TRANSFORMATIVE APPOINTMENTS

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I. BORK'S FATE

I begin where Chief Justice Burger ended: when judged by normal personal and professional criteria, Robert Bork is among the best qualified candidates for the Supreme Court of this or any other era.¹ Few nominees in our history compare with him in the range of their professional accomplishments — as public servant, private practitioner, appellate judge, legal scholar. Few compare in the seriousness of their lifelong engagement with the fundamental questions of constitutional law. Of course, Bork's answers to these questions are controversial. But who can be surprised by that? Even those, like myself, who disagree with Bork both can and should admire the way he has woven theory and practice, reason and passion, into a pattern that expresses so eloquently our deepest hopes for a life in the law. The Republic needs more people like Robert Bork. It is a tragedy that the Republic should repay him for his decades of service by publicly humiliating him.

Indeed, a first instinct is to search for some quick fix that will avoid such painful episodes in the future. The most obvious scapegoat is the Senate: if it had only limited itself to Bork's professional and personal qualifications, it would never have committed such a blunder. Or, if Senators insisted on moving to the merits of Bork's views, at least they should have preserved the proceeding's deliberative character, and refrained from rushing to the nearest T.V. camera to announce their judgment to their constituents before hearing the final debate.

Yet the Senate is hardly the only scapegoat. President Reagan provides an inviting target: why didn't he listen to the Senators, from both parties, who warned him to nominate a less controversial candidate?

As rival exercises in fault-finding proliferate, it is easy to forget how much both President-bashers and Senate-bashers have in common. Both suppose that Bork's fate could have been avoided if only the President or the Senate (or both) hadn't blundered in some readily

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¹ See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 1987: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 2, at 701 (1987) (testimony of Warren E. Burger, former Chief Justice of the United States).

identifiable way. In doing so, both sides blind themselves to the tragic aspect of the Bork affair: it is as if Oedipus' problem could have been avoided if he and his father had only stopped-looked-and-listened before encountering one another at their fateful crossroad.

As in classic tragedy, Bork's undoing was the product of his greatest virtues. When his moment came to walk the center of the constitutional stage, these virtues could no longer be interpreted simply as testimony to his distinguished service. Instead, the nation's constitutional history endowed them with a dramatically different meaning: Bork's superqualification came to symbolize Ronald Reagan's aspiration to rival Franklin Roosevelt's success in revolutionizing constitutional law by means of transformative appointments to the Supreme Court. My first task is to examine this symbolic process, showing how historical precedents from the Roosevelt era impressed a tragic meaning on Bork's virtues which he himself was powerless to deflect. I next consider the recurring presidential effort to make transformative appointments as a distinctive constitutional phenomenon worthy of study in its own right. What institutional ingredients are necessary before constitutional doctrine can be revolutionized by transformative appointments? How do these compare with the institutional processes for constitutional revision specified by the Founders in article V? By juxtaposing the classic method of constitutional amendment with the modern practice of transformative appointment, I hope to assess the strengths and weaknesses of these alternative modes of constitutional transformation. I conclude with a proposal for reform of our higher lawmaking system that tries to build on the strengths of both the classic model and the modern practice, while sharing the faults of neither.

II. THE GHOSTS OF PRESIDENTS PAST

To gain perspective on the past, begin with a thought-experiment about a might-have-been. Suppose that the Senate vote on Robert Bork has gone the other way, and that Justice Bork now proceeds to confirm his opponents' worst fears. Not only does he wield his "swing vote" with devastating effect on precedents from the Warren and Burger eras, but he provides the new conservative majority with an intellectual dynamism that it has not known previously. Within the space of a few years, much of the judicial work of a full generation — involving the constitutional status of privacy, equality, reapportionment — is consigned to the garbage heap of discarded precedent. In retrospect, it becomes clear that the Bork appointment did in fact herald the dawn of a new day in the constitutional life of the nation.

Of course, whether Bork's appointment would have had any such transformative consequence is a matter for unending speculation. In calling Bork's appointment potentially transformative, my aim is not

to predict the future but to remind us that similar events have happened in the past. This will allow us to put some historical perspective on the Bork proceeding, and thereby glimpse its tragic aspect.

My Bork scenario recalls, of course, Franklin Roosevelt's success in transforming the main lines of constitutional law in the 1930's. Like Ronald Reagan, Franklin Roosevelt won reelection on a political program that repudiated a complex body of constitutional principle developed by a generation and more of Supreme Court justices. Like Reagan, Roosevelt despaired of changing the Constitution by mobilizing the people to enact formal amendments in the way described by article V. Instead, he sought to change the path of constitutional law by making transformative judicial appointments.

Unlike Reagan, Roosevelt succeeded — but not before his effort encountered furious resistance in the Senate. Thus, when Roosevelt proposed that Congress authorize six new appointments to the Court, the Senate rejected his court-packing proposal. As traditionalist Justices retired, however, the Senate gave enthusiastic support to a series of transformative appointments, which had precisely the consequences that Roosevelt's opponents feared — and Reagan's opponents fear today. Within a few short years, the New Deal majority had decisively repudiated the rights-oriented jurisprudence so elaborately developed by its Republican predecessors.²

The delegitimizing technique used by the New Deal Court in this levelling operation fits neatly into our unfolding Bork scenario. Just as Justice Bork might have appealed to the "intent of the Framers" to undercut the Warren Court, the New Dealers appealed to the Framers to undercut the *Lochner* Court. Of course, Bork's "originalism" would have been used to discredit a different set of individual rights — based on privacy and equality rather than on property and contract. Nonetheless, the basic legal move would have been the same.

Call it the myth of rediscovery: a new wave of presidential appointments repudiates the Court's immediate past by appealing to the "intent of the Framers" of more distant times, and then reinterprets this intent in ways that give the President's party new authority to enact its program. Thus, after its transformative act of reinterpretation, the New Deal Court upheld congressional legislation modifying received notions of property and contract despite contrary Old Court precedent. Similarly, under Bork's leadership, the Reagan Court might have solemnly declared that its predecessors had profoundly distorted the "intent of the Framers" in giving constitutional meaning to values such as privacy, equality, and fairness in the electoral process.

² The relationship to the 1930's will be pursued at greater depth below, at pp. 1170-77.

Of course, this radical rejection of the Warren and Burger Courts in the name of the Framers would have hardly marked the end of constitutional debate. Though Black and Frankfurter both agreed that the *Lochner* Court had illegitimately distorted the Framers' intentions, they nonetheless disagreed about the best way to avoid a repetition of the Old Court's mistakes. Undoubtedly, Bork too would have met his Frankfurter. Despite their ongoing differences, however, neither the "originalist" Bork nor the "evolutionist" anti-Bork would have been tempted to repeat the paradigmatic mistakes of the era of the Warren and Burger Courts. In our hypothetical world of post-Bork jurisprudence, *Roe v. Wade*³ and *Reynolds v. Sims*⁴ would have functioned in the same way that *Lochner v. New York*⁵ and *Hammer v. Dagenhart*⁶ function in our existing universe of constitutional argument: as powerful negative precedents cautioning us never again to commit the judicial blunders of a discredited past.

III. SETTING THE STAGE FOR TRAGEDY

With the aid of the Roosevelt precedent, we may glimpse the tragic aspect of the Bork affair. To put the point in a single line, it was precisely because Bork was superqualified by normal appointment criteria that he served as such a compelling symbol of the Reagan effort to catalyze a judicial transformation of Rooseveltian magnitude.

After all, the normal Supreme Court nominee simply has not generated the kind of track record that would allow his opponents to gain credibility for their fears that the President's nominee might be a transformative appointment. Speaking generally, presidential nominations come in two varieties. First, there are the "solid professionals" qualified for appointment by reason of their distinguished service as president of the American Bar Association, as assistant attorney general, or as appellate judge. Typically, these nominees have not had the time, energy, or inclination to publish essays reflecting upon the fundamental questions of constitutional law in the manner of Robert Bork. Thus, even if the nominees harbor transformative ambitions, it is hard for opponents to make this charge plausible in public debate. Moreover, as an empirical matter, it is quite unlikely that solid professionals do in fact harbor transformative ambitions. Distinguished lawyers are far more likely to be masters of interstitial accommodation than propounders of revolutionary constitutional theses.

³ 410 U.S. 113 (1973).

⁴ 377 U.S. 533 (1964).

⁵ 198 U.S. 45 (1905).

⁶ 247 U.S. 251 (1918).

A second type may, in contrast, be more open to such a leadership role. These are the nominees who have spent most of their adult lives in politics. Unlike solid professionals, successful politicians are accustomed to dealing in sweeping (if vague) pronouncements. Though they have legal training, they probably have not invested much of their spiritual capital in mastering the conceptual order of the existing legal universe. Thus, this type may be more amenable to the suggestion that the last generation of judges has somehow lost touch with the Framers and that a sharp break with established doctrine is imperative.

Even here, however, the successful politician who looks upon the Supreme Court with serious transformative intent is rare. Rarer still is the politician who combines this intent with the requisite legal ability to spearhead a transformative movement in constitutional law. While casting a "swing vote" is important, intellectual leadership is no less so: Earl Warren needed William Brennan. It is unusual, to say the least, when the nomination of a successful politician to the Court can be viewed as a signal of a presidential design to transform the reigning principles of constitutional law.

Thus, it is quite wrong to discount the Senate's resistance to Bork as "merely" a matter of partisan politics. While the Democrats who controlled the Senate would have looked skeptically upon any proposed replacement for Lewis Powell's swing vote, they were no less aware of the dangers of appearing "stubbornly obstructionist" as the nation began to think about the next presidential election. It was precisely Robert Bork's multifaceted excellence that allowed the Democrats to endow their opposition with a dramatically different political meaning. In contrast to the normal nominee, here was a man whose public record suggested that he might possess both the transformative vision *and* legal ability needed to spearhead a radical judicial break with the past. If the Senate was ever to raise questions about the constitutional direction in which the President proposed to lead the nation, surely it was *this* nomination that made such questioning appropriate?

It was Bork's capacity to symbolize the prospect of a Rooseveltian transformation that made the Senate hearings such an extraordinary event. Normally, there is no need for the nominee to define his transformative intentions through an intense dialogue with concerned Senators, for there is nothing in the nominee's past that would give substance to such a sustained dialogue. Instead, most nominees can blandly assure the Senate that they have yet to grapple with the large questions of constitutional law that await them on the bench, and promise that they will judge each case on its merits as the Lord allows them to grasp those merits. Opponents to a nomination are then obliged to search for evidence of personal misconduct or professional

inadequacy if they hope to defeat the President's nominee. In contrast, by virtue of Bork's lifelong public engagement with the fundamental questions of constitutional law, the transformative possibilities involved in the President's nomination were a matter of public record before Robert Bork took the stand to testify on his own behalf.⁷ Thus the scene had already been set for tragedy: if the Senate and the country decided that President Reagan should not be granted Roosevelt-like authority, they could express this judgment only by rejecting a nominee who, by normal criteria, was superbly qualified for the office.

I do not propose here to trace the way this theme was elaborated in the course of the debate in Washington and around the country. My point is that it was the very distinction of Bork's past that invited the Senate to ask itself a distinctive question: should President Reagan, like President Roosevelt, be granted the constitutional authority to make transformative appointments?

Not that this question wasn't brewing in some of Reagan's earlier Supreme Court nominations. In retrospect, it is possible to see an escalation in the President's transformative ambitions. In nominating Sandra Day O'Connor, the President began with a nomination at the opposite pole from his Bork proposal. While O'Connor was a solid professional who held vaguely conservative views, these facts did not account for the President's decision to single her out. Instead, he was using her nomination as a reassuring symbol to a potentially important voting bloc.⁸ In this, if nothing else, Sandra O'Connor resembles William Brennan, another solid professional who does not owe his place on the Court to his distinctive substantive views, but to President Eisenhower's desire to symbolize his sympathy with Democratic Catholics from Northern industrial states before the 1956 election.⁹

⁷ Thus, while the Judiciary Committee's majority report devotes six pages to a critique of Bork's conduct during the Watergate affair, *see* SENATE COMM. ON THE JUDICIARY, 100TH CONG., 1ST SESS., NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REP. 7, 65-71 (1987), the rest of the 99-page document does not focus on Bork's personal or professional attributes but on his substantive views and concludes that "[t]he positions adopted by Judge Bork at critical moments of decision bespeak a perilous inclination for one who would guide our nation's future." *Id.* at 98.

⁸ During his 1980 presidential campaign, candidate Reagan had promised that "[o]ne of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find . . ." H. ABRAHAM, JUSTICES AND PRESIDENTS 330 (1985). Professor Abraham concludes that "[i]n descending order of importance, balancing representation, political/ideological compatibility, and objective merit were the three main motivations in President Reagan's selection of O'Connor." *Id.* at 333.

⁹ Professor Abraham usefully spells out the political symbolism involved in Eisenhower's nomination of Brennan one month before the 1956 election, as well as the President's subsequent disappointment with Brennan's voting record on the Court. *See id.* at 262-63. But why should

With the nominations of Rehnquist and Scalia after the President's reelection, appointments began to take a more transformative turn. Nonetheless, conditions were not yet ripe for a national debate on the President's constitutional pretensions. Not only were the Republicans still in control of the Senate, but neither Rehnquist nor Scalia raised the prospect of a Rooseveltian transformation with Bork-like clarity. While Rehnquist had established his transformative inclinations during his lengthy service as Associate Justice, he had also demonstrated that, without further reinforcements, he could not lead the Court to make a sharp and sustained break with the past. Similarly, Antonin Scalia's public views on the Constitution were less distinct than Bork's and less distinctively transformative in their implications. Even if the Judiciary Committee had then been controlled by Democrats, could they have successfully established in the public mind that Scalia promised anything more than conservative variations on the major doctrinal themes established by the Warren and Burger Courts?

We will never know. What we *can* say is that Bork's remarkable virtues crystallized the question of transformative appointments. Here was a man who transparently did not owe his nomination to his sex, race, religion, national origin, or regional roots. He owed it to the power of his mind, the vigor of his ideas, and his demonstrated capacity to act on his convictions in moments of crisis. If there was anything wrong with his nomination, it was precisely that Ronald Reagan had failed to earn the Rooseveltian authority to insist that the Senate endorse a radical break with the constitutional achievements of the last generation.

IV. THE MODEL OF PRESIDENTIAL LEADERSHIP

My aim thus far has been to present the Bork affair as a tragedy rather than a farce. The affair looks farcical only if one supposes that it centrally involved the application of normal principles of judicial qualification. It takes on a very different meaning when viewed as part of a difficult process by which our constitutional system is gradually coming to terms with the transformational precedents bequeathed to us by the Roosevelt era.¹⁰ The New Deal established

Eisenhower have been disappointed by Brennan's judicial performance when constitutional philosophy played such a small role in his initial decision?

¹⁰ Roosevelt's success in making transformative appointments itself built upon nineteenth-century practice, most notably the efforts of the Jackson and Grant Administrations to challenge then-existing constitutional principles. See C. SWISHER, *THE TANEY PERIOD, 1836-64*, 5 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 30 (1974) (discussing the connection between support for Chief Justice Taney's appointment and the desire for changes in Court policies); C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, pt. 1, 6 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 677 (1971) (discussing the relation of the appointments of Justices Strong

that the President may, under certain conditions, gain senatorial authorization to lead a radical break with reigning constitutional principles by means of transformative appointments. The Reagan years are establishing, however, that these conditions are very stringent ones, and that the President normally can expect a skeptical response when he embarks on a course of judicial appointments that arguably has a transformative aspect. Such a fundamental constitutional precedent has not been established without bitter debate and personal tragedy. Now that the shouting is over, it is not too soon to try to put the latest precedent into larger legal perspective: what does the Bork affair teach us about the process through which modern Americans go about transforming their constitutional law?

A. The Classical System Compared

Begin by contrasting both the Roosevelt and Reagan precedents with the classical system of constitutional amendment set out in the text of article V. Here the Founders expressly contemplated the possibility that future generations of Americans may authorize new political movements to make fundamental changes in preexisting constitutional principle. How does the method of transformative appointment differ from the methods for constitutional transformation set out in article V? In two basic ways: one involves the nature of the institutions whose assent must be gained before a political movement can transform its constitutional vision into constitutional law; the second involves the legal form in which the constitutional change is codified.

1. *The Changing Institutional Matrix.* — Consider first the distinctive institutional matrix through which the Democrats in the 1930's and the Republicans in the 1980's sought to make new constitutional law. Both of these exercises in transformative appointment challenged three basic institutional premises of article V.

The first involves the Article's commitment to dual federalism. Before a new political movement can break with the constitutional past by enacting an article V amendment, it must gain the assent of both national and state institutions. In the case of transformative appointments, however, only the consent of national institutions is necessary. The modern practice is, then, far more nationalistic than its classical predecessor. Although the Founders expected constitutional proposals for constitutional re-vision to be tested in a dialogue

and Bradley to the decision of the *Legal Tender Cases*). Although both of these presidential efforts succeeded in changing the course of constitutional doctrine significantly, neither did so in the massive way accomplished by Roosevelt in the 1930's. Similarly, the earlier efforts by Thomas Jefferson to undermine the Marshall Court through transformative appointments were even less successful.

between the nation and the states, modern practice tests proposed transformative appointments in a dialogue between different branches of the national government.

The new prominence of the national separation of powers implies a second major institutional change. In writing article V, the Framers supposed that only one kind of institution would be involved in the process of constitutional change: only popular assemblies, acting on both national and state levels, were to decide whether the People supported a decisive break with the constitutional past. In contrast, the twentieth century has seen other institutions play a decisive role. Most notably, it is the Presidency in the 1930's and the 1980's that claims a mandate from the People in support of constitutional revision. The fate of this presidential initiative is then debated and determined first by the Senate's assessment of transformative appointments and ultimately by the Court. To mark this second contrast, I shall say that the classical system of constitutional transformation is assembly-led, while twentieth century practice has often been presidentially-led.¹¹

The rise of the Presidency prepares the way, in turn, for a third institutional break with article V. This involves the role of presidential elections in the process by which Roosevelt and Reagan sought to gain constitutional authority for their transformative appointments. Defenders of both Presidents claimed that their successful reelection gave them a popular "mandate" to transform preexisting constitutional principle. As far as article V is concerned, however, presidential elections are non-events. The only elections it deems relevant for ascertaining the People's will are those involving the selection of representatives to constitutional conventions or legislatures deliberating on amendments in Washington and the state capitals. While the Article's narrow focus blinds us to the importance modern Americans

¹¹ In addition to these exercises in presidential leadership, is it right to say that the twentieth century has also seen the rise of *Court-led* constitutional transformations? In this scenario, the Supreme Court does not break with established constitutional doctrine unless a lengthy process occurs, through which the President gains the support of the Senate and the voters for a series of transformative appointments. Rather than following the political branches, the Court claims the constitutional authority to embrace new principles that have no legitimate interpretive warrant in the relevant constitutional sources. This effort at constitutional leadership then provokes a complex response in the political branches and the nation more generally, which leads finally to the acceptance, rejection, or modification of the judicial initiative.

Although I shall discuss this hypothesis at length in the larger project, mentioned below in note 21, of which this Comment is a part, I cannot do it justice here. For starters, it requires us to rethink the judicial work products of both the *Lochner* and Warren eras and consider whether they can be defended as bona fide interpretive efforts or whether they are best viewed as exercises in judicial leadership of the kind hypothesized here. I have found, alas, that such questions require book-length treatment before they can be meaningfully addressed. *Bul see* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1070-72 (1984); *see also infra* note 20.

attach to presidential elections as a forum in which we debate our constitutional future, it would be a mistake to go to the opposite extreme and suppose that *every* presidential election has catalyzed an effort by the victor to use the appointment power to make a decisive break with the constitutional achievements of the past generation. Instead, transformative nominations have been seriously considered only after a President has won decisive reelection on the basis of a political program advocating fundamental change in reigning constitutional principle.

2. *From Institutional Substance to Legal Form.* — These changes in the institutional matrix of higher lawmaking generate a second, and very different, kind of challenge to classical premises. This concerns the legal form through which a movement for constitutional change ultimately expresses its higher lawmaking victory. In the classical system of assembly-led transformation, the People's demand for a fundamental change in constitutional principles is expressed in a text characteristic of legislative decision: a formal amendment to the preexisting constitution. In the presidentially-led system of transformative appointments, final victory is marked by a decisive set of transformative judicial opinions that self-consciously repudiate preexisting doctrinal premises and announce new principles that redefine the American people's constitutional identity.

B. The Limits of Presidential Leadership

So much for the similarities between the efforts by Roosevelt Democrats and Reagan Republicans to lead American institutions to make a sharp break with their constitutional past. What are the differences?

Before Franklin Roosevelt gained the Senate's advice and consent to transformative appointments, he did more than simply win reelection. Most obviously, he led the Democratic Party to a remarkable series of electoral victories in Congress. Looking narrowly at the Senate, the differences between the Roosevelt and Reagan years does not show up so dramatically on the day each President first took possession of the White House: in both 1932 and 1980, the President's party took control of the Senate for the first time in many years (fourteen years in the case of the Democrats, twenty-six in the case of the Republicans). The key difference is that Roosevelt succeeded, and Reagan failed, to build on this initial success. During Reagan's first six years, Republican support in the Senate remained in the low 50's, and finally sank to minority status in 1986, despite the President's warning about the fate of future Supreme Court nominees. In contrast, the New Deal Democrats kept building their representation to unprecedented heights during the next two elections — so that, after their landslide victory of 1936, there were no fewer than seventy-six Democrats in the Senate. By the time President Roosevelt gained his

first chance to name a Supreme Court Justice in 1937, only sixteen Republicans remained to represent the views of a party that had dominated American political life from the Civil War to the Great Depression.¹²

But numbers tell only a part of the story. Even more important is what the Democrats did with their increasingly overwhelming majorities in the political branches. In sharp contrast with the Reagan years, the 1930's saw the President's promise of a "New Deal" take solid form in a series of pathbreaking statutory initiatives that gave the American people some practical experience with the new ideals for national government proclaimed in Washington, D.C. At the same time, the Supreme Court was contributing to the American people's political education by presenting a rich constitutional critique revealing the extent to which the New Deal's innovations could be seen as departing from our nation's traditional political principles.

Thus, by the time Roosevelt had an opportunity to transform the Court in his second term with the appointments of Justices Black, Reed, Frankfurter, Douglas, and Murphy,¹³ the American people had

¹² The following table compares majority and minority party representation in the Senate at comparable stages in the Roosevelt and Reagan Presidencies:

ELECTION YEAR	PRESIDENT'S PARTY		PRINCIPAL OPPOSITION PARTY	
	Roosevelt	Reagan	Roosevelt	Reagan
Senatorial election year preceding first presidential victory (1930, 1978)	47	41	48	58
First presidential victory (1932, 1980)	60	53	35	46
Midterm election (1934, 1982)	69	54	25	46
Second presidential victory (1936, 1984)	76	53	16	47
Midterm election (1938, 1986)	69	46	23	54

This data was compiled from CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 1116 (1985) and WHO'S WHO IN AMERICAN POLITICS, 1987-88, at xv (1987). The difference between the Roosevelt and Reagan efforts at presidential leadership is even more striking in the House of Representatives, where the Republican contingent sank from 214 on the eve of Roosevelt's election to 89 in the aftermath of his reelection in 1936, while the Republicans never came close to gaining control of the House during the Reagan years, doing no better than the 192 seats at the time of Reagan's first presidential victory. CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra*, at 1116.

For investigations of Reagan's failure to match Roosevelt's success in gaining control over Congress, compare J. CHUBB & P. PETERSON, *Realignment and Institutionalization*, in THE NEW DIRECTION IN AMERICAN POLITICS 17-20 (1985), which emphasizes the modern representative's enhanced capacity to insulate himself from presidential coattails, with Ferejohn & Fiorina, *Incumbency and Realignment*, in J. CHUBB & P. PETERSON, cited above, at 91, 115, which suggests that "a critical minority of voters" wants different parties to control different branches of government "not because it reflects their notion of the ideal situation, but because they have decided it is the best they can hope for given the present configuration of the two parties."

¹³ See H. ABRAHAM, *supra* note 8, at 390.

already participated in a five-year process of political education in which they had been given an opportunity to gain practical experience with, and hear powerful critiques of, the new kind of national government being built in their name in Washington, D.C.

Not that all Americans enthusiastically embraced the interventionist welfare state elaborated by the New Deal. In addition to the tiny band of sixteen Republican senators and eighty-nine Republican representatives who remained on Capitol Hill after the landslide of 1936¹⁴, almost seventeen million Americans did prefer Alf Landon to Franklin Roosevelt in the presidential elections.¹⁵ Nonetheless, even they could not deny that a decisive majority of Americans had voted for the New Deal with their eyes open to the practical and constitutional implications of their collective decision. If ever there was a time that the People could be said to have endorsed a sharp break with their constitutional past, it was when Roosevelt and the Senate self-consciously began to make transformative Supreme Court appointments.

How different was the scene in 1987. After seven years in the White House, the President had failed to convince Congress to support his constitutional ideals. Thus, his advocacy of a constitutional amendment requiring balanced budgets was mocked by his Administration's unprecedented budget deficits; his appeals for a "right to life" amendment were belied by his own refusal to make a serious effort to persuade Congress to enact even "right to life" statutes that would induce the Supreme Court to reconsider *Roe v. Wade*; and so forth. This background made Reagan's nomination of Robert Bork seem a desperate effort by a lame-duck President to impose a constitutional program that had otherwise failed to gain the support of Congress, rather than the symbolic culmination of a period of emphatic popular approval for the statutory initiatives of his administration. Little wonder that the Senate took Bork's superqualifications more as a challenge than as a reassurance, and insisted upon its authority to deliberate whether Bork's constitutional philosophy deserved the support of We the People of the United States.

Indeed, despite the vastly different conditions prevailing in the 1930's, it is important to recall that the Senate also refused to give President Roosevelt free rein on the matter of transformative appointments. When Roosevelt sought to gain Congressional approval for a "court-packing" statute that would have allowed him to propose six transformative appointments in the aftermath of the landslide of 1936,¹⁶ the Senate refused to be swayed by presidential rhetoric far more powerful than any that President Reagan could muster:

¹⁴ See CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 12, at 1116.

¹⁵ This amounted to 36.5% of the total popular vote. See *id.* at 1120.

¹⁶ The President's proposal did not necessarily expand the size of the Supreme Court to 15

In this fight, as the lawyers themselves say, time is of the essence. In three elections during the past five years great majorities have approved what we are trying to do. To me, and I am sure to you, those majorities mean that the people themselves realize the increasing urgency that we meet their needs now. Every delay creates risks of intervening events which make more and more difficult an intelligent, speedy, and democratic solution of our difficulties.¹⁷

Despite the President's confident interpretation of his mandate from "the people themselves," the Senate insisted on preserving its own deliberative authority to determine whether the President's initiative deserved the American people's assent. Listen, for example, to the Senate Judiciary Committee recommending the rejection of the President's court-packing initiative:

Even if every charge brought against the so-called "reactionary" members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.¹⁸

Note the care with which the Committee majority stated its objection to the President's initiative. It did not reject the deliberate transformation of constitutional law through the use of the appointment power. It protested against the President's desire to "impatiently overwhelm" the Supreme Court rather than engage in an "orderly" process of senatorial deliberation as death and resignation take their toll.

It is precisely this suggestion that, fifty years later, was taken up by the Judiciary Committee in 1987. As the 1937 Committee had

members. Instead, court-packing was a part of a more general reorganization of the federal judiciary. The key provision created a new position if the incumbent judge did not resign upon reaching the age of 70 years and 6 months. Since there were then six Justices older than this on the Court, it was up to them whether they would remain on an expanded bench or resign and keep the Court's size below 15. If all six of the Justices exercised this second option, the Court would have remained at its traditional size. See SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. No. 711, 75th Cong., 1st Sess. 1-2 (1937).

¹⁷ F.D. Roosevelt, Address at the Democratic Victory Dinner (March 4, 1937), reprinted in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113, 120 (1941); see also F.D. Roosevelt, Fireside Chat on Reorganization of the Judiciary, reprinted in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra*, at 122-33 (featuring similar rhetoric and a fascinating defense of court-packing as a transformational device superior to article V amendments). The President made these two speeches during the week before the March 10 opening of the Senate Judiciary Committee's hearings on court-packing. At the hearing, Assistant Attorney General Robert Jackson elaborated the President's public speeches in a remarkable formal presentation. See *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong., 1st Sess. 38-51 (1937).

¹⁸ SENATE COMM. ON THE JUDICIARY, *supra* note 16, at 14.

hoped, their own struggles over the problem of transformative appointments did indeed "set an example" which the members of the 1987 Committee managed to emulate. Just as the majority of the 1937 Committee refused to respond to Roosevelt's invocation of a "mandate from the People" by rubber-stamping his request for six transformative appointments, so too the 1987 Committee refused to rubber-stamp the President's nomination of Robert Bork. Instead, both Committees urged the Senate to make an independent judgment on the constitutional merits of the potentially transformative proposal that the President had placed before them. Rather than simply defer to the President's desires for a sharp break with existing doctrine, the Senate asserted its own authority to consider whether the President's transformative initiative deserved the considered support of We the People of the United States.

C. The Last Word

Such qualitative judgments are always controversial. The important point to recognize is that the Senate's 1987 decision by no means settled the question. The final judgment on the Bork affair will be rendered in 1988, when our representatives in Washington return to the electorate to renew and redefine their mandate. Thus, partisans of Robert Bork's constitutional vision may try to make his rejection a central issue of the forthcoming election campaign, appealing to the voters to "send a message to Washington" by defeating those Senators who were deaf to the People's demand for a repudiation of key precedents of the Burger and Warren Courts. Similarly, the Republicans may nominate a presidential candidate who makes the Bork nomination one of the central points of his campaign and promises the American people that he will continue on the transformative path marked out by President Reagan.

If the Republicans were to take this course, they might make the next election into a constitutional referendum; if they won the Presidency and the Senate after such a campaign, the next presidential effort at a transformative appointment could well meet with a rather different Senatorial reception. Indeed, in this scenario, the next President might even seek to seal his mandate from the People by renominating Robert Bork to the next vacancy on the Court. "Nobody seriously believes," he could explain, "that Robert Bork's rejection in 1987 suggested a lack of normal judicial qualifications; and now that the People have spoken more clearly in favor of the views Bork expressed at the Senate hearings, is it not appropriate to symbolize the American people's demand for constitutional change by placing Bork 'where he belonged in the first place'?"

Of course, it is perfectly possible to envision very different turns in our constitutional debate. Rather than reinvigorating their political

crusade, the supporters of Judge Bork's constitutional vision may reveal, by their own actions, that they cannot presently win a decisive popular mandate for a radical repudiation of established constitutional doctrine. In this alternate scenario, conservative activists will acquiesce in the nomination of Republican candidates for the Presidency and the Senate who refuse to focus their campaigns on the great constitutional principles ventilated at the Bork hearings, but agonize instead over marginal changes in the rate of taxation, inflation, and unemployment. Given this turn in our public dialogue, most Republicans who might win in 1988 would not return to Washington with a sense that they had received a popular mandate to reconsider the Senate's judgment on the Bork affair. Instead, they would join their Democratic colleagues in discouraging the next President from nominating superqualified conservative critics of the Court who might provoke bitter reenactments of the Bork hearings. In this alternate scenario, the personal tragedy of Robert Bork would go down in history as a marker of a *failed constitutional moment*, in which a political movement, after raising a new agenda for constitutional reform, fails to generate the kind of deep and broad support necessary to legitimate a change in the constitutional principles institutionally defended in the name of We the People.

As it is this second scenario that seems to be unfolding before us, I should emphasize that even this outcome will not forever end public controversy over the Senate's 1987 decision. Surely another time will come when some future President will capture the White House on a political program that calls into question the constitutional achievements of the recent past. Especially if she gains reelection, she will doubtless interpret her repeated political victories as a popular mandate for a fundamental break with existing legal doctrine, and will call upon the Senate to consent to some potentially transformative appointments. At that point, the precedents established in 1987, no less than those of 1937, will shape the way this presidential demand will be received, debated, and decided.

When that day comes, there is no reason to suppose that the views then expressed by the future President's superqualified nominee will have much resemblance to those of Robert Bork. Perhaps they will be far better, perhaps they will be far worse. My aim in this essay, however, has not been to criticize the merits of Bork's doctrinal views, much less to persuade you of my own. It has been to suggest that there is more to constitutional law than the doctrinal opinions held by you or me or Robert Bork. The Constitution is, first and foremost, a project in democratic self-rule, providing us with institutions and a language by which we may discriminate between the passing show of normal politics and the deeper movements in popular opinion which, after much passionate debate and institutional struggle, ultimately *earn* a democratic place in the constitutional law of a Republic com-

mitted to the rule of We the People.¹⁹ The challenge has been to locate the Bork tragedy as a part of this ongoing project in self-government, and thereby isolate an important way in which twentieth century Americans have come to differ from their predecessors in the manner they debate and decide their constitutional future. In deciding whether to authorize a sharp break with their constitutional past, today's Americans do not use only the classical system of constitutional amendment described by the rules of article V. In the aftermath of the New Deal, they also find it meaningful to participate in a presidentially-led process of debate over transformative appointments, in which the Senate becomes a crucial forum for determining the legitimacy of a sharp break with the constitutional achievements of the recent past.²⁰

V. REFORM?

Once we have grasped this fact about ourselves, we have prepared the way for some final questions. Is the practice of transformative appointments a good thing? If not, what can be done to improve matters in the future?

My own answer is that it is a bad thing, but there is no going back to the good old days when article V provided the only means by which Americans debated changes in their constitutional destiny.²¹

¹⁹ See Ackerman, *supra* note 11.

²⁰ A note of caution: it is one thing to claim, as I do here, that Bork's defeat signifies the President's *failure* to carry the People with him in his critique of the Warren and Burger Courts; it is quite another to give the Senate vote a more expansive meaning and claim that it decisively establishes that a mobilized majority of Americans *affirmatively endorse* all the constitutional principles Bork criticized.

A reference to an analogous problem arising under the classic article V process reveals the non sequitur involved in making this more ambitious claim. Consider the status of gender equality after the failure of the ERA to gain ratification by three-fourths of the states. Does the success of ERA's opponents in blocking this initiative imply that most Americans reject the principles of gender equality? Of course not. All it shows is that a movement for constitutional revision must surmount a very formidable series of hurdles before it can *earn* the authority to revise the Constitution in the name of We the People. So too here: although Reagan's constitutional initiative failed to survive the Senate, those who blocked Bork would have to make a much more elaborate argument before they could convincingly claim that the People have affirmatively endorsed the liberal constitutional principles challenged by Reagan's nominee.

What would such an argument look like? Is it plausible? If not, how should the present Supreme Court look upon cases such as *Brown*, *Reynolds*, and *Griswold* in the aftermath of Reagan's failed effort at constitutional transformation? While I believe that the general approach to the Constitution adumbrated here does provide a framework for grappling with these fundamental questions, this brief commentary is hardly the place to attempt a convincing response.

²¹ As I have suggested elsewhere, the "good old days" of article V's hegemonic sway are older than most constitutionalists recognize. Our nation's decisive break with the institutional premises of article V did not occur in the 1930's but in the 1860's. See Ackerman, *supra* note 11, at 1065-70. A forthcoming book will explore the relationship between the higher lawmaking practice of Reconstruction Republicans and New Deal Democrats at greater length.

If we wish to avoid the future abuse of transformative appointments, we should come to terms with the deeper institutional changes that have made this practice seem symbolically appropriate to twentieth century Americans. Whatever their vices, debates over transformative appointments have two important virtues. As we have seen, such appointments provide, first, a nationalistic process which allows the American people to change their fundamental law without going through the states; and, second, a mechanism that allows the Presidency to play an important role in the process by which the American people determine their constitutional destiny. These two features express two fundamental respects in which the present American understanding differs from that of the Founders. Since the Civil War, it has become clear to us that We the People of the United States exist as a nation independently of the will of the individual states. At least since the New Deal,²² it has become clear to us that a principal way in which we democratically decide our fate as a People is through the vehicle of presidential elections.

The Founders anticipated neither of these decisive changes. They feared a plebiscitarian Presidency,²³ and they knew that their fellow citizens were then unwilling to endorse unequivocally a nationalistic conception of the Union²⁴ that, a century after the Civil War, almost all of us take for granted. As a consequence, the Founders could hardly have designed a system of constitutional amendment that corresponds to the modern sense of ourselves as We the People of the *United States*, in which the debate generated by presidential elections plays a central role in the democratic determination of our national identity. The rise of transformative appointments in twentieth century constitutional practice is not some random event, unconnected to deeper changes in the modern American's relationship to the national government. We find the technique acceptable because it allows us to express the nationalistic side of our constitutional identity in a way that is unavailable to us when we follow the federalistic, assembly-led forms of article V.

And yet I think we can design a far better mechanism for expressing these nationalistic changes in our institutional identity than debating transformative appointments. When judged as a method of democratic political change, this evolving practice has three principal deficiencies. First, the debate over the constitutional principles involved in a particular transformative appointment is, almost inevita-

²² The roots of this transformation of the Presidency go back to critical decisions made by Jefferson, Jackson, Lincoln, Johnson, and Wilson. For present purposes, however, it is not absolutely necessary to look past the second Roosevelt.

²³ See J. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 52-64 (1979) (discussing the Founders' anxieties about "popular leadership").

²⁴ See *THE FEDERALIST* No. 39, at 250, 257 (J. Madison) (J. Cooke ed. 1961).

bly, poorly focused. These vital questions will often be deflected by the personal style, charisma, frailties of the individual nominee. They may be obscured by the strategic manipulation of rhetoric by both the nominee's friends and foes, to the point where it is no longer clear where the nominee is seeking to lead the Court. Contrast this potential for confusion with the classical article V system, where the partisans of constitutional change must formulate a formal amendment before they can expect a serious debate to begin. Although textual statement of principle hardly eliminates all ambiguity and confusion, it does provide a focus for democratic discussion that can be entirely lost in the swirl of bobbing-and-weaving characteristic of a Senate confirmation hearing.

Second, although the classical system is deficient in failing to provide the President with any role in the process of constitutional change, the evolving system of transformative appointment may easily give a President too weighty a role. Presidents rarely come into office with a mandate for fundamental change of the kind that Franklin Delano Roosevelt plausibly claimed in the aftermath of the elections of 1936. After all, Roosevelt had done far more during his first term than simply prepare the way for reelection. He had gained congressional support for an activist program that sharply broke with traditional constitutional principles, and had gained massive popular support despite the Old Court's eloquent constitutional critique of the New Deal's interventionist premises. If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930's.²⁵

The transformative precedents established during Roosevelt's second term, however, may be easily abused by future Presidents with far more equivocal mandates for fundamental change. So long as they can convince a bare majority of the Senate to consent to transformative appointments, constitutional law may be jolted onto a new course without persuasive institutional evidence that a mobilized majority of the American people endorse the change. Once again, compare the requirement that a bare majority of Senators consent to a transformative appointment with the kinds of institutional assent demanded by the classical system of constitutional revision. Under article V, no amendment can even be proposed in the name of the People by the Congress unless two-thirds of both Houses agree, not just a bare majority of the Senate. Even such a weighty showing of institutional support suffices only to put the proposal on the constitutional agenda; a second institutionally weighty round of debate and

²⁵ Surely the decisive majorities commanded by the New Deal Democrats in all sections of the country would have been the envy of the Reconstruction Republicans and the Founding Federalists, the two other political movements in our nation's history whose constitutional achievements were of equal magnitude.

decision is then necessary before the classical system allows a new constitutional vision to be enacted into law. In short, the modern practice seems too institutionally flimsy to give credible evidence of the existence of the deep and broad popular support classically required for a sharp break with the constitutional past.

Yet the emerging system of transformative appointment not only lacks institutional weight and legal focus remotely comparable to the classical system; it also threatens to be unacceptably elitist. Think again about article V's stipulation that our representatives in Washington may only propose amendments, and that a much more open-ended debate is required in the several states before an amendment can be ratified. While we may no longer believe that the states should always have a veto over national political change, it is still possible to design a national mechanism requiring our political elite in Washington to go to the People and make a special effort to gain general public acceptance for their constitutional proposals. The device I have in mind — the referendum — is already familiar in the constitutional practice of our states, and in many foreign nations. Properly structured, it can serve as a catalyst for the broad-ranging popular debate essential for the democratic legitimation of proposed constitutional initiatives. Although President and Congress, acting together, should be able to propose an amendment, they should not be able to gain ratification without first going to the People and gaining the specially focused and considered consent permitted by the use of the referendum device.

Legal focus; institutional weight; popular responsiveness. Perhaps these ideals can be made more concrete by proposing a constitutional amendment that seems to capture them far better than does the current practice of transformative appointment:

During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States.

I have no stake in the details of this particular proposal. I present it simply to fix ideas, allowing us to consider whether we should replace the present practice of transformative appointment with a presidentially-led mechanism closer to, but hardly identical with, the assembly-led systems handed down to us by the Founders.

Even if such a proposal were adopted, three problems of implementation would remain. First, would such an amendment really deter future Presidents from making transformative nominations? While there can be no guarantees, I think that Presidents would be

quite reluctant to provoke the principled opposition likely to arise under the changed constitutional structure. The decision to forward a Bork-like nomination to the Senate would immediately lead opponents to ask why the President did not make his transformative proposal in the far more focused, institutionally weighty, and popularly responsive context of the new amendment procedure, rather than abuse the appointment process for purposes it serves relatively poorly. It is easy for cynics to discount the political force of such "naïve" functional concerns. So long as the Republic remains in relatively good health, however, American politicians will continue to take constitutional questions seriously (if not as seriously as legalists may like).

Second, even if I am right about this, couldn't the President accomplish his transformative objectives secretly, without making nominations that symbolized this intention in the manner of the Bork nomination? After all, Presidents will still be called upon to fill vacancies on the Court. Thus, nothing prevents them from searching through the list of "solid professionals" who are not cursed by the paper record engendered by Borkian superqualification until they identify a person who wants to be a Justice so badly that he will solemnly promise the President, in the privacy of the Oval Office, that he will vote the Administration's way on a long list of issues. So long as this secret commitment is successfully disguised from the public, it will be difficult to defeat such nominations in the Senate. Thus, aren't we engaged in an exercise in futility in calumniating against transformative appointments? Won't it still be possible for the President to get his way with the Court, only now the Senate hearings will be reduced to a sham?

My answer is yes, this is a danger: *if* Presidents are so hell-bent on transformation and *if* they can find men and women who will keep their side of the bargain after they have received life tenure, there is not much that institutions can do to prevent such corrupt bargains. And yet, as Publius cautiously put it, "[t]he supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude."²⁶ Moreover, I think most of our Justices have done a fairly good job in recognizing that they owe it to themselves, as well as the American people, to try to decide cases on the basis of their conscientious interpretation of two centuries of constitutional development, and not merely serve as well-paid servants of the President who put them in office. Is there any reason to think that the future will be so much worse than the past?

Third, is it politically realistic to think that a proposal to amend article V would ever survive the obsolescent obstacle course provided by the unamended article V?

²⁶ THE FEDERALIST No. 76, at 513-14 (A. Hamilton) (J. Cooke ed. 1961).

Before we give up the idea as hopeless, consider the alternative. In the absence of an amendment to article V, history will not stand still. There will be other presidentially-led efforts to make transformative appointments, with all the risks that such efforts entail. I believe, moreover, that the American people will continue to tolerate this technique because we recognize that the President ought to be given an important role in constitutional lawmaking, and this is the only mechanism we have hit upon so far to give him this role.

If, then, we wish to undermine the practice of transformative appointment, it would be wise to take the possibility of an amendment to article V seriously, and seek to build the kind of consensus necessary to secure its ultimate adoption. In this way we may yet gain something of lasting value from the tragedy that Robert Bork has played out before us in the Bicentennial year of our Republic.