Go back and discuss big picture

* + We presumably get what morality is
  + And we know that certain groups would have social practices
    - that are legal in nature
    - a basic idea of law as a set of social facts
  + And we can see the relation between the two above ideas
  + We discussed this in the beginning of the semester, when we discussed whether there was a prima facie moral duty to obey the law
* We then moved on to another question
* Concerning the Subset of legal systems (understood as sets of social facts) that are legitimate
  + What morally follows from a legal system being legitimate?
  + This was discussed in the Applbaum article
* But now we are doing analytical philosophy of law – nature of law
* We have moved on to what the law “is”
  + Harder to conceptualize
  + Why not just use sociological idea?
    - People just get together and social practices concerning law and follow them
      * This purely social understanding of law is basically what Austin says
    - just social facts
    - seems like a plausible idea
      * no community with social practices, then no law
      * Revolutions change the social practices and so change the legal system
  + The problem 🡪 RULES
    - Austin
      * Can’t account for the rule like nature of law:
        + Rule above the law makers (limitation, division, etc.)
        + Law is spoke of in terms of “oughts” in some way

Not just obliged to do something to avoid punishment

* + - * + Appealing to rules in an abstract sense

Some without threats of sanctions

* + - * + this “ought” of the law is probably not a moral “ought”

Not based in morality

E.g. would say Nazis had law

* + - Hart attempts to come up with a positivist account of the law that can explain why law is a matter of rules
      * Accounts for rules/authorizations
        + In terms of certain types of social practices that *are* or creates rules
    - Shapiro says Hart fails
      * First 🡪 if the rule just simply is social practice, this is a category mistake
        + When people talking about legal rules they aren’t talking about social practices, but abstract rules
        + Maybe what Hart is saying is “When there is a social practice, that necessarily creates a social rule”

Gives *just* those people (who follow the practice) a non-moral reason for action

Example 🡪 coordination Convention

Everyone drives on the right side of the road. This practice gives those people a reason to abide by the rule “Drive on the right side of the road.”

These particular social practices ( namely coordination conventions) do indeed generate social rules, but the basis of the legal system cannot be a coordination convention

* + - * Problem with Hart’s alleged claim that social practices ( in the sense that he defines them, which is broader than just a coordination convention) necessarily create social rules
        + The way he describes a social practice doesn’t work

A social practice in Hart’s sense exists when everybody does something and criticizes those who don’t using normative language that expresses their acceptance of the rule

Problem: The baseball example - everybody moves forward when on third when think the batter will bunt and criticize those who don’t

Everyone does this NOT because everyone in their group does it, but because there are other reasons to do it (it is best to win the game)

So Shapiro argues that Hart’s approach fails

* Where we stand
  + Have desire to explain the “rule” behind legal systems.
  + We will return to this when discussing Shapiro’s theory of law

Now a new problem

* what we are doing is trying to take a rule of recognition model and apply it to the American legal system

First Distinction by Greenawalt: Supreme Rule vs. Ultimate Rule

* Ultimate rule need not be supreme
* Supreme criterion
  + Whatever is created according to the supreme criterion can trump all other laws
* Ultimate
  + There is no further legal justification past this rule.
* Ultimate but not supreme – state law
  + Ultimate rule: the state constitution
    - but cn be trumped by federal law (supreme)

What is the truilt supreme law in the U.S.

* The amendment clause
  + Constitutional amendments trump everything, including previous amendments and the original constitution
* Limitations on amendment clause
  + Other limits not in Article V, but part of rule of Recognition
    - an amendment removing the House of Representatives
      * Would this be constitutional?
  + Remember: what is keeping the law going is what officials are doing *right now*.
    - Positivist view
    - So to show that there is a limit on article 5 processes, we must appeal to official practice right now

Notice that there are some limits in the rule of recognition on the creation of valid law that are not enforced through judicial review

* + - * Say, Michael Green announces a “law” that everyone stands on their left foot for an hour tomorrow
      * Not a law
      * Even though it doesn’t have to be struck down your judicial review
        + Social facts about official practice show that it is not a law

Officials would not recognize it or follow it

* + - This is another way besides judicial review for law to be held not legal 🡪 officials do not enforce it.

Spent time talking about the puzzle that Congress will decide issues of uncertainty concerning constitutional amendments

* Our conclusion was that there are maybe two rules of recognition concerning constitutional amendments
* Officials differ to what Congress says, provided that its resolution of the matter is reasonable
* But Congress does not take itself to have the power to make any decision it wants concerning constitutional amendments provided that it is reasonable - instead Congress takes itself to be limited by article 5
  + This is a general problem - there seem to have multiple rules of recognition, when under Hart’s theory there was supposed to be only one that all officials had
    - Sheriffs, police, legislators, judges - anyone working in the legal system - was supposed to have the same rule of recognition
  + But it seems like different groups of Officials use different criteria to determine what is valid law, depending upon their position,
    - What might a sheriff’s rule of recognition be?
      * Maybe determined by practice among sheriffs
      * Sometimes they just adhere to custom
        + Something they create for themselves/their own judgements

Just lock up the town drunk for the night instead of charging him with drunk in public

* + - * but maybe deference (if DA says it’s law, it is)
      * In any event, it does not look like the sheriffs’ rule of recognition will be the same as a rule of recognition of a judge

Greenawalt 🡪 actual practice seems not to fit with Hart

* Hart 🡪 all officials have the same things going on in their head – the RoR
* Really, they act based on different criteria of legal validity

These interconnected webs of deference in a legal system does not sound like what Hart meant by a rule of recognition

* Different rules of recognition would suggest that there are different legal systems
* What makes them all hang together in one legal system?
  + How do we know we have the US and not a bunch of small countries?
  + There is not a unified rule in the heads of all the officials
* For Hart, there is supposed to be a rule at the top which explains the unity
* Are there particular officials we look to as doing the job of determining the true rule of recognition
  + SCOTUS can’t be the only one, for that would not answer why does anyone listens to them
  + broader official practice must explain why the Supreme Court has power
  + Some philosophers say “judges” are the ones that actually determined the true rule of recognition of the legal system
    - SCOTUS has the power it does because judges have such a practice
    - Lower officials have forms of deference that aren’t representative of the rule of recognition
* Green: Maybe this deference isn’t a problem
* we can all be participants in the same practice, and yet defer to particular experts within that practice
* Ex: “What is a beech tree?”
  + We have a concept of beech tree, even if we don’t know what it is exactly.
    - Defer to a horticulturist/expert.
    - And yet we all have the same concept of beech tree
      * We are all participants in this conceptual practice
      * Even though most of us look to experts
    - Analogously all officials may be within the same practice of having a rule of recognition even though most defer to judges

OK now asking about ultimate but not supreme rules

(e.g. concerning the Constitution)

* Why is the Constitution law?
  + Three readings:
    - It is law because ratified under Article VII
      * Art VII is legally relevant itself via social acceptance
    - The ultimate rule is the Constitution itself
    - The ultimate rule is: whatever the Constitution contains is law

Greenawalt on ratification 🡪 it is wrong

* Our RoR is not that the Const is law because of Art VII
* Greenawalt’s arguments:
* 9 states ratifying, as required under Art VII, may not have really been effective
  + 9 smaller states may not have been enough – only really accepted as law when larger ones like VA and NY ratified
* Ratification is too much tied to the content of the Const
  + Art VII allows only a particular Const to be ratified
    - If it isn’t it has no place for the ratification of a different Const
    - If Const isn’t ratified: we are stuck in a legal system with no Const
    - Would have to change it only through revolution
  + Green: This is not inconceivable however
    - Just end up constitution-less for a small period of time, followed by a revolution (similar to revolution from Articles of Confederation to the Constitution)
* Another Greenawalt argument against Art VIOI being the reason the Const is law: It is inescapable once ratified
  + Once you have ratified the constitution, you are in it and cannot deratify.
    - Can only make amendments pursuant to Const – that is through Art V
  + Normally understand laws as able to be made and unmade
  + If article VII were the reason Const is law, we would be stuck with Const once ratified and unable to change the Constitution except through Const (Art V) or through revolution
  + againt Green wonders why this is a problem…
* If Article VII were the reason the Constitution were law, then we could have a current lawsuit that said the Constitution was improperly ratified (there is no Constitution)
  + but that is absurd
  + so present legal significance to Art VII
  + Problem accd to Green:
    - Greenawalt is working with the assumption is anything that is a criterion of law has got to be something that could be enforced by judicial review
    - That’s not so – some criteria of law are directly enforced through official attitudes
    - Could say the Constitution is law because it satisfied Article VII, and officials right now think that Article VII was satisfied.
      * Would not defer to a court saying that Constitution not ratified.
  + Green: in addition, think about perspective of states
    - Why might VA be concerned with ratification?
      * There is federal power because it was delegated to the Federal government by states through the Article VII mechanism
      * State officials (of 13 original states) might appeal to Article VII because it explains why Const is binding on their state

Difference between other two explanations of why Const is law

* Greenawalt goes with number two
  + The RoR is: whatever the Constitution contains is law
  + The alternative, no. 1, is that the RoR includes all the provisions of the Constitution
* Greenawalt: problem with No. 1 is can’t say the whole constitution is the ultimate rule because officials cannot keep the whole thing in their head.
  + No. 2 is better: “whatever the constitution contains is law” - that is something that could be in officials’ heads
    - Think “what is in the Constitution is law” then look at the Constitution to see what is law
    - do not have all the provisions in their heads
* Problem with “what is in the Constitution is law”
  + Imagine another crazy lawsuit 🡪 where it is alleged that the Constitution didn’t actually contain, say, the commerce clause
  + If the RoR is: *whatever the Constitution contains his law*, then Greenawalt would appear to have to accept this lawsuit as possible
  + Being in the Const would be a criterion for law and that criterion could fail to be satisfied
  + On the other hand if all of the individual provisions in the Constitution were themselves part of the rule of recognition, then such a lawsuit would not be possible
  + May be that No 1 is right - the constitution with all its provisions is the RoR
  + It is just dispersed among different officials in their heads
  + We have already seen that the view that the rule of recognition is actually in all officials’ heads is implausible
  + perhaps we can go we can further and say that it is in no individual official’s head

State Law

* concerning original 13 states VA, NH, etc. their law predates the constitution.
* They have their own source of law independent of the United States Constitution
* But there is a puzzle
  + Assume that the Federal constitution is law in Virginia because of VA’s Consent
  + That would suggest that even now a VA official treats a federal law as law because Virginia law says so
    - Ultimate source of federal authority is the state law of consent to it.
    - Federal law really kind of Virginia law because created through VA’s consent.
    - Federal law in NC has its source in NC law
      * So Federal law in Virginia would be different from federal law in NC.
      * This is implausible
    - 13 original states would remain their own countries with a treaty amongst themselves creating federal government. All in individual legal systems.
    - to avoid this conclusion…
    - Perhaps we have to conclude that Art VII isn’t the reason the constitution is law anymore, because we now understand the 13 original states as part of a unified legal system
* Another Problem : Illinois
  + Why is Illinois law law
    - VA existed before Constitution, so clearly not dependent on Constitution
    - Illinois law did not precede Constitution
    - It seems federal government delegated powers to Illinois
    - There was federal law in Illinois before the Constitution:
      * The state of Illinois was then created
        + By the federal government

Art. VI allows states to be created

* + - But that suggests that Illinois law is law because of the federal power
    - Illinois law would be fundamentally different from Virginia law
    - Illinois State powers not delegated to federal government as in VA example w/ consent.
      * rather, federal power delegated to Illinois
    - So how do we get Illinois law as having a coequal status with Virginia law?
    - Would have to say there was a revolution in the American legal system after Illinois was created-
      * Before there was only federal power, then revolution to create Illinois state power that has a nonfederal source, like Virginia state law
      * But now we are Getting too many revolutions
        + too many change in rule of recognition

Amendments

* Recall Greenawalt says Constitution cannot be law through Article VII
  + It is law in some sense only because of acceptance
* What about amendments, are they law because of article 5?
* Can we challenge the 14th amendment now is failing to satisfy article 5 processes? (questionable ratification)
* Perhaps more likeoy that present authority of 13th and 14th amendments based on acceptance rather than ratification
  + A new amendment may be challenged on Art. V ratification grounds
  + But after a time, it is no longer law because of Art. V
    - It is now law because of acceptance.
    - That is another change in the rule of recognition 🡪 another revolution
    - We are simply getting too many changes in the rule of recognition

Common problem going on in Greenawalt 🡪 a lot of revolutions and changes in the rule of recognition

* Trying to give an explanation of all the aforementioned phenomena is hard to do without using revolutions in the rule of recognition.
* But that undermines the idea of the continuity of the legal system