

The Nature of Law

I presented a paper on these issues at the colloquium four years ago. My argument has changed so much since then, thanks to the help I received from Tom, Ronnie, and many others¹ that I hope I'll be forgiven for the repeat—especially given that it will also provide an opportunity to continue the discussion of Dworkin on law that started on September 17. These are draft chapters from a book I am writing on the nature of law. Chapter One introduces the main question—whether moral considerations are among the grounds of law—and surveys a range of possible answers. The most important and interesting answers are “No, never” and “Yes, all the time”; these are the views I'll have in mind when I use the terms “positivism” and “nonpositivism,” respectively.

Chapter Two

Disagreement in Practical Philosophy

The dispute over the nature of law has been variously categorized as merely semantic, conceptual, factual, and as relating to law's essential attributes. My aim in this and the following chapter is to develop an account of what kind of disagreement positivists and nonpositivists have, in order to see better both why they think it matters and what the prospects for progress might be.

It is helpful to start by considering some apparently similar debates from moral and political philosophy.²

1. Mere Ambiguity

Attention to terminology can be important in legal, moral, and political argument because of the ideological use to which conceptual entrepreneurship and the exploitation of ambiguity can be put. Consider this discussion of liberty:

A person does not exercise his liberties when he kills or enslaves another; he does not vindicate his property rights when he steals from another. If he is restrained from these actions by another, he cannot claim a loss of liberty, but only the loss of an ability to act to which he was never entitled. Liberty is best understood as freedom from force or falsehood, not as a maximization of the things which are under one's disposition and control.³

Three different notions of liberty are invoked here. There is the "moralized" idea of liberty as freedom to do what you like so long as you do not violate certain rights,⁴ the classical negative liberty of freedom from force, and a notion of positive liberty as maximization of things under one's control. What is important in this passage is the insinuation that the first two of these are equivalent, standing together against the rejected idea of positive liberty. Traditionally understood, negative liberty is interfered with by the enforcement of the rights and other legitimate claims people may have, and so it is unsuitable for libertarian slogans such as "liberty can be limited only for the sake of liberty." For that, the moralized conception of liberty is more suitable. But "Freedom from force and fraud" sounds more stirring as a rallying cry than: "Freedom from force except where force is necessary to enforce the legitimate claims of other people." Also, the latter dangerously opens up space for argument about just what the legitimate claims

of others are. So it is clear why a libertarian author might try to keep both of these ideas in the air at the same time, appealing to one or the other as the rhetorical demands of his argument require. And it is important for the critic to point out that there are different ideas or kinds of liberty being invoked, that the differences are important, and so on.

But what doesn't seem important for arguments about libertarianism and for political philosophy generally is to settle what liberty, as opposed to some other possible political value, *really* is. Isaiah Berlin was right to describe "liberty" as a "protean word."⁵ We can make sense of each of the three values, debate their relative significance, and the connections between them. As a rhetorical matter, invocations of some of them may be more susceptible to demagogic abuse than others,⁶ and the very fact that there are these different but closely related (possible) values, all labeled "liberty," opens up the space for sleights of hand. So some may wish that a word of such historical significance were properly associated with but the one value. Certainly politicians and activists have reason to wish that in the public sphere it becomes associated exclusively with their own views. It is also a substantive and worthwhile project to ask what which notion of liberty people in a particular period of political history in a particular place have had in mind. Constant's 1816 essay comparing the liberty of the ancients and the liberty of the moderns is about something real and important and discussions of this sort are entirely familiar in the history of philosophy.

But what doesn't seem plausible is to insist that there is but the one liberty and that there is an important philosophical disagreement to be had about just what the contours of that value are. All the important philosophical and normative issues remain if we always specify more precisely which value—liberty as lack of interference, liberty as

autonomy or self-actualization, liberty as respect for and enforcement of some list of rights, liberty as freedom from domination, and so on—we mean to be discussing.⁷ That these are different potential values is perfectly clear to everyone and the contours of these values seem clear enough; argument over which one really deserves the splendid label “liberty” seems inevitably just strategic, aimed at rhetorical advantage. It is hard to see a substantive dispute here.

2. Basic Disagreement: Democracy and the Rule of Law

The case of democracy seems different. Arguments about what democracy really is do not seem so obviously empty. This is because there isn't a well-recognized range of fairly clear accounts of different ideals for governance that we imagine people might have in mind when they talk about what is democratic, and what is not. Debates about what democracy really is seem, on the face of it, to be substantive debates about the content of the same ideal, not just strategic arguments to claim a politically powerful word for their own cause (though there is some of that).

There's a good amount of agreement about what democracy is. A democracy is a system of governance where the people rule, in some sense. The people rule, rather than, say, a monarch, or an oligarchy, or a political party. Though some insist that there is no democracy without substantive equality, pretty much all agree that rule by philosopher kings who aim at securing equality is not democratic. Nor was the German Democratic Republic democratic, despite the fact that the use of the label in 1949 to claim the anti-fascist tradition in German history was understandable, as a political gambit. So there is

some level of agreement about the features all democracies share. Beyond that, there is disagreement, and some of it seems intractable. Is any derogation from majority rule a derogation of democracy? Is judicial review of legislation democratic? Is democracy possible in a society of gross social and economic inequality? It isn't obvious that there is any *argument*, other than the degenerate "Yes it is, No it isn't" variety,⁸ that can have any traction with this disagreement.⁹

Take Dworkin's discussion of democracy in *Freedom's Law*.¹⁰ The argument there is that most people mistakenly associate democracy with majoritarian institutions. He makes the compelling point that if we believe that because we believe that what is central to democracy is self-governance, we need to recognize that there are substantive preconditions of equality that would have to be met in a society before it could rightly be said to be governing itself through majoritarian institutions. But supposing that I am convinced by this argument that majoritarian institutions are not necessarily valuable (because they have value only in circumstances of equality where they can provide the means of community self-governance) that may not in the least shake my sense that a system that lacks majoritarian institutions, though it aims at creating the circumstances of equality that would make majoritarian institutions valuable, is not (yet) democratic at all.

In the case of liberty, I said that disputes about whether liberty as autonomy or liberty as noninterference (and so on) was the *real* liberty were not substantive, but merely instrumental, with the end being a rhetorical payoff. Disputes about whether democracy is compatible with derogation from majority rule, by contrast, do seem substantive. There does seem to be a single ideal up for discussion, and people really do disagree about its content. Nonetheless, it doesn't seem to me that any progress is likely

with this disagreement because though it is substantive, it does not seem to be responsive to substantive argument. I will call disagreements of this kind *basic disagreements*. I believe that there are quite a few basic disagreements in moral and political philosophy, and I think that the disagreement about the nature of law is basic in this way as well.

Obviously more needs to be said about the idea of a basic disagreement; that there can be genuine substantive disagreements that are not responsive to substantive argument may seem implausible. But an initial question is whether anything turns, for political philosophy, on this disagreement about the nature of democracy. Of course, this kind of disagreement can provide a space for instrumental argument similar to that we observed for the case of liberty. Everyone wants their own preferred ideal of governance to be thought of as democratic, and it is important to be aware that disagreement about the main features of democracies may open up space for rhetorical maneuvering.¹¹ So it is important that we are aware of this disagreement; and there's a practical reason why it would be better if we didn't disagree. Apart from that, however, it also just does seem to matter what democracy is. Political theorists naturally have an interest in knowing what the central features of this ideal of governance are. It even seems somehow embarrassing that we apparently don't already know. Even if we don't already know how important democracy is, relative to other values, you'd think we would already know what it is.

But our interest in knowing the nature of democracy is, I believe, purely theoretical in the sense that it isn't necessary for us to have a view about this before offering a theory of legitimate or just government. It is the possible contribution of democracy to legitimacy that gives debates over what democracy is their main

importance. Debates over judicial review are best understood as debates about whether constitutional arrangements that include this feature are more or less legitimate, or otherwise choiceworthy, than arrangements which lack it. This is the important question of political philosophy that “democratic theory” can make a contribution to, and we don’t need to resolve disagreement about the nature of democracy in order to make progress with it. We can continue our discussion by talking about the values of self-governance, political voice and political liberty, the epistemic or instrumental value of majority voting, noting also the possibility that none of these things will secure equality or the protection of minority and other rights, and so on.

That we can continue discussion of what matters most in democratic theory without discussing democracy as such might suggest that there is, after all, no substantive issue here.¹² But that’s not right. There is a substantive question here: What is democracy? And the response, “Which of the following political systems do you have in mind?” is not apt. Unlike the case of liberty, we are not here disputing merely over which tolerably well understood ideal deserves the label. We agree that there is a single ideal and disagree about its content. The dispute is substantive, all right; it’s just that, though it is very important for an understanding of actual political argument to be aware that the disagreement exists, it isn’t, in the end, so very important to resolve it.

Take next the ideal of the rule of law. On most people’s understanding, the rule of law is a political ideal that stands opposed to arbitrary and personal rule. As Jeremy Waldron puts it, the general aspiration is that of “the law being in charge,”¹³ and a debate is then to be had about how that might be possible and what the best form of government through law might be. Most of us think of the rule of law as an ideal that can be satisfied

though the content of the law is grievously unjust or otherwise bad, and also that satisfaction of the ideal does not guarantee legitimacy. For us, that's the whole point of this ideal; it sets out the conditions under which a system of governance by law can achieve a distinctive good—distinct from justice and legitimacy—just in virtue of being that kind of system of governance.¹⁴ But others, especially in recent years, associate the ideal with a particular substantive content to law—for example robust private property rights, or that which will in fact justify the use of force in the law's name.¹⁵

Disagreement about the right way to characterize the rule of law is not a disagreement about the weight of some well-understood value relative to others, but disagreement about the content of the ideal itself. Once again, I believe that much of this disagreement is basic.

This is a substantive disagreement that might seem to matter an enormous amount. Not just legal theorists and political philosophers but also politicians and development economists tell us that we should promote the rule of law.¹⁶ But there are, as we've seen, two ways in which this kind of dispute can matter. It is obviously essential, in the case of the rule of law, to be aware of the different implications attached to this ideal by different people. Here the risk of ideological sleights of hand are even more evident than in the case of discussions of liberty and democracy. Some claims about free markets and the rule of law should obviously be ignored because they are avowedly made in bad faith.¹⁷ But it is a fairly well-established minority view that the entire discourse of the rule of law is hopelessly ideological and so the only sensible thing to do is stop talking about it altogether.¹⁸

The second way the disagreement can matter is that it would be good to make progress with it, because it relates to an important question, something we'd like to know the answer to. It seems clear that the dispute matters in this second way, as well—it's just that the first way in which it matters seems to dominate, and so there is perhaps good practical reason for simply agreeing not to talk about the rule of law anymore, casting our discussions of the conditions under which governance by law can achieve a distinctive kind of value in other terms. It's not that nothing would be lost if we never debated the content of the ideal of the rule of law; I think that something would be lost. But we would still be able to talk about the values promoted by procedural fairness, effective enforcement, the separations of powers, and so on. And we would liberate ourselves from the tiresome need always to check just what particular set of values an economist, politician, or political theorist is hoping to slip by us by using a label we all associate with only good things.

3. Identifying Basic Disagreement: Justice and Wrongness

A basic disagreement is one that is resistant to argument, in a strong sense. What I have in mind emerges most clearly when we look to two other normative ideas, those of justice and wrongness.

In the opening pages of *A Theory of Justice*, Rawls writes:

The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role.¹⁹

This is Rawls's version of Hart's idea that all accounts of justice tell us to treat like cases alike, while different accounts of justice vary in their criteria for likeness.²⁰ Rawls and Hart held that so much is fixed by the very concept of justice. As I will argue in section 5, this is, for practical purposes at any rate, equivalent to saying that there is thus far basic agreement about what justice is. Neither took the claim to be controversial or requiring any kind of argument in its defense. What they were doing, in effect, was setting the parameters within which they believed all substantive argument about what justice requires would take place.

Of course, it is possible to disagree with Hart and Rawls about those parameters, or to offer more restrictive ones. Take the issue of whether it is unjust that most residents of the countries of the "global North" enjoy high levels of welfare while very many residents of the global South live in desperate poverty. Some believe that this is a grave injustice while others argue that, though the world's rich have humanitarian obligations to the world's poor, the situation can not accurately be described as unjust.

Here is how a conversation could go. There are three characters, the Cosmopolitan, the Constrained Humanitarian, and the Statist.

Cosmopolitan: Economic justice in the domestic case requires that we so order our social institutions to promote overall social welfare, paying more attention, crucially, to the interests of those who are worse off. This a modified version of the utilitarian principle, in that it holds that benefits to worse off people matter more than benefits to better off people. Classical utilitarianism may not take the distinction between persons seriously, and so not provide a plausible criterion of justice, but this "weighted beneficence"

criterion is not subject to that objection. In addition to being concerned about absolute levels of welfare, however, a just society will also be concerned with relative levels, and so will have the reduction of inequality as an independent aim. So far domestic justice. The next step is easy. Since national boundaries are irrelevant to our collective obligations to address absolute and relative deprivation, it is unjust if our national and international institutions fail to satisfy these obligations globally. It's obvious that this is so in the current world and that there is massive global injustice, on both counts.

Constrained Humanitarian: I agree with you about weighted beneficence being a requirement of domestic justice. But I don't accept the general moral importance of economic equality in the strict sense that looks to relative levels of welfare. Equality of that kind matters only when we are talking about matters of status, such as race and sex. I also don't agree that the step from a domestic obligation of weighted beneficence to a global one is easy. The moral requirement that the interests of others be promoted is stronger, the closer the ties between the people in question. I hold that, once we are talking about strangers who are not even conationals, we have no obligations of beneficence, only a duty not to harm and perhaps a duty to rescue (for example when we come across a foreign stranger drowning in a shallow pond.) So there is no global injustice.

Statist: First, I quite agree with Cosmopolitan that state boundaries are irrelevant to obligations of humanity, or beneficence. If our concern is with people's welfare just in virtue of their humanity, how could the borders matter? Second, you are both wrong that domestic justice has anything to do with obligations of beneficence. Economic justice is concerned solely with relative levels of welfare.²¹ Third, Cosmopolitan is wrong that the

requirement of equality, the concern with relative levels of welfare, applies independently of state boundaries. In fact, that requirement only arises in virtue of common membership in a single political community. So there is no global injustice.²²

In this little debate, all the disagreement is substantive, it is about something. But some of it is basic and some of it is not—that is, substantive argument is available to pursue some of the disputes, but not others. The argument about whether humanitarian duties are linked to associative ties of various kinds is clearly a substantive moral argument.²³

There is a lot that the two sides can say to each other. (“You agree that ties of family and friendship are relevant to the strength our responsibility for others’ welfare, don’t you?” And so on.) The argument about whether there is any moral significance to the mere fact of relative levels of welfare is also substantive. (“You can see that relative levels don’t matter in themselves from the fact that we aren’t concerned about inequality once everyone is pretty well off. Of course, if men generally are better off than women, that would matter, even if the women were well off. But that’s different. Maybe also relative levels matter with a family. But not generally, across humanity.” And so on.) And if someone wants to defend the idea that relative levels of welfare matter in themselves, it does seem plausible to tie this with some kind of associative bond, on the model of the family, so there’s substantive argument to be had about the significance of citizenship in this regard.

So far, substantive argument. But what does Statist say to Cosmopolitan in defense of his claim that *justice* is not concerned with absolute levels of welfare, only

relative levels? As far as I can see, all he can say is that that's just what justice is. To which the only possible reply would be, "No it isn't. Not necessarily."

As with the examples of democracy and the rule of law, this last dispute is substantive—the question is what justice requires. But it is a basic dispute, not responsive to genuine argument. And once again, though this situation needs to be taken into account as we keep an eye on political rhetoric, the fact that there is a basic disagreement here doesn't seem to me to matter very much. We want to know what the obligations of individuals, collectives, and governments are, domestic and international. And we can discuss all that without discussing justice—which is good, since there isn't enough basic agreement about justice to allow further productive argument on the question of global justice.

Turning next to wrongness, I think that basic disagreement about wrongness is pretty rare, at least at any high level of generality. There are some considered judgments about particular cases that seem immune to any kind of argument, but most of us tend to agree about what those are. And when it comes to broader principles, substantive argument never seems to run out. Or almost never. Consider someone who believes that the only consideration that is relevant to determining right and wrong conduct is the impact on aggregate welfare. Starting from this statement, there should be a lot to say by way of continuing the argument. The nonutilitarian points out that on the utilitarian view, it's hard to see why it would not be morally all right to kill one person to distribute his organs and save five lives. If the utilitarian responds by saying that this is, in fact, all right because it would maximize welfare, the debate could still continue because the opponent would continue to produce reasons that count against the view that welfare is

all the matters morally. Human rights, for example, are not easily explained in welfarist terms. And what about the fact that it seems almost absurd to say that we are all morally required to continue trying to benefit others, whomever and wherever, up to the point where the cost to us would equal the benefit to the others? This substantive argument could go on forever, or at least for an entire career. But suppose that, at some point, the utilitarian says: “But look, you keep bringing up all these irrelevant considerations. Maybe things that are not wrong have other things to be said against them. And maybe it’s ridiculous to think we should never act wrongly. But I’m talking about right and wrong, and that *is* what will or will not maximize welfare.” If that happens, we know that substantive debate has come to an end. Though some economists seem almost to have this frame of mind, I think that basic disagreement of this kind is not at all widespread.

That’s fortunate, since basic disagreement about right and wrong would matter a lot. It’s not just that we need to be on the look out for rhetorical sleights of hand. The important thing is that there’s nothing else we can talk about, other than wrongness, so that substantive argument can continue. Democracy, the rule of law, and justice, aren’t nothing, just wheels spinning on their own; we do lose something when we continue our substantive argument by talking about different things. But those different things are closely related to the ideals we have left to one side, and not much of practical moral significance, at any rate, seems to be lost. In the case of wrongness, there is nowhere else to go.²⁴

The trouble with law, as we’ll see in the next chapter, is that we can’t substitute close enough disagreements for disagreement about law either. Here too we have

nowhere else to go, but basic disagreement is rife. This is why the debate about the nature of law has seemed so intractable—because it is.

4. *Legal Texts*

I have said that basic disagreement often doesn't matter that much, since we can continue the argument by discussing other, closely related values. If we are not doing political theory but instead interpreting legal texts, our constraints are obviously different. Article 7 of the Canadian *Charter of Rights and Freedoms* provides that

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

An interpreter of this text will have to make judgments about what liberty and justice are. Neither requesting clarification about which value “liberty” is meant to pick out, nor sidestepping an investigation of what justice is, are options. But while the constraints are different when justice and the rest are invoked in legal texts, the resources are richer as well. If the interpreter is a judge, and the legal system follows a principle of stare decisis, either explicitly or implicitly, past decisions will narrow the scope for basic disagreement considerably. And if it is a case of first impression, or the clause in question is not apt for adjudication by a court, there are other resources to be found in the best theory of interpretation for that legal system. Legislative history, for example, or its equivalent in the constitutional context, might appropriately be consulted to narrow the range of

plausible options. It is a consequence of these differences that justice or liberty in the legal context may turn out to be rather different ideals than they are outside that context. This is not news, of course—we need think only of the ideals of due process and equal protection in the context of U.S. constitutional law.

5. Basic Disagreement and Concepts

I have said a basic disagreement is a real disagreement that is nonetheless not responsive to substantive argument. There is something that we are disagreeing about when we either affirm or deny that departures from majority rule are or are not democratic, but we don't seem to have any further resources to appeal to which could take the argument further.

Many, especially legal philosophers, would reject this characterization of the standoff. What we are facing, in their view, is disagreement about the content of the concept of democracy. Progress is therefore possible so long as we have the right account of how to resolve conceptual disagreement; the appearance of a basic disagreement is therefore an illusion caused by a failure to understand the nature of the dispute.

What would it take to show that these disputes are properly understood as conceptual, rather than disagreements about the nature of democracy, and so on? It is true that the dispute about the nature of law, at any rate, has traditionally been understood as a dispute about conceptual content, and this certainly can seem a natural way to frame the matter. If we think of concepts as marking out the category of thing we are

discussing, laying out the scope of the subject before us, then the basic disagreement I discussed about justice, for example, is easily understood as a conceptual dispute.²⁵ To me, however, it now seems more natural to think in terms of what justice, democracy, or law are or are not, rather than about the contents of the concepts of justice, democracy, or law. When we run into basic disagreement we no longer have sufficient agreement for further substantive discussion about these values to be possible. This account of what is going on has the advantage of allowing us to avoid questions about where you draw the boundary between the conceptual and the descriptive, and about whether we presuppose that there is a philosophically significant distinction to be drawn between analytic and synthetic claims. Of course, these advantages are not enough to establish that it is not appropriate to think of these disputes as conceptual. But in the end I don't believe we have to settle which way of framing the debate is correct, since for the purposes of my inquiry, it really doesn't matter. In either case, the conclusion will be the same: a point will be reached at which further substantive argument is no longer available.

To test this, let us imagine that the debate is about the contents of the concepts of democracy and the rest, not about the proper accounts of the values themselves. There are several familiar methods for pursuing the analysis of concepts, each of them importantly different from the others. They nonetheless all share a central feature: at the foundations, they depend upon intuitive reactions about the proper application of the concept in particular cases. These intuitions about correct usage now seem to me to be just basic judgments about what these ideals require. But whether or not there is a philosophical distinction between truths of meaning and descriptive truths, whether or not we can distinguish sensibly between intuitions about correct usage and basic judgments

about the nature of the thing the concept picks out, in either case we end up in the same place if there is disagreement: we seem to be disagreeing about something, but we have nothing left to say in defense of our different beliefs. And there is disagreement, whichever way we approach the matter.

Is this legless thing that carries people up mountains a chair? Is a speed limit the kind of thing that could be just or unjust? Is a country where less than half of the population votes in national elections a democracy? Can I be free if I have nothing to eat? Is this striped, vicious marsupial a tiger?

The traditional way of analyzing concepts used answers to well-posed questions such as these as the data from which to build a list of necessary and sufficient conditions for correct application of the concept. In recognition of the difficulty of finding such a list, there is the alternative of seeking a “cluster” of defeasible descriptions (of whatever the concept is a concept of) explicit or implicit knowledge of which would suffice for mastery of the concept. Legal philosophers have tended to follow Nicos Stavropoulos in referring to these approaches as “criterialism.”²⁶ Rawls’s account of the concept of justice, that justice is that department of political morality concerned with the distribution of benefits and burdens, is criterialist in this sense though it is, of course, a minimal account.

The main rival approach that legal philosophers have been attracted to is the “causal-historical” approach that ties the reference of a term to the nature of the thing in the world that was first given that label. This view is supported by thought experiments such as Hilary Putnam’s question about whether a substance on “Twin Earth” that satisfied all the descriptions we on earth commonly associate with water, but which had a

chemical structure other than H₂O, would be successfully referred to in the utterance of “water” by an earthling.²⁷ The correct intuitive response is supposed to be No, and this is the basis of the idea that the extension of the concept of water is fixed by the nature of the thing (as discovered by science) called water by the first user of the term and those who followed him, not by any cluster of beliefs ordinary people have about water. Most philosophers seem to share Putnam’s intuitions here whenever the concept concerns a “natural kind.” But not all do, and non philosophers are apparently divided on the matter.²⁸

It seems to me that the causal-historical approach to the political concepts I have been discussing doesn’t get off the ground. This approach requires for its support intuitions about cases just as much as the criterialist approach.²⁹ But is hard to think of the right kind of example, since there is not, for the case of democracy and the rest, the same plausibility to the distinction between underlying structure or essence and superficial description that the examples concerning natural kinds turn on. We don’t have even a tentative account of the essence of democracy that is sufficiently distinct from a folk description to serve the purpose that molecular structure does. But suppose it were plausible to believe that descriptive political theory, “at the end of enquiry,” would produce an account of the essential nature of different systems of government. Suppose, in other words, that the problem here is just the poor state of contemporary political theory. Then support for the causal-historical theory could come from a more abstract or theoretical kind of intuition—an intuition that the extension of the concept of democracy is to be found by uncovering the nature of those systems of government to which the term “democracy” has been applied in a causal chain since the initial baptism—where

that nature may have nothing to do with the kinds of beliefs that guide people in their day to day use of the term. The trouble is that this is an intuition that is not shared, neither among philosophers nor ordinary folk. This is hardly surprising, when we consider just how far our ideas about the system of government “democracy” picks out differ from those of the ancient Greeks.³⁰

By contrast, the criterialist approach does get off the ground, since reflection on these political concepts will yield some criteria, at least of a negative kind (an absolute monarchy is not a democracy). But when it comes to the questions that really matter, such as whether derogation of majority rule is, to that extent, a derogation of democracy (a question that might be approached by asking people whether a system of Parliamentary sovereignty is more democratic than one with judicial review), we will get no agreement and that will be the end of the matter.

It is to this situation that both Dworkin and Raz respond by offering methods of conceptual inquiry that mix the descriptive and the normative. Raz’s “normative-explanatory” account of the concept of authority is normative in the sense that it takes a stand on substantive issues that have been contested in the “philosophical and political traditions of our culture”; so there is no claim that to know how to apply the concept of authority without error is implicitly to believe Raz’s theory. But the account is also meant to be explanatory in that it is “an attempt to make explicit elements of our common traditions” which singles out “important features of people’s conception of authority.”³¹ For Raz, the normative and explanatory aspects of his theory together amount to “a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture.” The idea here is that brute disagreement about usage is not the

end of the matter—substantive argument can continue in the form of moral argument about what legitimate authority would look like. And yet we remain engaged in the project of understanding the concept we all share, in order better to understand ourselves.³²

Dworkin insists that “conceptual analysis that does not involve normative judgment, assumptions or reasoning”³³ is not part of constructive political philosophy. The main concepts of political theory, such as those we have been discussing, should be seen, in his view, as “interpretive concepts”: concepts whose deep structure can be revealed only by a constructive interpretation of the practice in which the concept finds a place. Such an interpretation aims to find a point to the practice, and to characterize the value picked out by the concept in its best light. In effect we settle disagreements about what democracy really is by arguing about what it is about democracies that is worth having. Since this process is normative—it is, in fact, doing political philosophy—we can expect to come up with a correct or best account.

The problem with these mixed methods is that, like every other method of conceptual analysis, they are hostage to convergence in intuitions about particular cases—here what we need are intuitions that can support the generalization that the proper application of these concepts is whatever application that emerges from a political theory about the values they pick out. Dworkin believes that we have such convergence. Or rather, he asserts that we actually have convergence at the more abstract level: we all already agree that these concepts are interpretive concepts in his sense. If that’s right, we don’t have to uncover or construct that agreement by generalizing from reactions to particular cases.³⁴ My response to this is hardly deep—it’s just that I think that there is

no agreement, either directly evident or derivable from the way we react to particular cases, that the right way to figure out the content of the concepts of democracy or authority is to engage in substantive political argument.

The point to emphasize from this discussion is that all accounts of the meaning or the extension of particular concepts will in the end need to be grounded in intuitions about proper usage. When we disagree, at that level, there is nowhere for us to go. This is exactly the position I have described as a basic disagreement. If I am told that the right way to figure out whether democracy is compatible with judicial review is to construct a political theory that will present the best (the philosophically and morally best) version of the aspirations we have associated with democracy, my reaction is simply that this doesn't seem right to me. That might be a good way, or part of a good way, to develop a theory of legitimacy, or the most choiceworthy system of government. But that wasn't my question. My question was what democracy is.

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² Following Dworkin.

³ Richard Epstein, "Causation and Corrective Justice: A Reply to Two Critics," *Journal of Legal Studies* 8 (1979): 489.

⁴ For discussion of libertarians' use of "moralized" accounts of liberty, see G.A. Cohen, "Capitalism, Freedom and the Proletariat," in *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, ed. Alan Ryan (1979), 9.

⁵ Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty*, 121 (1969).

⁶ This seems to be the main concern Berlin had about the concept of positive liberty. See his Introduction to *Four Essays on Liberty*, p. ix.

⁷ Chalmers calls this the "subscript gambit."

⁸ On the question of whether this kind of thing really is an argument, see the Monty Python Argument Sketch:

--An argument isn't just contradiction.

--It can be.

--No it can't. An argument is a connected series of statements intended to establish a proposition.
 --No it isn't.
 --Yes it is! It's not just contradiction.
 --Look, if I argue with you, I must take up a contrary position.
 --Yes, but that's not just saying 'No it isn't.'
 --Yes it is!
 --No it isn't!
 --Yes it is!
 --Argument is an intellectual process. Contradiction is just the automatic gainsaying of any statement the other person makes.
 --No it isn't.
 --It is.

⁹ See Scanlon, last pages of appendix on Williams on reason, on where argument about what kinds of reason for action there are runs out.

¹⁰ *Freedom's Law* (1996), 1-35.

¹¹ See John Dunn, *Democracy: A History*: "Why should it be this word that has won the verbal competition for ultimate political commendation across the globe" (15).

¹² In Chalmers' terms, it may therefore seem that disagreement about democracy is merely terminological. But I don't think so. To continue in his terms: I think we have here reached what he calls "bedrock." But not all bedrock disputes are responsive to substantive argument, and not all of them are important.

¹³ "Is the Rule of Law an Essentially Contested Concept?" 157

¹⁴ See Raz, "The Rule of Law and Its Virtue" in *The Authority of Law* (1979).

¹⁵ See Waldron's discussion of "the view under consideration" in "Legislation and the Rule of Law"; Dworkin, *Law's Empire, Justice in Robes, A Matter of Principle*.

¹⁶ Waldron, *The Concept and the Rule of Law; Legislation and the Rule of Law*; Kevin Davis.

¹⁷ World Bank, "Rule of Law as a Goal of Development Policy": "The main advantage of the substantive version of the rule of law is the explicit equation of the rule of law with something normatively good and desirable. The rule of law is good in this case because it is defined as such. This is appealing, first because the subjective judgment is made explicit rather than hidden in formal criteria, and, second, because the phrase 'rule of law' has acquired such a strong positive connotation." Quoted in Waldron.

¹⁸ Shklar, others.

¹⁹ John Rawls, *A Theory of Justice* (rev. ed., 1999), 9.

²⁰ *The Concept of Law*, 159-160.

²¹ "Humanitarian duties hold in virtue of the absolute rather than the relative level of need of the people we are in a position to help. Justice, by contrast, is concerned with the relations between the conditions of different classes of people, and the causes of inequality between them." Nagel, "The Problem of Global Justice," 33.

²² Nagel, Dworkin, Rawls.

²³ See Scheffler, *Boundaries and Allegiances*.

²⁴ In Chalmers' scheme, we have reached bedrock; our vocabulary is exhausted. I think that we reach bedrock with democracy, justice, and the rule of law as well. There remain substantive questions to be asked about these things. But I agree with Chalmers on the main point. In the other cases, though not that of wrongness, a substantive conversation can continue that covers most of what matters without discussing democracy, the rule of law, and justice. But that's not so for wrongness.

²⁵ Cite Frank Jackson

²⁶ Nicos Stavropoulos, *Objectivity in Law* (1996), 2.

²⁷ Hilary Putnam, "The Meaning of 'Meaning,'" in *Mind, Language, and Reality* (1975), 215.

²⁸ For discussion of divergent intuitions about this kind of thing, see Jonathan Weinberg et al., "Normativity and Epistemic Intuitions," *Philosophical Topics* 29 (2001): 429-; Gabriel M. A. Segal, "Reference, Causal Powers, Externalist Intuitions and Unicorns," in Richard Schantz, ed., *The Externalist Challenge* (2004): 329-. My own reaction, for what it's worth, is that I have no confident intuition one way or the other about this case. Saul Kripke's examples concerning biological kinds are more approachable; for example, we are invited to agree with him that a reptile that looks just like a tiger is not in fact a tiger

and wasn't one even before we had developed our modern biological taxonomy.²⁸ I find Kripke's invitation resistible, at least when I think about real cases rather than hypothetical ones. The thylacine, now extinct, was first called a Tasmanian tiger because of his stripes. Later it was considered more correct to call him a Tasmanian wolf, because he did, in fact, look and act a lot like a wolf. Biologically speaking, the thylacine was no more a wolf than a tiger since he was a marsupial. But then there is, it seems to me, a broad sense of "wolf" where it is perfectly reasonable to distinguish between placental and marsupial wolves. My intuition here is that the broad sense of "wolf" was always there—it did not get coined for the first time when someone first saw wolf-like marsupials; but I'm sure many disagree with that.

So even for terms referring to things that might be thought to have a scientific "essence," the intuitions supporting the causal-historical account of reference are, I think, unstable and therefore cannot be the basis of a refutation of a criterialist approach for such concepts. It is therefore perplexing that some philosophers appear to believe that intuitions about natural kind concepts support the rejection of a criterialist approach to *any* concept, and so too to such politically significant concepts as that of the cruel and unusual (David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy & Public Affairs* 17 (1988): 105) and law (Jules L. Coleman and Ori Simchen, "Law", *Legal Theory* 9 (2003): 1-.)

²⁹ See Jackson, 31-42; Fodor; J. L. Mackie, "What is De Re Modality?", *Journal of Philosophy* 71 (1974): 551-.

³⁰ Dunn, *Democracy*.

³¹ Raz, *The Morality of Freedom*, 63, 65. For discussion, see Murphy, "Razian Concepts."

³² On Raz and self-understanding, see, for example, "Law, Authority, and Morality," x

³³ Justice in Robes

³⁴ Justice in Robes, p.