

Constitutive Rules

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Abstract

Regulative rules regulate preexisting forms of behavior, constitutive rules make possible new forms of behavior. They constitute the phenomena they regulate. Brute facts can exist independently of any institutions. Institutional facts require pre-existing institutions, which consist of systems of constitutive rules. Constitutive rules create new forms of reality, with new powers, they typically require language, and they are the basis of human civilization.

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There is an intuitive distinction between two kinds of rules: those that regulate antecedently existing behaviors and those that constitute new forms of behavior and thus regulate the very behavior that they constitute. It is natural to think of these types of rules as regulative and constitutive. I think that terminology which I first introduced in the 1950s is useful and I believe it has stuck.

I do not know who was the first philosopher to make this distinction but I believe the first published version was in an article by John Rawls in the *Philosophical Review* for 1955.¹ Rawls' article "Two Concepts of Rules" distinguished not between two types of rules but between two concepts, two types of thinking about rules. I think it is natural to construe Rawls as a forerunner of the idea that these are not just concepts about rules but that they in fact mark different types of rules. Examples of the distinction are easy to come by. So, for example, the so-called "rule of the road", according to which people in the United States drive on the right hand side of the road is a regulative rule. Why? Because the activity of driving exists independently of this rule; the rule regulates an antecedently existing activity. The rules of chess, on the other hand, do not just regulate, but they constitute the activity they regulate. So, the rule that says the King moves to any adjacent square, one square at a time, looks like a regulative rule, but in fact taken as part of the whole system it is one of the rules that in their totality constitute the

¹ Rawls 1955.

game of chess. If you do not follow these rules, or at least a sufficiently large subset of the rules, you are not playing chess.

It is furthermore natural to think of these rules as having characteristically different syntactic forms. The regulative typically takes the form of an imperative, "Drive on the right!", for example; the constitutive rules, not so obviously but I think nonetheless apparently, take the form "x counts as y" or "x counts as y in context c". So, moving one square *counts as* a legal move for the King, it would not count as a legal move for the Knight, for example.

Within any system of constitutive rules it is typical that some perform a role that is purely or almost purely regulative. Thus, the United States constitution is a system of constitutive rules and together those rules constitute the structure of the United States government, but within the system of constitutive rules there are some regulative rules, the famous First Amendment for example regulates the power of government with regard to freedom of speech and other basic human rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The logical structure of the constitutive rules gives them enormous power. The first thing to notice is that the structure of the constitutive rule allows for its recursive iteration in such a way that you can build one rule on top of another more or less indefinitely. For example, uttering a certain sentence of English counts as making a promise, but making certain sorts of promises counts as undertaking a legal obligation, but undertaking certain sorts of obligations counts as getting married. Notice what occurred in the previous structures: on the bottom level x_1 counts as y_1 , but y_1 is equal to x_2 , and that counts as y_2 , y_2 then is equal to x_3 , and that counts as y_3 and so on up. This gives the system enormous power.

In order to understand the behavior of the constitutive rule I have to introduce another distinction that I first introduced in 1964² and that is the distinction between *brute facts* and *institutional facts*.³ Some facts exist independently of any institution. The fact that the Earth is 93 Million miles from the Sun is a brute fact—it is true, we need the institution of measurement to state the fact, but the fact needs to be distinguished from the statement of the fact. The fact stated, the actual distance between Earth and Sun is a brute fact requiring no institution. The fact that I am a Professor of Philosophy at the University of California at Berkeley, however, is an institutional fact. It requires a rather elaborate institution of universities and professorships and constitutive rules of those institutional structures in order that this fact should exist. Institutional facts are always applications of the form of the constitutive rule and institutions such as money, property and government are systems of such rules. Sometimes an institutional fact can be created informally without a preexisting constitutive rule. For example, a group might treat someone as their leader and thus count her as the leader without a preexisting rule for leader selection. This presumably is one way institutions can evolve.

Constitutive rules have some further remarkable properties, which for the sake of brevity I will simply list.

² See Searle 1964: 50.

³ Anscombe 1958.

1. By creating a class of institutional facts, they create a new reality. This reality is in part ontologically subjective because it only exists by way of human acceptance or agreement (Searle 1995: 69), but at the same time, statements about such facts are or can be epistemically objective.⁴ So it is an institutional fact that the piece of paper in my hand is a \$20 bill, but that is an epistemically objective fact, it is not just my opinion that it is a \$20 bill, it is an actual objective institutional fact. The ontological subjectivity of the existence of the fact does not prevent statements about it from being epistemically objective (Searle 1995: 9-10). This is why we can have objective sciences of domains that are ontologically subjective such as Economics.

2. These new ontological domains create new powers. The facts that Donald Trump is president of the United States and that I am an American citizen involve systems of powers. Those powers are what I call *deontic* powers, that is they are rights, duties, obligations, authorizations, permissions etc. These powers are crucial in the existence of human civilization because they give us *desire-independent reasons* for acting. Having made a promise to write this paper, I have created an obligation to write it and that obligation gives me a reason for writing it which is independent of my other inclinations. Without this, we have no human civilization. We are distinct from other animals in our capacity to create these deontic powers. As far as I know, no animal has the capacity.

3. Constitutive rules require language. My dog Tarski is very intelligent and I can train him to follow various regulative rules such as to come when I call him and obey various other simple commands, but I cannot teach him to play chess or vote in elections. Why not? These phenomena only exist insofar as they are represented and the representing relation requires something more sophisticated than the simple forms of symbolism that he is capable of. This is an arguable point and I will not argue it here, but the general thesis that I wish to advance is that constitutive rules can only function insofar as they are represented linguistically. A creature cannot have a system of constitutive rules without something approaching a human or humanlike language.

4. The application of constitutive rules in institutional facts constitutes human civilization.⁵ This is the chief way in which we differ from other social animals. It is customary and correct to see the human species as continuous with other species and all sorts of human forms of behavior are quite common, lots of other species have pair-bonding and other family-like forms of behavior. But no other species has the system of obligations, rights, duties and responsibilities that humans have created. No other animals have government, private property, marriage or universities. My dog, as I pointed out earlier, is very intelligent and along with other dogs he is a pack-animal and easily cooperates and moves as a member of a pack of dogs, but the pack of dogs will not get together to form a government, a university or even a primary school. Why not? In order to do these things they would have to be able to represent things in the form “x counts as y in c” common to constitutive rules, but to do that they would have to have a

⁴ Searle 1995.

⁵ Searle 2010.

system of representation vastly greater than their canine barks. In order to do that they would have to have constitutive rules.

Language is the fundamental human institution in that other institutions—money, property, government etc.—require language but language does not require them. For the creation of the institutional fact that I made the statement that snow is white I need only be a competent speaker of English. The semantics are sufficient to create the fact that the statement was made. But to create the institutional fact that you are president or that war is declared I need something more than semantics. We use semantics to create facts that go beyond semantics. And these facts have the structure of the constitutive rule.

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