

## ESSAY

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### THE LIMITS OF NATURAL LAW ORIGINALISM

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#### INTRODUCTION

In *Enduring Originalism*,<sup>1</sup> Jeffrey Pojanowski and Kevin C. Walsh outline how originalism in constitutional interpretation can be grounded in modern natural law theory as developed by John Finnis. Their argument to that effect is powerful and constitutes a welcome addition both to natural law theory and to originalist theory. However, the authors chose to present their account as a superior alternative to, or modification of, the “positive” (“original law”) originalism of Stephen Sachs and William Baude.<sup>2</sup> It is that aspect of the paper that I focus on in this short Essay. Contrary to their strong claims in that direction, Professors Pojanowski and Walsh are far from establishing that positive originalism is deficient and that their version of natural law-based originalism offers a plausible alternative to *positivist* originalism.<sup>3</sup> There is also a worry that, despite professing sympathy toward the “positive turn” in originalism, *Enduring Originalism* is at its core an account of what Professors Pojanowski and Walsh think the law *should* be, and not what the law *is*—precisely the kind of argument the positive turn militates against.

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1 Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

2 See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL’Y 817 (2015); Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014); see also Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016).

3 In what follows I refer to the theory advanced by Professors Pojanowski and Walsh as “natural law originalism.”

## I. GETTING CLEAR ABOUT POSITIVITY

Professors Pojanowski and Walsh insist that their account builds on the “positive turn” and that they “offer positive-law-based arguments for constitutional originalism.”<sup>4</sup> The latter is true. They argue that in the “classical natural law” framework there is a special understanding of stipulated positive law.<sup>5</sup> Because the Constitution was made as stipulated positive law, it belongs to “the kind of fixed, authoritative, and enduring” law.<sup>6</sup> And laws of this kind call for an appropriate kind of interpretation: an originalist one.<sup>7</sup> In this sense, Professors Pojanowski and Walsh are “positivity-welcomers.”<sup>8</sup> They think it is a (morally) valuable thing to have enacted laws and to treat them as “fixed, authoritative, and enduring.”<sup>9</sup> I am not disputing that.

However, this is an entirely different understanding of “positive” from the one that animates the “positive turn” of Professors Baude and Sachs. It would be an equivocation to refer to this kind of originalism and to natural law originalism of Professors Pojanowski and Walsh using the same label of “positive originalism.”<sup>10</sup> Professors Baude and Sachs (the latter more forcefully) rely on legal positivism.<sup>11</sup> Legal positivism of the kind that Professors Baude and Sachs employ is a theory of law according to which all valid law at any point in time is grounded in a special social practice of a certain group of people of recognizing certain things as law.<sup>12</sup> This view comes from H.L.A. Hart, who argued that a social practice of legal officials grounds the “ultimate rule of recognition” of every legal system.<sup>13</sup> For a Hartian legal positivist, there could be no law that is not grounded in the current social practice of recognition.<sup>14</sup>

The first question a positivist then asks is: what is the content of the current practice of recognition? And here we run into a problem with positivity-welcoming natural lawyers. There is no necessity that the current practice of recognition will treat enacted laws as “fixed” and “enduring.” In fact, it could adopt a universal “living instrument” approach to all enacted law, including a codified constitution. Hence, legal positivism allows for the possibility in which a legal system has no “positivity” of the kind Professors Pojanowski and Walsh think valuable. Whether there is any such “positivity” is a contingent empirical question. A positivist stresses that all law is “posited” not in the sense that it is intentionally made (at least some

4 Pojanowski & Walsh, *supra* note 1, at 99.

5 *Id.* at 122–24.

6 *Id.* at 152.

7 *Id.* at 125.

8 JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 26 (2012).

9 Pojanowski & Walsh, *supra* note 1, at 152.

10 It is not the case that their argument is “positive” in the sense positive originalists use the term. *Cf. id.* at 100 (“This argument is both ‘positive’ and ‘normative,’ in the sense that Baude and Sachs use these terms.”).

11 See Baude, *supra* note 2, at 2364–65; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 835–38; see also Pojanowski & Walsh, *supra* note 1, at 99.

12 See generally Baude, *supra* note 2, at 2364; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 835.

13 H.L.A. HART, *THE CONCEPT OF LAW* 94–95, 105–06 (3d ed. 2012).

14 See *id.* at 106.

of it clearly is not, for example customary law), but because at every point in time all law is grounded in a current pattern of human thoughts and actions.

The positive turn of Professors Baude and Sachs has at its core the claim that as a matter of contingent social fact it is the case that the current practice of recognition of U.S. law is fundamentally committed to “original law” originalism.<sup>15</sup> Professors Pojanowski and Walsh seem to suggest that there is no such fact, that what obtains is “constitutional eclecticism.”<sup>16</sup> Or, in other words, that the practice of recognition is not determinate on this point.<sup>17</sup> Both Professor Baude<sup>18</sup> and Professor Sachs<sup>19</sup> anticipate that possibility. Unsurprisingly, they both think that the challenge can be met (otherwise they would have been positive *nonoriginalists*).

It could be, as Professors Baude and Sachs suggest, that the current rule of recognition of U.S. law has as its supreme provision a duty to recognize as valid U.S. law only that which has the pedigree of unbroken continuity of lawful change since the founding.<sup>20</sup> If this is the claim of positive originalism, then it certainly is not—as Professors Pojanowski and Walsh claim—“a history of Supreme Court attitudes and practices”<sup>21</sup> for the simple reason that the rule of recognition is constituted by attitudes of a much broader group. It is also not true that this framework does not tell us whose attitudes (“internal perspective”) counts.<sup>22</sup> Yes, there is some disagreement on that point in the literature, and Professors Baude and Sachs do not commit themselves to a specific position on who counts as a member of this group, which Matthew Adler labeled the “recognitional community.”<sup>23</sup> However, the best view is that the recognitional community includes all members of the society who recognize each other as having a legal power authoritatively to apply the law (to say what it is in a given case).<sup>24</sup> In what follows, I will refer to them simply as “legal officials.” Any consensus (overlap) of their attitudes is likely to be shallow and narrow.

On one hand, this narrowness makes it more probable that the consensus needed to make the central claim of positive originalism true does not obtain (i.e., the legal officials are not committed to the original law in the way Professors Baude and Sachs argue).<sup>25</sup> On the other hand, it could very well be that the Supreme Court

15 See Baude, *supra* note 2, at 2364–65; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 835–38.

16 Pojanowski & Walsh, *supra* note 1, at 135–38; see also *infra* Parts IV & V. For more detailed criticism along these lines, see generally Barzun, *supra* note 2, and Primus, *supra* note 2.

17 Pojanowski & Walsh, *supra* note 1, at 104–06, 108–09.

18 See Baude, *supra* note 2, at 2403.

19 See Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 822.

20 Rules of recognition may be internally structured. Alternatively, one might say that there is a hierarchy of rules of recognition. Nothing hangs on that as long as there are no conflicting rules of recognition in a society.

21 Pojanowski & Walsh, *supra* note 1, at 114–15.

22 Cf. *id.* at 111, 116, 125.

23 Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 726 (2006).

24 See, e.g., John Gardner, *Why Law Might Emerge: Hart’s Problematic Fable*, in READING HLA HART’S *THE CONCEPT OF LAW* 81, 83 (Luís Duarte d’Almeida et al. eds., 2013).

25 Professors Pojanowski and Walsh are correct in saying that “[i]t is hard to establish that originalism is in fact the master interpretive convention in a univocal rule of recognition that all

is undermining the law we discover by paying attention to the higher-order principles accepted by other legal officials. Private attitudes and practices of the Supreme Court that are not shared in the wider recognitional community do not ground the rule of recognition. Hence, focusing on what the majority of the Court thought in some case, or what would have happened if it said something else, is far from being the positivist method. Natural law originalists and positive originalists can agree that the case law of the Supreme Court is not identical with the law of the Constitution.

That the social practice of recognition of law is not determinately originalist is not the authors' main criticism of positivist originalism. Their main criticism is that Hartian positivist originalism has yet to provide a practical (normative) "reason to be an originalist."<sup>26</sup> I will come back to that issue in Part V.

## II. THE CENTRAL CASE OF THE INTERNAL POINT OF VIEW

I now turn to the core of the case Professors Pojanowski and Walsh make for their natural law originalism. Seeing the limitations of that argument will allow me to say something about the relative merits of positivist and natural law originalisms.

Professors Pojanowski and Walsh are skeptical that the positive originalism of Professors Baude and Sachs succeeds on its own terms, because they are skeptical that there is sufficient agreement among U.S. legal officials on that point.<sup>27</sup> This is a fair point and it may well be right. If it is, then positivists must reject originalism as an account of the law as it is. However, this is not necessarily the end of the road for natural law originalism.

A natural law originalist may say that even though the relevant social practice is not settled on the point of originalism, even though there is fundamental disagreement, the nature of the U.S. law tells us how to resolve the disagreement.<sup>28</sup> How? In brief, by taking the perspective (the "internal point of view") of "the practically reasonable person."<sup>29</sup> In other words, by siding with one party of the disagreement. Instead of throwing up one's hands in the situation of fundamental disagreement as to the content of the law and saying that there is no legal fact of the matter (the law is not settled, indeterminate), a natural lawyer says that there is a legal (legally required) answer. This is undoubtedly a very alluring conclusion. It may seem more alluring than the positivist solution, which is to admit that in some cases the law allows legal officials to exercise discretion and to provide authoritative settlement that is not uniquely legally required, but merely legally permitted.

The problem is with where a natural lawyer gets his legally required answer. Who is the practically reasonable person? Stripping the account of technical language, a natural lawyer claims that this is a person who does what morality *really*

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relevant practitioners regard as obligatory." Pojanowski & Walsh, *supra* note 1, at 116. The goal of Professors Baude and Sachs is to show that there is such a shared commitment, not that it is easy to do so. See Baude, *supra* note 2, at 2403; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 822; see also Pojanowski & Walsh, *supra* note 1, at 105–08.

26 Pojanowski & Walsh, *supra* note 1, at 116.

27 See *infra* Part V.

28 See Pojanowski & Walsh, *supra* note 1, at 125.

29 *Id.*

requires. The “central case” of law identified by the practically reasonable person is law that *actually* realizes the moral values that law is supposed to realize (contributing to the common good of maintaining a “complete political community”).<sup>30</sup> So, where does the disagreement-settling legal answer come from? From morality. To be clear, the last point is also, in a sense, true of legal positivism. The difference is that positivists do not claim that the way discretion was exercised in any given case was legally required. Hence, positivism does not take sides in meta-ethical debates in a way that natural law does. For natural lawyers this counts in favor of natural law; for everyone else it counts against it.<sup>31</sup>

### III. COMPATIBILITY OF NATURAL LAW AND POSITIVIST ORIGINALISM

There is a considerable space for compatibility between natural law originalism and positivist originalism. As I show in Part IV, on some readings of *Enduring Originalism*, it could be fully endorsed by a legal positivist.

A positivist has no reason to reject the rather uncontroversial view that we all should be doing the morally right thing and that this applies to legal officials as well. However, potential for compatibility between the two jurisprudential views goes beyond that.

For instance, what if legal officials fail to do the morally right thing in identifying the content of the law? A positivist and a modern natural lawyer<sup>32</sup> may very well agree that we then end up with law that is a legally deficient, noncentral (nonparadigmatic) case of law.<sup>33</sup> There is likely to be disagreement between a positivist and a natural lawyer as to what exactly is the central case of law. A positivist may be more inclined to identify it with the ideal of legality (of the rule of law),<sup>34</sup> which a natural lawyer may find too thin (not encompassing all that is morally valuable about the central case of law).

A modern natural lawyer cannot even make arguments from the central case of law to the content of the law as practiced (i.e., to argue from “moral ought” to “legal is”) if the legal practice in question is settled (determinate). Following Professor Finnis, “reformed” natural law theorists like Professors Pojanowski and Walsh cannot say that a “formally or intra-systemically valid law” is simply not law.<sup>35</sup> The new natural lawyers do not take the maxim *lex iniusta non est lex* literally.<sup>36</sup> Professor Finnis is very careful to limit himself to statements like: “any significant injustice in making or content deprives a law or legal decision of that

30 *Id.* at 126.

31 It counts against natural law jurisprudence to the extent it purports to be a theory of the content of the law and not how the content of the law should be changed. *See infra* Part IV.

32 As opposed to “hard-core” natural lawyers who, unlike Professors Pojanowski and Walsh, think that unjust law literally is not law. *See, e.g.*, Norman Kretzmann, *Lex Iniusta Non est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99, 101 (1988); *see also* Pojanowski & Walsh, *supra* note 1, at 118 n.118.

33 *See* John Gardner, *Law as a Leap of Faith as Others See It*, 33 LAW & PHIL. 813, 837–42 (2014).

34 *See* GARDNER, *supra* note 8, at 229.

35 *See* John Finnis, *Law as Fact and as Reason for Action: A Response to Robert Alexy on Law’s “Ideal Dimension,”* 59 AM. J. JURIS. 85, 107 (2014).

36 There are natural lawyers who oppose this trend. *See generally* Gardner, *supra* note 32.

moral respect-worthiness that every formally or intra-systemically valid law and decision within a by-and-large just legal system has.”<sup>37</sup>

In other words, if a law does not conform to the ideal set by the natural law theory, it is “deprive[d]” of “moral respect-worthiness.”<sup>38</sup> In the same paper, Professor Finnis adds: “[u]njust laws, despite their intra-systemic validity, are not *reasons* of the authentically legal kind that law should exist to create.”<sup>39</sup> So those “unjust laws” are valid laws, but do not create reasons for action of a special moral kind. There are two crucial lessons here: (1) natural law theory to be of any plausibility to a modern lawyer must take on board the positivist concept of “intra-systemic validity” and, relatedly, (2) natural law theory does not claim that, as a matter of “intra-systemic validity,” content of legal norms is necessarily affected by what morality requires. That is, a modern natural lawyer cannot say that his jurisprudential theory can change “the *fact* that others treat these laws as legally valid.”<sup>40</sup>

Hence, if a law is settled as a matter of “intrasystemic validity” (for a positivist this translates simply to “validity”) and is morally bad, a modern natural lawyer can only say that it is nonparadigmatic. She cannot say that the law actually has different, morally correct, content. But what if the content of the law is not settled as a matter of “intrasystemic validity”? This is where Professors Pojanowski and Walsh come in and say that the nature of U.S. law requires officials to *choose* the morally (and thus legally) correct answer.<sup>41</sup> To an extent, even a hardcore legal positivist must allow for the possibility that they are correct. But it is not a straightforward thing to show.

First, it is contentious that morality requires U.S. legal officials to be originalists,<sup>42</sup> but let us assume that it does. This is a crucial assumption and the project of natural law originalism fails if it cannot be substantiated. Professors Pojanowski and Walsh do not deny this and aim to show that, given some salient features of U.S. constitutional history, morality requires originalism in the United States today.<sup>43</sup>

Second, neither the argument from historical understandings of the kind of law the Constitution is,<sup>44</sup> nor the moral argument on that point,<sup>45</sup> are sufficient. It must still be established, as a matter of current legal practice, that originalism is not legally precluded and that legal officials have discretion to make the choice in favor of originalism. What needs to be shown is that there is a legal gap and that the officials

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37 Finnis, *supra* note 35, at 107.

38 *Id.*

39 *Id.*

40 *Id.*

41 Pojanowski & Walsh, *supra* note 1, at 153, 155.

42 Moral arguments, and especially all-things-considered moral arguments, about such complex things as the U.S. constitutional settlement, are rather tricky. Professors Pojanowski and Walsh recognize this, and they end up with a version of the precautionary principle combined with a claim that the original Constitution is good enough (sufficiently just). *See id.* at 155–56. Naturally, even that is contentious.

43 *See id.* at 126–35, 149–57.

44 *See id.* at 126–35.

45 *See id.* at 119–26.

are at least legally permitted to fill it by reference to the sort of arguments that Professors Pojanowski and Walsh use. This is not just a requirement of legal positivism, but as my discussion of Professor Finnis's view showed,<sup>46</sup> it is also a requirement of modern natural law theory. If the "intrasystemically valid" law is settled, then there is no choice to be made. Professors Pojanowski and Walsh have written:

We agree that the case for originalism is contingent on continued adherence to the concept of our Constitution to which it is attached. But that continued adherence depends on choice and cannot be resolved by reference to social facts alone. In our constitutional order, a fixed, authoritative, enduring, stipulated positive-law Constitution is not the only official story on offer.<sup>47</sup>

This may very well be, but why is the choice legally open? And why is it open to be settled by the kind of moral and historical arguments that Professors Pojanowski and Walsh use? Social facts alone determine "intrasystemic validity" and hence whether a point of law is settled in that sense or not. The authors note that "insofar as the original law of the Constitution underdetermines legal questions within its domain, the system needs legal conventions for rendering the law sufficiently determinate."<sup>48</sup>

However, they argue for their favored conventions by referring to the choice made by the makers of the Constitution and to a moral argument, neither of which is a proper argument about the content of contemporary law unless one has already shown that contemporary law invites (or incorporates) these sorts of arguments.<sup>49</sup> The choice made by the makers may be determinative if positivist originalism is correct about current legal practices, but this is precisely what Professors Pojanowski and Walsh are skeptical of.

Perhaps Professors Pojanowski and Walsh believe that, at least in U.S. law, it is the case that whenever "intrasystemically valid" law is indeterminate there is a general legal permission for legal officials to make it determinate by exercising their legal powers (e.g., powers to adjudicate). To be more precise: a general permission to make it determinate by reference to the sort of arguments (moral and historical) that Professors Pojanowski and Walsh make. Again, I do not deny this possibility, but it cannot just be assumed. The authors have more explaining to do. In the next Part, I discuss what that explanation may be.

#### IV. WHERE NATURAL LAW AND POSITIVIST ORIGINALISM COME APART (MAYBE)

At least some of the claims of a natural law originalist, about paradigmatic (central) cases of law and about how morality may require developing indeterminate "intrasystemically valid" law to make it originalist, are compatible with legal positivism. The compatibility stems from the fact that legal positivism does not preclude them and is shown by the fact that some legal positivists endorse versions of those claims. Naturally, they do not do so *because* they are legal positivists, just

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46 See *supra* notes 35–40 and accompanying text.

47 Pojanowski & Walsh, *supra* note 1, at 153.

48 *Id.* at 142.

49 See *id.* at 119–35.

as mathematicians who are vegetarians are not so because they are mathematicians. Legal positivism, just like any theory, has a limited domain and the aforementioned claims of natural law originalism do not conflict with this limited domain. Due to its acceptance of “intrasystemic validity” as a social fact, modern natural law theory is positivism-friendly.

Nevertheless, as I already noted in Part II, a positivist originalist and a natural law originalist may have different starting points. A positivist starts with the current social practice of recognition of law. For her, there is no sense whatsoever in which “original law” is currently law, *unless* she already concluded that the current practice of recognition makes it so. It is not entirely clear whether Professors Pojanowski and Walsh endorse this or not.

Take, for instance, their example of “mental age” and “chronological age” versions of the constitutional age requirement for becoming President.<sup>50</sup> Once they assume “that the correct legal meaning fixed as an original matter is ‘chronological age,’” then they state confidently “[t]hat is the law.”<sup>51</sup> On their view, it would even be so if all the federal courts had accepted the “mental age” version. They have written: “The fixed meaning of the written Constitution remains law of a certain kind even if the Supreme Court ignores it or casts it aside. This persistence as positive law of a sort may seem counterintuitive, but it is real.”<sup>52</sup>

The way the authors phrased the last quoted passage makes it acceptable to a positivist. As Professor Sachs correctly argues, there could be a “constitution in exile.”<sup>53</sup> But this is only possible if there is agreement among legal officials in the form of a “higher-order belief” in some feature of law that those officials, or some subset of them, fail to adhere to in practice.<sup>54</sup> A positivist need not endorse the “narrow sense” of “the law” as merely “the law that should be applied in courts until the Supreme Court changes its tune.”<sup>55</sup>

A positivist will also allow for the possibility that “the output of original-law originalism is law”<sup>56</sup> even when it is not in practice applied by courts. As the authors say, it could be a distinct question whether it is “available for adoption as the law to govern a particular case.”<sup>57</sup>

The big question is whether Professors Pojanowski and Walsh go beyond that: whether they claim that even if there is no such enduring “higher-order” agreement among legal officials, some feature of the law could endure despite being rejected in practice.

The authors are not overly explicit about that, but some of their remarks suggest that they do not claim that originalism can never be abandoned in the United States. There is some limitation. For instance, they said “[a]s long as this conception of the Law of the Constitution endures, legal actors have available a potentially

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50 *See id.* at 149–51.

51 *Id.* at 150.

52 *Id.* at 150–51.

53 *See generally* Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, *supra* note 2.

54 *See id.* at 2275–76.

55 Pojanowski & Walsh, *supra* note 1, at 151.

56 *Id.* at 154.

57 *Id.*

winning argument based on it.”<sup>58</sup> What does it mean for the conception of this kind to *endure* if it means something other than an enduring agreement of higher-order beliefs? What is it for the Constitution to “keep[] its soul”?<sup>59</sup>

Professors Pojanowski and Walsh are somewhat cryptic as to whether they believe in the existence of “Sachsian” social facts making it the case that positive originalism succeeds on its own terms. They recount the standard, fair objections to the empirical claims made by positive originalists.<sup>60</sup> And then they say that they will not try to adjudicate this because “these are not [their] concerns, or at least not directly.”<sup>61</sup> I do not think this way out is open to them. What is at stake is a core question about their own theory and the extent of its commitment to the “positive turn” in originalism.

I see three possible readings of this core aspect of the argument in *Enduring Originalism*. The first one is fully compatible with positivist originalism. The remaining two are independent from positivist originalism, but are compatible with legal positivism.

#### A. *The First Option*

According to Professors Pojanowski and Walsh:

The best explanation for the endurance of originalism in practice, we contend, is the endurance of the idea of the written Constitution as fixed, stipulated positive law. Some version of constitutional originalism will always be attractive for interpreters as long as the Constitution is widely enough understood as the kind of legal instrument that it was designed to be—superior law authoritatively fixed until lawfully changed.<sup>62</sup>

One possible reading of what the authors are saying is that they concur with Professor Sachs that there is an agreement among contemporary U.S. legal officials of relevant higher-order beliefs making it legally the case that original law is law. On this reading, the added value of natural law originalism is in helping to *explain why* U.S. officials accept this idea of the Constitution and to *justify in moral terms* that they continue so to accept.<sup>63</sup> Hence, despite their protests to the contrary, Professors Pojanowski and Walsh are legal positivists who are also natural lawyers.

If this is what natural law originalism boils down to, then a positivist may be tempted to say that it is not much. Both the explanation and the justification provided by natural law originalism are highly contentious and, in any case, they are not necessary to establish that the original law is law, once it is already established that there is a relevant higher-order agreement. That is, once we already know that

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58 *Id.* at 149.

59 *Id.* at 158.

60 *See id.* at 108–09.

61 *Id.* at 109.

62 *Id.* at 149. Similarly, they argue that “our constitutional order maintains fundamental continuity as long as there remains some fidelity to the concept of the Constitution as stipulated, fixed positive law that interpreters should approach with interpretive conventions proper to such a document.” *Id.* at 152.

63 *See, e.g., id.* at 116.

U.S. legal officials agree that original law is law, despite inconsistent caselaw or executive practice.

### B. *The Second Option*

Perhaps the authors do not believe that there is a higher-order agreement that makes it the case that originalism is law in the sense Professor Sachs presents. They said, for instance, that “[i]t is hard to establish that originalism is in fact the master interpretive convention in a univocal rule of recognition that all relevant practitioners regard as obligatory.”<sup>64</sup> And “[originalism] is not as ascendant as advocates of the positive turn claim, but its legal force is nonetheless real.”<sup>65</sup> There would still be a need to explain their statements like the following: “[t]he social facts the positive turn identifies will be crucial, even if they are not sufficient to tell a court how to interpret the Constitution.”<sup>66</sup>

My best guess of what Professors Pojanowski and Walsh mean on the assumption that they disagree with Professor Sachs is that they think there is a lower threshold of agreement for higher-order beliefs to ground legal facts. In a different passage, they said “our constitutional order maintains fundamental continuity as long as there remains some fidelity” to the originalist concept of the Constitution.<sup>67</sup> Perhaps “some fidelity” is less than the kind of agreement a Hartian positivist sees as necessary to constitute ultimate legal facts (contents of the ultimate rule of recognition). If this is their view, then it is substantially different from that of a positivist originalist like Professor Sachs.

What Professors Pojanowski and Walsh said in the introduction supports this reading:

On our approach, originalism stands even if many legal participants reject originalism or merely pay lip service to it. What is decisive is the point of view of the morally reasonable person toward the social fact of our stipulated positive-law Constitution—not social facts about what today’s legal officials happen to believe about interpretive method. And the practically reasonable person’s attitude toward our Constitution, we argue, should be originalist.<sup>68</sup>

The authors hinted at their solution by saying: “[a]ccordingly, the interpretive revolution that seeks to depart from the understanding of the Constitution as stipulated positive law is not complete. This contested state of affairs still offers a live choice between original-law-ism and living constitutionalism.”<sup>69</sup>

There are two ways to interpret the “live choice” solution. The first would be to say that there is higher-order agreement in U.S. legal practice that indeterminacy in law is to be settled by the methods that Professors Pojanowski and Walsh employ (moral and historical). Or as the authors would prefer to phrase it:

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64 *Id.*

65 *Id.* at 155.

66 *Id.* at 116.

67 *Id.* at 152.

68 *Id.* at 100–01.

69 *Id.* at 155.

As long as disagreement about the nature of the Constitution as a legal instrument persists, a shared understanding of what to argue about in arguing for a particular set of interpretive conventions is not enough to enable identification of a full set of interpretive conventions for the Constitution. There will be no normative lens through which to filter conflicts between interpretive conventions. But insofar as there is agreement on some of this legal instrument's legal qualities, there can be agreement on some of the interpretive conventions appropriate to it.<sup>70</sup>

Hence, on this view it could conceivably be claimed that natural law originalism is required by current law (not only permitted or not precluded). If such higher-order agreement really exists, then a legal positivist would have no problem admitting as much. She may only have qualms about labeling the result of this legally required process as “law” *before* the officials adhere to their legal duties and “turn originalist.”<sup>71</sup> But she would admit the result as legally required.

Of course, this claim about the social facts at the foundation of U.S. law would face the same sort of objections the empirical claim of positive originalism faces. Maybe it would be easier to prove, maybe not. One might worry that Professors Pojanowski and Walsh are attempting to pack too much of their conclusion into the social fact of “agreement on some of [the Constitution’s] . . . legal qualities.”<sup>72</sup> The content of that social fact is perhaps thinner and leaves us only with the following alternative.

### C. *The Third Option*

The third way to interpret the “live choice” solution is that Professors Pojanowski and Walsh rely only on the existence of a general legal permission for legal officials to use their legal powers to settle disagreements in the law. On this scenario, all the support originalism needs in terms of social facts is that it is one seriously held view among others. This alone makes it eligible to be “chosen.”

A positivist description of this scenario would be that the law is not originalist now, but could be made so in a way that is neither legally required nor precluded. Any duty to develop the law in the originalist direction could only be a nonlegal duty (e.g., a moral duty).

Regarding the second and third options, a natural lawyer might want to say more about the content of U.S. law. She may claim both that (1) the choice to change the law as practiced is legally required because such is the central case of U.S. law, and that (2) the result of the choice *is law*, irrespective of whether it is law as practiced.

This is where the natural lawyer goes too far. Those two additional claims about the content of law are both implausible and incompatible with “positivity” of law viewed as the notion that all currently valid law is grounded in the current social reality. A positivist takes social reality as it is: if there is *fundamental* disagreement,

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70 *Id.* at 142.

71 Just because you can impose on someone who has a power to change the law a legal duty to exercise that power in a certain way, it does not follow that your imposition of that duty is identical with changing the law. They might fail to obey.

72 Pojanowski & Walsh, *supra* note 1, at 142.

there is no law. A natural law originalist, on this reading, is not satisfied with that. She picks one side in such fundamental disagreement and decrees it correct, based ultimately on her account of what morality requires. This does sound very much like “a flight from constitutional positivity.”<sup>73</sup>

However, a natural lawyer need not make those additional claims. She could be satisfied with claiming that the central case of U.S. law established a moral ideal and that legal officials have a moral duty to use the legal powers they have as a matter of social fact to make U.S. law conform to that ideal. This, to me, seems like a coherent and potentially plausible argument. Not to mention, one fully compatible with legal positivism. Yes, it is merely a moral argument for legal reform (informed by legal history), but it avoids identifying the law as it is with the law as it should be.

#### V. THE BEST REASONS TO BE AN ORIGINALIST

A practically reasonable vampire, I am told, would not enter a house uninvited. A similar thing is true about natural lawyers. They know that if they want to engage in a debate with legal positivists and avoid a charge of having an entirely different conversation (talking past one another), it is a good idea for them to be invited. A positivist may provide such an “in” by opening a particular discussion to considerations of genuine normativity (simplifying: to what is morally, not just legally, required). Professors Pojanowski and Walsh notice that Professors Baude and Sachs did so by attempting to provide an account of “how judges *ought* to decide cases”<sup>74</sup> and of “the *best* reason to be an originalist.”<sup>75</sup> Two questions immediately arise:

- (1) What does it mean to be or to have “the best reason to be an originalist”?
- (2) Who provides “the best reason to be an originalist”?

What are the reasons in question and what are they reasons for? What is it to “be an originalist”? One could be an originalist in the sense of believing that originalism correctly describes current positive law of the United States. This is the claim made by Professor Sachs.<sup>76</sup> Professors Pojanowski and Walsh are not satisfied with that.<sup>77</sup> They claim that the method employed by positive originalism “gives no reason to be an originalist.”<sup>78</sup> What they seem to mean by “being an originalist” is not only having the belief I mentioned, but also accepting that one *morally* ought to follow the original(ist) law and act accordingly.

Hence, radical abolitionists before the Reconstruction Amendments, who made originalist arguments about the place of slavery in the Constitution and used that as a reason *to deny* the Constitution moral authority, could not have been

<sup>73</sup> *Id.* at 151. Unless, of course, “positivity” is simply defined as treating the Constitution as “fixed, authoritative, and enduring” but that is precisely what is to be shown. *Id.* at 152.

<sup>74</sup> Baude, *supra* note 2, at 2392.

<sup>75</sup> Pojanowski & Walsh, *supra* note 1, at 114 (emphasis added) (quoting Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 822).

<sup>76</sup> See Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 822.

<sup>77</sup> See Pojanowski & Walsh, *supra* note 1, at 109, 114–16.

<sup>78</sup> *Id.* at 116.

originalists according to the authors.<sup>79</sup> Those abolitionists arguably had moral reasons to be originalists (it may have been morally valuable to show that the Constitution was morally bad), but those reasons were not moral reasons to obey the Constitution.

One of the major advantages of positivism is that it allows very straightforwardly the conclusion that something is law in a perfectly ordinary sense and at the same time there are no moral reasons to follow it. It is a simple, but common, error to equate “practical relevance” of an account of law with the issue of whether (and how) that account justifies a moral obligation to obey the law.<sup>80</sup> In fact, if one does not assume that a particular natural law theory is correct, then it is easy to conclude that such theory is devoid of any practical significance. Because if it is not correct, it is just someone’s personal view on what should be the case. Why would anyone else care about that?

In contrast, accounts of actual legal practices (what Professors Pojanowski and Walsh disparage as mere “descriptions about others’ beliefs”<sup>81</sup>) are always of practical relevance. One cannot even begin contemplating what one ought to do without having this sort of knowledge about the world.<sup>82</sup> Yes, to decide what one ought to do one also needs a first-order normative theory, but there are good reasons to separate the two. One such good reason is that first-order normative theories tend to be rather contentious, to put it mildly.

Importantly, there is significant confusion around the charge, repeated several times in *Enduring Originalism*, that legal positivists are exclusively interested in “neutral description” of the law.<sup>83</sup> Proper understanding of this issue will help in assessing the relative merits of positivist and natural law originalisms.

First, at the current stage of the debate on methodology of legal philosophy it is misleading to describe legal positivism as aiming to be “neutral,” “purely descriptive,” or even “normatively inert.”<sup>84</sup> In an important sense, no theory of

79 See, e.g., LYSANDER SPOONER, NO TREASON NO. VI: THE CONSTITUTION OF NO AUTHORITY (1870); THE CONSTITUTION A PRO-SLAVERY COMPACT: OR, EXTRACTS FROM THE MADISON PAPERS, ETC. (Wendell Phillips ed., 3d ed. 1856). I am not saying they were *correct* by modern methodological standards. See, e.g., LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1847); Helen J. Knowles, *Securing the “Blessings of Liberty” for All: Lysander Spooner’s Originalism*, 5 N.Y.U. J.L. & LIB. 34 (2010).

80 See, e.g., Pojanowski & Walsh, *supra* note 1, at 116.

81 See *id.*

82 Another way in which Professors Pojanowski and Walsh mischaracterize practical relevance of positivism is when they claim that the only response a positivist may have to “a renegade Justice” rebelling against the current positive law (including the current content of the rule of recognition) is to wait and see whether this Justice and his friends succeed in changing the law. *Id.* at 114. I cannot see what inspired that conclusion. If the Justice in question really is “rebellious” (i.e., there is settled law against which he is acting), then there are plenty of weapons in a perfectly ordinary legal arsenal to fight that. The Justice is acting unlawfully, and so can be criticized for that and perhaps even lawfully punished. The idea that “all that succeeds is success” grounds no legal protection for law-breaking before that law-breaking succeeds to change the law. HART, *supra* note 13, at 153.

83 See Pojanowski & Walsh, *supra* note 1, at 103, 110, 114.

84 See *id.* at 103, 110, 113. Julie Dickson’s work is magisterial in this respect. See JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001).

anything can achieve that. This is as true about mathematics and physics as it is about jurisprudence.<sup>85</sup> What makes it harder to see this fact is that in some fields (like mathematics) the methodological criteria are more entrenched and less controversial as a matter of sociology of the discipline. However, it is naïve not to notice that judgments of beauty or simplicity that ground many more advanced mathematical debates are not “objective” or “purely descriptive” (even though, importantly, they are not *moral* judgments). Methodological criteria used may be more or less controversial within a community, but it is futile to seek the “objective” ones.

No methodologically self-aware positivist can deny the crucial role of evaluative and normative judgments for her enterprise. An important and underappreciated issue is that different kinds of judgments are made on different levels, or stages of inquiry. Why be a legal philosopher instead of a medical doctor? This is, partly, a moral question. What methodological values to pursue in one’s account of the law? Certainly an evaluative and normative question. Is it, at least partly, a moral question? I am inclined to say yes.

The mistake that some natural lawyers make is not to see the *possibility* that evaluative, normative, and even moral judgments about how to pursue a field of inquiry may yield a methodology that, in turn, does not include any direct moral evaluations (even though, inevitably, it will involve other kinds of evaluation). Some legal positivists, as Professors Pojanowski and Walsh recognize in a footnote, have provided arguments of this sort.<sup>86</sup> What the authors do not admit is that positivism is not tied to utilitarianism or a specific “conception of human persons.”<sup>87</sup> One can imagine a natural law account of positivist methodology (even of the exclusive sort).<sup>88</sup> That no one so far tried is a merely contingent fact about personal interests of legal philosophers.

It is not in itself a problem that some positivists do not write about those issues, or at least do not focus on them. We do not criticize frontline mathematicians, physicists, or even sociologists, for not being at the same time theorists of mathematical, physical, or sociological methodology. The question is whether the methodology in question is *justifiable*, especially in comparison with available alternatives. I cannot hope to address this issue fully in this short Essay. However, I will note that much, if not the overwhelming majority, of the discipline shares the methodological values that underlie the work of Professors Baude and Sachs and find the framework relied on by Professors Pojanowski and Walsh interesting, but ultimately unconvincing. Perhaps we are all wrong. But how likely it is that we are wrong in as facile a way as the authors present it?

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85 See, e.g., Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 33–37 (2003).

86 See Pojanowski & Walsh, *supra* note 1, at 123 n.149.

87 See *id.* at 124 n.151.

88 Such an account would not necessarily be “positivity-welcoming” (i.e., it need not claim that there is specific moral value to originalist law). On the notion of “positivity-welcoming,” see GARDNER, *supra* note 8, at 26–29. The moral claim could be on a different level. Perhaps, a “practically reasonable” legal philosopher ought to be a positivist. Or, in other words, morality requires the kind of legal philosophy that allows for the possibility that immoral or unjust legal systems (e.g., Soviet law) are not defective *as* legal systems.

What is more, positivists (i.e., those who subscribe to legal positivism) are clearly very much interested in direct moral evaluation of the law. They are also interested in moral questions like the question when, if at all, people have moral duties to obey the law. Positivists refuse only to *start* their inquiry with an assumption of moral value of the law or of existence of a moral duty to obey. Why?

In a powerful discussion cited but not addressed adequately by the authors,<sup>89</sup> Professor Sachs gives a partial answer: no method of legal interpretation can be the law in virtue of being morally or philosophically required.<sup>90</sup> Whatever a clever philosopher can come up with as an account of what the law *should* be, that is in itself irrelevant to what the law *is* here and now. It just cannot be that “the entire society [is] getting its own law wrong, all the way down.”<sup>91</sup>

It is not a goal of positivism to stop anyone from asking questions about existence of duties to obey the law. To the contrary, positivism is, in a sense, a “plug-and-play” theory of law for a moral philosopher. Irrespective of which account of whether people morally ought to do *X* one accepts, legal positivism provides an *X*. Positive originalism provides an even more specific *X*.

As Professors Pojanowski and Walsh show (even though they do not stress), modern natural law theory may be used to support the claim that there are moral reasons to obey U.S. constitutional law if it happens to be originalist (i.e., if Professors Baude and Sachs are correct).<sup>92</sup> This is not trivial, though it is not as ambitious as Professors Pojanowski and Walsh might want. They seem to be saying that U.S. law is originalist because it morally should be (or more accurately: the judges should choose to make it originalist for that reason), not that it merely happens to be originalist as matter of fact and that is a morally good thing, as in my version.

However, positive originalism may work with other moral theories too. Professor Baude favors a view focused on normative significance of official oath.<sup>93</sup> Professors Pojanowski and Walsh are unimpressed.<sup>94</sup> We can expect other accounts to be offered in the future.

So who provides the best reason to be an originalist? Professors Pojanowski and Walsh tell us that “[t]o be more than a history of Supreme Court attitudes and practices, the positive turn needs an account of why legal officials and citizens should treat these attitudes and resulting norms as having authoritative force on their consciences.”<sup>95</sup>

Once we properly see the method of positive originalism as more like sociology of the practices that constitute the foundations of U.S. law than “a history of Supreme Court attitudes and practices,”<sup>96</sup> then it is much easier to recognize the benefits of this approach. This method yields as close a picture of the settled law as

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89 See Pojanowski & Walsh, *supra* note 1, at 103–06.

90 Sachs, *Originalism as a Theory of Legal Change*, *supra* note 2, at 828–35.

91 *Id.* at 834.

92 See generally Pojanowski & Walsh, *supra* note 1, at 119–26.

93 See Baude, *supra* note 2, at 2392–97; see also Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016).

94 See Pojanowski & Walsh, *supra* note 1, at 115.

95 *Id.* at 114–15.

96 *Id.*

possible. If there is no sufficient overlap in individual attitudes of legal officials to ground some higher-order principle as part of the rule of recognition, then it is not a part of the rule of recognition. If it can be shown that more than a small minority of legal officials reject the higher-order principles described by Professor Sachs, then positive originalism is falsified. If there really is more than one sufficiently prominent “official story,” then there is no settled law on that point.<sup>97</sup> That’s it. End of story. To be able to brush this aside, natural law originalists must focus, as they do, on what they think the law *should be*, as opposed to what in fact is practiced as law. But once that is clearly admitted, the pull of natural law originalism will probably only be felt by those who already are natural lawyers.

#### CONCLUSION

The kind of reasoning that Professors Pojanowski and Walsh develop has rhetorical force. They criticize living constitutionalists for trying to switch “the soul of our Constitution from one that approaches immortality to another that dies and is reborn every day.”<sup>98</sup> To establish what is “the soul” of the Constitution, the authors employ plausible arguments about what morality requires and about how this was understood historically by the some of those involved in the making of the Constitution. If someone is already convinced that such arguments translate into legal arguments because of the nature of law (i.e., if someone already is a natural lawyer) they will likely find the entire reasoning convincing. However, for the rest of us, the move from the moral to the legal will remain implausible. This is not to say that *Enduring Originalism* is not important for positive originalists. If Professors Pojanowski and Walsh are correct about the first stage—that is, if it cannot be established that there are, as a matter of current legal practice, higher-order principles grounding supremacy of the original law—then positive originalism is falsified.

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<sup>97</sup> *See id.* at 153.

<sup>98</sup> *Id.* at 157.