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Interpretation and Construction in Contract Law

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The interpretation-construction distinction has returned, at least in certain circles. Contract scholars have long recognized the difference between deciding what words mean, or “interpretation,” and determining their legal effect, “construction.” But in the last decade constitutional scholars have begun to attend to the difference as well. “New Originalists” like Randy Barnett, Jack Balkin, and Larry Solum have deployed the distinction to divide constitutional questions into two broad categories. The first comprises questions that originalist interpretation can answer. These include easy questions, like how old a person must be to be President—“the Age of thirty five Years”—and perhaps also harder ones, such as the scope of the “the right of the People to keep and bear arms.” In the second category are questions that the text’s original meaning does not answer, like the reach of vague constitutional terms like “freedom of speech” or “due process of law.” These questions occupy a “construction zone,” a region where interpretive rules and original meaning must be supplemented with other legal rules or principles to determine what the Constitution requires.

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1 In addition to Williston and Corbin, whose work is discussed in Part One, see Keith A. Rowley, Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between), 69 MISS. L.J. 73 (1999); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833 (1964).


3 U.S. CONST. art. II sect. 1.

4 U.S. CONST. amend. II.

5 U.S. CONST. amend. I & V.

6 See, e.g., Solum, supra note 2 at 108.
To those of us who find the distinction between interpretation and construction helpful, the new attention from constitutional theorists is exciting. Contract scholars who recognize the difference between interpretation and construction never thought it applied only to the law of contracts. In fact, the concepts first entered US legal culture through Francis Leiber’s more general 1839 work, *Legal and Political Hermeneutics*.\(^7\) So it is good to see the ideas being taken up by scholars in other areas of law.

At the same time, the new champions of the distinction have taken it in directions contracts scholars might find surprising. The idea of a construction zone is not native to contract law, and it is not clear that it makes sense there. And though textualism about contracts has had many champions, few would claim that parties’ contractual obligations can ever be derived solely from the words they use. No matter how clear and unambiguous the parties’ language, a court will not enforce an agreement that is unconscionable, against public policy, the result of fraud, mistake or duress, or in which a party lacked capacity. When the New Originalists divide constitutional questions between a zone of interpretation and a zone of construction they are doing something new and different with the interpretation-construction distinction.

This article examines the distinction between contract interpretation and contract construction, and the complex relationship between the two activities. Although influential figures such as Williston and Corbin employ the distinction, many contemporary contract scholars ignore it. I argue that this is a mistake. Attention to the difference between the two activities is essential to an adequate understanding of how contract law translates people’s words and actions into changes in their legal relationship, which is after all the fundamental project of contract law. Along the way, I draw comparisons to the interpretation and construction of public laws, and discuss the way constitutional originalists have employed the distinction. My hope is that a clear understanding of the distinct activities of interpretation and construction in the law of contracts will also illuminate those activities in other areas of law.

I argue for a complementary conception of interpretation and construction, one that views them as two interlocking activities. Because the parties’ legal relationship depends on the meaning of what they say and do, one must interpret their words and actions before applying a rule of construction to them. In the order of application, interpretation comes before construction. But what counts as the right approach to interpretation depends on the applicable rule of construction. There is no one thing that is contract interpretation. In determining parties’ contractual obligations, a court might look to any of several types of meaning: plain meaning,

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\(^7\) *Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics* (enlarged ed. 1839/1970).
contextually determined meaning, subjective meaning, objective meaning, the agreement’s purpose, or the parties’ beliefs and intentions. What sort of interpretation is appropriate when turns on the relevant rule of construction. There is therefore also an important sense in which rules of construction are prior to rules of interpretation. Legal interpretation serves construction.

Rules of construction can also be prior to interpretation in either two additional senses. In many instances the meaning of the parties’ words and actions refers in part to a rule of construction. This is so when parties intend their words or actions to satisfy or avoid a legal rule—when they choose their words in light of the relevant rule of construction. I call this the “pragmatic priority” of construction. It is also so when judicial construction turns a phrase into a term of art, giving it a new legal meaning. I call this the “semantic priority” of construction.

An adequate theory of how contract law translates parties’ words and actions into changes in their legal relationship must take account of both the difference between interpretation and construction and the complex interplay between those two activities. I argue that attention to the philosophy of language—such as philosopher’s distinction between semantic and pragmatic meaning, and the role of interpretation in the attribution of beliefs and intentions—can improve our understanding of how legal interpretation works. But because legal interpretation serves construction, the theory of language alone does not provide a complete account of it. We always must also attend to rules of construction, the choice of which is based on legal principles and purposes.

Part One of this article provides a brief history of the interpretation-construction distinction in US law and legal theory, and then describes generic conceptions of interpretation and construction—conceptions designed to work across multiple areas of law. Part Two makes two claims. First, although in the process of legal exposition, interpretation comes first and construction second, in the design of legal rules, one must know the relevant rule of construction before one can decide on the right approach to interpretation. If interpretation comes first in the process of determining the parties’ legal relationship, construction is prior from the perspective of design. Second, several different types of meaning, and by extension interpretation, are relevant to the construction of contracts. These include plain meaning, context meaning, subjective meaning, objective meaning, purpose, and belief and intent. Deciding which meaning is relevant in to a given legal question requires a rule of construction. Part Three briefly discusses the originalist idea of a construction zone, and argues that it has no place in the law of contract. Part Four further discusses the interplay between interpretation and construction. Because legal actors often take account of the law when deciding what to say and do, interpreting their words and actions sometimes requires understanding the rules of construction they mean to satisfy or avoid. And official acts of construction can sometimes give words or entire clauses technical meanings, turning
them into legal terms of art. These phenomena identify additional senses in which construction sometimes precedes interpretation. A complete understanding of interpretation and construction must take account of such interactions. Part Five applies the analysis to develop close, critical readings of Justice Traynor’s 1968 opinion in *Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging,* Justice Alito’s 2010 opinion in *Stolt-Nielsen v. AnimalFeeds International* and Judge Winters’s 1982 opinion in *Sharon Steele Corp. v. Chase Manhattan Bank, N.A.* The analyses of these cases demonstrates the value of closer attention to both the distinction between interpretation and construction, and the relationship between them.

1 The Interpretation-Construction Distinction

In order to understand the difference between interpretation and construction, and the relationship between the two activities, it helps to know something of the history of the concepts.

1.1 Francis Lieber

The interpretation-construction distinction is commonly traced to Francis Lieber’s 1839 book, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics,* though Ralf Poscher suggests that Lieber’s approach is rooted in Friedrich Schliermacher’s earlier work on hermeneutics. Lieber’s account is not entirely satisfactory. But it is a good place to start.

Lieber characterizes successful communication as the transmission of ideas from one person to another through the use of words or other signs. Interpretation is the activity of discovering those ideas. “Interpretation is the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them the very same idea which the author intended to convey.”

Lieber suggests that with respect to authoritative legal texts, successful interpretation suffices to give us the legal rule, which is the rule intended by

8 442 P.2d 641 (Cal. 1968).
9 559 U.S. 662 (2010).
10 691 F.2d 1039 (2d Cir. 1982).
13 LIEBER, supra note 11 at 23.
the legal authority that authored or authorized the text. Although Lieber does not articulate a command theory of law, his theory of interpretation is consistent with one. The correct interpretation of a command identifies the intent of the authority who issued it—precisely how Lieber describes the correct interpretation of a legal text.

Lieber observes that sometimes interpretation alone does not generate the correct legal rule. In the course of the book, he identifies several situations in which the “true significance,” of a legal text might not fully determine the legal rule: (1) when the text contains internal contradictions; (2) “in cases which have not been foreseen by framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate, as well as we can, our actions respecting the unforeseen case”; and (3) when the simple meaning of the text contravenes “more general and binding rules, [such as] constitutional, written and solemnly acknowledged rules, or moral ones, written in the heart of every man.”

Lieber does not discuss contracts, but contract law includes rules of construction for each of the situations he identifies. The Mirror Image Rule and section 2-207 of the Uniform Commercial Code (UCC), for example,


\[15\] Lieber, supra note 11 at 55-56. Today many theorists would also say that construction is necessary when a legal text is ambiguous. Lieber’s intent-based understanding of meaning, however, causes him to conclude that a legal text cannot be ambiguous.

No sentence, or form of words, can have more than one ‘true sense,’ and this only one we have to inquire for. . . . Every man or body of persons, making use of words, does so, in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning—and amounts to absurdity. Even if a man use words, from kindness or malice, in such a way, that they may signify one or the other thing, according to the view of him to whom they are addressed, the utterer’s meaning is not twofold; his meaning is simply not to express his opinion.

Id. at 86.

\[16\] Id. at 56.

\[17\] Id. at 166. Or again: “But it is not said that interpretation is all that shall guide us, and . . . there are considerations, which ought to induce us to abandon interpretation, or with other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, to the law itself, the means of obtaining it.” Id. at 115.
each provides a rule to resolve authoritative but conflicting contractual texts. Under the Mirror Image Rule, the terms in last document sent control (the “last shot rule”). Under section 2-207, conflicting terms drop out entirely and are replaced by the Code’s default terms. In neither case, does the rule turn on further interpretation of the meaning of the parties’ words or intentions. Lieber’s second category, “cases which have not been foreseen by the framers,” describes both situations that trigger contractual defaults or the implied duty of good faith. Defaults apply when a contractual agreement is silent on a subject—when, in effect, the parties have not agreed on a relevant term. The implied duty of good faith constrains a party’s actions when a contractual agreement gives her discretion by not fully specify her obligations, often due to unforeseen circumstances. Finally, the doctrines of unconscionability and public policy both generate cases in which a text’s legal effect is limited by “more general and binding rules.”

In each of these situations interpretation alone fails to specify the correct legal rule. We require supplemental rules or principles to reach the right legal result. Lieber terms these rules of “construction.”

Construction is unavoidable because “[m]en who use words, even with the best intent and great care as well as skill, cannot foresee all possible complex cases, and if they could, they would be unable to provide for them, for each complex case would require its own provision and rule.”

19 The above statement of the section 2-207 rule for different terms oversimplifies, but is in the author’s opinion the best reading of this poorly drafted statute. See 2 Anderson U.C.C. §§ 2-207:102 & 103 (3d ed.). Other readings of section 2-207 provide alternative rules of construction for cases in which writings conflict.
20 See, e.g. U.C.C. §§ 312, 314 & 315 (implied warranties of title, merchantability and fitness).
23 Id. at 57.
24 Id. at 121.
Construction for Lieber therefore serves a gap-filling and equitable function. On Lieber’s theory, “interpretation precedes construction” because construction steps in when interpretation, for one reason or another, runs out.\textsuperscript{25} For this reason, Lieber also sees a continuity of purpose between the two activities. “Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit though not within the letter of the text.”\textsuperscript{26} This supplemental conception suggests that, at least when extending a legal text to unforeseen cases, one should look for parallels to those cases that the text does cover. “Construction is the building up with given elements, not the forcing of extraneous matter into a text.”\textsuperscript{27} That said, Lieber also recognizes that in order to arrive at the correct legal rule, it is sometimes necessary to go beyond the “spirit” of the text. This is so when construction is required to cure some injustice in the law or conform it to a superior authority, such as a statute to a constitution.\textsuperscript{28}

The most interesting feature of Lieber’s theory for the analysis that follows is this supplemental conception of construction. Construction, for Lieber, operates only in what Solum calls the “construction zone”: “the zone of underdeterminacy in which construction that goes beyond direct translation of semantic content into legal content is required for application” of the rule.\textsuperscript{29} According to Lieber’s supplemental conception, construction steps in when interpretation fails to provide a legal rule.\textsuperscript{30}

1.2 Samuel Williston

It would be interesting to trace the influence of Lieber’s distinction between interpretation and construction throughout the next century of legal thought. Poscher suggests that it appears in somewhat different guise in Friedrich von Savigny’s 1840 System of Modern Law.\textsuperscript{31} William Story

\textsuperscript{25} “Since our object is to discover the sense of the words before us, we must endeavor to arrive at it as much as possible from the words themselves, and bring to our assistance extraneous principles, rules, or any other aid, in that measure and degree, only as the strictest interpretation becomes difficult or impossible, (interpretation precedes construction) otherwise interpretation is liable to become predestined.” \textit{Id.} at 113.

\textsuperscript{26} \textit{Id.} at 56.

\textsuperscript{27} \textit{Id.} at 124.

\textsuperscript{28} \textit{Id.} at 58-59.

\textsuperscript{29} Solum, \textit{supra} note 2 at 108 (2010) (internal punctuation omitted).


\textsuperscript{31} Poscher, \textit{supra} note 12 at 207.

First, Williston suggests a narrower conception of construction. The drawing of “conclusions that are in the spirit, though not in the letter of the text,” Williston argues, is not different in kind from interpretation and “seems of no legal consequence as far as the law of contracts is concerned.” To take a contemporary example, when a court reads a written agreement “as a whole to determine its purpose and intent,” it is engaging in a form of interpretation, even when the result supplements or even supplants the literal words in the agreement. One must interpret an

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34 JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT THE COMMON LAW* 411 n. 2 (1898).


35 SAMUEL WILLISTON, 2 *THE LAW OF CONTRACTS* § 602, 1160 (1920) (hereinafter “WILLISTON (1st ed.)”).


37 See, e.g., McCoy v. Fahrney, 55 N.E. 61, 63 (Ill. 1899) (“Particular expressions will not control where the whole tenor or purpose of the instrument forbids a literal interpretation of the specific words.”).
agreement to determine its purpose and the parties’ likely intent. Better then, Williston suggests, to limit what we call “construction” to activities entirely distinct from interpretation. For example, “when it is said that contracts which affect the public are to be construed most favorably to the public interest, it is obvious that the court is no longer applying a standard of interpretation, that is it is not seeking the intention of the parties.”

Similarly when a guarantee is interpreted in favor of the guarantor. Construction, for Williston, is the category of rules whose function is not to realize or extend the author’s intentions, but that serve some other principle or purpose.

Although he advocates a narrower conception of construction, Williston follows Lieber in conceiving construction as supplemental to interpretation. “[A] rule of construction can come into play only when the primary standard of interpretation leaves the meaning of the contract ambiguous.” Construction again appears only when interpretation runs out.

Williston’s second innovation is to suggest that neither interpretation nor construction is enough to determine the legal state of affairs. Each concerns itself “with the legal meaning of the contract, not with its legal effect after that meaning has been discovered.” The legal effect, Williston suggests, is a function of “substantive law of contracts which comes into play after interpretation and construction have finished their work.” Williston served as the Reporter for the first Restatement of Contracts, and a similar claim appears again in the comments to section 226 of the first Restatement: “Interpretation is not a determination of the legal effect of language. When properly interpreted it may have no legal effect, as in the case of an agreement for a penalty; or may have a legal effect differing from that in terms agreed upon, as in the case of a common-law mortgage.”

Williston therefore distinguishes three activities: (1) interpretation, which aims to get at the author’s intention; (2) a supplemental activity of

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38 WILLISTON (1st ed.) at 1161.

Interestingly, Williston suggests that contra proferentem—the rule that ambiguities are to be interpreted against the drafter—is a rule of interpretation, “since it should be anticipated that the person addressed will understand ambiguous language in the sense most favorable to himself, and that his reasonable understanding should furnish the standard” Id. I would say this is at best a majoritarian rule of construction, and better supported by considerations of fairness and incentives than by the logic of interpretation.

39 Id.

40 Id.

41 Id.

42 RESTATEMENT OF CONTRACTS §§ 226 cmt. c (1932).
construction, which applies purely non-interpretive principles and steps in when interpretation runs out, such as in cases of irresolvable vagueness or ambiguity; and (3) the substantive law of contract, which specifies legal effects based on the work of interpretation and construction.

1.3 Arthur Linton Corbin

Corbin’s 1951 treatise on contract law marks an important step forward in understanding the activities of interpretation and construction. Corbin provides the first clear account of construction as complementing, rather than merely supplementing, interpretation. He describes interpretation and construction as interlocking activities, each of which is necessary to determine what the law requires. It is worth quoting the relevant passage in full:

> By “interpretation of language” we determine what ideas that language induces in other persons. By “construction of the contract,” as the term will be used here, we determine its legal operation—its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties.43

Whereas Williston distinguished between, on the one hand, legal rules that resolve ambiguities or fill gaps and, on the other, rules that determine the legal effect of an unambiguous text or other speech act, Corbin recognizes that those two activities are not different in kind. Both determine the legal effect of what the parties said and did. Both should be classified as rules of construction.

This more expansive view of construction—the activity of determining the legal effect of what a legal actor said and did—allows Corbin to view construction as complementing, rather than supplementing,

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interpretation. Both Lieber and Williston conceived of construction as stepping in only when interpretation runs out. Corbin, on the contrary, suggests that we always need a rule of construction. “[T]he process of interpretation stops wholly sort of a determination of the legal relations of the parties,” because interpretation tells us only what some persons said, meant or intended. We require rule of construction to determine which sayings or meanings or intendings of what legal actors have what legal effects. Suppose an unemancipated minor and an adult sign two identical enforceable agreements, each clearly evincing her intention to be legally bound. Under US law, only the adult thereby acquires a nonvoidable contractual obligation. The reason is that meaning alone never determines legal effect. The adult can realize her intent to enter into a nonvoidable contract only because a rule of construction, or what H.L.A. Hart called a “rule of change,” attaches that result to her act. The rule of construction attaches to the same act done by a minor a different legal effect: a voidable obligation. Rules of construction determine not only unintended legal consequences, as Lieber and Williston maintain, but also intended ones.

This broader conception of construction casts new light on the common saying that the primary goal of contract interpretation is to ascertain the parties’ intent. Although often treated as a rule of interpretation, the rule is in fact one of construction. What the rule says is that when adjudicators are determining contracting parties’ legal obligations, they should look to evidence of the parties’ shared intentions.

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44 What I am calling the “complementary conception” of interpretation and construction is similar to what Solum calls the “Two Moments Model.” Solum, Constitutional Construction, supra note 30 at 498-99.
45 Thus Corbin could expressly reject Lieber’s account of interpretation and construction. CORBIN (1st ed.) § 534, at 11, n.11.
47 HART, THE CONCEPT OF LAW, supra note 14 at 95-96.
Generally speaking and *ceteris paribus*, contract law enforces the agreement that the parties intended. Such a rule is a rule of construction. But that is only generally speaking. When parties have memorialized their agreement in an integrated writing, for example, their contractual rights and obligations might turn on the writing’s plain meaning, even if one or both parties had a different understanding of it. And other rules of construction—the ones Lieber and Williston emphasize, and that Corbin also discusses—hew even less closely to the relevant legal actors’ expressed intent. Examples include generic rules of construction like *contra proferentem* (interpreting against the drafter) and the rule favoring interpretations that accord with public policy. Also in this category are the many default rules that determine parties’ legal obligations absent their contrary expression, as well as mandatory rules, such as the duty of good faith, that parties cannot contract out of. The rules of contract construction also include rules that deny enforcement based on the substance of an agreement, such as the rules for illegal agreements or unconscionability. These and other extra-interpretive rules of construction apply when the object of interpretation is ambiguous, contradictory or gappy, when the situation is one that we believe lawmakers did not foresee, or when the text’s meaning or parties’ intent contravenes a higher legal authority or principle.

The important point, however, is Corbin’s recognition that a text’s meaning never suffices to determine its legal effect. Even when that meaning appears to fully determine the legal rule, it does so only by virtue of a rule of construction. Construction does not supplement interpretation, but complements it.

1.4 Interpretation and Construction

Corbin’s complementary conceptions of interpretation and construction can be restated and generalized as follows: Interpretation identifies the meaning of some words or actions, construction their legal effect. Rules of interpretation are used to discern the meaning of what parties say and do; rules of construction determine the resulting legal state of affairs.

As the next part makes clear, the above paragraph uses “meaning” in a broad sense. Lieber, Williston and Corbin all employ narrow conceptions of meaning. For Lieber, “[t]rue sense is . . . the meaning which the person or persons, who made use of the words, intended to convey to others, whether he used them correctly, skillfully, logically or not.”

Williston follows Lieber’s intentionalist account: “Interpretation is the art of

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49 LIEBER, supra note 11 at 23. See also id. at 19 (“[I]t is necessary for him, for whose benefit [a sign] is intended, to find out, what those persons who use the sign, intend to convey to the mind of the beholder or hearer.”).
finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them the very same idea which the author intended to convey.50 Corbin adopts a different, listener-centered account of meaning, but one that is similarly one-dimensional. “By ‘interpretation of language’ we determine what ideas that language induces in other persons.”51 Part Two argues that such simple accounts of meaning and interpretation oversimplify. Contract law recognizes and gives legal effect to multiple types of meaning parties’ words and actions can have. These include plain meaning and context meaning, subjective and objective meaning, an agreement’s purpose, and the parties’ intentions and beliefs. Each can, under the right circumstances, be relevant to determining the parties’ contractual duties, rights, privileges, and so forth.52 And each is identified only through interpretation of the parties’ words and actions. The only sense of “meaning” that interpretation does not reach is legal meaning, understood as legal effect. Legal effect is the product of construction.

Rules of interpretation and rules of construction can both be thought of as functions. A rule of interpretation takes as its input some domain of interpretive evidence. That evidence always includes at a minimum the act or omission whose meaning is at issue, which I will call the “interpretive object,” as well as the interpreter’s background linguistic and practical knowledge. In contract cases, depending on the rule being applied, the interpretive input might also include dictionary definitions and rules of syntax, testimony or other evidence of local linguistic practices, what the parties said during negotiations, prior transactions between the parties, the course of performance of the transaction at issue, testimony as to how the parties meant or understood the interpretive object, evidence of the parties’ reasons or motives for entering into the exchange, and so forth. A rule of interpretation maps that input onto a meaning, which it ascribes to the interpretive object.

50 Williston (1st ed.) § 602, at 1159-60 (quoting LIEBER, supra note 11 at 23).
51 CORBIN (1st ed.) § 534, at 7.
52 Lieber expressly rejects the idea that there are multiple types of meaning relevant to the law, contrasting legal to Biblical interpretation.

Owing to the peculiar character which the Bible possesses, as a book of history and revelation, and the relation between the old and new testaments, we find that some divines ascribe various meanings to the same passages or rites, and that different theologians take the same passage in senses of an essentially different character. We hear thus of typical, allegorical, parabolical, anagogical, moral and accommodatory senses, and of corresponding modes of interpretation. . . . In politics and law we have to deal with plain words and human use of them only.

LIEBER, supra note 11 at 75-76.
The output of legal interpretation—the meaning ascribed to the interpretive object—serves as an input for construction. Construction might take other input as well. A rule of contract construction might, for example, condition legal effects on the identity of the speaker, on the form in which a speaker expresses herself, or on the use of ceremonial words or acts. And sometimes rule of construction requires no interpretation, as is the case for formalities or legal terms of art. The rule of construction maps those inputs onto a legal state of affairs. That is, it identifies their legal effect.

I will use “exposition” to refer to the process of determining the legal effect of a legal actor’s words or actions. Exposition commonly involves both interpretation and construction. In the exposition of a legal text, interpretation comes first, construction second. The reason is not, as Lieber suggests, that construction steps in only when interpretation runs out. It is that one generally must decide what words or actions mean before one can know their legal effects. As Corbin says, “A ‘meaning’ must be given to the words before determining their legal operation.” Or as I have put the point, the output of legal interpretation serves as the input for construction. That said, there are other senses in which construction can be said to be prior to interpretation. These are among the topics of Parts Two and Three.

Although the interpretation-construction distinction has been around a long time, it is often ignored. Many sophisticated contract scholars use “interpretation” to refer to the activity of construction. Ian Ayres: “Algebraically, one could think of interpretation as a function, \( f() \), that relates actions of contractual parties, \( a \), and the surrounding circumstances or contexts, \( c \), to particular legal effects, \( e \).” Richard Posner: “Contract interpretation is the undertaking . . . to figure out what the terms of a contract are, or should be understood to be.” Alan Schwartz and Robert Scott: “[A] theory of interpretation . . . ‘maps’ from the semantic content of

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53 “Commonly” because of the possibility of pure legal formalities, or “magic words,” whose use is sufficient to effect a legal change no matter what their nonlegal meaning. See, P.F. Strawson, *Intention and Convention in Speech Acts*, 73 Phil. Rev. 439, 457 (1964) (“A player might let slip the word “redouble” without meaning to redouble; but if the circumstances are appropriate and the play strict, then he has redoubled (or he may be held to have redoubled).”); Kent Bach & Robert M. Harnish, *Linguistic Communication and Speech Acts* 116-17 (1979) (discussing conventional illocutionary speech acts).

54 Corbin (1st ed.) § 534, 8.


the parties’ writing to the writing’s legal implications.” Contrariwise, and especially among British jurists and scholars, it is not uncommon to use “construction” to refer to the search for objective meaning, which is a form of interpretation as I am using the term.

These façons de parler are fine as far as they go. The technical definitions of “interpretation” and “construction” depart from those words’ everyday meanings, and there is nothing wrong with using common words in accordance with common usage. But there is a difference between the activities of interpretation and construction. Corbin again: “there is no identity nor much similarity between the process of giving a meaning to words, and the determination by the court of their legal operation.”

Attention to the difference is essential to a clear understanding of how law translates words and actions into legal effects. The advantage of adhering to the terms’ technical meanings is that it forces us to keep in view the difference between the two activities, and to be clear about what we are talking about when.

1.5 Realism

Before proceeding further, a few comments about method. This article is about the structure and content of legal rules. My interest is therefore in the legally authorized interplay between interpretation and construction. When I say that interpretation precedes construction in the process of exposition, I am saying something about the rules that govern legal exposition. This is not to say that parties, judges or other legal actors always play by those rules. Legal actors, consciously or unconsciously, sometimes look to results before rules. And the rules themselves are loose enough to allow some play at the joints. Thus Corbin, ever the Legal Realist, observed:

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58 For example, in his treatise, The Construction of Commercial Contracts, J.W. Carter defines “construction” as “the process by which the intention of the parties to a contract is determined and given effect to,” and argues that “since even a decision on the linguistic meaning of words may determine the legal rights of the parties, there seems little point in seeking to distinguish between a process called ‘interpretation’ and one which is termed ‘construction.’” J.W. CARTER, THE CONSTRUCTION OF COMMERCIAL CONTRACTS 4 & 6 (2013).
59 3 CORBIN (1st ed.) § 534, 11.
Just as construction must begin with interpretation, we shall find that our interpretation will vary with the construction that must follow. Finding that one interpretation of the words will be followed by the enforcement of certain legal effects, we may back hastily away from that interpretation and substitute another that will lead to a more desirable result.\(^60\)

This is an enormously important point, not in the least because the ability to substitute an interpretation that will lead to a more desirable result suggests that meaning is, to some degree and in some cases, indeterminate. The determinacy or indeterminacy of meaning has long been a topic of discussion and disagreement among legal theorists.\(^61\) And the degree to which legal texts have stable, predictable and precise meanings is crucial to the justification and critical appraisal of rules of construction that take one or another form of meaning as their starting points.

That said, this article is about the internal logic of legal rules that assume that words and other legally relevant acts often have sufficiently determinate meanings to bind future actors. From that point of view, outcome driven forms of interpretation such as Corbin describes are ultra vires. They do not belong to the internal logic of the law. This is not to say that they are not interesting or important. Only that they are not my topic here.

### 2 Rules of Construction and the Varieties of Contract Interpretation

Recently several legal scholars writing on the interpretation of public laws have observed that meaning is not a simple concept. Cass Sunstein has argued that “there is nothing that interpretation ‘just is,’” and that “no approach to constitutional interpretation is mandatory.”\(^62\) And Richard Fallon has identified a “diversity of senses of meaning that constitute . . . potential ‘referents’ for claims of legal meaning.”\(^63\) Sunstein suggests an outcome-based approach the choice among interpretive methodologies in constitutional law, though so far he has not argued for one or another. Fallon argues that it is a mistake to equate statutory or constitutional meaning with any one type of meaning, suggesting instead “a

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\(^{60}\) Id.


Contract law further illustrates the multiplicity of legally relevant types of meaning. Several different sorts of meaning and several types of interpretation can figure into determining contracting parties’ legal rights, obligations, powers, privileges and so forth. Unlike Sunstein’s and Fallon’s descriptions of the interpretation in public law, however, contract law contains generally accepted rules of construction that govern what type of interpretation to deploy when. Contract law thereby illustrates how legal exposition can deploy multiple types of interpretation in a rule-governed way. And it exemplifies how what counts as the right approach to legal interpretation depends on the relevant rule of construction. I call this the “design priority” of rules of construction.

In thinking about the varieties of interpretation in contract law, it is useful to remember a way that contracts differ from, say, statutes. Whereas a statute is often the product of a single act of legislation, parties’ contractual obligations often depend on more than the act of agreement. Contract scholars often focus on the interpretation of contractual agreements. But offers, rejections, counter offers, rejections, preliminary agreements, modifications, waivers, repudiations, demands for adequate assurance, post-repudiation cancellations, elections of remedies and other meaningful acts before and after formation can all alter the parties’ legal relationship. All require interpretation and then construction to determine their legal effect.

2.1 Plain Meaning and Context meaning

Perhaps the most contested question about contract interpretation concerns the choice between plain meaning and context meaning. In contract law, “plain meaning” generally refers to the meaning an experienced interpreter can glean from a writing using nothing but a dictionary, her knowledge of the English language, and her generic understanding of the social world. Because plain meaning interpretation uses so few inputs, a writing’s plain meaning is often its literal meaning. But not always. A written agreement read as a whole, for example, might evince a general purpose indicating that a clause in it should not be read according to its literal meaning. Thus Williston explained,

in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied. Thus “or” may be given the meaning of “and,” or vice versa, if the remainder of the

64 Id. at 1303.
agreement shows that a reasonable person in the position of the parties would so understand it.\textsuperscript{65}

The plain meaning of words is their meaning stripped of context, but not entirely of their users’ apparent intention.\textsuperscript{66}

I will use “context meaning” to refer to how a reasonable person would understand the parties’ words or actions in light the relevant circumstances of their use. An agreement’s plain and context meanings sometimes diverge. Parties sometimes objectively use and understand words to mean something other than their plain meanings. To take a famous example, consider a clause in a contract for the repair of a steam turbine that indemnifies the owner “against all loss, damage, expense and liability resulting from . . . injury to property.” Read literally, the clause covers all losses, including those of the owner. But it is easy to imagine that the parties’ reasons for adding the clause, their past dealings, or even the course of performance could cause them to reasonably understand the clause to cover only third-party losses. In such a case, the words’ context meaning would diverge from their plain meaning.

The law of contracts recognizes that even in an integrated writing— one that the parties intend to be a final statement of some or all terms of their agreement—plain meaning can diverge from context meaning. As just about every first-year US law student learns, different jurisdictions take different approaches to that possible divergence. In \textit{Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging}, the California Supreme Court held,

\begin{quote}
The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.\textsuperscript{67}
\end{quote}

This California rule eschews exclusive reliance on plain meaning and instructs courts to look in the first instance to an integrated writing’s context meaning—to how the parties reasonably understood the words in the circumstances of the writing’s production. At issue in \textit{Pacific Gas} was the legal effect of the above indemnification clause. The court therefore concluded that the defendant should have been allowed to introduce extrinsic evidence that the parties understood the clause to cover only third-

\textsuperscript{65} 2 WILLISTON (1st ed.) § 619, 1199.  
\textsuperscript{66} In other words, plain meaning is not necessarily semantic meaning. I discuss the distinction between semantic and pragmatic meaning in Part Four.  
party losses. In *W.W.W. Assoc. v Giancontieri*, the New York Court of Appeals rejected the *Pacific Gas* rule, holding that “when parties set down their agreement in a clear, complete document, . . . evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” In other words, when the plain meaning of an integrated writing is unambiguous, that meaning governs. In New York, the *Pacific Gas* indemnification clause would cover both third-party and owner losses.

There is a lively debate among contracts scholars as to which rule is better. Interesting though the question is, I am not going to weigh in on it here. Instead, I want to make three points about the choice between plain and context meaning.

First, both the *Pacific Gas* and the *Giancontieri* rules are rules of construction. *Pacific Gas* says that the parties’ legal obligations depend on the context meaning of their words even when the parties have reduced their agreement to an integrated writing that appears unambiguous on its face. *Giancontieri* says that when an integrated writing is unambiguous on its face, the parties’ legal obligations depend only on the writing’s plain meaning. Each rule establishes what type of meaning is legally salient.

Second, by determining what sort of meaning is legally salient, these rules of construction thereby determine what sort of interpretation courts should engage in. In New York, a court should first aim to interpret an integrated agreement’s plain meaning; in California it should begin with the writing’s context meaning. I have observed that in the order of application, interpretation comes first, construction second. But with respect to the design of legal rules, construction comes first. In legal contexts interpretation serves construction, and what counts as a correct approach to interpretation depends on the applicable rule of construction.

Third, the design choice is not simply between plain meaning or context meaning, but about which sort of meaning is relevant when. This is

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69 For some thoughts on it, see Gregory Klass, *Contract Exposition and Formalism* (February 2017); available at: https://ssrn.com/abstract=2913620.
70 Both rules are probably defaults. Alan Schwartz and Robert Scott discuss examples of contract clauses that expressly instruct courts to construe the agreement according to its plain meaning. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 955 (2010). Alternatively, parties might include a clause instructing courts to construe their agreement according to its context meaning. See, e.g., *Corthell v. Summit Thread Co.*, 167 A. 79, 80 (Me. 1933) (written agreement specifying that it “is to be interpreted in good faith on the basis of what is reasonable and intended and not technically”). Although there is not much case law on the effectiveness of such clauses, I believe a court would be hard pressed to altogether ignore such instructions from sophisticated parties.
most obvious under the New York rule. Giancontieri says that when the plain meaning of an integrated writing is unambiguous, that meaning controls. When its plain meaning is ambiguous, however, parties are free to introduce extrinsic evidence to show which meaning they intended and the reasonable understanding of the words in the context in which they were produced. Nor is it clear that New York courts would apply to the plain meaning rule to informal, non-integrated writings or to oral agreements. The New York rule for integrated writings does not eschew context meaning entirely, but identifies a narrower band of cases in which it is legally relevant than does the California rule.

2.2 Subjective and Objective Meaning

Plain meaning and context meaning are not the only types of meanings that might be relevant in a contract case. Rules of construction also govern the choice between subjective and objective meanings. In contract law, “subjective meaning” refers to what a speaker actually intended her words and actions to communicate or to what a hearer actually understood them to mean, “objective meaning” to what a reasonable person would understand those words and actions to have meant. Subjective meaning can be private; objective meaning is always public.

In the casebook staple Embry v. Hargadine, McKittrick Dry Goods Co., for example, a Missouri appellate court considered the correct interpretation of the words “Go ahead, you’re all right; get your men out and don’t let that worry you,” spoken by the company’s president, McKittrick, to an employee, Embry, who was threatening to quit unless given a new contract.71 At trial the jury was instructed to find that there was a contract only “if you (the jury) find both parties thereby intended and did contract with each other for plaintiff’s employment.”72 The appellate court held this was an error. “[T]hough McKittrick may not have intended to employ Embry by what transpired between them . . ., yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment.”73 In short, the existence of a contract depended on the objective meaning of McKittrick’s statement, not on his subjective understanding of it.

Plain meaning is always objective, as the inputs of plain meaning interpretation do not include evidence of privately held understandings. Context meaning can be understood subjectively or objectively. Objective context meaning is the meaning a reasonable observer would attribute to

71 105 S.W. 777, 777 (Mo. Ct. App. 1907).
72 Id. at 778.
73 Id. at 779.
the words or actions in the context of their use. Thus the court in *Embry* interpreted the objective meaning of McKittrick’s statement to be an agreement to renew the employment contract.

When [Embry] was complaining of the worry and mental distress he was under because of his uncertainty about the future, and his urgent need, either of an immediate contract with respondent, or a refusal by it to make one, leaving him free to seek employment elsewhere, McKittrick must have answered as he did for the purpose of assuring appellant that any apprehension was needless, as appellant’s services would be retained by the respondent. The answer was unambiguous. 74

An utterance’s or writing’s subjective context meaning is a party’s actual understanding of it, which might or might not be how a reasonable observer would understand it in the circumstances of its production. If McKittrick truly believed he was not agreeing to renew the contract, his subjective understanding of his words departed from their objective meaning in the circumstances of their utterance.

In the early twentieth century, scholars and jurists devoted considerable attention to the choice between subjective and objective forms of interpretation. 75 With respect to the interpretation of contractual agreements, most courts today would probably follow section 201 of the Second Restatement, which looks to a mix of subjective and objective meaning. Oversimplifying a bit, when the parties’ subjective meanings converge, those subjective meanings should govern; when the parties attach different subjective meanings to their words and actions, objective meaning governs. 76

My interest here, however, is not the content of these rules, but the fact that they are again rules of construction. They identify what type of meanings—objective or subjective—determines the legal state of affairs. And though they are not rules of interpretation, they tell adjudicators and others what sort of interpretation to engage in to determine the legal effects of the parties’ words and actions.

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74 Id. at 779-80.
2.3 Purposes

Yet other rules of contract construction condition legal outcomes on the purpose of the agreement or a term in it. Section 202 of the Second Restatement, for example, provides a generic rule of contract construction that emphasizes both context meaning and purpose: “Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.” But the interpretation of purpose does not always require context evidence. As observed above, interpretation of purpose also figures into plain meaning rules. Thus the New York Court of Appeals has recently reaffirmed that “[a] written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.”

An older New York case, William C. Atwater & Co. v. Panama R. Co., illustrates. At issue was the meaning, in an installment contract for the sale of coal, of the following provision: “Any portion of the tonnage remaining unshipped at the date of expiration of this agreement shall be considered cancelled without notice.” The sentence’s literal meaning would have released both parties from liability for any coal unshipped by the end of the installment period. The buyer invoked the clause to attempt to avoid liability for coal unshipped as a result of the buyer’s own refusal to accept earlier shipments. Reading the agreement as a whole, however, and in light of the seller’s option to reduce installments after a buyer breach, the Court of Appeals concluded that the clause’s purpose was to cancel only installments unshipped as a result of the seller’s exercise of that option. “Reason, equity, fairness—all such lights on the probably intention of the parties—show what the real agreement was.”

In addition to the generic relevance of the parties’ purpose, interpretation of purpose figures into many more specific rules of contract construction. A defense of supervening frustration exists, for example, “[w]here after a contract is made, a party’s principal purpose is substantially frustrated without his fault.” Article Two of the UCC provides that “[w]here circumstances cause an exclusive or limited remedy [such as liquidated damages] to fail of its essential purpose,” the court may provide any other remedies available under the Code. And though a commitment

77 RESTATEMENT (SECOND) OF CONTRACTS § 202(1).
79 159 N.E. 418 (N.Y. 1927).
80 Id. at 419.
81 RESTATEMENT (SECOND) OF CONTRACTS § 265.
82 U.C.C. 2-719(2).
to serve as a surety is generally subject to the Statute of Frauds’ writing requirement, where the surety’s main purpose is a pecuniary or business advantage, the agreement falls outside the scope of the Statute. All are rules of construction: each specifies ways that the parties’ or an agreement’s purpose figures into determining the legal state of affairs. Like other rules of contract construction, purpose-based rules can refer either to the parties’ subjective or to their objective purposes, depending on the rule and on circumstances of its application. And they can permit more or less evidence in the interpretation of that purpose.

The interpretation of purpose is somewhat different from the interpretation communicative meaning, plain or context. Purpose is more closely aligned with instrumental or practical reasoning. Although identifying an agreement’s purpose requires understanding its communicative content, the rational reconstruction of reasons and motives plays a larger role. Interpreting an agreement’s purpose is more like figuring out a tool’s function by examining its design. Although still a form of interpretation, the relevant evidence and inferences can differ from the interpretation of communicative meaning.

2.4 Intention and Belief

Yet other rules of contract law look to the parties’ beliefs, intentions or other propositional attitudes. The black-letter law in most jurisdictions outside of the United States, for example, is that a contract exists only if, at the time of formation, the parties objectively intended to be legally bound. And many US courts condition enforcement of specific types of agreements on evidence that the parties’ intended legal liability for breach. Examples include preliminary agreements, agreements between family members and

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83 See RESTATEMENT (SECOND) OF CONTRACTS § 116.
84 For philosophical accounts of this sort of interpretation, and its relationship to both the ascription of beliefs and the interpretation of linguistic meaning, see DANIEL C. DENNETT, THE INTENTIONAL STANCE (1989); Donald Davidson, Radical Interpretation, in INQUIRIES INTO TRUTH AND INTERPRETATION 125 (1984).
85 A propositional attitude is a mental state that takes as its object a proposition, and can therefore be described using a verb plus a “that” clause, as in, “She believed that . . .” or “They intended that . . .”
reporters’ confidentiality promises. Under these rules, the legal question is not the communicative content of the parties’ words or actions—parties need not say that they intend legal liability—but their actual or apparent intentions with respect to the legal enforcement of their agreement.

In addition to these formation rules, well-established contract defenses such as mistake, misrepresentation, duress and undue influence all call for interpretation of the parties’ beliefs or intentions at the time of formation. A party claiming unilateral mistake, for example, must show that she had a false belief about a basic assumption on which she entered the contract. A party arguing duress must show that she believed she had no reasonable alternative to agreeing to the transaction. But defenses are not the only rules that look to the parties’ beliefs or intentions. Some courts have read the duty of good faith to require an inquiry into a party’s state of mind, asking, for example, whether the party charged with breach of the duty intended to trick or deceive the other side. Although liability for breach is generally strict, the willfulness of a breach can make a difference under doctrines like the substantial performance rule and the rule for recovering cost of completion damages. And the doctrine of promissory fraud imposes punitive damages on parties who at the time of formation intend to breach their agreements.

All of these rules are rules of construction. Each attaches legal consequences to proof of one or both parties’ beliefs or intentions. Some readers might find it a stretch to say that these mental states are part of the meaning of the parties’ words and actions. But whether or not we call them “meaning,” identifying the parties’ beliefs, intentions or other legally salient propositional attitudes requires interpreting their words and actions. Attributing such mental states to others is a way of making sense of their behavior, linguistic and nonlinguistic. This type of interpretation is not the same as the interpretation of communicative content. But it is a type of

interpretation nonetheless, one required by well-established rules of construction.\(^{93}\)

The salience of parties’ mental attitudes distinguishes the exposition of contractual agreements from the exposition of constitutions, statutes, judicial and executive orders and other public laws. Although there are theories according to which the meaning of a public law should turn on the actual or apparent intentions of the individuals who drafted or enacted it, the rules that look to contracting parties’ beliefs and intentions are more firmly established, and the case for doing so much easier.

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The above discussion of contract exposition illustrates two important facts. First, there are multiple types of contract interpretation. The rules of contract construction call for the identification of several different types of meaning, each of which requires its own variety of interpretation. What sort of interpretation is required commonly depends on the legal question at issue, the form of the interpretive object, the nature of the transaction, other interpretive facts, and of course the governing law.

Second, legal interpretation serves construction. In the process of determining the legal effect of a legal actor’s words or actions, interpretation comes first, construction second. But because legal interpretation is the handmaiden of construction, the rules of the former should be crafted to satisfy the requirements of the latter. When it comes to legal design, rules of construction come first, rules of interpretation second.

The latter point is not limited to the law of contracts. It should be familiar to anyone who has encountered the divide within originalist constitutional theory between theorists who would have courts look to original intent and theorists who would have them look to original meaning.\(^{94}\) The difference between these two camps is in one sense about what constitutional interpretation should look like. Roughly, original-intent originalism recommends seeking out the framers’ intent when they drafted the constitutional text; original-meaning originalism recommends interpreting how, at the time of drafting, ordinary citizens would have understood the constitutional text. The theories themselves, however, are about the correct rule of constitutional construction. Neither side need deny that one might interpret the Constitution as the other side advocates. The question is which sort of meaning should make a legal difference. That is a

\(^{93}\) See, e.g., DANIEL C. DENNETT, THE INTENTIONAL STANCE (1989); Donald Davidson, Radical Interpretation, in INQUIRIES INTO TRUTH AND INTERPRETATION 125 (1984).

\(^{94}\) For a brief history and overview, see Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 1 NOTRE DAME L. REV. 1, 3-6 (2015).
question of construction, not interpretation. Jack Balkin makes a similar point with respect to constitutional history: “[I]n constitutional construction, history is a resource, not a command. . . . [H]ow history is used and how it becomes relevant depends on each modality’s underlying theory of justification.”

3 Is There a Contract Construction Zone?

As I noted in the introduction, the interpretation-construction distinction has recently received considerable attention from constitutional originalists. New Originalists, starting with Larry Solum, have used it to divide constitutional questions into two broad categories. In the first are questions answered by the constitutional text’s original meaning. As Solum puts it, this is the area of constitutional law where “the meaning of the text is clear, and the legal effects that follow from that meaning are not subject to serious challenge.” Constitutional questions that are not in the first category lie in what Solum calls “the construction zone,” which “consists of constitutional cases or issues that cannot be resolved by the direct translation of the constitutional text into rules of constitutional law that determine their outcome.” Solum identifies four reasons why a question might fall into the construction zone: vagueness, open texture, irreducible ambiguity, gaps and contradictions within the text.

It might look as if the idea of a construction zone involves a return to Lieber’s and Williston’s supplemental conception of interpretation and construction. Supplemental conceptions also distinguish between legal questions settled by interpretation of the text and those that interpretation leaves unanswered, and maintain that only question in the latter category are the subject of construction. But Solum unequivocally rejects Lieber’s supplemental conception. “Construction is ubiquitous—it occurs whenever the constitutional text is given legal effect.”

The originalist idea of a construction zone does not come from a supplemental conception of construction, but from a substantive commitment to a specific rule of constitutional construction: originalism. The operative commitment is what Solum calls the “constraint principle”: “the original meaning of the constitutional text should constrain

95 Balkin, The New Originalism, supra note 2 at 652.
96 Solum, Constitutional Construction, supra note 30 at 469.
97 Id. at 472. See also id. at 475 (Defining the “construction zone” as “[t]he set of constitutional issues and cases for which the [original meaning] of the constitutional text underdetermines legal effect”).
98 Id. at 469-72; Solum, The Fixation Thesis, supra note 94 at 11.
99 Solum, Constitutional Construction, supra note 30 at 495.
constitutional practice.”

Call the set of constitutional questions that are fully determined by original meaning the “constraint zone.” The construction zone is simply the absolute complement of the constraint zone, comprising every issue or case falling outside of it. The idea of a construction zone assumes that the outcome of some constitutional questions both can and should be fully determined by interpretation. It assumes a zone of constraint.

In other words, although the New Originalists employ the distinction between interpretation and construction, the idea of a construction zone does not follow from that distinction. Without a zone of constraint, it makes no sense to talk about a distinct zone of construction. And one gets a zone of constraint only if one is committed to a substantive rule of construction that legal effects are sometimes entirely derivable directly from the meaning of a legal text.

Contract law confirms this analysis. Contract law contains no analog to the originalist idea of constitutional construction zone.

Originalists perforce identify a single type of meaning as “original.” Thus Jack Balkin, although he recognizes that “there are many different meanings of ‘meaning’, “ argues that “what is fixed at the time of adoption—and binding on later generations—is original meaning . . . , and not the purposes, intentions, expectations, psychological states, or cultural associations of the adopters.”

Balkin defines “original meaning” narrowly as “the original semantic meaning of the text, any generally recognized legal terms of art, and any inferences from background context necessary to make sense of the text.” Although other originalists identify other types of meaning as legally salient, all hone in on a single type of meaning as the one that should constrain constitutional decision-making.

Such claims are not plausible with respect to the law of contracts. The many rules of contract construction call for different types of interpretation depending on the transaction type, the identity of the parties, the type of act they have performed, and the legal issue to be decided. There is no one thing that counts as contract interpretation.

Moreover, even when a given rule of contract construction gives pride of place to one type of meaning over others, interpretation need not

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100 Solum, The Fixation Thesis, supra note 94 at 1. See also id. at 7 (“the Constraint Principle claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases.”).

101 Balkin, The New Originalism, supra note 2 at 647.

102 Id. at 645.

103 See Solum, Interpretation-Construction, supra note 2 at 101 (describing the difference between original-intentions originalists and original public-meaning originalists).
end when that meaning runs out. To take a familiar example, the rule in many jurisdictions is that an integrated writing should be interpreted according to its plain meaning, limiting use of extrinsic evidence. But when an integrated writing’s plain meaning is ambiguous, vague, internally inconsistent or gappy, courts will admit extrinsic evidence of its context meaning, which can then control. Randy Barnett has written that “[w]hen original meaning runs out, constitutional ‘interpretation,’ strictly speaking, is over, and some new noninterpretive activity must supplement the information revealed by interpretation.”\(^{104}\) I doubt whether an originalist needs to agree with Barnett on this point. An originalist might maintain that when the preferred form of original meaning does not decide a constitutional question other types of constitutional meaning, and therefore other types of interpretation, should step in. But whether or not such a rule makes sense in constitutional law, it clearly applies in many areas of contract law. Contract interpretation need not end when one type of interpretation runs out.

Finally and most importantly, no matter what one thinks of constraints principles in constitutional law, the idea of zone of pure constraint is implausible in the law of contracts. Even when two contracting parties express their agreement in crystalline terms, if that agreement contemplates an illegal act, is unconscionable, attaches penalties to breach, attempts to contract out of all obligations of good faith, or violates other substantive limits, the agreement will not be enforced. These limits on what parties can contract for are rules of construction that operate in the background of every contract. Parties’ words alone never fully determine their contractual obligations. There is no zone of pure constraint in contractual agreements, and thus no complementary zone of construction.

In fact, the idea of a zone in which interpretation plus a constraint principle might fully suffice to determine the legal rule may be plausible only when applied to constitutional law. Only the Constitution is “the supreme law of the land,”\(^{105}\) and so subject to no higher-order limiting rules of construction. Thus just as contract law will not enforce an agreement that violates the unconscionability rule, so too an unambiguous statute is ineffective if it would violate the Constitution. It is only in constitutional law that we can imagine a zone of pure textual constraint complemented by a zone of construction.

In short, there is no construction zone in the law of contracts. It is true that some rules of contract construction are designed to give legal effect to the meaning of the parties’ words and actions, whereas of others advance social interests independent of their agreement. But the issues in contract cases cannot be neatly divided between a zone of constraint and a


\(^{105}\) U.S. CONST. art. VI.
zone of construction. More to the point, the spatial metaphor tends to obscure more than they illuminate when applied to the law of contract.

4 The Interplay Between Interpretation and Construction

I have argued that the relationship between interpretation and construction is more complex than theorists with simple conceptions of interpretation recognize. Although interpretation comes first in the process of exposition, because there is more than one type of meaning, the correct approach to interpretation depends on the rule of construction being applied. Rules of construction are prior in design to rules of interpretation. This part identifies two other ways that construction can be said to precede interpretation. Although they suggest a yet more complex relationship between the two activities, neither erases the difference between them.

Understanding of the interplay between interpretation and construction requires attending to yet another difference among types of meaning: that between pragmatic and semantic meaning. Linguists and philosophers of language disagree about the best way to define these concepts. Some describe the distinction in terms the types of evidence that goes into interpretation, others in terms of the question that the interpreter asks of that evidence. For my purposes, the latter approach is preferable and the following formulations serve well. The **pragmatic meaning** of an utterance or text is the best interpretation of the speaker’s communicative intentions. Thus Kent Bach describes the ascription of pragmatic meaning as follows:

The hearer . . . seeks to identify the speaker’s intention in making the utterance. In effect the hearer seeks to explain the fact that the speaker said what he said, in the way he said it. Because the intention is communicative, the hearer’s task of identifying it is driven partly by the assumption that the speaker intends him to do this. The speaker succeeds in communicating if the hearer identifies his intention in this way, for communicative intentions are intentions whose “fulfillment consists in their recognition.”

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107 Bach, *supra* note 106 at 41 (quoting BACH & HARNISH, *supra* note 53 at 15). The passage goes on to link this definition to the evidentiary conception of pragmatics. “Pragmatics is concerned with whatever
Semantic meaning, in distinction, is conventional meaning, which can be identified independently of the speaker’s communicative intentions. The semantic meaning of a sentence lies first and foremost in the conventional or literal meanings of its words, and the rules of syntax or grammar of the language they belong to. It might also include contextual elements whose contribution to meaning is governed by determinate rules, such as the rules governing indexicals like “I,” “you” and “those.” Pragmatic meaning diverges from semantic meaning when speakers use their words in nonliteral ways. Familiar examples include irony, innuendo, metaphor, ellipsis, malapropism and other forms of nonconventional conversational implicature.

4.1 Rules of Construction and Pragmatic Priority

Suppose we want to determine the communicative intent of two sophisticated parties who have added the words “Goods are sold as is” to an agreement for the sale of goods. Section 2-316(3)(a) of the UCC provides that “unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties.” Section 2-316(3)(a) is a rule of construction that attaches to use of the words “as is” a specific legal effect: exclusion of all implied warranties. Because sophisticated parties use the words “as is” to achieve those effects, in order to understand their communicative intentions—what they wish to achieve with their words—one must know something about that legal rule. The pragmatic meaning of what they say involves a rule of construction.

The phenomenon is a general one. Sometimes a legal speaker’s communicative intentions presuppose a rule of construction. In such instances, the speaker’s intention itself refers to the rule of construction, and the pragmatic meaning of what she says cannot be understood without knowing something about that rule. When this is so, I will say that the rule information is relevant, over and above the linguistic properties of a sentence, to understanding its utterance.” Id. Plain meaning rules demonstrate that the two are not always linked.

108 This negative definition can be found in KENT BACH, THOUGHT AND REFERENCE 180-181 (1987).
109 See Bach supra note 106 at 37-40.
110 See H.P. Grice, Logic and Conversation, in THE LOGIC OF GRAMMAR 64 (Donald Davidson & Gilbert Harman eds., 1975), reprinted in PAUL GRICE, STUDIES IN THE WAYS OF WORDS 22 (1989); BACH & HARNISH, supra note 53 at ___-___.
111 U.C.C. 2-316(3)(a).
of construction is “pragmatically prior” to interpretation of the speaker’s words and actions. Construction is pragmatically prior to interpretation when a speaker intends her speech act to satisfy or avoid a rule of construction.

The clearest examples of pragmatic priority are juristic acts, or what German private law calls “Rechtsgeschäfte” in civil law contexts. The idea of a juristic act is relatively unfamiliar in contemporary Anglo-American legal theory, but is important enough in German private law that Werner Flume gives it a full volume of his four volumes on the German Civil Code. A juristic act is a speech act that expresses the speaker’s or author’s intent to effect a legal change by the very expression of that intent. Examples include Congressional votes, Presidential Orders, judicial decrees, wills, deeds of transfer, contractual agreements under seal, and “as is” clauses. When successful, each effects a legal change by the expression, in the right form, of an intent to effect that change.

Juristic acts succeed by virtue of rules of construction. A Presidential Order, for example, can be effective by virtue of either an act of Congress or the President’s constitutional powers. When a purported Order is not authorized by one or the other, it does not effect a legal change. In the United States, if a last will and testament is effective, it is so by virtue of a state or other local statute governing wills. Such statutes provide that when

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112 WERNER FLUME, 2 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS: DAS RECHTSGESCHÄFT (1992). Although contemporary Anglo-American legal theory does pay much attention the category of juristic acts, it was central to Wigmore’s account of the parol evidence rule. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN LAW OF EVIDENCE IN TRIALS AT COMMON LAW, § 2401, 238 (2d ed. 1924) (describing the category of “jural acts”).

113 In 1888, the committee working on early drafts of what would become the German Civil Code described a Rechtsgeschäft as follows:

The juristic act . . . is a declaration of private will directed at the realization of a legal effect, an effect that follows on the authority of the legal system because it is willed. The essence of the juristic act is found in the fact that a will directed at the realization of the legal effect is confirmed, and that the legal system issues a judgment, in recognition of that will, that gives legal effect to the desired legal arrangement.

1 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH, 126 (Berlin & Leipzig, J. Guttentag 1888) (Ger.) (author’s translation). My definition is a bit broader, as it does not require that the act succeed in effecting a legal change. It is also broader German jurists generally apply the concept of a Rechtsgeschäft only to the analysis of private law, not to acts of officials.


115 Id. at 587.
a person expresses, in the correct form, her intent as to what shall happen to her property after death, she changes the legal beneficiaries of her estate. A contract under seal is effective by virtue of the common law rules governing sealed instruments, which provide that an “a manifestation in a tangible and conventional form of an intention that a document be sealed” suffices to trigger the rules that govern formal contracts. Each example is a rule of construction, for each provides that the right sort of actor can effect a legal change by expressing, in the right form, an intention to effect that change. A juristic act succeeds when it is authorized by a rule of construction.

In order to interpret the pragmatic meaning of a juristic act—in order to identify the speaker’s communicative intentions—one must therefore know something about the rule of construction the speaker seeks to satisfy. To interpret the meaning of the words, “By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered that . . . ,” one must know something about the nature of the statutory and constitutional powers a President invokes with those words. To interpret the meaning of a last will and testament, one must know something about testamentary law. And to interpret the meaning of “Locus Sigilli” on a writing, one must know something about the laws governing formal contracts, which might give those words a legal effect.

Rules of construction are therefore always pragmatically prior to the interpretation of juristic acts. To interpret the pragmatic meaning of a juristic act, one must know something—though not everything—about the rule of construction the speaker seeks to satisfy.

This is not to say that knowing the intended rule of construction tells an interpreter all she might want to know about the meaning of the juristic act. To know that a writing is a Presidential Order is not yet to know what it purports to command. To know that a document is a sealed instrument is not yet to know what obligations its author sought to create. The point is simply that in order to understand the speaker’s communicative intent, one must understand something about the rule of construction she seeks to

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119 Not all US jurisdictions still recognize the seal.
satisfy. This is the sense in which construction can be pragmatically prior to interpretation.

Juristic acts—acts that achieve a legal effect by the expression of an intent to achieve that effect—are the most obvious examples of the pragmatic priority of construction. But there are others. Even when the law does not require the expression of a legal intent, legal actors often choose their words in light of the legal rules they expect to determine the words’ legal effects. In the first edition of his treatise, for example, Williston makes the following argument for a plain meaning rule for integrated writings:

In an ordinary oral contract or one made by correspondence, the minds of the parties are not primarily addressed to the symbols which they are using; they are considering the things for which the symbols stand. Where, however, they incorporate their agreement into a writing they have attempted more than to assent by means of symbols to certain things, they have assented to the writing as the adequate expression of the things to which they agree.\(^\text{120}\)

Williston is suggesting here that when parties agree to an integrated writing, they expect it to be construed according to its plain meaning, and that their communicative intentions and choice of words presuppose that rule of construction. As an argument for the plain meaning rule, this suffers from circularity. Because responsive parties’ expectations depend on what the legal rule is, those expectations cannot serve as a reason to choose one rule over another. But as an analysis of parties’ communicative intentions when contracting in the shadow of a plain meaning rule, it reveals an important truth. Responsive parties take rules of construction into account when choosing their words.\(^\text{121}\) The interpretation of responsive parties’ communicative intentions—of the pragmatic meaning of their words and actions—also must take account of the salient rules of construction and their effect on what those parties say and do.

So far I have been discussing the pragmatic priority of construction in identifying communicative intentions. Rules of construction can also figure into the content of parties’ purposes, beliefs and non-communicative intentions. The comments to section 356 of the Second Restatement, for example, discuss the fact that sophisticated parties might attempt to avoid the penalty rule—unreasonable large liquidated damages will not be enforced—by disguising a penalty as an alternative form of performance. “Although the parties may in good faith contract for alternative

\(^{120}\) 2 WILLISTON (1st ed.) § 606, 1165.

\(^{121}\) The same observation lies behind familiar arguments, often advanced by those who employ economic analysis, that plain meaning rules give parties a new reason to invest in expressing their intentions in clear language. See, e.g., Schwartz & Scott, supra note 57 at 572.
performances and fix discounts or valuations, a court will look to the substance of the agreement to determine whether this is the case or whether the parties have attempted to disguise a provision for a penalty.\textsuperscript{122} A party can attempt to disguise a penalty in this way only if she understands the rule that penalties are not enforceable, which is a rule of construction. The interpretation of the parties’ legally salient purposes, beliefs and other mental attitudes can also require knowing something about the rules of construction that legal actors are taking into account.

Public law theorists have recognized something like the pragmatic priority rules of construction. One finds the idea, for example, in John McGinnis and Michael Rappaport’s “original methods originalism.”\textsuperscript{123} McGuiness and Rappaport sometimes use “interpretive rules” to refer to what I am calling “rules of construction.”\textsuperscript{124} Translating their point into the language I am using, their core empirical claim is that the framers and ratifiers of the Constitution would have taken into account the contemporary rules of legal construction, including those identifying the legally relevant type of meaning and the correct approach to interpretation, when they assigned meaning to the words in the Constitution. Originalist interpretation of those actors’ intent or understanding therefore requires attention to those rules.

\textsuperscript{122} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 356 cmt. c (1981).
\textsuperscript{124} Although McGinnis and Rappaport eschew the term “construction,” many of the rules they discuss qualify as rules of construction. The rule of lenity, for example, which provides that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language,” is clearly a rule of construction. McNally v. United States, 483 U.S. 350, 359-60 (1987) (cited by McGinnis & Rappaport, \textit{supra} note 123 at 757). It is designed not to get at likely legislative intent or probably meaning, but to specify the legal situation in cases of ambiguity or uncertainty. See United States v. Bass, 404 U.S. 336, 348 (1971) (identifying policies behind the rule). So too are the two more general “rules of interpretation” that McGinnis and Rappaport find at the time of the founding: “the original methods applied to the Constitution may have blended elements of original public meaning and original intent, [and] the original methods were within what is now understood as the family of originalism.” McGinnis & Rappaport, \textit{supra} note 123 at 802. See also \textit{id.} at 788-93. As I emphasized in Part Two, rules say which sort of meanings are legally relevant are not rules of interpretation but rules of construction.
The original intent approach requires the application of the original interpretive rules [rules of construction], because the enactors likely intended the meaning those rules would generate, and applying those rules is the most accurate way of discerning a single meaning. Original public meaning also leads to original methods because an informed and reasonable speaker of the language would have understood the Constitution as subject to the interpretive rules applicable to such a document.\(^{125}\)

Correct interpretation of what a drafter or ratifier intended or understood requires knowledge of the rules of construction that the drafter or ratifier took into account in choosing or understanding those words. This is the pragmatic priority of construction.\(^{126}\)

Along similar lines, William Eskridge and John Ferejohn’s anticipation-response theory argues that legislators and legislative staff often anticipate judicial construction of the legislation they produce, and that they craft their committee reports and floor debates accordingly.\(^{127}\) If this is correct, then to understand the purposes and intended meanings of such records, one must take into account their authors’ expectations about the rules of construction that would eventually govern their use.

Although rules of construction are sometimes pragmatically prior to interpretation, they are not always so. The question is an empirical one and depends both on the rule of construction at issue and on the responsiveness of legal actors to it. Corbin suggests a helpful example.

There seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement.\(^{128}\)

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\(^{125}\) McGinnis & Rappaport, \textit{supra} note 123 at 758.

\(^{126}\) Solum considers McGinnis and Rappaport’s argument, but suggest that it works only for original cannons of interpretation, not cannons of construction. Solum, \textit{Constitutional Construction}, \textit{supra} note 30 at 509-10. This is perhaps because Solum emphasizes the semantic meaning over pragmatic meaning in his theory of constitutional interpretation.


\(^{128}\) ARTHUR LINTON CORBIN, \textit{1 CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW} § 34 at 135 (1951) (hereinafter “CORBIN (1st ed.”)). The Second Restatement suggests another example:
Because the rules of contract formation do not require juristic acts, it is possible for parties to enter a contract unawares. In such cases, their communicative intentions do not refer to the relevant rule of construction. Along the same lines and somewhat more familiarly, the UCC provides that “[a]ny affirmation of facts . . . which relates to the goods and becomes part of the basis of the bargain creates an express warranty,” and that “[i]t is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty.” 129 Like Corbin’s agreement between two legal naïfs, a representation about the quality of goods is not a juristic act. It does not express an intent to effect a legal change by the very expression of that intent. More generally, although the contemporary law of contract makes room for juristic acts, it rarely requires them. Parties’ words and actions often have legal effects whether or not they intended or expected them. 130 When parties do not intend or expect a legal change, interpreting their communicative intent does not require an understanding the relevant rule of construction.

This marks another important difference between the exposition of contractual agreements and the exposition of public laws. Constitutions, statutes and regulations are always the products of juristic acts performed by authorized officials. The juristic character of constitution making and legislating is essential to McGinnis and Rappaport’s original methods originalism and Eskridge and Ferejohn’s anticipation-response theory. We expect framers, ratifiers, drafters and legislators to know that they are performing legally efficacious acts. We therefore expect them, when deciding how to express their intentions, to take into account the rules of construction that will apply to those acts. The pragmatic priority of rules of construction is more pervasive in the case of public law than it is in the case of contracts. 131

That said, even in the context of public lawmaking responsiveness to relevant rules of construction is a question of fact. A legislator might know that she is making a law without knowing all the rules of construction.

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A orally promises to sell B a book in return for B’s promise to pay $5. A and B both think such promises are not binding unless in writing. Nevertheless there is a contract, unless one of them intends not to be legally bound and the other knows or has reason to know of that intention.

Restatement (Second) of Contracts § 21 ill. 2 (1981)

129 U.C.C. § 2-314(1)(a) & (2).

130 For more on this point, see Klass, supra note 118, passim.

131 Some areas of private law are more like public law in this respect. Unlike a contract, for example, a last will and testament is always an expression of the testator’s intention to effect a legal change.
that will determine the legal effects of her words and actions. Victoria Nourse has argued, for example, that “[t]here are good empirical reasons to believe that members of Congress are indifferent to the vast majority of ordinary statutory interpretation cases in appellate courts.” 132 And several studies by Abbe Gluck and Lisa Bressman indicate that the congressional staffers who write federal legislation do not fully understand the canons of statutory interpretation and construction courts will use to give legal effect to the statutes they draft. 133 Even in public lawmaking, legal actors only sometimes take rules of construction into account when choosing their words. Rules of construction are sometimes pragmatically prior to interpretation, but not always and not pervasively.

4.2 Acts of Construction and Semantic Priority

A speech act’s pragmatic meaning lies in the speaker’s communicative intentions. Its semantic meaning resides in the conventional meanings of the words she uses. Construction is semantically prior to interpretation when individual acts of construction give words new conventional meanings.

Consider the following clause, which Lloyd’s of London used for several centuries to describe covered risks in its marine insurance policies:

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof. 134

In his 1914 treatise, Sir Douglas Owen observed that “[i]f such a contract were to be drawn up for the first time to-day, it would be put down as the

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132 Nourse, supra note 127 at 144.
134 I am grateful to Jim Oldham for bringing this example to my attention. See James C. Oldham, Insurance Litigation Involving the Zong and other British Slave Ships, 1780-1807, 28 J. LEGAL HIST. 299, 300 (2007).
work of a lunatic endowed with a private sense of humour." But the
“Adventures and Perils” clause in fact had a clear legal meaning:

It is an ancient and incoherent document, occasionally the subject
of judicial remarks in the highest degree uncomplimentary. But
nobody minds this or dreams of altering the ancient form, nor, one
may imagine, is it ever likely to be altered. Insurance experts
know—or very often know—exactly what it means, and with
generations of legal interpretations hanging almost to every word,
and almost certainly to every sentence, in it, it would be highly
dangerous to tamper with it.\textsuperscript{136}

Lloyd’s “Adventures and Perils” clause was a legal term of art. Years of
judicial construction gave it a conventional legal meaning. Just as one of
the dictionary meanings of “check” includes its role in the game of chess,
so the semantic meaning of Lloyd’s “Adventures and Perils” clause included
its legal meaning in a marine insurance policy. The semantic priority of
construction is a type of etymological priority. Judicial construction of
nontechnical words can give them a new conventional legal meaning going
forward. It can transform it into a legal term of art.

The same process of construction followed by conventionalization
can be found in contemporary insurance law. For example, many
jurisdictions today recognize the doctrine of reasonable expectations: “The
objectively reasonable expectations of applicants and intended
beneficiaries regarding the terms of insurance contracts will be honored
even though painstaking study of the policy provisions would have negated
those expectations.”\textsuperscript{137} This is a pure rule of construction. It provides that in
certain circumstances, the terms of an insurance contract are found not in
the meaning of the agreement’s words, but in insureds’ reasonable
expectations.

On its own, the doctrine of reasonable expectations is
unremarkable—just another example of the fact that the parties’ words of

\textsuperscript{135} \textsc{Sir Douglas Owen}, Ocean Trade and Shipping 158 (1914).
\textsuperscript{136} \textit{Id.} at 155.
\textsuperscript{137} Robert E. Keeton, Insurance Law Rights at Variance with Policy
Provisions, 83 Harv. L. Rev. 961, 967 (1970). Keeton’s article was the first
to articulate the principle, based on his collection of cases. For discussions
of subsequent developments in the doctrine, see Kenneth S. Abraham,
Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable
Expectations of the Insured, 67 Va. L. Rev. 1151 (1981); Roger C.
Henderson, The Doctrine of Reasonable Expectations in Insurance Law
After Two Decades, 51 Ohio St. L.J. 823 (1990); Peter Nash Swisher, A
Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable
agreement do not fully determine their legal obligations, or the ubiquity of noninterpretive construction in contract exposition. But as Michelle Boardman observes, insurance contracts are highly standardized, and once one court has construed a certain clause, subsequent courts are likely to apply the same rule to its appearance in other contracts.\textsuperscript{138} Section 211(2) of the Second Restatement authorizes this result providing that when a party adopts a writing knowing that it is the standard form for a transaction, the writing “is interpreted wherever reasonable as treating alike all those similarly situated, without regard to [the parties’] knowledge or understanding of the standard terms of the writing.”\textsuperscript{139} Although the Restatement uses the word “interpret,” section 211(2) is a rule of construction. It tells courts to treat boilerplate as having the same legal effect across multiple transactions, even if those transactions involve different parties with different background and occur in different circumstances. The practical effect in the insurance context is that judicial construction of contract boilerplate can transform nontechnical words into a term of art, telling future parties that, by employing the same words, they can achieve the same legal effect.

At first glance, this might look like a sort of pragmatic priority, as it involves future parties’ intention to achieve a certain legal effect. But there is a difference. When insurers intentionally use boilerplate, they realize their intentions by using words that now have a conventional legal effect, and thereby also a new semantic meaning. Judicial construction of boilerplate generates terms of art: words, phrases or entire clauses whose conventional legal meanings might, because of rules of construction like the doctrine of reasonable expectations—diverge from their nonlegal semantic meanings. Thus Boardman observes, “Boilerplate that has been repeatedly construed by courts will take on a set, common meaning, but one that may not be easily understood by reading the language itself.”\textsuperscript{140} Judicial acts of construction give boilerplate new semantic content, a content that happens to refer to the law.

The semantic priority of construction appears outside of contract law as well. When in 1942 the Supreme Court, in \textit{Skinner v. Oklahoma}, first used the phrase “strict scrutiny” to describe the appropriate judicial attitude towards suspect classifications, the words did not have a technical legal meaning.\textsuperscript{141} In the years since, the phrase has become a term of art, as subsequent judicial opinions construed the legal effect of \textit{Skinner} and other decisions that used the phrase. If a court today holds that a government action is subject to “strict scrutiny,” the meaning of those words can be

\textsuperscript{138} Michelle E. Boardman, Contra Proferentem: The Allure of Ambiguous Boilerplate, 104 MICH. L. REV. 1105, 1109-17 (2006).
\textsuperscript{139} RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1981).
\textsuperscript{140} Boardman, supra note 138
found in the corpus of judicial applications of the phrase. The process of judicial construction—here the construction of earlier, binding decisions—has given the words a technical legal meaning.

Not all legal terms of art get their meaning from judicial construction. Statutes and written agreements between sophisticated parties often contain definition sections. The technical legal term “Brandeis Brief” uses synecdoche, naming a salient member of the reference class. And historical patterns of usage among the legal community can give words conventional legal meanings long before they reach a judge’s chambers. Many technical legal terms of art are simply elements of the lawyer’s patois. The interpretation of their semantic meaning requires attention to linguistic facts such as patterns of usage and dictionary definitions in a way that is not significantly different from the interpretation of other usages of trade. In none of these cases does the conventional legal meaning of the term depend on a prior act of construction.

The occasional semantic priority of acts of construction is also a contingent feature of the system of judging we have. If judicial construction sometimes generates terms of art, it is only because judicial decisions are both backward and forward looking. When a text’s legal effect of is at issue, the court’s job is to construe the effects of the words that appear in it. As Solum puts the point, it is about a particular tokening of those words.142 At the same time, principles of stare decisis mean that this backward-looking decision can have forward-looking legal effects. The decision can also determine the legal consequences of future uses of the same words, or of the type. In fact, this is precisely what section 211 says should happen with respect to boilerplate. It is this future-looking aspect that can work to give the words a new, technical meaning, as legal actors treat the decision as instructions as to what words they can use to achieve a legal effect.

4.3 Conceptual Distinctions and Endogeneity

The occasional pragmatic and semantic priorities of construction reflect familiar phenomena: legal actors often take into account the legal effects of their words and actions when deciding what to say or do, and authoritative judicial decisions can give words new legal meanings. When either happens, construction can figure into the meaning of legal actors’ words and actions. Interpretation must take account of both the rules of construction that the legal actors have in mind (pragmatic priority) and any acts of construction that give their words a conventional legal meaning (semantic priority). Another way of putting this is that construction is not exogenous to meaning. It does not stand outside of legal actors’ intentions and the language they use.

The endogeneity of construction does not erase the distinction between interpretation and construction, any more than the interaction between price and demand means that there’s no difference between them. The relationship between interpretation and construction is simply a complex one. The priority of interpretation in the process of exposition is a conceptual fact. Rules of construction take as their inputs the output of interpretation. The relationship between the design of interpretive rules and rules of construction is also a conceptual fact. Because legal interpretation serves construction, what counts as the right type of interpretation, or as the legally relevant type of meaning, depends on the relevant rule of construction. The occasional pragmatic and semantic priorities of rules of construction are common but contingent facts. Pragmatic priority depends on legal actors taking rules of construction into account when deciding what to say and do. Although pragmatic priority is a necessary feature of juristic acts, even here the extent of a speaker’s knowledge of the rule can vary. Semantic priority exists only when, through the application of the principle of stare decisis, judicial construction of a word or phrase transforms it into a legal term of art. These various relationships mean that interpretation and construction are closely intertwined, which is precisely what Corbin’s complementary conception would predict. But this interplay does not alter the fact that interpretation and construction are distinct activities, which ask different questions, look to different types of facts, and apply different rules. Endogeneity does not eliminate difference. Nor does the occasional priority of construction to interpretation erase the distinction between the two.

5 Three Cases

Although this article has discussed the interpretation-construction distinction in considerable detail, I have not yet applied it to answer any questions of legal exposition, or to argue for any particular rules of contract interpretation or construction. The value of any conceptual distinction is in the light it shines on existing theoretical and practical problems. This part examines three judicial opinions that illustrate the practical utility of the above analysis.

5.1 Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging

I have already discussed the rule of Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging: even when the plain meaning of a written, integrated agreement is unambiguous, a California court may consider extrinsic evidence of other meanings “to which the language of the instrument is reasonably susceptible.”143 The Pacific Gas rule has generated

143 442 P.2d at 644.
a mountain of literature over the years. Here I want to consider not the rule itself, but Justice Traynor’s two arguments for it.

Traynor’s first argument appeals to the theory of meaning:

Words . . . do not have absolute and constant referents. . . . The meaning of particular words or groups of words varies with the “verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.”

The quoted text is from Corbin, and this line of argument is relatively common in his writing and among other antiformalists. But it is deeply confused. To begin with, it employs an overly simplistic a theory of meaning. As I have argued at length, and as philosophers of language commonly recognize, there are many different types of meaning—semantic and pragmatic, plain and contextual, subjective and objective, and so forth. Although the theory of language can tell us a great deal about how legal interpretation can work, it cannot tell us what form legal interpretation should take. For that is not a question of language, but of law. A theory of language cannot tell us which type of interpretation best serves the policies and purposes behind the law of contract. For that we need a rule of construction.

Traynor’s second argument for the *Pacific Gas* contextualist rule appears in the following passage:

144 442 P.2d at 644-45 (quoting Arthur Linton Corbin, The Interpretation of Words and the Parol Evidence Rule 50 Cornell L.Q. 161, 187 (1965)).

145 See, e.g. Melvin Aron Eisenberg, The Emergence of Dynamic Contract Law, in 2 THEORETICAL INQ. L. 1, 27 (2001) (“The proper interpretation of all purposive expressions, including contractual expressions, is necessarily dynamic, because the meaning of a purposive expression is always determined in part by its context, and the context is prior to the expression.”); E. Allen Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939 (1967) (“The very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication.”); RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (1981) (“meaning can almost never be plain except in a context”); U.C.C. § 2-202 cmt. 1 (“This section definitively rejects . . . [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used.”).
Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. Under this view, contractual obligations flow not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties’ intention therefore becomes irrelevant.

In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.\(^\text{146}\)

The argument has two steps. The first is that the goal of contract interpretation is to get at the parties’ actual agreement. This is, as I argued in Part One, a rule of construction, and it is hardly revolutionary.\(^\text{147}\) Traynor quotes as authority the California Civil code: “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”\(^\text{148}\) The argument’s second step is that the plain meaning of parties’ words, even in an integrated writing, does not always reflect their actual agreement. This too might appear uncontroversial. The Pacific Gas defendant was prepared to introduce evidence that both parties understood the “all loss” indemnification clause at issue in the case to cover only third-party losses.

But the occasional pragmatic priority of construction casts doubt on the second step. If sophisticated parties enter into a written agreement expecting that their legal obligations will correspond to its plain meaning, there is a sense that they have agreed to that meaning—even if it fails to capture their understanding of the words they are using. Traynor ignores the fact that in the shadow of a plain meaning rule, responsive parties are likely to intend that the plain meaning of their integrated writing should govern. That is, Traynor ignores the occasional pragmatic priority of rules of construction. If responsive parties are in fact agreeing to the plain meaning of their agreement, no matter what that turns out to be, a plain meaning rule perfectly realizes their shared intention.\(^\text{149}\)

\(^{146}\text{Id. at 644 (footnotes omitted).}\)

\(^{147}\text{See supra note 48.}\)

\(^{148}\text{Id. at 644 (quoting Cal. Civ. Code § 1636).}\)

\(^{149}\text{The above argument is comparable to Jody Kraus and Robert Scott’s argument that “that commercially sophisticated parties would prefer a regime in which courts apply formal doctrine exclusively, unless at the time of formation the parties have expressly indicated their desire for courts to apply equitable doctrine as well.” Jody S. Kraus & Robert E. Scott, Contract Design and the Structure of Contractual Intent, 84 N.Y.U. L. REV. 1023, 1026 (2009). But whereas Kraus and Scott focus on the rule of construction}\)
This objection to Traynor’s second argument is not decisive. I have argued that the pragmatic priority of interpretation is a contingent fact, depending *inter alia* on contracting parties’ responsiveness to the rules of construction that govern their agreement. It is not obvious that even in jurisdictions that apply plain meaning rules of construction, sophisticated parties attend to the rule and intend to be governed by the plain meaning of their integrated agreements. The question is an empirical one, on which reasonable minds can differ. Traynor, however, does not address it.

My goal here is not to answer that question, but to illustrate the utility of the above analysis. Traynor treats contract interpretation as if it must always be one thing. But courts can and do apply different rules of interpretation in different contractual contracts, depending on the applicable rule of construction. And responsive parties themselves sometimes take those rules of construction into account in choosing their words and actions. Attention to the varieties of interpretation, to the difference between interpretation and construction, and to the pragmatic priority of construction is essential to the project of “giv[ing] effect to the mutual intention of the parties as it existed at the time of contracting.”

5.2 Stolt-Nielsen v. AnimalFeeds International

No one would mistake the Roberts Court for a panel of experts on the law of contract. None of the Justices on it served on a state court, where much of private law happens. And those who spent time in the academy wrote primarily on questions of constitutional and public law. It is therefore not surprising to find occasional confusions on points of contract theory and doctrine in the Court’s Federal Arbitration Act (FAA) opinions, which often turn on questions of contract exposition. An example can be found in Justice Alito’s 2010 majority opinion in *Stolt–Nielsen v. AnimalFeeds International*.

The question in *Stolt–Nielsen* was whether two arbitration clauses that did not mention class arbitration authorized the arbitration panel to aggregate claims. Before the panel, the parties stipulated that their written agreements were “silent” on the availability of class arbitration, and that they had reached no agreement as to whether class arbitration was permissible. As an analytic matter, it did not follow that the question was

that sophisticated commercial parties prefer, I am emphasizing the rule that sophisticated parties expect and therefore intend their words to conform to. Still, Kraus and Scott reach a conclusion similar to the argument above: “Sometimes the only way to maintain fidelity to the parties’ contractual intent is to enforce the formal contract terms to which they agreed, even when doing so defeats their contractual ends.” *Id.* at 1027.

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150 559 U.S. 662 (2010).
151 *Id.* at 662.
beyond the purview of interpretation. Even when parties’ have not reached an actual agreement on an issue, plain meaning interpretation and context evidence can identify the most reasonable understanding of their agreement with respect to that issue in the circumstances. Thus the panel characterized the question as “the construction [i.e., interpretation] of the two clauses in the context of international maritime contracts.”

Emphasizing similar decisions of other arbitration panels and “the broad wording . . . in the present two clauses: viz., that ‘any and all differences and disputes whatsoever in nature’ and ‘any dispute arising from the making, performance or termination of this Charter Party’ shall be put to arbitration,” the panel concluded that the clauses authorized class arbitration. The District Court vacated the award, holding that the arbitration panel should have applied maritime law, which required greater consideration of custom and usage. The Second Circuit then reversed, treating the arbitration panel’s conclusion as a finding of fact and citing its own precedent for the proposition that “[t]he arbitrator’s factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law,” and affirmed.

Given this history, one might be surprised that the Supreme Court granted certiorari. First, the US Supreme Court generally does not review the interpretation of individual contracts. Second, as the Second Circuit observed, the FAA grants very limited review of arbitrator decisions of both fact and law. Third, although the contracts were arguably subject to federal maritime law, the case did not turn on any open issues in that body of law.

Justice Alito’s opinion provides a two-part account of why there was an issue for the Court to decide. First, Alito argues that the arbitration panel

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152 AnimalFeeds International Corp. v. Stolt-Nielsen S.A., Partial Final Clause Construction Award (Dec. 20, 2005), reprinted in Appendix D, Petition for Certiorari, Stolt–Nielsen v. AnimalFeeds International, at 49a No. 08-1198, (Mar. 26, 2009). See also id. (“[A]rbitrators must look to the language of the parties’ agreement to ascertain the parties’ intention whether they intended to permit or to preclude class action.”).

153 Id. at 50a.


155 Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., 548 F.3d 85, 98 (2d Cir. 2008) (citing Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 214 (2d Cir.2002)). The District Court similarly relied on extrinsic evidence to interpret the clause, though reaching a different conclusion as to the meaning of the clause. 435 F. Supp. 2d at 386.

156 But see DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015) (reversing the California Court of Appeal’s interpretation of five words in an arbitration clause).
did not in fact interpret the clauses, but reached a decision based on its own view of public policy. He finds evidence this reading of the panel decision in AnimalFeeds' policy arguments to the arbitration panel, and in the parties' stipulation of that they had not reached an agreement on class arbitration. “Because the parties agreed their agreement was ‘silent’ in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators’ proper task was to identify the rule of law that governs in that situation.”157 As the Second Circuit’s decision illustrates and Justice Ginsburg pointed out in dissent, this is not the only possible reading of the panel’s holding.158 Be that as it may, Alito is in effect saying that the question is not the correct interpretation of the clause, but the correct rule of construction for arbitration clauses of that type—clauses that do not address class arbitration. What the panel should have asked, according to Alito, was “whether the FAA, maritime law, or New York law contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent.”159 Although Alito did not put it this way, defaults are rules of construction: they say what the parties’ legal situation is absent their expression of a contrary intent. As distinguished from the interpretation of a clause in a contract, a default is the type of legal rule that the Supreme Court might profitably clarify. And by characterizing the question as the correct rule of construction, Alito is able to conclude that the arbitration panel exceeded its powers and dispensed its own brand of justice.

Second, Alito argues that the default rule for class arbitration is found not in New York or maritime law, but in the Federal Arbitration Act. Alito gets to this conclusion via the principle that “the FAA imposes the basic precept that arbitration is a matter of consent, not coercion.”160 A corollary, he argues, is that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”161 In short, FAA requires a rule

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157 559 U.S. at 673.
158 Id. at 694-96 (Ginsburg, J., dissenting).
159 Id. at 674.

At the time Stolt-Nielsen was decided, it appeared that its rule applied to arbitration clauses that did not expressly address class arbitration. See, e.g., Three years later, however, the Court held that an implicit agreement to class arbitration sufficed. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013). After Oxford Health, so long as an arbitrator says she is interpreting the parties’ intent and there is any arguable basis for her finding that they authorized class arbitration, that decision complies with the FAA.
160 559 U.S. at 681 (internal quotation marks omitted).
161 Id. at 684.
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of construction—a default rule—that ensures party consent to class arbitration.

It is at this point that Alito’s analysis goes seriously awry. Arbitration clauses are drafted by sophisticated parties, who are likely to be highly responsive to the rules of construction that govern to their agreements. Consequently, no matter what the default with respect to class arbitration, we can expect drafters to write their arbitration clauses accordingly. Call an arbitration clause that does not expressly address class arbitration a “bare arbitration clause.” If the Court were to hold that a bare arbitration clause does authorize class arbitration, responsive drafters who wanted no class arbitration would write clauses expressly prohibiting it. If the Court were to hold that a bare agreement to arbitrate does not authorize class arbitration, responsive drafters who wanted class arbitration would write clauses expressly permitting it. Rules of construction do not only reflect party intent; they guide its expression. Because of the pragmatic priority of construction, any default would result in terms that capture the intent of sophisticated parties.

Of course not all parties are sophisticated. Employment and consumer contracts are typically drafted by highly responsive repeat players and then given to nonsophisticated parties on a take-it-or-leave-it basis. In such transactions it is usually the drafter—the employer or business—who prefers no class litigation or arbitration, and the likely recipient—the employee or consumer—who is more likely to benefit from class litigation or arbitration.162 These facts suggest adopting an information-forcing, or “penalty,” default.163 A default that goes against the interests of the drafting party gives that party a reason to share information with the other side—by contracting around the default. Setting the default legal effect of a bare arbitration clause as authorizing class arbitration would force drafters who want to avoid aggregated claims to say so in their agreements, thereby giving contract recipients notice that by signing the agreement they are signing away their right to participate in a class action. Such an information-forcing default could work to ensure the quality of parties’ consent to an arbitration clause that permits only bilateral arbitration.164

164 “Could work” because is not obvious that information-forcing defaults do any work in the consumer context. There is evidence that very few consumers read the agreements they sign. In a national study of 1,007 credit card holders, for example, the Consumer Financial Protection Bureau...
Alternatively or in addition, one might think about broader policy-based arguments for assigning one or another legal effect to a bare arbitration clause. Default constructions tend to stick, as parties who prefer a different legal outcome sometimes fail to say so. When assigning legal effects to bare arbitration clauses, a court should therefore ask whether class arbitration is a good thing—something society wants to encourage or discourage. Setting the legal meaning of “arbitration” one way or the other is likely to promote that result.\textsuperscript{165}

The problem is that Alito addresses none of these considerations. Immediately after stating that the FAA requires party consent to class arbitration, Alito suggests that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”\textsuperscript{166} This claim suggests an interpretive argument that the word “arbitration” conventionally means only bilateral arbitration, not class arbitration. Otherwise class arbitration would not “change[] the nature” of the arbitration parties had agreed to. But Alito provides no evidence that the conventional meaning of “arbitration” does not include class arbitration. His opinion contains no citations to dictionaries, and no evidence that most parties associate the term “arbitration” with bilateral, not class arbitration. The argument appears to be an interpretive one, about the conventional meaning of “arbitration.” But Alito presented no interpretive evidence to support it.

Instead, Alito points to the differences between bilateral and class arbitration and the greater costs, especially to defendants, of the latter. The class arbitrator resolves not a single dispute, but many at once; the presumption of privacy does not apply in class arbitration; the arbitration award binds absent parties; and “the commercial stakes of class action arbitration are comparable to those of class action litigation, even thought

\textsuperscript{165} These considerations, however, are outside the range of the FAA’s preemptive effects.

\textsuperscript{166} 559 U.S. at 685.
the scope of judicial review is much more limited.”

Having concluded that class arbitration is very different from individual arbitration—a proposition no one could deny—Alito returns to the question of the parties’ intent. “[W]e see the question as being whether the parties agreed to authorize class arbitration. Here, where the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”

But with no evidence that the word “arbitration” does not also refer to class arbitration, the conclusion is unwarranted.

What is going on here? Alito’s argument flips back and forth between treating the question as one of interpretation and considerations that are more relevant to the construction of bare arbitration clauses. At the outset of his argument, Alito suggests the issue is the parties’ intent, which can be found in conventional meaning of the word “arbitration.” But he never engages in an interpretive or semantic analysis of the term. Instead, Alito switches gears and asks what sort of arbitration we can expect most parties to prefer. These considerations are not relevant to the meaning of the word “arbitration,” or to a case in which the parties had stipulated that they had no intent one way or the other. They are, however, relevant to determining the rule of construction that most parties would prefer. If Alito were correct, construing a bare arbitration clauses to prohibit class arbitration would get most parties the terms they most likely want most of the time. Although he does not put it in these terms, Alito’s analysis is at best an argument for a certain majoritarian default.

But as the above analysis shows, this is less than half an argument for the best default rule. Although potential defendants prefer bilateral arbitration, potential plaintiffs, and especially those with small claims not worth the costs of individual arbitration, are likely to prefer class arbitration. It is not therefore obvious that bilateral arbitration corresponds to the preferences of most parties. Nor does Alito consider the fact that potential defendants are likely to be more responsiveness to the rule of construction, the possible advantages of an information forcing default, or the potential stickiness of any default—all of which point in the opposite direction of his collusion. Only by eliding the interpretation-

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167 *Id.* at 686-87.
168 *Id.* at 687.
169 For criticisms of Alito’s arguments that most parties do not want class arbitration, see Justice Breyer’s dissent in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 363-64 (2011) (criticizing Scalia’s repetition in the majority opinion of Alito’s *Stolt-Nielsen* analysis).
construction distinction is Alito able to cloak a problem of construction, together with the attendant policy implications, in the apparently neutral language of party consent. The result is not only a deeply confused opinion, but an outcome that disfavors class arbitration without adequately explaining why that is the right result.\footnote{By effectively defining “arbitration” as bilateral arbitration, \textit{Stolt-Nielsen} also set the stage for the Court’s holding a year later that California’s application of the unconscionability doctrine to render adhesive class arbitration waivers ineffective “interfered with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” \textit{AT&T Mobility LLC v. Concepcion}, 563 U.S. 333, 344 (2011).}

5.3 Sharon Steel v. Chase Manhattan Bank

For a helpful counterpoint, consider Judge Ralph Winter’s 1982 opinion for a Second Circuit panel in \textit{Sharon Steele Corp. v. Chase Manhattan Bank, N.A.}\footnote{691 F.2d 1039 (2d Cir. 1982).} This case was about the legal meaning of five separate successor obligor provisions in debt instruments issued by a single borrower. The clauses permitted the issuer to delegate its payment obligations to a purchaser of “all or substantially all” of the issuer’s assets. The question was whether, after the issuer had divested itself of over half its original operating assets in sales to purchasers A and B, the clauses applied to a sale of substantially all of its remaining assets to purchaser C. Delegating payment obligations to the last in a series of purchasers provided the obligee considerably less security than delegation to a single purchaser would.

Winter begins his analysis by observing that successor obligor clauses are a form of boilerplate that can be “found in virtually all indentures,” and that although the words in such clauses often differ, the industry requires a standard rule of construction for them. Winter quotes an American Bar Foundation report on debentures:

\begin{quote}
Since there is seldom any difference in the intended meaning [boilerplate] provisions are susceptible of standardized expression. The use of standardized language can result in a better and quicker understanding of those provisions and a substantial saving of time not only for the draftsman but also for the parties and all others who must comply with or refer to the indenture, including governmental bodies whose approval or authorization of the issuance of the securities is required by law.\footnote{Id. at 1048 (quoting American Bar Foundation, \textit{Commentaries on Model Debenture Indenture Provisions 1965 - Model Debenture Indenture}}} 
\end{quote}
Even without standard language, Winters suggests, such clauses should receive standard constructions. Thus legal effects of succor obligor provisions should not turn on the interpretation of the wording of the particular clause at issue or on the details of the transaction, but be fixed as a matter of law.

Boilerplate provisions are thus not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact. 174

In short, Winters argues that what was needed was a rule of construction that would turn standard successor interest clauses into terms of art, giving them a conventional legal meaning.

There are two consequences. First, the need for a generic rule of construction provides Winters a basis for affirming the trial court’s decision not to permit extrinsic evidence of the clauses’ meaning and not to submit the issue to the jury. 175 Second, and more significantly, Winters’s treatment of the question as one of construction, rather than interpretation, leads him to a different sort of reasoning. Although the literal meaning of “all or substantially all” suggested that the last in a series of sales satisfied the clause, that literal meaning “is not helpful apart from the reference to the underlying purpose to be served.” 176 In determining that purpose, Winters looks not to the specifics of the debt agreements at issue, but to the needs of the industry as a whole. Again turning to the ABA report, Winters finds that successor obligor clauses are designed both to permit debtors to sell their assets free of public debt, and to ensure that the debt continues to be held by an entity with enough income-producing assets to pay it off. 177 “[P]rotection for borrowers as well as for lenders may be fairly inferred from the nature of successor obligor clauses.” 178 From these general considerations, Winters concludes that “boilerplate successor obligor clauses do not permit assignment of the public debt to another party in the course of a liquidation unless ‘all or substantially all’ of the assets of the company at the time the plan of liquidation is determined upon are

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174 Id.
175 Id.
176 Id. at 1049.
177 Id. at 1050.
178 Id. at 1051.
transferred to a single purchaser.\textsuperscript{179} In other words, the clauses would not automatically permit transfer of the debt to the last buyer in the course of piecemeal liquidation.

Winters’s reasoning in this case stands in stark contrast to Alito’s in \textit{Stolt-Nielsen}. Both cases exemplify the way judicial construction can give ordinary words new legal meanings—what I have termed the semantic priority of judicial acts of construction. By identifying the legal effect of a standard type of clause, each case effectively changed the clause’s conventional meaning. After \textit{Stolt-Nielsen} a bare arbitration clause, absent evidence of the parties’ contrary intent, means that the parties have not assented to class arbitration; after \textit{Sharon Steel}, a standard successor obligor clause, absent evidence of the parties contrary intent, does not permit the transfer of the debt to the last purchaser of a company’s assets. But whereas Alito obscured the policy implications of the rule the Court was to adopt by framing the issue as one of interpretation, Winters recognized that the issue in \textit{Sharon Steel} was the construction of boilerplate language, and that because of the semantic priority of construction he needed to consider the requirements of the industry as a whole.

\textbf{Conclusion}

\textit{Stolt-Nielsen} and \textit{Sharon Steel} illustrate that when deciding contract cases courts would do well to attend to the difference between interpretation and construction, and to the complex relationship between the two. The rules of contract interpretation are designed to identify what parties say and intend. But a contract’s existence and content depend on more than the parties’ meanings and intentions. And it is sometimes impossible to interpret what the parties’ say and do without knowing something about the rule of construction that their words and actions satisfy or that the parties seek to satisfy with them. Nor should courts ignore the way that their individual acts of construction can generate new rules of construction going forward, and the effects of those rules on future parties.

\textsuperscript{179} Id.