CONGRESS STORIES

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I.

Anita Hill's allegations of misconduct on the part of then-Supreme Court nominee Clarence Thomas produced such volumes of news coverage that all of us must have missed some of it. One newspaper story that many failed to see ran the morning of the second day of the Hill/Thomas hearings. It bears directly on the topic of this essay, which is the handling of Professor Hill's complaint by the Senate and its Judiciary Committee prior to the hearings themselves. In order to provide a common foundation for the discussion that follows, I shall reproduce it in full, supplemented by occasional annotations in the footnotes.

Today millions of Americans were riveted by live testimony from the historic Caucus Room of the Russell Senate Office Building. After a dramatic week filled with speculation, invective, and recriminations, Anita Hill and Clarence Thomas were finally telling their personal stories. As the week had unfolded, many Americans had chosen up sides already. By the end of the day, it appeared unlikely that many who had done so would change their minds, for the accounts heard were completely and flatly contradictory, and there seems little prospect of proving who is lying. The balance of public opinion rests with those who are just now making up their minds, and that is an unenviable task.

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1. This limitation on the scope of this essay should be emphasized. The hearings themselves raise further important questions concerning congressional investigative proceedings that are simply beyond my capacity to address in this space. Any treatment of the hearings themselves would, among many other things, require distinguishing sharply between the conduct of the Republicans and the Democrats on the committee, whereas this essay concentrates on attitudes and perceptions of the Congress as an institution. One claim the essay makes, however, is that those general attitudes have sharply different effects on the policy objectives of Democrats and Republicans, far beyond their objectives with respect to the nomination of Judge Thomas, an insight that should inform any analysis of the hearings themselves. See infra note 85 and text accompanying notes 80-86.

1531
Lost in the fascination over the allegations themselves is the story of how the Senate Judiciary Committee has ably acquitted itself of its constitutional duties, negotiating a mine field of competing moral claims, volatile political and social issues and strident demands that it act precipitously or irresponsibly. While it may well be lost in the din, it is a story well worth telling.

Professor Anita Hill had come reluctantly to the committee. Only after being solicited by staff members of individual Senators—not core committee staff members who are directly responsible to the Chairman—and only after those solicitations were repeated several times, did Hill agree to share her story. On the evening of September 12, she talked with the committee's chief investigator, and even then only on the assurance that her story would be confidential.²

Once he learned of the substance of Hill's allegations and her request for confidentiality, Chairman Biden immediately knew the situation was highly delicate.³ He was aware that the disclosure of such allegations was extremely difficult for the woman involved, and that it was often crucial to the pursuit of the truth that a woman be assured some measure of initial confidentiality. Still, Biden had worked hard for years to maintain not just the appearance but the actuality of a fair hearing process for all nominees, and he could see no reason for deviating from that course. To him, this meant that the use of anonymous information had to be highly limited, because it was fundamentally unfair to a nominee to have even a single Senator's vote turn on allegations of personal conduct of which the nominee had no knowledge or opportunity to respond.⁴

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² The chronology described here tracks that released by Chairman Biden's office on October 7, 1991. It is consistent with Time magazine's account in its October 15, 1991, issue. A Senate investigation is currently underway to ascertain whether Senate rules were violated in the days leading up to the Hill/Thomas hearing. Its report, due later this spring, will most likely contain a detailed chronology.

³ Senator Biden has had legislative experience investigating women's issues. Currently, for example, he is the primary sponsor of the Violence Against Women Act, S.15, 102d Cong., 1st Sess. (1991).

⁴ Universities and colleges are required by Title IX of the Education Act of 1972 to have a grievance procedure for victims of sexual harassment. 34 C.F.R. § 106.8 (1991). These procedures typically reflect exactly the same balance of interests as the Judiciary Committee reached: a mechanism through which initial confidential inquiry or complaint can be made, followed by a point at which no adverse action against an alleged harasser can be taken unless the victim is willing to disclose her identity and the accused given an opportunity to respond. See, e.g., FACULTY HANDBOOK OF DUKE UNIVERSITY app. W. At most campuses, complaints and their resolution remain undisclosed to the community as a whole, although some are urging that this policy be reexamined, on the ground that disclosure of the substance of such allegations and the result of the investigation would "impose a healthy self-discipline on the faculty and alert Professor Romeo to society's growing intolerance of sexual harassment." Edward Pattullo, Sex and Secrecy at Harvard College, HARVARD MAG., Jan./Feb. 1992, at 70.
Hill was assured that her confidentiality would be respected, but was also told that doing so would almost entirely thwart subsequent use of her allegations. Perhaps thinking she would try to take matters one step at a time, Hill responded to a question by the committee's chief investigator by indicating that another individual might corroborate her account. The investigator suggested that Hill have this individual contact the investigator.

Six days passed, without another word from Hill or her corroborator. Then, on September 18, the chief investigator received a call from Susan Hoerchner. Hoerchner explained that she had had a single conversation with Hill in 1981, in which Hill shared almost no details with her, but during which Hill was plainly upset and indicated that Thomas had acted improperly toward her.\(^5\)

The next day, Hill contacted the chief investigator again. She indicated that she now wished the entire committee to know her story, and inquired as to her options for bringing this about. Wanting to avoid any possible miscues, the chief investigator decided first to confer with the Chairman before responding. After doing this, the investigator returned the call to Hill the next morning, September 20, which was the last day of the first round of hearings on the nomination. She was informed that the prerequisite for any distribution of her story by the committee staff was that the nominee be given an opportunity to respond. The investigator suggested that Hill authorize the FBI to conduct a standard field investigation, including interviews with Thomas and Hoerchner. Hill said she would have to think it over and asked the investigator to call her back.

The investigator did call Hill back during the afternoon of the twentieth and again the next day, but each time Hill equivocated and gave no authorization to proceed. In fact, during the call on the 21st, she said she did not want to authorize an FBI inquiry.\(^6\)

\(^5\) During the hearings, Judge Hoerchner testified that Anita Hill had told her in 1981 that she was being subjected to "sexual harassment" by her boss, Clarence Thomas. Transcript of Proceedings, Committee on the Judiciary, United States Senate, Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court, October 11, 1991, at 16 [hereinafter "Tr., [date]"].

\(^6\) Nina Totenberg has said that the Chairman had dismissed Professor Hill's allegations before any investigation of them had been conducted and would have done nothing if other senators had not "basically pitched a fit." She added that "I don't think there even would have been an FBI report if other senators hadn't objected to Biden's failure to investigate." Ann Louise Bardach, Nina Totenberg: Queen of the Leaks, Vanity Fair, Jan. 1992, at 50. However, the fact is that Professor Hill herself refused to consent to an FBI investigation until the 23rd. There is also no evidence of
Notwithstanding this, on September 23, Hill phoned the chief investigator to authorize an FBI investigation, after the committee had received a personal statement from her. Once this statement was received by telefax, the committee contacted the FBI and the Bureau began field interviews. The FBI completed its report on September 25. Because the FBI is part of the administration’s Justice Department, the standard preparation and transmission of the report provided White House officials ample opportunity to learn of the report, to study its contents, and to notify Thomas’s handlers, before the report was sent to Biden.

When Biden received the FBI report, sources close to the committee say that he followed scrupulous procedures to ensure the confidentiality of the report. As has been his standard practice, he notified the ranking member, Senator Strom Thurmond (R-S.C.) and showed him and his chief of staff a copy of the FBI report. (They may have received it independently from the administration, in any event.) On Biden’s own staff, only the chief investigator, the staff director, and the committee’s chief counsel saw the report. Absolutely no copies of the report were made. Biden immediately began notifying the Democratic members of the committee about the Hill allegations and the contents of the FBI report.7 To ensure confidentiality, he made arrangements for Senators to be briefed by the staff director or the chief investigator, face to face, at which time each Senator could read the FBI report and ask questions of the staff personnel, if they chose. Thurmond was responsible for briefing the Republicans on the committee.

By the time the FBI reported, the committee’s scheduled vote was already less than two days away. Under committee procedures, each member of the committee had the right to postpone the scheduled vote for a week. Each, therefore, had to decide whether more information was necessary to determine the relevance of the allegations.

For anyone, including individuals extremely sensitive to women’s issues, this would have been a very difficult call, once they actually put themselves in the position of a Senator on the committee. For one thing, Clarence Thomas was not a stranger to the committee or the Senate. In the 1980s he had been through three confirmation hearings, with the last two, first to a second term as chairman of the EEOC, and next as a nominee to the Court of Appeals for the District of Columbia Circuit, being controversial and contested. Organized opposition

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7. We still have only the sketchiest ideas about what the FBI report contains because, contrary to the popular perception (aided by President Bush and Republican Senators), there is no evidence that the FBI report was ever “leaked.”
groups had quite legitimately investigated his job performance at EEOC and had presented critical analyses in testimony before the Senate. His entire tenure at the EEOC had been scrutinized. He had been accused of bias against specific EEOC employees and these charges had been studied. Throughout, nothing suggesting that he had sexually harassed any employee had been put forward.

Hill's allegations also related to conduct nearly ten years ago, at the very beginning of Thomas's public service career. It is possible that the intense scrutiny of his job performance had not looked back that far, although highly unlikely. Even if that were so, however, the committee was still faced with an incident ten years old, and an intensely examined subsequent career in which nothing similar had been unearthed, despite the efforts of many individuals to do so. Faced with this context of prior knowledge, together with Thomas's categorical and specific denial of Hill's allegations, a member might still have wanted more done, perhaps including a face-to-face meeting with Hill herself, if that could be accomplished without any countervailing costs.

Doing more would require delaying the committee vote, however, and delay would impose definite and potentially heavy costs. At this juncture, a decision to delay was tantamount to a decision to expose these charges to the public, because such a last minute interruption would have set off a storm of speculation over its cause. In all likelihood, that would have virtually guaranteed that the allegations became public at some point. Too many people had bits of information—none of it gained under a pledge of confidentiality—that the horde of media reporters covering the nomination would have eventually pieced together. Practically speaking, therefore, a Senator's request for delay would have resulted in the allegations being made known. That, in turn, would have necessitated a full public airing of the charges.

Thus, those who have recently suggested that the Hill matter could have been responsibly disposed of in private session have a naive understanding of the context within which these events unfolded. The members actually never faced a situation in which they could have simply resolved to gather more information without turning the allegations into a public spectacle of some sort.

Under these circumstances, should someone nevertheless have pushed ahead for the public spectacle? For those whose sole and

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8. For instance, Nina Totenberg had been investigating rumors of sexual harassment since July, 1991, and Timothy Phelps of *Newday* wrote a story on the subject the Saturday before the Totenberg Sunday broadcast. See Bardach, *supra* note 6, at 47. It is hard to believe these two, as well as others, would not have been able to connect the delay with the rumors.

9. In light of how much criticism there was after the hearings for what a circus the hearings were, it may seem extraordinary that this question could be asked at all.
entire objective was to defeat Clarence Thomas, and who did not care what methods were employed to achieve that objective, the answer might have seemed obvious.  

Nevertheless, the members of the committee who opposed Thomas seemed to have thought otherwise. It has been widely alleged that their failure to act reflected their unwillingness to take seriously the “women's issue” raised by Hill’s allegations. Much more likely, however, their individual decisions represented a rejection of the crude “ends justify the means” rationality that has infiltrated many quarters of public life. In an era in which the practice of politics seems to know few limitations based on principle, and in which many politicians stoop to sleaze, smear, or lie to advance selfish objectives, it is comforting to think that the seven Democrats opposed to Thomas seriously weighed the risks to Thomas’s reputation and self-esteem that revelation of unsubstantiated charges would bring.

And those risks were indeed substantial. Allegations raised in such a charged setting as these confirmation hearings can have a tremendously deleterious effect on the nominee's reputation and life. Nor can one be confident that the truth will completely overtake false charges. A Senate committee hearing is an extraordinarily awkward forum for conducting a trial on the merits. Unless the committee were prepared to instigate truly extraordinary procedures to arrive at a definitive statement of what had occurred—assuming any procedures could do so—it risked a situation in which unsubstantiated rumors would outrun the truth.

Even if the committee were committed to pursuing the truth to the bitter end, furthermore, the confirmation process could not be indefinitely halted pending its findings—months of delay would have eventually required the candidate or the president to withdraw the nomination, or the Senate to vote it down in the interests of opening the way for a nomination that could be confirmed. Yet if the vote occurred before an exhaustive review, the inflammatory revelations stood an excellent chance of prejudicing the outcome of the vote beyond their probative value and relevancy. In similar circumstances, presiding trial judges possess the authority to exclude highly prejudicial evidence from being introduced, even when its probity is very well established. Previous congressional investigations have also broached highly sensitive allegations against persons, and done so under procedures that threaten reputational damage to the accused and unfairness in the deliberative process. The McCarthy hearings were perhaps the

10. Again, the perspective after the hearings should affect what one thinks about this. In light of Judge Thomas’s successful use of race stereotyping to inflame black constituents against the Senate, the answer to this question seems far less obvious.
most memorable. When thoughtful individuals have studied the appropriate course to be followed in such circumstances, they typically have concluded that a congressional investigation should not publicly air such charges at least until the members conclude there exists a reasonable basis to believe the charge is true and relevant to the committee's deliberations.\textsuperscript{11}

In this case, the members assessed the evidence they then had and the competing values at stake, and concluded that there was no enough basis to delay the vote. Many conditions, had they been different, might have altered their judgment: personal interviews with Anita Hill—but there wasn't time and it wasn't then clear she would come to Washington; more specific corroboration from Susan Hoerchner—but the ten year old conversation had been vague on specifics; information from some other source substantiating either the Hill instances or detailing a separate instance—but the record was entirely clear;\textsuperscript{12} some reason to believe that Thomas's supervisory career had been inadequately explored—but precisely the opposite was the case; some better reason to believe that this described conduct provided an accurate insight into Thomas's present attitudes and motivations—but it was ten years old and apparently not repeated.\textsuperscript{13}

So the committee proceeded to vote without delay. Once that decision had been made, the decision not to disclose matters to their colleagues, while a weighty one and fraught with the dangers of second guessing, seemed dictated by Professor Hill's continuing desire that her name not be used outside the committee. This result may not have


\textsuperscript{12} The sworn testimony of a second woman, Angela Wright, was submitted for the record during the Hill/Thomas hearings. In an interview with majority and minority committee staff members, Ms. Wright stated that while she was employed at the EEOC in the early 1980s, she had been the subject of remarks similar to those recounted by Professor Hill. Ms. Wright's information was not known by anyone involved in the Senate's evaluation of Clarence Thomas until after October 8, 1991. (It was apparently not even known by Nina Totenberg before then.)

\textsuperscript{13} As the hearings unfolded, much was made by Thomas's supporters that his accusers had been unable to demonstrate a pattern of harassing behavior, which should have been possible if the allegation were true. However, there is no demonstrated basis to believe that males who harass a single employee necessarily repeat the behavior, although some do, so that an absence of other women who had been harassed does not establish that Hill was lying. Rather, the absence of more recent events raised the question of the relevance of these ten-year-old actions in assessing the current character of the nominee. This issue was, unfortunately, never squarely joined by a Senate that was plainly embarrassed over the accusations of insensitivity, but it no less plainly was a factor in how individuals weighed the Hill allegations in their overall evaluation of whether Thomas should be confirmed.
been precisely what Professor Hill most desired, but she seemed content to live with the outcome, because she did not initiate any wider dissemination of her story after the vote on September 27th.

Her interests in anonymity were overborne, however, on October 4, when members of the news media began contacting her.\textsuperscript{14} From the accounts to date, at least Nina Totenberg of National Public Radio had obtained copies of Hill's written statement to the committee and Timothy Phelps of Newsday had enough information to run a story without the statement.\textsuperscript{15} Whether Totenberg obtained the statement from an employee of the Senate is unknown, but it should be stressed that committee staff never had complete control over the distribution of that statement.\textsuperscript{16} Contrary to some press reports and to Senator Hatch’s diatribe at today’s hearings,\textsuperscript{17} there remains absolutely no evidence that either reporter had access to the FBI’s report.

After Hill’s allegations became publicly known, Hill has been portrayed as a double victim, first by Clarence Thomas and then by the Judiciary Committee. The second characterization, at least, seems erroneous. Hill’s allegations were investigated seriously and thoroughly, given the time made available by Hill’s eleven hour revelations of them and by the previously created Senate structure for

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  \item[14.] Anthony Lewis acknowledges that the committee could not have done more so long as Anita Hill desired anonymity, which he calls a “disabling condition.” Anthony Lewis, Abroad at Home: Wages of Cynicism, N.Y. Times, Oct. 11, 1991, at A3. Lewis, however, faults the committee for not doing more after September 23, when
  \item[15.] the condition of anonymity ended. . . . At the latest by September 25, when the F.B.I. delivered its report to the Judiciary Committee, its members were fully aware of the characters and their conflict. Yet the Senators did not push to explore that conflict in the only meaningful way—by hearings—until after the story became public on October 6. Why? I can think of no reason except that the fourteen Judiciary Committee members, all men, were insensitive to women’s experience and feelings.

\textit{Id.}

Lewis is wrong on four counts. First, the condition of anonymity did not end on September 25. Professor Hill still did not want anyone outside the committee to know her identity, not even the eighty-six other senators. Second, if Lewis is assuming that the hearings could have been conducted in secrecy, he reflects the naive understanding of context to which the article referred earlier. Third, if he would have had the committee proceed to open hearings, then he would have wanted to trench on Anita Hill’s wishes in a manner that can only reflect insensitivity on his part, as well as a complete indifference to the dangers associated with such congressional investigatory hearings for those accused. Finally, the article has already argued that there were a number of reasons other than insensitivity to “women’s experience and feelings” for not going further than the FBI investigation.

\item[16.] See supra note 8.

\item[17.] Subsequent to the hearings, this fact is being noted by those covering the investigation concerning the alleged leak. See, e.g., Nell Lewis, Constitutional Test Is Seen in Inquiry on Leak to Press, N.Y. Times, Feb. 3, 1992 at B8 (“It is unclear whether the information [concerning Anita Hill’s allegations] was obtained from a Senate employee because the journalists could have obtained it from any associate of Professor Hill’s who might have helped counsel her on her prepared statement.”)

\item[17.] See infra note 84.
handling the nomination. In Hill’s press conference on Monday, October 7, she said that all she wanted was for the Senators to “consider the behavior” of Clarence Thomas, as laid out in her statement. Committee members had done that, in conjunction with their weighing of all the facts and circumstances at their disposal in arriving at a vote in committee.

Her statement had not been transmitted to all Senators, but this did not make Professor Hill a victim, either. She was informed in the very first conversation she had with core committee staff that anonymous information would be impossible to disseminate. (We have no idea what she was told by, or what she expected from, staff members of individual Senators with whom she spoke.) So it could have been no surprise that the committee, once it voted, would not distribute an anonymous version of her statement to other Senators, as she apparently requested of Senator Simon. What is more, Professor Hill had throughout these events complete control over the distribution of her statement. She could have sent a letter to all Senators or held a press conference detailing her charges. Plainly, she was extremely and understandably reluctant to have her story widely circulated. It was just as understandable, and appropriate, that the Chairman refused to circulate the story without disclosing Hill’s identity. That would have lent the imprimatur of the committee to an anonymous story and would have been unfair to the nominee and to the process.

Now the hearings have begun, and we will have to await their conclusion to see if they shed significant light on the relationship between Hill and Thomas. Already, this looks highly unlikely. While the Democrats on the committee appear to be behaving responsibly, trying to create a fair forum for all evidence that time will allow to be received, the Republicans apparently have decided that who is telling the truth is irrelevant to their agenda. It is both ironic and revealing that Thomas’s supporters have been engaging in the tactic of “verdict first, trial later,” declaring Hill’s story false, suggesting it has been concocted as part of a conspiracy to destroy Thomas before any evidence at all had been received. Recall that during the Bork nomination this

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18. Ann Louise Bardach writes that Professor Hill was “baffled by the committee’s inertia” prior to submitting her written statement, and implies that this bafflement prompted her to submit the statement. Bardach, supra note 6, at 50. Professor Hill, however, had been informed from the beginning that the Chairman would not circulate anonymous charges, a course of action very much in keeping with the sexual harassment policies of universities and colleges, with which she is probably familiar. See supra, note 4. It is highly unlikely that the actions of the committee prior to September 23 baffled her.
was precisely the tactic that the Republicans accused Democratic Senators of using. 19 By all appearances, we are in for several days of grimy, irresponsible, and unprincipled behavior by Thomas’s supporters. 20

This story is completely accurate to the established facts of what happened prior to the hearings. It is also entirely fictitious, as I’m sure every reader realized well before reaching the end. I’m going to label it a “good Congress” story. Good Congress stories were not the norm during the entire Thomas proceedings.

Instead, the media subjected the Senate in general and the Judiciary Committee in particular to intense and negative scrutiny, 21 indicting them as insensitive to the issues of sexual harassment, 22 incompetent and irresponsible in permitting confidential information to be leaked to the press, in their general handling to the Hill allegations, and in their overall performance during the entire Thomas confirmation process. 23 For their

19. The situations of Bork and Hill/Thomas are completely incomparable on this score. In the case of Bork, the nominee had an extensive public record that formed the basis for the judgment of some senators. In the case of Hill, absolutely no relevant evidence had been laid out in an appropriate public forum prior to the first day of the Hill/Thomas hearings. Nonetheless, as retrospective reporting has made clear, the Republicans had determined to discredit Hill before they had received a single word of public testimony.

20. In fact, the standard spin placed on the behavior of the senators during the Hill/Thomas hearings was almost completely the opposite of that in the article. The Republicans were roundly credited with “having a strategy,” even by those who thought the tactics employed were scurrilous. The Democrats were derided for “appearing simply to be seeking the truth,” and thus for being politically disorganized and spineless. Perhaps one reason politics has become such an ugly business is that even critical observers of it implicitly are applying an “ends justify the means” standard to political behavior, instead of expecting politicians to behave responsibly and compassionately in their personal dealings with others in public life.

21. First among the committee members to be condemned was the Chairman. See, e.g., George Will, How It Came to This, WASH. POST, Oct. 10, 1991, at A23 (“Perhaps we are in a period when things must get squalid before they can get decent. It is simply not necessary—we can choose otherwise—for the Judiciary Committee to be the permanent plaything of Joe Biden, who has presided, grinning, over the degradation of the confirmation process. . . . Let us not yet question Anita Hill’s sincerity in making her charges. . . . [b]ut let us note how late they have leaked into what has become of Biden’s process.”).

22. See, e.g., Judy Mann, Why Women Are So Angry at the Senate, WASH. POST, Oct. 11, 1991, at C3 (“What we don’t understand is how the 14 men on the Senate Judiciary Committee could have dismissed her when she stepped forward with information about the behavior of a man who could be sitting in judgment on a whole range of legal issues involving women, including sexual harassment. Then again, we do understand. We understand that a lot of men don’t get it . . . .”); Mary McGrory, A Second Chance to Listen, WASH. POST, Oct. 10, 1991, at A2 (“The Senate, on what many members may remember as the Tuesday from hell, was flapping about, squawking and caving that the argument was over process and prerogatives, oblivious to the battle of the sexes that was raging all around them.”)

23. See, e.g., E.J. Dionne, Grace, Grit and Gutter Fight: Never Has Country Seen a Hearing Like This, Wash. Post, Oct. 12, 1991, at A2 (“The Senate itself was also on trial, struggling to
part, some non-committee Senators, attempting to localize responsibility for what went wrong, implicitly joined in criticism of the committee by protesting that they, like everyone else, had been left out of the process, and that the process had called into question the integrity of the entire body.\textsuperscript{24}

These efforts to avoid being targeted for blame were wholly understandable, because public reaction ranged from dismay to fury. The Senate was condemned as a Boys' Club incapable of understanding the seriousness of sexual harassment.\textsuperscript{25} Everywhere one turned, people were writing or reading "bad Congress" stories, a genre that depicts members of Congress as greedy, insensitive to the needs of their constituents, surrounded by privilege and prerogatives, serving special interests, bungling, immoral, incompetent, short-sighted, or ignorant.\textsuperscript{26}

counter the popular impression that it had botched its job, either by subjecting Thomas to unfair assaults or by failing to take Hill's complaints seriously. Character assassination or sexism: That was the choice."); Helen Dewar, More Than Senate's Reputation May be Left in Shreds, Wash. Post, Oct. 10, 1991, at A1 ("The Senate itself was in the throes of a self-inflicted pampering over the handling of the nomination ... [a]nd it was reeling from an outpouring of outrage from constituents who accused the male-dominated institution of insensitivity in failing to pursue Anita Hill's allegations until they were disclosed in the news media."); Juan Williams, Open Season on Clarence Thomas, Wash. Post, Oct. 10, 1991, at A23 ("Now the Senate has extended its attacks on fairness, decency and its own good name by averting its eyes while someone in a position to leak has corrupted the entire hearing process by releasing a sealed affidavit ... ").

24. E.g., Senator Bradley (D-NJ), who took to the Senate floor on October 8, 1991 (the morning of the originally scheduled floor vote) to say:

The real issue here is the truth. And that is what the American people expect us to find out when serious allegations are made about a nominee to a lifetime appointment to the highest court in the land. To settle for less than the truth, instead of a sincere attempt to discover the truth, is to tell the American people that the process is seriously flawed.

137 Cong. Rec. § 14532 (Oct. 8, 1991). See also Senator Mikulski (D-MD), 137 Cong. Rec. § 4508 (Oct. 8, 1991) ("[W]hat disturbs me as much as the allegations themselves is that the Senate appears not to take the charge of sexual harassment seriously. We have indicated that it was not serious enough to be raised as a question in the Judiciary Committee."); Senator Gore (D-TN), 137 Cong. Rec. § 14532 (Oct. 8, 1991) ("If we do not delay the vote to consider these charges, I simply do not understand how the Senate could possibly claim to have sufficient information to confirm his nomination.").

25. E.g., Margaret Carlson, The Ultimate Men's Club, Time, Oct. 21, 1991, at 50 ("All white, mostly over 50, cossed and toadied to by fawning aides, uninhibited by women, the Senate may be the most visible concentration of full-frontal prefeminist thinking left.")

26. E.g., Dionne, supra note 23, at A1 ("[T]he public display [of the televised hearings] could not help but lead Americans, who are already furious at Washington, to even greater doubts about who their leaders are and how they conduct their business."); Bob Schieffer to Dan Rather on CBS the night of the first day of Hill/Thomas ("I've never seen anything like it."). The mishandling of the nomination was causing people to ask, "Can the government get anything right anymore?", quoted in Tom Shales, The Hard-to-Watch Drama That Left No One Unscathed, Wash. Post, Oct. 12, 1991 at D1; Haynes Johnson, Truth and Consequences, Wash. Post, Oct. 11, 1991, at A2 ("In the absence of incontrovertible evidence [concerning Hill's allegations], the senators could find themselves further polarizing a bitterly divided capital, aggravating the most poisonous such condition here in years, to say nothing of intensifying growing public disgust with the way Congress works.
This essay takes up three issues. Parts II and III explore why the bad Congress story totally eclipsed the good Congress story. Part III also examines the implications of that explanation for government policymaking in general. Part IV returns to a more specific focus on the Congress, the Senate, Supreme Court nominations and the problem of sexual harassment in the workplace.

II.

For many, the explanation for the prevalence of the bad Congress story must seem obvious: the bad Congress story was accurate and true. The good Congress story would have been a fraud then, and it's a fraud now.

Obvious as this thought may be, it is this thought that is the fraud, not the good Congress story. As between the two versions, the good Congress story is more faithful to the facts and more accurate. The bad Congress story assumes that Committee members did not believe a charge of sexual harassment was a significant one, but there is no evidence that this was so; it condemns the Committee for leaking the FBI report, but there is no evidence that the report was leaked, and good evidence to the contrary; by automatically assuming that Anita Hill's statement was provided to the media by a Senate staff person, it ignores the fact that others could well have possessed the document; it suggests that somehow the committee could have handled Anita Hill's sensational allegations in a more graceful way, perhaps in private session, but that was not so.

In contrast, the good Congress story recognizes the crucial distinction between the FBI report and Professor Hill's written statement, as well as the difference between committee staff and the staff of individual Senators who were not under the control of the committee leadership; it acknowledges the care with which the FBI report was handled inside the committee; it recognizes the constraints under which Biden and his core staff operated, partly because of Hill's initial request for confidentiality and partly because of the timing; it stresses that the Totenberg broadcast relied upon Hill's statement, which could have been obtained from many sources; it places the committee's initial judgment not to delay its vote on

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For this, the Senate has only itself to blame.

Charles Krauthammer, *Clarence Thomas and the Decline of Congress*, Wash. Post, Oct. 11, 1991 at A27 (“Is Hill telling the truth? We may never know for sure. The only thing we know for sure is what has happened to Congress as an institution. The business of Congress has become a scandal.”).
the nomination in a context that includes the nominee's prior confirmations, the lack of any evidence less than ten years old that substantiated or supported the allegations, and the sensitive nature of the charges for both the victim and the accused, as well as the potential of these allegations to inflame and perhaps to influence improperly the vote on Thomas's confirmation.27

So if truth, accuracy, and attention to detail were to have made a difference, the good Congress story had the advantage. It is not that the truth is irrelevant in determining the public acceptance of one story over another; this is not some postmodern appeal to the inevitably value-laden character of facts. However fragmented our public discourse on values has become, there remains a core of agreement that certain questions are amenable to resolution by a search for the facts. In response to questions asking who, what, when, or where about events involving people or other medium-sized objects, there remains very wide agreement about the consequences of producing certain kinds of information. Thus, it is not necessary for the current discussion to take a view on whether truth is correspondence to reality, or warranted assertibility, or some other pragmatic notion. Even under a pragmatist's understanding, we can still ask whether one story or another is more truthful.28

What is more, sometimes truth will prove a sufficient tool to separate different renditions of past events, including good and bad Congress

27. It is also true that the good Congress story stresses some events while downplaying or ignoring others. Notably, fictionally placing it before the end of the hearings permits me to downplay criticism of the committee for failing to be tougher in their questioning of the nominee, for not coming vigorously to Hill's defense, and for restricting the scope of the hearings to workplace occurrences.

28. See, e.g., Richard Rorty, Texts and Lumps, 16 NEW LITERARY HIST. 1, 3 (1985). Pragmatists contend that the reputed hardness of facts is an artifact produced by our choice of language game. We construct games in which a player loses or wins if something definite and uncontrollable happens. . . . In the laboratory, a hypothesis may be discredited if the litmus paper turns blue or the mercury fails to come up to a certain level. . . . The hardness of facts in all cases is simply the hardness of the previous agreements within a community about the consequences of a certain event. The same hardness prevails in morality or literary criticism if, and only if, the relevant community is equally firm about who loses and who wins. Id. In the case of questions about who did what, when, and where, there exists a very large community, spanning political ideologies, that remains in basic agreement concerning the consequences of certain types of information for the answers to these questions. That is the "hardest" definition of factual accuracy that we need in order to proceed.
stories. Videotape of Congressman Smedley in a motel room receiving a bribe, combined with his recorded vote the next day on a piece of legislation important to the bribe-giver, provides very slim grounds for a good Congress story, although some have been attempted under nearly as strained circumstances.29

Before the Hill/Thomas hearings began, we must have hoped that they would provide an occasion for the truth to sort things out. But none of the Senators proved to be capable of breaking down either witness on live television (and perhaps that’s an ancillary reason we thought ill of them).30

Factual accuracy did not settle the matter as between Anita Hill’s version or Clarence Thomas’s, and it will not decide the superiority of the good and bad Congress stories, although for a different reason. I have found in conversation with others that pointing out factual discrepancies between the two has almost no impact on which story people think is superior. So what if the FBI report was not leaked? The confidential statement was and that’s bad enough. So what if Professor Hill’s statement was most likely in possession of persons outside the core committee staff? We know it was given to the press to create a public spectacle and to damage Thomas, and the committee was in charge of the confirmation process. It should have done something. So what if there was likely to be a public spectacle if the committee vote was delayed, given the timing? Thomas deserved to be beaten by whatever means necessary. So what if how to proceed was arguably a tough call, even for someone sensitive to women’s issues? We know these male Senators are insensitive to these issues.

29. Consider the case of Richard Kelly (R-FL), who was indicted and then convicted for accepting $25,000 bribe from an FBI undercover agent, a transaction that was captured on FBI videotape. Rep. Kelly contended that he engaged in the transaction in the course of his own investigation of one of his top aides and that he accepted the money only so that the aide would not be tipped off as to Kelly’s suspicions. Kelly’s Defense of $25,000 Abscam Payment Opens, N.Y. Times, Dec. 2, 1980, at § 1, p. 26. He failed to persuade a jury. Robert Pear, Ex-Representative Kelly Convicted of Abscam Bribery, N.Y. TIMES, Jan. 21, 1981, at A1.

30. On October 8, as the vote delay was being approved by the Senate, Senator Biden had warned that the Senate was not providing sufficient time for a thorough investigation so that high expectations that the truth would be somehow ferreted out were misplaced, even if you assume that more time could have produced dispositive evidence, an assumption that may well be false. Because the vote delay required unanimous consent, however, the extension of time was controlled by the Senator whose credible threat of disapproval was tied to the shortest extension. In this case, it appeared that Thomas would have refused anything longer than a one-week extension, and at least one Senator represented that position in the negotiations. So the week’s delay was the maximum that could have been obtained. See Cong. Rec. S.14569-70 (daily ed., Oct. 8, 1991) (statement of Senator Mitchell).
Eventually my conversant and I come to a point where she concedes the factual accuracy of my details, either because I have convinced her or just for the sake of argument, and where I have conceded the factual accuracy of other details in her story, and yet from this common factual foundation we can still construct a good or a bad story about Congress. What we find ourselves disagreeing about are issues that are trans-factual, disputes that resort to the facts is not going to resolve. In large measure, we end up disagreeing about the intentions and other mental states of the principal actors, especially the Senators. The most searing elements of the bad Congress story turn crucially on conclusions about intentions and beliefs: Senators did not understand the charges; Senators did not take the charges seriously; Senators were trying to protect the nominee; the individual who leaked the charges did not respect Professor Hill's privacy; Senators feared reprisal from black voters if they voted against him.

In other words, significant differences between the good congress and the bad Congress stories turn on the answers to a series of "why" questions about intentions and beliefs. While there may be facts of the matter about these questions, too, they are, practically speaking, inaccessible to us.

In such situations, the selection of a storyline will most likely be powerfully influenced by our existing preconceptions and assumptions. Rather than turning on matters of fact, these prior attitudes represent the accretion of a complex set of prior experiences, interpretations offered by others, and understandings adjusted and altered, all of which themselves presented conclusions, theories, or beliefs that would not have been resolvable into answerable questions of fact.

These existing preconceptions and assumptions do not typically dictate a unique interpretation of events, but sometimes we seem to possess a coherent set of assumptions that does exert a strong gravitational pull. Take up the perspective of a grade school teacher. One of his students, Johnny, has on occasion hit other students during recess on the playground. Another, Ben, has been a model pupil. Ben and Johnny come

31. I use the term trans-factual in much the same way as Alvin Weinberg employs the term trans-scientific:

Many of the issues which arise in the course of the interaction between science or technology and society...hang on the answers to questions which can be asked of science and yet which cannot be answered by science. I propose the term trans-scientific for these questions since, though they are, epistemologically speaking, questions of fact and can be stated in the language of science, they are unanswerable by science; they transcend science.

Alvin Weinberg, Science and Trans-Science, 10 Minerva 209, 209 (1972).
into the classroom after recess one day; each with clothes mused and
scrapes on their faces. When the teacher asks them what has happened,
each says he was simply trying to protect himself after the other had
started an unprovoked fight. Which interpretation will the teacher ini-
tially entertain as more likely to be the truth?

When the gravitational pull of already in place assumptions and
biases is strong, it is roughly analogous to the likelihood that someone
who has up to now been able to see only the duck in the duck-rabbit
picture will look away briefly and then, looking back, still see only the
duck. 32 Such strong assumptions and biases can operate across a more or
less broad range of circumstances—the teacher may have an impression
of Johnny as a sometimes violent, but otherwise quite trustworthy indi-
vidual, in which case he may be inclined to credit Johnny's denial of
cheating on a test, or he may see Johnny as sometimes generally unreli-
able, in which case he'd be inclined not to believe that story, either.

When a storyteller constructs a story to tell others, additional influ-
ences come into play, for now the ultimate story depends not only on
how the storyteller has interpreted the events, but also on how she wishes
the events to be interpreted by others. These two influences do not work
in isolation from one another. How a storyteller interprets events is par-
tially a function of how others have interpreted events to her. Just as
there can be no private language, there can be no private interpretation,
and we all come to events in our lives with contexts, assumptions, biases,
and prejudices accumulated from prior interactions with others. Piaget
had something like this in mind when he wrote that “reflection is inter-
nalized social discussion.” 33

This socially constructed set of understandings also forms the nor-
mal range within which the storyteller can plausibly expect her story to
have persuasive force for her audience. Sometimes, what the storyteller
wants for her audience is but a straightforward replication of how she
initially interpreted the events—a storyteller can want her audience to
see events “just as she did.” At other times, authorial interpretation and
wishes for the audience may diverge. We often suspect that the “spin
doctors” who try to influence the telling of public stories in the media are
not conveying their own, unadorned interpretations, but are providing
interpretations to serve ulterior motives.

(describing the concept of a gestalt shift).
33. JEAN PIAGET, STRUCTURALISM 40 (1968).
I suspect that one reason the bad Congress story has been accepted with so little examination is that we appeared to be constructing it unmediated by the army of spin doctors who so dominated the first round of Thomas hearings. Speaking of the Hill/Thomas hearings, Anna Quindlen has written that they "made such an indelible impression on us not only because the events were startling and distressing, but also because we sat across the table from [Anita Hill and Clarence Thomas]." Furthermore, being across the table made us all competent to judge the veracity of the witnesses. A similar attitude applies to the entire course of events. In the glare of intense and immediate exposure provided by the television, we were provided a long glimpse of the Senate and one of its committees operating "raw," out in the open, without an opportunity for explanations and excuses.

Yet, an implication of the fact that even solitary reflection is internalized social discussion is that events never make impressions on us unmediated by social understanding, even if they can sometimes reach us relatively pure of contemporaneous professional political interpretations. On these occasions, the stories that we construct ourselves, alone or in conversations with friends, do not expose events as they really are, but they do illuminate our dominant biases and presuppositions as they really are. Even events unfiltered by experts telling us how to interpret them do not somehow make direct impressions on our brains, unmediated by our pre-interpretive assumptions and biases.

Legal scholarship is currently enjoying, and debating, the use of storytelling as a means of persuasion. In commentary on the genre, stories are often extolled as "means of inciting change," or as tools for "oppositionists" to upset the existing mind-sets of the powerful. However, nothing prevents a story from reinforcing an existing mind-set, or from confirming rather than inciting change in an existing world view. Indeed, on the account just given, stories, insofar as they are persuasive and powerful, always reinforce and confirm certain assumptions, biases, or prejudices already in place, for it is only by operating within the range

35. Id.; see also Charles Krauthammer, The Case of Hill v. Thomas, WASH. POST., Oct. 19, 1991 at A21 (Public opinion polls showing public believed Thomas over Hill 2 to 1 do not "sit well with the professional feminists and civil rights leaders who believe her and who pretend to speak for women and blacks... They just don't get it. The Hill-Thomas hearing was perhaps the most unmediated political event of modern times. It was Anita Hill and Clarence Thomas speaking directly to every living room in the country.")
of interpretations made available by their social context that stories gain persuasive power, and this is no less true of so-called oppositionist stories as it is of orthodoxy-confirming ones. 38

What oppositionist stories can sometimes do—working within the already existing interpretive context—is help to rearrange the configuration of assumptions, biases, and prejudices, so that a type of interpretation formerly thought to be unusual or atypical becomes accepted as a normal or typical one. Upon investigation, the teacher finds out that several other students, whom he trusts, were eyewitnesses to the altercation between Ben and Johnny, and they all corroborate Johnny's account. This causes him to reflect upon other incidents in the playground, some of which he had seen, but others not. He begins to consider alternative explanations for some; for others, he begins to hold up Johnny's behavior against that of other boys in the class—whom he does not consider excessively violent—and thus comes to interpret Johnny as an "average," "normal" boy, no more prone to picking fights or hitting others than the vast run of boys he has taught in this and preceding years.

In Johnny's case, and in every other such case of an oppositionist story "working," the renegade account, the interpretation that seemed out of the mainstream, must already have been available to the storyteller and the audience. The renegade story works not by creating an understanding that we didn't previously have, but by triggering or stimulating a rearrangement of already available understandings. Oppositionist tales that don't work haven't stimulated the necessary rearrangements, and so they remain out of sorts with our working ideology. Martha Minow has

38. Advocates of storytelling for oppositionist purposes are fully aware that stories can reinforce orthodoxy. Indeed, the power of stories to reinforce is what triggers their analysis, and leads them to pursue alternative tales. See, e.g., K. Lane Scheppke, Foreward: Telling Stories, 87 Mich. L. Rev. 2073, 2079-80 (1989); Delgado, supra note 37, at 2438 (1989). Occasionally, however, they seem to suggest that the selection of orthodox stories is more an activity of the conscious will than a much less conscious implementation of preinterpretive understandings, that they could be easily rejected by those employing them, and that the continued deployment of orthodox stories occurs in order to maintain the positions of the dominant group. E.g., id. ("The dominant group justifies its privileged position by means of stories . . . that construct reality in ways favorable to it."); Delgado, Review Essay, 79 Cal. L. Rev. 1389, 1394 (1991) ("[A] Culture constructs its own social reality . . . in ways that are harmonious with and calculated to promote its own self-interest.") This emphasis on the subjective, chosen nature of storylines must be complemented by an appreciation of the extent to which the elements of orthodox storylines constitute part of the structures of human thought itself. See, e.g., Jack Balkin, Ideology as Constraint, 43 Stan. L. Rev. 1133, 1142 (1991) ("If . . . we took it seriously [that individuals are socially constructed] . . . there would no longer be a clear demarcation between at least some types of social norms on the one hand, and what an individual 'wanted to do' on the other.") As Balkin recognizes, embracing both the subjective and the structural elements of interpretation presents a significant challenge to social theory. Id. at 1169.
remarked that "marginality . . . is a construction placed on [a] work, not something inherent in it;" we might just as well say that centrality is what we construct, while marginalized stories are simply the residue, scrap material that won't fit, doesn't work, isn't persuasive.

One thing we learned as a result of the Hill/Thomas episode is that there is in place in this country a set of widely shared social understandings that made it much easier to construct a bad Congress story than a good Congress story. The next section sheds some light on why the good Congress story is an oppositionist's tale.

III.

Americans distrust their government. That distrust is an important part of our national character. From Federalist Ten’s concern with factions exercising power through government to Ronald Reagan’s battle cry to get government off the backs of the American people, we have made distrust of government a national theme. At a recent gathering someone referred to the statement, “Hi, I’m from the federal government. I’m here to help you,” as the world’s third most repeated lie, the same line I had heard years ago. I was only curious why it had not moved up in the rankings.

This may seem like a shopworn point to make. Yet the point is repeatedly made, as in James Morone’s recent book: “At the heart of American politics lies a dread. . . . Americans fear public power as a threat to liberty. Their government is weak and fragmented, designed to prevent action more easily than to produce it.” By all indications, furthermore, it is a point well worth repeating, for the persistence of the American distrust or dread of government has deep political implications that seem to be routinely ignored or forgotten.

If it is a case of amnesia, its source is the New Deal, or, rather, the mythologized New Deal. According to most accounts of American constitutional history, the New Deal period marked a sharp disjunction between an earlier conception of the role of government in society and our contemporary understanding. The modern regulatory state “emerged largely from deep dissatisfaction with both the common law system of private ordering and the original distribution of national powers.”

power from state to national government, in order to vest the central
government authority to address national economic weakness. The
crumbling of common law conceptualism was also partially attributable
to economic weakness, which undermined the conviction that common
law conceptions of rights necessarily contributed to economic productivity.\footnote{42}

In recent years, the scholarship of Cass Sunstein, Bruce Ackerman,
Jerry Mashaw, Chris Edley, and others has highlighted the failure of
constitutional doctrine and decisions to develop in a way fully consistent
with the implications of the New Deal conception of the role of govern-
ment.\footnote{43} For Bruce Ackerman in particular, the failure arises because
justices and scholars wrestle with old categories and inapplicable juris-
prudential concepts inadequate to the task of understanding “transform-
ative” moments in American history and constitutional growth.\footnote{44}

What matters for present purposes are not Ackerman’s jurisprudential
insights, which are controversial, but his claim that the New Deal
period was one of major legal and constitutional change, which is not.
According to him, the New Deal signaled a “sweeping legitimation of
activist government.”\footnote{45} “We the People” both rejected the primacy of
common law ordering by “repudiating[] Lochner’s property-oriented
jurisprudence,”\footnote{46} and fundamentally reordered the distribution of govern-
ment power by “decisively repudiating[]” the “[f]ounding notion that the
national government had limited powers over economic and social
development.”\footnote{47}

So the New Deal transformed and legitimated the legally operative
understandings of governmental power in the United States. Neverthe-
less, as Ackerman, Sunstein, Edley, and others illuminate so well, public
law doctrine remains inconsistent with the apparent premises of the New
Deal transformation, and it has been an ongoing project of liberal juris-
prudential scholarship to suggest doctrinal reforms that would make

\footnote{42} Further influences included egalitarian sentiments stirred by reaction to the era of the big
trusts, which urged redistributive policies that were only possible if one rejected common law norms
as limits on governmental power. The intellectual architecture for the constitutional shift was con-
structed by the Legal Realist assault on the legitimacy of common law ordering. See Joseph William

\footnote{43} E.g., Sunstein, supra note 41, at 425. (“American public law has not entirely come to terms
with New Deal Constitutionalism, and many current controversies reflect ambivalence about its
legacy.”)

\footnote{44} BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991).

\footnote{45} Id., at 117.

\footnote{46} Id. at 114.

\footnote{47} Id. at 105.
public law congruent with the public understanding that active government is both legitimate and desirable.

We would do well, however, to consider whether this project is pointing in the right direction. Rather than treating the New Deal as a transformative moment that demands more complete diffusion and assimilation through public law and public policy, an opposing viewpoint sees it as a momentary lapse in a steady history of suspicion and distrust toward government. In this vein, Morone argues that Americans have always dreaded their government. The outstanding exception was the Depression, when economics "briefly eclipsed the American wariness of government power" and the "dread of government was [held] in abeyance."\footnote{Morone, supra note 40, at 129.}

If Morone is correct, New Deal Americans suspended but did not abandon their working ideology about government, an ideology that enables us more easily to find persuasive stories of governmental incompetence, bungling, insensitivity, or venality than of governmental excellence, empathy, or heroism. Under any ideology, counter stories can on occasion break through. Although such counter stories may be necessary antecedents to permanent ideological change, they are certainly not sufficient. In this respect, invoking the duck-rabbit imagery is inapt, for the kind of gestalt shift that occurs when one finally sees the formerly occluded image usually results in one more easily seeing that image from henceforth, whereas an occasional story of governmental success does not necessarily dislodge the working ideology that government is to be feared.\footnote{Kuhn, supra note 32, at 52-76 (explaining how scientific paradigms can cope with anomalies without rejecting the paradigm.)} In any event, there is an important distinction between conceding the existence of governmental power and trusting the government to use that power wisely.

Obviously, the expansion of government continued, and accelerated, well beyond the 1930s. That growth, however, does not contradict the claim that the New Deal acceptance of governmental activity constituted an exception rather than the norm. The two can be reconciled by considering another set of deeply held American assumptions.

I'm referring now to the way that individuals approach the problem of suffering. Unfortunate events that cause suffering befall people in all societies and cultures. They raise what William Connolly has termed "the problem of evil."\footnote{William Connolly, Identity/Difference 1 (1991).} How a culture comes to terms with the problem
of evil is another important part of its character. In our society, many of us confront the problem of evil by locating the responsible cause for such events in human agents, whether an individual or group of individuals, or else in some corporate entity that is controllable by human agents. That is to say, when people are harmed, disadvantaged, or suffer a mishap of some sort, many of us exhibit a tendency to explain it by holding some specific person or persons responsible and blaming them for the situation.

This propensity to find individuals to blame expresses itself differently as contexts change. When the suffering is chronic, or constitutes a condition rather than the product of a discrete causal event, this propensity manifests itself in what social psychologists have termed the "just world" hypothesis, the belief that "I am a just person living in a just world, a world where people get what they deserve."51 Because we believe the world is just, we tend to locate the responsibility for the chronic condition in the person suffering from it by concluding that she is getting what she deserves. We blame the victim for her plight—and so, frequently, does the victim as well.52 The tendency to blame the victim has been documented with respect to a variety of chronic conditions, especially poverty.53

When suffering stems from an acute episode or discrete event—injuries in an auto accident rather than poverty—the search for responsible individuals is more complex. Certainly the just world tendency to blame the victim does not disappear. Especially interesting for our present discussion, the sex-related offenses of rape and sexual harassment are two types of acute events in which the tendency to blame the victim is quite pronounced.54 The hypothesis that the victim is responsible cannot always be maintained, however, particularly when there are no obvious cues correlating the magnitude of the suffering to either some character defect or some irresponsible action of sufficient severity. In these circumstances, attention shifts to a search for responsible others, some other way to explain the events.

52. LERNER, supra note 51, at 123-26.
54. See, e.g., Susan Estrich, RACE 95 YALE L.J. 1087 (1986); Eliza G. Collins & Timothy B. Blodgett, SEXUAL HARASSMENT... SOME SEE IT... SOME WON'T, HARV. BUS. REV., MAR.-APR. 1981, at 76.
Connolly has described the pressure that the desire for explanation places on the hunt for responsible others:55

The question of "Why?" is bound up with the issue of responsibility, so tightly that once this question acquires primacy the primordial experience of [inexplicable] suffering in life threatens to fall out of the category of "evil," reducing evil things to a smaller class of cases to which the question of responsibility is pertinent.

Now, before suffering can be called evil, some agent must be responsible for it. This may be a fateful shift. It simultaneously exerts pressure to exclude some injuries from the category of evil and to intensify the search for agents who can be said to be responsible for those forms of suffering we most abhor.

Among the sufferings that are the hardest to exclude from the category of evil, and for which the search for responsible individuals is the most relentless, are those in which human agency has been visibly involved at some stage. Whether it be an auto accident, the Bhopal methyl isocyanate spill, or fires in the hills of Oakland, California, the presence of human hands at some point in the overall chain of events precipitates accusations of individual responsibility.

Paired with this emphasis on blaming individuals is a strong sense that such wrongs demand correction. Expanding on this theme, Lawrence Friedman has argued American society is suffused with an "expectation of recompense" as well as the "expectation of total justice."56 Total justice demands that individuals avoid harming others; but if they nevertheless do, the expectation of recompense insists that those individuals compensate their victims.57

Together, these ideas comprise the compensatory or corrective justice model of human interactions: Individuals are entitled to be protected from the harmful actions of others; if that entitlement is breached, they are subsequently entitled to compensation. In the model, rights are defined across relationships of individuals, remedies for breach are strongly implied by the definition of the right, and remedial action is expected to be precise, effective and immediate.58

55. Connolly, supra note 50, at 1.
56. Lawrence Friedman, Total Justice 45 (1985).
57. In expecting recompense, individuals expect that "somebody will pay for any and all calamities that happen to a person, provided that it is not the victim's fault." Id.
58. The compensatory or corrective justice model finds powerful expression in common law forms of action. Abram Chayes and others have described it as the "private law" model. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). It is not its manifest role in legal doctrine that is stressed here, however, but rather how the model functions
Like distrust for government, compensatory justice is only an orientation. We are capable of seeing things another way. It's just that doing so is more of a struggle; corrective justice is more "natural," hence the odds are that is how problems of suffering will appear to us.

When this orientation is in place, its working presuppositions have certain predictable effects on the way problems of suffering are resolved. For one thing, the orientation disfavors and discounts structural and contextual explanations for suffering. For it, "the role requirements and situational forces working upon . . . person[s] are more invisible" than the persons themselves, and the characteristics and actions of the individuals, rather than the context or situation they find themselves in, bear the greatest explanatory burden. It also disfavors temporizing or experimentation in designing remedial measures, for there hardly seems any complicated design work left to do after we have fixed blame on a discrete individual or group of individuals.

The orientation also has a number of salutary psychological effects that help explain the strength of its grip on us. First, the working presupposition that discrete individuals are wholly responsible for suffering exonerates everyone else. While that effectively isolates and disadvantages the discrete few, it is a happy result for everyone else, who are more numerous. Second, by discounting options that change basic social structures, the model typically fails to generate proposals for such changes, which might well have troublesome ripple effects in the lives of everyone else. Third, victims can also be liberated by the corrective justice model. So long as the finger of blame doesn't come to rest on them, it has to light on some other individuals, who then seem to bear the full brunt of responsibility. Finally, because blaming comes bundled up with righteous demands for compensation, stories that follow the corrective justice structure may provide the best prospect that victims will find support for their demands in the wider society. Cries for structural

more latently as a pervasive preexisting perspective, a working ideology, a scaffolding on which individuals construct explanatory stories about the world around them.

59. Myers, supra note 51, at 456.

60. Basic structural changes will generate both winners and losers, of course, so that it might be thought that whether structural change seemed advantageous would require case by case analysis of the distribution of gains and losses. However, precise knowledge of the outcomes of basic change is extraordinarily illusive, so that, ex ante, individuals will face a probability distribution rather than certain knowledge of whether they will win or lose, and by how much. Cognitive psychologists tell us that people are risk averse with respect to losses from status quo positions, so that for structural change to be preferred ex ante the probability distribution will have to look very favorable, and not just slightly favorable, for an individual to prefer the uncertain change. By making structural changes the unusual case, the working ideology of corrective justice expresses this psychological bias against such changes.
change are often diffuse and seem unable to motivate; demands by victims for compensation from wrongdoers are concentrated, and seem to provide a strong reason for action.61

A great deal of post-New Deal lawmaking has been rationalized as legislative application of the corrective justice model to fields where pre-existing remedial structures have proven inadequate to vindicate the demand for compensation and correction. This is true, for instance, in the fields of health, safety and the environment,62 and the general justification of much modern regulation as the vindication of rights routinely invokes the corrective justice orientation.63

The capacity of the corrective justice orientation to overcome the dread of government constitutes at best a mixed blessing for many items on the progressive agenda. On the one hand, creating and protecting appropriate entitlements is and remains a vital function of government. On the other hand, forcing public law initiatives into forms compatible with the compensatory justice rationale can impair potentially more effective responses and even prevent government responses entirely. This can be horribly unfortunate, because changing social structures or norms may ultimately prove more valuable in reducing future suffering that concentrating attention on the individuals involved.

Social problems can resemble the problem of a highway curve that has been misdesigned, so that negotiating it when the pavement is wet unnecessarily difficult. Signs posted ahead of the curve, ordering individual cars to slow to forty-five miles per hour, may provide sufficient warning to sustain tort liability against individuals who are speeding drivers with negligence when accidents occur, but redesign of the curve may prove more effective in reducing those accidents.

61. See Jules Coleman, Risks And Wrongs (forthcoming 1992) (analyzing how alternative structures of corrective justice provide reasons for action).

62. Much environmental legislation has its origins in the perceived inadequacies of actions in tort and nuisance to address modern pollution problems. The legislature and administrative agencies are arguably better equipped to assemble the necessary data on pollution effects and sources, to impose horizontally equitable remediation measures throughout regions or across specific industries, and to consider economies of scale in studying diffuse pollution harms than is piecemeal common law litigation. See Christopher H. Schroeder, The Evolution of Federal Regulation of Toxic Substances, in Government and Environmental Politics 263, 277-80 (Michael J. Lacey ed., 1989).

63. See, e.g., Cass Sunstein, After The Rights Revolution, 21-29 (1990); see also id. at 88-91; Cass Sunstein, The Limits of Compensatory Justice, in COMPENSATORY JUSTICE NOMOS XXXIII 281 (1991) (criticizing the compensatory justice model for reasons similar to those advanced here, in addition to others).
Sometimes programs initially rationalized as necessary to vindicate rights in the corrective justice fashion subsequently attempt to address structural features of the problem as well. The corrective justice orientation inhibits their success in a second way. Programs that attempt to achieve structural change or to accommodate themselves to structural complexity are highly unlikely to be straightforward and will almost always require time, both for trial and error and because diffusing change throughout the society takes time. Understanding complex social structures, designing interventions that effect constructive change without destructive side effects, and creating administrative structures to carry out those interventions well are all slow and tentative undertakings.  

Because it is just these structural influences that are underappreciated in the corrective justice model, where simple, tight connections between rights and remedies are stressed, implementation complexities are ignored. What follows then is predictable: programs are pronounced as failures and individuals are blamed for the failures.

Again, the health, safety, and environmental fields provide ready examples. Throughout its existence, the Environmental Protection Agency has been routinely attacked at just those junctures when it appears not to be behaving as an agency simply vindicating rights ought to behave, such as when it tries to set priorities across statutes instead of being prepared to pursue all statutes with equal vigor, or when it engages in selective enforcement within individual statutes, or when it seems unable swiftly to promulgate regulations necessary to translate statutes into immediately enforceable rights.

In short, when government does attempt to effect or abet structural change, it typically ventures into fields where it needs some license to try and fail, and it needs some understanding that change takes time. It is precisely this elbow room that the corrective justice model refuses to provide. In situations where policy might be well served by structural reformation, the net result is a double whammy: in formulating policy, we are liable to overlook structural possibilities and to insist on rights-based strategies that promise an illusory quick fix; in implementing policy, we

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64. Of course, it is not necessary to start learning from scratch each time we consider a new regulatory regime. For one summary of some of the lessons of implementation failure that we have learned from our experiences so far, see Cass Sunstein, Administrative Substance, 1991 DUKE L.J. 607 (1991).

will be intolerant of excuses and quick to blame government officials for program failure.\textsuperscript{66}

In these ways, the presence of a corrective justice orientation both enables us to overcome a general dread of government and reinforces that dread. For a time after the New Deal, the enabling potential of that orientation seemed the more important influence, but recently more attention has been focussed on the limitations of shoehorning all social problems into the structure of rights analysis.\textsuperscript{67} Such analyses urge us to consider redesigning the highway, and not merely blaming individuals. As these analyses take hold, the dread-reinforcing feature of that orientation emerges as a serious inhibition to constructive governmental action.

IV.

Another way to say that Americans dread government is to say that they dread politics, at least politics as they see it routinely practiced.\textsuperscript{68} In the political arena entitlements frequently are at risk to a process that appears unconstrained and filled with no holds barred bargaining and self-dealing, where motives are short-sighted and ignoble, principles of correct decision obscure, and outcomes subject to multifarious and shifting considerations. All of this is antithetical to corrective justice’s preference for well-defined rights protecting one individual from another, and for procedures in which decision rules and remedies are well articulated and closely matched.

Of the three branches of government, Congress is especially vulnerable to the pathologies produced when dread of government combines with the corrective justice model. For the executive branch, fractious and open-ended politics among the President’s advisers can be hidden from view behind closed doors.\textsuperscript{69} Leaks sometimes provide a once-

\textsuperscript{66} For an elegant review of how the EPA has been plagued by a cycle of corrective justice expectations, programmatic shortfall, and recriminations against the agency, see \textit{id.}.

\textsuperscript{67} There is a broad literature on this topic. \textit{See, e.g., MARSHA MINOW, MAKING ALL THE DIFFERENCE} (1990); sources cited \textit{supra} note 63.

\textsuperscript{68} In Morone’s view, we have expanded governmental power precisely at the moments when we suspend our distrust of day-to-day politics and come to think that “the people” are acting in concert. Such fully participatory public activity surely counts as a kind of politics, indeed it is precisely the kind to which republican theories of government urge us to aspire. \textit{See MORONE, supra} note 40.

\textsuperscript{69} Courts, of course, employ many measures of rhetoric, appearance, and custom to emulate the forms of corrective justice. Maintaining a sharp distinction between law and politics reinforces the distinction between corrective-justice-driven governmental action and “politically motivated” action, and helps focus our dread of government on the latter. The complaints of Judge Bork and his supporters that judges who stray from strictly enforcing lawmakers’ intentions inevitably impose
removed view, much inferior to seeing it live. In contrast, it is out in the open in the legislative branches of government, especially so since the advent of televised proceedings in both chambers. In a pluralistic society, policy making in both the House and the Senate is going to be unstructured and unruly. Think about what a debate on important issues would look like among 535 randomly chosen Americans, then recognize that members of Congress are self-selected for their eagerness to engage in such debate and for their strong opinions on public issues, note that ideological divisions currently run very high in the country, and finally remember that divided government has produced extremely high levels of frustration in almost all ideological quarters, and it is only surprising that the Congress is not more contentious, angry, and hot-tempered than it is.

So Congress starts with its discretionary, non-rule bound, opportunist features in plain view. Of the powers it exercises, none seems more discretionary than the decision whether to confirm a judicial nominee. Historically, it has been impossible to define a set of decision criteria for the Senate’s decisions on judges and justices, other than to say that each Senator is sensitive to the entire political context of his or her vote—roughly what one would have to say about many other decisions, perhaps all other significant decisions, a Senator makes. Yet the seeming lack of timeless criteria for selection appears particularly discrepant when politics intersects with law, the one governmental activity whose administration aspires to be insulated from politics. In this setting, the fact that votes on nominees are context-dependent is frequently confused with lack of principles. So, when Time magazine ran an article during the Thomas proceedings entitled For All Their Posturing, Senate Judiciary Committee Members Have No Fixed Standards in Reviewing Presidential Nominee, their own will on others plays on the power of the corrective justice model to domesticate that dread and the concomitant strength of the dread once unleashed.

70. Priscilla Painton, *For All Their Posturing, Senate Judiciary Committee Members Have no Fixed Standards in Reviewing Presidential Nominees*, *Time*, Sept. 23, 1991, at 20. ("While [public hearings on nominees] has become de rigueur, its rules have changed from nomination to nomination, with Republicans and Democrats often contradicting themselves on what questions are appropriate.") To a considerable degree, Senators bring these criticisms on themselves, because they tend to justify their actions with speeches that imply the bases for any one decision are timeless principles, not sensitive to changing contexts. In front of a public that insists on that kind of justification, this practice seems likely to continue.
Not only is the confirmation process manifestly discretionary, and hence suspect, it has in recent years inflicted suffering on liberal and conservatives alike. For conservatives, the rejection of Robert Bork is a never to be forgotten insult. For liberals, the increasing conservatization of the Court is already destroying cherished rulings, and threatens to do more. When people are suffering, the corrective justice model motivates their search for culpable parties, and the Judiciary Committee is an obvious suspect.

In their condemnation of the committee, conservatives and liberals alike refuse to acknowledge the heavy influence of surrounding circumstances and context in producing the results they abhor. For their part, conservatives steadfastly refuse to acknowledge that President Reagan triggered the Bork firestorm, by offering up the national spear-carrier of an illegitimate and ultra-conservative theory of constitutional interpretation, immediately after the 1986 elections, in which the Senate had just turned more liberal and back to a Democratic majority, a time when someone attuned to context and circumstance might have thought a centrist or moderate conservative was a wiser choice. In addition, Bork’s defeat was strongly influenced by the political vulnerability of the southern Democratic senators who owed their recent elections to overwhelming black majorities, and who were angered by President Reagan, who had logged over 300,000 miles campaigning against them and other Democrats in an off-year election, stumping heavily to retain a Republican Senate majority so that he could continue to appoint arch-conservative jurists to the federal bench. Conservatives try to treat that information as totally illegitimate in its influence on a member’s vote. They try to convince the rest of us being a good representative to their constituents would have required that the southern Democrats throw themselves on their swords to put a jurist with whom they disagreed on the Court, solely and entirely because he was the “best qualified.”

Liberals, on the other hand, rejoice over the Bork defeat, but despise the Senate and especially the committee for failing to impale themselves to stop the continuing conservative juggernaut. In this, they have been


72. In the 1986 elections, five southern Democrats had defeated five Republican incumbents, representing a change of ten votes in the Senate and returning it to Democratic control. Senators Breaux (D-LA), Sanford (D-NC), Shelby (D-AL), Fowler (D-GA) and Graham (D-FL) all won narrow victories in which they captured very large majorities of the nonwhite vote. See id.

73. For tactical reasons, Judge Bork’s eligibility for that label was not challenged during his confirmation hearings.
entirely unappreciative of how the failure to win the Battle of the Legacy after Bork has nearly foreordained the confirmations of conservative justices since then. The battle against Bork largely succeeded because the opposition was able to paint a picture of a jurisprudential monster, a man who wanted to roll back the clock on foundational twentieth century decisions in areas of equal protection, race discrimination, women’s rights and privacy protections. Asserting that the Senate was entitled to reject a nominee who was outside the mainstream ran the risk, however, of implying that the Senate could reject a nominee only if he was outside the mainstream. After Bork, conservatives have claimed the legacy of Bork by effectively depicting that as the standard (all the while maintaining it was grossly misapplied in Bork’s case), and that heavy burden of proof has loomed over the Senate’s process ever since.74 Liberals, reflecting a lack of concern for structure and for the implementation of a long-term strategy, went to sleep, insensitive to the idea that valuable contexts for decision making have to be first created and then maintained. For them, it was enough to have defeated Bork; plans to defeat others could properly await their time.

It is entirely inappropriate to place such a burden on the Senate.75 Nevertheless, it is the context within which the Senate is currently operating. To blink at this reality whenever a conservative nominee slips through, choosing inside to blame the committee for bungling, incompetence, insincerity, cowardice, or some other moral fault is entirely unfair to the committee.76 Doing so imposes thoroughly unrealistic obligations on Senators—obligations that, ceteris paribus, none of the Senate’s critics would often be willing to accept. To be sure, there must be moments when the stakes are so high that a Senator has a moral obligation to sacrifice himself, even if doing so is likely to prove futile, but it is extremely difficult to argue that the selection of any single Supreme Court justice constitutes such a moment. Until the context changes, and it becomes publicly acceptable to reject a nominee without thereby being taken to have declared the person unfit, presidents will have enormous advantages in determining the composition of the Court. Refusing to

74. This burden is not entirely new; the Senate has been deferring to Presidential judgments for most of this century. See David Strauss & Cass Sunstein, The Need for Senate Independence in the Confirmation Process, 101 YALE L.J. (forthcoming 1992).
75. The view is shared by others. See, e.g. id.
76. Such an agenda, mind you, would only amount to insisting on distinguished moderates for the Court. Given the current political context, it would be a mistake for progressives to insist on liberal selections. See Christopher H. Schroeder, Low Roads to the High Court, N.Y. TIMES, Oct. 23, 1991, at A23.
recognize this is not only unfair, it is dysfunctional as a means to implement a progressive agenda with respect to nominees, because it means ignoring opportunities and methods that might change that context. 77

Nevertheless, each side either ignores or chooses to mask such contextual or structural considerations, 78 and instead constructs corrective justice stories to express their current dissatisfactions. With corrective justice supplying the story line, responsible individuals must be found, and the members of the Judiciary Committee seem well qualified for the role.

When the Thomas nomination itself was announced, an additional contextual feature specific to it also bore on the decisions and actions of Senators. This was the completely cynical, and previously leaked, intention of the administration to use the nomination process to rupture what remains of the Democratic coalition.

The year before Thomas was nominated, David Broder wrote in his syndicated column that Republican operatives were gleeful over the political prospects for the vacancy after that filled by Justice Souter. Broder wrote that “Bush has put himself into a position where he can play tough but rewarding ethnic and ideological politics with subsequent Supreme Court choices.” 79 After Judge Souter had been nominated, White House sources voluntarily telegraphed the names of the three highest also-rans: Clarence Thomas, Edith Jones, and Laurence Silberman. Each is quite conservative, and each is capable of driving a wedge into the Democratic coalition. Broder continued:

If Sandra Day O’Connor were to retire, Democrats opposing Judge Jones would find themselves opposing a female and a Southerner on a court that has had only one woman and no one from Dixie in recent years. If Thurgood Marshall were the retiree, how would Democrats feel about blocking Judge Thomas and making the court once again

77. See, e.g., Strauss & Sunstein, supra note 74.

78. Looming over all the confirmation machinations of recent years, of course, is the most significant of all contexts: the eleven most recent nominees have been named by a Republican President and sent to a Democratic Senate at the same time as the jurisprudential direction of the federal courts has been a politically salient issue in the country. Given this context, it is extraordinarily naive to think that the politics of division would be rampant in political elections but entirely absent once a nominee’s name reached the Judiciary Committee. When those politics turn ugly, as they have in recent years, the confirmation process will surely turn ugly as well. In this context, making confirmations is not dissimilar to making legislation. However, when the confirmation sausage gets ground, identifiable individuals, whether the nominee or, in the extraordinary case of Hill/Thomas, an accuser, can get ground up in the process as well, further ensuring that the corrective justice model will be operative.

all-white? And if Silberman were the choice, how many Democrats
would be eager to oppose the first Jew on the court since Abe Fortas?
You can see why White House political operatives like the set up.\textsuperscript{80}
Marshall retired, so the White House sent up Thomas. Now, the situ-
ation became even more likeable from the White House perspective. If
Thomas had been defeated, relations among Democrats and some blacks
would have been frayed, to say the least. Before wounds could heal, the
President could nominate either Silberman or Jones, both of whom
would have prompted yet another divisive confirmation fight and driven
a different wedge. Alternatively, the President could nominate the first
Hispanic justice (the names of several conservative, sitting federal judges
were prominently mentioned before the Thomas nomination), and watch
other sparks fly.

For someone taking a view of the entire cycle of interaction between
the President and the Senate from the creation of a vacancy to filling it
with a new justice, as Senators do, this context looks doubly discourag-
ing. Defeating any presidential nominee is a difficult task under the cur-
rently operative burden of proof, and any single defeat only promises to
be followed by another undesirable nominee. Should the second be
defeated, another one, with his or her own divisive consequences would
follow. In the end, the Court would still shift to the right, anyway.\textsuperscript{81}

I will not enumerate the new dissatisfactions with the process that
accumulated as a result of the first round of Thomas hearings, but by the
end of them there was scarcely a dissent from the view that the entire
process needed to be rethought. Once again, however, first impressions
of what was wrong tended to focus on ineptness and culpability of com-
mittee members, whether their own character flaws, their inability to ask
surgically precise questions, their unwillingness to "insist" on answers to
specific questions, or their failure to harass Thomas on his views on
affirmative action. All surrounding context and circumstance were
blocked out; no one appeared willing to say that any member had done
well or at least adequately under the circumstances. Fewer seemed to

\textsuperscript{80.} Id.

\textsuperscript{81.} The dynamics of the appointment process mean that the President is always going to have
substantial tactical advantages over the Senate. The President can keep nominating his or her prefer-
ences, but the Senate can only reject those names. Only when the Senate leadership has something
to trade, like progress on some other aspect of the president's legislative agenda, can it strongly and
positively influence choices. President Bush, however, has almost no affirmative legislative agenda to
worry about, so the prospects of logrolling on Supreme Court nominations in the near future seem
remote.
realize that almost none of the demands they were making on the committee would have been likely to make much difference to the ultimate outcome. Once Thomas decided to clam up (and there being no effective way to force a confession from him), it was highly unlikely that he could have been defeated.

This brooding disquiet set the stage for the Hill/Thomas revelations and the second round of hearings. Primed to believe bad Congress stories and already writing our own bad committee stories, our instant analysis of the committee's handling of Anita Hill's allegations seemed trivially obvious.

The near unanimity of the condemnation of the Senate and the committee indicates that assumptions highly suspicious of government span a broad political spectrum. However, those shared assumptions have profoundly divergent consequences across that spectrum. In particular, they provide comfort to defenders of existing positions and privileges of power, property and wealth, because the assumptions operate to undermine and enfeeble government, thereby helping preserve the status quo. Responsive as it is to the majority will, our government cannot exhibit energy if a broad spectrum of Americans doubt the efficacy and the safety of government action. The elected officials responsible for translating will into program will not do so if they anticipate that their actions will redound to their detriment later on, as yet another exercise in governmental action comes to be judged a failure.

Given their respective political platforms, distrust of government pays off differently to Republicans and conservative than it does to Democrats and progressives. The Republican program is one of less regulation, less income redistribution, less aggressive programs to remedy discrimination based on race and sex. The modern Democratic party, the party of FDR, has been built on the principle that government can and should make a constructive difference in the lives of the less well off members of our society. The Democrats need government that works, Republicans can live quite comfortably with a government that is hobbled. Distrust minimizes the opportunities for government to succeed by denying it the leeway to act; subsequently it maximizes the likelihood that programs that are begun will be prematurely pronounced failures, by magnifying the mistakes that occur, and attributing them to venality instead of good faith efforts.

Of course, conservatives who generally applaud government inaction can scarcely lay claim to social consensus in many policy areas, and
in these areas government inaction is as visible and contestable as governmental action would be. Despite this contestability, conservative positions retain a tremendous advantage: the case for the status quo, controversial as it is in a pluralist society marked by “dissensus rather than consensus, exploits our dread of government whereas the progressive case for change has to overcome that dread. No amount of legal realist proofs that inaction is action, that common law rights form a regulatory regime no different in kind from any other, and that there is nothing natural or inevitable about the status quo, can defuse this advantage of the status quo.82 Changing the status quo through government action requires, definitionally, that government act. If government is a dreaded, distrusted actor, that is a substantial positional advantage for the opponents of action. The advantage can be overcome—sometimes better the Devil we don’t know quite as well than the Devil we do, so that when things get bad enough a working majority of citizens may favor governmental action, as was the case during the Depression. Nevertheless, overcoming it is always a chore for progressives that conservatives do not face. Even if “we are all legal realists now,”83 dread of government supplies built in plus points for conservatives in almost all policy areas, and, when reform nevertheless comes, helps guarantee that it will take the form (whether real or rhetorical) of vindicating rights.

The divergence in political goals and objectives is easily kept in view when the topic is substantive legislation, but it gets lost at moments like Hill/Thomas, when the popular perception is that the Senate “as an institution” has come under attack. Yet to speak about “the committee” or “the Senate” as having a collective interest in restoring trust in government falsely assumes that Democrats and Republicans benefit equally from such trust. While almost all politicians want to keep their jobs, “the institution” needs to work in very different ways for it to satisfy the political objectives of the two parties. When the Congress is held in disrepute, this is much more advantageous for one agenda than it is for the other.84

Political pundits revel in the game of winners and losers. In that contest, Republicans and conservatives won twice in Hill/Thomas: they

82. See Singer, supra note 42.
83. Id. at 467.
84. Both the mistaken assumption of common interest and the reality of divergent interests were under display at the very outset of the hearings. Senator Orrin Hatch (R-Utah) disrupted the opening minutes of the Hill/Thomas hearings with a diatribe about the leaking of the FBI report and insisting that he be able to use the Hill statement (often referred to throughout the proceedings as an “affidavit”) before she testified. Tr., Oct. 11, 1991, supra note 5, at 24-29. Unable to proceed in an
have a young jurist who will occupy one of the far right seats on the Supreme Court for years to come, thus increasing the likelihood that the Court will defend their values against progressive change, and the events verified the existence of such a high degree of suspicion toward the Senate and the Congress as to help ensure that this branch of government is weak and ineffective, too.

On the other hand, for those who believe sexual harassment is a significant social, political, and legal issue requiring progressive changes in social structures as well as in legal entitlements, the box score is much worse, although with perhaps one victory, in that the hearings themselves may have heightened awareness of the issue in constructive ways.\textsuperscript{85} At the same time, in exposing or confirming a working ideology so hostile to government, the hearings revealed a resistance that will first hinder

orderly manner, Senator Biden called a recess to permit the committee to confer in executive session on appropriate ground rules. \textit{Id.} at 29.

The next day, Helen Dewar reports these events in the Washington Post as a defeat for “the Committee’s” intentions:

Stung by charges that it had mishandled the nomination of Clarence Thomas to the Supreme Court the committee hoped to open its new hearings yesterday in a way that would restore a sense of dignity and decorum to the extraordinarily bitter confirmation fight. Instead it opened with a political mudfight that set the tone for the rest of the day, forced a hasty rewrite of the committee’s agenda and cast a cloud over the goal of fairness and objectivity that Chairman Joseph R. Biden Jr. (D-Del) had laid out for the committee in its questioning.


Senator Hatch, however, didn’t care about restoring a sense of dignity and decorum, except on his own terms, and he didn’t care if he shot “the committee” in the foot as the hearings began. To the contrary, embarrassing the committee and causing the electorate to revile the committee’s processes substantially further Senator Hatch’s political objectives, both with respect to Thomas himself, as this will help elicit sympathy for him as a man wronged by cruel and intemperate forces, and in the long run, as a quiescent committee merely facilitates the Republicans’ ambition to stack the federal courts with archconservatives. The Republicans and the Democrats simply had different goals for these and many other events in the Senate, goals that would be advanced by very different tactics and performances. Senator Hatch’s performance, from his perspective, was both astute and effective.

\textsuperscript{85} The elimination of harassing behavior may indeed require adjustments to broad social structures and understandings; it may not be enough simply to announce that women are entitled to work in an harassment free workplace. For example, harassment may be related to larger issues, such as structuring jobs to make them more compatible with women’s expectations about child rearing, as well as equalizing such responsibilities between the sexes, so that women are not perceived to be outsiders in a male workplace environment, hence intruding on male terrain, and therefore fair game for male centered behaviors. Catharine MacKinnon’s work goes even further, linking sexual harassment in the workplace to broader issues of sexual subordination and arguing that solutions to the former are ineluctably linked to social restructurings that eliminates the latter. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Holly B. Fechner, \textit{Toward An Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts}, 23 U. Mich. J.L. Ref. 475 (1990).
and then undermine certain kinds of governmental responses to the problem.

To this degree, then, people who believed that one message from the Hill/Thomas hearings was that much more must be done to eliminate sexual harassment in the American workplace and who also were highly critical of the Senate's performance expressed ideas that work at cross purposes to one another. This doesn't mean that progress on the issue of harassment cannot be made; it does mean that in this area as well as others, potentially productive avenues for progressive change will tend to be slighted at the policy making stage, and programs aimed at change may be harshly and prematurely critiqued at the policy implementation stage.

In closing, I want to put in a final plug for the good Congress story presented at the beginning of this essay, although it is crucial to the broader arguments to see that the superiority of good to bad Congress stories on any particular occasion is somewhat beside the point. Whether or not any particular story of congressional malfeasance is true does not affect the broader claim: we tend to approach any and all information about Congress with a predisposition to see the bad Congress story in it. The first lesson to take away from Hill/Thomas is simply that this attitude exists. The second is to appreciate that that attitude inhibits our ability to see constructive activity in government when it occurs, as well as our ability to imagine constructive roles that government can play in addressing social problems. In my view, this presents a substantial difficulty that will inhibit constructive progress in addressing significant social issues, quite above and beyond any difficulties in achieving sufficient consensus on our substantive goals. There is much more to be said about whether this is a problem that can be remediated, or a fact about our current condition that simply must be acknowledged, or even a strength of the American people to be applauded. That is a project for another time. For now, it is enough to note that it is a serious issue, worth worrying about, especially for people interested in progressive change.

As to Hill/Thomas, the fictitious good Congress story is superior to the prevailing bad Congress story. In my view, the people with knowledge of Anita Hill's complaint struggled conscientiously to handle a most delicate revelation with integrity and principle, given the circumstances under which information was revealed. Other conscientious people might have made different decisions.
I'd like to think that presenting a version of a good Congress story has changed some impressions of what transpired, but the reality must be that it is extremely difficult to revisit events as sensational as these so as to revise many people's views. As the television commercial says, you only get one chance to make a first impression, and the first impressions on this story have been indelibly formed. So Hill/Thomas is likely to be remembered, wrongly, as an instance when Congress behaved poorly and let the country down. That in no way prevents a continuing debate on whether our working assumptions about the Congress can or should be turned around, but it does indicate that Hill/Thomas did not assist in converting good Congress stories from oppositionist tales into working ideology.