

# Rule-Following and Constitutive Rules: A Reconciliation

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**Abstract:** This article contrasts two broad approaches of rules and institutions in philosophy of social sciences: on the one hand, the approach that deals with institutions and institutional facts in terms of rule-following behavior, on the other hand the approach that characterizes institutions in terms of constitutive rules. This latter approach builds on a distinction between two kinds of rule – constitutive and regulative rules – that is alien to the rule-following account. I argue that this distinction is inadequate and that all rules are rules to be followed. The main contribution is to suggest a distinction between “constitutive” or “essential” rules in terms of intentional rule-following behaviors. Constitutive rules are rules that must be followed by individuals taking part to an institutional practice because of the value ascribed to the practice by these individuals. As a consequence, whether or not a rule is constitutive is an ontologically subjective (rather than objective) but epistemically objective fact.

**Keywords:** Rule-following – Constitutive Rules – Institutional Facts – Intentional attitudes

## 1. Introduction

The concepts of rules and institutions naturally occupy a central place in social ontology and the philosophy of social sciences. Rules and institutions are distinguishing features of human societies and any account of the nature of social reality has to figure out their role and their functioning. There are however many ways to account for rules and in particular how they are related to individuals’ behavior in a population.

This article contrasts two broad approaches of rules and institutions in philosophy of social sciences: on the one hand, the approach that deals with institutions and institutional facts in terms of rule-following behavior, on the other hand the approach that characterizes institutions in terms of constitutive rules. This latter approach builds on a distinction between two kinds of rule – constitutive and regulative rules – that is alien to the rule-following account. At the heart of the distinction between constitutive and regulative rules is the idea that constitutive rules are not followed properly speaking; rather, they create the social reality by ascribing status to entities or states of affairs. The philosopher John Searle has been the major proponents of the distinction between constitutive and regulative rules and has argued

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that the former are at the basis of the social reality. The notion of rule-following has been particularly developed in the late writings of Ludwig Wittgenstein and has found many applications in the social sciences, for instance in game-theoretic accounts of institutions in economics [(Hindriks and Guala 2015); (Hédoin 2015)].

I argue in this article that most of Searle's various criteria for the distinction between constitutive and regulative rules are unsatisfactory because they depend on the description of the rules. Depending on one's preferred descriptions, all rules can be seen as constitutive or regulative. In particular, regulative rules are generally stated in terms of behavioral description while constitutive rules are stated in terms of status description. However, both kinds of descriptions are formally equivalent. Actually, all rules are rules to be followed. Moreover, at the formal level, it can be shown that all rules consist in constraints on possible worlds. The main contribution of the article is then to suggest a distinction between "constitutive" or "essential" rules in terms of intentional rule-following behaviors. Constitutive rules are rules that must be followed by individuals taking part to an institutional practice given because of the value ascribed to the practice by these individuals. As a consequence, whether or not a rule is constitutive is an ontologically subjective (rather than objective) but epistemically objective fact.

The rest of the article is organized as follows. Section 2 briefly defines the key concepts. Sections 3 and 4 discuss Searle's three criteria for distinguishing constitutive and regulative rules and argue for their inadequacy. Section 5 uses a possible worlds semantic framework to show that all rules are ultimately constraints on possible worlds. This vindicates my claim that all rules are rules to be followed. Sections 6 and 7 build on Wittgenstein's and Rawls' practice conception of rules and argue that there are rules that are constitutive in the sense that individuals cannot take part into a practice without intentionally following them. Section 8 concludes.

## 2. Institutions and Constitutive Rules

Any account of social ontology must deal with a range of concepts such as institutions, institutional facts, institutional objects, social facts, and so on. Definitions vary within the literature but institutional facts are generally regarded as a subcategory of social facts. I will adopt a broad view of a social fact as *any set of repeated interactions between intentional beings that give rise to some regularity at the behavioral level*. This definition encompasses interactions between humans leading to some behavioral pattern (think of the road traffic) but also the complex organizations of collectives of insects or animals.<sup>1</sup> Institutional facts are more specific. They involve the existence of institutions. Examples of institutions are markets, money, marriage, language, corporations, etc. Institutional facts are then social facts that take place within a practice corresponding to an institution. Consider the following facts:

- a) 'John bought a car.'

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<sup>1</sup> Some authors like Searle (1995, 121) impose a condition of collective intentionality on social facts. Since I do not intend to discuss the issues related to collective intentionality, I omit this condition here.

- b) 'I have a twenty dollars bill in my wallet.'
- c) 'He has hit a home run in his last baseball game.'

These facts presuppose the existence of an institution (respectively, a market, money and baseball): the fact of buying something must take place on a market, the fact of having a twenty dollars bill in my possession necessarily implies the institution of money and hitting a home run is meaningless but in a baseball game, the latter itself presupposing the institution of baseball.<sup>2</sup> Institutional facts are social facts according to the above definition: they depend on the repeated interactions between intentional beings and occur on a regular basis. For instance, the very fact of having a *twenty dollars bill* in your wallet has meaning only through the way this piece of paper allows you to interact with others on a repeated and predictable basis. Institutional facts add something else however. Compare the collective behavior of a stack of fishes with the behavioral pattern that characterizes a baseball game. In both cases, you will be able to identify a behavioral pattern such that it is in principle possible to predict that in some specific circumstances, the whole collective will behave in some specific way. What distinguishes the baseball games however is that the behavior of each player (and thus the collective behavioral pattern) results from the fact that the players are *intentionally following some rules*. For the moment, this may seem obscure because the very notion of "intentionally following a rule" may be interpreted in quite different ways. This will be clarified below.

If institutional facts consist in rule-following behaviors, then it is coherent to characterize institutions as *systems or sets of rules*. The practices we associate to an institution (*e.g.* exchanging goods on a market) are generated by the rule-following behaviors. Institutions and practices are the two faces of the same coin, depending on whether we focus on the rules that are followed or on the behaviors they lead to. Among the philosophers interested in social ontology, John Searle is the one whose definition of institutions is the most similar to the one defended here. However, Searle is more specific since he defines institutions as systems of *constitutive* rules [(Searle 1969, 51); (Searle 2005); (Searle 2010, 10)]. The distinction between constitutive and regulative rules is indeed central in Searle's social ontology. Searle has grounded this distinction on two related but logically independent criteria: a metaphysical one and a syntactic one. He has introduced a third criterion only recently. The three criteria have the same implication: contrary to regulative rules, constitutive rules are not meant to be followed in a meaningful sense.

From the metaphysical point of view, regulative rules "regulate antecedently or independently existing forms of behavior" while constitutive rules "do not merely regulate, they create or define new forms of behavior" (Searle 1969, 33).<sup>3</sup> In other words, some behaviors or activities are logically impossible without the relevant constitutive rules; quite the contrary, regulative

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<sup>2</sup> One may argue that baseball, like any other games are not really institutions but rather practices that may, but necessarily, involve institutions such as the Major League of Baseball. However, there are several reasons to reject this distinction. One of them is the fact that I can hit a homerun in a baseball game even if this game is not an official one (*i.e.* formally recognized by the MLB). Another reason is that it seems dubious to separate practices and institutions in such a way. At least in a Wittgensteinian perspective, both are indeed the two faces of the same coin.

<sup>3</sup> See also Searle (1995, 27) and Searle (2010, 9-10).

rules are logically independent to the activities they regulate. As examples of regulative rules figure the rules of etiquette or the rule stating that we should drive on the right-hand side of the road. Examples of constitutive rules from this perspective are the rules of football or chess which create the very possibility of playing those games.

The second criterion differentiates constitutive and regulative rules on the basis of their syntax. According to Searle (1969, 36), regulative rules take the form of imperatives of the kind “Do X” or “If X, then Y”. Constitutive rules are rather of the form “This X counts as Y in circumstances C”. The count-as locution is a term of specification that imposes a status on some object or entity. One of Searle’s favored examples is pieces of paper that have the status of money: “pieces of paper engraved by the Federal Reserve counts as a twenty dollars bill in the United States of America”. Another example is such or such actions in a chess game that count as a bishop or a pawn move. While the syntax of regulative rules suggests that they consist in behavioral instructions that can or cannot be followed, constitutive rules take the form of statements about the status or the properties of some entities or objects. At the same time, the Y term does not only label the X term; it also embeds a set of consequences that follow from the status given to the entity or the object (Searle 1969, 36). Still, it may seem that constitutive rules cannot be followed in the proper sense of the term. They establish a state of affairs by describing this very state of affairs.

In his later work, Searle introduces a third criterion based on the “direction of fit” of the rule that makes this last point clearer (Searle 2010, 97). Regulative rules are “standing directives” with a world-to-word direction of fit, while constitutive rules are “standing declarations” with both a world-to-word and a word-to-world directions of fit. The world-to-word direction of fit means that regulative rules have for function to affect people’s behavior in such a way that the state of affairs conform to what the rule stipulates. Constitutive rules have this direction of fit but also have the reverse one, *i.e.* they describe what the state of affairs is. Hence, constitutive rules make “something the case by representing it as being the case”. This is a sensible criterion that reinforces the point of the syntactic criterion: constitutive rules are not rules to be followed. The simple fact of stating the declaration and of (collectively) accepting it is sufficient to change the social reality. However, an immediate implication of these criteria and of the definition of institutions as systems of constitutive rules is that contrary to what I have assumed above, institutional facts do not imply rule-following. The rest of the paper challenges this implication without completely giving up the constitutive/regulative rules distinction.

### **3. Behavioral Description and Status Description of Rules**

Searle’s distinction has been attacked numerous times, most often without an explicit recognition that there are two and not only criteria sustaining it.<sup>4</sup> Virtually all critics consist in pointing out either that all constitutive rules are also regulative rules or the reverse, or more radically that all rules are both constitutive and regulative. My aim in this section is to show

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<sup>4</sup> An exception is Morin (2013).

that all critics ultimately converge toward the same point: any rule can be described either in terms of *behavioral* properties or *status* properties. This is sufficient to establish that contrary to what Searle criterion suggests, all rules are to be followed. Describing a rule in terms of behavioral properties consists in relating two or more sets of propositions about the individual's behaviors. The description in terms of status properties characterizes the rule as a relationship between two or more sets of propositions with a normative or deontic meaning (e.g. "John is a thief" and "John is punishable" or "I have the white pieces" and "I should make the first move"). Once we recognize that normative or deontic statements have behavioral implications, then it is in principle always possible to translate a status description of a rule into a behavioral description.<sup>5</sup>

Consider the metaphysical criterion first. Though it seems intuitively reasonable, it has the problem of being description-dependent. The problem lies in the fact that the decisive test for determining the nature of a rule is if the behavior in accordance with the rule could be given the same *description* whether or not the rule existed (Searle 1969, 35). Thus, the distinction is not really between two kinds of rules but rather between two kinds of description of an action or a behavior. Obviously, this is not specific to action descriptions and institutional facts. Sentences referring to brut facts like "an asteroid falls on earth" logically imply the existence of the "constitutive objects" (the asteroid and the earth in the present case); however, the very same facts can also be described by substituting the constitutive objects for a complete list of properties that are constitutive of these objects. Now, consider an institutional fact like "John has hit a home run in his last baseball game". The description of this fact seems to imply a reference to the rules of baseball, at least regarding what is it to hit a home run. In principle however, it is possible (though tedious) to describe the very same fact without using the terms "home run" or "baseball": we only need a statement linking a first proposition about the sufficient conditions for the sentence "John has hit a home run" to be true with a second proposition about the consequences of this state of affairs, consisting in one or several sentences that are necessarily true. The two propositions can be themselves reformulated as two sets of sentences providing a full description of all the behaviors that have taken place since the beginning of the game.<sup>6</sup>

The syntactic criterion fails on the same ground. Once again, the point is that the syntax of a rule determines only the *description* of the rule rather than its nature or properties. It only points to a linguistic distinction.<sup>7</sup> Searle (1969, 36) actually notes that all regulative rules can be reformulated as constitutive rules. However, in the case of a reformulated regulative rules "the noun phrase following the 'count as' is used as a term of appraisal not of specification"

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<sup>5</sup> David Lewis makes a similar point in his article "Scorekeeping in a Language Game" (Lewis 1979).

<sup>6</sup> A counterargument is mentioned by Searle (1969, p. 35-6, my emphasis): "It is possible that twenty-two men might go through the same physical movements as are gone through by two teams at a football game, but if there were no rules of football, that is no antecedently existing game of football, there is no sense in which their behavior could be *described* as playing football". In substance, this is very similar to John Rawls' (1955) "practice conception" of rules. This is a valid point, but it is perfectly compatible with the idea that all rules are to be followed. Clearly, to play football *consists in following* the rules of football. Moreover, this has nothing to do with the fact that the rules "create" or "make possible" some practices, contrary to what Searle suggests. Ultimately, this argument fails to establish Searle's distinction because it is about the proper description of some fact, not about the nature of the fact.

<sup>7</sup> This point is convincingly made by Frank Hindriks (2009). See also Guala and Hindriks (2015).

(Searle 1969, 36). This is unpersuasive though because appraisal may require or imply some specification.<sup>8</sup> Still, even if we accept Searle's argument, another objection is even more convincing: all constitutive rules can be reformulated into regulative rules (Hindriks 2009). This is due to the fact that any "This X counts as Y in C" rule consists in the conjunction of two separate "If A, then B" rule. Consider for instance the case of the constitutive rule for money as formulated by Searle: "Pieces of papers that have been engraved by the Federal Reserve count as money in the United States of America". It consists into a first rule that states the properties that pieces of paper (the X term) must have to count as money in the United States of America. A second rule then specifies the properties ascribed to money (the Y term) in terms of deontic powers. The conjunction of these two rules gives:

[If pieces of paper of paper have been engraved by the Federal Reserve, then they count as money] and [If something counts as money, then it has the power to buy things.]

Note that the second rule (the "status rule" as Hindriks (2009) labels it) defines money in terms of a deontic power. We can go further and obtain a simpler statement:

[If pieces of paper of paper have been engraved by the Federal Reserve, then they have the power to buy things.]

Thus, we have reformulated a constitutive rule in terms of a "If A, then B" regulative rule. This rule will itself easily translates into a set of propositions about behavioral facts.<sup>9</sup> The point is thus that the syntactic criterion grounds the distinction between constitutive rules and regulative rules on a mere linguistic convenience: if we want to refer to a rule on the basis of a status description, the "X counts as Y in C" form is more straightforward and less ambiguous; if we want to refer to the same rule on the basis of a behavior description, the "if A, then B" form is more natural. Ultimately however, all rules can be formulated in this latter way. This is important because it indicates that we can speak of rule-following behavior for all kinds of rules.

#### **4. The "Direction-of-Fit" Criterion for Constitutive Rules**

As I have noted in the preceding section, Searle (2010, 97) has introduced a new criterion to sustain his distinction. Let me call it the "direction-of-fit criterion". In this perspective, constitutive rules are "standing declarations" which have both the world-to-word and the word-to-world directions of fit, while regulative rules are "standing directives" which only have the former one. As far as I can tell, this criterion evades the objections made above

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<sup>8</sup> Consider for instance the regulative rule "Drive at the right-hand side of the road". It can be reformulated as a constitutive rule "To not drive at the right-hand side of the road counts as unauthorized conduct". Here, it seems that the "count as" locution should be understood both in terms of appraisal and of specification: to say of something that it is "unauthorized" is to make an evaluation (an appraisal), but this evaluation implies a specification of what is for something to be unauthorized. It is simply not clear that we can separate the two because while the appraisal refers to the conduct, the specification refers to the status. But both are deeply intertwined as I argue in the text.

<sup>9</sup> These facts can be described by sentences of the type "In circumstances C, person x has given a piece of paper p to person y and y has given to x a good g".

because it does not depend on the way we describe rules (in terms of status or in terms of behavior).<sup>10</sup> However, on a rule-following account, it seems that all rules have the double direction of fit. This is due to the fact that intentional rule-following implies that the rule is self-fulfilling and self-reflexive.<sup>11</sup> Intentional rule-following means that a rule is followed on the basis of an intentional attitude (or a set of intentional attitudes) related to the subjectivity of the intentional being (Pettit 1990). This implies that the rule (whatever its description) itself must be part of the propositional content of the relevant attitude.

A minimally rational intentional being must form attitudes that verify conditions of satisfaction defined by their direction of fit.<sup>12</sup> In particular, an intention to follow a rule is necessarily causally self-referential: the satisfaction condition of the intention corresponds to its propositional content. In other words, the intention to follow the rule succeeds if and only if the intention causes actual rule-following behavior. Generally, this intention will have a cognitive counterpart corresponding to one or several beliefs. Ignoring the controversial case of private rules, rule-following necessitates for each person to form a belief about whether or not others are also following the rule. The propositional content of a belief is satisfied if it conforms to how the world actually is (*i.e.* beliefs have a word-to-world direction of fit), which in this case means that others are actually following the rule. If everyone's belief about the fact that others are actually following the rule is true and if everyone succeeds in forming the intention to following the rule, then it is a tautology that everyone actually follows the rule. Rule-following thus entails at least a belief and an intention. Since both attitudes have opposite directions of fit, *all* rules function on the basis of the double direction of fit.

## 5. Rules and Possible Worlds

Now that I have made my case for the claim that all rules can be followed and that institutional facts consist in rule-following behaviors, I will develop a slightly more formal framework to understand the nature of rules. This will provide the adequate foundations to redefine the constitutive/regulative rules distinction.

Following Hage (2013), I propose to characterize rules as *soft constraints* on possible worlds. Consider a *language*  $\mathcal{L}_R$  consisting in a set of sentences (atomistic propositions and formulae) describing states of affairs.<sup>13</sup> This language is formed on the basis of a combination of atomic

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<sup>10</sup> Note however that while the term “directive” more naturally applies to the behavioral description, the term “declaration” is easier to understand in terms of status description.

<sup>11</sup> See Bloor (1997, 27) who develops a “self-reflexive model” of institutions on the basis of Ludwig Wittgenstein’s account of rule-following [(Wittgenstein 1965); (Wittgenstein 1981); (Wittgenstein 2010)]. Bloor’s definition of self-reflexivity is stronger than mine however since he requires that an institution or a practice cannot be defined without referring to the practice (its rules) itself. I disagree with this but the point is that Bloor seems to hold that *all* rules are self-reflexive in this way.

<sup>12</sup> Searle (2010, 38-41) provides a useful summary of the different intentional attitudes and their direction(s) of fit.

<sup>13</sup> It is irrelevant here if the description is in terms of statuses or of behaviors. Generally, it will be more convenient to use the former but as I have explained in the preceding sections, it is always possible to translate one into the other. That means that the kind of descriptions used makes no difference from the semantic point of view.

propositions with the traditional connectives  $\neg$  (“not”) and  $\vee$  (“or”) and with the modal operator  $\Box$  (“necessary”). It satisfies the axioms of propositional logic as well as the axioms of some traditional system of modal logic (which one in particular is secondary for the moment). A semantic model  $M$  for  $\mathcal{L}_R$  is a triple  $M: \langle W, R, V \rangle$  where  $W$  denotes the set of possible worlds  $w$ ,  $R$  is an accessibility relation and  $V$  a truth value function. A possible world  $w$  is a complete description of all the states of affairs that actually hold. More formally, a possible world specifies the truthiness of each sentence in  $\mathcal{L}_R$  on the basis of the value function  $V$ . Thus, we can denote  $V(p)$  as the subset of  $W$  for which  $w(p) = \text{true}$ , *i.e.* the subset of possible worlds where the sentence  $p$  is true.  $V(p)$  is also sometimes called an “event”. Finally, the accessibility relation  $R$  specifies for each possible world  $w$  which are the  $w$ -accessible possible worlds  $w'$ . If world  $w'$  is  $w$ -accessible (it will be denoted  $wRw'$ ), then whatever is possible (not necessarily false) in  $w$  must also be possible in  $w'$ .<sup>14</sup>

Semantic models generally impose minimal constraints on possible worlds. Constraints can be understood in terms of compatibility between states of affairs (Hage 2013). The assumption that our language satisfies the axioms of propositional logic imposes a set of logical constraints. For instance, a world where  $p$  and  $\text{not-}p$  are both true is impossible. Similarly, all systems of modal logic impose that if  $p$  is possible in  $w$ , then it is impossible that necessarily  $\text{not-}p$  in  $w$ . Physical constraints and conceptual constraints are also generally imposed.<sup>15</sup> The idea here is that rules are another type of constraints on possible worlds, though softer than logical, physical and conceptual ones. For the sake of concreteness, I will start with two examples, one being an apparent instance of a regulative rule the other of a constitutive rule. A more general statement will be given after these illustrations.

As a putative example of a regulative rule, consider one of Searle’s favored examples slightly reformulated:

R1     If  $x$  drives a car in France, then  $x$  must drive at the right-hand side of the road.

Rule R1 articulates two states of affairs, a)  $x$  is driving a car in France and b)  $x$  must drive at the right-hand side of the road. Assume that R1 is valid in the sense that the rule is actually followed in some world  $w$ .<sup>16</sup> Then b) implies that  $x$  *actually* drives at the right-hand side of the road when he drives in France. As a consequence, at any  $w$ , it is impossible that the state of affairs “ $x$  drives a car in France” and “ $x$  drives at the left-hand side of the road” to hold together. Another example is given by the following rule:

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<sup>14</sup> Note that the accessibility relation needs not to be symmetric, *i.e.* the fact that  $w'$  is  $w$ -accessible does not entail that everything that is possible in  $w'$  is also possible in  $w$ .

<sup>15</sup> Physical constraints can be analyzed as *a posteriori* necessary truth, *e.g.* a particle cannot travel faster than the speed of light. On some understanding, conceptual constraints are necessary and *a priori* (as well as analytic) truth, *e.g.* triangles have three sides.

<sup>16</sup> One should be cautious here: R1 is not part of  $\mathcal{L}_R$  and thus is not a sentence that can be true or false in some possible world. By “valid”, I mean that R1 holds as a constraint. See below and Hage (2013).

R2 A piece of land  $l$  counts as property\* of person  $p$  in conditions  $C$ .<sup>17</sup>

I have voluntarily adopted Searle’s formulation of constitutive rules to make it clear that it does not make any difference. R2 can be suitably reformulated on the basis of the same method highlighted in section 3. We thus have

R21 If conditions  $C$  are fulfilled,  $l$  is property\* of  $p$ .

R22 Property\* gives the right of exclusive use of  $l$ .

Combining R21 and R22, we obtain a “If A, then B” statement of R2:

R2’ If conditions  $C$  are fulfilled, then  $p$  has the right of exclusive use of  $l$ .

Rule R2’ operates in the same way than rule R1. The sentence “If conditions  $C$  are fulfilled” describes a state of affairs either in status or behavioral terms. The sentence “ $p$  has the right of exclusive use of  $l$ ” describes another states of affairs which itself implies a whole set of actions that are necessary (e.g. “it is impossible for any other person than  $p$  to use  $l$ ”) or possible (e.g. “it is possible for  $p$  to grow corn on  $l$ ”). The point is that, provided that R2’ is valid, if the first sentence is true in  $w$ , then the second cannot not be true in  $w$ .

Now that the idea of rules as constraints on possible worlds as been illustrated, it can be systematized. One possible misunderstanding here lies in the fact that rules are not part of the language  $\mathcal{L}_R$  even though they can clearly be formulated through sentences like R1 or R2 (Hage 2013). It follows that the conditionals “if..., then...” to which any rule refers to must be manipulated with caution. For instance, consider the following syllogism:

If conditions  $C$  are fulfilled, then John has the right of exclusive use of  $l$ .

Conditions  $C$  are fulfilled.

Therefore, John has the right of exclusive use of  $l$ .

As such, the reasoning is perfectly fine if the first premise is a sentence describing a state of affairs. But rules are not state of affairs that may hold or not, they are constraints that determine the compatibility of states of affairs. It follows that the reasoning is not logically correct because the first sentence is not acceptable as a premise. Therefore, as Hage (2013) suggests, the logic ruling language  $\mathcal{L}_R$  has to be augmented by an axiom of the following kind:

$\text{Valid}([\text{Rule-formulation}]) \Rightarrow \Box \text{Rule-formulation}$ .

The antecedent  $\text{Valid}([\text{Rule-formulation}])$  indicates that the rule as it is formulated into the brackets operates as a constraint. When the rule is valid, that means that it is actually followed in the possible world  $w$  under consideration. The axiom imposes that in this case, the sentence that describes the rule is necessarily true in all the  $w$ -accessible worlds. Once again, the way

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<sup>17</sup> The term “property” is marked with an \* to emphasize that it does not refer to the institution of property as we know it in modern societies. It corresponds rather to a simpler “proto-institution” that may correspond to a rule that was followed when property rights have first started to be established at least informally.

the rule is described (in behavioral or status terms) is unimportant; only its semantic truth-value matters. If the axiom holds, then the following reasoning is logically sound:

Valid([If conditions C are fulfilled, then John has the right of exclusive use of  $l$ ]).

Conditions C are fulfilled.

Therefore, John has the right of exclusive use of  $l$ .

A first achievement of the possible worlds formalization of rules is that it reinforces the point made in the two preceding sections. It appears clearly that from the semantic point of view, all rules are of the same nature and operate identically. Rules are constraints that either make necessary or impossible for some sets of facts or states of affairs to hold together. From this point of view, rules are like any other kinds of constraints that limit the range of possible worlds.<sup>18</sup> A second achievement will be more fully explored in the next section. This necessitates before to making clear why rules are only “soft” constraints. Logical constraints necessarily hold for the entire of possible worlds in any semantic model. This is due to the fact that these constraints follow from the axioms that are imposed to the underlying language. Physical and conceptual are softer constraints: in principle, it is perfectly possible to consider models that allow for possible worlds with “four sides triangles” or where the laws of physics are different. However, since conceptual constraints are appropriately conceived as analytical truths (*i.e.* truths by virtue of definition) it seems hard to conceive possible worlds that violate them in a meaningful manner. Possible worlds with different physical constraints are easier to conceive. Here, I suspect that the status of physical constraints (whether “hard” or “soft”) may depend on one’s views about the ontology of possible worlds.

Rules are clearly different because of their contingent nature. A rule that is followed in some possible world may be perfectly not followed in another one. From the semantic point of view, the accessibility relation  $R$  might be defined such that all  $w$ -accessible possible worlds  $w'$  have the same valid rules than  $w$ . Then, if  $R$  is reflexive, symmetric and transitive, the space defined by  $W$  is partitioned into subsets of possible worlds, with all possible worlds belonging to the same subset characterized by the same set of valid rules. This does not mean that possible worlds with the same set of valid rules are all identical though (rules do not fully determine behavior and other features constitutive of a possible world). Moreover, not all combinations of valid rules in a possible world are acceptable. Indeed, rules have to be logically consistent in a sense that they must lead to states of affairs that are compatible (Hage 2000). Obviously, two rules cannot contradict each other and be both valid in the same world.<sup>19</sup> This consistency requirement limits considerably the range of logically possible sets of valid rules. Therefore, since institutions are sets of rules, it also limits the range of

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<sup>18</sup> It could easily be established that the possible worlds approach is also compatible with alternative accounts of social ontology that totally dispense with the concept of rules. This is the case for instance for Brian Epstein’s account in terms of frame principles and grounding relations (Epstein 2015). A frame principle establishes a relationship between two facts of the kind “for any  $z$ , the fact that  $z$  has property  $X$ , grounds the fact that  $z$  has property  $Y$ ”. Frame principles are stated in the language of facts and properties which is amenable either to a behavioral or status translation. The formalization through a possible worlds semantics is then straightforward.

<sup>19</sup> A straightforward case is a possible world where one rule makes mandatory to drive at the right-hand side of the road and the other at the left-hand side. These two rules cannot be both followed at the same time.

“possible institutions”. This provides a first hint regarding how to redefine the notion of “constitutive” rule. The next section deals with this issue.

## 6. Alternative Accounts of Constitutive Rules

Should we completely abandon the idea that some rules are constitutive? Is the notion of constitutive rules completely incompatible with a rule-following account of institutions and social ontology? I shall argue for a negative answer to both questions in this section and the next one. The notion of constitutive rules relies on an intuition that some rules are more fundamental, “thicker” than others. However, this intuition does not determine the criterion of “thickness” of rules and Searle’s three criteria discussed above do not fully exhaust all the possibilities. Other distinctions between kinds of rules have been proposed and are compatible with the notion of rule-following in spite of the fact that they are often discussed (and sometimes assimilated to) along Searle’s constitutive rules. Ludwig Wittgenstein’s later writings on language games and rule-following distinguish between several kinds of rules on the basis of their status relatively to a given practice. This is a particularly the case in *The Blue and Brown Books* (Wittgenstein 1965) where he suggests that a rules can be either “an instrument used in what we should call *the practice* of the game” or “an instrument for the *training*” in playing the game (Wittgenstein 1965, 96, emphasis in original). Call this the *Practice Case* and the *Learning Case* of rules respectively. Wittgenstein (1965, 98-9) also notes that some rules correspond to neither case and rather correspond to *descriptions* of the behavior of some group of persons. We can call this the *Summary Case* of rules. It should be clear that these three cases are easily understandable in terms of rule-following: in the Practice Case and the Learning Case, rule-following consist in conforming to the instructions given by the rule; in the Summary Case, the rule and the behaviors are conflated.<sup>20</sup>

A similar account is given by Rawls (1955). Rawls argues that we should not conflate the fact of justifying a practice with the fact of justifying a particular activity falling under a practice. The former is amenable to utilitarian considerations: for instance, the practice (institution) of promise keeping is clearly helpful to help people to achieve a better satisfaction of their wants and desires because it fosters cooperation in a population.<sup>21</sup> This is not the case for the latter because the activity is bounded and even determined by the practice. In the case of promise keeping, the fact of keeping is promise in a particular instance is not determined by the utilitarian principle (*i.e.* it is in the interest of the promisor to keep his promise) but rather because *it is part of the practice of promise keeping*. This leads directly to two corresponding conceptions of rules. On the *summary view*, “rules are pictured as summaries of past decisions arrived at by the *direct* application of the utilitarian principle to particular cases” (Rawls 1955, 19, emphasis in original). Rules are thus descriptions of salient behavioral regularities that

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<sup>20</sup> Of course, I ignore here all the difficulties related to Wittgenstein’s account of rule-following and whether or not he considered that there is a fact for following a rule. A well-known skeptical interpretation is offered by Kripke (1982). Bloor (1997) and Pettit (1990) develop on the contrary positive answers.

<sup>21</sup> This can be accounted for on the basis on an evolutionary game-theoretic approach. See Hédoin (2015) and Hindriks and Guala (2015) for further discussions on the different accounts of rules in a game-theoretic framework.

have emerged on the basis of the individuals' practical and epistemic rationality. Quite differently, according to the *practice conception* "rules are pictured as defining a practice... rules define a practice and are themselves the subject of the utilitarian principle" (Rawls 1955, 24). On the practice conception, it is insufficient that individuals act *as if* they were obeying the rules; rules must be actually followed as part of a practice. This implies that rules must be "publicly known and understood as definitive" (Rawls 1955, 24).

It is worth making a comparison between Wittgenstein's and Rawls' respective accounts and to put them in perspectives with Searle's metaphysical criterion. First, there seems to be a deep affinity between Wittgenstein's Summary Case and Practice Case on the one hand, and Rawls' summary view and practice conception on the other hand. Moreover, in the case of the practice conception, Rawls emphasizes the importance of the learning and teaching of rules: "It is the mark of a practice that being taught how to engage in it involves being instructed in the rules which define it, and that appeal is made to those rules to correct the behavior of those engaged in it" (Rawls 1955, 24). This makes it closely related to Wittgenstein's Learning Case. There are also similarities between Rawls' practice conception of rule and Searle's metaphysical criterion for constitutive rules. On the practice conception, the practice is logically prior to particular cases in the sense that "given any rule which specifies a form of action (a move), a particular action which would be taken as falling under this rule given that there is the practice would not be *described as* that sort of action unless there was the practice... No matter what a person did, what he did would not be described as playing baseball, and for him to be doing this presupposes the rule-like practice which constitutes the game" (Rawls 1955, 25, my emphasis). Searle (1969, 35-6, my emphasis) makes a very similar statement:

"It is possible that twenty-two men might go through the same physical movements as are gone through by two teams at a football game, but if there were no rules of football, that is no antecedently existing game of football, there is no sense in which their behavior could be *described as* playing football." (Searle 1969, 35-6, my emphasis).

As I note above (see fn. 6), this characterization of constitutive rules (or rules of practices) is not in contradiction with the notion of rule-following. However, it fails to establish that there are two *kinds* of rules because whether or not a rule is "logically" a particular case depends on the appropriate *description* of the practice. The possible world approach of the preceding section has established that this is irrelevant from a logical or ontological point of view: all rules are constraints on possible worlds. Note however that this does not make Wittgenstein's and Rawls' accounts irrelevant because the summary view of rules does not really deal with rules but rather with behavioral patterns. Therefore it is still possible (and correct) to distinguish between behavioral patterns that can be *described as if* they were the result of rule-following and rules that are *instruments* for a practice and lead to *intentional* rule-following behaviors. Searle's regulative and constitutive rules are both of this latter kind.

## 7. Constitutive Rules Again: Practical Rationality and Validity of Intentional Attitudes

Wittgenstein's and Rawls' practice conception of rules includes both regulative and constitutive rules in Searle's sense. Under some description of a given practice, any rule can be conceived as an instrument used in that practice. More formally, rules are constraints on possible worlds and since consistent systems of rules form institutions, they can be said to constitute "institutional" or "practical" constraints on possible worlds. I believe that this tends to indicate that to seek the distinction between constitutive and regulative rules in the *ontology* of rules is hopeless. However, I want to argue that an alternative way to ground this distinction is available while fully in accordance with a rule-following account and the practice conception.

As indicated in the preceding section, the intuitive idea underlying this distinction is that some rules are more essential than others for a given practice. Of course, if a practice is co-extensionally defined by the corresponding set of rules then all rules are essential. However, this is once again a matter of definition or description and this is not – I contend – what the intuition is about. My suggestion however is that whether or not a rule is essential (and so, "constitutive" of the practice in this particular sense) is not a matter of ontologically objective facts but rather of ontologically subjective but *epistemically* objective ones. This is suggested in an allusive way by Wittgenstein (2010, §564) who noted that that the distinction between essential and inessential rules depend on the *point* of the game. To the remark that a game is defined by its rules and that all rules are essential in this definitional sense, he suggested the objection that "one does not see the point of [the rule's] prescription" (Wittgenstein 2010, §567). In other words, the constitutive nature of a rule depends not on the fact that it is part of the definition or the description of the practice, but on the fact that it has a peculiar relevance given the whole point of the practice.

What determines the point of a practice and, on this basis, the relevance of a rule? There are several possibilities here. The possible worlds framework of Section 5 provides a first and partial answer. As I have explained, the framework imposes a formal requirement regarding the consistency of rules. Consider any given practice or institution  $P$  which is co-extensionally defined by a set  $S = (R_1, R_2, \dots, R_N)$  of  $N$  rules. In principle, the set  $S$  can be divided into two subsets  $S'$  and  $S''$  such that any single change of a rule in  $S'$  leaves intact the consistency of  $S$  while any single change in  $S''$  makes  $S$  inconsistent. That would mean that rules in  $S'$  and  $S''$  are respectively inessential and essential from a formal point of view. In this approach, the point of the practice is basically determined by the formal consistency of the set of rules  $S$  and the essentiality of each rule is evaluated against this formal consistency. There are several problems with this approach however. A first one is that whether a rule belongs to  $S'$  or  $S''$  may depend on which new rule will take its place.<sup>22</sup> A second problem is that even though a given rule may belong to  $S'$ , it may indirectly have an impact on the

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<sup>22</sup> The rule may also be simply suppressed rather than changed.

partition of  $S$ .<sup>23</sup> As a consequence, the essentiality of a rule is always relative to some given set of rules  $S$ .

Though these problems do not necessarily disqualify this first approach, they make it less appealing. A more attractive alternative is to point out that the essentiality of a rule may not depend on its *formal* consistency with the whole practice but on what I will call its *intentional consistency*. This point can be made by using the remarks made in section 4 about the role of intentional attitudes in rule-following. If we ignore the case of private rules, rule-following implies at least two kinds of intentional attitudes: a belief that others are following the rule and an intention to follow the rule. The former has a word-to-world direction of fit (*i.e.* the propositional content of the belief must match with the actual states of affairs) and the latter a world-to-word direction of fit (*i.e.* the intention is satisfied if it brings an action that leads to a state of affairs that conforms to the propositional content of the intention). Successful rule-following behavior thus supposes that the individuals form the appropriate intentional attitudes. Most of the time however, a rule will not be followed in isolation but as part of a whole institutional practice against which the *point* (to use Wittgenstein's word) of the rule will be evaluated. This evaluation is possible because all institutional practices have a *value*; more exactly, when we engage in some institutional practice we do so in part because we ascribe to this practice a value.<sup>24</sup> This is pretty much evident for games like chess or baseball where the value is derived from the fact of defining some goals and voluntarily establishing and submitting to obstacles that have to be overcome to reach these goals (Suits 2005). This is also the case for any other practice like getting married, making monetary exchanges, voting to an election, and so on. There are reasons why we engage in these practices and follow the corresponding rules and these reasons found at least partially their origins in the value of the practice.<sup>25</sup>

It seems reasonable to assume that the value of a practice supervenes on the rules that define it. Call it the "Value Supervenience Claim":

*Value Supervenience Claim* – For any institutional practice  $P$  defined by a set of rules  $S$ , the value  $V$  of  $P$  supervenes on  $S$ , *i.e.* any change in  $V$  implies a change in  $S$ .

Another way to put this claim is that "engaging in the practice constituted by  $S$  is valuable (at least for those who engage in it) in ways in which it *could not have been valuable without the existence of  $S$* " (Marmor 2009, 39, emphasis in original). More exactly, the practice  $P$  would have had a different value  $V$  (and maybe no value at all) if  $S$  has been different. Like all arguments based on the notion of supervenience, the *Value Supervenience Claim* does not imply that value reduces to the rules defining a practice because of multiple realizability: different sets  $S$  can realize the same value  $V$ . This is indeed a key point here: some rules may

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<sup>23</sup> Denote  $S^*$  the set  $S'$  of non essential rules after a change in one of its component. It is perfectly possible that the partition of  $S$  is affected by this change, *i.e.* that rules that belonged to  $S'$  before the change now belong to  $S^*$ .

<sup>24</sup> See also Marmor (2009, 36-44).

<sup>25</sup> There may be other reasons akin to Rawls' utilitarian principle, *i.e.* personal interests. That means that rule-following is clearly partially instrumental but it is hard to argue that we can reduce any practice as a whole to such kind of interests.

change or be suppressed without changing the value of a given institutional practice. These rules may be said to be “inessential” to the value of the practice. Other rules however will be regarded as essential because they cannot be changed or suppressed without affecting the value of the practice. Consider the example of chess: rules regarding the time allowed to each player to play their moves may be regarded as inessential to the practice; to the contrary, rules related to the movement of pieces should probably be regarded as fundamental for the value of the game. There are also borderline cases such as for the rules regarding the initial disposition of the pieces at the beginning of a match.<sup>26</sup>

The example of chess highlights an important point regarding the nature of the separating line between essential and inessential rules. From a strict ontological point of view, this line cannot be determined objectively. As I have emphasized in the preceding sections, all the attempts to distinguish constitutive from regulative rules in this way fall short. The very fact of grounding the distinction on the notion of *value* and on the *Value Supervenience Claim* indicates that it must be ontologically subjective: value does not exist independently of the persons who ascribe it to something. However, this does not mean that “anything goes”: the essentiality of some rules is reflected in the person’s attitudes toward the practices and their rules. Value is not purely subjective but rather inter-subjective: since we are ignoring the particular case of private rules, institutional practices are by definition collective practices common to the members of some community. In some way, the very fact of being the member of a community *is to* participate to some practices along shared public rules. The value of the practice thus does not depend on one individual in particular but on the whole community. This implies that the status of a given rule (“constitutive”, “essential”) is a function of the intentional attitudes of all the members of the community.<sup>27</sup>

How this translates at the level of each individual’s intentional attitudes? I have already explained why intentional rule-following implies for each individual to form a belief regarding the fact that others are also following the rule, and an intention to follow the rule. However, rule-following is derived from the fact of participating to a practice, *i.e.* we never follow a rule in isolation but in connection with other rules. The significance of a rule thus depends on the other rules that surround it as parts of the practice. Thus, I submit that intentional rule-following properly speaking implies that the propositional content of the intentional states (beliefs and intentions) includes the whole practice and (at least implicitly) its value. More formally, we can derive the two following formulae:

*Belief*: [The members of the collective *C* are following the rule *R* as part of the practice *P* with value *V*]; *c.s.*: the members of *C* actually follow *R* as part of *P* with value *V*.

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<sup>26</sup> There is a variant of chess called “random chess” where the initial disposition of the pieces is determined randomly before each match. This variant has been played a few times in official competition by professional chess players.

<sup>27</sup> As I will make it clear below, I am not assuming that this depends necessarily on the existence of *collective* intentional states. Whether or not there are intentional states that do not reduce to individual intentionality is an issue that is not essential to my point.

*Intention*: [I follow *R* as part of *P* with value *V* by performing the required action]; *c.s.*: this intention cause: I follow *R* as part of *P* with value *V* by performing the required action.

The first term in italics in each formula refers to the kind of intentional attitude. The sentence into brackets refers to the propositional content. The second sentence specifies the conditions of satisfaction *c.s.* for the intentional attitude to be satisfied. The self-referential nature of intentions is reflected by the fact that the propositional content is causally referred to in the conditions of satisfaction, which is not the case for beliefs. Once again, it should be emphasized that how the rule *R* and the practice *P* are described is irrelevant.

On this basis, I claim that the constitutive or essential nature of a rule is derived by imposing on each intentional attitude a *condition of validity*. This condition of validity should indicate if the propositional content of the formula is meaningful. More exactly, it has to state if the “rule *R* as part of the practice *P* with value *V*” part of the propositional content as any sense at all. How this is figured out depends on the value *V* of the practice *P* and on the resulting significance of the rule *R*. As I said above, for public rules and collective practices the value of a practice and the significance of a rule are neither objectively given nor purely subjective. It is ontologically subjective but epistemically objective because it is imposed by the whole community. Consider again the example of chess. When expecting to play a non-official match against someone, there are some rules upon which you can argue, *e.g.* the rule regarding the time given to the players to play their moves. For other rules, you cannot even imagine submit a change to the other players because you expect a response of the kind “well, actually you do not want to play chess” or “this is not how we play chess”. Actually, you would probably not be able to play any match because nobody would want to take part into the new practice you are creating. This is simply due to the fact that the rule changes you are submitting enter into conflict with the value of the practice as it is conceived by the community of players. As members of the community of chess players, everybody expects everyone else to recognize that some rules are indeed essential to the practice. This is part of the practical rationality of the chess player.<sup>28</sup>

This idea can be stated more generally and more formally. The practical rationality of the members of a given collective or community *C* taking part in a practice *P* sets the conditions of validity *CV* upon the meaningful intentional states. We can denote *CV(Beliefs)* and *CV(Intentions)* respectively the sets of all the valid beliefs and intentions that the members of *C* can have when participating in *P*. Not all the rules that are part of the propositional content of these valid intentional attitudes are “constitutive” or “essential” rules: some of them can be substituted or eliminated validly, *i.e.* the new rule figures in the propositional content of an attitudes belonging to *CV(Beliefs)* or *CV(Intentions)*.<sup>29</sup> It is possible that there are rules for

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<sup>28</sup> There are some affinities with Wittgenstein’s well known concept of *lebensform* (“forms of life”), which is basically a tacit agreement over what it implies to be part of some practice. It is not clear this is totally equivalent though, since Wittgenstein used this concept as a way to put an end to the infinite regress of interpreting a rule with another rule.

<sup>29</sup> In the case where the rule is simply eliminated, the criteria would be whether or not the intentional attitudes referring to the remaining rules corresponding to the practice remain valid.

which there are no alternative rules with valid intentional attitudes.<sup>30</sup> Such rules would be “constitutive” of or “essential” to the practice as conceived by the members of the community since they could not be given up for another rule to be intentionally followed as part of the practice. The content of the sets  $CV(\text{Beliefs})$  and  $CV(\text{Intentions})$  for a given practice depends on the individuals’ practical rationality. But the practical rationality of someone participating in a practice is partially determined by the very fact of being a member of the community of the people participating in the practice. As a consequence, the constitutive nature of a rule is not something to be determined purely subjectively by each person. It is a feature that is derived from the fact of being the members of some community.

## 8. Conclusion: Are There Problems with Essentialism?

I have developed in this paper an account of “constitutive” or “essential” rules that is not only compatible with the notion of intentional rule-following but also is immune to the problems of the standard accounts of constitutive rules, in particular Searle’s one. The main line of the argument is that Searle’s various criteria to distinguish constitutive rules fail to establish the distinction with regulative rules because they depend on how rules and practices are described. This is not surprising because ultimately, all rules have the same function and work the same way. This point has been established on the basis of a possible worlds approach which shows that all rules are constraints on possible worlds. Other accounts of rules developed for instance by Rawls and Wittgenstein develop a distinction between “as-if” rule-following behavior and rules used as instruments in a practice. Though their “practice conception” of rule does not distinguish between essential and non-essential rules, it points out an important relationship between rules and practices.

My own account of constitutive or essential rules depends on several claims: 1) that rule-following requires one to have the relevant intentional attitudes (beliefs and intentions), 2) that each practice has a value which is ascribed by the members of community who participate in it, 3) that value supervenes on rules (the *Value Supervenience Claim*). Combined, these three claims entail that the essentiality of a rule is ontologically subjective but epistemically objective: essential or constitutive rules are rules that cannot be substituted by other rules followed with a valid intentional attitudes. This is due to the fact that some rules are simply incompatible with a practice given the value given to it by the participants.

This account may be labeled “essentialist”. This may be perceived as a weakness because it seems to indicate that it relies on too strong assumptions regarding our intuitions about what is essential to an institution. The essentialist criterion is extremely demanding because “[f]irst, it requires us to make predictions about future instances of the institution, and about some

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<sup>30</sup> Conditions of validity can be formulated in terms of a possible worlds semantics with an accessibility relation. A rule is said to be constitutive or essential in actual world  $w$  if there is no  $w$ -accessible worlds with an alternative rule in the propositional content of the individuals’ intentional attitudes. The accessibility relation should be defined in this case such that all  $w$ -accessible worlds instantiate the same set of values than world  $w$ . Note that because of multiple realizability, this does not imply that these worlds all have the same set of valid rules (contrary to the accessibility relation I discussed in section 5).

present and past instances that we don't know about, but might discover some day" and "[s]econd, many social practices lack a stable set of core social features" (Morin 2013, 9). These are fair points but my version of the essentialist criterion is immune to them. The reason is that it makes absolutely no claim regarding the nature of institutional practices and their core features. It merely points out the fact that it is generally agreed in a given community what are the key rules that have to be followed because of the value of the practice. This translates at the behavioral level where there may be strong resistance to the change in the rules. As a result, a given practice will retain core practices as time unfolds, without anyone presupposing that this will be eternally the case.

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