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Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin

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HERMENEUTICS AND CONTRACT DEFAULT RULES: AN ESSAY ON LIEBER AND CORBIN

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The most provocative debate in contemporary contract law scholarship concerns default rule analysis.[1] Dozens of law review articles have been devoted to this puzzle regarding the manner in which courts do or should fill gaps in incomplete contracts.[2] The timing and course of this debate might have been very different, however, except for an accident of intellectual history.

The eminent but neglected nineteenth-century scholar Francis Lieber elaborated a comprehensive solution to the default rules puzzle by first distinguishing the judicial acts of contract interpretation and construction, and then by developing principles of construction with which to choose default rules.[3] The eminent and venerated twentieth-century treatise writer Arthur Corbin knew about Lieber's enterprise, but in his treatise on contracts, dismissed Lieber's distinction in a footnote and never explored the rest of Lieber's hermeneutics.[4] Corbin could have addressed Lieber in his text, however, and if he had, much of the professorial energy expended in the prevailing default rules debate might have been conserved.

Lieber and Corbin both understood contract interpretation to mean the act of determining whether the expressions of a contract (in acts or words) speak to a dispute and, if so, what meaning the parties to a contract intended to be assigned to their expressions. Lieber defined

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[1] Since there are virtually no other debates in contemporary contract law scholarship, *see* Ian Ayres & Robert Gertner, *Strategic Contractual Interpretation and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 730 & nn.3 - 4 (1992), the adjective "most" in this sentence may be meaningless, yet the debate is provocative.

[2] *E.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261 (1985); Symposium, *Default Rules and Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L.J. 1 (1994).

[3] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS 43 -137 (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), *republished in* 16 CARDOZO L. REV. 1883, 1921-88 (1995). [In subsequent citations, the page number as it appears in the republication will be given in brackets following the page citation to the third edition.]

[4] 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS s 534, at 13 n.11 (1960).

contract construction to mean the act of determining how a contract should be treated when either the expressions do not speak to a dispute or they speak to it in a manner inconsistent with some superior principle. He then developed a set of hermeneutic principles that closely linked the acts of interpretation and construction in a dedication to understanding and implementing the "spirit and true import" of the expressions.[5]

Corbin broadened Lieber's definition of contract construction to mean the act of determining what legal consequences are to follow from either the apprehension of the meaning of the expressions in a contract or a determination that the expressions do not speak to a dispute. Corbin's definition of construction broadened Lieber's definition by eroding the close link Lieber had attempted to maintain between interpretation and construction and using the label "construction" to capture all judicial determinations of the legal operation of a contract. Corbin may have done this to facilitate the development of a descriptively accurate framework that would accommodate the many ways in which contract law rules can or do yield results in conflict with the intentions of parties as revealed in interpreting their expressions. While so adapting Lieber's distinction was doctrinally sound, after doing so, Corbin gave no further consideration to Lieber's principles of construction, condemning them to the dustbins of intellectual history and contract law theory.

Though Lieber's work was broad and ambitious -- reaching all fields of legal analysis -- it was rather limited with respect to the law of contracts specifically. Given also that Lieber was not formally trained in the common law, it is not surprising that his work would require modification for application to the law of contracts. Even so, Lieber's principles of construction provide an analytical framework with which to understand and guide the way judges choose rules that actually or potentially conflict with the intentions of parties in contract disputes. Because Lieber's principles constitute foundational ideas, a return to them may be both efficient in conserving intellectual energy and profitable in providing fresh insights into the problems to which the ideas apply.[6] By reviewing the distinction between interpretation and construction as Corbin adapted it from Lieber in Part I and then showing how Lieber's principles of construction bear directly on the prevailing default rules debate in Part II, this Essay invites a return to those foundational ideas and the addition of hermeneutics to the default rules debate.[7]

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[5] LIEBER, *supra* note 3, at 53 [at 1927].

[6] Lieber's hermeneutic principles constitute the first full elaboration of the distinction between contract interpretation and construction, although the practical underpinnings of the distinction date to Lord Mansfield's statement of constructive conditions of exchange in Kingston v. Preston, *reported in* Jones v. Barkley, 99 Eng. Rep. 434, 437-38 (K.B. 1781) (reversing early common law rule that promises not made expressly conditional on the prior performance of a counterparty's performance were independent so that each party could sue to enforce a counterparty's promise even if that party had not itself performed its side of the bargain).

[7] Contract law scholars outside the default rules debate may also profit from a return to Lieber's foundational ideas because Lieber's illumination of the distinction between interpretation and construction may justify its rejuvenation. *See* E. ALLAN FARNSWORTH, CONTRACTS s 7.7, at 496 - 97 (2d ed. 1990) (stating that the distinction is too difficult to maintain in practice); *see also* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS s 3 -7, at 160 (3d ed. 1987) (same).

I. Interpretation and Construction

Lieber and Corbin shared basic views with respect to the problem of interpretation, though even Corbin's articulation of this part of the dichotomy was more precisely tailored for application specifically to the law of contracts. For Lieber, interpretation "can only take place, if the text conveys some meaning."[8] And if a text does convey some relevant meaning that can be interpreted to resolve a dispute arising under it, then no question of construction arises. Corbin agreed that interpretation relates to understanding " language itself -- to the symbols (the words and acts) of expression."[9] He did not agree, however, that the step of interpretation alone could resolve a contract dispute, except to the extent that interpretation led to the conclusion that no contract existed.

Corbin denied that a court would ever reach the stage of construction without first having decided, in the act of interpretation, that a contract had been formed. Instead, expressions must first be interpreted to determine whether the elements of a contract -- offer, acceptance, and consideration, for example -- exist. That determination requires the interpretation of, and that meaning be given to, the parties' expressions before ascertaining their legal operation. If a court decides in this process of interpretation that a purported expression of an offer, for example, is instead only a quotation of prices and the recipient should have understood that, then "it has no legal operation and the recipient got no power of acceptance. . . . In [such a case] the problem of 'construction' of a contract [does not] arise."[10]

Thus Corbin both sharpens and limits Lieber's conception of interpretation by saying first that interpretation will be dispositive in cases where there is no contract, and second, that interpretation alone cannot be conclusive in resolving a contract dispute where there is a contract. In effect, Corbin tailors Lieber's first part of the dichotomy for application specifically to contract law: the step of interpretation consists of ascertaining the meaning of the parties' expressions and includes the threshold determination of whether a contract exists. All steps beyond ascertaining the meaning of expressions and the determination that a contract exists involve acts of construction to ascertain the legal effect of that meaning.

The critical differences between Lieber's and Corbin's distinction therefore begin with the circumstances under which one moves from interpretation to construction. In addition to insisting that one should not move to construction unless interpretation is insufficient to resolve a dispute, Lieber identified four circumstances in which a judge would need to move (and be justified in moving) from the step of interpretation to the step of construction: when the contract is "inadequate[ ] . . . [to address] cases which human wisdom could not foresee";[11] when the contract makes "imperfect provision . . . [for cases] which might . . . have been provided for";[12] when the contract contains contradictions;[13] and when the contract text must be subordinated to

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[8] LIEBER, *supra* note 3, at 43 [at 1921].
[9] CORBIN, *supra* note 4, s 534, at 8.
[10] *Id*. at 10 -11.
[11] LIEBER, *supra* note 3, at 44 [at 1922].
[12] *Id*. (discussing this concept in terms of politics).
[13] *Id*.

some "superior authority," which Lieber characterized narrowly as consisting of certain fundamental issues of morality.[14]

For Lieber, construction means "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."[15] Thus Lieber draws one of his two "proper principles" of construction: "construction signifies the discovery of the spirit, principles, and rules that ought to guide us according to the text."[16] In constructing texts of inferior authority, moreover, "the problem . . . is to cause that which is to be construed to agree with" the superior principle at stake.[17] In that case, according to Lieber's second "proper principle" of construction, "construction is the causing of the text to agree and harmonize with the demands or principles of superior authority."[18]

Lieber is thus emphatic about linking the act of construction to the spirit or true import of the text. Thus, he declares, that

> [i]t is . . . construction alone which saves us . . . from sacrificing the spirit of a text or the object, to the letter of the text, or to the means by which that object was to be obtained. And, without construction . . . texts containing rules of actions . . . would . . . [often] become fearfully destructive to the best and wisest intentions [and], frequently, produce the very opposite of what it was purposed to effect.[19]

In addition to broadening the circumstances in which construction is necessary, Corbin also disagreed with Lieber's thesis that the act of construction must bear some close relation to the spirit or true import of the contract text. On the contrary, for Corbin, the act of construction has no necessary connection with the intention of the parties. Thus:

> [w]hen a court gives a construction to the contract as that is affected by events subsequent to its making and not foreseen by the parties, it is departing very far from mere interpretation of their symbols of expression, although even then it may claim somewhat erroneously to be giving effect to the "intention" of the parties.[20] More generally, "[w]hen a court is filling gaps in the terms of an agreement with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed, the judicial process should not be called interpretation."[21] That step in the judicial process should not, and indeed cannot, be called interpretation precisely because it has no necessary connection with the intentions of the parties, and in cases of unforeseen

[14] *Id*. at 45, 47 [at 1922-23].
[15] *Id*. at 44 [at 1921].
[16] *Id*. at 46 [at 1923].
[17] *Id*. at 47 [at 1923].
[18] *Id*. at 45 [at 1922].
[19] *Id*.
[20] CORBIN, *supra* note 4, s 534, at 9.
[21] *Id*. at 11.

contingencies, cannot possibly have any connection with those intentions.

Consider Corbin's example of a contract providing expressly that goods to be bought and sold must meet with the personal satisfaction of the buyer.[22] As a matter of interpretation, this phrase raises no uncertainty for either Corbin or Lieber. By this phrase, the parties mean that the buyer is to be satisfied, personally. Unless one contrives to see some superior principle of morality at stake in this clause, Lieber would decide that the step of interpretation is as far as a judge would need to go. In contrast, whether or not the clause implicates any superior principle of morality, Corbin would still insist that the step of construction remained to be taken. For it is not only that all judicial steps beyond ascertaining the meaning of words in a contract are acts of construction, but also that acts of construction are required in all cases where the act of interpretation shows there is a contract.

Corbin's next step into the act of construction, moreover, is not constrained, as it is for Lieber, by an obedience to the spirit or true import of the text. Thus where public policy dictates that a certain contract clause be understood in a certain way, the spirit or true import of the text is irrelevant. Corbin would therefore cheerfully go along with a judicial construction declaring that the legal operation of a personal satisfaction clause means the satisfaction of a reasonable person. Lieber, in contrast, would object that this act is not consonant with the spirit or true import of the language. In other words, whereas Lieber was utterly concerned that construction is necessary to avoid impairing the parties' intentions, Corbin insists that construction is necessary precisely to enable judges to impair the parties' intentions in appropriate cases.

Consider this example from Lieber.[23] Thomas Cumming prepares his will naming T. Cumming, his English nephew, as a beneficiary. At the time Thomas Cumming prepared the will, however, and unbeknownst to him, the nephew was dead and that nephew's son, another T. Cumming, had been born and was alive. In resolving the (inevitable) dispute over the will, according to Lieber, two steps are necessary. As a matter of interpretation, "according to the meaning [Thomas] attached to [the words], he cannot have meant T. Cumming the youngest."[24] That being so, "construction becomes necessary [[[because] interpretation is insufficient" to resolve the dispute.[25] As a matter of construction, Lieber therefore asks, "how shall we draw our conclusions and apply them to the subject, which lies beyond the direct expression of the text."[26] His answer: "elements afforded us by the text will lead us to the just and true conclusion, that Thomas Cumming the eldest meant to leave the sum in question to the English branch of his family, and that T. Cumming the youngest ought to receive it."[27]

Corbin would disagree with Lieber's analysis. Whereas Lieber believed that "construction

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[22] *Id*. at 13 -14 (citing and criticizing Inman Mfg. Co. v. American Cereal Co., 110 N.W. 287 (Iowa 1907)).
[23] LIEBER, *supra* note 3, at 50 -51 [at 1926-27].
[24] *Id*. at 51 [at 1926].
[25] *Id*. [at 1927].
[26] *Id*. [at 1926-27].
[27] *Id*. [at 1927].

becomes necessary if interpretation is insufficient,"[28] Corbin regarded construction as necessary even where interpretation enables a determination of intended meaning. Construction is deciding the legal operation of the contract (or will, in Lieber's example) once the meaning of the words is understood. Lieber's formulation of the interpretation/construction distinction leads him to conclude that there is only one choice -- in his will example, Lieber's "construction" is dedicated to understanding the testator's intent based on the text. Corbin understood that Lieber's choice is only one of many possible choices (though Lieber's choice seems eminently sound).[29] And it is making that choice, according to all available legal materials, that constitutes for Corbin the act of construction.[30] That act has no necessary relationship to the intentions of the parties (or testator), though Lieber's formulation insists that it must.[31]

Lieber and Corbin both recognized that the lines between the distinction they were drawing could sometimes be difficult to maintain. Thus Corbin noted that interpretation and construction are [not] wholly independent of each other. Just as construction must begin with interpretation . . . 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.[32] And Lieber acknowledged that "interpretation and construction must closely approach to one another; but still the distinction is clear."[33]

Lieber and Corbin were also each cautious about drawing the distinction between interpretation and construction. Corbin acknowledged that the distinction "is by no means a necessary one."[34] Lieber expressed deeper pangs: "It was not without repeatedly weighing the subject, that I first ventured upon the distinction between interpretation and construction; for, if clear distinction is one of the efficient means to arrive at truth, it is equally true that subtleties impede instead of aiding in seizing upon it."[35]

Lieber nevertheless believed he had identified a distinction of potential utility, advertising

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[28] *Id*.
[29] *Cf. infra* note 95 (use of *cy pres* doctrine in the "Girard College" case).
[30] *See* CORBIN, *supra* note 4, s 534, at 9 n.7 (noting that such "questions are not answered by 'interpretation.' They all involve the 'legal operation' of the contract after its meaning has been found by interpretation, a legal operation to be determined by long study of the common law, equity and statutes.").
[31] In Corbin's analogous example, a contract provides "We promise to pay ... $40,000" to C and "the signatures being thus, 'A three fifths; B two fifths." The first issue is whether A promised to pay $40,000 or $24,000 and whether B promised to pay $40,000 or $16,000. That is an issue of interpretation. If in the act of interpretation one decides that A and B each promised to pay $40,000, other issues might arise, including whether C can get a joint judgment for $40,000, two separate judgments for $40,000, the effect of releases, death, and so on, all of which are questions of construction. *Id.*
[32] *Id*. at 12.
[33] LIEBER, *supra* note 3, at 53 [at 1928].
[34] CORBIN, *supra* note 4, s 534, at 13.
[35] LIEBER, *supra* note 3, at 49 [at 1925].

that since he had articulated it, "two of our most distinguished lawyers have fully concurred in the distinction between the two, and have accepted it" and that as of 1860 the distinction was "very generally adopted."[36] Hammond, who edited the 1880 version of Lieber's work on hermeneutics, softened this claim: "While [many have adopted the distinction,] it can hardly be said to have been generally accepted by legal writers. The two words are still too often used interchangeably . . . ."[37] Corbin recognized this as well, noting that the concepts "are often used in the same sense"[38] and that the distinction "is very often not made."[39]

Corbin may therefore have departed from Lieber's distinction precisely because he had noticed that it had not caught fire -- he dismissed Lieber's distinction on the grounds that it was "supported by 'neither common usage nor practical convenience.' "[40] In contrast, Corbin believed that the distinction he drew was of "practical convenience."[41] In particular, Corbin justified his formulation of the distinction on two grounds: "First, 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";[42] and second, it "is consistent with that made in other chapters of [Corbin's] treatise and with the usage of the . . . [Restatement]."[43] In other words, Corbin was seeking to capture, more accurately than Lieber had done, the manner in which courts actually decided contracts disputes, thereby promoting the doctrinal coherence of contract law.

Lieber's formulation distinctly privileged a very broad conception of freedom of contract by tying all acts of construction back to the spirit and true import of the parties' expressions.[44] But such an infinite conception of freedom of contract is hard to reconcile with the common law. For there are numerous rules of contract law, constituting its very fabric, that cannot be changed no matter what the parties might say.[45] While this was of course already true when Lieber wrote, greater invasions upon freedom of contract accelerated in the decades after he developed his

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[36] *Id*. at 50 & n.* [at 1925 & n.9].
[37] *Id*. at 50 n.5 [at 1926 n.9] (citation omitted).
[38] CORBIN, *supra* note 4, s 534, at 7.
[39] *Id*. at 13.
[40] *Id*. at 13 n.11 (citation omitted).
[41] *Id*.
[42] *Id*. at 13.
[43] *Id*.
[44] Indeed, Lieber emphasized the special importance of linking the act of construction to the spirit and true import of the text in the case of "a compact, or solemn agreement." LIEBER, *supra* note 3, at 136 [at 1988].
[45] *See* W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISCIPLINARY L.J. 29, 32 (1994):

> [T]here are many laws of contract that cannot be contractually changed: the requirements of enforceability -- consideration, promissory estoppel, etc.; the parol evidence rule and the statute of frauds; the rules for determining the relative rights and duties of assignors, assignees, and third-party beneficiaries; the defenses of undue influence, conflict with public policy, unilateral and mutual mistake; and many, although not all, of the rules of offer and acceptance. And the changes that can be made in remedies by contract are limited ....

distinction. The proliferation of standard form contracts, the consequent development of the idea of contracts of adhesion and the later evolution of the doctrine of unconscionability would explode the limits of Lieber's distinction.[46] As a master treatise writer and contracts scholar, therefore, Corbin formulated a distinction between interpretation and construction that would accommodate both the historical background fabric of contract law, as well as contemporary assaults upon the abstract primacy of freedom of contract.

Lieber's implicit embrace of such a strong conception of freedom of contract is a particular instance of Professor Carrington's broader point that Lieber, being deeply committed to individual rights, sought to understand the judicial role as far more limited than was widely believed during the period of Jacksonian populism in which he wrote.[47] The close link Lieber sought to maintain between interpretation and construction reflects his theory of language that words and collections of words contain a unitary meaning capable of being discovered.[48] That theory in turn can be read to make plausible strong claims of judicial objectivity and legal determinacy, for judges simply uncover and then give effect to the meaning of expressions according to a fixed set of rules. As a pioneer of legal realism, Corbin understood the judicial role to involve a greater degree of normative discretion than is implied by this way of understanding Lieber. Accordingly, Corbin's rejection of Lieber's distinction between interpretation and construction may not only recognize that much of contract law depends on the expressions of contracting parties along with the social context in which they acted, but that equally critical is the social subsystem of contract law in which judges resolve contract disputes between contracting parties.[49]

II. Principles of Construction

If Corbin's adaptation of Lieber's distinction between contract interpretation and construction offered a more accurate descriptive account of what judges actually do in contracts cases and recognized the normative choices inherent in that activity, Lieber's principles of contract construction nevertheless offered remarkably prescient prescriptions for the construction process.

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[46] *See* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 834 -38 & n.3 (1964) (elaborating Corbin's distinction between interpretation and construction); *id*. at 855 -59 (discussing contracts of adhesion and doctrine of unconscionability).

[47] *See* Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135 (1995).

[48] LIEBER, *supra* note 3, at 74 [at 1943].

[49] A more cynical explanation for the way Corbin formulated the distinction is to recognize how it would improve his position in debates with Williston in arguing against rigid adherence to the parol evidence rule. By insisting on a sharp distinction and putting all questions of meaning on the side of interpretation, Corbin could apply the parol evidence rule narrowly, at least in terms of what information the trier of fact gets to review. *See* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189 (1965) (the parol evidence rule "has no application in the process of interpretation of a written instrument"). This is a cynical view, however, because Williston adopted a similar distinction (though without Corbin's alacrity). *See generally* 4 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS s 602 (3d ed. 1961).

Lieber justified the need for such principles: "For the very reason that construction endeavors to arrive at conclusions beyond the absolute sense of the text, and that it is dangerous on this account, we must strive the more anxiously to find out safe rules, to guide us on the dangerous path."[50]

Corbin may have decided that Lieber's principles of construction were unhelpful because they were bound up with the limits of Lieber's underlying distinction. Or, he may have neglected them either because he did not regard the act of judicial construction as "dangerous" in the way Lieber suggested, or because he did not regard Lieber's principles as capable of constraining judicial discretion. But it is precisely a concern about that aspect of the judicial role to which Lieber's principles may be addressed, and they are not as strictly formal as Corbin's neglect of them may be taken to imply. For when Lieber's principles of construction are applied within Corbin's distinction between interpretation and construction, they offer a framework for determining how contract law's background rules should operate. As a result, participants in the prevailing default rules debate would profit by examining the number of possible ways that Lieber's principles of construction can contribute to the debate, the most general of which I will sketch below.[51]

For both Corbin and Lieber, the first step a judge must take in resolving a dispute concerning the expressions of a contract is to read (or hear) those expressions. In this step the judge must interpret those expressions.[52] The judge will determine that the expressions either address the dispute in some way or are silent concerning it. If in this interpretive step the judge determines that the expressions are silent with respect to the dispute or imperfectly address it, he must in the next step supply terms to fill the gap discovered by interpretation.[53]

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[50] LIEBER, *supra* note 3, at 53 [at 1927-28].

[51] I leave it to individual scholars to discover the ways in which Lieber's hermeneutics relate specifically to their own work, though I note strong points of consonance between Lieber's ideas and those of, among others, Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 829 (1992) (Barnett's conventionalist default rules thesis); Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISCIPLINARY L.J. 115, 129 (1994) (Burton's notion that default rules are necessary once the "authority of a contract" is "exhausted"); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1818 (1991) (Charny's "framework for determining interpretive conventions"); Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 MICH. L. REV. 489, 508 -11 (1989) (Craswell's economic approach); and Dennis Patterson, *The Pseudo-Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISCIPLINARY L.J. 236, 285 - 86 (1994) (Patterson's search for legal justifications for default rules).

[52] To be true to Corbin, by "judge," with respect to questions of fact, I mean equally the jury, as the case may be. *See* CORBIN, *supra* note 4.

[53] In glossing over the step of interpretation I do not mean to suggest any simplicity in it (I recognize quite the opposite). I do so because in the default rules context, questions of construction dominate, and it is to that end that I am attempting to adapt Lieber's hermeneutics. Note though, that Lieber's hermeneutics include principles of interpretation as well, on which contract law scholars may also wish to draw.

In the act of supplying a contract term the judge is engaged in an act of construction, as Corbin defined it, and in doing so would profit by appealing to Lieber's principles of construction. Lieber classified the legitimate species of construction as close, comprehensive and transcendent, and classified as illegitimate a species of construction called extravagant.[54] Close construction is the " directest possible application of the text, or the principles it involves, to new or unprovided cases, or to contradictory parts, in short, to subjects which lie beyond the words of the text."[55] Comprehensive construction is "an extensive application of the text, or the principles it involves, to new, unprovided, or not sufficiently specified cases or contradictions."[56] Transcendent construction is "derived from, or founded upon, a principle superior to the text, and, nevertheless aims at deciding subjects belonging to the province of that text."[57]

> *Extravagant construction*
> carries the effect of the text beyond its true limits, and, therefore, is not any longer genuine construction, as [transcendent construction] becomes of a more and more doubtful character the more it approaches to this. The difference between the two is this, that the former remains, in spite of its transcendency, within the spirit of the . . . document to be construed; whilst extravagant construction abandons it.[58]

Here there is an apparent tension in Lieber's principles of construction. Lieber's definition of transcendent construction permits departures from the spirit or true import of the text when it conflicts with a superior principle. This definition would accommodate contract law's background rules using Corbin's distinction between interpretation and construction. But Lieber's further discussion of extravagant construction appears to deny that accommodation by limiting legitimate transcendent construction to that which is "within the spirit" of the contract. One way to reconcile these points is to insist that by entering into a contract the parties have also consented to be bound by the background rules.[59] In that way, a judge applying those background rules even against the meaning of the parties' expressions may be seen as acting in accordance with the spirit or true import of those expressions.

Understood this way, Lieber argues that the intentions of parties are to be given greatest respect in close construction, less respect in comprehensive construction, and least respect in transcendent construction. The applicable species of construction in particular contract disputes in turn depends on the source of the need for construction.[60] The source of the need for

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[54] Lieber classified the species of interpretation along analogous lines. LIEBER, *supra* note 3, at 54 - 62 [at 1928-34] (identifying the species of interpretation as close, extensive, predestined, and authentic).
[55] *Id*. at 65 [at 1936] (emphasis added).
[56] *Id*. (emphasis added).
[57] *Id*. at 65 - 66 [at 1936] (emphasis added).
[58] *Id*. at 69 [at 1939].
[59] *See* Barnett, *supra* note 51.
[60] Recall that Lieber identified four circumstances that called for and justified construction. *See supra* text accompanying notes 11-14. I am linking those circumstances to Lieber's species of construction although he did not do so. My adaptation is analogous to the point made by

construction consists of a combination of external and internal conditions with respect to the contingency at issue in a dispute.[61]

External conditions are those outside the contractual relationship and text with respect to the contingency at issue. The first of these is the degree of foreseeability. By this I mean to identify a range of probabilities concerning states of the world, defined in terms of transactions costs and not in a strictly legal sense.[62] One end of the range consists of contingencies which are "actually unforeseeable" in some abstract sense, as well as those that are "functionally unforeseeable" -- contingencies which are too improbable or of too little magnitude in a given setting to warrant the expense of addressing expressly. The other end of the range consists of contingencies sufficiently probable or of sufficiently high magnitude to warrant the expense of addressing expressly. The second external condition is superior principles. These include the social or policy values (such as fairness, certainty, and efficiency) embedded in the background rules of contract and other applicable law, as well as the object of contract law in particular to minimize the costs of transacting and dispute resolution, as by promoting good drafting and fair negotiations.

Internal conditions are those inside the contractual relationship or text with respect to the contingency at issue. The first of these is the degree to which expressions in the contract address the contingency. The expressions either do not provide for the contingency or insufficiently provide for it, by which I mean only that the expressions were not entirely silent concerning it, but address it in some imperfect way.[63] The second internal condition is the degree of strategic behavior by the parties, which can either be absent or, if present, of two kinds.[64] Unilateral strategic behavior is the withholding by one party of information, the disclosure of which would be optimal according to some normative criterion such as efficiency.[65] Bilateral strategic

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Professors Ayres and Gertner that calls for specifying default rules based on the source of the need for them. *See* Ayres & Gertner, *supra* note 2, at 92, 127.

[61] A separate table contains a schematic representation of the accompanying discussion. *See infra* table accompanying note 96.

[62] I note that in this way I am linking high transactions costs and lack of foreseeability as a cause of the need for construction. At lesser levels of generality one might choose to treat them separately. *E.g.*, Ayres & Gertner, *supra* note 2, at 94 n.34. At this level of generality I am also not taking into account the distinction identified by Professors Ayres and Gertner between contingent contract incompleteness and obligational contract incompleteness. *See* Ayres & Gertner, *supra* note 1.

[63] The divide between "insufficiently provided for" and "unprovided for" will undoubtedly often be blurry. *E.g.*, Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 139 N.E. 470, 470 (N.Y. 1923) (Cardozo, J.) (contract contained formula for determining price but did not specify the periods of time during which the price would apply). Yet that should not undermine the value of Lieber's principles of construction.

[64] Lieber did not analyze the role strategic behavior would play in his hermeneutics but on the contrary, implicitly assumed that the parties would have comported themselves in good faith. *See* LIEBER, *supra* note 3, at 110 [at 1969] ("Men who use words, even with the best intent and with great care as well as skill ....").

[65] *See* Ayres & Gertner, *supra* note 2, at 94.

behavior is a joint refusal to address some matter and thereby to shift the costs of resolving it forward to the subsidized judicial system.[66] The third internal condition is the degree to which the expressions in the contract text conflict with a superior principle.

A. Close Construction

Close construction is called for when the gap-revealing contingency could not be foreseen by the parties ex ante (as Lieber said, the contract is inadequate to address "cases which human wisdom could not foresee").[67] This "unforeseeability" should be taken to include actual unforeseeability and functional unforeseeability -- that is, the circumstances do not justify the expense of explicitly addressing the contingency. Lieber's prescription is the "directest possible application of the text."[68] It therefore implies a rule tailored to the particular situation of the parties, determined as nearly as may be from the text of their contract. In other words it specifies filling gaps according to how the particular parties would have provided for a contingency had it been foreseeable, a version of what have lately been called tailored default rules.[69]

In close construction a tailored default rule is justified to provide maximal protection of the intentions of the parties. This is because the source of the need for construction is the external condition of the contingency's unforeseeability, whether actual or functional, and the internal condition of the contingency being unprovided for. And since there is also an absence of strategic behavior, a tailored default rule poses no adverse incentive effects on the negotiating or drafting of future contracts.

Consider a three-year requirements contract for the purchase and sale of coal at a variable price tied to a market benchmark. The buyer is a regulated public utility whose generating facility had been operating at an average 60% of capacity for the three years prior to the contract and based on historical growth in its existing market could be expected to operate at up to 75% of capacity during the contract term. At the beginning of the contract's second year, the buyer's regulator orders the buyer to begin serving an additional geographic market area and solely as a result of that regulatory action the buyer's production rises from 60% of its capacity to 90% of its capacity. The regulator had never before taken such a step with respect to any utility under its jurisdiction. The seller refuses to supply the buyer's additional requirements and the buyer sues. The gap to be filled by construction is the quantity of coal to be bought and sold under the contract.[70]

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[66] *See id*. at 93, 96.

[67] LIEBER, *supra* note 3, at 44 [at 1922]. This is one of the circumstances Lieber identified as calling for and justifying the act of construction, *see supra* text accompanying notes 11-14, which I am linking to his hermeneutical scheme, though Lieber did not do so. *See supra* note 60 and accompanying text.

[68] LIEBER, *supra* note 3, at 65 [at 1936].

[69] *See* Ayres & Gertner, *supra* note 2, at 89 (noting that "default terms should be set at what the parties would have wanted").

[70] Because the contract sets a variable price based on a market benchmark, it poses no issue as to price.

Because the regulator had never before taken such action, the regulatory mandate is an external condition that is unforeseeable and it was reasonable for neither party to incur the expense of addressing the possibility of expanded capacity being caused by regulatory expansion of the buyer's market. Close construction and a tailored default rule would therefore be indicated. The parties did not contemplate under any circumstance buyer operating at 90% of its capacity so the quantity should not be based on that level. Nor did they contemplate a limit of demand based on the buyer operating at 60% of its capacity, however, although the contemplated growth of up to 75% of the buyer's operating capacity was based solely on increased demand from the buyer's preexisting market. Although the increase to 90% of capacity has not been caused by increased demand in the buyer's preexisting market, since the seller was willing to supply coal based on the buyer operating at 75% of its capacity, the source of the increase in demand up to that level can reasonably be ignored. Accordingly, the quantity term under these circumstances should be filled in based on the buyer operating at 75% of its capacity.

B. Comprehensive Construction

Comprehensive construction is called for when the parties might have provided for the gap-revealing contingency but either left it unprovided for or insufficiently provided for (as Lieber said, the contract makes "imperfect provision" for cases "which might have been provided for").[71] What "might have been provided for" should be understood to mean contingencies that are neither actually unforeseeable nor functionally unforeseeable -- that is, the circumstances justify the expense of explicitly addressing the contingency. Lieber's prescription is an "extensive application of the text."[72] It therefore implies permission to depart from the parties' particular situation discovered by a close reading of the text.

In cases where the parties did not sufficiently provide for the gap-revealing contingency, comprehensive construction calls for filling gaps based on how most parties would have provided for a contingency had they addressed it, what have lately been called majoritarian default rules.[73] Attenuated protection of the intentions of these particular parties is justified because the source of the need for construction is the external condition of foreseeability and the internal condition of the contingency being insufficiently provided for. Since transactions costs are not the source of the incompleteness, the default rule should be designed to improve contract drafting.[74] Yet the insufficient provision at least suggests that the source of the incompleteness is not strategic behavior and therefore a default rule the parties would not have wanted is unjustified.

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[71] LIEBER, *supra* note 3, at 44 [at 1921-22] (discussing this concept in terms of politics). This is one of the circumstances Lieber identified as calling for and justifying the act of construction, *see supra* text accompanying notes 11-14, which I am linking to his species of construction, though Lieber did not do so. *See supra* note 60 and accompanying text.

[72] LIEBER, *supra* note 3, at 65 [at 1936].

[73] *See* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISCIPLINARY L.J. 1, 4 -5 (1993).

[74] To the extent that these particular parties would in any event have selected the majoritarian default, consideration could be given to a penalty default, as described in the succeeding text.

Such a so-called penalty default would be indicated, however, in a case where the parties might have provided for the contingency but did not do so at all.[75] The absence of even an insufficient provision in such a case suggests the possibility of strategic behavior on the part of at least one party.[76] Therefore, consideration should be given to a penalty default designed to induce parties to reveal information.[77] If the evidence shows bilateral strategic behavior -- for example, where each party deferred providing for the contingency to reduce costs by resort to ex post litigation -- then the bilateral penalty default of nonenforcement is appropriate. On the other hand, if the evidence shows unilateral strategic behavior -- for example, where one party has withheld information the disclosure of which would have been optimal (for efficiency or other reasons) -- then a unilateral penalty default is appropriate.

Consider the example of a requirements contract for coal referred to above except now assume that the regulator had, during the previous three years, been redefining territories served by the various utilities under its jurisdiction. Changes in the buyer's requirements based on regulatory interference was therefore foreseeable and the parties should have addressed this contingency expressly but instead left it unprovided for. If both parties were equally aware of that contingency then this should be seen as bilateral strategic behavior justifying a bilateral penalty default. The agreement should therefore be treated as if it fails to specify a quantity term with sufficient definiteness and the quantity term set, in effect, equal to zero.[78]

On the other hand, if only one party had been acting strategically, then a unilateral penalty default against that party would be appropriate. If the buyer had private access to the information concerning the public utility's oversight posture but failed to disclose this information to the seller, for example, then the contract should be enforced based on the buyer's requirements given its historical operating levels and without regard to the expected growth rate of its preexisting market. The quantity should therefore be set based on the buyer operating at 60% of its capacity.[79]

If instead of not providing for fluctuations in the buyer's requirements at all, the contract contained general language addressing fluctuations -- for example if the contract provided for

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[75] *See* Ayres & Gertner, *supra* note 2, at 91 (a penalty default is one "designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer").

[76] The absence of an insufficient provision suggests this possibility but is not conclusive. The omission may be utterly inadvertent, and if so, would not necessarily justify a penalty default.

[77] Other factors to consider in weighing the appropriateness of a penalty default rule include "the likelihood that the penalty will in fact result in information being revealed, the benefit (in more efficient reliance or precaution) of the revealed information, and the costs of explicitly contracting around the default." *Id*. at 128. If such factors imply that a penalty default is not justified in this context, then comprehensive construction would still be appropriate but would lead to a majoritarian default rule.

[78] From an ex ante perspective, this gives both parties seeking to enter into the requirements contract an incentive to negotiate and provide for the foreseeable contingency.

[79] From an *ex ante* perspective, this gives the party with private information an incentive to reveal the information and to permit negotiation and provision with respect to it.

increases in the buyer's requirements based on expanded capacity to meet increased demand but did not specify the applicable market -- then the regulatory expansion of the buyer's geographic market is a contingency insufficiently provided for and a majoritarian default rule would apply. The issue is how most parties entering into a requirements contract in a regulated environment would have treated a regulated expansion in the buyer's geographic market. The judge would look to industry practice in choosing the majoritarian default rule. If the practice was to base requirements on the capacity dictated by both natural growth in demand in the buyer's preexisting market as well demand from the new market created by the regulator, for example, the quantity should be set based on the buyer operating at 90% of its capacity.

If the judge in the interpretive process decides that the parties' expressions address the dispute but do so in a contradictory way, the applicable principles of construction depend on whether or not either party had a duty to make disclosure or provide clarification with respect to the contingency as to which there is a contradiction. If either party had such a duty, then the contradiction should be considered strategic. As such, comprehensive construction applies and calls for a unilateral penalty default against that party. This is similar to the doctrine of contra proferentum and means in this context that the contradiction is resolved against the interests of the duty-bound party to discourage strategic behavior and provide incentives for proper drafting.[80] If neither party had any such duty, then the contradiction should be considered nonstrategic. To the extent that the contradiction reveals that the contingency was foreseen, however, comprehensive construction still applies. But, because of the absence of strategic behavior, it leads to a majoritarian default rule.[81]

Consider again the coal requirements contract referred to above. Since requirements contracts are generally enforceable with respect to such quantities as the buyer in its usual course of business would need, then to the extent that the buyer has private information with respect to those needs it has a duty to make clarification with respect to what those needs are expected to be.[82] If the contract contains contradictions with respect to those expected needs -- for example if the contract defined the buyer's historical requirements based on operating at 60% of its capacity but also contained a formula yielding requirements based on operating at 75% of its capacity -- then this should be considered a strategic contradiction and calls for a unilateral penalty default against the buyer. The quantity would therefore be set based on the buyer operating at 60% of its capacity.

If the information about growth rates in the buyer's preexisting market was equally accessible, however -- for example if it was publicly available -- then the buyer should not be seen to have a duty to make clarification with respect to its expected requirements and the contradiction should be considered nonstrategic. A majoritarian default rule should therefore

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[80] *Cf.* Charny, *supra* note 51, at 1854 -55 (noting the significance of whether the drafting party had a duty of disclosure in the context of the doctrine of *contra proferentum*).

[81] Note that under the external condition of the foreseeable, the internal condition of nonstrategic contradiction yields the same analysis and result as the internal condition of insufficiently provided for -- comprehensive construction and a majoritarian default rule. *See infra* table accompanying note 96.

[82] *See* Utah Int'l Inc. v. Colorado-Ute Elec. Ass'n, 425 F. Supp. 1093 (D. Colo. 1976).

apply by appealing to prevailing industry practice. As noted above, if the practice was to base requirements on the capacity dictated by both natural growth in demand in the buyer's preexisting market as well demand from the new market created by the regulator, the quantity should be set based on the buyer operating at 90% of its capacity.

C. Transcendent Construction

In cases where the parties' expressions address the dispute and are free from contradiction, the judge must decide in the act of construction whether the meaning of the expressions as interpreted are to be enforced in accordance with that meaning or whether they may not be so enforced. In the former case the construction of the contract is consistent with the interpretation of the contract, and this amounts to pure Lieberian interpretation. In the latter case, the construction of the contract denies legal effect to the meaning of the expressions as determined in the act of interpretation of the contract. The judge is engaging in Lieberian transcendent construction and defines an unalterable background rule, what have lately been called immutable rules.[83]

Transcendent construction is called for when a superior principle conflicts with the parties' expressions. By permitting appeal to a "principle superior to the text," Lieber acknowledges the existence of immutable rules.[84] Superior principles in contract law are all those background rules that may not be altered by expression of the parties.[85] Determining whether a background contract rule may be altered by the parties depends on the extent to which the rule is necessary to implement a fundamental purpose of contract law. For example, the principal purpose of contract law is to promote the realization of the reasonable expectations of contracting parties.[86] To implement this purpose requires a rule prohibiting a party from taking action unnecessary to realizing its reasonable expectations that impairs a counterparty's reasonable expectations. This rule is recognized as the obligation of good faith performance that is a part of all contracts.[87]

Courts often speak of the obligation of good faith performance in contracts as an "implied covenant," suggesting that it is deduced by an interpretation of the parties' expressions. From that conception, some courts are led to conclude that it may be modified or waived by the parties,[88] though most contracts theorists hold that it may not.[89] And according to the method for

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[83] *See* Ayres & Gertner, *supra* note 2, at 87.
[84] *But cf. supra* notes 57-59 and accompanying text.
[85] *See supra* note 44. For a more specific discussion of immutable rules defined along a continuum between default rules and immutable rules positioned in the context of producing separating equilibria rather than pooling equilibria, see Ayres & Gertner, *supra* note 2, at 119 - 27.
[86] 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS s 1.1 (Joseph M. Perillo ed., rev. ed. 1993).
[87] *See* Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. (forthcoming 1995) (citing Kirk La-Shelle Co. v. Paul Armstrong Co. 188 N.E. 163 (N.Y. 1933); Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614 (2d Cir. 1979) (Friendly, J.); Parev Prods. Co. v. Rokeach & Sons, 124 F.2d 147, 149 (2d Cir. 1941) (Clark, J.)).
[88] *See* 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS s 654A, at 88 - 89 (Lawrence A. Cunningham & Arthur J. Jacobson eds., Supp. 1994) (citing and criticizing Chemical Bank v.

determining whether a background rule may be altered just stated, once one understands the close connection between contract law's principal purpose and the good faith obligation, that obligation must be seen as a rule designed to implement that purpose. As a rule dedicated to determining the legal operation of the parties' expressions, therefore, in Corbin's terms it is a question of construction, not of interpretation;[90] in Lieber's terms, it is a superior principle; in contemporary terms, it is an immutable rule.[91] For that reason, courts that have decided that the covenant may be waived or modified both misunderstand Corbin's distinction between interpretation and construction and fail to recognize Lieber's hoary insight concerning superior principles.[92]

When a text is found to conflict with a superior principle so identified, the question is how to treat that conflict. In what manner should the superior principle displace the expressions in conflict with it? The analysis here is analogous to that in the context of comprehensive construction of expressions accompanied by strategic behavior.[93] If a disclaimer of the good faith obligation runs one way, then it should be considered unilateral strategic behavior and a unilateral penalty default should be imposed. If a disclaimer of the good faith obligation runs both ways, then it should be considered bilateral strategic behavior and a bilateral penalty default of nonenforcement of the contract should be imposed.

Reconsider the coal requirements contract referred to above. Assume that it contains a

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Paul, 614 N.E.2d 436 (Ill. App. Ct. 1993); Chrysler Credit Corp. v. Dioguardi Jeep Eagle, Inc., 596 N.Y.S.2d 230 (App. Div. 1993); McKenzie v. Pacific Health & Life Ins. Co., 847 P.2d 879 (Or. Ct. App. 1993)).

[89] *See, e.g.*, Burton, *supra* note 51, at 131 n.43 (noting that "the covenant of good faith may not be disclaimed by agreement of the parties" mainly because "a contract clause disclaiming any obligation to keep a promise would be a contradiction in terms").

[90] *See* CORBIN, *supra* note 88, s 654A, at 88.

[91] One would be led to a very different conception of good faith if one settles on a different primary mission for contract law. For example, Judge Posner believes that the main purpose of contract law is to facilitate exchange in the face of vulnerabilities to which sequential performance gives rise. *See* RICHARD A. POSNER , ECONOMIC ANALYSIS OF LAW 81 (4th ed. 1991). Under that mission, good faith merely means the absence of bad faith, or the absence of opportunistic behavior by the parties. *See id*. For a critique of this point of view and a comparison of it with the traditional view, articulated by Cardozo, see Cunningham, *supra* note 87.

[92] Corbin's distinction is most often explicitly used by courts only in the context of distinguishing between questions of fact and questions of law. *See, e.g.*, John F. Harkins Co., Inc. v. Waldinger Corp., 796 F.2d 657 (3d Cir. 1986); Ram Constr. Co., Inc. v. American States Ins. Co., 749 F.2d 1049 (3d Cir. 1984). While important for defining the proper scope of appellate review and for allocating power between trier of fact and trier of law, that limited usage falls far short of exploiting the full power of Corbin's distinction.

[93] *See* Ayres & Gertner, *supra* note 2, at 125 -26. Professors Ayres and Gertner note that the situations are analogous, although in the earlier case the goal is to eliminate gaps (to avoid the need to construct default rules) and in this case the goal is to promote gaps (to avoid the need of displacing expressions that conflict with superior principles).

provision defining the good faith requirements of the buyer based on something other than the buyer's expected requirements given various historical and projected economic and regulatory environments. In other words, the provision purports to permit the buyer to demand quantities unbounded either by its historical operations at 60% of its capacity, its expected operations at 75% of its capacity, or its regulator-induced operations at 90% of its capacity. Such a provision conflicts with the good faith obligation because it attempts to alter that rule's insistence on mutual respect for the reasonable expectations of the parties. And since the provision runs one way, a unilateral penalty default should be imposed -- the contract should be enforced and the quantity set based on the buyer operating at 60% of its capacity. If the contract also contained a provision purporting to limit the seller's good faith to something more narrow than acting in accordance with the mutual reasonable expectations of the parties -- for example by permitting the seller to decline to meet the buyer's needs if other customers demand all the seller's production in a particular period -- then the conflict should be seen as bilateral and a bilateral penalty default of nonenforcement of the contract should be imposed.

Conclusion

The foregoing discussion of Lieber's hermeneutics -- adapted for contract law according to Corbin's distinction between interpretation and construction -- is tentative and general. It is intended to recognize a potential intellectual debt owed to Lieber, who has been a neglected figure in contemporary American legal thought even in those fields in which he was at one time regarded as the avatar. In addition to hermeneutics, of which he has been called the high priest, these include the law of war, constitutional and political theory, and philosophies of education.[94] Lieber's potential contributions to the law of contracts have been ignored, thanks to Corbin's dismissal of his distinction between interpretation and construction and neglect of his principles of construction.

Yet while Corbin has been treated as the legal academy's equivalent of royalty, even his distinction between interpretation and construction has been underappreciated. So this Essay is also an acknowledgement of an additional intellectual debt owed to him. And while the limited space allocated for this Essay makes it impossible to explore the much deeper and richer insights that Lieber's hermeneutics offer contract law, I hope that it will lead contracts scholars who have participated in or followed the default rules debate to give Lieber a read.[95]

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[94] *See generally* Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 352- 98 (1992).

[95] I do have space to mention personal debts to Lieber and Corbin. Lieber wrote the "Constitution and Plan for Girard College," the great boarding school-orphanage I attended which was founded according to the will of Stephen Girard for the education of "poor male white orphan children" and has been educating young people since 1848 according to Lieber's ingenious philosophy of education. *See* CHEESMAN A. HERRICK, HISTORY OF GIRARD COLLEGE 182 (1935); *see also* Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957) (reviewing the "Girard College" case, the Supreme Court's articulation of the cy pres doctrine holding that Girard College could not discriminate against applicants for admission on the basis of race). As for Corbin, my personal debt is more

Lieber's Principles of Construction and Default Rules[96]

Species of Construction	External Conditions	Internal Conditions	Form of Default Rule
Close	Unforeseeable [Quiet Reg.]	Unprovided	Tailored [Q=75]
		Insufficiently Provided	Majoritarian [Q=90]
		Unprovided	Penalty (Bi, Uni) [Q=0, 60]
Comprehensive	Foreseeable [Active Reg.]		
		Strategic Contradiction	Unilateral Penalty [Q=60]
		Nonstrategic Contradiction	Majoritarian [Q=90]
Transcendent	Superior Principle	Conflict	Penalty (Bi, Uni) [Q=0, 60]

modest but more directly lucrative, for I have had the privilege since 1994 of serving as an editor of his magisterial treatise on the law of contracts.

[96] As with the text to which this chart relates, *supra* text accompanying notes 67- 93, this schematic offers one possible understanding of the relationship between Lieber's principles of construction and general aspects of prevailing default rules discourse. *See also supra* note 50 and accompanying text. The bracketed entries in this table reflect the hypothetical requirements contract discussed in the text: “Quiet Reg” denotes the circumstance in which the regulator had never previously redefined a utility's geographic market; “Active Reg” denotes the circumstance in which the regulator had been doing so actively; and the “Q=” denotes how the quantity term should be set based on percentage levels of buyer's operating capacity.