and I think it would be well for the Judiciary Committee to do this. That would be a start.
>
> Koppel: Senator Simon?
>
> Sen. Simon: . . . I agree with Alan in terms of a charge like sexual harassment. That kind of a charge I think we should have in closed session.

See also Neil A. Lewis, *High Court Nominee Faces Easy Road Through Senate*, N.Y. TIMES, July 20, 1993, at A15 ("Beginning with [Ruth Bader Ginsburg's] . . . nomination, the Committee will hold a closed hearing for all future nominees to consider any allegations about personal conduct.").

have been open to the public since 1929[123] and have contributed to the fairness of those proceedings.[124]

More specifically, the Committee should strive for a multiplicity of perspective. Although admittedly a vague phrase which appears more consistent with theory than practice, it nevertheless can be meaningfully applied in the hearings process. The first and most obvious development that needs to be made is a more diverse Senate Judiciary Committee.[125] Second, the Committee must become more self-conscious in its proceedings, in order to transcend culturally ingrained modes of thought.[126] The Committee should ask itself why hearings are conducted in the way that they are. Are members asking certain questions of nominees because of assumptions about a nominee or a witness based on his or her race or gender? Does the structure of the hearings rigidify those biases? In the Thomas hearings, the senators should have asked *why* certain members of the Committee tried to lambaste Hill's character instead of merely allowing her to give her testimony and deciding individually what weight to give it in their analysis. Was it really necessary to depict her as a liar? Was it necessary to depict her as a demented and jealous woman?[127] Why did they introduce a heavy burden of proof? Did their modes of ques-

---

123 *See* Freund, *supra* note 54, at 1157. Radio microphones and television cameras were not permitted in the hearings until Justice Sandra Day O'Connor's 1981 nomination. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

124 Consider, for example, the nomination of Louis Brandeis. Before the Brandeis hearings, Attorney General Thomas W. Gregory knew that Brandeis would be accused of unprofessional conduct, but that these charges were motivated by a bias against Jews. Gregory moved to have the hearings opened to the public, which was an "unusual procedure at the time." JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 103 (1953). Harris wrote that open hearings were:

> essential to the approval of the nominee. If the hearings had been closed it would have been impossible to clear Brandeis of these charges; with open hearings, the opposing witnesses were more cautious in their statements. The hearings brought to public attention the fact that there was not sufficient factual evidence to substantiate the various accusations, or the accusations were controverted by reliable witnesses. When exposed to a searching inquiry, most of the charges and rumors of unprofessional conduct were revealed to be little more than prejudiced opinion."

Id.

125 With Senators Diane Feinstein and Carol Moseley-Braun on the panel, the Committee is more diverse than it was during the Clarence Thomas hearings.

126 *See* Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443, 448-49 (1993). ("[T]he men entrusted with the task of evaluating the evidence presented during the hearings were limited and, ultimately, blinded by their positions of privilege.... The senators failed to appreciate the significance of Professor Hill's experience as a woman in the workplace, and they were completely ignorant of her life struggles as an African American. The real ADita Faye Hill remained invisible to them.").

127 *See id.* at 445. ("[T]he Committee had an infinite variety of models from which to choose. It could have established a nonconfrontational setting, gathering facts through the presentation of statements and clarifying issues with open-ended questions.").

tioning or the burden have any "cultural meaning,"[128] that is, did they fit into patterns of race and gender discrimination that women and people of color face?[129] In these instances, the Committee should consider calling "expert" witnesses to educate its members on the subtleties of discrimination and on how individuals may respond to various forms of discrimination such as sexual and racial harassment. This could help defuse the power of certain misconceptions such as the belief that failure to report harassment signifies that the victim enjoyed it or that it never happened. Additionally, such an education would sensitize Committee members to gnard against the emergence of bias in the hearings without undermining the ability of the process to accurately determine judicial fituess.

These suggestions are open to criticism. First, whenever we give special attention to the "differences" of women and people of color—in this context, the discrimination that they face and their response to it—we run the risk of validating biases against them.[130] Asking Committee members to be "sensitive" when questioning women and minorities may create the perception that these individuals and their qualifications can only be seen in light of a victim status, and thus, limit our expectations of them.[131] Yet, because the dangers of not examining the race and gender meaning of Committee hearings are so great, more gender and race consciousness is necessary to develop a more conscientious process. The goal must be to incorporate women and people of color into that process so that they can fully par-

---

128 *See* Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

129 This resembles Martha Minow's suggestion that the judiciary "engender justice" by making a "perpetual commitment to approach questions of difference by seeking out unstated assumptions, about difference and typically unheard points of view. There will not be a rule, a concept, a norm, or a test to apply . . . . I urge struggles over descriptions of reality." *See* Minow, *supra* note 113, at 16.

130 *See* DEBORAH L. RHODE, JUSTICE AND GENDER 82 (1989). ("By constantly presenting gender issues in difference-oriented frameworks, conventional legal discourse implicitly biases analysis. To pronounce women either the same or different allows men to remain the standard of analysis."). Minow cautions that:

> [W]e may recreate difference either by noticing it or by ignoring it. Decisions about employment, benefits, and treatment in society should not turn on an individual's race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. . . . Focusing on difference poses the risk of recreating them. Especially when used by decisionmakers who award benefits and distribute burdens, traits of difference can carry meaning uncontrolled and unwelcomed by those to whom they are assigned.

Minow, *supra* note 113, at 12.

131 Fear of this development was seen in one WALL STREET JOURNAL editorial written after the Thomas hearings: "As the year draws to a close, what lessons are to be learned from this? Women must not define themselves as victims. Victims can never be successful, never be equal." R. Gaull Silberman, *The Canonization of Anita Hill*, WALL ST. J., Oct. 20, 1992, at A22.

ticipate in important decisionmaking, without using "sensitivity" to race and gender issues as a vehicle to further demean them.[132]

One may also criticize these suggestions as futile gestures that cannot achieve race and gender equity in the judicial selection process because they focus on slippery notions of "neutrality" and "multiplicity of perspectives" instead of directly attacking societal discrimination which has many roots and may be insoluble. No matter how self-conscious the Committee becomes in its method it might only replace one form of racist or sexist response with another, unable to overcome culturally ingrained biases. We may, however, already be seeing the fruitfulness of introducing race and gender consciousness into the political forum.[133] Senator Carol Moseley-Braun, a new member of the Senate Judiciary Committee, recently led the Senate in denying the patent on the Confederate flag by reacting to the flag's association with slavery and continuing racism.[134] Moreover, Braun also provided a voice for women and racial minorities at the recent confirmation hearings of Justice Ruth Bader Ginsburg.

Finally, the judicial selection process should progress because of its importance to the American people. As the national response to the Thomas appointment shows, judicial selection can have a cataclysmic effect. The nation feels an almost "proprietary interest,"[135] in who is chosen to be on the Supreme Court and how they are chosen. Although implementing procedures to ensure that race and gender issues are recognized in the judicial selection process may be difficult, it is crucial to do so. The Committee's focus on these matters will not only provide a fairer process, but may also raise citizen's awareness of how race and gender factor into our everyday lives.

---

132 *See* Minow, *supra* note 113, at 12. ("[R]efusing to acknowledge . . . differences may make them continue to matter in a world constructed with some groups, but not others, in mind.").

133 Gloria Steinem asserted that since the Thomas hearings " 'Sexual harassment complaints are up 500 percent. . . .' Five months after the hearings, the Chicago Tribune carried this main headline on the front page: Sex Harassment Complaints on Rise . . . . Senator Barbara Mikulski of Maryland called the hearings a national 'teach in' on sexual harassment." PAUL SIMON, ADVICE AND CONSENT 123 (1992). *See* Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459 (1992); The Honorable Stephen Reinhardt, *The End of the Age of Ignorance*, 65 S. CAL. L. REV. 1431 (1992).

134 Susan Feeney, *Women, Minorities Altering Congress*, DALLAS MORNING NEWS, August 5, 1993, at A37.

135 *See* Carter, *supra* note 5, at 1191.