

## Is the Rule of Law an Essentially Contested Concept (in Florida)?

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### 1. The Florida Debacle

There was something for everyone in the events surrounding the counting and recounting of ballots in Florida in the 2000 U.S. presidential election. (I shall use the phrase “the Florida debacle” to refer to those events, from the day of the election to the parties’ acceptance of the decision of the U.S. Supreme Court on December 12, 2000.)<sup>1</sup> For legal and political philosophers, one item of particular interest was the constant reference in public appeals of almost all the participants to the venerable ideal we call “the Rule of Law.”

The references were legion, and often at odds with one another. This was true of every phase of the debacle. Those who criticized Florida Secretary of State Katherine Harris said that her evidently partisan role in certifying the Florida result undermined the Rule of Law, while her supporters cited her decisions as examples of the Rule of Law, since she was exercising a discretion established by existing legal rules.<sup>2</sup> Harris herself, when she certified George W. Bush as the winner in Florida by 537 votes told the nation that “[t]he true victor in the Florida election is the rule of law.”<sup>3</sup>

When the Florida Supreme Court decided to allow recounting to proceed, both majority and dissenters on the court cited the Rule of Law in laying out the basis of their respective determinations.<sup>4</sup> Some commentators decried the court’s decisions as antithetical to the rule of law;<sup>5</sup> others said it struck

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<sup>1</sup>Bush v. Gore 531 U.S. 98 (2000).

<sup>2</sup>Lars-Erik Nelson, “Taking White House by Force,” Daily News (New York), November 16, 2000, p. 5: “Worst of all, this disputed election may never be decided by the rule of law. Bush’s younger brother, Jeb, is the governor of Florida. Harris, his campaign co-chairwoman, has the authority to certify the election results for him.” See also the following Bush campaign filing with Florida Supreme Court, reported by AP Online (November 19, 2000): “The secretary of state’s conduct was reasoned and reasonable, and was perfectly consistent with (indeed, mandated by) the laws of Florida. This court’s own cases therefore require it to defer to the secretary’s judgment. In these heated circumstances, when so much is at stake for the state and nation, it is essential for this court and all public officials to be faithful to the rule of law.”

<sup>3</sup>Katherine Harris, as quoted in The Arizona Republic (November 27, 2000). Later, at the end of the debacle, Harris added this: “As the tumult subsides, we affirm once again the wisdom of our founding fathers in creating the rule of law which spans generations” (as quoted in the Sun-Sentinel (Fort Lauderdale), December 19, 2000).

<sup>4</sup>See Gore v. Harris 772 So.2d 1243 (2000) at 1272 (per Harding J., dissenting): “We are a nation of laws, and we have survived and prospered as a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.” See also the response of the majority, *ibid.*, p. 1261 n21 (per curiam):

The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

<sup>5</sup>E.g. Thomas Sowell, in The Detroit News (November 27, 2000): “[T]he Florida Supreme Court has a history of usurping powers belonging to other branches of government. Now they have given us a civics lesson in corruption - how the use of arbitrary power from the judicial bench can even determine who becomes president. But we have gotten used to judicial

a fair balance among the rights of the candidates, the voters and the prerogatives of elected officials: "The written opinions of these judges give comfort to those who cherish the rule of law and stand in sharp contrast to the shrill and combative tenor of the public debate between the two campaigns and their supporters."<sup>6</sup> Those who sought legislative intervention from Tallahassee thought it was necessary in order to restore the Rule of Law in Florida, which they said had been undermined by the courts; while those who opposed legislative intervention thought the Rule of Law required legislators at least to wait for a final decision by the U.S. Supreme Court.<sup>7</sup>

When their turn came, the decisions of the U.S. Supreme Court attracted deference and anticipation, and praise and reproach, on this score. The decision on December 4 to "vacate and remand" the Florida courts' authorization of more recounts was described by Cass Sunstein as "a triumph for ... the rule of law" (on account of its modesty, its narrowness, even its unanimity).<sup>8</sup> And looking forward on December 10 to the Court's next decision, David Boies said the Gore legal team would abide by whatever the Supreme Court ruled:

It may be a decision based on the rule of law that we agree with, it may be a decision based on the rule of law that we disagree with, but it will be based on the rule of law.<sup>9</sup>

If it meant anything, Boies's tautology seemed to mean that he thought a Supreme Court decision either way would serve the Rule of Law, more or less by definition. That, however, was not the view of some members of the Supreme Court minority on December 12. The words of Justice Stevens, in dissent, have become legendary:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.<sup>10</sup>

Vice President Gore took the high line that public criticism of the courts was precluded by the Rule of Law.<sup>11</sup> Yet plainly, many on his side thought that in the circumstances they could do nothing better for

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despotism, and some even confuse the fiat of judges with the rule of law - which is the real danger for the future of this country."

<sup>6</sup>Gerald F. Uelman and James M. Fischer, "Courts Offer the Best Hope for Vote Outcome," Los Angeles Times, November 19, 2000.

<sup>7</sup>"[Florida] State lawmakers yesterday surged closer to a historic intervention ... when House and Senate committees approved their own slate of electors loyal to George W. Bush. Republican lawmakers say they're fulfilling a constitutional duty to make sure that Florida is represented when the Electoral College meets.... But House Democratic leader Lois Frankel warned her GOP colleagues not to ... 'take matters into its own hands.' 'Please respect the rule of law,' Frankel pleaded. 'We don't know what the courts are going to do.'"(Boston Herald, December 12, 2000.)

<sup>8</sup>Cass Sunstein, as quoted in the Pittsburgh Post-Gazette (December 10, 2000).

<sup>9</sup>David Boies, as quoted in the New York Daily News (December 10, 2000).

<sup>10</sup>531 U.S. 98, at 128-9. See also Breyer J. in dissent, *ibid.* at 157-8.

<sup>11</sup>"The vice president told aides that whatever the Supreme Court decided, they should not criticize the justices. 'He has made it clear to everyone that we are going to respect the rule of law and [give] due deference to our judicial process,' said a Gore spokesman. (Chicago Tribune, December 13, 2000).

the Rule of Law than to condemn the majority's decision as shameful. Herman Schwarz told the readers of The Nation that "[t]he rule of law has taken a terrific beating from the Supreme Court" and that "[basic principles of adjudication have been trampled on,"<sup>12</sup> while Jeffrey Rosen wrote in The New Republic that the majority in Bush v Gore "have made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor."<sup>13</sup> Other commentators dismissed all this as "over-heated."<sup>14</sup> I particularly liked columnist Jack Kilpatrick's response:

The Supreme Court was damaged, but the court was not disgraced. The electoral machinery sputtered, but finally it performed. Our constitutional house is not falling. In this hectic period many things were said that should have been slept on. ... Did the court's opinion truly make it "impossible" for citizens to sustain "any kind of faith" in the rule of law? Professor Rosen is very young. When I was his age I was denouncing the high court for its usurpation of power in the school desegregation cases. There is something to be said for growing old.<sup>15</sup>

Still, even with the assistance of Kilpatrick's weary stoicism, it was hard to avoid a sense that the stakes were high in the Florida debacle, and that the ideal we call "rule of law" was one of those stakes. Certainly it was hard to avoid talking about it in the aftermath of Bush v. Gore. It was just all over the place. It was not the only political ideal at stake in the dispute. Naturally there was also a great deal of talk about democracy. But just because law and law-suits were involved in every phase of the debacle, it was inevitable that the Rule-of-Law card would be played by the parties whenever it suited them.

## 2. Analytic Confusion

As political philosophers we like to keep our armory of concepts in good shape; that's why we devote so much energy to the analysis and clarification of terms like "liberty," "justice," and "law." So there are bound to be alarm-bells ringing in analytic circles when a term like "the Rule of Law" is invoked so frequently on so many sides of so many issues in a fraught political debacle.

We know, of course, that common usage of a loaded term like the "Rule of Law" does not necessarily reflect careful philosophical analysis, and that good analysis can survive a rather loose fit with ordinary usage. Still, there must be some connection. Philosophical analysis of an important term cannot afford to distance itself too much from the use of that term on the streets: otherwise the analysis is not the analysis of anything interesting, from a political point of view. On the other hand, if street-level use is completely confused, we may have no alternative but to pronounce the term meaningless. That is, it may turn out to be impossible to say what any use of the term implies or is implied by, or what it presupposes or is presupposed by; its protean usage may make it nothing more than a site for equivocation. At that stage, the best we could do would be to substitute for it a well-defined technical

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<sup>12</sup>The Nation, January 1, 2001.

<sup>13</sup>Jeffery Rosen, "The Supreme Court Commits Suicide," The New Republic, December 25, 2000. Other liberal commentators took much the same line. "[T]his is not the rule of law: it is the rule of subjective sensibility," said Akil Amar in "The Supreme Court: Should We Trust Judges?" Los Angeles Times, December 17, 2000. See also Frank I. Michelman, "Suspicion, or the New Prince," University of Chicago Law Review, 68 (2001), 679, at 688: "All told, then, the Bush v. Gore majority pressed ahead in apparent disregard for some obvious and weighty institutional counterindications. In doing so, they may have caused injury to public confidence ... in the Court's supposed special guardianship of the rule of law."

<sup>14</sup>See, e.g., Richard A. Epstein, "'In Such Manner as the Legislature Thereof May Direct': The Outcome in Bush v. Gore Defended," University of Chicago Law Review, 68 (2001), 613.

<sup>15</sup>Jack Kilpatrick, in Deseret News (December 25, 2000)

term, which will serve us for analytic and theoretical purposes.<sup>16</sup> The technical term might be a homonym of the ordinary language term. But the ordinary language term, with its confused and confusing meanings, will in fact have been relegated to the realm of street-level rhetoric; and serious philosophers will have forgotten about it.<sup>17</sup>

Even before Florida, a number of theorists had come close to a conclusion along these lines so far as “the Rule of Law” was concerned. Judith Shklar’s verdict was perhaps the most severe:

It would not be very difficult to show that the phrase “the Rule of Law” has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.<sup>18</sup>

On Shklar’s account, “the Rule of Law” is just an empty slogan, useful perhaps as decoration for whatever else one wants to assert in a political dispute, but incapable of driving one’s argument very much further forward than the argument could have driven on its own. Our experience of its use in the Florida debacle might seem to reinforce that position. “The Rule of Law” sounded grand, certainly; but at the end of the day, many will have formed the impression that the utterance of those magic words meant precious little more than “Hooray for our side!”

Joseph Raz has noted a tendency to use “the Rule of Law” as a general stand-in for everything nice one could ever want to say about a political system, or everything good one could want from it. “Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.”<sup>19</sup> He cited the use of the phrase in a report emerging from a 1959 meeting of the International Congress of Jurists, which defined it by invoking “just about every political ideal which has found support in any part of the globe during the post-war years.”<sup>20</sup> Raz observed acidly:

If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to believe ... that good should triumph.<sup>21</sup>

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<sup>16</sup>For a defense of this approach, see Felix Oppenheim, Political Concepts: a Reconstruction (Oxford: Basil Blackwell, 1981), pp. 177 ff.

<sup>17</sup>Of course the strategy of replacement and relegation often doesn’t work. Well-defined technical terms hardly ever succeed in replacing the loose usage they are intended to supersede. Since the two terms - the loosely used term of ordinary language and the theorist’s well-defined “replacement” - co-exist, the theorist’s use of the newly-defined technical term will have to be attended with constant reminders that it is not to be confused with its promiscuous and disorderly twin on the streets. Moreover, there is seldom ever just one technical stipulation: usually there are dozens, each put forward by a well-meaning philosopher hoping to clear up ordinary usage. The result is a situation among theorists which is often as confused and equivocal in its way as the situation on the streets. See further Jeremy Waldron, “Vagueness in Law and Language: Some Philosophical Issues,” California Law Review, 82 (1994), 509, at pp. 524-5.

<sup>18</sup>Judith N. Shklar, “Political Theory and the Rule of Law,” in Allan C. Hutcheson and Patrick Monahan (eds.) The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987). p. 1. (This is reprinted in Judith N. Shklar, Political Thought and Political Thinkers, ed. Stanley Hoffman (Chicago: University of Chicago Press, 1998), at p. 21.)

<sup>19</sup>Joseph Raz, “The Rule of Law and its Virtue,” in his collection The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979), at p. 210.

<sup>20</sup>*Ibid.*, p. 211.

<sup>21</sup>*Idem.*

Raz, however, does not despair of the phrase. He maintains that it once did have a meaning that was more determinate than this, and he sets out in his essay to retrieve or reconstruct that more specific meaning. I shall examine the detail of the specific meaning Raz attributes to “the Rule of Law” in section 6. For the time being, however, we shall leave him with Judith Shklar in the camp of those who are sad but not surprised that the term is available for such indiscriminate use in a situation like the Florida debacle.

Should we accept their diagnosis? I wonder. Raz and Shklar both write as though “the Rule of Law” once had a clear meaning, but now lamentably it has lost it, through misuse occasioned by well-meaning but muddled enthusiasm. This lamentation over lost clarity is a common trope in the rhetoric of philosophical analysis. But it is usually a myth. The terms whose ordinary usage we now deplore as confused, the terms that we accuse our contemporaries of misusing, have almost always been perplexing. Although numerous attempts have been made to pin them down with clear definitions, or precisely because of this, they have presented themselves throughout their history as sites for contestation as to what counts as their proper use.<sup>22</sup> They have always resisted the analyst’s corral.

### 3. A History of Contestation

“The Rule of Law” is no exception. Both in its origins and in its application to early-modern and modern political institutions, its content and implications have been uncertain and controversial.<sup>23</sup> Let me give a few examples.

As early as the fourth century B.C., we have Aristotle hesitating on the implications that the Rule of Law might have for the use of rules in politically fraught situations. On the one hand, he says in the Rhetoric that as many matters as possible must be settled in advance by general rules.<sup>24</sup> On the other hand, he says in the Politics that for hard cases, the Rule of Law consists in a legal specification of the individual or group that must take personal responsibility for the decision. (For those cases, said Aristotle, the law controls the decision indirectly by controlling the process of appointment and basis on which appointees are educated.)<sup>25</sup> We have him saying, too, in the Nichomachean Ethics, that if there are likely to be many hard cases, then the law should adopt a less rigid rule.<sup>26</sup> These hesitations in Aristotle’s account mean that, although he’s generally regarded as the founder of our Rule-of-Law tradition, no one quite knows what to draw from him. “I stand with Aristotle, then - which is a pretty good place to stand,” wrote Justice Scalia in an article published more than ten years before his

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<sup>22</sup>The best example is the controversy about the proper use of “rights.” For a fine account of the long historical pedigree of our modern disputes and confusions about what it means to say that someone has a right, see Richard Tuck, Natural Rights Theories: their Origin and Development (Cambridge: Cambridge University Press, 1979).

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<sup>24</sup>Aristotle, On Rhetoric, trans. George A. Kennedy (Oxford: Oxford University Press, 1991), p. 31 (Bk. I, Ch. ii, 1354a.): “It is highly appropriate for well-enacted laws to define everything as exactly as possible and for as little as possible to be left to the judges....”

<sup>25</sup>Aristotle, The Politics, ed. Stephen Everson (Cambridge: Cambridge University Press, 1988), p. 78 (Bk. III, Ch. xvi, 1287a): “...it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. We thus arrive at law; for an order of succession implies law. ... [T]here may indeed be cases which the law seems unable to determine, but ... the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgment.”

<sup>26</sup>Aristotle, Nichomachean Ethics, translated by Sir David Ross (London: Oxford University Press, 1954), p. 133 (Bk. V, Ch. 10, 1137b): “For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid....”

controversial intervention in Bush v. Gore.<sup>27</sup> But what Scalia draws from Aristotle - “Allocate as little personal discretion to judges as possible” - is different from what a jurist like Lawrence Solum draws from him - “Have faith in the virtue of the judiciary” - and different again from the conclusions of a formalist philosopher like Ernest Weinrib - “Trust the immanent reason of the common law.”<sup>28</sup> Again, Aristotle is famous for his rather mystical observation that “the law is reason unaffected by desire”:

[He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.<sup>29</sup>

But this means different things in the hands of those who equate law with reason and those who see law as the opposite of individual judgement. If law is reason, then legal structures must facilitate the exercise of reason, and that means trusting human discretion to be reasonable in certain circumstances.<sup>30</sup> From this point of view, the last thing you want is to be hedged around with rigid rules, for rules are necessarily arbitrary compared to the reasonable pursuit of the goals that underlie them.<sup>31</sup> On the other hand, the very same passage from Aristotle seems to support something like Scalia’s case for determinate rules: unless a rule operates like a machine to exclude individual judgement, there is always a danger that individual passion or purpose - “the element of the beast” - will creep back into political decision-making.

Such perplexities have helped lay the foundation for enduring controversy about whether judge-made law is to be regarded as the epitome of the Rule of Law or as part of the problem that the Rule of Law is supposed to solve.<sup>32</sup> The concern about judicial legislation is a hardy perennial. We hear the concern in Montesquieu’s insistence that where the judge becomes the law-maker, “the life and liberty of the subject [are] exposed to arbitrary control.”<sup>33</sup> We hear it too in Jeremy Bentham’s invective against the law made by “Judge & Co.”

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<sup>27</sup> Antonin Scalia, “The Rule of Law as a Law of Rules,” University of Chicago Law Review, 56 (1989) 1175, at p. 1182.

<sup>28</sup> Lawrence B. Solum, “Equity and the Rule of Law,” in Ian Shapiro (ed.) Nomos XXXVI: The Rule of Law (New York: New York University Press, 1994) 120; Ernest Weinrib, “The Intelligibility of the Rule of Law,” in Hutcheson and Monahan, supra note 18, 59, at p.63.

<sup>29</sup> Aristotle, Politics, supra note 25, p. 78 (Bk. III, Ch. xvi, 1287a).

<sup>30</sup> “Liberals think the Rule of Law should be aligned with the rule of reason. You take a law and then ask how reasonable people would interpret it.” - Richard Fallon, as quoted by Steven Thomma, in “Rule of Law or Rule of the People?” The Philadelphia Inquirer (December 12, 2000).

<sup>31</sup> For the inherent arbitrariness of rules, see Duncan Kennedy, “Form and Substance in Private Law Adjudication,” Harvard Law Review, 89 (1976) 1685, at p. 1689.

<sup>32</sup> Legal historian A.W.B. Simpson tells the story of what he says must have been “a rather slack day” in the Court of Common Pleas in 1345: “[C]ounsel raised the question of how courts should discharge their function under the Rule of Law, arguing that if they did not do as they had done in the past nobody would know what the law was. This provoked a judge called Hilary ... to tell him what the law was: ‘It is the will of the justices.’ Stonore, another judge, was obviously rather shocked by this, and emphatically contradicted him: ‘Not at all; law is reason.’” - See A.W.B. Simpson, Invitation to Law (Oxford: Blackwell, 1988) p. 189. (I am obliged to Carl W. Herstein, “Real Property,” Wayne Law Review, 46 (2000) 1037, at p. 1042n, for this reference.)

<sup>33</sup> Montesquieu, The Spirit of the Laws (1748), ed. Anne Cohler, Basia Miller and Harold Stone (Cambridge: Cambridge University Press, 1989), p. 157. (Bk. 11, Ch. 6)

When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do ... they lie by till he has done something which they say he should not have done, and then they hang him for it.<sup>34</sup>

And we hear echos of it in Robert Cover's attack on "jurispathic courts"<sup>35</sup> and in Lon Fuller's nervous concession that common-law decision-making seems to partake of the retroactivity prohibited by his "internal morality of law."<sup>36</sup>

We hear a version of it, too, in Thomas Hobbes's insistence that rule by judges is just another form of sovereignty, an argument Hobbes thinks shows the hopelessness of the liberal position that a sovereign can be bound by law:

A fourth opinion, repugnant to the nature of a Common-wealth is this: That he that hath the Sovereign Power is subject to the Civill Lawes. ... Which error, because it setteth the Lawes above the Sovereign, setteth also a Judge above him, and a Power to punish him; which is to make a new Sovereign; and again for the same reason a third to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth.<sup>37</sup>

On this logic, either you have a final human authority or you do not. If you do, then all talk of being ruled by the law is fatuous, whether or not the final authority wears a wig and sits in a court. There must always be somebody - not some text but some body - who has the final word.

The attempt to find a way around this absolutist logic is what exercised generations of jurists after Hobbes - from Harrington's republicanism, through the liberalism of Locke, Montesquieu and the Federalists, to the Victorian paradoxes of Albert Venn Dicey's attempt to reconcile parliamentary sovereignty and the Rule of Law.<sup>38</sup> It remains with us today in the United States as we swing uneasily between the position that the Rule of Law positively requires that the Supreme Court have the final say in any constitutional crisis, and the position that judicial supremacy is as offensive to the Rule of Law as any other form of unreviewable hegemony in a constitutional regime.

As with judicial authority, so with lawyers and litigation. Again the Rule-of-Law heritage is riddled with antinomies. Alexis de Tocqueville paid tribute, famously, to the disproportionate involvement of lawyers in American public life, believing that this protected the Rule of Law against the sort of impetuous reformism that always threatened to destabilize it

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<sup>34</sup>Jeremy Bentham, in a manuscript cited by Gerald J. Postema, Bentham and the Common Law Tradition (Oxford: Clarendon Press, 1986), p. 277. See also Jeremy Bentham, Of Laws in General, edited by H.L.A. Hart (London: Athlone Press, 1970), pp. 152-3 and 184 ff.

<sup>35</sup>Robert M. Cover, "Nomos and Narrative," Harvard Law Review, 97 (1983) 4, at pp. \_\_\_

<sup>36</sup>Lon L. Fuller, The Morality of Law, Revised Edition (New Haven: Yale University Press, 1969), pp. 56-7.

<sup>37</sup>Thomas Hobbes, Leviathan (1651), ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 224 (Ch. 29).

<sup>38</sup>James Harrington, The Commonwealth of Oceana (1656) ed. by J.G.A. Pocock (Cambridge: Cambridge University Press, 1992), pp. 8ff.; John Locke, Two Treatises of Government (1689) ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), pp. 326-30 (II, paragraphs 89-94); Montesquieu, *supra* note 33, at pp. 154 ff. (Bk. 11, Chs. 2-6); James Madison, Alexander Hamilton and John Jay, The Federalist Papers (1787-8), ed. Isaac Kramnick (Harmondsworth: Penguin Books, 1987), pp. 318-22 and 436-42 (Numbers 51 by Madison and 78 by Hamilton); and A.V. Dicey, Introduction to the Study of the Law of the Constitution (1886), (Indianapolis: Liberty Classics, 1982), pp. 268-73.

Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.<sup>39</sup>

For others, however, litigators are the enemy, their livelihood depending (in the words of Edmund Burke) upon whatever rendered property or other institutions “questionable, ambiguous, and insecure,” as they struggle to find loopholes in the rules set down by society for the ambition or greed of their clients. Nothing permanent, said Burke, nothing with the stability normally connoted by the Rule of Law, could ever be expected from such men.<sup>40</sup> Accordingly, the use of litigation as a strategy for influencing and determining public outcomes may be seen at the same time as subservience to the ideal of legality and as the very thing that threatens to undermine it.

#### **4. Rule-of-Law Issues in Florida**

These uncertainties as to what the Rule of Law consists in - litigation or self-restraint, judicial supremacy or judicial deference, rules or standards, mechanical judgment or reasoned discretion - are not just a matter of intellectual history. They are there waiting to crop up whenever a political system goes into crisis or controversy along any of these dimensions. And when you think about it, the Florida debacle was a natural ground for the airing of these disputes. What was at stake was the most powerful office an individual can occupy in the United States, perhaps in the world. This office is allocated by indirect election on the basis of an extraordinarily complicated set of rules relating the democratic expression of individual preferences to political outcomes, with further layers of relatively untested rules as back-up should the first echelon of rules prove unsatisfactory. With these high stakes - power and democracy - the interpretation of the back-up rules was thrown in doubt, and the issue was litigated and came before the courts. Since the courts have a political complexion in the United States, the issue very quickly reduced itself to this: who controls (or what are the political allegiances of those who control) the laws that are supposed to control the allocation of the most powerful office in the land? No better ground for exploring the traditional antinomies of the Rule of Law can possibly be imagined.

Moreover, when we look at the way in which the Rule of Law was invoked in the Florida debacle, we find that it was invoked in ways that were precisely calculated to raise these central issues. The rival invocations of the Rule of Law were not just a matter of “‘tis!” and “‘tisn’t!” in regard to the legitimacy of each particular decision. They weren’t simply products of legal or political disagreement about what specific laws or precedents required, with one side thinking that a particular provision of Florida electoral law required X while the other side thought it required or permitted not-X. They involved wholesale, not just retail disagreement about what the Rule of Law required. Quite apart from the meaning of any particular text or precedent or doctrine, there was disagreement among participants and commentators in Florida in four general areas: (i) the exercise of official discretion by partisan actors, (ii) the governance of discretion by vague or indeterminate standards, (iii) the parties’ recourse to litigation, (iv) the role of courts in resolving substantive disputes. In each of these four areas, there were some who thought the practice in question was the epitome of the Rule of Law and some who thought it was the antithesis of the rule of Law.

Let me go through these in turn. (i) Some participants and commentators believed that an exercise of discretion could certainly count as a fine example of the Rule of Law, provided the discretion was legally vested in the person purporting to exercise it. But aspects of American state

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<sup>39</sup>Alexis De Tocqueville, Democracy in America, ed. Alan Ryan (London: Everyman, 1994), Vol. I, p. 273 (Ch. xvi).

<sup>40</sup>Edmund Burke, Reflections on the Revolution in France ed. Conor Cruise O’Brien (Harmondsworth: Penguin Books, 1968), p. 131.



practice cast serious doubt on this in the context of the Florida debacle. It is common in the United States for official positions to be held by political appointees, people appointed precisely on account of their political partisanship. That such a partisan should be the one entrusted with discretion to certify an electoral result is problematic, to say the least, from the point of view of anyone interested in the outcome being determined by law rather than by the political clout of the parties. (Similar worries were expressed, too, about the appointments background of the various judges who intervened in the case: the Democratic credentials of the Florida Supreme Court majority, and the conservative credentials of the hardest-line members of the US. Supreme Court majority in Bush v. Gore.)

(ii) Apart from the question of who exercises discretion, there was also controversy about the way in which discretion is exercised. Discretion can be tightly bound by rules, so that the official is required to exercise it in one way if certain facts are present - "a chad hanging by one corner" - and another way if other facts are present. Or the discretion may be more loosely governed by requiring the official to make a judgement about some factor - "the intention of the voter" - on which opinions may differ. Many who criticized the Florida Supreme Court's empowerment of ballot-counters thought that in the absence of clear rules to govern the vote-counting, any legal authorization of discretion was itself antithetical to the Rule of Law. On this view, the Rule of Law is supposed to supersede the role of human discretion; though, as we have seen, there is also a view that the Rule of Law is supposed to frame the exercise of reasoned judgment and furnish it with an aura of legality.

(iii) Even the recourse of the parties to litigation could be viewed as a consummation of the Rule of Law or as its opposite. "Gore and Lieberman are exercising their legal ... right to contest the messiest election result in memory," wrote commentator Michael Kramer. And he went on: "The way out of chaos is through the Rule of Law, and that means seeking any court in a storm."<sup>41</sup> That's one view of the matter, and for the other we have James Baker's suggestion (as early as November 27) that an attempt to prolong litigation is contrary to Rule-of-Law values: "At some point the Rule of Law must prevail and the lawyers must go home."<sup>42</sup> From the latter perspective, persistent litigation is like a gambler insisting on rolling the dice again and again, hoping against hope that blind fate will yield a random decision in his favor. But from the former perspective, litigation is essential to the Rule of Law: the entitlement to litigate embodies the law's respect for each individual, and litigation is the adversarial institution we use to ensure that all legal issues are addressed, one by one, and that layers of legal accountability are respected. To count litigation as something contrary to the Rule of Law whenever it exasperates us is simply to display the temperamental limits of our allegiance to the ideal.

(iv) Some thought that the resolution of any issue counted as the Rule of Law provided it was done by through the hierarchy of courts. Earlier I quoted Gore counsel David Boies, anticipating what turned out to be the final decision by the U.S. Supreme Court: "It may be a decision based on the rule of law that we agree with, it may be a decision based on the rule of law that we disagree with, but it will be based on the rule of law."<sup>43</sup> Yet others evidently thought that the autonomy and unaccountability of judges was precisely the sort of problem that the Rule of Law ideal was supposed to confront. On the former view, a court deciding an issue is the same as that issue being decided as law. Of course it is possible that the courts may get the law wrong; but short of the fantasy that the laws themselves might rear up and render their own objective decision, this is the most that the Rule of Law could possibly entail. Realistically - according to this view - the Rule of Law consists in issues being settled by ponderous legal processes, procedures of deliberation and reason-giving that are focused on antecedent legal materials rather than political advantage, and in a form of deference on the part of the contesting parties that is motivated by the stake they have, along with their fellow citizens, in the integrity of the legal and constitutional order.

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<sup>41</sup>Michael Kramer, in The New York Daily News (November 27, 2000)

<sup>42</sup>The Atlanta Constitution (November 27, 2000)

<sup>43</sup>David Boies, as quoted in the New York Daily News (December 10, 2000).

On the latter view, by contrast, there is always the danger that judges are taking advantage of the power and authority of their office to make themselves into the very autocrats whose rule the Rule of Law is supposed to supersede. On both sides in the Florida debacle, criticism of judicial decision-making resonated with what is now a settled feature of American political culture - the suspicion that judges are elevating their own morality or their own political preferences above the law of the land. We want the rule of laws, not men, say most Americans, and “men” includes judges.<sup>44</sup>

### 5. What does “Essentially Contested” Mean?

As I have said, these antinomies are not new. Whether the antagonists in Florida knew it or not, they are in fact aspects of a venerable heritage of contestation that comes down to us as part and parcel of the Rule-of-Law tradition. The fact that “the Rule of Law” has always evoked this contestation has led some to surmise that an old article by a linguistic philosopher, W.B. Gallie, entitled “Essentially Contested Concepts” might afford the most fruitful basis for approaching the analysis of the term.<sup>45</sup> The suggestion was made in 1997 by Richard Fallon:

The Rule of Law is what some philosophers have called an “essentially contestable concept”: it has evaluative as well as descriptive elements, and its correct application cannot be fixed simply by appeal to ordinary usage. In more concrete terms, the “true,” “best,” or “preferred” meaning of the Rule of Law depends on the resolution of contestable normative issues; disagreements are therefore to be expected.<sup>46</sup>

W.B. Gallie’s claim was that there are certain concepts “the proper use of which inevitably involves endless disputes about their proper uses on the part of their users,”<sup>47</sup> and Fallon thought this might be a helpful basis for thinking about the Rule of Law. I think he is right, and I think his suggestion has the advantage over Raz’s diagnosis - mentioned above, at the end of section 2 - that it does not require us to contrast present confusion with historical clarity. If the Rule of Law is essentially contested, then it has always been contested; contestation is part of what it (essentially) is, and it is Raz who is making the mistake of attributing to it a determinacy that it does not and cannot have. To sustain this suggestion, however, I need to say more than Fallon said about what essential contestability amounts to; and at the end of the paper I also want to ask what a philosopher’s diagnosis of “essential contestability” can tell us about the use of the concept in question on the streets, for example on the streets of the Florida counties where these issues were fought out.

Professor Fallon did not say much more than I have quoted about the general idea of “essential contestability.” Most of his article was devoted to a dissection of various rival conceptions of the Rule of Law. But more does need to be said, because “essentially contested concept” is a phrase plainly vulnerable to overuse. In his original paper, Gallie suggested that it might help us understand debates about democracy, art, and Christianity. In political theory, the idea has been used also to analyze power, interests and freedom.<sup>48</sup> But in the law review literature, the use of the term has run wild. A Westlaw

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<sup>44</sup>See the discussion in Ronald Dworkin, “Political Judges and the Rule of Law” in his collection A Matter of Principle (Cambridge: Harvard University Press, 1985), 9.

<sup>45</sup>W.B. Gallie, “Essentially Contested Concepts,” Proceedings of the Aristotlean Society, 56 (1955-56) 167.

<sup>46</sup>Richard Fallon, “‘The Rule of Law’ as a Concept in Constitutional Discourse,” Columbia Law Review, 97 (1997) 1, at p. 6. (There was an earlier hint of this suggestion also in Margaret Jane Radin, “Reconsidering the Rule of Law,” Boston University Law Review, 69 (1989) 781.)

<sup>47</sup>Gallie, *supra* note 45, at p. 169.

<sup>48</sup>See William E. Connolly, The Terms of Political Discourse (Lexington, Mass.: D.C. Heath, 1974); Steven Lukes, Power: A Radical View (London: Macmillan, 1974); Christine Swanton, Freedom: a Coherence Theory (Indianapolis: Hackett, 1992).

check reveals that the following have been described as “essentially contested concepts,” with more or less cursory reference to Gallie’s analysis:

alienation, autonomy, author, bankruptcy, boycott, citizenship, civil rights, coherence, community, competition, the Constitution, corruption, culture, discrimination, diversity, equality, equal protection, freedom, harm, justification, liberalism, merit, motherhood, the national interest, nature, popular sovereignty, pornography, power, privacy, property, proportionality, prosperity, prostitution, public interest, punishment, reasonable expectations, religion, republicanism, rights, sovereignty, speech, sustainable development, and textuality.

Much of this material uses “essentially contested” to mean something like “very hotly contested, with no resolution in sight.” But in Gallie’s article, “essentially” is not just an intensifier.

One way of getting at Gallie’s idea is to say that the term “essentially” refers to the location of the disagreement or indeterminacy: it is contestation at the core, not just at the borderlines or penumbra of a concept. We all know about vagueness and legal indeterminacy based on vagueness: some things are green, some are blue; but on the borderlines there are blue/green cases of uncertainty.<sup>49</sup> This and allied phenomena like “open texture” are quite familiar in jurisprudence.<sup>50</sup> By contrast, a concept such as democracy evokes disagreement not only about marginal cases (say, Kuwait or Malaysia) but also about paradigm or core cases. For some the United States is a paradigm or core case of democracy: if it is not a democracy nothing is. For others, the U.S. is not a good paradigm, not only because of things like low voter-turnout, lack of proportional representation, and compromises with various aristocratic ideals (like judicial review), but also because it lacks important features of social democracy - the empowerment, in something more than merely formal terms, of the worst-off members of society. The disagreement between those who define democracy purely in terms of formal electoral arrangements and those who insist on a social element cannot be understood using the model of vagueness or open-texture. It is disagreement about the core or essence of the concept; and thus it seems to indicate that democracy might be described as an essentially contested concept.

Even this, though, doesn’t quite capture Gallie’s idea: it misses the element of value or normativity associated with this contestation-to-the-core. The key to Gallie’s idea of essential contestability seems to be a combination of normativity and complexity: only normative concepts with a certain internal complexity are capable of being essentially contested.

Consider the following characteristics that a concept might have. Suppose a concept is used to refer to some sort of valued or outstanding achievement, which everyone agrees is a complex achievement, having to do with the presence of a number of different aspects or attributes. Though everyone agrees the achievement is complex, no one thinks it is just the sum of what he takes as its constituent parts: everyone says that the achievement is valued as a whole, even though they disagree about the parts. Moreover, as Gallie puts it,

there is nothing absurd or self-contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in

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<sup>49</sup>See also the discussion in Waldron, supra note 17, at pp. 516-7: “Problems of vagueness will arise whenever we confront a continuum with terminology that has, or aspires to have, a bivalent logic. On the one hand, there is this subtle gradation of hues; on the other hand, surely something either is blue or is not blue. On the one hand, humans range imperceptibly in age from zero to more than a hundred years old; on the other hand, surely it is either true or false, at a given time, that Sam is a youth and not an adult. And so on for all sorts of terms: “short” and “tall” classifying persons on the continuum of height; “village,” “town,” and “city” classifying communities on the continuum of population; “rich” and “poor” classifying individuals on continua of wealth and income; “careful,” “negligent,” and “reckless” classifying behavior on a continuum of attentiveness.”

<sup>50</sup>For a more detailed discussion of the open texture of ordinary language, see *ibid.*, pp. 522-6. For the application of the idea to law, see H.L.A. Hart, The Concept of Law, Second Edition (Oxford: Clarendon Press, 1994), pp. 124-36.

one order of importance, a second setting them in a second order, and so on. ... [T]he accredited achievement is initially variously describable.<sup>51</sup>

Suppose too that the everyone acknowledges that the achievement is “of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance.”<sup>52</sup>

With this as background, we imagine people advancing and defending (and criticizing and modifying) rival conceptions of the concept.<sup>53</sup> Various rival conceptions might cite lists of attributes which stand in a “family-resemblance” relation to one another,<sup>54</sup> and they might offer rival accounts of how the distinct attributes go together to make up the valued achievement that all the conceptions are trying to give an account of. For example, in discussions of democracy, one conception might stress electoral rights and civil liberties (considered purely as adjuncts to electoral rights); another might stress economic equality and the effective enfranchisement of working people; a third might stress grass-roots participation and civil liberties promoting thoughtful deliberation among an educated populace; a fourth might characterize electoral competition simply as an efficient and peaceful framework for changeovers in power; and so on. Each conception is put forward as an attempt to outdo others in capturing an elusive sense, that we all share, a sense that somewhere in the midst of this contestation there is an important ideal that social and political systems should aspire to. What that ideal is exactly none of us can say without participating in the contestation, i.e. without offering a conception of it that is bound to be controversial. But it is precisely in successive efforts to get at it in this way that we together - all the contestants - sustain and develop their shared sense of the presence and importance of such an ideal.

“Essential contestability,” then, is about a way in which certain ideals are present to us. Some ideals are present in clear and well-defined form - the economists’ “wealth-maximization,” for example. In that cases controversies tend to center on strategies and implementation, and the weight that the ideal should have against other competing values. But in the case of essentially contested concepts, they are present to us only in the form of contestation about what the ideal really is. And it is an important contribution of Gallie’s article to remind us - particularly us analytic philosophers who purport to put such a premium on clear definitions - that this is one of the ways in which people come to terms with values.

The idea of essentially contested concepts has sometimes been understood pessimistically, as an imperfection that takes us in the direction of relativism. For example, William Connolly characterizes their role in this way:

Politics involves the clash that emerges when appraisive concepts are shared widely but imperfectly, when mutual understanding and interpretation is possible but in a partial and limited way, when reasoned argument and coercive pressure commingle precariously in the endless process of defining and resolving issues.<sup>55</sup>

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<sup>51</sup>Gallie, *supra* note 45, p. 172.

<sup>52</sup>*Idem*.

<sup>53</sup>I follow Ronald Dworkin, Taking Rights Seriously Revised Edition (London: Duckworth, 1977), pp. 103 and 134-6 in using the terms “concept” and “conception” to refer, respectively, to the focus of contestation and to particular moves in that contestation.

<sup>54</sup>For “family resemblance,” see Ludwig Wittgenstein, Philosophical Investigations, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1958), p. 32 (para. 67). It refers to overlapping resemblances which don’t necessarily involve the presence of any common element in all the relevant cases. For example, one member of a family may have the Churchill nose and the jowls, another the Churchill complexion and the dimple, another the nose and the cherubic expression but without the dimple. There may be no one feature they all have in common, but still they share the Churchill family face.

<sup>55</sup>Connolly, *supra* note 48, at p. 40.

It may lead us to adopt an attitude of humility, but it will humility in the face of an intractable problem. But I read Gallie's account as much more upbeat than that, and certainly - by suggesting that the Rule of Law is an essentially contested concept, I don't want to be taking a gloomy view of the "imperfect" or "precarious" nature of argumentation about the Rule of Law. Instead, I take seriously Gallie's suggestion that the contestation surrounding the use of an essentially contested concept characteristically advances the quality of argumentation using that concept:

Recognition of a given concept as essentially contested implies recognition of rival uses of it (such as oneself repudiates) as not only logically possible and humanly "likely", but as of permanent critical value to one's own use or interpretation of the concept in question.... One very desirable consequence of the required recognition in any proper instance of essential contestedness might therefore be expected to be a marked raising of the level of quality of arguments in the disputes of the contestant parties.<sup>56</sup>

In other words, the contestation between rival conceptions deepens and enriches all sides' understanding of the area of value that the contested concept marks out.

Having said all that, of course one must acknowledge the danger that an idea like essential contestability will be used by feeble-minded theorists as a cop-out - for instance, as an excuse for not taking seriously criticisms by other theorists of some analysis they have offered. We need to bear in mind that the claim that a concept is essentially contested is not self-certifying, and it is also not a way of immunizing oneself against analytic mistakes. It is tempting to associate essential contestability with a comprehensive skepticism about the analytic/synthetic distinction, along Quinean lines.<sup>57</sup> But that is a mistake.<sup>58</sup> Even if democracy is an essentially contested concept, still there are some propositions about it which are analytically false: for example, that democracy is a living animal, or that a private event in the life of a single individual can be democratic. That the achievement connoted by "democracy" can be described in various competing ways which cannot be dismissed as absurd doesn't mean that no description of democracy can be dismissed as absurd. Moreover, the claim that democracy is an essentially contested concept is itself an analytic thesis: it presupposes that analysis can establish certain truths about the concept in question - e.g., that it is complex (in roughly the way Gallie describes), evaluative, and so on.

John Gray has raised the question of whether there might not be "a radical fault in the very notion of a contest which cannot by its nature be won or lost."<sup>59</sup> How can there be argument about something which (in Gallie's words) is "not resolvable by argument of any kind"?<sup>60</sup> If it is true that "no one clearly definable general use of any of [the concept in question] can be set up as the correct or

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<sup>56</sup>Gallie, *supra* note 45, at p. 193.

<sup>57</sup>W.V.O. Quine, From a Logical Point of View (Cambridge: Harvard University Press, 1953), pp. 20-6.

<sup>58</sup>Connolly, *supra* note 48 at pp. 7 and 41, says that essential contestability implies that, at some point, the distinction between analytic and synthetic truths (e.g. about democracy) breaks down. What essential contestability connotes is that some claims that look like they are analytic statements - "Nothing is a democracy unless it involves popular voting among freely nominated candidates for office" - turn out to be controversial in ways that our ordinary paradigms of analytic statements - like "A bachelor is an unmarried man" - are not. But Connolly is careful to add that this "is not the same as saying that there are no analytic statements."

<sup>59</sup>John Gray, "Political Power, Social Theory, and Essential Contestability," in David Miller and Larry Siedentop (eds.) The Nature of Political Theory (Oxford: Clarendon Press, 1983)

<sup>60</sup>Gallie, *supra* note 45, at p. 169.

standard use,"<sup>61</sup> then there doesn't seem to be anything for the disagreement to be about. Indeed the characterization in terms of essential contestability seems to misrepresent what it is like to engage in such contestation. To a participant, surely nothing matters more than that his definition be sustained and his opponent's refuted. He is not saying simply, "Here's one more view about democracy to put in the catalogue." Surely each proponent is saying, "This is what democracy really is. This, and not those other views, captures the true essence of the concept." An observer, however, will say: "JW thinks he's going to win, but he must know in the back of his mind that the discussion is unwinnable. So why is he making so much fuss? There are no right answers here: democracy is an essentially contested concept." Can these perspectives be combined? Towards the end of the paper I want to consider the extent to which a concept can be essentially contested without all users being aware of that fact. But still, even at the level of the well-informed theorist, we may ask: Is it possible to engage in one of these debates as a partisan of a particular view but also as a theorist who knows why disputes of this kind are intractable? Can one acknowledge that a concept is essentially contested and still claim that one's own view is right and one's opponent's view wrong? Well, one certainly cannot expect to prevail comprehensively - that is, to have one's opponents slap their foreheads and say, "But of course! JW's definition of 'democracy' is correct and it has been correct all along. Why didn't we all see that before?" One understands the ideological and philosophical sources of persistent controversy. Realistically the hope one invests in one's participation in such a dispute is that the contestation - and the sense of the underlying ideal at subsequent stages - will be the better for one's intervention. But that is not the same as hoping or expecting to settle the matter.

No doubt all of this will annoy some of my brother philosophers.<sup>62</sup> Philosophical analysis is often done aggressively and competitively, and to many the point is getting it right (which means something like defeating rival analyses). If this sort of victory is not available, I know people in philosophy who would say, "What's the point?" Never mind that few such victories are ever certified; to them, it's the nature of the game that counts; and I suspect there's a worry among some of us that one might have to change one's tone (or talk more quietly, or interrupt less frequently) if one were participating in a contest which was genuinely irresolvable. To this one just has to say, "Get over it." But, as I said, if this is not to be a cop-out one has to be able to buttress the "Get over it," with a clear account of the basis of the contestation and of its benefits so far as the enrichment of the underlying discourse is concerned. Merely using "essentially contested" as the reflex of a lazy relativism will not do anything to rebut the stridency of the misguided philosophical realist. The sort of benefits we have been talking about cannot be expected in every case of conceptual contestation. Some concepts are just "radically confused": we would do better disengaging on the basis of the redefinition of terms or the invention of new ones.<sup>63</sup> If we want to defend the characterization of a given concept as essentially contested, we have to do something to show why this is not an appropriate option in that case. Perseverance in advancing and defending rival conceptions of what we are calling an essentially contested concept has a point if it helps deepen and enrich people's understanding of the sort of achievement that the use of the concept normally purports to accredit. Conceptions may rival each other, but yet each may profit from the rivalry; and each would be the poorer if the rival had been absent. And this is what has to be shown before an attribution of essential contestedness can be regarded as helpful: anyone who thinks it worth characterizing a concept as essentially contested must be prepared to make a case that this sort of benefit is available.

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<sup>61</sup>Ibid., p. 168.

<sup>62</sup>I say "brother philosophers" to avoid what Susan Okin has called "false gender neutrality." (See Susan Moller Okin, Justice, Gender and the Family (New York: Basic Books, 1989), pp. 10 ff.), and to highlight the relation between philosophical analysis and testosterone.

<sup>63</sup>Gallie, *supra* note 45, at p. 180.

## 6. The Rule of Law as an Essentially Contested Concept

The Rule of Law seems to fit this bill quite well. I said at the beginning of section 6 that Gallie gives an account of essential contestability in terms of the complexity of certain evaluations. The Rule of Law is plainly an appraisive concept: it is deployed by almost all of its users to enter a favorable evaluation of the regimes or situations to which it applies.<sup>64</sup> And its complexity is well-known, too.

Now, actually, there are several levels of complexity associated with the Rule of law. At one level, well known to students of Anglo-American jurisprudence, the phrase “the Rule of Law” is used to conjure up a sort of laundry list of features that a healthy legal system should have. These are mostly variations on the eight desiderata of Lon Fuller’s “internal morality of law”:<sup>65</sup> laws should be (1) general, (2) publicly promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) actually congruent with the behavior of the officials of a regime.<sup>66</sup> Fuller explained that these desiderata work together as a system, and that each of them is a matter of degree, and he himself thought that some of them - public promulgation, for example - were more important than others. Other jurists have made other lists. John Finnis gives us eight principles, which are more less Fullers’ in a different order.<sup>67</sup> Joseph Raz gives us eight principles, too;<sup>68</sup> but they are somewhat different principles, some of them clusters of several different principles, and anyway Raz says his list is incomplete. Raz reminds us, too, that these principles are not canonical in their own right.

My purpose in listing them was merely to illustrate the power and fruitfulness of the formal conception of the Rule of Law. It should, however, be remembered that in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance. The principles do not stand on their own. They must be constantly interpreted in the light of the basic idea.<sup>69</sup>

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<sup>64</sup>But see Morton J. Horwitz, “The Rule of Law: An Unqualified Human Good?” *Yale Law Journal*, 86 (19\_\_ ) 561, at p. 566: “I do not see how a Man of the Left can describe the Rule of Law as ‘an unqualified human good.’ It undoubtedly restrains power, but it also prevents power’s benevolent exercise. It creates formal equality ... but it promotes substantive inequality.... By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.” (This in response to the discussion in E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin Books, 1977), p. 266.)

<sup>65</sup>Notice, though, that Fuller did not use the term “the Rule of Law” to characterize these desiderata; he described them simply as “the internal morality of law.”

<sup>66</sup>Fuller, *supra* note 36, at p. 39.

<sup>67</sup>John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 270 : “A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated,, clear stable and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.”

<sup>68</sup>Raz, *supra* note 19, at pp. 214-19:

<sup>69</sup>*Ibid.*, at 218.

Similarly, Margaret Radin “boils down” Fuller’s eight principles to two: “[F]irst, there must be rules; second, those rules must be capable of being followed.”<sup>70</sup> John Rawls gives us four precepts, each a cluster of requirements, instead of the customary eight (or two): “ought implies can,” “similar cases [are to] be treated similarly,” “no offense without a law,” and “natural justice (due process) is to be observed.”<sup>71</sup>

Most of these precepts and principles relate to the ordinary working of a legal system. The approach they take is summed up by John Finnis when he says that “the Rule of Law” is “[t]he name commonly given to the state of affairs in which a legal system is legally in good shape....”<sup>72</sup> By itself, however, the complexity and difference exhibited at this level is not really sufficient to justify calling the Rule of Law an essentially contested concept, since Fuller, Rawls, Raz and Finnis do not present themselves as advocating rival conceptions. Instead, their approaches seem quite congenial to each other; they are filling in the details of what is more or less the same conception in slightly different ways.

We see this when we try to relate their laundry lists to a rather more challenging idea associated with the Rule of Law. This is the idea that we might be able to make a salutary addition to the classic menu of constitutional forms: as well as rule by one man, rule by the few, and rule by the many - monarchy, oligarchy, and democracy - there might also be the possibility of the rule of laws, not men.<sup>73</sup> That the law might rule rather than any number of men is the theme of Aristotle’s discussion of the Rule of Law in the Politics; it’s a common topic in medieval political philosophy;<sup>74</sup> and it survives into the modern era in the discussion sparked by Hobbesian absolutism, which I mentioned in section 3. Now, many legal positivists regard the idea of the rule of laws, not men as a non-starter. Since laws are made, interpreted and enforced by men, there is really no contrast, and to the extent that men are involved, we still want to know whether we are dealing with (say) a legislative democracy, oligarchy, or monarchy.<sup>75</sup> The most we can hope for, they say, is men ruling us through the medium of law,<sup>76</sup> and that is what the laundry lists set out by Fuller and the others purport to describe. They are, certainly,

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<sup>70</sup>Radin, *supra* note 46, at p. 785.

<sup>71</sup>John Rawls, A Theory of Justice, (Oxford: Oxford University Press, 1971), pp. 236-9.

<sup>72</sup>Finnis, *supra* note 67, at p. 270. Richard Fallon shows his lack of acquaintance with the inside of Finnis’s book when he says that Finnis identifies the Rule of Law “with natural law or respect for transcendent rights” (Fallon, *supra* note 46, at pp. 1-2 and n.4). In fact Finnis’s account is remarkable for its emphasis on the internally-generated discipline of ordinary positive law, though of course like most other Rule-of-Law theorists, he does associate the ideal ultimately with transcendent values like respect for human dignity (see Finnis, *supra* note 67, at pp. 273-4).

<sup>73</sup>My apologies for “man” and “men” in this part of the discussion. (It has nothing to do with the testosterone point at *supra* note 62.) The formula - “the rule of laws, not men” - is traditional, and nothing significant hangs on the gender. It is true that for Aristotle the contrast was between the Rule of Law and the rule of male persons; Aristotle didn’t get out much, and he labored under the impression that a woman’s deliberative faculty “is without authority.” See Aristotle, Politics, *supra* note 25, at p. 19 (Bk. I, Ch. 13, 1260a). For medieval and modern theorists, however, the Rule of Law is as much opposed to the rule of a Matilda or an Elizabeth as it is to the rule of a Henry.

<sup>74</sup>See, e.g., James of Viterbo, “Is It Better to Be Ruled by the Best Man than by the Best Laws?” (1295-6) in Arthur Stephen McGrade, John Kilcullen, and Matthew Kempshall (eds.) The Cambridge Translations of Medieval Philosophical Texts, Volume Two: Ethics and Political Philosophy (Cambridge: Cambridge University Press, 2001), p. 322.

<sup>75</sup>See also Jeremy Waldron, The Law (London: Routledge, 1990), pp. 32-6.

<sup>76</sup>Joseph Raz believes that government is necessarily by laws as well as men: “Actions not authorized by law cannot be the actions of a government as a government.” (Raz, *supra* note 19, at p. 212.) This is an interesting relic of Raz’s Kelsenian upbringing - compare Hans Kelsen’s claim in Introduction to the Problems of Legal Theory (1934), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press 1992), p. 105, that “every state must be a Rechtsstaat,” and that the concept of a state or government without law is a contradiction in terms.



quite demanding norms of legislation and public administration, but they appear to have given up on the idea that law can ever truly be ascendant over the individuals who have the responsibility of making and enforcing it. They constitute a second-best ideal, relative to the traditional Rule-of-Law aspiration.

Other political and legal theorists have second-best ideals that are rather different in character from the Fuller-style laundry list. For example, we have jurists defending the view that the Rule of Law favors certain types (or sources) of law over others. The choice depends a little on the kind of “men” whose rule they want to contrast with the Rule of Law. For Justice Scalia, the rule of men means discretionary rule by judges, and he favors a body of law consisting as far as possible of hard, textually grounded rules, which specify ex ante the outcomes required in particular situations.<sup>77</sup> F.A. Hayek’s apprehensions on the other hand are directed towards rule by managerial legislators; for him the Rule of Law means something like the rule of spontaneously emerging norms.<sup>78</sup> The ascendancy of legislation, on his account, would be at odds the Rule of Law, even if the legislation were drafted and enforced in a way that satisfied the strictures of Fuller at al. For Ronald Dworkin, one gets the impression sometimes that the Rule of Law means the ascendancy in a political system of a certain culture of argumentation: so the “men” whose rule it opposes are those who would close the argument down or insist that something is to prevail just because they say it should.<sup>79</sup>

Nor do legal theorists stand unanimously with Hobbes and Austin in despairing of the higher aspiration that law should have priority over sovereign authority, i.e. over the judges who interpret the law and the legislators who make it. The Rule of Law continues to inform the doctrine of separation of powers, one of whose rationales is to ensure that those who make the law will be bound by the laws they make, just like any other member of society.<sup>80</sup> And the idea of constitutional government taking place entirely under the control of a body of fundamental law continues to attract and fascinate us, even when we acknowledge that it runs up against its limits in the power of the judges to interpret the constitution (judicial supremacy) or the power of the people to alter it (popular sovereignty). Even legal positivists these days admit a version of the thesis that law controls sovereignty, whether in the form of A.V. Dicey’s emphasis on legislative due process or - more familiar - in the form of H.L.A. Hart’s secondary rules.<sup>81</sup> Admittedly, Hart’s secondary rules remain human artifacts, and Hart himself is scrupulous about not attributing to them any of the value usually associated with the Rule of Law ideal. Still, the status of secondary rules as human practices that emerge, rather than being the product of intentional enactment, does establish some sort of ascendancy for law as such over the deliberate initiatives of human politicians.

Taking all this into account, then, what we have in regard to the Rule of Law is a form of contestation which amounts to an on-going debate among jurists and political theorists about the practicability of law being in charge in a society. In the account of essential contestability that I gave in section 5, I followed Gallie in associating the idea with different ways of conceiving of some valued achievement: a complex achievement, variously describable, is conceptualized in various and rival

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<sup>77</sup>Scalia, *supra* note 27, at pp. 1177 ff.

<sup>78</sup>F.A. Hayek, Law, Legislation and Liberty: Volume I (Chicago: University of Chicago Press, 1983), at pp. 94 ff.

<sup>79</sup>This might seem at odds with Dworkin’s so-called “right answer” thesis. But it isn’t. Since the right answer thesis is not associated with any method for determining conclusively who has got the answer to the legal question right, it functions mainly as a regulative idea of objectivity, underwriting our insistence that there is still something to argue about even when some human authority claims to have had the last word.

<sup>80</sup>“By which means,” as Locke put it (*supra* note 38, at p. 330), “every single person became subject, equally with other the meanest men, to those laws, which he himself, as part of the legislative, had established; nor could any one, by his own authority, avoid the force of the law, when once made; nor by any pretence of superiority plead exemption, thereby to license his own, or the miscarriages of any of his dependents.”

<sup>81</sup>Dicey, *supra* note 38, at pp. 268-9; Hart, *supra* note 50, at pp. 91 ff.

ways, under the auspices of a concept one of whose functions is to praise or accredit that achievement. However, with regard to the Rule of Law, I am now suggesting that the contestation is not so much about ways of characterizing an achievement that we already have, but rather about ways of answering a challenge - how to make law rule, rather than men - which many are convinced cannot be answered. The problem is conceived as urgent, and for that reason, the solution - if a solution could be found - would be highly valued. But much of the contestation is between rival proposals for responding to this urgent challenge: we respond to it with the separation of powers, or with an emphasis on common law, or an emphasis on rules, or on secondary rules, or the aura that surrounds constitutional norms, etc.

In Gallie's original exposition, essential contestability was associated with the existence of an original exemplar, whose achievement the rival conceptions sought to characterize and develop. For example, disagreements about the meaning of "the Christian way of life" are held together by reference to the Gospel accounts of the life of Jesus of Nazareth; each conception purports to provide the best account of what that complex exemplar stands for.<sup>82</sup> But I am suggesting, now, that reference back to the achievement of an exemplar may be too narrow an account of what gives unity to a contested concept. Perhaps there is no exemplar of the Rule of Law, but just a problem that has preoccupied us for 2,500 years: how can we make law rule? On this account the Rule of Law is a solution-concept, rather an achievement-concept; it is the concept of a solution to a problem we're not sure how to solve; and rival conceptions are rival proposals for solving it or rival proposals for doing the best we can in this regard given that the problem is insoluble.

I have mentioned two levels of complexity: (i) the various precepts and principles on Fuller's laundry list; (ii) the different ways there are - of which Fuller's is one - of trying to solve (or respond with a second-best solution to the insolubility of) the problem of designing a political system in which the laws rule rather than men. There is also a third level of complexity: (iii) the several values which arguably might be served by the Rule of Law. Some theorists associate the Rule of Law with respect for fairness and human dignity;<sup>83</sup> others associate it with the provision of an environment hospitable to freedom;<sup>84</sup> still others see it as purely instrumental value, having to do with the effective pursuit of whatever other goals one is trying to use law to promote.<sup>85</sup>

This provides an interesting variation on the account of essential contestability that I have taken from Gallie's work. Gallie's account involves contestation concerning the internal complexity of a valued achievement: the idea is that we know we value the achievement, but we are unsure what it consists in. An opposite form of contestation would be this: we know broadly what the achievement would consist in, but we are unsure why we value it. Moreover different accounts of the value of the practice give us different bases for elaborating and developing the practice.<sup>86</sup>

In the case of the Rule of Law, I think both forms of contestation are present. There is contestation about the content and requirements of the Rule of Law ideal, and there is contestation about its point. The two forms of contestation of course feed off one another. To put it slightly differently, the lead idea of the Rule of Law is that somehow respect for law can take the edge of human political power, making it less objectionable, less dangerous, more benign and more respectful. But we disagree about how this can be done, and whether it can ever be done completely. And we

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<sup>82</sup>Gallie, *supra* note 45, at pp. 176-81.

<sup>83</sup>See Finnis, *supra* note 67, at p. 273.

<sup>84</sup>See F.A. Hayek, The Constitution of Liberty (London: Routledge and Kegan Paul, 1960), pp. 142-3.

<sup>85</sup>For instrumental vs. non-instrumental conceptions of the Rule of Law, see Radin, *supra* note 46, at pp. 784 ff.

<sup>86</sup>This, I think, is what is going on in Ronald Dworkin's three-step account of interpretive concepts in Law's Empire (Cambridge: Harvard University Press, 1986), pp. 46-9 and 65-8: first we identify a certain practice; then we attribute a point to it; and finally we revise the practice in the light of that value-attribution.

disagree also about the precise nature of the danger posed by human power in its unmitigated form, and about the values that would be served by introducing law into the picture. We disagree about the ailment, the medicine, and the character of the cure. All this makes for an extraordinarily complicated package of theoretical contestation.

### 7. Law and the Rule of Law

Obviously the concept of law is implicated in the concept of the Rule of Law, and we have already noticed a number of ways in which disputes about the latter implicate disputes about the former. Many who believe in the Rule of Law privilege some forms or sources of law over others: legal rules over legal standards, for example, or common law over legislation. Law comprises many elements and practices, and as part of the contestation associated with the Rule of Law, different items will be highlighted for the contribution they can make to taking the edge off power or otherwise promoting important moral and political values.

This doesn't necessarily mean that rival conceptions of the Rule of Law sponsor rival accounts of law itself. True, there might be a tendency in that direction. If one begins by conceding that law includes both common law and legislation, but then goes on to say that only the ascendancy of legislation constitutes the Rule of Law, then there will be some theoretical pressure to say that only legislation is law in the sense of "law" that really matters.

This raises all sorts of issues that have been prominent in recent analytic jurisprudence - in particular the issue of whether the concept of law itself is an evaluative concept, so that its analysis in jurisprudence must implicate issues of political values and morality.<sup>87</sup> I am tempted by the view that that is so, and that the concept of law is so tightly bound up with the Rule of Law that the former cannot be understood in purely descriptive terms.<sup>88</sup> But I understand that some jurists see reasons to resist this temptation. One reason is that it may be a mistake to tie the evaluative implications of law so exclusively to the mast of the Rule of Law. Other types of evaluations may be involved as well. For example, law is sometimes seen as a set of practices that makes a claim on our deference and fidelity, and that strand of value falls under the heading of Political Obligation rather than under the heading of the Rule of Law.<sup>89</sup> Or sometimes law is seen as a practice of governance distinguished by its orientation to justice or the common good;<sup>90</sup> again, that involves political evaluations of a different sort.

Other grounds for hesitation are more radical. Some positivists (I call them "descriptivists") insist, as a matter of analytic priority, that we must provide a descriptive analysis of law first before we analyze the more complicated concept the Rule of Law.<sup>91</sup> The descriptivist position might or might not

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<sup>87</sup>Hart, in his "Postscript" to the second edition of The Concept of Law, supra note 50, at p. 240, insisted that the jurisprudence of that book was purely "descriptive." It had, he said, "no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law." For doubts about this conception of jurisprudence, see: Postema, supra note 34, at pp. 328 ff.; Neil MacCormick, 'A Moralistic Case for A-moralistic Law,' Valparaiso Law Review, 20 (1985) 1; and Stephen Perry, 'Interpretation and Methodology in Legal Theory' in Andrei Marmor (ed.) Law and Interpretation: Essays in Legal Philosophy (Oxford: Clarendon Press, 1997),

<sup>88</sup>See Jeremy Waldron, "Normative (or Ethical) Positivism," in Jules Coleman (ed.) Hart's Postscript: Essays on the Postscript to 'The Concept of Law' (Oxford: Oxford University Press, 2001), 411, at pp. 419-22.

<sup>89</sup>Lon L. Fuller, "Positivism and Fidelity to Law - a Reply to Hart," Harvard Law Review, 71 (1958) 630, at pp. 631-5.

<sup>90</sup>See Finnis, supra note 67, at p. 276; see also Jeremy Waldron, "Does Law Promise Justice?" Georgia State University Law Review, 17 (2001), 759.

<sup>91</sup>For a recent powerful defense of this order of analytic priorities, see Jules Coleman, The Practice of Principle: In Defense of a Pragmatic Approach to Legal Theory (Oxford: Oxford University Press, 2001), esp. pp. 175 ff.

entail that there can be law without the Rule of Law.<sup>92</sup> Or it may be that the separation of the two ideas works only in theory: so even if “law” is a purely descriptive term whose analysis doesn’t implicate the Rule of Law, it may still be true in the real world that there cannot be law (or a fully-flourishing legal system) without something like the Rule of Law in place.

### 8. Finally, the Streets of Florida

It would be silly to portray the likes of James Baker and David Boies as political philosophers engaged in theoretical contestation about the essence of the Rule of Law. They used the slogan when it suited them, and there is little evidence that they had time or patience for much philosophical reflection on the nature or content of the concept they were invoking. They invoked it as though it were perfectly clear what it meant, and as though no one could imagine its being invoked on any other side of the dispute in which they were currently participating. I guess some of those who talked about “the Rule of Law” were a little more thoughtful than that.<sup>93</sup> But for the most part the use of the phrase on the streets, in tones of categorical requirement (“We must accept the Rule of Law”) and categorical denunciation (“They are violating the Rule of Law”), seems to belie a lot of what I have said about its essential contestability.

Gallie thought that a concept was essentially contested when the contestedness was understood to be part of the very meaning of the concept.<sup>94</sup> His idea was that someone who does not realize that democracy, for example, or art are sites of contestation really doesn’t understand the concepts he is invoking. As we have seen, this need not prevent a person from putting forward a firm view about the concept or taking sides in the controversy about its meaning. But anyone who says that one of these concepts has a perfectly clear meaning and that he cannot see why so many people get it wrong, shows (on Gallie’s account) that he himself doesn’t really understand what he is talking about.

Now I think this suggestion needs to be qualified. As I said at the end of section 2, I don’t think we should rush too precipitously, even in Florida, to the position that partisan political uses of “the Rule of Law” are meaningless pieces of ideological abuse; we certainly shouldn’t do so just because the political partisans have not read their Gallie and show no understanding of essential contestability. Maybe we need to elaborate more carefully the relation between theoretical and non-theoretical uses of an essentially contested concept.

We know, first, with regard to any piece of conceptual analysis that there is likely to be a loose and informal fit, at best, between the theorist’s specification of necessary and sufficient conditions etc. and the use of the concept on the street. The use of almost any concept on the street is a form of know-how<sup>95</sup> - the street user will say things like “I know how to use it,” “I know it when I see it,” etc. - and that know-how may not be reducible even at the back of the user’s mind into the form of propositional analytic knowledge that the concept has such and such implications and presuppositions. Still, unless street usage is horribly chaotic, the analyst can test his propositional knowledge against the user’s know-how.

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<sup>92</sup>Raz seems to think that this is a possibility, since he describes the Rule of Law as a virtue that law might or might not exhibit: see supra note 19, e.g. at p. 228.

<sup>93</sup>Justice Stevens’ dissent in *Bush v. Gore*, supra note 2, offered some brief reflection, though he, too, wrote as though the Rule of Law ideal were straightforward and as though it were under straightforward attack. And this was true of the vast majority of newspaper and news-magazine commentaries. (An exception was Steven Thomma’s account of conservative and liberal versions of the Rule of Law, cited supra in note 30.)

<sup>94</sup>Gallie, supra note 45, at p. 169.

<sup>95</sup>Cf. the distinction between knowing how and knowing that in Gilbert Ryle, *The Concept of Mind* (London: Hutchinson, 1949), Ch. II.

Sometimes the user's know-how will be meta-theoretical: the user will show that he knows how to hesitate in a borderline case, for example. (He knows there are some things that are sort-of-green and sort-of-blue.) But this may not be so in the case of all meta-theoretical diagnoses. Some such diagnoses may take place only at the level of theory. Moreover, in the case of an essentially contested concept, there are two levels of theory to which ordinary street usage might orient itself (and vice versa). There is (a) the theorizing involved in the construction of a particular conception of a contested concept, and there is (b) the theorizing involved in the diagnosis of the concept as essentially contested. It is probably unrealistic to think that street-level usage involves anything much more than a glimpse of (b). The street user may show himself - to the theorist's eye - as an informal partisan of a particular conception of the Rule of Law; and the theorist will appeal to the street-user's know-how to test his analytic account of that particular conception. But the street-user's occasional use of "the Rule of Law" (or whatever the concept is) may show little awareness of the fact that this well-worked-out conception is challenged by other equally well-worked-out conceptions of the concept in the sort of rivalry we have described as essential contestability. The ordinary user may be puzzled and dismayed by the fact that other people seem to be citing "the Rule of Law" as though it meant something else altogether. But since he hasn't thought much about the well-worked-out conception that corresponds to his own use, since his use of the concept is sporadic anyway, and since he has little time for fancy theory, he is unlikely to dwell on the relation between the well-worked-out conception that corresponds to his informal use and the well-worked-out conception that corresponds to his opponent's informal use. Indeed the situation may be even untidier than this: the ordinary user may have little sense of which side he's on so far as these rival conceptions are concerned, and he may draw on various of them from time to time with little concern for their analytic consistency.

This, I think, is what we should expect if a concept is essentially contested. People always use concepts with varying degrees of self-consciousness and reflectiveness. With an essentially contested concept, there are more layers available for reflection - for example, the layer at which rival conceptions present themselves explicitly as such, and the layer at which the theorist becomes aware of how their rivalry enriches everyone's sense of what is going on - but just for that reason, there is likely to be a greater variety of reflective involvement in the use of the concept. The verdict of essential contestedness does not stand or fall with everyone's being aware of it; it stands or falls with the way it helps us understand all that goes on at the various different levels at which people use a concept and reflect upon their use of it.

I said in section 5 that, in Gallie's account, one of things which distinguishes an essentially contested concept from concept-talk that is just "radically confused" is the fact that contestation between rival conceptions deepens and enriches our sense of what is at stake in a given area of value. Gallie describes this as a process taking place in the context of contestation among theorists who are aware that the concept they are contesting is essentially contested. But perhaps that awareness need not be present in order for the deepening and enriching effect to accrue. Maybe our understanding of the Rule of Law (of the values and possibilities associated with it) is deepened and enriched even by vigorous debate among partisans each of whom believes - if he gives any thought to the matter at all - that the Rule of Law has a single clear meaning. For example, someone who starts off convinced that the Rule of Law means that politicians must submit to the discipline of clear constitutional rules may be horrified when he hears someone else saying that the Rule of Law is actually promoted by people's willingness to engage incessantly in litigation. But as the argument goes on he may modify his position somewhat, or those who listen to the dispute may come away with a somewhat more complex position than either of the ones held by the two disputants - and as a result subsequent interventions by these or other parties may be more thoughtful and sophisticated. Of course there's no guarantee that this will happen; in some cases, disputation might make things worse, not better. My point at this stage is just to emphasize - against Gallie's suggestion - that disputation can make things better whether or not the participants are in position to associate that process with anything like the idea of essential contestability. Perhaps it is best to say, then, that we should call a concept essentially contested when we find that contestation about its definition helps deepen and enrich our sense of what is at stake in a

given area. We should not suppose that this deepening and enriching effect depends upon a prior characterization of the concept as essentially contested or that it depends upon the parties accepting such a characterization. Their arguments play a part in the process whether they do so self-consciously or not.<sup>96</sup>

As it happened, the Rule of Law was invoked in Florida on just the occasions one would expect it to be invoked if it were (at some level) essentially contested along the lines I have outlined. As I said in section 4, people appealed to the Rule of Law to defend and to criticize legally authorized exercises of discretion by political partisans, to defend and criticize the use of rules rather than standards as a basis for recounting votes, to defend and criticize innovative judicial decisions, and to defend and criticize the American tendency to litigate and go on litigating. No doubt it was all over-determined, and it is easy enough to say, as many commentators said at the time, that a lot of it was simply self-serving rhetoric.<sup>97</sup> Still, that verdict is not inconsistent with the possibility that our understanding of the Rule of Law - or of the difficulties associated with the Rule of Law - was in fact enriched and deepened in the context of partisan, perhaps even cynical invocations of the ideal in Florida. (By the way, it would be consistent, too, with Justice Steven's lament that public confidence in the judiciary as guardians of the Rule of Law has declined as a result of the decision in Bush v. Gore; that might be true, and still people might come away with a better sense of the complexity of the ideal and of the nature of the challenge that it poses.)

This optimistic assessment might be taken one step further (though I'm not sure whether I want to go this far or not). I can imagine someone saying that the fact that this dispute was fought out in the context of contestation about the Rule of Law is itself a tribute to the presence of the Rule of Law in American politics. The idea would be that the Rule of Law is actually served by people asking and arguing about what counts as the Rule of Law in regard to some decision or set of decisions that the Rule of Law is supposed to control. (Analogously, we might say that we are sure we live under a Constitution in the United States, precisely because we argue so much about what the Constitution means.) There is something to this. A society ruled by laws, not men is bound to be a society in which there is constant debate about what the Rule of Law means. And this is so not just because the Rule of Law is an essentially contested concept, but also because law and legalism are inherently garrulous and self-reflective practices. It is part of law and the practice of law to reflect and wonder what law is,<sup>98</sup> and for this reason it is part of any evaluative ideal involving law - such as the Rule of Law - that it will have this self-referential argumentative presence in society. We must be careful, though, not to confuse necessary and sufficient conditions. The Rule of Law probably cannot exist in a society unless people engage in constant argument what the Rule of Law amounts to; but it doesn't follow that the sheer fact that they engage in such argument means the Rule of Law exists. One can imagine a sort of fake legalism which concocts argumentation about the Rule of Law purely in order to lend political decision-making a spurious legitimacy under this head. Still, when as in Florida it seems not only that such

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<sup>96</sup>The lack of self-consciousness here may be analogous to the process described by John Stuart Mill in On Liberty, ed. Curran V. Shields (Indianapolis, Bobbs Merrill, 1956), Ch. 2, at p. 58: "Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners."

<sup>97</sup>Andrew Gumbel, "George W's Battle Is a Family Affair," The Independent (London) November 19, 2000: "When Mr Baker heard a legal ruling he liked on Friday morning - a decision supporting Ms Harris's refusal to consider manual recounts - he crowed that "the rule of law has prevailed." When the Florida state supreme court contradicted the ruling a few hours later, the rule of law suddenly didn't seem so attractive and he made no mention of it."

<sup>98</sup>Cf. Dworkin, Law's Empire, supra note 86, at p. 90: "[N]o firm line divides jurisprudence from adjudication or any other aspect of legal practice. ... So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law."

argumentation is taking place but also that the outcome of the whole debacle somehow turns on it in a non-preordained way - then there might be greater reason for optimism. Despite all the chaos and confusion of rival invocations of the Rule of Law, there certainly seemed to be a sense abroad that whoever won that argument - unwinnable as it might seem, from the theorist's point of view - was entitled to win the election. And I don't think we should denigrate that sense just because we, as philosophers, are irritated by the untidiness and unsophistication of the parties' invocations of the Rule-of-Law ideal.