Class notes – 3/14

What is the Rule of Recognition for the American legal system?

-We need an ultimate rule that explains federal law and the first thirteen states’ laws. They are all part of the same system, but there is an ultimate rule for why Virginia law is law that doesn’t get justified through the US constitution. What about a state that joined the union after ratification, e.g. Illinois. Is the source of Illinois law the fact that congress created it and gave it law making power, which would make the source of Illinois law not ultimate? This would be true even if congress, the delegated power is irrevocable. But if it is irrevocable, perhaps it doesn’t matter? What does it matter that that power is delegated, if irrevocable, as opposed to coming from the rule of recognition?

-A reason why it makes a practical difference. Imagine a colony e.g. U.S. that became independent. In treaty of Paris they say UK will irrevocably delegate power to the U.S. It seems to cheapen the power of the U.S. though it is practically no different than saying the U.S. got its power through revolution.

-Difference between delegation and revolution. A revolution is a break. A new beginning. Where the rule of recognition changes. Delegation seems connected to the delegator. If US gains power through delegation the rule of recognition goes back to the Queen in Parliament.

-Hartian, they are different systems because they have different official practices with different rules of recogn

-We start running into problems with Hart when we start looking at legal systems that emerge through revolution.

-Supreme criterion – the one that identifies the law that cannot be trumped by any other law

-Greenawalt says it is the amending clause.

-Ultimate rule is what ever cannot be justified by other law – eg the rule giving state lawmakers lawmaking power is ultimate but not supreme

-Can you have supremacy without ultimacy? In a bare direct democracy there may not be any supremacy. It is just whatever the majority says. There is no level of supremacy because no level of law is trumping another level, e.g. no federal over state.

-We are going to assume the amending clause is supreme. New amendments can beat the constitution. Does not seem like the amendment can be beaten by anything else.

-In the amending clause you cannot get rid of states’ representation in the senate. Can you have illegal amendments in other respects? Unamendable amendments? Or get rid of the constitution with an amendment.

-Harts positivist theory, rule of recognition in the present is what makes the constitution relevant at all, if it is, is because of current official practice and acquiescence of the people. So these questions must be answered by looking to the current RoR

-If I say something is a statute it will not be because officials will just ignore it. That is what we are looking for – when would officials simply say that something is not an amendment even though ¾ of the states ratified it? Problem – if ¾ of the states ratified it, officials probably generally like it anyway. But there is a difference between revolution and amendment. If tomorrow officials said Green was emperor, he would be, but that does not mean that the Const was amended to make Green emperoir

-Officials not enforcing something that is recognized as law. What is difference between something being recognized as law and not being enforced?