THE AMERICAN CONSTITUTION AND PUBLIC POLICY:

The Problem of Constitutional Change through the Introduction of New Overruling Law in a System of Constitutional Principle

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I

The Constitution of the United States of America was ratified nearly two hundred years ago. It grew from the failure of government and was largely a recreation of the past.

Following independence from Great Britain the former colonies established a confederated government that had the immediate and principal shortcoming of not being able to establish and to coordinate a national policy. The Articles of Confederation were noted for their inability to treat with other governments, to provide for a common defense, and to regulate exchanges among the various states. The new nation was confronted with the problem of sovereignty. The need to present a common front to other national states; the need to establish a legitimate central authority for coordinating and regulating the activities between the various state jurisdictions; and the need to superimpose national standards for exchange — the monetary and postal systems — were chief among the reasons that called the constitutional convention to Philadelphia.

The document that emerged was a constitution that provided solution, or at least amelioration, for the problems of national government. What the Articles of Confederation could not provide the new constitution did; and it did so by recreating in large measure the structure of English government as it had emerged just prior to the Hanoverian Succession and by stating

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that the new government which it created could not deviate from the structure imposed by the Constitution. The new constitution established a government of national policy that guaranteed individual rights by seeking to ground all actions of the government in certain principles that would secure those rights.

The influence of the early documents of modern constitutional government that emerged from seventeenth century England — the Petition of Right, the Declaration of Right, the Habeus Corpus Act and the Act of Settlement, to mention the most famous — is so strong in the American Constitution that much of the language is roughly similar to them. Woven into these rights were philosophical and political doctrines whose purpose it was to provide the practical, political foundation for the defense of these rights. The philosophical doctrines were those primarily associated with John Locke on natural law and natural right. The political doctrines were those associated with the "ancient constitution" that sought to secure the rights of Englishmen that had existed "time out of mind" and held in place by provision of citizenship that identified the exercise of political right with the ownership of real property. There were other influences and components as well, of course, in the construction of the new constitution, but these were the most important ones. The central feature was the doctrine of political association that linked political right to the ownership of real property. In turn, the political power that derived from property secured the free exercise of political right.

The legitimation for this arrangement, an arrangement to be secured by government in which there was separation and balance of power, came from the past. Or to put it better, the legitimation came from a denial of time itself. The rights guaranteed by the Constitution and practically protected by the power derived from property ownership were held to have always existed from "time out of mind" and were thus thought to be protected from subsequent challenge. Something fashioned yesterday could be easily brought into question by something "better" tomorrow, but something that had always existed beyond memory and out of time could be secure from the challenge of reform or the danger of abrogation.

Thus, the American Constitution is constructed of political and philosophical principles that claim political legitimacy not only by philosophical persuasion but also — and principally, I think — by their political assertion

to have always existed, fixed and unwavering. Since principles are understood to be fixed and constant, and since the theory of the origin of rights embodied in the Constitution claims its legitimacy from a past beyond memory that always was, it is probably accurate to describe both English and American constitutional law as "conservative." It claims to be good law because it is an eternal law derived from principles that are valid because they are eternal; all modification of existing legal arrangements is done in the name of the past through a "re-affirmation of the past" in that change represents a closer approximation in the management of human affairs to the propositions embodied in the fixed principle. In other words, new reforming legislation of tomorrow is better than the governing legislation of today only if it can get "closer" to the principles of the past. In this view, new law does not so much spring from the past as it is a return to the past. But new law, of course, is new law; and an examination of the process by which new law is made through the actions of courts and legislatures shows that this view, perhaps, is not the entire truth. Part of the truth, nevertheless, rests on the view that the introduction of new law into the American constitutional system depends on the past. To assert this view may also be to assert a paradox.

A similar paradox can be found in the history of Roman law. Some Roman lawyers held that the law of Rome from the time of the Twelve Tables of the Law to the growth of authoritative interpretation in the Dominate had remained faithful to the original structure of the law, even though every stone in the building of the law had been changed. This view, of course, was not true in Rome any more than it is fully true in American law, but it is the expression of a theory of political legitimacy that secures new law by identifying new law with the good, old law. It is a theory that has great practical power.

II

If, then, the law of the American Constitution and its subsequent interpretation is a law of principles, the question may be properly asked, "What are they?" What are the principles that claim to be fixed in the past that simultaneously permit the elaboration of new law according to the scheme of government and the pattern of rights stipulated in the Constitution?

Constitutional scholars have at various times identified and pointed to

many principles in the constitutional order, but, according to my understanding there are three which are most important, under which the others may be contained or subsumed.

These are:

1. the principle of liberty, individual and corporate;
2. the principle of the fundamental equality in moral dignity of all citizens in the society;
3. the principle of the supremacy of law — the rule of law.

These principles drive legislation, administrative enactments, and constitutional interpretation in modern American government; they have done so for a long time, even though they have been given different meanings and different emphasises over the course of the past two hundred years. A principal reason for the development of a government of public policy from an earlier one of national policy has been the extension of these principles in legislation and in judicial decision. I shall return to this theme somewhat later, but by "national" policy I wish to designate an earlier form of American government in which laws were formed primarily on the basis of political considerations and by "public policy" a later form in which laws have been formed not only on political considerations, but also on economic and social ones as well.

One way to understand these principles and the effect of their various interpretations on policy is to consider them as part of a constellation; they work together because together they form a pattern of government. But they do not always co-exist happily. Even though in their nature as ideal principles they may be harmonious, in their practical aspirations they are at odds with one another in their complete fulfillment or realization. In their partial fulfillment, they are often capable of effective collaboration and worthwhile co-operation. This collaboration and co-operation when it occurs, is a product of good judgment and good fortune — the product of statesmanlike actions that have reconciled larger disjunctive political forces. From time to time they are achieved.

At other times, however, when one of these principles seeks to "fulfill" itself, to achieve complete expression in practical policy, it does so at the expense of the others and can create an unhappy imbalance in the constitutional structure. Equally, the subordination of one principle to another, the

"stunting" or "harnessing" of one and forcing it, thereby, into collaboration with others represents a compromise of that principle, which is repugnant to its aspirations, and makes it impure and unsatisfactory. It follows from this subordination that the entire constellation is called into question and becomes the object of revision through political action. Even so, despite the inability of this constellation of constitutional principles to form a constant harmony, there is no element of policy that proclaims or asserts itself to be in opposition to these principles or divergent from them.

According to this view there exist some inherent antinomies not only in the simultaneous expression of constitutional principles, because of the competition among them, but also within the principle itself. For example, with respect to the first principle, it is easy to recognize that the exercise of freedom by corporations could limit the exercise of freedom by individuals. It has been said by many people that the exercise of the freedom of contract over a period of time has resulted in inequality of bargaining power between corporations and individuals, favoring the freedom of corporations. With respect to the second principle, once the proposition of equality of moral dignity is given a specific content — such as, for instance, "a basic standard of living" — that conjoins to any degree at all economic, social, and political meanings the aspiration of equality is called into doubt as the realities of inequality are better understood. Similarly, any attempt to diminish social or economic inequality through legislative reform can only be done by imposing inequality on those whose status or wealth is to be distributed. The correction of inequality in the name of equality is inequality. I am not certain this has always to be so, but it is hard to think of an exception to it in modern legislation. Perhaps one of the most difficult problems for contemporary government is a proper and complete understanding of equality, as an ideal and in its implications, followed by an application of that understanding. Finally, the conflict between the ideals of freedom and equality should be mentioned. Simultaneously providing for the possibility of these ideals has been one of the classical dilemmas of government; and the usual way of resolving the conflict by political thinkers has been to define one ideal — whichever is favored by a particular writer — in terms of the other and thereby to extinguish the conflict. The intention of such definitions is to have one ideal "revealed" or "fulfilled" by the other. But in the

world of practical politics the solution, much less the ruminations of political and legal philosophy, have not been entirely helpful in resolving the conflict between these ideals — a conflict that arises from the antimony between them.

Nonetheless, the actions of constitutional government in the United States in the original formation of a national policy may be described, according to this model, as the precipitate of the collaborative tension of these ideals. The policy of government could be said to be an implementation of the compromise of these principles, if for no other reason than that there is no element of policy that proclaims opposition to these principles. Since it does not seem possible to have full liberty with absolute equality at the same time (insofar as it has not been achieved), but since it is also possible to have continuity in government, the compromise among these principles, when viewed as a whole, may appear as harmonious with the third principle of the rule of law acting as a governor. But what appears to be a harmony of compromise of the whole, when viewed from the postion of one principle in competition with others, appears as a conflict; and where the regulatory principle of the rule of law is disturbed so, too, the harmonious arrangement may dissolve.

Indeed, the harmony of this arrangement and the worthwhileness of it have been more recently brought into question than may have been true in the past. The Constitution was constructed as a political document, for the conduct of a national policy that was devoid of such economic and social legislation as today characterizes modern welfare states. There are, certainly, contrary interpretations, but, minimally, the economic and social orders encased by the political order established by the Constitution were not the economic and social orders that presently characterize modern society.

There has been, then, a conversion in the United States dating mainly from the New Deal but having definite roots in earlier actions of government, of which the early regulation of monopoly, the growth and legal protection of organized labor, and the administration of a national tax on incomes must be reckoned as important, from a government of national policy to one of public policy. The distinction between these two types of policy is helpful in understanding the new kind of public law that has grown in the United States since the reconception of the role of government that was institutionalized in New Deal legislation as well as by the administrative

actions of the Executive Branch, an institutionalization that marked a self-conscious change of belief about the rightful role of government.

This newer form of the actions of government — public policy — is the precipitate of the collaborative tension of these principles, subjected to changing interpretation.

One of the questions before us, is whether the effects resulting from changed interpretations alter or undercut the principles (and the collaboration of them) on which the constitutional government is based and from which the newer interpretations about the rightful actions of government are derived.

III

Ultimately, the legitimacy and meaning of new law in the United States rests on the interpretation of the Constitution by the constitutional court — Supreme Court. The new law that has enabled government to create new patterns of legal actions that have so changed the public order from what it was is largely the result of change in constitutional interpretation.

This constitutional interpretation, however, is different from what is usually understood as Common Law interpretation in which courts act in some measure with regard to precedent according to a legal principle. The new public constitutional law is too different from the old law to admit a fully progressive interpretation of old law as the basis of it, even though Common Law interpretation has played a large role in bringing about that change.[1)]

1) Perhaps the best account of "Common Law interpretation" may be found in Edward H. Levi, *An Introduction to Legal Reasoning*, (Chicago: The University of Chicago Press, 1949). "Therefore, it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made," p. 3. "The emphasis should be on the process .... Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities .... Nor can it be said that the result of such a method is too uncertain to compel. The compulsion of the law is clear; the explanation is that the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works," p. 104. The problem I am working with here in the constitutional area owes much to Mr. Levi's formulation. But I am suggesting something different in the view that shifts in constitutional doctrine, at least in the United States because of the principled basis of a written Constitution, involve something more than interpretation by a "moving system of classification" that characterizes the interpretation of statutory law, even though it is through the interpretation of statutory law that shifts in constitutional doctrine are achieved.

Nor has the new law come from the deliberate creation of a new system of legal norms. Prophets, historically, are the only persons who have taken a fully dismissive approach to existing law by consciously fashioning new law. Judges do exercise judicial restraint. Even those, who from an objective point of view have been the most creative in making new bodies of law, as opposed to fundamentally "new" law, saw themselves as expounders of existing norms and principles, bound not only to those norms but also to existing techniques and methods for interpreting existing law to new situations of fact. Despite the efforts of writers on legal questions to elevate judicial behavior to an independent and normative status, the most eminent jurists, almost without exception, adhere to the view that they are not consciously creating new law. Legislators, too, have regarded the constitutional apparatus as subject to modification but not to fundamental change —— even amendments to the Constitution are regarded as extensions and clarifications of principles, or as corrections of them, not as introjections of new norms —— and have behaved towards it this way. That they believe this makes the problem of explaining fundamental change in constitutional law based on fixed principle, albeit with alterable or, if you will, interpretable meaning, more difficult.

Of course, despite the subjective view of jurists and legislators, it must be acknowledged that the present meaning of old law comes only from creating new law from old, or from interpreting old law in a new way (it is, surely, possible to have a "new" interpretation of an old law that claims to be an "old" interpretation). In the case of the United States Constitution this may be a distinction without a difference, for the present meaning of the law is known by its interpretation, whether the product of "conscious" creation or not. The claim for legitimacy of an interpretation rests on an appeal to a constitutional principle that has been transmitted from the past. It is very hard to avoid the conclusion that in a government of constitutional principle, the possibility of creating fundamentally new law, or law in conflict with a principle, whether by judges or legislators, is practically excluded. Even the power of "judicial review", the power to deny the effect of new legislation if it is held to violate a provision of a principle of the Constitution, is essentially the power to say "no" to the new because the new violates the old.

This view of a "conservative" law of principles has been recently con-

fronted, however, by a number of extremely labile interpretations of the law by the constitutional court in the United States that has resulted in a number of overturned decisions. It is very difficult to reconcile a judicial decision that overrules a previous judicial decision with a government of enduring principle, especially in constitutional matters. It does not matter if an overruling decision is taken to be created law or merely law extended by legitimate interpretation of legal concepts in the light of changing demands of the public interest, for neither view can alter the fact that an overruling decision changes the law, calls the previous interpretation into question, raises the issue of remedying claims, but most important for the discussion here, embarrasses the principle on which the previous decision was based, especially in those cases where there has not been a clear demonstration of error for appeal.

There is another matter and perhaps a more important one from the point of view of polity, that a law that changes itself frequently calls itself, its usefulness and its legitimacy, into question. Indeed, in the United States this has happened to some degree with the result that to a degree the law has become politicized. But perhaps this is inevitable in the light of an increasing number of overruling decisions. In the first one hundred fifty years of the United States' history, there were very few such judicial decisions. Likewise, in the field of legislation, there was what might be called continuity, that is, the more or less continuous application of a fixed interpretation of governmental principles into legislation, according to a more or less fixed view of what could be expected from a practical application of those principles. There are, certainly, scholars who would challenge this assertion, but it is the nature of assertions to open themselves to challenge.

In contrast, in the past fifty years, although there are notable and important examples of a somewhat earlier date, there have been a large number of overruling decisions by the constitutional court. The contrast in the number alone, comparing the earlier period with the more recent one, is a matter for instruction. Some areas, such as freedom of contract, have required more than one subsequent decision to overrule the older one. This was true in the overturning of *Lochner*. Nothing, especially, in the Constitution commanded the interpretation of *Lochner*; nor did anything especially command the opposite. But it seems possible to have found both a view and its opposite in the same document. Could this have been

the much talked about "original intention"? Indeed, if a view and its opposite co-exist, so to speak, one salient while the other is recumbent, why in time should they not be again reversed, why should not the old *Lochner* rule prevail again? If one view is really better than the other view and if the fundamental law has remained constant, why was justice not done in the first place? The same question may be asked with respect to the pairing of *Plessy vs. Ferguson* and *Brown vs. Board of Education (Topeka, Kansas)* or with respect to the recent constitutional history of the validity of capital punishment. The same question may be raised in a slightly different way by asking about the validity of the denial of early New Deal legislation by the pre-1937 Supreme Court, followed by its subsequent enactment. The actions of striking down what on the face of it appeared to be legitimate and properly enacted legislation cannot be explained, in the face of the subsequent history, by labelling the court an ideological backwater. However saurian those justices may have been, their decisions were based on quite solid views grounded in the best practices of constitutional interpretation, and the overturning of their decisions by subsequent enactment does not admit of ready explanation, especially according to tenets of distributive justice. All of these overruled decisions raise the possibility of their being subsequently overruled, an eventuality that certainly has consequences for the system of law that permits such lability.

Still, despite the discontinuities in the law that may be seen from comparing overruled with overruling decisions or sharp alterations in the course and intent of legislation, there has remained continuity in legal development to the degree that there has remained much certainty about the place of legal institutions in the larger social order and the applications of the law, because the constitution that supports these arrangements provides for a government of principles.

So, the question may be raised in light of these diverging facts — on one hand, legal phenomena that contradict themselves and cannot be reconciled in terms of the principles of constitutional law from which these phenomena are derived, and, on the other hand, the basic disposition in the American constitutional order for legal continuity — how it is possible for a constitutional document to give rise to, through the manipulation of it, such swings of meaning so wide that one decision of the con-

stitutional court may come to overrule another decision of the same court (if of different membership) in a relatively short while without severing (and apparently without disturbing too much) legal continuity. The premise here is that judicial overruling in a constitutional court must be regarded as one of the most serious actions in a constitutional order.

This is an especially perplexing question for a constitutional order that leaves no place for legal prophecy by virtue of its claim to legitimacy through the assertion of the importance of the past; and thereby, having created a government of political principle that requires public policy to be attached to and based on a constitutional principle before new law can be enacted by legislatures or newly interpreted overruling law be proclaimed by a court. While it is possible, for example, to have a law in the American government that is palpably not in the public interest in its effect, it is not possible for a public law to say it will serve only a private interest. Even the most outrageous favoring, "pork-barrel" legislation proclaims that it serves a public interest — as it might well: for it to do otherwise would violate a convention of the constitution. Still, we are confronted with a peculiar constitutional arrangement that has — and increasingly so — provided, even stimulated, its opposite result and bears, significantly, the possibility of a return to a rule similar to the first, subsequently overruled, formulation — why should one not be followed by another? — through judicial overrulings and divergences in legislation, but all held within the framework of a continuing order.

To understand this curious result in modern American constitutional law means to suggest an explanation of how a government of constitutional principle can yield, as it has, successive differing (and contradictory) answers to questions of policy, one of which by definition violates a constitutional interpretation derived from a principle that, by extension, must also to some extent violate that principle. I should like to explore how it is possible to provide two (or maybe more) conflicting interpretations of principles that themselves claim to have some meaning and also claim to be fixed, in some sense eternal and deriving legitimacy in government from this claim by returning to the model of the harmonious yet conflicting principles.

Let me give two examples of such conflict. The first is that of the conflict between the principle of freedom and that of equality with respect to property and the economic order. The second, that of the conflict

between the principle of equality and that of the rule of law, with a consideration of the potential consequences of that conflict for the principle of freedom.

IV

In the course of this century, but having strong roots in the last century, the principle of moral equality of all citizens took on a materialistic aspect. Equality was not longer exclusively understood to mean "equal before God", but came to mean equal in the senses associated with "equal protection", "equal opportunity" and a number of others that were given content by constitutional elaboration. Equal came to mean not only an equal claim to salvation in another world, the means of which should be protected by law in this world, but also a collectivistic view of social equality in which responsibility for material well-being of citizens was to be borne by collective arrangements. By definition, this state of affairs restricts individual liberty — what it does to corporate liberty is more complicated.

The historical account of the present situation is, certainly, complex, and it is not my purpose here to give historical detail, however necessary such detail may be. I wish merely to assert that in the United States the present public policy has resulted in what is called a mixed economy. The present policy for the "management" of the economy has resulted in an extraordinary melange of arrangements that affect the regulation, control, allocation, and provision not only of good and services, but also resources. The present economy — one where half of all federal expenditure consists of benefits to individuals, and for two-thirds of those benefits, the financial need of the recipient is not a factor — has become the amalgamation stemming from the attenuation of private ownership of property through the public management of property and from the imposition of tax on incomes. That is, the way to achieve the principle of moral equality in a meaningful, material way has been to impose quasi-collectivization on what were formerly private property arrangements. The way to fulfill the principle of equality was through the imposition of legal arrangements that resulted in governmental control over resources, because such control was believed to be the means to solve the problems that beset mankind. What used to be called "public ownership" has been converted to some

degree to "social ownership." The notions of "accountability" and "disclosure" have played a large role in fashioning this approach to equality. So have certain social movements, prominent among them that of "environmentalists" and "ecologists", who have held that the maintenance of the environment is the responsibility of the collectivity, because the private management of a collective good was held to be insufficient in light of the given evidence. This means that there has arisen in law a new understanding with respect to the use of property. This new understanding has converted to some degree a law that had at one time very strong arrangements for the protection of private property. In some ways, the common law as it emerged at the end of seventeenth century and was taken up by the United States was a law of real property. That this is no longer as much so is because private property was antagonistic to the principle of equality in its new "social" manifestation, even if it was friendly to the competing principle of individual liberty.

The present political situation in the United States attests to the fierceness of this competition. The debate over taxes versus the budgetary deficit, indeed the immediate discussion over the next majority leader in the United States Senate are in some measure sub-conflicts of this larger competition of constitutional principles.

In the second example I propose to consider the conflict between the principle of equality and that of the rule of law, and the potential consequences of that conflict for the ideal of freedom.

The rule of law is the limitation of government by law. It is the limitation by law of the discretion of the executive in the exercise of power over the citizen; it is also the limitation of the legislative branch by constitution and custom, by tradition and morals. The limitation of the executive to the law passed by the legislative and adjudged by the judicial entails, at once, the separation of powers. The rule of law is infringed when any one of the instances involved abdicates its autonomous function within the total system of authority or seeks so to expand it that it compromises the autonomy of another function of government. A bureaucracy which acts without reference to law infringes on the rule of law as much as on a legislature which seeks to dominate the decisions of the judiciary. A legislative body which abandons its responsibilities to the populace which has elected it diverges from the rule of law as much as does a legislative body

which renounces its constitutional powers to the executive.

The rule of law rests at bottom on the belief widely and deeply diffused throughout the society that there is an intrinsically sacred element in the law as such. The law, if the rule of law as a principle of constitutional government is to exist, must be though to be legitimate. The lawfulness of the law, its legitimacy, must be generally accepted.

This presents us with a difficulty. The principle of liberty, which includes the freedom to criticize and to suggest change, is affronted by the notion of the sacred that fixes the law and obstructs its change. Modern liberalism insists that no law should be so secure that no one can ever discuss it or challenge it, but it also acknowledges that some laws ought to be more secure and less changeable than others. Laws, by virtue of being law, should be thought to have an inherent, even if only temporary, validity.

Law is made by legislators, who, to become legislators, must also be, first, politicians. Politics is necessarily sectional; it always involves the quest of the advantage of some group, class, interest, region, coalition, etc., but above all the advantage of the party itself. Politics centers about divergent interpretations of the common good, because it involves the polemical espousal of the party's own interpretation of what is good.

These divergent interpretations, once brought into the realm of practical politics which seek the advantage of some over others, create a source of strain in any democratic system, the very constitution of which comprises some measure of dissensus. Where free discussion and criticism of the laws are possible, the preservation of fundamental agreement on certain standards and rules may be difficult.

Thus, while the institution of criticism and the competition of parties are forces engendered by the nature of the system in which the three principles of the constitutional order exist, these forces are potentially injurious to the rule of law, and more so than to the other two principles. There are, however, situations which might endanger the rule of law as a principle more seriously which arise from the accentuation of the principle of equality if it has the practical effect of enhancing political populism. These situations are intimately bound with the interpretation of the Constitution and the formation and administration of public policy.

I do not mean populism in the sense of radical rural progressivism. I mean it as a much broader political current, rather, especially prominent

in the United States historically and recently, in which the "will of the people" becomes identified with justice and morality. This is so because populism proclaimed that the will of the people as such is supreme over every other standard. Populism contains, therefore, the belief that the people are not just equal to their rulers; they are actually better than their rulers.

The mere fact of popular preference is regarded as all-determining. Emanation from the people confers validity on a policy or on the value underlying it or both. Populism does not deny ethical standards or objective validity, but it discovers them in the preferences of the people. The belief in the intrinsic and immediate validity of the popular will has direct implications for the rule of law as a principle of constitutional government. For one thing, it denies autonomy to the legislative branch of government. It favors "responsive" government over a "government of leadership." Populism demands that all institutions of government be permeated by the popular will or responsive to it — since the validity of the popular will is self-evident.

In recent times the effect of populism on the executive branch of government can be even more pronounced. Because of the vast discretionary and administrative authority that has become vested in the executive department, its responsiveness to the popular will can be swifter and its effect on the public policy quite sweeping. One has only to look at the growth of the quantity of executive orders since 1936 to see this. The pattern of the growth of executive orders is quite similar to that of overruling decisions. Franklin Roosevelt, after the failure of the court-packing plan, elevated the executive order to a new status of authority, and used it, more or less, to implement the Second New Deal. Lyndon Johnson, likewise, used the executive order for the conduct of the Vietnam conflict. For better or worse, these actions were to some degree an abrogation of earlier established constitutional arrangements.

Populistic politicians are preoccupied with opinion. They wish to conform to what appears to them to be dominant in the body of popular opinion. This principle of populism, in which the dominant opinion reigns is to some degree the condition of modern government, and to that degree it contravenes the principle of the rule of law, because it expresses a fundamental moralistic attitude that cannot tolerate ideological heterogeneity.

It is likewise suspicious of defined jurisdictions and institutional autonomy.

The principle of the rule of law is damaged when politicians and legislators abdicate or cede some of their institutional responsibilities to others, who, to gratify their desire for the approval of the popular will undercut the separation of powers and create policies especially suited for the interest of the popular will. Such conduct is a renunciation of the principle of the supremacy of law to an unrepresentative popular will. The populist politician's fear of misapprehending the will of the people guides him in his policy decisions and leads to a distored and extreme elaboration of the principle of equality in the formation of policy. But deformed though this is, this tendency — in which egalitarianism is exaggerated so far as to become an inverted inegalitarianism — is a forceful and recurrent part of American constitutionalism. In this sense the populistic tendency to hyperdemocracy through the extension of equality exerts force on all three of the fundamental principles of American constitutionalism as well as on the practical formulation of policy. The roots of this tendency lie in the distrust of politics as a legitimate activity and favor, thereby, the correction of politics by judicial action. Since the popular will is changing and changeable, "responsive" judicial action may be seen as following the popular will. Neither the tendency to hyperdemocracy nor the distrust of politics can be said to serve the principle of the rule of law, but both may help to understand why it is possible for a constitutional government of principle to provide contradictory responses to policy questions, while deriving the rationale for those responses from the same principle.

V

The first part of this discussion sought to provide a way to understand some part of the extremely variable modern constitutional law in the United States. I should like to explore now in a much more tentative and speculative way some of the implications of a law of constitutional principles that has become increasingly transformable (transformable here in the sense that it can overrule itself) in the light of expediential considerations, a law in which sociological, economic, and new ethical arguments have taken the place of older legal concepts and impaired to some degree the precision of juristic logic, while perhaps simultaneously providing a greater measure

of justice.

One of the most striking features of modern law in contrast to that of the last half of the 19th century has been the emergence of new sources of law, law in which "social factors", understood in a new way, have come to play a dominant role in the making of new law. Modern social development has given rise to a series of factors, apart from the political and internal professional motives of legal practitioners, that has weakened the older forms of legal formal rationalism.

The modern theory of legal sources has focused on the contemporary force of a statute or other piece of law by freeing law from the original intent of the "legislative will" that could be discovered through the study of the legislative history of an enactment and by disintegrating the old force of "customary law", which had acted as a source of legislative and judicial restraint. By so doing the new theory of legal sources that sees a statute in some sense as "atemporal" and subject to interpretation in the light of "social factors" has opened a way to the free balancing of values and interests in each individual case, which has in turn created a body of law that is asymmetric to other related bodies of law — as in the matter of judicial overrulings.

The course of modern constitutional interpretation has systematically opened the way for other systems of value to become incorporated into judicial decision. The findings of social science first found a place in *Muller vs. Oregon*, but they were almost co-etaneous with economic policy that found fault with monopoly and later concentration. Perhaps the most powerful engine for the introduction of extra-legal values into the law was the growth of legal Realism and the belief that "empirical investigation" accompanied by a recognition of the "true facts" would offer a happy solution to the perceived shortcoming of judicial decisions influenced by the conceptual apparatus of the law. Indeed the attack on conceptual law was accompanied by one on historical jurispudence that weakened the basis of judicial decision derived from the way things had been. Since this attack on the historical past sought to show that things had not been as the historical jurisprudents asserted, the way was opened — a vacuum was created, so to speak — for the introduction of sources of values outside of the law into the law.

By discrediting the old synthesis of the conceptual apparatus and the

basis for law that historical jurisprudence provided, the Realist-reformers also made it easier for lawyers to revise common law doctrines on a piecemeal basis in ways that might accommodate half-formed intuitions about the meaning of the new regime that resulted in the New Deal. Since traditional doctrines were now demoted to the status of working rules, it became easier to supplement, modify, and transform them whenever a Realist sense of situational justice required it. Thus the consideration doctrine came to sit, if uncomfortably, with new ideas of unconscionability: negligence, with strict liability. The multiplication of such dissonances was an occasion not for anxiety but for proud recognition of the capacity of the common law under the banner of Realist reform, to adapt pragmatically to the political repudiation of its laissez faire past. The emerging pattern of common law discourse came to resemble the new administrative discourse that had overwhelmed it. In both public and private domains, lawyers would learn to look upon organizing abstractions — be they "contract" or the "public convenience and necessity" — with considerable skepticism. The life of the law was to be found in the sensitive formation of highly particularistic rules, and in the Realist refusal to generalize those rules beyond the particular contexts that gave them meaning.

It was the "statement of the facts" by the Realist lawyers that provided the route to challenge what they had asserted. This has been done by a number of thinkers, but perhaps the most influential have been, in the near term, the economist-lawyers who have extended the paradigm of Ronald Coase's *The Problems of Social Cost*. In this formulation of a classic struggle between the farmers and the ranchers, Coase posits "zero transaction costs" which holds that both parties to the complaint were in perfect positions to predict the future consequences of their actions at a time at which they could have made cost-minimizing adjustments in their courses of conduct.

The Coasean transformation of tort law is not only important in itself; it is also symptomatic of a larger effort by lawyers to reconstruct their understanding of the "facts" throughout the length and breadth of the legal culture. This new form of factual analysis, moreover, provides a powerful impetus for legal generalizations of a kind quite different from our Realist predecessors. As the Coasean lawyer, given to complexity, states his version of the facts in more and more cases, it becomes ever

clearer that different branches of the law treat similar market failures in very different ways. "Nuisance," "products liability," and "fault", for example, now seem different common law labels for handling a complex set of interrelated problems organized by the existence of a complex variety of externalities and related market failures. Since lawyers are taught that like cases should be treated alike, this perception of factual similarity generates a cognitive drive for a new synthesis. Should not the law be reconstructed to deal responsively with the facts that the new analysis has come to reveal?

This question applies with even greater force to the disordered heap of statutory law that dominates today's legal landscape. While the previous generation could see little beyond a mass of particular statutory formulas disguising enormous administrative discretion, Coasean lawyers are quick to find that their understanding of market failure permits them a view, quite new, of the statutory terrain. Vast forests of legal detail can be reduced to manageable categories as soon as they are seen as efforts to co-ordinate a series of interrelated market failures. The ground is being prepared in short for a disciplined effort to compare and assess a broad range of responses to market failure in terms of common legal language. This major overhaul of tort law, stemming from a new way to see the facts, rests on the belief that certain economic values such as "efficiency" and "maximization" have applicability and relevance to the law. Perhaps economics is the most significant source for a change in the theory of legal sources, but it is not the only one. And all of the changes, despite their separate intellectual claims for validity, have a common root in modern politics.

VI

Since we live in a politically guaranteed legal order, the legal order reflects some of the vicissitudes of politics as well as responds to them. Not only must the law respond to political forces for substantive justice by being a balancer of interests, a calmer of claims, according to the values inherent in the new legal sources, but also the law must respond to the tendencies inherent in certain forms of political authority, either of authoritarian or of democratic character, concerning the ends of law which are

respectively appropriate to those forms of political authority. A most important aspect of the modern forms of political authority has been the rise of and increase in governmental administrative authority to "manage" the state. Bureaucratic authority is the authority of imposed regulation and discretion, and by definition discretion is arbitrary, which places it outside the ambit of the principle of the rule of law.

Moreover, the United States Constitution is an instrument fashioned for a republican form of political authority — which was understood to be something quite different from a democratic form. So, as the political structure of the United States has changed in recent years, becoming increasingly "democratized", in its claims as least, the constitutional law has been changed in ways thought to be more appropriate to this form of political authority. A feature of government that is more important in democratic forms of authority than in republican ones is increased emphasis on equality, especially "economic" and "social" equality rather than "political" equality. This emphasis coupled with the substantive claims of law for the balancing of interests has led to the "administration of equality," which however imperfectly achieved, has resulted in much greater administrative and discretionary authority than was previously the case.

From this situation have come two developments that are significant for the principles of constitutional government in the United States and for the construction of its public policy. One, as I have already suggested, is the difficulty of confronting the principle of the rule of law with discretionary authority, an authority the exercise of which in time will pose difficulties for the other two broad principles as well. It is very hard to find evidence that might contravene this indication.

The second development is concerned with the administrative domination that has come from the increase in state power. This domination is the result of expanded intrusion into areas that come from the confusion of the tenets of public policy, making the foundations of that policy much harder to discern, to understand, and to judge. When a political order of constitutional principles rubs or smears those principles into indiscernible shapes, it must be minimally recognized that a legal order has changed in ways that defy the original claims of that order.

Something of this nature has happened to the United States Constitution. And whatever one makes of this change, it has provided us anew with

the opportunity to examine an important aspect of the problem about the ends and claims of law: is a constitutionally governed system of law to balance class interests and social ideologies and to respond to changes in forms of political authority, or is it to provide political freedom through the limitation of the power of government? If the answer is affirmative to the first part of that question, if the constitutional system is to balance and to respond, than it would be worthwhile for us to examine the implications of the decline of a *garantiste* variety of constitution, implications not only for constitutional law but also for the conduct of public policy — and perhaps much else besides.