

**CONFIRMATION BIAS:  
STAGED STORYTELLING IN SUPREME COURT CONFIRMATION HEARINGS**

**by**

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## CHAPTER 1

### SITES OF THEATRICALITY

*The theater is a place where a nation thinks in public in front of itself.*

--Martin Esslin, An Anatomy of Drama (1977)<sup>1</sup>

*The Supreme Court confirmation process – once a largely behind-the-scenes affair – has lately moved front-and-center onto the public stage.*

--Laurence Tribe, Advice and Consent (1992)<sup>2</sup>

#### I.

In 1975 Milner Ball, then a law professor at the University of Georgia, published an article in the *Stanford Law Review* called “The Play’s the Thing: An Unscientific Reflection on Trials Under the Rubric of Theater.” In it, Ball argued that by looking at the actions that take place in a courtroom as a “type of theater,” we might better understand the nature of these actions and “thereby make a small contribution to an understanding of the role of law in our society.”<sup>3</sup> At the time, Ball’s view that courtroom action had an important “theatrical quality”<sup>4</sup> was a minority position, even a

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<sup>1</sup> Esslin, Martin. *An Anatomy of Drama*. New York: Hill and Wang, 1977. 101. Print.

<sup>2</sup> Tribe, Laurence. Foreword. *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court’s Nomination Battles*. By Senator Paul Simon. Washington, DC: National Press Books, 1992. 13. Print.

<sup>3</sup> Ball, Milner. “The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater.” *Stanford Law Review* 28:1, 1975. 82. Print.

<sup>4</sup> *Ibid.*

fringe one. The prevailing view among lawyers was that “theatrics were an expendable, intrusive embarrassment to the scientific and businesslike austerity of the courts.”<sup>5</sup>

But now, over four decades later, Ball’s view has moved from the fringe to the forefront. Theatrics in the courtroom are no longer considered “expendable.” Instead, they are considered essential, as illustrated by the title of the leading trial guide published by the National Institute for Trial Advocacy: *Theater Tips and Strategies for Jury Trials*.<sup>6</sup> A national best-seller now in its third edition, *Theater Tips* is not written by a lawyer. It’s written by the former chair of the drama department at Duke University.<sup>7</sup>

I don’t expect my dissertation, which applies Ball’s “Rubric of Theater” to Supreme Court confirmation hearings, to provide similar publishing opportunities for the chair of the drama department at Duke University or the chair of the drama department at any other university. But I hope it will provide a helpful parallel to Ball’s key insight that once we pay attention to the theatrical quality of trials, we begin to see the nature and meaning of trials much more clearly.<sup>8</sup> That is, once we pay attention to the theatrical quality of Supreme Court confirmation hearings, we also begin to see the nature and meaning of these confirmation hearings much more clearly, by which I mean we begin to see them not simply as a legal event with a one-dimensional outcome – a yes or no vote for the nominee – but as a unique form of cultural expression.

This claim may seem at odds with itself: how can paying attention to how confirmation hearings are like one form of cultural expression – theater – helps us see how confirmation hearings are very much their own form of cultural expression? The

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<sup>5</sup> *Ibid.*

<sup>6</sup> Ball, David. *Theater Tips and Strategies for Jury Trials*. 3rd edition. Notre Dame, Indiana: National Institute for Trial Advocacy, 2003. Print.

<sup>7</sup> <http://www.trialguides.com/authors/david-ball/>

<sup>8</sup> Ball, Milner. “The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater.” *Stanford Law Review* 28:1, 1975. 82. Print.

answer lies in the work of James Boyd White, who published his pioneering study of law and the humanities, *The Legal Imagination* (1973), around the same time Ball's "Rubric of Theater" article appeared in the *Stanford Law Review*, and who has since spent the following four decades exploring the connections between, among things, law and poetry, law and history, and law and narrative.<sup>9</sup> "The kind of analogy I draw," White notes in one of his later works, in what be taken as a general statement about his overall approach, "is not a point-by-point comparison of features, but an attempt by looking at two things to make real and vivid the ground that they share, against which each is a somewhat different figure."<sup>10</sup> In other words, what White does is set out what he calls a "way of reading": a way of comparing two cultural forms that are often thought to have little to do with each other – a judicial opinion and a poem, for example – with the hope that this comparison can teach us something about how "each [form] can and should proceed."<sup>11</sup>

The analogy I will be making between theater and confirmation hearings employs a similar method, only instead of setting out a "way of reading," I set out of "way of watching." This difference is motivated by the difference between the cultural forms White compares and the cultural forms I compare. The cultural forms White compares are written texts. They include – along with judicial opinions and poems – novels, statutes, short stories, even the U.S. Constitution.<sup>12</sup> The primary mode of

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<sup>9</sup> The original version of *The Legal Imagination* is no longer widely available. Instead an abridged version has taken its place. White, James Boyd. *The Legal Imagination: Abridged Edition*. Chicago: University of Chicago Press, 1973. Print. For a discussion of how *The Legal Imagination* came to be, see White, James Boyd. "The Cultural Background of *The Legal Imagination*." *Teaching Law and Literature*. Eds. Austin Sarat, Catherine O. Frank, and Matthew Anderson. New York: Modern Language Association of America. 2001. Print.

<sup>10</sup> White, James Boyd. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: University of Wisconsin Press, 1985. ix. Print.

<sup>11</sup> *Ibid.* 107.

<sup>12</sup> See, for example, White, James Boyd. *When Words Lose their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*. Chicago: University of Chicago Press, 1985.

interpreting each of these cultural forms is to “read” them, so it makes sense for White to set out a way to do that.

But the primary mode of interpreting the cultural forms I compare is slightly different. Yes, theater productions start as written texts,<sup>13</sup> and confirmation hearings end up as recorded transcripts, so both forms can, in a sense, be “read.” But what appears on the page is different than what appears in performance. As the drama critic Martin Esslin explains, “discursive literature,” by which he means novels, short stories, and poems, “operate at any given instant only along a single dimension. Their storytelling is linear.”<sup>14</sup> Theater, in contrast, “by being a concrete representation of action as it actually takes place, is able to show us several aspects of that action simultaneously and also to convey several levels of action and emotion at the same time.”<sup>15</sup>

This difference shows that, as Esslin puts it, “the dramatic form of expression leaves the spectator free to make up his own mind about the sub-text concealed behind the overt text.”<sup>16</sup> In other words we, as spectators, are put in the same position as the characters who hear Shylock’s plea for mercy in *The Merchant of Venice* or the senators who hear Anita Hill’s accusation of sexual harassment in the confirmation hearing of Clarence Thomas. We have to decide for ourselves how to interpret the words we hear. We have to decide for ourselves who is being honest, who is being manipulative, who is being a little of both. We have to decide for ourselves, fundamentally, how to respond.

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Print; White, James Boyd. *Justice as Translation: An Essay in Cultural and Legal Criticism*, 1994.

Print; White, James Boyd. *Living Speech: Resisting the Empire of Force*. Princeton: Princeton University Press. 2008. Print.

<sup>13</sup> A notable exception is “commedia dell-arte,” a kind of performance originating in the Italian Renaissance in which the text sprung spontaneously in performance, and so was not written down or prerehearsed. Esslin, Martin. *An Anatomy of Drama*. New York: Hill and Wang, 1977. 89. Print.

<sup>14</sup> *Ibid*, 17.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*, 18.

Or as Senator Alan Simpson put the point to Robert Bork during Bork's confirmation hearing in 1987 "the American people are hearing, and listening, and judging, judging you on how you handle the questions."<sup>17</sup>

A.

Senator Simpson could have added that the American people were judging Bork on multiple levels, that wrapped up in their overall judgment of how Bork "handled the questions" were other, more subtle, perhaps even unconscious judgments of not only the words Bork used but also the way he sounded and looked when he delivered them. What was his tone like? What was his demeanor? How did he appear physically? Was he well-dressed? Was he clean-shaven? Did he seem *judicial*?

Indeed these more subtle judgments, which extend to and are affected by stage effects such as how Bork was backlit, what "props" he appeared with, and how he was positioned in relation to the people around him, explain why something more than James Boyd White's "way of reading" is needed to engage with and evaluate Supreme Court confirmations hearings and the role they play in our culture.<sup>18</sup> Like plays, Supreme Court confirmation hearings operate on several levels at once. Our judgments about them, "subtle" and otherwise, are not bound by a text. They do not flow exclusively nor even primarily from what we read. Instead they flow from what we see and hear, two activities I lump together under the term "watch," both for that term's

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<sup>17</sup>*Confirmation Hearing on the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court: Hearing before the Committee on the Judiciary United States Senate*(hereafter "Bork Hearings"), 100th Cong., 1st Sess. 33, 1987, 343.

<sup>18</sup> These subtle judgments help explain how, for example, in one production of *The Merchant of Venice* Shylock's plea for mercy can elicit our sympathy while in another production Shylock's plea will demand our scorn, even though the words in each production are the same.

historical link to observing a legal event<sup>19</sup> and for its modern use in popular publications describing how we consume confirmation hearings. As a headline in the *US News and World Report* read on the eve of Justice Kagan's hearing, "Elena Kagan's Confirmation Hearing: What to Watch."<sup>20</sup>

## B.

Of course, that we can watch confirmation hearings at all unsettles some legal commentators. Geoffrey Stone of the University of Chicago Law school worries that publicly performed hearings encourage grandstanding, especially among senators, some of whom, knowing their constituents will be watching, unhelpfully repeat questions they know the nominee will try to evade, hoping that this will make the nominee look bad and themselves look good.<sup>21</sup> In fact Stone suggests that we might be better off doing away with the hearings completely. "We did not even have hearings until "1955," he notes. "They are not indispensable."<sup>22</sup>

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<sup>19</sup> "watch, v.". OED Online. December 2012. Oxford University Press. 26 February 2013 <http://www.oed.com.proxy.lib.umich.edu/view/Entry/220676?rskey=3OhCpO&result=2&isAdvanced=false>. ("c. Of a barrister: To attend the trial of (a case) in order to note any point that may arise to affect the interests of a client who is not a party in the litigation, and to raise objections to any questions or evidence that may be inadmissible as compromising the client. 1890 M.Williams *Leaves of Life* I. 87, Serjeant Ballantine's clerk...came up and asked me whether, as his chief was absent, I would watch a case that was about to be argued.")

<sup>20</sup> Schlesinger, Robert. "Elena Kagan's Supreme Court Confirmation Hearings: What to Watch." *US News and World Report*. 28 June 2010. Web. 26 Feb. 2013.

<sup>21</sup> "Because Supreme Court confirmations now attract enormous media attention, they increasingly afford senators "an attractive opportunity" to perform for their constituents. The result is that nominees now repeatedly confront the same "tough" questions from a succession of senators, and unresponsive answers therefore must be repeated over and over again." Stone, Geoffrey. "Understanding Supreme Court Confirmations." *The Supreme Court Review*. Vol 2010, No 1 (2010). 439. Print.

<sup>22</sup> *Ibid*, 465.

Benjamin Wittes of the Brookings Institute agrees. In *Confirmation Wars: Preserving Independent Courts in Angry Times* (2009), Wittes argues that Supreme Court confirmation hearings “almost invariably prove an embarrassing spectacle that yield minimal information.”<sup>23</sup> And although doing away with them would “by no means eliminate nasty nomination fights,” it would, in Wittes’s view, “let a good deal of air out of the balloon—eliminating that one extended, nationally televised moment at which senators publicly name the price of their votes.”<sup>24</sup> For this reason, Wittes proposes the Senate vote on a nominee based on his or her record and the testimony of others.<sup>25</sup>

This kind of proposal goes too far, according to Christopher Eisgruber, the author of *The Next Justice: Repairing the Supreme Court Appointments Process* (2007). “It is hard to believe [ ],” he suggests, “that Americans today would be satisfied with a process in which Supreme Court nominees were confirmed or rejected without first being questioned about their views.”<sup>26</sup> That said, Eisgruber agrees with Wittes core point: the hearings, he says, “have degenerated into embarrassing spectacles.”<sup>27</sup> And so does Justice Elena Kagan, or at least she did in 1995 when, still a law professor, she wrote in the *University of Chicago Law Review* that confirmation hearings have become a “vapid, hollow charade” that “serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government.”<sup>28</sup>

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<sup>23</sup> Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. Lanham: Rowan and Littlefield, 2009. 12. Print.

<sup>24</sup> *Ibid*, 13.

<sup>25</sup> *Ibid*, 122.

<sup>26</sup> Eisgruber, Christopher. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. 164-165. Print.

<sup>27</sup> *Ibid*, 164.

<sup>28</sup> Kagan, Elena. “Confirmation Messes, Old and New.” Rev. of *The Confirmation Mess*, by Stephen L. Carter. *The University of Chicago Law Review*, Vol. 62, No. 2 (Spring 1995). 941. Print.

My own view is at once less pessimistic and more pedagogical. I think that Supreme Court confirmation hearings are a valuable form of cultural activity, one that should be taught and studied as plays are often taught and studied: as a record of," to return to Martin Esslin's phrase from the epigraph, "a nation thinking about itself in public."

### C.

The specialness of this record comes from its form. Unlike a statue or judicial opinion, unlike anything written, a confirmation hearing is a series of ordered exchanges performed by real people in real time in front of an audience. Senators, costumed in suits, positioned behind a dais, and arranged purposefully in relation to one another and to the nominee, with lights beaming down and an audience looking on, speak to and about the nominee, who is similarly "staged." The language of a confirmation hearing, therefore, is not just verbal but also visual, spatial, and architectural. It is both multi-voiced and multi-dimensional. It is, at its core, the language of theater, a language—and this is a key point—particularly well-suited to expressing deep cultural conflicts.

For the language of theater emerges from dialogue and disagreement, from the opposition of different ways of speaking and so also different ways of being. The Greeks called this opposition *agon*, and perhaps its most salient example comes from Sophocles *Antigone*, where Antigone, determined to bury her slain brother despite a royal edict, clashes with Creon who is just as determined to see the edict enforced, having issued it himself. A common interpretation of this clash is that it is a clash between the individual as represented by Antigone and the state as represented by Creon, or that it is a clash between divine law as represented by Antigone and human law as represented by Creon, since Antigone claims to be obeying the gods in

disobeying Creon. A more nuanced interpretation pairs Antigone and Creon together and instead identifies the clash as a clash between the self-righteousness and inflexibility they share with the with the more humane openness to context and compromise exhibited by their respective confidantes, Ismene and Haemon, each of whom offers what amounts to the same advice: “Be more open to human reality.”<sup>29</sup>

But more important than how these interpretations differ is what these interpretations share – the sense that *Antigone*, as a play, creates a space where oppositions can be aired and explored, where competing voices can be put in conversation with each other, where people with different viewpoints stemming from different sensibilities and different backgrounds can be made to interact. Such interactions are the essence of theater. *King Lear* works as a play because Cordelia does not respond to her father the way her sisters do. *The Crucible* works as a play because not everyone believes Abigail Williams, nor agrees what to do with her. A *Tartuffe* full of Tartuffe’s would be unbearable.

Much of the value of these plays, and by extension the theatrical form more generally, derives from how the conflicts they crystallize give us a sense of the culture that produced them. We can learn something from *Antigone* about the faultlines in 5<sup>th</sup> century Athens between private and public duty. We can learn something from *King Lear* about the faultlines in Elizabethan England created by the transfer of power. And we can learn something from both *The Crucible* and from *Tartuffe* about how two different communities, America during the rise of Joseph McCarthy and France during the reign of Louis XIV, coped with similar struggles: the threat of obsession and hypocrisy. What theater does is give us special access to the felt experience of people trying to work through the struggles and inconsistencies of a cultural moment. It helpfully, and rather artfully, documents the dialogues that divide communities.

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<sup>29</sup> See White, James Boyd. *Heraclitus’ Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: Wisconsin University Press, 1985. 115. Print.

My claim is that Supreme Court confirmation hearings do something similar. To watch the 1987 confirmation hearing of Robert Bork as senators from one side of the aisle criticize Bork as racist and retrograde, while senators from the other side of the aisle champion him as a principled protector of individual rights, is to get special access to the tensions circulating during the “Reagan Revolution,” as well as to the scars left by Watergate, since many of the most heated exchanges during Bork’s hearing centered around Bork’s role in the firing of Special Prosecutor Archibald Cox while carrying out his duties, as Solicitor General, on October 20, 1973, the evening that came to be known as the “Saturday Night Massacre.”

Similarly, to watch the 1991 confirmation hearing of Clarence Thomas as senators from both sides of the aisle appear at once captivated and confused by the testimony of Anita Hill is to get special access to a country learning to talk to itself about self-harassment, and also learning that the dynamics of race become even more complicated when combined with the dynamics of gender. “Are you black?” the civil rights activist and scholar Lani Guinier remembers being asked by a friend watching the Thomas hearing – the insinuation being that if she were, she would support Thomas. “Or are you female?” – in which case she would presumably instead support Hill. The problem with the question is that Guinier is both black *and* female, which, she notes, makes the question’s intended dichotomy all the more unhelpful.<sup>30</sup>

And finally, to watch during the confirmation of Sonia Sotomayor, as the phrase “Wise Latina” becomes both one of Sotomayor’s biggest assets and one of her biggest liabilities is to get special access to the tug of war between the desire for a Court full of multiple background and perspectives and the desire that none of these backgrounds and perspectives affect the outcome of a case.

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<sup>30</sup> Grunier, Lani. “Sex, Power, and Speaking for Truth: Anita Hill 20 Years Later.” Hunter College, New York, New York. 20 Oct 2011.

#### D.

This is not to say that the special access Supreme Court confirmation hearings provides to the dialogues that divide communities is the only access to the dialogues that divide communities. Newspaper editorials document these dialogues. Law review articles document the dialogues that divide communities, as do novels, short stories, and poems. Yet none of these forms presents us with actual people who speak and move and react.

It is one thing to read about the battles over “originalism” in a law review article. But it is another thing to see these battles unfold on stage, as they did during the confirmation hearing of Robert Bork. To see these battles unfold on stage – to see “originalism” in a very real sense embodied in someone like Bork – is to see how originalism responds when confronted with other ways of thinking and speaking and being. How well does originalism stand-up under the hostile questioning of Senator Ted Kennedy of Massachusetts, who suggested, even before the hearings began, that Bork and his originalism would create an “American in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rouge police could break down citizen’s doors in midnight raids, school children could not be taught about evolution...and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy?”<sup>31</sup> Alternatively, how significantly is originalism revived by the support of Senator Chuck Grassley of Iowa, who claimed critics like Kennedy are unprincipled and actually “know the law they prefer is judge-made, and therefore susceptible to change by other judges. Their loud protests underscore that the law they prefer is not found in the Constitution or the statutes.”<sup>32</sup>

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<sup>31</sup> 133 Cong. Rec. S9188-S9189 (daily ed. July 1, 1987) (Statement of Sen. Kennedy).

<sup>32</sup> Bork Hearings, 75.

In a law review article, such differing perspectives would be expressed by a single voice – the written equivalent of a lecture. But in a confirmation hearing, as in a play, these differing perspectives are expressed by multiple voices. The effect for the audience, therefore, is less like hearing a lecture and more like dropping in on a seminar. There is dialogue. There is diversity, both in the views on display and in the appearance of those who offer them. There is dynamic disagreement.

Each of these multiple voices also comes with a face, is spoken with a combination of tone, accent, and gesture, and so becomes part of a larger physical and verbal ethos, a fact apparently not lost on Anita Hill, who insisted on being able to deliver her allegations against Clarence Thomas in person rather than having those allegations read into the confirmation hearing record by someone else.<sup>33</sup> Nor was it lost on many who tuned into the Sotomayor hearings and heard, for the first time in American history, the sound of a Hispanic accent coming out of the mouth of a Supreme Court nominee.

Such moments illustrate the surprising economy of Supreme Court confirmation hearings, their ability to use a bundle of sights and sounds to communicate meaning in a way that a written transcript cannot: the sights and sounds of Clarence Thomas telling an all-white panel of senators that he has been the victim of a “high-tech lynching” aimed at “uppity blacks,”<sup>34</sup> as his very fair-skinned white wife, Virginia, sits behind him in support; the sights and sounds of Sandra Day O’Connor, dressed in a purple suit and a pink blouse, answering questions on her way to becoming the first woman to sit on a court that once held, in *Bradwell v. Illinois* (1873), that members of her gender could be prohibited from even becoming lawyers; and more recently, the sights and sounds of

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<sup>33</sup> Hill’s decision caused a considerable commotion during Caused commotion Hatch

<sup>34</sup> Confirmation Hearings on the Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court: Hearing Before the Committee on the Judiciary United States Senate (hereafter “Thomas Hearings”) 102th Cong., 1st Sess. 33, 1991, 842.

now Chief Justice John Roberts introducing himself to the country with perhaps the most quoted line in Supreme Court confirmation history and one that continues to drive the questions of senators and the answers of nominees: “Judges are like umpires. Umpires don’t make rules; they apply them.”<sup>35</sup>

I say this economy is “surprising” because most Supreme Court confirmation hearings are long and boring. The Bork hearing lasted five days and ended up creating over 8,000 documents. During Sotomayor’s hearing, her own nephews, sitting in the front row alongside Sotomayor’s other family members and friends, fell asleep.

Yet it is helpful to remember that most theater is also long and boring. As the famed London theater critic Kenneth Tynan acknowledged in the preface to *The Sound of Two Hands Clapping*, a lifetime collection of his reviews, “The fact, as any critic will confirm, is that most theatrical productions, like most books and most television shows, are extremely dreary.”<sup>36</sup> Said differently, even Shakespeare is not always Shakespeare. *Hamlet* rewards extended attention. *Titus Adronicus* does not.

Which is why when Shakespeare is taught, and when theater in general is taught, not every play is chosen nor every scene discussed. Instead, teachers approach these topics selectively – the idea being that more can be learned by focusing on a few particularly rich examples than can be learned by attending to every available example. Later in the dissertation, in the three case studies chapters, I follow this selective approach. In particular, I focus on the confirmation hearing of Robert Bork in 1987, the confirmation hearing of Clarence Thomas in 1991, and the confirmation hearing of

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<sup>35</sup> *Confirmation Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court Before the Committee on the Judiciary United States Senate* (hereafter “Roberts Hearing”), 109<sup>th</sup> Congress, Sess 1, 2005. 34.

<sup>36</sup> Tynan, Kenneth. *The Sound of Two Hands Clapping*. Boston: De Capo. 1. Print.

Sonia Sotomayor in 2010, each of which “produced”<sup>37</sup> deep cultural battles that spread well beyond the specific legal battle over their confirmation. In the Bork hearing, these battles involved “originalism” and the Reagan Revolution. In the Thomas hearing, they involved sexual harassment and affirmative action. And in the Sotomayor hearing, they involved immigration, diversity, and whether there should be a place in law for “empathy.”

But before taken this selective approach, I think it is important to step back and take a more collective approach, the idea being to establish a common vocabulary between theater and confirmation hearings in general before examining any one confirmation hearing in particular. So in the next section, I identify several formal characteristics that theater and confirmation hearings share. And then in the next chapter I focus on one of these characteristics in depth: the opening statements that begin each confirmation hearing, statements that function very much like dramatic monologues.

## II.

### Rehearsals

*Speak the speech, I pray you, as I pronounced it to  
you, trippingly on the tongue: but if you mouth it,  
as many of your players do, I had as lief the  
town-crier spoke my lines.*

--Hamlet advising the Players before their performance<sup>38</sup>

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<sup>37</sup> Here I mean “produce” in two senses. First, I mean “produce” in the causal sense of “triggered,” or what Robert Ferguson call a “spread a conflict,” a term he uses to describe when legal events “expand into a more memorable event” that “spawns less restrained quarrels around it.” Ferguson, Robert. *The Trial in American Life*. Chicago: University of Chicago Press, 2007. 2. Print. But I also mean “produce” in the theatrical sense of “put on display.”

<sup>38</sup> Shakespeare, William. *Hamlet*. New York: Penguin, 1998. III.ii.1-4. Print.

*About 20 members of President Barack Obama's team play senators peppering Kagan with tough questions designed to trip her up or elicit an unscripted response.*

--Julie Hirschfield Davis "Kagan Practices Answers, Poise During Mock Hearings"<sup>39</sup>

Every nominee goes through what are called "murder boards," a series of mock-confirmation exercises in which the nominee is peppered with questions he or she is likely to be asked during the real confirmation hearing. The goal of these murder boards would be familiar to any actor, as news coverage of the most recent murder boards, involving Elena Kagan, made clear: settle your nerves, work out your kinks, and above all, *learn your lines*.

For several grueling hours each day, Supreme Court nominee Elena Kagan sits at a witness table, facing a phalanx of questioners grilling her about constitutional law, her views of legal issues and what qualifies her to be a justice. They are not polite.

It's all a rehearsal for Kagan's big performance next week during her confirmation hearings at the Senate Judiciary Committee. The "murder boards" are elaborately planned sessions where Kagan hashes out answers to every conceivable question and practices staying calm and poised during hours of pressure and hot television lights.<sup>40</sup>

A notable exception to the murder boards, or at least to a full run of them, was Robert Bork, who abandoned the exercise after the first few sessions. "The questions are oversimplifications and put the nominee in the worst light," he later said of the experience, at one point describing it as the kind of preparation in which "a trainer

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<sup>39</sup> Davis, Julie Hirschfield. "Kagan Practices Answers, Poise in Mock Hearings." *Associated Press*. 22 June 2010. Web.

<sup>40</sup> *Ibid.*

repeatedly throws a medicine ball at the boxer's solar plexus."<sup>41</sup> Yet it is not as if Bork abandon preparing for the hearings altogether. "Instead [of the murder boards], I had several sessions with lawyers from the White House and the Department of Justice, law school professors, and private practitioners, at which we discussed substantive legal issues."<sup>42</sup> In other words, he still rehearsed. He just did it in his own way, which, for anyone who knew Bork or saw him perform at the actual hearing, probably isn't too surprising.

### Live Performance

*The collaborative production of actors, playwrights, designers, directors, and spectators, theater achieves its magic in the live moment, rich with its sounds, sights, and feelings.*

--J. Ellen Gainior, Stanton J. Garner, and Martin Puchner, The Norton Anthology of Drama (2009)<sup>43</sup>

*And I was particularly, given everything that had led up to it and gone before it, grateful to be here at that moment, saying: "All right, I'm under oath, they can ask me anything and I get a chance to tell them what I really think about what judges do and about who I am." And, you know, let's do it. That is part of why [my confirmation hearing] was...in a real sense exhilarating.*

--Chief Justice John G. Roberts Jr.<sup>44</sup>

The need for "murder boards," for rehearsing before one's "big performance," highlights perhaps the most theatrical aspect of confirmation hearings: they are

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<sup>41</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1997. 278. Print.

<sup>42</sup> *Ibid.*

<sup>43</sup> Gainior, J. Ellen, Stanton Garner, and Martin Puchner. *The Norton Anthology of Drama*, 2009. 5 Print.

<sup>44</sup> John G. Roberts Jr., interview with Benjamin Wittes, quoted in *Confirmation Wars: Preserving Independent Courts in Angry Times*. Lanham: Rowan and Littlefield. 2009. 126. Print.

performed. Performance is what “makes drama drama.”<sup>45</sup> “A play that is not performed is merely literature.”<sup>46</sup>

Similarly, we might say that a confirmation hearing that is not performed is merely a congressional vote – which is generally what confirmation hearings were until the Senate voted to open up confirmation hearings to the public in 1916. In fact, nominees were rarely invited to participate in confirmation hearings until close to forty-years later, when the Court’s decision in *Brown v. Board of Education* created a demand, especially among southern senators, for face-to-face answers and assurances. Then in 1981, when Sandra Day O’Connor was made the first female Supreme Court nominee, C-Span started televising the hearings. And ever since, confirmation hearings have increasingly become a kind of national spectacle, something the wider public gets to watch and experience as well as something the participants have to perform.<sup>47</sup>

### Deliberate Staging

*To begin with, the theater is a place. This place, in all known forms, sets up such a vibration in those who frequent it that certain properties roughly suggested by the term magic are invariably attributed to the building itself.*

--Eric Bentley, The Theater of Commitment (1967)<sup>48</sup>

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<sup>45</sup> Esslin, Martin. *An Anatomy of Drama*. New York: Hill and Wang, 1977. 14. Print.

<sup>46</sup> *Ibid*, 23.

<sup>47</sup> The historical development of Supreme Court confirmation hearings is well documented in Abraham, Henry. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush*. Lanham: Rowan and Littlefield. See also, Stone, Geoffrey. “Understanding Supreme Court Confirmations.” *Supreme Court Review*. Vol 2010, No 1 (2010). 426-440. Print. For examinations of judicial appointments more generally, see Carter, Stephen. *The Confirmation Mess: Cleaning up the Federal Appointments Process*. New York: Basic Books; Epstein, Lee and Jeffrey Segal. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford, 2005. Print.

<sup>48</sup> Bentley, Eric. *The Theater of Commitment*. New York: Antheneum, 1967. 55. Print.

*[C]ameras, hard lights, the room packed with people, the atmosphere of a Roman circus about to begin.*

--Robert Bork, describing the atmosphere of his Supreme Court confirmation hearing<sup>49</sup>

“[W]e are conditioned to think of a stage as spaces within which significant things are being shown,” observes Martin Esslin. “[T]hey therefore concentrate our attention and compel us to try and arrange everything there into a significant pattern.”<sup>50</sup> When it comes to the stage of a confirmation hearing, which is often housed in the regal and history-rich Caucus Room of the Russell Senate Building, that “significant pattern” is generally one of authority and interrogation. There is a long, wooden dais behind which the members of the Senate Judiciary Committee sit aligned and elevated, like an appellate court sitting en banc. Behind them sit a cadre of Congressional aides, each of whom add an extra layer of power and prestige to the senators, as if those senators have been granted what Shakespeare’s *Lear* was denied: the chance to keep a full entourage.

In contrast, the nominee sits alone and unsupported at a much smaller table, both in height and length, her subservient stage position reflecting her, at the moment, subservient political position. She needs the Senate’s approval; the Senate does not need hers.

Of course, as with any stage, this choreographed hierarchy is manipulable. For example, Robert Bork remembers how during his own hearing the long, wooden table behind which the senators sat was lowered so that they “would not be seen looking down on the witness.”<sup>51</sup> Apparently, the senators did not want to come across as condescending. Bork also remembers similar changes being made to how each witness

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<sup>49</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1997. 296. Print.

<sup>50</sup> Esslin, Martin. *An Anatomy of Drama*. New York: Hill and Wang, 1977. 52. Print.

<sup>51</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1997. 296. Print.

was filmed and photographed, himself included: “The television cameras were moved off to the left and raised so that the angle would not be good for the witness, and the press photographers were forbidden to take frontal shots below during the testimony.”<sup>52</sup>

Each of these changes was made in response to the performance of Lt. Colonel Oliver North during the Iran-Contra hearings, the last congressional hearing before Bork’s to reach a wide-television audience. In that hearing, North had used an impressive display of both military medals and personal charm to upstage the investigating congressman, twice landing on the cover of *Time Magazine* and generally creating what came to be known as “Olliemania.”<sup>53</sup>

According to Bork, the risk of his own hearing creating a corresponding Borkmania was low. “The Judiciary Committee Democrats need not have worried. I did not have the histrionic talents of North and, if I had, would not have employed them.”<sup>54</sup> Yet the changes to the hearing room following North’s performance suggest that at least some senators thought otherwise, and that whoever was responsible for the changes to the hearing room was thinking like a theater director: sightlines matter, the position of the performers matter, *staging* matters.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* See also, “Front and Center: Lieut. Colonel Oliver North.” *Time Magazine*. 13 July 1997. Cover. Print.; “I was authorized to do everything I did – Oliver North.” *Time Magazine*. 20 July 1997. Cover. Print.

<sup>54</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1997. 296. Print.

## Costumes

*Each separate costume we create for a play must be exactly suited both to the character it helps to express and to the occasion it graces.*

--Robert Edmond Jones, The Dramatic Imagination (2004)<sup>55</sup>

*How discombobulated would folks be if a male [Supreme Court] nominee walked the Hill wearing a Thom Browne suit with trousers that ended at the ankles or if a woman strode purposefully down the marble corridors in a pair of platform Christian Louboutin heels and a Marni sack dress? There'd be nothing profoundly inappropriate with any of that other than the images wouldn't square with the preconceived notion that sobriety equals intellect.*

--Robin Givhan, fashion critic for *The Washington Post*<sup>56</sup>

*Bork's personal appearance and demeanor seemed as suspect as his ideology. His devilish beard and sometimes turgid academic discourse did not endear him to wavering Senators or the public.*

--Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II (2008)<sup>57</sup>

What also matters is the way a nominee looks, as Bork discovered when his physical appearance, and particularly his choice of facial hair, was interpreted as a sign of his overall "scariness." As Tom Shales, the television critic of the *Washington Post* observed, "He looked, and talked, like a man who would throw the book at you — maybe like a man who would throw the book at the whole country."<sup>58</sup>

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<sup>55</sup> Jones, Robert Edmond. *The Dramatic Imagination: Reflections and Speculations on the Art of the Theater*. New York: Routledge, 2004. 28. Print.

<sup>56</sup> Givhan, Robin. "Elena Kagan Goes on Supreme Court Confirmation Offensive in Drab D.C. Clothes." *Washington Post*. 23 May 2010. Web.

<sup>57</sup> Abraham, Henry. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush*. Lanham: Rowan and Littlefield, 2007. Print.

<sup>58</sup> Shales, Tom. "The Bork Turnoff: On Camera, the Judge Failed to Save Himself." *Washington Post*, 9 Oct 1987. B 01. Print.

In fact, Bork's facial hair became such an issue that at one point Senator Howell Heflin of Alabama asked Bork if he would like to defend it, insinuating that some saw in his bearded face the manifestation of a radical mind.<sup>59</sup> Bork offered what he called "a very unromantic explanation":

In the 1968-69 academic year, I was on sabbatical leave in England with my family. I was writing a book. It was an antitrust book, and you may ask why I chose to write it in England. The answer is, the alternative was to write it in New Haven.

And I—we went on a canal boat trip. You drive it yourself along the canal and the family was in there. And the—in the bathroom, the sink was right against the wall, so when you tried to shave, unless you shaved with your left hand, I couldn't do it. And for about a week I didn't shave. And by that time, my children had become fascinated with what was then the beginnings a red beard, and they asked me to let it go. And so I did.... And I let it grow, and it kind of intrigued me and intrigued my children. I've had it ever since.<sup>60</sup>

It seems unlikely that Bork's beard would survive the media-savvy wardrobe consultants of today, especially given what Sonia Sotomayor revealed about her own scripted look to an audience at Yale University in October of 2009, two months after

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<sup>59</sup> "Well, now, there are those - this is not my idea - who say, 'Well, you can look at his attire, and the way he wears his hair is some indication.' I don't agree with that. I've got several members in my staff that have beards and everything else. Would you like to give us an explanation relative to the beard?" *Bork Hearings*, 271.

<sup>60</sup> *Bork Hearings*, 271. Bork's beard continued to be one of his defining characteristics long after he shaved it off, as illustrated by its mention in several prominent obituaries after his death on December 19, 2012. See, for example, Bronner, Ethan. "A Conservative Whose Supreme Court Bid Set the Senate Afire." *New York Times*. 19 Dec 2012. Web. ("Judge Bork, a bear of a man with a scraggly red beard and untamed fizz on a balding pate who liked to eat, drink, and smoke for much of his adult life, handled himself poorly in front of the committee and failed to give doubters confidence"); Miller, Stephen. "Hearings Torpedoed Bid for Supreme Court Seat." *The Wall Street Journal*. 19 Dec 2012. Web. ("Mr. Bork, looking distinctly out of the ordinary with his rotund frame and scraggly red beard, barely tried to sugarcoat his contempt for judges who found new 'rights' in the Constitution.); Kamen, Al and Matt Schudel. "Robert H. Bork. Conservative Judicial Icon, Dies at 85." *The Washington Post*. 19 Dec 2012. Web.

being confirmed. Excited to go shopping and pick out her confirmation outfit, she was apparently told by her white house handlers: Bring us five suits. We'll pick the one you wear.<sup>61</sup>

But what does seem likely is that confirmation audiences will continue to use a nominee's appearance to draw conclusions about his or her character, just as theater audiences do with Stanley Kowalski and his plain white t-shirt in *A Street Car Named Desire* (especially played by Marlon Brando) or with Willy Loman and his gray flannel suit in *Death of a Salesman*. As Pulitzer-Prize winning fashion critic Robin Givhan pointed out during the confirmation hearings of Elena Kagan, "Tied up in the assessment of style – Kagan's or anyone else's – is the awkward, fumbling attempt to suss out precisely who a person is."<sup>62</sup> In Kagan's case, that meant the awkward, fumbling attempt to suss out her sexual orientation. "So the chatter on the internet and in the coffee shops," Givhan noted, "turned to the lesbian archetypes: the Birkenstock-wearing, crunch granola womyn<sup>63</sup>; the short-haired, androgynous type; and the glamorous, lipstick wearing Portia de Rossi girl." "What does Kagan's short hair mean?" Givhan asked. "Or the fact that she wears makeup?"<sup>64</sup> In Bork's case, that meant the awkward, fumbling attempt to suss out his moral sense: were Bork's ideas

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<sup>61</sup> Misur, Susan. "Justice Returns to City: Sotomayor is Star at 30<sup>th</sup> Reunion." *New Haven Register*. 18 October 2009. Web.

<sup>62</sup> Givhan, Robin. "Elena Kagan Goes on Supreme Court Confirmation Offensive in Drab D.C. Clothes." *Washington Post*. 23 May 2010. Web.

<sup>63</sup> This is not a misspelling. Instead Givhan is intentionally using "womyn" as a less male-centric version of "women." See "womyn, n." OED Online. December 2012. Oxford University Press. 28 February 2013

<<http://www.oed.com.proxy.lib.umich.edu/view/Entry/247997?redirectedFrom=womyn>>. ("In feminist use: women. "Los Angeles Times 9 July v.1/2 I was in Berkely protesting against apartheid in South Africa...and I found the "Womyn's Caucus up there. (Because it is) a group of feminists, I immediately duded that womyn is the feminist form for female – plural.")

<sup>64</sup> Givhan, Robin. "Elena Kagan Goes on Supreme Court Confirmation Offensive in Drab D.C. Clothes." *Washington Post*. 23 May 2010. Web.

really as devilish as his beard? Was his vision of America really as nightmarish as his opponents described?

And in both cases, and in the cases of all six nominees between Bork's beard and Kagan's short hair, that meant that how nominees appear affects how they are assessed. "Bland equals responsible," Givhan suggests. "Matronly equals trustworthy."<sup>65</sup> Which might explain why after surrendering wardrobe control to her white house handlers, Sotomayor ultimately appeared in an "almost-by-the numbers uniform that spoke of manuals, consultants, media coaches, committees, and politics." "In short," Givhan observed, "it was safe and guarded."<sup>66</sup>

### Props

*A chair is just a chair, but place it on a stage and it becomes something else again.*

--Arthur Miller<sup>67</sup>

*Yesterday, Supreme Court nominee Sonia Sotomayor fell and broke her ankle, and she's expected to be on crutches for several weeks. In a related story, Republicans have announced that Sotomayor's confirmation hearing will consist of three questions and an obstacle course.*

--Conan O'Brien

What Sotomayor's White House handlers didn't script was her broken ankle, the product of a stumble at the LaGuardia Airport the day Sotomayor began what has become a Supreme Court confirmation hearing tradition: "courtesy visits" paid by the

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Brater, Enoch. "Drama Matters: Suitcases, Sand, and Dry Goods." *The Michigan Quarterly Review*. vol. XLVI, no. 4, Fall 2007. ("A chair is just a chair," Miller observed years later, during one of his many visits to [the University of Michigan], "but place it on a stage and it becomes something else again.")

nominee to various Senators in the Capitol during the weeks leading up to the hearing. Still, the accidental nature of Sotomayor's injury didn't stop some of her opponents from suggesting that the injury was simply a ploy to get sympathy, trumped up by her resulting crutches, which made headlines around the country.<sup>68</sup>

Republican Senator David Vitter of Louisiana took a different tact. Greeting Sotomayor with ice and a pillow as she limped into his office, Vitter quipped to the press on hand "I hope you all note, that some Republicans have *empathy*, too," a reference to the term that became a kind of leitmotiv for Sotomayor after being plucked from President Obama's own opposition, as a Senator, to the nomination of John Roberts to the Court in 2005. At the time, Obama had voted against Roberts on the ground that Roberts lacked the "breadth and depth" of "empathy" Obama deemed necessary for a Supreme Court justice.<sup>69</sup> "The problem I face," Obama had announced in his opposition speech, is that "that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases — what matters on the Supreme Court is those 5 percent of cases that are truly difficult. ...[I]n those difficult cases, the critical

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<sup>68</sup> No major publication raised the sympathy angle but many in the blogosphere did. See, for example, [http://www.democraticunderground.com/discuss/duboard.php?az=view\\_all&address=102x3913034](http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x3913034) ("I guess Sotomayor is trying for sympathy. Don't expect any from the Pubs."); <http://politicalticker.blogs.cnn.com/2009/06/08/sotomayor-breaks-ankle-on-her-way-to-capitol-hill/> ("Does she really believe this is going to get her sympathy?" "A broken ankle gets no sympathy[sic]. She's still a racist."); <http://macsmind.com/wordpress/2009/06/sotomayors-sympathy-break/> ("Sotomayor's Sympathy Break?...I question the timing. How convenient. I wonder though, are latino women more suited to break their ankles than old white men?")

<sup>69</sup> Obama, Barack. "Remarks on the Confirmation of John Roberts." <http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm>

ingredient is supplied by what is in the judge's heart."<sup>70</sup> Now Vitter, who ultimately voted against Sotomayor, was cleverly chiding Obama and the rest of those who had adopted what had become known as the "empathy standard."

Similarly clever was a widely reprinted column Ellen Goodman wrote for the *Boston Globe* the day after Sotomayor's visit with "Sotomayor Has Tough Dance Ahead." In it, Goodman turns Sotomayor's crutches into her own vehicle for commentary and criticism, just as Vitter did with his empathy quip. Only instead of targeting Obama's empathy standard, Thompson targeted what she perceived as the confirmation process's double-standard: "The very fact that [Sotomayor] has to prove her impartiality to a Senate that is more than three-fourths white and male is a bit bizarre. As the late Ann Richards said, Ginger Rogers had to do everything Fred Astaire did, only she had to do it backward and in high heels. Sotomayor is going to have to do this dance forward and on crutches."<sup>71</sup>

These two minor examples get at a more major point about the prop-like roles objects can play in confirmation hearings. "A crutch is just a crutch," we might say, echoing Arthur Miller's observation in the epigraph above, "but place it in a confirmation hearing and it becomes something else again." Sometimes that "something else" might be an opportunity to criticize the president, as it was for Vitter. Sometimes that "something else" might be an opportunity to criticize political culture more generally, as it was for Thompson. The key is that the way confirmation hearings are constructed has created the opportunity for what theater scholar Andrew Sofer calls a "peculiarly theatrical phenomenon: the power of stage objects to take on a life of their own in performance."<sup>72</sup>

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<sup>70</sup> *Ibid.*

<sup>71</sup> Goodman, Ellen. "Sotomayor's Dance to the Supreme Court." *Boston Globe*. 12 June 2009.

<sup>72</sup> Sofer, Andrew. *The Stage Life of Props*. Ann Arbor: University of Michigan Press, 2003. 2. Print.

We can see this theatrical phenomenon in the confirmation hearings of Robert Bork, when then Senator and Chairperson of the Judiciary Committee Joe Biden breaks out a copy of the Constitution to read and take notes from as Bork explains his views on the 14<sup>th</sup> Amendment. Given a close-up by the C-Span cameras, Biden's notepad and copy of the Constitution help transform Bork's explanation into some more akin to a lecture, with Biden looking less like a Senate Chairperson and more like a first-year law student. The effect isn't flattering, particularly for Bork, who already came into the hearings with a *Paper Chase*-like reputation for being arrogant, pedantic, and intimidating, from his years teaching at Yale Law School. <sup>73</sup> "Some viewers must have looked at Judge Bork," Tom Shales noted, "and seen in him every haughty professor whose lectures they dreaded in college."<sup>74</sup>

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<sup>73</sup> Noted constitutional law scholar Akhil Amar, a student of Bork's at Yale, described Bork the Teacher in terms that are both harsh and admiring in a column for *Slate Magazine* the day after Bork's death: "The last time I spoke to Robert Bork, who died Wednesday, was 30 years ago this week. In mid-December 1982, I was a second-year law student at Yale finishing up a seminar that Bork taught, a seminar organized around ambitious works by leading constitutional scholars – Alex Bickel, John Hart Ely, Charles Black, and others. I did not entirely love the seminar, or Bork, but it and he changed my life.... So why didn't I ever converse with Bork after the class ended? And how did a seminar and a professor that I didn't entirely love end up having such a profound effect on me? I never spoke to Bork after 1982 because, frankly, he could be insensitive and off putting. In the classroom, he was quick to dismiss imaginative ideas floated by students. In his defense, it must be said that many of these student bubbles deserved to be popped. A law professor's job is to train students to think rigorously. Bullshit does not win cases. So even as I disliked Bork's demeanor at the time, I have since come to admire his honesty. Here was a man who cared enough about ideas to defend his own, and to hit yours head-on if he thought they deserved it. Most important of all, he did not downgrade students who came back at him with tight counterarguments. My term paper for this class was an all-out 30-page attack on Bork's pet ideas, yet he gave me a top grade – without which I might never have been hired by Yale to teach constitutional law. Bork's truculence in the classroom made me want to fight back – but to do so, I had to work hard and drill down. In the process, I came to love constitutional law, a subject that had not electrified me as a first-year student in an intro course taught by a gentler and less edgy professor." Amar, Akhil. "Remembering Robert Bork." *Slate Magazine*. 20 Dec 2012. Web.

<sup>74</sup> Shales, Tom. "The Bork Turnoff: On Camera, the Judge Failed to Save Himself." *Washington Post*, 9 Oct 1987. B 01. Print.

But perhaps the best example of this theatrical phenomenon comes in the confirmation hearings of Clarence Thomas and the now famous can of *Coke* that appeared in every listener's mind as Anita Hill told the story of "an occasion in which Thomas was drinking *Coke* in his office. He got up from the table at which we were working, went over to his desk to get the *Coke*, looked at the can and asked, 'Who has put pubic hair on my *Coke*?'"<sup>75</sup>

This *Coke* example is trickier than the Constitution example because the can of *Coke* didn't actually appear on stage. But perhaps more interestingly, it did quickly appear off-stage. It appeared in political cartoons. It appeared in skits on *Saturday Night Live*. And it also appeared in primetime, thanks to the then popular sitcom *Designing Women*, which devoted two full episodes to having its characters watch and debate the hearings. In other words, the can of *Coke* had what director Jonathan Miller calls an "afterlife," as many of the most iconic stage props do.<sup>76</sup>

Moreover, like, for example, the afterlife of Yorick's skull in *Hamlet* or the afterlife of Desdemona's handkerchief in *Othello*, which continue to be appropriated by other cultural forms of expression long after their initial introduction, the afterlife of the Clarence's *Coke* remains vigorous. Two years ago a satirical magazine in the mode of *The Onion* ran a fake news piece claiming that the The Smithsonian was putting the *Coke* can on display in an exhibit cheekily called: "Justice Thomas: Nominated by a Hair."<sup>77</sup> And just last year, the can of *Coke* appeared again when Clarence Thomas's wife Virginia left a much-publicized voicemail on Anita Hill's office phone asking Hill,

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<sup>75</sup>Thomas Hearings, 222-223.

<sup>76</sup> Miller, Jonathan. *The Afterlife of Plays*. San Diego: San Diego University Press, 1992. Print.

<sup>77</sup> "Infamous Pubic Hair from 1991 Clarence Thomas Confirmation Hearings on Display at Smithsonian" *The Skunk Nation*. <http://theskunk.org/2011/11/infamous-pubic-hair-from-1991-clarence-thomas-confirmation-hearings-on-display-at-smithsonian/#sthash.fgfiVLJs.dpuf>

after 20 years, “to apologize sometime and explain why you did what you did with my husband,”<sup>78</sup> or as a parodying cartoon put it

### Dialogue

*Suit the action to the word, the word to the action.*

--Hamlet advising the Players

*This man does not belong on the Supreme Court. He belongs in the National Repertory Theater.*

--Character from the sitcom *Designing Women* as she watches Clarence Thomas speak during his confirmation hearing

The “afterlife” effect can also be seen in the final theatrical aspect of confirmation hearings I’ll discuss in this section: the hearings unfold through dialogue. A senator asks a question; the nominee responds. The senator then asks another question and the nominee responds again, until it is time for a new senator to take over. When the questions and answers involve certain topics, such as abortion, the dialogue can seem downright scripted, as Benjamin Wittes observed following the confirmation hearings of Republican appointees John Roberts and Samuel Alito. Describing what he calls “the Kabuki dance so often performed it has grown meaningless,” Wittes offers the following scene:

A Democratic senator asks about one controversial case after another – dwelling for unnaturally long periods on abortion. The nominee tries to make reassuring noises while saying little and committing to nothing. The senator waxes exasperated. The nominee insists he will merely follow the law. The senator points out that different judges have different views of the law. The nominee mutters something about bringing no agenda to the job. Eventually the clock runs out. Then a Republican senator professes indignation

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<sup>78</sup> Savage, Charlie. “Anita Hill Asked to Apologize by Justice Thomas’ Wife.” *New York Times*. 19 October 2010. Web.

at the question and lobs softballs at the nominee for his allotted time. Then the cycle begins anew with another Democratic senator.<sup>79</sup>

The presence of an “afterlife” exists on both sides of this verbal exchange. Sometimes Senators explicitly revive past confirmation hearings when they ask their questions. Sometimes nominees revive past confirmation hearings when they give their answers. And sometimes both Senators and nominees not only reference past confirmation hearings but actively try to replay past confirmation hearings.

For example, four years after John Roberts delivered his now famous baseball analogy (“Judges are like umpires; they do not make rules, they apply them”) several senators used their speaking time in the confirmation hearing of Sonia Sotomayor to revisit Robert’s line, with many Democratic senators in particular taking the opportunity to attack it, and so also attack Roberts himself. “[J]ust short of four years ago,” Senator Charles Schumer of New York reminded the audience,

then-Judge Roberts sat where Judge Sotomayor is sitting. He told us that his jurisprudence would be characterized by modesty and humility. He illustrated this with a now well-known quote, ‘Judges are like umpires. Umpires don’t make the rules. They apply them.’ Chief Justice was, and is, a supremely intelligent man with impeccable credentials. But many can debate whether during his four years on the Supreme Court he actually called pitches as they come – or whether he tried to change the rules.<sup>80</sup>

In the same vein, Senator Dianne Feinstein of California noted that “several past nominees have been asked about the *Casey* decision, where the Court held that the Government cannot restrict access to abortions that are medically necessary to preserve a woman’s health.”<sup>81</sup> “Some nominees,” she continued, referring to Roberts, among others, “responded by assuring that *Roe* and *Casey* were precedents of the Court entitled

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<sup>79</sup> Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. 2006. Lanham: Rowman and Littlefield, 2009. 6. Print.

<sup>80</sup> *Confirmation Hearings on the Nomination of Sonia Sotomayor. to be Chief Justice of the Supreme Court Before the Committee on the Judiciary United States Senate* (hereafter “Sotomayor Hearings”). 11<sup>th</sup> Cong. 1<sup>st</sup> Sess, 2009. 45

<sup>81</sup> *Ibid*, 56.

to great respect.”<sup>82</sup> But once appointed to the Court, “these same nominees voted to overturn the key holding in *Casey*...[and also] disregarded or overturned precedent in eight other cases.”<sup>83</sup> Such maneuvers convinced Feinstein that “Supreme Court Justices are more than umpires calling balls and strikes.”<sup>84</sup> The critique of Roberts by Senator Richard Durbin of Illinois was even more biting: “When Chief Justice Roberts came before this Committee in 2005, he famously said a Supreme Court Justice is like an umpire calling balls and strikes. We have observed, unfortunately, that it is a little hard to see home plate from right field.”<sup>85</sup>

This backward-looking referendum on Roberts was not lost on Republican senator Tom Colburn of Oklahoma, who tried to direct attention back to the present. “I also wanted to note that this was your hearing,” he told Sotomayor at one point, and everyone else listening, “not Judge Roberts’.”<sup>86</sup> Nor was it lost on Sotomayor herself. When Senator Herbert Kohl of Wisconsin asked her to weigh in on the aptness of Roberts’ analogy, she, diplomatically, tried to avoid picking sides. First, she responded with humor. “Few judges could claim they love baseball more than I do,”<sup>87</sup> she said, gaining a laugh from the audience after already having shared, earlier in the hearing, that she not only grew up “in the shadow of Yankee stadium” but that among her fondest memories of her father were those times when she would watch baseball games by his side.<sup>88</sup> She then explained that “analogies are always imperfect,” so she preferred to describe the role of a judge in a more straightforward way: “to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 65.

<sup>86</sup> *Ibid.*, 72.

<sup>87</sup> *Ibid.*, 78.

<sup>88</sup> *Ibid.*, 56.

looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands.”<sup>89</sup>

It was a savvy response. Sotomayor successfully distanced herself from the part of Roberts’ analogy that she knew had already accumulated a lot of negative baggage – the specific comparison to umpires – at the same time that she successfully embraced the part of the analogy that she knew would play well with her audience: the core message that judges are neutral arbiters who, as Roberts put it, “do not make rules, they apply them,” or in Sotomayor’s reformulation, simply “apply the law as the law commands.”<sup>90</sup> She also did this out loud, in real time, through spoken words, just as Roberts had done when he made the umpire analogy in the first place, and just as all nominees must do from the moment they open their mouth to deliver what is the most scripted part of every Supreme Court confirmation hearing, and so also the subject of the next chapter: opening statements

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<sup>89</sup> *Ibid*, 78.

<sup>90</sup> *Ibid*.

## CHAPTER 2

### SITES OF STORYTELLING

#### A.

In addition to the theatrical features of confirmation hearings, there is also an interesting biographical feature of confirmation hearings: before a nominee even says a word, many words are said about her. This feature is a product of how each senator on the confirmation committee is allowed to make an opening statement. Some of these statements are, as Robert Bork remembers from his own confirmation hearing, “lavish in their praise,” some are “lavish in their denunciations,” and some are “lavish in their equivocations.”<sup>91</sup> The result is a disorienting kind of biography by committee, one which produces not one all-encompassing “warts and all” biography<sup>92</sup> of a nominee, with tensions reconciled, discrepancies explained, and the presentation of a coherent, if complex, portrait of the nominee, but rather several competing biographies, many of which directly war with each other.

For Bork, those competing biographies included a biography by Senator Gordon Humphrey of New Hampshire in which Bork was hailed as a brilliant constitutional law scholar, a dedicated former Solicitor General, a respected judge, a real “lawyer’s lawyer” – indeed the “best qualified [Supreme Court] nominee in 50 years.”<sup>93</sup> But they also included a biography by Senator Ted Kennedy of Massachusetts in which Bork was

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<sup>91</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Touchstone, 1990. 298. Print.

<sup>92</sup> By “biography” I mean what Hermonie Lee means: “the story of a person told by someone else.” Lee, Hermonie. *Biography: A Very Short Introduction*. New York: Oxford, 2009. 5. Print

<sup>93</sup> 133 Cong. Rec. S14721 (daily ed. Oct. 21, 1987). (Hereafter, “Bork Hearing”)

attacked as “hostile to the rule of law,” “publicly itching to overrule” established Supreme Court precedent, and antagonistic to the rights of women and racial minorities,<sup>94</sup> as well as a biography by Senator Howard Metzenbaum of Ohio in which Bork was described as someone who “could weaken, literally with a few years, fundamental constitutional freedoms which the Supreme Court has protected throughout its history.”<sup>95</sup>

In fact, from the time this biography by committee began until the time that Bork was allowed to respond with his own autobiographical retort, the senators had entered the following biographies into the record: one that made Bork out to be the poster boy for judicial restraint, and another that made him out to be the poster boy for judicial activism<sup>96</sup>; one that made him out to be a kind, compassionate man with a wonderful sense of humor, and another that made him out to be a heartless ideologue with attitudes that were both racist and sexist<sup>97</sup>; one that made him out to be a selfless public servant, and another that made him out to be in the pocket of big business<sup>98</sup>; one, in other words, that made him out to be essentially the best of all judges, and another that made him out to be essentially the worst of all judges.<sup>99</sup>

So it is no wonder that, while sitting in his nominee chair listening to these competing biographies, Bork felt as if he were listening to the description of “not one person...but several,” as he later recounted in his post-confirmation memoir *The Tempting of America: The Political Seduction of the Law*.<sup>100</sup>

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<sup>94</sup> *Bork Hearing*, 17.

<sup>95</sup> *Bork Hearing*, 28.

<sup>96</sup> *Bork Hearing*, 128.

<sup>97</sup> *Bork Hearing*, 126.

<sup>98</sup> *Bork Hearing*, 136.

<sup>99</sup> *Bork Hearing*, 142.

<sup>100</sup> Bork, Robert. *The Tempting of America: The Political Seduction of the Law*. New York: Touchstone, 1990. 298. Print.

Bork's experience, repeated in virtually every Supreme Court confirmation hearing since confirmation hearings became a regular part of the nomination process in 1955, presents an overlooked opportunity for scholars of life narratives. These scholars, Sidonie Smith and Julia Watson foremost among them, have brought helpful critical attention to the way biographical and autobiographical storytelling have contributed to the "making, unmaking, and remaking of 'America.'"<sup>101</sup> But so far this attention has not extended to the way biographical and autobiographical storytelling have specifically contributed to the "making, unmaking, remaking" of America's highest court, an institution that arguably has as much influence on the "making, unmaking and remaking" of America more generally as does any other institution in the country.

I plan to provide that extension in the second chapter of my dissertation. In particular, I plan to focus on Supreme Court confirmation hearings as what Smith and Watson call "sites of storytelling,"<sup>102</sup> ones which not only shape the stories we tell about American Supreme Court justices in particular but also the stories we tell about American justice in general.

## B.

Sites of storytelling are sites that establish a set of "expectations about the stories that will be told and be intelligible to others."<sup>103</sup> For example, the expectations about the stories that will be told and be intelligible to others on a personal website, Watson and Smith explain, are much different than the expectations about the stories that will

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<sup>101</sup> Smith, Sidonie and Julia Watson. (eds) *Getting a Life: Everyday Use of Autobiography* Minneapolis: University of Minnesota Press, 1996. 4. Print.

<sup>102</sup> Smith, Sidonie and Julia Watson. *Reading Autobiography: A Guide for Interpreting Life Narrative*. 2<sup>nd</sup> edition. Minneapolis: University of Minnesota Press, 2010. 69. Print.

<sup>103</sup> *Ibid.*

be told and be intelligible to others in a courtroom – and confusing these two sites of storytelling “might cause real problems.”<sup>104</sup>

What’s particularly important about sites of storytelling for my purposes is that they are at once “occasional” and “locational.”<sup>105</sup> That is, they are at once “specific to an occasion” and so a “literal place,” and they are also located in “a moment in history” and so “a sociopolitical place.”<sup>106</sup> Take a doctor’s office. A doctor’s office is an “occasional” site of storytelling in the sense that it is a literal place, with walls and insurance forms and people walking around with stethoscopes – all of which shape the stories that are told in the office and are intelligible to others there. It would be odd to tell the story of your battle with high cholesterol in a check-out line at Whole Foods. But it wouldn’t be odd to tell this same story in a doctor’s office.

At the same time, a doctor’s office is also “locational” in the sense that it is located in a particular moment in history, a fact that also shapes the stories that are told in the office and are intelligible to others there. The stories told in that doctor’s office in 1980, before the discovery of AIDS, will be much different than the stories told in it now. That the concept of a site of storytelling has this multi-layer structure, or what Smith and Watson call “multi-layer matrices,”<sup>107</sup> makes it an especially useful tool for analyzing Supreme Court confirmation hearings, which share the characteristic of being at once “occasional” and “locational.”

### *Occasional*

What makes Supreme Court Confirmation hearings occasional are the specifics of the literal place in which the confirmation hearings are held: from who the

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

chairperson running the hearing is, to who the other senators asking questions are, to whether the audience will include people watching on television. A confirmation hearing chaired by someone like Senator Strom Thurmond of South Carolina, who followed a more formally question-and-answer approach during his eight years as chairperson,<sup>108</sup> will produce different stories than a confirmation hearing chaired by someone like then then-Senator Joseph Biden of Delaware, who followed a much more informally conversational approach during his own eight year reign.

For example, Biden began the confirmation hearing of Ruth Bader Ginsburg with a quip about how nice it was to open the *New York Times* that morning and not see any mention of the hearing on the front page or the second page or even the third or fourth or fifth or sixth or seventh page. “[This] is the most wonderful thing to happen to me since I have been chairman of the committee,” Biden said, because it means “thus far

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<sup>108</sup> See, for example, the confirmation hearing of Sandra Day O’Connor, where Senator Thurmond presented his questions in a way that allowed O’Connor to essentially read her responses, which already seemed prepared. *Confirmation Hearings on the Nomination of Sandra Day O’Connor to be Associate Justice of the Supreme Court Before the Committee on the Judiciary United States Senate* (hereafter “O’Connor Hearings”). 97<sup>th</sup> Cong. 1<sup>st</sup> Sess, 1981. 57-68. See also, the confirmation hearing of Antonin Scalia, where each one of Senator Thurmond’s opening questions follows the same format: an introductory statement to contextualize his question – “Judge Scalia, since the announcement of your nomination to be an Associate Justice of the Supreme Court, you have been criticized by some for decisions you have rendered regarding the first amendment and libel” – followed by the question itself: “Would you please give the committee your view as to why your interpretation of the first amendment, with regard to libel, led to this criticism?” *Confirmation Hearings on the Nomination of Antonin Scalia to be Associate Justice of the Supreme Court Before the Committee on the Judiciary United States Senate* (hereafter “Scalia Hearings”). 99<sup>th</sup> Cong. 1<sup>st</sup> Sess, 1986. 31-40. Senator Thurmond continued this more formal, questionnaire-type approach after he moved from chair of the Senate Judiciary Committee back to its ranking Republican member. As he explained to Clarence Thomas during Thomas’s hearing, “Now, Judge, I think we can move right along. I have about 30 minutes here, and I have approximately 14 questions. I think we can finish them if you will just make your answers fairly brief.” *Confirmation Hearings on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court Before the Committee on the Judiciary United States Senate* (hereafter “Thomas Hearings”). 102<sup>nd</sup> Cong. 1<sup>st</sup> Sess. 131.

[the hearing] has generated so little controversy.”<sup>109</sup> Senator Thurmond never began any of the hearings he chaired with a quip like that, nor did he add in his own wry commentary as each hearing progressed, something Biden often did, even during the most contentious hearings. When, at the beginning confirmation hearing of Clarence Thomas, Thomas introduced the committee to his family, Biden joked with Thomas’s son Jamal that “You look so much like your father that probably at a break you would be able to come and sit there and answer questions. So, if he is not doing the way you want it done, you just slide in that chair.”<sup>110</sup> And when, toward the end of the confirmation hearing of Robert Bork, Senator Alan Simpson of Wyoming noted that he was glad he never published any of his speeches now that he has seen the negative attention Bork’s published speeches were getting, Biden interjected, “I think you will find that a bunch of [your speeches] are taped Al. I am finding that out now.”<sup>111</sup> The comment, which triggered laughter throughout the hearing room, alluded to plagiarism charges Biden was facing at the time for speeches that would ultimately end Biden’s run for the 1988 presidency. Biden’s next comment produced even more laughter, as well as a raucous round of applause. “And not all of [those speeches] turn out to be mine either.”<sup>112</sup>

This is not to say that the levity Biden brought to the confirmation hearings he chaired changed the outcome of those hearings. Robert Bork may still have gotten “Borked” had Senator Thurmond instead chaired that hearing; Clarence Thomas may still have been confirmed. But it is to say that the levity Biden brought to the confirmation hearings he chaired changed the atmosphere of the hearings, and so also

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<sup>109</sup> *Confirmation Hearings of the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court Before the Committee on the Judiciary United States Senates* (hereafter “Ginsburg Hearings”). 103<sup>rd</sup> Cong. 1<sup>st</sup> Sess, 1993. 1.

<sup>110</sup> Thomas Hearing, 113.

<sup>111</sup> Bork Hearings, 432.

<sup>112</sup> Bork Hearings, 432.

the stories told there; just as the participation of female senators in the hearings, something that did not happen until Ruth Bader Ginsburg's confirmation hearing in 1991, changed the atmosphere of the hearings, and so also the stories told there; and just as the introduction of television cameras, something that did not happen until Sandra Day O'Connor's confirmation hearing in 1983, changed the atmosphere of the hearings and so also the stories told there, as many commentators have noted<sup>113</sup> and as the Senate Judiciary Committee itself seems to have acknowledged in a new rule, implemented after the confirmation hearing of Clarence Thomas, that at least part of all hearings be conducted behind closed doors.<sup>114</sup> In short, what is true of theater is true of

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<sup>113</sup> See Stone, Geoffrey. "Understanding Supreme Court Confirmations." *The Supreme Court Review*. Vol 2010, No 1 (2010). 439. Print. ("Because Supreme Court confirmations now attract enormous media attention, they increasingly afford senators 'an attractive opportunity' to perform for their constituents. The result is that nominees now repeatedly confront the same 'tough' questions from a succession of senators, and unresponsive answers therefore must be repeated over and over again."); Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. Lanham: Rowan and Littlefield, 2009. 124. Print. ("Eliminating nominee testimony would, in fact, accomplish only one thing – but a huge thing that would have a great clarifying effect on the Senate's process. It would remove the central event to which all of this builds, that opportunity for senators to confront the nominee and, over hours and days of national spectacle, make him or her answerable for every decision the Court has ever made or might make in the future."); Carter, Stephen. *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. New York: Harper, 1994. Print. 6 ("What a wonderful time to be an American, if you care about who serves in government and you watch television! The confirmation battles, which the Founders evidently thought would be private little debates between President and Senate, are now available for all to enjoy. Because you can see it all laid out for you, at least if a breath of controversy attaches: you need not read for yourself the writings of a Lani Grunier or a Robert Bork or a Ruth Bader Ginsburg, because television brings you plenty of partisans who have read the works for themselves (and plenty more who have not) and are happy to describe it to you in terms either lurid and censorious or glowing and righteous, depending on which side of the issues they happen to be on.")

<sup>114</sup> As Chairperson Biden explained, "[B]efore I begin the first round I have a very brief few comments to make about procedure, not merely in terms of timing, but how procedurally this Supreme Court nomination will be handled differently than any that has been handled thus far, at least any of the others that I have handled. It is somewhat of an outgrowth of some of the

confirmation hearings: If you change the cast, you change the stories. If you change the settings, you change the stories. If you change the audience, you change the stories. Which is all of way of saying that if you change the “occasional site of storytelling,” you change the storytelling itself.

### *Locational*

What makes confirmation hearings locational, on the other hand, is that each takes place during a particular moment in history. Among the reasons the confirmation hearing of Thurgood Marshall, the first African American to be nominated to the Supreme Court, produced different stories than the confirmation hearing of Clarence Thomas, the second African American to be nominated to the Supreme Court, is that the confirmation hearing of Thurgood Marshall occurred in 1967, over a decade before the Supreme Court’s decision in *Regents of California v. Bakke* (1978), while the confirmation hearing of Clarence Thomas occurred in 1991, over a decade after the Supreme Court’s decision in *Regents of California v Bakke*.

This decision, which struck down a quota-based admission system at the University of California-Davis medical school, helped turn the issue of “affirmation action” into a matter for national debate, the terms of which eventually shaped many of the stories told during Thomas’ confirmation, particularly given Thomas’ outspoken stance against the policy. Supporters of affirmation actions believe, Thomas explained

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contentious fights that we have had, and hopefully it will make the process a litter better.... Beginning with you, there will be a closed hearing at one point. It will be, in this case, on Friday. This is a new procedure adopted for the first time in this hearing, and it does not imply the need to discuss any adverse information with regard to you, Judge, but it is now going to be a standard part of all hearings. Whether or not any allegation is raised, we will at some point for every nominee from this point on go into a closed session, where only the Senators on the committee and the nominee are there, to discuss any investigative matter that has been raised. Under rule XXVI of the Senate, any information that can be potentially embarrassing allows us to go into closed session, and embarrassing information can be real or false, nonetheless embarrassing under these klieg lights” *Ginsburg Hearing*, 114.

in a 1989 speech included in the confirmation hearing record, “that the laws should be read to prohibit only some discrimination and to permit, or even require, other discrimination – the prohibited and permitted types to be determined, apparently, by the governing elites.”<sup>115</sup> But “since the memory of when the governing elite favored discrimination against black people is still so clear in my mind,” Thomas concluded, “I prefer not to leave the elites the discretion to categorize race discrimination into permitted and prohibited classes. All discrimination must be prohibited.”<sup>116</sup>

Such statements, coupled with characterizations of Thomas as someone who benefited from affirmative action but now “condemns government efforts to give other people the same chance he had,”<sup>117</sup> led to a concern among various senators that would have been unthinkable during the confirmation of Justice Marshall: could this African-American nominee be trusted to protect the rights of African-Americans?

In fact, during Marshall’s confirmation, the concern was just the opposite. Senators worried whether Marshall could be trusted to protect the rights not of African Americans but of white people. “Are you prejudiced against white people of the South?” Senator James Eastland of Mississippi asked Marshall directly, from Eastland’s center seat as chairperson of the committee.<sup>118</sup> The question was one of many like it

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<sup>115</sup> *Thomas Hearings*, 46.

<sup>116</sup> *Thomas Hearings*, 46.

<sup>117</sup> *Thomas Hearings*, 63 (“Opening Statement of Hon. Howard M. Metzenbaum, a Senator from the State of Ohio”).

<sup>118</sup> Senator Eastland holds the record for longest tenure as chairperson of the Senate Judiciary Committee, having held that position for the twenty-two years spanning from 1956, the year after *Brown* was decided, to 1978, the year *Bakke* was decided. He may have also been the most racist. As a *New York Times* obituary noted after Eastland’s death in 1986, Eastland once characterized his views about racial integration by saying “If it came to fighting, I’d fight for Mississippi against the United States, even if it meant going out into the streets and shooting Negroes.” See “James O. Eastland, 81, Former US Senator.” *New York Times*. February 20, 1986. Curiously, though, the origins of this quote seem to start not with Eastland but with William Faulkner, who, in a 1955 interview with British journalist Russell Warren Howe, used the following terms to describe the increasing, almost war-like tension over desegregation in the

during a confirmation hearing that scholars have singled out for its venom and bigotry. Segregationists like Senator Eastland “had recognized the inevitability of a black appointment for some time,” notes Henry Abraham, the leading historian on Supreme Court confirmation hearings, “but they were not about to accept it without a battle.”<sup>119</sup> “The result,” adds Benjamin Wittes in *Confirmation Wars: Preserving Independent Courts in Angry Times*, “was a degrading spectacle of the vestiges of public racism picking at a man (Marshall) who surely ranks as one of the great figures of the twentieth century.”<sup>120</sup>

Yet by the time Thomas was nominated in 1991, this kind of public racism, although still evident in contemporaneous legal events such as the beating of Rodney King, was no longer acceptable during Supreme Court confirmation hearings, a fact perhaps best illustrated by the evolution of Strom Thurmond, one of two senators to participate both in Marshall’s confirmation hearing in 1967 and in Thomas’s confirmation hearing twenty-four years later in 1991. (The other senator is Ted Kennedy of Massachusetts.)<sup>121</sup>

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American South: “As long as there is a middle road, alright. I’ll be on it. But if it came to fighting, I’d fight for Mississippi against the United States, even if it meant going out into the streets and shooting Negroes.” See Blotner, Joseph. *Faulkner: A Biography*. New York: Random House. 602. Print. But regardless of the origins of the quote, the import of its association with Eastland is clear: Eastland was preset to be hostile toward Marshall during Marshall’s confirmation hearing, particularly given Marshall prominent role in arguing – and winning – Brown before the Supreme Court, a case Eastland urged Mississippians to disobey. See, Williams, Juan. *Eyes on the Prize: America's Civil Rights Years, 1954–1965*. New York: Viking 38. Print.

<sup>119</sup> Abraham, Henry. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5<sup>th</sup> Edition. Lanham: Rowman & Littlefield. 229. Print.

<sup>120</sup> Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. Lanham: Rowan and Littlefield, 2009. 73. Print.; see also, Carter, Stephen. *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. New York: Harper, 1994. Print. 6 (describing the Marshall hearing as the “most vicious confirmation fight in our history”)

<sup>121</sup> Another way to illustrate the historical change between Marshall’s confirmation hearing and Thomas’s confirmation is to look at the evolution of Ted Kennedy. It is difficult to imagine Kennedy opposing any African-American nominee in 1969. But by 1991 he was one of Thomas’s

During Marshall's confirmation hearing, Thurmond, who had run for president on a pro-segregationist platform in 1956, grilled Marshall with pedantic questions after pedantic question in what Wittes has described as a "kind of confirmation-process version of the just-banned literacy tests for voting"<sup>122</sup>:

**Senator Thurmond:** Do you know who drafted the 13<sup>th</sup> Amendment to the U.S. Constitution?

**Marshall:** No, sir; I don't remember. I have looked it up time after time but I just don't remember.

**Senator Thurmond:** Why do you think the framer said that if the privileges and immunities clause of the 14<sup>th</sup> amendment had been in the original Constitution the war of 1860-65 could not have occurred?"

**Marshall:** I don't have the slightest idea.<sup>123</sup>

At one point, Thurmond even asked Marshall "What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2, through the necessary and proper clause of article I, section 8?"<sup>124</sup>, a question so convoluted and picayune that Senator Kennedy felt compelled to intervene, asking Thurmond for "further clarification" – even after Thurmond had already repeated the

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biggest opponents, although a conspicuously muted one when the focus of the hearing turned to sexual harassment, given the scandals in Kennedy's own past, from the drowning of Mary Jo Kopechne at Chappaquidick in 1969 to the rape trial involving his nephew William, which finished just months before the start of Thomas's confirmation hearing.

<sup>122</sup> Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. Lanham: Rowan and Littlefield, 2009. 73. Print.

<sup>123</sup> *Hearings Before the Committee on the Judiciary Senate: Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., 1967.* 161-176. ("Marshall Hearings")

<sup>124</sup> *Marshall Hearings*, 172.

question verbatim – because, as Kennedy told Thurmond, “I really am confused as to what actually you are driving at.”<sup>125</sup>

This question, like Thurmond’s other questions, seemed designed to make Marshall look ignorant, a particularly demeaning gesture considering Marshall’s status at that time as both a former appellate court judge on the D.C. circuit – the so-called “Second Highest Court in the Land” – and as the current Solicitor General, not to mention Marshall’s reputation as perhaps the greatest Supreme Court advocate of his generation, having won 29 of the 32 cases he argued before the Supreme Court while a private attorney, including the landmark case of *Brown v. Board of Education*. [To put Marshall’s legal record in perspective, Chief Justice John Roberts, who before becoming chief justice had the reputation for being perhaps the greatest Supreme Court advocate of *his* generation, argued more cases before the Supreme Court than Marshall did (35), but won fewer times (25)].

Yet when the time came to confirm Thomas, who, meaningfully, had been nominated to replace Marshall and so take over as the only African-American justice on the Court, Thurmond showed no signs of his earlier “literacy test” approach. He didn’t grill Thomas. He lauded him. According to Thurmond, Thomas possessed “the integrity, intellect, professional competence, and judicial temperament to make an outstanding Justice.” Thomas’s “personal struggle to overcome difficult circumstances early in his life” – namely, growing up poor and black in segregated Georgia – “is admirable,” Thurmond suggested, and “a review of his background shows he is a man of immense courage who has prevailed over many obstacles to attain remarkable success.”<sup>126</sup>

Thurmond offered these words of praise without any hint of irony about his own role, as a pro-segregationist Dixiecrat, in creating the “difficult circumstances” Thomas

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<sup>125</sup> *Marshall Hearings*, 172.

<sup>126</sup> *Thomas Hearings*, 33-34.

had to overcome or the “many obstacles” over which Thomas prevailed. He even paid tribute to the “diligent work of individual such as Justice Thurgood Marshall and others involved in civil rights efforts.”<sup>127</sup>

The key point here – and the key help the idea of occasional and locational sites of storytelling can give us – is to call our attention to context and possibility. In the context of 1967, it would not have been possible for Marshall to become the first African-American justice to sit on the Court had his wife, like Thomas’s wife, been white. At the time, only 20% of Americans approved of interracial marriage, and 16 states officially banned the practice.<sup>128</sup> Marshall’s nomination had already run into problems because of his status as the symbol of integrated classrooms, as Juan Williams recounts in *Thurgood Marshall: American Revolutionary*.<sup>129</sup> His nomination would have been derailed completely had he also been the symbol of integrated bedrooms.

But the context when Thomas was nominated in 1991 was much different. That same year Spike Lee was able to put images of interracial bedrooms on movie screens across the country through his film *Jungle Fever*, and John Guare was able to put images of interracial bedrooms on Broadway through his play *Six Degrees of Separation*, earning nominations for a Tony Award, a Drama Desk Award, and the Pulitzer Prize in process. *Loving v. Virginia*, the case that that ultimately struck down Virginia’s Racial Integrity Act – and with it all other state statutes prohibiting interracial marriage – was nearing its 25<sup>th</sup> anniversary, with no sign of being overturned. Rather, the case was celebrated

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<sup>127</sup> *Thomas Hearings*, 34.

<sup>128</sup> For Gallup Poll testing of American views on interracial marriage from 1958, when the approval rate was 4%, to 2011, when the approval rate climbed to a record 86%, see Jones, Jeffery. “Record High 86% Approve of Black-White Marriage.” Gallup. Web. September 12, 2011. For a law and literature approach to *Loving v. Virginia*, see Nussbaum, Martha. “Narratives of Hierarchy: *Loving v. Virginia* and the Literary Imagination.” 17 QLR 337 (1997-1998).

<sup>129</sup> Williams, Juan. *Thurgood Marshall: American Revolutionary*. New York: Three Rivers Press, 1988. 3-15. Print.

during Thomas's hearing, by both Democrats and Republicans alike, as one of the Supreme Court's signature achievements.<sup>130</sup>

All of this is to say that in 1991 confirmation hearing stages was ready for a nominee from an interracial couple in a way that it wasn't in 1967, just as in 1981, when Ronald Regan picked Sandra Day O'Connor to be the first woman justice on the Court, the confirmation hearing stage was ready for a female nominee in a way that it wasn't in, for example, 1952, when O'Connor graduated third in her class from Stanford Law School yet could not convince any law firm to hire her as a lawyer. Instead, the only offers she received were for positions as a legal secretary.

Or to put the point somewhat differently: the stories it was possible to tell about a Supreme Court nominee in 1991 (or in 1981) were different than the stories it was possible to tell about a Supreme Court nominee in 1967 (or in 1952), a fact that both highlights the changing complexion of the nation's highest court and also raises a corollary question – what stories will it be possible to tell about a Supreme Court nominee in 2023 or in 2033 that it is not possible to tell about a Supreme Court nominee today, in 2013?

For example, the idea that it would someday be possible to tell the story of a gay nominee would have been incredible when the Court decided *Bowers v. Hardwick* in 1984, since in that case the Court upheld the constitutionality of sodomy laws in Georgia that were essentially a stand-in for prohibitions against homosexuality. But that was before Tony Kushner's two-part epic *Angels in America: A Gay Fantasia on National Themes* became a commercial and critical success on Broadway in 1993, earning Kushner that year's Pulitzer Prize for Best Drama as well as an offer from HBO to adapt the play into a mini-series, which itself ultimately became a commercial and critical success in

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<sup>130</sup> *Thomas Hearings*, 16, 233, 490.

2003, winning both an Emmy and a Golden Globe.<sup>131</sup> And that was before television show such as *Will and Grace*, *Glee*, and *Queer Eye for the Straight Guy* were welcomed along with their homosexual stars, into American living rooms on a weekly basis — *Will & Grace* having done more “to educate the American public,” in the words of Vice President Joe Biden during an interview on *Meet the Press* in May of 2012, “than almost anything that anybody has ever done.” “When things really begin to change is when social culture changes,” Biden explained. “[P]eople fear that which is different. Now they’re beginning to understand.”<sup>132</sup>

And of course that was before the Court, in a move that cannot be divorced from these and other shifts in cultural attitudes, nor from the increased presence of homosexual law clerks within its own chambers,<sup>133</sup> reversed *Bowers* in 2003, ruling in *Lawrence v. Texas* that the two men arrested in the case for homosexual conduct “are

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<sup>131</sup> Of course not everyone was impressed. The critic Lee Siegel used the premiere of the HBO version of *Angels in America* to opine that Kushner’s play had “no artistic merit” and was instead “a second-rate play written by a second-rate playwright who happens to be gay, and because he has written a play being gay, and about AIDS, no one--and I mean no one—is going to call *Angels in America* the overwrought, coarse, posturing, formulaic mess that it is.” Siegel, Lee. “*Angels in America*.” *The New Republic*. December 29, 2003. Web.

<sup>132</sup> *Meet the Press*. NBC. Sunday, May 6, 2012. Television. I rearranged Biden’s quote slightly to fit the structure of the paragraph. The full quote reads. “When things really begin to change, is when the social culture changes. I think *Will & Grace* probably did more to educate the American public than almost anything anybody's ever done so far. And I think- people fear that which is different. Now they're beginning to understand.”

<sup>133</sup> In *The Nine: Inside the Secret World of the Supreme Court*, Jeffery Toobin explains that in the 1990s “a new generation of law clerks brought a new attitude toward homosexuality.” Toobin captures that new attitude with the following anecdote about Justice O’Connor. “O’Connor gave T-shirts with the words ‘Grand Clerks’ to the newborn children of all her law clerks; shortly after 2000, she learned that one of her former clerks, a gay man, was adopting a baby with his partner. In her briskly efficient way, O’Connor poked her head into her current clerks’ office, explained the situation, and said, ‘I should send one of the shirts, right? We think this is a good idea, don’t we? The clerks nodded and the shirt went in the mail.” Toobin, Jeffery. *The Nine: Inside the Secret World of the Supreme Court*. New York: Doubleday, 2007. 217-218. Print.

entitled to respect for their private lives. This State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>134</sup>

So now, close to thirty years after *Bowers*, and with the Supreme Court having just issued an at once practical and symbolic victory for gay rights in *Hollingsworth v. Perry* (2013) and *United States v. Windsor* (2013), the idea that someday it will be possible to tell the story of a gay nominee no longer seems incredible. In some ways, it seems inevitable, especially given that, beginning with Judge Deborah Batts in 1994, five openly gay nominees have been already been confirmed to federal district courts and one openly gay nominee is awaiting confirmation to the a federal appellate court – the make-up of lower courts often being a good harbinger of the eventual make-up of the Supreme Courts. Women were judges on lower courts before Sandra Day O’Connor became the first woman on the Supreme Court, African Americans were judges on lower courts before Thurgood Marshal became the first African American on the Supreme Court, and Hispanics were judges on lower courts before Sonia Sotomayor became the first Hispanic on the Supreme Court.

Yet it is important not to focus exclusively on typically progressive stories, such as those attached to pioneering women and minorities, when considering the stories it will be possible to tell about Supreme Court nominees in the future. In fact, one of the most dramatic changes to Supreme Court confirmation hearings in recent years has been to the kind of conservative story is now possible to tell – namely, the story of the “originalist.”

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<sup>134</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

### C.

Even the justice best known for being an “originalist,” Antonin Scalia, was not described as such when he appeared for confirmation in 1986. Instead, attention focused on his Italian-American background and his winning personality. “What a political symbol,” reads an issue of the *New Republic* in the weeks leading about to Scalia’s hearing, quoting a White House official. “[Scalia] would be the first Italian-Catholic on the Court. He’s got nine kids. He’s warm and friendly. Everybody likes him. He’s a brilliant conservative. What more could you ask?”<sup>135</sup>

The reason Scalia was not then labeled an “originalist” is that “originalist” was not yet in the popular lexicon when Scalia was confirmed, having been only introduced to the legal academy in 1982 through the efforts of the newly formed Federalist Society and having been only introduced to the legal profession more generally through a speech to the American Bar Association by then Attorney General Edwin Meese III in 1985, a little less than twelve months before Scalia was nominated.<sup>136</sup>

But by the time George W. Bush was elected in 2000, “originalist” had become a kind of Supreme Court archetype – so much so that when reports circulated that Bush would nominate a justice “in the mold of Scalia or Thomas,” nobody thought that meant Bush would nominate a justice that was Italian American or a justice that was African American. Everyone knew that Bush would nominate a justice that shared Scalia’s and Thomas’s (and Meese’s) conservative orthodoxy.

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<sup>135</sup> “Reagan’s Full Court Press: How the Supreme Court is Going to be Reaganized.” *New Republic*, June 10, 1985. For fuller coverage of Scalia’s nomination, see Abraham, Henry. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5<sup>th</sup> Edition. Lanham: Rowman & Littlefield. 276-278. Print.

<sup>136</sup> See Calebresi, G. Stephen. “A Critical Introduction to the Originalism Debate.” 31 *Harvard Journal of Law and Public Property* 875 (2008). Web.

Or at least everyone thought they knew this until, after Bush nominated John Roberts – who remembers being inspired by Meese’s speech while working in the Department of Justice during the administration of Ronald Reagan<sup>137</sup> – and before Bush nominated Samuel Alito – who worked directly under Meese in the Department of Justice during the administration of Ronald Regan – Bush actually nominated Harriet Miers, a wildcard nominee whose close friendship with Bush and lack of judicial experience sparked fervent criticism. “[N]ominating a constitutional *tabla rasa* to sit on what is America’s constitutional court,” remarked columnist Charles Krauthamer in the *Washington Post*, “is an exercise of regal authority with the arbitrariness of a king giving his favorite general a particularly plush dukedom.”<sup>138</sup>

The strong negative reaction to Miers’s nomination, which ultimately led Miers to withdraw her name from consideration, highlights a final point worth considering about confirmation hearings as a site of storytelling: just as there are certain stories it was not possible to tell about Supreme Court nominees in the past that will be possible to tell about Supreme Court nominees in the future, there are perhaps certain stories that it will not be possible to tell about Supreme Court nominees in the future that it was possible to tell about them in the past.

For example, former Chief Justice Earl Warren was in many ways “a constitutional *tabla rasa*” when he was nominated to the Court in 1953 by Dwight Eisenhower. Like Miers, Warren had no judicial experience at the time of his nomination, a trait actually true of over 1/3 of the 111 justices ever to sit on the Court,

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<sup>137</sup> Clemetson, Lynne. “Meese’s Influence Looms in Today’s Judicial Wars.” *New York Times*. August 17, 2005. Web. See also, Toobin, Jeffery. *The Oath: The Obama White House and the Supreme Court*. New York: Knopf, 2012. 221.

<sup>138</sup> Krauthammer, Charles. “Withdraw This Nominee.” *Washington Post*. October 4, 2005. A23. For fuller coverage of Miers’s nomination, see Abraham, Henry. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5<sup>th</sup> Edition. Lanham: Rowman & Littlefield, 2008 319-321. Print.

including such revered justices as Louis Brandeis, Robert Jackson, Joseph Story, Felix Frankfurter, and William Rehnquist. Like Miers, Warren had never argued a case before the Supreme Court. And finally, like Miers, Warren had spent much of his legal career in electoral politics. First, he was elected to be a district attorney in California. Next, he was elected to be the attorney general of California. And then, he was elected Governor of California, a position that, by giving him the chance to “deliver” California to Eisenhower in the 1952 election, catapulted Warren to the top of Eisenhower’s list when the position of Chief Justice opened up during Eisenhower’s first months in office.<sup>139</sup> In short, Eisenhower giving Warren the center seat on the Supreme Court can be seen as “a king giving his favorite general” – or in this case his favorite governor – “a particularly plush dukedom.”

Yet Warren was confirmed quickly and smoothly, and is now considered by scholars of the Court to be one of the greatest justices in history, particularly given his influential role in such landmark opinions as *Brown v. Board of Education* (1954), which declared the doctrine of “separate but equal” unconstitutional; *Gideon v. Wainwright* (1963) which guaranteed defendants in criminal cases the right to counsel; and *Miranda v. Arizona* (1966), which created the now famous “Miranda Warning” that gives anyone in police custody the right to request an attorney before being interrogated and the right to remain silent while being interrogated.<sup>140</sup> Miers, on the other hand, was never even

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<sup>139</sup> Irons, Peter. *People’s History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped America*. New York: Penguin, 2006. Print. (“In choosing to Earl Warren to replace [Fred] Vinson as Chief Justice, Eisenhower paid a large political debt to the California governor, who had swung his state’s delegates behind Ike at a crucial point in the 1952 GOP convention.”)

<sup>140</sup> For a summary of how Supreme Court justices have been rated by scholars, see “Appendix A” in Abraham, Henry. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5<sup>th</sup> Edition. Lanham: Rowman & Littlefield. 373-376. Eisenhower, of course, would likely disagree with Warren’s rating as “Great”, having reportedly referenced Warren and William Brennan, another justice Eisenhower appointed,

given a confirmation hearing, as multiple senators complained when Samuel Alito was given one instead.<sup>141</sup>

Or perhaps a better parallel is between Miers and Sandra Day O'Connor, the justice Miers was nominated to replace. Both O'Connor, an Arizonan, and Miers, a Texan, grew up in states underrepresented on the Supreme Court, geography being a factor in judicial appointments ever since George Washington made the first appointments in 1789.<sup>142</sup> Both O'Connor and Meirs were committed public servants.<sup>143</sup>

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when asked whether he made any mistakes as president. "Yes, two," Eisenhower replied, "and they both are sitting on the Supreme Court." Irons, Peter. *People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped America*. New York: Penguin, 2006. Print. 345.

<sup>141</sup> See, for example, the questioning done by Senator Arlen Specter of Pennsylvania ("And as I have said before, Ms. Miers was run out of town on a rail. The nomination was decided in the radio talk shows, TV talk shows, on the op-ed pages, and not by the Committee, which is what the Constitution says should be done. The Senate should make the decision and it ought to have a hearing in this Committee."); the opening statement of Senator Charles Schumer of New York ("Harriet Miers's nomination was blocked by a cadre of conservative critics who undermined her at every turn. She didn't get to explain her judicial philosophy, she didn't get to testify at the hearing, and she did not get the up-or-down vote on the Senate floor that her critics are now demanding that you receive. Why? For the simple reason that those critics couldn't be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure of you. The same critics who called the President on the carpet for naming Harriet Miers have rolled out the red carpet for you, Judge Alito. We would be remiss if we didn't explore why."); and the questioning done by Senator Patrick Leahy of Vermont ("[I]t has been pointed out you are to replace Justice Sandra Day O'Connor. Actually, initially Chief Justice Roberts was nominated for that. Then Harriet Miers was nominated. The President was forced by concerns within his own party to withdraw her, then nominated you very quickly after you had been — well, you had been interviewed once at the beginning of his term, but then you were interviewed again by Vice President Cheney and Karl Rove, Scooter Libby, I think a few others. And that is why I worry.") *Confirmation Hearings on the Nomination of Samuel Alito to be Associate Justice of the Supreme Court Before the Committee on the Judiciary United States Senate 109<sup>th</sup> Cong. 2<sup>nd</sup> Session, 2006*. (Hereafter "Alito Hearings") 769, 36, 649.

<sup>142</sup> As the historian Henry Abraham explains, "Geography must also be noted as one of the elements that strongly influenced Washington's appointments. He regarded it as extremely

Both, too, were considered pragmatic conservatives without strong ideological commitments, a fact that cost each of them supporters in the Republican party since pragmatic conservatives, the fear was, might not necessarily overturn *Roe v. Wade*. And neither had any experience as a federal judge.

Yet while the story of a conservative, female, pragmatist, with Western roots and without much judicial experience, was a confirmable story when O’Conner was nominated in 1981, it was no longer a confirmable story by the time Miers was nominated in 2001, particularly because there was now one big data point on whether this kind of nominee would actually overturn *Roe v. Wade*: when given the chance to

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important in the light of his constant endeavor to be president of all the states of the fledging nation, and he repeatedly stated his desire to see each section ‘represented’ on the Supreme Court. On several occasions [he] rewarded a strategic state. For example, in commenting on [the appointment of James Iredell], the president frankly stated: ‘he is of a State (North Carolina) of some importance to the Union that has given no character to a federal office.’” Abraham, Henry. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5<sup>th</sup> Edition. Lanham: Rowman & Littlefield. 64-65. For the role of geography in the appointments made by other presidents, see examples of presidents, see Abraham 70, 166-67, 173-74, 177, 186.

<sup>143</sup> O’Connor began her career as deputy county attorney in San Mateo, California, moved on to a position as a civilian lawyer for the Quartermaster Corps in Frankfurt, West Germany (while her husband John served in the army’s Judge Advocate General’s Corp), spent five years in the Arizona state senate and eventually won a seat on the Maricopa County Superior Court in Phoenix before being running for a seat on the while Miers held a similarly various and civic-minded set of positions, including M then six more as an Arizona state judge, first in a seat she won in 1974 in Maricopa Superior Court and then, for 18 months, Miers had been the first woman president of the Dallas Bar Association, a member of the Dallas City Council, the chair of the Texas Lottery Commission and, in the Bush white house, staff secretary, deputy chief of staff for policy, and White House counsel.

overturn do so in *Planned Parenthood v. Casey* (1992), Justice O'Connor didn't, much to the dismay of pro-life advocates.<sup>144</sup>

Another way to put this point is to ask two questions: First, if Sandra Day O'Connor were nominated to the Supreme Court in 2005 instead of in 1981, would her nomination have been ultimately successful? Second, if Harriet Miers were nominated to be on the Supreme Court in 1981 instead of in 2001, would her nomination have been ultimately un-successful?

It is plausible that the answer to both of these questions is "No." Which seems odd, given that O'Connor became an American hero – the legal commentator Jeffrey Toobin has even called her "the most important woman in American history"<sup>145</sup> – and given that Miers, in contrast, became a late night punch-line. "A lot of conservative Republicans say they are very upset about President Bush's choice of Harriet Miers," Jay Leno quipped soon after Miers was nominated. "They say she has no experience, she doesn't know anything about constitutional law, and she's never shown any interest in it. Where were these people with the high standards when they nominated Bush to be president?"

But just as some new stories have been added to Supreme Court confirmation hearings, some old stories have been foreclosed. In 1921, Former President William Howard Taft became Current Chief Justice William Howard Taft, a transition unlikely to be repeated in the future. Barack Obama's retirement plans probably do not include donning judicial robes.

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<sup>144</sup> For an account of O'Connor's jurisprudential approach to abortion, see Joan Biskupic. *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*. New York: Harper/Collins, 2005. 216-234, 265-277.

<sup>145</sup> Toobin, Jeffery. *The Nine: Inside the Secret World of the Supreme Court*. New York: Doubleday, 2007. 251. Print.

Such changes provide a great opportunity to chart the different cultural moments that produced them, to see how the stories told at different Supreme Court confirmation hearings offer not just an “an index of [their] time,”<sup>146</sup> as Hermonie Lee suggests all autobiographical and biographical stories do, but also an index for the kind of stories we, as Americans, tell about the complexion of our country’s highest court, and so also the complexion, more broadly, of justice in America. In the next three chapters, I will examine three of these stories in-depth, beginning with the stories told by and about Robert Bork, a man whose confirmation hearing is often said to have changed both the kind of stories that are told at confirmation hearings and, perhaps just as important given their theatrical nature, how these stories are performed.

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<sup>146</sup> Lee, Hermoine. *Biography: A Very Short Introduction*. New York: Oxford, 2009. 26. Print

### CHAPTER 3

#### THE TAUNTING OF AMERICA: THE SUPREME COURT CONFIRMATION HEARING OF ROBERT BORK

##### A.

*My nomination was, as I have said, merely one battleground in a long-running war for control of our legal culture, which in turn, was part of a larger war for control of our general culture.*

--Robert Bork, The Tempting of America: The Political Seduction of the Law (1990)<sup>147</sup>

*But this nomination, with all due respect, Judge – and I am sure you would agree – is about more than just you.*

--Opening Statement of Senator Joe Biden, the chairperson of the 1987 Senate Judiciary Committee<sup>148</sup>

The 1987 Supreme Court confirmation hearing of Robert Bork presents a unique opportunity to see a country think through two decades of constitutional change in the span of five days.<sup>149</sup> The civil rights movement, Watergate, battles over the right to

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<sup>147</sup> Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990. Print. 271.

<sup>148</sup> "Transcript Viewer." *C-SPAN Video Library*. Web. 27 Jan. 2014. (Hour 2:56:44)  
Because I believe that confirmation hearings, like plays, have sights and sounds much richer than what is found in a written text, I cite, where possible, to C-Span online's video archive of the hearing. Occasionally, I deviate from this practice, mostly when I think the edited transcripts of the hearing helpfully arranged by Ralph E. Shaffer offer a more clear rendering of what was actually said, free as those transcripts are of the stammers and stutters of spoken speech. But for the most part, C-Span's archive is, in my view, the best place to experience the hearing.

<sup>149</sup> The hearing actually lasted twelve days, with several witnesses testifying for Bork and several witnesses testifying against Bork after his time in front of the committee ended. But

privacy – all of these issues, and many others, manifest themselves live, on stage, through real people, speaking real words, in front of real audience, all against the local backdrop of the historic Kennedy Caucus Room<sup>150</sup> and the ceremonial backdrop of the 200th anniversary of the Constitution itself.<sup>151</sup> There are dramatic bits of dialogue. There are intriguing sub-plots and bits of off-stage action. There are moments when

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although some of these witnesses gave powerful performances – most notably William T. Coleman Jr., the first African American to serve as a clerk on the Supreme Court, the second to serve on a president’s cabinet, and someone who explained his decision to speak out against what he saw as Bork’s anti-civil rights agenda.

by, in part, remembering that “When I was in high school and I went out for the swim swimming team, they abolished the team rather than let me swim” – none of them reached the theatrical heights of Bork’s days on center stage. Nor did any command nearly the same size audience. Televisions viewers tuned in to see Bork. They turned to something else when he departed. For an account of Coleman’s performance and other key witnesses that followed, see Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 247-253; Pertschuk, Michael, and Wendy Lesko. *The People Rising: The Campaign against the Bork Nomination*. New York, NY: Thunder's Mouth Press, 1989.

Print.26-31

<sup>150</sup> The room had been the site of, among other things, the hearing following the collapse of the Titanic in 1912; the hearings led by Senator Joseph McCarthy in 1954 which culminated in Army Counsel Joseph Welsh asking, accusingly, “Have you no sense of decency, sir”?; and the Watergate hearings in 1974. Of course, the room wasn’t named the Kennedy Caucus Room during any of those hearings, nor during Bork’s hearing in 1987. Instead that name came later, in 2009, to honor the three Kennedy brothers who served as members of the senate: John, Robert, and Edward.

<sup>151</sup> Several senators evoked the bicentennial in their opening statements, suggesting that it added greater weight to the questions of constitutional interpretation Bork would be discussing. Transcript Viewer." *C-SPAN Video Library*. Day 1, Part I. Web. 27 Jan. 2014. These senators included Chuck Grassley of Iowa, Patrick Leahy of Vermont, and Joe Biden of Delaware. The celebration also created an opportunity for some presidential lobbying. In the middle of the hearing, Republican Arlen Specter, a key committee member who had not yet made up his mind about Bork joined President Ronald Reagan at a bicentennial ceremony in Specter’s home state of Pennsylvania. Bork supporters hoped Reagan would be able to persuade Specter to vote for confirmation, but in that respect, the pairing was a missed opportunity. “You know, it was very surprising,” Specter would later say of the trip, “I thought he would have talked about the nomination, but he hardly mentioned it.” Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990. Print. 234; see also "Oral Histories: Arlen Specter on Robert Bork & Clarence Thomas Supreme Court Confirmation Hearings | C-SPAN." *C-SPAN | Capitol Hill, The White House and National Politics*. N.p., n.d. Web. 28 Jan. 2014.

fundamental aspects of character seem to be revealed through a single phrase or gesture or manner of dress. In short, the 1987 Supreme Court hearing of Robert Bork is one of the more gripping plays of the 20<sup>th</sup> century.

To say this is at once commonplace and controversial. It is commonplace because every major account of the hearing notes the hearing's theatricality.<sup>152</sup> Yet none of these accounts go the next step of claiming that the hearing, like a good play, is a valuable form of cultural expression, that the questions we should therefore ask of it are not simply political and legal but also, in a way, literary: What sort of action in words (and images) is the Bork hearing? What sort of language does it introduce to the world, both verbal and visual? What ways of being does it make possible – and also foreclose?

For decades, scholars led by James Boyd White have been fruitfully asking these questions of legal texts.<sup>153</sup> Now, years into an age of C-Span and “gavel to gavel” coverage of Supreme Court confirmation hearings, it seems time to ask these same questions of what are quintessentially legal performances. In doing so, this chapter – and the similar case-study chapters that follow – borrows much not only from the work of James Boyd White but also from the work of Robert Ferguson, who, in *The Trial in American Life*, examines high profile trials through a literary lens. “The adversarial

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<sup>152</sup> See, for example, Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. Print.152-156. Though a more succinct statement of Eisgruber's view can be found on the popular law blog "Balkinization." *Balkinization*. N.p., n.d. Web. 28 Jan. 2014. (“As anybody who watched them will remember, the Bork hearings were unforgettable political theater. They mixed hyperbole and scandal with sophisticated constitutional argument.” See also, Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 180-181; Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. IX.

<sup>153</sup> See, for example, White, James B. *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*. Chicago: University of Chicago Press, 1984. Print. White, James B. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison, Wis: University of Wisconsin Press, 1985. Print. White, James B. *Justice As Translation: Essay in Cultural and Legal Criticism*. Chicago: Univ.of Chicago Press, 1994. Print.

nature of the trial in the American system,” Ferguson writes, beginning a series of observations that could easily be applied to Supreme Court Confirmation hearings, “gives public voice to division. It pits one side against another, and the greater the division, the more outside controversy is likely to produce.” In this way, “[h]igh-profile trials are a distinct phenomenon at the nexus of the legal system and public life. Episodic as they are powerful, they surprise by attracting massive attention beyond the locality in which they take place and by influencing social thought generally, and although they come in many different forms and situations, they share qualities that aid the interpretation of history and culture.”<sup>154</sup>

My claim is that a high-profile Supreme Court confirmation hearing – of which the Supreme Court confirmation hearing of Robert Bork is perhaps the most high-profile of all – does something similar. In a form designed for debate and disagreement, for the airing of different viewpoints reflecting not just different political parties but also, among other things, different states, different generations, and different pet interests, a hearing like Bork’s gives, to use Ferguson’s phrase, “public voice to division.” Tensions that had been circulating privately throughout the country – over the legacy of the “Saturday Night Massacre,” over the meaning of “originalism,” over the conservative overhaul of the federal judiciary ushered in by the “Reagan Revolution” – get displayed publicly in front of the country. It’s an exercise in subjectivity on a communal stage, one made all the more dramatic because all three branches of government must intersect, creating what Joe Biden, who chaired Bork’s hearing, has called “one great democratic moment.”<sup>155</sup>

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<sup>154</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. Print. 1-2.

<sup>155</sup> This is a phrase Biden seems to have developed in later confirmation hearings, bringing it out first in the confirmation hearing of Clarence Thomas and then again in the confirmation hearing of John Roberts. But it applies equally well to the Bork hearing--and perhaps even better, considering that in addition to the normal intersection of the president (executive) nominating a

Yet the form of a high profile confirmation hearing is not enough to explain why it is worthy of close, cultural study, since low profile confirmation hearings – which are generally quite boring and forgettable – share that form as well. Instead, what is needed is some analysis of how the form works with the content, and also with the surrounding historical context, to produce something of lasting value, something that can be used, like the trials Ferguson discusses, as “an aide to the interpretation of history and culture.”<sup>156</sup> What is needed, essentially, is the kind of analytic toolkit Ferguson sets out in *The Trial in American Life*.

There, Ferguson identifies three interlocking concepts that help make sense of why “certain trials become enduring events and why other trials that would seem to qualify do not.”<sup>157</sup> First, it is important that the trial involve a “spread of conflict,” a term Ferguson uses to describe how a discrete legal quarrel “spawns less restrained quarrels all around it” and so ultimately transforms the legal quarrel into something much more than a legal quarrel.<sup>158</sup> To use a theater analogy, the spread of conflict is the kind of thing that happened when London’s Royale Court Theater put on John Osborne’s *Look Back in Anger* in 1956, a play whose discrete stage quarrel – memorably voiced through the anti-establishment tirades of its lead character, Jimmy Porter – spawned less restrained quarrels around it, about the “angry young men” Porter came to symbolize, about the smugness of the British middle class, about the nature of theater itself. In the words of Alan Sillitoe, a writer and critic who would eventually be deemed one of the “angry young men” himself, the play “set off a landmine.... The bits

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judge (judiciary) who then has to be confirmed by the senate (legislative), members of each of these three branches testified on Bork’s behalf, starting with former President Gerald Ford and Senator Jack Danforth and ending with former Supreme Court Justice Warren Burger.

<sup>156</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. Print. 2.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

of have settled back in place, of course, but [British theater] can never be the same again."<sup>159</sup> Similar things, about Supreme Court Confirmation process never being the same again, are often said of the Bork hearing.<sup>160</sup>

The second helpful concept is the concept of "peripeteia," a term Ferguson borrows from Aristotle to describe that element of surprise or sudden reversal through which, as Ferguson puts it, "an entire community can be forced to reflect on behavior that is unprecedented, particularly horrifying, or invasive."<sup>161</sup> Oedipus discovering his

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<sup>159</sup> Heilpern, John. *John Osborne: The Many Lives of the Angry Young Man*. New York: Vintage Books, 2006. Print. 184. Critic Kenneth Tynan memorably made the impact of the Osborne's play more personal: "I doubt if I could love anyone who did not wish to see *Look Back in Anger*. It is the best young play of its decade." Tynan, Kenneth "The Voice of the Young," *The Observer*, 13 May 1956. Though perhaps the best observation, at least in terms of a parallel for the Bork hearing, comes from the director Peter Brook, who pointed out that, with the invention of Jimmy Porter, "the world acquired a new reference point," something certainly true of the nomination of Robert Bork. Heilpern, John. *John Osborne: The Many Lives of the Angry Young Man*. New York: Vintage Books, 2006. Print. 184.

<sup>160</sup> See, for example, "Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever': It's All Politics : NPR." *NPR.org*. Web. 28 Jan. 2014. ("The nomination changed everything, maybe forever," says Tom Goldstein, publisher of the popular SCOTUS blog, which extensively covers the Supreme Court. "Republicans nominated this brilliant guy to move the law in this dramatically more conservative direction. Liberal groups turned around and blocked him precisely because of those views. Their fight legitimized scorched-earth ideological wars over nominations at the Supreme Court, and to this day both sides remain completely convinced they were right. The upshot is that we have this ridiculous system now where nominees shut up and don't say anything that might signal what they really think."); "The Ugliness All Started With Bork - NYTimes.com." *The New York Times - Breaking News, World News & Multimedia*. Web. 28 Jan. 2011; Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. Print. 152. ("If the Thomas hearings are the most dismal chapter in the history of the Supreme Court confirmation proceedings, the Bork hearings are perhaps the most consequential ones. Unlike the Thomas hearings, they resulted in the defeated of the nominee and changed the composition of the Court. They also changed the way later nominees would approach their hearings, and they even generated a new verb."). For a different view, one that suggests the Bork hearing was more of an anomaly than a pivot point, see Stone, Geoffrey. "Understanding Supreme Court Confirmation Hearings." *Supreme Court Review* 2010.1 (2010): 415-435. Print.

<sup>161</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. Print. 2.

true parentage in *Oedipus Rex* is perhaps the most salient example, equaled only, in the confirmation context, by the surprise testimony of Anita Hill in the confirmation hearing of Clarence Thomas. But in the Bork hearing, too, surprise played a crucial role, starting with the surprise that when Bork was asked questions, he, unlike previous nominees, actually answered them. Not only that, he answered those questions candidly, thoroughly, and, at times, controversially, such as when he attacked the Supreme Court's reasoning in *Shelley v. Kramer*, a 1948 decision that ruled that racial covenants on private homes were unconstitutional, or when he called *Bolling v. Sharpe*, the 1954 case that outlawed segregation in the public schools of Washington, D.C., a "troublesome case."<sup>162</sup> Both sets of answers contributed to the "spread of conflict" mentioned above. What was supposed to be a hearing to determine Bork's fitness as a Supreme Court Justice soon turned into a national referendum on civil rights.

The third and final concept is the concept of "iconography," something Ferguson defines as the "symbolism and imagery of personality."<sup>163</sup> Without images of Bork, of his demeanor, of his stature, of his notorious beard, it is tough to imagine him becoming—and staying—a household name, much less the inspiration for a new verb: "To bork," according to the *Oxford English Dictionary*, means "To defame or vilify (a person) systematically, esp. in the mass media, usually with the aim of preventing his or her appointment to public office; to obstruct or thwart (a person) in this way." Clement Haynesworth and Harold Carswell, for example, who are the two failed nominees before Bork, quickly faded from popular memory after being rejected by the Senate in 1969 and 1970 respectively. So did Herbert Hoover's failed 1930 nominee John J. Parker. Part of the reason seems to be that none of these nominees had the benefit—or, perhaps,

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<sup>162</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014. See also, Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. 38-39.

<sup>163</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. Print. 2.

the curse--of having his image beamed onto televisions across the nations. It is tough to remember a nominee you never saw.

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Below I use each of Ferguson's three concepts to explore the Bork hearing in more depth, while at the same time drawing on the specific vocabulary of the theater, and even comparisons to canonical works and characters, to highlight the hearing's particular dramatic power. In the process, I hope to show the value of the hearing as a form of cultural expression and also create a space to critically engage with that form—to evaluate, in other words, as you might with a play, the different ways of speaking and being on display.

B.

### "The Stage Was Set"

Like a controversial play with a lot of opening night buzz, the Bork hearing started, in a way, before the Bork hearing started—thanks principally to a speech Senator Edward Kennedy of Massachusetts made on the Senate floor on July 1, 1987, less than an hour after President Reagan announced Bork as his nominee.<sup>164</sup> A more venomous review of a performer who had yet to perform may be hard to find:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.

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<sup>164</sup> English, Bella, and Peter S. Canellos. *Last Lion: The Fall and Rise of Ted Kennedy*. New York: Simon & Schuster, 2009. Print. 250.

America is a better and freer nation than Robert Bork thinks. Yet in the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.

Kennedy's words capture, and certainly contributed to, the spread of conflict that helped turn the ensuing confirmation hearing into an event that "shook America."<sup>165</sup> Virtually every issue Kennedy raised – women's rights, civil rights, privacy, freedom of expression – eventually became a subject of heated debate, both inside and outside the packed confirmation hearing room. "I wanted to make clear what was at stake in this nomination," Kennedy later explained. "The statement had to be stark and direct so as to sound the alarm."<sup>166</sup>

And sound the alarm it did, on both sides. Senator Paul Simon, a Democrat from Illinois, received 120,000 pieces of mail on Bork. Senator Arlen Specter, a Republican from Pennsylvania, had two extra phone lines installed in his Washington office to deal with Bork-related calls, which reached a volume of 2,000 per day; this was in addition to the 1,000 calls per day that flooded into Specter's Pennsylvania office, a fact that helps account for why his receptionists began answering the phone: "Senator Arlen Specter's office. Are you calling about the Bork nomination? Are you for or against?"<sup>167</sup> "Wherever you go, and some of us go a lot of places," explained Republican leader of the Senate Bob Dole of Kansas on the first day of questioning, summing up the pre-hearing hype, "[Bork] is generally question number one or number two in any town meeting in America."<sup>168</sup>

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<sup>165</sup> "Shook America" is a reference to the subtitle of Ethan Bronner's in-depth account of the Bork hearing *Battle for Justice: How the Bork Hearing Shook America* (Union Square Press, 2007).

<sup>166</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 85-86.

<sup>167</sup> *Ibid.* at 178.

<sup>168</sup> *Ibid.* at 178.

Accordingly, the third floor of the Russell Senate Building, which had previously housed the Watergate hearings in 1973 and the Iran-Contra hearings just a month before Bork's nomination was announced, was set up for a major event. Tables for 150 journalists stretched from one Corinthian-columned wall to another Corinthian-columned wall in the ornate neoclassical amphitheater. Row upon rows of seats for other observers, each of whom had to rotate out in intervals to accommodate the excess demand, crowded in behind. Above them all was a thirty-five foot high gilded ceiling; below, a newly shined, black-veined, marble floor. "The stage," as Ethan Bronner writes in *Battle for Justice*, his in-depth account of the hearing, "was set."<sup>169</sup>

### **Cast of Characters**

This was particularly true for the participants. Twenty-three shining lights were focused on the witness chair Bork occupied. A television camera was set up at the front right corner of the room as well as at the very back, creating an atmosphere of spectacle Bork later likened to a "Roman circus."<sup>170</sup> The whole amphitheater, he remembers, felt "jammed."<sup>171</sup> Staring back at Bork were 14 senators, all evenly arranged along a long green table according to rank and political affiliation. To Bork's right sat the Democratic senators: Ted Kennedy of Massachusetts, Robert C. Byrd of West Virginia, Howard Metzenbaum of Ohio, Dennis DeConcini of Arizona, Patrick Leahy of Vermont, Howard Heflin of Alabama, and Paul Simon of Illinois. To Bork's left sat the Republicans senators: Strom Thurmond of South Carolina, Orrin Hatch of Utah, Alan Simpson of Wyoming, Charles Grassley of Iowa, Arlen Specter of Pennsylvania and Gordon J. Humphrey of New Hampshire. And directly in front of Bork sat Joe Biden of Delaware, who, because the Democrats controlled the Senate at the time, got to be

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<sup>169</sup> *Ibid.* at 180.

<sup>170</sup> Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990. Print. 296.

<sup>171</sup> *Ibid.*

chairperson, a position that afforded him and his coterminous presidential campaign one of the more valuable of all political (and theatrical) commodities: the spotlight.

In fact, Biden, knowing that “the hearing room was a vast stage set from which [he] would propel himself into the homes and hearts of millions,”<sup>172</sup> seems to have prepared for the hearing more rigorously than did Bork, who notoriously cancelled his own pre-confirmation rehearsals—commonly known as “murder boards”—after finding the first one unhelpful.<sup>173</sup> Biden, on the other hand, “closeted himself with anti-Bork experts day after day, on anti-trust, on privacy, and on the First Amendment. He and his campaign staff wanted to leave none of the staging to chance.”<sup>174</sup> He even brought in Lawrence Tribe, one of the leading constitutional law scholars in the country, to play the part of Bork during videotaped sessions, which Biden then studied and evaluated, enlisting family and friends to help him figure out whether the message he wanted to communicate was being communicated, particularly to non-lawyers.<sup>175</sup>

This intense level of preparation, apparently matched by other members of the committee, highlights a crucial aspect of the Bork hearing, in fact *the* aspect that made it such a unique vehicle for giving, to return to Ferguson’s phrase, “voice to public division”: Bork wasn’t the only performer. Had Bork simply sat down, read his opening statement and left, the hearing would have had about as much cultural impact as a presidential press release—news for a day, maybe, but soon forgotten after that and certainly not something that would necessitate a new entry into the *OED*.

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<sup>172</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 180

<sup>173</sup> Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990. Print. 296.

<sup>174</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 180

<sup>175</sup> *Ibid.*

Instead, though, Bork had to engage with an entire cast of characters, some sympathetic, many hostile, each with his own voice, presence, and agenda. Senator Howard Heflin, a 6 foot 4, 275 pound Democrat from Alabama with a slow-southern drawl and folksy wit, pressed Bork on *Roe v. Wade*.<sup>176</sup> Senator Paul Simon, a bowtie-wearing Democrat from Illinois with Biden-like presidential aspirations of his own, pressed Bork on school prayer.<sup>177</sup> And Senator Alan Simpson, a bald, bespectacled, “shoot-from-the-lip”<sup>178</sup> Republican from Wyoming didn’t press Bork much on anything, choosing instead to use his speaking time, and his penchant for mockery, to attack those who had been attacking Bork. “This is a curious place,” Simpson quipped during his first round of questioning, right after Senator Howard Metzenbaum of Ohio finished grilling Bork for Bork’s role, fourteen years earlier, in the Watergate events known as the “Saturday Night Massacre.” “If you go out in the land and say ‘What were you doing on the night of the Saturday Night Massacre?’, a guy will say, ‘What are you talking about?’ But in this town when you say, ‘What were you doing on the night of the Saturday Night Massacre?’, they say, ‘I was just finishing shaving. I was going out to dinner. I will never forget it my whole life. I went limp. My wife and I talked and huddled together and had a drink and just shuddered in shock.’”<sup>179</sup> In Simpson’s view, most of the country had moved on from Watergate; Senator Metzenbaum should too.

It’s this great range of personalities debating an even greater range of topics that gives the hearing the intellectual richness and multi-dimension vitality of a good dramatic dialogue. On display was not just Bork, provocative and polarizing as he was.

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<sup>176</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014. See also Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.s. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. 121-122.

<sup>177</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014.

<sup>178</sup> Simpson’s authorized political biography, written by his long-time Chief of Staff Donald Loren Hardy, is called *Shooting from the Lip: The Life of Senator Al Simpson* (University of Oklahoma Press, 2011).

<sup>179</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014.

On display was a kind of “slice of life” realism, with representatives from fourteen states and both parties engaged in a constitutional conversation unprecedented in its scope, liveliness, and accessibility. Oral arguments before the Supreme Court, though often lively – particularly given the current “hot bench” – are generally narrow in scope and are never televised. Judicial opinions, though made publicly available, are similarly narrow in scope, and because they lack the flesh and blood of live argument, they usually seem dead on arrival. For every vigorous prose stylist such as Oliver Wendell Holmes Jr., there are eight Stephen Breyer’s, about whom a friend once remarked, “You think like an eagle,” which was meant as a compliment, “but you write like a turkey,” which was not.<sup>180</sup>

Finally, law review articles, the other major forum for constitutional conversation, suffer in all three categories. They tend to be dryly written.<sup>181</sup> They tend to be on supremely narrow topics, to the point where the current Chief Justice, John Roberts, has questioned their usefulness.<sup>182</sup> And they tend to languish in obscurity, particularly outside the academy. Even what is perhaps the best known law journal, the

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<sup>180</sup> Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. New York: Anchor Books, 2008. Print. 158.

<sup>181</sup> One way to get a sense of the problem is to take a look at a proposed solution – namely the formation, in 1952, of Scribes, an organization dedicated to “honor legal writers and encourage a ‘clear, succinct, and forceful style in legal writing.’ We seek to promote better writing throughout the legal community – in courthouses, law offices, publishing houses, and law schools. And we hope to spread the growing scorn for legal writing that is archaic, turgid, obscure, and needlessly dull.” *Scribes*. Web. 29 Jan. 2014. Side note: in 1985 Scribes gave their annual book award to *When Words Lose Their Meaning* by our own Jim White. So you know they have good taste!

<sup>182</sup> “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.” Web. <[www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference](http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference)>.

*Harvard Law Review*, has under 2,000 subscribers, a number barely more than the small cohort of people who actually attend Harvard Law School at any one time.<sup>183</sup>

The Bork hearing, in contrast, reached millions of viewers, involved live performance, and covered everything from the Commerce Clause to the First Amendment to the anti-trust principles behind discount stores. It was as if the entire country had been invited to a kind of grand constitutional seminar, as several senators quickly realized once Bork, with greater forthrightness than any previous nominee, started answering their questions. At one point Senator Orrin Hatch of Utah praised Bork for being able to explain the intricacies of the Constitution better than the many professors and pundits then appearing on television, both the ones who were speaking to celebrate the document's bicentennial and the ones who were speaking to opine on the hearing itself.<sup>184</sup> At another, Senator Al Simpson said that that getting to participate in the hearing was like getting to go back to law school, and take a class where the smartest professor debated the smartest students.<sup>185</sup> Then, after the hearing finally ended, former Attorney General William Rogers described it as an adult education class of the highest order, "one which should be required reading for law students."<sup>186</sup>

### **Off-Script**

Of course, not all of that reading was edifying. Challenging Bork on his paltry record of pro bono work—a record Bork wholeheartedly owned up to<sup>187</sup>—Democratic

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<sup>183</sup> Davis, Ross E. "The Increasingly Long-Run of the Law Reviews: Law Review Business and Circulation." *George Mason University School of Law*. Web. 29 Jan. 2014. 258.

<sup>184</sup> "Bork Nomination Day 3, Part 1." *C-SPAN Video Library*. Web. 29 Jan. 2014.

<sup>185</sup> "Bork Nomination Day 5." *C-SPAN Video Library*. Web. 29 Jan. 2014. See also the comments of Senator Patrick Leahy of Vermont, who compared the hearing to a graduate seminar in constitutional law. "Bork Nomination Day 3, Part 1." *C-SPAN Video Library*. Web. 29 Jan. 2014.

<sup>186</sup> Shaffer, Ralph E. "Elena Kagan is no Robert Bork." *Chicago Tribune*. Web. 29 Jan. 2014.

<sup>187</sup> "Are you proud of the fact you didn't do any pro bono work?" Leahy asked. "I'm not proud of it," Bork replied. ". . . To tell you the truth, Senator, I was not asked. I was busy working on

Senator Patrick Leahy committed what Ethan Bronner calls “an unspeakably cruel gaffe,”<sup>188</sup> inadvertently bringing up a time when Bork tried to supplement his professor’s salary with consulting work so he could pay the medical bills of his ailing first wife, who was struggling with cancer and would ultimately die of the disease. Normally a gracious questioner, Leahy was trying to undermine the idea, put forth by Republican Senator Hubert Humphrey of New Hampshire, that Bork had repeatedly picked public service over private gain, by enlisting in the marine corps, by trading in a corporate lawyer’s salary for an academic’s salary, and by accepting government positions in the Department of Justice and as a judge on the D.C. Circuit Court of Appeals, both at modest pay, at least compared to what Bork could have made as a partner at a fancy, white-shoe law firm. So Leahy brought up the nearly \$200,000 Bork made in fees in 1979, the \$300,000 in 1980, and the \$150,000 in 1981, all without making the connection between those years and the years Bork’s wife was most sick. “[T]here was reason why I did it,” Bork responded, face red, eyes looking down, his usual spark of combativeness noticeably extinguished, “and I don’t want to get into it here.”<sup>189</sup> Moments later Bork signaled that to Chairperson Biden that he needed to take a break, the only time he seems to have done so during the entire hearing.<sup>190</sup>

Leahy’s gaffe, which he publicly apologized for during the next round of questioning, showcases the at once scripted and unscripted nature of the hearings. You could tell Leahy had planned to attack Bork’s pro bono record. He had a series of questions written out. He knew exactly what answers those questions would elicit. And

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other things and I didn’t think about it. I should have thought about it. I didn’t.” “Bork Nomination Day 2.” *C-SPAN Video Library*. N.p., n.d. Web. 28 Jan. 2014.

<sup>188</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 233.

<sup>189</sup> “Bork Nomination Day 2.” *C-SPAN Video Library*. N.p., n.d. Web. 28 Jan. 2014.

<sup>190</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 233.

he pursued them with the focused intensity of the prosecutor he once was.<sup>191</sup> Yet what he didn't plan, what he couldn't plan, was that he would stumble into such a sensitive line of inquiry and be caught, on live television, castigating a man for trying, as best he could, to help out his sick wife. Leahy couldn't plan this because although he controlled his own script, he didn't control the script of anyone else, especially Senator Humphrey, whose defense of Bork provoked Leahy to push beyond his original series of questions and ask new ones. In other words, Humphrey, a known loose cannon on the committee, provoked Leahy to, in a sense, go "off-script."

Which is what makes the hearing so compelling to watch. In previous hearings, and many subsequent ones, everyone essentially followed the same script. Senators would ask banal questions; the nominee would give banal answers. And even if a senator decided to ask provocative questions—about, for example, the nominee's position on *Roe v. Wade*—the nominee would still give banal answers, often retreating to what has been called a kind of "pincer move": "If the question pertained to a specific cases, [the nominee] would say that she could not answer because she might appear biased when such a case reached the Court. When the question was more abstract, she would say that it was too hypothetical to answer."<sup>192</sup> As a result, notes Christopher

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<sup>191</sup>At one point Senator Biden, as chairperson, intervened. "Senator," he said firmly, trying to get Leahy to move off the topic of pro bono work and pursue a different line of questioning, "I think he's answered that question." "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014.

<sup>192</sup>Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. Print. 157. The term "pincer move" comes from a 1995 law review article written by then professor Elena Kagan, who would then, of course, be accused of using the same tactic during her own confirmation hearing. Kagan, Elena. "Confirmation Messes, Old and New." *University of Chicago Law Review* 62.2 (1995): 925. Print.

Eisgruber in *The Next Justice: Repairing the Supreme Court Appointments Process*, the nominee would be able to “evade any imaginable set of questions.”<sup>193</sup>

But once Bork showed that he wouldn't evade questions, that he would instead answer them fully and forcefully, an element of unpredictability crept into the hearing, creating the conditions for that Greek notion of “peripeteia,” of surprise and sudden reversal, mentioned above. You didn't know who was going to say what next.

A principal example of this came when Senator Orrin Hatch tried to lead Bork through an attack on the reasoning in *Roe*. Hatch started by cataloguing all the prominent scholars and jurists who had criticized the court's decision: John Hart Ely of Stanford, Lawrence Tribe of Harvard, Phillip Kurland of Chicago, and Justices William Rehnquist and Byron White, who, at the time of the hearing, were still serving on the Supreme Court. Hatch wanted to show that Bork's own criticism of *Roe* did not make Bork an extremist, a label attached to him since the beginning of the hearing. Instead it placed him in the esteemed company of some of the top legal minds in the country, both conservative (Kurland, Rehnquist, and White) and liberal (Ely and Tribe). To cement this point, Hatch tried to paint the authors of *Roe* as the ones who were the extremists, having handed down one of the most controversial opinions in Supreme Court history. But when Hatch asked Bork to name a similarly controversial – and maligned – opinion, hoping that Bork would name the infamous slavery case *Dred Scott*, Hatch received an unexpected response: “I suppose the only candidate for that, Senator, would be *Brown v. Board of Education*.”<sup>194</sup>

What Hatch wanted was for Bork to liken *Roe* to the most reviled decision in Supreme Court history; but what Bork did was to liken *Roe* to perhaps the most revered

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<sup>193</sup> Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. Print. 157.

<sup>194</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014

decision in Supreme Court history. “It was very frustrating,” Hatch would later say, describing Bork’s tendency not to follow the script, “when you serve up a question that he ought to hit a home run on and he wouldn’t do it.”<sup>195</sup> It was also, on the other hand, very refreshing. Bork never resorted to a “pincer move” with Hatch, or with any other senator. He never gave a banal answer. Instead he responded to each question with candor and conviction, even if that meant flatly disagreeing with Supreme Court precedent<sup>196</sup>; even if that meant defending a decision that, if read a certain way, made it seem like he had endorsed sterilization<sup>197</sup>; and even if that meant, as a result, coming across as a brute. There was an honesty and rawness to Bork that no confirmation hearing had ever seen before and none is likely to see again. “He had no airs,” wrote John Podhoretz in *Commentary* magazine. “You asked him a question, he answered it.”<sup>198</sup> He was, in a way, Stanley Kowalski with a law degree.

### C.

But not just any law degree, or rather not just with any legal education and cast of mind. A graduate of the University of Chicago Law School, perhaps the most conservative elite law school in the country, Bork had gone on to become a jag officer in the Marine Corps, a partner at the high-powered law firm Kirkland and Ellis, the holder of two endowed chairs at Yale Law School, Solicitor General under Richard Nixon, and, thanks to a nomination by then-President Ronald Reagan, a Court of Appeals Judge on the D.C. Circuit. Indeed, by the time Bork appeared for his confirmation hearing, he

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<sup>195</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 201-202

<sup>196</sup> Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. 55-58.

<sup>197</sup> *Ibid.* at 122-132.

<sup>198</sup> Podhoretz, John. "Robert Bork, 1927-2012: Commentary Magazine." *Commentary Magazine*. Web. 30 Jan. 2014.

was already an icon of conservatism. More particularly, he was *the* icon of “originalism,” the legal philosophy that holds that judges who abandon the original meaning of the text of the Constitution invariably – and illegitimately – end up substituting their own political philosophy for those of the Framers.<sup>199</sup> So, for example, Bork objected to the Supreme Court’s ruling in *Griswold vs. Connecticut*, the 1965 contraception case that established the “right to privacy,” not because he had anything against privacy but because he could not find the word privacy, let alone a right to it, in the Constitution.

Before the hearing, such objections were voiced to a limited audience: the readers of Bork’s books, the attendees of his seminars and public lectures, the academic community. Once the hearing started, however, they were voiced to the entire country. They were given a national stage, creating a theatrical effect in some ways analogous to what happened during the Scopes Monkey Trial of 1925, when famed Chicago-trial lawyer Clarence Darrow called to the witness stand William Jennings Bryan, the well-known orator and three-time presidential candidate who had been brought in to help Tennessee keep its schools free of the theory of evolution. What Bryan was in 1925 – the articulate spokesperson for a conservative, text-based ideology and so also the symbol, for some, of all that is good and right in world but, for others, all that is retrograde and dangerous – Bork was in 1987. Both men were seen as threats to civilization. Both men were seen as saviors of civilization. Both men, therefore, became vehicles through which the country thought through and argued over the direction civilization should take. The local conflict may have been over how to interpret individual pieces of Scripture, the Bible in the case of Bryan, the Constitution in the case of Bork; but because of the iconography, because of way each man became a stand-in, a symbol, of a

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<sup>199</sup> Calebresi, Stephen. "A Critical Introduction to the Originalism Debate." *Harvard Journal of Law and Policy* 31: 875. Print.

larger idea and worldview, that conflict grew in magnitude and meaning. Such is the power of drama.

This fact seems to have been recognized by Jerome Lawrence and Robert Edwin Lee, who, in 1955, turned the events of the Scopes Monkey Trial into the now classic play *Inherit the Wind*. And while I am not suggesting that someone do the same with the events of the Bork hearing – in part because dramatizing historic legal events has a way of distorting historic legal events, as the example of *Inherit the Wind* itself shows<sup>200</sup> – I am suggesting that there is a theatrical richness to the hearing that warrants cultural consideration. It is tough to think of another forum in which we get to watch and listen, up close, as so many issues that divided the country get discussed and debated by so many people that ran the country, all in the tense, tidy confines of a single stage. And so it is also tough to think of a better opportunity, particularly from public, political life, to engage in the kind of ethical criticism drama is so perfectly suited for: the criticism that involves experiencing and evaluating different ways of speaking and being.<sup>201</sup>

For example, one of the most novel aspects of the Bork Hearing also became one of the nastiest. Beginning with Senator Kennedy's "Bork's America" speech, given even before the hearing started, Bork's worldview became an issue in a way unprecedented in confirmation hearings. "The speech was a landmark for judicial nominations," explains Ethan Bronner in *Battle of Justice*. "Kennedy was saying that no longer should the Senate content itself with examining a nominee's personal integrity and legal qualifications, as had been the custom – at least publicly – for half a century. From now on the Senate and nation should examine a nominee's vision for society."<sup>202</sup> Examining

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<sup>200</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. Print.

<sup>201</sup> For examples of this kind of criticism, see White, James B. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison, Wis: University of Wisconsin Press, 1985. Print. 3-28.

<sup>202</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 85.

a nominee's vision for society is not objectionable in itself. According to Chris Eisgruber, one of the great successes of the Bork hearing was that senators used the hearing to expose and assess Bork's overall outlook.<sup>203</sup> The objectionable part, rather, was the way Kennedy examined Bork's vision for society. He didn't engage with Bork; he lectured him, essentially giving an extended version of his "Bork's America" speech, with pauses built in to scold Bork, directly, for particular positions Bork had taken.

For example, attacking Bork for having once expressed reservations about how Civil Rights legislation might coerce restaurant owners in unconstitutional ways, reservations Justice John Marshall Harlan II – no conservative radical<sup>204</sup> – had himself expressed, Kennedy told Bork that "I wish, quite frankly, you had demonstrated as much concern about the coercion that was happening to those black citizens that were being coerced as you apparently were concerned about others."<sup>205</sup> Kennedy took a similarly admonishing tone when characterizing Bork's change of heart regarding that same legislation: Bork had been prompted to publish his reservations by Alexander Bickel, a close friend and fellow constitutional law scholar at Yale, but his explanation of why he didn't also publish his subsequent reevaluation of those reservations – "Senator, I do not usually keep issuing my new opinion every time I change my mind. I just do not. If I re-visit it, I re-visit it, but I do not keep issuing looseleaf services about my latest state of mind" – didn't garner Kennedy's approval. "I would just say,"

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<sup>203</sup> Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton University Press, 2007. Print. 8.

<sup>204</sup> For a short overview of Harlan, see Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008. Print. 205-208. For a more in-depth look, see Levin, M. "Justice Harlan: The Full Measure of the Man." *58 American Bar Association Journal* 579 (1972).

<sup>205</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. Web. 28 Jan. 2014.

Kennedy insisted, “that I wish you had been as quick to publish your change of heart as you were to broadcast your opposition.”<sup>206</sup>

Even when Kennedy did ask questions, they were embedded in accusations and declarations, as Bronner, who likened Kennedy’s approach to a bulldozer, has noted. “[Kennedy] began on Bork’s view of *Griswold*: ‘Doesn’t that lead you to the view that you would uphold a statute requiring, say, compulsory abortion, if a legislature enacted it by a majority?’ It was followed by five paragraphs before Bork had a chance to respond.”<sup>207</sup> And when Bork did respond, his words, rarely insincere or evasive, were often met with condescension, such as when Kennedy smugly remarked that Bork was “too good a professor not to understand” a distinction Kennedy was trying to make about the doctrine of “one man, one vote,” a distinction Bork insisted on challenging.<sup>208</sup>

My point, again, is not that Bork should have received a free pass, from Kennedy or any other senator. Article 2 of the Constitution requires the Senate to “Advise and Consent” the president when it comes to judicial nominations, not just offer a rubber stamp. That said, what Kennedy seemed set out to do was not “Advise and Consent” but “Attack and Destroy.”<sup>209</sup> It wasn’t a pretty performance, nor one that helped bring

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<sup>206</sup> *Ibid.*

<sup>207</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 85.

<sup>208</sup> “Bork Nomination Day 2.” *C-SPAN Video Library*. N.p., n.d. Web. 28 Jan. 2014.

<sup>209</sup> The sense of malice and ruthlessness is well captured in an anecdote from Senator Al Simpson, who remembers a conversation he had with Kennedy soon after Kennedy’s initial “Bork’s America” speech: “I walked up to [Kennedy] a day or two after that and said, ‘I want to tell you, that was just savage. There is no call for that. You didn’t have to do that. That was just dramatic bullshit, and you know it. This is not just some jerk. This is a law professor at Yale. You never even met a professor like this guy – this sharp, bright guy.’” He said, ‘Well, we’re scared to death of him.’ I said, ‘You might be, but you didn’t have to do that.’ Ted didn’t say he was sorry or anything, he just said, ‘We’ve got to bring him down.’” Hardy, Donald L. *Shooting from the Lip: The Life of Senator Al Simpson*. Norman: University of Oklahoma Press, 2011. Print.

about the kind of weighty, thorough assessment of a nominee that a confirmation hearing is supposed to bring about. Savagery doesn't often yield a lot of substance.

Neither, of course, does sycophancy, which is what Senator Orrin Hatch of Utah mainly engaged in right after Kennedy finished his round of questioning. Like an attorney trying to rebuild the credibility of a battered client, Hatch used leading question after leading question to try to recast Bork as "a most eloquent, consistent, brilliant exponent of the classic theory of judicial restraint."<sup>210</sup> He would make a statement – "The fact of the matter is you, as a federal judge, weren't elected to [make law]" – end it with the question "Is that right?", and then Bork would simply nod and say "That is correct."<sup>211</sup> As with Kennedy, the routine was more monologue than dialogue. Bork wasn't there to talk; he was there so Hatch, like Kennedy, could speechify. In this way, Bork was at the center of a Sophoclean clash of absolutes, with Kennedy and Hatch squaring off like Antigone and Creon, each convinced of the righteousness of their cause, neither willing to make even the smallest of concessions, and both making verbal what the confirmation stage had made visual, divided as it was between all the Democrats on one side and all the Republicans on the other: there seemed to be only two ways of speaking to a nominee. You either lauded him or you lacerated him.

Considering the high stakes – Supreme Court justices are appointed for life and the justice Bork was nominated to replace was the Court's frequent "swing vote," Lewis F. Powell<sup>212</sup> – such partisanship is understandable. Yet its poverty as a way of speaking

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<sup>210</sup> "Bork Nomination Day 2." *C-SPAN Video Library*. N.p., n.d. Web. 28 Jan. 2014.

<sup>211</sup> *Ibid.*

<sup>212</sup> The power Justice Powell had as the swing vote is well-documented in "The Most Powerful Man in America," the first chapter of Ethan Bronner's *Battle for Justice: How the Bork Nomination Shook America* (Union Square Press 2007). Print. Or think of the situation this way: the justice who eventually filled Powell's seat, after Bork was rejected by the Senate, was Justice Anthony Kennedy, who Time magazine labeled "The Decider" in a cover story in June of 2012 for often

and being starts to become exposed when placed alongside a new, more nuanced sensibility. This is what Sophocles shows in *Antigone* when he contrasts the rigid, absolutist minds of Antigone and Creon with the more subtle, context-specific minds of Ismene and Haemon; and it is also, remarkably, what happens in the Bork hearing, particularly when the time comes for Senator Arlen Specter of Pennsylvania to speak.

At the time, Specter was a Republican, though one who relished his political independence. He supported abortion rights. He favored civil rights legislation. And he would later be one of only three Republicans who supported the 2009 Stimulus Bill, a decision that eventually led him to switch parties. He had also, after graduating law school from Yale in 1956, spent eight years as the district attorney of Philadelphia, where he developed a reputation for being tough, tireless, and insatiably hungry for both ideas and facts, qualities he eventually brought to the Senate Judiciary Committee. In the words of Tom Korogolous, a former ambassador and lobbyist often called on by Republican presidents to guide judicial nominees through confirmations, Specter was the “Einstein of the Senate” and wanted the “Ph.D. treatment” when it came to background information: the more there was to read about a nominee, the better.<sup>213</sup>

This was especially true with Bork. In fact, to prepare for his rounds of questioning, Specter spent several months reading every article, speech, and opinion Bork had written – no small feat considering how prolific Bork had been both as a scholar and judge. As a result, by the time the hearing started, he knew the “tone and content [of Bork’s writing] better than anyone else in the Senate,” which helps explain

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being the fifth opinion in many 5-4 opinions. For example, Kennedy sided with the four conservatives on the bench in *Citizens United Federal Election Commission*, 558 U.S. 310, (2010), the landmark free speech and campaign finance decision, and he would later, after the article, side with the four liberals on the bench in *United States v. Windsor*, 570 (2013), the landmark gay marriage decision.

<sup>213</sup> Stolberg, Sheryl G. "Arlen Specter, Former Senator, Dies at 82." *The New York Times*. Web. 31 Jan. 2014.

why accounts of the hearing signal out Specter for having “lent the hearings the feel of a high-minded constitutional debate.”<sup>214</sup> He covered the First Amendment. He covered the Fourteenth Amendment. He covered every major area of law Bork had written about, from anti-trust<sup>215</sup> to legislative intent<sup>216</sup> to executive power<sup>217</sup> to privacy.<sup>218</sup> And he did so in a manner that wasn’t malicious, like Kennedy, or obsequious, like Hatch. Rather, Specter’s manner was inquisitive, probing, curious. He seemed to actually want to hear what Bork had to say, not so he could make Bork look bad, or so he could make Bork look good, but so he could decide for himself whether Bork should be confirmed, a decision Specter quite publicly said he would not make until the hearing was over and Bork had a chance to fully explain his views.<sup>219</sup>

In particular, Specter wanted to give Bork a chance to explain how, as an originalist, Bork could support the Court’s decision in *Brown v. Board of Education* and other desegregation cases, since the framers of the Constitution surely did not intend for little black children and little white children to share a Topeka, Kansas classroom.<sup>220</sup> Or how Bork could make room for the the “needs of the nation” in his commerce clause jurisprudence, but not in his privacy jurisprudence. Objections like these had been raised before – most notably in an essay Ronald Dworkin published in the *New York Review of Books* six weeks before the hearing start – but never in person, on a national

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<sup>214</sup> Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York, NY: Union Square Press, 2007. Print. 235.

<sup>215</sup> Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. 78-85.

<sup>216</sup> *Ibid.* at 95-98.

<sup>217</sup> *Ibid.* at 72-78.

<sup>218</sup> *Ibid.* at 111.

<sup>219</sup> "Oral Histories: Arlen Specter on Robert Bork & Clarence Thomas Supreme Court Confirmation Hearings | C-SPAN." *Capitol Hill, The White House and National Politics*. Web. 28 Jan. 2014.

<sup>220</sup> Shaffer, Ralph E. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History*. Princeton, NJ: Markus Wiener Publishers, 2005. Print. 35.

stage, in real time. What Specter's line of questioning did, with the help of Bork's own willing, candid responses, was take a seemingly diffuse debate and transform it into a dramatic dialogue. He pressed Bork. Bork pressed back. And the two of them, together, created something that neither of them could have created alone, which is not something you can necessarily say of Kennedy and Bork, or of Hatch and Bork. Both of those pairings, one-sided as they were, could have been conducted without Bork. But with Specter and Bork there was an engaging, creative interdependency reminiscent of the best theatrical exchanges. Both parties seemed intent on changing the other person's mind but both parties also, importantly, seemed open to having their mind changed as well, an effect that then carries over to the audience. During the performance of Kennedy and Hatch, you want to either cheer or jeer, depending on your political predisposition. But when it's Specter's turn, you seem invited to watch, to listen, to weigh and consider.

This is not to say that the exchange is without its flaws and frustrations. There is an entire stretch where Specter seems determined not to understand Bork's rather straightforward view of the First Amendment, where he hounds Bork, over and over again, to repeat an explanation Bork has already repeated several times.<sup>221</sup> But one bad scene doesn't spoil a play. Nor does it prevent the hearing from becoming the kind of genre-shattering performance that could pave the way for similarly searching, substantive hearings in the future—or at least that was the hope at the time. "I believe these hearings will set a new standard for nominees," Specter said on the fifth and final day of questioning, remembering the intellectual roadblocks set up by the non-answers of previous nominees such as Antonin Scalia, Ruth Bader Ginsberg, and Sandra Day O'Connor, "which I think is really important."<sup>222</sup>

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<sup>221</sup> "Bork Nomination Day 3, Part 1." *C-SPAN Video Library*. N.p., n.d. Web. 29 Jan. 2014.

<sup>222</sup> "Bork Nomination Day 5." *C-SPAN Video Library*. N.p., n.d. Web. 29 Jan. 2014.

Of course we now know that, not Specter, but Alan Simpson was the more accurate forecaster, having predicted, in his own closing remarks, that a hearing this “dazzling” would never happen again. “We will never get the zip and yeast that we had here,” he said, since future nominees will instead clam up, having seen that a stimulating and forthcoming nominee is not necessarily a confirmable nominee. In Simpson’s view, this would be a “tragedy.”<sup>223</sup>

Yet the distinctiveness of the Bork hearing also lends further support to the notion that the hearing itself deserves our close, cultural attention. If plays like *Antigone* were written every few years, there wouldn’t be the same need to spend time studying the original, trying to see what it has to teach us about both about the particular conflicts of a given moment and how to navigate, through language, more general conflicts that still persist. As the Bork hearings show, the clashing mindsets of the play live beyond Ancient Athens.

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<sup>223</sup> *Ibid.*

**CHAPTER 4**  
**POISON IN THE EAR:**  
**THE SUPREME COURT CONFIRMATION HEARING OF CLARENCE THOMAS**

*I find Judge Thomas more difficult to stereotype than his public image might suggest. I believe almost everyone will discover a few surprises during the confirmation process.*<sup>224</sup>

--Opening statement of Senator Charles Robb, September 10, 1991

*I am not what I am.*<sup>225</sup>

--Iago, Othello I.i.67.

*I really am getting stuff over the transom about Professor Hill. I've got letters hanging out of my pocket. I've got faxes. I've got statements from her former law professors, statements from people that know her, statements from Tulsa, Oklahoma, saying, "Watch out for this woman." But nobody's got the guts to say that because it gets all tangled up in this sexual harassment crap.*<sup>226</sup>

--Senator Al Simpson, October 12, 1991

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"It is difficult to remember a more grotesquely riveting day before a U.S. Senate committee,"<sup>227</sup> observed Ted Koppel on ABC's *Nightline*, just after Clarence Thomas and

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<sup>224</sup>"Thomas Confirmation Hearing Day 1 Part 2 | Video | C-SPAN.org." N.p., Web.

<<http://www.cspan.org/video/?21107-1/thomas-confirmation-hearing-day-1-part-2>>.

<sup>225</sup> Shakespeare, W., Raffel, B., & Bloom, H. (2005). *Othello*. New Haven: Yale University Press.

<sup>226</sup>"Thomas Second Hearing Day 2 Part 3 | Video | C-SPAN.org." N.p., Web.

<<http://www.cspan.org/video/?22218-1/thomas-second-hearing-day-2-part-3>>.

<sup>227</sup> Siegel, Joel. (1991, October 24). *Clarence Thomas-Anita Hill Supreme Court Confirmation Hearing 'Empowered Women' and Panel Member Arlen Specter Still Amazed by Reactions - ABC News*.

Anita Hill finished their first day of trading testimony before a 14-member panel of senators in October of 1991 – all of whom were white, all of whom were male, and all of whom had been brought together to consider whether Hill’s allegations of sexual harassment should derail Thomas from becoming only the second African-American Supreme Court justice in the Court’s, at that point, 202 year history.

Many commentators<sup>228</sup> have examined this “grotesquely riveting” day and the two-month long confirmation hearing it helped transform into what Lani Grunier has called a powerful “culture-shifting moment.”<sup>229</sup> Some have even reached toward the resources of literature. Patricia Williams, for example, couched her critique of the hearing in the form of a story co-written by Zora Neale Hurston, Charlotte Perkins Gillman, and Mary Shelley<sup>230</sup>; Charles Lawrence III leveled his as part of a “Three-Act Morality Play”<sup>231</sup>; and Louis Menand, writing in the contemporaneous pages of *The New Yorker*, suggested that the best way to make sense of all that had transpired, the accusations, the denials, the never reconciled truth claims, was to think like a

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Retrieved from <http://abcnews.go.com/US/clarence-thomas-anita-hill-supreme-court-confirmation-hearing/story?id=14802217>.

<sup>228</sup> See, for example, Richards, Amy and Greenberg, Cathy. *I Still Believe Anita Hill: Three Generations Discuss the Legacies of Speaking Truth to Power*. New York: Feminist Press, 2013. Print.; Ragan, Sandra. Ed.. *The Lynching of Language: Gender, Politics, and Power in the Hill-Thomas Hearings*. Urbana, Ill: University of Illinois Press, 1996. Print; Hill, Anita Faye and Jordan, Emma Coleman. Eds. *Race, Gender, and Power in America: The Legacy of the Hill-Thomas hearings*. New York: Oxford University Press, 1995. Print; Morrison, Toni. Ed. *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. New York: Pantheon Books, 1992. Print.

<sup>229</sup> Guinier, Lani. “But Some of Us Are Brave.” *I Still Believe Anita Hill: Three Generations Discuss the Legacies of Speaking Truth to Power*. Eds. Richards, Amy and Greenberg, Cathy. New York: Feminist Press, 2013. 48. Print.

<sup>230</sup> Williams, Patricia. “A Rare Case study of Muleheadedness and Men.” *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Morrison, Toni. New York: Pantheon Books, 1992. 159-171. Print.

<sup>231</sup> Lawrence, Charles. “The Message of the Verdict: A Three Act Morality Play Starring Clarence Thomas, Mike Tyson, and Will Smith.” Eds. Hill, Anita Faye and Jordan, Emma Coleman. *Race, Gender, and Power in America: The Legacy of the Hill-Thomas hearings*. New York: Oxford University Press, 1995. 105-28. Print.

novelist.<sup>232</sup> "Hill and Thomas are enormous characters," he wrote, something "[n]o legal account can recognize, of course. It cannot matter that Hill is a striking and exceptionally self-confident woman, or that Thomas is a forceful and exceptionally self-confident man. If he did those things to her, one continually heard, he must have done them to other women, too, or if she had invented this story about him, she must have invented things about other men as well. Everyone looked for 'patterns.' But characters like Thomas and Hill don't fit into patterns."<sup>233</sup>

It is into this conversation, which also includes the voice of Toni Morrison,<sup>234</sup> that I hope to enter with my own literary analysis of the hearing – though my approach will be slightly different than the commentators mentioned above. They all reached toward literary sources external to the hearing, whether *Their Eyes Were Watching God*,<sup>235</sup> *Crime and Punishment*,<sup>236</sup> or, in the case of Morrison, *Robinson Crusoe*.<sup>237</sup> I, in contrast, will focus on a source actually referenced in the hearing: *Othello*.

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<sup>232</sup>Menand, Louis. "Comment, Pt. I." *The New Yorker*. N.p., 28 Oct. 1991. Web. 1 May 2014.

<sup>233</sup> *Ibid.*

<sup>234</sup>Morrison, Toni. "Introduction: Friday on the Potomac." *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Morrison, Toni. New York: Pantheon Books, 1992. vii-xxx. Print.

<sup>235</sup>Williams, Patricia. "A Rare Case study of Muleheadedness and Men." *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Morrison, T. New York: Pantheon Books, 1992. 159-171. Print. Williams's literary comparison seems particularly apt given Anita Hill's own reach to Zora Neale Hurston when trying to explain the experience of the hearing, years later, to the reporters Jane Mayer and Jill Abramson. "Hill explained that she had taken particular comfort in the writings of Zora Neale Hurston, whose novel *Their Eyes Were Watching God* tells the story of a black woman who is falsely accused of murdering her husband. Hill read aloud Hurston's description of the protagonist seeing 'all of the colored people standing up in the back of the courtroom...They were all against her, she could see. So many were against her that a light slap from each would have beat her to death.' She evidently saw herself reflected in this portrait of woman falsely accused, racially ostracized, and utterly unprotected." Mayer, Jane, and Abramson, Jill. *Strange Justice: The Selling of Clarence Thomas*. Boston: Houghton Mifflin, 1994. 3. Print.

<sup>236</sup> Menand, Louis. "Comment, Pt. I : The New Yorker." *The New Yorker*. N.p., 28 Oct. 1991. Web. 1 May 2014.

The reference came toward the end of last round of questioning, when Senator Al Simpson, a Republican from Wyoming, tried to sum up the past day's revelations. "I tell you I do think Shakespeare would love this [hearing]," he said, looking at Thomas, though also, of course, addressing the entire viewing audience. "This is about love and hate and cheating and distrust and kindness and disgust and avarice and jealousy and envy – all those things that make that remarkable bard read today."<sup>238</sup> Simpson then narrowed specifically on *Othello*: "But, boy, I tell you one [play] came to my head and I just went out and got it out of the back of the book, *Othello*. Read *Othello* and don't ever forget this line. 'Good name in man and woman dear, my Lord, is the immediate jewel of their souls. Who steals my purse steals trash...But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.'"<sup>239</sup>

The line comes from the mouth of the play's villain, Iago, and so had an effect perhaps different than Simpson intended, at least for the hearing's more literate viewers.<sup>240</sup> What was ostensibly meant as an expression of solidarity – Simpson was

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<sup>237</sup> Morrison, Toni. "Introduction: Friday on the Potomac." *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. xxiii-xxx. Print.

<sup>238</sup> "Thomas Second Hearing Day 2 Part 3 | Video | C-SPAN.org." N.p., Web. <<http://www.cspan.org/video/?22218-1/thomas-second-hearing-day-2-part-3>>.

<sup>239</sup> *Ibid.*

<sup>240</sup> Moreover, the line comes in Act 3 Scene 3, right as Iago is trying to deceive Othello; and earlier in the play, in Act 2 Scene 3, Iago expresses essentially the opposite view, minimizing the importance of one's reputation in response to Cassio's lament that he has lost his:

**Cassio:** Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial. My reputation, Iago, my reputation!

**Iago:** As I am an honest man, I thought you had received some bodily wound; there is more sense in that than in reputation. Reputation is an idle and most false imposition: oft got without merit, and lost without

indignant that, in his view, Thomas had been robbed of his reputation, without justification – came across as an indirect indictment. When your honesty and character are being questioned, as Thomas’s was, being linked with someone known for their “motiveless malignity”<sup>241</sup> is rather damning, as several commentators have noted, including the Shakespearean director Barry Edelstein.<sup>242</sup> But rather than rehearse his argument and try to untangle what Simpson’s reference got right from what Simpson’s reference got wrong, I want to instead use that reference as springboard for a more probing discussion of the ways an understanding of *Othello* as a play may inform our understanding of the Thomas hearing as an event, as a spectacle, as what has been called “one of the great set pieces of the 20<sup>th</sup> Century.”<sup>243</sup>

Let me be clear, however: my claim is not that *Othello* offers a simple one-for-one parallel with the Thomas Hearing. Clarence Thomas, though black, stately, and powerfully articulate, was not Othello. Anita Hill, though youthful, maligned, and captivatingly dignified, was not Desdemona. Nor was there a single stand-in for Iago. The parallel is much more slippery than that, and also much more substantive. It is much more slippery in the sense that there are times in the hearing when Thomas seems to assume the role of Othello, such as when he first appears on the confirmation hearing stage to defend himself against charges of sexual misconduct. A crowd of supporters

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deserving. You have lost no reputation at all,  
unless you repute yourself such a loser. (2.3. 262-271)

Such are the perils of quoting one of literature’s most insincere and untrustworthy characters.

<sup>241</sup> Coleridge, Samuel T. *Lectures 1808-1819 on Literature*. Foakes, Reginald. A. Ed. London: Routledge & Kegan Paul, 1987. 315. Print.

<sup>242</sup> Edelstein, Barry G. "Macbluff: The Clarence Thomas Shakespeare Festival." *The New Republic* 11 Nov. 1991: 13. Print.

<sup>243</sup> Toobin, Jeffrey. "The Thomases vs. Obama’s Health-Care Plan." *The New Yorker*. Web. 2 May 2014.

cheers his entrance.<sup>244</sup> A cadre of powerful white men prepare to judge him.<sup>245</sup> And an almost preternatural eloquence rises not just into his voice but into his posture, his bearing, his whole demeanor. Shoulders back, gaze stern, he presents himself as confident, fearless, and perhaps most important, keenly aware of his position, at once precarious and powerful, as a black man married to a white wife who now has to, like Othello, “out-tongue”<sup>246</sup> the complaint against him.

Yet there other times when Thomas seems to assume a different role. Particularly if you believe Hill was telling the truth and Thomas was not, Thomas’s performance actually smacks of Iago – beginning right when Thomas, with persuasive poise and solemnity, reframes the hearings as a “high-tech lynching.” “This is not an opportunity to talk about difficult matters privately or in a closed environment,” he says, the television camera focused not just on his black face but also the very white face of his wife Virginia, who sits supportively behind him, her own kind of Desdemona. “This is a circus. It's a national disgrace. And from my standpoint, as a black American it 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.”<sup>247</sup>

What is Iago-like about this speech is what is, more fundamentally, Iago-like about the entire hearing: it spreads its poison not simply by introducing new fears, but

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<sup>244</sup> The CPSAN coverage includes this cheering, which gets raucous enough for Senator Joe Biden, who chaired the hearing, to warn that any similar outbursts would lead to ejection from the hearing room. "Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org* Oct. 1991. Web. 2 May 2014.

<sup>245</sup> For the corresponding scene in *Othello*, see Shakespeare, William. *Othello*. Raffel, Burton and Bloom, Harold. Eds. New Haven: Yale University Press, 2005. I.iii.48-301. Print.

<sup>246</sup> *Ibid* at I.ii.19.

<sup>247</sup> "Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org* | *National Politics* | *History* |, 11 Oct. 1991. Web. 2 May 2014.

by exploiting old ones; by tapping into pernicious cultural prejudices about race, about gender, about how these two categories interact; by, at its core, creating the conditions for toxic conclusions. For Iago's skill lies not in producing overwhelming amounts of evidence – his case rests on a single, flimsy handkerchief. Rather, Iago's skill lies in planting stories that can't be unplanted, stories that grow and fester in his audience's mind because the seeds for them, in a sense, already exist there. Preying on Othello's own fears about Desdemona's sexuality – she's already committed one social transgression by marrying him, so what's to stop her from committing a second by cheating on him<sup>248</sup> – Iago can count on Othello to finish the rest of the condemnatory story. Once prodded, Othello will fill in the blanks. He will search for evidence. He will interrogate witnesses.<sup>249</sup> He will, ultimately, concoct his own version of what happened and why, with disastrous consequences.

A similar thing can be said of the Thomas hearing, in ways that illuminate both the corrosive power of false stories and our national capacity to believe them – to become, in other words, unwitting Othellos, particularly when it comes to issues of sex, race, and power. If you believe Hill was telling the truth, perhaps this capacity is easier

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<sup>248</sup> "She did deceive her father, marrying you/ And when she seemed to shake and fear your looks,/ She loved them most." *Othello*, IV.iii. 207-208. This same idea is also planted, earlier in the play, by Desdemona's father Barbantio. "Look to her, Moor, if thou hast eyes to see/ She hath deceived her father and may thee." (I.iii.293-294)

<sup>249</sup> *Ibid.*

**Othello:** You have seen nothing, then?

**Emilia :** Nor ever heard.

**Othello:** Yes, you have seen Cassio and she together

**Emilia :** But then I saw no harm. And then I heard/ Each syllable that breath made up between them.

**Othello:** What? Did they never whisper?

**Emilia :** Never, my lord.

**Othello:** Nor send you out o' the way?

**Emilia :** Never.

**Othello :** That's strange. (4.2.1-11).

to see in people who didn't, people who, you might say, foolishly bought what Thomas and his many supporters were selling: the Horatio Alger-like tale of Thomas overcoming a poverty-filled childhood in Pinpoint, GA to become a presidential appointee, a tale some dubbed moving "from the outhouse to the Whitehouse"<sup>250</sup>; the tantalizing plotline taken from *Fatal Attraction*<sup>251</sup>; and finally, and perhaps most powerfully, the lynching trope, which packaged Thomas's story as the depressingly familiar story of an innocent black man being accused of a sexual crime he did not commit.

Of course, if you instead believe Thomas was telling the truth, the substance of the duplicity changes, but the basic form stays the same: tap into a story that already has cultural traction – in this case, the story of a hyper-sexualized African-American male unable to control his deviant appetites<sup>252</sup> – and then sit back and watch as that

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<sup>250</sup> "In meeting with Judge Thomas [Senator Peter Domenici of New Mexico] said, 'I wanted to find out as best as I could what his life – from outhouse to the White House as a nominee – has been like.' 'You cannot talk to that man without getting a pretty powerful message that he has not forgotten how tough it was to get anywhere,' [Domenici] said." Berke, Richard L. "Thomas Repeating A Ritual: Stroking." *The New York Times*. 26 July 1991. Web. 2 May 2014; For a slightly different version of the phrase, which became a kind of tagline through the hearing, see Mayer, Jane, and Jill Abramson. *Strange Justice: The Selling of Clarence Thomas*. Boston: Houghton Mifflin, 1994. 29. Print. ("What had impressed [Justice Department Lobbyist John] Mackey most was that once Thomas started talking his deprived childhood, opponents usually melted. Mackey had been astonished by the power of [Thomas's] life story. 'From the outhouse to the courthouse – everybody loved that,' he observed.")

<sup>251</sup> The *Fatal Attraction* comparison was played up most during the hearing by John Doggett, a witness whose own credibility was questioned once it was discovered that his testimony – built around the theory that Hill had a tendency to create fantasies about men she couldn't get – would be mostly self-flattering. But then, quickly after the hearing, Thomas's wife adopted the same comparison in a much read cover story, authored by herself, in *People Magazine*. "And what's scary about her allegations," she wrote, "is that they remind me of the movie *Fatal Attraction* or, in her case, what I call the fatal assistant. In my heart, I always believed she was probably someone in love with my husband and never got what she wanted." Thomas, Virginia L. "Breaking the Silence." *People Magazine* [New York] 11 Nov. 1991: 110. Print.

<sup>252</sup> The stereotype of a hyper-sexualized African-American male was addressed explicitly, if rather awkwardly, in an exchanged, towards the end of the hearing, between Thomas and Senator Orrin Hatch:

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**Senator HATCH.** Now, I want to ask you about this intriguing thing you just said. You said some of this language is stereotype language? What does that mean, I don't understand.

**Judge THOMAS.** Senator, the language throughout the history of this country, and certainly throughout my life, language about the sexual prowess of black men, language about the sex organs of black men, and the sizes, et cetera, that kind of language has been used about black men as long as I have been on the face of this Earth. These are charges that play into racist, bigoted stereotypes and these are the kind of charges that are impossible to wash off...

**Senator HATCH.** Well, I saw – I didn't understand the television program, there were two black men – I may have it wrong, but as I recall – there were two black men talking about this matter and one of them said, she is trying to demonize us. I didn't understand it at the time. Do you understand that?

**Judge THOMAS.** Well, I understand it and any black man in this country [will understand it]...

**Senator HATCH.** Well, this bothers me.

**Judge THOMAS.** It bothers me.

**Senator HATCH.** I can see why. Let me, I hate to do this, but let me ask you some tough questions. You have talked about stereotypes used against black males in this society. In the first statement of Anita Hill she alleges that he told her about his experiences and preferences and would ask her what she liked or if she had ever done the same thing? Is that a black stereotype?

**Judge THOMAS.** No.

...

**Senator HATCH.** In the next statement she said, "His conversations were very vivid. He spoke about acts that he had seen in pornographic films involving such things as women having sex with animals and films involving group sex or rape scenes. He talked about pornographic materials depicting individuals with large penises or breasts involved in various sex acts. What about those things?"

**Judge THOMAS.** I think certainly the size of sexual organs would be something.

**Senator HATCH.** Well, I am concerned. "Thomas told me graphically of his own sexual prowess," the third statement.

**Judge THOMAS.** That is clearly.

**Senator HATCH.** Clearly a black stereotype.

story crowds out contradictory evidence, crowds out reasoned judgment, and eventually settles in as accepted truth.

Being attentive to the themes and mechanics of *Othello* the play can help us see this process at work in the Thomas Hearing, a moment of dramatic national history that, reciprocally, gives us some insight into the particular dilemma faced by Othello the character: when confronted with rival claims of the same event but denied any definitive way of choosing between them, when forced to decide who is lying and who is telling the truth but offered nothing by way of conclusive evidence, nothing by way of what Othello calls "ocular proof,"<sup>253</sup> how, ultimately, do we decide what we decide? What explains, in other words, why we end up believing what we end up believing in situations where observable facts are absent and we must instead rely on, essentially, theatrical representations?

Below I explore these questions as well as the related question of what the theatrical representations in the Thomas hearing reflect back to us about the culture that produced and absorbed them. But first I want to briefly return to two concepts, borrowed from Robert Ferguson, that I used in the previous chapter to provide an initial context for the Bork hearing, because I think they provide an equally good initial context for the Thomas hearing.

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**Judge THOMAS** [continuing]. Stereotypical, clearly.

"Thomas Second Hearing Day 2 Part 1 | Video | C-SPAN.org." *C-SPAN.org*, 12 Oct. 1991. Web. 3 May 2014.

<sup>253</sup> "Villain, be sure thou prove my love a whore,  
Be sure of it. Give me the ocular proof  
Or by the worth of mine eternal soul  
Thou hadst been better have been born a dog  
Than answer my waked wrath!" *Othello*, III.iii.369-373)

## Spread of Conflict

Like the Bork hearing, the Thomas hearing involved, indeed was consumed by, a “spread of conflict,”<sup>254</sup> that term Ferguson’s uses to describe how a discrete legal quarrel morphs into a much larger cultural quarrel, one with many more participants and positions than were originally anticipated and so also many more opportunities for explosive social division. In fact, the Thomas hearing was consumed by two. Before Anita Hill and the term “sexual harassment” even entered the conversation, another term—“affirmative action”—helped transform what could have been a dry, unwatched meeting of the Senate Judiciary Committee into a highly scrutinized, highly polarizing national drama. President George H.W. Bush may have claimed, when announcing Thomas’s nomination from the lawn of the Bush family compound in Kennebunkport, Maine, that “the fact that [Thomas] is black and a minority had nothing to do with this.”<sup>255</sup> But from the moment Bush made that claim, the fact that Thomas was black and a minority—and was replacing Thurgood Marshall, the only justice who was then black or a minority—had everything to do with what followed. It triggered an outpouring of support for Thomas, including a powerful endorsement from Maya Angelou in the editorial pages of *The New York Times*.<sup>256</sup> It triggered an outpouring of opposition against Thomas, particularly from the NAACP, which attacked Thomas’s “reactionary philosophical approach” to affirmative action in its official report

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<sup>254</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. 2. Print.

<sup>255</sup> "George Bush: The President's News Conference in Kennebunkport, Maine." *The American Presidency Project*. N.p., 1 July 11. Web. 3 May 2014.

<sup>256</sup> "I am supporting Clarence Thomas' nomination, and I am neither naive enough nor hopeful enough to imagine that in publicly supporting him I will give the younger generation a pretty picture of unity, but rather I can show them that I and they come from a people who had the courage to be when being was dangerous, who had the courage to dare when daring was dangerous -- and most important, had the courage to hope. Because Clarence Thomas has been poor, has been nearly suffocated by the acrid odor of racial discrimination, is intelligent, well-trained, black and young enough to be won over again, I support him." Angelou, Maya. "'I Dare to Hope'." *New York Times* [New York] 25 Aug. 1991: A15. Print.

recommending the Senate not confirm him. “While we appreciate...that Judge Thomas came up in the school of hard knocks and pulled himself up by his own bootstraps, as many other Americans have,” said NAACP chairman William Gibson at a standing-room only news conference in Washington, “we are concerned about his insensitivity to giving those who may not have any bootstraps the opportunity to pull them up.”<sup>257</sup>

But most of all, it added an electric level of subtext to the hearing, one which only intensified when Anita Hill, herself black and a minority but one with a very different view of affirmative action than Thomas,<sup>258</sup> entered the fray. Every question, every answer, because infused with racial significance, took on a much more expansive cultural significance. Here was not just a local contest of “He Said, She Said,” but a national crisis in which that “He” and that “She” came to represent – and divide – entire communities: black from white, certainly; but also black from black; and white from white – and this leaves out, for the moment, all the gender divisions between and within these communities.

To put this point another way: as with *Othello*, you could imagine the hearing with only white participants. There would still be sexual intrigue. There would still be tragic misjudgment. But the scope of the experience and overall cultural charge wouldn't be the same. Because of who Thomas and Hill were and what they looked like, what they came to stand for grew and grew, until each became not simply subjects

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<sup>257</sup>Eaton, William, and Douglass, Jehl. "NAACP Vows to Fight Thomas' Confirmation." *Los Angeles Times Articles.*, 1 Aug. 1991. Web. 3 May 2014. For an in-depth look at the NAACP's controversial decision not to support Thomas, see Mayer, Jane, and Jill Abramson. *Strange Justice: The Selling of Clarence Thomas*. Boston: Houghton Mifflin, 1994. 182-190. Print.

<sup>258</sup>“I no doubt benefited from affirmative action programs, which looked at my race, gender, and background and determined whether I would be admitted. But I am not ashamed of this fact, nor do I apologize for it. Such programs provided me with the opportunity to prove myself, no more, no less.

After admission, my success or failure would be determined by my efforts. I do not consider myself either more or less worthy than my colleagues in the same program.” Hill, Anita. *Speaking Truth to Power*. New York: Doubleday, 1998. 46. Print.

but symbols, a transformation that can be usefully thought of through another term from Ferguson's framework: iconography.

### Iconography

For Ferguson, iconography is the "symbolism and imagery of personality."<sup>259</sup> An extension of the performative element in legal trials – and despite the frequent statements of Chairperson Joe Biden to the contrary<sup>260</sup>, the Thomas Hearing was very much a trial, if a haphazardly conducted one<sup>261</sup> – it is the process through which "participants turn into celebrities,"<sup>262</sup> their every move and mannerism magnified for public consumption, their individual story replaced by – because a catalyst for – collective projection.

In the case of Thomas and Hill, this process happened immediately. Equipped with the kind of struggle-filled background that appeals to many different audiences and the kind of dramatic poise and self-possession that seemed made for a stage, each became, overnight, a richly resonant figure. For Thomas, this was a real advantage, since as Nellie McKay has noted, many black Americans identified with his tale of gritty achievement and many more aspired to emulate it, seeing in his rise "the ultimate in black triumph over oppression"<sup>263</sup>: here was someone who was teased, as a kid, with

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<sup>259</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. 3. Print.

<sup>260</sup> "Those watching these proceedings will see witnesses being sworn and testifying pursuant to a subpoena. But I want to emphasize that this is not a trial, this is not a courtroom. At the end of our proceedings, there will be no formal verdict of guilt or innocence, nor any finding of civil liability "Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org | National Politics | History | Nonfiction Books.*, 11 Oct. 1991. Web. 2 May 2014.

<sup>261</sup> See Wiegand, Shirley. "Analyzing the Testimony From a Legal Evidentiary Perspective: Using Judicial Language Injudiciously." *The Lynching of Language: Gender, Politics, and Power in the Hill-Thomas Hearings*. Ed. Sandra Regan. Urbana, Ill: University of Illinois Press, 1996. 3-24. Print.

<sup>262</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. 3. Print.

<sup>263</sup> McKay, Nellie. "Remembering Anita Hill and Clarence Thomas: What Really Happened

the nickname "A.B.C." ("America's Blackest Child")<sup>264</sup>; who was the only black student in an all-white high school; who became the first in his family to go to college and then, while there, decided to major in English literature because, having grown up speaking Gullah, he knew his English was clumsy and therefore wanted to "conquer the language."<sup>265</sup> And now, after graduating from Yale Law School and heading two major government agencies, he had been picked to sit on the highest court in the land, replacing civil rights legend Thurgood Marshall. It was an inspiring, even intoxicating set of images, akin to the bewitching tale of hardship and heroism Othello uses to initially woo Desdemona.<sup>266</sup> And not just for black Americans.

In fact, for many white Americans, Thomas's iconography was perhaps even more powerful,<sup>267</sup> particularly once he claimed to be the victim of a lynching, a

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When One Black Woman Spoke Out." *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 281. Print.

<sup>264</sup> "It was only adolescent hazing, but it still hurt. In those days it was an insult to call a dark-skinned Negro black, and more than once when our teacher was out of the room, someone would call me "ABC – America's Blackest Child," an epithet that made many of my classmates roar with laughter. Such racial slurs stung all the more for having come from my own people." Thomas, Clarence. *My Grandfather's Son: A Memoir*. New York: Harper, 2007. 30. Print.

<sup>265</sup> Kantor, Jodi, and David Gonzalez. "For Sotomayor and Thomas, Paths Diverge at Race – NYTimes.com." *The New York Times - Breaking News, World News & Multimedia*. N.p., 6 Jan. 2009. Web. 4 May 2014.

<sup>266</sup> Othello account of how "the story of my life" charmed Desdemona, how "She'd come again, and with greedy ear/Devour up my discourse," comes in I.iii.128-170 when he is defending himself against charges of sorcery.

<sup>267</sup> Even Catharine Mackinnon, who pioneered the legal claim for sexual harassment and would soon become one of Thomas's biggest critics, seems to have been taken, at least initially, by the power of Thomas's story, as Christine Stansell has pointed out. Describing a series of remarks Mackinnon gave as part of a roundtable discussion on Thomas for *Tikkun Magazine*, before Hill's allegations went public, Stansell notes that "Mackinnon began her reflections on Thomas ambivalently enough but quickly turned to pleasant observations about the candidate's credentials. It was Thomas's background – the 'reality' and "life experience" of his southern past – that swayed her toward a comfortable view of the nomination. In contrast to the critics who saw Thomas's use of autobiography in the hearings as an opportunistic evasion, MacKinnon saw the centrality of personal narrative, what she termed Thomas's 'reality,' as an emblem of political and intellectual potential. Never a woman to pass lightly over male

rhetorical move that all but silenced the team of senators tasked with interrogating him. Senator Howard Heflin of Alabama, for example, who was the first to question Thomas, didn't even use up the full time allotted to him, and when he did talk, he did so cautiously, almost deferentially, seemingly aware that his thick Southern drawl, usually a charming asset, was now a liability.<sup>268</sup>

Senator Leahy, the former prosecutor who had grilled Robert Bork on everything from the First Amendment to Bork's scant record of pro bono work, appeared to be similarly cowed. His questions lacked directness. His voice lacked conviction. And in a way that made it seem like he was representing Thomas instead of cross-examining him, Leahy uncritically accepted each of Thomas's answers – not necessarily because he believed those answers but because he felt that he would be labeled a racist if he challenged them. Later, Leahy would report experiencing so much stress and remorse for not having been tougher on Thomas that, just before the official confirmation vote, he was rushed to the hospital, fearful that he was having a heart attack.<sup>269</sup> But in the moment, during the actual rounds of questioning, as a national audience looked on, he essentially gave Thomas a free pass.

That Hill was not given the same, by Leahy or any other senator, highlights how Thomas's iconography if not eclipsed Hill's iconography, at least significantly altered it.

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failings, MacKinnon nonetheless warmed to Thomas as a man closer to 'reality' than others of his sex. 'I sense that he is connected with reality,' she mused, 'that he approaches issues from an actual experiential base rather than the kind of abstracted-from-life categories of legal analysis... When he talks, he seems to start off with life experiences.'" Stansell, Christine. "White Feminists and Black Realities: The Politics of Authenticity." *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Morrison, Toni. New York: Pantheon Books, 1992. 256-257. Print. For the published version of MacKinnon's remarks, see MacKinnon, Catharine. "Doubting Thomas: A Roundtable." *Tikkun* 6.5 (1991): 23-30. Print.

<sup>268</sup> "Thomas Second Hearing Day 1 Part 2 | Video | C-SPAN.org." *C-SPAN.org*. 11 Oct. 1991. Web. 3 May 2014.

<sup>269</sup> Mayer, Jane, and Abramson, Jill. *Strange Justice: The Selling of Clarence Thomas*. Boston: Houghton Mifflin, 1994. 254. Print.

Once Thomas, with great flair and righteousness, claimed the role of victim, cleverly identifying as the villain not Hill but the row of white men sitting in front of him, Hill's own access to that role was thwarted. In the pithy words of historian Nell Irvin Painter, "Democratic senators became the lynch mob; Thomas became the innocent lynch victim. As symbol and an actual person, Anita Hill was no longer to be found."<sup>270</sup>

Which makes it all the more remarkable that Hill made the impression she did, one that galvanized the country and, as Catharine MacKinnon has noted, made sexual harassment "real to the world at large for the first time."<sup>271</sup> Denied any recognizable role of dignity, and saddled with one particularly noxious role of scorn – the black-woman-as-traitor-to-the-race<sup>272</sup> – Hill was still able to emerge from the hearing as an inspiring symbol, to millions of Americans, of the kind of courage and composure it

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<sup>270</sup>Painter, Nell. "Hill, Thomas, and the Use of Racial Stereotype." *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 205. Print.

<sup>271</sup> "What happened in the Hill-Thomas hearings, among other things, was that sexual Harassment became real to the world at large for the first time. My book of 1979 framing the legal claim in the way that it became legally accepted, did not do this. The EEOC guidelines of 1980 did not do this. Winning Mechelle Vincent case in Supreme Court in 1986 did not do this, although these cases. Anita Hill did this: her still, fully present, utterly lucid testimony, that ugly microphone stuck in her beautiful face, the unblinking camera gawking at her from point blank range." MacKinnon, Catharine. "Voice, Heart, Ground." *I Still Believe Anita Hill: Three Generations Discuss the Legacies of Speaking Truth to Power*. Eds. Richards, Ann and Greenberg, Cathy. New York: Feminist Press, 2013. 72. Print.

<sup>272</sup> "The black-woman-as-traitor-to-the-race is at least as old as *David Walker's Appeal of 1829*, and the figure has served as a convenient explanation for racial conflict since that time. Although Thomas did not flesh out his accusation, which served his purposes only briefly, it should be remembered that in the tale of the subversion of the interests of the race, the black female traitor – as mother to whites or lover of whites – connives with the white man against the black man. Such themes reappear in *Black Skin, White Masks* by Frantz Fanon; in *Black Rage*, by William Grier and Price Cobbs; and in *Madheart*, by LeRoi Jones, in which the figure of 'the black woman,' as 'mammy' or as 'Jezebel,' is subject to loyalties to whites that conflict with her allegiance to the black man." Painter, N. "Hill, Thomas, and the Use of Racial Stereotype." Painter, Nell Irving. "Hill, Thomas, and the Use of Racial Stereotype." *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 204. Print.

takes to “speak truth to power.”<sup>273</sup> The tricky part is that so did Thomas, just to a different set of millions. In fact, both Hill and Thomas were inundated with letters of support and admiration after the hearing concluded.<sup>274</sup> Both, too, have become cultural heroes, celebrated in symposiums, biographies, and magazine profiles, as well through their own best-selling memoirs.

All of which highlights a key point about iconography, one which helps explain how so many people watching the Thomas hearing came to such different conclusions: iconography can be dangerously misleading. It can, in Ferguson’s words, “control patterns of perceptions, ...distort awareness...and leave contention and misdirection in [its] wake.”<sup>275</sup> After all, Hill and Thomas couldn’t have each been telling the truth. One of these “cultural heroes” in fact lied to the United States Senate, on national television, repeatedly, in a way that humiliated and forever sullied the other. But because the

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<sup>273</sup> The phrase, popularized through a Quaker pamphlet in 1955 calling for an alternative approach to the Cold War, is now often linked with Hill, most notably in the title of her 1997 memoir: *Speaking Truth to Power*. See also, the title of a conference at Hunter College commemorating the 20<sup>th</sup> anniversary of her testimony – “Sex, Power, and Speaking Truth: Anita Hill 20 Years Later” – as well as the collection of essays that conference produced. Richards, Amy and Greenberg, Cathy. *I Still Believe Anita Hill: Three Generations Discuss the Legacies of Speaking Truth to Power*. New York: Feminist Press, 2013. Print.

<sup>274</sup> “The enormous amount of mail was testament to the extraordinary level of public interest in the hearing. Beginning on Tuesday, October 15, the Postal Service started delivering trays of letters addressed to me. Some of them must have been written and mailed on the day of my testimony. And as the days passed, the volume of letters increased. By October 19 I was receiving two trays of cards and letters, each tray containing about seven hundred pieces of mail. I told myself that this probably represented a backlog of mail and would stop. I was wrong. The following day brought five trays, and the deliveries continued at this pace for three weeks. The mail come from around the country and then from around the world.” Hill, Anita. *Speaking Truth to Power*. New York: Doubleday, 1998. 4. Print. “In the weeks that followed [the hearing], the flood of mail that had been coming to our house all summer became a deluge. We received letters of support, prayer offerings, invitations to use vacation homes, even McDonald’s gift cards, all of them heartwarming tokens of the kindness and decency of the ordinary citizens of America.” Thomas, Clarence. *My Grandfather's Son: A Memoir*. New York: Harper, 2007. 281. Print.

<sup>275</sup> Ferguson, Robert A. *The Trial in American Life*. Chicago: University of Chicago Press, 2008. 3. Print.

structure of a confirmation hearing, particularly a high-profile hearing like the Thomas hearing, is much more theatrical than procedural – in the sense that the stage is filled with representations but never given an official unifying judgment, like a verdict after a trial or a final judgment after an appeal – contrary images can linger, as can ambiguity, innuendo, misperception, essentially all the stuff that make a good drama good and a clear resolution hard.

As a result, the risk of being manipulative is high. Just like in *Othello*, or any other troubling play, no omniscient guide appeared in the Thomas hearing to tell the audience how to process the troubling events on display. Instead, what we were left was a pregnant mix of scenes, speeches, and characters, each with the capacity to contaminate our thoughts with false images and beliefs, and therefore push us to judgments that were potentially both erroneous and harmful. In other words, each had the capacity to put, with Iago-like skill, “poison in our ear” – a metaphor Arnold Weinstein uses to describe the seductive power of language in *Othello* and also one that aptly describe the seductive power of language in the Thomas hearing, the way both Thomas and Hill, and many senators as well, entered our minds and, to varying degrees, corrupted them simply through spoken words.

## II.

One of the hardest things to remember about *Othello* is that Othello himself is not a dupe. How could he be so gullible, it is common to ask – how could he fall for each of Iago’s lies, believing this deceitful man to be “honest” while condemning his faithful wife as not? How could he not recognize the truth?

At their core, these questions are the same questions that animate the Thomas hearing, particularly for those who feel strongly about whom, Hill or Thomas, should have been believed. It can be difficult, if you think Hill should have been believed, to

see how anyone would have instead believed Thomas, just as it can be difficult, if you think Thomas should have been believed, to see how anyone would have instead believed Hill. Yet millions of people believed Hill, and millions of others believed Thomas, a fact that suggests the choice between them was not actually that simple, something that is also true, in fact, of the choice faced by Othello, who is tragic not because he thoughtlessly accepted a false story, as would a simpleton, but because, after much careful deliberation – “I think my wife be honest and think she is not”<sup>276</sup> he laments at one particularly vexed point – he makes the wrong choice between stories. In other words, he commits the same error in judgment that a large set of viewers committed while watching the Thomas Hearing, an error that, in turn, creates the space for a productive kind of dual analysis.

One place to take up this dual analysis is with Carol Neely’s insight that the real conflict in *Othello* is not between Iago and Othello but between men and women, that what moves the play to its horrifying end – Desdemona dead from the mistakenly jealous hands of her husband Othello, Othello on top of her, also dead, having killed himself in a moment of tragic recognition – is the striking gap between male and female perspectives.<sup>277</sup> In the eyes of the men of the play, Neely argues, women are objects of sex and suspicion, their bodies the property of whatever male rules over them, be it father, husband, or even, in the case of Cassio and Bianca, entitled lover. Female voices are not to be trusted. Protest as she does, for example, of her innocence and her chastity, Desdemona cannot in the final, murderous scene get Othello to heed what she has to say. She cannot get her words to count. Instead, Othello rushes ahead, with great fury and righteousness, and carries out the script that Iago has planted in him, the one that

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<sup>276</sup> *Othello*, III.iii.394.

<sup>277</sup> Neely, Carol. “Women and Men in *Othello*.” *William Shakespeare's Othello*. Ed. Harold Bloom. New York: Chelsea House Publishers, 1987. 79-104. Print.

casts Desdemona as a harlot and liar, a woman who has betrayed him wantonly and won't even admit it.

Contrast this with how Desdemona views Othello, even after getting “ocular proof” that he means her great harm. Her perspective is not too suspicious, Neely points out; it is not suspicious enough. For instance, when Othello slaps Desdemona in Act 4.1, she forgives him. When Othello calls her a “whore” and a “strumpet” and the “devil” in Act 4.2, she forgives him. And when Othello comes to kill her in Act 5.2, having announced his brutal intentions, she welcomes him, lovingly, into their marriage bed. Nor is Desdemona the only female character to display this dangerous magnanimity. Even Emilia, the shrewd wife of Iago, trusts that her husband has benevolent motives when he asks her for Desdemona's handkerchief, the one that he will later turn into a deceitful weapon.<sup>278</sup>

It is tempting to look for this same kind of disconnect in the Thomas hearing, this same gap between male and female worldviews, this same sense that the genders are speaking different languages. That certainly seems to be what Patty Murray saw, the self-described “mom in tennis shoes” who responded to the hearing by running for a seat in the Senate; having seen the all-male panel of Senators perform, she figured she could do better.<sup>279</sup> As did eleven other women. In fact, the election year directly following the Thomas hearing came to be known as the “Year of the Woman,” not just because Murray won her Senate race but because more women than in any previous year won their Senate races too – including Dianne Feinstein and Barbara Boxer, who were both conspicuously present as members of the Senate Judiciary Committee the

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<sup>278</sup> *Othello*, III.iii.308-330.

<sup>279</sup> “Watching the hearings on the West Coast, Washington State senate member Patty Murray asked herself, ‘Who’s saying what I would say if I was there?’ Later, at a neighborhood party, as others expressed similar frustrations, Murray spontaneously announced to the group, ‘You know what? I’m going to run for the Senate.’” U.S. Senate: Art & History Home > Senate Stories > 1964-Present > “Year of the Woman.” *U.S. Senate*. N.p., n.d. Web. 4 May 2014.

next time a Supreme Court nominee was up for confirmation.<sup>280</sup> Even Ann Simpson, the wife of Senator Al Simpson, who, in addition to being the Senator to reference *Othello*, was also one of Hill's fiercest interrogators, was repulsed by the performance of her husband and all the other males involved. "What is going on?", she called from their home in Wyoming to ask, pointedly, after a day of watching the hearing on television. "You look so nasty, all of you men."<sup>281</sup> Later, she would say something similar to Senator Arlen Specter, whose aggressive questioning of Hill left a lasting stain on his reputation.<sup>282</sup> "You all look terrible," Ann Simpson told him. "You look like male chauvinist pigs!"<sup>283</sup>

Yet not everyone watching thought so, not even every woman watching. As Thomas entered the hearing room to respond to Hill's testimony, scores of women cheered him on, their chants of support implicitly indicting Hill for, at the least, "airing dirty linen"<sup>284</sup> and, at the worst, outright lying. Opinion polls taken right after the

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<sup>280</sup> For an in-depth account of this political change, told through the women who led it, see Whitney, Catherine. *Nine and Counting: The Women of the Senate, 2001*. New York: Perennial, 2001. Print.

<sup>281</sup> Hardy, Donald L. *Shooting from the Lip: The Life of Senator Al Simpson*. Norman: University of Oklahoma Press, 2011. 383. Print.

<sup>282</sup> "The Thomas confirmation nearly cost Mr. Specter his Senate seat," Specter's obituary in the *New York Times* reads. "[E]ven now, millions of American women remain furious with him for his aggressive questioning of Anita F. Hill, a law professor who had accused Justice Thomas of sexual harassment when they worked together at the Department of Education and the Equal Employment Opportunity Commission." Stolberg, S. "Arlen Specter, Former Senator, Dies at 82 - NYTimes.com." *The New York Times*, 14 Oct. 2012. Web. 4 May 2014.

<sup>283</sup> Hardy, Donald L. *Shooting from the Lip: The Life of Senator Al Simpson*. Norman: University of Oklahoma Press, 2011. 383. Print.

<sup>284</sup> "[F]or many black people, Anita Hill's speaking out against Clarence Thomas as she did, even in telling the truth, was an act of much larger dimensions than possibly undermining the credibility and fitness of the then-judge for the job to which he aspired. In the first place, any allegations she could make the cast doubt on the wisdom or rightness of the nomination of Judge Thomas to the Supreme Court would violate the racial taboo of revealing 'family affairs' to the white world. But more serious than what might be ascertained an 'inappropriate airing of dirty linen,' in exposing a situation that called into question the sexual conduct of a black man, to those minds, Anita Hill committed treason against the race." McKay, Nellie.

hearing showed first, that 57% of women concluded Thomas should be confirmed, and second, that twice as many women believed Thomas as believed Hill-- roughly the same ratio as that found among men.<sup>285</sup> So while it is tempting to view the hearing through the tidy gender dichotomy Neely sees in *Othello*, the reality is considerably more complicated than that.

For one thing, there is the issue of “intersectionality,” Kimberle Crenshaw’s term for the “double burden” Hill faced as a black woman: she was subject to the dominating practices of a sexual hierarchy and, at the same time, she was subject to the dominating practices of a racial hierarchy.<sup>286</sup> As a result, Crenshaw explains, Hill was handicapped by a central disadvantage: “the lack of available and widely comprehended narratives to communicate her experience.”<sup>287</sup> Thomas, as a black man, at least had the lynching narrative to turn to, which he used expertly, and he also had the benefit of how, as Crenshaw notes, “underlying the legal parameters of racial discrimination are numerous narratives reflecting discrimination as it is experienced by black men.”<sup>288</sup> So when he cried “racism,” his audience was ready to believe him, just as when Iago cried “infidelity,” his audience was ready to believe him – Othello already having absorbed the idea, from his 16<sup>th</sup> century Venetian environs, that a dangerous sexuality lurked inside every woman, and particularly a woman transgressive enough to marry a Moor.

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“Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Woman Spoke Out.” *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 282. Print.

<sup>285</sup> Burnham, Margaret. “The Supreme Court Appointment Process and the Politics of Race and Sex.” *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 306. Print.

<sup>286</sup> Crenshaw, Kimberle. “Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill.” *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 403. Print.

<sup>287</sup> *Ibid.* at 404.

<sup>288</sup> *Ibid.*

But Hill, as a black woman, faced a much different situation, indeed a much different – and less comprehending – audience. She couldn't claim to be the victim of a lynching, or even the reason for one. "[N]o man, white or black," Nellie McKay reminds us, "has ever faced death for the sexual abuse of a black woman."<sup>289</sup> Nor did she fit well into salient narratives of gender discrimination, because, as Crenshaw points out, the imagery of those narratives features the experiences of white women, not black women.<sup>290</sup> On top of all this was perhaps Hill's biggest hurdle, the hurdle that, more than any other aspect of the hearing, transformed it from a soon-to-be-forgotten scandal into an enduring public drama, one that gave the country a chance to see, in real time, culture change: she was trying to communicate a story that hadn't been communicated before, at least not on a national stage.

In fact, before Hill's performance, sexual harassment was largely, in Gloria Steinem's phrase, "just life."<sup>291</sup> The concept, in other words, wasn't yet a concept; it was simply how (mostly) men behaved. In this way, Hill's "double burden" was actually a "triple burden." She was a marginalized figure peddling a not-yet-recognizable tale, a tale that would require her audience to accept a new vocabulary, a new set of assumptions, a new way of understanding how power and sex interact, particularly when set against that backdrop of race.

How, then, did Hill pull this transformation off? How did she convince millions of Americans to believe her seemingly unbelievable claims, especially considering those claims were attacked, continually, in the same devastating way that Iago attacks the

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<sup>289</sup> McKay, Nellie. "Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Women Spoke Out." *Race-ing justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 285. Print.

<sup>290</sup> Crenshaw, Kimberle. "Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill." *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Ed. Toni Morrison. New York: Pantheon Books, 1992. 404. Print.

<sup>291</sup> *Gloria: In Her Own Words*. Dir. Peter Kunhardt. HBO, 2011.

claims of Desdemona: by using her own noble qualities against her, by turning, in essence, “her virtue into pitch”<sup>292</sup>? For just as Desdemona’s generosity towards Cassio is used to indict her – every time she defends Cassio to Othello, pleading with him to overlook Cassio’s faults, to focus instead on his talents, to give him another chance, Othello gets more and more suspicious<sup>293</sup> – so was Hill’s generosity toward Thomas used to indict her, most notably regarding her decision, years after the alleged harassment, to follow Thomas to a new government agency and then, when she finally left that organization, to stay in contact with him through personal communications and even an invitation to speak at her new place of employment, Oral Roberts University Law School. To many, including Senator Al Simpson, this pattern of behavior was difficult to reconcile with the awful treatment she described: the constant requests for dates,<sup>294</sup> the gross references to pornographic movies,<sup>295</sup> and, of course, the infamous

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<sup>292</sup> “So, I will turn her virtue into pitch/ And out of her won goodness make the net/ That shall enmesh them all.” *Othello*, II.iii.269-271.

<sup>293</sup> See *Othello*, III.iii.40-240, and IV.ii..220-255.

<sup>294</sup> **Senator LEAHY.** What are the things that you felt he should have known were sexual harassment?

**Ms. HILL.** Well, starting with the insisting on dates, I believe that once I had given a response to the question about dating, that my answer showed him that any further insisting was unwarranted and not desired by me. I believe that the conversations about sex and the constant pressuring about dating which I objected to, both of which I objected to, were a basis – there was enough for him to understand that I was unappreciative and did not desire the kind of attention in the workplace. I think that my constantly saying to him that I was afraid, because he was in a supervisory position, that this would jeopardize my ability to do my job, that that should have given him notice.

**Senator LEAHY.** Did he ask you – well, you have said that he asked you for dates many times. By many, what do you mean? Can you give us even a ball park figure?

**Ms. HILL.** Oh, I would say over the course of –

**Senator LEAHY.** Of both the Department of Education and the EEOC.

**Ms. HILL.** I would say 10 times, maybe, I don't know, 5 to 10 times.

incident involving a supposed pubic hair left on the top of a Coke can.<sup>296</sup> “If what you say this man said to you is true,” Senator Simpson asked Hill, picking up on a line of questioning pursued by several other similarly incredulous members of the committee, “why in God’s name, when he left his position of power or status or authority over you,....why in God’s name would you ever speak to a man like that the rest of your life?”<sup>297</sup>

Hill’s answer, which was not defensive nor condescending but instead an endearing combination of humble, tough, and balanced, as were most of her answers, helps explain how, even if she could not get Senator Simpson to believe her, she did, remarkably, get millions of other Americans to. “That is a very good question,” she responded, looking straight at Simpson, unfazed by his hostility. “And I am sure I cannot answer that to your satisfaction.... I have suggested that I was afraid of retaliation. I was afraid of damage to my professional life. And I believe that you have to understand that this response, this kind of response, is not atypical. I can’t explain. It

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**Senator LEAHY.** And you said, no, each time?

**Ms. HILL.** Yes.

"Thomas Second Hearing Day 1 Part 2 | Video | C-SPAN.org." *C-SPAN.org* ., 11 Oct. 1991. Web. 3 May 2014.

<sup>295</sup> “He spoke about acts that he had seen in pornographic films involving such matters a women having sex with animals, and films showing group sex or rape scenes. He talked about pornographic materials depicting individuals with large penises, or large breasts involved in various sex acts.” Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org | National Politics | History | Nonfiction Books*. 11 Oct. 1991. Web. 3 May 2014.

<sup>296</sup>“One of the oddest episodes I remember was an occasion in which Thomas was drinking a Coke in his office, he got up from the table, at which we were working, went over to his desk to get the Coke, looked at the can and asked, “Who has put pubic hair on my Coke?” Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org | National Politics | History | Nonfiction Books*. N.p., 11 Oct. 1991. Web. 3 May 2014.

<sup>297</sup> Thomas Second Hearing Day 2 Part 1 | Video | C-SPAN.org." *C-SPAN.org*., 11 Oct. 1991. Web. 3 May 2014.

takes an expert in psychology to explain. But it can happen. Because it happened to me."<sup>298</sup>

What is so crucial about Hill's response was that final "me." After gracefully enduring hours of interrogation, remaining at once steely and serene in the face of bullying, badgering, and even outright defamation, Hill had become stunningly credible. She had become someone with whom women around the country could identify, someone who was telling *their* story. Letty Cottin Pogrebin, a founding editor of *Ms.* magazine, expressed her experience watching the hearing this way, at a conference honoring Hill in 2011: "I want to personally thank you, Anita Hill, for what you did for us twenty years ago," she began, before sharing her own story of being sexually harassed while working, as an executive, in the book publishing industry in 1960s. "Thank you for speaking up and speaking out. Thank you for your quiet dignity, your eloquence and elegance, your grace under pressure. Thank you for illuminating the complexities of female powerlessness, and for explaining why you didn't complain when the offense occurred, and for describing how cowed and coerced a woman can feel when she is hit on by a man who controls her economic destiny. Twenty years ago you had the courage to tell the truth and do what women rarely did: Make a scene. Fifty years ago I didn't."<sup>299</sup>

Pogrebin's use of the word "scene" helps draw our attention to the essentially dramatic way in which Hill became a "me," in fact the essentially dramatic way in which a confirmation hearing, because of its structure, encourages this powerfully public form of representation: Hill was allowed to perform. She was allowed to get up on stage and speak, in her own voice, at own pace, with her own cadence and gestures and mannerisms. Had her words been simply printed in the newspaper or even read

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<sup>298</sup> *Ibid.*

<sup>299</sup> "Anita Hill Testimony 20 Years Later | Video | C-SPAN.org." *C-SPAN.org.*, 15 Oct. 2011. Web. 5 May 2014.

aloud by someone else on the hearing room floor, it is unlikely that there would be conferences honoring her or documentaries featuring her<sup>300</sup> or, most significantly, that more than three times as many sexual harassment claims would be filed in the years following her testimony as were filed in the years preceding her testimony.<sup>301</sup> It is unlikely, in sum, that she would have been as believed.

Of course, this does not mean she was telling the truth, just as Thomas's own persuasive performance does not mean he was telling the truth, filled as it was with great feeling and emotion—at times, he even fought back tears—as well as a rhetorical flair and force on par with what Wilson Knight has called “the Othello music.”<sup>302</sup> In fact, both Hill and Thomas performed brilliantly, as evidenced by the conflicted reaction of Nina Totenberg, who covered the hearing for NPR. “I don't know what to believe,” she apparently told Senator Hatch after Hill and Thomas finished testifying. “I believe them both!”<sup>303</sup> But one of these performances, we have to remember, was untruthful. One of them successfully deceived a large group of people, using all the tricks of a good theatrical performance: innuendo, misdirection, the whole-hearted verbal conviction Patsy Rodenburg calls “speak[ing] to survive.”<sup>304</sup>

And perhaps, in the end, this is the most unsettling *Othello*-like legacy of the hearing: it is a cultural record of deceit. It is a real-life example, with big stakes, of someone pulling off what Iago pulled off—representing themselves, and the actions of

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<sup>300</sup> *Anita: Speaking Truth to Power*. Dir. Frieda Mock. (Samuel Goldwyn Films, 2014).

<sup>301</sup> MacKinnon, Catharine. “Voice, Heart, Ground.” *I still believe Anita Hill: Three generations discuss the legacies of speaking truth to power*. Eds. Amy Richards and Cathy Greenberg. New York: Feminist Press, 2013. 73. Print.

<sup>302</sup> Knight, G. Wilson. *The Wheel of Fire*. London: Methuen, 1949. 97-119. Print

<sup>303</sup> I say “apparently” because the account of Totenberg's reaction comes from *Square Peg*, the Political memoir of Hatch, who was and continues to be one of Thomas's strongest supporters. Hatch, Orrin. *Square Peg: Confessions of a Citizen Senator*. New York: Basic Books, 2002. 156. Print. Still, the anecdote captures the difficulty millions watching had sorting out who was telling the truth.

<sup>304</sup> Rodenburg, Patsy. *Speaking Shakespeare*. New York: Palgrave Macmillan, 2002. 11. Print.

others, as not what they really are. "I am not what I am"<sup>305</sup> might be Iago's most defining statement, and with Thomas and Hill, we get two candidates for this kind of master manipulation. That we may never know, for sure, which of them was instead actually being genuine makes the hearing, in some sense, even more important to keep revisiting, year after year; for like the best of the Shakespearean tragedies, it continues to generate helpfully unsettling questions. Would more people have believed Hill if she were white? Would less people have believed her if Thomas were not black? Is it possible, if you don't believe Hill, to still believe that her performance had value – that, genuine or not, her words started a national conversation on sexual harassment that needed to be started? Is it possible, if you don't believe Thomas, to still believe that his performance had value – that, genuine or not, his words called attention to the closed mindedness, even racism, waiting for, in his phrasing, "uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas?"<sup>306</sup>

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<sup>305</sup> *Othello*, 1.1.67

<sup>306</sup> "Thomas Second Hearing Day 1 Part 1 | Video | C-SPAN.org." *C-SPAN.org.*, 11 Oct. 1991. Web. 2 May 2014. Juan Williams, the celebrated author of both *Eyes on the Prize*, the companion book to PBS's acclaimed mini-series about the Civil Rights movement, as well as the definitive biography of Thurgood Marshall, seemed to get at this intolerance in a column that ran in the *Washington Post* after Hill's allegations against Thomas first surfaced: "Here is indiscriminate, mean-spirited mudslinging supported by the so-called champions of fairness: liberal politicians, unions, civil rights groups and women's organizations. They have been mindlessly led into mob action against one man by the Leadership Conference on Civil Rights... To listen to or read some read reports on Thomas over the past month is to discover a monster of a man, totally unlike the human being full of sincerity, confusion, and struggles whom I saw as a reporter who watched him for some 10 years. He has been conveniently transformed into a monster about whom it is fair to say anything, to whom it is fair to do anything. President Bush may be packing the court with conservatives, but that is another argument, larger than Clarence Thomas. In pursuit of abuses by a conservative president the liberals have become the abusive monster." Williams, Juan. "Open Season on Clarence Thomas." *Washington Post*. 10 Oct. 1991: 23. Print. It seems important to note that, in the days following Williams's column, he himself was accused of sexually harassing several female employees of the *Washington Post* and later publicly apologized for his behavior. Kurtz, Howard. "Post Reporter Williams Apologizes for 'Inappropriate' Verbal Conduct." *Washington Post: Breaking News, World, US, DC News & Analysis.*, 2 Nov. 1991. Web. 5 May 2014. Of course, this doesn't necessarily make his view of how Thomas was treated any

And, finally, what would happen if the hearing were held today? It is nice to think that we are wiser now than we were in 1991, that we more sensitive to the pathologies of sexual misconduct, more discerning when it comes to identifying who is telling the truth and who is not. But then we are reminded of how many people believed Bill Clinton – including Hillary – before he confessed to abusing his position of power over Monica Lewinsky; how many people still don't know what to believe about whether Dominique Strauss-Kahn, the former managing director of the IMF, abused his position of power over both a direct subordinate and a hotel employee; or, on the other side of the spectrum, how many people wrongly believed that the blameworthy behavior of three Duke lacrosse players at a house party in the spring of 2006 also included rape. The machinations of Iago, it seems, continue to have a ready audience.

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In the next chapter, I will turn my attention to the confirmation hearing of Sonia Sotomayor, a confirmation hearing that, though not as “grotesquely riveting” as the Thomas Hearing, does continue to teach us something important about confirmation hearings as forms of cultural expression. Just as few other places in public life could have accommodated the rich range of performances and perspectives on the conflicts that came to dominate the Thomas hearing – namely, affirmative action and sexual harassment – few other places in public life could have accommodated the rich range of performances and perspectives on the conflicts that dominated the Sotomayor hearing – namely, immigration and subjective nature of judging. Said differently, few other places could have provided the country with what, in the words of drama critic

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less valid.

Martin Esslin, good theater is supposed to provide: a chance to “think in public about itself.”<sup>307</sup>

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<sup>307</sup> Esslin, Martin. *An Anatomy of Drama*. New York: Hill and Wang, 1977. 101. Print.

## CHAPTER 5

### THE WISE LATINA: THE SUPREME COURT CONFIRMATION HEARING OF SONIA SOTOMAYOR

*"We just put the first Latina on the Supreme Court. Pretty cool, huh?"*

--President Barack Obama, August 6, 2009, the day the Senate voted to confirm Sonia Sotomayor<sup>308</sup>

*"Impartiality is a discipline and its necessity is enshrined in the judicial oath. A judge who injects personal experiences into a decision corrupts the very foundations of our judicial system."*

--Dr. Charmine Yoest, Americans United for Life, testifying against the confirmation of Sonia Sotomayor<sup>309</sup>

*"But can't you see that all the trouble lies here! In the words! All of us have a world full of things inside of us, each of his own world of things! And how can we understand one another, sir, if in the words I speak I put the meaning and the value of things as I myself see them, while the one who listens inevitably takes them according to the meaning and the value which he has in himself of the world he has inside of himself."*

--*Six Authors in Search of a Play* (1921), Luigi Pirandello<sup>310</sup>

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<sup>308</sup> Baker, Peter. "Obama's First Term - A Romantic Oral History - NYTimes.com." *The New York Times*, 16 Jan. 2013. Web. 22 Oct. 2014. The quote comes from an anecdote told by Obama's chief communications strategist, David Axelrod: "It was late in the day, and many people weren't in the White House, and the Senate had just confirmed Sonia Sotomayor to the Supreme Court. The president came walking down the hall just looking for people. He saw me and gives me a fist bump and says: 'We just put the first Latina on the Supreme Court. Pretty cool, huh? But he was frustrated because there weren't enough of us around. He was seeking out people to celebrate with.'"

<sup>309</sup> "Sotomayor Confirmation Hearing Day 4 Legal | Video." *C-SPAN.org*. N.p., 16 July 2009. Web. 25 Oct. 2014.

Few nominees to the Supreme Court have been at once inspiring and polarizing as Sonia Sotomayor. To her supporters, Sotomayor was the “true American dream.”<sup>311</sup> The diabetic daughter of Puerto Rican immigrants, she had worked her way, with the now famous help of a set of the *Encyclopedia Britannica*,<sup>312</sup> from Cardinal Spellman High School in the Bronx to Princeton University and then, eventually, to Yale Law School, excelling at each step.<sup>313</sup> And then, after several years as a prosecutor in Manhattan,

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<sup>310</sup> Pirandello, L, and M. Musa. *Six characters in search of an author and other plays*. London: Penguin Books, 1995. Print. 19.

<sup>311</sup> One of the most common rhetorical moves of the senators during their introductory remarks was to point to Sotomayor as a shining example of the “American Dream.” Senator Patrick Leahy of Vermont, the first to speak at the hearing, led things off: “Judge Sotomayor’s journey to this hearing room is a truly American story.” Senator Kohl of Wisconsin followed suit: “Your nomination is a reflection of who we are as a country, and it represents an American success story we can all be proud of.” See also Senator Orrin Hatch of Utah (“[Sotomayor’s] nomination speaks to the opportunities America today provides for men and women of different heritages and backgrounds”) and Senator Benjamin Cardin of Maryland (“Judge Sotomayor is a perfect example of how family, hard work, supportive professors and mentors, and opportunity all can come together to create a real American success story.” “Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org.” N.p., 13 July 2013. Web. Then, following the hearing the first biography of Sotomayor was published with the title *Sonia Sotomayor: The True American Dream*. Felix, A. *Sonia Sotomayor: The true American dream*. New York: Berkeley Books, 2011. Print.

<sup>312</sup> In his nominating speech, President Obama mentioned that Sotomayor’s mother, who raised Sotomayor and her brother alone after Sotomayor’s father died when Sotomayor was nine, “bought the only set of encyclopedias in the neighborhood” to help educate her children. “Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court | The White House.”, 26 Mar. 2009. Web. The detail was quickly picked up by the media and even made an appearance, during the hearing, in the introductory remarks of Senator Amy Klobachar of Minnesota. “When President Obama first announced your nomination, I loved the story about how your mom saved all of her money to buy you and your brother the first set of encyclopedias in the neighborhood, and it reminded me of when own parents bought us Encyclopedia Britannicas. [They] always held a hallowed place in the hallway, and for me they were a window on the world and a gateway to knowledge, which they clearly were to you as well...[Your mom] struggled to buy those encyclopedias on her nurse’s strategy. But she did it because she believed deeply in the value of education.” “Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org.” N.p., 13 July 2013. Web.

<sup>313</sup> A stand-out student at Spellman, Sotomayor won a full scholarship to Princeton, where she eventually graduated *summa cum laude* and won the prestigious Pyne Prize, the college’s top award for undergraduates. She then won a second full scholarship, to Yale Law School, where became an editor on the *Yale Law Journal*. For a more extended look at Sotomayor’s experience

where she worked under – and impressed – legal legend Robert Morgenthau,<sup>314</sup> and close to a decade in private practice, she became the first Hispanic federal judge in New York state; one of the first Hispanic judges to sit on the Federal Court of Appeals; and, finally, the first Hispanic judge nominated to the Supreme Court. She even, during this quintessentially American rise, developed a life-long love of the national pastime – baseball – having grown up in the shadows of Yankee stadium.<sup>315</sup>

To her detractors, however, she represented a threat to something even more American: the right to appear before an impartial judge. Of particular concern was her infamous “wise Latina” comment. “I would hope that a wise Latina woman with the richness of her experiences,” she said to a university crowd at Berkeley in 2011, having been asked to deliver the Judge Mario G. Olmos Law and Cultural Diversity Lecture, “would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>316</sup> It was a comment that she had made several times before, in various forms, the point being, she explained when asked about it during the hearing, “to

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at Princeton and Yale, see Felix, A. (2011). *Sonia Sotomayor: The true American dream*. New York: Berkley Books. 37-69; Sotomayor, S. (2014). *My beloved world*. New York: Knopf. 119-91.

<sup>314</sup> Morgenthau served as the Manhattan District Attorney from 1975-2009, the longest tenure of anyone who has ever held that powerful position. His reputation is such that Senator Katherine Hildebrand of New York referenced his endorsement of Sotomayor during her introductory remarks. “The Manhattan D.A., Bob Morgenthau, described [Sotomayor] as ‘fearless’ and ‘an effective prosecutor’ and ‘an able champion of the law.’” *Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org*. (2009, July 13). Later in the hearing, he was even asked to testify. District Attorney of New York County Robert Morgenthau Testifies at Judge Sotomayor's Confirmation Hearings. (2009, July 16.). <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602990.htm>.

<sup>315</sup> “It is often said that I grew up in the shadows of Yankee stadium. To be more accurate, I grew up sitting next to my dad, while he was alive, watching baseball and it’s one of my fondest memories of him.” *Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org*. (2009, July 13). <http://www.c-span.org/video/?287672-1/sotomayor-confirmation-hearing-day-1-part-1>.

<sup>316</sup> Sotomayor delivered the speech on October 26, 2001 as part of a symposium called *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*. The full text can be found here. Lecture - ‘A Latina Judge’s Voice’ - Text - NYTimes.com. (2009, May 14). <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all& r=0>

inspire young Hispanic [] students and lawyers to believe that their life experiences added value to the process."<sup>317</sup>

But to many Republican senators on the judiciary committee she seemed to be suggesting that life experiences trumped the process, that being Hispanic gave her an edge when it came to making legal decisions, that, fundamentally, justice is best administered, not behind a blindfold, as is the common cultural depiction, but rather through a particular set of eyes belonging to a particular person with a particular ethnic background. "The American legal system requires that judges check their biases, personal preferences, and politics at the door of the courthouse," Senator Jeff Sessions of Alabama declared in his opening statement, implicitly attacking Sotomayor's comment. "Lady Justice stands before the Supreme Court with a blindfold, holding the scales of justice. Just like Lady Justice, judges and justices must wear blindfolds when they interpret the Constitution and administer justice."<sup>318</sup> The implication was that Sotomayor had absolved herself of this imperative.

Senator Jon Kyl of Arizona was more direct. "The wise Latina woman quote," he said, "...suggests that Judge Sotomayor endorses the view that a judge should allow gender, ethnic and experience-based biases to guide her when rendering judicial opinions."<sup>319</sup> Earlier he had criticized her on the grounds that "[from] what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but rather who wins in her personal opinion."<sup>320</sup> Both of these comments help explain Kyl's insistence that confirming Sotomayor would seem to go against 220 years "in which presidents and the Senate have focused on

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<sup>317</sup> "Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org." N.p., 13 July 2013. Web. <<http://www.c-span.org/video/?287672-1/sotomayor-confirmation-hearing-day-1-part-1>>.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

appointing and confirming judges who are committed to putting aside their biases and prejudices and applying law to fairly and impartially resolve disputes between parties.”<sup>321</sup>

Senator Lindsey Graham of South Carolina, who entered the hearing openly unsure of how he would vote,<sup>322</sup> did not go as far as Senator Kyl did, but he did say that it “bothers me when someone wearing a robe takes the robe off and says that their experience makes them better than someone else.”<sup>323</sup> He also made sure to highlight what he, as a white male, perceived to be a double-standard when it comes to championing one’s ethnic background. “If I had said anything remotely like [that wise Latina comment],” he told Sotomayor, “my career would have been over. That’s true of most people here. You have to understand that.”<sup>324</sup>

A lot of this Republican pushback against Sotomayor, of course, can be attributed to partisan politics. As Graham himself made clear, the days when a conservative nominee such as Antonin Scalia could be confirmed 98-0 and a liberal nominee such as

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<sup>321</sup> *Ibid.*

<sup>322</sup> “I don’t know what I am going to do yet,” Sessions said very early on in his opening statement, referring to how he didn’t know whether he was going to vote to confirm Sotomayor or not. See *Ibid.*

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.* Graham picked up the same theme and admonitory tone later, when he had a chance to ask Sotomayor questions:

**Senator Graham:** “But do you understand, ma’am, that if I had said anything like that, and my reasoning was that I’m trying to inspire somebody, they would have had my head? Do you understand that?”

**Judge Sotomayor:** I do understand how those words could be taken that way, particularly if read in isolation.

**Senator Graham:** Well, I don’t know how else you could take that. If Lindsey Graham said that I will make a better Senator than X because of my experience as a Caucasian male, makes me better able to represent the people of South Carolina, and my opponent was a minority, it would make national news, and it should. “Sotomayor Confirmation Hearing Day 2 Part 5 | Video | C-SPAN.org.” N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-104/sotomayor-confirmation-hearing-day-2-part-5>>.

Ruth Bader Ginsburg could be confirmed 96-3 are probably over.<sup>325</sup> A president could nominate Atticus Finch and the opposition party would still find something to gripe about.

Still, the nature of the pushback, the way it brought to the stage, for full view and evaluation, widespread tensions and anxieties about an issue of national importance — in this case, diversity — is further evidence of how valuable confirmation hearings can be as a form of cultural expression. Like the Bork hearing and the Thomas hearing, the Sotomayor hearing created a space where the country could engage in a kind of public self-reflection, a particularly useful task given that the Sotomayor hearing followed quickly after the historic presidential election of 2008 in which a rapidly growing Hispanic population played a big part in the election, for the first time, of a non-white president.<sup>326</sup> Diversity, at that time of Sotomayor's nomination, was on the nation's brain.

As was President Obama's "empathy" standard of judging. First articulated in a press release when Obama was still a senator — he was defending his decision to vote against the confirmation of Justice John Roberts — the standard placed a premium on a nominee's "deepest values, [her] core concerns, [her] broader perspectives on how the world works, and the depth and breadth of her empathy."<sup>327</sup> Or as Obama put the point later, while campaigning in 2007, "We need [a justice] who's got the heart — the

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<sup>325</sup> "Now, there was a time when someone like Scalia and Ginsburg got 95 plus votes. If you were confused about where Scalia was coming down, as a judge you should not be voting any more than if you were a mystery about what Justice Ginsburg was going to do in these 5 percent of the cases. That is no mystery." "Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org." N.p., Web. <<http://www.c-span.org/video/?287672-1/sotomayor-confirmation-hearing-day-1-part-1>>.

<sup>326</sup> Preston, J. "In Big Shift, Latino Vote Was Heavily for Obama - NYTimes.com." N.p., 6 Nov. 2008. Web. <[http://www.nytimes.com/2008/11/07/us/politics/07latino.html?\\_r=0](http://www.nytimes.com/2008/11/07/us/politics/07latino.html?_r=0)>.

<sup>327</sup> "Obama Speech - Confirmation of Judge John Roberts - Complete Text." N.p., Web. <<http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm>>.

empathy —, to recognize what’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”<sup>328</sup>

During the hearing Sotomayor distanced herself from this standard, making clear, when asked directly by Senator Kyl whether she agreed with it, that “No, sir, I wouldn’t approach the issue of judging the way the president does.”<sup>329</sup> But that didn’t stop it from becoming a major issue, the kind of thing that spread beyond the confirmation hearing room and onto talk shows and editorial pages, as well as into living rooms and classrooms, as “originalism” had during the Bork hearing and as both “affirmative action” and certainly “sexual harassment” had done during the Thomas hearing. In fact, the issue of “empathy” and its intellectual sibling “diversity” brought into sharp relief, perhaps more so than in any other confirmation hearing, the at once theatrical and constitutional questions at the heart of every confirmation hearing: how should we cast the Supreme Court?

Said differently: how do we negotiate the tension between the idea that justice is objective, even “blind” — so it shouldn’t matter who we cast, at least in an ethnic or gender sense — and the realization that a court full of only white men or of only African-American women or of only any single category of people wouldn’t be a just court at all, particularly as the demographics of the country change?

The Sotomayor hearing doesn’t give us a tidy answer. But when read together with a parallel text, one that explores some of the same themes — though in a strikingly different context — perhaps it can give us some insight into the pressures and

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<sup>328</sup> The speech was given at a conference held by the Planned Parenthood Action Fund. For the full text, Echevarria, L. "barackobamabeforeplannedparenthoodaction - lauraetch." N.p., Web. <<https://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction>>.

<sup>329</sup> "Sotomayor Confirmation Hearing Day 2 Part 4 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-103/sotomayor-confirmation-hearing-day-2-part-4>>.

perspectives that motivate the questions, each of which continue to resonate today, particularly as Justice Ruth Bader Ginsburg, who once suggested it was “lonely”<sup>330</sup> on the Court when she was the only woman, nears retirement.

## II.

The parallel text I will be using is a surprising one. It is not anything from the impressive canon of Marie Irene Fornes or Richard Rodriguez or any other Hispanic-American writer whose multicultural sensibility might help illuminate the “borderlands”<sup>331</sup> identity Sotomayor experienced growing up and then had reconstructed for her during the hearing – though an inquiry like that does seem to have productive potential. Nor is it a work such as Arthur Miller’s *View from the Bridge* or even Israel’s Zangwill’s *The Melting Pot*, both of which might offer interesting points of comparison more generally for Sotomayor’s immigrant experience.

Instead it is a play that was so avant-garde when first produced in Milan in 1921 that its author, the eventual Nobel Prize winner Luigi Pirandello, had to be ushered out

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<sup>330</sup> “The word I would use to describe my position on the bench is ‘lonely,’” Ginsburg said in an interview with USA Today in January of 2007, about a year after Justice Sandra Day O’Connor had retired and two years before Sotomayor was nominated. Biskupic, J. “Ginsburg ‘lonely’ without O’Connor - USATODAY.com.” N.p., 25 Jan. 2007. Web.

<[http://usatoday30.usatoday.com/news/washington/2007-01-25-ginsburg-court\\_x.htm](http://usatoday30.usatoday.com/news/washington/2007-01-25-ginsburg-court_x.htm)>. Later that month, in a speech at Suffolk Law School in Boston, Ginsburg put her special bond with O’Connor this way: “We have very different backgrounds. We divide on a lot of important questions, but we have had the experience of growing up women and we have certain sensitivities that our male colleagues lack.” Maguire, K. “Ginsburg Laments Solitary Role on Court.”, 26 Jan. 2007. Web. <<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012602037.html>>.

<sup>331</sup> The term and theoretical concept “borderlands” was made popular, at least in academic circles, by Gloria Evangelina Anzaldua in *Borderlands/La Frontera: The New Mestiza* (Aunt Lunte Books, 1987), a book that explores Anzaldua’s experience growing up between cultures on the border of Mexico and Texas.

of the premiere through a side exit to avoid being accosted by hostile audience members.<sup>332</sup> Even the name of the play, *Six Characters in Search of an Author*, annoyed people. Yet since that time, the play has become a foundational piece of modern theater, its ingenious premise – six characters in an unfinished play interrupt a set of actors rehearsing an actual play and then demand that an author be found to complete their story, and so also their lives – now recognized as a rich chance to explore questions of illusion and reality, permanence and impermanence, and perhaps most profoundly, the shifting nature of the self.<sup>333</sup> Of course, the premise of the play, with its somewhat tawdry play-within-a-play melodrama, is not what makes *Six Authors* a helpful parallel text. Particularly when compared to the Thomas hearing, the Sotomayor hearing was the opposite of tawdry. Rather, what makes *Six Authors* a helpful parallel text is the insight it gives us into how unsettling it can be to have our notions of objective reality undermined by intrusions of subjective experience, particularly someone else’s subjective experience.

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<sup>332</sup> For a full account of not just the play’s opening night but its entire production history from 1921-2001, see Lorch, J. *Pirandello: Six characters in search of an author*. Cambridge, U.K: Cambridge University Press, 2005. Print.; see also, Pirandello, L, S. Bassnett, and J. Lorch. *Luigi Pirandello in the theatre: A documentary record*. Chur, Switzerland: Harwood Academic Publishers, 1993. Print.

<sup>333</sup> In the words of preeminent theater critic Robert Brustein, the former Dean of the Yale School of Drama and longtime reviewer for the *New Republic*, “Pirandello’s influence on the drama of the 20<sup>th</sup> century is immeasurable. In his agony over the nature of existence, he anticipates Sartre and Camus; in his insights into the disintegration of personality and the isolation of man, he anticipates Samuel Beckett; in his unremitting war on language, theory, concepts, and the collective mind, he anticipates Eugene Ionesco; in his approach to the conflict of truth and illusion, he anticipates Eugene O’Neil (and later, Harold Pinter and Edward Albee); in his experiments with the theater, he anticipates a host of experimental dramatists, including Thornton Wilder and Jack Gelber; in his use of the interplay between actors and characters, he anticipates Jean Anouilh; in his view of the tension between public mask and private face, he anticipates Jean Giraudoux; and in his concept of man as a role-playing animal, he anticipates Jean Genet. The extent of even this partial list of influences marks Pirandello as the most seminal dramatist of our time...” Brustein, R S. *The theatre of revolt: An approach to the modern drama*. Chicago: Elephant Paperbacks, 1991. Print. 316.

In the play, this intrusion comes directly. The very presence of the fictional characters shakes the belief system of the actual actors, as does the characters' sincere insistence that, as characters, they are more internally consistent than the actors, more stable and permanent – more, in fact, “real.”<sup>334</sup> “If you think back to those illusions which you no longer have,” the most forceful of the characters, “the Father,”<sup>335</sup> explains to the actors, “to all those things which now no longer ‘seem’ to be for you what they ‘were’ at one time, don’t you feel not necessarily the boards of the stage but the ground, the very ground beneath your feet give away – when you deduce in the same way ‘this,’ the way you feel right now, all the reality of today, the way it is destined to seem an illusion to you tomorrow?”<sup>336</sup> In other words, to be a person, as the actual actors are, is to be constantly in flux, to be constantly shedding old versions of what you believe both about the world and about yourself. The love of your life turns out to be the bane of your existence. The job of your dreams eventually becomes a lot less so, especially when you are presented with a more attractive alternative. And certainly the books, clothes, and politics you thought cool at, say, seventeen are unlikely to be the books, clothes, and politics you think cool at seventy, or even seventeen and a half. Styles change. Circumstances change. You change, the Father character makes clear, summing

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<sup>334</sup> The intended difference between the actors and the characters is reflected in Pirandello’s stage directions: “To stage this play one must take every possible precaution to achieve the effect that these SIX CHARACTERS are not be [sic] confused with the company of ACTORS. The arrangement of the ACTORS and the CHARACTERS when they go on stage will undoubtedly be helpful; for example, using different kinds of colored lighting by means of special reflectors. But the most suitable and efficacious means suggested here is use of special mags for the CHARACTERS.... The CHARACTERS, in fact, should not appear to be unreal figures but rather created reality, the creations of immutable fantasy; their more real and substantial than the changeable naturalness of the ACTORS.” Pirandello, L, and M. Musa. *Six characters in search of an author and other plays*. London: Penguin Books, 1995. Print. 10.

<sup>335</sup> For a particular compelling “Father,” see Andy Griffith’s performance in *Six Authors in Search of a Play*. Dir. S Keach. Kultur Video, 2002. Film.

<sup>336</sup> Pirandello, L, and M. Musa. *Six characters in search of an author and other plays*. London: Penguin Books, 1995. Print. 55.

up the actors' precarious position: whatever you touch and believe in and that seems real for you today, is destined, like the reality of yesterday, "to reveal itself as an illusion to you tomorrow."<sup>337</sup>

To be a character, on the other hand, is to live in "an immutable reality."<sup>338</sup> Huck Finn, for example, will always "light out for the territory" at the end of Mark Twain's novel. Elizabeth Bennett will always marry Mr. Darcy at the end of *Pride and Prejudice*. Ahab will never get the whale. These characters, like all literary characters, are fixed and reliable in ways that human beings can never be. Their reality doesn't change day to day; their reality, as Pirandello sees it, is eternal – regardless of whether they be heroes or simpletons.

[H]e who has the luck to be born a live character can even laugh at death. He will never die. The one who will die is the man, the writer, the instrument of the creation. The creation never dies. And for it to live forever, it need not have exceptional talent or the ability to work miracles. Who was Sancho Panza? Who was Don Abbondio? Any yet they live eternally, because, being live germs, they had the good fortune to find a fertile matrix, a fantasy that knew how to raise and nourish them, to make them live for eternity!

Pirandello's term for this eternal state is *being form*, which, in the preface<sup>339</sup> to *Six Authors*, he pairs with the contrasting term *having form* to explore the difference between the permanence of art and the impermanence of life, a difference that can be usefully applied to the Sotomayor hearing as well. One way to understand the hearing, and particularly the tense conflict that resulted not just over Sotomayor's "Wise Latina" comment but also over her more general suggestions that there is something inherently subjective and mutable about the law, is as a conflict between those who view the law

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<sup>337</sup> *Ibid.* at 56.

<sup>338</sup> *Ibid.* at 14.

<sup>339</sup> The importance of the preface to *Six Authors* has long been recognized in Pirandello scholarship. Frances Ferguson, for example, described it as "almost as important as the play." Cambon, Glauco. *Pirandello: A Collection of Critical Essays*. Englewood Cliffs, N.J.: Prentice-Hall, 1967. Print. 36.

as *being form* – that is, as something absolute, unchanging, secure – and those who view the law as *having form*: that is, as something flexible, provisional, and, perhaps most unsettling, not entirely objective.

Senator Sessions questioning of Sotomayor is a good example. The ranking Republican member of the judiciary committee, Sessions was the first hostile senator Sotomayor faced. He got right to the point. “Do you think there is any circumstance,” he asked her, “in which judges should allow their prejudices to impact their decision making?”<sup>340</sup> The question was triggered, like many questions in the hearing, by a line from Sotomayor’s “Wise Latina” speech. “I am willing to accept,” she had said in the lead-up to the now infamous part of that speech, “that we who judge must not deny differences resulting from heritage and experience, but attempt, as the Supreme Court suggests, to continuously judge when those opinions, sympathies, and prejudices are appropriate.”<sup>341</sup>

What so troubled Sessions about this comment, and after him Senator Kyl<sup>342</sup> and Senator Coburn,<sup>343</sup> was the attack it seemed to make on impartiality, the cornerstone of the American judiciary. “[I]sn’t it true,” he charged, “that [your] statement suggests that you accept that there may be sympathies, prejudices, and opinions that legitimately

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<sup>340</sup> "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>>.

<sup>341</sup> "Lecture - 'A Latina Judge's Voice' - Text - NYTimes.com." N.p., 14 May 2009. Web. <[http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all&_r=0)>.

<sup>342</sup> "Sotomayor Confirmation Hearing Day 2 Part 4 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-103/sotomayor-confirmation-hearing-day-2-part-4>>. For a closer analysis of Senator Kyl’s exchange with Sotomayor see Greenhouse, Carol J. "Judgment and the Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings." *Law, Culture, and the Humanities* 8.3 (2010): 418. Print.

<sup>343</sup> "Sotomayor Confirmation Hearing Day 3 Part 1 | Video." *C-SPAN.org*. N.p., 15 July 2009. Web. 22 Oct. 2014.

influence a judge's decision? How can that further faith in the impartiality of the system? "<sup>344</sup> He then pressed Sotomayor on a different part of the Wise Latina speech, a part where she questioned "whether achieving the goal of impartiality is possible at all in even most cases, and... whether by ignoring our differences as women, men, or people of color we do a disservice to both the law and society."<sup>345</sup>

To someone like Ronald Dworkin, who uses the word "myth,"<sup>346</sup> pejoratively, to describe the belief that a judge's personal experiences and convictions will not affect how she makes decisions, Sotomayor's questions offered a refreshingly candid tonic to what could be called the strong form of impartiality, one predicated on the idea that law, like the fictional characters in Pirandello, has a fixed form that can be discovered rather than an evolving form that is consistently updated and revised, often because new people with new perspectives look at it in a new way. "If a judge has only to discover the law," Dworkin noted, pointedly, in his assessment of the hearing in the *New York Review of Books*, "and if personal experiences and convictions are irrelevant, what difference could it make whether the judge is a woman and a Latina?"<sup>347</sup>

Senator Amy Klobuchar, a Democrat out of Minnesota, made a similar point during the hearing, describing the idea that life experiences shape the decisions of individual justices as not just "unremarkable" but "completely appropriate."<sup>348</sup> In her

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<sup>344</sup> "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org.", 14 July 2009. Web. <<http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>>

<sup>345</sup> "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org.", 14 July 2009. Web. <<http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>>

<sup>346</sup> "Sadly, practically everyone concerned in judicial confirmation hearings – senators and nominees – has an overriding interest in embracing the myth that judges' own political principles are irrelevant." Dworkin, Ronald. "Justice Sotomayor: The Unjust Hearings." *The New York Review of Books.*, 24 Sept. 2009. Web. 22 Oct. 2014.

<sup>347</sup> *Ibid.*

<sup>348</sup> "Sotomayor Confirmation Hearing Day 1 Part 4 | Video." *C-SPAN.org.*, 13 July 2009. Web. 22 Oct. 2014.

view, “different experiences are a gift for any court in the land,”<sup>349</sup> a position Dworkin himself takes later in his review essay. “[J]ust as being a woman helps a judge understand the horror of a strip search for a teenage girl,” he writes, referencing Justice Ruth Bader Ginsburg’s comments about *Safford United v. Redding* (2009), where the court found that school officials violated the rights of a thirteen-year old girl when, told by another student that she was hiding drugs, they made the girl remove all her clothes except for her bra and underwear and then searched inside her bra and underwear for contraband,<sup>350</sup> “[b]eing a Latina may give a judge a better understanding of the crucial moral difference between racial discrimination poisoned by prejudice and race-sensitive policies aimed at erasing that prejudice.” “A judge with that understanding,” he goes on to say, “would reach a better interpretation of the Constitution’s equal protection clause than a judge without it.”<sup>351</sup>

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<sup>349</sup> *Ibid.* Hoping to further make the case that a diversity of experiences can enrich a decision-making body, Klobachar described the, in her view, helpfully various backgrounds of the very members of the Senate Judiciary Committee conducting the hearing. “After all, our own Committee members demonstrate the value that comes from members who have different backgrounds and perspectives. For instance, at the same time my accomplished colleague Senator Whitehouse, son of a renowned diplomat, was growing up in Saigon during the Vietnam War, I was working as a car hop at the A&W Rootbeer stand in suburban Minnesota. And while Senator Hatch is a famed gospel music songwriter, Senator Leahy is such a devoted fan of the Grateful Dead that he once had trouble taking a call from the President of the United States because the Chairman was on stage with the Grateful Dead....So when one of my colleagues questioned whether you, Judge, would be a Justice for all of us or jut for some of us, I couldn’t help but remember something that Hubert Humphrey once said. He said, “America is all the richer for the many different and distinctive strands of which it is woven.”

<sup>350</sup> Following the oral argument, Ginsburg was surprisingly candid about what she perceived as the failure of the rest of the justices to understand just how frightened and violated the young girl felt. “They have never been a 13-year-old girl. It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.” Biskupic, J. “Ginsburg ‘lonely’ without O’Connor - USATODAY.com.”, 25 Jan. 2007. Web.

<[http://usatoday30.usatoday.com/news/washington/2007-01-25-ginsburg-court\\_x.htm](http://usatoday30.usatoday.com/news/washington/2007-01-25-ginsburg-court_x.htm)>.

<sup>351</sup> Dworkin, Ronald. “Justice Sotomayor: The Unjust Hearings.” *The New York Review of Books*. N.p., 24 Sept. 2009. Web. 22 Oct. 2014.

There is a certain power and persuasiveness to this view. For example, one of the qualities Thurgood Marshall brought to the Supreme Court when he became the first African-American justice in 1967 was a sensitivity to the felt experience of a whole category of citizens that had been, for much of the country's history, largely ignored or mistreated by the Court. A similar thing can be said of Sandra Day O'Connor when she became the first female justice in 1981, although a distinction she made soon after being confirmed highlights the very tension between diversity on the one hand and impartiality on the other that shook up the Sotomayor hearing. "I think the important thing about my appointment is not that I will decide cases as a woman," O'Connor said, careful not to link her jurisprudence to her gender, "but that I am a woman, who will get to decide cases."<sup>352</sup>

In fact, it was O'Connor's suggestion, years later, that "a wise old man and a wise old woman will reach the same conclusion" when deciding cases that originally triggered Sotomayor's Wise Latina comment. Noting that she was "not so sure" she agreed with O'Connor's statement, Sotomayor reminded her audience at Berkeley that "wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society" and that until 1972—less than a decade before O'Connor broke the male monopoly on the Supreme Court—"no Supreme Court case ever upheld the claim of a woman in a gender discrimination case."<sup>353</sup> In Sotomayor's view, therefore, although it is important not to be "so myopic as to believe that others of difference experiences or backgrounds are incapable of understanding the values and needs from a different group," it is also true that

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<sup>352</sup> Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008. Print. 270.

<sup>353</sup> "Lecture - 'A Latina Judge's Voice.'" *New York Times*, 14 May 2009. Web. <[http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all&_r=0)>.

“[p]ersonal experiences affect the facts judges choose to see.”<sup>354</sup> “Hence,” she concluded, “one must accept the proposition that a difference there will be by the presence of women and people of color on the bench.”<sup>355</sup>

But the problem with this proposition, at least if you are someone who views law as *being form*, as something stable and, in some sense, sealed off from the preferences and predispositions of individual judges, is that it seems to eliminate the boundary between the law and those who interpret it, a boundary Sotomayor herself repeatedly – and to Dworkin, disappointingly<sup>356</sup> – endorsed during the hearing, beginning with her opening statement. “In the past month, many Senators have asked me about my judicial philosophy,” she said. “It is simple: fidelity to the law.”<sup>357</sup> She then, by way of clarification, seemed to align herself with John Roberts’ famous “umpire” approach to judging, at least rhetorically. “The task of judge is not to make the law,” she made clear, “it is to apply the law.”<sup>358</sup>

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<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*

<sup>356</sup> In Dworkin’s view, the hearing was a real missed opportunity.” [Sotomayor’s] hearings could therefore have been a particularly valuable opportunity to explain the complexity of constitutional issues to the public and thus improve public understanding of this crucially important aspect of our government. But she destroyed any possibility of that benefit in her opening statement when she proclaimed, and repeated at every opportunity throughout the hearings, that her constitutional philosophy is very simple: fidelity to the law. That empty statement perpetuated the silly and democratically harmful fiction that a judge can interpret the key abstract clauses of the United States Constitution without making controversial judgments of political morality in the light of his or her own political principles. Fidelity to law, as such, cannot be a constitutional philosophy because a judge needs a constitutional philosophy to decide what the law is.” Dworkin, Ronald. “Justice Sotomayor: The Unjust Hearings by Ronald Dworkin | The New York Review of Books.” *Home | The New York Review of Books*. N.p., 24 Sept. 2009. Web. 22 Oct. 2014.

<sup>357</sup> “Sotomayor Confirmation Hearing Day 1 Part 4 | Video.” *C-SPAN.org*. N.p., 13 July 2009. Web. 22 Oct. 2014.

<sup>358</sup> *Ibid.*

Conservative senators quickly jumped on Sotomayor for what, to them, seemed like disingenuousness.<sup>359</sup> How could she claim to view law as something external and independent, something that judges apply mechanically and with utter objectivity, when for years, in speech after speech, she had focused on how inescapably subjective the process of judging is; how it depends, at least in part, on one's background and experiences, including, significantly, one's gender and one's ethnicity; and how, as a result, what law "is" will change according to who is called on to interpret it?<sup>360</sup> In other words, how could she claim to view law as *being form* after so often suggesting that a better way to understand law was as *having form*?

That Dworkin, a thoroughly liberal scholar, challenged Sotomayor on the same issue highlights two important points. First, neither end of the political spectrum was particularly satisfied with Sotomayor's response. Second, and related, neither side seems to have figured out how to negotiate the tricky tension between wanting to celebrate diversity on the Supreme Court and not wanting to give up the idea that the law is the law regardless of who puts on those nine black judicial robes. Virtually every senator who participated in the hearing, for example, called attention to how wonderful

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<sup>359</sup> See, for example, the comments of Senator Sessions: I have got to say that I liked your statement on the fidelity of the law yesterday and some of your comments this morning. And I also have to say had you been saying that with clarity over the last decade or 15 years, we would have a lot fewer problems today, because you have evidenced, I think it is quite clear, a philosophy of the law that suggests that a judge's background and experiences can and should – even should and naturally will impact their decision, which I think goes against the American ideal and oath that a judge takes to be fair to every party, and every day when they put on that robe, that is a symbol that they are to put aside their personal biases and prejudices. "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>>.

<sup>360</sup> See, for example, the comments of Senator John Cornyn of Texas. "As you can tell, I am struggling a little bit to understand how your statement about physiological differences could affect the outcome or affect judging and your stated commitment to fidelity to the law as being your sole standard and how any litigant can know where that will end." "Sotomayor Confirmation Hearing Day 3 Part 1 | Video." C-SPAN.org. N.p., 15 July 2009. Web. 22 Oct. 2014.

it was for the country that there could now be a Hispanic woman on the bench.<sup>361</sup> Yet none gave an adequate account of how to reconcile Sotomayor's special characteristics with the cherished belief that the integrity of the law is immune to special characteristics.

Nor did anyone take the opposite approach of embracing the kind of frank acknowledgement of subjectivity articulated by the Father in *Six Authors*. "All of us have a world full of things inside of us,"<sup>362</sup> he says, explaining how every time we tell a story, we tell it in our own way, because every time we engage with the world, we engage with it in our own way. "And how can we understand one another if in the words I speak, I put the meaning and the value of things as I myself see them, while the one who listens inevitably takes them according to the meaning and the value which he has himself of the world he has inside of *himself*?"<sup>363</sup> As unsettling as this idea is to the Father's on-stage audience, it was even more unsettling to Sotomayor's confirmation hearing audience, or at least the many members of it who saw in Sotomayor someone

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<sup>361</sup> See, for example, the comments of Senator Kyl, one of Sotomayor's biggest opponents and someone who ultimately voted against Sotomayor's confirmation. "I would hope that every American is proud that a Hispanic woman has been nominated to sit on the Supreme Court." See also, the comments of Senator Arlen Specter of Pennsylvania ("I join my colleagues, Judge Sotomayor, in welcoming you and your family here. I compliment the President for nominating an Hispanic woman. I think it was wrong for America to wait until 1967 to have an African-American, Justice Thurgood Marshall, on the court, waited too long, until 1981, to have the first woman, Justice Sandra Day O'Connor. I think, as a diverse Nation, diversity is very, very important."), Senator Dick Durbin of Illinois ("Until Thurgood Marshall's appointment to the Supreme Court a generation ago, every Justice throughout our Nation's history had been a white male. President Obama's nomination of you to serve as the first Hispanic and the third woman on the Supreme Court is historic."), and Senator Ted Kaufman of Delaware ("I am heartened by what you bring to the court based on your upbringing, your story of achievement in the face of adversity, your professional experience as a prosecutor and commercial litigator, and yes, the prospect of your being the first Latina to sit on the high court.)

Sotomayor Confirmation Hearing Day 1 Part 1 | Video | C-SPAN.org." , 13 July 2013. Web. <<http://www.c-span.org/video/?287672-1/sotomayor-confirmation-hearing-day-1-part-1>>.

<sup>362</sup> Pirandello, L, and M. Musa. *Six characters in search of an author and other plays*. London: Penguin Books, 1995. Print. 19.

<sup>363</sup> *Ibid.* (emphasis in the original)

who, in her decisions, would do the legal equivalent of putting “the meaning and the value of things as I myself see them” – as opposed to putting the meaning and value of things as they actually are, and will forever exist, in the law, like an originalist may be said to.

But in some ways every justice will inevitably, in the decisions they make, put the meaning and values of things as they see them, just as in some ways every actor will inevitably, in the roles they perform, put the meaning and values of things as they seem them. In fact, this point about actors is precisely why the Father character objects to having an actual actor portray him in *Six Characters*. In his view, as much as an actor “may try with all his good will and all of his artistic ability to make himself into me...it will be difficult [for the actor] to play me as I really am.”<sup>364</sup> It will be difficult because the actor is not the Father; because the actor will not be able to avoid, completely, filling the role with his own personality and perspectives; and, because any representation of the Father will be just that, a representation, with all the unavoidable distortions – some benign, even salutary, others deleterious – that term implies. “[E]ven doing his best to look like me with make-up,” the Father explains, the actor will not be able to capture “how I myself feel inside of me.”<sup>365</sup>

Perhaps it has been easier to overlook the way this kind of subjectivity also functions in the composition of the Supreme Court, because for over a hundred and fifty years, every justice was a white male and every justice-in-waiting was too. Replacing one white guy in black robes with another white guy in black robes does not come across as the most dramatic of casting changes. But one of the helpful things about the Sotomayor hearing, one of the things that makes it worthy of close cultural attention, was the way it highlighted how, in the context of the Supreme Court, decisions about casting are also decisions about justice. Watching and listening to

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<sup>364</sup> *Ibid.* at 36.

<sup>365</sup> *Ibid.*

Sotomayor on national television, her complexion and accent signaling that she would be a different kind of justice, it was tough to ignore the question of whether she would also mete out a different kind of justice, whether her personal characteristics – which were both visibly and audibly distinct from the one hundred and ten previous members of the Court – would carry over into her jurisprudence, and so also the jurisprudence of the Court. The cover of *Time Magazine* in the days leading up to her confirmation asked this question directly. “Latina Justice;” its main title read, using the a play on the word “Justice” to capture the controversy, “Will Sonia Sotomayor Change the Court?”<sup>366</sup>

Obviously, the answer to that question is “Yes,” as it would be for any Supreme Court nominee. You can’t take a body that depends on group decision-making, replace one of its members, and then expect it to still operate the same way. But when the new member is, for the first time, also a member of a minority around which a combination of resentment, excitement, and historical prejudice all swirl, then the anticipated change to the court, however unexceptional, becomes a point of deep cultural contention. This happened in 1916 when Louis Brandeis became the first Jewish Supreme Court nominee, a move that created so much controversy<sup>367</sup> that something that now seems standard – holding a hearing to evaluate the nominee – was first made part of the confirmation process. Responding to stinging criticisms of Brandeis in everything from the *Wall Street Journal* to the *Nation* to the *New York Times*, as well as ringing endorsements from the likes of Felix Frankfurter, Walter Lippman, and Samuel

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<sup>366</sup> "TIME Magazine Cover: Latina Justice - June 8, 2009 - Supreme Court - Sonia Sotomayor." *TIME.com.*, 9 June 2009. Web. 24 Oct. 2014.

<sup>367</sup> “The Brandeis confirmation battle still ranks as the most bitter and most intensely fought in the history of the Court, and the delay of more than four months after [Woodrow] Wilson submitted Brandeis’s names to the Senate on January 28, 1916, is still a record.” Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008. Print. 141.

Gompers, the Senate decided it needed not just to vote for or against Brandeis but to discuss, together, in public, whether they should do so.<sup>368</sup>

It also happened in 1967 when Thurgood Marshall became the first African-American nominee, catalyzing what Stephen Carter, in *The Confirmation Mess*, has called “the most vicious confirmation battle in our history.”<sup>369</sup> Marshall may have been, in Carter’s phrase, “the most admired human being ever to sit on the Supreme Court,”<sup>370</sup> but that didn’t stop his nomination from dividing the country, nor, as chapter 2 showed, from triggering a barrage of racially charged questions from members of the Senate Judiciary Committee.

Both the Brandeis hearing and the Marshall hearing, then, were important precursors to the Sotomayor hearing, in that they marked crucial cultural moments when the diversity of the Court started to match up with the diversity of the country, when the casting pool out of which a justice could be plucked, in other words, expanded dramatically. This is no small thing. The Supreme Court may not be an elected body, but it is a representative body, in the sense of representing, to the country, what justice looks like at the highest level. Before Brandeis, justice looked exclusively Christian. Before Marshall, it looked exclusively white. And it wasn’t until close to 200 years after the creation of the Supreme Court, that, thanks to Sandra Day O’Connor, justice looked anything but exclusively male.

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<sup>368</sup> The hearing, though, did not include Brandeis, who remained adamant in his unwillingness to talk to the members of the Senate, or members of the press. “When a reporter for the Baltimore Sun asked whether he would respond to the charges against him, Brandeis observed: “I have not said anything and will not . . . and that goes for all time and to all newspapers, including the Sun and the moon.” *Ibid.* At 143.

<sup>369</sup> Carter, Stephen L. *Confirmation Mess: Cleaning Up the Federal Appointments Process*. New York: Basic Books, 1995. Print. 3.

<sup>370</sup> *Ibid.*

The Sotomayor hearing fits in this lineage. It signaled a demographic shift that was also, in a way, a democratic shift. For much of the nation's history, Hispanic Americans were largely excluded from the legal system or, worse, the target of it. The Zoot Suit Riots,<sup>371</sup> "Operation Wetback,"<sup>372</sup> enforced segregation at pools, schools, and movie theaters<sup>373</sup> – these are the enduring legal images of the 20<sup>th</sup> century for many Hispanic Americans, supplemented by images of big, border-protection fences and deportation hearings in the 21<sup>st</sup>. So when Sotomayor, with her Hispanic name and Hispanic complexion and Hispanic accent, appeared before the country as a nominee for the most august court in the land, she became a powerful symbol of how even the highest levels of government were now open to Hispanic Americans and also of how a new voice, backed by the Constitution, was in a position to advocate for their causes and felt experience.

It was as if Hispanic Americans moved one step closer to the ideal of theatrical representation articulated by the Father in *Six Characters*. No longer would they have to settle for a set of "actors" who would try to approximate, as best they could, an experience that was not their own. Instead they would get someone who actually was

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<sup>371</sup> For an excellent documentary on the Zoot Suit Riots, which were a series of riots that broke out in Los Angeles in 1943 between groups of white sailors and marines stationed in the city and the Latino Youths who lived there (and were known for their stylish way of dressing), see *The American Experience: Zoot Suit Riots*. Dir. Joseph Tovares. PBS, 2002. Film.

<sup>372</sup> For a full account of "Operation Wetback," the derogatory name given to state-sponsored program to stop illegal border crossings from Mexico to the U.S., often through means that did not carry with them a high respect for civil and human rights, see García, Juan R. *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*. Westport, Conn: Greenwood Press, 1980. Print.

<sup>373</sup> Almost ten years before *Brown v. Board of Education*, Mexican-American parents in California successfully argued *Mendez v. Westminster* before that state's supreme court. The case established that segregation violates children's constitutional rights. For an extended treatment of the case, see Strum, Philippa. *Mendez V. Westminster: School Desegregation and Mexican-American Rights*. Lawrence, Kan: UP of Kansas, 2010. Print.

Hispanic American. They would get, in essence, a “character” – someone, like the Father, who was the thing she was trying to portray.

### III.

Of course, thinking about Supreme Court justice in terms of representation clashes with the idea that they are supposed to be disinterested interpreters of the law, that they are not supposed to represent anyone, or at least not any group in particular. Add in the already contentious issue of affirmative action and this clash intensifies, as Sotomayor discovered: her decision in *Ricci v. DeStefano*, a case involving efforts by the New Haven fire department to promote more minority firefighters, became the most talked about during the hearing.<sup>374</sup>

The case was brought by a group of white firefighters after the city of New Haven, facing a lawsuit by a group of black firefighters, threw out the results of a performance exam that, if followed, would have disqualified all the city’s black firefighters, along with all but two of its Hispanic firefighters, from becoming a captain or lieutenant – this, in a city where 60 percent of the population is black or Hispanic.<sup>375</sup> Had Sotomayor been white, like the other two judges on the panel, both of whom ruled against the white firefighters, her decision also to rule against the white firefighters is unlikely to have caused such a stir. Sotomayor’s opponents, for example, arranged for all of the white firefighters in the case to attend the hearing, fully uniformed, and then sit in a row in protest; and they also arranged for Frank Ricci, the lead plaintiff, to testify

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<sup>374</sup> Dworkin nicely captures the disproportionate focus on *Ricci* during the hearing. “Sotomayor has made thousands of decisions in her seventeen years as a federal judge. Only one of these, however, attracted any sustained attention in the hearings: her vote in the New Haven firefighters case.” Dworkin, Ronald. “Justice Sotomayor: The Unjust Hearings by Ronald Dworkin | The New York Review of Books.” *Home | The New York Review of Books*. N.p., 24 Sept. 2009. Web. 22 Oct. 2014.

<sup>375</sup> *Ibid.*

about how hard he had to study to pass the exam. Among the things Ricci told the committee (and the national audience) is how he often paid people to read to him because his dyslexia made it so difficult for him to read on his own.<sup>376</sup> It is tough to imagine the same theatrics having been used to block the confirmation of, say, Stephen Breyer or even Elena Kagan, both proponents, like Sotomayor, of affirmative action but both, importantly, white.

Of course, that is the flip side of Sotomayor's powerfully symbolic on-stage identity, as anthropologist Carol Greenhouse explains in "Judgment and Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings": yes, Sotomayor's ethnicity was a source of pride not just for Hispanic Americans but for any American who values diversity on the Supreme Court; on the other hand, it was also a point of vulnerability, in that her critics used it to challenge her objectivity, to question her judgment, to, in Greenhouse's phrase "delegitimate" her.<sup>377</sup> The implication of Sotomayor's "Wise Latina" speech in particular, Greenhouse argues, was that "professionalism filters personal experience through educated critical self-awareness, rendering experience as discernment and disciplined judgment."<sup>378</sup> In Greenhouse's view, Sotomayor's praise for experience "does not reduce judging to experience; rather, it affirms the on-going self-constitution of judges through judging."<sup>379</sup>

But in the hearing Sotomayor's critics advanced a different view. To them, Greenhouse points out, "unbiased judgment requires personal experience to be set aside—as if a legal career were a kind of born-again experience, enabling one to begin life anew in the sacred world of legal doctrine."<sup>380</sup> In other words, unbiased judgment

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<sup>376</sup> *Ibid.*

<sup>377</sup> Greenhouse, Carol J. "Judgment and the Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings." *Law, Culture, and the Humanities* 8.3 (2010): 409-432. Print.

<sup>378</sup> *Ibid.* at 414.

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

requires one to embrace the idea of law as *being form*, to return to the language of Pirandello – something someone who champions the “on-going self-constitution of judges” is going to have a hard time doing, since the “on-going self-constitution of judges is” is a notion more in line with law (and judges) *having form*.

Which is perhaps why Sotomayor had such a hard time explaining her Wise Latina comment. For her (and Greenhouse) one’s personal experience, and particularly one’s ethnic experience, informs and enriches one’s professional identity.<sup>381</sup> Being Latina is a real judicial asset. But for Sotomayor’s critics it is, in a sense, a liability, something Sotomayor must overcome, even renounce. Greenhouse puts the point this way: “Renunciation is key [for minority nominees like Sotomayor], since . . . the default assumption [is] that minority individuals are bound by minority community interests to the exclusion of more general interests.”<sup>382</sup> Or perhaps better, because more illustrative, are the words of one of Sotomayor’s actual critics, Senator Jeff Sessions of Alabama, the ranking Republican member of the committee and so also the one who initiated the attack on Sotomayor after she finished making her opening statement. “[Y]ou have evidenced, I think it’s quite clear, a philosophy of the law that suggests that a judge’s background and experiences can and should – even should and naturally will – impact their decision, which I think goes against the American ideal and oath that a judge takes to be fair to every party; and every day when they put on that robe, that is a symbol that they’re to put aside their personal biases and prejudices.”<sup>383</sup> He then zeroed in on the *being form* versus *having form* distinction, although of course he didn’t use those Pirandellian terms. “Let me recall that [in your opening statement] you said [your judicial philosophy] is simple: fidelity to the law. The task of a judge is not to make law,

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<sup>381</sup> *Ibid.* at 415.

<sup>382</sup> *Ibid.*

<sup>383</sup> "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <<http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>>.

it's to apply law. I heartily agree with that. However, you previously<sup>384</sup> have said that the Court of Appeals is where policy is made. And you have said in another occasion, 'The law that lawyers practice and judges declare is not a definitive capital 'L' law that many would like to think exists,' close quote. So I guess I am asking today, what do you really believe on those subjects? That there is real law and that judges do not make law, or that . . . there is no real law and the Court of Appeals is where policy is made?"<sup>385</sup>

Sessions' questions helpfully capture the competing tensions at the heart of the Sotomayor hearing, tensions which reflect a more fundamental division in how the country thinks about who should be confirmed to the Supreme Court and why. On the one hand, people gravitate towards stories like Sotomayor's, and before her, stories like Sandra Day O'Connor's, Louis Brandeis', Thurgood Marshall's, and Clarence Thomas's<sup>386</sup> — stories that stem from a different and often discriminated against kind of identity, that involve backgrounds not previously attached to a Supreme Court justice

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<sup>384</sup> The remarks Senator Sessions is referring to were said at Duke Law School in February of 2005. She was part of a panel that discussed clerking for an appellate court judge. "Judge Sotomayor 2005 Duke University Forum | Video." *C-SPAN.org*. N.p., n.d. Web. 24 Oct. 2014.

<sup>385</sup> "Sotomayor Confirmation Hearing Day 2 Part 2 | Video | C-SPAN.org." N.p., 14 July 2009. Web. <http://www.c-span.org/video/?287701-101/sotomayor-confirmation-hearing-day-2-part-2>.

<sup>386</sup> The success of Thomas's mode of storytelling, one which focused on his humble beginnings growing up in Pinpoint, Georgia, has even seemed to spawn some imitators, as well as a label: the "Pinpoint Strategy." "The Thomas hearings also established what came to be known as 'the Pinpoint strategy,' named for the tiny Georgia town where Thomas was raised. At his confirmation hearing, Thomas spoke of the grim poverty of his early childhood, describing how he and his family 'lived in one room in a tenement. . . .And we shared a common bathroom in the backyard, which was unworkable and unusable.' At Sonia Sotomayor's confirmation, she spoke of a similar background, saying, 'I grew up in modest circumstances in a Bronx housing project.' Samuel Alito discussed his immigrant roots, focusing on the fact that his 'father was brought to this country as an infant. . . . He grew up in poverty.' Even John Roberts, the son of an upper-middle-class Indiana family, found a way to eulogize his roots by describing the golden fields of his home state and how as he 'grew older those endless fields came to represent for me the limitless possibilities of our great land.'" Totenberg, Nina. "Thomas Confirmation Hearings Had Ripple Effect : NPR." *NPR.org*. N.p., 11 Oct. 2011. Web. 25 Oct. 2014

and that, accordingly, offer hope that a new perspective will be added to an old and sometimes wrongheaded institution. “We are not final because we are infallible,” Justice Robert Jackson famously observed of the Supreme Court. “We are infallible because we are final.”<sup>387</sup> Each new story, each new outlook, gives the Court a chance to make this finality more deserved, particularly when it comes to the rights of marginalized individuals, an area that often reveals the Court’s cultural blindspots, as cases like *Bradwell v. Illinois*<sup>388</sup> (1873), *Plessy v. Ferguson*<sup>389</sup> (1896), and *Korematsu v. United States*<sup>390</sup> (1944) all show.

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<sup>387</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953).

<sup>388</sup> In an 8-1 decision, the Court upheld an Illinois state law that prohibited women from becoming lawyers. Among the now regrettable statements made by the court in this case were “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life” and “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” 83 U. S. 130, 142 (Bradley concurring)

<sup>389</sup> Behind *Dred Scott v. Sanford* (1857), *Plessy* is perhaps the most vilified Supreme Court case in history, in large part for the reasoning reflected in these lines from Justice Henry Billings Brown in the Court’s majority opinion: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it” 163 U.S. 537 (1896).

<sup>390</sup> *Korematsu*, which upheld the constitutionality of the internment of Japanese-Americans during World War II, has never officially been overturned by the Court. But in 2011, the Justice Department issued an official notice stripping the case of its precedential value, which gives hope that the most enduring sentences in the opinion will be from Justice Frank Murphy’s farsighted dissent. “I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.” 323 U.S. 214 (1944).

On the other hand, there are people who covet not stories but stability, not new perspectives but old principles, especially the principle that the law is the law is the law. A person's ethnic identity doesn't change that principle. Cultural conditions don't change that principle. Nothing changes that principle, because if something did, the fear is, our legal system's claims to the objective, even timeless, pursuit of truth would start to erode. "Equal justice under the law,"<sup>391</sup> which is the motto inscribed above the intentionally classical-looking columns of the Supreme Court, would be a lot less inspiring as "Equal justice under the law as it is currently interpreted but may change soon."

What the Sotomayor hearing gives us, then, is a chance to interrogate both of these ways of thinking, to see, in the kind of dialogue perfect for stage, how each holds up against the other. That Sotomayor was ultimately confirmed does not mean, of course, that one way of thinking triumphed over the other, particularly considering there were times when Sotomayor herself seemed to vacillate between a law as *having form* position and a law as *being form* one. Nor should we expect to see a resolution of the conflict anytime soon – on the Supreme Court or in public. In fact, there are many indications that battles on the Court are becoming more entrenched, especially on the issue about which Sotomayor was pressed most intensely: affirmative action.

But what we can take away from the hearing is something similar to what we can take away from Pirandello's play: a greater understanding of the interplay between two rival modes of thought, one committed to the ideal of an objective, permanent reality, the other more at home in the realm of subjective, ever-changing experience. Neither mode is without its flaws. Neither would be that compelling, alone, on a stage. But

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<sup>391</sup> The phrase was actually suggested by the architects hired to build the Supreme Court in 1932. It was then approved by Chief Justice Charles Evans Hughes and the rest of the Supreme Court Building Commission. "Architectural Information Sheets." SupremeCourt.gov, Web. 25 Oct. 2014.

when combined, and contrasted, these two separate modes can, together, create a cultural event that is at once compelling and instructive.

## CHAPTER 6

### CONCLUSION: CONFIRMATION CRITIQUE

Up until now, I have taken a largely neutral stance toward the three confirmation hearings I have covered. This was deliberate. One of the main goals of this dissertation is to document a form of cultural expression that has not been, in my view, adequately documented as a form of cultural expression. Plenty of commentators have criticized confirmation hearings. I wanted, instead, to re-imagine them. I want to see, in other words, whether something useful could be learned by viewing these hearings not just through a political lens but through a literary lens, and specifically through a theatrical lens. Temporarily suspending judgment seemed an important part of that process, like waiting until after a play ends to review it.

But I would be remiss if I didn't evaluate these hearings at all, if I didn't offer my own account of what is admirable about them, what is lamentable about them, and what, if anything, dramatic works of literature can teach us about how they might more profitably proceed. Several times in previous chapters I claim James Boyd White as an intellectual model; it is with his own brand of ethical criticism in mind, one that often asks of literary and legal texts "What forms of conversation do they open up? What ways of being do they make possible?," that I offer the critical judgments below. The hope is that these judgments will supplement the mostly descriptive account of confirmation hearings I have given so far, adding a more analytic dimension to my, up to this point, narrative approach.

Of course, part of this analytic dimension has already been present in, or at least set up by, my selection of confirmation hearings. The Bork hearing, the Thomas hearing, the Sotomayor hearing – these were not chosen haphazardly. Each reflects what I see as particularly valuable about confirmation hearings. So perhaps a good place to begin my critical appraisal of confirmation hearings in general is to spend some time with a quality shared by these confirmation hearings in particular: each of the hearings gave the country a chance to confront, in a multi-dimensional way, important if sometimes painful aspects of American history.

The Thomas hearing and the Sotomayor hearing did this most vividly. The very presence, on a national stage, for a highly revered and coveted position, of a nominee of color triggered wide-ranging conversations about the historical relationship, on the Supreme Court certainly but also throughout society, between race and justice. On public display, in both hearings, were nominees whose skin color would have barred them in earlier years not just from the bench but also from various schools, pools, and drinking fountains. Thomas was born, in the segregated South, before *Brown v. Board of Education*. Sotomayor was born, to a father who never spoke English, the same year as *Hernandez v. Texas*, the Supreme Court case that acknowledged that Latinos suffered widespread discrimination.<sup>392</sup> Each experienced both overt and subtle forms of racism throughout their lives.

I mention these details because when I say these hearings gave the country a chance to confront, in a multi-dimensional way, important if sometimes painful aspects of American history, I mean to note that one of these dimensions had the helpfully theatrical quality of being physical. Americans didn't just read about Thomas and

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<sup>392</sup> For more on *Hernandez v. Texas*, see Olivas, Michael A. "Colored Men" and "Hombres Aquí": *Hernández v. Texas and the Emergence of Mexican-American Lawyering*. Houston, TX: Arte Público, 2006. Print; see also Soltero, Carlos R. *Latinos and American Law: Landmark Supreme Court Cases*. Austin: U of Texas P, 2006. Print.

Sotomayor; they got to see and hear them. They got to experience, up close, faces and voices that had been, for the first 150 years of the country's existence, discriminated against by the very Court for which they were now being considered.

On the one hand, this experience was cause for celebration. As Lani Guinier has said about watching the Thomas hearing, particularly as an African American, there was "an element of voyeurism but there was also an element of accomplishment."<sup>393</sup> Here were middle-class black people just like her *on television*, a sight she was not used to seeing. "When my husband was growing up, for example, in the 1950s, and a black person was on television, my husband and his brother used to run down the street saying, 'There is a black person on television!'"<sup>394</sup> Disagree as Guinier might with Thomas's views and certainly his alleged behaviors, she could not help feel a certain amount of pride at the sight and sound of him, and other African Americans, on such a national stage. She was witnessing progress—in real time, in an arena of immense political and symbolic importance.

Reporters covering the Sotomayor hearing observed a similar phenomenon. "Never far from the surface was the historic nature of the day,"<sup>395</sup> wrote the *Washington Post* after Sotomayor's first appearance before the Senate Judiciary Committee. "Signs of the change were easy to find: bits of Spanish spoken by those who stood in line amid the stark marble of the modern Hart Senate Office Building; a family in the front-row seats behind the nominee unlike that of any of the 110 justices who have come before; and an acknowledgment from both Democrats and Republicans of what Sotomayor called the only-in-America nature of her nomination."<sup>396</sup> In some ways, the scene was

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<sup>393</sup> Grunier, Lani. "Sex, Power, and Speaking for Truth: Anita Hill 20 Years Later." Hunter College, New York, New York. 20 Oct 2011.

<sup>394</sup> *Ibid.*

<sup>395</sup> "In Senate Confirmation Hearings, Sotomayor Pledges 'Fidelity to the Law'." *Washington Post*. Web. 26 Mar. 2015.

<sup>396</sup> *Ibid.*

less like a meeting of political operatives and more like the Broadway opening of *West Side Story* or, in Thomas's case, the Hollywood premiere of *Look Who's Coming to Dinner*, particularly considering that in the front-row seat behind him was his white wife. It was, in other words, what Guinier said the Thomas hearing was: "a powerful culture-shifting moment."<sup>397</sup>

At the same time, however, it was also a deeply unsettling moment. In both the Thomas hearing and the Sotomayor hearing, racial progress was not the only thing on display. There was also racial animus, a troubling reminder that the country's legacy of discrimination was not so easily triumphed over. This was most apparent in the Thomas hearing, with its dominant metaphor of a "high-tech lynching." But it was also present in the Sotomayor hearing. As Kimberle Crenshaw has noted, during both Antonin Scalia's hearing in 1986 and Samuel Alito's hearing in 2006, "their Italian ethnicity was celebrated as an enhancing dimension of their belonging"; but during Sotomayor's hearing in 2009, right in the midst of the supposedly "post-racial" period Barack Obama's presidency ushered in, Sotomayor's ethnicity was still viewed with skepticism.<sup>398</sup> Even her membership on the board of directors of the Puerto Rican Legal Defense Fund set off a backlash.<sup>399</sup>

Part of what these hearings offer, then, is what Eugene Ionesco said theater offers: a chance to contradict ourselves, a chance to explore, in public, competing notions of our own history, politics, and identity.<sup>400</sup> For Ionesco, this exploration came, most reliably, through the creation of multiple characters; and for confirmation hearings

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<sup>397</sup> Grunier, Lani. "Sex, Power, and Speaking for Truth: Anita Hill 20 Years Later." Hunter College, New York, New York. 20 Oct 2011.

<sup>398</sup>Crenshaw, Kimberle. "The Rise of Sonia Sotomayor." *New York Times*. 10 Oct. 2014: BR17. Print.

<sup>399</sup> *Ibid.*

<sup>400</sup> "Paris Review - The Art of Theater No. 6, Eugene Ionesco." *Paris Review - Writers, Quotes, Biography, Interviews, Artists*. Web. 26 Mar. 2015.

too, that is the dominant method. Not only does each nominee create a character during the hearing, through his or her appearance, gestures, tone, opinions, and overall demeanor, but so does each member of the 18-person Senate Judiciary Committee, all of who are different ages, hold different values, and represent different states. The diversity of performers in confirmation hearings is one of their greatest strengths, although certainly still in an area in which they can improve. Women senators were glaringly absent from the Thomas hearing. Minority senators have continued to be from more recent ones, a trend that, should it continue, will be increasingly at odds with the idea of the Senate Judiciary Committee as a representative body given recent demographic shifts: since 2012, over 50% of babies born in the U.S. have been non-white.<sup>401</sup>

Yet even with an almost exclusively white, male cast, Supreme Court confirmation hearings have shown a rare capacity for public, political multiplicity, by which I mean the ability to foster a rich variety of viewpoints on matters of national importance and then hold them in helpfully unresolved tension. Presidential debates narrowly consist of just two opposing viewpoints. Presidential primaries, though populated by more candidates and so presumably more viewpoints, have a much more limited *range* of viewpoints. Some issues just won't get raised among a group of only Democrats. Others won't get raised among a group of only Republicans. The events are structurally prohibited from having members of different political parties engage one another.

Other political events, too, seem not to be able to match Supreme Court confirmation hearings in terms of the breadth and depth of conversation they make possible. The State of the Union address is always met by an official response from the opposing party but it is difficult to call this exchange a "dialogue." And other

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<sup>401</sup> Tavernise, Sabrina. "Whites Account for Under Half of Births in U.S." *The New York Times* 17 May 2012: A1. Print.

congressional hearings generally just focus on one topic – Benghazi, steroid use in major league baseball, Enron. As memorable as even the Army-McCarthy hearings were, they didn't offer much by way of substantive content.

Supreme Court confirmation hearings, on the other hand, at least offer the opportunity for a much more wide-ranging conversation. Senators can ask questions on everything from affirmative action to campaign finance reform to gun control. The hearings have the potential to be an engaging exhibition of the democratic process, with representatives from across the country – and across the political spectrum – coming together to decide whether the candidate before them is qualified to make decisions that will ultimately affect the entire country. It is this democratic potential that seems to have led Heather Gerken of Yale Law School to declare, “I believe in confirmation hearings. The Constitution belongs to all Americans, and confirmation hearings offer dramatic proof of that fact.”<sup>402</sup>

Of course, this potential is rarely achieved, as Gerken herself acknowledges.<sup>403</sup> Although senators can ask questions about everything from affirmative action to campaign finance reform to gun control, they often don't ask questions at all. Instead, they make speeches. They turn what is supposed to be a dialogue into a diatribe, if they oppose the nominee; and if they support her or him, they turn it into an equally unhelpful encomium. Lost is the act of conversation, which is a big loss indeed, because as James Boyd White reminds us, quoting John Dewey, “Democracy begins in

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<sup>402</sup> Gerken, Heather. “The Sotomayor Hearings: A Waste of Time?” *Room for Debate*. The New York Times, 15 July 2009. Web. 27 Mar. 2015.

<sup>403</sup> *Ibid.* (“The problem is that what appears to be emerging from the hearings is a depiction of judging that is unrecognizable to lawyers of any jurisprudential stripe. A *New York Times* reporter has already observed that the hearings seem to have drained all the life out of Judge Sotomayor. My worry is that confirmation hearings will inevitably drain the life out of the law itself, at least in the public's eyes.”)

conversation.”<sup>404</sup> Without a meaningful exchange of ideas, one where the words don’t just flow in a single direction, confirmation hearings become little more than campaign commercials, their democratic potential overrun by the tendency, by both Democrats and Republicans, to grandstand.

Perhaps, then, the most helpful way to reform confirmation hearings would be to insist that the senators converse with the nominees, not just talk at them. This could be done by following Christopher Eisgruber’s suggestion in *The Next Justice: Repairing the Supreme Court Appointments Process* to limit the senators to open-ended questions, like those you might find on an essay exam:

The late Chief Justice William Rehnquist wrote that ‘manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper.’ Could you tell us something about the values and purposes that will guide you when you interpret provisions like the Equal Protection Clause? How do those values and purposes distinguish your approach from those taken by other justices?<sup>405</sup>

Banned would be the more hostile True/False style of questioning, where senators try to trick nominees into damaging concessions and contradictions, since the goal of a confirmation hearing should not be to trap nominees, as you might the opposition on the witness stand. Nor should the posture of nominees have to be one of defensive reticence, frightened that any slip-up will result in self-incrimination. Little is learned from attempts to play “gotcha.” Democracy, it seems safe to say, rarely begins in cross-examination.

So we might even push Eisgruber’s suggestions further and propose that senators commit to a series of questions that they would then share with the nominee

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<sup>404</sup> White, James B. *Justice as Translation: An Essay in Cultural and Legal Criticism*. Chicago: U of Chicago P, 1990. 91. Print.

<sup>405</sup> Eisgruber, Christopher L. *The Next Justice: Repairing the Supreme Court Appointments Process*. Princeton: Princeton UP, 2007. Print.

before the hearing starts. The job nominees are being interviewed for requires thoughtful deliberation on issues that they'll be given time to research and reflect on, not quick-second responses to questions they'll hear for the first time. Why not have the actual interview simulate that experience? Plus, advanced knowledge of the main topics could raise the overall level of conversation during the hearing, like a class in which everyone has done the reading – and even drafted answers to a set of discussion questions.

Of course, giving nominees time to prepare responses could simply transfer the problem of speech-making from the senators to the nominees. The opening statements are already filled with scripted orations, including one from the nominee. A whole hearing of them would get tiresome. A potential compromise, therefore, might be to have senators submit scripted questions before the hearing but then be allowed, indeed encouraged, to follow up with additional, unscripted questions during the hearing. One of the best, most distinctive features of confirmation hearings is the give-and-take, the chance an actual dialogue has to develop, in real time, between a wide-range of thinking, reacting participants. Unlike, for example, a presidential debate, with its strict format of pre-selected questions and predetermined response times, the exchanges in a confirmation hearing have more of the flexibility of natural conversation. Topics can be explored, spontaneously, as they come up. One senator's question might trigger a line of inquiry another senator hadn't even considered but now will decide to pursue thanks to being prompted. And the nominees, whose communication is the most unrestricted, have the freedom to revisit and restate positions that, once said, they might no longer fully endorse. As then-Senator Joe Biden reminded Robert Bork when chairing Bork's hearing, "I just want to make it clear: you have as much time as you want [to answer

questions]. I literally mean that. If you want to take 20 minutes to answer a single question, or an hour, you have the time.”<sup>406</sup>

So far no nominee has really abused this privilege. Reticence, not loquacity, has generally been the norm. The same, however, cannot be said of the senators, who often ramble on past the speaking time allotted to them. Scripted questions submitted before the hearings starts are one possible solution to this. Another is to borrow an approach used in the Thomas hearing, one that seemed to reign in digressions and keep the conversation more helpfully focused: pick a small set of senators to do most of the questioning.

This approach – which limited both Republicans and Democrats to three questioners each – was used because of the “extraordinary circumstances”<sup>407</sup> of the Thomas hearing. But that doesn’t mean it can’t be used in more ordinary circumstances as well. The Thomas hearing isn’t alone in being able to benefit from a thoughtful selection of senators with the skill and experience to ask questions on behalf of the rest of the group, and, in some sense, on behalf of the rest of the country. Not every senator used to be a prosecutor, like Arlen Specter of Pennsylvania and Patrick Leahy of Vermont, two of the questioners selected for the Thomas Hearing; nor a chief justice of a state supreme court, like one of the other questioners, Howard Heflin. In fact, there is very little in the daily duties of a senator to suggest that they have a special competence when it comes to asking insightful, probing questions about constitutional law. Their most basic job requirement is the ability to get elected. Contemplating the intricacies of the Fourth Amendment doesn’t win you a lot of votes.

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<sup>406</sup> "Bork Nomination Day 2 | Video." *C-SPAN.org.*, 16 Sept. 1987. Web. 27 Mar. 2015.

<sup>407</sup> "Thomas Second Hearing Day 1 Part 1 | Video." *C-SPAN.org.*, 11 Oct. 1991. Web. 27 Mar. 2015.

So perhaps an even more useful reform, if also a more radical one, would be to have the questioners not be senators. Instead they could be people who not only, for example, contemplate the intricacies of the Fourth Amendment but also know how to articulate those contemplations into clear, thought-provoking verbal packages. These people might be esteemed constitutional law professors with experience arguing before the Supreme Court. They might be particularly sharp journalists whose specialty has become communicating complex legal issues in a readily understandable way. They might even be former justices themselves. All that is constitutionally required of the Senate when it comes to Supreme Court nominees is that it give the President its “Advice and Consent.”<sup>408</sup> That can still happen if, for example, Professor Erwin Chemmerinsky, NPR’s Nina Totenberg, or former justice Sandra Day O’Connor were brought in to ask questions.

In fact, the advice and consent the Senate ultimately gives may be more informed should the discussion during the hearing be led by someone with an in-depth understanding of the job of a justice – all the better if that person had actually been a justice, or at least worked for one. None of the senators who questioned Bork, Thomas, or Sotomayor had even been a law clerk. Nor is the idea of bringing in outsiders to enrich the hearings and aid the senators in their decision-making as radical as it may originally seem. The writings of academics, journalists, and justices are often entered into the hearing records as testimony, and these people frequently appear as witnesses. Most of the time their appearances occur after the nominee has been dismissed, but there is no rule saying this has to be the case. Indeed, what is so encouraging about confirmation hearings and their capacity to reform is that there are virtually no rules at all. The Senate Judiciary Committee is not a body hemmed in by precise constitutional constraints. It is not the electoral college. Instead, it is an ever-evolving cast of political characters with the freedom to come up with new ways to carry out its Article II duties.

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<sup>408</sup> US Const. art. II, sec. 2, cl. 2.

Among these ways, of course, was the very idea of confirmation hearings, something that didn't come into existence until almost a hundred years after the Judiciary Committee was established in 1816.<sup>409</sup> Others include: televising the hearings, which first occurred in 1981; making sure there is at least one closed-door session, an innovation implemented in 1993 to address the privacy concerns raised by the Thomas hearing; and broadcasting the hearings on the internet, something former chairperson Patrick Leahy introduced in 2009 in an effort to give "Americans [an opportunity] to see and hear Judge Sotomayor for themselves and to consider her qualifications."<sup>410</sup>

Largely focused on the public's access to the hearings, these innovations would be well-complemented by an innovation to the hearing's format, particularly one like bringing in skilled outsiders to help ask questions. The chief complaint against confirmation hearings in recent years has been the quality of the conversation. Injecting new intellectual blood into the proceedings could raise the level of discourse, especially if this new blood could communicate a sense of independence and integrity, like the best kind of moderators for a presidential debate. Partisan politics, we have seen, does not always produce high-minded, or even helpful, civic discussion.

There is actually a model for the type of format I am thinking of, one which combines elements of the stage with elements of the classroom – classrooms themselves being common sites of theatrical performance. Beginning in 1988, then-President of CBS News Fred Friendly partnered with Columbia University and the Annenberg Media Foundation to produce "Ethics in America," a 10-part television series designed to engage, in a sophisticated yet accessible way, with issues of national concern, much

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<sup>409</sup> Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008. Print.

<sup>410</sup> "Sotomayor Confirmation Hearing Day 1 Part 1 | Video." *C-SPAN.org.*, 13 July 2009. Web. 27 Mar. 2015.

like a Supreme Court confirmation does.<sup>411</sup> Part of what made the series remarkable was the extraordinary group of panelists it showcased. For an episode on “Politics, Privacy, and the Press,” the panel included *Washington Post* publisher Katherine Graham, former Vice Presidential Candidate Geraldine Ferraro, and the journalists Peter Jennings and Mike Wallace. For an episode on the military, it included Generals William Westmoreland and David Jones, and two-time National Security Adviser Brent Scowcroft. Twice Justice Scalia appeared. And once C. Everett Koop, who was the Surgeon General at the time, and Arnold Relman, who was the editor of the *New England Journal of Medicine*, did. It was very much an all-star cast.

And at the center was the most important element, the element from which I think confirmation hearings can learn the most: an experienced, eloquent emcee. Sometimes the emcee was Charles Arthur Miller, whose experience includes teaching, via the Socratic Method, at Harvard Law School; serving, for over two decades, as a legal correspondent for *Good Morning America*, while also hosting a public affairs program for the BBC; and arguing several cases before the Supreme Court. His commanding stage presence, developed in each of the above arenas, lent a helpfully dramatic dynamic to the program. His performance in an episode called “The Constitution: A Delicate Balance” even helped that episode win an Emmy.

Other times the emcee was Lewis Kaden or Charles Neesson, who both matched Miller in terms of being able to ask questions that invited, even compelled, thoughtful responses, as did perhaps the most adroit of the emcees, Charles Ogletree. Ogletree’s familiarity with the confirmation process – he represented Anita Hill during the Thomas hearing – would seem to recommend as an emcee over the other three, his experience as an African American being an added bonus, particularly given how the hearings continue to suffer from a lack of diversity.

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<sup>411</sup> "Ethics in America." *Annenberg Learner Teacher Professional Development*. Web. 27 Mar. 2015.

But more than recommending a particular person to emcee the hearings, I am recommending a particular set of traits, ones that combine the skills of two theatrical roles: the stage actor and the stage director. The emcee needs the skills of a stage actor in that she or he needs to be able to, at the most basic level, hold an audience's attention. Confirmation hearings can be gruelingly boring affairs, stretched out over multiple days and multiple rounds of questioning. A certain level of energy and expressiveness is required to keep everyone interested and engaged. So, too, a certain mix of daring and decorum—daring, so that difficult topics get discussed; and decorum, so that the conversation always remains respectful. Few people benefit when a hearing turns acrimonious.

As for the skills of a stage director, these are perhaps even more important. A major problem at confirmation hearings is that people try to hog the spotlight. They talk too much. They interrupt too often. They inevitably try to make the hearing about them. Most frequently, these people are the senators, each eager to show off for his or her constituents, each, too, used to being the center of attention. But occasionally, witnesses will similarly overplay their role, as Texas businessman John Doggett did in the Thomas hearing when in a long, rambling, and transparently self-promotional string of testimony, he accused Anita Hill of harboring sexual fantasies about him.<sup>412</sup> An emcee with the skills of a stage director could help reign in this ego-driven excessiveness. She or he could refocus the hearing on the real star: the nominee. As British director Frank Hauser has written about his own approach, “[As the director],

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<sup>412</sup> A few months after the hearing concluded, the *Los Angeles Times* summed up Doggett's performance, and its reception: “Doggett was widely ridiculed for his testimony, which seemed to focus inordinately on his own achievements. He offered scant evidence to support his conclusion that his break conversations with Hill showed that she had ‘fantasized’ about him. Sen. Joseph R. Biden Jr. (D-Del.), chairman of the Judiciary Committee, suggested that Doggett's ego tainted his conclusion. The nation media was even tougher, using words like ‘pompous’ and ‘arrogant’ to describe him.” Ward, Mike. “John Doggett, at Senate Hearing, Will Speak Tonight at Claremont McKenna College.” *Los Angeles Times*, 27 Feb. 1992. Web. 31 Mar. 2015.

you are the obstetrician. You are not the parent of this child we call the play. You are at its birth for clinical reasons, like a doctor or midwife. Your job most of the time is simply to do no harm. When something does go wrong, however, your awareness that something is awry – and your clinical intervention to correct it – can determine whether the child will thrive or suffer, live or die.”<sup>413</sup>

Accordingly, the emcee could also make sure the real star acts like the real star. Just as senators and witnesses sometimes hog the spotlight, nominees sometimes hide from it – which is equally unhelpful. Confirmation hearings are supposed to be opportunities for the Senate and the interested public to get to know a nominee, to better understand the nominee’s temperament, judicial outlook, and overall cast of mind. Yet too often nominees clam up when it comes to their personal views, and even their personality.

John Roberts, for example, so frustrated some senators with his way of answering questions – which they considered not answering questions at all, or at least not candidly – that one senator, Charles Schumer of New York, quipped that Roberts would likely try to evade a simple question about Roberts’s taste in movies. “If I asked what kind of movies you like – tell me two or three good movies. [You’d] say, ‘I like movies with good acting. I like movies with good cinematography. And I ask you, no, give me an example of a good movie. You don’t name one. I say give me an example of a bad movie. You don’t name one. Then I ask you if you like *Casablanca* and you respond by saying, ‘Lots of people like *Casablanca*.’ You tell me ‘It is well settled that people like *Casablanca*.’”<sup>414</sup>

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<sup>413</sup> Hauser, Frank, and Russell Reich. *Notes on Directing: 130 Lessons in Leadership from the Director's Chair*. New York: Walker & Co, 2008. 9. Print.

<sup>414</sup> "Roberts Confirmation Hearing Day 2 Part 3 | Video." *C-SPAN.org.*, 13 Sept. 2005. Web. 31 Mar. 2015.

To his credit, and to the delight of the live audience, Roberts quipped back, “*Dr. Zhivago* and *North by Northwest*,”<sup>415</sup> before delving into a deeper answer meant to give some insight into his particular jurisprudential approach.<sup>416</sup> But the concern Schumer raises is a real one, particularly as nominees increasingly seem to embrace the advice of Tom Korogolos, who has coached several nominees through the confirmation process: the purpose of a confirmation hearing is to get confirmed.<sup>417</sup> An emcee with the skills of a stage director could be helpful in this regard. She or he could try to limit the evasive answers nominees give. Under the current system, where Democrats and Republicans alternate engaging in 15-20 minutes sets of questioning, nominees just need to dodge the hardball questions of one senator from the opposing party before being greeted, even rehabilitated, by the softball questions of a senator from their own party. John Roberts decided to answer Senator Schumer’s questions about movie preferences and judicial philosophy – but he didn’t have to. At that point, Schumer’s questioning time had expired, well before he could get from Roberts the responses he wanted.<sup>418</sup>

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<sup>415</sup> *Ibid.*

<sup>416</sup> *Ibid.*

<sup>417</sup> Korogolos, Tom. "The Art of Getting Confirmed." *Washington Post*, 5 Jan. 2009. Web. 31 Mar. 2015. (“Your role is that of a bridegroom: Stay out of the way. Be on time. Keep your mouth shut.”)

<sup>418</sup> Senator Schumer kept trying to add in more questions and comments, and Chairperson Arlen Specter kept cutting him off:

**Chairman SPECTER:** Senator Schumer, now that your time is over are you asking him a question?

**Senator SCHUMER:** Yes. I am saying, sir, I am making a plea here. I hope we are going to continue this for a while, that within the confines of what you think is appropriate and proper, you try to be a little more forthcoming with us in terms of trying to figure out what kind of Justice you will become.

**Chairman SPECTER:** We will now take a 15-minute break and reconvene at 4:25.

**Judge ROBERTS:** Mr. Chairman, could I address some of the –

**Chairman SPECTER:** Oh, absolutely, absolutely. I didn’t hear any question, Judge Roberts, but you –

**Judge ROBERTS:** Well, there were several along the way. I will be very succinct.

An emcee, on the other hand, would have the benefit of being able to more fully control the flow of questions, and the time allotted to answering them. She or he could pursue a particularly fruitful line of inquiry without fear of running out of time, and take chances on a more daring line of inquiry knowing that there would still be an opportunity to recover even if the conversation didn't immediately lead anywhere productive. She or he could also control the mood, tone, and overall atmosphere of the hearing – speeding up the pace of conversation when the conversation started to drag, slowing it down when it turned to topics of more grave importance, or even adding a bit of levity to keep the participants relaxed and the audience engaged. This freedom may be reason enough to consider experimenting with an emcee instead of sticking with the standard format. Led by the right guide, this already rich form of cultural expression could become even richer.

Which is not to say that I think Supreme Court confirmation hearings can become as rich a form of cultural expression as the plays I sometimes compare them to. The Thomas hearing may have had Shakespearean elements: plot twists, rhetorical flourishes, a core conflict centered around noble characters seemingly undone by ignoble deeds. But it definitely wasn't Shakespeare. Nor would an emcee, however skilled, change that fact. The subtlety of a playwright, the capaciousness, the careful

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**Chairman SPECTER:** You are privileged to comment. This is coming of [Senator Schumer's] next round, if there is one.

**Judge ROBERTS:** Oh, well, then.

[LAUGHTER]

**Senator SCHUMER:** I guess there will be.

**Judge ROBERTS:** First, "Dr. Zhivago" and "North by Northwest."

[Laughter]

**Senator SCHUMER:** Now how about on the more important subject of what cases –

**Chairman SPECTER:** Let him finish his answer. You are out of time.

"Roberts Confirmation Hearing Day 2 Part 3 | Video." *C-SPAN.org.*, 13 Sept. 2005. Web. 31 Mar. 2015.

attention to story and sequence and stagecraft, cannot be matched by even the most adroit of moderators.

Yet that doesn't mean that confirmation hearings and dramatic works of literature do not share enough qualities for the comparison to be illuminating, particularly in terms of challenging the prevailing view of confirmation hearings as, at best, lamentably inane and, at worst, depressingly full of political posturing and hypocrisy. "For the most part," Alan Dershowitz has written, summing up the opinion of many "confirmation hearings for Supreme Court justices bring out the worst in the senators and in the nominee."<sup>419</sup>

To take this view, however, is to miss how these hearings, for all their faults, create a unique space in American public life for representations of justices, by which I mean representations of the actual women and men who sit on the nation's highest court as well as representations of the many ways we imagine what it means to be fair, principled, reasonable, and consistent – what it means, in other words, to be "just." These representations are important because, once appointed, Supreme Court justices all but disappear behind their black robes. They rarely give interviews. They don't allow cameras in their courtroom. And the press, relentless when it comes to the private lives of members of the other two branches of government, largely gives Supreme Court justices a free pass. In fact, anecdotes abound detailing the degree of anonymity justices assume after being appointed. Only a few years into his appointment, for example, Justice Anthony Kennedy was stopped on the courthouse's steps by a couple hoping to get a photograph. But when they approached Kennedy,

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<sup>419</sup> Dershowitz, Alan. "Room for Debate." *The New York Times*. 15 July 2009. Web. 31 Mar. 2015.

they didn't ask him to be in the photograph. Not knowing who he was, they just wanted him to take it.<sup>420</sup>

Confirmation hearings therefore offer a rare opportunity for us to see the justices perform; as a result, they disproportionately shape our view of who the justices are and what justice is, at its highest legal level. Chief Justice Roberts seems like he will be forever linked to the line "Judges are umpires." Yet he only said this once, not in a judicial opinion or at oral argument, but in the opening statement at his confirmation hearing. Similarly, although Justice Sotomayor had for many years, and in many places, talked about the potential jurisprudential benefits of being a "Wise Latina," it took the spectacle of her confirmation hearing for this phrase to be cemented into the country's lexicon. When we view confirmation hearings through a theatrical lens, we start to see how, as spectacles, as spaces where identities are performed, social positions are contested, and national imaginaries are brought into being, they create both new cultural categories and new cultural characters. We start to see, that is, just how big the stakes of these hearings are.

On the line is not simply a seat on the nation's most powerful court, and so also a vote in a potentially crucial five-to-four decision—although the importance of those

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<sup>420</sup> Savage, David G. "9 Justices Pursue Anonymity in City Dedicated to Exposure." *Los Angeles Times*. 23 June 1991. Web. 31 Mar. 2015. Justice Antonin Scalia had a similar experience in a hotel in Nebraska during a cross-country road trip with his family. When the receptionist, during check-in, mispronounced his last name "SKALyuh," Scalia corrected her: "It's SkaLEEuh." To which the receptionist responded, still not recognizing him, "Oh, like the Supreme Court justice." *Ibid.*

Though perhaps the best story involves Justice David Souter, who didn't have the heart to correct a couple who, spotting him at a restaurant, mistook him for Justice Stephen Breyer. As the conversation was ending, the couple asked Souter to share his favorite thing about being a justice. "Well," Souter responded, with a smile, "I'd have to say it's the privilege of serving with David Souter." Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. New York: Anchor Books, 2008. 287. Print.

things is immense given the currently divided Court; as Justice William Brennan liked to say, the most important rule in constitutional law is the “rule of five”: “Five votes. Five votes can do anything around here.”<sup>421</sup> But on the line as well, in a way, is control over the public imagination. The insight of Arthur Miller’s alluded to in Chapter 1 is again instructive. “A chair is just a chair,” he once observed, “but place it on a stage and it becomes something else again.” The stage of a confirmation hearing, in my view, has a similarly transformative effect. On it, the special theatrical alchemy of words and images can, under the right conditions, and with the right participants, create sequences of powerful, culture-changing drama, ones that redefine not just the legal landscape but the social and political landscape as well, particularly when it comes to race and gender. Few people outside law’s elite knew Robert Bork’s name before his nomination in 1987. But once he appeared on the confirmation hearing stage, he became one of the most polarizing figures of the decade. Nothing about his views had changed. For years, he had been advocating for the same originalist approach to interpreting the Constitution that he espoused at the hearing. What changed, however, was the setting. Put Bork on a on a stage and he “becomes something else again.”

More specifically, he becomes a brand new cultural character, one through which nationwide tensions and anxieties get funneled and refracted. “Bork’s America,” that catchy phrase Senator Kennedy used to try to scare off support for Bork, became an actual place in the minds of many Americans, particularly those who, like Kennedy, believed Bork would quickly unwind the progressive achievements of both the civil rights movement and of the women’s movement. With his scraggy beard, gruff tone, and, to some, off-puttingly aggressive mode of intellectual exchange, Bork became a symbol of a coming dystopia, like Barry Goldwater during the 1964 election – only with Bork, there was no need to frighten people with a television ad like “Daisy,” the

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<sup>421</sup> Simon, James F. *The Center Holds: The Power Struggle Inside the Rehnquist Court*. New York: Simon & Schuster, 1999. 54. Print.

incendiary spot that linked Goldwater to nuclear disaster. Bork's performance scared many people enough.

Of course, it also inspired others. Catapulted by the hearing into a rare level of celebrity, Bork went on to become a bestselling author and sought after speaker. He was even still relevant enough in 2012, over twenty years after his hearing, for Mitt Romney to add Bork to his presidential campaign's "Judicial Advisory Committee." On the left, Bork's name may have become synonymous with censorship, intolerance, and bigotry; but on the right, it became synonymous with principle, candor, and intellectual rigor. "The highest court in the land will not enjoy the services of one of the finest men ever put forward for a place on its bench," President Ronald Reagan said after the Senate voted not to confirm. "Judge Bork will be vindicated in history."<sup>422</sup> The many encomiums following Bork's death at the age of 85 expressed similar sentiments.<sup>423</sup>

This wide interpretative gap between, on the one hand, those who saw in Bork's performance a reason to shudder and, on the other, those who saw in Bork's performance a reason to applaud, reinforces the idea that these hearings produce not just nominees but powerfully resonant cultural characters. People still fight over the Bork hearing. It's a touchstone, an event onto which many meanings have been projected and through which deeply sewn national divisions have been and continued to be revealed. Ask someone to tell you what they think of the hearing and you are likely to learn a lot – not just about the person's general ideology, but also about her or his specific views on, for example, originalism, Watergate, and the Reagan Revolution.

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<sup>422</sup> "Ronald Reagan: Statement on the Failure of the Senate to Confirm the Supreme Court Nomination of Robert H. Bork." *The American Presidency Project*. Web. 1 Apr. 2015.

<sup>423</sup> *The Wall Street Journal* collected a number of these, including ones by Justice Scalia and Justice Ginsburg. See "Reactions: Robert Bork, 'A Titan' in the Legal Field - Washington Wire." *WSJ*. Web. 1 Apr. 2015; see also "Robert Bork." *The Weekly Standard*. Web. 1 Apr. 2015; Nordlinger, Jay. "Bob Bork." *National Review Online*. 19 Dec. 2012. Web. 1 Apr. 2015. Podhoretz, John. "Robert Bork, 1927-2012"; *Commentary Magazine*. 19 Dec. 2012. Web. 1 Apr. 2015.

The same is true, only with different issues, if you ask about the Thomas hearing or the Sotomayor hearing. In a very real and lasting way, all three – Bork, Thomas, and Sotomayor – have become icons. They have become symbols of various (and often competing) national aspirations and antipathies, essentially because of their performance, for a few days, on a stage.

Of course we don't get a new cultural character every time we get a new confirmation hearing. Between the Thomas hearing and the Sotomayor hearing, for example, was a span of almost two decades, with four separate confirmation hearings. That said, we also don't get a new cultural character every time we get a new theater season. Othello and Iago are rare creations. So, too, the ensemble in Pirandello's *Six Characters in Search of an Author*. Still, one of the reasons we value theater as a form is because of the chance that figures like these like will emerge – not just on the page, but live, on stage, with voices and bodies and physical presences that stretch toward the symbolic, grabbing in the cultural conflicts of a particular moment and repackaging them for public display and debate.

The suggestion of these five chapters, the last three case-study ones especially, is that Supreme Court confirmation hearings offer a similar opportunity – in ways that actually help remind us of the public power of theater. In their content, in their staging, in their reliance on agonistic dialogue, these hearings give us, at their best, what theater gives us: dramatic performances that at once capture and transcend their historical moment. On one level, the performances of Bork, Thomas, and Sotomayor help mark specific times and political climates. Like the characters in August Wilson's "American Century" cycle of plays, they document issues that define particular decades: you can learn a lot about the 1980s and the rise of (and backlash against) conservatism by watching the Bork hearing; you can learn a lot about the 1990s and evolution of both affirmative action and, certainly, sexual harassment by watching the Thomas hearing; and you can learn a lot about the first decade of the twenty-first century and the uneasy

embrace of “post-racial” thinking by watching the Sotomayor hearing.<sup>424</sup> Each of these performances is an important cultural artifact; each offers a unique window into the mood and preoccupations of a distinct era.

On another level, however, the performances are more than just artifacts. The insights they yield are not limited to historical exegesis. They also teach us something about theater as a form, about how it is, particularly in the legal context, remarkably rich but also dangerously reductive, how it is capable of providing powerful, culture-shaping moments – though perhaps a bit too tidily. In *Justice Performed: Courtroom TV Shows and the Theaters of Popular Law*,<sup>425</sup> Sarah Konzinn explores this tension in a study of television programs such as “Judge Judy” and “The People’s Court.” What she found has direct application to confirmation hearings: that these programs “educate audiences in pedagogies of citizenship” and “substantiate judicial ideals that cannot be actualized anywhere else but on stage.”<sup>426</sup> Law review articles, legal briefs, books, blogs, and magazines pieces – none of these can match the live performance of justice or, in the case of confirmation hearings, the live performance of potential justices. Konzinn quotes helpfully from the legal scholar Bernard Hibbits: “In performance, people can manifest their allegiance to and respect for a law. They can at the same time enjoy its application in community. This enjoyment can stem from several sources: physical participation, communal involvement, the engagement by the sense by argument or ritual, or the general association of performed law with the restoration of order.”<sup>427</sup>

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<sup>424</sup> Nor need the cycle stop with these three hearings. Consider, for example, what could be learned about the 1960s and the Civil Rights Movement by studying the confirmation hearing of Thurgood Marshall or the 1910s and the Progressive Era (and anti-semitism) through the confirmation hearing of Louis Brandeis.

<sup>425</sup> Konzinn, Sarah. *Justice Performed: Courtroom TV Shows and the Theaters of Popular Law*. London: Bloomsbury Publishing, 2015. Print.

<sup>426</sup> *Ibid.* at 3.

<sup>427</sup> *Ibid.* at 7.

The concern, however, is that, hemmed in by the formal constraints of staged production – limited time, limited space, limited lines and roles to distribute among the cast – legal performance also imposes an oversimplified order on an often messy, complex process. “Visually, Judge Judy’s courtroom looks very much like one might imagine a New York State courtroom to appear,” observes another commentator Kozinn quotes, “if they never actually had been inside one.”<sup>428</sup> Yale’s Heather Gerken made a similar observation about the Sotomayor hearing. “The problem is that what appears to be emerging from the hearings is a depiction of judging that is unrecognizable to lawyers of any jurisprudential stripe.”<sup>429</sup> In other words, what is being represented on stage is not actually very representative.

To focus too much on this disconnect, however, risks missing the real service confirmation hearings provide, even when they contain distortions. It is a service that theatrical performances provide more generally, and something the actor Tom Wilkinson captured when talking about the Arthur Miller character John Proctor, whom Wilkinson played in a National Theater Production of *The Crucible*. “It is rare for people to be asked the question which puts them squarely in front of themselves,” Wilkinson said, in a statement that, as literary critic Christopher Bigsby has pointed out, both describes what happens to Proctor in the play and what happened to Miller in real life.<sup>430</sup> It is also a statement that, in my view, describes, in a helpfully summarizing way, what happens in the confirmation hearings I have discussed – in two respects.

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<sup>428</sup> *Ibid.* at 3.

<sup>429</sup> Gerken, Heather. “The Sotomayor Hearings: A Waste of Time?” *Room for Debate*. The New York Times, 15 July 2009. Web. 27 Mar. 2015.

<sup>430</sup> Bigsby, Christopher. “Introduction.” *The Crucible: A Play in Four Acts*. New York: Penguin, 2003. 6. Print. Called before the House Un-American Activities Committee, Miller faced his own kind of confirmation hearing: he was asked to confirm whether he and friends participated in communist political activities. His refusal to “name names” is well-covered in

First, Bork, Thomas, and Sotomayor were all asked questions that put them squarely in front of themselves. They were all asked about their schooling, their career choices, their past decisions as lower court judges. They were asked about things they have written and said, as well as about things that have been written and said about them. They were presented, in other words, with a jurisprudential version of “This is Your Life” and made to account for it. Sometimes the version was overly laudatory. Sometimes the version was overly critical. But each time it forced them to face, on stage, in front of an audience, who they had become. Rare in public life, such acts of self-confrontation are theatrically significant in themselves.

Yet it is the second respect, in which questions are put squarely in front of people during confirmation hearings, that is even more significant – the people, in this case, being the country. This dissertation began with a quote from Martin Esslin: “The theater is a place where a nation thinks in public in front of themselves.” It is difficult to imagine a better characterization of the contribution confirmation hearings make. These hearings are not just occasions for personal acts of self-confrontation; they are occasions for national self-confrontation. Often enough to be useful but not so often that the experience becomes redundant, they give us a chance to examine, together, who we want our justices to be: what we want them to look like, what we want them to sound like, what skills and perspectives and background experiences we hope they contain. Which means they also give us a chance to examine what, in a larger sense, we want “justice” to be. Because this examination necessarily involves multiple, and often competing, viewpoints, a dispiriting divisiveness often creeps in, and sometimes completely takes over. For the same reason, however, there remains the chance for powerful drama, the kind of drama that can introduce new terms (“Bork,” “high-tech lynching,” “Wise Latina”) into the cultural lexicon; new issues (“originalism,” “sexual

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Brater, Enoch. *Arthur Miller: A Playwright's Life and Works*. London: Thames & Hudson, 2005. Print.

harassment," "empathy") into the cultural mainstream, or at least new ways of talking about them; and new characters into our living rooms, newsfeeds, and water cooler conversations. In sum, I think they are the kind of drama that deserves more critical attention – not just as a part of the democratic process but also as a uniquely valuable form of cultural expression.

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