

1992

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Repository Citation

Gerhardt, Michael J., "Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas" (1992). *Faculty Publications*. 979.

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Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas

Michael J. Gerhardt*

"The fault . . . is not in our stars, [b]ut in ourselves[.]"
William Shakespeare¹

Introduction

For roughly two hundred years, politics has influenced dramatically the nomination and confirmation of Supreme Court justices. Presidents routinely have selected nominees to the Court based on political considerations,² and senatorial advice and consent remains the only political check in the process of selecting Supreme Court justices.³ Even so, the racial and sexual politics underlying much—but not all—of the controversy over the appointment of Clarence Thomas as an associate justice of the United States Supreme Court shocked most observers,⁴ prompting widespread condemnation of

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1. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2, ll. 140-41 (Arthur Humphries ed., Oxford Univ. Press 1984).

2. See *infra* note 27 and accompanying text; cf. *infra* note 25 and accompanying text.

3. See *infra* notes 25, 27-31 and accompanying text.

4. See, e.g., Leslie Phillips, *Marching in Protest; 7 Try to Crash Senate*, USA TODAY, Oct. 9, 1991, at 3A.

the Thomas confirmation hearings and proposals to change the system for nominating and confirming Supreme Court justices.⁵

This Essay argues that the existing process for the nomination and confirmation of Supreme Court justices is sound, but that it failed with respect to Justice Thomas because many of the decisionmakers did not strive to ensure the appointment of a justice with the appropriate professional credentials, integrity, judicial temperament and philosophy, and grounding in constitutional law. Political choices and differences rather than procedural defects explain any missteps in Justice Thomas' nomination and confirmation. The outcome turned in large part on deep-seated divisions among the American people and their leaders over racial equality, the relevance of race and sexually related conduct to the evaluation of Supreme Court nominees, and the applicable burden of persuasion in the Senate's confirmation proceedings. These divisions crippled the confirmation hearings on Justice Thomas, paralyzing much fruitful discussion in the Senate on his qualifications to be an associate justice, and culminating in the most closely divided vote ever in favor of the confirmation of a Supreme Court justice.⁶

Part I identifies the common elements of those moments when the nomination and confirmation process has worked most effectively. At its best, the process has enabled the President and the Senate to push each other to consider seriously the nominee's professional accomplishments, judicial temperament and philosophy, intellectual integrity, and ability to bring ideological balance or diversity to the Court. At its worst, the process has failed to prevent the President, the Senate, or both, from caring primarily about the immediate political gains of an appointment, and thus from being indifferent or even consciously opposed to considering any of the factors truly relevant to selecting competent jurists.

Part II criticizes President Bush, Justice Thomas, and many senators for their performances in the nomination and confirmation of Justice Thomas, and particularly for allowing Justice Thomas' race and background to turn the focus of the process away from the factors that appropriately identify those meriting a seat on the

5. See, e.g., Ann Devroy, *Bush Launches Strike at Congress: President Calls Lawmakers 'Privileged Class of Rulers'*, WASH. POST, Oct. 25, 1991, at A1; David Lauter & Ronald J. Ostrow, *Ways Sought to Improve Confirmation Proceedings*, L.A. TIMES, Oct. 17, 1991, at A1; Anthony Lewis, *Lessons of Thomas*, N.Y. TIMES, Sept. 30, 1991, at A17; Robert F. Nagel, *No Show Show: Reform the Hearings*, NEW REPUBLIC, Oct. 7, 1991, at 20; David E. Rosenbaum, *The Thomas Confirmation: Selection Process Under Attack on All Sides*, N.Y. TIMES, Oct. 17, 1991, at A22; see also Glenn H. Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992) ("If we are to give effect to the advice provision, then, we must create a system that grants the Senate an institutional role in the selection of nominees, but one that does not bind the President's hands.").

6. The Senate confirmed Clarence Thomas to the Supreme Court by a 52-48 vote. 137 CONG. REC. S14,704-05 (daily ed. Oct. 15, 1991). The only other favorable confirmation vote that comes as close is the Senate's 26-23 vote in 1857 to confirm Nathan Clifford, President Polk's Attorney General and an ardent defender of slavery. See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 88 (1985).

Supreme Court. This Part condemns (1) the President's purely partisan decision to nominate Justice Thomas because of the latter's race and ideology, (2) Justice Thomas' reliance on his handlers' "Pin Point Strategy"⁷ rather than his professional record in the hearings, and (3) the Senate's general failure to seize on the appropriate issues—competency and credibility—for evaluating Justice Thomas.

Part III suggests that, although no proposal for modifying the nomination and confirmation process can protect the nation from errors in human judgment, some minor changes can prevent divided government from obstructing the appointment of qualified persons, and make it easier for the participants to focus on something more noble than the petty political concerns of the moment. This Part proposes that the public and the Senate should pressure the President to take more seriously his own public rhetoric about nominating qualified people for the Court in spite of any ideological baggage they may carry. This Part further proposes that the Senate should (1) focus primarily on the nominee's full public record, (2) follow the lead of senators such as Albert Gore and Paul Simon, who suggested putting the burden of persuasion on the President, his nominee, or both, (3) steadfastly oppose any nominee whose ideology the Senate opposes or whose level of professional experience it finds wanting, and (4) schedule hearings shortly after the President selects his nominee in order to prevent the nominee from being indoctrinated by his handlers.

I. The Lessons of History: A Brief Overview of the Nomination and Confirmation Process

To provide some perspective on the battle over Justice Clarence Thomas' appointment to the Supreme Court, it is useful to consider what generally distinguishes successes from failures in the nomination and confirmation process. The obvious starting point for such analysis is the Appointments Clause, which provides that the President "by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."⁸ This Clause reflects the framers' intent that the politically accountable branches of the federal government—the President and the Senate—each perform serious roles in determining the composition of the third branch.

7. Richard L. Berke, *The Thomas Hearings: In Thomas' Hearing Room, Spirits of Hearings Past*, N.Y. TIMES, Sept. 11, 1991, at A25 (describing Justice Thomas' handlers' "Pin Point Strategy," which required Justice Thomas to remind the senators on the Judiciary Committee whenever possible about his difficult childhood and upbringing in Pin Point, Georgia, in order to keep them from focusing the hearings on his professional record).

8. U.S. CONST. art. II, § 2.

Although the President and the Senate invariably consider the political ramifications of their decisions regarding appointments,⁹ the history of the nomination and confirmation process shows significant moments in which the President and the Senate have pushed each other to look past the immediate—often petty—political gains of a Supreme Court appointment for the sake of promoting certain political ideals, particularly with respect to the improvement, balance, and quality of the third branch.

At its best, the process has enabled the President and the Senate to cooperate in making considered judgments on the Supreme Court nominee's professional experience, judicial temperament and philosophy, intellectual integrity, and capacity to provide ideological diversity or balance on the Supreme Court.¹⁰ Although these

9. See *infra* note 26 and accompanying text; see also Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 1 (1990) (analyzing the history of Supreme Court appointments in terms of "failed nominations," "controversial but successful nominations," "instances in which the President nominated the Senate's choice," and "instances in which the President has let the Court (or an individual Justice) dictate the choice").

10. No consensus exists in favor of these factors. Some people might even vehemently oppose them, especially those who believe appointing justices who share a specific ideology is in the Court's, Constitution's, and nation's best interests. I stand by these factors, however, because I believe they do not give an undue advantage to any reasonable view of constitutional interpretation and because they comport with what I regard as the essential judicial function, which is to mediate between competing constitutional visions. See Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1390-92 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)) [hereinafter Gerhardt, *Interpreting Bork*]; Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 140-47 (1991) [hereinafter Gerhardt, *Role of Precedent*]. Many who favor appointing only justices who share a particular ideology may do so because they believe that there is a single correct answer to every interpretive question about the Constitution, and that their particular ideology is the inexorable guide to those answers or results. Although I believe that some seminal cases, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), can be defended in terms of a variety of respectable judicial ideologies, I suspect most Americans share the view that the Court is at its best when it (1) concedes that cases must be judged on their facts and that no single theory of constitutional interpretation can explain all of constitutional law, and (2) fosters an open dialogue on constitutional issues. See generally HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* 158 (1990) ("For what the Court decides is both derived from public values and in turn shapes public values. It is this interaction—this complex and robust dialogue—that ultimately makes final the meaning of our fundamental law."); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1371 (1990) ("[T]he Court's survival and flourishing are indeed more likely to depend on the political accountability of its results than on its adherence to an esoteric philosophy of interpretation.").

For examples of other scholars' criteria for evaluating nominees, see *TRIBE, supra* note 6, at 94, 96, 106-07 (suggesting that, beyond determining a nominee's basic competency to sit on the Court, senators should determine whether the nominee's "vision of what the Constitution means" comes within the bounds of the "American vision" (emphasis omitted) and whether the nominee's appointment "would upset the Court's equilibrium or exacerbate what [they regard] as an already excessive conservative or liberal bias"); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 657 (1970) (maintaining that a senator should vote against confirmation if he or she "firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him [or her] to sit and vote on the Court"); Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 (1988) (proposing that senators should feel free to vote against a Supreme Court nominee based on "statesmanship, prudence, common sense, and politics"); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 681 (1987) (arguing that a senator

factors may not be perfectly neutral, they generally have played to the advantage of both political parties over the years and have fostered the appointment of distinguished Supreme Court justices with varied backgrounds and respectable constitutional visions.

For the sake of brevity, I offer only a few examples in which presidents, senators, or both, have based their respective nomination and confirmation decisions on some or all of the above factors. Perhaps the most famous example is Republican President Hoover's nomination of Benjamin Cardozo, who at the time of his appointment was the revered chief judge of the New York Court of Appeals.¹¹ Although Justice Cardozo was a Democrat, and would have been the third New Yorker and the second Jew on the Supreme Court, the Senate, numerous distinguished academics, and labor leaders demanded that President Hoover nominate Justice Cardozo because they believed the times warranted the kind of intellectual distinction and balance he could bring to the Court.¹²

Similarly, President Eisenhower—a Republican—nominated as associate justice the highly regarded New Jersey Supreme Court Justice William Brennan—a Democrat—to show the President's willingness to add political diversity to the Court.¹³ Two of President Eisenhower's other appointments to the Supreme Court, Justices John Harlan and Potter Stewart, although both solid Republicans, were overwhelmingly confirmed by the Democrat-controlled Senate—despite some staunch opposition from southern segregationists—because each had demonstrated first-rate legal minds, intellectual integrity, and even judicial temperaments. Justice Harlan had practiced law for over twenty-five years and served briefly as a judge on the United States Circuit Court of Appeals.¹⁴ Justice Stewart had received widespread praise for his judicial restraint, acumen, and independence during his four years as a judge on the United States Court of Appeals for the Fifth Circuit.¹⁵ Similarly, although ideology, heritage, or friendship obviously mattered in the nominations of Justices Louis Brandeis,¹⁶ Harlan Fiske

should vote against confirmation of any nominee "whose fundamental judicial or political values differ from those of the senator"); Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283, 289 (1990) (suggesting that each senator should consider a nominee's positions with regard to "[t]he outcome of cases of major national significance[, p]ublic confidence in the Supreme Court[, and t]he fairness and efficiency of the Supreme Court's decisionmaking process").

11. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 204-07 (3d ed. 1992); Massey, *supra* note 9, at 11-12.

12. ABRAHAM, *supra* note 11, at 204-07; Massey, *supra* note 9, at 11-12.

13. ABRAHAM, *supra* note 11, at 265-67; TRIBE, *supra* note 6, at 52.

14. See ABRAHAM, *supra* note 11, at 262-65.

15. *Id.* at 271-75.

16. *Id.* at 180-84; see also ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 466

Stone,¹⁷ Felix Frankfurter,¹⁸ Abe Fortas,¹⁹ and Thurgood Marshall,²⁰ they each had, at the time of their respective appointments, virtually unparalleled professional accomplishments.²¹

Among the more recent appointments, Justices John Paul Stevens, Anthony Kennedy, and David Souter were highly regarded lawyers and judges at the time of their nominations. Justice Stevens graduated first in his college and law school classes, and was a nationally renowned antitrust lawyer and independent judge for five years on the United States Court of Appeals for the Seventh Circuit.²² Justice Kennedy served with distinction as a federal court of appeals judge for over twelve years;²³ and Justice Souter had received widespread praise as a state attorney general, trial court judge, and supreme court justice in New Hampshire.²⁴ Justices Stevens', Kennedy's, and Souter's public records merited and received

(1946) (discussing President Wilson's esteem for Justice Brandeis on a personal level); MELVIN I. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* 119-25 (1971) (discussing President Wilson's respect for and frequent reliance on the advice of Justice Brandeis prior to his nomination).

17. See ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 181-85 (1956) ("[President] Coolidge's decision to appoint Stone was prompted by . . . his record[,] . . . independence[,] . . . his political services, . . . and personal friendship.").

18. See ABRAHAM, *supra* note 11, at 220-25; TRIBE, *supra* note 6, at 84-85.

19. See ABRAHAM, *supra* note 11, at 288-90; see also LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 241-48 (1990) (discussing President Johnson's friendship with and respect for Justice Fortas prior to his nomination).

20. See ABRAHAM, *supra* note 11, at 292-94; see also *infra* note 137 and accompanying text.

21. Justice Brandeis graduated first in his Harvard Law School class and practiced law for over forty years in Boston. During this time, he devoted himself to numerous public causes including, but not limited to, his arbitration of labor disputes in New York's garment industry, and arguments before the Court in support of the constitutionality of state maximum hour and minimum wage statutes. See UROFSKY, *supra* note 16; MASON, *supra* note 16. Justice Harlan Fiske Stone practiced law for twenty-five years with a Wall Street law firm. He then served, in succession, as a professor at and Dean of the Columbia Law School, Attorney General of the United States, associate justice of the Supreme Court, and finally chief justice. See MASON, *supra* note 17, at 77-181. Prior to his appointment to the Supreme Court, Justice Frankfurter was a distinguished professor of constitutional, administrative, and labor law at Harvard Law School; helped found *The New Republic*; and served in a variety of public positions and as an informal advisor to President Roosevelt in formulating the New Deal. See ABRAHAM, *supra* note 11, at 220-25; TRIBE, *supra* note 6, at 84-85. Justice Fortas was editor of the Yale Law Journal, served as an advisor to various Democratic politicians, founded the prestigious Washington, D.C. law firm of Arnold, Fortas, and Porter, defended many victims of McCarthyism, and litigated several major civil rights cases, including *Gideon v. Wainwright*, 372 U.S. 335 (1963). See ABRAHAM, *supra* note 11, at 288-90; KALMAN, *supra* note 19. After graduating at the top of his class from Howard Law School, Justice Marshall served for over two decades as General Counsel to the National Association for the Advancement of Colored People. During this time he won several landmark civil rights cases in the Supreme Court, including *Brown v. Board of Education*, 347 U.S. 483 (1954); was appointed by President Kennedy to sit on the United States Court of Appeals for the Second Circuit; and was appointed United States Solicitor General by President Johnson. Justice Marshall won twenty-nine of the thirty-two cases he argued before the Supreme Court. See ABRAHAM, *supra* note 11, at 292-94; see also *infra* note 137 and accompanying text.

22. See ABRAHAM, *supra* note 11, at 327-31; TRIBE, *supra* note 6, at 108.

23. See ABRAHAM, *supra* note 11, at 359.

24. See, e.g., Paul R. Baier, *The Court and Its Critics*, A.B.A. J., Feb. 1992, at 60-61 (refuting Bruce Fein's criticism of the professional abilities of recent Court appointments including Justices Kennedy and Souter); Richard L. Berke, *Senate Confirms Souter, 90 to 9*, *As Supreme Court's 105th Justice*, N.Y. TIMES, Oct. 2, 1990, at A1 (referring to

strong bipartisan support in the Senate, which was controlled by the Democrats at the time each was nominated.

There also have been times when the Senate has focused as much on the net impact of adding the candidate to the Court as on the opinions of the nominee himself. In this century, the Senate rejected President Hoover's nomination of the concededly competent Judge John Parker of the United States Court of Appeals for the Fourth Circuit because it did not want to add another vote to the Court's conservative, antilabor majority.²⁵ More recently, in one of the most widely publicized nomination hearings in American history, the Senate rejected Robert Bork, despite his distinguished professional background, because it found that many of his views on constitutional issues threatened well-settled American constitutional jurisprudence and because it feared he would tip the Court's ideological balance too far to the right.²⁶

At other times, though, presidents and senators have made petty political judgments during the Supreme Court appointment process.²⁷ Indeed, the first Senate rejected for the position of chief justice President Washington's nomination of Associate Justice John Rutledge—a delegate to the constitutional convention—based on its disagreement with Justice Rutledge's views on the United States' treaty with Great Britain.²⁸ In this century, the Senate confirmed Justice Brandeis in 1916, but only after four months of Senate debate marred by antisemitism and accusations that Justice Brandeis was radical, anti-establishment, and anti-big-business.²⁹ In 1967,

Judiciary Chairman Biden's statement regarding "the strong bi-partisan support" for Justice Souter).

25. The Senate focused on Judge Parker's adherence to a Supreme Court precedent upholding contracts that conditioned employment on not joining a labor union. See ABRAHAM, *supra* note 11, at 42-43, 200; TRIBE, *supra* note 6, at 34, 90-91; Massey, *supra* note 9, at 6.

26. See Massey, *supra* note 9, at 6-7; Gerhardt, *Interpreting Bork*, *supra* note 10, at 1386-90.

27. Some of those nominated to the Supreme Court for political and even ideological reasons also had diverse and distinguished professional experience, and became intellectual leaders or coalition builders for the betterment of constitutional doctrine on the Court. Perhaps the most prominent example is President Eisenhower's nomination of Earl Warren to Chief Justice to reward the latter's support at the 1952 Republican Convention. See BERNARD SCHWARTZ, *SUPREME CHIEF*, at 2 (1983); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 138-40 (1982). Other examples of such appointments include Justices Hugo Black, see GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 43-48 (1977), Robert Jackson, see EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 229-32 (1958), and Lewis Powell, see ABRAHAM, *supra* note 11, 311-18. For a discussion of these and other politically motivated appointments to the Court, see, for example, ABRAHAM, *supra* note 11; TRIBE, *supra* note 6, at 50-76.

28. For a discussion of the reasons for the Senate's rejections of Justice Rutledge and other nominees throughout the nineteenth century and the first part of the twentieth century, see ABRAHAM, *supra* note 11, at 71-207; TRIBE, *supra* note 6, at 77-92; Massey, *supra* note 9, at 5.

29. See ABRAHAM, *supra* note 11, at 180-184; TRIBE, *supra* note 6, at 91.

the Senate confirmed Justice Marshall despite strong objections on philosophical and overtly racist grounds.³⁰ In 1973, President Richard Nixon, frustrated over the Senate's rejection of the distinguished Fourth Circuit Judge Clement Haynesworth based on claims of ethical impropriety and insensitivity to racism,³¹ nominated the lackluster Judge Harold Carswell of the United States Court of Appeals for the Fifth Circuit.³² The Senate wasted little time in rejecting Judge Carswell for not being sufficiently competent.³³

In the final analysis, the Appointments Clause of the Constitution challenges the President and the Senate to put petty political concerns aside to make deliberate and respectable judgments as to whether particular appointments are in the nation's, the Court's, and the Constitution's best long-term interests. The history of the nomination and confirmation process suggests that sometimes the responsible political actors meet this challenge, and sometimes they do not. Part II suggests that the nomination and confirmation of Justice Clarence Thomas ranks more toward the merely political rather than the nobler end of the spectrum of the Supreme Court confirmation process.

II. A Case Study: The Ups and Downs of the Thomas Nomination and Confirmation

This Part examines the respective political judgments of President Bush, the Senate, and Justice Thomas himself, as major participants in the nomination and confirmation of Clarence Thomas. It maintains that, for the most part, they each failed in their respective roles to ensure the appointment of a Supreme Court justice with the appropriate professional credentials, intellectual integrity, judicial temperament and philosophy, and ability to maintain intellectual distinction or balance on the Court.

A. The Thomas Nomination: President Bush's Racial Politics Meet the Supreme Court

When President Bush nominated Clarence Thomas to fill the vacancy on the Court created by Justice Marshall's resignation, no one took seriously the President's characterization of Justice Thomas as "the best person" in the country to serve on the Court.³⁴ Justice Thomas had limited professional distinction, with his most significant legal experiences having been a controversial tenure as chairman of the Equal Employment Opportunity Commission and barely more than one year of experience as a federal court of appeals

30. See ABRAHAM, *supra* note 11, at 292-95.

31. See TRIBE, *supra* note 6, at 82, 88-89.

32. See *id.*; Massey, *supra* note 9, at 7.

33. See TRIBE, *supra* note 6, at 82, 88-89; Massey, *supra* note 9, at 7-8.

34. John E. Yang & Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST, July 2, 1991, at A1.

judge. At forty-three, Justice Thomas was a controversial conservative who happened to be a judge rather than a distinguished judge—such as Anthony Kennedy or David Souter—who also happened to be a conservative.

Justice Thomas' race and ideology accounted for his nomination. In nominating Justice Thomas, the President dared the Senate to reject an African-American who combined an "up-by-the-bootstraps" life story³⁵ with Judge Robert Bork's flare for alienating liberal interest groups and assailing popular or well-established, rights-granting Supreme Court opinions. Justice Thomas' nomination was a bold political move calculated to make it more difficult for many of the same civil rights organizations and southern blacks, who opposed Judge Bork's nomination, to oppose Justice Thomas.³⁶ In addition, Justice Thomas' nomination was designed in part to remove political heat from the President's opposition to the Civil Rights Act of 1991,³⁷ which continued even in the midst of the Thomas confirmation hearings.³⁸ The Thomas nomination reflected President Bush's general political approach to civil rights: The President hoped to mollify many whites dissatisfied with affirmative action through his opposition to the Civil Rights Act of 1991,³⁹ but he also hoped to attract more blacks to the Republican party through his appointment of Justice Thomas. Thus, it was Justice Thomas' race and ideology, and not his professional credentials, that made him uniquely qualified to merit President Bush's nomination to the Court.⁴⁰

In selecting Justice Thomas, President Bush returned to a practice—nominating extreme ideologues for the Supreme Court—that many hoped had ended with the Senate's rejection of Judge Bork. At the same time, President Bush was following President Reagan's lead by relying on a small cadre of advisors to facilitate the selection

35. Linda Greenhouse, *Who's Judge Thomas? For Now, It Depends on Who You Are*, N.Y. TIMES, Sept. 8, 1991, § 4, at 4.

36. See Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497 (1992).

37. The Civil Rights Act of 1991 became law on November 21, 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1991)).

38. See, e.g., Adam Clymer, *White House Rejects New Compromise on Rights*, N.Y. TIMES, Sept. 25, 1991, at A16.

39. The President opposed the Civil Rights Act of 1991 because he believed it would lead to the implementation of racial quotas in hiring. See Adam Clymer, *Senate Democrats Back a Compromise on Civil Rights Bill*, N.Y. TIMES, Oct. 26, 1991, at A1.

40. Cf. Reginald Alleyne, *Think of the Outcry If This Nominee Were White*, L.A. TIMES, Sept. 10, 1991, at B7 (suggesting that "a white nominee with a record like Thomas' would have a very difficult time winning Senate confirmation" and that a rejection of Judge Thomas would have left the Court "without a black member, because President Bush's nomination of another black would destroy his already ludicrous attempt to portray the nomination of Thomas as one having nothing to do with race. Also, Thomas may actually be the only prominently placed black in the United States whose views on legal issues of race would be acceptable to the Bush Administration").

of federal judges with conservative views far to the right of the judges that Republican Presidents Eisenhower, Nixon, and Ford had tended to appoint.⁴¹ For the most part, Reagan and Bush judges are disposed to agree on a strong libertarian distrust of federal power, as well as on confining the scope of—particularly federal—statutes to their literal language, opposing federal court interference with state legislation on the basis of unenumerated fundamental rights, allowing more religion in public life, giving little deference to precedents that do not conform to their ideologies, deferring to the executive in separation of powers disputes, supporting the death penalty, rejecting or discounting claims of constitutional violations in criminal convictions, and sometimes recognizing economic liberties enforceable against federal and state governments.⁴²

To understand how important ideology rather than experience or competency is to the President's choice of federal judges, particularly in the lower courts, one need look no further than the President's choice to replace Justice Thomas on the United States Court of Appeals for the District of Columbia, John Roberts.⁴³ Rather than choose from among numerous conservative and moderate Republicans with substantially more legal or judicial experience,⁴⁴ the President nominated Roberts, a thirty-seven-year-old white male with modest legal experience, consisting of a prestigious law school record, judicial clerkships, a few years in a big firm practice, a short stint as Deputy Solicitor General, and, perhaps most notably, "important relationships with influential Bush administration officials, especially among the corps of youthful GOP lawyers who are wielding increasing influence in the federal government."⁴⁵ Even though

41. See Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; Amy Singer, *A Federalist in the White House*, AM. LAW., Oct. 1991, at 87.

42. See Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15 (denouncing the current majority's "aggressive, willful, statist" behavior); Earl Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990) (describing the strands of conservatism reflected in contemporary constitutional theory and decisionmaking); cf. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 83, 151 (1991) [hereinafter Calabresi, *What the Bork-Brennan Debate Ignores*] (describing the Reagan and Bush appointees as having "an activist outlook" and as "generally supporting state power and eroding libertarian values"). The nomination of judges and justices with such ideologies contrasts sharply with President Jimmy Carter's system for merit selection of federal judges. See Charles R. Babcock, *Picking Federal Judges: Merit System vs. Pork Bench*, WASH. POST, Nov. 7, 1978, at A4 (describing President Carter's plan to establish a merit selection system for selecting federal judges, including the establishment of special judicial selection commissions appointed by the President); Stuart A. Taylor, Jr., *Carter Judge Selections Praised, but Critics Discern Partisanship*, N.Y. TIMES, Oct. 3, 1980, at A1 (describing President Carter's merit selection system as partially succeeding in removing partisanship in the nomination of federal judges).

43. See Daniel Klaidman, *Bush Chooses Deputy SG for D.C. Circuit*, LEGAL TIMES, Dec. 16, 1991, at 1.

44. *Id.* (indicating Bush passed over "better-known and more seasoned contenders, including Judge Michael Boudin of the [United States] District Court for the District of Columbia and Stuart Gerson, assistant attorney general for the Justice Department's Civil Division").

45. *Id.* at 17; see also Sandra Torrey, *D.C. Lawyer May Be Named to Fill Thomas' Seat*, WASH. POST, Dec. 21, 1991, at A5.

Roberts will be younger than a substantial majority of lawyers practicing before him, his appointment serves the goal of packing the judiciary with ideologues, preferably young, who have had little experience to inform their judgment.⁴⁶ Justice Thomas also fits this mold, being younger than many of the distinguished lawyers appearing before him and expecting to serve far longer on the Court than he spent in training to get there.

The tragic effect of President Bush's apparent attitude about judicial nominations is that this is the longest period in American history in which one political party has without interruption made appointments to the Supreme Court.⁴⁷ President Bush and his small cadre of advisors has helped to solidify the most ideologically unbalanced Court—as well as the most hostile to civil rights—since the Fuller Court, which decided *Plessy v. Ferguson*⁴⁸ in 1896.⁴⁹ The degree to which Justice Thomas fulfills White House plans to overhaul the federal courts becomes even clearer in the next subpart, which examines Justice Thomas' performance during his confirmation hearings.

B. Clarence Thomas: *The Divided Justice*

Essentially, Justice Thomas' confirmation hearings consisted of two phases, the first of which focused on his views on constitutional issues (Phase I) and the second of which dealt with Professor Anita Hill's charges of sexual harassment (Phase II). Before, during, and after the confirmation proceedings, more than one image of Justice Thomas appeared in the public eye. It remains to be seen which of these personas will emerge as an associate justice of the United States Supreme Court.

Prior to his nomination to the Court, Clarence Thomas appeared to be a man at war with himself and his heritage. While he admitted to having benefited from affirmative action programs at Yale Law

46. Yet another example is the recent appointment of Judge J. Michael Luttig, age: thirty-seven, to the United States Court of Appeals for the Fourth Circuit. See Sandra Torrey, *Some Judges Decide a Lifetime on the Federal Bench Is Too Long*, WASH. POST, Jan. 20, 1992, at F5. Shortly after being confirmed by the Senate, Judge Luttig received widespread criticism for continuing to work as an advisor to Justice Thomas in the latter's confirmation hearings in spite of the Code of Judicial Conduct for United States Judges, which "discourages judges from engaging in 'political activity' and from any conduct that appears to compromise their independence or impartiality." Robb London, *A Question of Ethics for a New Judge*, N.Y. TIMES, Oct. 18, 1991, at B16.

47. See ABRAHAM, *supra* note 11, at app. D.

48. 163 U.S. 537 (1896).

49. See Calabresi, *What the Bork-Brennan Debate Ignores*, *supra* note 42, at 83, 151; A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1027 (1992) (urging Justice Thomas not to aid the Court in its continuing "retreat from protecting the rights of the poor, women, the disadvantaged, minorities, and the powerless") (footnote omitted).

School,⁵⁰ he characterized such programs as “offensive.”⁵¹ In addition, despite often claiming that he had not sought civil rights-related jobs because he believed others saw them as the only legal work appropriate for African-Americans, he eventually turned down an opportunity to work in the White House on energy and environmental issues and instead agreed to serve as Assistant Secretary for Civil Rights in the Department of Education, and later as Chairman of the Equal Employment Opportunity Commission (EEOC).⁵² Regrettably, none of these positions, even combined with his experience for little more than a year as a federal appellate judge, required Thomas to spend much meaningful time doing the kind of work expected of Supreme Court justices, including critiquing and crafting legal decisions and arguments.

During the hearings, Justice Thomas consciously cast himself as someone other than the often strident and controversial government figure he had been in the Reagan and Bush administrations. Following the Pin Point strategy,⁵³ Justice Thomas used every opportunity in the hearings to remind the senators about his impoverished youth, his grandfather’s heroic nurturing, and the love and care he received from the nuns at the Catholic schools he had attended, rather than his professional accomplishments.⁵⁴ Justice Thomas tried to have it both ways; claiming that most of his professional record was not relevant to his judicial performance but that he was otherwise uniquely qualified to become an associate justice. The same man, who dared the senators to base their confirmation decisions on the merits of his appointment rather than his race, constantly avoided claiming that his professional record reflected anything pertinent to the consideration of his nomination. Justice Thomas implied that he would be an “empty vessel” who would decide cases strictly as the law dictated, but who would still somehow be influenced in a positive way by his unique upbringing.⁵⁵

50. Ruth Marcus, *Thomas Affirms Right to Privacy*, WASH. POST, Sept. 11, 1991, at A1; cf. Higginbotham, *supra* note 49, at 1018 (“I submit that even your distinguished undergraduate college, Holy Cross, and Yale University were influenced by the milieu created by [Brown v. Board of Education, 347 U.S. 483 (1954),] and thus became more sensitive to the need to create programs for the recruitment of competent minority students. In short, isn’t it possible that you might not have gone to Holy Cross if the NAACP and other civil rights organizations, Martin Luther King and the Supreme Court, had not recast the racial mores of America? And if you had not gone to Holy Cross, and instead had gone to some underfunded state college for Negroes in Georgia, would you have . . . met the alumni who have played such a prominent role in maximizing your professional options?”).

51. Neil A. Lewis, *Thomas’ Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991, at A12.

52. See David A. Kaplan, *Supreme Mystery*, NEWSWEEK, Sept. 16, 1991, at 18, 30.

53. See *supra* note 7.

54. See, e.g., *The Thomas Hearings: Excerpt from Senate Session on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22.

55. Richard L. Berke, *Thomas Vote Delayed Until Tuesday*, N.Y. TIMES, Oct. 2, 1991, at A20 (quoting Senator Paul Wellstone); Tom Wicker, *A Court of Mediocrity*, N.Y. TIMES, Oct. 6, 1991, § 4, at 17 (quoting same).

Given the Pin Point strategy⁵⁶ in Phase I, Justice Thomas appeared to be either lying or woefully uninformed. It stretched credulity for Justice Thomas to claim that he never *seriously* discussed *Roe v. Wade*⁵⁷ with anyone during or after law school,⁵⁸ even though *Roe* was one of the most important constitutional law cases decided by the Court in the past twenty-five years *and* he had criticized it more than once in his public statements and writings.⁵⁹ Justice Thomas further stretched credulity when he claimed that he signed, but never read, at least one government report deriding *Roe*, that he never read a criticism of *Roe* that he had publicly praised, and that he had no personal opinion regarding *Roe* despite his public condemnations of the controversial case.⁶⁰ Even if it were possible that Justice Thomas had not read these documents before being nominated, it is astonishing that he did not read them in preparation for the hearings when he must or should have known he would be questioned about them.

In addition, it stretched credulity for Justice Thomas to protest repeatedly in Phase I of the proceedings that his controversial speeches and articles—often critiquing liberal policies and Court rulings—had not expressed any personal opinions he held or would hold as a justice with respect to judicial decisionmaking. For example, he testified that he did not “see a role for the use of natural law in constitutional adjudication” and that his “interest in exploring natural law . . . was purely in the context of political theory.”⁶¹ Yet his writings consistently reflect a belief that natural law is a legitimate basis for judicial decisionmaking.⁶² For example, in a 1989 law review article, then-EEOC Chairman Thomas wrote that:

without recourse to higher law, we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.⁶³

56. See *supra* note 7.

57. 410 U.S. 113 (1973).

58. See Neil A. Lewis, *At the Bar: The Press Is Caught in a Misrepresentation of Clarence Thomas' Words, or Is It?*, N.Y. TIMES, Dec. 20, 1991, at B9 (summarizing and evaluating Justice Thomas' testimony regarding *Roe*).

59. See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63 n.2 (1989) [hereinafter Thomas, *Higher Law Background*]; Clarence Thomas, *Why Black Conservatives Should Look to Conservative Policies*, Speech to Heritage Foundation (June 18, 1987) [hereinafter Thomas, *Why Black Conservatives*].

60. See Lewis, *supra* note 58, Chemerinsky, *supra* note 36.

61. *Confusion Rules over Natural Law: Rivals Find Ammunition in Theory*, BOSTON GLOBE, Sept. 12, 1991, at 16.

62. See *infra* note 63 and accompanying text.

63. Thomas, *Higher Law Background*, *supra* note 59, at 63-64.

Yet another problematic—and perhaps deceptive—piece of testimony was Justice Thomas’ statement regarding the Court’s 5-4 decision in *Metro Broadcasting, Inc. v. FCC*,⁶⁴ which upheld FCC broadcast license issuing policies favoring racial and ethnic minorities. When asked whether he agreed with *Metro Broadcasting*, Justice Thomas testified, “I have had no basis as a judge to disagree with it.”⁶⁵ Yet, within days, the *Legal Times* broke a story suggesting Justice Thomas was trying to protect his nomination by withholding from publication an opinion he had just written in which he questioned the reach of *Metro Broadcasting* and struck down the FCC’s policy preference for women in broadcast licensing.⁶⁶ Justice Thomas denied that he was withholding the opinion for political reasons,⁶⁷ but he proceeded to release the opinion as reported months after his confirmation.⁶⁸

Similarly, in yet another apparent contradiction, Justice Thomas testified that he accepted a marital right of privacy but held no personal opinion about privacy cases such as *Griswold v. Connecticut*,⁶⁹ even though he had described the holding as a judicial “invention.”⁷⁰ If Justice Thomas were to be taken at his word, the question becomes how well suited for the Supreme Court is someone who did not hesitate to take public positions on controversial issues about which he never has read or studied seriously, showed questionable judgment regarding his preparation to defend his record in the only public forum in which he could be held accountable, and exhibited virtually no intellectual curiosity about the most dominant subject area—constitutional law—with which he would be dealing on the Court.

During Phase II of the hearings,⁷¹ the image of Justice Thomas that emerged was no more appealing than the one that had appeared in Phase I. His characterization of Phase II of the hearing as

64. 110 S. Ct. 2997 (1990).

65. Stuart Taylor, Jr., *Beware the Judicial Override*, N.Y. TIMES, Oct. 3, 1991, at A25.

66. See Neil A. Lewis, *Appeals Court Ruling by Thomas Limits F.C.C. Affirmative Action*, N.Y. TIMES, Feb. 20, 1992, at A1.

67. *Id.*

68. On February 19, 1992, Justice Thomas, by special designation, returned to the appellate court to release his opinion (joined by Judge James Buckley, over a strong dissent by Chief Judge Abner Mikva) in *Lamprecht v. FCC*, No. 88-1395, 1992 U.S. App. LEXIS 1997 (D.C. Cir. Feb. 19, 1992), striking down the FCC’s policy giving preferential treatment to women in awarding broadcast licenses. In explaining that the policy was unconstitutional because it denied equal protection of the law to white men, Justice Thomas rejected *Metro Broadcasting*’s expressed deference to congressional fact-finding in support of its laws on the ground that “the Government had failed to show that its sex-preference policy is substantially related to achieving diversity on the airwaves.” *Id.* at *30.

69. For Justice Thomas’ testimony on *Griswold*, see, for example, Linda P. Campbell, *Thomas Supports a Right to Privacy; Reply Surprises Democrats; Judge Won’t Discuss Abortion*, CHI. TRIB., Sept. 11, 1991, at A1.

70. Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, in *ASSESSING THE REAGAN YEARS* 398 (David Boaz ed., 1988).

71. See text preceding *supra* note 50.

"a high-tech lynching for uppity blacks"⁷² was shockingly hypocritical for at least two reasons. First, Justice Thomas and his sponsor, Senator John Danforth, had asked for the Phase II hearings.⁷³ Second, Justice Thomas spent much of his professional life criticizing other African-Americans for blaming the ills that befell them on racism rather than their own shortcomings.⁷⁴ He even denounced his sister by invoking the stereotype of a "welfare queen,"⁷⁵ although he had her sit behind him during his confirmation testimony.

If the nominee that appeared at the hearings was not the real Clarence Thomas, but rather a caricature molded by his handlers, then one can only wonder who is the real Clarence Thomas and whether he is qualified to sit on the Court. Was it the real Clarence Thomas who, in a 1987 speech, praised Lewis Lehrman's pro-life oriented critique of *Roe v. Wade* as "a splendid example" of the application of natural law to judicial decisionmaking;⁷⁶ or was it the real Clarence Thomas who testified in 1987 that he only "skimmed" the Lehrman article?⁷⁷ Was it the real Clarence Thomas who testified before the Senate Judiciary Committee that he was qualified to sit on the Supreme Court because he had the compassion to ponder "but for the grace of God[,] there go I" whenever he saw a busload of prisoners coming to the District of Columbia Courthouse?⁷⁸ Or was it the real Clarence Thomas who, in one of his first dissents, sharply criticized the seven member majority for applying the Eighth Amendment's ban on cruel and unusual punishment to confinement conditions in general and to the gratuitous beating of a black inmate?⁷⁹ Was it the real Clarence Thomas who testified

72. *The Thomas Nomination: Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at A12.

73. See Chemerinsky, *supra* note 36.

74. See, e.g., Derrick Z. Jackson, *Hardly a Lynch Victim*, BOSTON GLOBE, Oct. 16, 1991, at 15. In the aftermath of Thomas' confirmation, these charges prompted an open letter from Judge A. Leon Higginbotham, Jr., who was somewhat skeptical of Justice Thomas and other black conservatives. "Other than their own self-advancement, I am at a loss to understand what it is that the so-called black conservatives are so anxious to conserve." Higginbotham, *supra* note 49, at 1018.

75. Charles R. Lawrence III, *Perspectives on the Thomas Controversy*, L.A. TIMES, Oct. 15, 1991, at B7; see also Murray Kempton, *What About the Children, Senators?*, NEWSDAY, Sept. 18, 1991, at 13 (referring to Justice Thomas, then-EEOC chairman, as having "trash[ed] his nephews as welfare addicts"); Neil A. Lewis, *Thomas' Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991, at A12 (quoting Justice Thomas, then EEOC Chairman, as saying his sister "gets mad when the mailman is late with the check").

76. Thomas, *Why Black Conservatives*, *supra* note 59, at 8.

77. Ruth Marcus, *Thomas Refuses to State View on Abortion Issue: Nominee Steadfast amid Senators' Questions*, WASH. POST, Sept. 12, 1991, at A1, A4.

78. *Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Sept. 13, 1991, at A18.

79. Joined only by Justice Scalia, Justice Thomas argued that the Eighth Amendment's ban on cruel and unusual punishment did not protect prisoners from beatings by guards unless the prisoners suffered serious injuries. Justice Thomas scolded the majority, including Chief Justice Rehnquist, for adhering to precedents which "cut the Eighth

under oath, that he had no judicial ideology hostile to liberal judicial decisionmaking—regardless of any public statements to the contrary—but who has voted differently from Justice Scalia, the Court's most strident conservative ideologue, only twice thus far.⁸⁰ First, as the sole dissenter in *Dawson v. Delaware*, Justice Thomas caustically attacked Chief Justice Rehnquist's majority opinion ruling that the First and Fourteenth Amendments prohibit, in the capital sentencing phase of a murder trial, the introduction of evidence of a defendant's membership in the Aryan Brotherhood which began after the defendant had become a prisoner for the crime for which he was being sentenced.⁸¹ The second divergence occurred "when [Justice] Scalia issued a three sentence concurrence in a minor case involving federal [civil] procedure."⁸²

Ultimately, the irony of Justice Thomas' career may be that, despite his lifelong protestations to the contrary, he may be remembered primarily for his work in civil rights. Indeed, he has done little, if any, memorable work in any other area. Justice Thomas has reached a point at which it would be futile to protest further against being associated closely with the one area of the law that he claimed he sought to avoid.⁸³ The question now facing him is: In rising above his impoverished background, how much of it did Justice Thomas leave behind? We can only wonder in what ways he will use his race, his impoverished background, the lessons his grandfather taught him, and the discrimination he often has faced—

Amendment loose from its historical moorings" by applying it to both punishment and confinement conditions. See *Hudson v. McMillian*, 60 U.S.L.W. 4151, 4155, 4157 (U.S. Feb. 25, 1992) (Thomas, J., dissenting); see also David Margolick, *At the Bar: From a Lonely Prison Cell, an Inmate Wins an Important Victory for Civil Liberties*, N.Y. TIMES, Mar. 6, 1992, at B8 (describing how a prison guard, after using racially abusive language, beat Hudson for washing his laundry in his cell toilet). In another of his first votes, Justice Thomas joined Chief Justice Rehnquist and Justice Scalia in dissenting from the Court's decision to override Justice Scalia's ruling as a Circuit Justice to reverse an order staying an execution. See *Collins v. May*, 112 S. Ct. 576 (1991).

80. See L. Gordon Crovitz, *Justice Thomas's Opinion: No Wonder They Wanted to Stop Him*, WALL ST. J., Jan. 29, 1992, at A13 (indicating "Justice Thomas has voted with Justice Scalia more than any other Justice" and suggesting that "Justice Thomas already has done more than solidify the intellectual conservative wing of the Court. It also seems likely that his lifelong career on the Supreme Court will be a constant reminder to his critics of why they went to such lengths to try to block his nomination"); Ruth Marcus, *Early Returns Show Justice Thomas as Advertised: Conservative*, WASH. POST, Mar. 1, 1992, at A6; see also Linda Greenhouse, *Judicious Activism: Justice Thomas Hits the Ground Running*, N.Y. TIMES, Mar. 1, 1992, § 4, at 1 (criticizing Justice Thomas for his "willingness to discard precedents in which the Court departed from the search for the original understanding," for chiding the majority in *Hudson* "for endorsing 'the pervasive view that the Federal Constitution must address all ills of our society,'" and for using a tone in his opinions "reminiscent of the speeches in which [he] used to criticize the Court when he served as one of the Reagan Administration's chief emissaries to conservatives interested in reshaping the Federal judiciary. At his confirmation hearing, he said he had made the speeches as a 'part-time political theorist,' but that when he became a Federal judge [he] had 'shed the baggage of ideology'").

81. *Dawson v. Delaware*, 60 U.S.L.W. 4197, 4201 (U.S. Mar. 9, 1992) (Thomas, J., dissenting) (suggesting that majority's "[d]enying that [the defendant's] gang membership told the jury anything about his activities, tendencies, and traits—his 'character'—ignores reality").

82. Marcus, *supra* note 80.

83. See *supra* note 52 and accompanying text.

all of which he presented as the only basis on which the Senate should confirm him⁸⁴—to become an effective spokesperson on the Supreme Court in dealing with the civil rights issues that surely will come his way. In short, will Justice Thomas tell the same stories on the Court that he told in his confirmation hearings, and will a more formidable, coherent, uplifting and lasting vision of constitutional law ever emerge from the beneficiary of the Pin Point Strategy?

C. *The Senate: "You Take the High Road, and I'll Take the Low Road"*

To appreciate the effectiveness of the Pin Point strategy,⁸⁵ it is important to analyze separately the performance of the Democratic and Republican senators in each phase of the confirmation hearings.⁸⁶ Despite beginning somewhat cautiously in Phase I with their criticism, the Democrats on the Senate Judiciary Committee—with the exception of Senator DeConcini—eventually took Justice Thomas to task for his evasive testimony, surprisingly weak grasp of constitutional law, and dubious credentials. For example, Senator Metzenbaum opposed Justice Thomas based on the latter's controversial record as Chairman of the EEOC, unbelievable testimony before the Judiciary Committee, and inadequate "legal credentials" to serve on the Court;⁸⁷ Senator Leahy opposed Justice Thomas because the nominee lacked "the experience and qualifications that a Supreme Court Justice ought to have";⁸⁸ Senator Kohl opposed Justice Thomas for his "selective recall," "lack of legal curiosity," and "limited legal knowledge";⁸⁹ and Senator Heflin voted against Justice Thomas' confirmation because Justice Thomas lacked credibility and competency.⁹⁰ Nevertheless, Justice Thomas' evasive answers and expressions of ignorance⁹¹ had little negative impact on the Senate's portended vote at the conclusion of Phase I.⁹²

In addition, Justice Thomas' performance in Phase I often seemed to hinder the senators from pursuing a more elevated discussion with him regarding constitutional law and his intellectual fitness to

84. See *supra* notes 53-54 and accompanying text.

85. See *supra* note 7.

86. Professor Chemerinsky notes that the Pin Point Strategy worked particularly well with a number of the southern Democrats, who approved of Justice Thomas' views on affirmative action and were keenly aware that much of their support came from African-Americans, who tended to support Thomas. See Chemerinsky, *supra* note 36.

87. See *The Thomas Nomination: Excerpts from Remarks by Members of Senate Judicial Panel on Thomas*, N.Y. TIMES, Sept. 28, 1991, § 1, at 8.

88. *Id.*

89. See *id.*

90. See Richard L. Berke, *Two Democrats on Senate Panel Say They Will Oppose Thomas*, N.Y. TIMES, Sept. 27, 1991, at A1.

91. See *supra* notes 55-70 and accompanying text.

92. See, e.g., Neil A. Lewis, *The Thomas Hearings; Thomas to Win Court Seat, Senators Predict*, N.Y. TIMES, Sept. 14, 1991, § 1, at 1.

serve on the Court, often deflecting or obstructing more intensive interrogation. First, in response to questioning from Senator Leahy, Justice Thomas stated he did not debate *Roe v. Wade* as a law student because he was married and working at the time, and “did not spend a lot of time around the law school doing what all the other students enjoyed so much, and that is debating all the current cases.”⁹³ Yet *Newsweek* reported that, as a student, Justice Thomas usually “spent the entire day at [law] school, not going home until after midnight.”⁹⁴ Justice Thomas again evaded an attempt to engage him in a discussion of constitutional law when he later testified, in the midst of questioning from Senator Leahy, that he did not believe there were any cases holding that fetuses are not persons entitled to the protections of the Fourteenth Amendment.⁹⁵ The obvious answer was *Roe*, which held that fetuses are not “persons” for constitutional purposes.⁹⁶ Afraid of appearing to badger the witness, senators did not use Justice Thomas’ ignorance about the elementary holding of a case, which even he acknowledged as being one of the most important constitutional law cases decided in this century,⁹⁷ to stress that Justice Thomas lacked the intellectual distinction or fitness to serve on the Court.⁹⁸

Second, Justice Thomas’ testimony that he thought the Supreme Court upheld a private employer’s policy barring pregnant women from working on jobs that might harm their fetuses was equally damning.⁹⁹ In fact, the Court struck down just such a policy as violating federal employment discrimination laws (Title VII) in *International Union, U.A.W. v. Johnson Controls*.¹⁰⁰ *Johnson Controls* was one of the most important Title VII decisions last term and was within Justice Thomas’ supposed area of specialization; yet his misstatement of its holding appeared to become lost in the midst of his many evasive and incredible statements under oath.

Third, in response to the controversial question of what criterion Justice Thomas would use for determining whether to overrule a constitutional precedent, he approved the standard announced in Justice Thurgood Marshall’s final dissent,¹⁰¹ which suggested the Court should have “strong reasons” for overruling a prior decision.¹⁰² Justice Thomas testified further that the Court’s standard

93. Marcus, *supra* note 77, at A4.

94. David A. Kaplan et al., *Supreme Mystery*, *NEWSWEEK*, Sept. 16, 1991, at 18, 26.

95. See Neil A. Lewis, *Thomas Undergoes Tough Questioning on Past Remarks*, *N.Y. TIMES*, Sept. 12, 1991, at A1, A21.

96. 410 U.S. 113 (1973).

97. See Anna Quindlen, *Trying to Fill In Clarence Thomas’ Newly Blank Slate*, *CHI. TRIB.*, Sept. 17, 1991, at 19 (quoting Justice Thomas as testifying, “I cannot think of any cases that have held [that fetuses are not persons for Constitutional purposes]”).

98. Cf. Neil A. Lewis, *High Court Nominee’s Testimony Continues to Frustrate Democrats*, *N.Y. TIMES*, Sept. 13, 1991, at A1.

99. See Neil A. Lewis, *Thomas Ends Testimony but Senators Grumble over Elusive Views*, *N.Y. TIMES*, Sept. 17, 1991, at A14.

100. 111 S. Ct. 1196 (1991).

101. *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

102. Lewis, *supra* note 99.

for overruling precedents "should be as uniform as possible"¹⁰³ and that he believed "the cases in the individual rights area deserve the greatest protection."¹⁰⁴

Yet no senator probed the accuracy, sincerity, or implications of Justice Thomas' answers. For instance, he slightly misstated Justice Marshall's view on *stare decisis*, which would have required that the Court overrule precedents only if those decisions were decided wrongly *and* would lead to other serious problems if followed.¹⁰⁵ Nor did any senator ask Justice Thomas to explain what he would accept as "strong reasons" for overruling precedent. In addition, it would have been possible to assess Justice Thomas' position on precedent by asking Justice Thomas to cite and distinguish between cases he felt should be overruled and those he felt should not.

Fourth, when Justice Thomas testified that the only opinion in *Griswold v. Connecticut*¹⁰⁶ with which he agreed was Justice Harlan's concurrence, the same stance taken by Justices Kennedy and Souter,¹⁰⁷ no one pressed Justice Thomas on why he preferred Justice Harlan's concurrence over Justice White's concurrence or Justice Douglas' majority opinion.¹⁰⁸ Given the general admiration many senators and scholars have for Justice Harlan's jurisprudence in general, and his *Griswold* concurrence in particular, Justice Thomas' professed agreement with the latter was such welcome news to the Democratic senators on the Judiciary Committee that it seems to have misled them into thinking Justice Thomas may have more in common with Justice Harlan than is the case.

103. Marcus, *supra* note 77, at A4.

104. *Id.* It did not take Justice Thomas long, however, to renege on this statement. Within his first four months on the Supreme Court, Justice Thomas called for the reconsideration and overruling of the Court's well established precedents on the Confrontation Clause and the Eighth Amendment. See *supra* note 79; *White v. Illinois*, 112 S. Ct. 736, 744, 746 (1992) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Court should have reexamined the Court's Confrontation Clause precedents because "[t]he standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment" and that he "wr[ote] separately only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the clause itself").

105. *Payne*, 111 S. Ct. at 2621-22. See generally Gerhardt, *Role of Precedent*, *supra* note 10, at 120-21.

106. 381 U.S. 479 (1965).

107. See Campbell, *supra* note 69. Justice Thomas' endorsement of *Griswold* "was almost identical to statements given a year ago by David Souter." *Id.*

108. The honest answer would probably have been that Justice Harlan did not live long enough to sit on the Court during *Roe v. Wade*, 410 U.S. 113 (1973), and that Justice Douglas' concurrence and Justice White's dissent in *Roe* were not positions with which Justice Thomas wanted to associate himself. Other issues many senators failed to probe during the hearing included Justice Thomas' tenure as EEOC chairman, see Chemerinsky, *supra* note 36, and Justice Thomas' endorsement of Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), which has racist elements.

Phase I presented the Democrats with numerous other problems. Justice Thomas repeatedly asked the Committee, in effect, to confirm him on the basis of his character and achievements while claiming that his professional record said nothing about how he would perform as a justice.¹⁰⁹ If Justice Thomas was to have been taken at his word, then it is not clear on what basis the administration wanted him as a Supreme Court justice or could have claimed him as the "best person" for the job.¹¹⁰ If Justice Thomas' professional record were indicative of how he would perform on the Supreme Court, then the Committee should not have hesitated to reach conclusions about his record, with or without Justice Thomas' assistance.

In addition, the Democrats in Phase I did not fully address Senator Hatch's charge that, particularly with respect to abortion, they were holding Justice Thomas to a far tougher standard than the one to which they had held Justice Souter.¹¹¹ The Democrats could have clarified their strategy and Justice Thomas' own dubious performance in the hearings by arguing that Justice Thomas merited different treatment because, unlike Justice Souter, Justice Thomas had publicly criticized *Roe* and, therefore, his testimony distancing himself from that criticism merited close scrutiny. In addition, Justice Thomas' testimony was far more evasive than Justice Souter's, which displayed a vastly greater degree of familiarity with the nuances of constitutional law and judicial decisionmaking.¹¹² Moreover, unlike Justice Souter, Justice Thomas relied on his character as the primary basis for confirmation. Thus, the Democrats had license to probe his character, intellectual abilities, and integrity, particularly about an issue as important as abortion.

Neither the Democrats nor Republicans fully addressed the statements from various witnesses that the hardships Justice Thomas overcame in his youth could not forecast his performance as a judge.¹¹³ More than one witness' testimony suggested that Justice Thomas' background did not necessarily make him a better person or judge, or reflect anything probative about his current attitudes toward various segments of society, judicial authority, or federalism;¹¹⁴ yet this testimony went unaddressed.

109. See *supra* notes 53-55 and accompanying text.

110. *Supra* note 34 and accompanying text.

111. See Neil A. Lewis, *High Court Nominee's Testimony Continues to Frustrate Democrats*, N.Y. TIMES, Sept. 13, 1991, at A1.

112. See, e.g., Baier, *supra* note 24.

113. See *Excerpts from Hearing on Thomas' Nomination*, N.Y. TIMES, Sept. 18, 1991, at A16.

114. See, e.g., *id.* (testimony of Professor Patricia King of the Georgetown University Law Center). Professor King testified, "I don't think Judge Thomas' background is any more a predictor of his future service on any bench than mine has been for my career [as a law professor]. . . . Somehow, Judge Thomas seems not to remember those he must have encountered along the way who were lost to the darkness simply because there was no help for them." *Id.* Harvard Professor Chris Edley, Jr., another prominent African-American legal scholar, also testified that character alone does not necessarily make someone a good justice. *Id.*

In Phase II, Justice Thomas' charges of racism¹¹⁵ cowed the Democrats into not pressing him on several matters relevant to the illumination of his character and Professor Hill's credibility. None of the Democrats responded to Justice Thomas' charge that Professor Hill's allegations were the product of a racist conspiracy.¹¹⁶ The senators neglected to answer Justice Thomas' charge that Phase II was racist by reminding him that the investigation undertaken in Phase II was pursuant to a request made by Justice Thomas and Senator Danforth.¹¹⁷ Nor did anyone press Justice Thomas to identify the racists responsible for the probe—which he had requested—or to prove the existence of the racist conspiracy against him, including how it could have started ten years earlier when Professor Anita Hill first told a friend about being sexually harassed by Thomas.¹¹⁸

Moreover, the Chairman of the Committee, Senator Biden, may not have clarified sufficiently the most difficult question in Phase II. Senator Biden conducted Phase II as if the burden of proof were on Justice Thomas' accusers. If the only issue in Phase II were the truth of Professor Hill's allegations, then this position was absolutely correct: Justice Thomas was entitled to a presumption of innocence regarding any specific allegations of misbehavior in the office. Otherwise, any nomination could be thwarted by anyone coming forward with false accusations. But if the issue in Phase II was Justice Thomas' fitness to serve on the Court, then the burden of proof remained on Justice Thomas, particularly because his character was already put into question by much of his earlier evasive and incredible testimony.¹¹⁹ In other words, the debate over the truth of Professor Hill's allegations should not have clouded the issue whether Justice Thomas had established generally the kind of character and professional fitness to merit confirmation to the Court.¹²⁰

115. See *supra* text accompanying note 72.

116. See, e.g., Steve Daley & Mitchell Locin, *Day of Reckoning for Thomas; Democrats from South May Hold Key*, CHI. TRIB., Oct. 15, 1991, at A1 (referring to Justice Thomas' remark that he was a "victim" of a racist conspiracy).

117. See *supra* note 73 and accompanying text.

118. See *The Thomas Nomination: Statements to Senators from Witnesses for Anita Hill*, N.Y. TIMES, Oct. 14, 1991, at A1.

119. See *supra* notes 53-82 and accompanying text.

120. In addition, Senator Biden may have given in too easily to the Administration's requests to allow Justice Thomas to testify during prime time and to forego personal questions about his conduct outside of the office. See Helen Dewar, *Democrats Criticized for Strategy on Thomas: Approach in Hearings Called Too Cautious*, WASH. POST, Oct. 20, 1991, at A11. Senator Biden's acquiescence in these requests allowed the Committee only a partial view of Justice Thomas' character, yet his character was the only real basis on which Justice Thomas was allowing the Senate to evaluate him. See *supra* notes 53-55 and accompanying text. Regrettably, questioning was either discouraged, or simply not allowed, with respect to (1) the dissolution of Justice Thomas' first marriage, which

For their part, the Republicans in Phase I—with the exceptions of Senators Grassley and Brown—appeared to be apologists for Justice Thomas, overlooking his many foibles in the hopes of attracting more African-Americans to their party and of his being the kind of ideologue they would like to see on the Court. They generally failed to question the Bush administration's faith in the nominee's qualifications and ideology and avoided pressing him on any substantive matters or on his lack of judicial experience.

During Phase II, Senators Hatch, Simpson, and Specter seemed to twist facts, mischaracterize Professor Hill's testimony, give credence—without proof—to the most outlandish theories on why she was lying before the Committee, and assume without serious inquiry that Justice Thomas had an exemplary character and was credible. None of the three senators allowed the facts to get in the way of their mission to discredit Professor Hill. Senator Simpson referred cryptically to information “coming in over the transom”;¹²¹ Senator Specter triumphantly declared that Professor Hill “committed perjury” even though there was no credible evidence to support the claim (and he later recanted);¹²² and Senator Hatch sanctimoniously suggested that anyone who acts the way Professor Hill described Justice Thomas as acting could not be a “normal person,” but rather a “psychopathic sex fiend or a pervert”—in contrast to Justice Thomas' presumably always-professional conduct.¹²³ Senator Hatch even suggested that Hill must have lifted parts of her testimony from the horror novel, *The Exorcist*,¹²⁴ and an opinion from the Tenth Circuit, in which Professor Hill lives.¹²⁵

The Democrats and Republicans together must share the blame for not taking seriously Professor Hill's—and other women's—claims of sexual harassment by Justice Thomas. Once the Federal

seemed painfully relevant to his state of mind at the time of the alleged harassment, (2) Justice Thomas' behavior outside the office, and (3) whether Professor Hill's allegations could have been prompted by her personal dislike for, or philosophical disagreements with, Justice Thomas.

121. *Against Clarence Thomas: Even 'Don't Know' Calls for a 'No' Vote*, N.Y. TIMES, Oct. 15, 1991, at A24.

122. *Id.*

123. Walter V. Robinson, *Thomas Says He'll Fight to the End: Supporters Rip into Sex Allegations*, BOSTON GLOBE, Oct. 13, 1991, at 1. This line of questioning may have had its desired effect in that it put the burden on the senators who disbelieved Justice Thomas to show that he had a pattern or practice of engaging in the type of behavior alleged by Professor Hill. Although making this showing would have been relevant—but not dispositive—in a 1991 lawsuit brought against Justice Thomas for sexual harassment, it was irrelevant to a simple claim that his behavior was tasteless, degrading to women, and unprofessional, if not illegal. As the administration's top official responsible for redressing sexual harassment claims, Justice Thomas should have been held to a higher standard of performance in the office than just whether his conduct was legal. Moreover, this kind of questioning by Senator Hatch was just one dramatic example of why each side should have designated a special counsel to ask their respective questions. The problem was that the senators apparently were not familiar with changes in sexual harassment law or inadequately identified the relevant factors for determining the credibility of the witnesses in Phase II.

124. Michael Hedges, *Hatch Finds Curious Precedents for Hill's Allegations*, WASH. TIMES, Oct. 13, 1991, at A18.

125. *See id.* (referring to *Carter v. Sedgwick County*, 705 F. Supp. 1474 (D. Kan. 1988)).

Bureau of Investigation (FBI) Report indicated that it was a swearing match between Justice Thomas and Professor Hill as to whether he sexually harassed her, no one in a position of authority on the Committee seemed to want to go forward, even to hold closed hearings. In fact, many senators, including Senator Hatch, did not even read the FBI report when it first came out.¹²⁶ Closed hearings would have fulfilled the Senate's duty to take the charges seriously and to assess the only thing Justice Thomas ever willingly put into issue during the hearings—his character. At the very least, the FBI could have been asked to extend its investigation to probe into Professor Hill's motivations for lying, Justice Thomas' general conduct in the office, and other allegations of sexual harassment directed at Justice Thomas.

Moreover, most of the senators did not separate legal claims of sexual harassment from mere allegations of improper sexual conduct. The Republicans asking questions in Phase II tried to suggest either that Professor Hill must have been lying because she did not seek legal redress at the time Justice Thomas allegedly sexually harassed her, or that her claims did not rise to the level of being legally cognizable. The Senate failed to recognize that our general sensitivity and understanding of sexual harassment is far different today than it was in the early 1980s, and that Professor Hill did not have available at the time of the alleged harassment the same kind or range of legal remedies a woman would have now.¹²⁷ Nor did any of the senators on the Committee focus on the impropriety of Justice Thomas' conduct as opposed to its illegality, a particularly apt focus given that Justice Thomas relied solely on his character for confirmation. In addition, in the event that any of the senators believed Professor Hill's allegations, not one of them pointed out that Justice Thomas' outright denials under oath constituted perjury.

III. *Politics and the Court in the 1990s: Back to the Future*

If the system for nominating and confirming Supreme Court justices does not require constitutional amendment, the question remains how the President, the Senate, and the public can ensure the elevation of political discourse on, and the criteria for, evaluating Supreme Court justices. The answer turns largely on making minor adjustments to the nomination and confirmation proceedings to

126. See Timothy M. Phelps & Gaylord Shaw, *The 2nd Woman: New Witness Against Thomas Was Fired from EEOC*, *NEWSDAY*, Oct. 11, 1991, at 5.

127. For example, at the time of the alleged harassment, Professor Hill would not have had any claim under Title VII. However, assuming arguendo there would have been no statute of limitations problem, she could have conceivably brought a Title VII action against Justice Thomas at the time of the hearings for back pay and reinstatement. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 75 (1986).

make it easier for the public to participate more fully in the process, and for the President and the Senate to undertake nobler and more accountable judgments regarding the selection of Supreme Court justices. These changes may be particularly effective in aiding the divided state of our government to allow its institutions to function optimally in the nomination and confirmation process.

One solution is for members of the public to become more involved in the nomination and confirmation process. If the public and its representatives in the Senate do not share the President's views on the criteria to be used in evaluating and choosing federal judges in general and Supreme Court justices in particular, then the public and the Senate should demand that the President prove his appointments are in the best interests of the American people, the Court, and the Constitution, and hold him politically accountable when they are not.

The Senate, and particularly the Judiciary Committee, could also do more to influence the selection of federal judges. First, the Judiciary Committee could follow the example established by President Hoover's selection of Justice Cardozo and refuse to confirm anyone unless the person is of the Committee's own choosing.¹²⁸ Of course, the effectiveness of this proposal depends on the Senate's ability to stand its ground in the face of presidential opposition.

Second, the Senate and, in particular, the Judiciary Committee should not refrain from explicitly endorsing nominees on the basis of their credibility, judicial temperament and philosophy, and professional experience. In other words, the Senate should reach some consensus on the credentials it would like for judicial nominees to possess, and then adhere to that consensus in spite of presidential opposition. For example, the majority on the Judiciary Committee could announce at the outset of confirmation proceedings that they will not vote for any nominees who give evasive answers to questions about their public records, fail to affirm expressly certain fundamental liberties or freedoms that members of the Committee would like to see endorsed, or fail to demonstrate a level of professional accomplishment that the members of the Committee want to see in a federal judge including a Supreme Court justice. If the President were to nominate to the bench ideologues with little meaningful experience in the law and the craftsmanship of judging, then the Senate could exercise its political judgment to demand a nominee with more substantial and meaningful professional experience.

Third, the Committee could spend less time interrogating the nominee and more time examining the nominee's public record and questioning people who are familiar with that record. For example, the Committee could make clear at the outset of its proceedings that it will place more importance on how a cross-section of the legal community perceives the nominee's qualifications to become a

128. See *supra* notes 11-12 and accompanying text.

Supreme Court justice than on the nominee's testimony. In addition, in questioning people who know the nominee, the Committee could be more aggressive in uncovering stances on constitutional issues that the nominee may have communicated privately.¹²⁹

Fourth, the Senate should reach some consensus on the burden of persuasion in confirmation proceedings. In this regard, the Senate could follow the lead of Senators Gore and Simon, both of whom argued that the burden of persuasion in a confirmation battle should rest with the nominee.¹³⁰ In the final debate on the Thomas nomination on the floor of the Senate, they both took the position that the burden of persuasion was on the President, the nominee, or both, to show that Justice Thomas merited a seat on the Court. For example, Senator Simon pointed out that "the benefit of the doubt" regarding a Supreme Court nominee should be resolved in favor of "the people of this country" and the Constitution.¹³¹ Both senators maintained in effect that the Senate's ultimate fidelity should have been to the future generations of Americans who would have to live under Justice Thomas' rulings. In short, their position was that because Justice Thomas was asking the Committee to give him life tenure with which to become a final interpreter of the Constitution, the Senate should not have entrusted the Constitution to him unless it was fully comfortable with doing so.

Finally, the Judiciary Committee should reconsider its scheduling of confirmation hearings. The Committee delays hearings to allow for investigation of the nominee, but the delay enables the administration to fully coach or indoctrinate a nominee in the law. Any delay actually threatens judicial independence because it increases the degree to which the administration can influence the judicial philosophy of a nominee. In addition, the nominee may feel inclined to favor the administration based on his ideological indoctrination and the assistance he receives—particularly during heated hearings—to achieve confirmation.

Instead, the Committee could schedule hearings shortly after the President announces his choice for the Court and focus the hearings primarily on the public record of the nominee. If the Committee were to choose to hear from the nominee, its more rapid scheduling

129. For example, the Committee could cross-examine a nominee as to whether he spoke to anyone about his prospective nomination or testimony and, if so, to whom did he speak, when did the conversation(s) take place, what was said, and why did the conversation occur.

130. See *Senate Debate on the Nomination of Judge Thomas*, Federal News Service, Oct. 15, 1991, available in LEXIS, Nexis Library (remarks of Senator Simon) [hereinafter *Simon's Remarks*], *Senate Debate on the Nomination of Judge Thomas*, Federal News Service, Oct. 8, 1991, available in LEXIS, Nexis Library (remarks of Senator Gore).

131. See *Simon's Remarks*, *supra* note 130.

could force the nominee to rely more on his own resources. In addition, the Committee could limit the nominee's testimony to specific responses to particular attacks on his record or specific arguments regarding why he should be confirmed. Or the Senate might even consider returning to its pre-1925 practice of simply evaluating nominees on the basis of their public records rather than their testimony before the Committee.¹³² The earlier practice never precluded substantial give-and-take between the President and the Senate whenever they each felt inclined to become involved seriously in nomination and confirmation decisions.¹³³

Conclusion

In the twenty-four years between Justice Marshall's and Justice Thomas' confirmation hearings, this nation traveled from being divided over fear, hatred, and hope in having a distinguished African-American on the Supreme Court to feeling guilty, confused, and angry about the place of race, racism, and sexism in the nomination and confirmation of Supreme Court justices. If Justice Frankfurter's observation was correct that constitutional law is "applied politics, using the word in its noblest sense,"¹³⁴ then it is hard to find the nobility in the aftermath of Justice Thomas' nomination and confirmation. Indeed, Justice Thomas' performance thus far as an associate justice exposes his evasive, and oftentimes seriously misleading, testimony in his confirmation hearings *and* the Senate's negligence in allowing him to get away with such testimony.¹³⁵

Nevertheless, we can still recapture some nobility with two remembrances. First, we should recall those moments in the history of the nomination and confirmation process when the President and the Senate pushed each other to consider seriously the best interests of the nation, the Court, and the Constitution in selecting and evaluating Supreme Court nominees. Moreover, the framers envisioned the Senate as the body best suited to deliberate carefully on the great political issues of the day,¹³⁶ of which Justice Thomas' confirmation was clearly one.

132. Indeed, the practice of allowing nominees to testify before a committee did not become firmly entrenched until about 1955, and only since 1959—with the hearings on Justice Potter Stewart's nomination—did it become customary for the Senate to inquire in any detail about a nominee's views on cases or legal philosophy. See ABRAHAM, *supra* note 11, at 251-95.

133. If the Committee were to adopt this proposal—something I admit is highly unlikely—it would then be incumbent upon the Senate to stop nominees from paying private "courtesy calls" on each senator. Otherwise, the nominees could easily undermine the rationale behind the proposal by making private assurances to various senators. If, however, the Committee barred nominees from testifying in confirmation hearings but the Senate permitted private "courtesy calls" with each senator, then the Committee should ensure that any information about the nominee's judicial ideology which was shared privately with any senator is aired publicly.

134. Alexander M. Bickel, *Applied Politics and the Science of Law: Writings of the Harvard Period*, in FELIX FRANKFURTER: A TRIBUTE 164, 166 (Wallace Mendelson ed., 1964).

135. See *supra* notes 79-82 and accompanying text.

136. See PETER C. HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 106 (1984).

Second, we could all do well to remember the example Justice Marshall set throughout a lifetime dedicated to racial justice. No lawyer or judge ever spoke more eloquently, powerfully, forthrightly, or tirelessly for the powerless, disenfranchised, and dispossessed among us. Justice Marshall remains the only Supreme Court justice who devoted most of his professional life to helping the underprivileged, who had the courage to criticize relentlessly from the bench and elsewhere the public and private sectors for their failures in achieving racial equality, and who—like Justice Thomas—had suffered the sting of racism throughout his life. Justice Marshall's life reminds us that Justice Thomas is not the first person to be able to tell the kinds of stories he told to the Judiciary Committee. Justice Marshall's career, ranging from a brilliant and courageous public-interest lawyer for over two decades, to a federal court of appeals judge, to United States Solicitor General, reminds us of the level of professional distinction we can demand from and get in our Supreme Court justices.¹³⁷

However, Justice Marshall had no monopoly on principle, and Justice Thomas has every right in the world to chart his own judicial course. Justice Marshall emphasized that the federal courts exist in large part to protect individual liberties from being infringed by the government, at all levels, or by private conduct that is encouraged or fostered by hostile or callously indifferent states.¹³⁸ He persistently admonished that we, as a nation, have a long way to travel before we can end racial discrimination and injustice, and that the Court has an indispensable role to perform in helping us reach that elusive destination.¹³⁹ In contrast to Justice Marshall, Justice Thomas rejects "the pervasive view that the Federal Constitution must address all ills in our society."¹⁴⁰ Justice Thomas seems to take the position that a function of the federal courts, at least as important as the one advanced by Justice Marshall, is to protect from federal or private interference the structural and policymaking autonomy of the states regarding a wide range of important interests.

Yet, Justice Thomas has not shown how his constitutional vision, including his apparently deep-seated distrust of the federal government and courts and trust in state governments, will leave the field

137. For discussion of Justice Marshall's career and jurisprudence, see *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23-76 (1991) (including commentaries by William J. Brennan, Jr., Robert L. Carter, William T. Coleman, Jr., Owen Fiss, A. Leon Higginbotham, Jr., and Martha Minow).

138. See William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23-32 (1991).

139. *Id.*

140. *Hudson v. McMillian*, 60 U.S.L.W. 4151, 4155, 4158 (U.S. Feb. 25, 1992) (Thomas, J., dissenting).

of civil rights better off than he found it. Nor has he shown how his vision will be more effective than Justice Marshall's competing approach to heal racial divisions and injustice. In addition, Justice Thomas has not demonstrated why, particularly with respect to the maintenance of the conditions characterizing Justice Thomas' and many other Americans' childhoods, the states deserve the kind of widespread deference he apparently wants to give them. Consequently, we should not forget that although a divided justice of the sort Justice Thomas appears content to perpetuate is better than no justice at all, it is still not the kind of justice or as much justice as we need.