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A Short History of the Interpretation-Construction Distinction

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A Short History of the Interpretation-Construction Distinction
Gregory Klass
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This document collects for ease of access and citation three of my posts on the New Private Law Blog, which chart the conceptual history of the interpretation-construction distinction. The posts begin with Francis Lieber’s 1939 introduction of the concepts, then describes Samual Williston’s 1920 account of the distinction in the first edition of Williston on Contracts, and concludes with Arthur Linton Corbin’s 1951 reconceptualization in the first edition of Corbin on Contracts. The posts identify two different conceptions of the distinction. Under the first (Lieber and Williston), construction supplements interpretation. Under the second (Corbin), the two activities complement one another. The complementary conception is the better one.

Interpretation and Construction 1: Francis Lieber
November 19, 2015

In several posts on DIRECTV v. Imburgia (here, here and here), I suggested that the interpretation-construction distinction illuminates some of the Supreme Court’s recent arbitration cases. The interpretation-construction distinction has recently been receiving more attention from con law theorists than from contract theorists. (See, e.g., here, here and here.) I’ve been working on a larger project on contract interpretation and construction, and want to use a few posts here to share some of what I’ve learned about the history and development of the distinction. What I have only scratches the surface. The history is a rich vein waiting to be mined. These posts describe only the outlines of the story as I currently understand it. In my telling, it has three protagonists: Francis Lieber, Samuel Williston and Arthur Linton Corbin.

The distinction between interpretation and construction is commonly traced to Lieber’s 1839 book, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics. Though Lieber’s account is not entirely satisfactory, it is a good place to start.

Successful communication, for Lieber, is 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

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which their author intended to convey, and of enabling others to derive from them the very same idea which the author intended to convey.” (23) Lieber suggests that with respect to authoritative legal texts, successful interpretation suffices to give us the legal rule, which is the rule intended by the legal authority who authored or authorized the text. (Throughout the book, Lieber assumes a command theory of law.)

But interpretation alone is not always enough to discover the correct legal rule. In the course of the book, Lieber 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 (55-56); (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” (56); 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.” (166) In each of these situations interpretation does not suffice to tell us what the legal rule is. We require supplemental rules or principles to reach the right legal result. Lieber terms these rules “construction.”

In politics, construction signifies generally the supplying of supposed or real imperfections, or insufficiencies of a text, according to proper principles and rules. By insufficiency, we understand, both imperfect provision for the cases, which might or ought to have been provided for, and the inadequateness of the text for cases which human wisdom could not foresee. (57)

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.” (121)

Construction, for Lieber, therefore serves a gap-filling and equitable function. Lieber maintains that “interpretation precedes construction” because construction steps in when interpretation, for one reason or another, runs out. Lieber therefore 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.” (56) When extending a law to unforeseen cases, one should look for parallels to those cases that the law does cover. “Construction is the building up with given elements, not the forcing of extraneous matter into a text.” (144) 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 the case when
construction is required to cure some injustice in the law or conform it to some superior authority, such as a statute to a constitution. (58-59)

The most interesting feature of Lieber’s theory, for my purposes, is that he views construction as supplemental. It operates only in what Larry Solum has called 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. The Interpretation-Construction Distinction, 27 Const. Comment. 95, 108 (2010). I think this supplemental view of construction is inadequate. In the next two posts I’ll explore subsequent developments and say why.

Interpretation and Construction 2: Samuel Williston
November 23, 2015

In my last post on the interpretation-construction distinction I described Francis Lieber’s supplemental view of construction, which can be found in his 1839 book, Legal and Political Hermeneutics. Lieber’s view is characterized by two claims. First, construction is supplemental: it steps in only when interpretation runs out. Second, the activity of construction is for the most part continuous with that of interpretation. “Construction is the building up with given elements, not the forcing of extraneous matter into a text.” (144) That said, Lieber also recognizes that sometimes construction departs from the spirit of the text, such as when the text yields to a superior legal principle.

It would be interesting to trace the influence of Lieber’s distinction between interpretation and construction throughout the next century of legal thought. Theophilus Parsons, for example, discusses the categories in his 1855 Law of Contract. James Bradley Thayer, in his 1898 Treatise on Evidence, expressly declines to adopt Lieber’s distinction, arguing that “neither common usage nor practical convenience in legal discussions support [it]”. (411 n.2) For my purposes, things get interesting with the 1920 first edition of Samuel Williston’s The Law of Contracts. In section 602, “Construction and interpretation,” Williston makes what I view as two improvements on Lieber’s theory.

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.” (1160) Better, then, to limit what we call “construction” to activities fully 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.” (1161) 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 is guided by some other principle or purpose.

(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” (1161). I would say this is at best a majoritarian rule of construction, and better supported by considerations of fairness and incentives than by interpretive fidelity. But that’s a subject for another post.)

That said, Williston follows Lieber in conceiving of 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” (1161). Lieber and Williston both view rules of construction as stepping in when interpretation runs out—which I would call a supplemental conception of construction.

Williston’s second innovation is to suggest that neither interpretation nor construction is enough to get to the legal rule. Each concerns itself “with the legal meaning of the contract, not with its legal effect after that meaning has been discovered.” *Id.* 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.” (1161) A similar claim appears again in the comments to section 226 of the First Restatement, “What is interpretation”: “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 identifies three sorts of rules: (1) interpretation, which aims to get at the author’s intention; (2) construction, which applies purely non-interpretive principles and steps in when interpretation runs out, e.g., in cases of ambiguity; and (3) the substantive law of contract, which specifies legal effects based on the work of interpretation and construction. The addition of (3) provides the tools for rejecting, at least with respect to contracts, Lieber’s implicit reliance on a command theory of law. The parties’ legal obligations are not simply the obligations they agree to. We need what Hart would call a “rule of recognition” to translate their agreement into legal consequences.
Interpretation and construction 3: Arthur Linton Corbin
November 25, 2015

In this third post on the interpretation-construction distinction, I introduce the hero of my story: Arthur Linton Corbin. Corbin builds on Francis Lieber’s and Samuel Williston’s work (which I have discussed here and here) to articulate more perspicacious conceptions of interpretation and construction. Whereas both Williston and Lieber viewed construction as supplementing interpretation, Corbin sees the two activities as complementary. He gets there by collapsing Williston’s three categories of rules into two.

Corbin’s 1951 treatise on contract law provides, as far as I know, the first clear articulation of the complementary conception. Corbin describes interpretation and construction as interlocking activities, both 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. (§ 534 at 7).

Whereas Williston distinguished between, on the one hand, legal rules that resolve ambiguities or fill gaps and, on the other, determining the legal effect of an unambiguous speech act, Corbin here recognizes that those two activities are not different in kind. Both are means of determining the legal effect of what the parties said and did. Both are therefore properly called 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 interpretation. Lieber and Williston conceived of construction as stepping in only when interpretation runs out. Corbin, on the contrary, suggests that construction is always required. “[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, meanings or intentions of what legal actors have what legal effects. 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. Though 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 first to the parties’ intentions and agreement. Generally speaking, contract law enforces the agreement that the parties intended. Such a rule is a rule of construction.

Of course that is only generally speaking. Other rules of construction—the ones Lieber and Williston emphasize, and that Corbin also discusses—hew less closely to the parties’ (or a legislature’s, judge’s, or group of constitutional framer’s) expressed intent. In the law of contracts, these include generic rules of construction like contra proferentem 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. Such extratextual rules of construction are required when a legal text is ambiguous, contradictory or gappy, when the situation is one that, we believe, lawmakers did not foresee, or when the text’s meaning contravenes some higher legal authority.

Corbin’s complementary conception of interpretation and construction also suggests taking care when using Solum’s idea of a “construction zone.” The term is a nice way to describe the situation when interpretation produces no result—when an authoritative text contains gaps or ambiguities. But the idea of a “construction zone” should not mislead us into thinking that that is the only place where construction happens. That would be to fall back into Lieber and Williston’s overly narrow, supplemental conceptions of construction. Drawing conclusions about what the law is from a legal text—or more generally, from what legal actors say and do—always requires construction. In this sense, we are always in the construction zone. This is not a criticism of Solum. As he writes, “construction also occurs in situations where it is overlooked or invisible, because interpretation has already done the work. Theoretically, this occurs when doctrine mirrors the semantic content of the text.” The Interpretation-Construction Distinction, 27 Const. Comment. 95, 107 (2010). But “doctrine only mirrors the semantic content of the text” when a rule of construction says it does. Even when a text’s meaning appears to fully determine the legal rule, it does so only because a rule of construction says it should.