Beyond Rules

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BEYOND RULES

Larry A. DiMatteo* & Samuel Flaks**

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I. INTRODUCTION

Legal realism dominated twentieth century American legal thought. However, the meaning of the realist movement and the composition of the movement's membership have been controversial. This Article sheds light on the meaning and

nature of the Legal Realist Movement (LRM) by arguing that the movement consisted of two strains of legal thought—Radical Legal Realism (RLR) and Conservative Legal Realism (CLR). Admittedly, the radical strain has been the more recognized and debated aspect of legal realism. This Article will analyze the mostly neglected strain of CLR. Scholars have not fully appreciated the political, economic, and religious roots of CLR, even though some have recognized that there were competing radical and nonradical schools of realism. The vehicle for this investigation of CLR will be the life and works of Nathan Isaacs.


2. See, e.g., HORWITZ, TRANSFORMATION, supra note 1, at 170 (“[The] Realist[s]... most lastning contribution [was a] critique of the claims of orthodox legal reasoning to be able to provide neutral and apolitical answers to legal questions.”); LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960, at 3 (1986) (explaining that the legal realist movement “grew out of... contempt for... conceptualistic legal theory... The realists... stressed the uselessness of legal rules and concepts”); Allen R. Kamp, Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context, 59 ALB. L. REV. 325, 327 (1995) (“Legal Realists, were a group of elite academics, from Yale, Harvard, and Columbia... who were generally modernist, leftist, and reform-oriented...” (footnote omitted)).

3. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW ixii (1994) (distinguishing between more extreme realists and realists who adhered to an “organic theory of rationalism” which acknowledged that legal reasoning was indeterminate but insisted that legal principles can decide cases); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 28–31 (1995) (contrasting “progressive” realists who relied upon social science to provide the normative content of law and believed that law was more than mere politics with “radical” realists who were more skeptical about legal reasoning and its purported ability to separate law and politics); Daniel T. Oistas, Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner, 36 AM. BUS. L.J. 193, 201–04 (1998) (adopting Minda’s dichotomy); Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151, 1225–26 (1985) (distinguishing between realists who believed in objective social science and those who did not).

4. Isaacs was born in 1886 and died in 1941. Isaacs, Nathan, in 9 ENCYCLOPAEDIA JUDAICA 42 (1971). He earned the following degrees at the University of Cincinnati: A.B. in 1907, A.M. in 1909, and a Ph.D. in 1910. The same year he received his Ph.D. he also earned his LL.B. at the Cincinnati Law School. In 1920, he received his S.J.D. from Harvard Law School. Myles L. Mace, Nathan Isaacs, 16 BUS. HIST. REV. 19 (1942). Isaacs taught at the University of Cincinnati from 1912–1918. Isaacs, Nathan, in 9 ENCYCLOPAEDIA JUDAICA,
We will see that Isaacs’s thought was complex, multifaceted, and evolving, but the term CLR best captures his work. This Article will investigate the legitimacy and determinacy of the legal order through the lens of CLR as represented by Isaacs.

Isaacs and CLR are especially worthy subjects for study given the current economic crisis. It is a crisis, much like the Great Depression, that has spurred many people to question core capitalistic premises, such as the superiority of minimal government regulation of business and the structuring of financial instruments through freedom of contract. Isaacs’s conservative brand of legal realism developed at the time of America’s greatest economic crisis. He represents a strain of conservative thinking that questions the coherence of existing rules but is faithful to underlying legal principles. Isaacs was critical of the rules of private law that existed at the time and called for a new commercial law. This critique of rules centered on the divergence of formal rules and rules in fact, along with the questioning of the public–private distinction and the fallacy of strict legal formalism. These facets of Isaacs’s thinking support his classification as a legal realist. However, unlike the more famous legal realists of the 1930s, Isaacs rejected the progressive political agenda of the New Deal. His merger of antiformalism and an idealism inspired by the Jewish legal tradition allowed him to reject *Lochner*-era judicial decisionmaking while attacking the constitutionality of New Deal interventionism. His rule skepticism supported government intervention in the employment realm, while his belief in the integrity of the common law system provoked him to respond harshly to the rise of the administrative state. The thoughts of this nondogmatic conservative legal thinker and his brand of legal realism are especially relevant now as the current economic crisis prompts a rethinking of the legal order.

CLR, although critical of the legal rules of the day, moved beyond the rule skepticism associated with RLR. It asserts that

although legal rules provide indeterminate answers in hard cases, principle-guided rules will usually lead to a correct answer. CLR calls on judges to strive to uncover underlying objective principles and to understand their historical evolution. Isaacs sought to blend an evolving, but cyclical, organic theory of legal development with the pragmatism needed to make rules workable. This embrace of both a critical and positive theory of legal rules, as well as a conservative vision of law, rests on the recognition that there is often a disconnect between formal and operative rules. CLR attempts to manage this divergence using principles, contextual evidence, and operative facts to guide legal evolution.

CLR provides a historical middle path between strict legal formalism and radical rule skepticism. Though CLR does not see rules as a product of pure deduction, rule skepticism is not a critical endpoint; instead, CLR sees it as the beginning of a positive–normative process. A historical understanding of the evolving rules can manage rule indeterminacy. Isaacs’s cycle theory of legal development—the continuous reframing of the legal order around status-based and contract-based relationships—asserts that Jewish, common, and civil law evolved in a similar way. Under cycle theory, the status-based features of private law take into consideration the social and economic context that can make a theoretically value-neutral rule in reality favor certain groups, while contract-based principles offer a degree of individual choice and freedom.

For Isaacs, a historical understanding of legal principles should ground the reforming of legal rules. This grounding allows for a reasoned critique of dynamic rulemaking and for the diminishment of the contingent nature of law. The contingent nature of law is contained within a framework of moral, political, and cultural values. This framework characterizes CLR as both a critical and positive theory of the legal order. It provides a path beyond a critique of rules, while at the same time advancing a conservative, pro-business political agenda. This fusion of an organic natural law with the inherent indeterminacy of legal conceptualism moves beyond rules to a principle-based contextualism. CLR attempts to continuously refresh legal rules and, at the same time, provide a prescriptive certainty to legal change based upon historically enriched principles. In some respects, the Law and Economics (LAE) movement is a recent example of the conservative strain of legal realism.

5. See infra text accompanying notes 321–24 (explaining Isaacs’s display of CLR).
The initial parts of this Article will set the personal context of Isaacs's contribution to CLR by providing a brief biographical sketch and a review of his contributions to American law. Isaacs was a prolific writer whose books and articles filled legal scholarship from 1914 through 1941. A review of Isaacs's background and contributions to disparate areas of law is necessary in order to understand his view of CLR. Isaacs also adapted his positions in response to the stormy events of his era, most notably the Great Depression and World War II. Nonetheless, his ideas remained remarkably consistent throughout his academic life. Our approach will discuss Isaacs's influence on specific areas of doctrine and legal thought, while also highlighting how and why he adjusted his stances over time.

Isaacs's writings, and his contextual worldview, provide numerous insights still important to modern legal theory. Isaacs's early writings provide insights that predated and presaged the works of the more famous realists, such as Karl Llewellyn, Jerome Frank, and Herman Oliphant. It is true that Llewellyn did not consider Isaacs a core member of the Legal Realist Movement. Moreover, despite his prolific and broad scholarly production, surprisingly few legal scholars know much about the man and his place in legal scholarship. Unfortunately, the fact that he often disguised his theoretical insights under the garb of doctrine may have lowered scholars' assessments of many of his important contributions and their connection to legal theory. Nonetheless, the works of Nathan Isaacs are cited to this day in such diverse areas as administrative, constitutional, contract, trust, and arbitration law. This Article investigates his many insights across various areas of law and their significance to modern legal theory.

The Article then shifts to the broader context of the role of the Jewish legal tradition in shaping Isaacs's critique of
American law. Isaacs's knowledge of the historical development of the common law and of Jewish law provided a unique scholarly vantage point that informed his legal realism. The commonality of Jewish and common law development is a core theme of his view of American law. This commonality centered Isaacs's theoretical insights of legal realism and functionalism, as well as his theories of constitutional interpretation and legal development. His position in the Harvard Business School also influenced his view of legal development. Isaacs's writings, while conscious of history, were also practical in their content. The framework that allows a conciliation of the many facets of his scholarship is CLR. CLR allows for the wedding of critical legal realism to conservative political theory.

As a CLR thinker, Isaacs adopted the legal realists' skepticism about classical legal theory and stressed a functional approach to law dictated by the changing needs of society. However, unlike liberal legal realists who were allies of political progressivism and liberalism, Isaacs relied upon the legal realist toolset to attain conservative political, social, and economic goals. Isaacs's conservatism, which he mediated with methodological legal realist commitments, took two major forms. First, Isaacs was a traditionally observant Jew. His study of Jewish law had a major influence on his secular legal scholarship, and his knowledge of common and civil law informed his understanding of Jewish law. An examination of the influence of Jewish law to his personal development as a legal scholar is necessary to understand Isaacs's work and views of law and legal development. We drew our information about Isaacs's personal approach to life and the role of law from accounts written by family members, valuable but scattered discussions in nonlegal books, various archival


and previous scholarly discussions of Nathan Isaacs's life.\(^\text{10}\) Second, Isaacs was committed to a vision of capitalism dominated by the requirements of business. Isaacs remained a leading figure in the efforts of some legal realists to adapt the law to the requirements of business while at the same time strongly opposing the New Deal.

Part II provides a brief biographical sketch of Isaacs's unique upbringing to better understand his application of the Jewish legal tradition to American law. His work reflects the forces that shaped his intellect—Midwestern pragmatism, business acumen, Jewish Orthodoxy, and intellectual curiosity. Part III reviews Isaacs's contributions to numerous areas of law including contract, tort, constitutional, and arbitration law. Part IV provides the context for assessing Isaacs's works and the notion of CLR. This Part investigates the role of Jewish law in the framing of Isaacs's CLR, the place of CLR in the LRM and modern legal theory, and the merging of the Jewish legal tradition and legal realism into a unified theory of legal development (cycle theory). Part V further explores the relationship between Isaacs's form of realism with Jewish law and the LRM. It more specifically analyzes his functional approach to the underlying themes of legal realism including interdisciplinary study of law, Llewellynian thought, and Hohfeldian conceptualism. Part VI and Part VII examine two important themes in Isaacs's CLR—the unconstitutionality of New Deal legislation and his theory of legal reasoning. Ultimately, two principles underlie Isaacs's functionalism: (1) law is a hybrid of status-based and contract-based

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relationships and (2) the need for a principle-based, rational–realistic approach to legal reasoning.

II. SETTING THE CONTEXT: A BRIEF BIOGRAPHICAL SKETCH

Isaacs was an orthodox observer of Jewish law and a believer in the Jewish faith. An intimate friend judged that his faith was based upon personal conviction and not merely "a creed which he inherited." However, Isaacs's upbringing in a unique nineteenth-century midwestern family that held fast to Jewish Orthodoxy immensely influenced him. Before arriving in America, the Isaacs family lived in the town of Libawa, which was located in the borderland between Lithuania and Germany. In 1853, Schachne immigrated to Cincinnati, Ohio. Cincinnati was the home of Rabbi Isaac M. Wise, the father of the American Jewish Reform movement, which Schachne fervently opposed. When Schachne was presented with Wise's radically reformed prayer book, he publicly

12. The biographical information in the following passages, except otherwise noted, is based upon the following sources: Isaacs, Nathan, in 9 ENCYCLOPAEDIA JUDAICA, supra note 4, at 42; Mace, supra note 4, at 19–20; Interview with Paul Wotitzky, Son-in-Law of Nathan Isaacs, in Brookline, Mass. (Feb. 13, 2008 and May 9, 2008) [hereinafter Wotitzky Interview] (notes on file with Authors); see also Finding Aid 2007, supra note 4 (describing the location of various sources).

13. Adolph S. Oko, Memorial Address for Nathan Isaacs 1 (Feb. 22, 1942) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 9, File 12) [hereinafter Oko, Memorial Address]. Oko (1883–1944), affiliated for many years with the Reform movement’s Hebrew Union College in Cincinnati, was a prominent librarian and a scholar who greatly influenced Isaacs. See An Inventory to the Adolph S. Oko Papers, Manuscript Collection No. 14, 1911–1944, http://www.americanjewisharchives.org/aja/FindingAids/oko.htm (last visited Mar. 26, 2010) (chronicling Oko’s life and achievements); see also Letter from Nathan Isaacs to Adolph S. Oko (July 10, 1936) [hereinafter, Isaacs to Oko Letter, July 10, 1936] (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 3) (acknowledging Oko's great intellectual influence on Isaacs). Isaacs was committed to a ritually observant lifestyle while Oko identified as a Reform Jew. However, they shared a common commitment to the renewal of Jewish learning and life. See Memorandum from Nathan Isaacs to Chancellor Henry Hurwitz (June 24, 1917) [hereinafter Isaacs Memorandum, June 24, 1917] (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2) (regarding that goal, Oko and Isaacs found themselves “surprisingly in accord for two Jews who according to all the formal classifications of Jews current to-day would be put on different sides of the fence”).

14. Elcanan Isaacs, MEN OF SPIRIT, supra note 8, at 575.

15. Id. at 575–76.

16. Id.

burned the prayer book in a stove and excommunicated Wise.\textsuperscript{18} Isaacs's maternal grandfather, Aaron Tzevi Friedman, immigrated to America in 1848 and became a prominent ritual slaughterer in New York City.\textsuperscript{19} Friedman's daughter Rachel and Schachne Isaacs's son Abraham married; they had eleven children, including Nathan Isaacs.\textsuperscript{20}

The Isaacs family was highly respected for their accomplishments, character, and loyalty to traditional Judaism.\textsuperscript{21} Their retention of a punctilious religious observance after three generations in America was particularly remarkable.\textsuperscript{22} The Isaacs household valued intellectual accomplishments more than material success. Nathan's brother Raphael attested that in their family "scholarship was considered the highest aim in a successful life" because proper knowledge of the Torah (the "Law") required unending study of a comprehensive religious law that related to most areas of life.\textsuperscript{23} The Isaacs children did not feel oppressed by the burdens of ritual because they experienced it as a natural part of life.\textsuperscript{24} At the same time, their parents rarely discussed dogma, as opposed to religious law. The Isaacs children felt they had "a considerable amount of freedom in the application of the religious laws to changing conditions."\textsuperscript{25} After

\begin{itemize}
\item \textsuperscript{18} I. Harold Sharfman, The First Rabbi: Origins of Conflict between Orthodox & Reform: Jewish Polemic Warfare in Pre-Civil War America 425-26 (1988); Elcanan Isaacs, Men of Spirit, supra note 8, at 576.
\item \textsuperscript{19} Klein, Seventh Son, supra note 8, at 69-70. Friedman was "widely known as the 'Ba'al Shem' [Holy Man] of America." Cyrus Adler, Friedman, Aaron Zebi, in Jewish Encyclopedia, available at http://www.jewishencyclopedia.com/view.jsp?artid=409&letter=F&search=Friedman (last visited Mar. 25, 2010).
\item \textsuperscript{20} Elcanan Isaacs, Men of Spirit, supra note 8, at 576-77.
\item \textsuperscript{21} "Cincinnati Jewry looked up to the Isaacs as to courageous men standing on a summit unattainable to all others." Boris D. Bogen, Born A Jew 73 (1930) (in collaboration with Alfred Segal). Boris D. Bogen (1869-1929), a pioneering Russian-born Jewish social worker, became the Superintendent of United Jewish Charities of Cincinnati in 1904. See An Inventory to the Boris Bogen Papers, Manuscript Collection No. 3, 1891-1929, http://www.americanjewisharchives.org/aja/FindingAids/Bogen.htm (last visited Mar. 26, 2010).
\item \textsuperscript{22} Elcanan Isaacs attributed Nathan Isaacs's loyalty to Judaism in part to a "stimulating early education in Jewish subjects." Elcanan Isaacs, Men of Spirit, supra note 8, at 592.
\item \textsuperscript{23} Raphael Isaacs, Self-Portraits, supra note 8, at 86. Nathan, who was six years older than Raphael, was Raphael's teacher. See id. at 86-87.
\item \textsuperscript{24} "There was no punishment or criticism for a violation of religious law," Raphael recalled, "it just was not the thing to do, so it never occurred to [the children] to violate it." Raphael Isaacs, Self-Portraits, supra note 8, at 85.
\item \textsuperscript{25} Id. at 87. The Isaacs clan did not always feel bound by community practices. In keeping with his minimalist Lithuanian-Jewish heritage, Abraham Isaacs detested longwinded performances by Cantors that sacrificed the meaning of the Hebrew words of the prayers in favor of catchy tunes. Accordingly, Abraham and his nine sons bucked Cincinnati Orthodox convention by walking out of the synagogue at 11:00 a.m. every
an immersion in Jewish learning and heritage from childhood, Isaacs's lifelong study of Jewish law reinforced his allegiance to the Jewish religion and his belief in its ability to respond to modern times. As an adult, he sought to discover intellectual justifications for Jewish ritual observance. Influenced by his secular studies, Isaacs's understanding of his religion eventually became significantly different from his childhood training. Despite his development of a more pragmatic view of Judaism, he remained religiously observant even after achieving professional success.

Isaacs excelled in his studies. His mind was "the ideal scholar's tool." Isaacs's dual law and economics degrees helped him develop an interdisciplinary view of business and law. After a few years of private law practice, Isaacs began his teaching career at Cincinnati Law School in 1912. The school possessed a Sabbath morning regardless of whether the service was finished. Klein, Seventh Son, supra note 8, at 71.


27. See infra Part IV.C, V (discussing Isaacs's view of Biblical and Jewish law).

28. See Bogen, supra note 21, at 73 (stating that the disappointed Orthodox parents of straying offspring often pointed to Abraham Isaacs's sons and said "[t]hey, too, are in the university and excel every one [sic] in scholarship and yet they are faithful"). Nathan Isaacs's siblings were remarkably successful. Klein, Seventh Son, supra note 8, at 73–74. Four of the siblings were included in Who's Who in America and eight were members of the Phi Beta Kappa Society. Elcanan Isaacs, Men of Spirit, supra note 8, at 578. Aaron, the oldest son, was a businessperson. Isaac also became a businessperson. Klein, Seventh Son, supra note 8, at 73. Schachne became an army psychologist at Walter Reed Hospital in Washington D.C. Raphael Isaacs was a prominent doctor and scientist known especially for his work on blood disorders. Nesha was an instructor in Political Science at the University of Cincinnati before her marriage. Eclcanan Isaacs, Men of Spirit, supra note 8, at 577. Elcanan was a graduate of the University of Cincinnati Law School who also earned a Harvard S.J.D. and taught at American University. See Contributors, in Men of the Spirit, supra note 8, at 713, 718. Moses Legis was an Assistant Professor at Columbia University, Dean of Yeshiva College, and Professor of Chemistry at Stern College of Yeshiva University. Asher became an economist and professor at the University of Pittsburgh. Judah, the youngest, ran his own insurance business. Klein, Seventh Son, supra note 8, at 74.

29. Elcanan Isaacs, Men of Spirit, supra note 8, at 582 (quoting Albert M. Freiberg, Nathan Isaacs in Cambridge 3 (July 15, 1952) (unpublished manuscript, on file with Hebrew College Library)).

30. Isaacs was especially close with his economics professor in Cincinnati, Fred C. Hicks, who later became President of the University of Cincinnati. See Letter from Fred C. Hicks to Nathan Isaacs (Aug. 23, 1920) (on file with the Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio). The Carnegie Institution financially supported Isaacs's research for his doctorate in economics. Isaacs Memorandum, June 24, 1917, supra note 13.

31. In 1897, the Cincinnati Law School merged with the University of Cincinnati Law Department. The first Dean of the merged school was William Howard Taft. Faculty members included Dr. Gustavus H. Wald and J. Dodridge Brannan, both of whom had studied under Christopher C. Langdell. They would help the school adopt Langdell's case method approach to law study. See Roscoe L. Barrow, Historical Note on the University of
library that included an extensive collection of legal history materials. Isaacs encountered the books of European legal historians including Frederic William Maitland, Frederick Pollock, and Paul Vinogradoff. He would draw from these legal historians and the historical and critical minded "Science of Judaism" school of thought in developing his theory of legal change. These studies led Isaacs to conclude that the Jewish Reform movement, as well as American commercial law, had become overly doctrinaire and insensitive to historical experience. In 1919, Isaacs moved to Cambridge to begin graduate study at Harvard Law School. His service in U.S. Army intelligence during World War I interrupted his studies. Isaacs reached the rank of captain quickly. White Russian agents had succeeded in convincing many in the American government that The Protocols of the Elders of Zion was an accurate description of a Jewish plot against the U.S. government; Isaacs helped to expose the fraud.

Cincinnati College of Law (Cincinnati Law School), in THE LAW IN SOUTHWESTERN OHIO 289, 294 (Compiled by Frank G. Davis, George P. Stimson ed., 1972). These teachers probably influenced Isaacs.

32. Elcanan Isaacs, MEN OF SPIRIT, supra note 8, at 579. The work of the great English legal historian, Sir Frederick Pollock, was influential at Cincinnati Law School. Dean Wald was the editor of the American edition of Pollock's casebook. See SIR FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY (Gustavus Henry Wald & Samuel Williston eds., 1906). When in 1903 the Law School dedicated a new building, Pollock gave the keynote address on the virtues of the common law. Barrow, supra note 31, at 295. Isaacs, still a student, was present at the dedication. Letter from Nathan Isaacs to Adolph S. Oko (June 8, 1936) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 3). Isaacs considered Pollock a powerful influence on his own legal thinking. Isaacs to Oko Letter, July 10, 1936, supra note 13. Dean Rogers's address at the building dedication might also have had an influence on the young Isaacs. Rogers declared that: "The proper laws of a community may ... exist ... often in contradiction to those which are declared." Barrow, supra note 31, at 295. In his own career, Isaacs would pursue similar ideas regarding the historical evolution of the law.

33. See Nathan Isaacs, Book Review, 26 YALE L.J. 512, 513 (1917) (reviewing RALPH W. AIGLER, TITLES TO REAL PROPERTY, ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS (1916)) (singling out for praise Maitland, Pollock, and Vinogradoff).

34. See Adolph S. Oko & Nathan Isaacs, Correspondence Between a Jurist and a Bookman, 4 MENORAH J. 73, 80, 82–83 (1918) (calling for the writing of a history of Jewish Law inspired by Maitland and Wissenschaft des Judenthums).

35. Isaacs reacted against the attitude of the Cincinnati Jewish Reform Rabbis of his youth, for whom "questioning [of Reform doctrine] was heresy and heresy-hunting was a great game." Letter from Nathan Isaacs to Henry Hurwitz (June 3, 1926) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Box 8, File 2).

36. See Nathan Isaacs, The Future of the Jewish Student in America, 5 JEWISH F. 131, 131 (1922).

37. Letter from Ella Isaacs to Max Davis (Ella's uncle) (n.d.) (on file with American Jewish Historical Society).

38. See Nathan Isaacs, The International Jew, 6 MENORAH J. 355, 356–60 (1920) (recounting in an indirect manner wide acceptance of The Protocols of the Elders of Zion...
Upon Isaacs's return to Harvard in 1919, he both taught and attended classes as the recipient of the Thayer Scholarship at Harvard Law School. He took classes taught by Roscoe Pound, Joseph H. Beale, and legal historian Eugene Wambaugh. Isaacs would develop his realist insights under the tutelage of two diametrically opposed legal scholars—Beale and Pound. Pound, although part of the "old guard," is considered a proto-realist. Contrary to the more classical mindset of Samuel Williston and Beale, Pound saw the need for a new jurisprudence to address the indeterminacy of the existing one.

After earning his S.J.D., Isaacs would return to Harvard a few years later to teach as a lecturer at the Harvard Business School. Isaacs found himself in a delicate and uncertain position. The President of Harvard, Abbott Lawrence Lowell, was an anti-Semite who had in the previous year publicly pushed for a quota system for admissions of Jewish students. It was not then publicly known that Dean Donham of the Harvard Business School had been a leading advocate of the quota system. Nonetheless, with the support of Dean Pound of the law school and then its debunking within intelligence circles, which was apparently based on personal involvement).


40. See The Class Notes of Nathan Isaacs, 1919–1920, Harvard Depository Class Notes Collection, Harvard Law School Library, Cambridge, Mass. This collection consists of class notes on administrative law, equity, international law, conflict of laws, jurisprudence, and Roman law, given by various members of the faculty, including Pound, Beale, and Francis B. Sayre.

41. MORTON & PHYLLIS KELLER, MAKING HARVARD MODERN: THE RISE OF AMERICA'S UNIVERSITY 47 (2001). Despite an official rejection of the plan by a faculty committee, anti-Jewish quota restrictions were covertly put in place by 1926. Id. at 48; RITTERBAND & WECHSLER, supra note 9, at 114. The faculty committee that rejected the quota proposition included Isaacs's friend and brilliant historian of Jewish philosophy, Harry Wolfson. RITTERBAND & WECHSLER, supra note 9, at 111. The pair became "intimately associated" in their work. Letter from Nathan Isaacs to Judge Julian W. Mack (Jan. 23, 1925) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2).

42. MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900–1970, at 70, 89 (1979). Donham had argued to the Committee on Methods of Sifting Candidates for Admission that there were two different types of Jews; one type of Jew desired "complete assimilation," while the other type desired to retain its separate group identity. Id. at 86. Donham asserted that "very serious racial antagonism" would result if too many separatist Jews were admitted into Harvard. Id. at 86–87. Donham had worked on the Subcommittee on Statistics, which developed an intricate method to identify Jews, and which later was used in the covert exclusion of Jews. Id. at 93, 107–08. Each Harvard student was divided into four categories: "J," "J," "Other." The J groups were deemed certainly to be Jewish. A "preponderance of the evidence" indicated that the J's were Jews, while J's were possible Jews. JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 96 (2005).
and Dean Donham, President Lowell, after initially ignoring the request, gave Isaacs a permanent position.\(^43\) It seems that Donham’s prejudice did not prevent him from recognizing the worth of Isaacs’s scholarship on the intersection of business and law.\(^44\) After only a single year of teaching at Harvard, Isaacs became one of the very few publicly self-identified Jewish members of the tenured faculty at Harvard University in 1924.\(^45\) That same year, Dean Donham and Isaacs took the radical step of eliminating the courses of business law at Harvard Business School.\(^46\) Instead, they put Donham’s dedication to the case method of teaching business students and Isaacs’s theory that law should serve the needs of business into pedagogical practice by having Isaacs sit in classes and give legal advice as the students grappled with business dilemmas.\(^47\) Though Isaacs eventually returned to teaching a standard business law class, in his teaching Isaacs continued his innovative approach of training

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43. Though Wolfson told Isaacs that Donham had been a leader of those supporting the quota on the faculty committee that had considered the question, the grateful Isaacs could not “believe it.” Isaacs refused to pay “much attention to the gossip because it fails to correspond in so many particulars with what I find.” Donham and his wife had been extremely cordial to Nathan and his wife Ella. Donham’s son befriended Nathan’s youngest brother Judah, who was then an undergraduate at Harvard. Isaacs was impressed that “[e]ven the Lowell’s have gone out of their way to be friendly.” Letter from Nathan Isaacs to Adolph S. Oko (Nov. 14, 1923) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2).

44. At memorial services held for Isaacs at Harvard on December 21, 1941, Donham said that he had considered Isaacs to be “[c]learly the most scholarly man among us, unique in his own field.” W.B. Donham, Eulogy for Nathan Isaacs (Dec. 21, 1941) (on file with American Jewish Historical Society); see also Elcanan Isaacs, MEN OF SPIRIT, supra note 8, at 593. Due to his association with Isaacs, Donham eventually arrived at a better understanding of Judaism. See Donham, supra (“All in all, by his life and his strict adherence to his intellectual, ethical and religious standards coupled with tolerance for the views of others, he gave those of us who adhere to other varieties of religious experience, some conception of the strength and majesty of the ancient Hebrew faith.”).

45. Wins Professorship for One Year of Lecturing: Mr. Nathan Isaacs Appointed to Chair of Business Law While on Leave of Absence from Pittsburgh, HARVARD CRIMSON, Mar. 4, 1924 (on file with Baker Library Historical Collections, Harvard Business School, Box 5, File: Newspaper Clippings 1924–1941). A few other Jews had previously received tenured chairs at Harvard. See SUSANNE KLINGENSTEIN, JEWS IN THE AMERICAN ACADEMY, 1900–1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION 10, 12 (1998) (observing that Leo Wiener became Harvard University’s first Jewish tenured professor in 1911, but Wiener was conflicted about his Judaism and identified as a Russian); see also HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 12 (1960) (Frankfurter was named Byrne Professor of Administrative law in 1921). Harry Wolfson received a tenured appointment in 1925. JONATHAN COHEN, PHILOSOPHERS AND SCHOLARS: WOLFSON, GUTTMANN, AND STRAUSS ON THE HISTORY OF JEWISH PHILOSOPHY 31 (2007).


47. Id.
students to view law as a tool to solve business problems rather than an independent realm of knowledge.\(^{48}\)

After finding his permanent home at Harvard Business School, Isaacs devoted much of his spare time to the organizational life of causes he cared about and to Jewish education.\(^{49}\) He was a "[p]rofound scholar" and "saintly soul" who "never took himself too seriously in the presence of others."\(^{50}\) Isaacs had a biting and cynical sense of humor, which he would sometimes unleash on shoddy scholars and the many demanding people who came for his help, "but he was always charitable and generous."\(^{51}\) Following many stressful years of helping refugees flee Nazi Germany and settling them in the United States, Isaacs died a premature death in 1941.\(^{52}\)

Howard L. Bevis, President of Ohio State University, eulogized that his boyhood companion and best friend possessed:

[An] intellect [that] ranged through time and across the whole field of human understanding. His deeply religious nature comprehended the ethnic development of his people in all of its religious significance. He knew the detail of dogma. He knew the broad sweep of human aspiration in its reaching for the Infinite. He knew the frailties of men; and all of his profundity was suffused by a human kindliness which made children love him. . . .

. . . .

He gave his life to the betterment of mankind.\(^{53}\)

\(^{48}\) Adolf S. Oko, Notes for Isaacs Eulogy for the Menorah Journal (n.d.) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 9, File 12).

\(^{49}\) Rabbi Joseph S. Shubow, Professor Nathan Isaacs, Saint and Scholar—Zeker Tsaddik Le-Berakah, JEWISH ADVOCATE (Boston), Jan. 23, 1942 (on file with American Jewish Historical Society). A devoted former student, who became a prominent Boston Rabbi, summarized in an obituary that:

[Isaacs] was president of the Menorah Educational Conference since 1923, and of the Boston Bureau of Jewish Education since 1925; he was a trustee of the Jewish Teachers College of Boston, and of the Associated Jewish Philanthropies of Boston; he was a member of the American Bar Association, Association of Collegiate Teachers of Business Law, the American Arbitration Association, the American Academy of Arts and Sciences, the Societas Spinozana, the Soncino Gesellschaft, the History of Sciences Society; a director of Gimbel Brothers; and, of course, a Phi Beta Kappa member. And the remarkable thing about it all is that in the midst of this amazingly crowded career he stated that his hobby was collecting and studying Hebrew books!

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) See Elcanan Isaacs, MEN OF SPIRIT, supra note 8, at 579.

\(^{53}\) Howard L. Bevis, Remarks Made at the Memorial for Nathan Isaacs Held in
The most cited contributions made by Isaacs come from numerous areas of law and remain influential to this day. His 1917 Yale Law Journal article *The Standardizing of Contracts* was the first to alert academe to the problem of standard form contracting within the framework of classical contract law and legal formalism. Professor Bates frames this debate and Isaacs's cautionary role by observing that "the inability of contract law and legal scholars to grasp effectively the phenomenon of standard form contracts has done little to help the consumer, it has certainly made Nathan Isaacs the most remarkable sage of the twentieth century." Isaacs's early defense of strict liability in tort was rooted in the same contextual viewpoint that spurred his contracts scholarship. In constitutional law, Isaacs critiqued the Supreme Court decisions during the *Lochner* era as overly literal interpretations of the contract clause and improperly based upon an unhistorical understanding of the Founders' view of freedom of contract. His 1927 Harvard Law Review article *Two Views of Commercial Arbitration* provides a framework for arbitration models still debated today. One model casts the arbitrator in the role of judge; the other views the arbitrator as agent. The rest of this Part will briefly examine Isaacs's contributions to these areas of law.

**A. Law of Contracts**

Isaacs developed a cyclical theory of the standardization of contracts that took issue with the widely accepted assessment of nineteenth century scholar Henry Sumner Maine that legal
development moves in a linear fashion from status-based to contract-based legal relationships. Instead, Isaacs argued that over the course of time contract law had repeatedly cycled back and forth between the broader categories of "individualized relations," in which the law places great weight upon the subjective will of the parties, to the alternative extreme of "standardized relations," in which the law imposes contracts based upon the status of the parties irrespective of attempts to contract out of that status. He also believed that the eras of individualized relations were associated with an expansive equitable approach to legal interpretation and that the periods of standardized relations were associated with codification and literalistic judicial interpretation. Isaacs's cycle theory was heavily influenced by his study of Jewish law. He felt that the social needs of the twentieth century required a return to the creation of legal relationships based on status for those "whom freedom of contract" had "become a mere mockery."

Duncan Kennedy groups Isaacs with Roscoe Pound and Morris Cohen because of their use of an analytical methodology that seeks to place specific areas or issues of law within the context of underlying interests and principles. In this way, those specific areas of law could be critiqued for congruence with the underlying principles and interests that they supposedly serve. Under this hypothesis, a given interest or interests that predominate in a particular area should be used to explain the rules within that area of law. Isaacs believed that these underlying interests varied in a cyclical movement between individualist and relational norms. The normative structure of the law wavered between these poles in responding to "prevailing social and economic conditions."

60. Isaacs, Standardizing Contracts, supra note 54, at 34–37.
61. Id. at 39.
62. Nathan Isaacs, "The Law" and the Law of Change II, 65 U. PA. L. REV. 748, 757 n.61 (1917) [hereinafter Isaacs, Law of Change II] (suggesting that the progress from status to contract is a "mark of commentatorial periods rather than a continuous factor in the history of law" and noting the contemporary growing use in statutes of the phrase "any provision in any contract to the contrary notwithstanding").
64. Isaacs, Standardizing Contracts, supra note 54, at 47.
66. Id. at 120.
Professor Weisbrod notes the importance of Isaacs’s insight that “one should get away from an idea of legal history progress as movement . . . in one direction or another, and see ‘a kind of pendulum movement back and forth between periods of standardization and periods of individualization.’” Isaacs not only placed the standardization of contract, and more generally, the unification of contract law, in a historical context, but also challenged the existence of mutual assent in standard form contracting. He also recognized the role of bargaining power in the drafting of contract terms. Isaacs’s solution was the incorporation of community- or law-determined standard terms.

It was in Isaacs’s The Standardizing of Contracts article that the term “standard” was first applied to contracts. He challenged the ability of contract law to adequately deal with standard form contracts within a unitary view of contracts. The conundrum of standard form contracts as a different category of contracts requiring specialized rules remains the center of debate even to the present. Isaacs noted that standard form contracting was not the pure exercise of the freedom of contract that underpinned the will theory and private autonomy principle of classical contract law. The “problem” posed by standard form contracting to classical contract theory was the strained

67. Weisbrod, Way We Live, supra note 11, at 788 (quoting Isaacs, Standardizing Contracts, supra note 54, at 40).
68. Isaacs, Standardizing Contracts, supra note 54, at 46.
69. See id. at 47 (noting standardizing contracts might help with the accident of power in individual bargaining).
70. Germany adopted this system in the most recent revision of its Commercial Code (BGB). See Sir Basil Markesinis, Hannes Unberath & Angus Johnston, The German Law of Contract 171 (2006) (“According to § 305 I BGB, standard terms are those terms which have been devised for use in a multitude of contracts . . . .”).
71. Professor Shell traces scholarly concern for adhesion contracts to the work of Isaacs:
[Isaacs argued] that contract law should promote “freedom in the positive sense of presence of opportunity” and that the law should strive toward “standardizing . . . the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining.” G. Richard Shell, Federal Versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on Mastrobuono, 65 U. Cin. L. Rev. 43, 64 n.109 (1996) (quoting Isaacs, Standardizing Contracts, supra note 54, at 47).
72. See American Legal Realism, supra note 1, at 78–79, 82 (providing excerpts from Standardizing Contracts as an example of a realist analysis that highlighted the conflict between the will theory of contract and early twentieth century legal developments).
73. Professor Weisbrod more recently argued that Standardizing of Contracts demonstrated the malleability of the consent principle: “All relationships can also be seen through the law of contracts—some more comfortably than others. By bending and twisting the idea of choice, most relationships can be understood as chosen, even if the choice is the refusal of an association.” Weisbrod, Way We Live, supra note 11, at 807 (footnote omitted).
application of the consent principle to boilerplate or standard terms.\(^{74}\)

Classical contract theory was embedded in the two cornerstone documents of Isaacs’s time, which were both authored by Samuel Williston—the First Restatement of Contracts and the Uniform Sales Act (1906).\(^{75}\) As to the latter, Isaacs described it as a standardized contract for both sales and purchases, which had the unfortunate drawback “that the contract made for us by the Sales Act might not under a given set of conditions be the contract that we would have made for ourselves if the various points had been called to our attention.”\(^{76}\) He argued that the Uniform Sales Act did not adequately take into consideration the needs of the modern purchasing agent, who, far from being a true independent contracting agent, was effectively controlled by the discipline of manufacturers and retailers.\(^{77}\) The Sales Act did not serve the needs of middlemen.\(^{78}\)

We see here the notion of what is now called the hypothetical bargain.\(^{79}\) Under hypothetical bargain theory, the implied terms or default rules of contract law are based upon what the parties would have agreed to if operating under full information at the time of formation. This implied hypothetical intent results in efficient implied terms because it mimics what the parties’ intent would have produced. An alternative formulation of this approach is Isaacs’s argument that the default rules in the Uniform Sales Act had grown hopelessly divergent to the customs and practices found in the business world. Llewellyn would later use this approach to infuse the rules of the Uniform Commercial Code (UCC) with recognition of the contextual nature of contracts and ongoing commercial practice.\(^{80}\) In this way, the default rules of contract are made to merge with the private parties’ hypothetical bargain.

\(^{74}\) “The contractual view focuses on individual autonomy in a way that denies much reality in the world.” \textit{Id.} at 808.


\(^{77}\) \textit{See id.} at 1.


\(^{80}\) \textit{See infra} notes 234–47 and accompanying text (noting Isaacs’s influence on Llewellyn as he drafted the U.C.C.).
Isaacs was committed to a contextual approach to contract interpretation and to the interpretation-application of contract rules. Under this approach, classical contract theory's major tenets relating to contract interpretation—duty to read, four-corners analysis, and the plain meaning rule—would be jettisoned in favor of a more nuanced exploration of contractual context. He argued that "analysis is necessary in every case in which rights and duties are considered to explain agreements far beyond the words used in the light of customs, past dealings of the parties, business understandings, and presumptions laid down in statutes and in the common law."

The UCC would later incorporate the tenets of contextual interpretation. Isaacs's observation made clear that the goal of contract rule application was to ascertain the intent of the parties as situated within the business world.

The abstraction of classical contract theory treated standard forms as traditional contracts, which resulted in diminishing the power of the private autonomy principle. The judiciary felt the need to adjust other doctrines of contract law to compensate for injustices caused by this single model approach. The expansion of the doctrine of unconscionability from equitable principle to legal principle is one such adjustment. The development of the implied duty of good faith is another example.

Isaacs charged that this diminished exercise of "private will" would and should lead to status-oriented rules for certain categories of contracts. He viewed standard form contracts as a "practical check on the individuality of contracts, if not a


84. See Larry A. DiMatteo, A Theory of Interpretation in the Realm of Idealism, 5 DEPAUL BUS. & COM. L.J. 17, 18–19 (2006) (explaining that Llewellyn adopted equitable rules like unconscionability into the U.C.C. to prevent injustices that would occur under a mechanical application of rigid rules); see also U.C.C. § 2–302 (2008) (providing a legal framework within which to determine whether a contract is unconscionable).

theoretical limitation on the freedom of contract."86 After *The Standardizing of Contracts*, contract theory has failed to properly adjust by continuing to rationalize the enforcement of such contracts through the rubric of unitary contract principles.87 Isaacs's prediction that status would make a major comeback88 is seen in the enactment of consumer protection laws, the merchant–consumer distinction in commercial law, and the good faith and implied-in-fact exceptions to the employment-at-will doctrine.

The oscillation between status and contract in Isaacs's analysis included a normative role for society and law. Given the role of standardized relations and agreements in a complicated, consumer-oriented marketplace, society needed to intervene through law to protect the weaker party in the standardized relationship. Isaacs was led by this reasoning to criticize the *Lochner-era*89 courts' hostility towards minimum wage legislation. For Isaacs, labor legislation was a form of standardizing employment relations necessary "to remove [society] from the control of the accident of power in individual bargaining."90 Professor Bridwell notes that Isaacs's article *The Standardizing of Contracts* drew the important "distinction between positive and negative freedom."91 Isaacs advanced the idea that freedom of contract was not by itself a surrogate for personal liberty.92 Instead, freedom of contract was susceptible to abuse by contracting parties with superior bargaining power. The one-sidedness created by the use of superior bargaining power

89. *Lochner v. New York*, 198 U.S. 45, 53, 57 (1905) (holding that the "right of free contract" was implicit in the due process clause).
90. Isaacs, *Standardizing Contracts*, supra note 54, at 38 n.17, 47 (discussing the extent of police power over the right to contract and asserting that "still much [may] be gained by the further standardizing of the relations in which society has an interest"); see also Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2239–40 (1992) (book review) (citing Isaacs, *Standardizing of Contracts*, supra note 54, and explaining the important role status continues to play in modern law).
92. See id. at 1519–20 & n.28 ("Isaacs's comment that the attack on standard-form contracts was premised on the idea that 'freedom of contract is not synonymous with liberty' illustrates the departure from the tenet of negative freedom that equated freedom of contract and personal liberty." (quoting Isaacs, *Standardizing Contracts*, supra note 54, at 47)).
dictated the intervention of the law to reorder relationships initially created by contract in order to protect the weaker party from overreaching.\textsuperscript{93} This reordering would transform standard contracts from being solely industry-generated to quasi-private, quasi-public creations.

Isaacs's approach to the enforcement of standard contracts was a mix of contract-based and status-based legal regimes. He explains that in their "origin, these relations are, of course, contractual; in their workings, they recall the régime of status."\textsuperscript{94} The later realists would call this the illusion of the public–private distinction. The Critical Legal Studies (CLS) movement would use this argument to support the thesis that the liberal legal order was built upon layers of contradiction.\textsuperscript{95} As we have seen, Isaacs uses the public–private distinction to describe the ongoing cyclical evolution of law.\textsuperscript{96} He also implies a normative assessment that the blurring or melding of public-private law is a necessary and efficient means of dealing with standard contracts.\textsuperscript{97}

Isaacs's cycle theory can be seen as a linear–cyclical blend. Types of relationships are formed through a purely contract-based legal regime. Over time, abuses of freedom of contract result in the law converting the relationship to a partially status-based one. Contractual rights and duties are determined by status-based and contract-based principles depending on the

93. Isaacs gave the example of the insurance contract in which overreaching by the insurance industry led to government intervention. NATHAN ISAACS, THE LAW IN BUSINESS PROBLEMS 217 (rev. ed. 1934); see also Carol Weisbrod, War, Insurance and Some Problems of Community, 10 CONN. INS. L.J. 109, 111–13 (2003) (comparing Isaacs's views of bargaining power in insurance contracts with those of Josiah Royce).


95. The public–private distinction held that some areas of law were within the private sphere and others within the public. Politically conceived it has been viewed "in terms of the administrative state [with] the 'public' realm [being] distinguished by the use of legitimate coercion and the authoritative direction of collective outcomes, as opposed to formally voluntary contract... based on market exchange." Jeff Weintraub, The Theory and Politics of the Public/Private Distinction, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 36 (Jeff Weintraub & Krishan Kumar eds., 1997). The realist and CLS scholars attacked the distinction as masking the power of the government and courts in the shaping of private law. See, e.g., Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8, 10–11 (1928) (providing a legal realist critique of the notion that property law was solely within the private sphere); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. PA. L. REV. 1349 (1982) (providing a CLS critique).

96. Isaacs, Standardizing Contracts, supra note 54, at 39.
97. Id. at 38–39.
particular term or issue. This eventually results in parties contracting away from the status-based relationship and creating new contract-based relationships with new sets of rights and duties. This process continues *ad infinitum* with freedom of contract providing the means for the creation of novel types of relationships and the law infusing them with status-based qualities. 98 Isaacs saw the status-based elements of the law as a grassroots creation in which community norms and practices become incorporated into the status-based relationship and subsequently incorporated into law. This is the perspective more deeply developed by Llewellyn in his scholarship and work on the UCC. The importance of trade usage and business custom in the UCC's interpretive methodologies is a testament to this belief that most of commercial law comes from the recognition of real-world commercial practice. However, for Isaacs this quest was not so simple. He believed that any complete theory of legal evolution needed to discover universal principles and allow those principles to accommodate change. The role of general principles in legal evolution will be more fully explored in Part VII's coverage of legal reasoning.

B. Tort Law

Much as he contested the inexorable march from status to contract, Isaacs also contested the claim that civilization had linearly progressed from strict liability to a morality-based negligence principle in tort law. The context of Isaacs's work in this field, as revealed by his lecture notes, was a wave of state high court rulings at the turn of the twentieth century, which had held that workers' compensation laws were an unconstitutional imposition of liability without proving fault. 99 Isaacs took issue with the fault-based rationale of the negligence standard in tort law. 100 The need for personal culpability was a central construct of classical tort theory. 101 Isaacs, as a realist and observer of social context, recognized that the rise of industrial society necessitated the recognition of other grounds of liability,

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such as strict liability. Professor Horwitz has explained that Isaacs's pro-standardization and pro-strict liability stance was unique among contemporary tort scholars, almost all of whom had retreated to a subjectivist position in order to defend the negligence principle. From a review of Anglo-American legal history, Isaacs concluded tort law had alternated between the principles of negligence and strict liability. He argued that the shift to a mass-production economy warranted a return to strict liability. Isaacs saw that strict liability was needed to police culpable conduct independent of individual culpability. This development came to pass with the acceptance of strict products liability.

Isaacs insisted that the variation in the law between negligence and strict liability was not caused by any inevitable evolution but by the constant challenge of reconciling changing realities with moral principles. Defending the supposedly amoral doctrine of strict liability, he argued that "a re-defining of external standards seems necessary. If the moral notion that links fault with liability must to some extent be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free."  

C. Constitutional Law

The cycle theory had a powerful influence on Isaacs's understanding of American constitutional law. Isaacs sought to develop a theory of jurisprudence that would, by putting the Supreme Court's method of constitutional interpretation in historical context, intellectually undermine the Supreme Court's

102. See Horwitz, Transformation, supra note 1, at 126 (noting that Isaacs recognized "that objectivism had already cleared away the most powerful individualistic objections to strict liability").

103. See Isaacs, Fault and Liability, supra note 56, at 960–62 (explaining that tort law has historically alternated between liability based on fault and liability without fault, and classifying liability in modern society within the latter); Nathan Isaacs, Quasi-Delict in Anglo-American Law, 31 Yale L.J. 571, 573 (1922) (explaining the need to include new types of liability without fault within the realm of tort doctrine); see also Edwin M. Borchard, Introduction to The Progress of Continental Law in the Nineteenth Century xxxv, xxxv–xxxvi (Augustus M. Kelley Publishers 1969) (1918) (suggesting the possibility that "in the field of labor legislation, a reaction against Sir Henry Maine's theory of evolution from status to contract or merely a recognition of the necessity for greater protection of the social interests of the state" was ongoing).

104. Isaacs challenged established authorities on this subject. "Nathan Isaacs...marshaled in evidence that both Holmes and Wigmore were wrong about historical tort rules of England being devoid of moral sense." Nelson P. Miller, An Ancient Law of Care, 26 Whittier L. Rev. 3, 4 (2004).

105. Isaacs, Fault and Liability, supra note 56, at 978.
Lochner-era doctrine, which held that the Fourteenth Amendment protected substantive economic rights.  

Isaacs grounded his criticism of the Lochner-era Court on the belief that the Constitution was, in essence, a “code.” He derided the Court for having turned “to literalism and to fictions” in the interpretation of that code and claimed that “[m]uch of the vaunted Constitutional Law” of the nineteenth century “was the merest word-study” in which words were stretched beyond their normal meanings. For example, legal fictions preserved the Electoral College and created federal jurisdiction over corporations. In the aftermath of the vast expansion of the federal government’s power during World War I, Isaacs argued that the Supreme Court had stretched the words “interstate commerce” in the Constitution “until they almost burst.” Yet, even legal fictions have their limits: “It is easier to read a current economic concept into the Constitution than to read it out again when it ceases to be current.” While acknowledging that the Founders did not anticipate modern conditions, Isaacs boldly pronounced that “we are entering just now after one hundred and fifty years nearly upon a second phase of constitutional interpretation in which we are trying to get at the spirit of the thing, rather frankly confessing that the letter is not the whole thing.” Isaacs suggested that an equitable way of studying the Constitution would be to try to understand the thought of the men who wrote it as an aide in discovering general constitutional principles.

Isaacs felt that the greatest legal battles of his day were “being fought over statutory collisions with the principle of freedom of contract.” One of the purposes of Isaacs’s

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106. See Lochner v. New York, 198 U.S. 45, 56–57 (1905) (invalidating a New York labor law on the premise that people have the liberty and right to contract freely for employment).

107. See Flaks, supra note 63, at 280 n.42 (quoting Nathan Isaacs, Cases and Documents Illustrative of Anglo-American Legal History 4 (1917) (unpublished manuscript, on file with Harvard Law School Library)) (noting a trend toward legislative codification of the law and pondering whether this law would be inundated with “fictions” as constitutional law had been).

108. Id.


110. Id.


112. Isaacs, Securities Act, supra note 109, at 220.


114. Isaacs, Standardizing Contracts, supra note 54, at 38 n.17.
groundbreaking analysis of the history of contracts and torts was to reveal the unhistorical nature of the *Lochner*-era Court's opposition to interfering with the freedom of contract, or in the imposition of strict liability. Isaacs argued that the Founding Fathers' and John Marshall's understanding of contract law was very different from that of the *Lochner* Court. In a 1922 lecture on legal history, Isaacs argued that decisions that had declared the inviolability of freedom of contract were the product of Justices who had been in "the habit of talking about natural rights. Whenever they wanted to prove that a man had a certain right, all they had to do was to say that it was natural." In the end, Isaacs's cycle theory of legal development molded his views on contract and tort law, as well as constitutional law. As discussed above, Isaacs did not think, as the influential Maine had, that civilization inexorably progressed "from Status to Contract." Minimum wage legislation, maximum work hour legislation, and collective bargaining of labor contracts were perhaps the most significant examples of retreats from absolute freedom of contract. While Isaacs thought that governmental regulation in status-based relationships, such as employment, was warranted in the 1910s and the 1920s, he was a critic of later New Deal legislation as unconstitutionally antibusiness. Part VI will examine Isaacs's critique of the New Deal.

D. Two Views of Arbitration

Perhaps prompted by the passage of the Federal Arbitration Act (FAA), Isaacs provided the first full analysis of the status

115. See AMERICAN LEGAL REALISM, supra note 1, at 78–79.
117. Nathan Isaacs, Second Lecture in Legal History 3 (Oct. 9, 1922) (on file with Baker Library Historical Collections, Harvard Business School, Box 1, File: Lecture on Legal History, 5 October 1922). Isaacs mocked Justices who were accustomed to thinking of Adam Smith's "economic theory as the law of nature." Id.
119. See Isaacs, Standardizing Contracts, supra note 54, at 47.
120. The FAA provided that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

and role of arbitration in society.\textsuperscript{121} In his 1927 Harvard Law Review article, \textit{Two Views of Commercial Arbitration}, he sketched two models of arbitration—the arbitrator as judge model and the arbitrator as agent model.\textsuperscript{122} Isaacs referred to the former model as the "legalistic view" and the latter as the "realistic view."\textsuperscript{123} Isaacs feared that the adoption of the legalistic view would make arbitration litigation-like and would leave arbitration bereft of most of its benefits as a unique means of dispute resolution.\textsuperscript{124} He argued that parties should opt towards treating the arbitrator as an agent of the parties instead of as a substitute judge.\textsuperscript{125} Professor Schmitz notes that Isaacs "emphasized that judicial review of awards would foster legalistic, ‘trial-like’ arbitration complete with formal procedure, records and opinions."\textsuperscript{126} Isaacs's argument that arbitration would lose its effectiveness as a tool of business if there was a far ranging judicial review of arbitration decisions, made only

\begin{itemize}
\item \textsuperscript{121} Kirgis, \textit{supra} note 58, at 27 n.148.
\item \textsuperscript{122} See Isaacs, \textit{Two Views, supra} note 57.
\item \textsuperscript{123} \textit{Id.} at 929.
\item The proper role of an arbitrator was transforming in the colonies and it remained unclear in the nineteenth-century. In a Harvard Law Review article, Nathan Isaacs contrasted the "legalistic view," which likens arbitrators to judges, with the "realistic view," generally adhered to by businesspeople, who see arbitrators as agents of the parties.
\item \textsuperscript{124} See Isaacs, \textit{Two Views, supra} note 57, at 937–38. Seventy years later, a scholar would note that:

Nathan Isaacs posed the question, "Is arbitration a mode of trial or a substitute for trial of so different a nature as not to be properly included under that term?"

On the one hand, Isaacs explained, arbitration might be viewed as a creature of private contract, with arbitrators as the parties' agents and instruments of their will. On the other hand, as a system for binding adjudication of disputes by independent decisionmakers, arbitration invited comparisons to court trials. Isaacs concluded that one's perspective on many practical and legal questions confronting parties, arbitrators, courts, and legislatures hinges on the "more or less subconscious" categorization of arbitration as an instrumentality of contract or court substitute.

\item \textsuperscript{125} See Isaacs, \textit{Two Views, supra} note 57, at 940–41. Wesley Sturges wrote to Isaacs in 1930 to voice similar concerns of the role of lawyers in the arbitration process: "As lawyers take on the management of arbitrations, more and more will the process not be a simple one." Letter from Wesley Sturges to Nathan Isaacs (Nov. 24, 1930) (on file with Baker Library Historical Collections, Harvard Business School, Box 2, File: Correspondence Re: Articles and Books, 1930).
shortly after the passage of the Federal Arbitration Act in 1925,\textsuperscript{127} has largely been accepted.\textsuperscript{128}

Space has not permitted an exhaustive review of Isaacs's many contributions to legal scholarship. However, this brief review shows the magnitude of his contributions. The next Part will more fully examine CLR and Isaacs's cycle theory of legal development, both of which were significantly influenced by Jewish law.

IV. CONSERVATIVE LEGAL REALISM AND THE JEWISH LEGAL TRADITION

Isaacs's insights were not cloaked in theoretical nomenclature,\textsuperscript{129} and his vein of CLR was not as sexy as the more radical insights of Llewellyn\textsuperscript{130} and Frank.\textsuperscript{131} Theoretical or not, radical or not, his insights into the actual working out of law in a cyclical evolutionary path were important contributions to legal realism and modern legal theory. His writings provide insights into the law from both critical and developmental perspectives. Many of the ideas he nurtured are still relevant to modern legal theory, as well as being foundational in disparate areas of law such as contracts, sales, arbitration, torts, and trust law. Isaacs's position as a proto-realist informs the intellectual offerings of other proto-realists like Pound, Corbin, Hale, and Hohfeld, as well as the realists of the 1930s, including Karl Llewellyn and Morris and Felix Cohen. Isaacs's focus on the functionality of law remains an important part of legal scholarship.\textsuperscript{132} Hohfeldian jurisprudence details the breaking down of legal concepts from abstract generalizations to concrete, workable duties.\textsuperscript{133} This

\begin{itemize}
\item \textsuperscript{128} See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282 (1995) (O'Connor, J., concurring) (explaining that prearbitration litigation would frustrate the very purpose of the FAA). In recognition of his scholarship, the American Arbitration Association invited Isaacs to become a member of its Board of Directors. Letter from Lucius Eastman, Chairman of the Bd. of the Am. Arbitration Ass'n, to Nathan Isaacs (Feb. 22, 1940) (on file with Baker Library Historical Collections, Harvard Business School, Box 1, File: Correspondence, 1935–1940).
\item \textsuperscript{129} Professor Horwitz labeled Isaacs as “the original and penetrating torts-contracts scholar.” HORWITZ, TRANSFORMATION, supra note 1, at 183.
\item \textsuperscript{130} See Llewellyn, Some Realism, supra note 1, at 1222–26 (responding to Dean Pound's critique of legal realism).
\item \textsuperscript{131} JEROME FRANK, LAW AND THE MODERN MIND (1930).
\item \textsuperscript{132} But see Robert Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 57–60 (1984) (criticizing the idea that law is functional).
\item \textsuperscript{133} See, e.g., Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 46 (1913) [hereinafter Hohfeld, Fundamental].
\end{itemize}
decomposition of legal abstraction is at the heart of Isaacs's analysis. The rest of this Part will place Isaacs's scholarship in the context of American legal realism, examine the connection between his brand of CLR and modern legal theory, and analyze the relationship between Jewish law and his theory of legal development.

A. American Legal Realism

Legal realism is often associated with two well-analyzed insights. First, the radical form of legal realism, more recently associated with CLS, questions the law's ability to provide determinate, unbiased answers to legal disputes. This rule skepticism is the most noted characteristic of the legal realist scholarship of the 1930s. This is also the idea that the CLS movement of the 1970s and 1980s further radicalized to question the very legitimacy of the legal order. Critics of the realists feared the nihilistic and lawless implications of such theorizing, but it is doubtful that many of the legal realists actually intended to assault the underlying legitimacy of law. As discussed earlier, Isaacs's CLR attempted to merge the indeterminacy of the dynamic nature of law with its disaggregated conceptual core. The second major insight of the legal realists was the need for an interdisciplinary analysis of law and legal practice. It is this insight that connects legal realism to the modern LAE

134. See Isaacs, Standardizing Contracts, supra note 54, at 39 n.19 (Isaacs "gratefully" adopted Hohfeld's eight fundamental legal conceptions). Duncan Kennedy has suggested that the search by Isaacs and other like-minded figures for the governing functional interest of a legal relation was "very similar to the principles of classical legal thought, or similar at least in that the trick is to find a governing interest for a domain and then implement it." Kennedy, supra note 65, at 120.

135. See Brian Leiter, American Legal Realism, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 64–65 (Martin P. Golding & William A. Edmundson eds., 2005).

136. The legal formalists of the early 1900s believed "that judges decide cases on the basis of distinctively legal rules and reasons." It is this type of formalism that the legal realists attacked. Id. at 50.

137. Id. at 64–65.

138. See AMERICAN LEGAL REALISM, supra note 1, at 49–62 (detailing the realism movement's origins and the clash over the meaning of the movement); William Twining, Karl Llewellyn and the Realist Movement 81 (1973) (describing the tremendous confusion within academia of the meaning of realism); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 840–42 (1935) (attacking formalist legal logic but also calling for the assessment of "conflicting human values"). But see Frank, supra note 131, at 32–41 (delivering radical criticisms of the judicial decisionmaking); Karl Llewellyn, The Bramble Bush 110 (1930) (distinguishing the concept of law from that of order); Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274, 278 (1929) (explaining the role of intuition in judicial decisionmaking).
movement. Isaacs’s Ph.D. in economics and immersion into legal history provided a knowledge base for his broad contextual view of law and the importance of an interdisciplinary approach to legal study. Isaacs’s CLR will be more fully explored in the next Part.

B. Conservative Legal Realism and Modern Legal Theory

The CLR strain of legal realism plays a major role in modern legal theory. The connection between legal realism and various schools of legal thought, such as CLS, law and society, and LAE, has been well documented elsewhere. However, the relationship between the work of Isaacs and modern legal thought has not been adequately analyzed. Understanding Isaacs’s insights can help us better comprehend the meaning and influence of the LRM and its intellectual descendents.

Professor Horwitz has argued that LAE’s general alignment with political conservatism lacks precedent from within the original legal realist tradition. One of the forerunners of legal realism, Roscoe Pound, became a conservative and was criticized by the realists of the 1930s for not going far enough with his realist insights. However, Robert Gordon has suggested that the general affiliation of legal formalism with political conservatism and legal realism with political liberalism is “only an accident of our recent history” and that “[i]t is easy to imagine a radical formalism, such as the French Revolution’s program to remake society in accordance with abstract legal

139. See, e.g., RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 13 (2001). Critical Legal Studies was “[i]n major part ... a revival of legal realism in an uncompromisingly radical form ... . The critical scholars claimed that law is nothing but politics.” Id. at 13. “[T]he legal realist movement of the 1920s and 1930s advocated not only greater psychological realism (Jerome Frank) and economic realism (Karl Llewellyn, William O. Douglas) about the law but also large-scale empirical research as the path of law reform.” Id. at 3.

140. See HORWITZ, TRANSFORMATION, supra note 1, at 269–71.


142. See, e.g., HULL, POUND AND LLEWELLYN, supra note 1, at 283 (“[T]he acuity of Pound’s intellectual vision faltered . . . .”).
rights, or a conservative Realism, such as German historicism.\textsuperscript{143} Isaacs embodied a brand of conservative realism present among the American legal academics of the 1920s and 1930s.

The recognition of a conservative strain of legal realism puts into perspective a long-standing dispute over the historic pedigree of legal realism and CLS. This Article suggests a resolution of this debate by establishing that there was a CLR strand of realism that embraced a conservative moral and political valence, while also advocating social scientific studies and recognizing the socially contingent nature of law. In the end, CLR recognizes the contingent nature of law but insists that such contingency is limited by moral, political, and cultural values that are essentially conservative. Professor Horwitz rejects the proposition that legal realism rested upon conservative values. He contests the assertion that because legal realism and LAE "both share an instrumentalist and consequentialist approach to law" they are both based upon a conservative ideology.\textsuperscript{144} Horwitz argues that the social science embraced by the realists was value-laden and intertwined with a progressive political ideology that is incompatible with LAE’s embrace of a purportedly value-free economic social science.\textsuperscript{145} The thesis here is that Isaacs’s strain of CLR is more aligned with modern LAE than with the generally held view of 1930s legal realism. Horwitz may be right regarding the linkage between RLR and CLS,\textsuperscript{146} but his argument loses weight when comparing CLR to CLS.

Richard Posner has chastised legal realism for its liberalism, irresponsibility, and its “naive enthusiasm for government.”\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{143} Gordon, supra note 132, at 66 n.18.
\item \textsuperscript{144} Horwitz, Transformation, supra note 1, at 270.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} This linkage has been challenged. See Wouter de Been, Legal Realism Regained: Saving Realism from Critical Acclaim 76 (2008) (accusing Horwitz of making distortions in finding this linkage).
\item \textsuperscript{147} Richard A. Posner, Overcoming Law 393 (1995) [hereinafter Posner, Overcoming Law] (advocating the “fusion” of liberalism, pragmatism, and economics in law application); see Richard A. Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency 7–9 (2006) (arguing for a pragmatic approach to issues of constitutional interpretation in relation to the war on terror); Richard A. Posner, Law, Pragmatism, and Democracy 3–4 (2003) (discussing legal pragmatism and its application to law and policy); Richard A. Posner, Foreword to Michael J. Whincop & Mary Keyes, Policy and Pragmatism in the Conflict of Laws xiv (2001); see also de Been, supra note 146, at 190 (observing that Posner has not been “keen to acknowledge the Realists as his intellectual forebears”); Elisabeth Krecke, Economic Analysis and Legal Pragmatism, 23 Int'l Rev. L. & Econ. 421, 427 (2003) (describing Judge Posner's relationship to the concept that an invisible hand “drives the law toward efficiency”). Posner’s pragmatism has been described as “an instrumentalist perspective which focuses primarily on the practical consequences of legal rules, rather than on their doctrinal logic and propriety.” De Been, supra note 146, at 197.
\end{itemize}
However, Posner has acknowledged that he agrees with the realists on “what to do—that think things not words, trace the actual consequences of legal doctrines, [and] balance competing policies.” \footnote{\textsc{posner, overcoming law}, \textit{supra} note 147, at 393; \textit{see de been}, \textit{supra} note 146, at 191 (suggesting that Posner could be considered a modern advocate of an “empirical approach inspired by Legal Realism”).} Posner’s more recently espoused theory of pragmatism is fully informed by legal realism. \footnote{Thanks are due to Professor Jon Hanson for this observation.} Posner echoes the realists’ pragmatic commitment to social science when he decries that contemporary law places “too much emphasis on authority, certitude, rhetoric, and tradition, too little on consequences and on social-scientific techniques for measuring consequences.” \footnote{\textsc{posner, the problems of jurisprudence} 465 (1990).} Isaacs’s functionalist CLR and Posner’s pragmatic LAE both offer a pro-business and conservative social vision of the American legal order. \footnote{\textit{see de been}, \textit{supra} note 146, at 200 (“There might be something wrong with the content of Posner’s substantive view, but from a Pragmatic perspective there is nothing wrong with his commitment to a vision. It lends coherence and purpose to his Law and Economics approach. There is a point to Posner’s varied research projects . . . ").} Like the realists, and anticipating Posner, Isaacs rejected the formalist view of law as a science and instead advocated for an understanding of law as a set of malleable tools that should be used to solve society’s problems. Politically, Isaacs was a conservative who believed in free enterprise. \footnote{Isaacs’s friend Oko, himself a political liberal, believed that Isaacs “was no rebel in politics. He was conservative. Not that he chose to stand in the zone of caution. His temper was not that of a reformer, but he was ready to consider every change upon its merits.” \textit{oko, memorial address}, \textit{supra} note 13, at 2.} He thought that the law should use its tools to assist businesspersons in their pursuit of economic gain. The next section examines the Jewish legal tradition as it relates to Isaacs’s unified theory of law. Though Isaacs’s economic views were directly related to the business law specialty to which he dedicated his academic career, Isaacs’s religious views undoubtedly played an even more fundamental role in shaping his understanding of the legal dilemmas of his era.

\section*{C. Jewish Legal Tradition and Isaacs’s Unified Theory of Law}

There was a complex interaction between Isaacs’s understanding of secular and religious law. His writings on Jewish and general legal subjects cannot be understood in isolation. Isaacs’s study of Jewish law was influenced by contemporary currents in general legal thought. He investigated Jewish law with the same scholarly approach in which he studied
other legal traditions, and his conclusions sometimes radically differed from traditional understandings. Simultaneously, Isaacs's academic contributions to secular legal thought were influenced by his study of Jewish law. Though Isaacs was notably reticent about his innermost convictions, his conservatism reflected his lifestyle and intellectual commitments as an observant Jew.

Jewish law served as a paradigm for other systems of law in Isaacs's mind. Adolph Oko noted that Isaacs was "fascinated by universal legal ideas" and held the belief that Jewish law was a living, growing law. Isaacs did not see the Jewish people or their law as sui generis. He recognized that the tension between tradition and innovation in Jewish law was a characteristic of civil and common law legal systems. Isaacs laid out his unified understanding of Jewish law and secular law in a two-part article: "The Law" and the Law of Change. In that article, he sketched the cycles in the history of Jewish law and extrapolated them to secular law. His knowledge of the Jewish and civil law legal systems enabled him to place Anglo-American law in a broader context. He claimed that the Jewish

153. Oko eulogized Isaacs as “a convinced Jew, and orthodox.” Oko, Memorial Address, supra note 13, at 1. However, Oko quickly added that Isaacs was “no ‘fundamentalist,' biblical or rabbinic” and that “[i]n Nathan Isaacs intelligence and orthodoxy met in a new embrace.” Id.

154. One of his assistants recounted that Isaacs “was always happy to discuss problems of religious history, theory and practice; but concerning his religious feelings and convictions he was always silent. Here his feelings were too deep, too personal for conversation.” Freiberg, supra note 29, at 6.

155. Oko, Memorial Address, supra note 13, at 1. See generally Oko & Isaacs, supra note 34, at 73–85 (calling for the writing of a history of Jewish Law).

156. See generally Nathan Isaacs, Jewish Law in the Modern World: A Study in Historic Fact and Fiction, 6 MENORAH J. 258, 262 (1920) [hereinafter Isaacs, Jewish Law in the Modern World] (“Jews are a part of the human family and have all the traits of the human family, and that their experiences and reactions are accordingly both natural and interesting.”).

157. See generally Nathan Isaacs, The Influence of Judaism on Western Law: A Gift Inter Vivos, in THE LEGACY OF ISRAEL 377, 397–406 (Edwyn R. Bevan & Charles Singer eds., 1927) [hereinafter Isaacs, Influence of Judaism on Western Law] (describing the relationship between the solution of Jewish problems and the improvement of general law and the relationship of the Jewish experience under western law). Some of his close associates wrote shortly after his death that Isaacs “saw in Jewish sacred law the foundation of his legal studies, since it is there that he found the higher purposes of Jurisprudence contemplated or attained.” Letter from Ben M. Selekman, Executive Dir. of Associated Jewish Philanthropies, to Ella Isaacs, Nathan Isaacs’s Widow (Apr. 8, 1942) (on file with American Jewish Historical Society) (discussing the resolution adopted by the Board of Trustees of the Associated Jewish Philanthropies at its meeting on March 9, 1942).


159. See Weisbrod, Way We Live, supra note 11, at 786 nn.40–44 (providing an analysis of the general character of Nathan Isaacs's writings and career).
and Anglo-American legal systems shared many essential attributes. Isaacs’s cycle theory was an attempt to discover universal principles of law while allowing for constant change in the content of the law. He asserted that those changes are accomplished through a predictable set of means that correlate to the different but recurring stages of how lawyers approach their legal system.

This cycle theory of jurisprudence was a direct outgrowth of the internal debate between Reform and Orthodox Jews over Jewish law. Isaacs conceived his theory of legal cycles to support a traditional understanding of Jewish law against the attacks of Reform Judaism, even as he embraced the changing nature of the law. Isaacs asserted that the difference between his own moderate traditionalism and the Reform faction was “not a question of change vs. no change; it is rather a question of the mode and manner of development.”

Rabbi Dr. Adolf Büchler, the principal of Jews’ College, an English Orthodox seminary, questioned Isaacs’s description of the Reform movement as a natural product of Jewish history. In response to the similar criticism that he was legitimizing the Reform movement by acknowledging change in Jewish law, Isaacs affirmed that while the Reform movement had historical antecedents, he believed that the cultural assimilation of Reform Jews would prevent the Reform movement from making a permanent contribution to Jewish tradition.

He used insights taken from the historical development of Jewish law to inform his theory of legal development and

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160. Nathan Isaacs, The Schools of Jurisprudence: Their Places in History and Their Present Alignment: The Quarrels of the “Schools,” 31 HARV. L. REV. 373, 409–10 (1918) (comparing the universal elements in grammar between two different languages and in jurisprudence between the two different legal traditions).


163. Isaacs, Notes on Fiction, supra note 162, at 601.


165. See Letter from A. Büchler to Nathan Isaacs (Oct. 6, 1919) (on file with Baker Library Historical Collections, Harvard Business School, Box 5, File: Material removed from Volume 1, 1919–1930) (“The negative attitude of the [nineteenth] century reformers . . . does not seem to fit in with the natural stages of development.”).

166. Isaacs, Notes on Fiction, supra note 162, at 601–02.
stressed that, in the realm of Jewish law, legal doctrines were mere tools that should be adapted as dictated by the moral goals of the law. It is striking that just as in the realm of commercial law, Isaacs advocated for a functional approach in Jewish law while simultaneously insisting upon the integrity of its traditional common-law-like process.

Much of Isaacs’s scholarship worked to resolve the challenge of recognizing that law adapts to the changing needs of society while continuing to insist that the law was not simply opportunistic. His worldview saw law as serving a relatively fixed moral end, even when the law changes to respond to different historical conditions. He thought that Jewish law evolved to serve human needs, but also that it contained timeless principles. A Talmudic story about the equitable Rabbi Hillel (c. 110 BCE–10 CE) and his more conservative contemporary Rabbi Shammai inspired Isaacs. A Gentile offered to convert to Judaism if Shammai would teach him the whole Law on one foot. An indignant Shammai chased the scoffer away. When the sarcastic Gentile presented the same offer to Hillel, he replied “[w]hat is hateful to you, do not to your neighbor: that is the whole [Law], while the rest is the commentary thereof: go and learn it.”

Because of his belief in the dynamic nature of law, Isaacs rejected the “simple account of Revelation” that the entire Torah was given de novo by God at Mount Sinai. Instead, he argued that “the great mystery of ‘revelation’ must be approached as an incident in the life of the law—an incident involving selection, rejection, purification, but not creation.” At the turn of the twentieth century, Higher Biblical Criticism rested in part on the presumption that law always evolved in a steady ethical progression which could be discerned by the

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171. Isaacs, Jewish Law in the Modern World, supra note 156, at 262.

Prophets from the different codes found in the Bible. Isaacs believed that such a presumption was untenable. He asserted that such a juristic theory encourages a revisionist view of history in relation to the interpretation of canonical texts. The framing of legal change through the prism of progressive evolution biases the interpreter toward a revisionist view of history in order to confirm the legal-ethical progression. At the same time, Isaacs also rejected a fundamentalist understanding of the Bible. Biblical fundamentalists believe that God’s intent can be discerned from a literal reading of holy texts. In contrast, nonfundamentalist Catholics, Orthodox Jews, and Muslims interpret the Bible through the lenses of tradition, doctrine, and precedent. In rejecting “Jewish fundamentalism,” he argued that the Pentateuch was primarily a Law Book in which the nonlegal parts are auxiliary. He insisted that there is a strand of Judaism that is zealously observant but still embraced the Law’s dynamic nature. Modern Orthodox Rabbi Leo Jung eulogized that “Nathan Isaacs was universally beloved because he was not confined to any contemporary scene nor exclusive in sympathy for any particular group.”

Isaacs condemned the classification of Jews as “Reform” or “Orthodox” as being deceptive and destructive. As matters

173. See generally Nathan Isaacs, Book Review, 45 HARV. L. REV. 949, 950 (1932) (reviewing J.M. POWIS SMITH, THE ORIGIN AND HISTORY OF HEBREW LAW (1931)) (suggesting that the doctrine of “higher criticism” dictates that legislation arise out of existing conditions and that the Bible borrows from the Hammurabi Code).

174. See id. at 950–51 (“It is almost grotesque to pick out from a cluster of laws found incorporated in an account of revelation, in a homily, or in a prophetic vision, details for comparison with the businesslike orders inscribed on a stone for the instruction of citizens.”).

175. Isaacs sarcastically noted, in relation to Jewish and English law, that:

[I]f we were to go through the whole body of English law and forcibly “date” each paragraph by reference to such a juristic theory, throwing out alleged “later additions” and other intractable matter and literally amending our texts, we might build up a body of learning on the basis of which a later writer could develop a simple history of English law that would concur exactly with our previous job of dating by internal evidence, and we should end with the same hypothesis . . . .

Id. at 951 (footnote omitted); see also Isaacs, Common Law of the Bible, supra note 172, at 117 (claiming that a knowledge of the development of unwritten law takes the sting out of turn of the twentieth century Higher Biblical Criticism).


177. Isaacs, Great Preamble, supra note 168, at 232.


179. Leo Jung, Eulogy Delivered at the Nathan Isaacs Memorial Service at the Hebrew Teachers College (Feb. 22, 1942) (on file with the American Jewish Historical Society).

180. See Nathan Isaacs, Jewish Sects and Factions in America, 5 JEWISH F. 8 (1922).
stood in 1922, Isaacs argued that "the labels are not only lies; they are an absolute menace" because they imposed ideological classifications which prevented people from thinking for themselves and hampered recognition of the more significant divisions between observance and non-observance. Isaacs's belief in a variant of Modern Orthodox or Conservative Judaism allowed him to formulate a universal theory of legal cycles and to search for new principles to anchor evolving law. He blended the negative critique of the legal order associated with the legal realists with a positive theory of legal development.

Isaacs considered radical change in the law as a sign of its continuing vitality rather than its capriciousness. At the same time, Isaacs's work was premised on a faith that it was possible to formulate objective principles in both Jewish and secular law in order to further moral goals. The LRM was a radicalization of the realist insights offered by Roscoe Pound and Nathan Isaacs. In the end, Isaacs's realist-conservative view allowed him to reject the New Deal political agenda shared by most of the realists, while retaining his legal realist commitments to studying the law in practice and to a pragmatic, nonliteralsitic jurisprudence. Isaacs's functional method at the core of his CLR, and its relationship to legal realism and Jewish law, will be more fully examined in the next Part.

181. _Id._ at 16.
182. Isaacs understood and sympathized with Jewish students attempting to deal with the demands of Jewish law and culture in a secular university setting. He wrote to Menorah Chancellor Henry Hurwitz that:

"You know as well as I do...what indelible scars the struggle of that transition [between traditional Jewish scholarship and American academia] has left on many of our contemporaries. They deserve our pity and have it, too, in spite of the awful things they perpetuate. I am reminded of the Talmudic story of the Four that entered the Garden [of esoteric philosophy]. One died, one lost his mind, one became a heretic and only one entered in peace and departed again in peace. The same general proposition obtains today among bechurim [young yeshiva students] who gain admittance to American graduate schools."

RITTERBAND & WECHSLER, _supra_ note 9, at 147 (second alteration in original). Isaacs, though he had never attended a Yeshiva, may have had himself in mind as someone who had seamlessly merged his secular and Jewish studies. Isaacs thought the transition of traditional Judaism to American life had created schisms in American Judaism. However, he was confident that eventually a moderate approach would arise combining the strengths of Jewish and American traditions. Louis Hurwich, _Professor Nathan Isaacs_, JEWISH ADVOC., Feb. 20, 1942 (on file with American Jewish Historical Society) (Acting Dean of Hebrew Teachers College and Superintendent Bureau of Jewish Education recounting the theme of a series of Hebrew lectures Isaacs had delivered at Boston's Hebrew Teachers College).
This Part will examine the roots of Isaacs's realist or functional approach to the law. Isaacs relied upon the legal realist insights to both facilitate business transactions and to defend Judaism. Isaacs's functionalism bridged the intellectual divide between the importance of teaching doctrine and critiquing that doctrine; between general principles and transaction-specific rules; and between legal formalism and radical realism. The first section reviews the role of Jewish law in Isaacs's functional analysis. He saw in the Jewish case law or responsa evidence of the dynamic nature of a supposedly fixed law. He used this knowledge of Jewish law to inform his legal realism and to frame his cycle theory of legal development. The second section analyzes the application of his insights taken from the study of Jewish law to develop a CLR critique of American law. This section will also analyze his promotion of an interdisciplinary approach to law study, the relationship of Isaacs's scholarship to Llewellynian thought, and his critique of Hohfeldian conceptualism.

A. Isaacs's Functionalism and Jewish Law

Isaacs's insight that Jewish law was a dynamic, living law that was responsive to moral and ethical concerns forged his commitment to a functional law. He applied this living law concept to the evolution of law in general and more specifically to the American legal system. He argued that Jewish life continually developed the Halakah through application to novel

183. See Letter from Isaacs [Jurist] to Oko [the Bookman] 3 (n.d.) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 3).

184. Felix Cohen believed that "functionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience." Cohen, supra note 138, at 822. He also remarked that "[i]f the functionalists are correct, the meaning of a definition is found in its consequences." Id. at 838.


186. See supra Part IV.C (describing Jewish legal tradition and Isaacs's unified theory of law).

187. Isaacs disagreed with the view that Jewish law became rigid and formalistic after biblical times. One of those who held that view was famed legal sociologist Eugen Ehrlich. Isaacs accused him of falling into the trap of believing that current Jewish law had become fixed. See Isaacs, Jewish Law in the Modern World, supra note 156, at 263–64 (discussing some common misunderstandings of Rabbinic Law).

188. Halakah is the traditional Hebrew term for Jewish law, literally meaning the "path." MICHAEL L. SATLOW, CREATING JUDAISM: HISTORY, TRADITION, PRACTICE 156 (2006).
situations. The Talmud was used creatively in practice to deal with novel issues. Isaacs used a Jewish legal concept, hazakah, as an example of the dynamic nature of Jewish law. In the Middle Ages, Jews would not compete with one another for housing rentals. Jewish practice held that it was improper to offer a higher rental amount for a residence occupied by another Jew. There was no explicit rule in the Talmud that dealt with this issue. However, some Rabbis found authority for the practice in the Talmudic principle that if a poor man is turning a cake in preparation to eating it, he who takes it from him is wicked. In this example, Jewish tenants came to respect "each other's tenant-right, or hazakah." Isaacs saw this as an example of Jewish law acting in the spirit of Pound's social engineering vision of law. Isaacs's research on the practice of hazakah was cited in briefs supporting the constitutionality of rent-control laws in the New York Court of Appeals and the U.S. Supreme Court.

189. Nathan Isaacs, Introduction of Professor Ginzberg, Zunz Lecturer 3–4 (Dec. 29, 1920) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2).
191. Isaacs, Influence of Judaism on Western Law, supra note 157, at 403.
192. For Isaacs, the "law" was "put to the test in this as in hundreds of other details in the Middle Ages." Isaacs, Jewish Law in the Modern World, supra note 156, at 264.
193. When the constitutionality of the first New York rent control laws was challenged in the New York Court of Appeals and then in the U.S. Supreme Court, Julius Henry Cohen, one of the lawyers defending the legislation for the Joint Legislative Committee on Housing of the New York Legislature, was aided by an article written by Isaacs in the Menorah Journal. Isaacs, Jewish Law in the Modern World, supra note 156. Isaacs also translated an Italian study of the subject for Cohen. Julius Henry Cohen, Book Review, 22 COLUM. L. REV. 603, 604 n.2 (1922) (reviewing EDGAR J. LAUER & VICTORE HOUSE, THE TENANT AND HIS LANDLORD (1921)). Cohen believed that the rent control law would be upheld if the judges were weaned "away from the prevailing lawyers' bias against the laws" by bringing the history of Jewish law and Parliamentary laws that regulated rents in Ireland into play. JULIUS HENRY COHEN, THEY BUILT BETTER THAN THEY KNEW 170 (1946). Cohen relied upon these arguments before the New York Court of Appeals; his arguments resulted in the court opinion joined by then-Judge Cardozo. See Edgar A. Levy Leasing Co. v. Siegel, 130 N.E. 923, 923 (N.Y. 1921) (holding that the rent regulations were constitutional). These historical precedents, or at least the British ones, were effective. Cohen successfully defended the wisdom of the laws during oral argument before the U.S. Supreme Court in Edgar Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). Cohen, supra, at 606. In the companion case to Siegel, Justice Holmes stressed in the majority opinion that "[t]he preference given to the tenant in possession . . . is traditional in English law." Block v. Hirsh, 256 U.S. 135, 157 (1921). However, it was probably more important for Holmes that the rent law purported to be a temporary emergency measure. Id. In contrast, Holmes would shortly thereafter void as a taking the permanent Pennsylvania statute which made it illegal for coal companies to cause the subsidence of public buildings, streets, or any private home. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922).
Isaacs's belief in the ability of the common law to adjust itself to meet modern problems was borne out of his study of Jewish *responsa*. He saw the adaptive qualities of Jewish law as evidence of "the Halakah as a living institution." He believed that studying the method of law application represented by the *responsa* system would result in a better understanding of the common law system both descriptively and prescriptively. The study of Jewish law was important not only for a better historical understanding of legal change but also in the quest for legal reform.

B. Isaacs's Functionalism and the Legal Realist Movement

Isaacs's research methodology, influenced by his position at Harvard Business School, focused on how law adapted in response to changing social and economic problems. He helped develop a functional approach to law study. Carol Weisbrod noted that his work centered on a nonformalistic, business-oriented vision of the law. Commercial law, Isaacs argued, should be organized through the perspective of a businessperson's problem-solving orientation. This functional, or problem-oriented, approach was an attempt to discuss legal concepts in their actual business context rather than through the lens of contract doctrine.

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194. Letter from Nathan Isaacs to Adolph S. Oko (Feb. 5, 1923) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2).

195. Isaacs, *Influence of Judaism on Western Law*, supra note 157, at 405–06. Isaacs's dream is closer to fulfillment today due to the availability of tools such as the computerized Global Jewish Database (The Responsa Project). *See* Judaic Responsa, http://www.biu.ac.il/JH/Responsa (last visited Mar. 26, 2010) (listing an advertisement for the Online Responsa Project). Isaacs systematically built up an impressive Judaica collection of an estimated 10,000 bound volumes and 1,000 pamphlets. The collection was especially strong in the fields of Jewish thought, bibliography, and law. The library included many valuable and rare early printed editions of *responsa* and other Jewish works. Adolph S. Oko, The Nathan Isaacs Jewish Collection (n.d.) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 9, File 12). The bulk of the Nathan Isaacs Library is now in the possession of the Chaim Berlin Yeshiva in Brooklyn, N.Y.


198. For Isaacs, the "law is made for such realities as business and not business for the law." Nathan Isaacs, Book Review, 25 ILL. L. REV. 114, 115 (1930) (reviewing WILLIAM H. SPENCER, A TEXTBOOK ON LAW AND BUSINESS (1929)) [hereinafter Isaacs, reviewing SPENCER].

Isaacs explained that his approach was a product of "the theories of the more recent schools that consider the law as a social phenomenon with a social function." As a disciple of Dean Pound, Isaacs studied the works of Eugen Ehrlich. Ehrlich's concept of "living law," sometimes characterized as the divergence between book law and the law in practice, influenced Isaacs's thinking on law creation and development. In 1924, Isaacs suggested that the Harvard Law School faculty participate in a Seminar of Living Law in order to study this dichotomy and to develop a functionalist method of law study.

Another influential scholar who helped develop the functional approach was Herman Oliphant of Columbia Law School. The link between Oliphant and Isaacs sheds new light on the origins of the legal realist conception of law as a tool to serve business. Isaacs and Oliphant had attended a 1914 conference in which the term "functional approach" was first used. In 1927, the American Federation of Labor recruited Oliphant to help write a landmark Brandeis brief in opposition to yellow-dog contracts that forbade employees from joining a union. The Interborough Rapid Transit Company required


202. This idea was inspired by Ehrlich's course of the same title, which had investigated the differences that had developed between European statutory law and the actual legal practices of specific regions. Isaacs wrote that though he was personally pursuing this line of research he had no desire "to monopolize the field." See Memorandum from Nathan Isaacs to Curriculum Comm. of Harvard Law Sch. 3 (Mar. 25, 1924) (on file with Baker Library Historical Collections, Harvard Business School, Box 1, File: HBS Memorandum related to Law School Conference, 25 March 1924) (following up informal conference with Curriculum Committee of Law School). Unfortunately, the legal formalist Harvard Law faculty apparently rejected the proposal. However, Isaacs was able to institute a joint program between the Harvard Business School and the Yale Law School with similar aims. See infra notes 231–34 and accompanying text (discussing the dual-degree program initiated between Harvard and Yale).


204. Isaacs later recalled that at the path-breaking meeting of business law teachers, "some one [sic] hit upon the adjective 'functional' to describe a new approach to the law for the business student." Isaacs, reviewing SPENCER, supra note 198, at 115; see also Nathan Isaacs, The Merchant and His Law, 23 J. Pol. Econ. 529, 556 n.1 (1915) (reporting that Oliphant had independently already begun experimenting with the functional method in Chicago).

205. See Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol,
employees to sign such a contract as a precondition to employment.\textsuperscript{206} Oliphant solicited Isaacs to provide his expertise of standardized contracts in the drafting of the brief.\textsuperscript{207} In his response, Isaacs noted that the marked disparity in bargaining power was the key factor in the labor–management relationship.\textsuperscript{208} The Brandeis brief became a storehouse of information and arguments that were relied upon by the drafters of the Norris–LaGuardia Act.\textsuperscript{209} The functional approach argued, in this instance, for the necessity of collective bargaining agreements in order to equalize the disparity of bargaining power.\textsuperscript{210} Realism would become associated with the idea that power plays a key role not only in private contracting but also in the choice to regulate or not regulate the private sphere.

In 1921, Isaacs co-authored a casebook entitled \textit{The Law in Business Problems} with Lincoln Frederick Schaub of the Harvard Business School.\textsuperscript{211} This was the first casebook to attempt a functional, rather than doctrinal, treatment of commercial law.\textsuperscript{212}
The casebook asked questions such as "[d]oes the law help or hinder or otherwise affect the process of engaging in business?"\textsuperscript{213} It juxtaposed topics unrelated doctrinally but that were functionally alternative tools to deal with business problems.\textsuperscript{214} Isaacs aimed to discover the law in business practice, as well as in the cases and statutes.\textsuperscript{215} Karl Llewellyn praised Isaacs's book for emphasizing business facts and how law serves as a tool for business.\textsuperscript{216} Isaacs and Schaub's book preceded the realist books and approaches of Wesley A. Sturges's \textit{Credit Transactions} and Carrol Shanks's and William O. Douglas's \textit{Management of Business Units}.\textsuperscript{217} The commonality of these functionalist–realist books was the supplementation of "legal principles with life situations."\textsuperscript{218} The radical–conservative realist distinction was already apparent here. Grant Gilmore characterized the Sturges book as nihilistic.\textsuperscript{219} In contrast, Isaacs's constructive approach prefigured the eventual rationalization and unification of

\textsuperscript{213} SCHAUB & ISAACS, \textit{supra} note 211, at vi.

\textsuperscript{214} For example, one part of the book, \textit{The Enforcement of Contracts, with Special Reference to the Relation of Debtor and Creditor}, dealt with the doctrinally diverse but practically related topics of guaranty, mortgages, conditional sales, pledges, and negotiable instruments. SCHAUB & ISAACS, \textit{supra} note 211, at 357–525. This portion of the book is further discussed in Donnell, \textit{supra} note 199, at 271. The book, which at over 800 pages was short compared to its contemporaries, contains fewer and fewer editorial comments as it progresses and becomes almost solely a collection of cases by its end. The authors intended that students would become proficient at understanding cases without the guidance of the authors as the school semester progressed. SCHAUB & ISAACS, \textit{supra} note 211, at vii.

\textsuperscript{215} See generally Nathan Isaacs, \textit{The Place of Business Law in the Curriculum of the School of Business, in} THE RONALD FORUM 13, 13–14 (n.d.) (on file with Baker Library Historical Collections, Harvard Business School, Box 4, File: The Place of Business Law in the Curriculum of the School of Business, circa 1923) (describing the importance of teaching business law in business schools).

\textsuperscript{216} See Karl N. Llewellyn, \textit{The Modern Business Law Book}, 32 YALE L.J. 299, 300 (1923) (reviewing SCHAUB & ISAACS, \textit{supra} note 211, and other business law books). Llewellyn declared that Isaacs's book, "[f]or the lawyer, law teacher, and to the student of social institutions," was "unquestionably the most valuable and suggestive single volume of any of those under discussion." \textit{Id.} at 304. However, Llewellyn thought that the book was ill-suited for the business student. \textit{Id.} Isaacs sought to change Llewellyn's opinion, but to no avail. Letter from Karl Llewellyn to Nathan Isaacs (Sept. 5, 1923) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio).

\textsuperscript{217} Nathan Isaacs, \textit{Book Review}, 44 HARV. L. REV. 880, 881 (1931) (reviewing WESLEY A. STURGES, CASES AND MATERIALS ON THE LAW OF CREDIT TRANSACTIONS (1930)) [hereinafter Isaacs, reviewing STURGES]; see WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF MANAGEMENT OF BUSINESS UNITS, at v (1931) (stating that the goal of the text is "to show the recent trends in the law in addition to the well established rules").

\textsuperscript{218} KALMAN, \textit{supra} note 2, at 80.

\textsuperscript{219} He described the book as consisting "principally of the most absurd cases, along with the most idiotic law review comments, which he had been able to find." GRANT GILMORE, THE AGES OF AMERICAN LAW 81 (1977).
commercial law. In his preface to the 1934 edition of *The Law in Business Problems*, Isaacs explained that the edition shifted "emphasis from the study of 'laws' which change from year to year and differ from state to state, to the study of 'the law' as an institution of importance in business life." Rather than attempt to teach business students the mechanics of legal doctrines, his book aimed to elucidate the "uses—and the abuses" of legal concepts "in the business world."

A good example of Isaacs's pro-business functionalism is his evaluation of the business trust. The common law’s concept of a business trust developed in the Massachusetts courts between 1910 and 1925. In 1929, Isaacs discussed the business trust in *Trusteeship in Modern Business* and noted that “[f]oremost among the advantages of trusteeship over the standardized legal devices is its flexibility” due to its contractual nature. He also observed that, unlike contract or corporate law, the trust concept is needed in areas where relationships could not be governed solely by the contract construct. As Isaacs predicted, the twentieth century saw the expansion of trust and fiduciary duty law. The commonality and differences between Isaacs’s CLR

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220. See id. at 83–86 (describing Llewellyn’s role in drafting the U.C.C. and the restraining effect that conservative viewpoints had in limiting the inclusion of his more radical ideas); Nathan Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit*, 8 CORNELL L.Q. 199, 199–200 (1923) (noting the irrational and “puzzling” nature of the law of credit and advocating the development of more rational rules). Isaacs called for lawyers as caretakers of business to look beyond the doctrinal forms of security devices to their business function. Id. at 209; see also Isaacs, *Business Security*, supra note 200, at 209 (contrasting the “the law in books and the law in action as applied to realizing on securities in business” and noting a substantial “gap” between those concepts).

221. ISAACS, supra note 93, at v.

222. Id. at v–vi.


225. Id. at 1052.

226. Id. at 1060–61.

and mainstream radical realism is discussed in the next three subparts.

C. Need for an Interdisciplinary Approach

Isaacs aspired to study empirically the extent of the changes in the use of contracts through time. Such a study would provide a basis for understanding legal change and its relationship to economic, political, and social life.228 He predicted that such research would serve "as a corrective for an unhistorical use of history" by those who thought that "each [legal] institution had a single original purpose."229 He saw empirical research as a means to uncover the underlying matrix of principles that supported specific areas of law, such as contract and tort. This "uncovering" would allow for a better understanding of law and its application to novel situations. At the same time, Isaacs did not feel that the functional approach should be the single means of teaching law.230 This tension between functionality and guiding principles is the underlying theme of CLR. CLR displays its realism by stressing the importance of business facts to law application. The conservative element of his CLR was premised on the belief in the importance of a body of evolving, but stable, principles. Under CLR, the centrality of doctrine and rules persists but is integrated into a multi-disciplinary approach that views law as being intertwined with society.

Isaacs sought to create an institutional framework for the interdisciplinary study of business and law. In 1932, he wrote to William O. Douglas, then a Professor at Yale Law School, and suggested an interchange of students between Harvard Business School and Yale Law School. Eventually, they decided on a joint


229. Id. at 15.
230. Isaacs was apparently conflicted over whether the functional approach, which was being strongly advocated for at Columbia Law School, was pedagogically appropriate for law students, as opposed to business students. Isaacs doubted the wisdom of abandoning the study of doctrine in law schools. He argued that "the clustering of law courses around business facts rather than around legal principles tends to result in a hodgepodge of legal points that offers no opportunity for the development of principles." Isaacs, reviewing STURGES, supra note 217, at 881. Moreover, if the functional approach appeared "more up to date it does so at the expense of making it to the same extent ephemeral." Id.; cf. WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 160 (1974) ("In credit transactions, we wanted to explore all the institutions of credit as well as the commercial code. The same was true of almost every other subject.").
This attempt to integrate the two schools' courses of study was the institutional embodiment of the realists' ambition to "cross-fertilize" academic disciplines. The program was cancelled in 1938 due to lack of student interest. Nonetheless, Isaacs was able to demonstrate his CLR approach in a Yale Law School seminar course, in which, for example, he traced the "economic repercussions" of the Pre-World War II neutrality laws. Students in the course were required to write papers on the "business realities of some particular" legal relation.

D. Isaacs's Relationship with Llewellynian Thought

It is hard to read the works of Llewellyn in the area of adhesion contracts without seeing the influence of Isaacs. A Romantic School of German Jurisprudence that emphasized the creative power of the Volk (people) in commercial law heavily influenced Llewellyn. This predisposed Llewellyn to Isaacs's conception of commercial law as a tool for business. These influences resurfaced in Llewellyn's reliance on the custom of businesspersons in writing the UCC. Isaacs and Llewellyn believed that business executives and lawyers should act as caretakers of business and society, and that commercial law should evolve from commercial practice.

The first evidence of Isaacs's influence on Llewellyn is when Llewellyn, as editor in chief of the Yale Law Journal, wrote to Isaacs that "[t]here have been few strictly legal articles published in the past [few] years as interesting and stimulating" as The Standardizing of Contracts. Professor Rakoff notes the connection between Isaacs's scholarship and that of Llewellyn:

232. KALMAN, supra note 2, at 136.
233. Id.
234. Letter from Nathan Isaacs to John F. Meck, Jr., Yale Law Sch. (Oct. 26, 1938) (on file with Baker Library Historical Collections, Harvard Business School, Box 1, File: Yale Law School joint program, 1938). Isaacs also saw a need for more interdisciplinary work on the interrelationship of business, law, and government. He was a founding faculty member at the Harvard University Graduate School of Public Administration, later to become the Kennedy School of Government. See Mace, supra note 4, at 19 (describing Isaacs's professional accomplishments and his role at Harvard University).
“From his earliest writings onward, Llewellyn, following the work of Nathan Isaacs, stressed the fact that the law itself provided parties with standardized institutions to serve as the background for their own particular arrangements: the sale, the pledge, the mortgage, and so forth.” Notably, Llewellyn was inspired by Isaacs's earlier extended horse-trader analogy when he wrote his path-breaking articles *Across Sales On Horseback* and *The First Struggle to Unhorse Sales*. Earlier, Isaacs had mocked the Sales Act of 1906 for being better suited for the selling of a saddle to a horseman than for twentieth century business transactions. Llewellyn, in *What Price Contract?—An Essay in Perspective*, and Isaacs earlier in *The Standardizing of Contracts* and *Business Security and Legal Security*, had analyzed the possible ill effects of law on commerce. Both focused on the antiquated rules relating to title, risk of loss, and warranty law found in the Uniform Sales Act.

In promoting the need to modernize the law of sales through codification, Isaacs used the notion of “delumping” concepts later mastered by Llewellyn. For Isaacs, “title no longer was a lump-

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245. In the area of warranty, Llewellyn argued that the “lumping” of title with
concept and instead became a conglomeration of separate property interests that each demanded individual treatment.\textsuperscript{246} Llewellyn and Isaacs applied the delumping concept to the area of risk of loss. Here both argued that the old notion that risk of loss passed from the seller to buyer at the time of transfer of title was outdated and needed to be disconnected. Once again, Isaacs can be seen as the predecessor to Llewellyn on the notion of delumping.\textsuperscript{247}

Llewellyn’s conception of the right kind of rules—the singing rule—can be seen in lectures delivered by Isaacs which predated Llewellyn’s work. Isaacs stated that “the reason for a rule will frequently determine the scope of that rule.”\textsuperscript{248} Llewellyn’s innovation was the belief that the patent reason for a rule should be part of the rule itself. For Isaacs, the reason for a rule was a historical inquiry. Llewellyn attempted to externalize those reasons in writing the UCC. The advantage of externalizing the reason for a rule is that it allows the rule and its reason to be analyzed critically. The problem with the antiquated rules of the Uniform Sales Act was that they no longer provided guidance in applying the rules to modern business transactions. The rules had been severed from their underlying reason or purpose. For Isaacs, this opened their interpretation to “false reason” and thus, “false scope.”\textsuperscript{249} Llewellyn sought to rectify this shortcoming in the drafting of the UCC.

The Llewellynian notion of transaction types was previously used by Isaacs to critique the \textit{First Restatement of Contracts} as

ownership and risk was necessary for long distance sales. \textit{See} Llewellyn, \textit{Warranty of Quality I}, supra note 240, at 712 (explaining that in the law of warranty, the relationship of the buyer and seller and the solvency of the seller play into the civil obligation of contract).


247. Llewellyn’s 1938 article \textit{Through Title} refers to Isaacs with great approval. Karl N. Llewellyn, \textit{Through Title to Contract and a Bit Beyond}, 15 N.Y.U. L. Q. REV. 159, 159 (1938). Isaacs also took issue with the \textit{Tarling} rule that held the setting aside of an item for future delivery passed the risk of loss to the buyer. Isaacs added the element previously missing from Llewellyn’s campaign, a direct attack on the \textit{Tarling} rule that had long been codified in the Sales Act and was proposed for inclusion in federal law. Robert L. Flores, \textit{Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and a Bit Beyond}, 27 FAC. L.J. 161, 212–13 (1996) ("The rule was ‘thoroughly logical’ within the realm of property theory in which it had been developed, but ‘nonsensical’ as judged by modern business practices, and so did not comport with expectations of the parties.” (quoting Isaacs, \textit{Sale in Legal Theory, supra} note 246, at 652)).


249. \textit{Id.}
an “idealized composite.” In that critique, he provided a description of the relationship of transaction types to contract law. He asserted that the Restatement failed to grapple with the deviations from general contract law to more specific contract types, such as construction, real estate, employment, and insurance contracts. Isaacs had fully articulated the concept of transaction types that Llewellyn would later popularize. Isaacs had fully articulated the concept of transaction types that Llewellyn would later popularize.

Despite his many intellectual debts to Isaacs, Llewellyn did not list him as a member of the realist movement either in his famous 1931 polemic Some Realism or in his expanded unpublished list of realists. This omission by Llewellyn, the leading realist, could be understood as an implicit exclusion of Isaacs from the movement. Professor Horwitz interprets the omission of Isaacs and others from the list as an indication that Llewellyn did not fully grasp the extent of the realist movement.

Relying upon these omissions, Professor Horwitz casts doubt on the accuracy of Llewellyn’s claim in Some Realism that the movement was politically neutral. That argument supports Professor Horwitz’s larger point that realism was not value neutral and had a leftist political valence.


251. Id. at 427.


253. Llewellyn, Some Realism, supra note 1, at 1237.

254. Isaacs, Restatements, supra note 250, at 428.

255. Llewellyn, Some Realism, supra note 1, at 1226 n.18; see HORWITZ, TRANSFORMATION, supra note 1, at 183 (noting that Llewellyn failed to list “the original and penetrating torts-contracts scholar Nathan Isaacs”); HULL, POUND AND LLEWELLYN, supra note 1, at 343-46; N.E.H. Hull, Some Realism About the Llewellyn–Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927–1931, 1987 WIS. L. REV. 921, 968.

256. HORWITZ, TRANSFORMATION, supra note 1, at 183.

257. Id. at 182; Llewellyn, Some Realism, supra note 1, at 1254 (“When the matter of program in the normative aspect is raised, the answer is: there is none.”).

258. HORWITZ, TRANSFORMATION, supra note 1, at 170.
argues that there were both radical and conservative realists, and that Isaacs was a major conservative realist.

Llewellyn probably did not intend to exclude Isaacs's contribution to the realist movement.\(^\text{259}\) Llewellyn framed his list in the context of Pound's criticism of the legal realists. It contained the names of scholars that Llewellyn thought Pound would have to agree were realists.\(^\text{260}\) Llewellyn's notes show that he considered many more scholars legal realists.\(^\text{261}\) He constructed his list for the Pound rebuttal with the assistance of legal philosopher Felix Cohen;\(^\text{262}\) Cohen added to the list works that exhibited common realist jurisprudential ground, such as Isaacs's article on legal reasoning. That article, in Cohen's estimation, was an enlightened exposition of traditional doctrinal analysis that challenged the mathematically precise process advanced by the legal formalists.\(^\text{263}\) Perhaps Cohen viewed Isaacs as a less formal legal formalist or a quasi-realist in that he remained faithful to the formalist belief of the central place of legal principles, while being critical of the formalistic application of those principles. In *Some Realism About Realism—Responding to Dean Pound*, Llewellyn praised Isaacs's "more recent work" as representative of the realist critique of the incongruence between the rules courts applied and the operative facts found in the cases.\(^\text{264}\) Whether or not Llewellyn considered Isaacs a full-fledged member of the LRM, or whether he thought that Isaacs's conservative realism was of a different kind than mainstream legal realism, it is indisputable that Isaacs's scholarship was influential in Llewellyn's construction of the UCC.


\(^{260}\) See *AMERICAN LEGAL REALISM*, supra note 1, at 50–51 (observing that in his critique of realist thinkers, Pound never offers a single scholar whom he believed to be a realist, even when Llewellyn privately prompted him for examples).

\(^{261}\) *Id.* at 51; Llewellyn, *Some Realism*, supra note 1, at 1233–34.

\(^{262}\) Cohen's contributions were separately noted in Llewellyn's notes. Llewellyn, *Some Realism*, supra note 1, at 1233 n.34.


\(^{264}\) Llewellyn, *Some Realism*, supra note 1, at 1236 n.36 (citing Isaacs, *Promoter*, supra note 263).
E. Questioning Hohfeld’s Reconceptualization of Law

Another possible, though ultimately unpersuasive, explanation of Llewellyn’s omission of Isaacs from his lists of realists is the friction resulting from Isaacs’s sometimes rough intellectual treatment of Llewellyn’s revered mentor at Yale, Wesley Newcomb Hohfeld. Isaacs initially had praised Hohfeld’s work on Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and had adopted his ideas in The Standardizing of Contracts. Subsequently, Hohfeld wrote to Isaacs in appreciation for “the fresh thinking that you are contributing to some of the great problems of the law.” However, Isaacs and Hohfeld’s relationship soured. Hohfeld saw no contradiction between the analytical approach that characterized his own work and the sociological jurisprudence of Pound. In one article, Isaacs criticized Hohfeld’s division of legal scholarship into several different, yet complimentary fields by pointing out how these diverse methods contradicted each other. In contrast, Isaacs argued that in different periods of the cycle of legal history, different schools of legal interpretation come to the fore. Later, Isaacs referred to Hohfeld’s speech to the Association of American Law Schools, in which he called for the simultaneous analysis of the different styles of legal study, as evidence that Hohfeld himself did not think his analytical system sufficed for all purposes. He did praise Hohfeld’s “meticulous

265. In a biographical note for Hohfeld, Llewellyn stated that while Hohfeld’s conceptual analysis “can obviously solve no cases it makes for clarification and cuts very close to the atomic structure of the law on its conceptual side.” Karl N. Llewellyn, Wesley Newcomb Hohfeld, in 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 400, 401 (Edwin R.A. Seligman & Alvin Johnson eds., 1932).

266. Isaacs, Standardizing Contracts, supra note 54, at 39 n.19 (citing Hohfeld, Fundamental, supra note 133).

267. Letter from Wesley N. Hohfeld to Nathan Isaacs (Nov. 21, 1917) (on file with Baker Library Historical Collections, Harvard Business School, Box 2, File: Correspondence regarding articles and books, 1917–1919) (“It seems to me that we are all under a debt to you for your very acute and penetrating analysis of the legal–historical phenomena which you have handled.”).


269. Isaacs compared Hohfeld’s desire for the simultaneous teaching of many different approaches to law to a gluttonous character in a joke: “A man in a restaurant once ordered a cherry pie, mince pie, peach pie, and lemon pie. The waiter quietly asked, ‘What’s the matter with the apple pie?’” Nathan Isaacs, The Schools of Jurisprudence: Their Places in History and Their Present Alignment, 31 HARV. L. REV. 373, 374 (1918).

270. Id. at 375.

insistence on the careful use of certain words." He thought Hohfeld's vision was relevant "when he endeavors to see farthest and recognizes in the whole analytical process mere preliminary work that must be followed by a study of the relation of law to life's needs." Still, ardent followers of Hohfeld thought Isaacs's review of a posthumous collection of Hohfeld's essays to be unfair. In contrast, Llewellyn, who was well on his way to nonformalist heterodoxy, wrote to Isaacs expressing agreement with the main points of his review. He agreed with Isaacs's proposition that there was a need to study the relationship between law and society's needs and not to solely focus on refining the law's conceptualism.

VI. ISAACS'S OPPOSITION TO THE NEW DEAL

Isaacs became deeply opposed to New Deal legislation, which he believed was irrationally antibusiness. During the 1930s, Isaacs stressed his faith in the existence of objective legal principles and the ability of judges to make decisions independent of any economic and social prejudices. This change in emphasis appears to be in conflict with his realist insights. In fact, Isaacs had stressed the importance of general legal principle from the beginning of his career, and he remained true to his

NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923) (hereinafter Isaacs, reviewing HOHFELD); see Hull, Vital Schools of Jurisprudence, supra note 268, at 271 (making a similar argument).

272. Isaacs, reviewing HOHFELD, supra note 271, at 1041.

273. Id. at 1042.

274. Dedicated acolytes on the Yale faculty included Arthur Corbin and the realist Walter Wheeler Cook. See Walter Wheeler Cook, Hohfeld's Contributions to the Science of Law, 28 YALE L.J. 721, 721 (1919) (arguing that Hohfeld's work was a major contribution to analytical jurisprudence); Arthur L. Corbin, Jural Relations and Their Classification, 30 YALE L.J. 226, 226 (1921).

275. Letter from Roger S. Justin, Harvard Law Review Book Review Editor, to Nathan Isaacs (Nov. 14, 1923) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio) (writing to Isaacs that he had talked with the Managing Editor of the Yale Law Journal, "who is apparently a more ardent Hohfeldian [than Llewellyn], and he had considered your review more or less of a 'slam'").

276. Letter from Karl Llewellyn to Nathan Isaacs (Sept. 5, 1923) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio).


theories of adaptive legal cycles and legal reasoning to the end of it. However, Isaacs's application of these ideas dramatically shifted from the early 1920s to the 1930s, most likely in response to the national calamities of the times and their changing implications for his legal theories for business.

A. The New Deal as Unconstitutional Impediment to Business

In 1922, Isaacs had argued for increased federal power in order to facilitate the growth of a national economy.\footnote{See Nathan Isaacs, Federal Control over Industry, 16 AM. POL. SCI. REV. 432, 443 (1922) [hereinafter Isaacs, Federal Control] (describing the increase in national power in medieval England through the centralization of authority and the corresponding social good and suggesting that the United States could benefit from greater centralization of governmental power).} He had then dismissed the importance of the Commerce Clause restrictions on federal power. At that time, he believed that the U.S. Constitution would give way to contemporary necessity.\footnote{See id. (arguing that federal power should expand to meet the realities of the time and that it was “misleading to brand the resulting federalization as federal usurpation”).} By 1934, though he continued to oppose Lochner-era constitutional formalism, he advocated constitutional limits on the federal commerce power because he concluded that the motivation of the New Deal program was thoughtless antibusiness animus.\footnote{See Isaacs & Taeusch, NIRA, supra note 240, at 469–65 (criticizing the New Deal era’s National Industrial Recovery Act as an ambiguous “delegation to business men . . . [that] these same business leaders will be ready at a moment’s notice to accept a charter and govern themselves”).}

In the early 1920s, Isaacs argued that history made greater government regulation of the economy inevitable. For example, he argued that American constitutional law would have to uphold price fixing legislation in order to adapt to changing social conditions.\footnote{Nathan Isaacs, Revival of the Justum Pretium, 6 CORNELL L.Q. 381, 397–400 (1921).} In relation to the Interstate Commerce Clause,\footnote{The Annual Meeting, 16 AM. POL. SCI. REV. 111, 111–12 (1922) (describing the proceedings of the seventeenth annual meeting of the American Political Science Association and noting Nathan Isaacs was one of the speakers on the topic of “centralization versus decentralization in the relation of the national government to the states”).} he declared that the lines of division between the state and federal governments were “mere chalk”; that state lines ignore the communication revolution that had made a single “business unit of the country.”\footnote{Isaacs, Federal Control, supra note 279, at 440.} Isaacs then justified the expansion of the federal government’s commerce power by drawing an analogy to
the extension of the King's power over feudal units in medieval England. Isaacs advocated the expansion of national power in order to facilitate the growth of business. So far as state power fails "to correspond to actualities," he insisted that "we may depend upon the 'law in action' to deviate from the law of the books so as to meet the practical needs of business." Such a divergence between the law in action and the law of the books would render law less facilitative and relevant to business.

In contrast, the New Deal, for Isaacs, represented law as an impediment to business. He thought most New Deal legislation was irrational and violated fundamental legal principles. In Isaacs's view, the New Deal of the mid-1930s was class conscious, pro-labor, and unfairly antibusiness. Isaacs's anti-New Deal stance was part of a broader pro-business attack on the Roosevelt administration. Conservatives articulated their opposition to the growing New Deal state by claiming that its policies threatened individual liberty and self-reliance. Isaacs believed that the most important challenge to the New Deal would come from the self-reliant character of human nature.

In an October 1934 speech, he declared that instead of relying upon economists, who were overborne by the immensity of the depression's challenge, the crisis could be resolved by relying upon business principles and the traditions of free private enterprise.

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285. Id. at 440–43 (maintaining that as English life "became national, national jurisdiction had to expand to take care of it").

286. Id. at 443.

287. See Reuel E. Schiller, The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 Mich. L. Rev. 399, 414 (2007) (arguing that there was a pro-large business First New Deal and a more pro-working class Second New Deal). Isaacs was opposed to both New Deals. He contended that much of the major New Deal legislation, including the early National Industrial Recovery and Securities and Exchange Acts, as well as the later "one sided" National Labor Relations Act (Wagner Act), reflected to a great degree "the assumption of some of the New Dealers, that business is intrinsically wicked." Isaacs, Transition, supra note 277, at 4; see Isaacs & Taeusch, NIRA, supra note 240, at 459 (mockingly comparing NIRA's premise that eliminating unfair competition would end the depression to the Biblical prophets' assumption of "a supernatural connection between sin and punishment, between repentance and recovery").


289. SCHLESINGER, supra note 288, at 472–73.

290. See Nathan Isaacs, Address Before the Harvard Business School Club of Boston: Government by Bribery (Nov. 19, 1935) (on file with Baker Library Historical Collections, Harvard Business School, Box 3, File: Speeches, 1935) (observing that no matter how strong a government may be it "cannot control the wants and fads and whims of human nature").

291. Praise and Blame Given New Deal, HARTFORD TIMES, Dec. 7, 1934 (on file with Baker Library Historical Collections, Harvard Business School, Box 5, File: Newspaper Clippings, 1924–1941); Speakers Flay, Laud New Deal at Wesleyan, NEW HAVEN J.
Isaacs based his attack on New Deal legislation on three beliefs. First, that much of the New Deal exceeded the constitutional limits of federal government power. He acknowledged that drastic federal government action had been spurred by what seemed “both a complete failure and a surrender on the part of the states at the height of the depression.” However, Isaacs believed that early New Deal legislation such as the National Industrial Recovery Act (NIRA), the Agricultural Adjustment Act (AAA), and the Bituminous Coal Conservation Act of 1935 (the Guffey Act) were unconstitutional exertions of control over intrastate commerce.

The second basis of his critique, which Isaacs thought had more weight, was his argument that the New Dealers’ faith in government ignored the fact that people make decisions often influenced by emotions and irrationality. Isaacs himself attributed the faults of the market to human nature’s tendency to “stock gambling, booms, and depressions.” This is a rudimentary argument that the rational human actor is a flawed decisionmaker. The more recent behavioral LAE reflects this questioning of the rationality assumption of economics.

Third, Isaacs warned that government is “limited in its ability to gather and digest information.” Isaacs thought there

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300. See New Deal Loses Sight, supra note 297.
was "great danger" in the belief of the effectiveness of government action which was "a fundamental axiom, preceding and underlying" the entire New Deal program. 301 This third belief is the efficiency argument that informs modern law and economics. The primary tenet of this belief is that governmental regulation is inherently more inefficient than freely made contracts.

The NIRA in particular upset Isaacs. Isaacs and Carl Taueusch mockingly compared the NIRA's premise that the end of unfair competition would end the depression to the Biblical belief that repentance would bring salvation. 302 He excoriated the administrators of the National Recovery Act as "petty bullies who shook their fists in the faces of worried shopkeepers or innkeepers and threatened them with dire consequences because of anonymous accusations of having violated impossible code provisions." 303 More temperedly, Isaacs called attention to the many obstacles faced by administrators, including constitutional and statutory constraints, political and lobbying pressure, and the practical administrative difficulties of conducting business operations as a government agency. 304

On May 27, 1935, the U.S. Supreme Court deemed the NIRA unconstitutional, in part because the act regulated intrastate commerce. 305 In an unpublished manuscript, Isaacs argued that the NIRA "fell to pieces eventually both for practical and legal reasons." 306 The practical fault was that most NIRA codes, "so far as they dealt with competition at all, were aimed against aggressive competition or uncomfortable competition, or possibly against competition altogether." 307 The legal barriers were the constitutional limitations on congressional regulation of intrastate commerce and "an abuse of the limit of the power of Congress to delegate legislative details to administrative officers." 308

As noted above, Isaacs's view of the Constitution was not value neutral. He was willing to embrace non-New Deal "growth of government control over business." 309 However, this was a

301. Id.
302. Isaacs & Taueusch, NIRA, supra note 240, at 459.
307. Id.
308. Id.
309. Nathan Isaacs, Where Business and Government Meet 1, 5 (Dec. 28, 1934) (on
limited control that had to support one of two objectives—the promotion of business or societal fairness. Under the fairness rationale, Isaacs was willing to support the constitutionality of state, as opposed to federal, labor and social welfare legislation.\(^{310}\) In the end, his conservative cultural commitment was a reflection of the values of business and American individualism.\(^{311}\) While Isaacs acknowledged that the aid of government might be necessary to end the Great Depression, he insisted that such government action support conventional business initiative rather than hinder it.\(^{312}\)

B. Constitutional Interpretation: Realist, Strict, and Isaacs’s Principles

The main premise for Isaacs’s opposition to the Securities Act of 1933 was his belief that it exceeded the constitutional limits of federal power. He believed that because securities were primarily the products of intrastate commerce, they were not subject to federal regulation.\(^{313}\) He labeled those that supported the Act as “realist” and those who opposed it as “verbalist.”\(^{314}\) But Isaacs neither believed in a literal interpretation of the Constitution nor did he accept the indeterminacy posed by the view that the Constitution was a body of “general and vague” terms.\(^{315}\) Isaacs embraced the premises of the 1930s realist theory of constitutional interpretation that eschewed a literal interpretation of the text but believed that an honest

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\(^{310}\) Isaacs, NRA Decision, supra note 303, at 404.

\(^{311}\) Nathan Isaacs, Address at Wesleyan University 12 (Dec. 6, 1934) (on file with Baker Library Historical Collections, Harvard Business School, Box 3, File: Speeches, 1934). In this paper, Isaacs discussed the state as a business actor and influencer of business decisions and argued that it was necessary to formulate “principles governing the conduct” of business in relation to the government. Id.

\(^{312}\) Id.

\(^{313}\) Id. at 15.

\(^{314}\) Isaacs, Securities Act, supra note 109, at 222–23.

\(^{315}\) Id. at 220.
application of underlying constitutional principles would render the Securities Act and other New Deal legislation unconstitutional.\textsuperscript{316} The social engineering approach of the realists reflected a radically dynamic view of the nature of law. Felix Frankfurter\textsuperscript{317} had argued that the Supreme Court should merely ascertain "whether there is a legitimate object to be accomplished by any particular piece of legislation."\textsuperscript{318} Under that view, the Act only needed to satisfy a rational basis test for constitutionality. In contrast, Isaacs argued that this rational nexus approach was inadequate to protect important constitutional values.\textsuperscript{319} He urged a "compromise" that emphasized a spirit-of-the-law approach, but not one that would go so far as to emancipate the Constitution from history.\textsuperscript{320}

A vivid display of the CLR of Isaacs is his merger of the realist claim that much of law was not in harmony with modern times and his idealistic claim that underlying principles were the proper means of adjustment. In 1934, he acknowledged that America was enduring a crisis that was "a supreme test of adjustability."\textsuperscript{321} To deal with this situation he wanted to formulate principles based on actual developments in constitutional law. The constitutionality of federal legislation should then be tested in light of these principles.\textsuperscript{322} A principled approach would allow for flexibility in application, but would prevent the indeterminacy represented by the radical, antiliteral approach. He rejected the radical realist view that all that is reasonable, desirable, or necessary is constitutional. Isaacs saw the principled approach as a more proper form of realist interpretation rather than a strict interpretation that

\begin{itemize}
\item \textsuperscript{316} Id. at 225.
\item \textsuperscript{317} An obituary reported that Isaacs had been "associated" with Frankfurter. \textit{Mourned: Prof. Nathan Isaacs, Chi. Advoc., Jan. 16, 1942} (on file with the American Jewish Historical Society).
\item \textsuperscript{318} Isaacs, \textit{Securities Act, supra} note 109, at 218 (summarizing the interpretative view advocated in Felix Frankfurter, \textit{Hours of Labor and Realism in Constitutional Law}, 29 \textit{Harv. L. Rev.} 353 (1916)).
\item \textsuperscript{319} Isaacs, \textit{The Securities Act, supra} note 109, at 221. In his view, the Supreme Court "must have the vision to read our fundamental charter progressively, but also the courage to resist panic." Nathan Isaacs, Cutler Lectures at the University of Rochester: Recovery Under the Constitution: The Spirit of the Constitution 10 (Apr. 19, 1934) (on file with Baker Library Historical Collections, Harvard Business School, Box 2, File: New Deal–Cutler Lectures, 1934 (Un. Of Rochester) (2 of 2)).
\item \textsuperscript{320} Nathan Isaacs, Cutler Lectures at the University of Rochester: Recovery Under The Constitution: The Natural History of Constitutions 11 (Apr. 17, 1934) (on file with Baker Library Historical Collections, Harvard Business School, Box 2, File: New-Deal–Cutler Lectures, 1934 (Un. Of Rochester) (2 of 2)).
\item \textsuperscript{321} Id. at 15.
\item \textsuperscript{322} Id. at 11.
\end{itemize}
would irrationally stretch the meaning of "interstate commerce." This strain of Isaacs's thought is akin with the postwar Legal Process School, which acknowledged that judges make law but insisted that impersonal principles disciplined them.

Isaacs believed that the spirit, rather than the letter of the Constitution, should be decisive when deciding between different courses of action. When making such a decision, the interpreter needed to see whether the intended course of action, the statute, violated "an essential principle" of the Constitution. Charles Black, decades later, similarly rejected the "purported explication or exegesis" of the constitutional text "as a directive of action." Isaacs argued that an application of constitutional principles in this manner would have resulted in the voiding of the Securities Act. He believed the only legal means that would allow such federal regulation was through a constitutional amendment. According to his cycle theory, a constitutional amendment was the only legitimate means to begin a new cycle of codification.

Isaacs's opposition to what he perceived as the excessive government regulation of business that characterized many New Deal measures reinforced his distaste for legal fictions. Isaacs sharply described the AAA and the Guffey Act, which gave tax breaks in exchange for following federal government requirements, as "government by bribery." In a November 19, 1935 speech to the Harvard Business School Club of Boston, Isaacs attacked these laws' reliance on the "grotesque subterfuge[ ... of] 'voluntary agreements' that are about as voluntary in fact as the votes of confidence flaunted by European dictators." He warned that if the Guffey Act "stands as law, 'the door is wide open for control by the Federal

323. See Isaacs, The Securities Act, supra note 109, at 219 (criticizing the Securities Act by opining that "[t]o call the issuing of securities connected with the organization of a corporation under state law a matter of interstate commerce ... is blowing the bubble until it bursts").
324. See Eskridge & Frickey, supra note 3, at lxviii–xcvi.
325. Isaacs, The Securities Act, supra note 109, at 221.
326. Id. at 221–22.
327. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) (advocating a method of constitutional interpretation that involves "inference from the structures and relationships created by the constitution").
331. Thornquist, supra note 296.
332. Id.
Government of every detail in the life of every person in the United States, regardless of the Constitution." In 1936, the conservative majority of the U.S. Supreme Court agreed that the provisions of theAAA and the Guffey Act were unconstitutional. Isaacs noted in an undated manuscript, that must have been written shortly after these decisions were decided, that the Supreme Court held the laws unconstitutional "because the court looked through the mechanism to the reality of an attempted regulation of that which it was beyond the power of Congress to regulate."

**C. Reconciliation**

Professor Weisbrod has noted that throughout Isaacs’s "work there is a descriptive or analytic rather than prescriptive quality." That descriptive mindset allowed Isaacs to adapt his thought to the legal landscape created by the New Deal. He remained confident that the Supreme Court would craft decisions striking a balance between the public and private spheres of law. He agreed with the views of the Supreme Court’s conservative majority, but he also agreed with the liberal proposition that the Constitution should evolve in order to keep up with the times. By 1937, shortly before the Supreme Court began upholding New Deal legislation, Isaacs retreated from his alarmist warnings about the New Deal and accepted the National Labor Relations Act, the centerpiece of the “Second New Deal.”

Isaacs was ultimately reconciled in part to the New Deal in two ways. First, he accepted the more expansive interpretation of interstate commerce that the Supreme Court began to develop in 1937. Isaacs thought that *Virginian Railway Co. v. System*

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333. *Id.*


336. Weisbrod, *Way We Live, supra* note 11, at 787 n.44.

337. In 1937, President Roosevelt introduced his infamous court-packing plan by declaring that "[m]eans must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world." 5 THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 639–40 (1938). Isaacs noted that Roosevelt’s proposal was based on the premise that the courts should respond to political pressure. Isaacs, Political, Legal, and Economic Logics, *supra* note 278, at 5.


Federation No. 40, which held that the Railway Labor Act applied to back-shop employees engaged in the repair of locomotives and carriers, had enunciated "a very important principle—namely, that whether an activity comes within the scope of the interstate commerce clause or not depends not merely on the activity but on the type of regulation under consideration." Isaacs recognized this new departure, not as a legal fiction, but as an important new principle. However, Isaacs did find it "surprising... that in each of the five cases that reached the Supreme Court for consideration it was found that interstate commerce was directly affected." However, it is far from clear whether Isaacs would have accepted the farthest implications of the aggregation doctrine later accepted by the Supreme Court. In 1937, the full implications of the new doctrine were far from clear to Isaacs. Perhaps a second, and more important reason, why Isaacs accepted the National Labor Relations Act was his sympathy for the impetus of the law, which Isaacs described as the persistent "demand for improved labor conditions."

Isaacs was now prepared to admit again, as he did before the New Deal, that judges should not rely solely on one line of legal reasoning to direct them to the correct decision. But he insisted that it was important to retain the idealism of universal principles even if they could not truly be formulated: "[E]very practical man... may find himself something of a Kantian, though he has never studied philosophy. He rationalizes his conduct by stating it in generalized terms..." Under this view, judicial decisionmaking and law in action worked within the shadow of general principles. Isaacs's CLR recognized the folly of deciding real cases through pure deduction from principles. But he also recognized the use of principles as an end goal of legal evolution. Principles provided a normative goal that the law would strive toward but never fully reach.

Isaacs was willing to reconcile his deep-seated commitment to free enterprise to the new spirit of the times. In 1940, he

343. Id.
344. See United States v. Darby, 312 U.S. 100 (1941).
347. Isaacs, Political, Legal, and Economic Logics, supra note 278, at 30.
declared that “[w]e no longer believe in self-starting, automatically-controlled competition as nature’s sacred device for regulating markets.”\(^{348}\) He concluded that the control of business is “a social and political matter in which the law can be used and must be used,” but he cautioned that the “law has its limitations.”\(^{349}\) Isaacs adopted Holmes’s view that the law “uses the vocabulary of morals, but its tests are and must be externalized and standardized.”\(^{350}\) Accordingly, the moralizing tone the regulation of business had taken frustrated him. He viewed the Robinson–Patman Act of 1935,\(^{351}\) which limited the ability of large retailers and chain stores to cut retail prices, as an anticompetitive law that was masquerading as pro-competitive antitrust law.\(^{352}\) Congressman Emanuel Cellar of New York relied upon Isaacs's negative description of the Robinson–Patman Act in order to oppose the proposed bill for being anticompetitive and anticonsumer.\(^{353}\) In general, Isaacs accepted the pro-regulation verdict of history but remained committed to the belief that many depression-era laws were anticompetitive in nature.\(^{354}\)
Isaacs never abandoned his conservative, pro-business standpoint. He was willing to compromise his commitment to free enterprise to the need to prepare America for World War II. He argued that impending war emergencies called for a revision of the business practices of distributors that would be partly voluntary and partly compulsory.\footnote{Isaacs supported wartime price controls.} He admitted to an audience of business people\footnote{He delivered this speech in the Statler Hotel in Boston, in a conference on distribution.} that the weakening of constitutional safeguards in an emergency was dangerous for democracy, but it was necessary to take that risk in order to quickly return to that "longed-for time when the nations of the earth will enjoy another respite from the horrors of war."\footnote{Isaacs promised that the "greater the voluntary contribution of business to the meeting of the emergency, the smaller will be the Government control and the quicker will be our recovery" and a return to that "longed-for time."} Nonetheless, he remained troubled by peacetime anticompetitive acts.\footnote{Id.}

\section*{VII. ISAACS AND LEGAL REASONING}

Isaacs's understanding of legal reasoning informed his general CLR approach. Indeed, all of his doctrinal work was shaped by his stance on this issue. He was an early contributor to the legal realists' attempts to recognize the contingencies and intuitions inherent in legal reasoning. Nonetheless, he sought to justify traditional, deductive legal reasoning as the pragmatic and best way to deal with legal problems, while eschewing any

\begin{footnotes}
\item\footnote{He delivered this speech in the Statler Hotel in Boston, in a conference on distribution. Business Problems Discussed: Boston and National Leaders in Notable Conference, \textit{Boston Post}, Oct. 8, 1940 (on file with Baker Library Historical Collections, Harvard Business School, Box 5, File: Newspaper Clippings, 1924–1941).} Voluntary Action, supra note 356.
\item\footnote{Id.} Delay Feared in Ending Curb on Free Trade: Wider Control Predicted for Business in Face of National Emergency, \textit{N.Y. Herald-Tribune}, Mar. 3, 1941 (on file with Baker Library Historical Collections, Harvard Business School, Box 5, File: Newspaper Clippings, 1924–1941).}

claims to scientific exactness. While cognizant of the contingencies and faults of traditional legal reasoning, Isaacs defended its legitimacy. He argued that there is a “power—quite different from knowledge—which comes from legal training and from contact with legal traditions.” He relied on a similar pragmatism to defend the study of the humanities, social sciences, and especially Jewish law, which was also the product of a learned legal tradition. He merged this nonformalist but conservative theory of legal reasoning with a thoughtful and measured conservative political, economic, and religious philosophy.

Isaacs’s CLR approach provided a moderate alternative to the more radical realists’ criticism of legal reasoning. Eskridge and Frickey have described the conservative version of realist legal reasoning adopted by Isaacs as an “organic theory of rationalism.” This description of CLR is neither formalistic nor fully realist in its approach to legal reasoning. An organic theory of rationalism assumes that hard cases cannot be decided by pure deduction but should be decided by reference to underlying “principles” and “equities.” This version of legal realism, espoused by Dean Pound, Justice Cardozo, Isaacs, and the later Llewellyn, recognizes the role of discretion and law creation in judicial reasoning. But it is a limited discretion and creativity in which underlying principles, sometimes unarticulated, regulate the creative process.

Isaacs was attracted to an understanding of legal reasoning which rejected the formalistic search for a right legal answer, yet still bestowed legitimacy to traditional lawyerly ways of thinking.

361. Nathan Isaacs, Liability of the Lawyer for Bad Advice, 24 CAL. L. REV. 39, 42–43 (1935) (explaining that there is a “practical reason for not assuming that a lawyer warrants his conclusion of law to be true”).

362. Letter from Isaacs [Jurist] to Oko [the Bookman] 3 (n.d.) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, Oko Papers, Box 8, File 2).

363. Eskridge & Frickey, supra note 3, at lxiii.

364. Id.

365. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 88–89 (1921). Isaacs was distantly related to Cardozo through marriage and developed a friendly relationship with him. Nathan Isaacs’s aunt, Julia Nathan, was married to Benjamin Cardozo’s uncle, a brother of Cardozo’s mother. Wotitzky Interview, supra note 12. After Cardozo was elevated to the Supreme Court, Isaacs visited Washington. Cardozo wrote to Isaacs that he had “yearned to see” him, but “[u]nfortunately the Court sessions and the bar receptions used up all my days.” Letter from Benjamin N. Cardozo to Nathan Isaacs (Oct. 16, 1932) (on file with Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio).

366. The “later Llewellyn” refers to the more moderate form of realism that he developed later in his career and culminating with LLEWELLYN, THE COMMON LAW TRADITION, supra note 252, at 60–61.

367. Id. at 217.
His familiarity with the evolution of Jewish law likely attracted him to modified natural law and neo-Kantian philosophy. These philosophies set the goal of legal reasoning to be the discovery of objective principles, while allowing those principles to grow and change with new conditions. This goal is similar to that of the Marburg Neo-Kantian School lead by Rudolph Stammler. Stammler believed in “a natural law with a variable content.”

Isaacs’s student notes from Dean Pound’s class reveal that he was attracted to Stammler’s search for “general,” but still contingent, principles rather than universally true principles. He held to the Kantian objectivity of law but recognized that the substance of that law changed over time.

The task for Isaacs was to reconcile the universality of natural law principles and the incoherency of legal conceptualism—the application of general principles to rapidly changing content. The pragmatic philosophy of John Dewey, who greatly influenced Isaacs and other realists, believed that the task of reconciliation was impossible because the admission of the changing or dynamic nature of law was “fatal to everything which the doctrine” of natural law was supposed to mean.

368. “[A]t the turn of the [twentieth] century Neo-Kantianism was the dominant academic philosophy or Schulphilosophie in the German universities.” 7 FREDERICK COPPLESTON, A HISTORY OF PHILOSOPHY 436 (1965). The founder of that school was Hermann Cohen (1842–1918), who dedicated his later work to Jewish philosophy. Simon Kaplan, Translator’s Introduction to HERMANN COHEN, RELIGION OF REASON: OUT OF THE SOURCES OF MODERN JUDAISM xi, xi, xiii (1919) (Simon Kaplan trans., 1972). Modern researchers have relied upon Stammler’s “natural law with changing content” in order to understand Jewish Law. B.S. Jackson, The Concept of Religious Law in Judaism, in 2 AUFSTIEG UND NIEDERGANG DER ROMISCHEN WELT 33, 37–38 (1979).

369. CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 248–49 (1930) (quoting RUDOLPH STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 124 (1911); RUDOLPH STAMMLER, DIE LEHRE VON DEM RICHTIGEN RECHTE 93, 196 (1902)).

370. Nathan Isaacs, Miscellaneous Class Notes 260 (on file with Harvard Law School Library, Isaacs Class Notes 1919–1920, Box 1, File: Misc.) (describing Stammler’s view of “justice as a methodical weighing of interests”); see also id. at 274 (discussing the “Revival of Natural Law in France”).

371. A French school of legal philosophers headed by R. Saleilles and J. Charmont further developed Stammler’s theory of law. See HAINES, supra note 369, at 252 (discussing the French natural law school); id. at 252 n.1 (“École historique et droit naturel d’après quelques ouvrages récents . . . .” (quoting REVUE TRIMESTRIELLE DE DROIT CIVIL 80–112 (1902)); id. at 258 (“[N]atural law . . . was universal, immutable . . . .” (quoting CHARMONT, LA RENAISSANCE DU DROIT NATUREL 167 (1910)). “Just law, like the law of nature, is a law or laws with specific legal content which is in accord with the standard. It is then objectively just, but not absolutely just; for moment the circumstances change the same legal content will no longer be in accord with the standard and hence will cease to be just.” Id. at 250 (quoting Isaac Husik, The Legal Philosophy of Rudolf Stammler, 24 COLUM. L. REV. 373, 388 (1924)).

Indeed, this coherency argument was the basis of Isaacs's attack on the natural law approach of the *Lochner* Court. However, although Isaacs thought that the Court's version of natural law theory was simplistic, he believed that a successful mediation between the conflicting elements of general principles and changing content was possible. Isaacs thought that Dewey's unique contribution was the insight that for different tasks there were many different types of logic. Depending on the immediate task, one kind of logic may depend heavily on intuition and precedents, while others may require a more mathematical rigor. There was no one ideal form of logic. Isaacs believed that this type of pragmatic reasoning had deep roots in the common law.

In order to better understand and improve the application of principles to novel cases, Isaacs supported the legal realists' proposition that it was not sufficient to study the purported logic of decisions. Empirical social scientific research was necessary to understand context and the true meaning of the law. In an unpublished manuscript, Isaacs claimed that the first step in reforming legal research was "an investigation of the facts of life made by such surveys as are used in the other social sciences." His contextual view of the law, later championed by Llewellyn in the UCC, saw the danger that deductive logic could obliterate background facts. Pure deductive logic would allow legal logic, at times, to dismiss important contextual facts as irrelevant.

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375. Isaacs observed that Dewey's definition of logic included "any of the methods actually used to reach conclusions, whether they be careless or extremely careful, whether they involve demonstration or only approximation of the truth sought." Isaacs, *How Lawyers Think*, supra note 259, at 556. Isaacs took handwritten notes of the following courses delivered at the Columbia University Summer Session Courses in Law and Special Conferences in Jurisprudence, July 10 to August 18: Roscoe Pound, Sociological Jurisprudence; John Dewey, Some Problems in the Logic and Ethics of Law; W.W. Cook, Some Problems in Legal Analysis. See id. at 556 n.2.

376. Id. at 556; Isaacs, *Political, Legal, and Economic Logics*, supra note 278, at 4 (recounting Lord Coke's classical defense of common law reasoning against the learned King James's assertion that he could reason as well as the lawyers and, therefore, he could decide cases for himself (citing Prohibitions del Roy, 12 Co. Rep. 64, 65, 77 Eng. Rep. 1342, 1343 (1608))).


378. See Isaacs, *Political, Legal, and Economic Logics*, supra note 278, at 27 (praising
In an analysis of the fact–law distinction, Isaacs offered a critical view of the distinction between issues of fact and issues of law. Isaacs was one of the first American scholars to criticize the generally accepted distinction between questions of law and questions of fact as an artificial concept that disguised judicial discretion. Much later, the CLS movement seized upon this distinction. Isaacs noted that judges often converted issues of fact into issues of law. In the area of administrative law, Professor Levin acknowledged that the distinction between law and discretion is “an updated version of Nathan Isaacs’ remark that ‘whether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law.’”

Isaacs’s pragmatic view allowed for a great deal of flexibility in legal reasoning. It also prevented him from falling into the traps that ensnared legal formalists who claimed that there was limited judicial discretion in finding the one right answer to questions of law application. By criticizing the formalistic no-discretion mindset of legal formalism, Isaacs was firmly exhibiting his legal realist views. However, his CLR approach did not see judicial discretion as a negative. He believed in the common law system and its entrustment of judges with discretion. Part of the reason he was so critical of the New Deal was that he saw it as preempting judicial discretion in favor of administrative discretion. He was disturbed with the courts’

in contrast the excellent “reasoning” of a judicial opinion despite its faulty formal “logic”). An example of Isaacs’s approach is his treatment of Conflict of Laws. Nathan Isaacs, Book Review, 38 HARV. L. REV. 125, 129 (1924) (reviewing ERNEST O. LORENZEN, CASES ON THE CONFLICT OF LAWS, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1924)).

379. “The delusive simplicity of the distinction between questions of law and questions of fact has been found a will-of-the-wisp by travellers approaching it from several directions.” Nathan Isaacs, The Law and the Facts, 22 COLUM. L. REV. 1, 1 (1922).


381. After surveying different eras of legal development, he concluded that “[w]hen one considers the vast fluctuations from time to time and from place to place in the extent allowed to judicial discretion, one becomes skeptical, to say the least, as to whether there is any right mixture, or at least as to whether we can ever hope to discover it.” Nathan Isaacs, The Limits of Judicial Discretion, 32 YALE L.J. 339, 352 (1923). For example, Isaacs asserts that during periods “of growth by equity,” there is a great deal of discretion exercised by judges. Id. at 345. Roscoe Pound later cited this article to support the proposition that “[t]here are many situations, however, where the course of judicial action is left to be determined wholly by the judge’s individual sense of what is right and just.” ROSCOE POUND, THE IDEAL ELEMENT IN LAW 87 & n.62 (Liberty Fund 2002) (1958).

382. Nathan Isaacs, Judicial Review of Administrative Findings, 30 YALE L.J. 781, 797 (1921) [hereinafter Isaacs, Judicial Review] (asking the loaded rhetorical question: “Is the country experiencing a general reaction against leaving important questions of property to the uncontrolled discretion of non-judicial bodies?”); see also Letter from
increased deference to administrative law decisions but predicted that the courts would resume their overseeing role over administrative agencies. Isaacs advocated a proactive judicial review of administrative law. This was founded on a belief that courts and not governmental agencies were better equipped to mediate the conflict between existing law and the changing needs of society. This view was based upon the assumption that there was an inherent tension between legal rules and governmental regulation. The concern here was that administrators would be unconstrained by the rule of law. The root of Isaacs's perspective was his respect for the judge-made common law and the responsa of Jewish law. His conservatism was on the losing side as progressives implemented the New Deal and ushered in the modern administrative state. Isaacs's distrust of the administrative state can be seen at work in LAE. Like his mentor, Roscoe Pound, Isaacs turned against the political program and the more extreme jurisprudential implications of the LRM. In the end, Isaacs remained true to his idealistic faith in the common law process.

VIII. CONCLUSION

Though scholars of the Legal Realist Movement of the 1930s have largely neglected Nathan Isaacs, he was an influential early legal realist whose insights are recognizable in the contemporary legal academic landscape. Despite his legal realist approach to law study, Isaacs remained an economic and jurisprudential conservative. This seeming incongruence is reconcilable through his adherence to a school of Jewish thought that emphasized historical study and believed in flexible adaptation to new conditions and contingencies, while affirming the divine and binding nature of the law.

Nathan Isaacs to B.M. Siegal (Dec. 6, 1921) (on file with Baker Library Historical Collections, Harvard Business School, Box 2, File: Correspondence Regarding Articles and Books, 1920–1921) (noting that the sentiments expressed in his article Judicial Review of Administrative Findings were not orthodox).


385. Id.

386. See generally Nathan Isaacs, Book Review, 30 YALE L.J. 776, 777 (1921) (reviewing NAGENDRANATH GHOSE, COMPARATIVE ADMINISTRATIVE LAW WITH SPECIAL REFERENCE TO THE ORGANIZATION AND LEGAL POSITION OF THE ADMINISTRATIVE AUTHORITIES IN BRITISH INDIA (1918)) (discussing constantly shifting line between when the courts will interfere with administrators); Schiller, supra note 287, at 402.

387. Isaacs's last research assistant provides an avenue into both the studied
Isaacs's broad contextual framework allowed him to play a pioneering role in the development of the social-scientific study of law and the critique of legal formalism that was the basis for the Legal Realist Movement. Simultaneously, Isaacs endeavored to discover universal legal principles through his cycle theory of legal development. He attempted to resolve the tension inherent in his jurisprudence by recognizing the provisional nature of law, while at the same time endorsing judicial reasoning's key role in the common law system. His conservative brand of legal realism saw the enactment of New Deal legislation as undermining the integrity of the common law.

The Conservative Legal Realism or realistic natural law theory advanced by Isaacs was a blend of insights associated with legal formalism and its antithesis—radical legal realism. In his brand of realism, law in action was somewhere between a body of principles and the "mass of undefinable discretion" of radical legal realism. Isaacs's contextualist approach to legal reasoning allowed for the certainty of principle and the ability to adjust principles to novel fact patterns. His scholarship assumed that there were natural law-inspired general principles, but that the content of that law was constantly changing. Isaacs's conservative realism recognized the dynamic nature of law but believed in the ability of the common law to provide a correct answer to legal questions. Isaacs's insights on the tension between conceptualism and realism—his belief in the efficiency of the common law system, the need for empirical research in order to make it more efficient, and his belief in the inefficiency of government regulation—can be used to better understand the role of conservative legal realism in modern legal theory.

ambiguity and the power of Isaacs's writings: The "ostensible meaning" of Isaacs's writings "always make sense;" but that plain meaning "is often almost contradictory to the ultimate or real meaning." Freiberg, supra note 29, at 4.
