

Review Essay

The Nature of Legal Interpretation: What Jurists Can Learn about Legal Interpretation from Linguistics and Philosophy

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Brian G. Slocum's *The Nature of Legal Interpretation: What Jurists Can Learn about Legal Interpretation from Linguistics and Philosophy* is a formidable addition to an evolving trend in analytical jurisprudence that invites insights from jurisprudentially "extraneous" domains such as linguistics, philosophy of language and mind, metaethics and philosophy of action. A praiseworthy feature of this trend is the importance it attaches to keeping these insights as free as possible of prior translation in the occasionally cryptic or unnecessarily insular language of analytical jurisprudence and legal doctrine. It is precisely thanks to this feature that recent discussions on the relevance of linguistic (semantic and pragmatic) facts as determinants of legal content display an impressive command of explanatory concepts and methods including the most challenging task of

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locating different aspects of legal meaning occurring outside as well as across the near side/far side spectrum of pragmatics.¹

The Nature of Legal Interpretation is an editorial undertaking that merits commendation for bringing a philosophically seasoned and linguistically refined eye to one of legal philosophy's most contested topics. An outstanding virtue of this collection is the even-handed exposition of insights drawn from almost every legally (jurisprudentially and doctrinally) crucial region in the figurative space that emerges from allowing three dimensions of "interpretative relevance." The first dimension captures the *linguistic* spectrum flanked by logical and semantic typologies of abstract objects (meanings and linguistic objects) on the one side and pragmatic typologies of specific events featuring the intentional acts of speakers at times and places (utterances). The contributions of Brian Slocum ("The Contribution of Linguistics to Legal Interpretation"), Kent Greenawalt ("Philosophy of Language, Linguistics, and Possible Lessons about Originalism") and Lawrence Solan ("Linguistic Knowledge and Legal Interpretation") locate, with impressive acumen, the pitfalls of a "jurisprudentially unfiltered" application of this general spectrum to the semantics and pragmatics of legal discourse.

The second dimension captures the *doctrinal* spectrum flanked by the epistemic activity of ascertaining the contribution of a legal provision to the content of the law and the constructive activity of creating law that takes over when a provision's contribution to the law is indeterminate or uncertain on an issue before the court.² The contributions of Karen Petroski ("The Strange Fate of Holmes' Normal Speaker of English"), Lawrence Solan ("Originalism, Hermeneutics, and the Fixation Thesis") and Francis Mootz ("Getting Over the Originalist Fixation") apply a historical, methodological and hermeneutical perspective respectively to bear on the normative, rather than simply factual, possibility of judicial lawmaking.

The third dimension captures the *jurisprudential* spectrum flanked by the roles that descriptive (linguistic, mental, social or cultural) and normative (moral, political and legal³) considerations play in the determination of legal content. The contributions of Frank Ravitch ("The Continued Relevance of Philosophical Hermeneutics in Legal Thought"), Nicholas Allott and Benjamin Shaer ("Legal Speech and the Elements of Adjudication"), Scott Soames ("Differentialism, Living Originalism, and the Constitution") and Gideon Rosen ("Differentialism and Adjudication") approximate from different disciplinary angles (hermeneutical, pragmatic, constitutional-doctrinal and metaphysical respectively) a

currently trending idea about legal content that tends to acquire—at least among analytical legal philosophers—the shell of a new minimal common ground. In its most abstract rendition the idea is that, *regardless* of where exactly one chooses to locate the borderline, there are many, several or select cases in judicial practice where descriptive facts about the sayings and doings of legal officials will fail to autonomously determine their own bearing on the content of the law at a given time and place.

In this brief general comment, I would like to take the liberty of flagging an issue that, albeit orthogonal to the more particular themes addressed in this collection, provides an illuminating background as to what might license the impression that disagreement between legal scholars, philosophers and linguists over the nature of legal interpretation is too shallow or “conceptual” to merit resolution as a distinct source of interdisciplinary concern. The background I am concerned with regards the answerability of theories of legal interpretation to the verdicts of metaphysical inquiry into the determinants of legal content.⁴ Broadly construed, determinants of legal content are descriptive and, arguably, normative facts about the sayings, doings and mental states of lawmaking officials in virtue of which different sources of law (statutes, constitutions, appellate decisions, administrative regulations) bear information or content about what the law requires, permits or empowers someone to do.

The present collection does not skimp on arguments that convey a committed viewpoint on this relationship. What is missing, nonetheless, is a “taxonomic primer,” so to speak, that would enable the reader to decode the chapter-by-chapter succession of profoundly diverse perspectives on how competing theories of legal interpretation map onto their different metaphysical backgrounds. As I plan to show further downstream, an overarching, taxonomic perspective that would facilitate the comprehension of the interdisciplinary scope of this collection becomes available only if we ascend at a higher level of abstraction where the elementary metaphysical question of what a legal interpreter *asks* when she interprets the law is neither bracketed nor treated as settled. The nature of this taxonomic perspective is distinctly metaphysical in the sense that it addresses head on the question of how the epistemology of law—namely, the way in which we acquire cognitive access to the legally relevant information conveyed by various sources of legal content (textual, historical, psychological)—tracks the metaphysics of law—namely, the explanation of how facts about the enactment of texts, the history of political and interpretative practices and the communicative dimension of legislative discourse ground

the existence of more fine-grained facts about general legal obligations and rights in a given jurisdiction.

Before moving on, I should stress that I do not perceive nor purport to present the lack of this “taxonomic primer” as a weakness to which the present collection is in any sense answerable. My aim is to alert the reader to the depth of substantive metaphysical disagreement implied by this ambitious collection of doctrinal (constitutional and statutory), linguistic, historical and philosophical (analytical and hermeneutical) perspectives on the nature of legal interpretation. Fortunately, the selection of topics addressed by each contributor contains a sufficient amount of “metaphysical cues” which I plan to “exploit” in the course of inferring the underlying pattern from which I plan to derive my metaphysical-taxonomic suggestions towards the end of this essay. What I am inclined to interpret as a metaphysically meaningful pattern that all featured essays appear to instantiate in one way or another is a recurring alternation mainly between *objectual* and *agentive* and, less frequently, *effectual* or impact-centered modes of describing the subject matter of legal interpretation. By “modes” I mean nothing more sophisticated than ways of talking about or expressing one’s viewpoint on what a legal interpreter is supposed to ask when (s)he engages in the respective activity of interpreting the law.

As I plan to document with textual evidence, the basic question of legal interpretation can be mirrored in three interrogative variants which the reader of this collection will encounter in more or less explicit and/or distinct formulation, namely: (1) what a legal text qua abstract *object* or artifact legally means or designates, (2) what a legal actor (enactor, drafter etc) qua authority-bearing *agent* means and/or implicates by a given enactment, and, (3) which normative states of affairs (legal obligations, rights, powers) obtain *as an effect of* certain linguistic (and institutional) facts about the meanings of certain texts and the utterances or speech acts of certain legal officials. Bracketing variations in scope of application or emphasis, all three modes of talking about legal *interpretanda* are used interchangeably across this collection of essays without their authors signaling an intentional shift in their background metaphysical allegiances. Moreover, the objectual and agentive modes are occasionally fused into a single conceptual compound such as the “*communicative content of a legal text*”—as opposed to the communicative content of a legislative *event* (utterance or speech act performed by a legislative *agent*). This versatility of usage, I shall argue, should be resisted when and because it suppresses the independent force of these modes of inquiry as guides for

evaluating the scope and content of our disagreement about the nature of legal interpretation.

Examples of the objectual mode abound in this collection both in a pure form or, as I will show further below, in fusion with the agentive mode. Reasons of space prevent me from reserving for each essay a separate documentation of the frequent use of this mode of presenting the object of legal interpretation but a few evocative examples will suffice for the bigger picture I venture to draw in this comment. Leaving aside stylistic variations, the most lucid objectual references can be found in Brian Slocum's frequent talk of "the determinants of meaning of legal texts" (14), Lawrence Solan's linguistic analysis of the interpretative dilemmas that arise "when the application of a legal text is at stake" (68), Frank Ravitch's hermeneutical elaboration of how the interpretive "horizon" of a legal text is determined by "the potential time lag and cultural shifts between the drafting of laws and their application to a variety of fact scenarios" (90) and Karen Petroski's defense of fictional legal discourse as a way of prompting "judges to step back from their own personal, prereflective understandings of the significance of legal texts" (118).

As opposed to the more extensive use of objectual expressions, explicit references to the agentive nature of legal interpretation are mainly concentrated in two essays of this collection. The most consistent use of the agentive mode of talking about legal interpretation can be found in Nicholas Allot's and Benjamin Shaer's speech-act-theoretic account of judicial deliberation (chapter 8). Quite interestingly, their agentive perspective draws its argumentative force directly from the actions of *judges as deliberators* and only derivatively from the actions or utterances of lawmaking officials. Allot's and Shaer's argument rests on the hypothesis that judges "are called upon to *do* [emphasis added] something: namely, to decide, on the basis of this [legislative] speech, which party wins the dispute" (193–94). In this regard, judges are simultaneously "hearers" of legislative utterances or actions and institutional "speakers" or agents who also "do things with words" by making a decision that settles the relevance of legislative utterances for the dispute at hand. Focusing on the relevance of legislative rather than judicial-deliberative action Scott Soames also adopts a distinctly agentive perspective on the question of what legal interpretation is about (chapter 9). He associates his deferentialist variant of originalism with a moderately pragmatic, *hence*, agentive, claim about the determinants of original content: "what is asserted," he suggests, "by the use of a text is what the *performance* commits the *performers* [emphasis added] to, which is what knowledgeable addressees

who understand the linguistic meaning of the text and are familiar with the contextual background reasonably take them to be committed to” (234).

Hybrid instances of an “objectual-cum-agentive” understanding of legal interpretation can be found in the direct dialogue featured by Lawrence Solum’s and Francis Mootz’s respective essays. Solum’s partial uptake of this fusion is evidenced by his recurring reference to “the communicative content of the constitutional text” and “the original meaning of the constitutional text” (130). These and other similar expressions are used to spell out the content of originalism’s two core ideas, namely, the temporal fixation of the original meaning of the constitutional text and the constraint this meaning imposes on constitutional actors “when they engage in constitutional practice (paradigmatically, deciding constitutional cases)” (132).⁵ In his dialogically responsive essay, Mootz rehearses the basic features of Solum’s defense of the fixation thesis with a view to showcasing, as he claims, its ontological rather than its normative dispensability. Mootz’s hermeneutical argument is also based on a hybrid conception of how the objectual-textual and agentive or reader-centered dimensions of meaning merge in the context of legal interpretation. In this regard, textual interpretation is taken to be a dialogic encounter in which the reader *qua* agent and the text *qua* object are at play. Mootz further complements this suggestion with a common articulation of the hermeneutical tenet that “there is no meaning of the text that exists independent of the interpreter’s hermeneutical activity” (160).

Finally, and, perhaps, not surprisingly so, the effectual mode of presenting the object of legal interpretation is almost exclusively prevalent in Gideon Rosen’s metaphysically nuanced critique of Solum’s deferentialist theory.⁶ With the exception of a brief reference by Brian Slocum to Mark Greenberg’s prominent variant of the effectual mode of explaining the task of legal interpretation (chapter 1, at 25), Gideon Rosen’s challenge of Scott Soames’ deferentialist model of constitutional interpretation is the only explicit endorsement of the implications of Greenberg’s understanding of legal interpretation as the epistemic process of discovering the normative (moral) impact of linguistic and institutional facts on legal-normative states of affairs (obligations, rights, powers).⁷ Rosen defends the power of deferentially mistaken, yet institutionally “calcified” past decisions to change the content of the law in the *effectual* sense of changing the legal effect of prior legislative pronouncements. Concurring with Mark Greenberg’s relevant critique of objectual and agentive conceptions of legal interpretation Rosen notes that the

question of legal interpretation “is not a question about the meanings of words, or about what some person said or meant when he used some words. It is a question about the *legal consequences* [emphasis added] of a speech act” (242).

I am aware that the way I have framed this evasive triad of modes of presenting the object of legal interpretation seems too *ad hoc* or even contrived. In the remainder of this review essay I will inject some further context and premises which will dispel, I hope, this worry. As I am about to illustrate, a brief inspection of contemporary scholarship indicates that no separate treatment is reserved for the question of what *the question* of legal interpretation is. Cast at this level of abstraction, this issue is often portrayed as merely inviting different proposals for *paraphrasing* what seems to be the same, more or less, idea, namely, that legal interpretation is *about* identifying what the content of the law is *whatever thing* this “legal content” is. Nevertheless, in the voluminous literature that foregrounds the nature of legal interpretation there is at least a triad of what I am inclined to see as metaphysically distinct suggestions or allusions—but certainly not fully elaborated theses—about what a legal interpreter is supposed to ask when she engages in this cognitive activity. This metaphysical triad directly corresponds to my exegetical remarks about the triad of modes (objectual, agentive, effectual) the reader will encounter in this collection.

For the sake of a very brief illustration and before continuing with my own taxonomic proposal, I will take the intermediate step of associating this triad of modes of interpretative inquiry with the ideas of three prominent analytical legal philosophers whose work is cited at various points in the present collection. Further downstream, I will use this brief exegetical digression as an informative background for introducing a reconstructive taxonomy that re-articulates the objectual, agentive and effectual modes of interpretative inquiry in a language that unmask their metaphysical implications. In doing so I hope to make a plausible case as to why these modes should not be treated simply as stylistic devices for highlighting the uneven legal relevance of different aspects of linguistic meaning but as “fragments” of metaphysically competing visions of how facts make law which, in their turn, invite jurisprudentially irreconcilable accounts of legal interpretation. Finally, I will supplement my taxonomic proposal with an illustration of how this alternative taxonomy fares better than more traditional categorizations at measuring the depth of the ongoing controversy over whether and how far normative considerations can steer the activity of legal interpretation.

A tacitly objectualist understanding of legal interpretation can be found in Timothy Endicott's suggestion that the question of legal interpretation is the meaning of a certain kind of legally relevant *object*, that is, "a good interpretation depends on true propositions that refer to the object" (Endicott 2012: 110).⁸ Beyond this overinclusive label Endicott shoulders no explicit metaphysical commitments as to what it means for the target of legal interpretation to be the meaning *of an object*, that is, of a cognitive (abstract) artifact⁹ such as a statute, a constitution or an appellate decision. Discarding the realist undertone that accompanies talk of abstract artifacts, Andrei Marmor highlights the virtues of an inferentialist, speech-act-theoretic approach that anchors the question of legal interpretation to what "the Law" or, equivalently, a properly designated legal authority *says*, requires, asserts or stipulates in the context of a given enactment. Leaving aside applicable nuances, the main focus here is a variant of *speaker* meaning which is a more conventional expression for describing the function of the agentive mode of legal interpretation.¹⁰ Finally, dispensing entirely with talk of legally meaningful objects or speech acts, Mark Greenberg appears to favor a distinctly effectual understanding of legal interpretation. In his words, "legal interpretation is the process or activity of using legal materials to ascertain what the law is, or, more precisely, to ascertain *legal obligations, powers, rights, privileges, and so on* [emphasis added]" (Greenberg 2016: 2). The question implied in this description is not what a legal artifact designates or what a speaker vested with legal authority means but which assertions of deontic propositions of law can be made true in a given jurisdiction by the normative effect of certain linguistic and other institutional facts.¹¹

Compressed as it may seem, this triad of modes of presenting the subject matter of legal interpretation is not dispensable by way of even more abstract or jargon-free paraphrasing because, as I will very briefly explain, a simple "scratch" on its surface reveals three sharply distinct, underlying conceptions of the metaphysics of lawmaking actions which supply the basic materials of legal interpretation. These accounts can be respectively labeled "lawmaking as a mode of production," "lawmaking as a mode of performative expression (or achievement)" and "lawmaking as a normatively impactful activity (or process)."

The first account ("lawmaking as production") directly corresponds to the *objectual* mode of talking about the object of legal interpretation and is perhaps the most metaphysically demanding in the sense that it rests on a stratified approach to ontology.

Asking what the legal meaning of an abstract object is necessarily implies a commitment to a type of mind-dependent (intended) or mind-independent (normative or essential) *function* served by the *products* of lawmaking actions.¹² The products of lawmaking are “laws” understood as abstract, institutionalized, cognitive artifacts which are not identical to but supervene on their material (inscriptions) or abstract (text-types) bases. Cognitive artifacts—to use Donald Norman’s pithy definition—“maintain, display, or operate upon information in order to serve a *representational* [emphasis added] function and...affect human cognitive performance.”¹³ All cognitive artifacts are usable on the basis of the type of information they carry. A map, for example, is used to navigate because the information it encapsulates can be used to perform a specific cognitive function (navigation). In the legal case laws can be modelled as representational artifacts whose mode of representing the world is *symbolic*,¹⁴ that is, they feature the use of natural language to impart legally relevant information. In this case, identifying the content of the law amounts to specifying the legally relevant *cognitive function*—for instance, the rational guidance of conduct—served by the “use” of particular legal cognitive artifacts such as statutes, constitutions and appellate decisions. The epistemology of the cognitive significance of legal artifacts will crucially depend on the tenability of a metaphysical theory of law that determines the properties that cluster together to compose such artifacts.¹⁵

An alternative path which is directly associated with the *agentive* mode of interpretative discourse is illuminated by the promising advances in speech act theory. Instead of shouldering a commitment to the metaphysical, so to speak, output of certain actions we may choose to inquire directly into what certain actors count as performing in a certain context.¹⁶ In other words, we proceed to ask what an authority-bearing speaker *means by way of uttering* a string of words that composes a text which is then subject to promulgation as law. Asking what an individual or group of individuals vested with lawmaking authority means by uttering a sentence X on a given occasion invites an inferential inquiry into the *mental states* (intentions, beliefs) that actually¹⁷ or counterfactually (ideally)¹⁸ *explain* the occurrence of a lawmaking *event*. In this case the content of the law is treated as identical with the content of an authoritative intention which, depending on the parameters of one’s favored theory, is actually or counterfactually and individually or jointly attributable to certain persons or groups that qualify as bearers of lawmaking authority.¹⁹ This is a typical speech-act-theoretic approach to lawmaking as it locates the source of illocutionary content in the communicative intention that makes

rationality intelligible a particular exercise of legal authority. In other words, a given utterance *qua* event is also a way of performing a legislative speech act (an enactment) which communicates the legal officials' views on how those subject to their authority are to behave.

Finally, asking which *propositions* of law can be truthfully asserted within a given jurisdiction at a given time amounts to asking which facts (linguistic and other) about the ongoing practices of lawmaking officials have the effect of generating the normative *states of affairs* that *make* certain propositions of law and not others *true*.²⁰ This case directly corresponds to the *effectual* mode of discourse about the nature of legal interpretation. On this approach to legal interpretation the way from semantics (sources of law) to ontology (true propositions and their truthmakers) is anything but royal. Instead of being treated as (part of the) contents of specific legal artifacts or legal utterances, they are taken to be the contents of those actual or hypothetical *assertions*²¹ of legal officials, legal practitioners and law-addressees which are apt to be *made true* by *those* normative states of affairs (or facts) that obtain *as a result of* the lawmaking activities (or processes) that take place within a given legal practice. On this picture the metaphysical question a legal interpreter should ask is not what determines the legal meaning of certain legally authoritative cognitive objects or mental states but the question of what makes certain assertions of legal duty or right true. Some of the aspects of the activities—rather than the productive or illocutionary actions—of lawmaking officials are taken to change the normative landscape in a way that generates situations that bear the pertinent truthmaking relation to certain propositional contents. Accordingly, the task of legal interpretation will be to ascertain the obtaining of such truthmaking situations.²²

The resulting division of opinion is, I would like to think, much sharper than the picture conveyed by “closer to the surface” distinctions such as the textualism/intentionalism/purposivism triad, the subjective and objective variants of communicative content or the originalism/non-originalism divide. To illustrate the ambit of this suppressed division of opinion it is worth casting a critical eye on the treatment that is commonly reserved for considerations related to the separation of powers in the context of statutory interpretation.²³ Theories of statutory interpretation do not only imply descriptive theories of representative lawmaking, but also normative theories about how the legislature should relate to the judiciary or the executive branch. More than that, textualists, intentionalists, purposivists and game theorists all agree that courts should not

exercise legislative power. In other words, all subscribe to a more or less rigid understanding of legislative supremacy which, in turn, presupposes the construction of a substantive constitutional theory of the separation of powers. Consequently, and without losing its main thrust, a sizeable portion of interpretative disagreements about the determinants of statutory content could be recast as a variant of normative political disagreement about how the branches of government should relate to each other. Each theory of statutory interpretation will invoke different aspects of linguistic meaning (semantic content, communicative or illocutionary content, perlocutionary meaning, etc.) as evincing the requisite fidelity to the ideal of legislative supremacy or, conversely, as capable of weeding out improper instances of judicial lawmaking.

So far so good, one might exclaim. But appearances can be deceptive, or so I would like to argue. Whereas it seems reasonable to accept that different aspects of linguistic meaning can be marshaled in defense of different variants of legislative supremacy, there remains a barrier to treating the resulting disagreement as normative-political all the way down. The relevant barrier is metaphysical in nature; it regards the commitments each theory of statutory interpretation carries with respect to the metaphysical question of how non-legal facts make legal facts. Without a prior account of what individuates certain facts as apt for making law appeals to competing conceptions of the division of epistemic labor among the branches cannot be conclusive. As a result, no such theory can guard itself against objections from judicial activism if it omits to make visible its metaphysical views on the nature of lawmaking actions. This is not a concern that rival theories of interpretation literally ignore but, more often than not, they suppress its urgency or direct relevance. Consequently, they appear to consent to the depiction of their arguments and counterarguments as being informed solely by a combination of linguistic and normative considerations.

It also bears noting that the controlling role of metaphysical argument in legal interpretation does not entail that normative considerations alone cannot determine the relevance of different determinants of legal content. Quite the contrary! It is unobjectionable, I dare to believe, that normative considerations can *themselves* figure in the controlling premises of a metaphysical argument. For instance, consider the case of a textualist who takes legal interpretation to be the activity of figuring out what certain legal artifacts individually or jointly mean. This position qualifies her as an *objectualist* about lawmaking—that is, she believes that lawmaking actions are individuated by reference to

the essential properties of the cognitive artifacts they *produce*.²⁴ Within this metaphysical framework she is licensed to argue that lawmaking is better understood as a productive enterprise in the artifactual sense explicated above *because* an *essential* property of legal artifacts is their origin in some procedure that is minimally recognizable as a form of representative lawmaking. Accordingly, their procedural pedigree requires that they be interpreted in a way that does justice to their function as instruments for reaching finality in the resolution of immanent disagreement about what is just and permissibly enforceable in a political community. With these premises at hand it could easily follow that, barring a list of exceptional circumstances, a variant of sentence meaning might be the best candidate for determining, in most cases, the content of the legal rules composing a particular statute.

My estimation is that such incidences make visible the indispensability of frequent appeals to an interpretative theory's metaphysical commitments. The specific questions we ask in the context of a more targeted interpretative dispute can be more or less normatively loaded but it is imperative for the intelligibility of our disagreement that they be transparent to their metaphysical origins. In other words, we should be hesitant to proclaim the felicitous or infelicitous conclusion of an episode of interpretative disagreement prior to making sure that we have settled or, at least, significantly mitigated the more basic dispute regarding the type of question we ask when we engage in legal interpretation. Are we inquiring into the meaning of textual artifacts, the meaning of authoritative utterances or the truth of assertions of deontic propositions about legal obligations, rights or powers? These questions are anything but reducible to a common "ontological" ascendant and for that reason it is advisable that they become more visible in a collective project that invites a confrontation of interdisciplinary insights from the law/language interface.

By taking on board the first question we shoulder a commitment to a stratified ontology of objects (material inscriptions, texts and laws) standing in relations of consecutive constitution to each other.²⁵ Accordingly, we must be ready to account for what makes it the case that an abstract entity equipped with a normative function springs into existence in virtue of representing certain texts as endowed with some specific characteristics. By taking on board the second question we shoulder a commitment to a category of reasons for action that derive their force from the performance of certain speech acts that qualify as a proper exercise of a type of practical authority. In this scenario we need to be ready to account for the rationality of guidance by a legal authority. In other words, we need to explain what makes it the case that, under certain circumstances, the

edicts of a legal authority provide a reason to treat them as settling the question of what to do. By taking on board the third question we have already pledged commitment to the normative nature of legal states of affairs. That is, we believe that there is a distinctly legal class of normative propositions about obligations and rights that are made true by legal normative states of affairs that obtain as a result of the activities of lawmaking institutions. On this view, legal interpretation aims to identify the normative difference that the activities of lawmakers make to what we may truthfully assert about our legal duties and rights.

NOTES

1. For the jurisprudential relevance of this distinction, see Marmor (2014: 28–34).
2. The interpretation-construction distinction reentered general legal theory in the context of debates over constitutional practice thanks to the work of what are sometimes called the “New Originalists.” See Whittington (1999) and Barnett (2004).
3. By “legal considerations” I mean to refer to the more specific considerations emanating from the values associated with the idea of the rule of law.
4. Mark Greenberg voices the same concern when he notes that “because legal interpretation seeks to ascertain the content of the law, a method of legal interpretation is correct if it accurately identifies the legal facts. Given this point, it is but a short step to recognize that the correct method of legal interpretation depends on how the content of the law is determined. As noted above, legal facts are high-level facts, which obtain in virtue of more basic facts. In general, in such high-level domains, the correct method of *ascertaining* the high-level facts will depend on how the more fundamental facts *make it the case* that the high-level facts obtain” (Greenberg 2017: 110–11). Whereas I do concur with Greenberg that a theory of legal interpretation must carry its metaphysical commitments “on its sleeve,” I do not agree that everyone else should or would agree that the question of legal interpretation is the ascertainment of the truth of normative propositions about the obtaining of legal obligations and rights. As I will try to show in the remainder of this note, not all legal philosophers tie their theories of legal interpretation so closely to the identification of robust normative states of affairs.
5. It bears noting that Solum’s hybrid variant of original meaning as both objectual and agentive rests on a *further* distinction between the *communicative, original* meaning or content of a constitutional text that judges recover by means of interpretation in the strict, descriptive sense and the *legal effect* or content of the same text as the latter is

derived by engaging in the normative, creative process of constitutional construction (142). The original meaning of a constitutional text is *eo ipso* constitutive of its legal content *only* when and because the originalist principle of constraint ought to be applied to a particular case.

6. The reason I am inclined to take the infrequency of this mode to be unsurprising is two-fold. First, to this day, the most metaphysically concise as well as jurisprudentially distinct account of legal interpretation as the activity of discovering the normative effect or impact of linguistic and other social facts is owed to the still developing research of a single analytical legal philosopher. Mark Greenberg's "Moral Impact Theory of Law" remains the basic source of reference for treating this mode of talking about the nature of legal interpretation as a distinct variant. That being said, there is room for arguing that the normative impact of linguistic facts is not conceptually distant from the more traditional *purposivist* and *pragmatist* elaboration of the "perlocutionary effect" of legislative utterances, namely, the change in the law that a legislature intends to achieve by enacting a given statute. I remain timid to stretch this correlation beyond the surface similarity between impact and effect mainly because Greenberg's theory is committedly normative and metaphysically realist, whereas standard appeals to the purposive nature of legal interpretation terminate at the descriptive claim that the inference of the *ratio legis* or purpose of an enactment is ultimately based on descriptive facts about the actual or counterfactual perlocutionary—as opposed to the illocutionary or communicative—*intentions* of lawmaking officials.
7. For Mark Greenberg's specification of the effectual or impact-centered approach to legal interpretation see *infra* note 20.
8. As Endicott remarks, "[i]t is quite true that all understanding of communications requires a grasp of context, as well as a grasp of the language being used. The word 'interpretation' is certainly flexible enough that you might, if you wish, signal this fact about the understanding of communication by saying that all understanding requires interpretation. Yet sometimes, gaining an understanding requires a creative intellectual process of finding reasons for an answer to a question (which might have been answered differently) as to *the meaning of the object* [emphasis added]. Some understanding does not require that process. The distinction is well signaled by using the term 'interpretation' for that process" (Endicott 2012: 121).

9. For a general note on the metaphysics of linguistic and other types of cognitive artifact, see Heersmink (2016).
10. Marmor lucidly describes this view as follows: “the content that was successfully asserted by the legislature is the legal content of the act; there is no gap between the content asserted by the legislature and the legal content of the act. *What the law says* [emphasis added] is what the law is” (Marmor 2014, *supra* note 1, at 12).
11. Greenberg notes that his formulation of the basic question of legal interpretation dispenses with conflating the ascertainment of the linguistic meaning of certain sources of legal content (statutes, constitutions, etc.) with the ascertainment of the contribution that these sources make to the content of the law. In his words, “the term ‘legal interpretation’ is often used in a way that is ambiguous between ascertaining the meaning of legal texts and using the relevant texts to ascertain what the law is. Theorists often slip back and forth between these two usages. For example, it is ubiquitous in discussions of constitutional interpretation to talk about ‘the meaning’ of the Constitution or of a constitutional provision. It is often left unclear whether the question is the meaning of the words of the provision or the provision’s contribution to the content of the law” (Greenberg 2017, *supra* note 4, at 107). In a somewhat similar spirit but from a different jurisprudential viewpoint, Lawrence Solum alerts us to the importance of distinguishing the interpretative process of recovering the linguistic meaning of certain legal texts from the constructive process of identifying the *legal effect* (or legal content) of these texts (see Solum 2010). I do not intend to challenge the cogency of these distinctions with which I generally concur. I do, however, believe that they fall short of “hitting” their main target, namely, to render void the license to make direct appeals to the “legal meaning” of texts or authoritative utterances. In other words, I believe that it remains permissible for a legal theorist to argue that what she takes the *legal contribution*, *legal effect* or *legal content* of a certain text or utterance to be *just is* the meaning of a certain object construed as a cognitive artifact or the meaning of an utterance endowed with the performative force of a legal directive or declaration. In other words, nothing in principle and in advance of further metaphysical argument, prevents someone from *denying* that the content of the law is the *normative* content of certain free-standing, publicly assertible, *deontic propositions* whose truthmakers are not descriptive facts about the existence of legislative artifacts or the performative force of legislative utterances but those states

of affairs that obtain as an effect of their existence or force. On pain of stumbling on the Humean is/ought gap objection, the truthmakers of such normative propositions must also be normative. Accordingly, invoking the centrality to legal interpretation of these normative propositions for the sake of closing the gap between the purported normativity of legal facts and the social practices on which the latter rest is a move that can be resisted as question-begging.

12. Roman Ingarden develops the idea that public artifacts are partly individuated by what is considered as a proper instance of their use. He notes, “[w]ith a piece of cloth, for example, we clean pots. To the flag we render military honors; we preserve it, often for centuries, as a remembrance, even though the cloth of the flag is badly damaged and without any value” (Ingarden 1989: 260). In a similar vein, Amie Thomasson suggests that “what seems most basic in many cases is the intention that the creation be *subject to certain norms*, in the sense that it be *recognizable* as something that is *to be treated, used, or regarded*, in some ways rather than others...It is the intended normative features (that the object be subject to certain norms) that drive the intended recognitional features...as well as many intended structural features”(Thomasson 2014: 51–52).
13. Norman (1991: 17). For a taxonomy of human-made, physical or abstract objects that functionally contribute to performing a cognitive task (cognitive artifacts), see Heersmink (2013). Crucially, Heersmink includes in his taxonomy non-representational artifacts which “contain information-structures *as* [rather than *about*] the world (i.e., ecological information)” (ibid., 472).
14. Alternative modes of representation include *icons* which are pictorially isomorphic to what they represent (e.g., a map or a graph) and *indices* which causally interact with the object they represent (e.g., a thermometer or a compass). See Heersmink (2013: 473–74).
15. Kenneth Ehrenberg’s artifactual theory of law provides a lucid example of an objectualist approach to the determinants of legal content as it is premised on the hypothesis that “[l]aws are artifacts in that they are specialized creations of human intentionality that serve specific purposes and are designed in order to be recognized as such” (Ehrenberg 2016: 175).
16. For the importance of registering the distinction between the agential and productive aspect of mental states and speech acts, see Moltmann (2013).

17. Subjective theories of communicative content take actual mental states to be the constitutive determinants of speaker meaning. See, e.g., Grice (1989), Schiffer (1972), Neale (2005), and Bach (2006).
18. Objective theories hold that the content that a speaker counts as having communicated is determined by the inferences that a rational hearer, knowing the context and conversational background, would be warranted in making about the speaker's communicative intentions. See, e.g., Goldsworthy (2005), Soames (2011), and Marmor (2013).
19. Joseph Raz's Sources Thesis is a refined specification of the ontological priority of enactments to the artifacts they "produce." The Sources Thesis regards both the existence of laws as well as the determination of their content. It is the former *existential* issue that regards the creation of sources of legal content through the performance of authoritative directives. In Raz's words, "A, being an agent who has legal authority to make a law that *p*, legislates (i.e., makes it the law) that *p* (where *p* is a variable for the statement of the content of the law) by performing an action which expresses the intention that *p* become the law in virtue of that intention being manifestly expressed" (Raz 2009: 283).
20. Two prominent jurisprudential theories that approach legal interpretation in "truthmaking" terms are Ronald Dworkin's interpretivist theory and Mark Greenberg's moral impact theory of law. Dworkin was widely praised and criticized at the same time for his construal of theoretical disagreement about the content of the law as being about the grounds of legal propositions. Being avowedly averse to lofty metaphysics, Dworkin refrained from providing a metaphysically circumscribed account of these grounds and took them to be equivalent to further propositions "which when true, *make* [emphasis added] a particular proposition of law true" (Dworkin 1986: 5). Being much friendlier to direct metaphysical argument, Greenberg has explicitly associated the epistemological component of his theory with the identification of the truthmakers of legal propositions. In presenting his vision of how the epistemology of law should track its metaphysics, Greenberg notes: "the full metaphysical explanation of the content of the law (of why certain legal propositions are true) must appeal to value facts" (Greenberg 2004: 159). Accordingly, he takes the central question that a full-fledged theory of legal content should ask to be "how can a collection of facts about what various people did and said (including the facts about

what they intended, believed, preferred, and hoped, and about what their words meant) *determine* [emphasis added] which legal propositions are true?" (ibid., 173). For Greenberg, *making* the law have or bear a certain content *just is* to *make a legal proposition*—and its accompanying assertion—*true* in a given context. For the most recent elaboration of his theory, see Greenberg (2014).

21. The choice of the speech act of assertion—rather than of a cognitive artifact or mental state—as the primary *vehicle* of legal content is anything but random. Precisely because assertion is a speech act that is commonly taken to be governed by the norm of knowledge (“one may assert that *p* only if one *knows* that *p*”), the assertibility of certain propositions of law is directly linked to the activity of legal interpretation, namely, the epistemic task of acquiring *knowledge* of what the law requires. For a general account of the epistemological background of assertion, see Goldberg (2015).
22. I believe that the prospect of this approach hinges, to a great extent, on the prospect of the recently booming metaphysical and semantic project of truthmakers. Leaving important nuances aside, the metaphysical component of this project is identified by the claim that truth-bearers—that is, representational entities that most theorists associate with propositions—bear a certain kind of relation of metaphysical (non-causal) dependence to truthmakers—that is, a certain type of worldly entity whose identity is often associated with facts or, alternatively, states of affairs. For a seminal defense of this component, see Armstrong (2004). The semantic component of the same project (truthmaker semantics) adds the further claim that representational contents are individuated by those facts (or states of affairs) that make these contents true. There are two principal accounts of truthmaker semantics, one developed by Yablo (2014) and Yablo (n.d.). The other account has been developed by Kit Fine in a series of papers; see, particularly, Fine (2017a) and (2017b).
23. For an overview of the interpretative relevance of these institutional considerations, see Nourse (2011).
24. Although some abstract artifacts have temporal or locational properties such as time of creation or jurisdictional scope (in the case of laws), abstract artifacts lack spatiotemporal location but at the same time they do not partake in the eternal, unalterable, modally robust entities inhabiting the Platonic universe, so to speak. In this regard, they occupy middle ground with respect to both real, spatiotemporally

individuated and ideal, timeless entities. On this mode of classification, see Thomasson (2003: 139–40).

25. In defending his artifactual theory of law, Ehrenberg aptly remarks that the relation of statutory artifacts to texts is not identity but rather constitution. He notes, “[l]aws and legal systems are certainly abstract institutions in that they are not identical with the people constituting the legal officials, *the words written in books or scrolls of law* [emphasis added], or the geographic area of their jurisdiction” (Ehrenberg 2016, *supra* note 15, at 170).

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