
ARE CONSTITUTIONAL NORMS *LEGAL* NORMS?

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I.

Modern legal positivism prides itself on the clear distinction it draws between legal and nonlegal norms. But how are we supposed to tell whether a given norm practiced and prevalent among the powerful in a society governed by law is actually one of its laws, part of its legal system, as opposed to a moral principle that powerful people happen to accept? The familiar answer refers us to the rule of recognition—the fundamental secondary rule, present in every system of law, whose function it is to pick and choose among positive norms and identify those that are accorded legal status. But this will not help if the norm we are asking about is arguably a part of the rule of recognition itself or part of some other fundamental secondary rule. Then we have a problem, for modern positivism provides no clear basis for distinguishing legal from nonlegal norms in this area. The rule of recognition helps us distinguish legal primary rules from nonlegal primary rules, but it is not clear how it can operate at the secondary level. Evidently, this is going to be a problem for constitutional norms, as many of the most important constitutional norms make up the secondary rules of the legal system to which they pertain. So we have to ask, Is there a way of distinguishing those constitutional norms that merely pertain to the foundations of the legal system from those that should be counted among the legal rules—the secondary legal rules—of the legal system itself?

II.

In *The Province of Jurisprudence Determined*, John Austin, the great philosopher of early legal positivism, confronted this question in regard to cases like the following:

From the ministry of Cardinal Richelieu down to the great revolution, the king . . . was virtually sovereign in France. But . . . during the same period, a traditional maxim cherished by the courts of justice, and rooted in the affections of the bulk of the people, determined the succession to the throne: It determined that the throne, on the demise of an actual occupant, should invariably be taken by the person who then might

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happen to be heir to it agreeably to the canon of inheritance which was named the Salic law.¹

Was the Salic law part of the legal system in operation at the time, or was it just a political custom among the French? Austin answered this question unequivocally. He said that although this norm was called the Salic law,² it was not and could not have been part of the law of France at the time:

[If] an actual king, by a royal ordinance or law, had attempted to divert the throne to his only daughter and child, that royal ordinance or law might have been styled with perfect propriety an *unconstitutional* act. It would have conflicted with the traditional maxim which fixed the constitution of the monarchy, and which was guarded from infringement by sentiments prevalent in the nation. But *illegal* it could not have been called³

It may have been a defining constitutional principle of the French monarchy in the mid-eighteenth century, but it was not constitutional law and no legal process could have enforced it. The norm was one of positive morality, said Austin, not part of the positive law of France. And he said the same about the rule that protected the established churches in England and Scotland, the rule that maintained the principle of bicamerality in England, and the rule of the Roman Republic prohibiting the imposition of *ex post facto* penalties.⁴

In general, Austin thought “constitutional law” was an oxymoron. He did not mean that there were no rules determining constitutional structure; rather, he thought it was “positive morality . . . which fixes the constitution or structure of the given supreme government.”⁵ Nor did he mean that there were no constraints on sovereign power:

In every, or almost every, independent political society, there are principles or maxims which the sovereign habitually observes, and which the bulk of the society, or the bulk of its influential members, regard with feelings of approbation. Not unfrequently, such maxims are expressly adopted, as well as habitually observed, by the sovereign or state. More commonly, they are not expressly adopted by the sovereign or state, but are simply imposed upon it by opinions prevalent in the community. Whether they are expressly adopted by the sovereign or state, or are

1. John Austin, *The Province of Jurisprudence Determined* 216 (Wilfrid E. Rumble ed., 1995) (1832).

2. The term “Salic law” usually refers to a particular provision of an ancient French code from about the fifth century, which now has little or no legal standing; the provision prohibited inheritance by a woman or through a female line while there were potential male heirs available. For an interesting discussion, see Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 *Am. J. Int’l L.* 1, 5 n.20 (1992); see generally John Milton Potter, *The Development and Significance of the Salic Law of the French*, 52 *Eng. Hist. Rev.* 235 (1937).

3. Austin, *supra* note 1, at 216.

4. See *id.* at 213-17.

5. *Id.* at 215.

simply imposed upon it by opinions prevalent in the community, it is bound or constrained to observe them by merely moral sanctions.⁶

We know better, of course. We know how to argue against Austin's view because we have read chapter four of H.L.A. Hart's book, *The Concept of Law*.⁷ Like Austin, Hart uses the example of succession. But Hart uses it to show the difference between perpetuating sovereignty by a mere habit (for example, a habit of obeying a king's eldest son when the king dies) and perpetuating sovereignty by the acceptance of a rule. Hart uses this to show the importance of the phenomenon of the internal aspect of norms. He writes,

In explaining the continuity of law-making power through a changing succession of individual legislators, it is natural to use the expressions "rule of succession", "title", "right to succeed", and "right to make law". It is plain, however, that with these expressions we have introduced a new set of elements, of which no account can be given in terms of habits of obedience to general orders [M]ere habits of obedience to orders given by one legislator cannot confer on the new legislator any *right* to succeed the old and give orders in his place. . . . If there is to be this right . . . at the moment of succession there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed.⁸

To understand the sort of social practice that makes sense of this possibility, Hart says that we have to understand not only that people behave in a certain way towards the sovereign and his successors, but that their doing so has an internal aspect:

[I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.

. . . .

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", "right" and "wrong."⁹

Hart's followers criticize Austin for having neglected the internal aspect of rules.¹⁰ And it seems to follow that it was this neglect that led Austin to

6. *Id.* at 214-15.

7. H.L.A. Hart, *The Concept of Law* (2d ed. 1994); *see id.* at 50-61.

8. *Id.* at 54-55.

9. *Id.* at 56-57.

10. *See, e.g.*, Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 75-76 (2001); Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. Rev.* 167, 167-68 (1999).

regard “constitutional law” as an oxymoron. He tried to understand the basic features of the constitution and regulation of sovereignty purely in terms of regularities of behavior—“maxims which the sovereign habitually observes.”¹¹ But once we see that the behavioral regularities have an internal aspect and that that internal aspect is normative in character, then we—for example, the positivist followers of Hart as opposed to Austin—can regard the relevant practices and habitual observances as rules and treat those rules as helping to constitute the fundamental secondary norms of the legal system in question.

I admire Hart’s jurisprudence as much as anyone, but I am not convinced by his attack on Austin. The difficulty with this sort of self-congratulation among Hart’s followers is that Austin plainly did not fail to notice the internal aspect of habitual observances of this kind. He spoke of these rules not just as behavioral regularities, but as practices expressive of the approbation of the bulk of the political community, something whose violation would not only thwart their expectations, but also “shock their opinions and sentiments.”¹² The Salic law was “rooted in the affections of the bulk of the people.”¹³ He assigned these norms to positive morality, and this certainly did not involve any doubt about their internal aspect or their normativity for the people who held them. Quite the contrary, we call something an element of positive morality precisely because it is regarded by an “aggregate of persons” with “a sentiment of aversion or liking.”¹⁴ True, we do not find in Austin the precise characterization of norms of succession that Hart offers—a practice among officials of (say) obeying the male heir rather than a female heir when the king dies, which is itself the subject of a reflective critical attitude among the officials that might be expressed by saying “this is right” or “this is what we ought to do.” Austin tended to focus on the “sentiments prevalent in the nation” which supported the norm against possible infringements, rather than the direct correspondence between behavior and internal aspect on the part of those whose actions were governed most directly by the norm—the chamberlains and high officials whose lead would be followed by the people in determining who is the next king.¹⁵ It is quite wrong to say that he thought

11. Austin, *supra* note 1, at 214.

12. A long endnote on “[t]he continuity of legislative authority in Austin” refers to Austin’s comments on succession in chapter five of *The Concept of Law*. Hart, *supra* note 7, at 288–89. But it ignores the comments that I have quoted, which are from chapter six of that work. Of the chapter five passage, Hart writes, “Austin seems to admit that to account for the continuity of sovereignty through a succession of changing persons who acquire it, something more is required in addition to his key notions of ‘habitual obedience’ and ‘commands’, but he never clearly identifies the further element.” *Id.* at 288. We should note also that Hart is no fairer to Austin in his later work. *E.g.*, H.L.A. Hart, *Sovereignty and Legally Limited Government*, in *Essays on Bentham: Studies in Jurisprudence and Political Theory* 224 (1982).

13. Austin, *supra* note 1, at 216.

14. *Id.* at 124.

15. Austin does talk about undertakings that a monarch may give concerning the legislation he will and will not enact. He says of these that they are not laws because they

it was simply a matter of behavioral regularity among the chamberlains and others similar. The element of internal normativity is as crucial to Austin's account as it is to Hart's.

In fact, Hart's response is important (as a critique of Austin) not on account of anything he says about the internal aspect of norms, but on account of Hart's insistence that sovereignty—where it exists—depends on rules, is constituted by rules, and so cannot intelligibly be regarded as the source of all the rules that make up the legal system. Austin did not deny that there were rules—such as succession rules—with an internal aspect at play in this area. He made it clear that this is the case. What he did not quite see is that one really could not define a sovereign apart from such rules.¹⁶ The rules did not merely affect the sovereign or pertain to the sovereign; some of them actually constituted the sovereign. They were in that sense constitutive rules of the legal system. That is the real lesson of Hart's critique of Austin in chapter four of *The Concept of Law*.

It would not be hard for Austin to be brought to see the point about the role of these rules in constituting the sovereign. There is really not much that is inconsistent with his position in this insight. Some developments of this insight, on the other hand, are inconsistent with the foundations of Austinian jurisprudence. For example, once we acknowledge that sovereigns are constituted by rules, we might entertain the possibility that the foundations of some legal systems can be constituted by rules in a way that establishes a constitution of a fundamentally different shape—for example, in a way that does not yield anything that looks remotely like a sovereign. We can then see through to the possibility that a legal system need not have a constituted sovereign at its base (though some do); it may just have a constitution. (This is how we have to think about the legal system of the United States, for example.¹⁷) Acknowledging this possibility—which Hart's account opens up—would throw a wrench in the works for positivist theories organized around the idea of sovereignty. But the more modest conclusion, in and of itself, need not trouble Austin. Indeed, it is not hard to imagine him conceding that these rules help to

cannot be enforced against him. Still, he adds, “[A] man may adopt a principle as a guide to his own conduct, and may observe it as he would observe it if he were bound to observe it by a sanction.” *Id.* at 213. If this is not a rule in its internal aspect, I do not know what is.

16. He comes pretty close, though:

I mean by the expression *constitutional law*, the positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme government. I mean the positive morality, or the compound positive morality and positive law, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside: and, supposing the government in question an aristocracy or government of a number, which determines moreover the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body.

Id. at 215-16.

17. For Hart's awareness of the importance of this implication, see Hart, *supra* note 7, at 68-78.

constitute the sovereign, while still persevering in his insistence that the constitutive rules are not legal rules. Just as the rules which constitute the International Rugby Board are not themselves rules of rugby, though they constitute the body that can make and change the rules of rugby, so the rules which constitute the sovereign monarchy of France (in the mid-eighteenth century) are not necessarily rules of French law, though they constitute the body that can make and change the rules of French law.

So Austin could maintain the proposition that constitutive rules are not legal rules. Hart's reasons for disagreeing with this proposition are really rather casual and pragmatic. Assuming (the strongest case for Hart's account) that the rule about succession forms part of the fundamental rule of recognition in a legal system, we might or might not decide to label it "law" on that account. Hart writes, "The case for calling the rule of recognition 'law' is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system . . ." ¹⁸ But he acknowledges that the rule of recognition could equally well be regarded as a mere social fact that lays the foundation for law. ¹⁹ Nothing much hangs on describing it one way or the other. It is really a matter of theoretical pragmatics. Hart believes it is tidier to use the label "legal rules" to apply to all the rules that affect the structure of the legal system than to adopt the potentially confusing nomenclature that Austin urges, with certain important and constitutive rules of the legal system being regarded as rules of positive morality. But opinions could differ on that.

III.

Let us consider now a more modern example. Bills become law in the United Kingdom by being voted on (in successive readings) in both Houses of Parliament and by then being given the Royal Assent. (There are some special circumstances, set out in the Parliament Acts of 1911 and 1949, in which bills may be given the Royal Assent and become law notwithstanding the opposition of the House of Lords. ²⁰ But I will not discuss the Parliament Acts, intriguing though they are.) I want to focus on the Royal Assent.

A bill does not become law unless the Queen indicates her assent to it. There is no provision for overriding the Queen's refusal to assent (as there

18. *Id.* at 111.

19. *Id.* at 111-12.

20. Parliament Act, 1911, 1 & 2 Geo. 5, c. 13; Parliament Act, 1949, 12, 13 & 14 Geo. 6, c. 103. The effect of the Parliament Acts is that bills may become law notwithstanding the opposition of the House of Lords if they have been voted up twice in successive sessions by the House of Commons. The Parliament Acts have rarely been used. They were invoked most recently to secure the passage—despite the Lords' opposition—of the Sexual Offences (Amendment) Act, 2000, c. 44, sched. 1 (N. Ir.), which equalized the age of consent for male homosexual sexual activities with that for heterosexual and lesbian sexual activities, and to secure the passage—again, despite the Lords' opposition—of the Hunting Act, 2004, c. 37, sched. 2 (Eng. & Wales), which prohibited the hunting of foxes and badgers with dogs.

is, for example, in the U.S. Constitution for overriding a presidential veto).²¹ But there is a rule—accepted, even taken for granted, in the British constitution—that the monarch will never withhold her consent; it will always be forthcoming when a bill has been properly passed in both Houses of Parliament (or passed according to the Parliament Acts). Her assent is required, but she is required to give it. In other words, the British constitution has two fundamental rules concerning the Royal Assent: (R1) No bill becomes law without the Royal Assent; and (R2) the Royal Assent must not be withheld from any bill properly passed in both Houses of Parliament (or passed according to the Parliament Acts).

As is well known, there is no document performing for the United Kingdom the function that the U.S. Constitution performs for the United States. Still, it is widely accepted that R1 is a binding rule of the constitution of the United Kingdom. A number of statutes—most notably the Parliament Acts²²—refer to it and proceed as though it is binding. Some of them do so, for example, by regulating the mode of exercise of certain powers that the rule provides for,²³ or by providing for certain exceptions to the rule under certain circumstances, a procedure which would not make sense if the underlying rule were not regarded as binding. Austin might quibble, but it makes sense to regard R1—the requirement of the Royal Assent—as a legal rule.

What about R2? The status of R2 presents some difficulty. We know that the Royal Assent has not been refused to any bill passed by both Houses of Parliament (or passed in accordance with the Parliament Acts) since 1708, when Queen Anne vetoed a bill “for the settling of Militia in Scotland” on March 11, 1708.²⁴ In 1999, the present Queen indicated her refusal to assent to a modification of her war-making powers. But that was a special case, pertaining to a separate constitutional rule that no bill modifying royal powers may be entertained for serious debate without an indication that the monarch is willing to be bound by it.²⁵ This bill was not

21. Cf. U.S. Const. art. I, § 7, cl. 2.

22. E.g., Parliament Act, 1911, 1 & 2 Geo. 5, c. 13, § 2(1) (as amended) (“If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to [Her] Majesty and become an Act of Parliament *on the Royal Assent being signified thereto*, notwithstanding that the House of Lords have not consented to the Bill.” (emphasis added)).

23. For example, the Royal Assent Act, 1967, c. 23, § 1, provides that the monarch can give her assent to a bill in writing by means of letters patent that are presented to the presiding officer of each House of Parliament; she is not required to give it in person at the Houses of Parliament (as was formerly the custom).

24. Queen Anne’s veto is recorded as “*La Reine se avisera*” in 18 H.L. Jour. 506 (1708).

25. The Military Action against Iraq (Parliamentary Approval) Bill, 1999, Bill [35] (U.K.), was a private member’s bill introduced by Tam Dalyell, MP, seeking to transfer the power to authorize military strikes against Iraq from the monarch to Parliament. The bill had its first reading on January 26, 1999, and was initially scheduled for second reading on April

passed in either House; after its first reading in the Commons, a second reading was not scheduled because of her Majesty's opposition. Of course, we know nothing of Queen Elizabeth's personal view of this bill. Her refusal of assent to its introduction was given on the advice of her ministers, pursuant to another rule of the British constitution: (R3) The monarch always follows the advice of her ministers in exercising the powers assigned to her under the constitution. That incident aside, there is no case in the United Kingdom of the monarch refusing his or her consent to any enacted bill in the 298 years since 1708.²⁶

So far, that is just a predictable behavioral regularity. But it is clearly a behavioral regularity with an internal normative aspect. The Queen knows that she must not withhold her consent, and she knows that if she did, her action would not be regarded just as surprising or unprecedented, but condemned as wrong and unconstitutional. She treats it as a rule that she must follow.²⁷ All other participants in the British political system subscribe to this rule as a norm for the Queen's behavior—they would condemn her refusal of the Royal Assent—and they subscribe also to R2's normative implications so far as their own behavior is concerned. For example, British politicians would regard it as highly inappropriate to lobby the Queen to exercise the power granted under R1 one way or the other; because it is not appropriate for her to make a choice, it is not appropriate for them to seek to influence that choice. It may be thought that a Royal Assent becomes a dead letter in light of a rule prohibiting its negative

16, 1999. "As a bill modifying the monarch's prerogative powers, the Queen's consent was required before it could be debated in Parliament. . . . The Queen, acting upon the advice of her government, refused to grant her consent for the introduction of the bill." Wikipedia, Military Action Against Iraq (Parliamentary Approval) Bill, [http://en.wikipedia.org/wiki/Military_Action_Against_Iraq_\(Parliamentary_Approval\)_Bill](http://en.wikipedia.org/wiki/Military_Action_Against_Iraq_(Parliamentary_Approval)_Bill) (last visited Nov. 8, 2006). As a result, the second reading was postponed, and eventually the bill was automatically dropped. *See id.*

26. But there have been more recent cases in the Commonwealth, where the Queen's representative has withheld Royal Assent. This happened in Canada: In 1937, exercising the power of the monarch, Alberta's Lieutenant Governor, John C. Bowen, refused the Royal Assent in respect of three bills passed under William Aberhart's Social Credit Government. *See* J.R. Mallory, *The Lieutenant-Governor as a Dominion Officer: The Reservation of the Three Alberta Bills in 1937*, 14 Can. J. Econ. & Pol. Sci. 502 (1948).

27. Possibly a practice could have an internal normative aspect without being a rule. Joseph Raz cites a number of cases to illustrate this point in Joseph Raz, *Practical Reason and Norms* 56 (1990). Or consider the following case. A.V. Dicey quotes an observation by Leslie Stephen, concerning the limits on the sovereignty of Parliament: "If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it." A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 33 (8th ed., Liberty Classics 1982). Clearly, the practice of refraining from passing statutes of this character has an internal normative aspect. But it is not regarded as a rule. Its internal aspect is that of the recognition of a very powerful reason (or set of reasons) for not doing something of a certain kind. To be treated as a rule, in Raz's system, a norm has to have the character of an exclusionary reason, and possibly also a conventional character in the technical sense that the observance of the norm by each is sensitive to the fact of its observance by others. The practice that Stephen identifies does not have these features in its internal aspect. But I think it is pretty clear that R2 does.

exercise: R1 may as well not be there if it is conjoined with R2. But there are a number of cases in law where a voluntary choice is required even though the party is not legally free to make a contrary choice: The requirement to undertake an oath or affirmation before giving evidence under subpoena is an example. Sometimes the symbolic exercise of a power matters even when there is no real discretion to refuse its exercise.

Notice also that R2 is of immense importance in relation to the blocking of what would otherwise be a powerful combination of R1 and R3. The authority of the British executive is already immense because a large array of powers formally assigned to the Crown are in fact exercised by (or on the binding advice of) ministers under R3. It is conceivable that R1 could be exercised on that basis, giving Tony Blair, for example, as Prime Minister, an effective right of legislative veto. A power of Crown veto exercised in this way would considerably enhance the power of the executive vis-à-vis Parliament: It would not do anything for the real power of the Queen, but it would give her ministers much greater power than they have at the moment. The Prime Minister could threaten to veto any bill that happened to be passed by Parliament (including by members of what was normally his own majority party) against his wishes. Fortunately, that is not how it works. R2 applies whatever the views of the Queen's ministers.²⁸ The rule is simply that the Royal Assent may not be refused. In other words, R2 ensures that though there is a requirement of Royal Assent, there is absolutely no provision for executive veto in the British constitution. If Tony Blair wants to stop a piece of legislation, he has to vote against it in the normal way in the House of Commons and use his Whips to persuade a majority of his fellow members of Parliament to join him. Plainly, R2 is an important rule. Unlike the U.S. presidency, the monarchy is not an elective office. An effective power of legislative veto in the hands of the monarch would undermine the democratic character of the British constitution (or, if conjoined with R3 to address the democratic difficulty, would tilt the balance of the British constitution further in favor of the executive). If Britain is, as Montesquieu is said to have remarked, not a monarchy, but a republic in the guise of a monarchy,²⁹ then rules like R2 explain why. Anyone who tried to understand the British legislative process (including R1) without a grasp of R2 would come away with a fundamental misapprehension. R2 is a crucial and constitutive feature of the sovereignty of Parliament.

28. Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* 21-22 (1984), makes a mistake in treating R2 as just a special case of R3. He writes, "That the Royal Assent should not be refused . . . is perhaps the least controvertible application of the general convention that prerogative powers are exercised on ministerial advice." *Id.* But the rule is that the Royal Assent may not be refused at all, not even on ministerial advice to refuse it.

29. See M.J.C. Vile, *Constitutionalism and the Separation of Powers* 92 (2d ed., Liberty Fund, Inc. 1998) (1967).

The importance of R2 can also be grasped in another way. We call rules like R2 and R3 conventions of the constitution to indicate their informal—almost customary—status. But sometimes we also think of the fundamental secondary rules in a positivist theory like Hart's as "conventions" in a different sense. These rules exist to coordinate the behavior of large numbers of people in society: Like rules about applause, language, or driving on the left, they make no sense as rules for one person to follow; it makes sense for me to follow them only on the assumption that large numbers of others are doing so, too. But secondary rules are not necessarily pure conventions (like the examples I have just mentioned). As Ronald Dworkin has pointed out, they also represent ways of doing things that people care about.³⁰ No one really cares about driving on the left or on the right, provided they do what others are doing on those roads. But the recognition of norms as law is different. Recognizing as law what has been enacted by a popular assembly, as opposed to what has been enacted by a Hobbesian strong-man, is something that people care about. True, they do not want to pursue a practice of recognition based on their own idiosyncratic views in political theory, which no one else participates in; so there is an element of convention.³¹ But there is also an element of conviction. People choose to coordinate legal recognition around the parliamentary option rather than the Hobbesian strong-man option because of their affection for democracy. There is no doubt that R2 plays an important role in this regard, along with the Parliament Acts and the elective credentials of the House of Commons.³²

But is R2 law? It is plainly not a primary rule of the British legal system, since it operates to structure the creation of law. But a strong case can be made that it is an important component of one or more of the fundamental secondary rules. When we think about the place of fundamental secondary rules in Hart's theory, our attention tends naturally to focus on the rule of recognition (crucial as this is to one of the central claims of legal positivism). But we ought to think also about the place of fundamental rules of change in Hart's theory.³³ Obviously, R2 operates as part of the fundamental rules of change of the British legal system. But we might also see it as part of the rule of recognition. *In extremis* it might affect the recognition of laws: A crisis in which R2 is violated and the Royal Assent

30. See Ronald Dworkin, *Law's Empire* 136 (1986).

31. We are dealing here with something like a "partial conflict" coordination game (comparable to "the Battle of the Sexes," for example). For a discussion of the importance of these interactions in law and politics, see Jeremy Waldron, *Law and Disagreement* 103-05 (1999).

32. The aim or end of the conventions of the British constitution, Dicey observed, is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular though not quite accurate language) the nation. Dicey, *supra* note 27, at 285.

33. For the importance of fundamental rules of change, see Hart, *supra* note 7, at 95-96.

withheld might well prompt the courts to act as though Royal Assent were dispensable and to begin recognizing as law bills enacted by Parliament, even though they had not been enacted by the Queen in Parliament.³⁴ Either way, a strong case can be made for not ignoring R2 when we give our account of the legal system's fundamental secondary rules.

Intriguingly, however, H.L.A. Hart does not take this view. His position on R2 turns out to be the same as we might imagine Austin's position to be. Austin, we might imagine, would say that R2 is not a legal rule, for the reasons we have already considered. He would say the same about R2 as he said about the French rule confining inheritance of sovereignty to the male line. It may be an important rule of positive morality, and as such it may be an indispensable part of the real constitution, but that does not make it law. What Hart says about R2 is this: "[T]he Queen may not refuse her consent to a bill duly passed by Peers and Commons; there is, however, no legal duty on the Queen to give her consent"³⁵ In other words, Hart follows A.V. Dicey and others in regarding R2 as a "convention," rather than a rule of law.³⁶ Such rules, says Dicey, are called conventions because the courts do not recognize them as imposing a legal duty.³⁷ But the rule of

34. Something like this happened during the crisis of the English monarchy from 1648-1649. See Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* 140 (2005).

35. *Id.* at 111.

36. Says Dicey:

[T]he conventions of the constitution . . . are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is the "King in Parliament," should each exercise their discretionary authority

. . . .

Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the Courts. . . . Suppose . . . that on the passing by both Houses of an important bill, the King should refuse his assent to the measure, or (in popular language) put his "veto" on it. Here there would be a gross violation of usage, but the matter could not by any proceeding known to English law be brought before the judges.

Dicey, *supra* note 27, at 284-85, 292-93.

37. *Id.* at 280-81. Dicey's position actually was more sophisticated than Hart's. On the one hand, Dicey said (as Hart says) that R2 did not amount to a legal rule because it could not be enforced by the courts. But Dicey went on to say about conventions generally, "Still the conventional rules of the constitution, though not laws, are, as it is constantly asserted, nearly if not quite as binding as laws. They are, or appear to be, respected quite as much as most statutory enactments, and more than many." *Id.* at 293.

Dicey did not settle for the usual explanation of this—that conventions like R2 are obeyed because of the immense political danger of violating them, which is associated with the power of popular opinion. He did not deny that such a sanction supported them, but thought we still needed to explain the extraordinary law-like effect of popular opinion in this case, compared to other cases where it has a more uncertain effect. See *id.* at 294.

His own position was that some of these conventions were supported by the force of law, but not directly on their own account:

[T]he sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is . . . that the breach of these principles and of these

conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.

Id. at 296-97. This will happen, Dicey says, not because the convention in question is directly enforced, but because it operates in a way that is crucial to the integrity of the law as a whole. He illustrates this with reference to another conventional rule, (R4) *that Parliament must be summoned at least once every year.*

[S]uppose that Parliament were prorogued once and again for more than a year, so that for two years no Parliament sat at Westminster. Here we have a distinct breach of a constitutional practice or understanding, but we have no violation of law. What, however, would be the consequences which would ensue? They would be, speaking generally, that any Ministry who at the present day sanctioned or tolerated this violation of the constitution, and every person connected with the government, would immediately come into conflict with the law of the land.

. . . The Army (Annual) Act would in the first place expire. Hence the Army Act, on which the discipline of the army depends, would cease to be in force. But thereupon all means of controlling the army without a breach of law would cease to exist. . . . Then, again . . . large portions of the revenue would cease to be legally due and could not be legally collected, whilst every official, who acted as collector, would expose himself to actions or prosecutions. The part, moreover, of the revenue which came in, could not be legally applied to the purposes of the government. If the Ministry laid hold of the revenue they would find it difficult to avoid breaches of definite laws which would compel them to appear before the Courts. . . .

The rule, therefore, that Parliament must meet once a year, though in strictness a constitutional convention which is not a law and will not be enforced by the Courts, turns out nevertheless to be an understanding which cannot be neglected without involving hundreds of persons, many of whom are by no means specially amenable to government influence, in distinct acts of illegality cognizable by the tribunals of the country. This convention therefore of the constitution is in reality based upon, and secured by, the law of the land.

Id. at 297-99. Or, as Dicey also puts it,

[T]he force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker.

Id. at 300.

Dicey's explanation has been criticized by other commentators for applying, at best, to only one or a few of the many conventions of the British constitution. *See, e.g.*, Marshall, *supra* note 28, at 5-7. (We can see how it applies to R4, but it is by no means clear, for example, how it would apply to R2 or even the crucial convention R3.) Still, it is a much more interesting explanation than anything that Hart offers, particularly because of the link it forges between the normativity of conventions and the internal aspect of rules, on the one hand, and the systematicity of law, on the other.

It is worth noting, finally, that Marshall's own suggested account of the bindingness of conventions is much closer to the Hart "internal point of view" account. Marshall writes,

Those who obey moral or other non-legal rules they believe to be obligatory, characteristically do it because of their belief that they are obligatory, or else from some motive of prudence or expected advantage. Those who disobey them do so because they do not regard them as obligatory, or wish to evade them, or wish to change them. In other words we do not need any special or characteristic explanation for obedience to the rules of governmental morality. Whatever we know about compliance with moral rules generally, will suffice.

Id. at 6-7. Marshall is right, except for the point that Hart's analysis of the internal point of view shows how this is the best way to characterize the obligatory aspect of certain *legal* rules as well as "moral or other non-legal rules." That an explanation like this is necessary

recognition is not treated by the courts as imposing legal duties, and Hart is still prepared to regard that as law, simply because it is an integral part of the structure of the legal system.³⁸ The rule of recognition is certainly relevant to the imposition of legal duties, but the same is true of R2. So it is really not clear why Hart should take this line so far as R2 is concerned, or why he does not admit to at least some ambivalence about the matter.

IV.

I have two further observations to offer concerning Hart's emphatic denial that R2 can be regarded as a rule of law. Neither of the observations reflects well on the rigor and originality of Hart's jurisprudence.

The first observation is that this case shows that Hart was not prepared to follow through wholeheartedly on the tendency of his theory of the internal aspect of rules in relation to social practices. His reason for denying that R2 is a legal rule is, as we have seen, that it is not upheld by the courts or imposed (with sanctions) as a legal duty. In the early part of *The Concept of Law*, Hart criticizes the earlier positivists for thinking that these things are crucial to legal normativity.³⁹ He criticizes the sanction theory of duty, and he introduces a way of understanding normativity that does not depend on institutional imposition. On his own account, the mere fact that behavior is practiced with a certain internal attitude is said to be enough to establish the normative character of that practice. (I do not mean that it is sufficient to establish the practice as normative for us—we who merely notice that all this is going on—but he does say that behavior plus internal aspect is sufficient to establish that the practice works as a norm for its practitioners.) We do not need to add anything about the imposition of the practice, with sanctions, by a court. Of course, some rules are imposed with sanctions by courts, but those are usually primary rules and their imposition depends on secondary rules which do not have this character. For the latter rules—for example, the fundamental secondary rules—the internal aspect is the key to their normativity. That seemed to be Hart's position, and my complaint is that he did not stick with it in analyzing the legal status of R2.

I have always found one of the most attractive features of Hart's jurisprudence to be his insistence that at the foundation of every legal system lie certain basic rules which work more like customs or conventions than like the enacted textual rules. In a little textbook on legal philosophy

for the binding aspect of rules like R2 should not be taken as a reason for denying their status as part of the law.

38. Thus Hart says,

Plainly the rule that what the Queen in Parliament enacts is law . . . is not a convention, since the courts are most intimately concerned with it and they use it in identifying laws. . . . The case for calling the rule of recognition 'law' is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system

Hart, *supra* note 7, at 111.

39. *See id.* at 19-25.

that I wrote many years ago,⁴⁰ I said that the advantage of this account is that it ceases to treat things like the fundamental conventions of the British constitution as anomalies or as problematic for legal theory. I wrote that although conventions like R2 and R3 seem terribly fragile when we contrast them, for example with the robust textuality and judicial enforcement of the rules of the American Constitution, still Hart teaches us that “every legal system is based in the end on something as fragile as this.”⁴¹ Law and political order matter to us,

[b]ut in the end they amount to an interlocking system of rules and practices that depend on nothing more concrete and nothing more secure than the readiness of those involved in political life to regulate and judge their own and others’ behaviour by certain standards. Hart’s theory of the rule of recognition implies that something no more secure than this lies at the foundation of every legal system.⁴²

The internal aspect of social practices was key to Hart’s understanding that certain practices amounted to rules and so could not be excluded from the foundations of a legal system on the ground that they lacked an articulate normative character. It is very disappointing, therefore, to find Hart flinching from the implication of this view and refusing to challenge the comparatively mindless position of British constitutionalists that some of the most fundamental conventions of the British constitution cannot be regarded as legal rules because they are not recognized and imposed by courts.

My second observation on Hart’s categorical denial that conventions like R2 may be considered as law has to do with the felt need, among modern legal positivists, to draw a sharp line between law and morality. “Morality” can mean many things, and usually that line is thought to matter because of our opposition to natural law theories, theories that fail to draw the requisite distinction between law and critical morality.⁴³ In this context, however, “morality” means positive or conventional morality—“standards of conduct which are widely shared in a particular society”⁴⁴ Hart acknowledged that in the early stages of the development of law, “there might be nothing corresponding to the clear distinction made, in more developed societies, between legal and moral rules.”⁴⁵ But it was key to his position that this blurring or indeterminacy is not the case with developed legal systems. The trouble is, however, that his account of why this is so refers entirely to the operation of certain fundamental secondary rules; these are what provide an understanding of the sharpness of a developed legal system’s distinction between primary legal rules and primary rules of positive morality. There

40. Jeremy Waldron, *The Law* (1990).

41. *Id.* at 64.

42. *Id.* at 66-67.

43. For the distinction between critical and positive morality, see Hart, *supra* note 7, at 167-84.

44. *Id.* at 169.

45. *Id.*

is little or nothing in Hart's account to characterize, explain, or make plausible the existence of a similarly clear distinction between the positive moral aspects and the legal aspects of the secondary rules of a political system. The wherewithal to do that is simply not present in the theory of modern positivism—probably for the very good reason that it is not necessary, that it would serve no useful or interesting jurisprudential function. It might be worthwhile simply to acknowledge this fact rather than pretend that a cast-iron separation of law and morality is necessary at every level in positivist jurisprudence.

V.

My American readers—those happy few who have not yet drifted off to read something else—may be congratulating themselves that such conundrums do not arise in their constitutional system. The great advantage of a written constitution is that it provides a clear textual basis for distinguishing rules which are part of constitutional law from those which are not. But maybe there is more to be said about the American case.

It is not hard to identify important norms of the U.S. constitutional system which cannot be found in the text that we call “The United States Constitution.” There is no mention in that document of the party system, or of primary elections, yet these are indispensable features of the American political structure. There is no textual norm in the Constitution to the effect that members of the electoral college should vote for the presidential candidate supported by the voters in their state; yet clearly this operates as a convention and as an important feature of our system of election to this crucial office.

We know too that there are certain rules set out in the constitutional text that the courts will not consider or enforce, because they raise “political questions.” The constitutional guarantee of republican government for the states is the best known historical example; this is a rule that the courts have refused to enforce.⁴⁶

There is also a broader debate about unwritten constitutional norms in the U.S. system having to do with our understanding of the enforcement of certain fundamental rights (particularly in regard to judicial review of legislation). Consider the debate about abortion rights in cases like *Roe v. Wade*.⁴⁷ It is true that some defenders of the decision in *Roe* insist that its holding is dictated by the terms of the written Constitution, and some of its opponents oppose the decision because they think the constitutional text says or implies no such thing. But much of the debate proceeds on the basis of fundamental norms about liberty and privacy that all sides admit have only a tenuous relation to the constitutional text but have constitutional force nonetheless. And a number of writers have been prepared to discuss

46. U.S. Const. art. IV, § 4; *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

47. 410 U.S. 113 (1973).

explicitly the possibility that decisions like *Roe* can be defended on the basis of unwritten constitutional norms.⁴⁸

In these debates, it is usually assumed that legal positivism is on the side of those who deny that there are unwritten constitutional norms. Thus Thomas McAfee writes that “[c]onstitutional textualists who oppose the idea of the unwritten constitution share a commitment to a positivist constitutional jurisprudence.”⁴⁹ This is partly because defenders of unwritten norms often identify those norms as norms of natural law, norms embodying natural rights. But unwritten constitutional norms need not be norms of critical morality; they may have a positive social existence (like our British examples), and indeed it would be quite implausible to identify the rules about primaries or about the electoral college that I mentioned earlier as rules of natural law.

Where the American enthusiasts for unwritten constitutional rules go wrong is in thinking that positivism rejects such rules. Thus Thomas Grey wrote, in a footnote to his early article on unwritten constitutional law, that “[t]he law in question consists of the generally accepted social norms applied in the decision of the cases, norms that are—contrary to the positivists’ position—best seen as ‘part of the law,’ quite independent of their promulgation through defined lawmaking procedures.”⁵⁰ What he talks about is actually not contrary to the positivist position. Modern positivism depends on the view that certain basic rules of the legal system consist of nothing more than certain generally accepted social practices, with an internal normative point of view. But the missteps that Hart takes in his discussion of the conventions of the British constitution encourage this misunderstanding. That is, the missteps encourage the view that even at the foundations of a legal system, nothing that is not written down as law counts as law; they encourage the view that this is what legal positivists believe, and thus they make it much harder for theorists like Grey to make good jurisprudential use of some of the originality, subtleties, and indeterminacy of modern legal positivism.

The same, I think, can be said about recent discussion of whether the textual provisions of the U.S. Constitution and the Bill of Rights should be regarded as part of “the rule of recognition” so far as a Hart-style analysis is concerned. Some jurists—like Michael C. Dorf and Matthew D. Adler—argue that certain of the textual provisions can be seen in this way.⁵¹ Others

48. See, e.g., William R. Casto, *Our Unwritten Constitution and Proposals for a Same-Sex Marriage Amendment*, 38 Creighton L. Rev. 271 (2005); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975); Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the “Unwritten Constitution” Thesis*, 61 U. Cin. L. Rev. 107 (1992); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. Cal. L. Rev. 107 (1989); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

49. McAfee, *supra* note 48, at 111.

50. Grey, *supra* note 48, at 715 n.48.

51. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105 (2003).

say it is a mistake to think of the whole or a part of the Constitution as equivalent to a rule of recognition.⁵² The latter account would identify the rule of recognition for the United States as a practice lying behind the Constitution—the general willingness of the political class to treat the constitutional document as law, for example—rather than identifying it with any part of the constitutional document itself. It may be helpful to relax a little when discussing these matters, and not insist on being able to point to the rule of recognition (in text or practice) or distinguish it as sharply as some seem to want from the array of formal and informal, textual and non-textual norms that—in one way or another—perform this function for a complex and flourishing legal system. At its best, the practice theory of rules that Hart expounded and the analysis that proceeds in terms of the internal aspect of rules offer exactly what we need for a relaxed, and thus reasonably sophisticated, approach to these matters; they enable us to talk in a grown-up way about the social foundations of a system of norms that is legal, and about the complexity of both the social phenomena and the emergent legal phenomena that this involves. Much of what Hart wrote encourages this sophisticated understanding. But as I hope to have shown, some of what he wrote exhibits and encourages a much less helpful, a much more simplistic, black-and-white account of the relation between law and the social rules that surround it.

52. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *Constitutionalism: Philosophical Foundations* 152, 160-62 (Larry Alexander ed., 1998). See generally Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987).