Lectures 14-15

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

OK now asking about ultimate but not supreme rules

* Why is the original 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:

Our rule of rec0gn is not that the Const is law because of Art VII

* Greenawalt’s arguments:
* Under article seven, 9 states ratifying is enough to make the constitution law, but that arguably wasn’t really true if the nine states were small ones
* Ratification is too much tied to the content of the Const
  + Art VII allows only a particular Const to be ratified
  + It is not like article five which allows any number of amendments to be ratified
  + If the constitution is not ratified then the only way we can get into a new constitutional order is through revolution
* Another Greenawalt argument against Art VII being the reason the Const is law: It is inescapable once ratified
  + It is true that amendments are possible, but those are changes that are in accordance with the constitution
* Finally, If Article VII were the reason the Constitution were law, then we could have a current lawsuit that said the Constitution was improperly ratified (the result of which, if successful, would be that there is no Constitution)

Green finds these reasons unpersuasive

* Why is it that the fact that article seven allows only a particular constitution to be ratified mean that article seven can’t be the reason the constitution is law?
* And why should the fact that we can get to a new legal order only through revolution if the constitution is not ratified mean that article seven isn’t part of the rule of recognition?
* Furthermore, there can be requirements for law (under the rule of recognition or otherwise)- that are not enforced through judicial review
* Article seven and could be the reason why the constitution is law as far as official are concerned, but officials would not allow the matter to be decided by courts
* Green: in addition, think about perspective of states
* The reason officials of the original 13 states might consider the constitution binding upon them, even now, is because their state ratified it

Difference between other two explanations of why Const is law

* The difference is linguistically subtle, but actually substantial
* Under the first, all of the provisions in the original constitution are part of the rule of recognition – they are simply law because they are accepted
  + Greenawalt finds this implausible, because officials are unlikely to have the entire constitution in their heads
    - Green: on the other hand, the rule of recognition is already so long that it is unlikely that it is in officials heads anyway
  + Greenawalt also argues that this approach cannot explain the fact that it is the constitution as a whole that is law, the individual provisions are not law simply because they are accepted individually
    - NOTE: the view that the constitution is law because of article seven would explain this
* Under the second the constitution is not in the rule of recognition. What is in the rule of recognition is the following rule: whatever is in the constitution is law
  + That rule, which is itself valid because of acceptance, validates the constitution
  + Green: but under Greenawalt’s reasoning, that would mean that there could be a lawsuit that claimed that the commerce clause is not law, because, as it turns out, the commerce clause is it in the constitution (isn’t in the document in the national archives, for example)

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
* So the reason why they have law will also be part of the rule of recognition
* But what about more recent states?
  + Federal law applies in the territories before they become states
  + And the states become states through the application of Federal law
  + That makes it sound as if states like Illinois are exercising lawmaking power delegated to them from the Federal gov’t
  + Which would make Virginia law and Illinois law very different under the rule of recognition
* To put Virginia and Illinois law on the same level, it seems, we would have to say that after the creation of the state of Illinois there is something like a revolution in which Illinois law now has its own source of validity independent of Federal law
* Again we seem to be getting too many revolutions going on

Old Amendments

* The more recent ones are law because of article five
* But Greenawalt argues that the older ones may be valid simply because of acceptance
  + In other words they have drifted up into the rule of recognition itself

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

Alf Ross

Here is one way of putting the problem:

The authority of a lawmaker is not commanded by the lawmaker

* That is true even for the highest lawmaker
* no legal control over his authority
* it is true that a lawmaker can delegate his authority
* Louis the 16th delegated his authority revocably to the estates general
  + But that wasn’t changing his authorization – he was simply taking advantage of something that he was authorized to do
* A monarch can also irrevocably delegate his authority through abdication to particular people
  + But again that isn’t changing one’s authorization – abdication is part of the authorization of the sovereign
* the rule of recognition in the system is something like
  + - * + the king’s word is law unless he dies or abdicates, in which case his son (or appropriate royal successor)’s word is law

what about when commoners withdrew from the estates general and named themselves the National Assembly?

* + Louis the 16th apparently irrevocably recognized it
  + That was something that his previous authorization did not allow him to do
  + did he use his authorization to change his authorization?
  + No – there was instead a revolution
    - RoR simply changed
    - Louis the 16th simply acknowledged an established legal fact

- so this is the problem

- it seems that actually using your authorized power to change your authorized power it is impossible or a revolution

- BUT

- often the lawmaker identified in an amendment clause uses its power to change the amendment clause

This happen in Denmark and it happens in states all the time

- it has never happen to article five, but it was suggested at one time, right before the Civil War

- and yet people do not think this change is a revolution

- they think it’s just normal exercise of lawmaking power

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- this is the paradox of self amendment

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* **Ross’s solution?**
* IF amendment clauses can be used to amend themselves, amendment clauses are not actually the true amendment procedures in the legal system
* another authorization in background of legal system e.g.
* Obey the authority instituted by [the amendment clause]*,* until this authority itself points out a successor; then obey this authority, until it itself points out a successor; and so on indefinitely

If there’s an infinite possibility of delegation, then there is an infinitely long amending procedure

Is that impossible?

- consider these examples

- I authorize you to make rules for my child in my absence

- you think you are going crazy, so you authorize someone else

- when crazy you try to rescind the authorization

- assume that you cannot

- one understanding is that there was a revolution

- new authorization unrelated to my authorization

- but more plausible to say that it was within my auth

- When I authorized you, it was implicit that I gave you the power to delegate

- you may make rules unless you delegate, then delegated party may, unless they delegate etc.

- I *could* have said – you and only you may make rules for my children, delegation is ineffective (even revocably)

- but I probably didn’t

- whichever it is you cannot change through an exercise of your authority

* Notice that this is true for subsidiary lawmakers too
  + congress is authorized
  + it tries to delegate powers to a regulatory agency
  + whether it can or not has to do with auth in Const.
  + If it is allowed to delegate but only revocably, it may not delegate irrevocably (Congess cannot pass a law that it cannot repeal)