Philosophy of Law Notes- 3/19/18

Working on Greenawalt article – trying to fit US legal system into Hart’s theory

Rule of Recognition (RoR) of US legal system

Greenawalt introduces the distinction between Ultimate Rule and Supreme Rule

-Ultimate Rule- A legal rule that is not itself derived from another legal rule

- lawmakers identified by an ultimate rule have not been given their power from another lawmaker

- and ultimate rule is in effect part of the rule of recognition

-Supreme Rule- An authorizing rule under which the rules created by the entity authorized trump all other rules

-A rule may be ultimate but not supreme, and vice versa

- the rule identifying state lawmakers is ultimate (eg not derived from federal law) but not supreme (because it can be trumped by federal law – especially federal constitutional law)

the original constitution is also not supreme, because it can be trumped by amendments

the supreme rule is probably Art V – which identifies who makes constitutional amendments

spent time on any whether there are any legal limits on amendments besides those in Article V

what would answer this question?

* it would have to be a criterion that, if violated, would lead officials to conclude that no valid amendment had been made
  + Can one say that because there are no limit specified in Art V there can’t be any other limits on constitutional amendments?
    - No – Art V is just a piece of paper
    - Under Hart’s theory it has only the effect the current official practices give it
    - And current official practices might add to the requirements for valid constitutional amendments
    - Likewise, questions of founders’ intent matter only to the extent that current practices say so
* This is an important lesson of Hart’s theory - The Rule of Recognition is constituted by the current views and practices of officials
* but we need to distinguish between criteria for lawmaking accepted by officials and things that a lawmaker might do that would so upset officials that they would have a revolution
  + The latter are not criteria for law in the relevant sense
* For example if Congress passed a law creating Osama Bin Laden Day that might so upset officials that there is a revolution
  + But the law would nevertheless satisfy the criteria for legal validity accepted by officials
* Art V does not identify everything we need to know to determine the validity of a constitutional amendment – many open questions, for example, how long act can the amendment process take?
  + In the end, Congress makes a determination of whether an amendment is valid or not
  + Does that mean that the real criterion for the validity of an amendment is that Congress recognizes it? That Congress actually creates constitutional amendments?
    - This is similar to the question of whether the constitution is whenever the supreme court says it is
  + But it can’t be true that Congress actually has the power to create constitutional amendments.
    - If Congress unreasonably said that something was an amendment (even though, say, it never been ratified by any state) officials would not say that an amendment had been created
    - The same point is true about interpretations of the constitution by the Supreme Court
      * Or determinations whether a batter is out made by an umpire
        + It isn’t really true that the batter is out if the umpire says he’s out
  + In addition, Congress looks took article five to determine whether an amendment is valid
    - It doesn’t think of itself as having the power to create constitutional amendments
    - Greenawalt says that there may be multiple rules of recognition, depending upon one’s status
      * For some officials an amendment is valid if Congress says its valid (and Congress’s interpretation is reasonable)
      * But for Congress, an amendment is valid if it satisfies article five
      * Green is not sure whether this is really an example of different rules of recognition
        + For example, we can have a common definition of what a beech tree even though many people will defer to an arborist concerning that definition

It does not mean that there are multiple definitions of a beech tree being used

* + - * still, it could be that there are different rules of recognition being used by different groups of officials within the same legal system
        + That is a problem for Hart’s theory

The existing US Constitution is not supreme, because it can be overridden by an amendment. But what is the relationship between the Const and the ultimate criteria of law (the RoR)?

One argument is that the Const is law because it satisfies Article VII. It is law because it was ratified. But if something came to light to show that the ratification was illegitimate, would people consider the Constitution no longer law? If not, then is Art VII irrelevant to the Const’s current status as law

* another problem, according to Greenawalt, is that Art VII is not a way of creating a number of possible constitutions
  + It is only way of ratifying a particular constitution
  + Green is not sure that this is a problem though
* Another problem, according to Greenawalt, is that once the constitution has been ratified through Art VII there is no method to get out of that constitutional order
  + The only way of changing things is through Art V amendment, which is itself part of the constitutional order – it was created, under this theory, through Art VII
  + Again, Green is not sure that this is a problem

is

* OK assume that the reason the constitution is law is not Art VII – other possibilities
* (1) All or part of the ultimate rule is the Constitution itself, including the amending clause but excluding the amendments.
  + This one is problematic, because it suggests that all of the particular clauses in the constitution are somehow in the heads of officials
    - They’re all accepted by officials making them all part of the rule of recognition
  + It also gives no explanation of why these various provisions belong together – it is just a contingent fact that they’re all accepted
* (2) All or part of the ultimate rule is: Whatever the Constitution contains that is not itself enacted according to another part of the Constitution is law.
  + Under this theory, which is the one Greenawalt accepts, what is in officials’ heads is the rule that would ever is in the constitution is law (unless it has been changed through amendment)
    - But what if tomorrow we found out that the document in the national archives is different from what we thought it was
      * The commerce clause isn’t there
      * We would not conclude that commerce clause is not law
* If