**Philosophy of Law Notes- 3/21/18**

Finishing Greenwald

* The American legal system causes a problem for Hart’s theory, because there appear to be too many shifts in the rule of recognition
  + That would mean that there are many revolutions, of sorts
* One example is provisions that are justified initially by some legal rule, but then become accepted in a way that is independent of that rule and they drift up into the rule of recognition itself
  + An example is the united states constitution, which was law initially because it satisfied article seven but subsequently simply becomes part of the rule of recognition
  + Another example is amendments under article five
    - They are initially law because they satisfy article five or Congress has validated the process by which they were ratified
    - later they drift up into the role of recognition itself
      * No one would say that the 14th amendment is not law simply because we now discover that article five processes were not satisfied
  + Shifts in the ultimate rule- revolutions
* Other discoveries
  + Discrepancies in what officials believe the rule of recognition is, but make no practical difference.
    - Does that mean these people and have a different legal systems?
  + Different rules of recognition depending on officials’ roles.
  + Absurdly long rule of recognition- source of all states laws have a place in the rule of recognition.
* Greenwald list ten insights that arise from considering the American legal system and the light of Hart’s theory

Paradox of Self-amendment

* Alf Ross- anybody who is authorized to create law cannot change their authorization.
  + for example can Congress limit their own power? No.
    - Can’t bind future Congress, for example.
  + this is true whether or not the lawmaker is authorized by the rule of recognition or law that is derived from the rule of recognition
* Rule of recognition has its source in the social practice of officials
  + This authorizes the sovereign- and the sovereign cannot change this.

So far so good. It would follow that amendment clauses cannot be amended

* Amendment clauses in Constitution authorize the creation of law. The people authorized by the amendment clause should not be able to change their authorization, which means they should not be able to amend the clause that authorizes them
  + This can be shown logically too
  + Const. can only be changed through process C.
  + Law X, which says that Const. can only be changed through process D, is enacted through process C.
  + Law X is valid 🡪 Const. can be changed only through process D.
* This can’t be possible
  + - The way that Ross puts it is in terms of a Self-referencing problem
    - But we can ignore this
* But there is a problem - the amendment of amendment procedures has happened in some legal systems. Using amendment procedure to change the amendment procedure.
* Furthermore no one thinks that it occurred through a revolution
* Everyone thinks that there still on the same legal system

This is the paradox: the amendment of amendment procedures appears impossible but it occurs, without revolution

Ross’s solution

* When amendment provision is amended through its own procedures, the real amendment provision in the legal system is something other than the provision that was amended
* So for example if Article V can be amended, it follows that Art V is not the actual amendment procedure in American legal system.
* consider another example
  + Babysitter is given authorization to make rules for Parents’ kids. Babysitter feeling sick, can she delegate? Could be a revolution but more than likely the Parents meant that she could delegate her power to someone, provided it was reasonable.
  + Parent’s authorization is complex and infinitely long with certain restrictions.
  + You can make rules for my children, unless you say that X can make the rules for my children, in which case X can, unless X says that Y can makes rules for my children in which case Y can …
* A revolution is always possible as long as officials change their practice. But we are talking about staying in the same legal system.
* If article 5 is the true amendment clause, then it would follow that amendments can be made only by ¾ states and ¾ states have no control over the matter
* That *could* be what officials think
* But if they think that if 3/4 of the states can make it such that 4/5 states are necessary for an amendment, then ART V is not the true amendment provision
* End of the day, paradox can be solved simply by looking to official practice. There is no way to determine a correct answer outside of this. Rule of recognition is king.
  + If Article 5 is truly the rule of recognition with no addenda, then it cannot be changed.
  + If Article 5 does have implicit addenda just like the baby sitter example, then able to change Article 5 through Article 5.